NORTH CAROLINA COURT OF APPEALS REPORTS

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OF
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COURT OF APPEALS

OF

NORTH CAROLINA

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RALEIGH

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; DUKE ENERGY CORPORATION; PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION; AND WELLS EDDLEMAN, PRO SE, PETITIONERS v. CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC. (INTERVENOR) RESPONDENT v. DUKE ENERGY CORPORATION, CROSS-APPELLANT

No. COA03-440

(Filed 17 February 2004)

Utilities— settlement agreement—standing of interveners

The interveners in a settlement agreement between Duke Power and the Utilities Commission in an investigation of Duke Power's accounting practices pursuant to N.C.G.S. § 62-37 were not parties affected by the Commission's order approving the settlement and had no standing to appeal the Commission's order.

Appeal by respondent, petitioner Wells Eddleman, and cross-appellant from an order entered 11 December 2002 by the North Carolina Utilities Commission. Heard in the Court of Appeals 27 October 2003.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Karen E. Long, for petitioner-appellee State of North Carolina ex rel. Utilities Commission.

Executive Director Robert P. Gruber, by Chief Counsel Antoinette R. Wike, for petitioner-appellee Public Staff—North Carolina Utilities Commission.

No brief for petitioner-appellee F. Barron Stone.

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West Law Offices, P.C., by James P. West, for respondent-intervenor-appellant.

Kennedy Covington Lobdell & Hickman, L.L.P., by Clarence W. Walker and Kiran H. Mehta; Law Office of Robert W. Kaylor, P.A., by Robert W. Kaylor; Paul R. Newton and William Larry Porter, for petitioner-cross-appellant.

HUNTER, Judge.

Carolina Utility Customers Association, Inc. ("CUCA") appeals an order of the North Carolina Utilities Commission ("the Commission") approving a settlement agreement regarding accounting irregularities at Duke Power, a division of Duke Energy Corporation ("Duke"). Wells Eddleman ("Eddleman") cross-appeals this order by writ of certiorari for the same reason. In turn, Duke cross-appeals the Commission's decision to allow CUCA and Eddleman to intervene in this matter. For the reasons stated herein, we affirm the Commission's order on the basis that CUCA and Eddleman are not "parties affected" by the settlement agreement as contemplated by applicable statutory authority and thus, have no standing to appeal.

In July of 2001, the Commission initiated a joint investigation with the South Carolina Public Service Commission ("SCPSC") and the North Carolina Public Staff ("the Public Staff") regarding accounting irregularities at Duke alleged by a then anonymous whistleblower. A 5 September 2001 news release announced the investigation, and the State Commissions subsequently selected Grant Thornton, L.L.P. ("GT") to audit Duke as a part of that investigation. Prior to the news release, Duke conducted its own internal investigation and provided a written report of its findings to both State Commissions on 28 August 2001.

On 5 October 2001, CUCA wrote a letter to the Commission requesting permission to participate in the investigation of Duke. As an association representing many of North Carolina's largest industrial manufacturers, CUCA wanted to insure that the interests of its rate-paying manufacturers who may have suffered disproportionately from any excessive charges for electrical power were protected. CUCA also requested that the Commission "initiate a general rate pro-

ceeding to allow interested parties to fully investigate Duke's revenues, costs, and rate design and to work with the Commission in setting rates of return that are appropriate for the current economic climate." In response to CUCA's requests, the Commission (1) stated that it was conducting the investigation pursuant to its authority under Sections 62-34 and 62-37 of the North Carolina General Statutes, which gives the Commission the discretion to proceed with or without a public hearing; (2) declined to allow CUCA to participate in the investigation; and (3) denied CUCA's request to initiate a general rate proceeding at that time.

On 8 October 2002, the Commission received GT's report regarding its audit of Duke. The report provided an "Overview of Findings" as follows:

> On Tuesday, December 8, 1998, [SCPSC] reduced the rates which South Carolina Electric and Gas (SCANA) was allowed to charge its customers after SCANA reported earnings over its allowed rate of return for the twelve month period ending September 30, 1998. [GT's] investigation has found that, in reaction to the December 1998 SCANA decision, a number of Duke mid to senior level managers met and developed a plan to identify expense and revenue items which could serve as a basis for accounting adjustments which could be made to "avoid reporting over-earnings to regulators" . . . . A focus of the plan was the identification and formulation of year-end 1998 entries which would minimize Duke's earned return as reported to the State Commissions, but would not impact or lower Duke Energy's consolidated earnings as reported to its investors or the Securities and Exchange Commission.
>
> [GT] has identified a number of entries made by Duke in the course of Duke's dealing[s] with its "allowed return problem", as it was characterized by some Duke managers. The entries identified included some of the fourteen entries pointed out by the whistleblower and addressed in the Duke Report, as well as other 1998 year-end entries, and some that affected the utility operating results for 1999 and 2000.
>
> [GT] has identified entries, pre-income taxes (except for the RAR Tax Entry), totaling more than $64 million that inappropriately reduced Duke's 1998 pre-tax utility operating income as reported to the State Commissions. In addition, [GT] noted entries, pre-income taxes, that inappropriately reduced Duke's reported

pre-tax earned return by $23,958,348 for fiscal 1999 and $35,198,605 for fiscal 2000.

Before the report was made public, Duke responded and contested several of the conclusions and opinions reached by GT. Duke also requested settlement negotiations in an effort to resolve the contested conclusions and opinions. Thus, the staffs of the State Commissions and Duke negotiated a proposed settlement agreement dated 22 October 2002, in which Duke agreed to the following:

1. To file for informational purposes, no later that December 1, 2002, certain regulatory reports and a reconciliation, for the years 1998, 1999, 2000 and 2001, to reflect the impact of the recommended entries set forth in the [GT] Report;

2. To restore in fiscal year 2002 the nuclear insurance reserve account to a level it would have reached had Duke not changed its accounting for nuclear insurance distributions in 1998, an adjustment of $50 million;

3. To correct in 2002 an erroneous 1998 accounting entry in the amount of $1.75 million related to its Price Anderson Act nuclear liability reserve;

4. To make a one-time $25 million credit in 2002 to its deferred fuel amounts in North Carolina and South Carolina (North Carolina in the amount of $18.75 million and South Carolina in the amount of $6.25 million) to be incorporated into the next fuel cost proceedings in the respective states;

5. To implement all of the remedial actions set forth in the Duke report of August 28, 2001;

6. To "acknowledge and regret" that communications with the two State Commissions failed to adequately detail significant changes to prior accounting practices; and

7. To charge the cost of the [GT] review to non-utility operations.

If approved by the State Commissions, the settlement agreement would "formally and positively resolve all matters within the scope of the accounting review without further controversy." A news release was issued later that same day (22 October 2002) stating that GT's report, Duke's response, and the proposed settlement agreement were available for public review and that the settlement agreement

would be considered by the Commission at a Commission Staff Conference ("the Conference") on 28 October 2002.

The Conference was an informal forum at which no testimony was pre-filed and no formal hearing or pre-hearing procedures were used. The Commission staff simply presented and explained the proposed settlement agreement and recommended its approval by the Commission. The Public Staff also recommended approval. Duke customer Eddleman and counsel for CUCA spoke in opposition to the settlement agreement, as did the whistleblower. Also, CUCA presented the Commission with a motion requesting further investigation and hearing. Nevertheless, the Commission denied CUCA's motion and voted unanimously to approve the settlement agreement. However, the vote did not immediately constitute a final order because the Commission had to await approval by the SCPSC.

In November of 2002, after the Commission's initial vote on the settlement agreement, CUCA and Eddleman filed petitions to intervene, additional motions for further investigation and hearing (arguing they were not afforded sufficient notice and hearing and that the proposed settlement agreement was inadequate), as well as exceptions and notices of appeal. In turn, Duke wrote the Commission requesting that both petitions either be ignored or denied because the Conference was not a formal evidentiary hearing allowing for intervention, and the petitions were not timely filed since the Commission had already voted to approve the settlement agreement.

The Commission subsequently issued a final order on 11 December 2002. In that order, the Commission majority granted the petitions to intervene of CUCA and Eddleman after concluding that "as ratepayers, CUCA [and] Eddleman . . . are affected by the level of Duke's rates and have an interest in this matter." The Commission majority further denied the motions for further investigation and hearing after concluding (1) the parties affected had received a proper hearing, i.e. the Conference, and adequate notice of that hearing; and (2) the results detailed in the GT report were based on a "thorough, complete and competent" investigation conducted in a manner the Commission found appropriate. Finally, the Commission majority also formally approved the settlement agreement. Two Commissioners, Lorinzo L. Joyner and James Y. Kerr, II ("Commissioners Joyner and Kerr"), agreed with the majority's decision to approve the settlement agreement, but concurred with the decision to deny the motions for further investigation and hearing because, unlike the majority, they did not believe Eddleman and CUCA were

"parties affected" as required by Section 62-37 and therefore, did not have standing to "complain about the adequacy of the notice and hearing afforded." Finally, the order opened a case sub-docket in the matter for the first time and declared the matter closed.

CUCA filed notice of appeal on 17 December 2002. Duke filed notice of cross-appeal on 6 January 2003, assigning as error the Commission's decision to allow the intervention of CUCA and Eddleman. On 13 January 2003, Eddleman also filed notice of cross-appeal, which was dismissed by the Commission as untimely. Eddleman then petitioned this Court for writ of certiorari. His petition was granted on 16 April 2003 (COAP03-293) thereby allowing his appeal to be heard in conjunction with CUCA's appeal of the Commission's order.

By this appeal, CUCA and Eddleman raise issues regarding the investigation of Duke and the Commission's subsequent order approving the settlement agreement resulting from that investigation. However, by its cross-appeal, Duke contends CUCA and Eddleman were not actually "parties affected" by the settlement agreement's approval thereby making their intervention in this matter improper. Duke further contends that, assuming their intervention was proper, the petitions to intervene filed by CUCA and Eddleman were untimely. Having concluded that CUCA and Eddleman are not "parties affected" by the order and as such have no standing to appeal the Commission's approval of the settlement agreement by that order, we do not reach the issues raised by CUCA and Eddleman.

At the outset, we note that the investigation of Duke was conducted by the Commission pursuant to its powers and duties defined under Article 3 of our General Statutes, particularly Section 62-37, and not pursuant to the Commission's judicial functions outlined in Article 4. As such, we are presented with a case of first impression because we have found no case law where the Commission has exercised its investigative authority under this statute. Nevertheless, since the Commission issued an order resulting from that investigation, that order is considered "prima facie just and reasonable." N.C. Gen. Stat. § 62-94(e) (2003). " 'Judicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court,' which may be justified only by strict adherence to the statutory guidelines governing appellate review." *State ex rel. Util. Comm'n v. Carolina Indus. Group*, 130 N.C. App. 636, 638, 503 S.E.2d 697, 699 (1998) (citation omitted). The applicable statute provides as follows:

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision 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.

N.C. Gen. Stat. § 62-94(b).

By its cross-appeal, Duke argues CUCA and Eddleman were not "parties affected" within the meaning of Section 62-37 and therefore, should not have been allowed to intervene in this matter.

Section 62-37 provides, in pertinent part:

> The Commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of public utilities or of any particular public utility. In conducting such investigation the Commission may proceed either with or without a hearing as it may deem best, but shall make no order without affording the *parties affected* thereby notice and hearing.

N.C. Gen. Stat. § 62-37(a) (2003) (emphasis added). Here, the Commission allowed CUCA and Eddleman to intervene in this matter after concluding "as ratepayers, CUCA [and] Eddleman . . . are affected by the level of Duke's rates and have an interest in this matter" pursuant to Section 62-37. With respect to intervention under the Commission Procedural Rules: "Any person having an interest in the subject matter of any hearing or investigation pending before the

Commission may become a party thereto and have the right to call and examine witnesses, cross-examine opposing witnesses, and be heard on all matters relative to the issues involved . . . ." N.C.U.C. Rule R1-19(a). Thus, the Commission majority concluded that CUCA and Eddleman not only had an "interest in the subject matter" but were also "parties affected" by the order arising out of the investigation and Conference conducted by the Commission. However, in their concurring opinion, Commissioners Joyner and Kerr addressed this particular conclusion as follows:

> The majority essentially equates "the parties affected" with persons "having an interest," and allows CUCA [and] Eddleman . . . to intervene because they represent Duke ratepayers or are Duke ratepayers themselves. The majority applies the same, very liberal view of intervention that the Commission follows in its other proceedings. While we adhere to that view ourselves for purposes of intervention in those other types of Commission proceedings, we do not think that it is required in a G.S. 62-37(a) investigation under Article 3.
>
> We think that when acting pursuant to G.S. 62-37(a), the Commission has broad discretion to define the "parties affected" and to prescribe the kind of "hearing" that must precede issuance of an order. The conclusions reached by the Commission on both of these matters will necessarily depend upon the unique facts and circumstances of the case. The subject of the investigation in the instant case was whether Duke had violated Commission rules or accounting practices in the way in which it reported its regulated income to the Commission. The injury was to the authority of the Commission, not to any individual ratepayer. We think that the only party "affected" in this proceeding is Duke, the utility being investigated. Therefore, only Duke is entitled to the notice and hearing required by G.S. 62-37(a), and only Duke has standing to complain about the adequacy of the notice and hearing afforded. We do not object to the Commission's allowing others an opportunity to be heard at the Staff Conference. However, in doing so, we think that the Commission afforded those persons greater participation than is required by G.S. 62-37(a). We would deny the motions of CUCA [and] Eddleman . . . on the grounds that they were not "parties affected" and thus lacked standing.

Duke's cross-appeal essentially relies on the concurring opinion to support the following contentions: (1) CUCA and Eddleman were not

"parties" during the Conference at which the settlement agreement was initially approved; and (2) they were not "affected" by that approval in the sense contemplated by Section 62-37. We agree.

"Parties to proceedings before the Commission are designated as applicants, petitioners, complainants, defendants, respondents, protestants, or interveners, according to the nature of the proceeding and the relationship of the parties thereto." N.C.U.C. Rule R1-3(a). At the time of the Conference, CUCA and Eddleman had not been given any of these party designations; they were merely members of the public who, as Duke customers or representatives of Duke customers, were allowed to voice their disapproval over the settlement agreement. The only party at that time was Duke and, "[i]n proceedings in which there is only one party, hearings [such as the Conference] may be held at any time convenient to the Commission and to the party to the proceeding, with or without a public notice, in the discretion of the Commission." N.C.U.C. Rule R1-21(b)(1). CUCA and Eddleman were not recognized as parties, i.e. interveners, until their petitions to intervene, filed after the Conference, were granted as part of the Commission majority's final order approving the settlement agreement—filed approximately one month after the Conference. However, the Commission majority's decision to recognize CUCA and Eddleman as interveners and thus "parties affected" pursuant to Section 62-37 was an abuse of its discretion.

The phrase "parties affected" has not previously been defined for purposes of Section 62-37. Nevertheless, our Supreme Court has defined this phrase with respect to a party's right to appeal a decision of the Commission. In *In re Housing Authority*, 233 N.C. 649, 657, 65 S.E.2d 761, 767 (1951), an interpretation of former Section 62-26.6 of the North Carolina General Statutes was required, which provided "for an appeal from a determination or decision made by the Utilities Commission by any *party affected* thereby." (Emphasis added.) Our Supreme Court defined "party affected" in that statute as follows: "[A] party is not affected by a ruling of the Utilities Commission unless the decision 'affects or purports to affect some right or interest of a party to the controversy and in some way determinative of some material question involved.' " *Id.* (citation omitted). *See also Utilities Com. v. Kinston*, 221 N.C. 359, 20 S.E.2d 322 (1942) (where the North Carolina Supreme Court similarly interpreted the phrase "party affected" from former Section 1097 of the North Carolina Consolidated Statutes).

Section 62-90 has since replaced Section 62-26.6 and uses the phrase "party aggrieved" instead of "party affected." N.C. Gen. Stat. § 62-90(a) (2003). Generally, "[a] 'party aggrieved' is one whose rights have been directly and injuriously affected by the judgment entered . . . . Where a party is not aggrieved, his appeal will be dismissed." *Hoisington v. ZT-Winston-Salem Assocs.*, 133 N.C. App. 485, 496, 516 S.E.2d 176, 184 (1999) (citations omitted). This Court's interpretation of "party aggrieved" as it relates to an appeal of an order by the Commission also suggests that more than a generalized interest in the subject matter is required. *See State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 104 N.C. App. 216, 408 S.E.2d 876 (1991) (holding CUCA was not an aggrieved party and dismissing its appeal of an order by the Commission for lack of standing because CUCA had failed to show that its interest in person, property, or employment has been substantially adversely affected, directly or indirectly); *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 142 N.C. App. 127, 136, 542 S.E.2d 247, 253 (2001) (holding that CUCA was not a "party aggrieved" and thus, lacked standing to appeal "because the Commission's order did not impact rates and because any rate increases [would] be effectuated at subsequent rates cases").

The Supreme Court's previous definition of "party affected," as well as the Courts' definitions of "party aggrieved," are instructive and relevant to the present case. Here, an investigation of Duke's alleged accounting irregularities was conducted by the Commission pursuant to Section 62-37 of Article 3. Duke was the only party recognized by the Commission throughout the investigation, as well as the only party directly and substantially affected by any subsequent order arising therefrom in the sense envisioned by the statute. As such, only Duke was entitled to receive notice and hearing pursuant to Section 62-37 to protect its due process rights. While CUCA and Eddleman may have had an interest in the matter, their interest was only generalized and unsubstantial—not specific to them as individual Duke customers. The settlement agreement itself supports this conclusion by providing that Duke was to make a one-time credit of $18.75 million to the *State of North Carolina*, which would be incorporated into the state's next fuel cost proceeding. (We note that the fuel cost proceeding was subsequently filed by Duke on 10 March 2003. CUCA petitioned to intervene in that proceeding and was allowed to do so and subsequently made no objection to the incorporation of the $18.75 million credit in the calculation of the fuel cost adjustment approved by the Commission in its 25 June 2003 order.)

Nevertheless, CUCA and Eddleman essentially contend that they were interested and affected parties because the settlement agreement directly forecloses their property interests as ratepayers to receive adequate and reasonable relief for any excessive charges by Duke for electrical power. They further contend that their intervention was proper because there was no other party participating in the investigation and settlement agreement to adequately represent those interests. *See Bailey v. State*, 353 N.C. 142, 155, 540 S.E.2d 313, 321 (2000) (citation omitted) (providing that intervention is a matter of right " '[w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties' ").

CUCA raised a similar argument regarding its "common law property interest to just and reasonable utilities rates[,]" in *State ex rel. Utilities Commission v. Carolina Utility Customers Assoc.*, 163 N.C. App. 46, 51, 592 S.E.2d 221, 225 (2004). In that case we held

> we have found no North Carolina case law recognizing the property interest alleged by CUCA in this appeal. On the contrary, our case law appears to suggest otherwise. *See State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 336 N.C. 657, 446 S.E.2d 332 (1994) (holding that the defendant customers association's interest in the supplier refunds used to fund the expansion of natural gas lines was nothing more than a mere expectation of receiving those refunds and not a property right).

Id. at 51, 592 S.E.2d at 225. Moreover, CUCA and Eddleman fail to recognize that the Public Staff participated in the investigation of Duke and subsequently recommended approval of the settlement agreement at the Conference. The Public Staff acts independently of the Commission, and was created "to represent [the interests of] the using and consuming public" in matters before the Commission, such at the one in the instant case. *See* N.C. Gen. Stat. § 62-15(b) (2003). Thus, the Public Staff represented CUCA and Eddleman, as well as all of Duke's rate-paying customers.

In conclusion, while they may have had an interest in the matter sufficient for intervention in a hearing or investigation pending before the Commission pursuant to Article 4, Article 3 requires the prospective interveners to also be "parties affected" pursuant to

Section 62-37. CUCA and Eddleman were never made parties to the investigation by the Commission. Furthermore, since approval of the settlement agreement only had a generalized and unsubstantial affect on CUCA and Eddleman, they were not "parties affected." Had they been so affected, their intervention would have been proper and they would have been entitled to notice and hearing, as well as the opportunity to "call and examine witnesses, cross-examine opposing witnesses, and be heard on all matters relative to the issues involved . . . ." N.C.U.C. Rule R1-19(a). Accordingly, the Commission abused its discretion in granting the petitions to intervene of CUCA and Eddleman. Therefore, the Commission's order is affirmed.

Affirmed.

Chief Judge EAGLES and Judge GEER concur.

Chief Judge Eagles concurred in this case prior to 30 January 2004.

STATE OF NORTH CAROLINA v. GEORGE WILLIAM BLACKWELL, SR.

No. COA03-199

(Filed 17 February 2004)

1. Homicide— voluntary manslaughter—evidence sufficient

There was sufficient evidence of voluntary manslaughter, despite defendant's contention that the State failed to present sufficient evidence that the shooting was not in self-defense.

2. Evidence— hearsay—information from website

Testimony from a firearms expert that a sawed-off shotgun was manufactured after 1905, based on information from a website, was not inadmissible hearsay. Moreover, its admission was not plain error because the antique status of a sawed-off shotgun is an affirmative defense, and the initial burden of presenting evidence on the antiquity of the shotgun was on defendant. The only evidence presented by defendant was merely that the shotgun was old.

3. Firearms and Other Weapons— variance—brand of shotgun—not fatal

There was not a fatal variance between the indictment and the proof concerning a weapon of mass destruction where defendant was indicted for possession of a Stevens shotgun and the evidence showed that he was in possession of an Eastern Arms shotgun, which was a brand of Stevens Arms. Moreover, any person of common understanding would have understood that defendant was charged with possessing the sawed-off shotgun that he used to shoot the victim.

4. Homicide— self-defense—pattern instruction misread—not plain error

There was no plain error in an instruction on self-defense where the court misread the pattern jury instruction and repeated an instruction on whether the victim had a weapon rather than giving the instruction on the victim's reputation. Defendant did not argue that the victim's reputation should have been considered.

Appeal by defendant from judgment entered 15 August 2002 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 November 2003.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Elizabeth F. Parsons, for the State.

Leslie C. Rawls for defendant-appellant.

HUNTER, Judge.

George William Blackwell, Sr. ("defendant") appeals from a judgment dated 15 August 2002 entered consistent with jury verdicts finding him guilty of voluntary manslaughter and possession of a weapon of mass destruction. Defendant was sentenced to a minimum term of imprisonment of seventy-two months with a corresponding maximum term of ninety-six months. We conclude there was no error.

The State's evidence presented at trial beginning on 12 August 2002 tends to show the following. On 5 November 1999, David Ray Baker ("the victim") returned home from visiting his aunt shortly after 11:00 p.m. The victim was still angry from an earlier altercation with his cousin and called his father, after which he went outside. The victim's father returned the call and the victim's wife went outside to

tell the victim. However, she did not find him and shortly after a gunshot was heard.

Defendant lived in a rooming house next door to the victim. Defendant's house-mate heard defendant leave the house at around 11:00 p.m. Subsequently, he heard a man next door standing outside cursing. Approximately fifteen minutes later, defendant returned and his house-mate heard the man next door state in an angry tone, "can't you drive?" Defendant was heard walking back to the rooming house, but was then engaged in a heated conversation, during which defendant was distinctly heard to say, "back off." Defendant's house-mate heard a gunshot, and defendant returned to the house and called emergency services.

Patricia Amos ("Amos"), a crime scene investigator for the Charlotte-Mecklenburg Police Department, testified that she arrived at the scene of the shooting at about 2:50 a.m. She observed the body of the victim lying in his own backyard with wounds to the left side of his neck. The victim was wearing a long sleeved shirt, blue jeans and tennis shoes. Amos searched the victim's clothing and found nothing. A four-foot high chain link fence separated the victim's residence from defendant's residence. By Amos' measurement, the waist of the victim was fourteen and a half feet from the chain link fence. The victim was lying on his back with his feet pointing toward the fence. Furthermore, there was a security light located at the base of the fence that was turned on. Amos did not find a weapon on the victim's body or anywhere in the victim's backyard. The only thing resembling a weapon that was found was a dust-covered toy pistol, located in an abandoned car thirty-feet away from the victim's body. Amos also examined defendant's residence and defendant gave consent for a search of his room. A 12-gauge Eastern Arms shotgun with a sawed-off barrel was laying on the bed and a spent shotgun shell was found on the bedside table.

Todd Nordhoff ("Nordhoff") testified that he was a firearm and toolmark examiner with the Charlotte-Mecklenburg crime lab. Defendant stipulated, through counsel, that Nordhoff was an expert in forensic firearms identification. He testified that the shotgun recovered from defendant's room had a barrel length of fifteen and a half inches and an overall length of twenty-four inches. Nordhoff stated that to be legal in North Carolina a shotgun was required to have a barrel length of eighteen inches and an overall length of twenty-six inches. Nordhoff identified the spent shotgun shell found in defendant's room as having been fired from the shotgun.

On recall, Nordhoff testified that the shotgun was a center fire weapon. On cross-examination, Nordhoff stated that the shotgun was manufactured sometime after 1905. Nordhoff was asked how he knew that and Nordhoff replied that he had done research on the internet at a website called "Gable Guns, dot, com." Although Nordhoff did not know the background of the website's proprietor, the website apparently specialized in pre-1898 antique firearms. According to this website, "Eastern Arms Company" was a brand name used by Jay Stevens Arms between the years 1910 and 1915. An autopsy showed the victim's major wound was a shotgun wound to the chest and neck resulting in numerous internal injuries. Eight shotgun pellets were found in the victim's body and a ninth had pierced the back of the victim and exited his body.

Defendant testified on his own behalf. He stated that on the night of the shooting he left his residence to purchase cigarettes. Upon returning, he saw the victim accosting a man in a pickup truck. The victim then threatened defendant and began approaching him saying, "I'll just kill you." The victim climbed a fence back into his own yard and began walking toward defendant's residence. Defendant returned to his room and retrieved his shotgun, which had a sawed-off barrel and returned to the deck of his house. As the victim was climbing the fence into defendant's backyard, defendant walked toward the victim and warned him to get off the fence. Defendant did not see a weapon in the victim's hands. He then warned the victim that he had two choices, "you can live or die." The victim got off the fence and began to walk away, but suddenly turned and defendant saw the victim's hands go into his pockets as the victim yelled, "f— you[,] I'm gonna kill you." Defendant fired his shotgun killing the victim.

Defendant also presented evidence that the shotgun had belonged to his father to whom it was given by an eighty-three year old lady whose father had given it to her. The first time defendant had tried to fire the gun after it was given to him, the barrel of the shotgun "banana-peeled like a Bugs Bunny cartoon." As a result, defendant had sawed off part of the barrel.

Defendant was indicted for manslaughter and felonious possession of a weapon of mass destruction, "to wit: a Stevens 12 gauge single-shot shotgun that was modified so that it had a barrel length of less than eighteen (18) inches in length and a total length of less than twenty-six (26) inches." Defendant's motions to dismiss were denied both at the close of the State's evidence and at the close of all the evi-

dence. As part of its jury instruction on the defense of self-defense the trial court stated:

> And, second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.
>
> It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time. In making this determination you should consider the circumstances as you find them to have existed from the evidence, including the size, age and strength of the defendant as compared to the victim, the fierceness of the assault, if any, upon the defendant, whether or not the victim had a weapon in his possession, and whether or not the victim had a weapon in his possession.

The jury convicted defendant on both charges.

The issues are whether: (I) there was sufficient evidence that defendant did not shoot the victim in self-defense to reach a jury; (II) admission of Nordhoff's testimony regarding the information he found on the website was plain error; (III) there was a fatal variance between the pleading and the proof on the charge of felonious possession of a weapon of mass destruction; and (IV) the trial court's instruction on self-defense constituted plain error.

I.

[1] Defendant first argues there was insufficient evidence upon which to convict him of voluntary manslaughter because the State failed to present sufficient evidence that the shooting was not committed in self-defense.

"Voluntary manslaughter is defined as 'the unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation.' " *State v. McNeil*, 350 N.C. 657, 690, 518 S.E.2d 486, 506 (1999) (quoting *State v. Rinck*, 303 N.C. 551, 565, 280 S.E.2d 912, 923 (1981)). "Generally, voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force is used or [the] defendant is the aggressor." *State v. Jackson*, 145 N.C. App. 86, 90, 550 S.E.2d 225, 229 (2001). In this case, defendant contends he did not commit voluntary manslaughter because he was acting in self-defense.

Pursuant to the law of perfect self-defense, a killing is excused altogether if, at the time of the killing, four elements existed:

> "(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm."

State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981) (citation omitted). When the evidence in a homicide prosecution raises the issue of self-defense, the State bears the burden of proving the defendant did not act in self-defense. *State v. Gilreath*, 118 N.C. App. 200, 208, 454 S.E.2d 871, 876 (1995). The test on a motion to dismiss is therefore whether the State has presented substantial evidence which, when taken in the light most favorable to the State, would be sufficient to convince a reasonable juror that the defendant did not act in self-defense. *Id.*

In this case, the State presented evidence that the victim was unarmed and his body was found in his own backyard fourteen and a half feet from the fence separating his property from defendant's residence. Other evidence revealed defendant left the initial confrontation with the victim in order to retrieve his shotgun. *See State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (on a motion to dismiss, defendant's evidence should be ignored unless it is favorable to the State or does not conflict with the State's evidence). He then returned with his shotgun, ultimately using it to kill the victim. This is evidence that defendant was not threatened with death or great bodily harm and that defendant exerted excessive force against the victim. Furthermore, as defendant left the scene and returned with a shotgun this is evidence that he entered into the confrontation willingly. This is sufficient evidence to support a voluntary manslaughter conviction. Defendant's evidence to the contrary does not negate the

State's evidence, but is instead evidence to be considered by the jury in reaching its verdict. *See In re Wilson*, 153 N.C. App. 196, 198, 568 S.E.2d 862, 863 (2002).

II.

[2] Defendant next contends it was plain error to admit testimony from Nordhoff that, based on information from the website, the shotgun used by defendant was manufactured by Jay Stevens Arms sometime after 1905. Defendant contends this was inadmissible hearsay. This testimony was, however, elicited by defendant's cross-examination of Nordhoff and defendant did not object or move to strike this testimony. It is apparent that defendant invited this testimony in an attempt to discredit Nordhoff's expert opinion by undermining his credibility through a showing that the only source he relied on as the basis of his opinion was an unverifiable website.

Even if this testimony was admitted as inadmissible hearsay evidence, and not as evidence impeaching the credibility of the witness, it would have to rise to the level of plain error to warrant a reversal, and thus the burden is on defendant to establish that without the error a different result probably would have been reached. *See State v. Bellamy*, 159 N.C. App. 143, 147, 582 S.E.2d 663, 667, *cert. denied*, 357 N.C. 579, 589 S.E.2d 130 (2003). Defendant contends this testimony rises to the level of plain error because it is the only evidence that the shotgun was not an antique and thereby exempted from the possession of a weapon of mass destruction statute.

N.C. Gen. Stat. § 14-288.8 defines a weapon of mass destruction as including, "any shotgun with a barrel . . . less than 18 inches in length or an overall length of less than 26 inches." N.C. Gen. Stat. § 14-288.8(c)(3) (2003). The statute exempts, however, any device which is defined by the United States Secretary of the Treasury as an "antique." N.C. Gen. Stat. § 14-288.8(c). Federal law defines an antique firearm as one that was manufactured in or before 1898. 18 U.S.C. § 921(16)(A) (2003). Defendant asserts that as Nordhoff's testimony on recall was the only evidence of the age of the weapon, without this evidence the State has failed to meet its burden of proof to show the gun was not an antique.

Although the question of which party has the burden of proof on the issue of whether a weapon is an antique under N.C. Gen. Stat. § 14-288.8(c) has not previously been addressed, this Court has held

that the "inoperability" of a weapon under N.C. Gen. Stat. § 14-288(c) is an affirmative defense with the burden on a defendant to produce evidence of inoperability. *See State v. Fennell*, 95 N.C. App. 140, 145, 382 S.E.2d 231, 233-34 (1989). Our Supreme Court has, however, subsequently criticized the rationale in *Fennell* and limited its holding to "mean inoperability is a defense to the extent that the defendant can prove the pieces [of a weapon] seized were not 'designed or intended for use in converting any device' into a weapon of mass death and destruction." *State v. Jackson*, 353 N.C. 495, 499, 546 S.E.2d 570, 573 (2001). Thus, our Supreme Court only criticized *Fennell* in its inexact usage of the general term "inoperability," not in our placing the burden of proof on this issue upon a defendant. *See id.*

The case *sub judice*, unlike *Fennell*, does not require interpretation of whether the antique status of a weapon exempts it from N.C. Gen. Stat. § 14-288.8, because antique weapons, as previously noted, are explicitly exempted. Instead, this case only presents the question of which party holds the burden of proof on this issue. We elect to follow the reasoning in both *Fennell* and *Jackson* by holding that the antique status of a sawed-off shotgun is an affirmative defense under Section 14-288.8, and thus, the initial burden of proof is on a defendant to present evidence of the antique status of the shotgun. *See Fennell*, 95 N.C. App. at 145, 382 S.E.2d at 233; *see also State v. Baldwin*, 34 N.C. App. 307, 309, 237 S.E.2d 881, 882 (1977) (where defendant presented no evidence of inoperability, the State was not required to present evidence of operability).

In this case, the only evidence presented by defendant as to the age of the shotgun was that it had belonged to his father, who had received it from an eighty-three year old woman whose father had owned it. This is not evidence that the shotgun meets the technical definition of an antique under N.C. Gen. Stat. § 14-288.8 and 18 U.S.C. § 921(16)(A), but is rather circumstantial evidence that the gun is merely old. We conclude that evidence a gun is simply old, without more, is insufficient to shift the burden of proof to the State to prove the gun is not an antique. Therefore, since there was no evidence that the shotgun was an antique, the jury could not have found it to be one. Consequently, even without Nordhoff's testimony as to the date of the gun's manufacture, it is not probable that the jury would have reached a different verdict. Thus, even assuming admission of this testimony was error, it does not rise to the level of plain error.

III.

[3] Defendant next argues that there was insufficient evidence to support the charge of felonious possession of a weapon of mass destruction. Specifically, defendant contends the proof did not match the indictment. Defendant was indicted for felonious possession of a weapon of mass destruction, "to wit: a Stevens 12 gauge single-shot shotgun." Defendant contends the only evidence presented was that the shotgun was an "Eastern Arms" shotgun. Defendant, however, ignores the testimony he elicited on cross-examination that "Eastern Arms" was a brand name of Jay Stevens Arms. This is evidence the shotgun was manufactured by Jay Stevens Arms and would thus be a Stevens shotgun.

Moreover, even if there was no evidence that the shotgun was a Stevens shotgun, the test for whether there is a fatal variance in the indictment is whether " 'the act or omission [alleged] is clearly set forth so that a person of common understanding may know what is intended.' " *State v. Snyder*, 343 N.C. 61, 66, 468 S.E.2d 221, 224 (1996) (quoting *State v. Coker*, 312 N.C 432, 435, 323 S.E.2d 343, 346 (1984)). In this case, any person of common understanding would have understood that he was charged with possessing the sawed-off shotgun that he used to shoot the victim on the night alleged.

IV.

[4] Defendant finally assigns plain error to the trial court's instruction on self-defense. In addressing the reasonableness of defendant's belief that it was necessary to kill the victim in order to save himself, the trial court stated, without objection: "In making this determination you should consider the circumstances as you find them to have existed from the evidence, including . . . *whether or not the victim had a weapon in his possession, and whether or not the victim had a weapon in his possession.*" (Emphasis added.)

Defendant argues this repetition was plain error. The trial court, however, was simply reading the pattern jury instruction, *see* 1 N.C.P.I.—Crim. 206.40 (2002), and made the repetition instead of reading "the reputation, if any, of the victim for danger and violence." *Id.* Defendant did not object at trial to the instruction and does not argue that the victim's reputation was an issue the jury should have considered. As such, the trial court's misreading of the instruction was not plain error.

No error.

Judges McGEE and GEER concur.

ANNE LITTON WHITE [DAVIS], PLAINTIFF v. JOHN BLEVINS DAVIS, DEFENDANT

No. COA03-359

(Filed 17 February 2004)

1. Divorce— equitable distribution—delays—no due process violation

Plaintiff's due process rights were not violated by delays in her equitable distribution action because those delays were caused by the complexity of the case and her own actions.

2. Divorce— equitable distribution—delay between announcement and entry of judgment

A lapse of four months between the announcement of the court's decision in open court and the formal entry of judgment was not unreasonable in an equitable distribution action involving extensive property.

3. Divorce— equitable distribution—pretrial order—motion to amend values—timeliness

There was no error in the denial of plaintiff's untimely motion to amend her pretrial equitable distribution order to supplement values she had marked as TBD (to be determined). The time which plaintiff claims as available to defendant for his response resulted from plaintiff's interlocutory appeal of this denial and would not have been available had the motion been granted.

4. Witnesses— expert—defense witness—originally hired as joint witness

Testimony from an expert witness for defendant who had originally been hired as an expert for both parties was properly admitted in an equitable distribution proceeding. Plaintiff had no expectation of privacy in hiring the witness because the data collected by the witness was always intended to be shared by both parties.

5. Divorce— equitable distribution—interest in medical practice—distributional factor—stipulation of marital classification

An equitable distribution defendant's interest in his medical practice was properly considered a distributional factor in his favor even though the parties had stipulated that the interest was to be classified as marital property. The trial court did not change the stipulated classification, but granted defendant the benefit of the distributional factor as a matter of fairness after defendant's expert testified that 85% of defendant's 72% interest in the practice had been gifted to him by his father and remained his separate property.

6. Appeal and Error— assignment of error—consistency with argument

An equitable distribution argument was deemed abandoned because it did not comport with the assignment of error.

7. Divorce— equitable distribution—post-separation increase in value—not pursued at trial

There was no abuse of discretion in an equitable distribution in not finding a distributional factor not pursued at trial.

Appeal by plaintiff from order dated 1 December 1997, *nunc pro tunc* March 10, 1997, orally entered order on 21 March 2000, order filed 31 October 2000, *nunc pro tunc* October 10, 2000, and judgment filed 8 July 2002 by Judge William B. Reingold in Forsyth County District Court. Heard in the Court of Appeals 3 December 2003.

Elliot Pishko Morgan, P.A., by David C. Pishko, for plaintiff-appellant.

Morrow Alexander Tash Kurtz & Porter, by Gary B. Tash, for defendant-appellee.

BRYANT, Judge.

Anne Litton White (plaintiff) appeals an order dated 1 December 1997 allowing John Blevins Davis (defendant) to use Robert N. Pulliam (Pulliam) as an expert, an order[1] entered 21 March 2000

1. Plaintiff cannot pursue her appeal of this order, which involved an oral denial of her motion in open court. *See* N.C.R. App. P. 3(a) ("[a]ny party is entitled to appeal from a judgment or order . . . rendered in a civil action"); *West v. Marko*, 130 N.C. App. 751, 756, 504 S.E.2d 571, 574 (1998) ("an order rendered in open court is not enforce-

denying plaintiff's oral motion to recuse Pulliam as an expert, an order dated 31 October 2000 denying plaintiff's motion to amend the equitable distribution pretrial order, and an equitable distribution judgment entered 8 July 2002.

On 9 September 1994, plaintiff filed a complaint seeking custody of the parties' children, child support, and equitable distribution. The custody and support claims were resolved first, and orders with respect to those claims were entered on 19 July 1995 and 28 May 1996 respectively. On 13 November 1997, an equitable distribution pretrial order was entered containing stipulations of the parties as to the classification (marital or separate) and value of their property. With regard to disputed property values, the pretrial order contained the separate dollar amounts claimed by plaintiff and defendant. For some of these items, the corresponding alleged values were not provided and either plaintiff or defendant merely indicated that they were "TBD" (to be determined). The pretrial order provided that:

> in the event that either party hereto has not listed any value for any item(s) of property that is marital . . . as itemized in this Pre-Trial Order . . . such party shall be required to notify the other party hereto through counsel of her or his value(s) of such property at least thirty (30) days in advance of the commencement of the equitable distribution trial . . . or upon the failure of such party to do so, the value(s) of such item(s) shall be the value(s) listed on this Pre-Trial Order by the other party hereto . . . .

The pretrial order was signed by the parties and the trial court.

The equitable distribution hearing commenced on 20 March 2000 with testimony on the value of the parties' respective medical practices and continued for a total of seventeen days over the course of two years. On 29 September 2000, plaintiff filed a motion to amend the pretrial order to include values for property she had previously marked as "TBD" in the pretrial order. The trial court denied her motion by order dated 31 October 2000. In its equitable distribution judgment entered 8 July 2002, the trial court concluded that an equal distribution of the marital property was equitable. Additional facts relevant to the analysis will be set out below.

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able [and therefore not individually appealable] until it is 'entered,' i.e., until it is reduced to writing, signed by the judge, and filed with the clerk of court").

The issues are whether: (I) plaintiff was prejudiced by an unreasonable delay in the proceedings and entry of the judgment; (II) the trial court abused its discretion in denying plaintiff's motion to amend the pretrial order; (III) Pulliam, defendant's expert, was barred from testifying based on a conflict of interest; (IV) the trial court abused its discretion in considering as a distributional factor in defendant's favor his 85% separate property interest in his 72% ownership of Salem Urological, P.A.; and (V) the trial court abused its discretion in failing to consider as a distributional factor the passive post-separation increase in defendant's stock in Carolina Physicians Associates, P.A. and (VI) in Salem Trust Bank.

I

In her first assignment of error, plaintiff argues her due process rights were violated and she was prejudiced by the unreasonable delay of (A) the trial proceedings and (B) entry of the equitable distribution judgment. Plaintiff points out that: the equitable distribution hearing did not commence until five years after the filing of her complaint; the 17 hearing dates were stretched out over the course of two years; and the equitable distribution judgment was not entered until seven months after the conclusion of the trial and four months after the trial court's oral announcement of its final decision in open court. In support of her proposition, plaintiff relies on this Court's holding in *Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000), which considered a nineteen-month delay between the date of trial and the date of disposition "more than a *de minimis* delay," *id.* at 314, 536 S.E.2d at 654 (analyzing the appellant's due process rights).

A

Trial Delay

[1] In the case *sub judice*, it appears that much of the delay in the equitable distribution proceeding was caused by a combination of the magnitude of the case, the sheer volume of the assets at issue, and plaintiff's own actions. *See Banner v. Banner*, 86 N.C. App. 397, 403, 358 S.E.2d 110, 113 (1987) (holding that the appellant should not be allowed to benefit on appeal when she was responsible for the delay in the entry of the divorce judgment).

After filing her complaint for custody, child support, and equitable distribution on 9 September 1994, hearings were first held on plaintiff's child custody and support claims. On the custody issue, a consent order was entered by the parties on 19 July 1995. An order for

child support was entered on 28 May 1996. Thereafter, plaintiff filed four separate motions in the cause to modify the orders, all of which the trial court denied on 21 December 1998. Dealing with the issues of child custody and support prior to equitable distribution was a justifiable ground for the initial delay of the equitable distribution portion of the trial.

Further, according to the local rules for the Twenty-First Judicial District, Forsyth County, North Carolina, plaintiff bore the burden of producing the initial draft of the equitable distribution pretrial order, and numerous drafts were circulated between the parties until they reached agreement on the final version. The final pretrial order, entered 13 November 1997, spanned sixty-three pages and addressed 664 items of property. Following completion of this expansive document, the trial court's focus shifted back to the child custody and support issues through plaintiff's filing of her motions in the cause to modify the custody and support orders, which the trial court denied on 21 December 1998. Thereafter, the trial court scheduled the commencement of the equitable distribution hearing for 20 September 1999 but had to postpone the date when plaintiff's attorney and the trial court discovered a scheduling conflict.

During the course of the equitable distribution proceeding, for which hearings commenced on 20 March 2000, plaintiff employed seven different attorneys, who were discharged or withdrew at various stages throughout the trial. Plaintiff also appealed from an interlocutory order of the trial court, thereby further delaying the equitable distribution proceeding until the appeal was dismissed by order of this Court filed 2 April 2001.[2] In addition, the trial court was forced to move the conclusion date for the trial to a later date after plaintiff withdrew her consent to a previously announced settlement agreement. Based on these factors, we hold that plaintiff's due process rights were not violated by an unreasonable delay in the trial proceedings as any delay appears to have resulted from the complexity of the case and plaintiff's own actions.

B

Judgment Delay

[2] The parties acknowledge that the trial court orally rendered its decision in this case on 25 February 2002, within three months of the last trial date. Defendant's attorney then prepared the proposed draft

2. The interlocutory appeal resulted in a delay of the hearing until 13 August 2001.

of the judgment for plaintiff's review. After plaintiff requested and received extensions of time to review the extensive draft, the equitable distribution judgment, which includes twenty-five pages of findings and conclusions as well as an additional forty-nine pages of property schedules, was filed on 8 July 2002. Considering the amount of property at issue, we do not deem the time lapse of four months between the trial court's announcement of its decision in open court and formal entry of the judgment to be unreasonable under the circumstances of this case. *Cf. Wall*, 140 N.C. App. at 314, 536 S.E.2d at 654 (holding nineteen months to be too long). Accordingly, this assignment of error is overruled.

II

[3] Plaintiff next assigns error to the trial court's denial of her motion to amend the pretrial order to supplement values she had only marked as "TBD" at the time the order was entered. Plaintiff acknowledges that she failed to comply with the notice provision contained in the pretrial order and did not move to amend until the hearing had already commenced. In her brief to this Court, plaintiff, however, argues that she was nevertheless entitled to the amendment because evidence on the items of property in question was not heard until several months after her request and defendant therefore would not have been prejudiced by the amendment. This argument is of no avail because at the time the trial court denied plaintiff's 29 September 2000 motion, the hearing was scheduled for conclusion during the week of 20 November 2000. It was only on 15 November 2000, through the filing by plaintiff of an interlocutory appeal from the trial court's order denying her motion to amend, that the continuation of the hearing was delayed until 13 August 2001. Consequently, had the trial court granted plaintiff's motion, defendant would not have had the amount of time to prepare as plaintiff now contends. This assignment of error is therefore without merit.

III

[4] Plaintiff also argues the trial court abused its discretion in allowing Pulliam to testify as defendant's expert because, having previously been hired as a joint expert for the parties, Pulliam's representation of defendant created a conflict of interest.

We begin our analysis by noting that plaintiff has not cited any authority in support of her proposition that the use by one party of a former, privately obtained joint expert creates a disqualifying conflict

of interest between the expert and the other party. This Court has also been unable to find any authority on point but concludes that the issue can be resolved based solely on the facts of this case.

The determination of whether expert opinion testimony is admissible is within the sound discretion of the trial court. *McLean v. McLean*, 323 N.C. 543, 556, 374 S.E.2d 376, 384 (1988). In this case, shortly after their separation, the parties employed Pulliam as a neutral expert to evaluate the parties' respective medical practices for purposes of equitable distribution and provided him with data on their medical practices. In October 1996, after receiving preliminary calculations from Pulliam, plaintiff terminated her contract with Pulliam and objected to his continued involvement as defendant's expert in the equitable distribution action. The trial court entered an order dated 1 December 1997 finding:

> [T]he parties' original agreement to jointly employ . . . Pulliam to evaluate their respective individual medical practices . . . as an independent[,] impartial evaluator did not create a confidential relationship between . . . Pulliam with either party hereto . . . . [T]here would be no conflict of interest, and no prejudice to . . . [p]laintiff, for . . . Pulliam to continue to evaluate the parties' respective individual medical practices as an expert for . . . [d]efendant in this equitable distribution action . . . .

The trial court then granted defendant permission to continue using Pulliam's services and ordered:

> 2. That . . . Pulliam shall be entitled to utilize all data previously provided to him by both parties . . . and to share all such data received by him from both parties hereto with . . . [d]efendant and with this Court;
>
> 3. That . . . [p]laintiff shall be entitled to utilize and to provide to her substitute expert witness all data previously provided to . . . Pulliam by both parties hereto . . . .

We agree with the trial court's reasoning. In hiring Pulliam as a joint expert, plaintiff had no expectation of confidentiality. The data collected by Pulliam was always intended to be shared by the parties and thus could not have resulted in a conflict of interest after plaintiff terminated her contract with Pulliam. Moreover, in light of the trial court's instruction to make available to each side the data previously provided to Pulliam, neither party suffered prejudice from

Pulliam's continued representation of defendant. As such, the trial court did not abuse its discretion in allowing Pulliam to testify as defendant's expert at trial. *See McLean*, 323 N.C. at 556, 374 S.E.2d at 384.

IV

[5] Plaintiff further contends the trial court abused its discretion in considering as a distributional factor in defendant's favor his 85% separate property interest of his 72% ownership in Salem Urological, P.A. because the parties had stipulated in the pretrial order that defendant's interest in the medical practice was to be classified as marital property. *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (appellate review of an equitable distribution award "is limited to a determination of whether there was a clear abuse of discretion").

"An admission in a pleading or a stipulation admitting a material fact becomes a judicial admission in a case and eliminates the necessity of submitting an issue in regard thereto to the jury." *Crowder v. Jenkins*, 11 N.C. App. 57, 62, 180 S.E.2d 482, 485 (1971). It has long been established that judicial admissions are binding on the pleader as well as the court "unless modified at the trial to prevent manifest injustice." *Inman v. Inman*, 136 N.C. App. 707, 713-14, 525 S.E.2d 820, 824 (2000); *see* N.C.G.S. § 1A-1, Rule 16(a) (2001).

In this case, defendant had moved the trial court on 20 March 2000 to change the classification in the pretrial order of his interest in Salem Urological, P.A. from marital to separate property. The trial court denied defendant's motion but allowed Pulliam to testify, for the limited purpose of establishing distributional factors, that 85% of defendant's 72% interest in the practice was gifted to defendant by his father and therefore remained his separate property. In the equitable distribution judgment, the trial court *found as fact*, and consistent with the pretrial order, that defendant's interest in Salem Urological, P.A. constituted *marital property*. Based on Pulliam's testimony though, the trial court then considered *as a distributional factor* under N.C. Gen. Stat. § 50-20(c)(12), allowing for the consideration of "[a]ny other [distributional] factor which the court finds to be just and proper," N.C.G.S. § 50-20(c)(12) (2001) (same provision as in 1994),[3] that:

3. Because plaintiff filed her complaint in 1994, her equitable distribution claim is governed by the law of that time.

> the value of marital property being distributed to . . . [d]efendant would have been reduced by $207,400.00 if . . . [d]efendant's medical practice had in fact been placed on the proper Pre-Trial Order Schedule before such Pre-Trial Order was entered by the [trial] [c]ourt (which would have increased the amount of the distributive award payable by . . . [p]laintiff to . . . [d]efendant).

In weighing the various distributional factors found in favor of both plaintiff and defendant, the trial court ultimately concluded that an equal division of the marital property was fair and equitable.

It is clear from the judgment that the trial court did not change the stipulated classification of the medical practice but, in its discretion, granted defendant the benefit of a distributional factor out of fairness considerations. As such a consideration was proper under section 50-20(c)(12) and fell within the spirit of *Inman* (allowing for the modification of judicial admissions to prevent manifest injustice), we see no abuse of discretion in the trial court's treatment of defendant's separate property interest in the medical practice as a distributional factor. We further note that, in finding distributional factors, the trial court has the discretion to consider inequities based on the classification of property as marital and that this does not have the effect of undermining the classification of the property, which will still be, and in this case was in fact, distributed as marital. *See, e.g., Collins v. Collins*, 125 N.C. App. 113, 116, 479 S.E.2d 240, 242 (1997) (a spouse's contribution of his separate property as a gift to the marital estate, in that case property held by the entireties, is a distributional factor under subdivision (c)(12)); *Minter v. Minter*, 111 N.C. App. 321, 329-30, 432 S.E.2d 720, 725-26 (1993) (holding that even though the trial court did not abuse its discretion in concluding that a spouse had failed to meet his burden of proving certain property to be his separate property, the trial court should have considered this separate property contribution to the marital estate as a distributional factor); *see also Cable v. Cable*, 76 N.C. App. 134, 137, 331 S.E.2d 765, 767 (1985) (classification, evaluation, and distribution are separate and distinct steps to be followed by the trial court in an equitable distribution proceeding).

V

[6] Plaintiff further asserts the trial court abused its discretion in failing to consider as a distributional factor the passive post-separation increase in defendant's stock in Carolina Physicians Associates, P.A.

This argument, however, does not comport with the assignment of error referenced by plaintiff, which only attacks the trial court's date-of-separation valuation of the stock. Accordingly, plaintiff's argument is deemed abandoned. *See* N.C.R. App. P. 10(a) ("the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal").

VI

[7] Finally, plaintiff contends the trial court abused its discretion in failing to consider as a distributional factor the post-separation increase in the value of Salem Trust Bank stock.

During the hearing on 15 August 2001, the trial court indicated its willingness to consider this increase in value as a distributional factor and told plaintiff it would accept an offer of proof as to the post-separation value of the stock if she were to make one. In her brief to this Court, plaintiff does not assert and a review of the transcript does not indicate that (1) her counsel presented evidence on the amount of the post-separation increase of the stock or (2) even argued for the finding of such a distributional factor when the trial court reached the distributional portion of the trial in November 2001. In light of plaintiff's failure to pursue the issue at trial and offer any evidence on the alleged increase in the stock value, the trial court did not abuse its discretion in failing to find the contended distributional factor. *See Truesdale v. Truesdale*, 89 N.C. App. 445, 450, 366 S.E.2d 512, 516 (1988) (the trial court must only consider those distributional factors raised by the evidence).

Plaintiff's remaining assignments of error not raised in her brief are deemed abandoned. *See* N.C.R. App. P. 28(a).

Affirmed.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA v. MITCHELL DANYELL BANKS

No. COA03-322

(Filed 17 February 2004)

1. Evidence— defendant's statements—not prejudicial

There was no undue prejudice from the denial of defendant's motion in limine to prohibit admission of his statements during a burglary, kidnapping, and assault. Defendant's actions were enough to establish the elements of the offenses.

2. Jury— undisclosed contact with witness—no prejudice

There was no prejudice from a juror's failure to reveal his feeling that he had "crossed paths with" a law enforcement officer who was to be a witness, or from his brief contact with the officer trying to figure out where they had met. There was no possibility that a vague familiarity with the witness could have compromised the juror's ability to be fair and just, regardless of whether the attorney provided effective assistance of counsel in the manner of his objection when the contact was revealed after the verdict.

3. Appeal and Error— objection to record sheet—subsequent stipulation

A defendant lost the benefit of his objection to an allegedly inaccurate record sheet when he subsequently stipulated to the record sheet.

Appeal by defendant from judgment dated 18 September 2002 by Judge J.B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 3 December 2003.

Attorney General Roy Cooper, by Assistant Attorney General Dorothy Powers, for the State.

Paul M. James and L. Jayne Stowers for defendant-appellant.

BRYANT, Judge.

Mitchell Danyell Banks (defendant) appeals a judgment dated 18 September 2002 entered consistent with a jury verdict finding him guilty of first-degree burglary, second-degree kidnapping, and assault on a female. The trial court entered prayers for judgment on the convictions of second-degree kidnapping and assault on a female.

Prior to trial, defendant made a "Request for Voluntary Disclosure" by the State. Defendant subsequently filed a motion *in limine* with the trial court pursuant to N.C. Gen. Stat. § 15A-903(a)(2) seeking exclusion of "any mention before the jury of any statement alleged to have been made by . . . defendant but not disclosed to . . . defendant or his counsel by 12 o'clock noon on Wednesday prior to the beginning of the week during which this case was calendared for trial." At the hearing on the motion, the State explained it had provided defendant with the police report prepared by the investigating officer and that all statements made by defendant to witnesses, of which the State was aware, were contained in the report. When the trial court denied the motion *in limine*, defendant sought to make an offer of proof by submitting the police report, which defendant contended did not include all the statements to which the witnesses would testify. The trial court did not grant defendant's request and brought the jury in for opening statements. During the testimony of the State's witnesses, defendant renewed his objection, based on the motion *in limine*, to testimony regarding statements the witnesses had heard defendant make during the commission of the charged offenses. Defendant made no further attempt to proffer the police report.

The State's evidence tended to show that in the early morning hours of 2 December 2001, while it was still dark, defendant, wearing black gloves, twice entered without permission the unlocked residence of Tameka Harvey (Harvey) to look for Tanique Norman (Norman) and Latoshia Holt (Holt). Defendant had dated all three women at one time or another, and defendant and Norman had just broken up the previous day.

Harvey testified that she awoke to find defendant standing in her bedroom. In response to defendant's question, she told him Norman and Holt had gone out and she did not know their whereabouts. Defendant left the house only to return a short time later. This time defendant checked the room in which Norman and Holt were sleeping following their return from their evening out. Harvey told defendant to leave, but he ignored her and instead ordered Norman to get up and come with him. When Norman resisted and "started saying no, hollering and screaming," defendant grabbed her and made her get her things. All the while, defendant repeatedly placed his hands in his back pocket. Seeing Norman's resistance, defendant pulled a small silver gun with a pearl handle from his back pocket and began pushing Norman, who was now crying, toward the bedroom door.

Defendant asked the women "Why do y'all think I wore these gloves?" and then stated "So I won't leave any evidence." Holt reached for her cellular telephone on the floor, but defendant stepped on her hand and took the telephone away from her, saying "You're not going to call anyone." Defendant pushed Norman toward the kitchen, "pushed her down on the floor and pushed her on out the [front] door." Harvey followed them outside and saw defendant force Norman into a silver van. Just before the van drove away, Harvey heard a gunshot. Thereafter, Harvey and Holt went to the home of Harvey's mother to telephone the police.

Norman testified she was asleep in Holt's room at Harvey's residence when she first heard defendant's voice in the kitchen. Defendant was questioning Holt, who explained Norman was not there. Because she was scared of what defendant might do, Norman stayed in the bedroom. After defendant had left, she did, however, telephone defendant's cellular phone and told him to "stop walking into people's houses looking for [her]." Defendant responded she had "a choice to come out or he [was] going to come in there and get [her]." Defendant returned to the house shortly thereafter and was met by Harvey at the door. Defendant pushed Harvey out of the way and headed toward Norman, saying "Let's go." In response to her refusal to go, defendant told Norman she had no choice. Norman testified the only reason she went with defendant was because he pulled a gun from his pocket and she "was afraid that he was going to use it." While still in the house, defendant also told Norman she "was not going to make it back home to see [her] mother." After defendant pushed her in the van, he shut the door on Norman's leg, went around to the driver's side, raised the gun, and shot into the air. Norman tried to exit the van, but defendant came back around and shut the passenger side door. This time, Norman stayed in her seat because she was scared and there was "no telling what [defendant] could have done to [her]" if she had moved again. Defendant began searching for his cellular telephone as he started driving away. Thinking he had dropped the telephone at Harvey's residence, defendant placed the vehicle in reverse, but because he was not paying attention while backing up, he hit a parked truck. As he stepped outside to investigate the damage, Defendant handed Norman the gun. Holding the gun, Norman got out of the van and started running toward Harvey's house. She could hear defendant calling her as she entered the house to look for Harvey and Holt. Unable to find them, Norman hid the gun in a laundry basket, covering it before running down the street to the home of Harvey's mother.

Officer J.T. Long testified that in the early morning hours of 2 December 2001 he was en route to Harvey's residence in response to a 911 call when he observed a man standing in the street "throwing his arms up in the air" and appearing to be "angry and agitated and cursing." Officer Long stopped the man, who was wearing black gloves and identified himself as Mitchell Banks, and detained him for further investigation. Officer Long proceeded down the street, noting a collision between a parked truck and another vehicle, and arrived at Harvey's empty house. Officer Long radioed the police station to confirm the origin of the 911 call and was directed to Harvey's mother's home. After questioning Norman, Harvey, and Holt, Officer Long went back to Harvey's residence where he found the weapon, a .25 caliber semi-automatic handgun, in the laundry basket. The magazine was still in the gun, but no rounds were in the chamber. Officer Long found one spent .25 caliber shell casing on the street in front of Harvey's house.

The issues are whether: (I) defendant can show prejudicial error based on the trial court's denial of his motion *in limine* and pretrial offer of proof; (II) defendant received ineffective assistance of counsel when his counsel moved for a mistrial as opposed to a new trial or appropriate relief after the jury returned its verdict; and (III) the record sheet used at the sentencing hearing contained errors.

I

[1] Defendant argues he was prejudiced by the trial court's erroneous denial of (1) his motion to suppress testimony regarding statements made by him on 2 December 2001 and (2) his offer of proof of the police report to show the discrepancy between the statements provided by the State prior to trial and the witnesses' actual testimony. According to defendant, the prejudice derived from the use of his statements to supply an element of the kidnapping charge, which in turn represented an element of the burglary charge. Because we conclude that defendant was not unduly prejudiced by the testimony regarding his statements to the witnesses, we do not determine whether the trial court's ruling constituted error. *See* N.C.G.S. § 15A-1443(a) (2001) (a defendant carries the burden of showing he was prejudiced by an error committed at trial in that a reasonable possibility exists that absent the error a different result would have been reached).

In this case, defendant's actions, as opposed to his words, were sufficient to establish the elements of the charged offenses. First,

the theory of kidnapping pursued by the State in this case required a showing that defendant unlawfully removed Norman from one place to another, without her consent, for the purpose of terrorizing her. *See* N.C.G.S. § 14-39(a)(3) (2001); *State v. Davis*, 340 N.C. 1, 24, 455 S.E.2d 627, 639 (1995) (terrorizing is defined as " 'putting [a] person in some high degree of fear, a state of intense fright or apprehension' ") (citation omitted). The evidence presented at trial revealed that defendant pushed and dragged Norman out of Harvey's house at gunpoint. Thus, the first two elements of the State's theory of kidnapping are satisfied. In addition, the evidence showed Norman was in a heightened state of fear, not knowing what defendant would do with the gun. She was crying and screaming while being forced out of the house. She was pushed into the van by defendant who closed the door on her leg, and then he fired a demonstrative gunshot into the air. This constitutes sufficient circumstantial evidence from which a jury could reasonably find defendant's intent to terrorize Norman. *See State v. Moore*, 315 N.C. 738, 745-46, 340 S.E.2d 401, 406 (1986) (intent to terrorize established where the evidence supported a finding that the defendant intended by his actions to put the victim in a state of intense fright or apprehension so that she would agree to stay with him and that he removed her to a mobile home and confined her there for that purpose); *State v. Williams*, 127 N.C. App. 464, 468, 490 S.E.2d 583, 586 (1997) (where the defendant pointed a gun at the victim and witnesses testified that the victim was crying and hysterical throughout the ordeal, there was sufficient evidence of the defendant's intent to terrorize); *see also State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000) (" 'the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that the defendant's purpose was to terrorize her' ") (citation omitted).

Next, the elements of the offense of first-degree burglary of which defendant was found guilty required a showing by the State that defendant: (1) broke, (2) and entered, (3) at night, (4) into the dwelling, (5) of another, (6) that was occupied, (7) with the intent to kidnap Norman. *See* N.C.G.S. § 14-51 (2001); *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721-22 (2001); *see also State v. Sweezy*, 291 N.C. 366, 383, 230 S.E.2d 524, 535 (1976) ("the mere pushing or pulling open of an unlocked door constitutes a breaking"). The evidence regarding defendant's actions on 2 December 2001 established that defendant entered Harvey's house at nighttime without permission, while Norman, Holt, and Harvey were inside, and with the intent to kidnap Norman. Defendant's oral statements to the witnesses were

therefore not vital to a guilty verdict. Accordingly, this assignment of error is overruled.

II

[2] Defendant further contends he received ineffective assistance of counsel when his counsel moved for a mistrial as opposed to a new trial or appropriate relief after the jury had already returned its verdict.

After the jury verdict had been rendered, the jury released from duty, and the sentencing hearing had begun, Keith French, juror number six, came forward with allegations of juror intimidation and harassment he had encountered through defendant's younger brother and three other men. During the trial court's questioning of French, the juror indicated the men had confronted him because they had seen him talk to Officer Long during a court recess. French and Officer Long had been talking for a "brief moment trying to figure out where [they] ha[d] crossed paths before because [French] had seen him many times." Defense counsel moved for a mistrial on the basis that French knew Officer Long but did not disclose this fact during jury selection and that French spoke with Officer Long during the trial. The trial court denied the motion and proceeded with the sentencing hearing.

"A defendant claiming ineffective assistance of counsel must demonstrate that his counsel's performance was defective and that this defective performance prejudiced the defense." *State v. Jones*, 146 N.C. App. 394, 400, 553 S.E.2d 79, 83 (2001). In reviewing such a claim, the court need not determine whether counsel made errors if the record does not show a reasonable probability that a different verdict would have been reached in the absence of counsel's deficient performance. *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248-49 (1985).

In his brief to this Court, defendant acknowledges that the trial court has no authority to grant a motion for a mistrial after the verdict has already been returned, *see State v. Smith*, 138 N.C. App. 605, 609, 532 S.E.2d 235, 238 (2000), and argues that counsel should have moved for a new trial or appropriate relief due to the prejudicial impact of the juror misconduct. Defendant contends French lied during jury selection about not knowing Officer Long and violated court rules by talking to the officer, thereby creating the appearance of bias.

"Due process requires that a defendant have 'a panel of impartial, "indifferent" jurors.' " *State v. Rutherford*, 70 N.C. App. 674, 677, 320 S.E.2d 916, 919 (1984) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722, 6 L. Ed. 2d 751, 755 (1961)). "It is the duty and responsibility of the trial judge to insure that the jurors remain impartial and uninfluenced by outside forces." *Id.* Misconduct must be determined by the facts and circumstances of each case, and " '[t]he circumstances must be such as not merely to put suspicion on the verdict, because there was an opportunity and a chance for misconduct, but that there was in fact misconduct.' " *State v. Johnson*, 295 N.C. 227, 234, 244 S.E.2d 391, 396 (1978) (quoting *Lewis v. Fountain*, 168 N.C. 277, 279, 84 S.E. 278, 279 (1915)). Having reviewed French's statements to the trial court, we find no such misconduct.

During *voir dire*, the trial court asked the jury if it knew any of the State's witnesses, including Officer Long. None of the jurors spoke up at that time. In response to defense counsel's examination of the jury, French did indicate that he was familiar with several people in law enforcement. The fact that French admitted after the trial that at some point during the trial he realized he had "crossed paths before" with Officer Long only indicates that he had seen the officer on prior occasions, not that he knew him personally. Moreover, French explained that they only talked for a moment to try and figure out where they had seen each other before. There was no discussion of the trial at that time. Based on these circumstances, there was no possibility that a personal connection to the case, through a vague familiarity with Officer Long, could have compromised French's ability to be fair and just. *See Rutherford*, 70 N.C. App. at 676-77, 320 S.E.2d at 918-19 (no abuse of discretion in denying the defendant's motion for a mistrial based on juror conversation with witness that lasted only a few minutes and did not concern the defendant's case or the juror's jury service because it had no effect on the verdict and therefore did not prejudice the defendant). As defendant did not show any prejudice from his counsel's failure to make the proper motion, his ineffective assistance of counsel claim fails.

III

[3] Finally, defendant asserts the record sheet used at the sentencing hearing contained errors.

At the sentencing hearing, the State submitted defendant's prior record sheet. Upon defendant's questioning of the correctness of the record sheet, the trial court asked the State to procure copies of

the case files from the clerk's office. The trial court then interrupted the sentencing proceeding to hear French's testimony on the harassment he had experienced. When sentencing resumed, the State had not yet obtained the requested case files. The trial court asked defendant: "What is it that you disagree [with] on this record sheet?" Defendant replied, "Your Honor, we don't have any problem with the record sheet," and at the conclusion of the sentencing phase agreed "Your Honor sentenced properly."

When evidence is admitted without objection, the benefit of a prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the admission of the evidence. *State v. Jolly*, 332 N.C. 351, 361, 420 S.E.2d 661, 667 (1992). As defendant in this case therefore lost the benefit of his initial objection through his subsequent stipulation to the accuracy of the record sheet, he did not preserve this issue for appeal. *See* N.C.R. App. P. 10(b)(1) ("[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely . . . objection"). Consequently, we do not address this assignment of error.

With respect to defendant's remaining arguments addressed in his brief to this Court, we note that defendant failed to make the necessary requests or objections at trial, *see* N.C.R. App. P. 10(b)(1), and did not "specifically and distinctly" contend plain error in his respective assignments of error, *see* N.C.R. App. P. 10(c)(4). Thus, they were not preserved for appeal.

No error.

Judges CALABRIA and ELMORE concur.

IN THE MATTER OF: DONALD MILTON HOPKINS, JR. (DOB: 7/8/1993), A MINOR CHILD

No. COA03-31

(Filed 17 February 2004)

1. Termination of Parental Rights— jurisdiction—pending appeal of prior planning order

The trial court lacked jurisdiction to enter a termination of parental rights order during the pendency of the father's appeal of a prior permanency planning order. N.C.G.S. § 7B-1003.

2. Termination of Parental Rights— right to counsel— waiver—inaction before hearing

The right to counsel for a termination of parental rights hearing cannot be waived by inaction prior to the hearing, and the court erred in this case by denying the mother's request for court-appointed counsel on that basis.

Appeal by respondent-parents from judgment entered 24 July 2002 by Judge Jonathan L. Jones in Burke County District Court. Heard in the Court of Appeals 11 June 2003.

Stephen M. Schoeberle for petitioner-appellee Burke County Department of Social Services; Mary R. McKay, Guardian Ad Litem.

Susan J. Hall for respondent-appellant Donald Milton Hopkins, Sr.

Rebekah W. Davis for respondent-appellant Michelle Stancil Riddle.

ELMORE, Judge.

Donald Milton Hopkins, Sr. (respondent-father) and Michelle Stancil Riddle (respondent-mother) (collectively, respondents) appeal separately from an order terminating their parental rights (TPR order) with respect to their son, D.J. For the reasons stated herein, we vacate the portion of the TPR order terminating respondent-father's parental rights, and we reverse and remand the portion of the TPR order terminating respondent-mother's parental rights.

Background

This Court, in an unpublished opinion, recently decided respondent-father's appeal from a permanency planning review order in which the trial court (1) concluded the permanent plan for D.J. should be adoption, and (2) ordered Petitioner Burke County Department of Social Services (DSS) to file a petition to terminate respondents' parental rights, which petition resulted in the TPR order from which both respondents now appeal in the present case. *See In re Hopkins*, 157 N.C. App. 572, 579 S.E.2d 520 (2003). In the earlier case, we vacated the permanency planning review order at issue and remanded the case to the trial court for additional findings of fact. *Id.* The facts regarding DSS' involvement with D.J. through entry of the

permanency planning review order giving rise to respondent-father's earlier appeal are fully set forth in our previous opinion, and we repeat herein only those facts germane to the present appeal.

DSS has been involved with respondents, who lived together for eight years until 1995 but never married, and D.J. since shortly after D.J.'s birth in 1993. Following an incident of domestic violence, D.J. was placed in the non-secure custody of DSS in March 1995. D.J. was adjudicated neglected in May 1995, and he remained in DSS' custody until May 1997, when custody was awarded to D.J.'s maternal aunt, Michelle Hopkins (Ms. Hopkins). The trial court reviewed the case on 30 April 1998 and ordered that D.J. remain with Ms. Hopkins, but in June 1999 Ms. Hopkins, without the trial court's approval, returned physical custody of D.J. to respondent-father. Respondent-father's step-brother Boyd Lane, who was living with respondent-father at the time, sexually abused D.J., for which Lane later pleaded guilty to taking indecent liberties with a child. As a result DSS requested that D.J. be placed in therapy, but respondent-father was initially resistant and thereafter inconsistent in facilitating D.J.'s treatment.

Respondent-mother visited D.J. only sporadically while D.J. was in Ms. Hopkins' custody, but she visited regularly after Ms. Hopkins returned physical custody of D.J. to respondent-father. However, after the summer of 2000, respondent-mother went with her husband to New York in an attempt to gain custody of his children and had no further contact with D.J. until October 2001.

On 29 November 2001, following a review hearing, the trial court entered an order which granted legal and physical custody of D.J. to DSS, terminated reunification efforts with respondents and with Ms. Hopkins, and ordered a permanency planning review. The permanency planning review was held on 29 November 2001, and by order entered 7 December 2001 (permanency planning review order), the trial court continued custody of D.J. with DSS; ceased reunification efforts with respondents and with Ms. Hopkins; set adoption as the permanent plan for D.J.; and ordered DSS to file a petition to terminate respondents' parental rights within sixty days.

Respondent-father appealed from the permanency planning review order. Neither respondent-mother nor Ms. Hopkins did so. On 20 March 2002, while respondent-father's appeal of the permanency planning review order was pending, DSS filed a petition to terminate respondents' parental rights (TPR petition), which was served upon respondent-father on 21 March 2002 and upon respondent-mother on

21 May 2002. Respondent-father filed his answer to the TPR petition on 26 March 2002. Respondent-mother neither filed an answer nor attended the pre-trial conference held by the trial court on 13 June 2002, at which time respondent-mother's counsel of record, who represented her at the November 2001 review hearing but had not been appointed to represent her for the TPR proceedings, was allowed to withdraw from representation of respondent-mother. While respondent-father's appeal of the permanency planning review order was still pending, the trial court heard the TPR petition on 11 July 2002. At the call of the case, respondent-mother requested that the trial court appoint counsel for her. The trial court denied respondent-mother's request and proceeded with the hearing. The trial court entered the written TPR order on 24 July 2002, again during the pendency of respondent-father's appeal from the permanency planning review order.

Respondent-mother filed notice of appeal from the TPR order on 17 July 2002, and respondent-father filed notice of appeal from the TPR order on 30 July 2002. Thereafter, in an opinion filed 6 May 2003, this Court vacated the permanency planning review order, holding that the trial court did not make the necessary findings of fact required by N.C. Gen. Stat. §§ 7B-907 and 7B-507, and remanded the case to the trial court for additional findings of fact. *See Hopkins*, 157 N.C. App. at 572, 579 S.E.2d at 520.

We now turn to respondents' separate appeals from the TPR order, taking the appeals of respondent-father and respondent-mother in turn.

Respondent-father's appeal

[1] Respondent-father brings forth five assignments of error in his appeal of the TPR order, asserting generally that (1) DSS' TPR petition failed to comply with the pleading requirement of N.C. Gen. Stat. § 7B-1104(7), and (2) the trial court abused its discretion in concluding that his parental rights to D.J. should be terminated. However, because we conclude the trial court lacked jurisdiction pursuant to N.C. Gen. Stat. § 7B-1003 to enter the TPR order during the pendency of respondent-father's appeal of the permanency planning review order, we do not reach these issues. *See Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86, *reh'g denied*, 318 N.C. 704, 351 S.E.2d 736 (1986) ("When the record clearly shows that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu*.") We therefore vacate that portion of the

TPR order terminating respondent-father's parental rights to D.J, for the reasons discussed below.

Under the statutory scheme established by our Juvenile Code, "review of any final order of the court in a juvenile matter . . . shall be before the Court of Appeals." N.C. Gen. Stat. § 7B-1001 (2003). The statute further provides that "[a] final order shall include: (1) Any order finding absence of jurisdiction; (2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken; (3) Any order of disposition after an adjudication that a juvenile is abused, neglected, or dependent; or (4) Any order modifying custodial rights." *Id.* Pending disposition of such an appeal, the trial court's authority over the juvenile is statutorily limited to entry of "a *temporary* order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State." N.C. Gen. Stat. § 7B-1003 (2003) (emphasis added).

In the present case, respondent-father *first* appealed from the 7 December 2001 permanency planning review order, which order set adoption as the permanent plan for D.J. and ordered DSS to file a petition to terminate respondents' parental rights. *During the pendency of that appeal*, (1) DSS filed the TPR petition on 20 March 2002; (2) the trial court held a hearing on the TPR petition on 11 July 2002; and (3) the trial court entered the TPR order which is the subject of the *present* appeal on 24 July 2002. Meanwhile, respondent-father's appeal of the permanency planning review order remained pending thereafter until 26 May 2003, when this Court's mandate issued twenty days after the 6 May 2003 filing of its opinion vacating and remanding the permanency planning review order. *See* N.C.R. App. P. 32(b).

An order terminating parental rights to a juvenile is, by its very nature, a *permanent* rather than a *temporary* order affecting the juvenile's custody or placement. *See* N.C. Gen. Stat. § 7B-1100 (2) (2003) ("It is the further purpose of this Article [11, governing termination of parental rights] to recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age[]. . . .") We hold that by entering the TPR order while respondent-father's appeal from the earlier permanency planning review order was still pending, the trial court exceeded the authority expressly granted to it under N.C. Gen. Stat. § 7B- 1003 to "enter a *temporary* order affecting the custody or placement of the juvenile" during the pendency of an earlier appeal. Accordingly, we conclude that the trial court was without jurisdiction to enter the order terminating respondent-father's

parental rights to D.J., and the portions of the TPR order terminating respondent-father's parental rights must be vacated. *See In re Rikard*, 161 N.C. App. 150, 153-54, 587 S.E.2d 467, 468-69 (2003) (holding that under a statute nearly identical to the controlling statute in the present case, the trial court exceeded its statutory authority by entering an amended adjudicatory order and a disposition order during the pendency of an appeal from the original adjudicatory order).

Respondent-mother's appeal

As noted above, unlike respondent-father, respondent-mother did *not* appeal from the 7 December 2001 permanency planning review order. Consequently, the pendency of respondent-*father's* appeal from the permanency planning review order did not remove from the trial court jurisdiction to enter the order terminating respondent-*mother's* parental rights to D.J. Our analysis must therefore proceed to respondent-mother's assignments of error.

[2] By her first assignment of error, respondent-mother contends the trial court erred by denying her request for court-appointed counsel to represent her in the TPR proceedings. We agree.

At the outset, we note this Court's previous recognition that "a 'parent['s] right to counsel in a proceeding to terminate parental rights is now guaranteed in all cases by statute' and that '[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one.' " *Little v. Little*, 127 N.C. App. 191, 192, 487 S.E.2d 823, 824 (1997) (*quoting In re Bishop*, 92 N.C. App. 662, 664, 375 S.E.2d 676, 678 (1989)). We consider respondent-mother's first assignment of error with these principles in mind.

Section 7B-1101 of our General Statutes provides that with respect to TPR proceedings, a "parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right." N.C. Gen. Stat. § 7B-1101 (2003). Section 7B-1106 mandates that the summons issued in connection with TPR proceedings include "[n]otice that if they are indigent, the parents are entitled to appointed counsel; the parents may contact the clerk immediately to request counsel[,]" as well as "[n]otice that this is a new case. Any attorney appointed previously will not represent the parents in this proceeding unless ordered by the court[.]" N.C. Gen. Stat. § 7B-1106(b)(3), (4) (2003). Finally, at the hearing on a TPR petition, the trial court:

> shall inquire whether the juvenile's parents are present at the hearing and, if so, whether they are represented by counsel. If the parents are not represented by counsel, the court shall inquire whether the parents desire counsel but are indigent. In the event that the parents desire counsel but are indigent as defined in G.S. 7A-450(a) and are unable to obtain counsel to represent them, counsel *shall* be appointed to represent them in accordance with rules adopted by the Office of Indigent Defense Services. The court shall grant the parents such an extension of time as is reasonable to permit their appointed counsel to prepare their defense to the termination petition or motion. In the event that the parents do not desire counsel and are present at the hearing, the court shall examine each parent and make findings of fact sufficient to show that the waivers were knowing and voluntary. . . .

N.C. Gen. Stat. § 7B-1109(b) (2003) (emphasis added).

In considering an earlier, substantially similar version of the foregoing statutory scheme, this Court previously stated as follows:

> *It is clear from reading the above statutes that the General Assembly did not intend to allow for waiver of court appointed counsel due to inaction prior to the hearing.* [Former] G.S. 7A-289.30 makes it quite clear that if the parent is present at the hearing, which respondent undoubtedly was, and does not waive representation, counsel "shall" be appointed. . . . If the party is present in court, waiver can only result from an examination by the trial court and a finding of knowing and voluntary waiver.

Little, 127 N.C. App. at 192-93, 487 S.E.2d at 825 (emphasis added).

In the present case, the TPR order states as follows regarding respondent-mother's request for court-appointed counsel:

> Upon the matter being called for hearing, [respondent-mother] requested court-appointed counsel. The Court noted that [respondent-mother] had been served personally on May 21, 2002, with a summons, the petition and notice of the [pre-trial conference] that took place on June 13, 2002; that [respondent-mother] failed to appear at that [pre-trial conference]; *that the Court entered an order that day that it would consider such a request if [respondent-mother] made it prior to this day* but that the hearing this day would not be postponed in order for her to obtain court-appointed counsel; and that the clerk had communicated the contents of that order to [respondent-mother] over the

telephone since the [pre-trial conference]. Therefore, the Court denied her motion.

Similarly, the transcript from the TPR hearing indicates that the trial court stated as follows in response to respondent-mother's request for court-appointed counsel:

> Let the record show that this summons in this proceeding, the record is in the file, was served on [respondent-mother] on 8/21 [sic]. The summons gave her written notice that she needed to come file for a court ordered attorney if she wanted one. She had 30 days to file an answer to this petition to terminate her parental rights.
>
> Let the record further show that she did not either appear in court, or ask for a court appointed attorney in the scheduled session that was scheduled for . . . June 13. *Nor did she appear before the clerk at any time since the service of the petition to apply for a court appointed attorney.* She has not filed a written response to the petition. The time for filing such a response has expired. She was informed by the clerk on the telephone in the clerk's office on June 13 that she needed to appear and apply for a court appointed attorney prior to the—today's date, if she wanted one. . . .
>
> She's appeared in court this date to apply for a court appointed attorney and the questioning continues. The court will deny her application . . . for her failure to appear and apply for an attorney. . . .

It is clear from both the TPR order and the transcript that the trial court denied respondent-mother's request for court-appointed counsel because she failed to follow the trial court's directive to make such application to the clerk of court *before* the 11 July 2002 TPR hearing. The transcript indicates that respondent-mother's failure to file an answer to the TPR petition was also a factor in the trial court's denial of court-appointed counsel. Here, as in *Little*, respondent-mother was present at the TPR hearing, requested appointed counsel, and was denied because she had not filed an answer or requested a court-appointed attorney prior to the TPR hearing. We are thus bound by our previous conclusion in *Little* that "[t]here is no support, statutory or otherwise, for the trial court's ruling that in North Carolina the right to counsel can be waived by inaction prior to the termination hearing." *Little*, 127 N.C. App. at 193, 487 S.E.2d at 825. Accordingly,

we remand this matter for a new hearing on the petition to terminate respondent-mother's parental rights. Because of our resolution of this matter, we need not address respondent-mother's remaining assignments of error.

In summary, with respect to respondent-father, the TPR order is vacated, while with respect to respondent-mother, the TPR order is reversed and remanded.

Vacated in part; reversed and remanded in part.

Judges TIMMONS-GOODSON and HUNTER concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; AND DUKE ENERGY CORPORATION RESPONDENTS v. CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC., PETITIONER

No. COA03-457

(Filed 17 February 2004)

1. Utilities— rate freeze—newly passed legislation

The Utilities Commission properly denied CUCA's petition to initiate a general rate case because the Legislature had frozen rates for a time after new legislation was passed; there was an exception for a utility that persistently and substantially earned more than its allowed rate of return during the freeze period; and CUCA's allegations were based on returns prior to the freeze period. N.C.G.S. § 62-133.6(e).

2. Utilities— rates—no common law property interest

There is no common law property interest in just and reasonable utility rates, and, even if such a property right existed, N.C.G.S. § 12-2 (repeal of a statute does not affect pending actions) would not apply in this case because no statute was repealed by the new legislation and temporary rate freeze. N.C.G.S. § 62-133.6.

Appeal by petitioner from orders entered 23 July 2002 and 17 October 2002 by the North Carolina Utilities Commission. Heard in the Court of Appeals 27 October 2003.

West Law Offices, P.C., by James P. West, for petitioner-appellant.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Karen E. Long, for respondent-appellee State of North Carolina ex rel. Utilities Commission.

Kennedy Covington Lobdell & Hickman, L.L.P., by Clarence W. Walker and Kiran H. Mehta; Law Office of Robert W. Kaylor, P.A., by Robert W. Kaylor; William Larry Porter, Kodwo Ghartey-Tagoe and Paul R. Newton, for respondent-appellee, Duke Energy Corporation.

HUNTER, Judge.

Carolina Utility Customers Association, Inc. ("CUCA") appeals an order of the North Carolina Utilities Commission ("the Commission") denying CUCA's petition to initiate a general rate proceeding and dismissing its complaint regarding unjust and unreasonable rates charged by Duke Power, a division of Duke Energy Corporation ("Duke"). For the reasons stated herein, we affirm.

CUCA is an association representing many of North Carolina's largest industrial manufacturers. On 12 June 2002, CUCA filed a verified petition and complaint against Duke alleging that Duke's base rates for electricity, particularly for CUCA's member base, were unjust and unreasonable. CUCA specifically alleged, *inter alia*, that (1) Duke artificially reduced its regulated earnings by amortizing asbestos expenses in a manner that was an exception to standard utility accounting practices, and (2) Duke's allowed rate of return, originally set in 1991, was too high for the current economic climate. CUCA supported its allegations by referencing an audit of Duke that was currently being conducted by Grant Thornton, L.L.P. as part of an investigation initiated by the Commission, the South Carolina Public Service Commission, and the North Carolina Public Staff "regarding Duke's alleged accounting improprieties." However, CUCA alleged that since the audit would only address "discrete accounting issues and discrepancies rather than all of the records that would be relevant to the setting of general rates[,]" the need for a comprehensive ratepayer review of Duke's records was necessary. Thus, CUCA petitioned the Commission to initiate a general rate case to remedy Duke's alleged overcharges.

While the petition and complaint were pending, clean smokestack legislation was enacted on 20 June 2002 as Section 62-133.6 of our

statutes. Among other things, Section 62-133.6 declared the "base rates" of investor-owned public utilities, such as Duke, will remain unchanged from 20 June 2002 until 31 December 2007. Three days later, the Commission issued an order concluding that, pursuant to Section 62-133.6, there were no reasonable grounds by which to allow CUCA's complaint to proceed. CUCA's petition to initiate a general rate case against Duke was therefore denied by the Commission, but CUCA was afforded an opportunity to be heard as to that decision by filing comments or a motion for reconsideration.

On 9 August 2002, CUCA filed comments and a motion for reconsideration, which contended the Commission's "denial of the petition to initiate a general rate case and its tentative finding that there are no reasonable grounds to proceed upon CUCA's complaint both rest upon a misapprehension of applicable law." Specifically, CUCA argued (1) the subsequent enactment of Section 62-133.6 had no effect upon pending litigation, and (2) the "base rates" referred to in Section 62-133.6 represent "base fuel rates"; thus, as long as base fuel rates are not impacted, the initiation of either a general rate proceeding or a complaint proceeding should not be prohibited. Nevertheless, in an order dated 17 October 2002, the Commission denied reconsideration of its previous order and once again concluded there were "no reasonable grounds to proceed with a complaint proceeding." CUCA appeals.

At the outset, Chapter 62 of our statutes governs public utilities and establishes, in part, that any finding, determination, or order of the Commission is deemed "prima facie just and reasonable." N.C. Gen. Stat. § 62-94(e) (2003). Therefore, " '[j]udicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court,' which may be justified only by strict adherence to the statutory guidelines governing appellate review." *State ex rel. Util. Comm'n v. Carolina Indus. Group*, 130 N.C. App. 636, 638, 503 S.E.2d 697, 699 (1998) (citation omitted). The applicable statute provides as follows:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the sub-

stantial 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.

N.C. Gen. Stat. § 62-94(b).

Additionally, Chapter 62 delegates rate making to the Commission. As stated by our Supreme Court:

> In fixing rates to be charged by a public utility, the Commission is exercising a function of the legislative branch of the government. It may not, therefore, exceed the limitations imposed upon the Legislature by the State and Federal Constitutions. The Commission, however, does not have the full power of the Legislature but only that portion conferred upon it in G.S. Chapter 62. In fixing the rates to be charged by a public utility for its service, the Commission must, therefore, comply with the requirements of that chapter . . . .

Utilities Comm. v. Telephone Co., 281 N.C. 318, 336, 189 S.E.2d 705, 717 (1972).

[1] CUCA assigns error to the Commission's conclusion that a newly enacted section of Chapter 62, Section 62-133.6, precluded the initiation of a rate adjustment proceeding by petition and complaint against Duke. The enactment of Section 62-133.6 was an exercise by the Legislature of the power granted to it under the North Carolina Constitution to alter electricity rates for investor-owned utilities, such as Duke, for the next five years while the utilities seek to comply with new air emission standards. *See* N.C. Const. art. II, § 1; N.C. Gen. Stat. § 62-133.6 (2003). The pertinent subsection at issue in this appeal provides as follows:

> (e) Notwithstanding G.S. 62-130(d) and G.S. 62-136(a), the base rates of the investor-owned public utilities shall remain

unchanged from the date on which this section becomes effective through December 31, 2007. The Commission may, however, consistent with the public interest:

(1) Allow adjustments to base rates, or deferral of costs or revenues, due to one or more of the following conditions occurring during the rate freeze period:

. . . .

d. The investor-owned public utility persistently earns a return substantially in excess of the rate of return established and found reasonable by the Commission in the investor-owned public utility's last general rate case.

N.C. Gen. Stat. § 62-133.6(e).

CUCA initially argues that despite the base rate freeze provision of Subsection 62-133.6(e), Subsection 62-133.6(h) still provides a statutory basis to proceed with its petition and complaint. Subsection 62.133.6(h) states "[n]othing in this section shall prohibit the Commission from taking any actions otherwise appropriate to enforce investor-owned public utility compliance with applicable statutes or Commission rules or to order any appropriate remedy for such noncompliance allowed by law." N.C. Gen. Stat. § 62.133.6(h). CUCA contends this subsection authorizes the Commission to take "any actions otherwise appropriate[,]" including the hearing of a complaint and the initiation of a general rate proceeding, in order to remedy a utility's noncompliance with applicable statutes and rules. We disagree.

" 'The cardinal principle of statutory construction is that the intent of the legislature is controlling.' " *Nationwide Mutual Ins. Co. v. Mabe*, 342 N.C. 482, 494, 467 S.E.2d 34, 41 (1996) (citation omitted). To ascertain our General Assembly's legislative intent, we look at " 'the phraseology of the statute [as well as] the nature and purpose of the act and the consequences which would follow its construction one way or the other.' " *Id.* Further, when reconciling statutes dealing with the same subject matter, they must be construed in *pari materia*, and harmonized, if possible, to give effect to each. *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 166 S.E.2d 663 (1969).

Subsection 62-133.6(e) plainly provides that base rate adjustments are allowed "during the rate freeze period" if "[t]he investor-

owned public utility persistently earns a return substantially in excess of the rate of return established and found reasonable by the Commission" in the utility's last general rate case. By this subsection, it is clear that the excessive return must occur during the rate freeze period. When construed in *para materia* with Subsection 62-133.6(h)'s prohibition against the Commission taking "any actions otherwise appropriate[,]" the Commission would have the authority to issue fines for bad acts, issue orders to compel adequate service, and to do any number of acts which would be appropriate to regulate utilities. However, the Commission would not have the authority to make base rate adjustments contrary to Subsection 62-133.6(e) in the absence of evidence that the investor-owned public utility had persistently and substantially earned more than its allowed rate of return during the rate freeze period. Here, CUCA's petition and complaint were based on alleged excessive rate of returns by Duke that occurred prior to 20 June 2002. Even if true, CUCA's allegations do not address rates of return by Duke during the rate freeze period. Therefore, while the Commission may have done other acts to enforce Duke's compliance with applicable statutes and rules (acts which are disputed in *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn. v. Duke Energy Corp.*, 163 N.C. App. 1, —— S.E.2d —— (No. COA03-440 filed 17 February 2004)), initiation of a general rate case was not such an act.

[2] Nevertheless, CUCA also argues that the Commission erred in denying CUCA's petition and dismissing its complaint because both were filed prior to the enactment of Section 62-133.6. Specifically, CUCA contends that it has a common law property interest to just and reasonable utilities rates; therefore, Section 12-2 of our statutes confirms that the existence of that property interest prevents subsequently enacted legislation from affecting CUCA's action. We disagree.

First, we have found no North Carolina case law recognizing the property interest alleged by CUCA in this appeal. On the contrary, our case law appears to suggest otherwise. *See State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 336 N.C. 657, 446 S.E.2d 332 (1994) (holding that the defendant customers association's interest in the supplier refunds used to fund the expansion of natural gas lines was nothing more than a mere expectation of receiving those refunds and not a property right). Second, assuming such a property interest did exist, Section 12-2 would still be inapplicable. Section 12-2 provides, in pertinent part, that "[t]he repeal of a statute shall not affect

any action brought before the repeal, for any forfeitures incurred, or for the recovery of any rights accruing under such statute." N.C. Gen. Stat. § 12-2 (2003). No statute was repealed by the enactment of Section 62-133.6 in the case *sub judice*. Subsection 62-133.6(e) simply allows the Legislature to preempt the Commission's ability to compel a general rate case by freezing rates until 31 December 2007, not completely revoking that ability. As stated by this Court in *Utilities Comm. v. Utility Co.*, 30 N.C. App. 336, 340, 226 S.E.2d 824, 826 (1976): "The Utilities Commission exercises a function of the legislative branch of the government, but only that portion of the legislative power conferred upon it by legislative act. It may not act in an instance where the Legislature has, by specific legislation, preempted such action." Thus, CUCA's second argument is without merit.

Accordingly, the Commission properly denied CUCA's petition to initiate a general rate proceeding against Duke and dismissed its complaint regarding unjust and unreasonable rates charged by the public utility.

Affirmed.

Chief Judge EAGLES and Judge GEER concur.

Chief Judge Eagles concurred in this case prior to 30 January 2004.

DAN PHILLIPS, PLAINTIFF v. IKE GRAY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF CHATHAM COUNTY, RANDY KECK, IN HIS OFFICIAL CAPACITY AS CHIEF DEPUTY SHERIFF OF CHATHAM COUNTY, DEFENDANTS

No. COA02-1570

(Filed 17 February 2004)

1. Immunity— sheriff and deputy—official capacities—wrongful discharge

Summary judgment was correctly granted for a sheriff and chief deputy in their official capacities on a wrongful discharge suit. Sovereign immunity bars actions against public officials in their official capacities, sheriffs and deputies are considered public officials, and the county's insurance fund included an excep-

tion for law enforcement employees bringing claims against each other.

2. Immunity— sovereign—sheriff—individual capacity—wrongful discharge

Sovereign immunity did not bar a claim for wrongful discharge in violation of public policy against a sheriff in his individual capacity. Sovereign immunity does not shield individuals from personal liability for actions which may have been corrupt, malicious, or outside the scope of official duties, and plaintiff provided evidence which could support his claim in that he provided an informant for an FBI investigation of mismanagement of marijuana by the sheriff's department.

Appeal by plaintiff from order entered 1 August 2002 by Judge John R. Jolly, Jr., in Chatham County Superior Court. Heard in the Court of Appeals 10 September 2003.

McSurley & Osment, by Ashley Osment and Alan McSurely for plaintiff appellant.

Womble Carlyle Sandridge & Rice, by Mark A. Davis for defendant appellee.

TIMMONS-GOODSON, Judge.

Dan Phillips ("plaintiff") appeals the trial court's order of summary judgment in favor of defendants Sheriff Ike Gray ("Sheriff Gray") and Randy Keck ("Keck") (collectively as "defendants"). For the reasons stated herein, we affirm the decision of the trial court to grant summary judgment for plaintiff's claims against defendants in their official capacities and plaintiff's free speech claim. We, however, reverse and remand the trial court's grant of summary judgment for plaintiff's claim against defendant Sheriff Gray in his individual capacity.

The record tended to show that plaintiff was a School Resource Officer ("SRO") with the Chatham County Sheriff's Department. Defendants are the sheriff (Gray) and chief deputy sheriff (Keck) of Chatham County.

Plaintiff acted as the SRO for Chatham Central High School ("CCHS") for the majority of the time pertinent to this appeal. While serving as the SRO, plaintiff witnessed a racially hostile environment at CCHS perpetuated by students and school administrators. Plaintiff made multiple attempts to discuss the hostile environment with his

then supervisor, Sheriff Don Whitt ("Sheriff Whitt"). Sheriff Whitt informed plaintiff that he did not "want to hear a damn thing [plaintiff had] to say" about the school.

The following summer, an unknown person left an audiocassette in the mailbox of the Chatham County Board of Commissioners Chair Richard Givens. The tape contained a conversation between the principal of CCHS, William Fowler ("Fowler"), and an unknown person. During said conversation, Fowler made several racial slurs. Fowler subsequently resigned as principal of CCHS.

Plaintiff's wife, Dorthy Ritter Phillips ("Mrs. Phillips"), is the principal of a local elementary school. In her affidavit for the court, Mrs. Phillips stated that a colleague of hers informed her that Fowler and Sheriff Whitt had made a deal to "take care of the one who had made the tape" and that plaintiff would not be re-sworn as a deputy when the new sheriff, Sheriff Gray, took office.

A few months later, plaintiff was informed that marijuana was stolen from a landfill used by the Chatham County Sheriff's Department to destroy and/or hold marijuana in the County's possession. The informant explained to plaintiff that he attempted to provide Keck with this information, but Keck "cursed him." Plaintiff met with the informant and agents from the FBI and the U.S. Customs. Sheriff Whitt asserted in his affidavit that he had contacted the FBI about the missing marijuana.

Sheriff Whitt retired as sheriff of Chatham County on 30 November 2001. Sheriff Gray was sworn in as sheriff and plaintiff was re-sworn as a deputy. Shortly thereafter, Sheriff Gray informed Keck that there was an Internal Affairs investigation of plaintiff.

Robert Lefler, an officer employed by the Division of Motor Vehicles Law Enforcement and the officer who arranged the meeting with the FBI and U.S. Customs, received a call from a U.S. Customs agent asking Lefler to give plaintiff a "heads up" that Keck planned to fire him. In mid-January 2001, Keck asked plaintiff to take a polygraph exam regarding the audiotape of Fowler. In Keck's affidavit, he stated that plaintiff became enraged when asked to take a polygraph. Keck further stated that plaintiff thereafter threatened to sue him. In plaintiff's affidavit, plaintiff asserts that he was willing to take the polygraph as long as standard operating procedure was followed and his accuser was also required to submit to a polygraph.

Deputy Seagroves, plaintiff's successor as SRO at CCHS, asserts in his affidavit that Keck also asked him to take a polygraph. Deputy Seagroves informed Keck that he would submit to a polygraph if standard operating procedure was followed. Neither plaintiff nor Deputy Seagroves took a polygraph test.

The next day Sheriff Gray discharged plaintiff. Plaintiff brought a wrongful discharge claim against Sheriff Gray and Keck in their official capacities and against Sheriff Gray in his individual capacity. The trial court granted defendants' motion for summary judgment and dismissed all claims against defendants with prejudice.

Plaintiff assigns error to the trial court's order of summary judgment to defendants. Plaintiff specifically argues that there are genuine issues of material fact regarding whether: (1) sovereign immunity bars wrongful discharge claims against defendants; (2) plaintiff's wrongful discharge claim is based on recognized public policy; and, (3) plaintiff was discharged in violation of his free speech rights under the North Carolina Constitution. We conclude that summary judgment was appropriate for plaintiff's claims against defendants in their official capacities, but not against Sheriff Gray in his individual capacity. We further conclude that the trial court's order of summary judgment was proper regarding plaintiff's free speech claim.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001); *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 656, 267 S.E.2d 584, 586 (1980). It is not the court's function to decide questions of fact when ruling on a motion for summary judgment; rather, the moving party must establish that there is an absence of a triable issue of fact. *Moore v. Bryson*, 11 N.C. App. 260, 262, 181 S.E.2d 113, 114 (1971). All evidence must be considered in the light most favorable to the non-moving party. *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. 347, 350, 363 S.E.2d 215, 217 (1988).

[1] Sovereign immunity ordinarily grants the state, its counties, and its public officials, in their official capacity, an unqualified and absolute immunity from law suits. *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). "The rule of sovereign immunity applies when the governmental entity is being sued

for the performance of a governmental, rather than proprietary, function." *Id.* The complaint must specifically allege a waiver of governmental immunity to overcome a defense of sovereign immunity. *Clark v. Burke County*, 117 N.C. App. 85, 88, 450 S.E.2d 747, 748 (1994). Absent such an allegation, the complaint fails to state a cause of action. *Id.* In the case herein, plaintiff alleges that Chatham County waived its sovereign immunity through the purchase of liability insurance.

A county may waive its sovereign immunity by purchasing liability insurance pursuant to N.C. Gen. Stat. § 153A-435(a) (2001). Chatham County purchased insurance entitled the "North Carolina Counties Liability and Property Insurance Pool Fund" ("Fund"). The Fund clearly defines county sheriffs and chief deputies as "Law Enforcement Employees."

> "Law Enforcement Employees" means persons described as . . . those armed employees who deal directly with the public and exercise general powers of arrest. This category includes but is not limited to the following:
>
> a. county sheriff and chief deputy exercising powers of arrest;
>
> b. an officer exercising powers of arrest; and
>
> c. all personnel with regular street or road duties, or both, detectives and investigators.

Plaintiff's brief to this Court concedes that Gray and Keck "[are] law enforcement employees." The provisions governing law enforcement employees specifically exclude any claims brought by a covered person (law enforcement employee) against another covered person. As plaintiff and defendants are covered persons, plaintiff's claims against defendants are within an exception to the Fund's coverage.

Defendants argue that the exception to liability insurance requires this Court to find that defendants are immune from suit. In order to facilitate discussion of this question, we must first address the capacities in which the defendants are being sued. We note that plaintiff's suit is against Gray and Keck in their official capacities, and against Gray in his individual capacity.

The doctrine of sovereign immunity bars actions against public officials sued in their official capacities. *Beck v. City of Durham*, 154 N.C. App. 221, 229, 573 S.E.2d 183, 190 (2002). Sheriffs and deputy

sheriffs are considered public officials for purposes of sovereign immunity. *Summey v. Barker*, 142 N.C. App. 688, 691, 544 S.E.2d 262, 265 (2001). Thus, sovereign immunity bars plaintiff's claims against defendants in their official capacities.

[2] Sovereign immunity does not shield public officials from personal liability for any actions which " 'may have been corrupt, malicious or perpetrated outside and beyond the scope of official duties.' " *Beck*, 154 N.C. App. at 230, 573 S.E.2d at 190 (*quoting Locus v. Fayetteville State University*, 102 N.C. App. 522, 526, 402 S.E.2d 862, 865 (1991)). Thus, sovereign immunity does not bar plaintiff's claim against Sheriff Gray in his individual capacity.

This Court must now determine whether plaintiff has sufficiently evidenced his wrongful discharge claim against Sheriff Gray individually. We must only find one theory to support plaintiff's claim in order to defeat the entry of summary judgment, and in doing so, we need not rule on the remaining theories.

To survive summary judgment, plaintiff must forecast sufficient evidence that a jury may find that Sheriff Gray discharged plaintiff in violation of public policy. *See Caudill v. Dellinger*, 129 N.C. App. 649, 656, 501 S.E.2d 99, 104 (1998). This Court has previously concluded that "[i]t is the public policy of this state that citizens cooperate with law enforcement officials in the investigation of crimes." *Caudill*, 129 N.C. App. at 657, 501 S.E.2d at 104. In the case *sub judice*, Sheriff Gray was implicated in the mismanagement of the marijuana, an incident under investigation by the FBI and U.S. Customs. Plaintiff cooperated with the investigating agents by providing a confidential informant. Plaintiff's cooperation with said agents was "clearly [a] protected activity which further[s] the public policy of this state." *Id.* We conclude that plaintiff has provided evidence which could support a claim for common law wrongful discharge in violation of public policy.

Plaintiff's third assignment of error argues that the trial court erred when it granted defendants' summary judgment motion on plaintiff's free speech claim. To establish a cause of action for wrongful discharge in violation of free speech, plaintiff must forecast sufficient evidence "that the speech complained of qualified as protected speech or activity" and "that such protected speech or activity was the motivating or but for cause for his discharge or demotion." *Swain v. Elfland*, 145 N.C. App. 383, 386, 550 S.E.2d 530, 533 (2001) (citations omitted).

In *Corum v. University of North Carolina*, our Supreme Court held that one whose state constitutional rights have been abridged has a direct claim under the appropriate constitutional provision. 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). A claim is available, however, only in the absence of an adequate state remedy. *Id.* As plaintiff's rights are adequately protected by a wrongful discharge claim, a direct constitutional claim is not warranted. *See Corum*, 330 N.C. at 783, 413 S.E.2d at 289. The trial court did not err when granting defendants' motion to dismiss based on plaintiff's free speech claim.

We affirm the trial court's order granting summary judgment in favor of defendants for plaintiff's claims against defendants in their official capacities and for plaintiff's free speech claim. We reverse the trial court's order granting summary judgment on plaintiff's wrongful discharge claim against Sheriff Gray individually.

Affirmed in part, reversed in part.

Judges HUDSON and ELMORE concur.

STATE OF NORTH CAROLINA v. JIMMY LAWRENCE SHUE

No. COA03-133

(Filed 17 February 2004)

1. Indecent Liberties— sufficiency of evidence—intent

There was insufficient evidence of an intent to take indecent liberties, and the trial court erred by denying defendant's motion to dismiss, where there was an encounter in a restroom but the only evidence of intent was in the defendant's subsequent actions with another victim in the same stall.

2. Kidnapping— second-degree—sufficiency of evidence

There was sufficient evidence of second-degree kidnapping where defendant restricted a child's ability to leave a restroom stall and removed the child from the view of others who might hinder defendant's taking of indecent liberties.

Appeal by defendant from judgment dated 15 October 2002 by Judge J.B. Allen, Jr. in Superior Court, Alamance County. Heard in the Court of Appeals 13 November 2003.

Attorney General Roy Cooper, by Assistant Attorney General Lori A. Kroll, for the State.

Clifford, Clendenin, O'Hale & Jones, LLP, by Walter L. Jones, for defendant.

McGEE, Judge.

Jimmy Lawrence Shue (defendant) appeals from judgment entered upon a jury verdict finding defendant guilty of taking indecent liberties with a child and second degree kidnapping. Defendant was sentenced to imprisonment for twenty-five to thirty-nine months for second degree kidnapping of a five-year-old child and a consecutive term of sixteen to twenty months for taking indecent liberties with an eight-year-old child. Defendant did not appeal the trial court's entry of prayer for judgment for defendant's conviction of taking indecent liberties with a five-year-old child and his conviction of assault of an eight-year-old child.

The State's evidence tended to show that on the evening of 25 March 2002, L.H. was dining with her daughter and her two minor sons (P.H. and N.H.) at Ham's restaurant in Burlington, North Carolina. L.H.'s sister and her four children, including her minor son (K.R.), joined them for dinner.

While the families waited for the arrival of their order, eight-year-old P.H. went to the restaurant's restroom. P.H. was unable to lock the only stall in the restroom. P.H. asked defendant, who was in the restroom, for assistance in locking the stall. Defendant, age forty-seven, entered the stall along with P.H. and attempted to engage the lock. Once defendant had successfully locked the stall, he turned towards P.H. and attempted to grab P.H.'s arm. Defendant left the stall when P.H. jerked his arm away. P.H. returned to his family's table.

Five-year-old N.H. later went to the restroom and shortly thereafter his mother asked P.H. and K.R. to check on N.H. since he had failed to return to the table. When P.H. and K.R. entered the restroom, they saw defendant and N.H. in the same stall with the stall door closed. P.H. saw defendant exit the stall.

While N.H. was in the stall of the restaurant's restroom, defendant entered the stall and closed the stall door just as N.H. finished urinating. N.H. testified that defendant stated that he wanted to help N.H. "tinkle" and he touched N.H.'s "tinkle spot" with both hands before leaving the stall and the restroom.

Defendant was convicted of second degree kidnapping and taking indecent liberties with a five-year-old child. Defendant was also convicted of assault on a child under twelve and taking indecent liberties with an eight-year-old child. Defendant appeals his convictions for second degree kidnapping of a five year old child and taking indecent liberties with an eight year old child.

Both of defendant's assignments of error allege the trial court erred in denying his motion to dismiss for insufficient evidence.

When considering a motion to dismiss for insufficient evidence, the trial court must determine whether there is substantial evidence of each element of the offense and that the defendant committed the offense. *State v. Irwin*, 304 N.C. 93, 97, 282 S.E.2d 439, 443 (1981). Substantial evidence is " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Smith*, 150 N.C. App. 138, 140, 564 S.E.2d 237, 239, (quoting *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (citations omitted)), *cert. denied*, 355 N.C. 756, 566 S.E.2d 87 (2002). All evidence is to be considered in the light most favorable to the State and all reasonable inferences are to be drawn therefrom. *Irwin*, 304 N.C. at 98, 282 S.E.2d at 443. Where there is a reasonable inference of a defendant's guilt from the evidence, the jury must determine whether that evidence "convinces them beyond a reasonable doubt of defendant's guilt." *Id.*

[1] In his first assignment of error, defendant contends that the trial court erred by denying his motion to dismiss because the State failed to present sufficient evidence that he took indecent liberties with an eight-year-old child.

N.C. Gen. Stat. § 14-202.1 proscribes that:

(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; 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).

In explaining the statute and its impact, our Supreme Court has stated that

> [t]he evil the legislature sought to prevent in this context 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. It is important to note that the statute does not contain any language requiring a showing of intent to commit an unnatural sexual act. Nor is there any requirement that the State prove that a touching occurred. Rather, the State need only prove the taking of any of the described liberties for the purpose of arousing or gratifying sexual desire.

State v. Hartness, 326 N.C. 561, 567, 391 S.E.2d 177, 180-81 (1990); *see also State v. Every*, 157 N.C. App. 200, 578 S.E.2d 642 (2003).

The State's evidence in the case before us showed that defendant entered a stall occupied by P.H. and after fixing the lock at P.H.'s request, defendant reached out to grab the child's arm. P.H. jerked his arm away and defendant exited the stall. Defendant argues that his conduct does not constitute the taking of indecent liberties with a child. However, the State asserts there was sufficient evidence of an attempt by defendant to take indecent liberties with P.H. and, therefore, he is guilty of the offense of taking indecent liberties with a child as prohibited under N.C. Gen. Stat. § 14.202.1.

"The two elements of the crime of attempt are (1) there must be the intent to commit a specific crime and (2) an overt act which in the ordinary and likely course of events would result in the commission of the crime." *State v. Brayboy*, 105 N.C. App. 370, 374, 413 S.E.2d 590, 593, (evidence that the defendant grabbed the victim, forced her to the ground, pinned her arms and straddled her was insufficient to support conclusion of the defendant's intent to rape), *disc. review denied*, 332 N.C. 149, 419 S.E.2d 578 (1992). It was the State's burden

at trial in the case before us to present sufficient evidence to establish that (1) defendant reached for P.H. with the intent to take indecent liberties with the child and (2) in the ordinary and likely course of events, defendant's conduct would result in the commission of the offense. *Id.*

The State contends that the requisite intent is evident in the actions of defendant toward the child's younger brother which occurred a short time later in the same restroom stall. We disagree. *See State v. Davis*, 90 N.C. App. 185, 368 S.E.2d 52 (1988) (evidence that the defendant had raped a woman in the same apartment complex thirteen years prior was insufficient on its own to prove intent to commit rape).

Although proof of intent is often shown by the circumstances, we do not believe the General Assembly intended, in enacting this statute, to alleviate the State's burden to prove a defendant's intent at the time of the offense at issue. When "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 perpetrator, the motion to dismiss should be allowed." *State v. Revels*, 153 N.C. App. 163, 167, 569 S.E.2d 15, 17 (2002) (citations omitted); *compare State v. Brown*, 162 N.C. App. 333, 338, 590 S.E.2d 433, 437 (2004) (mere conjecture that the defendant's motivation for conversing with the child was sexually motivated is insufficient evidence to establish the defendant's purpose was to obtain sexual gratification). The evidence of defendant's conduct involving N.H. does not support the conclusion that defendant attempted to take indecent liberties with P.H. Where the State offered no other indicia of defendant's intent, such a blanket assumption based on a later instance is insufficient. The trial court erred in denying defendant's motion to dismiss the charge of indecent liberties with P.H.

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the charge of second degree kidnapping of N.H., a five-year-old child. Defendant contends that the State presented insufficient evidence for the charge to survive his motion to dismiss because the act of kidnapping was not independent and separate from the charge and conviction for taking indecent liberties with N.H.

N.C. Gen. Stat. § 14-39 provides:

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another . . . any other person under the age of

> 16 years without the consent of a parent or legal custodian of such person, shall be guilty of: kidnapping if such confinement, restraint or removal is *for the purpose of*:
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony;
>
> (b) . . . If the person kidnapped was released in a safe place by the defendant . . . the offense is kidnapping in the second degree[.]

N.C. Gen. Stat. § 14-39 (2003) (emphasis added). "If the victim is shown to be under sixteen, the state has the burden of showing that he or she was unlawfully confined, restrained, or removed from one place to another without the consent of a parent or legal guardian." *State v. Hunter*, 299 N.C. 29, 40, 261 S.E.2d 189, 196 (1980).

"Confinement" in the context of the offense "connotes some form of imprisonment within a given area, such as a room, a house or a vehicle." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). Whereas " 'restrain,' while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without confinement." *Id.* The initial inquiry is whether there was "substantial evidence that the defendant[] restrained or confined the victim separate and apart from any restraint necessary to accomplish the act[] of [taking indecent liberties with the minor child]." *State v. Mebane*, 106 N.C. App. 516, 532, 418 S.E.2d 245, 255, *disc. review denied*, 332 N.C. 670, 424 S.E.2d 414 (1992); *see also State v. Oxendine*, 150 N.C. App. 670, 676, 564 S.E.2d 561, 566 (2002) ("The restraint of the victim must be a complete act, independent of the sexual offense."), *disc. review denied*, 356 N.C. 689, 578 S.E.2d 325 (2003).

In *Fulcher*, our Supreme Court recognized that two or more criminal offenses "may grow out of the same course of action," where the first offense is committed with the intent to commit the second offense, followed by the commission of the second offense. *Fulcher*, 294 N.C. at 523-24, 243 S.E.2d at 351-52 (e.g., a breaking and entering, with the intent to commit a larceny, followed by the commission of the larceny). In such an instance, a defendant may be convicted of both offenses.

In the present case, the State presented evidence that after N.H. had finished urinating, defendant entered the restroom stall occupied by the minor child and closed the door. Defendant did so without the consent of the minor's parents. Defendant effectively restricted the

child's ability to leave the stall and removed N.H. from the view of others in the restroom who might hinder the commission of the offense. These facts are substantial evidence from which a jury could reasonably infer defendant confined N.H. within the stall for the purpose of facilitating defendant's taking indecent liberties with N.H. Defendant's second assignment is therefore without merit.

Defendant's conviction for taking indecent liberties with P.H., an eight-year-old child, is reversed. The trial court did not err in defendant's conviction of second degree kidnapping of N.H., a five-year-old child.

Reversed in part and affirmed in part.

Judges HUDSON and CALABRIA concur.

COLUMBUS COUNTY, ON BEHALF OF KATIE BROOKS, PLAINTIFF v. MARION A. DAVIS, DEFENDANT

No. COA02-1569

(Filed 17 February 2004)

Evidence— DNA test—chain of custody—insufficient

The chain of custody for DNA samples for a DNA test that was not court-ordered was not complete, a proper foundation was not established for the test results, and a paternity judgment was remanded for a new trial.

Appeal by defendant from judgment entered 10 May 2002 by Judge Napoleon B. Barefoot, Jr. in Columbus County District Court. Heard in the Court of Appeals 12 November 2003.

James R. Caviness, attorney for plaintiff.

William L. Davis, III, attorney for defendant.

TIMMONS-GOODSON, Judge.

Marion A. Davis ("defendant") appeals a civil judgment declaring him to be the father of the minor child, Daquadrin Lawson. For the reasons stated herein we vacate the judgment of the trial court and remand this case for a new trial.

The evidence presented at trial tends to show the following: Defendant and Monica Louise Forbes ("Forbes") had a sexual relationship between April and June, 1991. In February or March of that year, Forbes had one sexual encounter with Arthur Pierre Frink ("Frink"), who is defendant's second cousin. Soon after her relationship with defendant ended, Forbes began dating and living with Arthur Lawson ("Lawson").

On 7 December 1991, Forbes gave birth to Daquadrin E'Maud Forbes Lawson ("Daquadrin"). Lawson believed that Daquadrin was his son, and Forbes did not tell him the truth. Forbes and Daquadrin lived with Lawson until 1994 when Forbes told Lawson that Daquadrin was not his son. Four months after the relationship between Forbes and Lawson ended, Lawson reported to the Columbus County Department of Social Services ("DSS") that Forbes was an "unfit mother." Forbes's mother, Katie Louise Hamilton ("Hamilton"), was subsequently given custody of Daquadrin. Hamilton applied for and received public assistance funds to assist in supporting Daquadrin.

In 1998, Forbes signed an affidavit of parentage at the request of DSS identifying defendant as Daquadrin's father. A paternity test was performed, which concluded that the probability that defendant fathered Daquadrin was 99.62 percent.[1] DSS subsequently filed a complaint against defendant seeking adjudication of Daquadrin's paternity, continuing support and maintenance for the child, and reimbursement of public assistance payments expended.

Over defendant's objection at trial, Dr. Gary Stuhlmiller ("Dr. Stuhlmiller"), director of the Department of Paternity Testing of Laboratory Corporation of America, testified that based on the deoxyribonucleic acid ("DNA") test results the defendant could not be excluded from paternity, and that there was a 99.62 percent probability that defendant was Daquadrin's father. By his objection, defendant took issue with whether there had been a proper showing of the chain of custody for the blood specimens. In offering his opinion, Dr. Stuhlmiller relied on the following exhibits:

Exhibit 1—Client Authorization form for blood sample collection and testing for paternity evaluation for Daquadrin and defendant.

1. The record on appeal fails to establish that the paternity test was ordered by the court. N.C.R. App. P. 9(1)(d) (2004) mandates that the record on appeal in civil cases contain "copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried." Therefore, for the purpose of our analysis, we deem the test not to have been court-ordered.

Exhibit 2—Client Authorization form for blood sample collection and testing for paternity evaluation for Forbes.

Exhibit 3—Affidavits of Receipt of Genetic Specimens Chain of Custody for Daquadrin and defendant.

Exhibit 4—Affidavits of Receipt of Genetic Specimens Chain of Custody for Forbes.

Exhibit 5—Chain of Custody Verification for collected and packaged specimens for Daquadrin and defendant.

Exhibit 6—DNA test results.

Over defendant's objections all of these documents were admitted into evidence.

The jury returned a unanimous verdict adjudging defendant to be Daquadrin's father. The trial court entered a judgment in accordance with this verdict. It is from this judgment that defendant appeals.

Defendant assigns error to the trial court (I) admitting plaintiff's Exhibits 1-6 relating to the DNA testing procedure into evidence; (II) admitting opinion testimony by an expert witness regarding Exhibits 1-6; (III) admitting into evidence the DNA test results; and (IV) denying defendant's motions for directed verdict and judgment not withstanding the jury verdict.

The dispositive issue on appeal is whether a proper chain of custody was established to admit the DNA test results. Both parties assert that the DNA test was not court-ordered, and that *Lombroia v. Peek*, 107 N.C. App. 745, 421 S.E.2d 784 (1992), is the controlling authority. Plaintiff argues that it "met the requirements of *Lombroia* in laying the foundation for admission of Exhibits No. 1-6." Defendant argues that under *Lombroia*, "[i]t was error to admit these exhibits without requiring testimony from the people involved in the collection of the sample and who performed these tests." We agree with defendant.

In instances in which the court orders DNA testing, N.C. Gen. Stat. § 8-50.1(b1) provides a less formal procedure for admitting DNA test results into evidence. The statute in pertinent part provides as follows:

Verified documentary evidence of the chain of custody of the blood specimens obtained pursuant to this subsection shall be

> competent evidence to establish the chain of custody. Any party objecting to or contesting the procedures or results of the blood or genetic marker tests shall file with the court written objections setting forth the basis for the objections and shall serve copies thereof upon all other parties not less than 10 days prior to any hearing at which the results may be introduced into evidence. . . . *If no objections are filed within the time and manner prescribed, the test results are admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy.*

N.C. Gen. Stat. § 8-50.1(b1) (2003) (emphasis added). If the blood test is not ordered by the trial court upon motion by a party, the standard in N.C. Gen. Stat. § 8-50.1(b1) will not apply and the party seeking to admit the test must present independent evidence of the chain of custody. *See Catawba County ex rel. Kenworthy v. Khatod*, 125 N.C. App. 131, 135, 479 S.E.2d 270, 272 (1997) ("[I]f the test report at issue did not meet the prerequisites for admission under G.S. § 8-50.l(b1), the rule of *Lombroia* requiring independent evidence of the chain of custody governs . . . .").

In *Lombroia* this Court held that

> [i]n order to establish the relevancy of blood test results, plaintiff is required to 'lay a foundation . . . by way of expert testimony explaining the way the test is conducted, attesting its scientific reliability, and vouching for its correct administration in [this] particular case.' . . . '[T]he substance analyzed must be accurately identified . . . [by proving] a chain of custody to insure that the substance came from the source claimed and that its condition was unchanged.'

107 N.C. App. at 749, 421 S.E.2d at 786, *quoting FCX, Inc. v. Caudill*, 85 N.C. App. 272, 276, 354 S.E.2d 767, 771 (1987).

We also look to *Rockingham County DSS ex rel. Shaffer v. Shaffer* which presents facts similar to the case at bar. In *Shaffer* the expert witness based his testimony "on 'Paternity Evaluation Reports,' showing the genetic testing results of tests performed by [the laboratory], and 'Client Authorizations' showing that the blood tested had been drawn from the parties, packaged, sealed and received unopened by [the laboratory]." 126 N.C. App. 197, 198-99, 484 S.E.2d 415, 416 (1997). Because the doctor had neither drawn the blood nor had any personal knowledge of the blood sample's chain of custody, this Court held that

> [p]laintiff therefore failed to establish the relevancy of the blood test results under either section 8-50.1(b1) or *Lombroia* and it was therefore error to admit the blood tests and allow [the doctor] to express an opinion based on the blood test results.

Shaffer, 126 N.C. App. at 201, 484 S.E.2d at 417, *see also Lombroia*, 107 N.C. App. at 749, 421 S.E.2d at 787. The chain of custody can be established by sworn affidavits, *see Shaffer*, 126 N.C. App. at 199, 484 S.E.2d at 416-17, or witness testimony from the people involved in the various stages of specimen collection and handling. *Lombroia*, 107 N.C. App. at 749, 421 S.E.2d at 786.

In this case as in *Shaffer*, the expert witness had no personal knowledge of the DNA sample collections or the samples' chain of custody. Thus, to establish a foundation for the DNA test results' admissibility, plaintiff was required to present affidavits or witness testimony for each link in the chain of custody for each DNA sample.

To lay the foundation for Forbes's DNA sample, plaintiff presented witness testimony from the person who collected, sealed and mailed the sample to the laboratory. Plaintiff also presented an affidavit by the person who received the specimen at the laboratory for testing stating that the specimen did not appear to have been tampered with. We do not consider this to be sufficient evidence to establish the chain of custody. In addition to these two affidavits, plaintiff should have also provided testimony or an affidavit from the individual who performed the DNA test to confirm that the specimen was transferred within the laboratory without being disturbed. *Cf. State v. Britt*, 291 N.C. 528, 533, 231 S.E.2d 644, 648 (1977), *quoting Joyner v. Utterback*, 196 Iowa 1040, 195 N.W. 594 (1923) ("It is generally held that the party offering such specimen is required to establish, at least as far as practicable, a complete chain of evidence, tracing possession from the time the specimen is taken from the human body to the final custodian by whom it is analyzed.") Thus, we conclude that the chain of custody was not properly established for Forbes's DNA sample.

We are also not satisfied with the foundation for the DNA samples belonging to Daquadrin and defendant. The only evidence that samples were taken from defendant and Daquadrin is the client authorization form. However, this form is not verified as an affidavit. Additionally, plaintiff did not present testimony from the person who collected these samples. Plaintiff provided two affidavits that the

samples were received by the laboratory and did not appear to have been tampered with, but this evidence is not sufficient to establish an entire chain of custody. Therefore, Dr. Stuhlmiller's testimony regarding the chain of custody of the sample of defendant and Daquadrin is unverified and should not have been admitted into evidence by the trial court.

Because the chain of custody for the DNA samples was not complete, we conclude that a proper foundation was not established for the admission of the DNA test results. Thus, the trial court improperly admitted the test results. Therefore, we vacate the underlying judgment and remand this case for a new trial. Accordingly, it is not necessary to address defendant's remaining assignments of error.

Vacated and remanded.

Judges WYNN and ELMORE concur.

BRENDA WATTS, PLAINTIFF v. SHARON F. SLOUGH, STEPHEN H. SLOUGH, INDIVIDUALLY AND AS TRUSTEE, BRIAN K. SHEETS AND JEFFREY L. SHEETS, DEFENDANTS

No. COA03-393

(Filed 17 February 2004)

Appeal and Error— appealability—partial summary judgment

Appeals from partial summary judgments were dismissed as interlocutory where the judgments were entered for one of four defendants and on four of eight claims for relief arising from investment sales; the trial court did not certify the case for appeal; and the lack of immediate review did not cause the loss of a substantial right.

Appeal by defendants from order and judgment entered 27 December 2002 by Judge Clarence E. Horton, Jr. in Cabarrus County Superior Court. Heard in the Court of Appeals 19 November 2003.

Hartzell & Whiteman, L.L.P., by Andrew O. Whiteman, for plaintiff-appellee.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Steven C. Lawrence, for defendants-appellants.

GEER, Judge.

Plaintiff Brenda Watts filed suit asserting eight claims for relief based on her loss of $243,000 as a result of an investment made in reliance on representations and omissions by defendant Sharon Slough that Ms. Watts contends were materially false and misleading. Defendants appeal from the trial court's entry of partial summary judgment in plaintiff's favor as to two claims for relief and its denial of summary judgment as to the remaining six claims for relief. Because defendants' appeal is interlocutory and does not affect a substantial right, we dismiss the appeal.

In the spring of 2000, Ms. Watts and Ms. Slough discussed possible investment opportunities for Ms. Watts' retirement funds. Ultimately, Ms. Watts agreed to invest in a program involving Global Telelink Services, Inc. ("Global"). Under this program, the investor would purchase from Cord Communications, Inc. telephone switch equipment called a Packet Gateway System ("PGS") and then would lease the PGS to Global in return for monthly payments resulting in a 14% annual return plus one-half percent of lease income. On 17 May 2000, Ms. Watts purchased nine PGS "bundles" at a cost of $243,000.

Plaintiff received distributions totaling $16,569.50 over an eight-month period beginning in June 2000. Payments ceased in March 2001 when Global closed its doors. Ms. Watts learned that on 8 March 2001, the SEC had filed a complaint alleging that this investment program was a "ponzi" scheme that had raised more than $10 million. On 9 March 2001, the United States District Court for the Northern District of Georgia entered an order granting the injunctive relief sought by the SEC, appointing a receiver for Global, and freezing Global's and other entities' assets.

Plaintiff brought suit on 28 March 2002 against Ms. Slough; Ms. Slough's husband, Stephen H. Slough; and Ms. Slough's sons, Brian K. Sheets and Jeffrey L. Sheets. Ms. Watts asserted seven claims for relief against Ms. Slough only: (1) sale of unregistered securities in violation of N.C. Gen. Stat. §§ 78A-24 and -56(a), (2) sale of securities by an unlicensed person in violation of N.C. Gen. Stat. §§ 78A-36(a) and -56(a), (3) fraudulent sale in violation of N.C. Gen. Stat. §§ 78A-8 and -56(a), (4) breach of fiduciary duty, (5) unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1, (6) fraud, and (7) negligent misrepresentation. In her eighth claim for relief, Ms. Watts alleged that the transfer of a home owned by Ms. Slough to her sons and the

transfer by them to her husband in trust was a fraudulent conveyance under the North Carolina Uniform Fraudulent Transfer Act, N.C. Gen. Stat. § 39-23.1 *et seq.* (2003).

Ms. Watts moved for partial summary judgment against Ms. Slough on the claims of unlicensed sale of securities and sale of unregistered securities, seeking $243,000 plus interest, costs, and attorney's fees. Defendants moved for summary judgment on all of plaintiff's claims.

The trial court granted partial summary judgment in favor of Ms. Watts on the claims of unregistered securities and unlicensed sale. The court ruled:

> Plaintiff's Motion for Partial Summary Judgment is allowed. Judgment is entered against defendant Sharon F. Slough on plaintiff's first and second claims for relief under the North Carolina Securities Act in the amount of $243,000, plus interest at the rate of 8% per annum from May 17, 2000, until paid, costs and reasonable attorney's fees, less the income plaintiff received upon the investment in the amount of $16,569.50. *The Court will assess the amount of recoverable costs and attorney's fees at a later hearing.*

(Emphasis added) The trial court allowed defendants' motion for summary judgment as to plaintiff's fourth and seventh claims for relief (breach of fiduciary duty and negligent misrepresentation). The court ruled "[d]efendants' motion is denied as to all other claims for relief."

Because the decision enters judgment only as to one defendant and only as to four of eight claims for relief, this order is interlocutory. An interlocutory order is immediately appealable in only two circumstances: (1) if the trial court has certified the case for appeal under Rule 54(b) of the Rules of Civil Procedure; and (2) "when the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Embler v. Embler*, 143 N.C. App. 162, 165, 545 S.E.2d 259, 261 (2001).

Since there was no certification in this case under Rule 54(b), "this avenue of interlocutory appeal is closed to defendant[s]." *Id.* We must determine, therefore, whether the trial court's order affects a substantial right that would otherwise be lost without immediate review.

We first hold that defendants Stephen H. Slough, Brian K. Sheets, and Jeffrey L. Sheets have not demonstrated that they have any substantial right requiring an immediate appeal. The trial court entered judgment in plaintiff's favor only as to the first two claims for relief and those claims were not asserted against these defendants. Their appeal can only relate to plaintiff's eighth claim for relief, alleging a fraudulent transfer of property. As to that claim, the trial court denied summary judgment. "[D]enial of a motion for summary judgment is not appealable unless a substantial right of one of the parties would be prejudiced should the appeal not be heard prior to final judgment." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998). Defendants do not make any argument that the denial of summary judgment affects a substantial right. Instead, defendants contend that plaintiff may now execute on their property as a result of the trial court's grant of summary judgment on plaintiff's first two claims. This assertion is mistaken. As a result of the trial court's denial of the motion for summary judgment, a jury must still determine whether there was a fraudulent transfer before Ms. Watts may undertake to execute on the property at issue. We therefore dismiss the appeal of defendants Stephen H. Slough, Brian K. Sheets, and Jeffrey L. Sheets.

As for Ms. Slough, against whom judgment was entered, she likewise argues that "[s]ince this judgment allows the Plaintiff to seek execution in satisfaction of the judgment, it affected a substantial right[.]" The question whether this argument entitles a party in Ms. Slough's circumstances to an interlocutory appeal was answered by *Beau Rivage Plantation, Inc. v. Melex USA, Inc.*, 112 N.C. App. 446, 436 S.E.2d 152 (1993). In *Beau Rivage*, the trial court entered summary judgment on a claim in the amount of $74,793 and awarded unspecified attorney's fees, providing: "[T]he Court reserves ruling on the amount of such fees until supporting affidavits are filed and a further hearing is conducted[.]" *Id.* at 452, 436 S.E.2d at 155. This Court held that a judgment for a specified sum leaving unresolved the amount recoverable in attorney's fees lacks "the requisite finality to make it subject to immediate appeal." *Id.*

In this case, the trial court similarly reserved for "a later hearing" the amount to be awarded in costs and attorney's fees. As a result, under *Beau Rivage*, the partial summary judgment order is not subject to immediate appeal. Plaintiff cannot seek execution on the judgment until the precise amount due from Ms. Slough has been determined. *See also Steadman v. Steadman*, 148 N.C. App. 713, 714,

559 S.E.2d 291, 292 (2002) (dismissing appeal as interlocutory when trial court had yet to determine the precise amount of money due plaintiff). Since Ms. Slough makes no other argument justifying an interlocutory appeal and since Ms. Slough presents no compelling circumstances to justify this Court's reviewing her appeal based on a writ of certiorari, we dismiss her appeal as well.

Dismissed.

Judges McGEE and HUNTER concur.

BENEFICIAL MORTGAGE CO. OF NORTH CAROLINA, PLAINTIFF v. STEVE PETERSON D/B/A DECKED OUT, PAUL A. DIX, MARY J. DIX, SAM C. OGBURN, JR. AND TERRY N. RENEGAR, DEFENDANTS

No. COA03-4

(Filed 2 March 2004)

1. Appeal and Error— appealability—interlocutory order—writ of certiorari

Although defendants appeal from an interlocutory order since the record does not establish that all claims against all parties have been resolved, the Court of Appeals exercised its discretionary authority to grant a writ of certiorari under N.C. R. App. P. 21 to review defendants' arguments.

2. Appeal and Error— appealability—denial of summary judgment

Although defendants contend the trial court erred in an action seeking to set aside an execution sale of real property by failing to grant defendants' motion for summary judgment, this assignment of error is dismissed because: (1) even if a denial of summary judgment were properly reviewable following a trial on the merits, defendants have failed to include in the record on appeal a copy of the trial court's order denying summary judgment; and (2) the omission from the record on appeal of any order denying summary judgment precludes review.

3. Enforcement of Judgments; Liens— execution sale—materialman's lien—material irregularities—grossly inadequate purchase price

The trial court did not err by setting aside an execution sale of real property to satisfy a materialman's lien based on its conclusions that there were material irregularities in the execution sale coupled with a grossly inadequate purchase price, because: (1) although defendants assigned as error the trial court's conclusion that the sales price was grossly inadequate, they did not assign error to the trial court's findings of fact relating to the adequacy of price nor did their brief contain any argument that the trial court erred by concluding that the sales price was grossly inadequate; (2) there were irregularities in the execution sale when contractor defendant's lien for installation of a deck did not specify that the lien related back to a prior date, the sheriff's notice of sale limited the interest being sold to that possessed by the former property owners as of 10 April 2000 and made the sale subject to any liens prior to that date, and the sale was not confirmed by the clerk of court as required by N.C.G.S. § 1-339.67; and (3) the potential effect that the irregularities had on the sales price for the home combined with the gross inadequacy of the ultimate sales price made the irregularities material.

4. Trials— motion for new trial—abuse of discretion standard

The trial court did not err in an action to set aside an execution sale of real property by denying defendants' motion under N.C.G.S. § 1A-1, Rule 59(a) for a new trial or, in the alternative, amendment or alteration of the judgment in their favor, because: (1) an appellate court's review of a trial court's discretionary ruling either granting or denying a motion to set aside a verdict and ordering a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion; and (2) a review of the record revealed that the trial court did not abuse its discretion.

Appeal by defendants Sam C. Ogburn, Jr. and Terry N. Renegar from judgment entered 24 April 2002 and order entered 13 August 2002 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 10 September 2003.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell and Christopher C. Finan, for plaintiff-appellee.

Hatfield, Mountcastle, Deal, Van Zandt & Mann, L.L.P., by John P. Van Zandt, III and Marc Hunter Eppley, for defendants-appellants Sam C. Ogburn, Jr. and Terry N. Renegar.

No brief filed on behalf of defendant Steve Peterson d/b/a Decked Out.

No brief filed on behalf of defendants Paul A. Dix and Mary J. Dix.

GEER, Judge.

This appeal arises out of a real property title dispute between plaintiff Beneficial Mortgage Co. of North Carolina, which holds a deed of trust in the subject property, and defendants Sam C. Ogburn Jr. and Terry N. Renegar, who claim title through an execution sale conducted to satisfy a materialman's lien in favor of defendant Steve Peterson d/b/a Decked Out. Because (1) defendants did not assign error to the trial court's findings of fact and (2) those findings supported the court's conclusion that material irregularities in the execution sale coupled with a grossly inadequate purchase price justified setting aside the sale, we affirm.

On 6 April 2001, plaintiff brought suit against defendants Ogburn, Renegar, Peterson, and Paul A. and Mary J. Dix, seeking to set aside an execution sale of real property owned by the Dixes. Default was entered against the Dixes. Mr. Peterson filed an answer to the complaint, seeking dismissal of any claims asserted against him. The record does not reflect any further proceedings with respect to the Dixes and Mr. Peterson.

Plaintiff Beneficial and defendants Ogburn and Renegar filed cross-motions for summary judgment together with supporting affidavits and depositions. The trial judge orally denied both motions for summary judgment. The trial court's judgment recites that both parties then "stipulated to final judgment being rendered by the Court based upon the evidence and stipulated facts before the Court."

In reviewing a judgment resulting from a bench trial, the question before this Court is whether competent evidence exists to support the trial court's findings of fact and whether those findings support the trial court's conclusions of law. *Lewis v. Edwards*, 159 N.C. App. 384,

388, 583 S.E.2d 387, 390 (2003). If the trial court's findings of fact are supported by evidence, then they have the force of a jury verdict and are conclusive on appeal. *In re Estate of Lunsford*, 160 N.C. App. 125, 129, 585 S.E.2d 245, 248 (2003).

Further, under N.C.R. App. P. 10(a), this Court's review is limited to those findings of fact properly assigned as error. Thus, " 'findings of fact to which [appellant] has not assigned error and argued in his brief are conclusively established on appeal.' " *Lunsford*, 160 N.C. App. at 129, 585 S.E.2d at 248 (quoting *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002)).

Since defendants Ogburn and Renegar did not assign error to any of the trial court's findings of fact in this case, those findings are binding on appeal. The trial court's findings of fact and undisputed evidence establish the following facts.

On 4 June 1998, the Dixes recorded a deed to the property at 432 Hollinswood Avenue, Winston-Salem, North Carolina. Mr. Peterson, a contractor, installed a deck on the seven room, 2,403 square-foot brick house. On 2 December 1998, after the Dixes failed to pay him for the deck, Mr. Peterson timely filed a claim of lien in the amount of $6,055.16. On approximately 25 March 1999, Mr. Peterson brought suit in Forsyth County District Court to enforce his lien.

On 10 April 2000, District Court Judge Roland H. Hayes concluded that Mr. Peterson was entitled to a lien in the sum of $6,055.16 plus interest. The court directed that the property be sold in accordance with Chapter 44A of the North Carolina General Statutes to satisfy Mr. Peterson's lien.

On 26 October 1999—after the filing of Mr. Peterson's claim of lien and his lawsuit to enforce the lien, but before the entry of judgment enforcing the lien—the Dixes borrowed $244,196.47 from Beneficial and gave Beneficial a deed of trust to secure repayment of that loan. Beneficial recorded the deed of trust on 4 November 1999. In April and May 2000, T. Daniel Womble, attorney for Mr. Peterson, attempted unsuccessfully to contact Beneficial at its local office to discuss Mr. Peterson's judgment and its implications for Beneficial.

On 11 September 2000, the Dixes filed a motion to claim as exempt the property at 432 Hollinswood Avenue. In that motion, they declared that the property had an estimated value of $219,000.00 and reported that Beneficial held a lien on the property with $247,000.00 still owed.

On 3 November 2000, Mr. Peterson obtained a writ of execution from the assistant clerk of superior court allowing the property to be sold at an execution sale to satisfy his judgment. The writ specified that pursuant to a judgment docketed on 10 April 2000, Mr. Peterson was entitled to the sum of $9,546.30. It directed the Sheriff of Forsyth County to satisfy the judgment "out of the personal property of [the Dixes], and if sufficient personal property cannot be found, then out of the real property belonging to [the Dixes] on the day the judgment was docketed in your county as shown above or any time after that date." Nothing in the writ of execution indicated that the underlying judgment had an effective date other than the date of docketing, 10 April 2000.

The Sheriff of Forsyth County posted a notice of sale announcing the sale of "all right, title and interest which the Defendants now have or at any time at or after the docketing of the judgment in said action had in and to [432 Hollinswood Avenue]." The notice of sale also stated, "This property is being sold subject to all prior liens and encumbrances pending against the property."

Beneficial was not sent notice of the execution sale and the trial court found nothing to indicate that Beneficial otherwise received actual notice of the sale. The property was sold by the sheriff on 19 February 2001 to defendant Ogburn, the highest bidder, for the price of $10,200.00. An order purporting to confirm the sale as required by N.C. Gen. Stat. § 1-339.67 (2003) was signed by District Court Judge Chester C. Davis. The sale was never confirmed by the clerk of superior court.

On 26 March 2001, the sheriff executed a sheriff's deed drafted by Mr. Womble, formerly Mr. Peterson's attorney, identifying Ogburn as the purchaser of the property. On 2 April 2001, Ogburn purported to convey to defendant Renegar by quitclaim deed, again drafted by Mr. Womble, a one-half undivided interest in the property.

Based on these facts, the trial court concluded that irregularities in the sale, coupled with a grossly inadequate purchase price, warranted setting aside the sale and declaring void the deed from Ogburn to Renegar. The court further concluded that Ogburn and Renegar were entitled to an equitable lien on the property in the amounts of $10,200.00 for the purchase price and $14,794.00 for expenses incurred in maintaining the property. The court ordered that if a second sale was conducted, then the proceeds were to be applied in the following order: (1) sums due the sheriff on account of the sale, (2)

the equitable lien granted to Ogburn and Renegar, and (3) the balance due Beneficial pursuant to its deed of trust in the original principal amount of $244,196.47.

I

[1] As a preliminary matter, we note that this appeal appears to be interlocutory. Although defendants recite in their brief that they have appealed from a final judgment, the record on appeal does not establish that all claims against all parties have been resolved. While the record on appeal contains an entry of default as to the Dixes, the record on appeal does not contain any default judgment, as provided in Rule 55(b) of the Rules of Civil Procedure. In addition, there is no indication that the claims asserted against defendant Peterson have been addressed in any manner.

When an order resolves some, but not all, of the claims in a lawsuit, any appeal from that order is interlocutory. *Mitsubishi Elec. & Elecs. USA, Inc. v. Duke Power Co.*, 155 N.C. App. 555, 559, 573 S.E.2d 742, 745 (2002). An appeal is permissible only if (1) the trial court certified the order for immediate interlocutory appeal under Rule 54 of the Rules of Civil Procedure or (2) the order affects a substantial right that would be lost without immediate review. *Embler v. Embler*, 143 N.C. App. 162, 164-65, 545 S.E.2d 259, 261 (2001). The judgment at issue in this appeal does not contain a Rule 54 certification. Defendants were, therefore, required to establish that a substantial right was at issue. Because defendants did not recognize that their appeal was interlocutory, they have failed to meet their burden. Nevertheless, we elect to exercise our authority under Rule 21 of the Rules of Appellate Procedure to review defendants' arguments pursuant to a grant of certiorari.

II

[2] Defendants Ogburn and Renegar first assign as error the trial court's failure to grant their motion for summary judgment. Our Supreme Court has held:

> The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of a trial when no material facts are at issue. After there has been a trial, this purpose cannot be served. Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury.

Harris v. Walden, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985) (internal citations omitted).

Even if a denial of summary judgment were properly reviewable following a trial on the merits, defendants have failed to include in the record on appeal a copy of the trial court's order denying summary judgment. This Court explained in *Sessoms v. Sessoms*, 76 N.C. App. 338, 339, 332 S.E.2d 511, 512-13 (1985):

> The [appellant's] failure to submit a copy of the purported order from which she appeals is a violation of Appellate Rule 9(a)(1)(viii), which states in clear language that the record on appeal in civil actions shall contain "a copy of the judgment, order or other determination from which appeal is taken." In this case, submission of the transcript of the trial court's statements as to what he will find and order is not sufficient.

See also Buckingham v. Buckingham, 134 N.C. App. 82, 91, 516 S.E.2d 869, 876 ("Because the record in this case does not contain a written order denying plaintiff's motions, such order was not entered by the trial court."), *disc. review denied*, 351 N.C. 100, 540 S.E.2d 353 (1999). The omission from the record on appeal of any order denying summary judgment thus precludes review.

For both of the foregoing reasons, we decline to address the question whether the trial court properly denied defendants' motion for summary judgment.

III

[3] Defendants next challenge the trial court's conclusion that the sale should be set aside due to material irregularities and the inadequacy of the sales price. We hold that the trial court's conclusions are properly supported by the findings of fact and that the trial court did not err in setting aside the sale.

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) (internal citations omitted). The Court clarified this principle in *Swindell v. Overton*, 310 N.C. 707, 713, 314 S.E.2d 512, 516 (1984) (internal 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.

Under *Swindell*, the trial court was required (1) to evaluate the adequacy of the sales price, (2) to identify whether any irregularities occurred in connection with the sale, and (3) to determine if the irregularities were material. The trial court in this case concluded that there were material irregularities and that the sales price was grossly inadequate. It is the role of this Court, in reviewing that judgment, to decide whether those conclusions are supported by the trial court's findings of fact.

A. *Adequacy of the Sales Price.*

Although defendants assigned as error the trial court's conclusion that the sales price was grossly inadequate, they did not assign error to the trial court's findings of fact relating to the adequacy of price. Moreover, defendants' brief does not contain any argument that the trial court erred in concluding that the sales price was grossly inadequate. This issue has not therefore been properly presented for review. N.C.R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

The trial court found that the fair market value of the property was $215,000.00 on the date of the sale and that the price of $10,200.00 realized at the execution sale thus represented only 4.7% of the property's fair market value. The court also noted both that the deck that had led to the execution sale was, standing alone, valued at $15,500.00—$5,300.00 more than the execution sale price—and the property had been listed for sale at $270,000.00. In the absence of any argument by defendants as to why these findings fail to establish the inadequacy of the price, we decline to set aside the trial court's conclusion.

B. *Irregularities in the Execution Sale.*

Although in the conclusions of law, the trial court did not specifically enumerate the irregularities upon which it was relying, the court's findings of fact indicate that the court found (1) the Peterson judgment did not specify that it related back to a date earlier than 10 April 2000, the date of the judgment; (2) the sheriff's notice of sale limited the interest being sold to that possessed by defendant as of 10 April 2000 and made the sale subject to any liens prior to that date; and (3) the sale was not confirmed by the clerk of court. We agree that these findings establish the existence of irregularities in the execution sale.

First, the Peterson judgment did not specify that the lien related back to a prior date. Although this Court has held that omission of the effective date of the lien from the judgment should not bar the lien, the judgment must still "relate[] the lien back to the date when labor and materials were first furnished at the site." *Metropolitan Life Ins. Co. v. Rowell*, 113 N.C. App. 779, 785, 440 S.E.2d 283, 285, *disc. review denied*, 338 N.C. 518, 452 S.E.2d 813 (1994). The trial court that rendered the Peterson judgment could have related the lien back to the first provision of labor and materials, 22 September 1998, but it did not do so. This lack of "relation back" language constitutes an irregularity. *See also Jennings Glass Co. v. Brummer*, 88 N.C. App. 44, 51-52, 362 S.E.2d 578, 583 (1987) (a "judgment relating back and incorporating the complaint and claim of lien" contained all required information), *disc. review denied*, 321 N.C. 473, 364 S.E.2d 921 (1988); *Miller v. Lemon Tree Inn of Roanoke Rapids, Inc.*, 32 N.C. App. 524, 529, 233 S.E.2d 69, 73 (1977) ("To enforce a materialmen's lien the judgment must state the effective date of the lien and contain a general description of the property subject to the lien so that one reading the docketed judgment would have notice that it was more than a money judgment.").

Second, the sheriff's notice of sale indicated that he was selling only the Dixes' interest as of the date of the judgment, 10 April 2000. Our Supreme Court noted in *Edwards v. Arnold*, 250 N.C. 500, 506, 109 S.E.2d 205, 210 (1959), that a sheriff's authority to convey property in an execution sale is "limited to that conferred upon him by the judgment, the execution and by his own advertisement and sale." *See also id.* at 507, 109 S.E.2d at 210 (emphasis original) (sheriff limited to selling "*the property* described in his advertisement").

In this case, the sheriff's notice of sale referred to the property interest being sold as ". . . all right, title and interest which the Defendants *now* have or at any time *at or after the docketing of the judgment* in said action had in [432 Hollinswood Avenue.]" (Emphasis added) The notice of sale also stated that "[t]his property is being sold subject to all prior liens and encumbrances pending against the property." Thus, the notice of sale expressly stated that the interest being sold in the property was as of the date of docketing of the judgment, 10 April 2000, a date subsequent to the recording of plaintiff's deed of trust. It also appeared to make any purchase subject to existing liens, which would potentially include Beneficial's nearly $250,000.00 interest in the property. This limitation on the interest being sold constitutes a second irregularity (although one logically flowing from the judgment's failure to include "relation back" language).

Third, the trial court relied upon the lack of confirmation by the clerk of superior court. N.C. Gen. Stat. § 1-339.67 provides: "No sale of real property may be consummated until the sale is confirmed by the clerk of the superior court." N.C. Gen. Stat. § 1-339.67. *See also Spalding Div. of Questor Corp. v. DuBose*, 46 N.C. App. 612, 613, 265 S.E.2d 501, 503 ("The clerk has original jurisdiction to enter orders confirming execution sales" pursuant to N.C. Gen. Stat. § 1-339.67.), *disc. review denied*, 300 N.C. 375, 267 S.E.2d 678 (1980). The high bidder at an execution sale acquires no right until his bid is accepted and the sale confirmed. *Pittsburgh Plate Glass Co. v. Forbes*, 258 N.C. 426, 429, 128 S.E.2d 875, 877 (1963). "If competitive bidding is stifled, resulting in a bid less than the fair value of the property sold, the clerk may decline to confirm the sale." *Id.*

Defendants argue that no irregularity occurred because a district court judge confirmed the sale. The language of the statute, indicating that *no* sale is valid unless confirmed by the clerk of superior court, is, however, mandatory. *See Coker v. Virginia-Carolina Joint-Stock Land Bank, Inc.*, 208 N.C. 41, 44, 178 S.E. 863, 864 (1935) (statutory language that "no deed or other conveyance, except to secure purchase money . . . shall be valid to pass possession, or title, during the lifetime of the wife" held to be "mandatory"). This Court has held that identical language in N.C. Gen. Stat. § 1-339.28(a) (2003), relating to judicial sales, gives the clerk of superior court "exclusive jurisdiction" over confirmations. *Brown v. Miller*, 63 N.C. App. 694, 697, 306 S.E.2d 502, 504 (1983), *appeal dismissed and disc. review denied*, 310 N.C. 476, 312 S.E.2d 882 (1984). Defendants have

presented no reason why N.C. Gen. Stat. § 1-339.67 should be construed differently. As a result, the failure to have the clerk of superior court confirm the sale is an irregularity.

C. *The Materiality of the Irregularities.*

We must next determine whether the trial court properly found that these irregularities were material. In deciding whether an irregularity is material, we must look at its "natural and probable" effect on the sales price. *Foust v. Gate City Sav. & Loan Ass'n*, 233 N.C. 35, 37, 62 S.E.2d 521, 523 (1950). 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." *Id.* at 38, 62 S.E.2d at 523.

The lack of "relation back" language in the Peterson judgment together with the notice of sale limiting the sale to the Dixes' interest on the date of the Peterson judgment (subject to existing encumbrances) would have suggested to potential bidders that their purchase would be subject to Beneficial's $244,196.47 deed of trust that pre-dated the Peterson judgment. That assumption would have the likely effect of decreasing the number of potential bidders, the amount of competition, and the ultimate price bid. *See Foust*, 233 N.C. at 37-38, 62 S.E.2d at 523 (erroneously reported purchase price in confirmation report, indicating property sold for more than its reasonable market value, had "natural and probable effect" of chilling upset bids and therefore constituted a material irregularity). The trial court thus did not err in concluding that the irregularities were material.

Given the potential effect that the irregularities had on the sales price for the Dixes' home combined with the gross inadequacy of the ultimate sales price, we hold that the trial court did not err in setting aside the sale.

IV

[4] Defendants also challenge the trial court's denial of their motion under Rule 59(a)(9) of the Rules of Civil Procedure for a new trial or, in the alternative, amendment or alteration of the judgment in their favor. Rule 59(a)(9) is a catch-all provision that allows a new trial to be granted for "[a]ny other reason heretofore recognized as grounds for new trial." Defendants contend that they were entitled to relief

under Rule 59(a)(9) because the trial court should have resolved the equities of the circumstances with an eye towards the acts of and effects on the title insurers.

"It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). Our review of the record does not reveal that the trial court abused its discretion.

Because of our resolution of this case, it is unnecessary for us to address plaintiff's cross-assignments of error.

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

STATE OF NORTH CAROLINA v. DERRICK THOMAS BAILEY

No. COA03-431

(Filed 2 March 2004)

1. **Confessions and Incriminating Statements— voluntariness—handcuffed to chair**

There was no error in the denial of a motion to suppress defendant's in-custody statements to police where there was testimony supporting findings that defendant was given and understood his rights, that he waived those rights and that he was not coerced. Although the statements were given over a six hour period during which defendant was handcuffed to a chair, officers provided food and drink, allowed bathroom breaks, and inquired about defendant's comfort at regular intervals.

2. **Evidence— hearsay—residual exception—unavailable witness—good faith effort to find**

There was competent evidence to support the trial court's conclusion that a witness was not available for purposes of the residual hearsay exception set forth in Rule 804(b)(5) where the

State attempted to subpoena the witness and called several telephone numbers provided by a friend. N.C.G.S. § 8C-1, Rule 804(b)(5).

3. Evidence— hearsay—residual exception—unavailable witness—notice

There was sufficient notice of the State's intent to introduce an absent witness's hearsay statement to officers under Rule 804(b)(5) where the State informed defendant at the outset of the trial that it intended to offer the statement at trial, and defendant received the statement about a year before trial and did not offer an argument about any prejudice he may have suffered.

4. Sexual Offenses— substitute parent—babysitter only—evidence insufficient

A charge of sexual offense by a substitute parent should have been dismissed where there was insufficient evidence that defendant had assumed the position of a parent in the home. The evidence established only that defendant was a babysitter. N.C.G.S. § 14-27.7(a).

5. Sentencing— consecutive sentences—two convictions from same incident

There was no error in imposing consecutive sentences for first-degree statutory sexual offense and indecent liberties, even though defendant argued that all of the convictions arose from the same incident.

Appeal by defendant from judgment entered 8 October 2002 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 28 January 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Staci Tolliver Meyer, for the State.

Richard E. Jester for defendant.

LEVINSON, Judge.

Defendant appeals from judgments and convictions of first degree statutory rape, indecent liberties, and sexual offense by a person in a parental role. We reverse in part and find no error in part.

The State's evidence showed the following: Lyndell Whitfield testified that in July, 2001, she lived in a Durham, North Carolina, apart-

ment with her boyfriend, Oliver Bonn; four of her children, then ages two through ten; and the defendant. Whitfield and defendant, who met about a year earlier in Williamston, North Carolina, had never dated or had a romantic relationship. In 2000, because Whitfield "needed a driver," she allowed defendant to live with her in return for driving her and her children to work and day care. When Whitfield and Bonn moved to Durham with Whitfield's children, defendant also moved. In exchange for babysitting Whitfield's children while she was at work, Whitfield allowed defendant to sleep in her apartment rent free.

When Whitfield left for work on the morning of 25 July 2001, defendant and her children were in the apartment. Shortly after arriving at work, she returned home for a sweater, and found the children in the living room. Another male friend, Derwood "Shay" Brown, was in her bedroom, and called Whitfield and J.B. (Whitfield's two year old daughter) into the bedroom to talk. He told Whitfield that when he came to the apartment that morning, he found defendant and J.B. lying next to each other on the bedroom floor, and that both were undressed. Whitfield ran outside and prevented defendant from driving away. Officers with the Durham City Police Department arrived in a few minutes and took defendant into custody. Shortly after the police arrived, Whitfield talked to J.B. alone and asked her what had happened. J.B. told Whitfield that defendant had "touched her" and that he took her into a bedroom, took her clothes off, removed his own clothes, and "stuck his man in her front bootie."[1] A few days later, J.B. told her mother about another assault that had occurred when the parties lived in Williamston. On that occasion, defendant barricaded a bedroom door before removing J.B.'s clothes and molesting her. Whitfield also testified that her nine year old son, A.B., told her that defendant "t[ook] his man out and put it in his butt," and that her ten year old daughter, K.B. told her defendant had "put his man in her front bootie."

A.B. testified that defendant had molested him in the past, when A.B.'s family and the defendant lived in Williamston. A.B. and the defendant were in A.B.'s room when the defendant closed the bedroom door, told A.B. to remove his clothes, and "put his man in [A.B.'s] butt." A.B. testified that the defendant had anal sex with him twice in Williamston, and once after they moved to Durham.

1. On cross examination, Whitfield explained that she had taught her children to use the terms "man," "front bootie," and "back bootie" instead of penis, vagina, and anus, respectively.

Detective David Addison, of the Durham City Police Department, testified that he and Detective Gregory, also of the Durham City Police, arrived at Whitfield's apartment at around 8:30 a.m. on 25 July 2001. They spoke briefly with Whitfield, then met with J.B, who told the officers that the defendant had laid her on her back, and made "hard breathing sounds" while moving "back and forth up and down." She also told the officers that her vaginal area hurt, and that defendant had hurt her. Testimony from Detective Gregory regarding J.B.'s statement tended to corroborate Addison. After speaking with J.B., the officers executed a search warrant for the apartment and defendant's car and removed a child's book and a list of names and phone numbers from the car.

Shortly after police arrived at Whitfield's apartment, the defendant was arrested and transported to the Durham Police Station, where he was interviewed by Officer Robert McLaughlin. Defendant initially told McLaughlin the following: He lived in Whitfield's apartment, where he babysat, cooked, and cleaned. He and Whitfield never dated; she was just a friend. On about eight separate occasions starting in May, 2001, he masturbated on J.B.'s bare bottom. On 25 July 2001 Brown caught him masturbating on J.B., which led to his arrest. McLaughlin reduced defendant's statement to writing, and the defendant read and signed it.

After McLaughlin took the first statement from the defendant, Gregory arrived at the interview room with two items taken from defendant's car: a picture book belonging to another child, and a list of names and phone numbers. This prompted McLaughlin to question defendant further about his sexual contact with J.B., and about whether he had sexual contact with other children. The defendant admitted to McLaughlin that he had vaginal, anal, and oral sex with J.B., and also confessed to sexual contact with sixteen other young children. At McLaughlin's request, defendant provided the officer with a signed list of these children, and told McLaughlin how many times he had sex with each and the type of sexual contact. At the bottom of his handwritten list of children, defendant wrote the following: "I have a problem and I don't . . . know how to deal with it. . . . Can someone help a person like this[?]" McLaughlin then wrote a second statement detailing the defendant's sexual activity with each minor child on defendant's list. Defendant read this statement and signed it. The only change he asked McLaughlin to make was to replace clinical terms such as "anal sex" with defendant's preferred slang phrases. McLaughlin read defendant's statements to the jury.

McLaughlin also read to the jury a statement taken from Shay Brown. In his statement, Brown said that he was at Whitfield's apartment on 25 July 2001. When he opened a bedroom door, he found J.B. and the defendant lying together on the floor, both undressed below the waist, with the defendant holding his penis in his hand. Brown asked J.B. to leave the room, and he and defendant argued about defendant's molestation of J.B. Shortly after Brown discovered the defendant and J.B., Whitfield returned home and he told her about the incident.

Investigator Catherine Lipsey of the Durham Police Department testified that when J.B. was examined at a hospital on 25 July 2001, Lipsey collected J.B.'s undershirt and a forensic rape kit. Dawn Jackson, also of the Durham Police Department, testified that she took hair, saliva, and blood samples from defendant. SBI Agent Jennifer Elwell, a forensic serologist, testified that, after her testing of J.B.'s undershirt showed the presence of semen, she prepared DNA standard samples for J.B. and the defendant, using physical samples taken from each of them. SBI Special Agent Brenda Bissette testified that DNA analysis of the samples prepared by Agent Elwell revealed that the semen found on J.B.'s undershirt matched the DNA in the defendant's blood sample, and that it was her "scientific opinion that the semen that was on [J.B.'s] shirt could be from no other individual except Derrick Bailey[.]"

Dr. Karen Sue St. Claire, a pediatrician with Duke Medical Center, testified that when she examined J.B. on 25 July 2001, she observed that J.B. had redness and puffiness around her urethra and peri-anal area, and "some sticky debris" on her external genitalia. These symptoms, which Dr. St. Claire testified were consistent with "physical trauma," were gone when she examined J.B. again on 30 July 2001.

Defendant did not present any evidence. Following the presentation of evidence, defendant was convicted of all charges and sentenced to consecutive prison terms of 300 to 369 months for first degree rape; 20 to 24 months for indecent liberties; and 15 to 27 months for sex offense by a substitute parent. From these judgments and convictions defendant appeals.

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[1] Defendant argues first that the trial court erred by denying his motion to suppress the statements he made to the police. We disagree.

"The standard for admissibility of a criminal defendant's inculpatory statement is whether, under the totality of the circumstances, the statement was made voluntarily and understandingly." *State v. Hill*, 139 N.C. App. 471, 478, 534 S.E.2d 606, 611 (2000) (citation omitted). Defendant argues that the trial court erred by finding that his statements were voluntary. In support of this argument, defendant asserts that (1) he was handcuffed to a chair in a police interrogation room; (2) the questioning took place over a six hour period; (3) he did not understand his legal rights; and (4) he was threatened by a law enforcement officer.

However, after conducting a hearing, the trial court found, *inter alia*, the following: (1) defendant was in custody at the time he gave his statements to the police; (2) Officer McLaughlin informed defendant of his *Miranda* rights; (3) defendant understood each of his constitutional rights; (4) the defendant knowingly, intelligently, willfully, and voluntarily waived his *Miranda* rights; and (5) the defendant's statements were not the result of any threats or coercion by any law enforcement officer.

"[T]he trial court's findings of fact following a hearing on the admissibility of defendant's statements are binding on this Court and conclusive on appeal if supported by competent evidence, even if that evidence is conflicting." *State v. Hyatt*, 355 N.C. 642, 653, 566 S.E.2d 61, 69 (2002) (citation omitted). In the instant case, we conclude that the court's findings were supported by ample evidence. McLaughlin testified that before conducting the interview he advised the defendant of his *Miranda* rights, using a standard rights form. He determined that the defendant had completed the 12th grade, then read each of the rights listed on the form aloud and questioned defendant to make sure he understood his rights. After this, defendant read the rights form to himself, signed the waiver of rights, and agreed to speak with McLaughlin. Further, McLaughlin observed nothing suggesting defendant was impaired or was unable to understand his situation. We also note that Officer Addison denied touching or threatening the defendant.

Nor do we agree with defendant that the conditions under which the statements were taken were inherently coercive. Although defendant's two statements were taken over a six hour time span, during which defendant was secured to a chair by a single handcuff, the evidence also shows that the law enforcement officers provided defendant with food and drink, inquired about his comfort at regular intervals, and allowed him several bathroom breaks. *See State v.*

Littlejohn, 340 N.C. 750, 757, 459 S.E.2d 629, 633 (1995) (upholding trial court's conclusion that confession was voluntary where, after advising defendant of his rights, the "officers then interrogated the defendant for approximately ten hours, at the end of which time the defendant confessed"). This assignment of error is overruled.

Defendant argues next that the trial court erred by admitting hearsay testimony of Derwood Brown. We disagree.

On 25 July 2001, shortly after the alleged incident between J.B. and the defendant, Brown made a statement to law enforcement officers. The contents of this statement were made available to defendant during discovery, approximately a year before trial. At the outset of trial, the State informed the trial court and defendant that it was unable to locate Brown and intended to offer his statement through Officer McLaughlin, pursuant to North Carolina Rules of Evidence, Rule 804(b)(5). Defendant argues that the trial court erred by ruling that the State had satisfied the requirements for admission of evidence under this rule.

Rule 804(b)(5) provides, in relevant part, as follows:

> (b) . . . The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:. . . .
>
> (5) . . . A Statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness. . . . However, a statement may not be admitted under this exception unless the proponent of it gives written notice . . . to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

[2] Defendant asserts first that, assuming Brown was unavailable at trial, this was "due to lack of diligence on the part of the State." We agree that "a witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber v. Page*, 390 U.S. 719, 724-25, 20 L. Ed. 2d 255, 260 (1968). Thus, "we must first determine whether . . . the state made good-faith efforts to locate [the witness]." *State v. Nobles*, 357 N.C. 433, 437, 584 S.E.2d 765, 769 (2003). However, the State is not required to "exhaust all conceivable means in the effort to locate a witness." Instead:

> they [must] undertake, in good faith, some reasonable, affirmative measures to produce the witness for trial. . . . [T]he prosecution made repeated efforts to locate [the witness] at the various addresses they had for him both in person and by telephone. That the witness remained unavailable despite these repeated efforts indicates neither a lack of good faith on the part of the prosecution nor a lack of reasonable affirmative measures undertaken to locate [him].

State v. Grier, 314 N.C. 59, 68, 331 S.E.2d 669, 676 (1985).

In the case *sub judice*, there was evidence that law enforcement officers tried to subpoena Brown at the address they were given, and called several phone numbers provided by Whitfield. Defendant cites no authority to support the proposition that this was insufficient to constitute reasonable good-faith efforts to locate the witness. We conclude the record contains competent evidence to support the trial court's conclusion that Brown was unavailable.

[3] The North Carolina Supreme Court has recently reviewed the other requirements of Rule 804(b)(5):

> Once a trial court establishes that a declarant is unavailable . . . the trial court must determine . . . (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission.

State v. Valentine, 357 N.C. 512, 517-18, --- S.E.2d ---, --- (2003) (citing *State v. Fowler*, 353 N.C. 599, 608-09, 548 S.E.2d 684, 696 (2001), and *State v. Triplett*, 316 N.C. 1, 8-9, 340 S.E.2d 736, 741 (1986)).

Defendant contests only the notice requirement, and argues that he did not have enough notice of the State's intention to introduce Brown's hearsay statement. "The notice requirement of Rule 804(b)(5) does not mandate a fixed period of time and 'most courts have interpreted the notice requirement somewhat flexibly, in light of the express policy of providing a party with a fair opportunity to meet the proffered evidence.' " *State v. Bullock*, 95 N.C. App. 524, 528, 383 S.E.2d 431, 433 (1989) (quoting *Triplett*, 316 N.C. at 12-13, 340 S.E.2d

at 743). In *Bullock*, the State informed defendant on the second day of trial of its intention to offer the hearsay statement of an unavailable witness. The defendant argued that he did not receive adequate notice. However, the record showed that the defendant received "the substance of [the witness's] statements" in discovery, two months before trial, and that the defendant knew the State intended to call the witness, and knew "in general, the expected content of his testimony." *Id.* On appeal, this Court held that "[g]iven this record, the defendant was neither surprised by the hearsay statements, nor deprived of a fair opportunity to meet them." *Id.*

The instant case presents a factual situation similar to that of *Bullock*. The defendant acknowledged at trial that he received Brown's statement about a year before trial. Moreover, defendant does not offer any argument explaining how he was prejudiced by the amount of notice he received. We conclude the trial court did not err by allowing the State to introduce Brown's hearsay statement. This assignment of error is overruled.

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[4] Defendant argues next that the trial court erred by denying his motion to dismiss the charge of sexual offense by a substitute parent for insufficiency of the evidence. We agree with defendant's contention in this regard.

Upon a defendant's motion to dismiss for insufficiency of the evidence, the trial court must determine whether:

> the evidence is legally sufficient to support a verdict of guilty on the offense charged[.] . . . We must view the evidence in the light most favorable to the State and afford the State every reasonable inference that may arise from the evidence. There must be substantial evidence to support a finding that an offense has been committed and that the defendant committed it. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State v. Ballew, 113 N.C. App. 674, 681-82, 440 S.E.2d 565, 570 (1994) (citation omitted).

Defendant herein was convicted of N.C.G.S. § 14-27.7(a) (2003), which provides that:

> (a) If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home . . .

> the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section.

This statute has generally been used to prosecute stepparents, *see, e.g., State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992); *State v. Cooke*, 318 N.C. 674, 351 S.E.2d 290 (1987). However, there is no legal requirement that a defendant be the victim's stepparent. *State v. Hoover*, 89 N.C. App. 199, 204, 365 S.E.2d 920, 923 (1988) ("[D]efendant had participated in the foster parent program for approximately 2½ years and . . . during such time, [the victim] was defendant's ward.").

The issue presented herein is whether the State presented sufficient evidence that defendant had "assumed the position of a parent in the home[.]" We have considered appellate cases addressing the relationship between child victims of sexual abuse and defendants who occupy a parental role in the victim's household. We conclude that to convict a defendant of violating G.S. § 14-27.7(a), the evidence of the relationship between the defendant and child-victim must provide support for the conclusion that the defendant functioned in a parental role. Such a parental role will generally include evidence of emotional trust, disciplinary authority, and supervisory responsibility.

In *State v. Raines*, 319 N.C. 258, 354 S.E.2d 486 (1987), a hospital employee was convicted of sexual offense by a custodian, in violation of G.S. § 14-27.7 (a), which at that time made it a Class G felony for "a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, . . . having custody of a victim" to engage in sexual relations with such victim. *Id.* at 261-62, 354 S.E.2d at 488. The North Carolina Supreme Court held that the trial court erred by aggravating defendant's sentence on the basis that he violated a position of trust. The Court held that "a showing of a relationship of trust and confidence was needed to prove the custodial element of the offense." *Id.* at 266, 354 S.E.2d at 491. In *State v. Tucker*, 357 N.C. 633, 639, 588 S.E.2d 853, 857 (2003), the North Carolina Supreme Court considered *Raines* in the context of the charge of sex offense by a substitute parent, and held:

> To be guilty of sexual offense by a person in a parental role, the defendant must have "assumed the position of a parent in the home of a minor victim." . . . Evidence of a parent-child relationship therefore was necessary to prove that defendant stood in a parental role with regard to the victim. A parent-child relationship is also indicative of a position of trust[.]

In the instant case, the evidence regarding defendant's role in J.B.'s household consisted of the following: (1) Whitfield's testimony that she and defendant were never romantically involved and that she lived with another man who was her boyfriend; (2) Whitfield's testimony that defendant "helped with the kids" and "would just baby sit them" in return for her letting him sleep in her apartment rent-free; (3) A.B.'s agreement with the prosecutor's statement that defendant "took care of [him] while Mama was gone to work"; (4) defendant's statement to McLaughlin that he lived in Whitfield's apartment and "watch[ed] her kids"; and (5) Brown's statement to McLaughlin that Whitfield and defendant were not romantically involved, and that defendant was a "babysitter of [Whitfield's] four children."

The evidence, taken in the light most favorable to the State, is sufficient to establish only that defendant babysat for Whitfield's children. Whitfield clearly did not regard defendant as her boyfriend or a *de facto* stepfather to her children. Thus, defendant's relationship with J.B.'s mother does not provide any support for the conclusion that defendant had assumed the "position of a parent" in J.B.'s household. Nor does the record evidence indicate whether defendant's "babysitting" had a quasi-parental quality, or whether defendant was essentially just a "warm body" at the apartment in case an emergency required the presence of an adult. For example, there was no evidence regarding whether defendant was authorized to make disciplinary decisions, assist with homework, treat minor injuries, decide whether the children could leave the apartment, or take them out of the apartment himself.

Even more significant is the absence of any evidence tending to show that the defendant and J.B. had a relationship based on trust that was analogous to that of a parent and child. Indeed, there is no evidence in the record regarding the relationship between defendant and J.B. Thus, there is no basis to determine whether defendant abused a quasi-parental relationship of trust or simply overpowered his young victim.

We do not accept defendant's argument that a defendant must have certain legal rights, such as the authority to give consent to medical treatment, in order for prosecution under this statute to be appropriate. Nor do we suggest that only stepparents or live-in romantic partners may be prosecuted under G.S. § 14-27.7(a). However, in the instant case, the evidence establishes only the bare fact that defendant was a babysitter. We conclude that the evidence presented by the State in this case was insufficient to estab-

lish that defendant had "assumed the position of a parent in the home of [the] minor." Accordingly, defendant's conviction of violating G.S. § 14-27.7(a) is reversed.

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[5] Defendant argues next that the trial court erred by imposing consecutive sentences, on the grounds that his convictions all arose from the same incident. Preliminarily, we note that the sentence imposed for violation of G.S. § 14-27.7(a) has been vacated and is no longer at issue. Defendant concedes that consecutive sentences are permissible, but argues that the sentence was "excessive and unconstitutional." We find no error. *See Ballew*, 113 N.C. App. 674, 440 S.E.2d 565 (no error where defendant sentenced to consecutive prison terms for two counts of first-degree rape and one count of sexual activity by a substitute parent). This assignment of error is overruled.

We have considered the defendant's remaining contentions and find them to be without merit.

In conclusion, defendant's conviction of sexual offense by a substitute parent is reversed. His convictions of first degree statutory sexual offense and indecent liberties are affirmed.

Reversed in part, no error in part.

Judges HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. KAREN ELAINE EVERETT

No. COA03-95

(Filed 2 March 2004)

1. Homicide— self-defense—no duty to retreat in home—instruction not given

A second-degree murder defendant was entitled to an instruction that she had no duty to retreat in her home, and a new trial was granted, where there was sufficient evidence that she was attacked by her husband in her home and that she was not at fault, and the State argued in closing that she had a duty to leave.

2. Trials— cross-examination—hypothetical statements

Cross-examination about hypothetical statements from a witness who did not testify was not condoned, although a new trial was granted on other grounds.

Appeal by defendant from judgment dated 30 August 2001 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 13 November 2003.

Attorney General Roy Cooper, by Assistant Attorney General Lorrin Freeman, for the State.

Osborn & Tyndall, P.L.L.C., by Amos Granger Tyndall, for defendant-appellant.

McGEE, Judge.

Karen Elaine Everett (defendant) was convicted of second-degree murder on 30 August 2001. The trial court found defendant to have a prior record level I and sentenced defendant to a minimum term of 135 months and a maximum term of 171 months in prison. Defendant appeals.

The evidence presented by the State at trial tended to show that on 26 November 2000, personnel from the Wake County Sheriff's Office and the Garner EMS responded to a call from the residence of defendant and her husband, Michael Everett (Everett). Upon arrival at the home, Everett was found lying in the entrance to the kitchen, having suffered multiple gunshot wounds. Everett had no pulse and no signs of cardiac activity. The medical examiner confirmed that Everett died as a result of the gunshot wounds. A special agent with the State Bureau of Investigation testified that one of the wounds was the result of a contact shot, while the other three wounds resulted from shots fired from less than eighteen inches.

Deputy Jamie Landmark (Deputy Landmark) with the Wake County Sheriff's Department testified as to his conversation with defendant after the incident. Defendant told Deputy Landmark that she and her husband had been arguing both the day before and the day of the shooting. Everett had been away from the house for a while on 26 November. When he returned, he and defendant began arguing because Everett thought defendant had been to meet another man the day before. Defendant also told Deputy Landmark that her husband had pushed her and said, "b-----, I'll kill you." Defendant said she told Everett he needed to leave. He refused to do so and told defendant

she needed to leave. Defendant grabbed a gun and told Everett to "back up off [her]." Defendant told Deputy Landmark that Everett "kept coming towards [her] and she just shot." Deputy Landmark further testified that defendant told him Everett had said something about defendant wanting to play with guns and indicated that Everett was going to get a gun. Defendant also told Deputy Landmark that Everett grabbed her throat and kept telling her he was going to kill her and that he should have done so before.

Defendant testified that she and Everett were married on 3 December 1986. The early years of their marriage were problematic because defendant had a job in the printing industry and Everett was not comfortable with defendant "working with a lot of gentlemen." Arguments between Everett and defendant "turned physical a lot." However, defendant did not call police until a particular argument in 1990 which occurred when defendant failed to meet Everett after work. Defendant had left work with her father, but Everett assumed she had left with someone else and was very upset. Defendant testified that she called police because Everett "had gotten physical. He had choked me. He had ripped my [clothes]. He had slammed me around. He had tore the house up." As a result of this incident, Everett was convicted of assault on defendant.

Defendant testified that during the early years of her marriage to Everett (early nineties), there were periods of time when they would separate from one another. Usually defendant would be the one to leave, but after the birth of their child, Everett would leave the home. Defendant testified that these periods of separation happened five to seven times a year and lasted "a couple of days to a couple of weeks or so."

In June 1998, another serious altercation occurred between defendant and Everett. Defendant decided to help a friend move even though Everett disapproved. While defendant was moving an aquarium, Everett "came at [her.]"

> He grabbed me. He started ripping my clothes off. He was raging about how he was going to kill me. He was going to kill me. He threw me through the screen door. He started choking me, banging me on the wall.
>
> . . . .
>
> I was trying to get away from him. I was on the porch. We were on the porch when he was strangling me, and at that time

> there wasn't a bannister, a railing, and I leaned back and I guess my body weight just carried me off of his hand and I fell into the yard, and I believe that's when my friend [got] in between us.

As a result, defendant obtained a restraining order to protect herself from Everett. The couple again separated for a few months and Everett went to counseling. Defendant and Everett reunited in an attempt to keep their family together.

Defendant testified that in 2000, Everett's temper worsened and she and Everett were arguing "[v]ery frequently." One night in September, Everett accused defendant of "fooling around with somebody" and that night defendant slept on the couch. Defendant testified that she woke up during the night and Everett was holding a gun in her face saying that he should kill her. After defendant told Everett the gun might explode because it had never been cleaned, Everett put the gun down and unloaded it. The next morning defendant and her daughter moved to defendant's mother's house for about three weeks.

Defendant testified that on 25 November 2000, she and Everett argued because defendant had not yet brought back all of her things from her mother's house, and because of this, Everett thought defendant was planning to leave him. Defendant and Everett spent that day apart. Around 5:00 p.m., defendant returned home with their daughter and the argument between Everett and defendant resumed. That evening, Everett took their daughter to a movie. Upon returning home from the movie, Everett again started arguing with defendant and continued to argue with her throughout the evening.

On the morning of 26 November 2000, the argument resumed and Everett told defendant "he should have finished [her] off when he had a chance to." When Everett returned that evening, he inquired as to whether defendant had retrieved her things from her mother's house. Defendant responded that she had not gotten all of her things, and an argument ensued. Defendant told Everett that one of them needed to leave. Defendant announced that she was leaving and attempted to get up from the couch to get their daughter from the back bedroom. Defendant testified that Everett "pushed [her] back down. He had his—he never choked me, but he had his arm—his hand on my neck, push[ed] me down, and [had] his knee kind of in my shoulder." Everett told defendant "[t]hat the only way [she] was leaving [was] if somebody took [her] out, out on a stretcher." Defendant thought Everett was going to kill her.

Defendant testified that Everett was "different that night" in that "[h]e wasn't raging and ranting like he usually did. He wasn't trying to tear things up. He was just cold, very cold and calm and very direct when he said what he said." Everett eventually got off defendant and went into the kitchen. Defendant grabbed the gun from a living room table because she "wanted him to stay off of [her]." As Everett walked towards the kitchen, he said to defendant, "you want to play with guns now?" He then said, "I'll go get mine and kill everything in here." Defendant told Everett she wanted to leave and "wanted him to stay away from [her]" but he "started coming towards [her]." Defendant testified that she told him to stop and when he continued coming towards her, she fired a shot towards the window to scare him. Defendant testified that Everett still did not stop and she fired the gun when "[h]e was right on top of [her]." Defendant testified that Everett said nothing as he came towards her. She further testified to the events by saying, "[i]t's like I didn't even hit him. I thought maybe that I had missed him, because I thought it would throw him back and it didn't. He just kept walking and he turned to go down the hallway." Defendant continued to fire the gun because she "thought he was going to get the other gun."

We first note defendant has failed to present an argument in support of assignments of error numbers one and two and they are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

I.

[1] Defendant first argues that the trial court erred when it refused her specific request to instruct the jury that defendant had no duty to retreat in her own home. During the charge conference, defendant specifically requested an instruction that defendant had no duty to retreat. The trial court did instruct on self-defense but denied defendant's specific request, stating that "I don't see where retreat fits in this one, so I'm not going to give it, because I don't see where there was any retreat." Defendant's counsel persisted by saying, "I think, and I don't know if the State would argue this, but if they argue, you know, that she could have left as opposed to do[ing] what she did, then I think it's incumbent that the jury know that she didn't have to do that." The trial court responded by saying, "I don't believe they're going to argue that she should have retreated. That's not their theory." The trial court concluded that the instruction would not be given but stated, "[w]ell, if they argue some form of retreat, I'll have to give it."

The issue is whether defendant was entitled to a jury instruction informing the jury of the law relating to the right not to retreat when a party is attacked on one's own premises. "Where the defendant's or the State's evidence when viewed in the light most favorable to the defendant discloses facts which are 'legally sufficient' to constitute a defense to the charged crime, the trial court must instruct the jury on the defense.' " *State v. Marshall*, 105 N.C. App. 518, 522, 414 S.E.2d 95, 97, *disc. review denied*, 332 N.C. 150, 419 S.E.2d 576 (1992) (quoting *State v. Clark*, 324 N.C. 146, 161, 377 S.E.2d 54, 63 (1989)). "If an instruction is required, it must be comprehensive." *State v. Brown*, 117 N.C. App. 239, 241, 450 S.E.2d 538, 540 (1994), *cert. denied*, 339 N.C. 616, 454 S.E.2d 259; 340 N.C. 115, 456 S.E.2d 320 (1995). *See State v. Graves*, 18 N.C. App. 177, 181, 196 S.E.2d 582, 585 (1973) (the trial court should "fully, correctly, and explicitly instruct").

In the case before us, the trial court instructed the jury on self-defense. However, defendant argues that the facts of this case mandated a comprehensive self-defense instruction, including language regarding her right not to retreat. For the reasons stated below, we agree.

Our Court stated in *State v. Allen*, 141 N.C. App. 610, 618-19, 541 S.E.2d 490, 497 (2000), *disc. review denied*, 353 N.C. 382, 547 S.E.2d 816 (2001), that

> [t]he general rules of self-defense allow a defendant to use the amount of force "necessary or apparently necessary to save himself from death or great bodily harm." *State v. Pearson*, 288 N.C. 34, 39, 215 S.E.2d 598, 602 (1975). When confronted with an assault that does not threaten the person assaulted with death or great bodily harm, a party claiming self-defense is required to retreat "if there is any way of escape open to him, although he is permitted to repel force by force and give blow for blow." *Id.* at 39, 215 S.E.2d at 602-03. There is *no* duty to retreat when (1) the person assaulted is confronted with an assault that threatens death or great bodily harm or (2) the person assaulted is not confronted with an assault that threatens death or great bodily harm and the assault occurs in the dwelling, place of business, or premises of the person assaulted, provided the person assaulted is free from fault in bringing on the difficulty. *Id.* at 39-40, 215 S.E.2d at 603.

In addition, "a person is not obliged to retreat when he is assaulted while in his dwelling house or within the curtilage thereof, whether

the assailant be an intruder or another lawful occupant of the premises." *State v. Browning*, 28 N.C. App. 376, 379, 221 S.E.2d 375, 377 (1976) (the defendant killed his brother in the backyard of their mother's home where both resided); *see also Brown*, 117 N.C. App. 239, 450 S.E.2d 538 (wife killed her husband in their home and wife was entitled to an instruction that she had no duty to retreat).

> "Where there is evidence that defendant was on his own premises when he was assaulted, or that a felonious assault was being made upon a defendant without fault on his part, it is error for the court to fail to submit the question and to charge upon defendant's right to stand his ground without retreating."

Browning, 28 N.C. App. at 380, 221 S.E.2d at 378 (quoting 4 Strong, N.C. Index 2d, *Homicide*, § 28, pp. 248-49 (1968)).

In the case before us, the evidence shows that the argument and altercation that occurred between Everett and defendant began when Everett returned home and asked defendant if she had brought all of her things back from her mother's house. Everett and defendant began to argue and Everett pushed defendant down onto the couch after she announced she was leaving. Everett held defendant down by placing his hand on her neck and his knee in her shoulder. As Everett was restraining defendant, he told her that the only way she would leave the house would be on a stretcher. Everett got up and went into the kitchen. Defendant grabbed the gun in order to keep Everett off of her. Defendant walked towards the kitchen and Everett threatened to go get his gun and "kill everything in here." Defendant fired the gun only after Everett started coming towards her. She initially fired a warning shot but Everett continued in her direction. She then shot him several times as he was going down the hallway because she feared he was going to get the other gun.

Our analysis is guided by *Brown*, 117 N.C. App. 239, 450 S.E.2d 538. In that case, the defendant wife was sentenced to prison for stabbing and killing her husband during an argument. Our Court ordered a new trial based on the fact that the defendant was entitled to an instruction that she had no duty to retreat. *Brown*, 117 N.C. App. at 242, 450 S.E.2d at 541. As in the case before us, the trial court did instruct on self-defense but failed to include the portion relating to no duty to retreat. *Brown*, 117 N.C. App. at 241, 450 S.E.2d at 540.

In *Brown*, the defendant's husband had assaulted her on at least two prior occasions and on the day of the killing, the defendant tried

to leave the home when the parties began to argue. *Brown*, 117 N.C. App. at 240, 450 S.E.2d at 540. The defendant's husband grabbed her to prevent her from leaving and the defendant fell to the ground. Her husband then verbally abused her, produced a small knife, and slapped her to the floor as she attempted to leave a second time. He pinned her against the stove and began to choke her; the defendant grabbed a knife and stabbed her husband in the chest. *Id.*

The facts of the case before us are similar to *Brown*. Both cases involved a husband and wife with a history of domestic problems. In each case, the killing occurred in the marital home only after the wife attempted to leave the residence. Although the fight between the parties in *Brown* appears to have been more physical than the altercation in the case before us, the same result is mandated by the rule stated in *Allen*. Under that rule, even if the assault does not threaten death or great bodily harm, there is no duty to retreat if the assault occurs in one's home. *Allen*, 141 N.C. App. at 619, 541 S.E.2d at 497. Thus, even though Everett did not have a weapon and was not physically touching defendant at the time of the shooting, Everett had verbally threatened to "go get [his gun] and kill everything in [the house]" and had begun coming towards defendant. At that point, defendant believed Everett was going to get his gun. This is sufficient to conclude that defendant was being attacked in her own home. A final similarity between *Brown* and the case before us is the timing of the killings. The defendant in *Brown* did not stab her husband until the threat of death was imminent. Similarly, defendant in the case before us did not fire the gun until Everett began coming towards her and defendant thought Everett was on his way to retrieve the other gun. The similarities in these two cases warrant the same instruction that the women had no duty to retreat.

The evidence in the case before us is legally sufficient to support a conclusion that defendant was attacked by her husband in her own home and that she was not at fault. Thus defendant, as requested by her at the charge conference, was entitled to a jury instruction which related to the jury a defendant's right not to retreat; it was error for the trial court to fail to so instruct. Accordingly, defendant is entitled to a new trial.

Furthermore, we credit the trial court with correctly noting at the charge conference that the no duty to retreat instruction should be given if the State did in fact argue that defendant should have retreated. In closing argument, the State insinuated that defendant had a duty to leave by saying,

> What were the options she had at that point? In that house she could have walked out the front door. If she really felt frightened of him, she could have walked out the front door. She was the one who drove the family car. She had her gun with her. She could not have been threatened. She could have left.

Because the State did argue retreat, the instruction was warranted and should have been given. Defendant is entitled to a new trial.

II.

Defendant next argues that the trial court erred by allowing the State, during closing argument, to contend that defendant and her attorney had concocted defendant's testimony. In light of our decision on the first issue and the fact that this same scenario is not likely to reoccur at retrial, we need not address this issue.

III.

[2] Defendant finally argues that the trial court erred by allowing the State to use hypothetical statements to impeach defendant and to argue the substance of those statements during closing argument. During *voir dire*, the State indicated that it might call the Everetts' daughter to testify. However, the State rested its case without ever calling the daughter to the stand. Rather, the State asked defendant numerous questions on cross-examination that implied the substance of what her daughter's testimony would have been had the daughter testified. The State essentially provided defendant with hypothetical statements by her daughter, followed by a question to defendant as to whether or not her daughter was being truthful. For example, one exchange between the State and defendant included the following:

> Q When [the daughter] came into the kitchen, where were you standing?
>
> A I probably was in the living room.
>
> Q Where was Michael [Everett]?
>
> A In the door by the Christmas tree.
>
> Q Okay. If she—if [the daughter] were to say he was standing by the sink would that be correct?
>
> A I don't recall exactly where [the daughter saw] Michael at.
>
> . . . .

Q At any point did he go towards the sink? Was—Michael was towards the sink was—[the daughter] . . . in the room.

A I'm not sure.

Q If [the daughter] were to say that, would that be true or not, to the best of your recollection?

A If that's what she saw, then it was true for her. I couldn't say that.

Q Okay. You don't think she would have any reason to say anything different about it, do you, about where her daddy was?

A No, she wouldn't have any reason to say that.

The State used a similar method of questioning concerning when the daughter heard gunshots and what parts of the argument between her parents she overheard.

The State contends that these questions were used solely for the purpose of impeaching defendant's testimony and not as evidence. Thus, the State argues it was not error for these questions to be admitted. However, in addition to attempting to impeach defendant with these statements, the State also referenced these exchanges during closing argument. For example, the State said, "[w]e know that [the daughter] has seen [Everett] standing beside the sink, washing his hands, or at least [defendant] didn't deny it. But I was not going to let [defendant] force me to call [the daughter]." In addition, the State explained the reason for not calling the daughter as a witness:

> I told you before and I told you during jury selection that we were—might have to call a child. I made a decision that we were not going to call that child. She's been through enough, and you're just going to have to piece together through little questions I was able to ask. But I'm not going to do it and if you hold that against us, you can just say not guilty, but I'm not going to call her back up here. I think she's been through enough.

These remarks by the State make it clear that the State wanted the jury to consider these hypothetical statements as if they were the testimony of the daughter. The State clearly intended that the statements be used for more than merely impeaching defendant's credibility.

A similar line of questioning was pursued in *State v. Robinson*, 355 N.C. 320, 561 S.E.2d 245, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002). In *Robinson*, the defense counsel asked a witness the fol-

lowing question: "But, if he [the detective] testified that you told him that, he would be telling the truth, wouldn't he, Ms. Baker?" *Robinson*, 355 N.C. at 334, 561 S.E.2d at 254. The trial court sustained the objection to this question and another similar question. Our Supreme Court held that, "[i]n both instances, defendant sought to have the witnesses vouch for the veracity of another witness. This form of questioning is not proper." *Robinson*, 355 N.C. at 334, 561 S.E.2d at 255.

Similarly, we do not condone this line of questioning and the subsequent remarks in the State's closing argument. However, our grant of a new trial is based on the trial court's refusal to instruct the jury that defendant had no duty to retreat. For the reasons stated, the judgment is vacated and the case is remanded for a new trial in accord with this opinion.

New trial.

Judges HUDSON and CALABRIA concur.

PEGGY JONES, AS ADMINISTRATRIX OF THE ESTATE OF CECIL JONES, PLAINTIFF v. N.C. INSURANCE GUARANTY ASSOCIATION, NORTH CAROLINA FARM BUREAU INSURANCE COMPANY, AND TRAVELERS INDEMNITY COMPANY, DEFENDANTS

No. COA03-158

(Filed 2 March 2004)

Insurance— uninsured motorist—insolvency—partial payment—stacking—credit

The trial court did not err by granting summary judgment in favor of plaintiff based on its conclusion that each defendant uninsured motorist (UM) insurer must pay the full $100,000 of their UM policy coverage toward the unfunded portion of a wrongful death settlement between plaintiff and an insolvent insurance company, because: (1) the liability insurance company's insolvency on 3 January 2001 triggered defendants' UM liability under the Motor Vehicle Safety and Financial Responsibility Act (Act) of N.C.G.S. § 20-279.21(b)(3) instead of the date of decedent's death; (2) nothing in the Act suggests that a partial payment by the insolvent insurer would have any impact on the

responsibility of the UM insurers since defendants' liability did not arise until after the partial funding occurred; (3) the amendment to N.C.G.S. § 20-279.21(b)(3) does not require that coverage amounts above $25,000 be controlled by the policy rather than the Act, nor does it make *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, inapplicable; (4) plaintiff was not required to file suit and prove liability and damages in light of the settlement agreement, and the Act specifically allows recovery from a UM insurer where the liability insurer of the tortfeasor became insolvent within three years after such an accident as in this case; (5) defendant Farm Bureau's liability arises from the terms of the Act which does not require it to be a party to the agreement; (6) plaintiff notified defendant Farm Bureau of her claim against the UM policy within one month of the liability insurer's insolvency; (7) the Act's anti-stacking provision does not apply in this case; (8) defendants are not entitled to any credit the liability insurer paid before becoming insolvent when nothing in the record indicated that the settlement between plaintiff and the liability insurer resulted from the exercise of any limits of recovery of plaintiff against the tortfeasor; and (9) defendants are not entitled to a credit for any workers' compensation payments made to plaintiff since the UM insurers' liability is based on the liability insurer's insolvency and not on the underlying accident itself.

Appeal by defendants from judgment entered 25 November 2002 by Judge Stafford G. Bullock in the Superior Court in Wake County. Heard in the Court of Appeals 30 October 2003.

Jones, Martin, Parris & Tessener Law Offices, P.L.L.C., by Hoyt G. Tessener, for plaintiff.

George L. Simpson, III and Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Mark A. Michael and Sharon E. Dent, for defendant-appellant Travelers Indemnity Company.

Willardson, Lipscomb & Miller, L.L.P., by William F. Lipscomb, for defendant-appellant North Carolina Farm Bureau.

Nelson, Mullins, Riley & Scarborough, L.L.P., by Joseph W. Eason and Christopher J. Blake, for defendant-appellee North Carolina Insurance Guaranty Association.

HUDSON, Judge.

On 19 March 2002, plaintiff Peggy Jones, Administratrix of the Estate of Cecil Jones ("plaintiff"), filed a complaint seeking to have the court declare the obligations of defendants, the North Carolina Insurance Guaranty Association ("NCIGA"), Farm Bureau Insurance Company ("Farm Bureau"), and Traveler's Indemnity Company ("Travelers" and, collectively with Farm Bureau, the "UM insurers"), to pay a portion of a wrongful death settlement between plaintiff and Credit General Insurance Company ("Credit General"). Credit General was declared insolvent 3 January 2001, at which time, it owed $290,000 to plaintiff under terms of the settlement. Plaintiff, Farm Bureau and Travelers each moved for summary judgment, and following a hearing, the court granted summary judgment in favor of NCIGA and plaintiff, ordering the UM insurers to each pay $100,000 of uninsured motorist coverage toward the unfunded portion of the settlement. The UM insurers appeal. For the reasons discussed below, we affirm the judgment of the trial court that the UM insurers each must pay the full $100,000 of their UM policy coverage.

Background

Plaintiff's husband Cecil Jones was killed 11 August 1999 while at work for his employer Pettiford Trucking at Fogleman Landfill in Durham. As Mr. Jones stood next to his Pettiford dump truck, he was struck and killed by the tailgate of a passing Orange Hauling dump truck driven by Geryl Terrell ("Mr. Terrell"). Three insurance policies in effect at the time of the accident are at issue here. Credit General, then solvent, insured Orange Hauling under terms of a commercial automobile policy. Farm Bureau insured the owners of Pettiford Trucking under terms of a commercial automobile policy, which provided $100,000 in uninsured motorist ("UM") coverage. Cecil Jones, plaintiff, owned a personal automobile policy issued by Travelers, which also provided $100,000 in UM coverage.

Following Mr. Jones' death, plaintiff threatened to bring a wrongful death action against Orange Hauling and Mr. Terrell, alleging negligence. Plaintiff reached a settlement with Credit General in October 2000, without filing a lawsuit. In the settlement, Credit General agreed to pay plaintiff $270,000 in cash plus an annuity paying $1,500 per month; in exchange, plaintiff agreed to release Orange Hauling and Mr. Terrell from liability. Credit General then partially paid the settlement before being declared insolvent on 3 January 2001.

Plaintiff then sought to have NCIGA pay the $290,000 still due under the terms of the settlement (comprising the entire $270,000 lump cash payment plus $20,000 by which the annuity was underfunded), and NCIGA informed her that she must first collect the $100,000 limits from each of the UM insurers. Of the unfunded amount, NCIGA paid plaintiff $90,000, the portion of the settlement remaining after deducting the expected $200,000 UM coverage. The UM insurers denied coverage to plaintiff, maintaining that NCIGA was liable for the entire $290,000 amount. Plaintiff filed this action to have the court declare the liability of NCIGA and the UM insurers.

Analysis

"[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). The evidence presented must be viewed in the light most favorable to the non-movant. *Id.* Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. § 1A-1, Rule 56(c) (1999). Thus, the issue before us is whether a genuine issue of material fact existed as to plaintiff's entitlement to UM coverage under the Travelers and Farm Bureau policies.

Throughout their assignments of error, the UM insurers focus on the date of Mr. Jones' death as the date triggering possible coverage under their UM policies. We do not believe his date of death is the critical point, however, and thus the UM insurers' arguments based on this date are misplaced. Instead, we conclude that Credit General's insolvency 3 January 2001 triggered Travelers' and Farm Bureau's UM liability. The pertinent language of the Motor Vehicle Safety and Financial Responsibility Act ("the Act") states:

> Provided under this section the term "uninsured motor vehicle" shall include, but not be limited to, an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability within the limits specified therein because of insolvency.
>
> An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's

> uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within three years after such an accident.

G.S. § 20-279.21 (b)(3) (1999). Credit General was "unable to make payment with respect to the legal liability within the limits" of its policy, and its insolvency occurred within three years of the accident. Thus, under the Act, Credit General's insolvency triggers the liability of the UM insurers for the amount of payment remaining under the settlement at that time.

I.

Both Travelers and Farm Bureau first argue that UM coverage does not apply here because at the time of Cecil Jones' death, Credit General was solvent and was able to pay $170,000 to plaintiff before it became insolvent. The UM insurers contend that the Act does not address the facts presented here, and that a claim in which a substantial payment has been made by an insurer prior to insolvency should not be considered "uninsured". We disagree.

As discussed above, the Act does address the factual situation presented here, and nothing in the Act suggests that a partial payment by the insolvent insurer would have any impact on the responsibility of the UM insurers, since their liability did not arise until after Credit General's partial funding occurred. The UM insurers were not liable for any amount of the settlement paid by Credit General before its insolvency. The UM insurers became liable only when Credit General became insolvent (unable to pay further) and Orange Hauling and Mr. Terrell became uninsured. Thus, any payments made before that time have no bearing on whether they are liable here.

II.

Farm Bureau next argues that Cecil Jones was not an insured under its UM coverage because Mr. Jones was not "occupying" the Pettiford dump truck when he was killed, as required by terms of its policy. Farm Bureau acknowledges that the Act and case law define "insured" more broadly, so as to include Mr. Jones, but argues that the policy controls. *See Falls v. N.C. Farm Bureau Mut. Ins. Co.*, 114 N.C. App. 203, 441 S.E.2d 583, *disc. review denied*, 337 N.C. 691, 449 S.E.2d 521 (1994); *see also* G.S. § 20-279.21 (b)(3) (1999). In addition, our Supreme Court, in *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, held that a policy provision that contradicts the mandates of the Act is not enforceable. 341 N.C. 678, 684, 462 S.E.2d 650, 653 (1995). Farm

Bureau, argues however, that *Bray* is inapplicable here because of a subsequent amendment of G.S. § 20-279.21 (b)(3), which removed the requirement that UM coverage equal a policy's liability coverage, in the absence of a rejection, and which set the minimum liability coverage at $25,000.

In our view, the amendment to G.S. § 20-279.21 (b)(3) simply changed the presumptive limits of UM coverage included in a policy, absent a different specification. The amendment does not, however, require that coverage amounts above $25,000 be controlled by the policy rather than the Act, or make *Bray* inapplicable to the case at hand. Thus, this argument lacks merit.

III.

Next, both Farm Bureau and Travelers argue that plaintiff is not entitled to UM coverage because she has not shown she is legally entitled to recover damages from either of their insureds. The UM insurers contend that plaintiff has proved neither her legal right to recover damages, nor the amount of damages she suffered. Farm Bureau argues that because plaintiff knew of Credit General's insolvency by 1 February 2001, and could have filed a wrongful death claim against Geryl Terrell and Orange Hauling in the six months remaining under statute of limitations, but failed to do so, her claim is now barred. Because, as we have previously noted, Credit General's insolvency was the event triggering the liability of the UM insurers, this argument is misplaced.

On the date of Credit General's insolvency, Farm Bureau and Travelers became liable to plaintiff for the unfunded amount of its settlement, not directly for damages arising from the accident that caused Mr. Jones' death. The amount of the settlement represented, in essence, the "damages" agreed upon by the parties and a release of liability. We do not believe plaintiff was required to file suit and prove liability and damages, in light of this agreement. Prior to its insolvency, Credit General clearly had the "legal liability" to make payment accordingly. G.S. § 20-279.21 (b)(3). Further, even if plaintiff had not released Orange Hauling and Mr. Terrell from liability, the statute of limitations for the wrongful death claim was irrelevant once the settlement between plaintiff and Credit General was reached. The Act specifically allows recovery from a UM insurer "where the liability insurer of the tort-feasor becomes insolvent within three years after such an accident," without reference to any other limitation period. G.S. § 20-279.21 (b)(3).

Here, plaintiff was legally entitled to recover from Credit General under the terms of the settlement, and Credit General did become insolvent within three years of the underlying accident. Thus, the UM insurers became liable to plaintiff for payments Credit General was unable to make.

IV.

The Farm Bureau next argues that plaintiff is not entitled to UM coverage because Farm Bureau was not a party to the settlement agreement. We disagree. By virtue of its UM policy and the terms of the Act, Farm Bureau succeeded to Credit General's liability to plaintiff upon Credit General's insolvency. Farm Bureau's liability here arises from terms of the Act, which does not require that it be party to the agreement. Thus, plaintiff is entitled to recovery under its UM policy.

V.

Farm Bureau also argues that plaintiff is barred from recovery under its UM policy because she breached the policy terms by failing to notify it promptly of the accident which took her husband's life. Again, it was Credit General's insolvency, not the date of the accident that gave rise to the UM liability. Because plaintiff notified Farm Bureau of her claim against the UM policy within one month Credit General's insolvency, this assignment of error is without merit.

VI.

Farm Bureau and Travelers next assert that plaintiff can recover a maximum of $100,000 from both UM insurers combined. The UM insurers contend that both the Act and their policies prohibit inter-policy combining or "stacking." We disagree and conclude that the type of stacking plaintiff seeks here is not prohibited by the statute.

The Act addresses directly the issue of stacking coverages from multiple UM policies:

> Where the coverage is provided *on more than one vehicle insured on the same policy or where the owner or the named insured has more than one policy with coverage* under this subdivision, there shall not be permitted any combination of coverage within a policy or where more than one policy may apply to determine the total amount of coverage available.

G.S. § 20-279.21(b)(3) (emphasis added). The plain language of the statute prohibits intra- and inter-policy stacking of UM coverage only for the same owner or named insured. Here, Mr. Jones was neither the owner nor the named insured of both policies; he was the named insured only under the Travelers policy. Under the Farm Bureau policy, he was insured as an employee of the named insured. Thus, the Act's anti-stacking provision does not apply here, and we reject this argument.

VII.

Next, the UM insurers argue that, even if plaintiff is entitled to coverage under their UM policies, Farm Bureau and Travelers are entitled to a credit against their combined liability for the $170,000 amount Credit General paid before becoming insolvent. Because we disagree with their interpretation of the statute, we conclude otherwise.

The UM insurers rely on the following statutory language in support of their argument:

> In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of coverage, the insurer making payment shall, to the extent thereof, be entitled to the proceeds of any settlement for judgment resulting from the exercise of any limits of recovery of that person against any person or organization legally responsible for the bodily injury for which the payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

G.S. § 20-279.21(b)(3). The UM carriers argue that "In plain English, the statute says that a UM insurer called upon for payment to its insured may recover whatever sums are paid by the at-fault party or its insurer." While the UM insurers' argument is in plain English, the language of the statute is anything but. To the extent we are able to decipher this provision, we believe it means that a UM insurer who must pay is entitled to a credit in the event that the plaintiff has received proceeds "resulting from the exercise of any limits of recovery." Nothing in this record indicates that the settlement between plaintiff and Credit General resulted from "the exercise of any limits of recovery" of the plaintiff against the tortfeasor. Thus, we hold that this credit does not apply here.

Finally, the last phrase of this statute section specifies that if this provision applies, the UM carrier may have a credit for any "proceeds

recoverable from the assets of *the insolvent insurer*." Since we have concluded that the provision does not apply at all, we need not address the significance of this last phrase.

VIII.

In its final assignment of error, Farm Bureau contends that it is entitled to a credit for any workers' compensation payments made to plaintiff, pursuant to G.S. § 20-279.21(e), which provides the following, in pertinent part:

> Uninsured or underinsured motorist coverage that is provided as part of a motor vehicle liability policy shall insure that portion of a loss uncompensated by any workers' compensation law and the amount of an employer's lien determined pursuant to G.S. 97-10.2(h) or (j).

G.S. § 20-279.21(e). Again, based on the insolvency of Credit General as the trigger for Farm Bureau's UM liability, we disagree.

The cases cited by Farm Bureau each concern UM coverage triggered by car accidents involving motorists who were uninsured or under-insured at the time of the accident, not insurers who settled claims and then subsequently became insolvent. In the former cases, the UM or UIM insurers were liable based on the accidents themselves, and thus, workers' compensation payments made as result of the accident were properly credited against UM or UIM coverage. Here, the UM insurers' liability is based on Credit General's insolvency, and not on the underlying accident itself. Thus, the "loss" at issue here is that part of the settlement which remained unpaid at the date of insolvency, not the actual injury. Workers' compensation benefits would not be available to pay any part of the settlement upon Credit General's insolvency, and thus, the entire "loss" was uncompensated by workers' compensation. Therefore, Farm Bureau may not take credit for any workers' compensation payment previously received as a result of the accident against its UM liability. This final assignment of error is overruled.

Conclusion

For the reasons discussed above, we affirm the judgment of the trial court.

Affirmed.

Judges McGEE and CALABRIA concur.

RESORT REALTY OF THE OUTER BANKS, INC. T/A RESORT REALTY, PLAINTIFF v. VOLKER BRANDT AND WIFE, EVA BRANDT, DEFENDANTS

No. COA03-464

(Filed 2 March 2004)

1. Brokers— realtor's commission—breach of good faith

A realtor seeking to recover a commission under a listing contract need not prove a conspiracy to avoid paying the commission, but must show a breach of the principal's duty to act in good faith towards his agent.

2. Brokers— realtor's commission—ready, willing and able buyer—tax-free exchange

The trial court did not err by concluding that a realtor had produced a ready, willing, and able buyer, despite a reference to a section 1031 tax-free exchange in the listing contract, where offers were declined during the listing period because an exchange property could not be found; the property was sold to one of those offerors after the listing period at a lower price but without the commission, resulting in a net benefit to defendant; and the property used for the exchange had been owned by defendant's corporation all along. The exchange provision required defendants to exercise good faith.

3. Brokers— realtor's commission—origination of sale

The trial court did not err in an action to collect a realtor's commission by concluding that plaintiff had originated a series of events which, without a break in continuity, resulted in the sale of the property.

Appeal by defendants from judgment entered 3 December 2002 by Judge William C. Griffin, Jr., in Dare County Superior Court. Heard in the Court of Appeals 15 January 2004.

Gray & Lloyd, LLP, by E. Crouse Gray, Jr., for plaintiff-appellee.

Volker Brandt, MD and wife, Eva Brandt, defendants-appellants, pro se.

TYSON, Judge.

Resort Realty of the Outer Banks, Inc. ("Resort Realty") filed a verified complaint seeking payment of a commission due under an

Exclusive Right to Sell Listing Agreement ("the listing agreement"). Dr. Volker Brandt ("Dr. Brandt") and his wife, Eva Brandt (collectively, "defendants"), appeal from the trial court's judgment finding that they had defaulted under their obligations in the listing agreement and ordering them to pay the commission due in the amount of $45,000.00. We affirm.

I. Facts

Defendants owned two adjacent oceanfront lots in Dare County, North Carolina ("the property"). After the property was condemned due to beach erosion, defendants decided to relocate to another oceanfront property. In September 1997, Dr. Brandt met with Resort Realty agent Charles Rocknak ("Rocknak") to discuss finding a replacement property. Prior to this meeting, Dr. Brandt had conversations with Billy Roughton, who had offered to buy the property for $290,000.00. Dr. Brandt informed Rocknak of this offer and Rocknak indicated that the offer was too low.

After several discussions, defendants entered into the listing agreement with Resort Realty on 19 September 1997. The listing agreement granted Resort Realty the exclusive right to sell the property for a period of six months, or until midnight 19 March 1998, for a cash price of $450,000.00. Defendants also agreed to pay a commission if the property was sold during a "protection period" of sixty additional days beyond the expiration of the listing period to any person who viewed the property during the exclusive listing period. The listing agreement specifically included a provision that stated, "[t]he sale of this property is subject to a 1031 Tax Free Exchange." *See* 26 U.S.C. § 1031 (2003).

Rocknak attempted to locate a replacement property to comply with the § 1031 Tax Deferred Exchange requirement ("exchange requirement"). He and Resort Realty also marketed the listed property and received numerous offers, all of which were submitted to defendants. After several offers and counteroffers, James M. Rose, Jr. ("Rose") made an offer at the listing price of $450,000.00. Defendants did not accept any of the offers. When Rose inquired of Rocknak regarding the reason for the rejections, he was informed that defendants were unable to find a § 1031 replacement property. Rose contacted Dr. Brandt personally and testified that Dr. Brandt would not directly negotiate with him while the listing contract with Resort Realty was in effect. Rose withdrew his offer on 3 December 1997.

On 12 March 1998, Rocknak received and transmitted to defendant by facsimile another full price offer to purchase from James and Sharon Haskell (the "Haskells"). Dr. Brandt testified that he did not respond to the Haskells' offer because the facsimile was illegible, and Rocknak had not located a suitable replacement property. Defendants began looking to purchase bay front property in Maryland.

The listing agreement expired on 19 March 1998. On 19 March 1998, Rocknak registered a list of interested parties and on 20 March 1998, demanded payment from defendants for the real estate commission. The protection period expired on 18 May 1998. In July 1998, Rose again contacted defendants directly. After negotiations, Rose purchased the property for $425,000.00. Dr. Brandt later completed the § 1031 tax deferred exchange. The replacement property was located in Fairfax County, Virginia, and was owned by a Virginia Corporation, V. Brandt MD, Ltd., Defined Benefit Plan. Dr. Brandt was the sole shareholder of this corporation. Following a bench trial, the trial court entered judgment for Resort Realty for the $45,000.00 commission due from the sale of the property. Defendants appeal.

II. Issues

Defendants contend the trial court erred in concluding that: (1) Resort Realty produced a ready, willing, and able buyer despite the agreement's exchange requirement as a condition of sale; and (2) Resort Realty originated a series of events, which resulted in the sale of the property.

III. Standard of Review for Non-Jury Trial

In an appeal from a judgment entered in a non-jury trial, our standard of review is whether competent evidence exists to support the trial court's findings of fact, and whether the findings support the conclusions of law. *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163, *disc. rev. denied*, 354 N.C. 365, 556 S.E.2d 577 (2001). "The trial judge acts as both judge and jury and considers and weighs all the *competent* evidence before him." *Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary. *Id.* When competent evidence supports the trial court's findings of fact and the findings of fact support its conclusions of law, the judgment should be affirmed in the absence of an error of law.

IV. Performance Under the Contract

[1] A licensed real estate broker is entitled to recover a commission if a binding contract and performance under the contract is established. *Thompson-McLean, Inc. v. Campbell*, 261 N.C. 310, 313, 134 S.E.2d 671, 674 (1964). It is undisputed that the parties executed a valid listing agreement. To determine whether the trial court erred by awarding Resort Realty a commission, we must consider whether Resort Realty performed under the contract.

On appeal, defendants challenge the trial court's conclusion that they "conspired" with Rose to deprive Resort Realty of a commission pursuant to the listing agreement. A plaintiff need not prove a conspiracy not to pay a commission, but must show a breach of the principal's duty to act in good faith towards his agent, the broker. *See* Patrick K. Hetrick, Larry A. Outlaw, and Patricia A. Moylan, *North Carolina Real Estate Manual*, Chapter 8, *Brokerage Relationships* 227 (5th ed. 2004) ("The owner must cooperate with the broker and not do anything to hinder the broker's performance."); *see also* 12 Am. Jur. 2d *Brokers* § 138 (2003) ("Under general agency principles, a principal is subject to a duty to perform the contract made with his or her agent, to exercise good faith toward the agent, and to refrain from unreasonably interfering with the agent's work, and the principal is liable to the broker for a failure to do so."); *Campbell v. Sickels*, 89 S.E.2d 14, 19 (Va. 1955) ("A principal's contractual duty is to compensate his broker for services rendered in accordance with his contract of employment, and so long as the relation of principal and agent exists to exercise good faith toward him."). Because the issue of good faith is discussed within the other issues raised, we incorporate this assignment of error into that discussion.

A. Ready, Willing, and Able Buyer

[2] Defendants argue the trial court ignored the exchange requirement when it concluded that Resort Realty produced a ready, willing, and able buyer. We disagree.

"The law is well settled in this jurisdiction that when a broker, pursuant to an agreement with the owner of land, procures a purchaser for his principal's land ready, able and willing to buy the land upon the terms offered, he is entitled to commissions or compensation for his services." *Carver v. Britt*, 241 N.C. 538, 542, 85 S.E.2d 888, 891 (1955).

> When the broker's right to his commission is made to depend upon the satisfaction of any condition other than his production of a ready, willing and able purchaser, North Carolina courts require that such a variation from the general rule be clearly expressed. It is important in such situations that a distinction be made between language that imposes a condition which goes to the substance of a contract and language which relates only to its ultimate performance.

Tryon Realty Co. v. Hardison, 62 N.C. App. 444, 448, 302 S.E.2d 895, 898 (1983) (internal citations omitted).

"The term 'ready, willing, and able' means that the prospective purchaser desires to purchase, is willing to enter into an enforceable contract to purchase, and has the financial and legal capacity to purchase within the time required on the terms specified by the seller." James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 8-11, at 253 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999) (citing Hetrick and Outlaw, *North Carolina Real Estate for Brokers and Salesmen* (4th Ed., 1994), Chapter 10, *Agency Contracts and Related Practices*). Further, "the purchaser indicates readiness and willingness by executing a valid offer to purchase that either complies with the seller's requirements as set forth in the listing contract or is accepted by the seller." *Id.* Since Rose entered into a contract with defendants and consummated the transaction by purchasing the property, the evidence supports the trial court's conclusion that Resort Realty produced Rose as a ready, willing, and able buyer. *See Carolantic Realty, Inc. v. Matco Grp., Inc.*, 151 N.C. App. 464, 468, 566 S.E.2d 134, 137 (2002).

Defendants argue the trial court did not consider the exchange requirement in making this conclusion. The listing agreement at bar states in Paragraph Nine, "The sale of this property is subject to a 1031 Tax Free Exchange." Defendants contend the exchange requirement included in the listing agreement established a duty on Resort Realty to locate and secure a suitable replacement property before a commission could be earned. We disagree.

The inclusion of the exchange requirement in the listing agreement gave Resort Realty notice that defendants could refuse an offer if a suitable replacement property to fulfill this exchange requirement was not identified or secured. Nothing in the listing agreement placed the duty on Resort Realty to locate and secure the replacement property. The § 1031 exchange provision required defendants to exercise

good faith and reasonable efforts to identify and secure the replacement property. *See Mezzanotte v. Freeland*, 20 N.C. App. 11, 17, 200 S.E.2d 410, 415 (1973), *cert. denied*, 284 N.C. 66, 201 S.E.2d 689 (1974) (By making the condition, the promisor impliedly promises to use good faith and reasonable efforts).

"One who prevents the performance of a condition, or makes it impossible by his own act, shall not take advantage of the nonperformance." *Id.* at 20, 200 S.E.2d at 416 (citations omitted). In October 1997, defendants made an offer through Resort Realty for a replacement property. The offer of $320,000.00, however, was substantially lower than the asking price of $375,000.00. Defendants did not make any other offers on a replacement property during the listing period. After receiving Rose's full price offer in November 1997, Dr. Brandt sent a letter to Rocknak stating that he would accept Rose's offer only if Resort Realty would reduce its commission to a flat fee of $10,000.00. His letter specifically stated, "we could void the existing contract and re-write another . . . and you collect $10,000." Following Rose's withdrawal of his offer in early December 1997, defendants had limited or no contact with Resort Realty.

Rose and Dr. Brandt executed a contract for the purchase of the property in July 1998 for $425,000.00. Based on the terms of this contract, Rose was able to purchase the property for less than his offer in November 1998, and Dr. Brandt was able to secure higher net proceeds by avoiding Resort Realty's commission. The replacement property, eventually identified and used to satisfy the exchange requirement, was land that Dr. Brandt owned and controlled in a corporate capacity during the *entire* existence of the listing and protection periods. Also, as a condition of the sale, Dr. Brandt requested and Rose agreed, to sign an indemnity agreement, wherein Rose would pay the legal fees, costs, and any commission due over $10,000.00 if Resort Realty attempted to collect a commission from the sale.

We hold that the evidence does not support a "conspiracy" finding. "A conspiracy is an agreement between two or more persons to commit an unlawful act or to do a lawful act in an unlawful manner." *Evans v. GMC Sales*, 268 N.C. 544, 546, 151 S.E.2d 69, 71 (1966). Resort Realty produced no evidence to show an agreement to commit an unlawful act. Further, no evidence in the record supports the portion of the trial court's finding that stated, "at the time the Defendants rejected the full price offer that had been submitted by the Haskells, the Defendants had received another offer, being an offer from James

Rose, that had been directly negotiated between the Defendants and James Rose . . . ." Although the evidence shows that Rose and Dr. Brandt engaged in several direct phone conversations during the listing period, the evidence shows that Rose did not make the offer that Dr. Brandt accepted until after the listing and protection periods expired.

The trial court's determination of a "conspiracy" was harmless error, because a valid listing contract existed and the broker performed under the contract. *See Thompson-McLean, Inc.*, 261 N.C. at 313, 134 S.E.2d at 674. The trial court's findings, however, are sufficient to show a lack of good faith by defendants in their control over and acceptance of the exchange requirement in the agreement. Specifically, the trial court made findings of fact that are supported by competent evidence in the record:

> 39. That upon receipt of the facsimile of the Haskell contract, the Defendant, Dr. Volker Brandt, took no action. Defendants could tell that the written offer sent to them by facsimile was for a purchase price of $450,000.00, but did not contact Plaintiff after receipt of the offer.
>
> 40. That numerous conversations ensued between James Rose and the Defendant prior to the expiration of the Exclusive Listing Agreement between the Defendants and the Plaintiff. . . . That the Defendants indicated that they would not enter into a written agreement until the Protection Period of the Exclusive Right to Sell Listing Agreement between the Defendants and Plaintiff had expired.
>
> . . . .
>
> 48. That at the time of the transfer of the title to the real property on August 8, 1998, for the Defendants to James Rose, that the Defendants had designated as their replacement property, pursuant to the 1031 tax deferred exchange, only *one* piece of property . . . which such property had been owned since the early 1990s by V. Brandt, MD, Ltd., Defined Benefit Plan, a Virginia corporation.

The trial court, in its discretion, determined what weight to give the replacement property requirement, considered whether defendants exercised good faith in fulfilling this requirement, and made adequate findings of fact to support its conclusions. *Williams*, 288 N.C. at 342, 218 S.E.2d at 371. By failing to exercise good faith, defendants

prevented the performance of the "condition" stated in the listing agreement regarding replacement property. *Mezzanotte*, 20 N.C. App. at 20, 200 S.E.2d at 416. Competent evidence supports the trial court's conclusion that Resort Realty produced a ready, willing, and able buyer. Defendants are prohibited from accepting the benefits derived from their own nonperformance. *Id.*

B. Procuring Cause of the Sale

[3] Defendants also contend the trial court erred in concluding that Resort Realty originated a series of events, which, without break in their continuity, resulted in the sale of the property. We disagree.

A broker is the "procuring cause" if he originates or sets in motion "a series of events which, without break in their continuity, result in the . . . sale or exchange of the principal's property . . . ." *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 251, 162 S.E.2d 486, 491 (1968). "[O]rdinarily, a broker with whom an owner's property is listed for sale becomes entitled to his commission whenever he procures a party who actually contracts for the purchase of the property at a price acceptable to the owner." *Id.* at 250, 162 S.E.2d at 491.

Here, it is undisputed that Rose inquired of the property through Resort Realty after noticing Resort Realty's "for sale" sign placed in the yard. Rose made several offers to purchase and Dr. Brandt made several counteroffers to sell the property by and through Resort Realty during the listing period. Although the listing agreement and the protection period had expired, the evidence clearly shows that Rocknak and Resort Realty originated the "series of events" that ultimately led to Rose's offer to purchase the property that was accepted by Dr. Brandt. *Id.*

Rose made a full price offer, subject to the exchange requirement in the listing agreement. We previously held that this condition did not impose a duty on Resort Realty to secure the replacement property. After making this full price offer through Resort Realty, Rose had direct contact with Dr. Brandt, withdrew his offer, and later purchased the listed property at a lower price. In satisfying the § 1031 tax deferred exchange, defendants used a property that Dr. Brandt controlled throughout the listing and protection periods. The trial court did not err in concluding that Resort Realty was the procuring cause of the sale of the property. This assignment of error is overruled.

V. Conclusion

"The law does not permit an owner to reap the benefits of the broker's labor without just reward if he has requested a broker to undertake the sale of his property and accepts the results of services rendered at his request." *Id.* The trial court properly considered the exchange requirement and concluded that Resort Realty produced a ready, willing, and able buyer. The trial court also properly concluded that Resort Realty was the procuring cause of the contract and sale of the property between Rose and Dr. Brandt. We affirm the trial court's judgment.

Affirmed.

Judges HUDSON and STEELMAN concur.

STATE OF NORTH CAROLINA v. MARTIN ALVA CRAWFORD DEFENDANT

No. COA03-485

(Filed 2 March 2004)

1. **Evidence— homicide victim's character—not in issue—defense of accident**

Testimony that a murder victim had shot her former husband was properly excluded. Defendant had raised the defense of accident, and the character of the victim was not in issue.

2. **Criminal Law— prosecutor's remark about defense witness—not prejudicial**

There was no prejudicial error in a second-degree murder prosecution where the prosecutor made a derogatory remark about defendant's firearms expert while objecting to his testimony. This was one brief statement at the end of an objection from the State which was overruled, there were no impermissible questions or arguments, and there was sufficient evidence that the shooting was not an accident, as defendant was contending.

3. **Jury— taking notes—allowed—no abuse of discretion**

The trial court did not abuse its discretion in a second-degree murder prosecution by allowing the jurors to take notes. N.C.G.S.

§ 15A-1228 no longer requires that the court give a "no notes" instruction on request.

4. Constitutional Law— effective assistance of counsel—failure to record voir dire—no prejudice

A second-degree murder defendant was not denied effective assistance of counsel by his attorney's failure to record the jury voir dire where defendant contended on appeal that a motion for a change of venue should have been granted. Jury selection was completed by lunch on the first day without difficulty, media coverage was primarily factual, and defendant did not argue that any of the jurors were biased.

Appeal by defendant from judgment entered 27 September 2002 by Judge Sanford L. Steelman, Jr. in Superior Court, McDowell County. Heard in the Court of Appeals 3 February 2004.

Attorney General Roy Cooper, by Assistant Attorney General Philip A. Lehman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for the defendant-appellant.

WYNN, Judge.

By this appeal, Defendant Martin Alva Crawford argues the trial court erred by (I) excluding testimony that his wife shot her former husband; (II) overruling his objection to the prosecutor's prejudicial comment concerning Defendant's firearms expert; and (III) failing to instruct the jurors that they may not take notes. Defendant also contends that he was afforded ineffective assistance of counsel in that his attorney failed to have jury selection recorded. After careful review, we find Defendant received a fair trial, free from prejudicial error.

The pertinent facts indicate that on the evening of 8 December 2001, Defendant shot and killed his wife, Jennifer Crawford. Prior to the shooting, Defendant and his wife were arguing outside of their home about Defendant going to visit a friend. During the argument, Defendant's wife raised a baseball bat and smashed out a side window in their vehicle. Immediately thereafter, Defendant shot his wife in the head. After smashing his gun on the ground, Defendant went inside of his home, told his brother that he thought he had just shot his wife, went back outside and sat beside his wife's body. Soon thereafter, the police arrived and arrested Defendant.

Defendant was convicted of second degree murder and received an active term of a minimum of 157 months and a maximum of 198 months. Defendant appeals.

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[1] Defendant first contends the trial court erroneously sustained the State's objections to Defendant's testimony that his wife shot her former husband. We disagree.

As part of his defense, Defendant testified that after he and his wife began arguing about his attempt to leave in their vehicle, he went across the street to see his wife's cousin, Carl Beatty, to see if he would intercede. After his wife's cousin declined, Defendant testified that he went into his home to get his .22 rifle in order to hide it from his wife. He testified that two months earlier, his wife had shot out the tires in his car and he attempted to testify that his wife shot her former husband. After the State's objection, Defendant testified, on *voir dire*, that he was thinking about the conversation in which his wife told him of the prior shooting when he retrieved the gun from his home. He wanted to hide the gun in order to prevent her from getting it.

Defendant testified that after he came out of the house, he went to his car, heard the window break and saw his wife approaching him with the bat. He testified that he crouched down and protected his head with the rifle and that as he did this, the gun went off and his wife fell backwards. Thus, Defendant contended the shooting was accidental and therefore he was not guilty of murder.

On appeal, Defendant contends that his testimony regarding his wife's prior shooting of her former husband would have explained why he went into the home to get the .22 rifle during the argument. He argues that "if he had been able to present the evidence of his actual state of mind in removing the rifle from the house, the jury would have been much more likely to find that the shooting was an accident, was due to criminal negligence, or was done in the heat of passion." However, in *State v. Goodson*, we held that "evidence of the victim's violent character is irrelevant in a homicide case when the defense of accident is raised. The character of the deceased in such a case is not at issue." 341 N.C. 619, 623, 461 S.E.2d 740, 742 (1995) (citing *State v. Winfrey*, 298 N.C. 260, 258 S.E.2d 346 (1979)). "The defense of accident, in effect, says that the homicide did not result from any volitional act on [the defendant's] part. Thus, there could be no relevancy in evidence tending to show that [the defendant] acted reasonably. The only issue before the jury was whether [the rifle] discharged acci-

dentally, and, therefore, evidence of the victim's character traits could shed no light on whether the [rifle] accidentally discharged and inflicted the fatal wounds." *State v. Winfrey*, 298 N.C. 260, 263, 258 S.E.2d 346, 348 (1979). Accordingly, we conclude the trial court did not erroneously sustain the State's objection.

[2] Defendant next argues the trial court erroneously overruled his objection to the prosecutor's prejudicial comment concerning his expert witness on firearms. Michael Mercer, a gunsmith and firearms manufacturer, was accepted as an expert in gunsmithing and firearms by the trial court and testified for the defense. During his direct testimony, he testified that if a person holds a Marlin .22 caliber rifle with his hand around the trigger mechanism, but outside the trigger guard, the person could fire the gun accidentally if one of his fingers touched the trigger. During redirect examination, the following occurred:

> Q: . . . [D]oes the size of [defendant's] hand make any difference in regards to your opinion of the possibility of another of his fingers causing this trigger to pull?
>
> A. Yes. When I saw the size of the defendant's hand I immediately thought—an individual with that amount of flesh and muscle on his hand—if your hand is manipulated, rolled around the trigger guard—
>
> MR. WALKER: Well, I object. He's giving an opinion far outside his field of expertise if he has any.
>
> THE COURT: Overruled.
>
> MS. TAYLOR: I object and ask to strike the commentary.
>
> THE COURT: Proceed. I've made a ruling. I overruled his objection. Now let's proceed.

Relying upon *State v. Sanderson*, 336 N.C. 1, 442 S.E.2d 33 (1994) and *State v. Rogers*, 355 N.C. 420, 562 S.E.2d 859 (2002), Defendant contends the words "if he has any" stated at the end of the prosecutor's objection was impermissible and prejudiced his defense to the extent that a new trial is warranted. We disagree.

In *State v. Rogers*, after detailing numerous improper cross-examination questions and comments during closing argument regarding a psychiatrist's testimony during a capital sentencing proceeding, our Supreme Court stated:

> In the case at bar, the prosecutor went beyond ascribing the basest of motives to defendant's expert. As detailed above, he also indulged in *ad hominem* attacks, disparaged the witness' area of expertise, and distorted the expert's testimony. We have observed that maligning the expert's profession rather than arguing the law, the evidence, and its inferences is not the proper function of closing argument. When vigor in unearthing bias becomes personal insult, all bounds of civility, if not of propriety, have been exceeded.

Rogers, 355 N.C. at 464, 562 S.E.2d at 886. Based upon its analysis of the record and transcript, our Supreme Court in *Rogers* was unable to conclude that defendant was not unfairly prejudiced by the prosecutor's misconduct and therefore ordered a new capital sentencing proceeding. *Id.* at 465, 886.

In the subject case which is non-capital, even assuming the prosecutor's statement was impermissible, we are unable to conclude Defendant was prejudiced by the statement. First, the prosecutor made one brief statement at the end of an objection that was overruled by the trial court unlike the numerous unfettered questions and comments in *Rogers*. Second, there is no indication the prosecutor made any impermissible statements during closing argument regarding the expert's testimony or asked any impermissible questions during his cross-examination of the expert. Finally, there was sufficient evidence presented by the State indicating Defendant's shooting of his wife was not an accident. Indeed, the State presented the eyewitness testimony of Bill Whiteside, which consisted of hearing Defendant's threat to his wife that he would shoot her if she smashed the car window and a description of how Defendant raised his arm, turned his hand over and fired the gun at his wife after she smashed the car window. Accordingly, we conclude Defendant was not prejudiced by the prosecutor's brief comment.

[3] In his third issue, Defendant argues the trial court erroneously failed to instruct the jurors that they could not take notes during closing arguments. We disagree.

> N.C. Gen. Stat. § 15A-1228 (2001) states:
>
> Except where the judge, on the judge's own motion or the motion of any party, directs otherwise, jurors may make notes and take them into the jury room during their deliberations.

At the beginning of the trial in this case, the trial court instructed the jurors that they could take notes without objection from either party. However, prior to closing argument, both parties indicated they would prefer the jurors not take notes because they wanted the jurors focused on the argument and exhibits. The trial court overruled the parties' request and allowed the jurors to take notes.

By referencing a prior version of N.C. Gen. Stat. § 15A-1228, Defendant argues that the trial court must instruct the jurors they cannot take notes upon the request of either party. However, under the current version of N.C. Gen. Stat. § 15A-1228, whether the jurors are allowed to take notes is within the trial court's discretion. *See State v. Rhodes*, 290 N.C. 16, 23, 224 S.E.2d 631, 635 (1976) (stating "the presiding judge is given large discretionary power as to the conduct of a trial. Generally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within his discretion"). As N.C. Gen. Stat. § 15A-1228 no longer contains the mandatory requirement that the trial court instruct jurors not to take notes upon the motion of either party, we conclude whether jurors are allowed to take notes is a discretionary decision made by the trial court. After careful review, we conclude the trial court did not abuse its discretion.

[4] In his final argument, Defendant contends he was afforded ineffective assistance of counsel when his attorney failed to have jury selection recorded. We disagree.

Prior to trial, Defendant moved for a change of venue because:

> The deceased, Jennifer Crawford, is a long time resident of McDowell County and has extensive family in the county which includes the following potential witnesses at trial: Wynn Jackson, her uncle and a well known business and political figure in McDowell County owning and operating a landscaping business with clients throughout McDowell County; Olin Jackson, her uncle; Guy Jackson, her uncle, her and the Defendant's landlord at the time of the incident, as well as landlord for all tenants on the road where the incident occurred; Alphonso Terrell Hardy and Demethria Garshelle Hardy, her cousin and his wife who live across the street from her and the Defendant; and approximately a dozen more witnesses that gave statements mainly based on rumor and hearsay. . . .

Defendant also referenced a local newspaper, television, and radio reports that contained incorrect and highly inflammatory statements relating to Defendant and his wife's relationship and he stated that because McDowell County was a small, close-knit community, it was likely the incorrect and inflammatory statements had been circulated as rumors throughout the community. The trial court denied Defendant's motion and jury selection was not recorded.

Defendant argues he was afforded ineffective assistance of counsel because the trial attorney's failure to have jury selection recorded rendered Defendant's attempt to have the denial of his change of venue motion reviewed on appeal, futile. As stated by our Supreme Court in *State v. Madric*, 328 N.C. 223, 228, 400 N.C. 31, 34 (1991):

> The best and most reliable evidence as to whether existing community prejudice will prevent a fair trial can be drawn from prospective jurors; responses to questions during the jury selection process. If an impartial jury actually cannot be selected, that fact should become evident at the *voir dire*.

Thus, Defendant argues the trial attorney's failure to request a recording of jury *voir dire* is akin to a complete denial of counsel, such as when a trial attorney fails to give notice of appeal. *See Roe v. Flores-Ortega*, 528 U.S. 470, 145 L. Ed. 2d 985 (2000). We disagree.

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington*, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

Even assuming counsel's performance was deficient, Defendant cannot establish he was deprived of a fair trial. First, there is no indication in the record that there were any difficulties in selecting a jury. Jury selection was completed before the lunch recess on the first day of a four-day trial. Moreover, "standing alone, evidence of pretrial publicity does not establish a reasonable likelihood that a fair trial

cannot be had. [Our Supreme Court] has consistently held that factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves warrant a change of venue." *State v. Soyars*, 332 N.C. 47, 53, 418 S.E.2d 480, 484 (1992). Having reviewed the news articles submitted by Defendant as exhibits to his motion for a change of venue, we conclude these articles were primarily factual in nature and did not contain any inflammatory comments. Indeed, the articles indicate the date and time of the incident; Mrs. Crawford was shot with a .22 caliber rifle; Defendant was charged with first-degree murder; the parties had been arguing and Mrs. Crawford hit the vehicle with a baseball bat; the police had on previous occasions had been to the Crawford home for noise complaints and allegations that tires had been shot out; and neither party had a criminal record.

Finally, "the burden remains on defendant to show that it was reasonably likely that the jurors would base their decisions on pretrial information rather than on the evidence presented at trial. Where, as here, a jury has been selected to try the defendant and the defendant has been tried, the defendant must prove the existence of an opinion in the mind of a *juror who heard his case* that will raise a presumption of partiality." *See Soyars*, 332 N.C. at 54, 418 S.E.2d at 484. Defendant has not argued any jurors were partial in this case. Accordingly, we conclude Defendant was not afforded ineffective assistance of counsel.

No error.

Judges McGEE and TYSON concur.

STATE OF NORTH CAROLINA v. ELLEN MONICA ROBERSON

No. COA03-397

(Filed 2 March 2004)

Search and Seizure— traffic stop—motion to suppress evidence—delayed reaction at traffic light

The trial court did not err in a driving while under the influence case by allowing defendant's motion to suppress evidence obtained during a traffic stop, because: (1) defendant's eight-to-ten-second delayed reaction to a traffic light did not give rise to a

reasonable articulable suspicion that criminal activity may be afoot; (2) there was nothing suspicious about defendant's driving and thus no indication that she may have been under the influence of alcohol; (3) the fact that the officer's observation of defendant gave rise to no more than an unparticularized suspicion or hunch cannot be rehabilitated by adding the general statistics advocated by the State on time, location, and special events from which a law enforcement officer would draw his inferences based on his training and experience; and (4) the State failed to raise at trial the issue of the community caretaking function carried out by law enforcement.

Appeal by State from order filed 2 October 2002 by Judge Mark E. Klass in Guilford County Superior Court. Heard in the Court of Appeals 29 January 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Isaac T. Avery, III and Assistant Attorney General Patricia A. Duffy, for the State.

Wyatt Early Harris Wheeler, LLP, by John Bryson, for defendant-appellee.

BRYANT, Judge.

The State of North Carolina appeals an order filed 2 October 2002 allowing a motion by Ellen Monica Roberson (defendant) to suppress evidence obtained during a traffic stop.

In its 2 October 2002 order, the trial court found as fact that:

1.

On October 19, 2001, Deputy J. S. Eaton of the Guilford County Sheriff's Department was on routine patrol in Greensboro, North Carolina.

2.

Deputy Eaton . . . is experienced in the field of DWI detection, having received training in that area and also having been involved in more than 100 DWI arrests himself.

3.

At approximately 4:30 a.m. on October 19, 2001, Deputy Eaton was traveling southbound on High Point Road in

Greensboro, North Carolina when he approached the intersection of Holden Road, whereupon he stopped for a red traffic light. Defendant's vehicle was also stopped at this light; however, it was on the opposite side of the intersection traveling northbound on High Point Road. There were no other vehicles in the area.

4.

When the light turned green, Deputy Eaton proceeded through the intersection[;] however, he noticed defendant's vehicle remained stationary. As he passed defendant's vehicle, he observed defendant and could see that she was looking straight ahead. Deputy Eaton was unable to recall whether he observed her hands. As he proceeded down High Point Road, he could see that . . . defendant's vehicle remained stationary at the light[;] however, he could no longer make any observations about her person.

5.

After traveling approximately one city block, defendant's vehicle had still not moved. Deputy Eaton executed a U-turn and began to approach defendant's vehicle from the rear. As he approached defendant's vehicle, she lawfully proceeded through the intersection.

6.

Deputy Eaton then activated his blue light and effected a traffic stop of defendant's vehicle. Defendant was subsequently arrested and charged with the offense of driving while impaired.

7.

Deputy Eaton estimated the total time that defendant's vehicle had delayed before proceeding through the intersection at Holden Road upon the signal changing to green at ten seconds; however, he acknowledged that in previous testimony he had estimated the time at eight to ten seconds.

8.

On October 19, 2001, the furniture market was in session in High Point. Deputy Eaton testified that High Point Road was a major thoroughfare connecting Greensboro to High Point, and there were many bars and restaurants located in the immediate area where he stopped defendant. Deputy Eaton also expressed

his belief that the bars and restaurants were required to stop serving alcohol at 2:00 a.m.

9.

Deputy Eaton testified he had previously made other arrests for driving while impaired during other furniture markets. His observations of defendant on this evening led him to the opinion defendant may have been either impaired or suffering some medical difficulty.

Based on these findings, the trial court concluded the totality of circumstances did not give rise to a reasonable, articulable suspicion of criminal wrongdoing justifying a stop or seizure of defendant's person or vehicle. As a result, the trial court suppressed evidence obtained during the traffic stop.

The dispositive issue is whether defendant's eight-to-ten-second delayed reaction at a traffic light gave rise to a reasonable, articulable suspicion that criminal activity may be afoot.

Generally, an appellate court's review of a trial court's order on a motion to suppress "is strictly limited to a determination of whether its findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." *State v. Allison*, 148 N.C. App. 702, 704, 559 S.E.2d 828, 829 (2002). Where, however, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984). In this case, the State did not assign error to the trial court's findings. Accordingly, we review the trial court's order to determine only whether the findings of fact support the legal conclusion that the circumstances surrounding Deputy Eaton's stop of defendant did not give rise to a reasonable, articulable suspicion of criminal wrongdoing.

> "[A] traffic stop based on an officer's [reasonable] *suspicion* that a traffic violation is being committed, but which can only be verified by stopping the vehicle, such as drunk driving or driving with a revoked license, is classified as an investigatory stop, also known as a *Terry* stop. Such an investigatory-type traffic stop is justified if the totality of circumstances affords an officer reasonable grounds to believe that criminal activity may be afoot."

State v. Wilson, 155 N.C. App. 89, 94-95, 574 S.E.2d 93, 98 (2002) (quoting *State v. Young*, 148 N.C. App. 462, 470-71, 559 S.E.2d 814, 820-21 (2002) (Greene, J., concurring) (distinguishing between traffic stop situations requiring the application of the probable cause versus the reasonable, articulable suspicion standard) (citations omitted)), *appeal dismissed and disc. review denied*, 356 N.C. 693, 579 S.E.2d 98 (2003). As our Supreme Court has held:

> "The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' "

State v. Steen, 352 N.C. 227, 238-39, 536 S.E.2d 1, 8 (2000) (citations omitted).

The issue of whether a delayed reaction at a traffic signal can give rise to a reasonable, articulable suspicion that criminal activity may be afoot is one of first impression in this State but has been addressed in other jurisdictions. In *State v. Emory*, 119 Idaho 661, 809 P.2d 522 (1991), the Idaho Court of Appeals considered a delayed reaction at a traffic light for the purpose of arousing reasonable, articulable suspicion justifying a stop. The defendant in that case, who was alone in his vehicle, stopped at a red traffic light at 2:40 a.m. on a Sunday morning. A law enforcement officer on patrol duty was also waiting at the light. When the traffic light turned green, the defendant's vehicle did not move for five to six seconds. Thereafter, the officer observed the defendant drive away in a straight line but close to parked vehicles. Based on "the slowness of [the defendant's] response to the traffic signal[,] the closeness of [the defendant's] vehicle to other vehicles parked on the street[,] . . . the fact that it was 2:40 a.m. on a Sunday morning," and the officer's training "that forty percent of all people who have a slow response at a traffic signal may be under the influence of alcohol," the defendant was stopped. *Id.* at 663, 809 P.2d at 524. Evidence was subsequently obtained resulting in his arrest for driving while intoxicated. *Id.* In support of its holding that these factors were insufficient to give rise to a reasonable, articulable suspicion that the defendant was driving while intoxicated, the Idaho Court of Appeals stated:

> The evidence adduced by the officer could just as easily be explained as conduct falling within the broad range of what can

> be described as normal driving behavior. "Of course, an officer may draw reasonable inferences from the facts in his possession, and those inferences may be informed by the officer's experience and law enforcement training." In this case, the officer relied upon his prior training which suggested that forty percent of all people who make a delayed response to a traffic signal are driving while under the influence of alcohol. However, such inferences must still be evaluated against the backdrop of everyday driving experience. It is self-evident that motorists often pause at a stop sign or traffic light when their attention is distracted or preoccupied by outside influences. Moreover, the fact that the stop occurred in the early morning hours does not enhance the suspicious nature of the observation.

Id. at 664, 809 P.2d at 525 (citation omitted).

Similarly, in *State v. Hjelmstad*, 535 N.W.2d 663 (Minn. App. 1995), the Minnesota Court of Appeals held that a four-second hesitation at a traffic light that had turned from red to green did not afford the responding law enforcement officer a reasonable basis to stop the defendant upon suspicion of driving while under the influence in the absence of any erratic driving. *Id.* at 666-67. In *State v. Cryan*, 320 N.J. Super. 325, 331-32, 727 A.2d 93, 97 (1999), the Appellate Division of the New Jersey Superior Court also rejected the State's contention that a five-second delay at a traffic light could give rise to a reasonable, articulable suspicion that an offense had been committed and noted that even the State in that case had conceded this point at the trial level.[1]

We agree with the rationale behind the above rulings. A motorist waiting at a traffic light can have her attention diverted for any number of reasons. Moreover, as there was no other vehicle behind defendant to redirect her attention to the green light through a quick honk of the horn, a time lapse of eight to ten seconds does not appear so unusual as to give rise to suspicion justifying a stop. When defendant did cross the intersection, there was nothing suspicious about her driving and thus no indication that she may have been under the influence of alcohol. Consequently, defendant's driving, including the delayed reaction at the traffic light, did not give rise to a reasonable, articulable suspicion that she was driving while under the influence. The fact that Officer Eaton's observation of defendant gave rise to no

1. At the suppression hearing in the case *sub judice*, defendant informed the trial court of the rulings in *Hjelmstad* and *Cryan*.

more than an " 'unparticularized suspicion or hunch,' " *Steen*, 352 N.C. at 239, 536 S.E.2d at 8 (citation omitted), cannot be rehabilitated by adding to the mix of considerations the general statistics advocated by the State on time, location, and special events from which a law enforcement officer would draw his inferences based on his training and experience,[2] *see, e.g.*, *Emory*, 119 Idaho at 664, 809 P.2d at 525 ("[statistical] inferences must still be evaluated against the backdrop of everyday driving experience . . . [and the time of day of the stop] does not enhance the suspicious nature of the observation [of the delay]"). Defendant was stopped at 4:30 a.m. in an area that hosted several bars and restaurants; however, by law, those establishments were prohibited from serving alcohol after 2:00 a.m. Moreover, the furniture market's presence in town did not serve to increase the level of suspicion related to defendant's delayed reaction at the traffic light. We thus hold that under the totality of the circumstances in this case, there was no reasonable, articulable suspicion that defendant was driving while under the influence of alcohol when she was stopped. As such, the trial court properly granted the motion to suppress.

The State further contends the stop was proper under the community caretaking function carried out by law enforcement. Because the State did not raise this issue at the trial level, it is not properly before this Court. *See State v. Washington*, 134 N.C. App. 479, 485, 518 S.E.2d 14, 17 (1999) ("[t]he appellate courts will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal"). We also note that this alternative argument was rejected in *Cryan*. *See Cryan*, 320 N.J. Super. at 331, 727 A.2d at 96.

Affirmed.

Judges TIMMONS-GOODSON and ELMORE concur.

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2. In its brief to this Court, the State also argues that statistics on slow responses to traffic signals, listed in a National Highway Traffic Safety Administration publication, lend objective credibility to Deputy Eaton's suspicion. As neither the publication nor testimony on it were introduced at the suppression hearing, we do not address this argument. *See also Emory*, 119 Idaho at 664, 809 P.2d at 525 (rejecting such statistical considerations based on the evidence in that case).

JANE DOE 1, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JOHN DOE 1, MINOR CHILD, JANE DOE 2, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JOHN DOE 2, MINOR CHILD, AND JOHN AND JANE DOE 3, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JOHN DOE 3, MINOR CHILD, PLAINTIFFS V. SWANNANOA VALLEY YOUTH DEVELOPMENT CENTER, A NORTH CAROLINA STATE AGENCY, NORTH CAROLINA DEPARTMENT OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, A NORTH CAROLINA STATE AGENCY, BRIAN HARKINS, PHIL LYTLE, LANI LANCASTER, KEN ARONTIN, T. CORDELL, J.B. SIMMONS AND MICHAEL SWEITZER, INDIVIDUALLY AND AS PUBLIC EMPLOYEES, DEFENDANTS

No. COA03-416

(Filed 2 March 2004)

1. **Appeal and Error— appealability—interlocutory order—discovery order—privilege—substantial right**

Although defendants' appeal from an order compelling discovery is an appeal from an interlocutory order, defendants' assertion of privilege, while not a privilege arising directly by statute, is nonetheless neither frivolous nor insubstantial and thus affects a substantial right which would be lost absent immediate review.

2. **Discovery— Tort Claims Act—juvenile records—social services records—law enforcement records—agency records**

The Industrial Commission did not err in a Tort Claims Act case by compelling discovery of records including juvenile records, social services records, law enforcement records, and records maintained by defendant agencies in a case filed by minor plaintiffs and their respective guardians arising out of physical mistreatment and sexual assault at the hands of both facility employees and fellow minors, because: (1) N.C.G.S. §§ 243-291 and 143-300, together with the precedent already set forth by the Court of Appeals in prior opinions, compel the conclusion that the Commission acted within its authority; and (2) the information sought by plaintiffs is expressly subject to disclosure by order of the court, and the Commission, as sole arbiter of tort claims against the State, may properly order such disclosure.

Appeal by defendants from order of the North Carolina Industrial Commission entered 9 December 2002. Heard in the Court of Appeals 27 January 2004.

Holtkamp Law Firm, by Lynne M. Holtkamp, and White & Stradley, by Nancy P. White, for plaintiff appellees.

Attorney General Roy Cooper, by Assistant Attorney General Donna B. Wojcik, for defendant appellants.

WYNN, Judge.

Defendants Swannanoa Valley Youth Development Center ("Swannanoa") and the North Carolina Department of Juvenile Justice and Delinquency Prevention, along with the named individual defendant employees (collectively hereafter "Defendants"), appeal from an order of the North Carolina Industrial Commission ("the Commission") compelling discovery in a case filed by minor Plaintiffs and their respective guardians. For the reasons set forth herein, we conclude the Commission was authorized to compel discovery and therefore affirm the order of the Commission.

On 7 June 2002, Plaintiffs filed a claim with the Commission against Defendants for damages arising under the North Carolina Tort Claims Act. Plaintiffs alleged that, while in the care of Defendants, they suffered physical mistreatment and sexual assault at the hands of both facility employees and fellow minors, resulting in serious emotional and physical injuries to Plaintiffs. Plaintiffs further alleged that although Defendants were aware of such abuse, they took no steps to prevent harm to Plaintiffs, and "undertook measures to destroy evidence and quash investigation of complaints of staff on child and child on child abuse."

As part of their requests for discovery, Plaintiffs asked Defendants to

> please identify the name[,] address and telephone number of each child at your facility, and their legal custodians, who were residents of Frye Cottage and/or any other dormitory at which [named employee] worked during the period of [his] employment.

Defendants objected to the request, contending that the information was confidential under the North Carolina General Statutes. Plaintiffs also requested Defendants to

> identify the name[,] address, social security number, employment status and telephone number of each individual who investigated any and all incidents of alleged sexual assault

> involving [named employee] including, but not limited to, any and all internal and external investigators, [Department of Social Services], the State Bureau of Investigation, and Department of Juvenile Justice Investigators.

Defendants objected to the request, stating that the information was protected and confidential. On the same grounds, Defendants denied other similar requests by Plaintiffs for information related to potential investigations conducted by the State Bureau of Investigation, the Department of Social Services, or the Department of Juvenile Justice Investigators.

On 26 September 2002, Plaintiffs filed a motion to compel Defendants' discovery responses. After conducting a hearing on the matter, a deputy commissioner of the Commission entered an order compelling Defendants to provide Plaintiffs with most of the requested information and documentation. The deputy commissioner also entered a protective order prohibiting disclosure of the requested information to anyone not associated with the case, and allowing the parties to submit any confidential documents under seal. Defendants appealed to the Commission, which dismissed the appeal as interlocutory and ordered Defendants to comply with the deputy commissioner's order compelling discovery. Defendants appealed the order of the Commission.

Defendants present two arguments on appeal, contending the Commission (1) lacked authority to order disclosure of the information sought by Plaintiffs in the instant case and (2) improperly dismissed Defendants' appeal.

[1] Preliminarily, we address Plaintiffs' motion before this Court to dismiss this appeal as interlocutory. Indeed, Defendants acknowledge that the instant appeal is from an interlocutory order, but contend that the order affects a substantial right which will be lost absent immediate review.

Generally, an order compelling discovery is not immediately appealable. *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). Where, however, "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right." *Id.* at 166, 522 S.E.2d at 581. Defendants concede that the information subject to discovery in the instant case is "not specifically

covered by statutory privilege." Defendants further admit that the information sought by Plaintiffs is subject to disclosure through court order. Defendants nevertheless assert that the Commission is not a "court" for purposes of ordering disclosure of confidential records, and it therefore lacked authority to issue an order compelling discovery of the information sought by Plaintiffs. Following the reasoning set forth in *Sharpe*, we determine that Defendants' assertion of privilege, while not a privilege arising directly by statute, is nonetheless neither frivolous nor insubstantial. We hold, therefore, that Defendants' appeal affects a substantial right which would be lost if not reviewed before the entry of final judgment and deny Plaintiffs' motion to dismiss the appeal. *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 24, 541 S.E.2d 782, 786 (holding that the appeal from an order compelling discovery affected the defendants' substantial rights, although the privilege asserted was a common law privilege and not a statutory one), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001).

[2] Defendants argue that juvenile records, social services records, law enforcement records, and records maintained by Swannanoa and the North Carolina Department of Juvenile Justice and Delinquency Prevention are confidential and cannot be disclosed "without a proper court order." In support of their argument, Defendants point to statutory provisions prohibiting the various agencies at issue from disclosing information unless by court order. *See, e.g.*, N.C. Gen. Stat. §§ 7B-3000(b) (juvenile records may be examined only by order of the court); 7B-2901(b) (records kept by the Department of Social Services may be examined by the juvenile or guardian ad litem; otherwise, only by order of the court); 132-1.4(a) (records of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information may be released by order of a court of competent jurisdiction). While acknowledging that the Commission constitutes a "court" for purposes of hearing and ruling upon tort claims brought against agencies of the State, Defendants nevertheless assert that the Commission is not a "court" for purposes of ordering disclosure of records. According to Defendants, the Commission must obtain an order from the district court to have these records released. We disagree.

Section 143-291 of the North Carolina General Statutes states, in pertinent part, that "[t]he North Carolina Industrial Commission is hereby constituted *a court* for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of

Transportation, and all other departments, institutions and agencies of the State." N.C. Gen. Stat. § 143-291(a) (2003) (emphasis supplied).[1] Thus, in North Carolina, our superior and district courts have no jurisdiction over a tort claim against the State, or its agencies, as the Commission is vested with exclusive original jurisdiction of such actions. *Guthrie v. State Ports Authority*, 307 N.C. 522, 539-41, 299 S.E.2d 618, 628 (1983); *Wood v. N.C. State Univ.*, 147 N.C. App. 336, 342, 556 S.E.2d 38, 42 (2001), *disc. review denied*, 355 N.C. 292, 561 S.E.2d 887 (2002).

Under the Tort Claims Act, the Commission and its deputies are empowered to

> issue subpoenas, administer oaths, conduct hearings, take evidence, enter orders, opinions, and awards based thereon, punish for contempt, and issue writs of habeas corpus ad testificandum pursuant to G.S. 97-101.1. The Industrial Commission is authorized to appoint deputies and clerical assistants to carry out the purpose and intent of this Article, and such deputy or deputies are hereby vested with the same power and authority to hear and determine tort claims against State departments, institutions, and agencies as is by this Article vested in the members of the Industrial Commission. Such deputy or deputies shall also have and are hereby vested with the same power and authority to hear and determine cases arising under the Workers' Compensation Act when assigned to do so by the Industrial Commission. The Commission may order parties to participate in mediation, under rules substantially similar to those approved by the Supreme Court for use in the Superior Court division, except the Commission shall determine the manner in which payment of the costs of the mediated settlement conference is assessed.

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1. Section 143-291 further provides:

> The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, 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. If the Commission finds that there was negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority that was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages that the claimant is entitled to be paid, including medical and other expenses, and by appropriate order direct the payment of damages as provided in subsection (a1) of this section . . . .

N.C. Gen. Stat. § 143-296 (2003). Further, the Commission is authorized to "adopt such rules and regulations as may, in the discretion of the Commission, be necessary to carry out the purpose and intent of [the Tort Claims Act]." N.C. Gen. Stat. § 143-300 (2003). Moreover, the North Carolina Rules of Civil Procedure apply in tort claims before the Commission, to the extent that such rules are not inconsistent with the Tort Claims Act, in which case the Tort Claims Act controls. N.C. Gen. Stat. § 143-300; 4 NCAC 10B.0201(a). Pursuant to Rule 37 of the North Carolina Rules of Civil Procedure, the Commission may enter an order compelling discovery and may impose sanctions on a party refusing to comply with such order. N.C. Gen. Stat. § 1A-1, Rule 37(a)-(b) (2003); *Williams v. N.C. Dept. of Correction*, 120 N.C. App. 356, 363, 462 S.E.2d 545, 549 (1995) (holding that the Commission abused its discretion by failing to impose sanctions pursuant to Rule 37 where the defendant failed to comply with the deputy commissioner's order to compel discovery).

Defendants' argument that the Commission is not a "court" for purposes of discovery is similar to one rejected by this Court in *Karp v. University of North Carolina*, 88 N.C. App. 282, 362 S.E.2d 825 (1987), *affirmed per curiam*, 323 N.C. 473, 373 S.E.2d 430 (1988). The issue in *Karp* was whether the Commission had authority to award attorneys' fees pursuant to section 6-21.1 of the North Carolina General Statutes for actions brought under the Tort Claims Act. Section 6-21.1 provided in pertinent part:

> "In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the Court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, . . . the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant. . . ."

Id. at 283, 362 S.E.2d at 826 (quoting N.C. Gen. Stat. § 6-21.1 (1986)). Appealing from the Commission's grant of attorneys' fees in favor of the plaintiff, the defendant in *Karp* argued that the Commission was not a "court," nor was a deputy commissioner a "presiding judge" within the meaning of section 6-21.1. The *Karp* Court, while recognizing that the Commission is a "court of limited jurisdiction having only those powers conferred upon it by statute[,]" concluded that the

Commission had the statutory authority to award attorneys' fees. *Id.* at 284, 362 S.E.2d at 826. The Court held that section 143-291 of the General Statutes, which designates the Commission a court for the purposes of hearing tort claims, combined with section 143-291.1, which authorizes the Commission to tax the costs of litigation, permitted the Commission to award attorneys' fees. *Id.*

Similarly, we conclude the Commission acted within its authority in issuing its order compelling discovery. Sections 143-291 and 143-300 of the North Carolina General Statutes, together with the precedent set forth by this Court in *Williams* and *Karp*, compel this conclusion. The information sought by Plaintiffs is expressly subject to disclosure by order of the court, and the Commission, as sole arbiter of tort claims against the State, may properly order such disclosure.[2] Given our conclusion, we need not address Defendants' remaining assignment of error. The order of the Commission is hereby

Affirmed.

Judges McGEE and TYSON concur.

JACQUELINE SHUGGERS GREENE, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF JANE TURNER MEDLIN, DECEASED, PETITIONER v. JAMES W. GARNER, AND WIFE, PEGGY L. GARNER; BURLA M. GARNER; JOHN L. KNOX, ACTING AS TRUSTEE; AND SOUTHERN BANK AND TRUST COMPANY, RESPONDENTS

No. COA03-196

(Filed 2 March 2004)

1. Highways and Streets— right to cartway—timbering—determination by superior court

The superior court did not err by determining the issue of whether there was a right to a cartway across respondents' land so that heavy equipment used for harvesting and maintaining timber on petitioner's property could be transported to the property,

2. We note that the deputy commissioner, in issuing the order compelling discovery, simultaneously issued a protective order prohibiting disclosure of the requested information to any person not associated with the case. Defendants' arguments, dire predictions, and fears regarding "public dissemination" of the documents at issue are therefore allayed.

because: (1) both sides appealed the decision granting the cartway before the jury of view proposed a location for the cartway, thus making the adjudication a final judgment where both sides had the right to appeal the clerk's decision to the superior court immediately; and (2) the parties did not have to wait for the clerk to confirm, modify, or reject the location since the jury of view had not proposed where the cartway would be.

2. Highways and Streets— right to cartway—timbering—summary judgment

The trial court did not err by granting partial summary judgment in an action that allowed the establishment of a cartway under N.C.G.S. § 136-69 across respondents' land so that heavy equipment used for harvesting and maintaining timber on petitioner's property could be transported to the property, because: (1) the pertinent land will be used for the cutting and removing of any standing timber; (2) lack of access to a public road was uncontested, as was the contention that access to petitioner's land other than over respondents' property was not feasible; and (3) petitioner has demonstrated that the failure to grant a cartway would lead to undesirable results that would deprive petitioner of a substantial economic benefit, and the land would not be used to its greatest potential.

3. Highways and Streets— right to cartway—timbering—permanency

The trial court did not err by using its authority under N.C.G.S. § 136-70 to make a cartway permanent across respondents' land so that heavy equipment used for harvesting and maintaining timber on petitioner's property could be transported to the property, because: (1) petitioner requested that the cartway be permanent; and (2) petitioner presented evidence that the cartway had to be permanent so that immediate access was always available to inspect the timber for infestation and storm damage.

Appeal by respondents from an order granting partial summary judgment entered 12 September 2002 by Judge Dwight L. Cranford in Halifax County Superior Court. Heard in the Court of Appeals 18 November 2003.

Poyner & Spruill, LLP, by J. Nicholas Ellis, for petitioner appellee.

William T. Skinner, IV, for respondent appellants.

McCULLOUGH, Judge.

James W. Garner, Peggy L. Garner, and Burla M. Garner (respondents) appeal the trial court's order granting partial summary judgment. The underlying facts are as follows: When this action began, Jane Turner Medlin (Medlin) owned a tract of land in Weldon Township, North Carolina. The property still borders Little Quankey Creek and is divided by Interstate 95. Although Interstate 95 is a public highway, it does not provide public access to the property. The North Carolina Department of Transportation informed Medlin that property which abuts an interstate highway but does not have access to that highway through a formal interchange will not be allowed to have temporary access for the removal of timber.

Medlin's land was to be used for forestry, but there was not a public road or other access to get to and from the property. Respondents own real property that is west of and adjacent to Medlin's property. Respondents' property also borders Little Quankey Creek and property owned by a third party. Medlin contended that she needed a cartway across respondents' land so that heavy equipment used for harvesting and maintaining the timber could be transported to the property.

A District Conservationist for the United States Department of Agriculture, J. Wayne Short, has inspected Medlin's property and determined that building a bridge across the creek is unfeasible. Moreover, the wetlands which are located between Medlin's property and the third party's property makes the area unsuitable for the construction of an access road.

A registered forester, James F. Watson, is familiar with the property and has assisted Medlin in managing the tract for years. Modern forestry practice indicates that access to a timberland should be by a permanent roadway of 30 feet in width to allow equipment to pass through. The cycle in a pine timber tract includes harvesting, reforestation, timber stand improvement, and interim harvesting that lasts for 30 to 35 years. Each of these steps for managing timber requires a road large enough to allow for entry of large tractor trailers and cutting and hauling equipment. According to the North Carolina Forest

Service, immediate access to the timber tract is always necessary for inspection of the timber for infestation and storm damage. Thus, access to forested tracts should be available at all times and should be permanent.

On 24 August 2000, Medlin sought to establish a cartway over respondents' land. After the petition was amended to request a permanent cartway, the clerk conducted a hearing. On 25 March 2002, the clerk entered an order granting a cartway of no less than 18 feet in width across respondents' land for a period of five years. Both sides appealed this decision and sought a jury trial *de novo* under N.C. Gen. Stat. § 136-68. Medlin appealed because she requested a permanent cartway, not a cartway for five years. Respondents appealed because they believed that Medlin was not entitled to any cartway, temporary or permanent.

On 14 June 2002, Medlin died, and Jacqueline Shuggers Greene (petitioner) filed a motion to substitute party. The trial court granted this motion because Greene was Medlin's sole heir and the owner of the real property in question. On 27 August 2002, petitioner filed a motion for partial summary judgment and attached the affidavits of three potential witnesses. Respondents did not present any evidence to contest these affidavits. After reviewing the pleadings and affidavits, the trial court granted petitioner's motion for partial summary judgment because there was no genuine issue as to any material fact and petitioner was entitled to the establishment of a cartway as a matter of law. The trial court also remanded this proceeding to the clerk for the appointment of commissioners to establish the location of the cartway and to assess damages.

Respondents appeal. On appeal, respondents contend that the trial court erred by granting the motion for summary judgment because this deprived respondents of their right to a jury trial *de novo*. We disagree and affirm the decision of the trial court.

Under N.C. Gen. Stat. § 136-68 (2003),

> [t]he establishment . . . of any cartway . . . over the lands of another, shall be determined by a special proceeding instituted before the clerk of the superior court in the county where the property affected is situated. . . . From any final order or judgment in said special proceeding, any interested party may appeal to the superior court for a jury trial de novo on all issues including the right to relief, the location of a cartway, tramway or rail-

way, and the assessment of damages. The procedure established under Chapter 40A, entitled "Eminent Domain," shall be followed in the conduct of such special proceeding insofar as the same is applicable and in harmony with the provisions of this section.

Our Supreme Court has directed that "An order of a clerk of superior court adjudging the right to a cartway is a final judgment and an appeal lies therefrom." *Candler v. Sluder*, 259 N.C. 62, 66, 130 S.E.2d 1, 4 (1963). It further found that "[a] defendant is not required to wait until a roadway is laid off before availing himself of the right to appeal . . . ." *Id.* On appeal, the issue "is the same as before the clerk—whether petitioners are entitled to a cartway over some lands." *Id.* at 67, 130 S.E.2d at 5. The Court should not decide the actual location of the cartway because these are matters to be decided by the jury of view. *Id.*

There is one limitation to the right to immediately appeal an order granting the right to a cartway. Where the jury of view has been appointed and has filed a written report of its findings, a party must wait until the clerk enters an order confirming, modifying, or rejecting the jury of view's proposed location of the cartway before appealing. *Jones v. Winckelmann*, 134 N.C. App. 143, 144-46, 516 S.E.2d 876, 877-78 (1999).

[1] Although the parties did not raise this issue, we conclude that the superior court was allowed to consider whether there was a right to a cartway. On 25 March 2002, the clerk determined that petitioner was entitled to a cartway for five years. In her order, the clerk stated that the jury of view "will be appointed by this Court to lay off a cartway." However, both sides appealed the decision granting the cartway *before* the jury of view proposed a location for the cartway. Based on the decision in *Candler*, this adjudication is deemed to be a final judgment. Therefore, both sides had the right to appeal the clerk's decision to the superior court immediately. Furthermore, since the jury of view had not proposed where the cartway would be, the parties did not have to wait for the clerk to confirm, modify, or reject the location.

[2] Having determined that this matter was properly before the superior court, we must consider whether summary judgment was available. Under N.C. Gen. Stat. § 1-393 (2003), the Rules of Civil Procedure are applicable to special proceedings except where otherwise provided. The establishment of a cartway is a special proceeding

under N.C. Gen. Stat. § 136-68. Thus, summary judgment would be available unless the statute specifically precluded it.

Under the statute, once the clerk has issued a final order or judgment, any interested party may appeal to the superior court for a jury trial *de novo*. N.C. Gen. Stat. § 136-68. The right to appeal to the superior court is expressly stated. However, whether the issue will actually reach the jury is another matter entirely. At this stage of the proceeding, the superior court is conducting a civil trial. We conclude that like any other civil trial, the Rules of Civil Procedure, including motions for summary judgment, are available.

The standard for summary judgment is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 393-94, 499 S.E.2d 772, 775 (1998). Furthermore, summary judgment "is not limited in its application to any particular type or types of action, and the procedures are available to both plaintiff and defendant." *McNair v. Boyette*, 282 N.C. 230, 234-35, 192 S.E.2d 457, 460 (1972). Under Rule 56(e) of the Rules of Civil Procedure,

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2003).

N.C. Gen. Stat. § 136-69 (2001) addresses when an individual is entitled to a cartway. In particular, three elements must be satisfied:

> 1) the land in question is used for one of the purposes enumerated in the statute; 2) the land is without adequate access to a public road or other adequate means of transportation affording necessary and proper ingress and egress; and, 3) the granting of a private way over the lands of *other persons* is necessary, reasonable and just.

Davis v. Forsyth County, 117 N.C. App. 725, 727, 453 S.E.2d 231, 232, *disc. review denied*, 340 N.C. 110, 456 S.E.2d 313 (1995).

In this case, the land in question will be used for one of the purposes enumerated in the statute: "the cutting and removing of any standing timber." N.C. Gen. Stat. § 136-69. The affidavits of James Watson and J. Wayne Short verify that the land would be used for this purpose. More importantly, since respondents do not contest this claim, we conclude that the first element has been established.

To meet the second element, an individual must show that there is not access to a public road or that another form of transportation would provide adequate ingress and egress. The lack of access to a public road was uncontested. Short, stated:

> There are no established or existing roads or paths exiting the Medlin Estate lands directly onto the Raymond Garner property between Interstate Highway No. 95 and the Jimmy Garner property because of the low and wet nature of that particular land.

Similarly, a district engineer for the North Carolina Department of Transportation, B.A. Mills, indicated that an application for a formal interchange which would have the sole purpose of benefitting a single tract of land "would not be approved in any case by the North Carolina Department of Transportation."

The petitioner also presented evidence suggesting that there was no other form of transportation that would provide adequate ingress and egress. Short's affidavit established that access to the petitioner's land other than over respondents' property was not feasible because of the nature of the land, the existence of wetlands, and the presence of a creek. Once again, respondents did not present any evidence to refute this claim. Therefore, the second element was established.

The third element is whether granting the cartway is necessary, reasonable, and just. Petitioner established that the land is being used for timbering, a purpose enumerated in the statute. Similarly, petitioner has shown that the only way to access the property is over respondents' land. Finally, petitioner has demonstrated that the failure to grant a cartway would lead to undesirable results because petitioner would be deprived of a substantial economic benefit, and the land would not be used to its greatest potential. We believe that if the respondents produced some evidence, there could be a triable issue on this element. However, once again, respondents failed to produce any evidence. Thus, the third element was satisfied.

[3] The last issue for consideration is whether the cartway could be made permanent. N.C. Gen. Stat. § 136-70 (2003) grants this authority

by providing that a cartway established for the removal of timber "shall automatically terminate at the end of a period of five years, unless a greater time is set forth in the petition and the judgment establishing the same." Here, the petitioner requested that the cartway be permanent. She also presented evidence that the cartway had to be permanent so that immediate access was always available to inspect the timber for infestation and storm damage. We conclude that the trial court acted appropriately in making the cartway permanent.

Because the petitioner has established all elements of the claim and respondents have presented nothing to contradict this evidence, there is no genuine issue as to any material fact and the petitioner is entitled to judgment as a matter of law. Therefore, we affirm the trial court's decision granting summary judgment. It is further ordered that this proceeding be remanded to the Clerk of Superior Court for Halifax County for the appointment of the jury of view which will lay out the cartway and assess damages.

Affirmed in part, remanded in part.

Judges WYNN and TIMMONS-GOODSON concur.

ALICE CORBETT STAFFORD, ET UX, PLAINTIFFS v. COUNTY OF BLADEN, DEFENDANT

No. COA03-405

(Filed 2 March 2004)

Collateral Estoppel and Res Judicata— collection of landfill fees—dismissal of prior action upon payment under protest

Summary judgment was properly granted for defendant county based on res judicata where the county had brought a prior suit against the Staffords for collection of landfill fees; the Staffords answered asserting constitutional issues and then paid the fees plus interest, but noted on the check that they were paying under protest pursuant to N.C.G.S. § 105-381; the County voluntarily dismissed the action with prejudice; and the Staffords then brought this action to recover the fees. The claims raised in the original action are the claims raised in this action and their

claims were adjudicated on the merits when they paid the full amount due and forced the county to dismiss instead of litigating and proving their defense of unconstitutionality. There was no right to seek a refund because the protest statute, N.C.G.S. § 105-381, applies to taxes and the Staffords concede that this is a fee.

Judge HUDSON concurring in the result.

Appeal by plaintiffs from an order entered 9 January 2003 by Judge D. Jack Hooks, Jr., in Bladen County Superior Court. Heard in the Court of Appeals 15 January 2004.

A. Michelle FormyDuval, for plaintiffs-appellants.

W. Leslie Johnson, Jr. and J. Gates Harris, for defendant-appellee.

TYSON, Judge.

Alice Corbett Stafford and William Stafford, Jr. ("the Staffords") appeal from an order granting Bladen County's ("the County") motion for summary judgment. We affirm.

I. Background

The Staffords owned and operated the "White Lake Motel and Campground" between 1992 and 1997. During these years, the County assessed landfill use fees ("fees") against the Staffords in the total amount of $11,615.00. The fees were assessed against the Staffords through the authority of Bladen County Ordinance 23. The Staffords refused to pay these fees, contending they were unfair.

In September, 1998, the County brought suit against the Staffords for failure to pay the fees and placed a lien on their property pursuant to N.C. Gen. Stat. §§ 105-355, 105-356, 105-360, and 105-369. The Staffords filed an answer asserting that the fees violated the due process and equal protection clauses of the United States and the North Carolina Constitutions. On 29 December 1999, the Staffords paid the fees plus interest by check in the amount of $24,384.07. The Staffords noted on the check that they were paying "under protest" per N.C. Gen. Stat. § 105-381. Upon payment, the County voluntarily dismissed its lawsuit with prejudice.

The Staffords subsequently requested a refund of the fees by letter dated 3 March 2000. The County denied a refund by letter dated 5

April 2000. The Staffords brought suit on 6 June 2001 to recover the fees paid under protest. The County moved to dismiss and for summary judgment, arguing that the Staffords were barred by *res judicata* and collateral estoppel and that the fees were constitutional. The trial court granted the County's motion for summary judgment. The Staffords appeal.

II. Issue

The sole issue before this Court is whether the trial court erred in granting the County's motion for summary judgment on the basis that the Staffords' suit was barred by *res judicata*.

III. Standard of Review

When reviewing a lower court's grant of summary judgment, our standard of review is *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999); *see* N.C. Gen. Stat. § 1A-1, Rule 56 (2003). The evidence is viewed in the light most favorable to the non-moving party. *Stack*, 132 N.C. App. at 809, 513 S.E.2d at 574. Summary judgment is proper when the pleadings, together with depositions, interrogatories, admissions on file, and supporting affidavits show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664, *disc. rev. denied*, 353 N.C. 262, 546 S.E.2d 401 (2000).

IV. *Res Judicata*

The Staffords contend that the trial court erred in granting the County's motion for summary judgment on the basis of *res judicata*. We disagree.

In *Caswell Realty Assoc. v. Andrews Co.*, this Court set out the principles pertaining to *res judicata* and collateral estoppel. 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998).

> In order to successfully assert the doctrine of res judicata, a defendant must prove the following essential elements: (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits. Collateral estoppel, on the other hand, applies where the second action between the same parties is upon a different claim or demand,

> [and] the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. A dismissal with prejudice is an adjudication on the merits and has res judicata implications . . . Strict identity of issues . . . is not absolutely required and the doctrine of res judicata has been accordingly expanded to apply to those issues which could have been raised in the prior action.

Id. at 720, 496 S.E.2d at 610 (internal citations omitted). "A final judgment, rendered on the merits by a court of competent jurisdiction, is conclusive as to the issues raised therein with respect to the parties and those in privity with them and constitutes a bar to all subsequent actions involving the same issues and parties." *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 711-12, 306 S.E.2d 513, 515 (1983).

Rule 41(a)(1) of the North Carolina Rules of Civil Procedure provides that a plaintiff may voluntarily dismiss his action, without permission of the court, by filing a notice of dismissal at any time before resting his case. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2003); *see also Riviere v. Riviere*, 134 N.C. App. 302, 306, 517 S.E.2d 673, 676 (1999). "A dismissal taken with prejudice indicates a disposition on the merits which precludes subsequent litigation to the same extent as if the action had been prosecuted to a final adjudication." *Riviere*, 134 N.C. App. at 306, 517 S.E.2d at 676 (citing *Johnson v. Bollinger*, 86 N.C. App. 1, 8, 356 S.E.2d 378, 383 (1987)); *see also* N.C. Gen. Stat. § 1A-1, Rule 41(b) (2003). "Thus, it is well-settled in this state that a voluntary dismissal with prejudice is a final judgment on the merits," implicating *res judicata*. *Riviere*, 134 N.C. App. at 306, 517 S.E.2d at 676 (citations omitted).

Here, the Staffords' claims raised in the original action are the exact claims raised in this action. In the prior action, the Staffords refused to pay the fees and asserted the unconstitutionality of the ordinance from which the fees were derived as a defense in their answer. In the subsequent lawsuit brought by the Staffords, they again asserted the unconstitutionality of the ordinance and the fees as a defense. "[A] judgment is final, not only as to matters actually determined, but as to every other matter which the parties might litigate in the cause, and which might have been decided." *Walton v. Meir*, 10 N.C. App. 598, 604, 179 S.E.2d 834, 838 (1971).

> [T]his principle simply means that a defendant must assert any defense that he has available, and that he will not be permitted in a later action to assert as an affirmative claim, a defense, which if asserted and proved as a defense in the former action, would have barred the judgment entered in plaintiffs' favor.

Id.

When the Staffords filed their answer and asserted their defense of the unconstitutionality of the ordinance, the issues of their claims and the County's claims became joined. *Id.* The Staffords, instead of litigating and proving their defense of the ordinance's unconstitutionality, chose to pay the full amount of the fees plus interest to the County, while noting on the check that they were paying in protest pursuant to N.C. Gen. Stat. § 105-381. By failing to litigate their unconstitutionality defense in the former action and paying the disputed amounts, the Staffords satisfied the County's claims and *required* the County to dismiss their action with prejudice. The Staffords' unconstitutionality defense and the County's claims were adjudicated on the merits, and the Staffords are barred from now bringing this defense as an affirmative claim against the County. *Id.*; *see Caswell Realty Assoc.*, 128 N.C. App. at 720, 496 S.E.2d at 610. As the parties and claims are identical and the dismissal with prejudice based on the Staffords' payment is a final judgment on the merits, the Staffords' claim is barred by *res judicata*. *Caswell Realty Assoc.*, 128 N.C. App. at 720, 496 S.E.2d at 610.

V. Payment Under Protest

The Staffords contend, however, that since they paid the fees "under protest" pursuant to N.C. Gen. Stat. § 105-381, their claims cannot be barred by *res judicata* as their right to sue under this statute did not occur until the payment of the fees was actually made. They argue the present claim under N.C. Gen. Stat. § 105-381 did not accrue until 5 April 2000, when the County denied their request for a refund of monies paid.

If this statute applied to the facts at bar, we would agree. The statute, however, does not apply. N.C. Gen. Stat. § 105-381 (2003), in part, provides:

> (a) Statement of Defense.—Any taxpayer asserting a valid defense to the enforcement of the collection of a *tax* assessed upon his property shall proceed as hereinafter provided. (1) For the purpose of this subsection, a valid defense shall include the

> following: a. A tax imposed through clerical error; b. An illegal tax; c. A tax levied for an illegal purpose.
>
> . . . .
>
> (c) Suit for Recovery of *Property Taxes*.— . . . (2) Request for Refund.—If within 90 days after receiving a *taxpayer's* request for refund under (a) above, the governing body has . . . notified the *taxpayer* that no refund will be made . . . the *taxpayer* may bring a civil action against the *taxing* unit for the amount claimed.

(emphasis supplied).

In *Barnhill Sanitation Service v. Gaston County*, this Court explained the difference between taxes and fees and specifically addressed the question of landfill fees. 87 N.C. App. 532, 541-42, 362 S.E.2d 161, 167 (1987), *disc. rev. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988). We held:

> [a] tax within the meaning of the constitutional prohibition against nonuniformity of taxation is a charge levied and collected as a contribution to the maintenance of the general government, and it is imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue. However, the landfill fees, like sewer service charges, are neither taxes nor assessments, but are tolls or rents for benefits received by the use of the [landfill]. . . . The record reveals that the Board of Commissioners adopted landfill fees as opposed to increased property tax as the most equitable source of revenue to fund sanitary landfill costs. It is clear to this Court that [the County] did not levy a tax, as it had the power to do, but acted pursuant to its authority under G.S. sec. 153A-292 to set reasonable fees for the use of its available landfills.

Id. (internal citations omitted). We found it unnecessary to determine whether a refund of fees paid pursuant to an ordinance may be obtained because the landfill toll was a fee and not a tax. *Id.* at 542, 362 S.E.2d at 168.

Here, the Staffords were charged *landfill use fees* not a tax. N.C. Gen. Stat. § 105-381 applies only to taxes imposed, not fees. *Id.* The Staffords concede that the fees are not taxes. Since the Staffords were charged fees rather than a tax, no right to seek a refund or to protest the fees arises pursuant to this statute. As the statute

does not reach fees paid and the Staffords asserted defenses in the dismissed action, we do not address the constitutionality of Bladen County Ordinance 23.

VI. Conclusion

The Staffords failed to show that the trial court erred in granting the County's motion for summary judgment on the basis of *res judicata*. N.C. Gen. Stat. § 105-381 does not apply to the facts at bar. The judgment of the trial court is affirmed.

Affirmed.

Judge STEELMAN concurs.

Judge HUDSON concurs in the result only by separate opinion.

HUDSON, J., concurring in result.

Although I concur in the result here, I am not persuaded that *res judicata* applies to this scenario. None of the cases cited involve a case where the defendant in a civil case was barred by *res judicata* even though (1) he had no opportunity to be heard on his defense in an earlier case because (2) the plaintiff took a voluntary dismissal with prejudice, resulting in an adjudication on the merits against—rather than in favor of—the plaintiff. I would address and uphold the constitutionality of the fee.

TIMOTHY LEE DREYER, PLAINTIFF v. RLENA MURPHY SMITH AND JOHNNY HARDY SMITH, DEFENDANTS

No. COA03-286

(Filed 2 March 2004)

1. Appeal and Error— preservation of issues—failure to assign error—findings of fact

Defendant mother's failure to properly assign error in a child custody modification case to any specific findings of fact as required by N.C. R. App. P. 10(a) means those findings are binding on the Court of Appeals.

2. Child Support, Custody, and Visitation— modification— substantial change of circumstances—best interests of child

The trial court did not abuse its discretion by modifying a child custody order to provide that the minor children would reside primarily with plaintiff father, because: (1) there was a material and substantial change of circumstances of the parties including the negative effect on the children of defendant mother's remarriage by the children's exposure to alcohol abuse, violent behavior, illegal drugs, and a risk of physical harm; and (2) it was in the best interests of the children.

3. Appeal and Error— preservation of issues—child custody modification—in-chambers testimony—failure to request recordation

Although defendant mother contends the trial court erred in a child custody modification case by holding unrecorded in camera interviews of the children, this procedure of interviewing the children in-chambers was specifically requested by defendant's attorney and defendant did not request at trial that the interviews be recorded.

Appeal by defendant Rlena Murphy Smith from order entered 23 July 2002 by Judge Richard W. Stone in Rockingham County District Court. Heard in the Court of Appeals 3 December 2003.

No brief filed on behalf of plaintiff-appellee.

Eunice Jones O'Beng, for defendant-appellant.

GEER, Judge.

Defendant mother, Rlena Murphy Smith, appeals from the trial court's order modifying a prior custody order to provide that the minor children would reside primarily with their father, plaintiff Timothy Lee Dreyer. Because Ms. Smith has not assigned error to any of the trial court's findings of fact and because the trial court's conclusions of law were supported by those findings of fact, we affirm.

[1] Under N.C.R. App. P. 10(a), this Court's review is limited to those findings of fact and conclusions of law properly assigned as error. *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991) ("the scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal"). "Where no excep-

tion 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." *Id.* at 97, 408 S.E.2d at 731.

Ms. Smith did not specifically assign error to any of the trial court's findings of fact. Her sole assignment of error on this appeal states:

> The trial court committed reversible error when it found that the Plaintiff had proffered sufficient evidence to show that there had been a material and substantial change of circumstances of the parties since entry of the last order that will likely have an [e]ffect on the children and a modification of the prior order would be of material benefit to the children and in the children's best interest.

"A single assignment [of error] generally challenging the sufficiency of the evidence to support numerous findings of fact, as here, is broadside and ineffective" under N.C.R. App. P. 10. *Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 266, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). Because Ms. Smith has not properly assigned error to any specific findings of fact, those findings are binding on this Court.

Mr. Dreyer, appearing *pro se*, filed a complaint in Rockingham County District Court on 19 October 2001, asking to have primary custody of his children transferred to him. Ms. Smith and her husband, Johnny Hardy Smith, filed an answer on 16 November 2001, denying the material allegations of the complaint.

After a bench trial, the trial court found the following facts. The parties, who were married in 1989 and separated in 1994, are the parents of two children: Andrew (age 13) and China (age 9). In 1996, the parties entered into a consent order that provided for joint custody of the children, with the children to reside with Ms. Smith 225 days per year and with Mr. Dreyer 140 days per year. Since the entry of that order, Ms. Smith has remarried and now lives with her new husband and his two sons, who are age 18 and age 16.

With respect to that marriage, the trial court found:

> 5. . . . . The new husband drinks regularly. The children are exposed to drunken outbursts including cussing and punching walls. The children are allowed to ride in the car with her new husband while he is drinking. The youngest child, China, is afraid

of the mother's new husband and would feel safer living with her father.

6. The boys' room is in the basement of the house and has to be accessed by going outside. Andrew shares that room with his 16 year old step brother who is addicted to drugs and is able to go in and out of the room without the parents' knowledge. China is scared of her step brother.

The court also noted that both children "are doing miserable [sic] in school." The court ultimately found that Mr. Dreyer would be able to provide a more stable environment with fewer risks to the children's future development.

Based on its findings of fact, the court concluded that "there has been a material and substantial change of circumstances of the parties since entry of the last order that will likely have an [e]ffect on the children and a modification of the prior order would be of material benefit to the children and in the children's best interests[.]" Accordingly, the court modified the prior custody order, maintaining joint custody but providing that the children would reside primarily with Mr. Dreyer. Ms. Smith appeals from that order.

[2] The only question properly before this Court is whether the trial court's conclusions of law are supported by the findings of fact. A court order for custody of a minor child "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party . . . ." N.C. Gen. Stat. § 50-13.7(a) (2003). A trial court may not alter an existing custody order unless the court has determined "(1) that there has been a substantial change in circumstances affecting the welfare of the child; and (2) a change in custody is in the best interest of the child." *Evans v. Evans*, 138 N.C. App. 135, 139, 530 S.E.2d 576, 578-79 (2000) (citations omitted). The court, however, "need not wait for any adverse effects on the child to manifest themselves before the court can alter custody." *Id.* at 140, 530 S.E.2d at 579.

This Court held in *Evans* that "remarriage, in and of itself, is not a sufficient change of circumstance affecting the welfare of the child to justify modification of the child custody order without a finding of fact indicating the effect of the remarriage on the child." *Id. See also Hassell v. Means*, 42 N.C. App. 524, 531, 257 S.E.2d 123, 127 ("Remarriage in and of itself is not a sufficient change of circumstance to justify modification of a child custody order."), *disc. review*

denied, 298 N.C. 568, 261 S.E.2d 122 (1979). Here, however, the trial court made ample findings of fact describing the negative effect of Ms. Smith's remarriage on the children. We hold that these findings—setting forth the children's exposure to alcohol abuse, violent behavior, illegal drugs, and a risk of physical harm—support the trial court's conclusion that there has been a substantial change of circumstances affecting the welfare of the children.

Further, based on these findings, we hold that the trial court did not abuse its discretion in concluding that a change in custody was in the best interests of the children. *Metz v. Metz*, 138 N.C. App. 538, 541, 530 S.E.2d 79, 81 (2000) ("As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion.").

[3] Even though she failed to assign error to the critical findings of fact, Ms. Smith further challenges the trial court's conclusion by contending that the evidentiary basis for those findings was provided during unrecorded *in camera* interviews of the children. Yet, this procedure was specifically requested by Ms. Smith's attorney. When Mr. Dreyer sought to call Andrew to the witness stand, the following colloquy occurred:

> THE COURT: Did you want to do this in chambers?
>
> MR. DREYER: Yes, sir.
>
> [DEFENDANT'S ATTORNEY]: Yes, sir. I thought we were going to let you take the kids back to chambers, Judge. Do you agree to that?
>
> MR. DREYER: Yes, sir.
>
> THE COURT: Me and the clerk will go back in chambers and talk with the children one at a time. Do you agree to that?
>
> [DEFENDANT'S ATTORNEY]: Yes, sir, Judge.
>
> MR. DREYER: Yes, sir.
>
> THE COURT: Mrs. Smith, do you agree to that?
>
> THE DEFENDANT: Yes.

In accordance with the parties' agreement, Judge Stone then interviewed the children in chambers.

Because the record shows that Ms. Smith expressly consented to the in-chambers interviews of the children, she may not now assert that the procedure was error. *Stevens v. Stevens*, 26 N.C. App. 509, 510-11, 215 S.E.2d 881, 882 (where plaintiff ex-wife had not objected to in-chambers interview of child, she waived her "right [to have] the judge consider nothing except evidence duly developed in open court[,]" and was estopped from asserting it as error on appeal), *cert. denied*, 288 N.C. 396, 218 S.E.2d 470 (1975). Furthermore, given that defendant did not request at trial that the interviews be recorded, it is immaterial on appeal that the interviews were not recorded. The trial court's findings are still deemed supported by competent evidence: "Where there is evidence which does not appear in the record on appeal, it will be presumed that the evidence supports the trial court's findings of fact." *Goodson v. Goodson*, 32 N.C. App. 76, 80, 231 S.E.2d 178, 181 (1977) (in child custody case, content of child's in-chambers testimony, although not in record, deemed to support findings).

Because we hold that the trial court's findings of fact fully supported its conclusion that there had been a material and substantial change of circumstances of the parties and that it was in the best interests of the children to modify the custody order, we affirm.

Affirmed.

Judges McGEE and HUNTER concur.

JOSEPH MICHAEL GUARASCIO, PLAINTIFF v. NEW HANOVER HEALTH NETWORK, INC., D/B/A NEW HANOVER REGIONAL MEDICAL CENTER, NEW HANOVER REGIONAL MEDICAL CENTER AND BILL CREECH, DEFENDANTS

No. COA03-492

(Filed 2 March 2004)

Employer and Employee— breach of contract—employment manual—failure to state a claim—unilateral contract theory

The trial court did not err in a wrongful discharge case by dismissing plaintiff former employee's breach of contract claim under N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted, because: (1) plaintiff did not

have a contract for a definite period of employment and was therefore an at-will employee; (2) the complaint did not contain any allegations that the terms of defendant company's code of conduct indicated that it was expressly included in and therefore became part of plaintiff's employment contract, or that the employment manual was incorporated into the employment contract by virtue of a signature required at the time of hiring; and (3) the Court of Appeals has already concluded that a unilateral contract analysis will not be applied to the issue of wrongful discharge since it would in effect require the abandonment of the at-will doctrine which is the law in North Carolina.

Appeal by plaintiff from order dated 12 November 2002 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 29 January 2004.

Waller, Stroud, Stewart & Araneda, LLP, by W. Randall Stroud, for plaintiff-appellant.

Hedrick & Morton, L.L.P., by B. Danforth Morton, for defendant-appellees.

BRYANT, Judge.

Joseph Michael Guarascio (plaintiff) appeals an order dated 12 November 2002 dismissing his breach of contract claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Plaintiff filed a complaint dated 15 September 2001 against his former employer New Hanover Health Network, Inc. d/b/a New Hanover Regional Medical Center (NHRMC) and Bill Creech, NHRMC's Chief of Special Police Services, (collectively defendants) for breach of contract, defamation per se, tortious interference with contract, and punitive damages. In an amended complaint filed 13 December 2001, plaintiff added New Hanover Regional Medical Center as an additional defendant. With respect to plaintiff's breach of contract claim, the complaint alleged that plaintiff was employed from 6 July 1998 through 8 November 1999[1] as an officer for NHRMC's Special Police Services. Having joined NHRMC with an exemplary record from the New York City Police Department, plain-

1. Although the complaint lists the date of termination as "November 8, 2001," subsequent factual allegations establish that the date of termination was in 1999. Consequently, the 2001 designation is merely a typographical error.

tiff "was promoted in rank from officer to sergeant faster than any other employee of the special police force." Following plaintiff's promotion to sergeant, he discovered that a police supervisor was falsifying time and attendance records and that Chief Creech sanctioned this conduct. Plaintiff met with a NHRMC human resource representative on 27 August 1999 to discuss his discoveries regarding the police supervisor. Thereafter, the police supervisor and Chief Creech became aware of plaintiff's probing into the attendance records. At the request of the police supervisor, plaintiff was subsequently investigated based on his participation in an automobile search. Plaintiff was suspended from duty following this investigation even though no other police officer, including the officer who actually conducted the search, was either suspended or reprimanded. Soon thereafter, plaintiff was asked by Chief Creech to prepare statements on: (1) the time and attendance records of the police supervisor and (2) allegations that plaintiff had disseminated information from a departmental survey. On 2 November 1999, plaintiff received his first and only employee disciplinary warning, which terminated his employment with NHRMC. When plaintiff was afforded an option on 8 November 1999 to sign a resignation letter instead, he did.

The complaint further stated:

> 13. That, as part of plaintiff's employment with defendant hospital, plaintiff was given training in compliance with corporate procedures. At the training, plaintiff was given a written version of the NHRMC Code of Conduct which, among other things, establishes guidelines for the relationship between the defendant hospital and its employees.
>
> . . . .
>
> 19. That the NHRMC Code of Conduct says that NHRMC "will not tolerate the theft of property" nor "embezzlement of money."
>
> 20. That the NHRMC Code of Conduct commands that "[a]ny employee who has knowledge of an actual or potential violation of the law, regulation, policy or procedure, and/or the NHRMC Code of Conduct should report the matter to a supervisor." Alternative reporting means exist in the event the violation observed directly involves a supervisor.
>
> 21. That the NHRMC Code of Conduct further commands, in bold print, that "[a]n employee who . . . engages in, causes, or by

inaction or inattention tolerates or condones any illegal or unethical conduct has automatically violated NHRMC's Code of Conduct and will be subject to disciplinary action, up to and including discharge. Every employee of the medical center has an obligation to report illegal or unethical conduct by another employee."

22. That in a letter to NHRMC employees printed on the first page of the NHRMC Code of Conduct, William K. Atkinson, President of the defendant corporation, wrote, "If you observe violations of this Code of Conduct, you have an obligation to report them. I can assure you that there will be no retaliation or retribution against anyone for reporting problems . . . ."

Based on these factual allegations, plaintiff asserted a breach of contract claim based on retaliatory termination of his employment contract in violation of the NHRMC Code of Conduct, which plaintiff claimed to be part of his employment contract with NHRMC, and in violation of defendants' duty of good faith and fair dealing.[2]

Defendants filed a motion to dismiss plaintiff's breach of contract claim under Rule 12(b)(6), which the trial court granted in an order dated 12 November 2002. Thereafter, plaintiff filed a voluntary dismissal without prejudice with respect to his remaining claims of defamation per se, tortious interference with contract, and punitive damages and appealed the dismissal of the breach of contract claim.

The dispositive issue is whether the NHRMC Code of Conduct, an employment manual, was part of plaintiff's contract for employment with NHRMC.[3]

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a complaint by determining "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory."

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2. North Carolina does not recognize a claim for wrongful discharge based on an employer's bad faith. Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts* § 12.20, at 116-17 (2d ed. 1999) (citing *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 359-60, 416 S.E.2d 166, 173 (1992)). In any event, such a claim would fall under tort, not contract law. *See generally Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989); *Hill v. Medford*, 158 N.C. App. 618, 623-27, 582 S.E.2d 325, 328-31 (Martin, J., dissenting) (discussing tort of wrongful discharge), *rev'd*, 357 N.C. 650, 588 S.E.2d 467 (2003) (per curiam).

3. We note that plaintiff's first claim for relief in his complaint is for breach of contract only. Plaintiff does not state a claim for the tort of wrongful discharge.

Lynn v. Overlook Dev., 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991). A Rule 12(b)(6) motion to dismiss for failure to state a claim should not be granted "unless it appears to a certainty that [the] plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970) (emphasis omitted).

Employment Manual

North Carolina courts have consistently held that in the absence of some form of contractual agreement between an employer and employee creating a definite period of employment, "the employment is presumed to be an 'at-will' employment, terminable at the will of either party, irrespective of the quality of the performance by the other party." *Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987). Thus, an at-will "employee states no cause of action for breach of contract by alleging that he has been discharged without just cause." *Id.* In addition, our courts have held that " 'unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it,' " *Rucker v. First Union Nat. Bank*, 98 N.C. App. 100, 102, 389 S.E.2d 622, 624 (1990) (quoting *Rosby v. General Baptist State Convention*, 91 N.C. App. 77, 81, 370 S.E.2d 605, 608 (1988)), or in the case of local governments, they are enacted as ordinances, *Wuchte v. McNeil*, 130 N.C. App. 738, 741, 505 S.E.2d 142, 144 (1998).

The only North Carolina case that has upheld a breach of contract claim based on an employee manual is *Trought v. Richardson*, 78 N.C. App. 758, 338 S.E.2d 617 (1986). In *Trought*, this Court held that the plaintiff had properly stated a claim for breach of contract based on her allegation that the employer's personnel policy manual was part of her employment contract where her complaint further alleged that: (1) she was required to sign a statement at the time of hiring indicating she had read the manual (2) providing she could be discharged "for cause" only and stating that certain procedures had to be followed in order for an employee to be discharged, and (3) she was discharged without cause and without the benefit of the personnel policy manual procedures. *Id.* at 762, 338 S.E.2d at 619-20 (reversing the trial court's dismissal under Rule 12(b)(6) of the plaintiff's breach of contract action). Our Supreme Court has since limited the rule in *Trought* to its narrow facts. *See Harris*, 319 N.C. at 631, 356 S.E.2d at 360.

In the case *sub judice*, plaintiff did not have a contract for a definite period of employment and was therefore an at-will employee. Furthermore, the complaint contains no allegations that the terms of the NHRMC Code of Conduct indicated it was "expressly included in" and therefore became part of plaintiff's employment contract, or that the employment manual was incorporated into the employment contract by virtue of a signature requirement at the time of hiring. *Rucker*, 98 N.C. App. at 102-03, 389 S.E.2d at 624-25 (distinguishing *Trought*). Thus, as an employee at will, plaintiff's breach of contract claim, based on the mere conclusory allegation, without supporting factual allegations, that the NHRMC Code of Conduct was part of plaintiff's employment contract, fails. *See Miller v. Rose*, 138 N.C. App. 582, 592, 532 S.E.2d 228, 235 (2000) (in ruling on a Rule 12(b)(6) motion to dismiss, "[l]egal conclusions . . . are not entitled to a presumption of truth").

Unilateral Contract

Plaintiff contends in the alternative that the employment handbook created an independent unilateral contract between him and NHRMC. Plaintiff argues he is entitled to recover for defendants' breach of that unilateral contract, for which he gave consideration by reporting the time and attendance record discrepancies. We disagree.

North Carolina has recognized a unilateral contract theory with respect to certain benefits relating to employment. *See White v. Hugh Chatham Mem'l Hosp. Inc.*, 97 N.C. App. 130, 387 S.E.2d 80 (1990) (where the court accepted legal theory of contractual entitlement to disability payments); *Welsh v. Northern Telecom, Inc.*, 85 N.C. App. 281, 354 S.E.2d 746 (1987) (where the court acknowledged legal claim to vacation and retirement benefits); *Brooks v. Carolina Tel.*, 56 N.C. App. 801, 290 S.E.2d 370 (1982) (finding severance payments part of a unilateral contract). In *Rucker*, however, this Court declined "to apply a unilateral contract analysis to the issue of wrongful discharge." *Rucker*, 98 N.C. App. at 103, 389 S.E.2d at 625. The Court reasoned that: "[T]o apply a unilateral contract analysis to the situation before us would, in effect, require us to abandon the 'at-will' doctrine which is the law in this State. This we cannot do." *Id.* As we are bound by prior rulings of this Court, plaintiff's argument is without merit. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same

court is bound by that precedent, unless it has been overturned by a higher court").

Affirmed.

Judges TIMMONS-GOODSON and ELMORE concur.

JOHN D. OLIVER, OHR BUILDING, INC., AND GLENDA FAYE MOTSINGER OLIVER, PLAINTIFFS V. ZACHARY T. BYNUM, III, BYNUM & MURPHREY, PLLC, MTNJ CONSTRUCTION COMPANY, INC. AND M.T.N.J. DEVELOPMENT COMPANY, INC., DEFENDANTS AND COUNTERCLAIM PLAINTIFFS V. RANDOLPH M. JAMES AND PAUL FREER, COUNTERCLAIM DEFENDANTS

No. COA03-6

(Filed 2 March 2004)

Attorneys— disqualification as counsel—conflict of interest—champerty and maintenance

There was no abuse of discretion in the court's disqualification of James as plaintiffs' counsel where evidence of civil conspiracy and champerty and maintenance supported the conclusion that James had a conflict of interest.

Appeal by plaintiffs and counterclaim defendant Randolph M. James from order entered 2 October 2002 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 8 October 2003.

Randolph M. James, P.C., by Randolph M. James, and Bell, Davis & Pitt, P.A., by Stephen M. Russell, for plaintiffs and counterclaim defendant Randolph M. James appellants.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Maria C. Papoulias, and Bennett, Guthrie & Dean, PLLC, by Richard V. Bennett, for defendant appellees.

TIMMONS-GOODSON, Judge.

John D. Oliver ("Oliver"), OHR Building, Inc., and Glenda Faye Motsinger Oliver (collectively as "plaintiffs"), and Randolph M. James ("James") appeal from an order of the trial court granting the dis-

qualification of James as plaintiffs' counsel. For the reasons stated herein, we affirm the order of the trial court.

The pertinent facts of the instant appeal are as follows: Defendant Zachary T. Bynum, III ("Bynum") and James are both attorneys in Winston-Salem, North Carolina. James represented Paul Freer ("Freer") in a real estate venture in which Freer became a business partner with Bynum. Thereafter, James approached Bynum about merging their legal practices. Bynum declined.

Freer and his wife own P.F. Plumbing Contractors, Inc., a plumbing business that provided services for Bynum and Watson Development Company ("Bynum and Watson Dev."), a real estate development company. James represented Freer in an action against Bynum and Watson Dev., which resulted in a settlement agreement. The settlement provided that Bynum would personally guarantee a partial payment of Bynum and Watson Dev.'s debt to Freer. The personal guarantee is secured by a deed of trust wherein Bynum is the grantor, P.F. Plumbing Contractors, Inc., is the beneficiary, and James is the trustee. Bynum alleges that James gained access to Bynum's confidential financial records as a result of his representation of Freer in this matter.

The record is clear that there is animosity between these two lawyers. Bynum alleges that James defaulted on a referral fee arising from a fee-splitting arrangement. Around the same time, James's sole associate left James to work for Bynum.

At the end of 2001, James represented Freer in an action against Oliver, who was represented by Bynum. The record is unclear as to whether this suit was ever settled. In late 2001, Oliver was unhappy with Bynum's representation of him. Oliver contacted Freer for a lawyer referral. Freer recommended James.

Before the end of 2001, Oliver audiotaped a conversation between himself and Bynum. At the time of the conversation, Bynum believed that he still represented Oliver. Oliver delivered the tapes to James. Although James denies that he directed Oliver to tape these conversations, James's paralegal, Susan Gray ("Gray"), testified that James told her that he requested that Freer direct Oliver to tape his conversations with Bynum.

Oliver expressed concern that he would be unable to finance his suit against Bynum. Freer offered to finance the litigation. James's paralegal testified about the contents of the fee agreements between

James, Freer, and plaintiffs. Plaintiffs and James entered into a contingency fee agreement while Freer and James created a part contingency, part hourly agreement wherein Freer agreed to finance the litigation up to $40,000. If the suit was successful, Freer would recoup the money he spent and would be entitled to part of the proceeds after attorney's fees and costs were paid.

James filed plaintiffs' complaint against Bynum on 27 December 2001, alleging breach of fiduciary duty, negligence, fraud, and negligent infliction of emotional distress. Bynum, Bynum & Murphrey, PLLC, MTNJ Construction Company, Inc. and M.T.N.J. Development Company, Inc. (collectively as "defendants") counterclaimed that plaintiffs conspired with Freer and James to defraud them. Defendants then motioned the trial court to disqualify James as plaintiffs' counsel. In granting defendants' motion to disqualify James, the trial court entered the following findings of fact:

> 1. Defendants and counterclaim plaintiffs have offered evidence and asserted claims and affirmative defenses in their responsive pleading alleging that counterclaim defendant James ("James") engaged in a civil conspiracy, champerty and maintenance. In addition to the testimony offered, the court reviewed and considered a written agreement between James and counterclaim defendant Paul Freer ("Freer"), a stranger to this litigation, in which Freer agreed to finance the prosecution of plaintiff's claims in the above lawsuit up to the sum of $40,000, with provision for reimbursement and participation in any recovery on their behalf.
>
> 2. Defendants and counterclaim plaintiffs have offered evidence and asserted claims and affirmative defenses in their responsive pleading alleging that James represented Freer in a dispute with defendant Bynum ("Bynum") which resulted in a settlement in August 2001, in which James served as trustee under a deed of trust securing performance under the agreement. The alleged breach of this agreement is also the subject of a claim by Bynum against Freer in this lawsuit. As part of this settlement, James and Freer obtained confidential financial information from Bynum which he contends they intend to use in the current lawsuit. Subsequent to the above settlement, James continued to represent Freer's interest in a claim against plaintiff OHR Building, Inc. while at the same time representing plaintiffs in the preparation of their claims in this lawsuit.

3. Counterclaim defendant James will be a material fact witness in this lawsuit because of his involvement in the above transactions and representations of multiple parties.

Based on the foregoing findings of fact, the court made the following conclusions of law:

1. James's representation of multiple parties and his involvement in this litigation as a party creates a conflict of interest in violation of Rules 1.7(b) and 1.9(a) of the North Carolina Rules of Professional Conduct.

2. James is a material witness in this litigation, which creates a further conflict of interest in his representation of plaintiffs.

3. Defendants and counterclaim plaintiffs have made a colorable showing at this stage of the litigation that James has engaged in the conduct alleged in their affirmative defenses and counterclaims.

Plaintiff and James assert that the trial court abused its discretion by granting defendants' motion to disqualify plaintiffs' counsel based on findings of fact not supported by competent evidence and conclusions of law not supported by the findings of fact. For the reasons stated herein, we disagree.

"Decisions regarding whether to disqualify counsel are within the discretion of the trial judge and, absent an abuse of discretion, a trial judge's ruling on a motion to disqualify will not be disturbed on appeal." *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 295, 420 S.E.2d 426, 430 (1992), *citing In re Lee*, 85 N.C. App. 302, 310, 354 S.E.2d 759, 764-65, *disc. rev. denied*, 320 N.C. 513, 358 S.E.2d 520 (1987). An appellate court may reverse a trial court under an abuse of discretion standard "only upon a showing that its actions are manifestly unsupported by reason." *Dockery v. Hocutt*, 357 N.C. 210, 215, 581 S.E.2d 431, 435 (2003) (citations omitted).

The standard of review for findings made by a trial court sitting without a jury is "whether any competent evidence exists in the record" to support said findings. *Hollerbach v. Hollerbach*, 90 N.C. App. 384, 387, 368 S.E.2d 413, 415 (1988). Findings of fact and conclusions of law "allow meaningful review by the appellate courts." *O'Neill v. Southern Nat. Bank*, 40 N.C. App. 227, 231, 252 S.E.2d 231, 234 (1979). Findings of fact are conclusive if supported by competent evidence, irrespective of evidence to the contrary. *Associates, Inc. v.*

Myerly and Equipment Co. v. Myerly, 29 N.C. App. 85, 89, 223 S.E.2d 545, 548 (1976).

Plaintiffs and James assert that the trial court erred when it found as fact that James engaged in civil conspiracy, champerty and maintenance and that he obtained confidential financial information from Bynum during his representation of Freer. We disagree.

A successful civil conspiracy claim requires the moving party to evidence an agreement of two or more parties to carry out unlawful conduct and injury resulting from that agreement. *Toomer v. Garrett*, 155 N.C. App. 462, 483, 574 S.E.2d 76, 92 (2002). Gray testified that upon questioning James regarding his arrangement with Freer and Oliver, James stated that "he and Paul Freer were teaming up to do whatever it took to strip Zack Bynum of his law license. He further stated that this would probably push Mr. Bynum into bankruptcy." Gray's testimony provides competent evidence to support the trial court's finding of fact that James engaged in a civil conspiracy.

The terms "maintenance" and "champerty" have been defined as follows:

> "Maintenance" [is] an officious intermeddling in a suit, which in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it. "Champerty" is a form of maintenance whereby a stranger makes a bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense. The Supreme Court . . . noted that many exceptions to the principles of champerty and maintenance have been recognized and that it has come to be generally accepted that an agreement will not be held to be within the condemnation of the principles unless the interference is clearly officious and for the purpose of stirring up strife and continuing litigation.

Wright v. Commercial Union Ins. Co., 63 N.C. App. 465, 469, 305 S.E.2d 190, 192 (1983) (citations omitted). Freer offered to financially support Oliver's lawsuit against Bynum even though Oliver still owed him $10,000 from a previous lawsuit. Gray testified that James "instructed Mr. Freer and/or Mr. Oliver to obtain taped conversations from meetings with Mr. Bynum" and that James intended to destroy Bynum's legal career. Although James did not personally finance the lawsuit, there is evidence on the record that he facilitated the financ-

ing through Freer "for the purpose of 'stirring up strife and continuing litigation.' " *See Wright*, 63 N.C. App. at 469, 305 S.E.2d at 192, *quoting 5 Lawson on Rights and Remedies, § 2400.* Thus, there is competent evidence in the record that James engaged in champerty and maintenance. *Id.*

Plaintiffs and James further argue that the findings of fact do not support the conclusions of law. The trial court concluded as a matter of law that (1) James's "representation of multiple parties and his involvement in this litigation as a party creates a conflict of interest;" (2) James is a material witness in this litigation, creating another conflict of interest; and, (3) defendants have made a colorable showing that James has engaged in the conduct alluded to in their affirmative defenses and counterclaims, including civil conspiracy, champerty and maintenance.

As there is competent evidence in the record to support findings that James engaged in civil conspiracy, champerty and maintenance in his dealings with plaintiffs and Freer, the trial court could reasonably have concluded that James may have a conflict of interest in regard to this litigation. As such, plaintiffs and James have failed to show that the trial court's disqualification of James as plaintiffs' counsel is an abuse of discretion and manifestly unsupported by reason. *See Dockery*, 357 N.C. at 215, 581 S.E.2d at 435.

Affirmed.

Judges HUDSON and ELMORE concur.

RODNEY A. BASS AND WIFE, SHERRI FAUCETTE BASS, PLAINTIFFS v. PINNACLE CUSTOM HOMES, INC., DEFENDANT

No. COA03-248

(Filed 2 March 2004)

1. Warranties— waiver—implied warranty of habitability

The implied warranty of habitability from the construction of a house was waived by limited warranty language that unambiguously showed that both parties intended to waive the implied warranty of habitability and all other warranties.

2. Warranties— exclusion of other warranties—no ambiguity

There was no patent ambiguity in a limited warranty that excluded all other warranties where the language was not susceptible to disagreement.

3. Arbitration and Mediation— arbitration—required by language of agreement

The trial court did not err by requiring plaintiff to submit claims to arbitration where there was a valid agreement to arbitrate and the language of the arbitration agreement was broad enough to include plaintiff's claim.

Appeal by plaintiffs from judgment entered 4 April 2001 by Judge Orlando Hudson in Durham County Superior Court and order entered 13 December 2002 by Judge A. Leon Stanback, Jr., in Durham County Superior Court. Heard in the Court of Appeals 2 December 2003.

Law Office of Robert B. Jervis, P.C., by Robert B. Jervis, for plaintiff appellants.

Robert R. Chambers for defendant appellee.

McCULLOUGH, Judge.

On 5 March 1997, plaintiffs Rodney and Sherri Bass entered into a contract which obligated defendant, Pinnacle Custom Homes, Inc., to construct and sell a house to be built at 109 Springmoor Lane in Durham, North Carolina. The contract included a new construction addendum which mentioned some warranties. However, at the time of closing, plaintiffs accepted a 2-10 Home Buyers Warranty which had language that purported to waive all other warranties.

During construction and after completion of the home, plaintiffs began to complain about various defects in the home. Plaintiffs filed suit on 25 May 1999 alleging breaches of implied and express warranties. Defendant filed an answer and pleaded an arbitration agreement as an affirmative defense. Defendant also moved for an order staying further judicial proceedings pending arbitration. Plaintiffs filed an amended complaint in which they asserted claims for fraudulent and/or negligent misrepresentation, nuisance, and deceptive trade practices.

On 4 April 2001, the trial court found that all of plaintiffs' claims in the original complaint and the proposed amended complaint arose

under or were related to the warranty. The court further found that the parties agreed to resolve all of their disputes through binding arbitration. Finally, the court ordered that the action be stayed pending arbitration of the claims.

An arbitration hearing was held on 16 May 2002, and the Honorable Roderic Leland rendered his award on 8 June 2002. On 4 September 2002, plaintiffs asked the trial court to vacate and/or modify the arbitration award. Defendant moved to confirm the arbitration award on 27 September 2002. On 13 December 2002, the trial court entered an order confirming the arbitration award. Plaintiffs appealed.

On appeal, plaintiffs argue that the trial court erred by: (I) finding that plaintiffs waived the implied warranty of habitability, (II) enforcing a contract that had a patent ambiguity, and (III) requiring plaintiffs to submit all their claims to arbitration. We disagree and affirm the orders of the trial court.

I. Waiver of the Implied Warranty of Habitability

[1] Plaintiffs first argue that they did not waive the implied warranty of habitability. We disagree.

"The doctrine of implied warranty of habitability requires that a dwelling and all of its fixtures be 'sufficiently free from major structural defects, and . . . constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction.' " *Allen v. Roberts Constr. Co.*, 138 N.C. App. 557, 571, 532 S.E.2d 534, 543, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000) (quoting *Hartley v. Ballou*, 286 N.C. 51, 62, 209 S.E.2d 776, 783 (1974)). "[A] builder-vendor and a purchaser could enter into a binding agreement that such implied warranty would not apply to their particular transaction." *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 202, 225 S.E.2d 557, 567 (1976). However, "[s]uch an exclusion, if desired by the parties to a contract for the purchase of a residence, should be accomplished by clear, unambiguous language, reflecting the fact that the parties fully intended such result." *Id.* at 202, 225 S.E.2d at 568.

We believe that the language in the 2-10 Home Buyers Warranty constituted an express waiver of the implied warranty of habitability: Section VII provides in pertinent part:

> THIS IS AN EXPRESS LIMITED WARRANTY OFFERED BY YOUR BUILDER. To the extent possible under the law of your

> state, *all other warranties*, express or implied, including but not limited to *any implied warranty of habitability*, are hereby disclaimed and waived. No one can add to or vary the terms of this Warranty, orally or in writing. (Emphasis added.)

This language unambiguously shows that both parties intended to waive *all other warranties*, including the *implied warranty of habitability*.

In a few key respects, the case at bar differs from *Brevorka v. Wolfe Constr., Inc.*, 155 N.C. App. 353, 573 S.E.2d 656 (2002), *rev'd per curiam*, 357 N.C. 566, — S.E.2d — (2003). In *Brevorka*, our Supreme Court adopted the reasoning of the dissent written by Chief Judge Eagles. There, the language purporting to exclude the warranties was as follows:

> Other than the Expressed Warranties contained herein, there are no other warranties expressed or implied including Implied Warranty of Merchantibility [sic] or Implied Warranty for Particular Purpose, which implied warranties are specifically excluded.

Brevorka, 155 N.C. App. at 361, 573 S.E.2d at 661. The Court determined that the language did not show both parties' clear intent to waive the implied warranty of habitability or workmanlike quality of construction. *Id.* The Court further noted that the parties signed an additional limited warranty agreement which, by its terms, was "separate and apart" from plaintiff's contract with the builder. *Id.* at 361-62, 573 S.E.2d at 661-62. For these reasons, plaintiff was permitted to maintain an action for breach of the implied warranty of habitability or workmanlike construction against the builder. *Id.* at 362, 573 S.E.2d at 662.

We believe that the present case is distinguishable from *Brevorka* because the 2-10 Home Buyers Warranty here unambiguously waived the implied warranty of habitability and all other warranties. This case is also unlike *Brevorka* because there is not an additional warranty that was intended to be "separate and apart" from the 2-10 Home Buyers Warranty. Instead, the 2-10 Home Buyers Warranty in this case was designed to be the sole warranty of the parties. It waived "all other warranties" and stated that "[n]o one can add to or vary the terms of this Warranty, orally or in writing." This assignment of error is overruled.

II. Patent Ambiguity

[2] Plaintiffs further contend that the 2-10 Home Buyers Warranty should be set aside because there is a patent ambiguity in the contract.

An ambiguity exists in a contract if the language of that contract is fairly susceptible to either party's interpretation. *State ex rel. Utils. Comm'n v. Thrifty Call, Inc.*, 154 N.C. App. 58, 63, 571 S.E.2d 622, 626 (2002), *disc. review denied, appeal dismissed*, 357 N.C. 66, 579 S.E.2d 575 (2003). However, if the language is clear, the Court must enforce the contract as written. *Id.*

As we have indicated, the 2-10 Home Buyers Warranty was clear and unambiguous: "[A]ll other warranties, express or implied, including but not limited to any implied warranty of habitability, are hereby disclaimed and waived." Since this language is not susceptible to disagreement, we are required to enforce the contract as written. Accordingly, this assignment of error is rejected.

III. Motion to Compel Arbitration

[3] Plaintiffs claim that the trial court erred by requiring them to submit all their claims to arbitration.

Under N.C. Gen. Stat. § 1-567.2(a) (2001) (repealed by Session Laws 2003-345, s. 1, effective January 1, 2004, and applicable to agreements to arbitrate made on or after that date), a contract provision that requires the parties to settle disputes by arbitration is valid, enforceable, and irrevocable unless the parties agree to the contrary. In considering a motion to compel arbitration, the trial court must determine (1) whether the parties have a valid agreement to arbitrate, and (2) whether the subject of the dispute is covered by the arbitration agreement. *Ragan v. Wheat First Sec., Inc.*, 138 N.C. App. 453, 455, 531 S.E.2d 874, 876, *disc. review denied*, 353 N.C. 268, 546 S.E.2d 129 (2000). The trial court's conclusion regarding a motion to compel arbitration is reviewable *de novo*. *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001). In North Carolina, there is a strong public policy favoring arbitration. *Id.* at 135, 554 S.E.2d at 678. Therefore, any doubts as to the scope of arbitrable disputes are to be resolved in favor of arbitration. *Servomation Corp. v. Hickory Construction Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986).

In this case, plaintiffs acknowledge that there is a valid agreement to arbitrate. Therefore, the remaining issue is whether any of

plaintiffs' claims fall outside of that agreement. Plaintiffs first argue that they have a claim for breach of express warranty and the warranty to make necessary repairs because these warranties were mentioned in the new construction addendum. This claim has no merit because plaintiffs' acceptance of the 2-10 Home Buyers Warranty waived all other express and implied warranties, including those found in the new construction addendum.

Plaintiffs also suggest that their nuisance claim falls outside the scope of the arbitration agreement. Under N.C. Gen. Stat. § 1-567.2(a), parties can draft a contract provision which makes arbitration the method of resolving *any* controversy related to the contract. This Court has interpreted that to mean that "there is no legislative bar to arbitration of these claims as long as they arise out of or relate to the contract or its breach." *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 23, 331 S.E.2d 726, 731 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986). We have further indicated that "whether a claim falls within the scope of an arbitration clause . . . depends not on the characterization of the claim as tort or contract[.]" *Id.* at 24, 331 S.E.2d at 731. Instead, we must look at "the relationship of the claim to the subject matter of the arbitration clause." *Id.*

Here, the arbitration clause states that "[a]ny and all claims, disputes and controversies arising under or relating to this Agreement . . . shall be submitted to arbitration[.]" Mindful of our policy favoring arbitration, we conclude that this language is broad enough to include plaintiffs' nuisance claim. The alleged tortuous conduct in this case, defendant's unreasonable interference with plaintiffs' use and enjoyment of the property, arises under or is related to plaintiffs' contract with defendant. In fact, the very essence of plaintiffs' nuisance claim is that there were deficiencies in the building of the home, defendant did not correct the deficiencies, and plaintiffs suffered damages as a result.

We note that our decision is consistent with the holding in *Rodgers Builders*. There, the arbitration clause stated that, "[a]ll claims, disputes and other matters in question between the Contractor [plaintiff] and the Owner [McQueen Properties] arising out of, or relating to, the Contract Documents or the breach thereof, . . . shall be decided by arbitration . . . ." *Id.* at 18, 331 S.E.2d at 728. We concluded that this language was broad enough to include tort claims which occurred in connection with the formation, performance, and alleged breach of contract between the parties. *Id.* at 25,

331 S.E.2d at 732. Based on the facts of the present case and the precedent in *Rodgers Builders*, the trial court did not err in forcing plaintiffs to submit all their claims to arbitration.

We have considered plaintiffs' other arguments and find them to be unpersuasive. Therefore, the orders of the trial court are

Affirmed.

Judges WYNN and TIMMONS-GOODSON concur.

PATRICIA A. MOOSE, PLAINTIFF v. HEXCEL-SCHWEBEL, EMPLOYER, AND AIG CLAIM SERVICES, CARRIER, DEFENDANTS

No. COA03-542

(Filed 2 March 2004)

1. **Workers' Compensation— injury by accident—course of employment**

The Industrial Commission did not err in a workers' compensation case by finding and concluding that plaintiff employee smash technician sustained a compensable injury by accident arising out of and in the course of her employment when she was asked by her supervisor to do weaving for three days while another employee was on vacation, which required her to lift heavy bobbins, because the lifting of bobbins was not her normal job.

2. **Appeal and Error— preservation of issues—failure to argue**

Although plaintiff employee contends the Industrial Commission erred in a workers' compensation case by its award of total disability, attorney fees, payment of medical bills, and election of remedies, plaintiff failed to comply with N.C. R. App. P. 28 which requires her brief to have arguments in support of her assignments of error or questions presented.

Appeal by plaintiff and defendants from order entered 27 January 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 February 2004.

Franklin Smith for plaintiff.

Cranfill, Sumner & Hartzog, L.L.P., by J. Shannon Harris, for defendants.

WYNN, Judge.

Plaintiff, Patricia A. Moose, and Defendants, Hexcel-Schwebel and AIG Claim Services, appeal from the opinion and award of the North Carolina Industrial Commission awarding temporary total disability and permanent partial disability compensation to Ms. Moose. Defendants contend that the Commission erred by concluding Ms. Moose sustained a compensable injury by accident arising out of and in the course of her employment. Plaintiff, in her appeal, asks this Court to consider whether the Commission erred in failing to award (I) total disability compensation at the rate of $415.54 per week from 15 August 2000 and continuing until further orders of the Commission; (II) an attorney fee of 25% on the lump sum recovery from 15 August 2000; (III) payment of medical bills that are approved by the Commission and vocational rehabilitation services as may be necessary to allow Plaintiff to obtain suitable work in accordance with her restrictions; and (IV) an election of remedies to her post-injury wage than her pre-injury wage. After careful review, we affirm the opinion and award.

The pertinent facts indicate that Ms. Moose had been employed by Hexcel-Schwebel as a smash-hand technician for five years at the time of her injury. Hexcel-Schwebel produced lightweight woven fiberglass for circuit boards and electronics. As a smash-hand technician, Ms. Moose was required to make sure the ends on a warp were pulled through if the ends were broken. If she did not have any work to do, Ms. Moose was required to relieve weavers as they were taking their breaks. Ms. Moose did not have to weave on a day-to-day basis and the lifting of bobbins was not a part of her job as a smash-hand technician.

On the weekend Ms. Moose was injured, her supervisor asked her to operate a loom because the scheduled employee was on vacation. Thus, Ms. Moose operated the machine for three twelve hour shifts. On Sunday, Ms. Moose lifted a large bobbin that weighed between 20 and 22 pounds off of the floor with both hands. When she bent down to lift the bobbin, she felt her left arm pull and pain radiated through her left arm, neck and shoulder. Ms. Moose testified that she immediately told her supervisor about the pain and

worked the remainder of the shift at her supervisor's request. Her supervisor testified that lifting the heavy bobbins was not a part of Ms. Moose's normal job.

After the pain did not subside, Ms. Moose sought treatment with Dr. Daniel Bellingham the following Tuesday. Ms. Moose was subsequently referred to Dr. William O. Bell, a neurologist, to determine whether Ms. Moose had a stroke. After the MRI ruled out a stroke, the doctor diagnosed Ms. Moose with ulnar neuropathy at the elbow, which is essentially a pinched nerve at the elbow. On 31 October 2000, she underwent left ulnar nerve decompression surgery, and afterwards, she had several months of physical therapy. On 27 March 2001, Dr. Bell assigned a 10% permanent disability rating to the left elbow, determined that she could not return to her previous employment, recommended sedentary, low physical demand type employment, restricted Ms. Moose from lifting anything over 20 pounds and recommended limited use of her left arm. Dr. Bell opined Ms. Moose's injury was work-related.

After Hexcel-Schwebel's denial of Ms. Moose's workers' compensation claim, the Commission awarded Ms. Moose temporary total disability compensation, 24 weeks of permanent partial disability compensation, attorney's fees, and reimbursement or payment of her medical bills. Plaintiff and Defendant appeal.

"When considering an appeal from the Commission, its findings are binding if there is any competent evidence to support them, regardless of whether there is evidence which would support a contrary finding. Therefore, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings, and (2) whether those findings justify its conclusions of law." *Shaw v. Smith & Jennings, Inc.*, 130 N.C. App. 442, 445, 503 S.E.2d 113, 116 (1998).

I. Defendant's Appeal

[1] In its sole issue on appeal, Hexcel-Schwebel contends the Commission erred in finding and concluding Ms. Moose sustained a compensable injury by accident arising out of and in the course of her employment. Hexcel-Schwebel argues that the lifting of the heavy bobbins had become a part of Ms. Moose's normal work routine and therefore an injury caused by the lifting of the bobbin could not constitute a compensable injury under our workers' compensation act. We disagree.

"Under the North Carolina Workers' Compensation Act, an injury arising out of and in the course of employment is compensable only if caused by an 'accident' and the claimant bears the burden of proving an accident has occurred." N.C. Gen. Stat. Section 97-2(6) (2001); *Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 115, 519 S.E.2d 61, 63 (1999). "An accident is an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." *Id.* "The elements of an 'accident' are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Adams v. Burlington Industries, Inc.*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983). "If the employee is performing his regular duties in the usual and customary manner and is injured, there is no accident and the injury is not compensable." *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 26, 264 S.E.2d 360, 363 (1980).

In this case, the Commission found:

> 4. On August 13, 2000, Arlene Smith was plaintiff's supervisor. As a weaver was on vacation, Ms. Smith asked plaintiff to leave her smash technician job and do the weaving. The weaving job required plaintiff to lift heavy yarn bobbins, weighing approximately twenty pounds. Plaintiff occasionally had to help with weaving, but the lifting was not a regular part of her primary job as a smash end technician.

Indeed, the record shows that Arlene Smith testified that she was Ms. Moose's supervisor; a weaver was on vacation; she asked plaintiff to do the weaving for the three days; the bobbins weighed between 20 and 22 pounds and lifting was not a regular part of Ms. Moose's job. Ms. Moose testified similarly. Accordingly, we conclude this finding of fact was supported by competent evidence.

Nonetheless, Defendants contend that, according to this Court's decision in *Bowles v. CTS of Asheville*, 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985), "once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an 'injury by accident' under the Workers' Compensation Act." Thus, Defendants argue that although Ms. Moose did not perform weaving functions on a day-to-day basis and did not lift the heavy bobbins daily, because she was expected to perform the weaving functions when needed due to the absence of another employee and was trained in the operation of

looms, the lifting of the heavy bobbins had become a part of her normal work routine. However, as her supervisor testified, the lifting of bobbins was not her normal job; moreover, Ms. Moose testified:

> But that one particular job I was working on that weekend, it's the one job out there that has the really heavy filling on it. I'd never worked on it but maybe a couple of times. The majority of the jobs out there, except for that one, the filling is not but about five pounds maybe. It's real light-weight. They run light-weights over there, and that's where I stayed most of the time. But on this particular weekend, she was really short-handed. I didn't like to go on the job. I went over there and ran the job anyway.

Accordingly, we conclude the Commission's findings and conclusions determining Ms. Moose's work-related injury was compensable was supported by competent evidence and in accordance with applicable law.

II. Plaintiff's Appeal

[2] In her appeal, Ms. Moose challenges certain aspects of the Commission's award. Specifically, Ms. Moose contends the Commission should have (I) awarded total disability to the plaintiff at a rate of $415.54 per week from August 15, 2000 and continuing until further orders of the Commission or the Court; (II) awarded an attorney fee of 25% on the lump sum recovery from August 15, 2000; (III) awarded payment of medical bills that were approved by the Commission and provided for vocational rehabilitation services to allow Ms. Moose to work in accordance with her restrictions; and (IV) awarded an election of remedies to her post-injury wage than her pre-injury wage. We affirm the Commission's award.

Ms. Moose has not complied with North Carolina Rule of Appellate Procedure 28 as her brief does not contain any argument in support of her assignments of error or questions presented. Her argument does not address the calculation of the rate of disability, attorney's fees, medical bills or election of remedies. In her brief, Ms. Moose merely discusses the definition of disability and the facts of her case that support such a determination. Thus, her argument is more of a response to Defendant's contentions on appeal—that Ms. Moose did not sustain a compensable injury—than an argument in support of the issues she presented on appeal. Moreover, in this case, the Commission awarded Ms. Moose her medical bills, attorney's fees, temporary total disability and

permanent partial disability compensation. As Ms. Moose has not presented an argument as to how the Commission's award was in error, we affirm the Commission's opinion and award. *See State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 593-94 (1975) (stating "it is well recognized that assignments of error not set out in an appellant's brief and in support of which no arguments are stated or authority cited, will be deemed abandoned").

Affirmed.

Judges McGEE and TYSON concur.

IN THE MATTER OF: N. B., MINOR CHILD

No. COA03-688

(Filed 2 March 2004)

Appeal and Error— mootness—adjudication of neglect—subsequent termination of parental rights

An appeal from an adjudication of abuse, neglect and dependency was moot where there was a subsequent termination of parental rights in which the judge noted that she had relied on some of the evidence from the adjudication hearing but not on the adjudication, and had found independent grounds supporting the termination.

Judge TYSON dissenting.

Appeal by respondent parents from judgment entered 17 October 2002 by Judge Marvin Pope in the District Court in Buncombe County. Heard in the Court of Appeals 15 January 2004.

Renae S. Alt, for Buncombe County Department of Social Services, petitioner-appellee.

Judy N. Randolph, for Pam Gretz, Guardian ad Litem.

M. Victoria Jayne, for respondent-appellant mother.

Hall & Hall Attorneys at Law, P.C., by Susan P. Hall and Douglas L. Hall, for respondent-appellant father.

HUDSON, Judge.

Respondent parents appeal an adjudication order finding abuse, neglect and dependency and a disposition order denying any reunification services and visits, arguing that the court considered inadmissible hearsay, prejudicially delayed entry of the order, and violated respondent parents' due process rights with a deficient transcript of proceedings. For the reasons discussed below, we dismiss respondent parents' appeal as moot.

After respondents appealed the 17 October 2002 adjudication order to this Court, the trial court on 20 October 2003 entered a judgment terminating the parental rights of both respondents. In the order terminating respondents' parental rights, the trial judge specifically noted that, while she relied on some of the evidence presented at the adjudication hearing, she did not rely on the previous adjudication of abuse and neglect itself. Instead, she found two additional grounds to support termination: 1) leaving N.B. in foster care for twelve months without making reasonable progress to correct the conditions that led to her removal, and 2) failing to pay a reasonable portion of the cost of N.B.'s care, although physically and financially able to do so. N.C. Gen. Stat. § 7B-1111(a)(2) and (a)(3) (2001).

This Court has recently addressed the very situation presented here, and held that a pending appeal of an adjudication of abuse and neglect is made moot by a subsequent termination of parental rights based on independent grounds. *In re Stratton*, 159 N.C. App. 461, 583 S.E.2d 323 (2003). "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). Because courts will not determine abstract propositions of law, a case should be dismissed "[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." *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). Where an appellant has "received a new, independent adjudication of the neglect issue and any resolution of the issues raised on this appeal will have no practical effect on the existing controversy," the appeal should be dismissed. *Stratton*, 159 N.C. App. at 464, 583 S.E.2d at 325.

While we acknowledge that the issues raised here could regain life were the subsequent termination of parental rights to be reversed, we are unable to distinguish this case from *Stratton*, and are bound to follow that decision. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court"). In both cases, an adjudication of neglect was followed by the termination of parental rights, based on independent grounds following a hearing by an independent judge. Thus, because the issues regarding the 17 October 2002 order have been rendered moot by the subsequent 20 October 2003 order, according to *Stratton*, we dismiss respondent parents' appeal.

Dismissed.

Judge STEELMAN concurs.

Judge TYSON dissents.

TYSON, Judge dissenting.

I. Mootness

I respectfully dissent from the majority's decision to dismiss this appeal as moot. The trial court did not have jurisdiction over DSS's petition to terminate respondents' parental rights ("TPR petition") while the adjudication and disposition order that purportedly gave DSS legal custody over the minor child is properly pending on appeal to this Court. The entry of the TPR judgment does not render this appeal moot.

The two petitions must be considered separately in the case at bar. The first petition ("underlying petition"), from which respondents appeal, is the original petition filed by DSS alleging abuse and neglect of the minor child. The trial court entered judgment on this petition and granted DSS custody of the minor child. Following entry of that judgment and after respondents' appeal was properly taken, DSS filed and obtained judgment on the TPR petition.

II. Jurisdiction

The majority's opinion dismisses this appeal as moot based on the judgment entered on DSS's TPR petition. *In re Stratton*, 159 N.C. App.

461, 583 S.E.2d 323 (2003). The case here is distinguishable. *Stratton* did not address the issue of the trial court's jurisdiction to enter judgment on a TPR petition.

This Court may consider, *ex mero motu*, whether subject matter jurisdiction exists. *In re McKinney*, 158 N.C. App. 441, 448, 581 S.E.2d 793, 797 (2003).

> Under N.C.G.S. § 7B-200(a)(4) (2001), the district court has "exclusive, original jurisdiction over . . . [p]roceedings to terminate parental rights." The district court has "exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights[.]" N.C.G.S. § 7B-1101 (2001) [emphasis omitted]. However, *in the absence of a proper petition, the trial court has no jurisdiction to enter an order for termination of parental rights. See In re Ivey*, 156 N.C. App. 398, 401, 576 S.E.2d 386, 389 (2003) ("trial court erred in [entering order for non-secure custody] . . . where no petition had been filed and the trial court did not have jurisdiction over the child"); *In re Triscari Children*, 109 N.C. App. 285, 426 S.E.2d 435 (1993) (termination of parental rights order vacated for lack of subject matter jurisdiction where petition not verified).

Id. at 445, 581 S.E.2d at 796 (emphasis supplied).

III. Who May File to Terminate

N.C. Gen. Stat. § 7B-1103 sets forth who may properly file a petition to terminate parental rights. The filing of the petition invokes the district court's subject matter jurisdiction. DSS may file a TPR petition only if DSS "has been given custody by a court of competent jurisdiction," or "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." N.C. Gen. Stat. § 7B-1103(a)(3)-(4) (2003); *see In re Miller*, 162 N.C. App. 355, 358, 590 S.E.2d 864, 868 (2004) ("DSS may file a [termination of parental rights] petition only if a court has given DSS custody of the juvenile.").

Here, the trial court's TPR judgment purports to establish jurisdiction because the "child is in the legal custody of Buncombe County DSS." The underlying judgment on appeal is the sole basis for DSS having custody of the child. Respondents have assigned error to this underlying judgment placing the issues of DSS's legal custody and Respondents' parental conduct before this Court. Respondents' appeal of the underlying judgment divested DSS's authority to file the

TPR petition and the trial court's power to terminate respondents' parental rights. *See RPR & Assocs. v. University of N.C.-Chapel Hill*, 153 N.C. App. 342, 346-47, 570 S.E.2d 510, 513 (2002), *disc. rev. denied*, 357 N.C. 166, 579 S.E.2d 882 (2003) ("[O]nce a party gives notice of appeal, such appeal divests the trial court of its jurisdiction, and the trial judge becomes *functus officio*."); *see also Pate v. Eastern Insulation Service of New Bern*, 101 N.C. App. 415, 417, 399 S.E.2d 338, 339 (1991) ("We first note that no written notice of appeal, which would divest jurisdiction from the trial court, had been filed with the clerk . . . .") The minor child's placement in the "legal custody of Buncombe County DSS" is at issue and properly before this Court.

IV. Conclusion

Respondents' assignments of error raise issues that challenge whether DSS properly had "legal custody" under N.C. Gen. Stat. § 7B-1103, a prerequisite to filing the TPR petition. DSS's "legal custody" of the minor child, which purportedly allowed DSS to seek termination, is challenged. Without a final determination of whether DSS properly received "legal custody" of the minor child, the trial court did not have jurisdiction to terminate respondents' parental rights.

The judgment terminating respondents' parental rights does not render appeal of the underlying judgment moot. I vote to reach the merits of this appeal. I respectfully dissent.

AARON L. GREEN AND MILDRED GREEN PATE, PLAINTIFFS v. POLLY PATE WILSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF WADELL H. PATE, LYDIA P. DUGAN, JANET PATE HOLMES, DARIAN PATE, BRYAN PATE, AND LINDSEY PATE, DEFENDANTS

No. COA03-714

(Filed 2 March 2004)

Courts; Jurisdiction— Georgia action to set aside N.C. deeds— stay of pending N.C. action to quiet title

The trial court erred by staying proceedings in a North Carolina action to quiet title where the administratrix of an estate in Georgia had filed an action in Georgia to set aside deeds, then moved to stay the North Carolina action. While a foreign court could render judgments that indirectly affect ownership of the

property, only the court with in rem jurisdiction may serve as a proper forum to determine title to the property.

Appeal by plaintiffs from the stay order entered 15 May 2003 by Judge Kenneth Crow in New Hanover County Superior Court. Heard in the Court of Appeals 29 January 2004.

Johnson, Lambeth & Brown, by Maynard M. Brown, Anna Johnson Averitt and Robert White Johnson for the plaintiff-appellants.

Marshall, Williams & Gorham, L.L.P., by Charles D. Meier for the defendant-appellees.

ELMORE, Judge.

Plaintiffs filed an action in New Hanover County, North Carolina, to quiet title to certain real property located therein. Wadell H. Pate, deceased, had been the prior owner of the property and conveyed it by deeds of gift to his wife, Mildred Green Pate, and stepson, Aaron L. Green (plaintiffs). Wadell H. Pate died testate 22 February 2002. The administratrix of his estate, Polly Pate Wilson, asserted that the deeds were conveyed by undue influence and sought to have the deeds reformed. The plaintiffs filed suit to quiet the title. Thereafter, the administratrix filed suit in Georgia, where the plaintiffs reside, seeking to set aside the deeds of gift on the basis that they were procured through fraud and undue influence.

The defendants in the North Carolina suit then filed multiple motions, among them a motion to stay the proceedings to permit trial in a foreign jurisdiction pursuant to N.C. Gen. Stat. § 1-75.12, with respect to the Georgia suit. The trial court granted that motion, staying the proceedings, and found as a matter of law:

1. That the Richmond County, Georgia Superior Court has personal jurisdiction over the Plaintiffs and Defendants in this action.

2. That the Court having considered the convenience and the access to another forum, nature of [the] case involved, relief sought, applicable law, possibility of jury view, convenience of witnesses, availability of compulsory process to produce witnesses, cost of obtaining attendance of witnesses, relative ease of access to sources of proof, enforceability of judgment, burden of litigating matters not of local concern, desirability of lit-

igating matters of local concern in local courts, choice of forum by Plaintiffs, and all other practical considerations which would make the trial easy, expeditious and less expensive concludes that Richmond County, Georgia Superior Court is a convenient, reasonable, and fair place for trial.

3. That it would work substantial injustice for this action to be tried in New Hanover County, North Carolina.

Section 1-75.12 of our General Statutes allows any court of this State, upon motion of a party, to stay proceedings here to allow trial in a foreign jurisdiction when it would work substantial injustice for the action to be tried in a court of this State. Subsection (c) of 1-75.12 states that a party in a proceeding that has been stayed to permit trial in a foreign jurisdiction has an immediate right to appeal. N.C. Gen. Stat. § 1-75.12(c) (2003). "Entry of an order under N.C. Gen. Stat. § 1-75.12 is a matter within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion." *Home Indemnity Co. v. Hoechst-Celanese Corp.*, 99 N.C. App. 322, 325, 393 S.E.2d 118, 120, *disc. review denied*, 327 N.C. 428, 396 S.E.2d 611 (1990).

The issue presented to this Court is whether North Carolina has exclusive *in rem* jurisdiction, and therefore is the proper venue for this action. If the state of Georgia has jurisdiction that may determine title to property located in North Carolina, then the trial court was correct to stay the proceedings here to await the outcome in the Georgia court, for the reasons stated by the trial court. If, however, North Carolina has exclusive *in rem* jurisdiction, then the Georgia proceeding cannot dispose of a deed executed in North Carolina to convey property located entirely within North Carolina, and the stay was ordered in error. We hold that Georgia does not have *in rem* jurisdiction, and that North Carolina is the proper venue. Regardless of issues of convenience to the parties, which are valid issues, the North Carolina courts alone have *in rem* jurisdiction over the subject property to determine title when it is disputed. The trial court therefore erred in staying the proceedings, and we vacate the stay order.

Black's Law Dictionary defines "*in rem*" as

> A technical term used to designate proceedings or actions instituted *against the thing*, in contradistinction to personal actions, which are said to be *in personam*.

> "In rem" proceedings encompass any action brought against a person in which essential purpose of suit is to determine title to or affect interests in specific property located within territory over which court has jurisdiction.

Black's Law Dictionary 793 (6th ed. 1990).

In the case of *Hanson v. Denckla*, 357 U.S. 235, 2 L. Ed. 2d 1283 (1958), the United States Supreme Court discussed the effect of *in rem* jurisdiction, stating that "[t]he basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State" *Id.* at 247, 2 L. Ed. 2d 1293 (citation omitted). Without question, North Carolina exclusively has *in rem* jurisdiction of the subject property in the case at bar.

We recognize that a foreign court with *in personam* jurisdiction could render judgments that indirectly affect ownership of property over which that court would have no *in rem* jurisdiction in certain specific instances. However, a court in a jurisdiction foreign to the subject property could not determine title to the property. An example of the former would be an equitable distribution in which the divorcing couple hold property in North Carolina but bring the divorce action in another state. The foreign court would have the authority, under principles of *in personam* jurisdiction, to divide the commonly held title. But where the ownership of the deed is in dispute or there is a cloud on the title, a court must have *in rem* jurisdiction to decide such matters. Our Supreme Court discussed this distinction in the case of *McRary v. McRary*, 228 N.C. 714, 47 S.E.2d 27 (1948):

> The Ohio court had jurisdiction to allot alimony to plaintiff herein. Even so, the jurisdiction acquired over the parties was purely *in personam*. Its judgment cannot have any extraterritorial force *in rem*. Nor did it create a personal obligation upon the defendant McRary which the courts of this state are bound to compel him to perform. At most it imposed a duty, the performance of which may be enforced by the process of the Ohio court.
>
> The courts of the *situs* of lands cannot be compelled to issue their decrees to enforce the process of courts of another state, or the performance of acts required by the decrees of such courts, ancillary to the relief thereby granted, affecting such lands.
>
> By means of its power over the person of the parties before it, a court may, in proper cases, compel them to act in relation to

> property not within its jurisdiction, but its decrees do not operate directly upon the property nor affect its title. The court's order is made effectual only through its coercive authority.
>
> A judgment seeking to apportion the rights of the parties to property outside the jurisdiction of the court rendering it may be given extrastate effect for many purposes, but it does not establish any right in the property itself, enforceable in the state of its *situs*.

McRary v. McRary, 228 N.C. 714, 718, 47 S.E.2d 27, 30 (1948) (citations omitted).

This Court applied the reasoning of *McRary* in the case of *Courtney v. Courtney*, 40 N.C. App. 291, 253 S.E.2d 2 (1979). In *Courtney*, a Texas court that had jurisdiction over the parties entered a judgment ordering defendant personally to convey title to North Carolina realty to plaintiff. On appeal, this Court affirmed the trial court's decision, finding that the Texas judgment was effective in North Carolina because it only affected the real estate indirectly and was not an *in rem* order that improperly purported to vest title. The Court reasoned:

> In the instant case, the Texas court has not exceeded its jurisdictional powers nor contravened any law or public policy of North Carolina or Texas. Apparently recognizing its limited jurisdiction, it never attempted to vest any muniment of title in North Carolina realty, as did the Ohio court in *McRary*. Therefore, the *in personam* judgment directing the conveyance of North Carolina realty is entitled to full faith and credit in this State.

Courtney v. Courtney, 40 N.C. App. 291, 298, 253 S.E.2d 2, 5 (1979).

Both the *McRary* and *Courtney* decisions cited the U.S. Supreme Court decision in *Fall v. Eastin*, 215 U.S. 1, 54 L. Ed. 65 (1909), and echo its reasoning. In that case, the Court affirmed the Supreme Court of the State of Nebraska, which held that a deed to land situated in Nebraska, made by a commissioner under the decree of a court of the State of Washington in an action for divorce, was not effective in Nebraska because the Washington court lacked *in rem* jurisdiction.

These and other similar cases define the limits of *in personam* jurisdiction, where *in rem* jurisdiction is lacking, to affect title to land. The case at bar falls beyond these clearly defined limits. When

title to property is determined, only the court with *in rem* jurisdiction may serve as a proper forum. North Carolina being the only forum with *in rem* jurisdiction in the case at bar, it is not a substantial injustice for the case to be tried in New Hanover County, North Carolina.

Reversed.

Judges TIMMONS-GOODSON and BRYANT concur.

STATE OF NORTH CAROLINA v. WILLIAM FREDRICK RHODES, DEFENDANT

No. COA03-270

(Filed 2 March 2004)

1. Appeal and Error— appealability—guilty plea

Consistent with N.C.G.S. § 15A-1027 and under *State v. Bolinger*, 320 N.C. 596 (1987), it is permissible for the Court of Appeals to review pursuant to a petition for writ of certiorari during the appeal period a claim that the procedural requirements of Article 58 involving challenges to guilty pleas were violated.

2. Criminal Law— guilty plea—withdrawal of offer by State

Although defendant contends the trial court erred in a case involving defendant's failure to register as a sex offender by allowing the State to withdraw from its plea agreement with defendant after he entered his guilty plea, this assignment of error lacks merit because there was no indication in the record that the State withdrew from the plea agreement. Instead, the trial court sua sponte reopened defendant's sentencing hearing and resentenced him based on information it received during recess.

3. Sentencing— resentencing—opportunity to withdraw guilty plea

The trial court erred in a case involving defendant's failure to register as a sex offender by failing to follow the procedural safeguards established by N.C.G.S. §§ 15A-1022 and 15A-1024 upon resentencing him, because the trial court should have: (1) informed defendant of the court's decision to impose a sentence other than that provided in the plea agreement; (2) informed

defendant that he could withdraw his plea; and (3) granted a continuance until the next session of court if defendant chose to withdraw his plea.

Appeal by defendant from judgment entered 16 September 2002 by Judge Michael E. Helms in Wilkes County Superior Court. Heard in the Court of Appeals 3 December 2003.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Carol Ann Bauer, for defendant-appellant.

GEER, Judge.

Defendant appeals from his sentence entered after the trial court, on its own motion, reopened his sentencing hearing and imposed a sentence inconsistent with the plea agreement between defendant and the State. Because we conclude that the trial court erred in resentencing defendant without affording him the opportunity to withdraw his guilty plea, we vacate defendant's sentence and remand the matter to the trial court.

Defendant was indicted on one count of failure to register as a sex offender in violation of N.C. Gen. Stat. § 14-208.11 (2003). He entered into a plea agreement with the State, which, as memorialized in the transcript of plea, provided for punishment in the intermediate range. The trial judge accepted the plea agreement and imposed an intermediate range sentence: 21 to 26 months incarceration suspended for three years, intensive probation, and a special probation condition of 60 days in jail on work release.

After the luncheon recess, defendant was brought back into the courtroom. The trial judge informed those present that during the luncheon recess, the Sentencing Services Coordinator had brought to his attention the Sentencing Services report on defendant. The judge explained:

> [A]fter reading through the report, . . . I have decided to bring [defendant] back into the courtroom for further hearing since my ruling in the case did not include all relevant matters that I think the Court should have been aware of at the time it made its decision to do what it previously did, which is now ALL STRICKEN.

The trial judge then resentenced defendant to an active sentence of 21 to 26 months incarceration. Defendant filed timely notice of appeal to this Court.

I

[1] As a threshold matter, we must address the State's contention that defendant is not entitled to appellate review under *State v. Bolinger*, 320 N.C. 596, 601-02, 359 S.E.2d 459, 462 (1987). In *Bolinger*, the defendant contended that the trial judge violated N.C. Gen. Stat. § 15A-1022 (2003) in accepting his guilty plea. Our Supreme Court recognized that a challenge to the procedures followed in accepting a guilty plea does not fall within the scope of N.C. Gen. Stat. § 15A-1444 (2003), specifying the grounds giving rise to an appeal as of right. 320 N.C. at 601, 359 S.E.2d at 462. Accordingly, the Court held that "defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea." *Id.* The Court further held that "[d]efendant may obtain appellate review of this issue only upon grant of a writ of certiorari." *Id.* Although the defendant had failed to petition the Court for a writ of certiorari, the Court nonetheless elected to review the merits of the defendant's contentions. *Id.* at 602, 359 S.E.2d at 462.

Under *Bolinger*, defendant in this case is not entitled to appeal from his guilty plea as a matter of right, but his arguments may be reviewed pursuant to a petition for writ of certiorari. We choose to treat defendant's appeal as a petition for writ of certiorari, which we now allow. *See, e.g., State v. Taylor*, 308 N.C. 185, 186, 301 S.E.2d 358, 359 (1983) ("Defendant has no appeal of right since he entered pleas of guilty and no contest pursuant to a plea bargain. His purported appeal is therefore subject to dismissal. However, in order to put this matter to rest, we elect to treat his attempt to appeal as a petition for writ of certiorari and grant that petition."); *State v. Young*, 120 N.C. App. 456, 459, 462 S.E.2d 683, 685 (1995) (although the defendant had failed to move to withdraw his guilty plea and, therefore, had no appeal of right, "we treat the assignment of error as a petition for writ of certiorari and elect to grant review of the issue").

Although not argued by the State, we note that if defendant were not challenging the procedures employed in accepting a guilty plea, the decisions in *State v. Dickson*, 151 N.C. App. 136, 137-38, 564 S.E.2d 640, 640-41 (2002) and *State v. Pimental*, 153 N.C. App. 69, 76-77, 568 S.E.2d 867, 872, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002) would apply. Challenges to guilty plea procedures

brought under Article 58 of the North Carolina General Statutes (entitled "Procedures Relating to Guilty Pleas in Superior Court"), N.C. Gen. Stat. § 15A-1021 *et seq.* (2003), are distinguishable from more common appeals from guilty pleas. The Official Commentary to Article 58 states that one of the benefits of the Article is "[t]he likelihood of fewer successful attacks on guilty pleas in post-conviction hearings." Consistent with this purpose, the General Assembly enacted N.C. Gen. Stat. § 15A-1027 (2003), which specifically provides that "[n]oncompliance with the procedures of this Article [58] may not be a basis for review of a conviction after the appeal period for the conviction has expired." This provision expresses the General Assembly's intent to permit review of procedural violations only during "the appeal period." *Id.* In short, under *Bolinger* and consistent with N.C. Gen. Stat. § 15A-1027, it is permissible for this Court to review pursuant to a petition for writ of certiorari during the appeal period a claim that the procedural requirements of Article 58 were violated.

II

[2] Defendant contends that the trial court erred in allowing the State to withdraw from its plea agreement with defendant after he entered his guilty plea. There is, however, no indication in the record that the State withdrew from the plea agreement. Instead, the transcript shows that the trial court *sua sponte* reopened defendant's sentencing hearing and resentenced him on the basis of information it received during the luncheon recess. Accordingly, this assignment of error lacks merit.

[3] Defendant next argues that the trial court erred in not following the procedural safeguards established by N.C. Gen. Stat. §§ 15A-1022 and 15A-1024 (2003) upon resentencing him. We agree that the trial court failed to comply with N.C. Gen. Stat. § 15A-1024. That statute provides:

> If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact *and inform the defendant that he may withdraw his plea.* Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

N.C. Gen. Stat. § 15A-1024 (emphasis added). Our Supreme Court has explained that this statute applies when:

> the trial judge does not reject a plea arrangement when it is presented to him but hears the evidence and at the time for sentencing determines that a sentence different from that provided for in the plea arrangement must be imposed. *Under the express provisions of this statute a defendant is entitled to withdraw his plea and as a matter of right have his case continued until the next term.*

State v. Williams, 291 N.C. 442, 446-47, 230 S.E.2d 515, 517-18 (1976) (emphasis original). This is precisely the situation presented in this case. The trial judge should have (1) informed defendant of his decision to impose a sentence other than that provided in the plea agreement, (2) informed him that he could withdraw his plea, and (3) if defendant chose to withdraw his plea, granted a continuance until the next session of court.

Because the trial judge failed to follow the procedure mandated in N.C. Gen. Stat. § 15A-1024, we vacate defendant's sentence and remand the matter to the trial court for proceedings consistent with those prescribed by N.C. Gen. Stat. § 15A-1024. *See State v. Puckett*, 299 N.C. 727, 730-31, 264 S.E.2d 96, 98-99 (1980) (vacating court's judgment for failure to comply with N.C. Gen. Stat. § 15A-1024).

Vacated and remanded.

Judges McGEE and HUNTER concur.

IN RE: KENDRA LYNETTE SAVAGE, A MINOR CHILD

IN RE: KELLY DAWN SAVAGE, A MINOR CHILD

No. COA03-267

(Filed 2 March 2004)

Termination of Parental Rights— order signed by judge other than one presiding over hearing—nullity

The orders terminating respondent mother's parental rights are vacated and the case is remanded for a new trial, because: (1) the orders were signed by a judge who did not preside over the parental rights termination hearing; and (2) the presiding judge has since left office and is unavailable to render a decision in this case.

Appeal by respondent from orders entered 6 November 2002 by Judge Robert M. Brady in Catawba County District Court. Heard in the Court of Appeals 19 November 2003.

No brief filed on behalf of petitioner-appellee.

Janet K. Ledbetter, for respondent-appellant.

No brief filed on behalf of Guardian ad Litem.

GEER, Judge.

Respondent Marion B. Savage Coffey, the mother of the two children who are the subject of this case, appeals from orders terminating her parental rights. Because the orders were signed by a judge who did not preside over the parental rights termination hearing, we must reverse and remand for a new trial.

Petitioner Rodney Eugene Savage, the children's father, filed petitions to terminate Ms. Coffey's parental rights as to each child on 15 December 2000. The Honorable Jonathan L. Jones, then the Chief District Court Judge, presided at the hearing on those petitions on 17 September 2002. During the hearing, Judge Jones announced in open court certain findings of fact, his conclusion that grounds for termination existed based on failure to pay child support for one year prior to the filing of the petition, and his decision that termination of Ms. Coffey's parental rights was in the children's best interest. Judge Jones requested that Mr. Savage's attorney prepare an order with proposed findings of fact.

The record on appeal contains an adjudicatory order and a dispositional order for each child dated 31 October 2002 and filed 6 November 2002, purportedly terminating Ms. Coffey's parental rights. These orders were not, however, signed by Judge Jones, but rather by District Court Judge Robert M. Brady.

Although the orders signed by Judge Brady state that the hearing was held before "the undersigned Judge," the certified transcript, which is a part of the record, states that Judge Jones presided. A certified record "imports verity" and the Court is bound by the record as certified. *State v. Johnson*, 295 N.C. 227, 233, 244 S.E.2d 391, 395 (1978) (Supreme Court bound by the certified record, even where confusing jury instruction appeared to have been erroneously transcribed). Additionally, the parties' designation of this transcript as part of the record on appeal without any limitation is binding. *Rogers v. Rogers*, 265 N.C. 386, 387-88, 144 S.E.2d 48, 49 (1965) ("We do not

believe the able judge who tried this case charged the jury in the manner in which the charge is set out in the record. Even so, counsel for the respective parties agreed to the case on appeal and we are bound by it."). The record, therefore, established that the judge who signed the orders terminating Ms. Coffey's parental rights was not the same judge who heard the evidence.

In re Whisnant, 71 N.C. App. 439, 322 S.E.2d 434 (1984) is dispositive of this appeal. In *Whisnant*, this Court held that an order terminating parental rights was a "nullity" when signed by a judge other than the one who presided over the hearing. *Id.* at 441, 322 S.E.2d at 435. The Court pointed out that Rule 52 of the Rules of Civil Procedure requires a judge presiding over a non-jury trial to (1) make findings of fact, (2) state conclusions of law arising on the facts found, and (3) enter judgment accordingly. *Id.* *Whisnant* confirms that the requirements of Rule 52 are not met when the presiding judge simply announces his decision in open court without ever reducing that decision to writing and filing it. *Id.*

As the *Whisnant* Court noted, Rule 63 of the Rules of Civil Procedure contemplates some instances in which a judge may sign an order for another judge. *Id.* Rule 63 currently provides:

> If by reason of death, sickness or other disability, resignation, retirement, expiration of term, removal from office, or other reason, a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed:
>
> . . . .
>
> (2) In actions in the district court, by the chief judge of the district, or if the chief judge is disabled, by any judge of the district court designated by the Director of the Administrative Office of the Courts.
>
> If the substituted judge is satisfied that he or she cannot perform those duties *because the judge did not preside at the trial or hearing* or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing.

N.C. Gen. Stat. § 1A-1, Rule 63 (2003) (emphasis added). The function of a substitute judge under this rule is "ministerial rather than judicial." *Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435.

This Court explained in *Whisnant*:

> "Rule 63 does not contemplate that a substitute judge, who did not hear the witnesses and participate in the trial, may nevertheless participate in the decision making process. It contemplates only . . . [performing] such acts as are necessary under our rules of procedure to effectuate a decision already made. Under our rules, where a case is tried before a court without a jury, findings of fact and conclusions of law sufficient to support a judgment are essential parts of the decision making process."

Id. at 441-42, 322 S.E.2d at 435 (quoting *Girard Trust Bank v. Easton*, 12 N.C. App. 153, 155, 182 S.E.2d 645, 646, *cert. denied*, 279 N.C. 393, 183 S.E.2d 245 (1971)).

Because the orders terminating Ms. Coffey's parental rights were not signed by the presiding judge, we must vacate those orders. Respondent represents that Judge Jones has since left office and is unavailable to render a decision in this case on remand. We are therefore left with no choice but to remand this case for a hearing *de novo*. *Id.* at 442, 322 S.E.2d at 436. Resolution of the important issues in this case have been unnecessarily delayed.

Because of our resolution of this appeal, we need not address respondent's other assignments of error.

Vacated and Remanded.

Chief Judge MARTIN and Judge HUNTER concur.

THOMAS BLYTHE v. REBECCA BRYANT BLYTHE

No. COA03-224

(Filed 2 March 2004)

Appeal and Error— appealability—interlocutory order—order continuing show cause hearing

Plaintiff's appeal in a divorce and equitable distribution case from the trial court's entry of an order continuing a show cause hearing and directing plaintiff to comply with a memorandum order is dismissed because: (1) the trial court's 8 November 2002

order is not a final judgment when it continues the cause so as to permit plaintiff additional time in which to comply or be held in contempt; and (2) it does not affect a substantial right for the purposes of N.C.G.S. § 1-277(a).

Appeal by plaintiff from order entered 8 November 2002 by Judge Spencer G. Key, Jr. in Stokes County District Court. Heard in the Court of Appeals 2 December 2003.

R. Michael Bruce, attorney for plaintiff.

No brief filed for defendant.

TIMMONS-GOODSON, Judge.

Thomas Blythe ("plaintiff") appeals the trial court's entry of an order continuing a show cause hearing and directing plaintiff to comply with a memorandum order entered on 5 July 2002. For the reasons stated herein, we dismiss the appeal.

The procedural history of this case is as follows: Plaintiff filed for divorce from bed and board from his wife, Rebecca Bryant Blythe ("defendant"), on 8 May 2002. Plaintiff also filed for injunctive relief related to equitable distribution. Defendant filed a counterclaim seeking post-separation support and alimony. On 5 July 2002, the parties, their respective attorneys, and the trial judge signed a partially typed, partially handwritten agreement entitled "Memorandum of Judgment/Order" ("memorandum order"). The memorandum order did not provide a date by which the property should be exchanged between plaintiff and defendant. On 26 September 2002, defendant filed a Motion to Show Cause praying that the trial court "issue an [o]rder to the Plaintiff to show cause if any exists, as to why he should not be held in contempt for violation of [the memorandum order] . . . ." Defendant alleges in her motion that plaintiff had not conveyed the marital home to defendant, transferred his 49% interest in the family business to defendant, executed a release of all claims against defendant, or entered into a separation agreement as required by the memorandum order.

This motion was heard before the trial court on 8 November 2002, at which time the trial court acknowledged that plaintiff had not complied with the memorandum order, and continued the show cause hearing until 26 November 2002. The trial court ordered plaintiff to comply with the memorandum order, stating that "[f]ailure to comply with this order shall subject the person in actual

possession [of the property] to contempt." It is from this order that defendant appeals.

The dispositive issue is whether the 8 November 2002 order is a final judgment from which an appeal may be taken. We conclude that it is not, and thus we dismiss this appeal.

N.C. Gen. Stat. § 1-277(a) (2003) states that

> [a]n appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

Thus, "the right of appeal lies from the final judgment of [the trial court] or from an interlocutory order of the [trial court] which affects some substantial right." *Whalehead Properties v. Coastland Corp.*, 299 N.C. 270, 275, 261 S.E.2d 899, 903 (1980), *citing Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950), *and Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979). "A final judgment disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court, while an interlocutory ruling does not determine the issues but directs some further proceeding preliminary to the final decree." *Burwell v. Griffin*, 67 N.C. App. 198, 203, 312 S.E.2d 917, 920 (1984), *appeal dismissed*, 311 N.C. 303, 317 S.E.2d 678 (1984), *citing Atkins v. Beasley*, 53 N.C. App. 33, 279 S.E.2d 866 (1981), *and Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983). "[O]rders and judgments which are not final in their nature, but leave something more to be done with the case, are not immediately reviewable. The remedy is to note an exception at the time, to be considered on appeal from final judgment." *Cox v. Cox*, 246 N.C. 528, 531, 98 S.E.2d 879, 882-83 (1957), *citing McIntosh, North Carolina Practice and Procedure, Second Edition, Section 1782(3).*

In the present case, the trial court's order is not final, but leaves further action to be taken. Specifically, the 8 November 2002 order continues the cause so as to permit plaintiff additional time in which to comply or be held in contempt. For this reason, we conclude that the trial court's order is not a final judgment, nor does it affect a

substantial right for the purposes of N.C. Gen. Stat. § 1-277(a). Therefore, we dismiss the appeal.

Dismissed.

Judges WYNN and McCULLOUGH concur.

IN THE MATTER OF: J.R.; A.R.

No. COA02-1659

(Filed 2 March 2004)

Child Abuse and Neglect— adjudication—absence of parent

An adjudication of neglect by respondent mother was remanded where the order was entered with the consent of the father but in the absence of the mother or her counsel and with an unsworn summary of the allegations from a social worker.

Appeal by respondent mother from order dated 8 October 2001[1] by Judge Wendy M. Enochs in Guilford County District Court. Heard in the Court of Appeals 17 September 2003.

County Attorney Jonathan V. Maxwell, by Deputy County Attorney Lynne G. Schiftan, for petitioner-appellee.

Cynthia A. Esworthy for respondent-appellant.

BRYANT, Judge.

Sirlena Rivera (respondent) appeals an order dated 8 October 2001 adjudicating her children J.R. and A.R. neglected.

On 30 May 2001, the Guilford County Department of Social Services (petitioner) filed a juvenile petition alleging respondent had neglected J.R. and A.R. The petition listed Elbert Isaac Williams (Williams) as J.R.'s father and Lennie Monroe (Monroe) as the putative father of A.R.[2] At the adjudicatory hearing on 25 September 2001, Williams was not present but was represented by his attorney, who

1. The caption has been altered to show only the children's initials.

2. A paternity test later established that Monroe is not A.R.'s biological father.

stipulated to a finding of neglect as alleged in the petition.[3] Although neither respondent nor her counsel was present, the trial court commenced the adjudication phase of the proceeding. The trial court noted that "one of the parents," Williams, was "willing to enter into a consent . . . at this time." In preparation for the consent order, the trial court inquired of the clerk of court whether she had the names of all the persons present. The trial court next asked: "And is it a consent as the facts are alleged in the petition?" The clerk replied that "[it is" and inquired whether the trial court wished to hear a summary of facts. Dana Hoxworth, the social worker who had signed the juvenile petition, then offered an unsworn summary of the facts alleged in the petition. Respondent's counsel did not arrive until after Hoxworth had concluded her recitation of facts and the trial court had already begun the dispositional stage of the hearing.[4]

At the conclusion of the hearing, the trial court directed that the findings in the order should read "as alleged in the petition." In its 8 October 2001 order, the trial court ordered the children to remain in the legal and physical custody of petitioner and granted petitioner the authority to place them with J.R.'s paternal grandmother. The trial court further required respondent to comply with the visitation plan and other terms. Respondent's arrival in the courtroom occurred just after conclusion of the dispositional phase.

The dispositive issue is whether Williams' consent and the summary of facts presented by the social worker constituted sufficient evidentiary support for an adjudication of neglect.

As mandated by statute, a trial court may enter a consent order or judgment only "when all parties are present." N.C.G.S. § 7B-902 (2003). Consistently, this Court has held that the consent of one parent to a finding of neglect does not give rise to a valid consent judgment in the absence of the other parent. *See In re Shaw*, 152 N.C. App. 126, 130, 566 S.E.2d 744, 746-47 (2002); *In re Thrift*, 137 N.C. App. 559, 563, 528 S.E.2d 394, 397 (2000). Thus, entry of a consent order in this case, in the absence of respondent and without her consent was not proper. Moreover, Williams' consent to a finding of

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3. Williams does not appeal the trial court's order adjudicating the children neglected.

4. In its order, the trial court summarily noted the presence of respondent's counsel at the proceeding. The order, however, was drafted after the conclusion of both the adjudicatory and dispositional hearings, and the transcript actually indicates respondent's counsel did not arrive until after the trial court's adjudication of neglect.

neglect as alleged in the petition could not bind respondent, as the allegations of neglect in the juvenile petition pertained solely to her actions and not those of Williams. *See McRary v. McRary*, 228 N.C. 714, 719, 47 S.E.2d 27, 31 (1948) ("[a] judgment by consent is the agreement of the parties").

In its brief to this Court, petitioner argues the trial court adjudicated respondent's children neglected based also on the testimony of a social worker. We note, however, that the social worker's recitation of facts, which was unsworn, was not offered as substantive evidence but merely as a summary of facts alleged in the petition for purposes of drafting the consent order and therefore did not meet the "clear and convincing evidence" requirement for adjudicatory hearings. N.C.G.S. § 7B-805 (2003) ("[t]he allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence"). As the trial court's adjudication of neglect therefore did not have a sufficient evidentiary basis, we reverse and remand this case for a new hearing.

Although respondent raises another troubling issue in her brief to this Court, the holding of the adjudicatory hearing in the absence of respondent's counsel, we do not address this issue because of our decision to remand.

Reversed and remanded.

Chief Judge MARTIN and Judge GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

BRANCH BANKING & TR. CO. v. HAYES No. 03-242	Johnston (02CVD1565)	Reversed
DOE 1 v. SWANNANOA VALLEY YOUTH DEV. CTR. No. 03-417	Ind. Comm. (TA-17538)	Affirmed
DOE 1 v. SWANNANOA VALLEY YOUTH DEV. CTR. No. 03-418	Ind. Comm. (TA-17539)	Affirmed
HALIFAX CTY. ex rel. WHITAKER v. WHITAKER No. 03-277	Halifax (98CVD672)	Dismissed
IN RE D.J.W. No. 03-400	Chowan (02J10)	Affirmed and remanded to amend the judgment consistent with this opinion
IN RE PEEPLES No. 03-438	Surry (02J92B)	Affirmed
KATSIFOS v. PULTE HOME CORP. No. 03-429	Wake (02CVS4451)	Affirmed
KIKENDALL v. PARKER No. 03-220	Wake (97CVS6825)	Dismissed
N.C. INDUS. CAPITAL, LLC v. RUSHING No. 03-274	Mecklenburg (01CVD19376)	Affirmed
NEELY v. LUCENT TECHNOLOGIES, INC. No. 03-442	Ind. Comm. (I.C. 968777)	Affirmed
NORTHCROSS LAND & DEV., L.P. v. LAKE NORMAN CASTALDI'S, INC. No. 03-395	Mecklenburg (02CVD14651)	Affirmed
PARSONS v. SHAKI No. 03-448	Ashe (00SP43)	Affirmed; remanded for compliance with General Statute 38-3(c)
PRICE v. HAGAR FIN. CORP. No. 03-280	Wake (02CVS4005)	Affirmed in part; reversed in part

PROPERTY RIGHTS ADVOCACY GRP. v. TOWN OF LONG BEACH No. 03-654	Brunswick (02CVS1249)	Dismissed
PRUETT v. PRUETT FLOOR COVERINGS No. 02-1381	Ind. Comm. (I.C.557214)	Affirmed
SCARVEY v. FIRST FED. SAVINGS & LOAN ASS'N OF CHARLOTTE No. 03-354	Mecklenburg (98CVS204)	Affirmed
STATE v. BROWN No. 03-174	Buncombe (01CRS63681) (01CRS63682)	No error
STATE v. BYOUS No. 03-246	Mecklenburg (00CRS49631)	No error
STATE v. GUEVARA No. 02-1350	Mecklenburg (00CRS26471) (00CRS26472) (00CRS26473) (00CRS26474) (00CRS26475) (00CRS160567) (00CRS160568)	No error
STATE v. HESTER No. 03-331	Orange (01CRS1778)	No error
STATE v. LAWRENCE No. 03-386	Martin (01CRS50707)	No error
STATE v. PALMER No. 03-369	Wilkes (01CRS51819) (01CRS53626) (01CRS54893)	Reversed and remanded
STATE v. SEAWOOD No. 03-493	Pender (02CRS3326) (02CRS51349)	No error
STATE v. WILSON No. 03-374	Guilford (01CRS79971)	No error
STATE v. YARRELL No. 03-243	Beaufort (01CRS2910) (01CRS51194)	Affirmed in part, vacated in part and remanded for new sentencing

STATE v. YELVERTON No. 03-304	Wayne (01CRS12076) (01CRS12077) (01CRS53601) (01CRS53602)	No error
SYKES v. MOSS TRUCKING CO. No. 03-548	Ind. Comm. (I.C.106105)	Dismissed

SEARS ROEBUCK AND CO., PLAINTIFF v. BARBARA AVERY, DEFENDANT

No. COA02-925

(Filed 16 March 2004)

1. Appeal and Error— appealability—interlocutory order—order denying arbitration

Although the appeal from an order denying arbitration is an appeal from an interlocutory order, it is immediately appealable because it affects a substantial right.

2. Arbitration and Mediation— motion to compel—credit card agreement

The trial court did not err by denying plaintiff company's motion to compel arbitration even though plaintiff contends it validly added an arbitration provision to the terms of defendant's credit card agreement by mailing notice to its cardholders based on a provision in the agreement entitling the company to change any term in the agreement, because: (1) although plaintiff relies heavily on the public policy favoring arbitration, that policy is immaterial unless there is an enforceable arbitration agreement; (2) no enforceable arbitration agreement exists when, applying Arizona law, the company was only authorized by the change of terms provision to make changes relating to subjects already addressed in the original agreement and the original agreement did not contain an arbitration clause; (3) allowing plaintiff now to unilaterally insert an arbitration provision would ignore the requirement of good faith implied in all contracts of adhesion; (4) allowing plaintiff to change or amend its agreement without any limitation is not within the reasonable expectations of its cardholders and gives rise to an illusory contract; and (5) an arbitration provision is waived by conduct inconsistent with the use of the arbitration remedy, and even if the parties entered into an enforceable arbitration agreement based on Arizona law, plaintiff has waived the right to compel arbitration when plaintiff made a tactical decision to file suit rather than seek arbitration and only moved to compel arbitration after plaintiff learned that its tactical decision was not in fact advantageous.

Appeal by plaintiff from order entered 2 April 2002 by Judge A. Leon Stanback, Jr. in Wake County Superior Court. Heard in the Court of Appeals 26 March 2003.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Douglas W. Hanna, for plaintiff-appellant.

Wilmer, Cutler & Pickering, by Christopher R. Lipsett, Daniel H. Squire and Michael D. Leffel, for plaintiff-appellant.

Robert P. Holmes, for defendant-appellee.

Webb & Webb, by William D. Webb, for defendant-appellee.

GEER, Judge.

The primary issue before this Court is whether plaintiff, Sears Roebuck and Co. ("Sears"), validly added an arbitration provision to the terms of defendant Barbara Avery's Sears credit card agreement. While Sears, in arguing that it is entitled to compel arbitration, relies upon a provision in its cardholder agreement allowing it to change any term of the agreement, we hold, applying Arizona law, that Sears was only authorized by that provision to make changes relating to subjects already addressed in the original agreement. Because Sears' arbitration clause did not fall into that category and because Sears has, in any event, waived its right to compel arbitration, we affirm the trial court's denial of Sears' motion to compel arbitration.

Facts

The undisputed facts show that Ms. Avery opened a credit card account with Sears in 1983. In March 1995, that account was transferred to Sears National Bank ("SNB"), a Sears subsidiary. Although Ms. Avery's cardholder agreement with SNB was ten pages long and contained 37 separate provisions (not including a statement of rights under the Fair Credit Billing Act), it made no reference to arbitration or any other dispute resolution procedures and did not in any manner address the forum in which a customer could have disputes resolved. The agreement also contained a "Change of Terms" provision stating (emphasis original): "As permitted by law, SNB has the right to change any term or part of this agreement, including the rate of *Finance Charge*, applicable to current and future balances. SNB will send me a written notice of any such changes when required by law."

In July or August 1999, SNB sent a 12-page notice of changes to the cardholder agreement to most of its cardholders.[1] SNB's records indicate that SNB sent this notice to Ms. Avery; Ms. Avery's affidavit

1. Arkansas cardholders and certain other specified cardholders (such as those in bankruptcy) did not receive the notice.

stated that she was unaware of any correspondence regarding changes to her account. The SNB notice highlighted certain changes to the account, including the addition of an arbitration provision, noting that "[a]t present, there is no such arbitration provision for your Account." The notice announced that the changes would "become effective 30 days from your receipt of this notice, unless you notify us in writing before that date . . . that you wish to reject the new Agreement." The notice instructed the cardholder that if she provided notice that she did not agree to the changes, she "may pay any outstanding balance under the terms currently governing [her] Account."

Within the body of the new cardholder agreement, section 22 provided:

> ARBITRATION. Any and all claims, disputes or controversies of any nature whatsoever (whether in contract, tort, or otherwise) arising out of, relating to, or in connection with: (a) this Agreement; (b) any prior agreement you may have had with us, Sears, the Sears Affiliates, or with any of their predecessors, successors, and assigns, or with any of the dealers, contractors, licensees, agents, employees, officers, directors and representatives of any of the foregoing entities; (c) the application for the Account, this Agreement or any prior agreement; (d) the relationships which result from this Agreement or any prior agreement (including any relationships with us, Sears or any of the Sears Affiliates); or (e) the validity, scope or enforceability of this arbitration section or this Agreement or any prior agreement (the immediately preceding subsections (a) through (e) shall be referred to in this section, collectively, as "claims"), shall be resolved, upon your election or our election, by final and binding arbitration before a single arbitrator, on an individual basis without resort to any form of class action, except that each party retains the right to seek relief in a small claims court, on an individual basis without resort to any form of class action, for claims within the scope of its jurisdiction.

The new agreement also contained detailed provisions governing the arbitration proceedings.

In addition, the new agreement altered the "Change of Terms" provision. It now specified:

> We may, at any time and subject to applicable law:
>
> - Change any Credit Limit applicable to the Account;

- Change any term or condition of this Agreement relating to your Account, including the Annual Percentage Rate applicable to outstanding and future balances, and the fees or other charges applicable to the Account; and

- *Add any new term or condition* to this Agreement relating to your Account.

Our right to change or add terms or conditions to this Agreement applies both to financial terms, such as Finance Charges and fees, and to non-financial terms, such as our enforcement rights and other contractual provisions. We may apply any changed or new terms or conditions to any current and/or future balances created after that date. We will send you a written notice of any such change(s) or addition(s) as required by law.

(Emphasis added)

On 16 April 2001, Sears filed an action against Ms. Avery in Wake County District Court to collect an outstanding balance on her account in the amount of $3,080.08. Ms. Avery moved to transfer the action to Superior Court and filed an answer and class-action counterclaim alleging that Sears' interest rate is higher than that permitted by the North Carolina Retail Installment Sales Act. Sears moved to dismiss or in the alternative to stay Ms. Avery's counterclaim pending arbitration pursuant to the 1999 arbitration provision.

The trial court denied Sears' motion, finding (1) that there was no mutual assent by the parties to arbitrate, (2) that Ms. Avery did not make any new or additional purchases on her Sears card after the mailing of the 1999 notice apart from automated, pre-authorized charges, (3) that Ms. Avery had been financially unable to pay the amount necessary to close her Sears account, and (4) that Sears had not paid any consideration in connection with the 1999 changes to the account. Based on these findings, the trial court concluded that since the parties did not mutually assent to the arbitration provision in the 1999 notice and since that provision was not supported by consideration, "[t]here is no contract requiring arbitration of the counterclaim . . . ." The trial court specifically declined to address whether the arbitration clause was unconscionable, whether the issues involved in the litigation fell within the scope of the arbitration clause, whether Sears had standing to enforce the provision, and whether Sears waived the right to compel arbitration.

Sears appealed from the trial court's decision. Ms. Avery has cross-assigned error to the trial court's failure to address unconscionability, the scope of the arbitration clause, standing, and waiver.

Discussion

I. Standard of Review.

[1] Although this appeal is interlocutory, this Court has held that an "order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991). Our standard of review is *de novo* "since the order appealed from is based upon contract interpretation and therefore presents a question of law." *Internet East, Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 405, 553 S.E.2d 84, 87 (2001).

In considering a motion to compel arbitration, a court " 'must determine whether the parties agreed to arbitrate, and, if so, the scope of the arbitration agreement.' " *Tohato, Inc. v. Pinewild Mgmt., Inc.*, 128 N.C. App. 386, 390, 496 S.E.2d 800, 803 (1998) (quoting *Southwest Health Plan, Inc. v. Sparkman*, 921 S.W.2d 355, 358 (Tex. Ct. App. 1996)). We apply Arizona law since the cardholder agreement provides that "[t]his agreement . . . will be governed by and interpreted in accordance with the laws of the State of Arizona and the United States[.]" *Torres v. McClain*, 140 N.C. App. 238, 241, 535 S.E.2d 623, 625 (2000) (holding that the parties' choice of law is given effect " 'as long as they had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental public policy of the state or otherwise applicable law' ") (quoting *Behr v. Behr*, 46 N.C. App. 694, 696, 266 S.E.2d 393, 395 (1980)).

II. The Relevance of Public Policy Favoring Arbitration.

[2] While both federal and Arizona public policy favor arbitration, this public policy does not come into play unless a court first finds that the parties entered into an enforceable agreement to arbitrate. As the United States Supreme Court has stressed, "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 131 L. Ed. 2d 985, 993, 115 S. Ct. 1920, 1924 (1995) (emphasis added). *See also* ***Mastrobuono v.***

Shearson Lehman Hutton, Inc., 514 U.S. 52, 57, 131 L. Ed. 2d 76, 84, 115 S. Ct. 1212, 1216 (1995) (quoting *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 103 L. Ed. 2d 488, 500, 109 S. Ct. 1248, 1256 (1989)) (arbitration under the Federal Arbitration Act is a matter of " 'consent, not coercion' "); *DIRECTTV, Inc. v. Mattingly*, 376 Md. 302, 321, 829 A.2d 626, 638 (2003) ("We never reach the questions controlled by the [Federal Arbitration Act] because we hold that there was never a valid agreement to arbitrate . . . .").

The Arizona Court of Appeals has similarly stated that the public policy in favor of arbitration "presupposes the existence of a valid agreement to arbitrate. Only when the arbitration provision is enforceable will the court compel arbitration." *Stevens/Leinweber/Sullens, Inc. v. Holm Dev. & Mgmt., Inc.*, 165 Ariz. 25, 30, 795 P.2d 1308, 1313 (Ct. App. 1990). *See also Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 173 Ariz. 148, 153, 840 P.2d 1013, 1018 (S. Ct. 1992) ("When agreements to arbitrate are freely and fairly entered, they will be welcomed and enforced. They will not, however, be exempted from the usual rules of contract law . . . ."). Although Sears relies heavily on the policy favoring arbitration, that policy is immaterial unless this Court first finds that an enforceable arbitration agreement exists under Arizona law.

III. The Existence of an Enforceable Agreement to Arbitrate.

It is undisputed that Ms. Avery's original cardholder agreement with Sears did not contain an arbitration clause. Sears, however, purported to amend that agreement to add an arbitration clause by mailing notice to the cardholders pursuant to the existing "Change of Terms" provision. The question before this Court is whether Sears could, consistent with Arizona law, unilaterally add an arbitration clause to its shareholder agreement by simply mailing notice to its cardholders. *See DIRECTTV, Inc.*, 376 Md. at 311, 829 A.2d at 631 ("While the arbitration clause and its applicability to the instant dispute provides the shell of the case *sub judice*, arbitration is merely a context for the threshold issue—the interpretation of a provision within a contract that did not contain an arbitration clause[,] the initial customer agreement. Our decision, therefore, rests solely upon this Court's interpretation of Maryland contract law and not on principles set forth within the substantive law of arbitration.").

The Arizona Supreme Court has recognized that "the enforceability of the agreement to arbitrate is determined by principles of

general contract law." *Broemmer*, 173 Ariz. at 150, 840 P.2d at 1015. Ariz. Rev. Stat. § 12-1501 (2003) provides:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"Grounds in equity or law for revocation of a contract include an allegation that the contract is void for lack of mutual consent, consideration or capacity or voidable for fraud, duress, lack of capacity, mistake, or violation of a public purpose." *U.S. Insulation, Inc. v. Hilro Constr. Co.*, 146 Ariz. 250, 253, 705 P.2d 490, 493 (Ct. App. 1985) (reviewing agreement to arbitrate).

A. *Authority from Jurisdictions Other Than Arizona.*

Arizona's appellate courts have not squarely addressed the issue presented by this appeal. The California Court of Appeals has, however, in *Badie v. Bank of America*, 67 Cal. App. 4th 779, 79 Cal. Rptr. 2d 273 (1998), applied general contract principles to the identical question presently before this Court. In *Badie*, the cardholder agreement did not include an arbitration agreement, but the Bank attempted to amend that agreement to add an arbitration provision by sending notice of the change in a bill stuffer pursuant to a provision permitting the Bank to "Change or Terminate Any Terms, Conditions, Services or Features of [the] Account (Including Increasing [the] Finance Charges) at Any Time." *Id.* at 786, 79 Cal. Rptr. 2d at 278.

The California Court of Appeals held, relying upon California contract law:

> [A]fter analyzing the credit account agreements in light of the standard canons of contract interpretation, we conclude that when the account agreements were entered into, the parties did not intend that the change of terms provision should allow the Bank to add completely new terms such as an ADR clause simply by sending out a notice. Further, to the extent that application of these canons of construction has not removed all uncertainty concerning the meaning of the provision, we resort to the rule that ambiguous contract language must be interpreted most strongly against the party who prepared it . . ., a rule that applies with particular force to the interpretation of contracts of adhesion, like the account agreements here. . . . Application of this

> rule strengthens our conviction that the parties did not intend that the change of terms provision should permit the Bank to add new contract terms that differ *in kind* from the terms and conditions included in the original agreements.

Id. at 803, 79 Cal. Rptr. 2d at 289 (emphasis original). The *Badie* court concluded that the arbitration clause "is not a part of the Bank's contract with the four individual plaintiffs here and may not be enforced against them." *Id.* at 807, 79 Cal. Rptr. 2d at 291.

Our review of Arizona appellate decisions regarding standardized contracts and modification of contracts has revealed that Arizona courts apply the same principles and analyses relied upon by the California court in *Badie*. We conclude, therefore, that the Arizona appellate courts would adopt the same reasoning as the *Badie* court and would reach the same result.

In seeking to overturn the trial court's order denying arbitration, Sears cites only a solitary decision from Arizona that does not address the pertinent issues on this appeal. We do not believe that the decisions from other jurisdictions relied upon by Sears reflect what Arizona courts would do faced with these circumstances.

With respect to the cited decisions addressing the authority of a credit card company to use a "Change of Terms" provision to unilaterally add an arbitration clause, those opinions rely upon state statutes interpreted to specifically authorize that conduct. *See, e.g., Fields v. Howe*, No. IP-01-1036-C-B/S, 2002 WL 418011 (S.D. Ind. Mar. 14, 2002) (unilateral addition of arbitration clause authorized by 5 Del. C. § 952(a) (2003)); *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 831 (S.D. Miss. 2001) (unilateral addition of arbitration clause "specifically authorize[d]" by Ohio Rev. Stat. § 1109.20(D)), *aff'd*, 34 Fed. Appx. 964, 2002 U.S. App. LEXIS 7759 (5th Cir., 5 Apr. 2002); *SouthTrust Bank v. Williams*, 775 So. 2d 184, 190 (Ala. 2000) (holding that the Alabama legislature in enacting Ala. Code § 5-20-5 "provided a procedure that differs in no material respect from the one [the credit card company] followed in this case"). Since Sears has cited no comparable Arizona statute and we have not found one, these decisions are not persuasive.[2]

2. In *Gaynoe v. First Union Corp.*, 153 N.C. App. 750, 754-55, 571 S.E.2d 24, 27 (2002) (applying Georgia law), *disc. review denied*, 356 N.C. 671, 577 S.E.2d 118 (2003), cited by Sears, this Court did not address the issues presented by this appeal, but rather held that when a cardholder had successfully sought an amendment to his interest rate, he could not then argue that the bank was bound by the original interest rate. Sears also relies upon a decision from the United States District Court for the

Sears has also cited three decisions involving its own cardholder agreement. One of those decisions, *Rule v. Sears, Roebuck & Co.*, Civ. A. No. 3:00-cv-390WS (S.D. Miss. Mar. 30, 2001), cites no Arizona cases. Indeed, on the critical issue, it cites no cases at all. In *Hutcherson v. Sears Roebuck & Co.*, 342 Ill. App. 3d 109, —, 793 N.E.2d 886, 892 (2003), the Illinois Court of Appeals, in determining that Sears could unilaterally amend its cardholder agreement to add an arbitration clause, relied on the same decisions cited by Sears in this case applying inapplicable state statutes. With respect to *Vigil v. Sears Nat'l Bank*, 205 F. Supp. 2d 566 (E.D. La. 2002), we respectfully disagree with its limited analysis of Arizona decisions.

B. *Arizona Law Governing Contracts of Adhesion.*

There is no dispute that Sears' cardholder agreement is a contract of adhesion. The Arizona Supreme Court has held:

> An adhesion contract is typically a standardized form "offered to consumers of goods and services on essentially a 'take it or leave it' basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract."

Broemmer, 173 Ariz. at 150, 840 P.2d at 1015 (quoting *Wheeler v. St. Joseph Hosp.*, 63 Cal. App. 3d 345, 356, 133 Cal. Rptr. 775, 783 (1976)).

The *Broemmer* court, noting that Arizona follows the Restatement (Second) of Contracts § 211 ("Standardized Agreements"), *id.* at 152, 840 P.2d at 1017, held that "[t]o determine whether [a] contract of adhesion is enforceable, we look to two factors: the reasonable expectations of the adhering party and whether the contract is unconscionable." *Id.* at 151, 840 P.2d at 1016. Quoting a California decision, the Arizona Supreme Court explained further:

> "Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. . . . The second—a prin-

Western District of North Carolina, *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574 (W.D.N.C. 2000). This decision, applying Delaware law, expressly distinguished the situation present in this case, "involv[ing] a credit card agreement containing no arbitration clause which was later unilaterally modified to include one." *Id.* at 577-78.

> ciple of equity applicable to all contracts generally—is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.' "

Id. at 151, 840 P.2d at 1016 (quoting *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 820, 171 Cal. Rptr. 604, 612, 623 P.2d 165, 172-73, (1981)). The court flatly held: "Contracts of adhesion will not be enforced unless they are conscionable and within the reasonable expectations of the parties." *Id.* at 153, 840 P.2d at 1018.

In *Broemmer*, the Arizona Supreme Court applied these principles to hold that an arbitration clause included in a standardized contract by a medical clinic was not enforceable. The court held that "there was no conspicuous or explicit waiver of the fundamental right to a jury trial or any evidence that such rights were knowingly, voluntarily and intelligently waived. The only evidence presented compels a finding that waiver of such fundamental rights was beyond the reasonable expectations of plaintiff." *Id.* at 152, 840 P.2d at 1017.

The comments to the Restatement (Second) of Contracts 2d § 211 (1981) note the value of standardized agreements. *Id.* cmt. a.[3] It points out that "[o]ne of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms." *Id.* cmt. b. Consistent with that purpose, "[c]ustomers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated." *Id.* Nevertheless, the Restatement recognizes the abuse that may occur and states that although standard terms are generally enforced "they are construed against the draftsman, and they are subject to the overriding obligation of good faith and to the power of the court to refuse to enforce an unconscionable contract or term." *Id.* cmt. c (internal citations omitted). Further, customers "are not bound to unknown terms which are beyond the range of reasonable expectation." *Id.* cmt. f.

In *Darner*, the Arizona Supreme Court applied this section of the Restatement to hold that recognition of the practical necessities of

3. *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 392, 682 P.2d 388, 397 (S. Ct. 1984) expressly adopted the analysis contained in the comments to this section of the Restatement.

standardized contracts "stops short of granting the drafter of the contract license to accomplish any result. [Contract law] *holds the drafter to good faith and terms which are conscionable*; it requires drafting of provisions which can be understood if the customer does attempt to check on his rights; *it does not give effect to boilerplate terms which are contrary to either the expressed agreement or the purpose of the transaction* as known to the contracting parties." 140 Ariz. at 394, 682 P.2d at 399 (emphasis added).

Under *Broemmer* and *Darner*, we are thus required to determine whether the unilateral addition of an arbitration clause to Sears' cardholder agreement pursuant to its "Change of Terms" provision was within the reasonable expectation of the cardholders and in compliance with the requirement of good faith.

C. *Arizona Law Governing Provisions Authorizing Unilateral Changes.*

Sears argues in support of its arbitration clause that it used a common method of credit card companies for modifying the terms of their agreements with their cardholders. According to Sears, the provision in its cardholder agreement allowing it, "[a]s permitted by law," to "change any term or part of this agreement" granted Sears the right to make any change, addition, or modification it wished, without limitation, to the cardholder agreement. We believe Arizona courts would conclude that such a construction is not consistent with good faith and is not within the reasonable expectations of cardholders.

In *Demasse v. ITT Corp.*, 194 Ariz. 500, 984 P.2d 1138 (S. Ct. 1999), the Arizona Supreme Court addressed a provision in an employee handbook that granted the employer the right to amend, modify, or cancel the handbook or any of the policies, rules, procedures, or programs outlined in the handbook. The handbook had originally contained a lay-off policy that was enforceable, according to the Arizona Supreme Court, as an implied-in-fact contract. *Id.* at 506, 984 P.2d at 1144. The defendant employer contended that the "right to amend" provision permitted it to unilaterally change the lay-off policy. The court disagreed, holding that "as with other contracts, an implied-in-fact contract term cannot be modified unilaterally." *Id.*

The *Demasse* court noted that "[n]othing could be more illusory" than to allow a party to unilaterally amend a contract based on a pro-

vision such as the one in the handbook. *Id.* at 508, 984 P.2d at 1146. The court elaborated with reasoning equally applicable here:

> We do not agree that a party to a contract containing a term that proves to be inconvenient, uneconomic, or unpleasant should have the right, like an administrative agency, to change the rules prospectively through proper procedures. . . . Self-interest may certainly provide a party with a legitimate business reason to request assent to a contract change, but the law has never before permitted unilateral change or excused non-performance of a contract on such a ground.

Id. at 511-12, 984 P.2d at 1149-50 (internal quotation marks omitted).

One commentator has suggested, similarly to the *Demasse* analysis, that a breach of the requirement of good faith occurs "when discretion is used to recapture opportunities forgone upon contracting . . . ." Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 373 (1980). Consistent with good faith, a party may exercise a discretionary power "for any purpose within the reasonable contemplation of the parties at the time of formation—to capture opportunities that were preserved upon entering the contract, interpreted objectively." *Id.* This view of unilateral changes to contracts is consistent with the definition of bad faith set out in the Restatement (Second) of Contracts 2d § 205 cmt. d (1981). That comment lists as an example of bad faith the "abuse of a power to specify terms . . . ." *Id.* cmt. d. The *Badie* court relied upon these principles in holding that

> [w]here . . . a party has the unilateral right to change the terms of a contract, it does not act in an 'objectively reasonable' manner when it attempts to 'recapture' a forgone opportunity by adding an entirely new term which has no bearing on any subject, issue, right, or obligation addressed in the original contract and which was not within the reasonable contemplation of the parties when the contract was entered into.

Badie, 67 Cal. App. 4th at 796, 79 Cal. Rptr. 2d at 284 (citations omitted).

Sears' construction of its "Change of Terms" provision is inconsistent with *Demasse* and these principles. It would permit Sears to add wholly new terms to its cardholder agreement that it did not see fit to include when it first contracted with its cardholders.

Arbitration was, of course, a popular alternative dispute resolution procedure in 1995 when Sears adopted the original cardholder agreement at issue in this case. Even though public policy already strongly favored arbitration, Sears chose not to include an arbitration clause in its agreement. To allow Sears now to unilaterally insert such a provision would ignore the requirement of good faith implied in all contracts of adhesion.

Nor do we believe that allowing Sears to change or amend its agreement without any limitation is within the reasonable expectations of its cardholders. A customer would not expect that a major corporation could choose to disregard potential contractual opportunities and then later, if it changed its mind, impose them on the customer unilaterally.

Significantly, if we construe the "Change of Terms" provision in the manner urged by Sears, that term arguably would render the contract illusory. Other courts have likewise concluded that the power to unilaterally amend contractual provisions without limitation gives rise to an illusory contract. *See, e.g., Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 2003) ("[W]e conclude that the provision affording Circuit City the unilateral power to terminate or modify the contract is substantively unconscionable."), *cert. denied*, — U.S. —, — L. Ed. 2d —, — S. Ct. —, 72 U.S.L.W. 3486 (26 Jan. 2004); *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) ("We join other circuits in holding that an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory."); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 316 (6th Cir. 2000) (defendant's right to alter arbitration provision unilaterally "renders its promise illusory"; agreement did not therefore "constitute an enforceable arbitration agreement"), *cert. denied*, 531 U.S. 1072, 148 L. Ed. 2d 664, 121 S. Ct. 763 (2001). In fact, this principle is black letter contract law:

> One of the commonest kind of promises too indefinite for legal enforcement is where the promisor retains an unlimited right to decide later the nature or extent of his performance. This unlimited choice in effect destroys the promise and makes it merely illusory.

1 Walter H. E. Jaeger, *Williston on Contracts* § 43, at 140 (3d ed. 1957).

D. *Construction of the Sears "Change of Terms" Provision.*

In Arizona "[i]t is a long-standing policy of the law to interpret a contract whenever reasonable and possible in such a way as to uphold the contract." *Shattuck v. Precision-Toyota, Inc.*, 115 Ariz. 586, 589, 566 P.2d 1332, 1335 (S. Ct. 1977). The Restatement (Second) of Contracts 2d § 77 cmt. d (1981) recognizes that an otherwise illusory contract may be remedied because a limitation on a promisor's freedom of choice "may be supplied by law." *See also Darner*, 140 Ariz. at 394, 682 P.2d at 399 (emphasis added) (acknowledging that to enforce standardized contracts "as written, *subject to those reasonable limitations provided by law*, is to recognize the reality of the marketplace as it now exists, while imposing just limits on business practice"). We must, therefore, determine whether the Sears "Change of Terms" provision may be salvaged through a construction that imposes a limitation on Sears' ability to change or amend its cardholder agreement.

We find persuasive the approach adopted by *Badie* that permits credit card companies to rely upon "Change of Terms" provisions in their adhesion contracts insofar as the new or modified terms relate to subjects already addressed in some fashion in the original agreements. We believe that the Arizona courts would imply the same limitation with respect to the Sears "Change of Terms" provision.

In *Badie*, the court held that the requirements of objective reasonableness and good faith supply "an implied limitation on the change of term provision" restricting any modifications or additions to "the universe of terms included in the original agreements." 67 Cal. App. 4th at 797, 79 Cal. Rptr. 2d at 285. The court explained:

> The Bank's interpretation of how broadly it may exercise that right, with no limitation on the substantive nature of the changes it may make as long as it complies with the de minimis procedural requirement of "notice," virtually eliminates the good faith and fair dealing requirement from the Bank's relationship with its credit account customers[.]

Id. at 796, 79 Cal. Rptr. 2d at 284. Thus, while a credit card company may reserve to itself the right to amend its credit card agreements with its cardholders, it can change only those terms encompassed within the scope of the original agreement between the parties.

Even if we set aside concerns about illusoriness, reasonable expectations, and good faith, this construction is consistent with the

principle that ambiguous contracts (particularly contracts of adhesion) are construed against the drafter. *Harford v. National Life & Casualty Ins. Co.*, 81 Ariz. 43, 45, 299 P.2d 635, 637 (S. Ct. 1956) ("It is a fundamental principle of law that a contract will be construed most strongly against the drafter[.]"). *See also* Restatement (Second) of Contracts 2d § 206 cmt. a (1981) (the rule providing for construction of a contract against the drafter "is often invoked in cases of standardized contracts and in cases where the drafting party has the stronger bargaining position").

While Sears argues vigorously that the word "change" should be construed to mean "add," its own conduct recognizes that reasonable minds could differ. It chose to modify its "Change of Terms" provision to explicitly permit it to "add" as well as "change" terms. This amendment suggests that the original cardholder agreement was susceptible of either the interpretation (1) that Sears was allowed to add wholly new terms as well as modify existing terms; or (2) that Sears could only modify existing terms. It was, therefore, ambiguous. *See Mid-Century Ins. Co. v. Samaniego*, 140 Ariz. 324, 326, 681 P.2d 476, 478 (Ct. App. 1984) ("Where a policy provision is subject to more than one reasonable interpretation, it is ambiguous and the ambiguity will be construed against the insurer."). To resolve this ambiguity, the agreement should be construed against Sears as the drafter. Application of this principle results in a construction of the "Change of Terms" provision as limiting any changes to modification of existing terms—a construction that is also consistent with contract principles, reasonable expectations, and the requirement of good faith.

Thus, after carefully reviewing the record and applying Arizona case law with guidance from the Restatement (Second) of Contracts and the *Badie* court, we hold that the parties did not intend that the "Change of Terms" provision in the original agreement would allow Sears to unilaterally add completely new terms that were outside the universe of the subjects addressed in the original cardholder agreement.

E. *Sears' Lack of Authority to Add an Arbitration Clause.*

We must determine next whether the arbitration clause adopted by Sears in 1999 constitutes a modification of an existing term or falls within the universe of terms included in its original cardholder agreement. We hold that the Sears arbitration clause fails this test.

Ms. Avery's original account agreement includes no terms regarding alternative methods of or forums for dispute resolution. The closest language that addresses how conflicts will be resolved is the Statement of Credit Billing Rights which instructs cardholders how to deal with errors identified in or questions about their credit card bills. This provision does not, however, provide a forum for dispute resolution. Nothing in the original agreement would have alerted Ms. Avery that by allowing Sears to "change any term or part" of the agreement, "she might someday be deemed to have agreed to give up the right to a jury trial or to any judicial forum whatsoever." *Badie*, 67 Cal. App. 4th at 803, 79 Cal. Rptr. 2d at 289.

We cannot conclude that a cardholder's reasonable expectations would include allowing Sears to unilaterally add a term not even hinted at in the original agreement. Because the arbitration clause was a wholly new term that did not fall within the universe of subjects included in the original agreement, Sears did not have authority under its "Change of Terms" provision to condition continued use of its credit card on acceptance of the arbitration clause. The trial court properly denied Sears' motion to compel arbitration because there was no enforceable arbitration agreement.

IV. Waiver of the Right to Compel Arbitration.

Even if the parties had entered into an enforceable arbitration agreement, we hold, based on Arizona law, that Sears waived its right to enforce that agreement. Although the trial court chose not to address the issue, our research reveals that Arizona law is well-established on that question. This holding, therefore, provides an alternative basis for our decision.

The Arizona Court of Appeals has held that "[a]n arbitration provision is waived by conduct inconsistent with the use of the arbitration remedy; in other words, conduct that shows an intent not to arbitrate." *Meineke v. Twin City Fire Ins. Co.*, 181 Ariz. 576, 581, 892 P.2d 1365, 1370 (Ct. App. 1994). The court then explained what conduct qualified as a waiver: "In our view, a party's filing of a lawsuit without invoking arbitration . . . would nearly always indicate a clear repudiation of the right to arbitrate . . . ." *Id.* at 582, 892 P.2d at 1371.

The court based its holding on the Arizona Supreme Court's decision in *Bolo Corp. v. Homes & Son Constr. Co.*, 105 Ariz. 343, 464 P.2d 788 (S. Ct. 1970). In *Bolo*, the Supreme Court, relying upon Ariz. Rev.

Stat. § 12-1501, stressed that an arbitration agreement, while generally enforceable, could be avoided upon any grounds available in law or equity for the revocation of any contract. Since waiver is a valid defense to a contract, the court recognized that an arbitration clause could be waived. *Id.* at 345, 464 P.2d at 790. The court held: "[I]f either party, by his conduct can be said to have waived his right to arbitrate, the other party is placed in a position of choice: Either to compel arbitration under the contract, or to acquiesce in the waiver thereby making the revocation complete and binding on both." *Id.* The court pointed out that the plaintiff had made a tactical decision to file suit rather than seek arbitration and only moved to compel arbitration after the plaintiff learned that its tactical decision was not in fact advantageous. *Id.* at 347, 464 P.2d at 792. It held that "when this plaintiff sought redress through the courts, in lieu of the arbitration tribunal, and asked the court for exactly the same type of relief (i.e. damages), which an arbitrator is empowered to grant, it waived the right to thereafter arbitrate the controversy over the protest of the defendant." *Id.*

We hold that, even if an enforceable arbitration agreement existed, Sears has waived its right to compel arbitration. Sears' new arbitration provision excepted from arbitration only actions filed in small claims court. Sears, however, elected to sue Ms. Avery in district court for precisely the same relief that it could have obtained from an arbitrator. Moreover, Sears has only moved to compel arbitration as to Ms. Avery's counterclaim. It still intends to proceed with its collections action in district court. Under *Bolo* and *Meineke*, this conduct amounts to "a clear repudiation of the right to arbitrate[.]" *Meineke*, 181 Ariz. at 582, 892 P.2d at 1371.

Conclusion

Because no enforceable arbitration agreement exists and, in any event, Sears has waived the right to compel arbitration, we affirm the trial court's denial of Sears' motion to compel arbitration. In light of our resolution of this appeal, we decline to address defendant's remaining cross-assignments of error.

Affirmed.

Judges TIMMONS-GOODSON and BRYANT concur.

TOMMY DAVIS NATHAN CAMERON, AND WIFE LISA CAMERON, PLAINTIFFS-APPELLANTS v. MERISEL, INC., MERISEL PROPERTIES, INC., MERISEL AMERICAS, INC., AND BRIAN GOLDSWORTHY, DEFENDANTS-APPELLEES

No. COA02-1330

(Filed 16 March 2004)

1. **Workers' Compensation— statutes of limitation—*Woodson* and *Pleasant* claims**

   The trial court erred by dismissing *Woodson* and *Pleasant* toxic mold claims under one-year statutes of limitation. Both are subject to three-year statutes of limitation.

2. **Workers' Compensation— toxic mold—co-employee liability—*Pleasant* exception—allegations sufficient**

   Plaintiff's allegations that a co-employee responsible for building maintenance ignored toxic mold were sufficient to establish a *Pleasant* claim for co-employee liability, and the court should not have granted a 12(b)(6) dismissal of the *Pleasant* claim or related consortium and punitive damages claims.

3. **Workers' Compensation— toxic mold—*Woodson* claim—allegations insufficient**

   Allegations about toxic mold in a workplace were not sufficient to state a *Woodson* claim. Plaintiff's illness is not relevant to an inquiry about defendant's knowledge prior to that injury, and the allegations in the complaint do not set out the types of symptoms, maladies, and illnesses that co-employees supposedly complained of to defendants.

4. **Landlord and Tenant— premises liability—toxic mold—corporate lessee and lessor**

   The trial court erred by dismissing a premises liability claim against defendant landlord based on toxic mold for failure to state a claim where the landlord was a related but separate entity from plaintiff's employer which leased the premises, and the ownership allegations thus contained no insurmountable bar under workers' compensation exclusivity provisions or landlord-tenant law.

5. **Damages and Remedies— punitive—dismissal of underlying claim**

   The trial court erred by dismissing a punitive damages claim where it also erred by dismissing the underlying claims.

Appeal by plaintiffs from order entered 19 August 2002 by Judge Narley L. Cashwell in Superior Court, Wake County. Heard in the Court of Appeals 12 June 2003.

Hunton & Williams, by Steven B. Epstein, for plaintiffs-appellants.

Cranfill, Sumner & Hartzog, L.L.P., by Gloria Taft Becker, for defendants-appellees.

McGEE, Judge.

Tommy Davis Nathan Cameron (Mr. Cameron) and his wife Lisa Cameron (Ms. Cameron) (collectively plaintiffs) filed a complaint on 2 November 2001 alleging that they suffered injury from a toxic workplace maintained by Merisel, Inc. (Merisel), Merisel Properties, Inc. (Merisel Properties), Merisel Americas, Inc. (Merisel Americas), and Brian Goldsworthy (Goldsworthy) (collectively defendants). Specifically, plaintiffs alleged that defendants knew that the workplace at which Mr. Cameron was employed was contaminated with toxic molds. The complaint further alleged that defendants knew that several of Mr. Cameron's co-employees had suffered serious illnesses from toxic molds, but that defendants failed to warn Mr. Cameron and other employees of the molds or the dangers associated with the molds. Plaintiffs also alleged that despite defendants' knowledge of the molds, defendants failed to address the problem at the workplace premises. Plaintiffs alleged that due to defendants' failure to warn or to take action to correct the mold problem, Mr. Cameron sustained debilitating, irreversible, and disabling injuries.

Plaintiffs alleged in their complaint that Mr. Cameron was employed by Merisel Americas on 1 December 1998 at the company's remote customer call center located in Cary, North Carolina (Cary call center), which was operated by Merisel and Merisel Americas. Merisel or Merisel Americas had leased the entire building from its owner and had used the building for a remote customer call center since at least 1996. Goldsworthy was hired by Merisel or Merisel Americas as director of security for the Cary call center around 1996. Goldsworthy's responsibilities included the maintenance and upkeep of the workplace at the Cary call center.

Plaintiffs alleged that between 1996 and 1 December 1998 Merisel, Merisel Americas, and Goldsworthy became aware of the existence of toxic molds in the workplace but took no action to

remove the molds. Merisel Properties purchased the Cary call center building from its owner on 7 December 1998 and was aware of the existence of the toxic molds at that time. Defendants took no action to remove or alleviate the toxic molds in the Cary call center between 1 December 1998 and 31 December 1999, and in fact knowingly concealed their existence from the employees and occupants of the Cary call center.

Plaintiffs alleged that between 1996 and December 1999, numerous employees and occupants at the Cary call center complained to defendants about a variety of symptoms, maladies, and serious illnesses which defendants knew resulted from the complainants' exposure to the toxic molds. Soon after Mr. Cameron began working at the Cary call center he experienced dizziness. This dizziness eventually became chronic and resulted in nausea, blackouts, and falling spells. By the end of 1999, Mr. Cameron had been diagnosed with complete loss of the balance function of both inner ears and significant damage to the vestibular end organs of both ears. Throughout Mr. Cameron's employment at the Cary call center, defendants repeatedly assured him that the workplace and premises were safe and free from toxic molds. Based on these assurances, Mr. Cameron continued to work at the Cary call center through April 2000, until he was diagnosed as being completely disabled and was ordered by his doctors not to return to the Cary call center.

Based on these allegations, plaintiffs asserted the following claims: (1) under *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), against Merisel and Merisel Americas for intentionally exposing Mr. Cameron to toxic workplace conditions which they knew were substantially certain to cause severe bodily injury or death; (2) under *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985), against Goldsworthy for his willful, wanton, and gross disregard for the safety of his fellow employees by failing to maintain the Cary call center in a safe condition which resulted in the development of an unsafe and toxic environment; (3) for negligence against Merisel Properties for its failure to maintain its premises in a reasonably safe condition and allowing defects to exist; and (4) for punitive damages against all defendants. Ms. Cameron also filed a loss of *consortium* claim against all defendants.

Defendants filed a motion to dismiss dated 21 February 2002, pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6). Defendants argued that the complaint failed to state a claim under any exception to the exclusivity provisions of the Workers'

Compensation Act and the trial court therefore had no jurisdiction to hear plaintiffs' claims. Defendants argued that "because the allegations [did] not amount to willful, wanton and reckless conduct, [resulting in] a constructive intent to injure [Mr. Cameron]," the complaint failed to state a claim against Goldsworthy under the exception created in *Pleasant*. Further, defendants argued that the complaint failed to state a claim under *Woodson*, "because the allegations [were] insufficient to show any willful, wanton, reckless or intentional conduct by defendants that [was] substantially certain to cause serious injury or death."

The trial court entered an order on 19 August 2002 dismissing plaintiffs' claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief could be granted and because the claims were barred by the applicable statute of limitations. Plaintiffs appeal.

I.

[1] We first note the trial court erred in dismissing plaintiffs' claims based on a one-year statute of limitations. Our Court determined that a *Woodson* claim is governed by the statute of limitations for intentional torts, N.C. Gen. Stat. § 1-54(3). *Alford v. Catalytica Pharms., Inc.*, 150 N.C. App. 489, 491-92, 564 S.E.2d 267, 269 (2002) (Thomas, J., dissenting). However, our Supreme Court reversed that decision *per curiam*, and adopted Judge Thomas' dissent that stated the catch-all three-year statute of limitations, N.C. Gen. Stat. § 1-52(5), applied to *Woodson* claims. *Alford v. Catalytica Pharms, Inc.*, 356 N.C. 654, 577 S.E.2d 293 (2003). Applying a three-year statute of limitations, plaintiffs' *Woodson* claim is not time barred.

We also hold that plaintiffs' *Pleasant* claim is not barred by the statute of limitations. A claim brought pursuant to *Pleasant* is a common law action for willful negligence, and thus subject to the three-year statute of limitations in N.C. Gen. Stat. § 1-52 (2001). *Pleasant*, 312 N.C. 710, 325 S.E.2d 244; *see also Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993).

II.

[2] The purpose of the Workers' Compensation Act is to "provide certain limited benefits to an injured employee regardless of negligence on the part of the employer, and simultaneously to deprive the employee of certain rights he had at the common law." *Brown v. Motor Inns*, 47 N.C. App. 115, 118, 266 S.E.2d 848, 849, *disc. review*

denied, 301 N.C. 86, 273 S.E.2d 300 (1980). "In exchange for these 'limited but assured benefits,' the employee is generally barred from suing the employer for potentially larger damages in civil negligence actions and is instead limited exclusively to those remedies set forth in the Act." *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003) (quoting *Pleasant v. Johnson*, 312 N.C. 710, 712, 325 S.E.2d 244, 246-47 (1985)). However, there are limited exceptions to this general rule of exclusivity.

A.

Our Supreme Court recognized an exception in *Pleasant*, stating the "Workers' Compensation Act does not insulate a co-employee from the effects of his willful, wanton and reckless negligence." *Pleasant*, 312 N.C. at 717, 325 S.E.2d at 250. The Court explained that

> [c]onstructive intent to injure exists where conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified. Wanton and reckless negligence gives rise to constructive intent.

Id. at 715, 325 S.E.2d at 248 (citation omitted).

A complaint must be dismissed pursuant to a motion under N.C.G.S. § 1A-1, Rule 12(b)(6)

> when one or more of the following three conditions is satisfied: (1) when on its face the complaint reveals no law supports plaintiff's claim; (2) when on its face the complaint reveals the absence of fact sufficient to make a good claim; and (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim.

Johnson v. Bollinger, 86 N.C. App. 1, 4, 356 S.E.2d 378, 380 (1987). "Thus, a complaint is sufficient 'where no "insurmountable bar" to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim.' " *Pastva v. Naegele Outdoor Advertising*, 121 N.C. App. 656, 659, 468 S.E.2d 491, 493, *disc. review denied*, 343 N.C. 308, 471 S.E.2d 74 (1996) (quoting *Johnson*, 86 N.C. App. at 4, 356 S.E.2d at 380, (quoting *Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E.2d 611, 613 (1979)). "Notice of the nature and extent of the claim is adequate if the complaint contains 'sufficient information to outline the elements of [the] claim or to permit inferences to be

drawn that these elements exist.' " *Pastva*, 121 N.C. App. at 659, 468 S.E.2d at 493 (citations omitted).

In the present case, the allegations in the complaint are sufficient under this standard to support Mr. Cameron's claim for co-employee liability under *Pleasant*. The complaint sufficiently alleges Mr. Cameron's co-employee, Goldsworthy, engaged in "conduct [that] threaten[ed] the safety of others and [was] so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified." *Pleasant*, 312 N.C. at 715, 325 S.E.2d at 248. While Mr. Cameron must present evidence of these allegations at trial, we find the allegations in the complaint are sufficient to overcome a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) as to Mr. Cameron's *Pleasant* claim.

B.

[3] Another exception to the exclusivity rule in workers' compensation cases arose in *Woodson*, 329 N.C. 330, 407 S.E.2d 222, where the Supreme Court stated:

> We hold that when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act. Because, as also discussed in a subsequent portion of this opinion, the injury or death caused by such misconduct is nonetheless the result of an accident under the Act, workers' compensation claims may also be pursued. There may, however, only be one recovery.

Woodson, 329 N.C. at 340-41, 407 S.E.2d at 228. Thus, when an employer commits an action "tantamount to an intentional tort," employees' suits against their employer "are not barred by the exclusivity provisions of the [Workers' Compensation] Act." *Id.* at 341, 407 S.E.2d at 228. This is a stricter standard than that announced in *Pleasant* for co-employee liability. *Pendergrass*, 333 N.C. at 240, 424 S.E.2d at 395.

"The elements of a *Woodson* claim are: (1) misconduct by the employer; (2) intentionally engaged in; (3) with the knowledge that the misconduct is substantially certain to cause serious injury or

death to an employee; and (4) that employee is injured as a consequence of the misconduct." *Pastva*, 121 N.C. App. at 659, 468 S.E.2d at 494.

As previously discussed, a plaintiff has sufficiently met his burden to overcome a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) " 'where no "insurmountable bar" to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim.' " *Pastva*, 121 N.C. App. at 659, 468 S.E.2d at 493 (quoting *Johnson*, 86 N.C. App. at 4, 356 S.E.2d at 380) "Notice of the nature and extent of the claim is adequate if the complaint contains 'sufficient information to outline the elements of [the] claim or to permit inferences to be drawn that these elements exist.' " *Pastva*, 121 N.C. App. at 659, 468 S.E.2d at 493 (citations omitted).

Defendants contend that the complaint does not sufficiently allege knowledge by defendants of a substantial certainty of serious injury. In *Wiggins v. Pelikan, Inc.*, 132 N.C. App. 752, 513 S.E.2d 829 (1999) (citations omitted), our Court set forth multiple factors to be considered in determining substantial certainty of serious injury. However, in *Whitaker*, our Supreme Court stated "we explicitly reject the *Wiggins* test and rely solely on the standard originally set out by this Court in *Woodson v. Rowland.*" *Whitaker*, 357 N.C. at 556, 597 S.E.2d at 667.

Our Courts have focused on the "substantial certainty" aspect of the inquiry, not the "serious injury" aspect of the inquiry. *See Keith v. U.S. Airways, Inc.*, 994 F. Supp. 692, 696 (M.D.N.C. 1998). As discussed in *Keith*, our Courts have not defined the meaning of "serious injury" under *Woodson*. *Id. Black's Law Dictionary* 1371 (7th ed. 1999) defines "serious" as it relates to injury, illness, or accident, as "dangerous; potentially resulting in death or other severe consequences <serious bodily harm>." This definition does not give us definitive guidance as to whether a particular injury is "serious" in a particular case.

Cases previously determined by our Courts to involve risk of "serious" injury have included a plaintiff being crushed by a cave-in, *Woodson*, 329 N.C. at 334-36, 407 S.E.2d at 224-26; an employee's body parts being crushed by industrial machines, *Regan v. Amerimark Building Products*, 118 N.C. App. 328, 454 S.E.2d 849, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995), *cert. denied*, 342 N.C. 659, 467 S.E.2d 723 (1996) and *Owens v. W. K. Deal Printing, Inc.*, 113

N.C. App. 324, 438 S.E.2d 440 (1994); and an employee being injured from a fall while washing windows without safety mechanisms, *Arroyo v. Scottie's Professional Window Cleaning*, 120 N.C. App. 154, 461 S.E.2d 13 (1995). In *Keith*, the federal district court noted that the risk of neck ailments and decreased range of motion did not qualify as "serious injury" for the purposes of a *Woodson* claim. 994 F. Supp. at 696-97. Although we agree with the district court's reasoning, its decision merely helps define the extremes of the continuum of injury and does not allow us to sufficiently classify the alleged serious illnesses plaintiff cites. We agree with the reasoning in criminal assault cases dealing with "serious injury" in which our Courts have declined to precisely define the term and, instead, consider the facts and circumstances of each case. *See State v. Williams*, 150 N.C. App. 497, 502, 563 S.E.2d 616, 619 (2002).

In this case, allegations in the complaint that several of Mr. Cameron's co-employees "had contracted serious illnesses" and had complained to all defendants of a variety of "symptoms, maladies, and serious illnesses" are insufficient allegations that Merisel and Merisel Americas had knowledge of a "substantial certainty" of "serious injury." Allegations in the complaint do not set out the types of symptoms, maladies, and illnesses that co-employees had allegedly complained of to defendants. In fact, the allegations themselves tend to indicate that the co-employees had different reactions to the alleged toxic mold in the Cary call center. It is insufficient for plaintiffs to simply make a conclusory statement that some of these illnesses were "serious," as opposed to general symptoms and maladies, without describing the illnesses or indicating the number of co-employees who suffered "serious" illnesses. *See Keith*, 994 F. Supp. at 696-97 ("Although Plaintiff alleges that Defendant knowingly risked 'Plaintiff being inflicted with . . . severe impairing [physical] . . . conditions caused by repetitive stress,' (Am. Compl.¶ 11), the facts she has pled do not make out a *Woodson* claim . . . ."). Further, Mr. Cameron's own alleged specific illness, while it can be relevant for other purposes, should not be included in this inquiry because the inquiry focuses on what defendants knew prior to Mr. Cameron's injury. Therefore, plaintiffs cannot "bootstrap" Mr. Cameron's claim by pointing to the specific illness he contracted to indicate prior knowledge by defendants. Where the complaint simply alleges defendants knew co-employees had varying reactions to an alleged harm without any further description of those reactions, it is insufficient to meet the standard under *Woodson*. Therefore, we affirm the trial court's dismissal of Mr. Cameron's *Woodson* claim against Merisel and Merisel Americas.

III.

[4] Plaintiffs also seek recovery under a premises liability theory, alleging that:

> 15. On or about December 1, 1998, [Mr. Cameron] became employed by Merisel Americas at the remote customer call center operated by Merisel and Merisel Americas at 305 Gregson Drive in Cary, North Carolina . . . .
>
> 16. Upon information and belief, Merisel and/or Merisel Americas had leased the entirety of the Cary facility from its owner, and had operated the remote customer call center there, since at least 1996.
>
> . . .
>
> 18. Upon information and belief, between 1996 and December 1, 1998, Merisel [and] Merisel Americas . . . had become aware of the existence of several toxic molds within the workplace at the Cary facility.
>
> 19. Upon information and belief, between 1996 and December 1998, Merisel [and] Merisel Americas . . . failed and/or refused to take action to remediate these toxic molds.
>
> . . .
>
> 21. Upon information and belief, Merisel Properties purchased the Cary facility from its existing owner on or about December 7, 1998.
>
> 22. Upon information and belief, Merisel Properties became aware of the existence of the toxic molds within the Cary facility on or before December 7, 1998.
>
> . . .
>
> 27. Upon information and belief, despite the complaints of employees and occupants of the building and [the] knowledge [of Merisel Properties, Merisel, and Merisel Americas] that the toxic molds were the source of their complaints [of illness], [they] concealed their knowledge of the existence of the toxic molds, failed to warn employees and occupants of the facility of their existence, and failed and refused to take any action to remediate them.

Based on our standard of review for motions to dismiss, the complaint does not reveal an absolute bar to plaintiffs' recovery under a

premises liability theory. Our Court held in *Phillips v. Stowe Mills, Inc.*, 5 N.C. App. 150, 154, 167 S.E.2d 817, 820 (1969), that the owner of a building, a parent corporation of the tenant employer, could not invoke the exclusivity provisions of the Workers' Compensation Act to bar recovery by an injured employee simply because the employer was a wholly owned subsidiary of the parent corporation. This Court concluded that, because the parent corporation was not the employer of the plaintiff and the employer corporation and parent corporation were separate entities, the Workers' Compensation Act's exclusivity bar did not apply to the parent corporation. *Id.* The allegations in the present case do not reveal that Merisel Properties is anything more than a related, but separate entity, from Merisel and Merisel Americas, and thus does not show at this point an absolute bar to recovery due to the exclusivity provisions of the Workers' Compensation Act.

Our Supreme Court abolished the distinction between invitees and licensees in *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). An owner or occupier of land owes a "duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Id.* at 632, 507 S.E.2d at 892. Plaintiffs have alleged that Merisel Properties was the owner of the building where the Cary call center was located. Plaintiffs have further alleged that Merisel Properties knew of the alleged toxic mold but did nothing to warn or protect Mr. Cameron and other co-employees and occupants of the Cary call center from the dangers of the toxic mold.

Merisel Properties, Inc. argues that it should be protected under landlord tenant law because

> "[o]rdinarily, the doctrine of *caveat emptor* applies to the lessee[.] To avoid foreclosure under this doctrine in an action for tortious injury, he must show that there is a latent defect known to the lessor, or which he should have known, involving a menace or danger, and a defect of which the lessee was unaware or could not, by the exercise of ordinary diligence, discover, the concealment of which would be an act of bad faith on the part of the lessor."

Phillips, 5 N.C. App. at 154, 167 S.E.2d at 820 (citations omitted). A landlord therefore does not have a duty to warn a tenant of a defect on the premises known to the tenant, and the landlord ordinarily cannot be held liable to the tenant for a defect the tenant knew about when the tenant leased the premises. *Id.* Merisel Properties argues

that under *Phillips*, Merisel Properties cannot be liable to the employees of a tenant if it could not be liable to the tenant itself for injuries allegedly arising from a defect known to the tenant. *See id.*

However, our Courts have recognized several exceptions, including where: (1) a landlord leased the premises in a ruinous condition, *Vera v. Five Crow Promotions, Inc.*, 130 N.C. App. 645, 650-51, 503 S.E.2d 692, 696-97 (1998); (2) there was a contract that obligated a landlord to repair the premises, *Wellons v. Sherrin*, 217 N.C. 534, 540, 8 S.E.2d 820, 823 (1940); (3) a landlord authorized a wrong, *id.*; and (4) somewhat similarly, where a landlord exercised control over the premises despite the tenant's occupancy, *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 478, 562 S.E.2d 887, 895 (2002).

In deciding a Rule 12(b)(6) motion to dismiss, we must determine whether, on the basis of the allegations in the complaint, an " 'insurmountable bar' to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim." *Pastva*, 121 N.C. App. at 659, 468 S.E.2d at 493 (citations omitted). We hold that the allegations of the complaint in this case do not present such an insurmountable bar and have put Merisel Properties on notice of the nature and extent of plaintiffs' claim for premises liability.

IV.

[5] Having determined the trial court erred in dismissing plaintiffs' *Pleasant* and premises liability claims, it was also error to dismiss plaintiffs' claims for punitive damages as to Goldsworthy. *Regan*, 118 N.C. App. at 332, 454 S.E.2d at 852 ("Plaintiff has alleged willful and wanton misconduct and has specifically requested punitive damages. This gives defendants adequate notice of plaintiff's claim for punitive damages.") It was also error for the trial court to dismiss Ms. Cameron's claim for loss of consortium as to Goldsworthy and Merisel Properties. *See Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 40-41, 493 S.E.2d 460, 462-63 (1997). However, as we have held that the trial court did not err in dismissing plaintiffs' *Woodson* claim against Merisel and Merisel Americas, we affirm the dismissal of plaintiffs' claims for punitive damages and also Ms. Cameron's claim for loss of consortium against Merisel and Merisel Americas. We also affirm the trial court's dismissal of the punitive damages claim against Merisel Properties, since plaintiffs alleged only a premises liability negligence claim as to Merisel Properties.

In summary, (1) plaintiffs' *Woodson* and *Pleasant* claims are not time barred; (2) we affirm the trial court's dismissal of plaintiffs' *Woodson* claim as to Merisel and Merisel Americas, as well as the related claims for punitive damages and loss of consortium as to those defendants; (3) we reverse the trial court's dismissal of plaintiffs' *Pleasant* claim against Goldsworthy and the related loss of consortium and punitive damages claims; (4) we reverse the trial court's dismissal of plaintiffs' premises liability claim against Merisel Properties and the related loss of consortium claim; and (5) we affirm the trial court's dismissal of plaintiffs' punitive damages claim against Merisel Properties. We remand plaintiffs' *Pleasant* claim against Goldsworthy and the corresponding loss of consortium and punitive damages claims, as well as plaintiffs' premises liability claim against Merisel Properties and the corresponding loss of consortium claim.

Affirmed in part; reversed and remanded in part.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA v. ROBERT THOMAS LITTLE

No. COA03-38

(Filed 16 March 2004)

1. Assault— inflicting serious injury—clerical error

The trial court's judgment for assault inflicting serious bodily injury is remanded for correction of a clerical error to reflect defendant's conviction of assault inflicting serious injury.

2. Burglary and Unlawful Breaking or Entering— first-degree burglary—failure to instruct on lesser-included offense—misdemeanor breaking or entering

The trial court did not err by denying defendant's request for a jury instruction on the crime of misdemeanor breaking or entering as a lesser-included offense of first-degree burglary, because: (1) as defendant concedes, the State presented sufficient evidence to convict defendant of first-degree burglary; and (2) defendant's testimony alone is not sufficient to require an instruction of the lesser-included offense when there was no

before-the-fact evidence to support defendant's statement that he did not intend to use the bat on the two victims unless his life was threatened.

3. Evidence— prior crimes or bad acts—cross-examination

The trial court did not abuse its discretion in a first-degree burglary, assault with a deadly weapon inflicting serious injury, and assault inflicting serious injury case by allowing the State to cross-examine defendant regarding facts of a prior crime beyond the time and place of conviction and the punishment imposed, or by preventing defendant from cross-examining one of the victims regarding a sentence imposed from a prior conviction, because: (1) even if the State's cross-examination of defendant was impermissible, defendant failed to show that the cross-examination prejudiced him as a result; and (2) defendant failed to prove that his inability to question the victim about the court's prohibition against further contact with a gang prejudiced the result of defendant's trial.

4. Sentencing— aggravating factors—joined with more than one other person in committing offense and not charged with conspiracy

The trial court did not err in a first-degree burglary, assault with a deadly weapon inflicting serious injury, and assault inflicting serious injury case by using the N.C.G.S. § 15A-1340.16(d)(2) aggravating factor that defendant joined with more than one other person in committing the offenses and was not charged with committing a conspiracy, because the trial court could have found by the preponderance of the evidence that defendant joined with his father and either defendant's friend or his friend's drug dealer, or both, in the commission of these crimes.

5. Sentencing— nonstatutory aggravating factors—defendant's lifestyle—defendant's character

Although defendant contends the trial court's comments to defendant during the sentencing process for first-degree burglary, assault with a deadly weapon inflicting serious injury, and assault inflicting serious injury regarding defendant's lifestyle and his character suggested that the trial court used these factors in addition to the statutory aggravating factor under N.C.G.S. § 15A-1340.16(d)(2) to further increase his sentence, defendant was properly sentenced within the aggravated range because there was a preponderance of evidence in the record that de-

fendant acted with more than one person in the commission of these crimes.

Judge ELMORE concurring in part and dissenting in part.

Appeal by defendant from judgment entered 27 June 2002 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 28 October 2003.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for defendant appellant.

TIMMONS-GOODSON, Judge.

Robert Thomas Little ("defendant") appeals his convictions of first-degree burglary and assault with a deadly weapon inflicting serious injury against Brian Lada ("Lada"), and assault inflicting serious injury against Christopher Lee ("Lee"). For the reasons stated herein, we find no error.

The State's evidence at trial tended to show the following: Lada and Lee lived together in a two-bedroom apartment with Michael Powell ("Powell"). Lada slept in one bedroom, while Lee and Powell shared the second bedroom. Lada, Lee, and Powell worked at a nearby Wal-Mart store with a deaf woman, Karen Smith ("Karen"). Karen provided Lee with Ecstacy pills to sell. When Lee decided to stop selling the drugs, he returned the pills to Karen. Karen testified at trial that Lee did not return all the pills she had given him to sell, nor did he provide her with money to pay for the missing pills. Three days later, Lee and Lada began receiving death threats from an unidentified male.

At approximately 3:30 a.m. on 5 January 2002, defendant and his father appeared at the door of the apartment shared by Lada, Lee and Powell. Defendant and Lada began to strike one another. Lada testified that defendant's father appeared and struck Lada on the head with a baseball bat, cracking the bat in two pieces.

After Lada was struck in the head, he went to Lee and Powell's bedroom for assistance. Defendant entered Lee and Powell's bedroom and struck Lee several times with the bat, telling Lee that he wanted "his money."

Lada left the apartment to seek help from his neighbor, Misty Fuller ("Misty") and her roommate, Sean Peters ("Peters"). Lada, Misty and Peters all returned to Lada's apartment. Both Misty and Peters were threatened by defendant before defendant and his father left the apartment.

Defendant testified at trial that he was concerned for Karen's safety, because her drug supplier had threatened to kill her if she did not obtain the missing money and/or drugs from Lee. Defendant further testified that on the morning of the altercation, he asked his father to go with him to "get some money owed [to him]." Defendant removed a bat from his house and placed it in the trunk of the car he and his father drove to the apartment. Upon arriving at the apartment, defendant concealed the bat in his pants. Defendant testified that he intended to use the bat only if his life was threatened. Defendant further testified that after knocking on the apartment door, Lada invited them inside and they conversed for a few minutes before the fight began. Defendant testified that he intended to assault Lada and Lee.

At trial, defendant testified to a series of past crimes, including a misdemeanor larceny charge. Defendant further testified that he did not break into Lee and Lada's apartment because he "[knew] the severity of what a breaking and entering like that is." On cross-examination, the State asked defendant what he meant by his statement. Defendant admitted to being charged with breaking and entering on a previous occasion, but pled guilty to misdemeanor larceny. The State then questioned defendant over defense counsel's objection about the facts of the misdemeanor larceny case.

Defendant's counsel attempted to cross-examine Lada about the punishment Lada received for a prior misdemeanor assault charge. Judge Hill allowed counsel to question Lada about the punishment generally, but did not allow counsel to question Lada regarding the judgment which prevented Lada from future association with any "past, current or future member of the Shadow Device Crypt Gang." Defendant objected.

The jury found defendant guilty of first-degree burglary, assault with a deadly weapon inflicting serious injury, and assault inflicting serious injury. Judge Hill found as an aggravated factor that defendant joined with his father in committing the offense and was not charged with committing a conspiracy. At the sentencing hearing, defense counsel said "I don't think I can argue with [the State] offer-

ing [this] aggravating factor . . . . Although I don't like it, there's not a whole lot I can say about that." The trial court did not find any mitigating factors and sentenced defendant within the aggravated range. Defendant appeals his conviction and his sentence.

Defendant argues on appeal that the trial court erred by (1) failing to instruct the jury on the lesser-included offense when there was sufficient evidence to support the charge; (2) allowing the State to cross-examine defendant regarding the facts of defendant's prior conviction; (3) preventing defendant from cross-examining Lada regarding a sentence Lada received in connection with a prior conviction; and (4) basing defendant's sentence on impermissible aggravating factors.

[1] At the outset, we note that defendant first filed a motion for appropriate relief and then moved for a partial withdrawal of that motion. Both filings are based upon an error appearing on the face of the judgment entered against defendant for assault inflicting serious bodily injury. The State posits, and now defendant agrees, that the mistake here was a clerical error, requiring only that this matter be remanded to the trial court to correct the judgment to reflect defendant's conviction of assault inflicting serious injury. We, therefore, vacate the trial court's judgment for assault inflicting serious bodily injury, and remand this matter for entry of a judgment properly reflecting defendant's conviction of assault inflicting serious injury. *See State v. Lorenzo*, 147 N.C. App. 728, 735, 556 S.E.2d 625, 629 (2001). We proceed, then, to the merits of defendant's appeal.

[2] Defendant first argues that the trial court erred in denying his request for a jury instruction on the crime of misdemeanor breaking or entering, a lesser-included offense of first-degree burglary. We conclude the trial court did not err.

The common-law offense of burglary is committed when a person breaks or enters into the dwelling house or sleeping apartment of another in the nighttime with the intent to commit a felony therein. *State v. Cooper*, 288 N.C. 496, 219 S.E.2d 45 (1975); *State v. Faircloth*, 297 N.C. 388, 255 S.E.2d 366 (1979). A person is guilty of first-degree burglary when the crime is committed while "any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime . . . ." N.C. Gen. Stat. § 14-51 (2003). In the instant case, if defendant did not have the intent to commit a felony inside the apartment, even if he com-

mitted all the other elements of first-degree burglary, defendant would be guilty of misdemeanor breaking or entering, not first-degree burglary. *See Faircloth*, 297 N.C. 388, 255 S.E.2d 366.

Defendant contends that his testimony contained some evidence which would support an instruction by the trial court on the lesser offense of misdemeanor larceny. Defendant directs us to his testimony wherein he asserts that although he purposefully brought the bat into the apartment, and that he intended to assault Lee and Lada therein, he did not intend to use the bat unless his life was threatened.

It is well established that a judge must declare and explain the law arising upon the evidence. N.C. Gen. Stat. § 15A-1232 (2003); *State v. McLean*, 74 N.C. App. 224, 328 S.E.2d 451 (1985). A judge must therefore charge the jury upon a lesser-included offense, even absent a request by counsel, where there is evidence to support it. *State v. Wright*, 304 N.C. 349, 283 S.E.2d 502 (1981). If there is any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense, the judge is obligated to give such an instruction. *Id.* at 351, 283 S.E.2d at 503.

Defendant concedes that the State presented sufficient evidence to convict him of first-degree burglary and that he did assault Lee and Lada therein. We have held that the commission of a felony inside the dwelling house is not positive proof that the defendant had the intent to commit the felony at the time of breaking and entering. *See State v. Thomas and State v. Christmas and State v. King*, 52 N.C. App. 186, 196-97, 278 S.E.2d 535, 542-43 (1981). The presence of any evidence of guilt in the lesser degree is the determinative factor. *State v. Simpson*, 299 N.C. 377, 261 S.E.2d 661 (1980).

Defendant argues that by his testimony alone he has alleged sufficient evidence to allow a reasonable trier of fact to question whether he had the requisite intent for first-degree burglary. Defendant's testimony alone is not sufficient to require an instruction of a lesser-included offense of misdemeanor breaking and entering. *See State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985); *State v. Patton*, 80 N.C. App. 302, 341 S.E.2d 744 (1986).

> [W]here the only evidence of the defendant's intent to commit a felony in the building or dwelling was the fact that the defendant broke and entered a building or dwelling containing personal property, the appellate courts of this State have consistently and

> correctly held that the trial judge must submit the lesser included offense of misdemeanor breaking and entering to the jury as a possible verdict. . . . However, where there is some additional evidence of the defendant's intent to commit the felony named in the indictment in the building or dwelling, such as evidence that the felony was committed . . . or evidence that the felony was attempted, . . . or . . . evidence that the felony was planned, and there is no evidence that the defendant broke and entered for some other reason, then the trial court does not err by failing to submit the lesser included offense of misdemeanor breaking and entering to the jury as a possible verdict.

Patton, 80 N.C. App. at 305-6, 341 S.E.2d at 746-47, *quoting State v. Thomas and State v. Christmas and State v. King*, 52 N.C. App. at 196-97, 278 S.E.2d at 542-43.

In *State v. Singletary*, the defendant was convicted of first-degree burglary when he broke into his wife's apartment and shot her lover. 344 N.C. 95, 472 S.E.2d 895 (1996). The defendant testified that he brought his gun to her apartment at 1:00 a.m. for protection because "if someone was in the apartment, [he] wasn't going to get hurt." *Singletary*, 344 N.C. at 103, 472 S.E.2d at 900. Our Supreme Court held that an "after-the-fact assertion by the defendant that his intention to commit a felony was formed after he broke and entered is not enough to warrant an instruction on the lesser-included offense of misdemeanor breaking or entering unless there is some 'before the fact evidence to which defendant's statements afterwards could lend credence.' " *Id.* at 104, 472 S.E.2d at 900, *quoting State v. Gibbs*, 335 N.C. 1, 53-54, 436 S.E.2d 321, 351 (1993).

In the case *sub judice*, defendant testified that he planned to assault Lee and Lada if they did not give him money and that he planned to use the baseball bat if the altercation threatened his life. Defendant testified that he placed the bat in the trunk of the car with the intent to bring it into the apartment, that he concealed the bat from view, and that the bat was broken during the assault. We conclude that there was no "before-the- fact evidence" to support defendant's statement that he did not intend to use the bat on Lee or Lada. This argument is without merit.

[3] Defendant's second and third arguments assert that the trial court improperly ruled on evidentiary issues regarding cross-examinations of defendant and Lada. Defendant contends that the trial court should not have allowed the State to cross-examine him regarding facts of a

prior crime beyond the time and place of conviction and the punishment imposed. Defendant further contends that the trial court erred by preventing defendant from cross-examining Lada regarding a sentence imposed from a prior conviction.

Whether cross-examination is unfair is generally a matter "in the sole discretion of the trial judge, and his ruling thereon will not be disturbed absent a showing of gross abuse of discretion." *State v. Ruof*, 296 N.C. 623, 633, 252 S.E.2d 720, 726 (1979). The trial judge "sees and hears the witnesses, knows the background of the case, and is in a favorable position to control the proper bounds of cross-examination." *State v. Edwards*, 305 N.C. 378, 381, 289 S.E.2d 360, 362-63 (1982). Since it is in the discretion of the trial judge to determine the limit of legitimate cross-examination, his rulings thereon are not prejudicial error absent a showing that the verdict was improperly influenced by the ruling. *State v. Britt*, 291 N.C. 528, 231 S.E.2d 644 (1977); *Edwards*, 305 N.C. at 381-82, 289 S.E.2d at 362-63.

Rule 609(a) of the North Carolina Rules of Evidence states that the credibility of a witness can be attacked by evidence that the witness was convicted of a felony. Case law has limited the use of prior felony convictions to "the name of the crime and the time, place and punishment for impeachment purposes" during the guilt-innocence phase of a criminal trial, unless the information is introduced "to correct inaccuracies or misleading omissions in defendant's testimony . . . ." *State v. Lynch*, 334 N.C. 402, 410, 412, 432 S.E.2d 349, 353, 354 (1993).

> For example, when the defendant "opens the door" by misstating his criminal record or the facts of the crimes or actions, or when he has used his criminal record to create an inference favorable to himself, the prosecutor is free to cross-examine him about details of those prior crimes or actions.

Id.

Defendant argues that the trial court erred when it allowed the State to cross-examine defendant regarding the facts of a misdemeanor larceny conviction. The State argues that defendant "opened the door" to the cross-examination in question. On direct examination, defendant stated that he did not force his way into Lada and Lee's apartment "because [he knows] the severity of what a breaking and entering like that is." On cross-examination, the State questioned defendant regarding said statement and defendant admitted that he

had been previously charged with breaking and entering, but pled guilty to misdemeanor larceny. Defendant then began to explain the facts of the previous charge.

Even if this line of questioning is impermissible, defendant must still prove that he was prejudiced as a result. *See Edwards*, 305 N.C. at 381-82, 289 S.E.2d at 362-63. Defendant testified to numerous convictions and the State produced a witness in addition to Lada and Lee who testified that defendant used the bat against Lee. Misty, Lada and Lee's neighbor, testified that she entered the apartment before defendant and his father left and was threatened by defendant with the bat. Thus, even if the State's cross-examination of defendant was impermissible, defendant has failed to evidence that the cross-examination prejudiced him as a result.

Defendant next argues that he should have been permitted to cross-examine Lada regarding a sentence Lada received from a prior assault conviction. The judgment of the court required Lada to have no contact with "any past, current or future member of the Shadow Device Crypt Gang." The court allowed defense counsel to question defendant regarding the rest of his sentence, but prohibited any reference to the gang. Although we note that *Lynch* permits the cross-examination of a witness about the time, place and punishment of a prior crime, 334 N.C. at 410, 432 S.E.2d at 353, permissive cross-examination remains within the discretion of the trial judge and is not reversible unless defendant can show prejudice as a result. *Edwards*, 305 N.C. at 381-82, 289 S.E.2d at 362-63. Defendant has failed to prove that his inability to question Lada about the court's prohibition against further contact with the gang prejudiced the result of defendant's trial for the reasons stated above. We, therefore, conclude that defendant's second and third arguments also fail.

[4] Defendant's final argument on appeal is that the trial court used impermissible aggravating factors to sentence him. The trial court found that defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy, which is an aggravating factor under N.C. Gen. Stat. § 15A-1340.16(d)(2) (2003).

We note that this issue is not properly before the Court. Defendant did not object to the alleged error at the sentencing hearing. Therefore, he has waived his right to appellate review. N.C.R. App. P. 10(b)(1) (2004). In our discretion, however, we have examined defendant's argument and find that it is without merit.

Under Structured Sentencing, the trial court may find as an aggravating factor that defendant "joined with more than one other person in committing the offense and was not charged with committing a conspiracy." N.C. Gen. Stat. § 15A-1340.16(d)(2). The plain language of this statute requires the participation of defendant and at least two others. *Id.*; *State v. Rogers*, 157 N.C. App. 127, 130, 577 S.E.2d 666, 669 (2003). The State bears the burden of proving by a preponderance of the evidence that the aggravating factor exists. N.C. Gen. Stat. § 15A-1340.16(a). "The trial court's finding of an aggravating factor must be supported by 'sufficient evidence to allow a reasonable judge to find its existence by a preponderance of the evidence.' " *State v. Hughes*, 136 N.C. App. 92, 99, 524 S.E.2d 63, 67 (1993), *quoting State v. Hayes*, 102 N.C. App. 777, 781, 404 S.E.2d 12, 15 (1991). The weight given aggravating factors is within the sound discretion of the sentencing judge and should not be re-evaluated by the appellate courts. *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983).

The trial court heard testimony that defendant sold drugs for Karen and that defendant had previously accompanied Karen to Lada and Lee's apartment to help Karen retrieve the same money defendant attempted to retrieve the night of the attack. Karen and defendant also testified to receiving death threats from Karen's dealer who threatened to kill them if they did not recover the money owed him by Lee. Karen testified that she saw defendant on the phone with her dealer just a few days before defendant attacked Lada and Lee. The trial court could have found by the preponderance of evidence that defendant joined with his father and either Karen or Karen's drug dealer, or both, in the commission of this crime.

[5] Defendant also argues that the trial judge's comments to defendant during the sentencing process regarding his lifestyle and his character suggest that the trial court used these factors, in addition to the statutory aggravating factor above, to further increase his sentence. We disagree. As there is a preponderance of evidence in the record that defendant acted with more than one person in the commission of these crimes, defendant was properly sentenced within the aggravated range.

No error as to defendant's convictions. Vacate the judgment for assault inflicting serious bodily injury, and remand for correction of the clerical error contained therein.

Judge WYNN concurs.

Judge ELMORE concurs in part and dissents part.

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

I agree with the majority's conclusions regarding defendant's first three assignments of error, and accordingly concur with the majority's holding of no error in the guilt-innocence phase of defendant's trial. However, because I conclude that the trial court erred in finding as a statutory aggravating factor that "defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy" pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(2) (2003), I would vacate defendant's sentence and remand to the trial court for re-sentencing from the presumptive range.

The majority correctly states that "the plain language of [N.C. Gen. Stat. § 15A-1340.16(d)(2)] requires the participation of defendant and at least two others" in order to find the existence of an aggravating factor under this statute, and that "[t]he State bears the burden [under N.C. Gen. Stat. § 15A-1340.16(a)] of proving by a preponderance of the evidence that the aggravating factor exists." It is clear from the uncontroverted trial testimony that defendant, accompanied by only one other person, his father, entered the victims' apartment on the night in question and assaulted Lada and Lee. The testimony offered at trial tending to show that defendant sold drugs for Karen and had previously accompanied Karen to the victims' apartment to retrieve money from them, and that defendant and Karen had received death threats from Karen's dealer, gives rise to mere speculation that either Karen, Karen's dealer, or both joined with defendant and his father in the commission of these crimes. Because I find nothing in the record to indicate that a third person was involved in any aspect of the burglary and assault perpetrated by defendant, and joined in by defendant's father, on the night in question, I would vacate defendant's sentence and remand to the trial court for re-sentencing from the presumptive range. *See State v. Moses*, 154 N.C. App. 332, 340, 572 S.E.2d 223, 229 (2002) (aggravated sentence imposed pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(2) vacated, and remand for re-sentencing appropriate, where no evidence presented at trial of anyone involved in the crimes other than defendant and accomplice).

ANDREA ANDERSON, PLAINTIFF v. JOHN ESTON LACKEY, III, AND BARBARA LACKEY AS GUARDIAN AD LITEM FOR JOHN ESTON LACKEY, III, DEFENDANTS

No. COA02-1650

(Filed 16 March 2004)

1. Appeal and Error— preservation of issues—failure to assign error in record

Although plaintiff mother contends an April 2002 child custody modification order included findings of fact not based on competent evidence and conclusions of law unsupported by the findings of fact, this argument is dismissed as to those arguments for which plaintiff failed to assign error in the record, N.C. R. App. P. 10(a).

2. Child Support, Custody, and Visitation— child custody—modification—findings of fact—unsupervised visits

The trial court's finding in a child custody modification action that the visits between defendant father and his minor child were no longer required to be supervised was supported by competent evidence because: (1) the record contains statements by defendant regarding his devotion to his child and defendant's constant attempts to seek regular contact with the minor child since the start of these proceedings in 1991; (2) the record contains testimony by the clinical supervisor of the treatment team appointed by the trial court who stated that the minor child would benefit from maintaining a relationship with defendant; (3) a psychiatrist concluded that the minor child would benefit from a relationship with defendant; and (4) the trial court made uncontested findings of fact that the minor child has not suffered any abuse at the hands of defendant and that defendant has at all times cooperated fully with the orders of the court.

3. Child Support, Custody, and Visitation— child custody—modification—fit and proper person for visitation

The trial court did not err in a child custody modification action by drawing the conclusion of law that defendant father is a fit and proper person to have visitation with his son, because the conclusion is supported by the findings of fact.

4. Child Support, Custody, and Visitation— child custody—modification—substantial change in circumstances—temporary order

The trial court did not err by modifying a child custody order without first finding a substantial change in circumstances, because: (1) if a child custody order is temporary in nature and the matter is again set for hearing, the trial court is to determine custody using the best interests of the child without requiring either party to show a substantial change of circumstances; (2) defendant was not required to show a substantial change in circumstances based on the language in the 6 January 1999 order referencing a specific reconvening time and the later alteration and rehearing within 20 months of the 6 January 1999 order; and (3) a twenty-month delay between a temporary order and a request for modification does not alter the temporary status of the order if the parties were negotiating a new arrangement during that time.

5. Child Support, Custody, and Visitation— child custody—modification—notice—possible visitation changes

Although plaintiff mother contends the trial court erred in a child custody modification action by allegedly failing to provide plaintiff mother with proper notice that the hearing held on 20 March 2002 would include changes to the visitation schedule, this assignment of error is dismissed because plaintiff was adequately apprised of the pendency of an altered visitation schedule which afforded her an opportunity to present her objections in light of defendant's complaint and the opening statements by the court on the day of the hearing.

6. Trials— trial court's pre-existing bias—prejudgment of case

Plaintiff mother failed to show in a child custody modification action a pre-existing bias against her or a prejudging of her case based on the trial court's comments on the evidence presented before it in a nonjury trial, because: (1) the trial court found as fact that plaintiff has failed to comply with orders of the court; and (2) the trial court's role is to determine what is in the best interest of the child, and the trial court stated its focus was on the child.

Appeal by plaintiff from order entered 18 April 2002 by Judge Jane V. Harper in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 October 2003.

Andrea Anderson for plaintiff-appellant.

Michael Schmidt for minor child-appellant.

No brief filed for defendant-appellee.

TIMMONS-GOODSON, Judge.

Andrea Anderson ("plaintiff") appeals from an order of the trial court granting unsupervised visitation by John Lackey ("defendant") with his minor child, John Colby Lackey ("Colby"). For the reasons stated herein, we affirm the order of the trial court.

The pertinent facts of the instant appeal are as follows: Plaintiff and defendant were married on or about 6 July 1985. Colby was born of the union on 19 March 1988. Plaintiff and defendant separated on or about 28 April 1991, following a horseback-riding accident that caused serious head injuries to defendant.

On 21 August 1991, defendant was declared incompetent by the Clerk of Superior Court for Mecklenburg County and plaintiff was appointed as guardian of defendant's estate. Defendant's mother was substituted as guardian of defendant's estate in November 1991. On 27 January 1992, defendant's competency was partially restored by the court.

In June 1992, plaintiff filed a complaint against defendant for custody of Colby, child support, alimony, and equitable distribution of marital assets. Defendant filed an Answer and Counterclaim seeking visitation with Colby, a divorce from bed and board, and equitable distribution of marital assets. On 23 December 1992, plaintiff and defendant entered into a Consent Order whereby defendant agreed to pay child support and the parties agreed to mediate issues of child custody and visitation.

The trial court entered an Order Adopting Parenting Agreement on 18 June 1993, which incorporated a temporary parenting agreement between the parties stating that "the [parties] will work together cooperatively to insure that adequate time is provided for Colby and [defendant]." The parties revised their agreement two times thereafter, providing for altered supervised visitation schedules between defendant and Colby. The last revision included the statement that

defendant "is interested in moving to unsupervised time with Colby, [and that] the [parties] have agreed that any changes to this schedule will be at the recommendation of [a therapist] who has been working with Colby."

On 11 February 1997, plaintiff moved to modify the order for child support because of change of circumstances. On 9 April 1997, defendant moved to establish a specific schedule for regular, frequent, and unsupervised visitation with Colby and to order psychological evaluations of both parties and Colby. On 2 December 1997, the trial court ordered the evaluation of the parties and Colby and found as fact that defendant had not been permitted to visit with Colby at the agreed upon times listed in the 12 September 1995 consent order and that although defendant desired unsupervised visits with Colby, defendant had been told that Colby was afraid of him. Defendant therefore requested psychological evaluations as to what visitation was in Colby's best interests.

On 6 January 1999, the trial court entered a Consent Order On Custody And Visitation. The parties requested the entry of this order, which was entered into freely and voluntarily. The Consent Order On Custody and Visitation provided defendant with supervised visitation at the Family Center/Connections Program ("Program") facility which could be increased at the direction of the Program. The 6 January 1999 order further allowed that visitation could become unsupervised if the Program, guardian *ad litem*, and the parties agreed. If any party did not agree to unsupervised visitation, the Court could review the matter. Prior to any unsupervised visitation, defendant was to supply proof to the Program and the guardian *ad litem* that he was physically and mentally able to care for Colby. The Consent Order On Custody And Visitation included a date of review of the order to "determine whether the custody and visitation issues need[ed] to be revised in any way."

The trial court entered a 30 October 2000 order which found that the 6 January 1999 Consent Order had not been implemented as required by the Court. The trial court included additional provisions that Colby was to attend all scheduled visits with defendant and that plaintiff was to ensure that Colby attended the scheduled visitations with defendant. The trial court reviewed this matter on 30 January 2001 and found that the visitation and additional provisions of the 30 October 2000 order continued to be in Colby's best interests.

Defendant filed a Motion For Contempt And Motion For Judicial Assistance on 20 December 2001, requesting that the court hold plaintiff in contempt for her failure to comply with the provisions of the prior orders entered in this matter. After a hearing, the trial court entered an order titled "Order Setting Visitation and Closing the Case" on 18 April 2002. The court made the following uncontested findings of fact therein:

> 1. This case has been pending since June 1999. . . . [Plaintiff's] complaint for custody . . . does not allege any type of physical abuse of herself or Colby. It does allege indignities. . . . The court has never heard evidence about these allegations, or found any of them to be true.
>
> . . . .
>
> 5. . . . Counsel is referred to the court's order of December 15, 1998, and especially to its findings regarding mother's noncooperation with the [psychologists], and later with aspects of Dr. Pleas Geyer's evaluations. . . .
>
> 6. Since November 1998, Dr. Geyer has stressed the importance of Colby having contact with his father, for Colby's benefit. . . . The consent order, entered in January 1999, provided, inter alia, for visitation on alternate weeks at Connections . . . .
>
> 7. In February 2000 the case was scheduled for another hearing. By consent order, the parties reserved the right to challenge private school expenses, as had happened in previous orders.
>
> 8. Dr. Warren's September 14, 2000 letter to the court is instructive. . . . [Plaintiff's] lack of cooperation, and delays; its statement, "Clearly the current plan is not working"; and its report, based on Irv Edelstein's information, that "Irv did not perceive Colby to be fearful of contact with her[sic] father" and "Colby was adamant that he would no longer have anything to do with [defendant], and would not participate today, or in any future sessions we may schedule."
>
> . . . .
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> 13. [Defendant] has at all times cooperated fully with the court'[sic] directives.
>
> . . . .
>
> 16. [Plaintiff] and Colby continue to believe that [defendant] molested Colby at some point in the distant past. The court has

> never found this to be true, nor does the court find it to be true now. [Plaintiff] and Colby also believe that Colby should have no contact with [defendant]. . . . The court is not convinced that any therapist would [change plaintiff's views on these subjects], and therefore sees no point in continuing to monitor [plaintiff's] therapy.
>
> . . . .
>
> 18. The court agrees with Dr. Geyer that Colby will benefit by [plaintiff] taking an ambivalent stance in favor of normal visits [with defendant] . . .

The trial court thereafter concluded that it was in Colby's best interest to have unsupervised visits with defendant and ordered same. From this order, plaintiff appeals.

Plaintiff argues that the trial court erred by (1) issuing an order where the findings of fact are not supported by competent evidence and do not support the court's conclusions of law; (2) modifying a prior custody order without finding a substantial change in circumstances; (3) issuing an order without proper notice to the parties; and, (4) issuing an order based on the court's bias against plaintiff.

[1] In her first assignment of error, plaintiff argues that the April 2002 order included findings of fact not based on competent evidence and conclusions of law unsupported by the findings of fact. While plaintiff asserts in her brief that the first, fourth, sixth, eighth, tenth, fifteenth, sixteenth, and eighteenth findings of fact are not supported by competent evidence in the record, she has failed to assign error to said findings in the record. Thus, plaintiff has not properly preserved these arguments for appellate review. "The 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). Plaintiff's arguments as to these findings of fact are overruled.

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). Substantial evidence has been defined as " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at

474, 586 S.E.2d at 253 (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)).

> Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to " 'detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges.' " Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence " 'might sustain findings to the contrary.' "

Id. at 474-75, 586 S.E.2d at 253-54 (internal citations omitted).

[2] Plaintiff argues that finding of fact number 17 is not supported by competent evidence in the record. Finding of fact number 17 asserts the following:

> The Court sees no need for Colby's contact with his father to be supervised, either by a mental health professional or by a lay person. Colby is not afraid of his father, and his father poses no danger to him. Colby will benefit by frequent, unsupervised contact with his father. Dr. Geyer's reason for having such contact supervised by a law person—to provide a report to the court—will no longer apply, as the court does not intend to schedule further reviews.

The record contains statements by defendant regarding his devotion to Colby and defendant's constant attempts to seek regular contact with Colby since the start of these proceedings in 1991. The record also includes testimony by Dr. Warren, the clinical supervisor of the treatment team appointed by the trial court, stating that Colby would benefit from maintaining a relationship with defendant. Dr. Geyer, a psychiatrist appointed by the court to conduct a psychiatric evaluation of plaintiff, defendant, and Colby, also concluded that Colby would benefit from a relationship with defendant. Furthermore, the trial court made uncontested findings of fact that Colby has not suffered any abuse at the hands of defendant and that defendant has at all times cooperated fully with the orders of the court. Thus, there is substantial evidence in the record to support the trial court's finding of fact number 17.

[3] Plaintiff next argues that the trial court's conclusion of law that defendant is a fit and proper person to have visitation with his son is

not supported by the findings of fact. For the reasons addressed above, the trial court's conclusion of law that defendant is a fit and proper person to have visitation with Colby is supported by the findings of fact. This assignment of error is overruled.

[4] Plaintiff next argues that the trial court erred in modifying a child custody order without first finding a substantial change in circumstances. Plaintiff contends that the trial court should have considered the January 1999 order to be a permanent order and required defendant to show a substantial change of circumstances pursuant to N.C. Gen. Stat. § 50-13.7(a) (2003). We disagree.

"Once the custody of a minor child is determined by a court, that order cannot be altered until it is determined (1) that there has been a substantial change in circumstances affecting the welfare of the child and (2) a change in custody is in the best interest of the child." *Evans v. Evans*, 138 N.C. App. 135, 139, 530 S.E.2d 576, 578-79 (2000) (citations omitted). The party seeking modification of the child custody order bears the burden of proving the existence of a substantial change in circumstances affecting the welfare of the child. *Id.*

"If a child custody order is temporary in nature and the matter is again set for hearing, the trial court is to determine custody using the best interests of the child test without requiring either party to show a substantial change of circumstances." *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 915 (2002). An order is considered temporary if "it either (1) states a 'clear and specific reconvening time' that is reasonably close in proximity to the date of the order; or (2) does not determine all the issues pertinent to the custody or visitation determination." *Simmons v. Arriola*, — N.C. App. —, —, 586 S.E.2d 809, 811 (2003) (quoting *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000)).

The parties voluntarily entered into a Consent Order on Custody and Visitation on 6 January 1999, which included a "clear and specific reconvening time" to determine whether the parties had complied with the Order. The Order stated:

> This matter shall be reviewed by the Court in the May, [sic] 17, 1999 through June 11, 1999 calendar to determine the quality of the parties compliance with this Order, the communications with the Clinical Supervisor, the quality of the interaction between the Defendant and Colby, as well as the Plaintiff and Colby and deter-

mine whether the custody and visitation issues need to be revised in any way.

In the 18 April 2002 Order being appealed from herein, the trial court enters several findings of fact that establish the procedural history pertinent to this case.

> 6. Since November 1998, Dr. Geyer has stressed the importance of Colby having contact with his father, for Colby's benefit. . . . The consent order, entered in January 1999, provided, inter alia, for visitation on alternate weeks at Connections, . . . In May 1999 Dr. William Warren was substituted as clinical supervisor; at some point the Connections order was modified, and Irv Edelstein was appointed to supervise the visits.
>
> 7. In February 2000 the case was scheduled for another hearing. By consent order, the parties reserved the right to challenge private school expenses, as had happened in previous orders.
>
> 8. Dr. Warren's September 14, 2000 letter to the court is instructive. . . . [Plaintiff's] lack of cooperation, and delays; its statement, "Clearly the current plan is not working"; and its report, based on Irv Edelstein's information, that "Irv did not perceive Colby to be fearful of contact with her[sic] father" and "Colby was adamant that he would no longer have anything to do with [defendant], and would not participate today, or in any future sessions we may schedule."
>
> 9. The court reviewed the case September 18, 2000.

Although plaintiff argues that the 6 January 1999 order was a final order, the trial court's later findings of fact clearly establish that between the 6 January 1999 order and the September 2000 hearing, the trial court had modified the 6 January 1999 order prior to another hearing held in February of 2000. Plaintiff argues that if this Court finds that the 6 January 1999 order is a temporary order, the twenty month delay in requesting a modification of the temporary order changes the status of the order from temporary to permanent. *See Brewer*, 139 N.C. App. 222, 533 S.E.2d 541 (2000). However, this Court recently found that a 20 month delay between a temporary order and a request for modification did not alter the temporary status of the order if the parties were negotiating a new arrangement during this time. *Senner v. Senner*, —— N.C. App. ——, ——, 587 S.E.2d 675, 677 (2003). Due to the clear language in the 6 January 1999 order referencing a specific reconvening time and the later alteration and

rehearing within 20 months of the 6 January 1999 order, defendant was not required to show a substantial change in circumstances and plaintiff's assignment of error is overruled. *See LaValley*, 151 N.C. App. at 292, 564 S.E.2d at 915.

[5] Plaintiff's third assignment of error asserts that the court failed to provide her proper notice that the hearing held on 20 March 2002 would include changes to the visitation schedule. N.C. Gen. Stat. § 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. (2003).

In the case *sub judice*, plaintiff argues that although she received notice of the hearing, she did not receive notice that the hearing would review possible visitation changes. This Court said in *Clayton v. Clayton* that 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." 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) (citations omitted). Furthermore, in *Danielson v. Cummings*, this Court held that no written notice of a motion was required to effectuate adequate notice to the opposing party where the motion 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).

In the appeal herein, defendant's Motion For Contempt And Motion For Judicial Assistance states that "defendant hereby moves the Court . . . for an order finding and holding Plaintiff in civil contempt of Court for her disobedience and failure to comply with the provisions of prior orders entered in this case." At the beginning of the 20 March 2002 hearing, the trial court stated that the hearing was a "review of the arrangements that the Court has been trying, with a whole lot of assistance, to follow to reacquaint a little boy with his father." The trial court then asked the parties whether there was "anything else that [the court was] supposed to hear in [the] case . . . *other than its review of how things are going as far as the . . . supervised visits*" (emphasis added). The court then asked if there was anything else before it that afternoon. In light of defendant's complaint and the opening statements by the court on the day of the hearing, we conclude that plaintiff was adequately

apprised of the pendency of an altered visitation schedule which afforded her an opportunity to present her objections. *See Randleman*, 267 N.C. at 140, 147 S.E.2d at 905.

[6] Plaintiff's fourth assignment of error asserts that the trial court's bias against plaintiff prevented the court from addressing Colby's best interests. Plaintiff directs this Court to a statement made by the trial court during the 20 March 2002 hearing, which is the basis for the 18 April 2002 order. The statement to plaintiff's attorney is as follows: "This has been your client's goal from the beginning, is to insure that [Colby] didn't see his father. That's always been her goal. I have some level of discomfort in saying because things have reached the pass they've reached, she wins. I'm sorry." Plaintiff's counsel then responded: "I'm not suggesting that anybody win. I'm suggesting that we—if you take what has been reported. Let's just look at the child." The court replied: "That's what I've tried to look at all along, was the child." Plaintiff argues that this interchange suggests bias to such a degree that the court could not properly assess what was in Colby's best interests. We disagree.

There is a "presumption of honesty and integrity in those serving as adjudicator." *In re N. Wilkesboro Speedway, Inc.*, 158 N.C. App. 669, 675, 582 S.E.2d 39, 43 (2003) (quoting *Taborn v. Hammonds*, 83 N.C. App. 461, 472, 350 S.E.2d 880, 887 (1986), *appeal after remand*, 91 N.C. App. 302, 371 S.E.2d 736 (1988), *rev'd on other grounds*, 324 N.C. 546, 380 S.E.2d 513 (1989)). "Trial judges are not barred from expressing their opinions in trials conducted without a jury, especially where the comments are consistent with the court's role as finder of fact." *Hancock v. Hancock*, 122 N.C. App. 518, 528, 471 S.E.2d 415, 421 (1996). In *Hancock*, this Court determined that the appellant failed to prove that the judge was biased when he commented on the case and the evidence collected in a non-jury trial. *Id.* In the case herein, the trial judge based her comments on the evidence presented before her, in which she found as fact that plaintiff has failed to comply with orders of the court. Furthermore, as the trial court's role is to determine what is in the best interest of the child, and the judge clearly states that the child is her focus, plaintiff has failed to evidence a pre-existing bias against plaintiff or a prejudging of her case.

Affirmed.

Judges WYNN and ELMORE concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. ELM LAND COMPANY, FIRST AMERICAN TITLE OF THE CAROLINAS, LLC, TRUSTEE, TEXTRON FINANCIAL CORPORATION; DAVID L. HENDERSON, TRUSTEE; CHARLOTTE NATIONAL INVESTMENT COMPANY; AND CHARLOTTE GOLD LINKS, LLC, DEFENDANTS

No. COA03-468

(Filed 16 March 2004)

1. Appeal and Error— appealability—condemnation order—substantial right affected

A condemnation order was interlocutory but affected substantial rights and was immediately appealable.

2. Eminent Domain— condemnation—dedication—intent

There was competent evidence in a condemnation proceeding to support findings that defendant never intended to donate a right-of-way unless its zoning petition was approved. It is within the trial court's discretion to determine the weight and credibility of evidence in a non-jury trial.

3. Appeal and Error— assignments of error—authority required

Assignments of error not supported with authority are abandoned, as are errors assigned and argued under different theories.

4. Eminent Domain— conditional dedication—null and void

A conclusion that defendant did not expressly dedicate a right-of-way to the public was supported by findings that defendant's conditional dedication of the right-of-way became null and void when defendant's zoning application was denied.

5. Eminent Domain— implied dedication—evidence insufficient

There was no implied dedication of a right-of-way where defendant refused to allow construction of an electronic transmission line over the property, constructed a private sewer line over the property, and paid taxes on the property.

6. Appeal and Error— assignment of error—inconsistent argument

An argument about the admission of testimony was deemed abandoned where the error was not argued on the theory assigned.

7. Evidence— relevancy—condemnation—intent to dedicate right-of-way

A landowner's intent to dedicate a right-of-way to the public is relevant to whether the dedication was made.

8. Evidence— condemnation—city council minutes and public hearing file—excluded

There was no abuse of discretion in a right-of-way case in the exclusion of city council minutes and a DOT public hearing file that referred to a dedication but did not mention defendant.

9. Eminent Domain— findings and order—motion to amend denied

The trial court did not err in a right-of-way case by denying a motion to amend the findings, make additional findings, and amend its order.

Appeal by plaintiff from order entered 22 January 2003 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 January 2004.

Attorney General Roy Cooper, by Assistant Attorney General James M. Stanley, Jr., for the State.

The Odom Firm, PLLC, by T. LaFontaine Odom, Sr., and Thomas L. Odom, Jr., for defendant-appellee Elm Land Company.

TIMMONS-GOODSON, Judge.

The Department of Transportation ("DOT") appeals from an order of the trial court declaring that DOT acquired a public right-of-way over property owned by Elm Land Company ("defendant") without compensation. The trial court further ordered a jury determination of the amount of damages, if any, owed to defendant. For the reasons stated herein, we affirm the order of the trial court.

The evidence presented at trial tended to show that DOT commenced this action on 20 November 2000 by filing a Complaint and Declaration of Taking to condemn and take a temporary construction easement across a portion of defendant's property in Mecklenburg County. On 9 January 2002, defendant filed an Answer to Complaint, Response to Declaration of Taking, and a Counterclaim for Inverse Condemnation alleging that DOT appropriated approximately 6 acres

of real property owned by defendant without paying just compensation. DOT moved the trial court to determine all issues raised by the pleadings other than the issue of damages. The matter came before the trial court 22 January 2003, at which time the trial court made the following pertinent findings of fact:

> 7. On February 14, 1986 Elm Land acquired 25 acres of land in Mecklenburg County by North Carolina General Warranty Deed from Rea Brothers, Inc. . . . .
>
> 8. On April 30, 1987 Elm Land acquired 5.381 acres in Mecklenburg County by North Carolina General Warranty Deed from First Providence Investors . . . within this deed the description referred to a "proposed 100' right-of-way as shown on survey" and "right-of-way margin of said proposed right-of-way" and referred to a survey for "First Providence Investors" . . . .
>
> 9. On April 30, 1987 by North Carolina General Warranty Deed Elm Land conveyed 2.375 acres and 0.004 acres to First Providence Investors . . . within this deed the description referred to "proposed 100' right-of-way," and "proposed right-of-way" and referred to a survey for "First Providence Investors" . . . .
>
> 10. Prior to April 30, 1987 Elm Land and First Providence Investors worked together to prepare for filing a joint rezoning petition with the Charlotte-Mecklenburg Planning Commission for their respective properties, adjacent to each other, located in southeastern Mecklenburg County.
>
> 11. On May 1, 1987 Willie Rea, as a general partner for Elm Land, signed a letter on behalf of Elm Land addressed to the Charlotte-Mecklenburg Planning Commission which "authorizes the dedication of the right of way shown on the following surveys . . . from the Record Plat of Right-of-Way Dedication of First Providence Investors . . . ." At the time of the signing of this letter dated May 1, 1987, Willie Rea believed this was necessary for a rezoning petition which would be filed later by First Providence Investors and Elm Land and would constitute a dedication if the rezoning petition was approved by the Mecklenburg County Board of Commissioners.
>
> 12. On May 26, 1987 Elm Land Company, First Providence Investors and John R. Rea filed an "Official Rezoning Application" with the Charlotte-Mecklenburg Planning Commission . . . seeking conditional district and innovative district rezoning for the

property . . . In conjunction with the Application a "PROPOSED REZONING SITE PLAN" . . . was also filed with the Charlotte-Mecklenburg Planning Commission and contained the following "GENERAL NOTES":

> 1. PETITIONER WILL DEDICATE 20' OF RIGHT-OF-WAY TO NCDOT FOR PROVIDENCE ROAD LENGTH OF PROJECT AND WILL DEDICATE THE FULL 100" [sic] INDICATED ON THE PLAN FOR THE LOWER MECKLENBURG CIRCUMFERENTIAL . . . .

13. On August 13, 1987 First Providence Investors filed in the Mecklenburg County Public Registry "Record Plat of Right of Way Dedication" . . . ." Elm Land's name does not appear on this plat and Elm Land did not authorize the filing of this in the Mecklenburg County Public Registry.

14. On November 24, 1987 Elm Land Company and John R. Rea filed an "Official Rezoning Application" with the Charlotte-Mecklenburg Planning Commission . . . In conjunction with the Application, a "PROPOSED REZONING SITE PLAN" . . . was also filed with the Charlotte-Mecklenburg Planning Commission and contained the following "GENERAL NOTES":

> 1. PETITIONER WILL DEDICATE 20' OF RIGHT-OF-WAY TO NCDOT FOR PROVIDENCE ROAD LENGTH OF PROJECT AND WILL DEDICATE THE FULL 100' INDICATED ON THE PLAN FOR THE LOWER MECKLENBURG CIRCUMFERENTIAL . . . .
>
> 2. AS A CONDITION OF THIS PETITION, IT IS AGREED THAT A TWO-LANE ROADWAY WILL BE CONSTRUCTED FOR THE LENGTH OF THE CIRCUMFERENTIAL INCLUDED IN THIS PETITION IN ACCORDANCE WITH THE CROSS-SECTION SHOWN.

15. On January 21, 1988 the Charlotte-Mecklenburg Planning Commission, after a joint public hearing with the Mecklenburg County Board of Commissioners, recommended approval of the May 26, 1987 Application and recommended denial of the November 24, 1987 application.

16. On February 15, 1988 the Mecklenburg County Board of Commissioners denied both Applications.

17. Under the Rezoning Regulations of Mecklenburg County in effect in 1987 and 1988, any offers to dedicate right-of-way to the public and to construct roads on public right-of-ways, in a conditional or innovative rezoning application, contingent upon the rezoning applications being approved; upon a denial of a conditional rezoning application, any offers to dedicate right-of-way to the public became null and void.

18. In March 1988 Elm Land refused to allow Duke Power Company to construct an electric transmission line within portions of its land that included the proposed 100' right-of-way. . . .

19. From 1988 until 2000 Elm Land Company paid ad valorem taxes to Mecklenburg County for the 28 acre parcel . . . this tax parcel included portions of the proposed 100' right of way of the East-West Road, the subject of this action.

20. In 1995 Elm Land, in order to service a portion of its property leased for a golf course north of the East-West Road, constructed an 8" private sewer line a distance of approximately 4000 feet within the area of the proposed 100' right-of-way of the East-West Road, the subject of this action. Elm Land Company still owns this sewer line.

. . . .

22. On July 20, 1998 a "Final Plat of Rea Village—Map 1" . . . was filed in the Mecklenburg County Public Registry . . . showing a portion of the former Elm Land property that fronted on Providence Road and the future East-West Road; this was owned by CVR Associates Limited Partnership (which partnership included Elm Land as a partner); the recorded Plat recited on it "Future East-West Circumferential Road (proposed 100' public right of way)—Not Constructed".

23. On June 9, 1999 a "Final Plat of Rea Village—Map 2" . . . was filed in the Mecklenburg County Public Registry . . . showing a portion of the former Elm Land property that fronted on Providence Road and the future East-West Road; this was owned by CVR Associates Limited Partnership (which partnership included Elm Land as a partner); the recorded Plat recited on it "Future East-West Circumferential Road (proposed 100' public right of way)—Not Constructed".

24. In September 1999 DOT contacted Willie Rea to discuss the purchase of a temporary construction easement for the East-West Road over Elm Land property; at this time Willie Rea on behalf of Elm Land Company notified DOT that Elm Land had not dedicated any right-of-way to the public for the East-West Road and demanded compensation for any right-of-way that might be required over its property for the East-West Road.

25. On March 7, 2000 a "Final Plat of Rea Village—Map 3" . . . was filed in the Mecklenburg County Public Registry . . . showing a portion of the former Elm Land property that fronted on Providence Road and the future East-West Road; this was owned by CVR Associates Limited Partnership (which partnership included Elm Land as a partner); the recorded Plat recited on it "Future East-West Circumferential Road (proposed 100' public right of way)—Not Constructed".

26. Elm Land never intended to give, donate or transfer a 100' right-of-way to the public for the East-West Road without compensation unless one of the 1987 Rezoning Petitions was approved by the Mecklenburg County Board of Commissioners.

The trial court thereafter concluded that DOT failed to evidence that a public right-of-way was acquired over defendant's property and ordered a jury determination as to the amount of damages, if any, DOT must compensate defendant. From this order, DOT appeals.

DOT asserts 38 assignments of error on appeal. Generally, these issues are whether: (I) there is clear and convincing evidence to support the trial court's findings of fact; (II) the findings of fact support the conclusions of law; (III) the trial court appropriately ruled on evidentiary issues presented at the hearing; and, (IV) the trial court erred in denying DOT's motion to amend the findings of fact, to make additional findings, and to amend the order.

[1] We note initially that this matter is interlocutory. However, the Supreme Court recently held that "orders from a condemnation hearing concerning title and area taken are 'vital preliminary issues' that must be immediately appealed pursuant to N.C.G.S. § 1-277, which permits interlocutory appeals of determinations affecting substantial rights." *Dep't of Transportation v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 709 (1999) (quoting *Highway Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967)). Therefore, this appeal is properly before this Court.

I.

[2] The standard of review for findings made by a trial court sitting without a jury is whether any competent evidence exists in the record to support said findings. *Hollerbach v. Hollerbach*, 90 N.C. App. 384, 387, 368 S.E.2d 413, 415 (1988). Findings of fact and conclusions of law allow meaningful review by the appellate courts. *O'Neill v. Bank*, 40 N.C. App. 227, 231, 252 S.E.2d 231, 234 (1979). Findings of fact are conclusive if supported by competent evidence, irrespective of evidence to the contrary. *Associates, Inc. v. Myerly and Equipment Co. v. Myerly*, 29 N.C. App. 85, 89, 223 S.E.2d 545, 548 (1976).

DOT argues that findings of fact numbers 5, 10, 12, 14, 15, 16 and 17 are irrelevant, but fails to assert caselaw in support of the claim. "The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon." N.C.R. App. P. 28(a) (2003). "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. 28(b)(6).

DOT further argues that the following two findings of fact by the trial court are not supported by competent evidence in the record:

> 11. On May 1, 1987 Willie Rea, as a general partner for Elm Land, signed a letter on behalf of Elm Land addressed to the Charlotte-Mecklenburg Planning Commission which "authorizes the dedication of the right of way shown on the following surveys . . . from the Record Plat of Right-of-Way Dedication of First Providence Investors . . . ." At the time of the signing of this letter dated May 1, 1987, Willie Rea believed this was necessary for a rezoning petition which would be filed later by First Providence Investors and Elm Land and would constitute a dedication if the rezoning petition was approved by the Mecklenburg County Board of Commissioners.
>
> . . . .
>
> 26. Elm Land never intended to give, donate or transfer a 100' right-of-way to the public for the East-West Road without compensation unless one of the 1987 Rezoning Petitions was approved by the Mecklenburg County Board of Commissioners.

It is within the trial court's discretion to determine the weight and credibility given to all evidence presented during a non-jury trial. *Kirkhart v. Saieed*, 98 N.C. App. 49, 54, 389 S.E.2d 837, 840 (1990). "The trial court is in the best position to weigh the evidence, determine the credibility of witnesses and 'the weight to be given their testimony.' " *Kirkhart*, 98 N.C. App. at 54, 389 S.E.2d at 840 (quoting *Lyerly v. Malpass*, 82 N.C. App. 224, 225-26, 346 S.E.2d 254, 256 (1986)).

At trial, Willie Rea, a general partner of defendant, testified that he signed a letter on behalf of defendant authorizing the dedication of a right-of-way. Willie Rea further testified that he signed the letter because he believed it was necessary for a rezoning petition which would be later filed by defendant and First Providence Investors. Thus, there is competent evidence in the record to support findings of fact 11 and 26. *See Hollerbach*, 90 N.C. App. at 387, 368 S.E.2d at 415. DOT's assignment of error is overruled.

II.

[3] Once it has been determined that the findings of fact are supported by the evidence, we must then determine whether those findings of fact support the conclusions of law. *Kirby Building Systems v. McNiel*, 327 N.C. 234, 241, 393 S.E.2d 827, 831 (1990).

DOT assigned error to the trial court's conclusions of law 3, 4, 5, 6, 7, and 9. As DOT failed to specifically support these arguments with authority, these arguments are deemed abandoned. N.C.R. App. P. 28(b)(6). Although we note that DOT argues to this Court that conclusion of law 3 is not the correct interpretation of the current caselaw, DOT assigned error to this conclusion of law under a different theory in the record on appeal. "The 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). DOT's assignments of error to the trial court's conclusions of law 3, 4, 5, 6, 7, and 9 are overruled.

[4] DOT further argues that the following conclusion of law is not supported by competent evidence:

> 2. DOT failed to convince this Court by the greater weight of the evidence that it acquired a public right-of-way over Elm Land's land for the East-West Road prior to October 6, 2000.

Specifically, DOT argues that defendant expressly or impliedly dedicated a right-of-way to the public. We disagree.

The burden is on DOT to prove that defendant dedicated a right-of-way to the public. *See Lumberton v. Branch*, 180 N.C. 249, 250, 104 S.E. 460, 461 (1920). This Court stated the following in *Town of Highlands v. Edwards*:

> A dedication of property to the public consists of two steps: (1) an offer of dedication, and (2) an acceptance of this offer by a proper public authority. *Cavin v. Ostwalt*, 76 N.C. App. 309, 311, 332 S.E.2d 509, 511 (1985). An offer of dedication can be either express, as by language in a deed, or implied, arising from the "conduct of the owner manifesting an intent to set aside land for the public." *Bumgarner v. Reneau*, 105 N.C. App. 362, 365, 413 S.E.2d 565, 568, *modified and aff'd.*, 332 N.C. 624, 422 S.E.2d 686 (1992). In either case, whether express or implied, it is the owner's intent to dedicate that is essential. *See, Milliken v. Denny*, 141 N.C. 224, 229-30, 53 S.E. 867, 869 (1906); *Nicholas v. Salisbury Hardware & Furniture Co.*, 248 N.C. 462, 468, 103 S.E.2d 837, 842 (1958).

144 N.C. App. 363, 367, 548 S.E.2d 764, 766-67 (2001). In the case *sub judice*, the trial court found as a fact that defendant did not intend to dedicate the right-of-way to the public unless its rezoning application was approved. The trial court further found as fact that when defendant's rezoning application was denied, the conditional dedication of the right-of-way became null and void. Thus, the findings of fact support the conclusion of law that defendant did not expressly dedicate a right-of-way to the public. *See Edwards*, 144 N.C. App. at 367, 548 S.E.2d at 766.

[5] DOT argues that if defendant did not expressly dedicate a right-of-way to the public, it impliedly did so. Specifically, DOT asserts that defendant's conveyances of property referencing "a 100 foot right of way" re-offered the dedication to the public. The trial court found as fact seven such conveyances, six of which reference the right-of-way as either a proposed right-of-way or a right-of-way "not constructed" and all conveyances reference the right-of-way as that which was "filed by First Providence Investors."

DOT is correct that the subjective intent of a landowner to make a dedication is not always necessary. *Dept. of Transportation v. Haggerty*, 127 N.C. App. 499, 501, 492 S.E.2d 770, 771 (1997).

However, under the implied dedication theory DOT must prove that the acts of the landowner "are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation." *Tise v. Whitaker*, 146 N.C. 374, 376, 59 S.E. 1012, 1013 (1907).

DOT's reliance on *Haggerty* in support of its argument that defendant impliedly dedicated a right-of-way is misplaced. 127 N.C. App. 499, 492 S.E.2d 770. In *Haggerty*, the landowner outwardly manifested his intent to dedicate a right-of-way and conveyed property by reference to a plat which divided the tract into streets and lots. *Id.* at 500, 502, 492 S.E.2d at 770, 772.

> Here the defendants' deeds referred to plats that showed the 100 foot right of way. In addition, the defendants allowed public utilities, without easements, to place utility poles on the defendants' land more than 30 feet from the center of Wendover Avenue. The DOT correctly argues that this shows objectively an intent to dedicate a 50 foot right of way. In 1940, the State Highway Commission also set concrete right of way monuments on the Haggerty, McIntosh and Willard properties which should have put the defendants on notice of the 50 foot right of way being claimed by the Highway Commission. Finally, the tax cards for Stevens', McIntosh's and Haggerty's predecessors showed that the defendants were not paying ad valorem taxes on the land within the 100 foot right of way. This further suggests that the defendants had notice of and intended or acquiesced in the right of way being claimed by the DOT.

Id. at 502, 492 S.E.2d at 772. In the case *sub judice*, the trial court made findings of fact that defendant refused to allow Duke Power Company to construct an electric transmission line over the area in question, constructed an 8-inch private sewer line of approximately 4000 feet within the area in question, and has paid taxes on the property for at least the three years preceding this action. Thus, the findings of fact support the conclusion of law that defendant did not impliedly dedicate the right-of-way to the public.

III.

[6] DOT argues that the trial court erred by permitting defendant's witnesses to testify to legal conclusions and by failing to admit relevant exhibits produced by DOT. DOT asserts that the testimony of

Willie Rea and Scott McCutcheon impermissibly stated legal conclusions, yet DOT fails to assign error to any specific testimony by either witness on this theory. DOT's assignment of error is overruled. N.C.R. App. P. 28(a)(6).

[7] DOT further argues that Willie Rea's testimony regarding his intent to dedicate a right-of-way to the public if his rezoning application was approved is irrelevant. "Evidence is relevant if it has 'any logical tendency to prove any fact that is of consequence' in the case being litigated." *Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God*, 136 N.C. App. 493, 497, 524 S.E.2d 591, 594 (2000) (quoting *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991)). This Court must determine whether the trial court abused its discretion in determining whether the proffered evidence was relevant to the issues being tried. *Tomika*, 136 N.C. App. at 498, 524 S.E.2d at 595. We stated in *Edwards* that "it is the owner's intent to dedicate that is essential." 144 N.C. App. at 367, 548 S.E.2d at 767. Thus, although not conclusive, Willie Rea's intent to dedicate is relevant to the trial court's determination of whether a dedication was made. *See id.*

[8] The trial court refused to permit DOT to introduce into evidence two certified copies of minute books from Charlotte City Council meetings and a portion of DOT's public hearing file for the realignment of a roadway. The City Council meeting minutes refer to the movement of a roadway and the dedication of a right-of-way, but do not include any reference to defendant. DOT's public hearing file likewise references the dedication of a right-of-way, but fails to reference who dedicated the right-of-way. DOT has the burden of proving that defendant dedicated a right-of-way, not that a right-of-way was dedicated. *See Lumberton*, 180 N.C. at 250, 104 S.E. at 461. Thus, DOT has failed to prove that the trial court abused its discretion in preventing the introduction of this evidence. *See Tomika*, 136 N.C. App. at 498, 524 S.E.2d at 595.

IV.

[9] DOT's final assignment of error asserts that the trial court erred by denying its Motion to Amend Findings of Fact, Make Additional Findings of Fact, and to Amend Order pursuant to Rule 52(b) of the North Carolina Rules of Civil Procedure. We disagree.

Rule 52(b) states in pertinent part that "the court may amend its findings or make additional findings and may amend the judgment

accordingly." N.C. Gen. Stat. § 1A-1, Rule 52(b) (2003). The primary purpose of an amendment under Rule 52(b) is to give the appellate court a correct understanding of the factual issues determined by the trial court or a clearer understanding of the trial court's decision. *Branch Banking and Tr. Co. v. Home Fed. Sav. and Loan*, 85 N.C. App. 187, 198, 354 S.E.2d 541, 548 (1987). In the instant appeal, the trial court made 27 findings of fact and 9 conclusions of law which support the determination that defendant did not dedicate a right-of-way to the public. Pursuant to Rule 52(b) and *Branch Banking*, DOT's final assignment of error is overruled. *Id.*

Affirmed.

Judges WYNN and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. TAMMY KAY SINNOTT AND DAVID MICHAEL SINNOTT

No. COA03-187

(Filed 16 March 2004)

1. Taxation— income tax—compensation for labor—constitutionality

The trial court did not err in an attempting to evade and defeat the imposition and payment of North Carolina Individual Income Tax case by denying defendants' identical pretrial motions to dismiss the charges against them, because: (1) it is constitutional to tax an individual's compensation for labor; (2) taxing income is not an unconstitutional capitation tax; (3) defendants failed to make an argument in support of their contention that this action was commenced by the Department of Revenue rather than by the State thus violating Article IV, § 13 of the North Carolina Constitution, and defendants' contention is a misstatement of what in fact occurred; (4) paying income tax is not a violation of the prohibition against involuntary servitude; and (5) N.C.G.S. §§ 105-236(7) and 105-236(9) are not too vague and general as to be ambiguous.

2. Taxation— attempting to evade and defeat imposition and payment of individual income tax—sufficiency of evidence

The trial court did not err in an attempting to evade and defeat the imposition and payment of North Carolina Individual Income Tax case by denying defendants' motion to dismiss the charges against them at the close of all evidence, because the evidence was sufficient to establish that: (1) defendants willfully attempted to evade or defeat a tax or its payment in violation of N.C.G.S. § 105-236(7) when defendants filed returns in 1993 and 1994 indicating tax liability and then subsequently filed amended tax returns which listed their taxable income as zero without including exemptions and deductions which warranted a conclusion that no taxes were owed, and defendants also filed returns in 1995 and 1996 indicating they owed no taxes without deductions and exemptions to justify their claim; and (2) defendant husband willfully failed to file income tax returns for years 1997, 1998, 1999, and 2000 despite the fact that his gross income exceeded his federal and state exemption allowances in violation of N.C.G.S. § 105-236(9).

Appeal by defendants from judgments dated 31 May 2002 by Judge Evelyn W. Hill in Superior Court, Wake County. Heard in the Court of Appeals 19 November 2003.

Attorney General Roy Cooper, by Assistant Attorney General Michael D. Youth, for the State.

Tammy K. Sinnott and David M. Sinnott, Pro Se.

McGEE, Judge.

Tammy Kay Sinnott (Tammy Sinnott) and David Michael Sinnott (David Sinnott) (collectively defendants) were convicted on 29 May 2002 of attempting to evade and defeat the imposition and payment of North Carolina Individual Income Tax for the calendar years 1993, 1994, 1995, and 1996, in violation of N.C. Gen. Stat. § 105-236(7). In addition, David Sinnott was also convicted of failing to file a North Carolina Tax Return for calendar years 1997, 1998, 1999, and 2000, in violation of N.C. Gen. Stat. § 105-236(9). Defendants appeal.

The evidence presented by the State at trial tends to show that defendants have been residents of North Carolina since at least 1989. In calendar years 1993 through 2000, defendants earned wages which exceeded the applicable federal exemption amounts. Accordingly,

defendants were required to file both federal and North Carolina individual income tax returns.

For calendar year 1993, defendants filed a joint state tax return on 24 January 1994, declaring their taxable income to be $39,883.00 with a tax liability of $2,579. Subsequently, defendants filed an amended 1993 return on 24 February 1997, declaring their taxable income to be zero. However, defendants listed no itemized deductions warranting a taxable income of zero. Essentially, defendants were claiming entitlement to a refund of the tax paid for 1993.

For calendar year 1994, defendants again filed a joint state tax return on 14 February 1995, declaring their taxable income to be $47,669 with a tax liability of $3,125. Similarly, on 23 February 1997, defendants filed an amended 1994 return declaring their taxable income to be zero even though the deductions and exemptions did not justify such a change. Again, defendants were claiming a refund.

For calendar year 1995, defendants filed a joint state tax return on 15 February 1997 declaring their taxable income to be zero with no evidence of deductions and exemptions legitimizing their claim. Thus, defendants were asking for a refund of the tax withheld in 1995.

For calendar year 1996, defendants filed a joint state tax return on 19 February 1997 declaring zero as their taxable income. They failed to submit evidence of deductions and exemptions entitling them to zero tax liability. Once again, defendants were asking for a refund of the tax withheld for the year 1996.

For calendar years 1997, 1998, 1999, and 2000, David Sinnott's gross income exceeded his federal and state exemption allowances and necessitated that he file both federal and state tax returns. David Sinnott failed to file a state tax return for these four years by the applicable deadlines.

[1] Defendants first argue that the trial court erred by denying their identical pre-trial motions to dismiss the charges against them on constitutional grounds. Defendants made these motions pursuant to N.C. Gen. Stat. § 15A-954, claiming that the criminal statutes which they were charged with violating, N.C. Gen. Stat. § 105-236(7) and (9), were facially unconstitutional and unconstitutional as applied to each of them. Within this overall argument, defendants specifically make the following constitutional arguments: (1) that the State's claim that

defendants' compensation for labor is taxable as income violates Article I, § 1 of the North Carolina Constitution and the Bill of Rights because it is a tax upon the fruits of one's labor, (2) that a tax on one's labor is a capitation tax in violation of Article V, § 1 of the North Carolina Constitution and Article I, § 9 of the United States Constitution, (3) that the action commenced against defendants was in violation of Article IV, § 13 of the North Carolina Constitution because it was an action by the Department of Revenue rather than the State, (4) that taxing compensation for labor violates the prohibition against slavery and involuntary servitude in Article I, § 17 of the North Carolina Constitution and the Thirteenth Amendment to the United States Constitution, and (5) that the applicable statutes are vague and ambiguous and thus violate the due process clause in Article I, § 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution. For the reasons stated below, we find these arguments to be without merit.

Defendants' first argument is meritless because it is well-settled that it is constitutional to tax an individual's compensation for labor. This proposition was asserted in *Lonsdale v. Commissioner*, 661 F.2d 71 (5th Cir. 1981) where the federal court of appeals summarized the appellants' arguments by stating the following:

> The first category of contentions may be summarized as that the United States Constitution forbids taxation of compensation received for personal services. This is so, appellants first argue, because the exchange of services for money is a zero-sum transaction, the value of the wages being exactly that of the labor exchanged for them and hence containing no element of *profit*. This contention is meritless. The Constitution grants Congress power to tax "incomes, from whatever source derived . . . ." U.S. Const. amend. XVI. Exercising this power, Congress has defined income as including compensation for services. 26 U.S.C. § 61(a)(1). Broadly speaking, that definition covers all "accessions to wealth." *See Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431, 75 S.Ct. 473, 477, 99 L.Ed. 483 (1955). This definition is clearly within the power to tax "incomes" granted by the sixteenth amendment.

Lonsdale, 661 F.2d at 72. Defendants in the case before us seem to be asserting an argument similar to the one asserted by the appellants in *Lonsdale*. *Lonsdale* was followed in 1984 by a district court in the Fourth Circuit in the case of *Scull v. United States*, 585 F. Supp. 956, 963 (E.D. Va. 1984). The plaintiffs in *Scull* reported their taxable

income as zero and were assessed a penalty. The plaintiffs reported this amount because they claimed "that money received as wages is not taxable as income because it constitutes an exchange of labor for compensation." *Scull*, 585 F. Supp. at 963. In response, the district court cited *Lonsdale* and a multitude of other cases and stated, "[t]his position is clearly frivolous and is asserted in an effort to avoid the payment of taxes. The Internal Revenue Code explicitly provides that gross income includes compensation for services. 26 U.S.C. § 61(a)(1). Furthermore, the position the plaintiffs assert has been rejected repeatedly by the courts as frivolous." *Id.*

Similarly, a bankruptcy court in the Fourth Circuit cited *Lonsdale* and stated, "[w]ages are income; to argue otherwise is to make a meritless contention." *In re Hall*, 174 B.R. 210, 213 (Bkrtcy. E.D. Va. 1994). Although these decisions are not binding on our Court, we follow the reasoning asserted therein and hold that taxing compensation for labor is constitutional.

Defendants' second argument that taxing income is an unconstitutional capitation tax is also without merit. In *Ficalora v. Commissioner*, 751 F.2d 85 (2d Cir. 1984), *cert. denied*, 471 U.S. 1005, 85 L. Ed. 2d 162 (1985), the appellant argued that the income tax is a non-apportioned direct tax and that Congress does not have the constitutional power to impose such a tax. The Second Circuit disagreed and held that Congress did possess the authority and cited *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 39 L. Ed. 759, *reh'g*, 158 U.S. 601, 39 L. Ed. 1108 (1895), *overruled on other grounds*, *South Carolina v. Baker*, 485 U.S. 505, 524, 99 L. Ed. 2d 592, 611 (1988). *Ficalora*, 75 F.2d at 87. " '[T]he conclusion reached in the *Pollock Case* did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property[.]' " *Hale v. Iowa State Bd. of Assessment and Review*, 302 U.S. 95, 107, 82 L. Ed. 72, 80 (1937) (quoting *Brushaber v. Union P. R. Co.*, 240 U.S. 1, 16-17, 60 L. Ed. 493, 501 (1916)).

Similarly, in *In re Becraft*, 885 F.2d 547 (9th Cir. 1989), the Ninth Circuit noted the "patent absurdity and frivolity" of an argument that a direct non-apportioned income tax is not allowed. *Becraft*, 885 F.2d at 548. The court upheld the validity of federal income tax laws stating that "[f]or over 75 years, the Supreme Court and the lower federal courts have both implicitly and explicitly recognized the Sixteenth Amendment's authorization" of such a tax. *Id.* By analogy, a state income tax does not run afoul of the prohibition against capitation taxes. Accordingly, this argument is without merit.

Defendants fail to make an argument in support of their third contention within this assignment of error. Defendants merely state that this action was commenced by the Department of Revenue rather than by the State and thus violates Article IV, § 13 of the North Carolina Constitution. Accordingly, since no authority is cited and no reason or argument is stated, this contention is deemed abandoned pursuant to N.C.R. App. P. 28(b)(6). We note that not only is no argument asserted, defendants' contention is a misstatement of what in fact occurred. Defendants assert that the Department of Revenue commenced the action by serving warrants on 4 February 2002. However, even though a special agent with the Department of Revenue is listed as the complainant on the warrants, the fact remains that this action was instituted by the State of North Carolina as the caption indicates. Further, it is obvious that the State is the party opposing defendants in that an assistant attorney general prosecuted the case.

Defendants' fourth argument that paying income tax is a violation of the prohibition against involuntary servitude is also without merit. Again, due to a lack of state case law, we turn to federal law for guidance. In *Porth v. Brodrick*, 214 F.2d 925 (10th Cir. 1954), the Tenth Circuit affirmed the trial court's dismissal of the taxpayer's suit. The taxpayer argued that Congress' power to collect income taxes violated the prohibition against involuntary servitude. The court responded by stating, "[i]f the requirements of the tax laws were to be classed as servitude, they would not be the kind of involuntary servitude referred to in the Thirteenth Amendment." *Porth*, 214 F.2d at 926. Multiple other cases have come to this same conclusion and summarily dismissed this argument. *See Ginter v. Southern*, 611 F.2d 1226, 1229 (8th Cir. 1979), *cert. denied*, 446 U.S. 967, 64 L. Ed. 2d 827 (1980); *Kasey v. Commissioner*, 457 F.2d 369, 370 (9th Cir.), *cert. denied*, 409 U.S. 869, 34 L. Ed. 2d 120 (1972); *Abney v. Campbell*, 206 F.2d 836, 841 (5th Cir. 1953), *cert. denied*, 346 U.S. 924, 98 L. Ed. 417 (1954). We agree with the reasoning of these cases and find defendants' argument to be without merit.

Defendants' final contention within this assignment of error is that the statutes under which defendants were prosecuted are so vague and general as to be ambiguous. Defendants argue that N.C. Gen. Stat. § 105-236(7) fails to describe what conduct constitutes willfully, what constitutes an attempt to evade, and what amounts to aiding and abetting. Similarly, defendants argue that N.C. Gen. Stat. § 105-236(9) fails to state who is required to file,

fails to specify to whom the statute applies, and fails to explain what constitutes willfully.

"[T]he test for determining whether a statute is vague, as set forth by us in *Vehaun*, is whether the statute gives a 'person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.' " *State v. Blackmon*, 130 N.C. App. 692, 700, 507 S.E.2d 42, 47, *cert. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998) (quoting *State v. Elam*, 302 N.C. 157, 161-62, 273 S.E.2d 661, 664-65 (1981)).

> Principles of "due process" require courts to declare a criminal statute unconstitutionally vague if the statute fails to clearly define what is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 33 L.Ed. 2d 222, 92 S.Ct. 2294 (1972); *State v. Evans*, 73 N.C. App. 214, 326 S.E. 2d 303 (1985). A statute is "void for vagueness" if it forbids or requires doing an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *Coates v. Cincinatti*, 402 U.S. 611, 29 L.Ed. 2d 214, 91 S.Ct. 1686 (1971); *In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879 (1969), *affirmed* 403 U.S. 528, 29 L.Ed. 2d 647, 91 S.Ct. 1976 (1971). Only a reasonable degree of certainty is necessary, mathematical precision is not required. *Grayned v. City of Rockford, supra*; *State v. Martin*, 7 N.C. App. 532, 173 S.E. 2d 47 (1970).

State v. Worthington, 89 N.C. App. 88, 89, 365 S.E.2d 317, 318 (1988).

The subsections of N.C. Gen. Stat. § 105-236 which are at issue are as follows:

> (7) Attempt to Evade or Defeat Tax.—Any person who willfully attempts, or any person who aids or abets any person to attempt in any manner to evade or defeat a tax or its payment, shall, in addition to other penalties provided by law, be guilty of a Class H felony.
>
> . . .
>
> (9) Willful Failure to File Return, Supply Information, or Pay Tax.—Any person required to pay any tax, to make a return, to keep any records, or to supply any information, who willfully fails to pay the tax, make the return, keep the records, or supply the information, at the time or times required by

> law, or rules issued pursuant thereto, shall, in addition to other penalties . . . .

N.C. Gen. Stat. § 105-236(7) and (9) (2003).

Regarding subsection (7), defendants take issue with the term "willfully" and with what conduct constitutes an attempt to evade or defeat a tax. Although this language has not been addressed specifically in N.C. Gen. Stat. § 105-236(7) and (9), a challenge was mounted against a statute containing similar language in another context. N.C. Gen. Stat. § 14-202.1 (2003) punishes criminally one who "[w]illfully takes or attempts to take . . ." indecent liberties with a child. The appellants in *Blackmon* asserted a challenge based on the claim that N.C. Gen. Stat. § 14-202.1 was unconstitutionally void for vagueness. This Court upheld this statute despite the challenge. *Blackmon*, 130 N.C. App. at 699-700, 507 S.E.2d at 47. Likewise, we hold that the statute in the case before us withstands the constitutional vagueness challenge.

Defendants also contend that "aids and abets" is unconstitutionally vague. However, defendants cite no authority and make no argument for this proposition. Accordingly, this argument is deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

With respect to subsection (9), defendants primarily argue that the statute does not specify to whom it applies. The subsection refers to "[a]ny person required to pay any tax, to make a return . . . ." Defendants correctly assert that subsection (9) does not specify who must file a return. However, this provision is merely one which provides for penalties for those who fail to comply. One must look to a different provision within the Individual Income Tax Act (N.C. Gen. Stat. § 105-133 et seq.) to determine which individuals are required to file returns. The applicable provision is N.C. Gen. Stat. § 105-152 (2003). Subsection (a) is entitled "Who Must File," and it delineates exactly who must file an income tax return. Thus, N.C. Gen. Stat. § 105-236(9) does not fail for vagueness simply because it fails to reference which individuals are required to file income tax returns.

Defendants also take issue with the term "willfully" contained in subsection (9). Again, the analysis from *Blackmon* is instructive and we hold that the statute in the case before us withstands the constitutional vagueness challenge.

[2] Defendants next argue that the trial court erred by denying their motion to dismiss at the close of the State's evidence. "Upon defend-

ant'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 that amount of 'relevant evidence that a reasonable mind might accept as adequate to support a conclusion.' " *State v. Armstrong*, 345 N.C. 161, 165, 478 S.E.2d 194, 196 (1996) (quoting *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)). "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).

The evidence at trial showed that in 1993 and 1994, defendants filed returns indicating tax liability and then subsequently filed amended returns which listed their taxable income as zero. However, these amended returns failed to include exemptions and deductions which warranted a conclusion that no taxes were owed. Similarly, in 1995 and 1996, defendants filed returns indicating they owed no taxes without deductions and exemptions to justify their claim. In addition, Nancy Yokely (Yokely), a special agent with the Department of Revenue, testified as to a conversation she had with Tammy Sinnott regarding the payment of taxes. Yokely testified that Tammy Sinnott claimed to not owe taxes because she and her husband had no source of income and the income tax was a duty tax. Tammy Sinnott further claimed that she would not file any returns until she was given proof that she had to file. This evidence is sufficient to establish that defendants willfully attempted to evade or defeat a tax or its payment in violation of subsection (7).

In addition, the evidence tended to show that David Sinnott failed to file an income tax return for years 1997, 1998, 1999, and 2000 despite the fact that his gross income exceeded his federal and state exemption allowances and necessitated that he file a return in each of those years. This evidence, coupled with the testimony by Yokely, is sufficient to establish that David Sinnott willfully failed to file income tax returns in violation of subsection (9). Accordingly, the trial court did not err in failing to dismiss the charges. This assignment of error is overruled.

No error.

Judges HUNTER and GEER concur.

TEMONIA D. DAVIS, PETITIONER v. BRITAX CHILD SAFETY, INCORPORATED, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS

No. COA03-624

(Filed 16 March 2004)

Unemployment Compensation— discharge based on substantial fault—attendance policy

The trial court erred by affirming the North Carolina Employment Security Commission's determination that petitioner employee is partially disqualified from receiving unemployment insurance benefits based on her being discharged due to substantial fault on her part for abusing defendant company's points-based attendance policy, because the company's general points-based policy may not form the basis of a finding of fault where petitioner never accumulated the twenty-four points necessary to warrant discharge under the policy, and the company did not follow this policy when it fired petitioner for absenteeism.

Appeal by petitioner from judgment entered 3 March 2003 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 February 2004.

Legal Aid of North Carolina, Inc., by Linda S. Johnson, Maureen C. Atta, and Kenneth L. Schorr, for petitioner-appellant.

Chief Counsel C. Coleman Billingsley, Jr., by Camilla F. McClain, for respondent-appellee Employment Security Commission of North Carolina.

LEVINSON, Judge.

The present appeal arises from a dispute over whether petitioner-appellant Temonia D. Davis is entitled to unemployment compensation benefits after being discharged by Britax Child Safety, Inc., for

alleged abuse of the company's attendance policy. Davis appeals from a superior court order affirming the North Carolina Employment Security Commission's determination that Davis is partially disqualified from receiving unemployment insurance benefits because she was discharged due to substantial fault on her part. We reverse and remand.

Temonia Davis began working with Britax Child Safety, Inc. on 7 September 1999 as an assembler. Britax made Davis aware of its points-based, "no-fault" attendance policy on 1 February 2000. The policy states that "[e]xcessive absenteeism or tardiness will not be tolerated and may be cause for disciplinary action up to and including discharge." Under Britax's policy, an employee accumulates points for being absent and tardy.

The nature of an absence or tardiness determines the number of points an employee receives. An employee does not accumulate any points for, *inter alia*, taking an earned sick day, medical or family leave, missing work due to a traffic accident in which the employee was involved while coming to work, or taking earned vacation time after giving one week prior notice. An employee receives one point for an absence where the employee has properly "called-in" and presents a signed doctor's slip, one point for taking an earned vacation day without giving one week prior notice, and one point for being less than ten minutes tardy or leaving with less than ten minutes left before the end of the employee's shift. Employees who are late to work by more than ten minutes or who leave work with more than ten minutes of their shift remaining receive two points. An employee receives three points for an absence without a proper "call-in" for which no doctor's slip is presented.

Disciplinary action coincides with accumulation of points by an employee in a twelve month period. Upon receiving twelve points, an employee will receive a written notice of her point total. After accumulating sixteen points, the employee is given a written warning. At twenty points, the employee receives a "final" written warning. Upon receiving twenty-four points, an employee will be discharged. On the first day of each calendar month, Britax removes points accumulated by an employee during that same month of the previous year.

During the course of her employment, Davis was either absent or tardy on numerous occasions. Davis told her employer that many of her absences were attributable to high blood pressure, which made

her dizzy and sick. She also suffered from repeated sinus infections. For most of her absences, Davis submitted a doctor's note.

Davis received written warnings on 18 February and 8 May 2000 for having sixteen and nineteen attendance points, respectively, and a "final written warning" on 8 June 2000 for having twenty-two attendance points. After being tardy without properly clocking-in for work, Davis received one additional point on 16 August 2000, at which time Britax issued another "final written warning" to her for having twenty-three attendance points. On 9 August 2001, Britax again issued a "final written warning" to Davis for having twenty attendance points; the warning contained the following handwritten admonition: "[p]olicy states an employee will be discharged when they [sic] reach 24 points[.]" On 29 October 2001, upon accumulating twenty-one attendance points, Davis received yet another "final written warning" which contained the following handwritten comment: "the no fault attendance policy states that any employee who accumulates 24 or more points in a 12-calendar-month period under this system will be discharged."

On 14 March 2002, Davis received one point for taking an earned vacation day without giving one week prior notice. At this time, she received a written warning "in accordance with the No Fault Attendance Policy" for having sixteen points. Between 19 March and 28 March, Davis received two points for being more than ten minutes late for work, three points for an unexcused absence, and one point for a three-day absence for which a doctor's slip was submitted. Britax issued a "final written warning" to Davis on 1 April 2002 for having accumulated twenty-two points; the warning stated that "[e]xcessive absenteeism or tardiness will not be tolerated and may be cause for disciplinary action up to and including termination."

Moreover, Britax representatives concluded that Davis had abused the point system by missing work until she accumulated twenty or more points and then reporting to work until her point total fell below twenty, at which time she would begin to miss again. Therefore, on 1 April 2002, the company also placed Davis on "disciplinary probation" with the following written terms:

> Because of excessive abuse of the point system [Davis] is being placed on disciplinary probation until June 1, 2002. During this time [Davis] is expected to be [at] work on time and to be out only with pre-approved authorization. Any absence longer than

> 3 days will require a leave of absence. A dramatic improvement needs to be seen in [Davis'] attendance. If abuse continues it will be subject to further disciplinary action up to and including termination.

Davis was neither absent nor tardy while on probation.

Following the probation, Davis called in sick on 4 June and again on 6 June 2002. Although she did not have enough remaining sick leave to cover the 6 June absence, Davis was issued only one point because she submitted a doctor's note. In addition, on 5 June 2002, Davis was issued one point for leaving work and then returning. A sinus infection caused these absences. On 7 June 2002, Britax issued a final written warning to Davis for having twenty-one points and terminated her employment for "excessive absenteeism and abuse of the attendance point system."

Following her discharge, Davis filed a claim for unemployment insurance benefits with the North Carolina Employment Security Commission. An adjudicator, and subsequently a hearing officer, determined that Davis was not discharged due to substantial fault on her part and should not be partially disqualified from receiving benefits. On Britax's appeal, the Employment Security Commission reversed. The Commission made the following pertinent findings of fact:

> 3. The claimant [Davis] was discharged for abuse of the employer's attendance policy due to excessive absenteeism despite prior disciplinary actions.
>
> . . . .
>
> 7. . . . The employer concluded that the claimant abused the attendance policy because the claimant would miss work until she had accumulated twenty or more points and then the claimant would report to work until she was back down to under twenty points. This was accomplished due to the employer's policy of removing points after one year.
>
> 8. During her probationary period, the claimant reported to work although she was sick. The claimant was aware that her job was in jeopardy if she was absent from work during her probationary period. Pursuant to the employer's attendance policy, two attendance points were removed during the probationary period which left the claimant with 20 attendance points.

> 9. After the 60 day period had elapsed, the claimant was absent on June 4 and 6, 2002, and left work early on June 5, 2002. The claimant received 1 attendance point on June 5 and 6, 2002. The claimant was absent due to a sinus infection. The claimant provided the employer with a doctor's note regarding her absence.

The Commission made the following conclusions of law:

> The Commission . . . concludes that the claimant was discharged for substantial fault connected with the work. . . . Further, the claimant must be held disqualified from receiving unemployment insurance benefits for a period of nine (9) weeks.

Davis appealed to the Mecklenburg County Superior Court, which affirmed the decision of the Commission.

Davis appeals to this Court, contending (1) the Superior Court and the Commission erroneously interpreted N.C.G.S. § 96-14(2a) in concluding that Davis was discharged due to substantial fault on her part for abusing her employer's points-based policy, and (2) there is no competent record evidence to support the Commission's findings of fact which indicate that Davis abused Britax's attendance policy. Because we conclude that Davis' first argument has merit, we need not address the second.

A party claiming to be aggrieved by a decision of the Employment Security Commission may "file[] a petition for review in the superior court of the county in which he resides or has his principal place of business." N.C.G.S. § 96-15(h) (2003). "The legislature, in granting this jurisdiction to the superior court, intended for the superior court to function as an appellate court." *In re Enoch*, 36 N.C. App. 255, 256, 243 S.E.2d 388, 389 (1978). "An appeal may be taken from the judgment of the superior court, as provided in civil cases." N.C.G.S. § 96-15(i) (2003). The same standard of review applies in the superior court and in the appellate division: "the findings of fact by the Commission, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." *Id.* Accordingly, this Court, like the superior court, will only review a decision by the Employment Security Commission to determine "whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law." *RECO Transp., Inc. v. Employment Sec. Comm'n*, 81 N.C. App. 415, 418, 344 S.E.2d 294, 296 (1986).

"Ordinarily a claimant is presumed to be entitled to benefits under the Unemployment Compensation Act, but this is a rebuttable presumption with the burden on the employer to show circumstances which disqualify the claimant." *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 376, 289 S.E.2d 357, 359 (1982). An employee is partially disqualified from receiving unemployment compensation benefits "if it is determined by the Commission that such individual is, at the time the claim is filed, unemployed because he was discharged for substantial fault on his part connected with his work not rising to the level of misconduct." N.C.G.S. § 96-14(2a) (2003).

> Substantial fault is defined to include those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment.

Id. Thus, "[r]easonable control coupled with failure to live up to a reasonable employment policy equals substantial fault." *Lindsey v. Qualex, Inc.*, 103 N.C. App. 585, 590, 406 S.E.2d 609, 612 (1991).

"An employee has 'reasonable control' when she has the physical and mental ability to conform her conduct to her employer's job requirements." *Id.* This Court has supplied the following examples of "reasonable control":

> [A]n employee does not have reasonable control over failing to attend work because of serious physical or mental illness. An employee does have reasonable control over failing to give her employer notice of such absences. Also, an employee does not have reasonable control over tardiness caused by an unexpected traffic accident. An employee does have reasonable control over tardiness caused by her failure to maintain her own vehicle. An employee also has reasonable control over her ability to comply with job rules when the employer's policy gives her the opportunity to make up for demerits resulting from circumstances in which she had marginal or little control.

Id.

"What constitutes 'reasonable requirements of the job' will vary depending on the nature of the employer's business and the employee's function within that business." *Id.* This Court has set forth

six non-exclusive factors which may be used to assess the reasonableness of an employer's policy:

> (1) how early in the employee's tenure she receives notice of the policy; (2) the degree of departure from expected conduct which warrants either a demerit or other disciplinary action under the policy; (3) the degree to which the policy accommodates an employee's need to deal with the exigencies of everyday life; (4) the employee's ability to redeem herself or make amends for rule violations; (5) the amount of counseling the employer affords the employee concerning rule violations; and (6) the degree of notice or warning an employee has that rule violations may result in her discharge.

Id. "The reasonableness of the employer's job requirements should be analyzed on a case-by-case basis in light of the totality of the circumstances surrounding the employee's function within the employer's business." *Id.*

Non-compliance with an employer's attendance policy may form the basis of a finding of substantial fault on an employee's part. *See id.* at 591, 406 S.E.2d at 612-13. Neither the General Statutes nor any decision from our appellate courts require that an employer's policy be a general policy that is applicable to all employees. *See, e.g.*, G.S. § 96-14(2a) (using the phrase "reasonable requirements of the job" rather than "employer policies"); *Lindsey*, 103 N.C. App. at 590-91, 406 S.E.2d at 612-13 (applying the concept of "reasonable requirements of the job" to an employer's generally applicable policy). Thus, an employer may impose upon an employee reasonable requirements, notwithstanding the fact that such special requirements may deviate from—or be in addition to—the employer's generally applicable policy. However, "discharge in violation of [an employer's] own rules should not be the basis of disqualifying [a claimant] from benefits." *Doyle v. Southeastern Glass Laminates, Inc.*, 104 N.C. App. 326, 334, 409 S.E.2d 732, 736 (1991) (Cozort, J., dissenting), *rev'd for reasons stated in the dissent*, 331 N.C. 748; 417 S.E.2d 236-37 (1992) (*per curiam*).

In *Doyle*, an employee was discharged for excessive absenteeism. The employer's policy made excessive absenteeism subject to a three step disciplinary process: written warning, suspension, and discharge for violations occurring after suspension. The employee received numerous warnings and was ultimately suspended. When the employee returned from suspension, he was discharged for atten-

dance violations which had occurred prior to the date of his suspension. A majority of this Court affirmed a denial of benefits to the employee on the grounds that he had been discharged due to substantial fault on his part. Judge Cozort dissented, stating that because the employee had not actually violated his employer's attendance policy by committing attendance infractions after his suspension, the employee could not have been discharged due to substantial fault on his part. Our Supreme Court reversed the majority for the reasons stated in Judge Cozort's dissent. *Id.* at 333-34 409 S.E.2d at 735-36 (Cozort, J. dissenting), *rev'd for reasons stated in the dissent*, 331 N.C. 748; 417 S.E.2d 236-37 (1992) (*per curiam*).

In the present case, it is possible that Britax imposed requirements upon Davis that were not generally applicable to other employees. It is likewise possible that Davis violated these requirements. These matters present questions of fact, which the Commission should resolve on remand. In the decision currently under review, however, it does not appear the Commission considered whether Britax imposed any additional requirements on Davis beyond the general attendance policy. Rather, the Commission's decision that Davis was at substantial fault in her discharge relied on Britax's general attendance policy. In so doing, the Commission misapplied applicable law.

Pursuant to the decision in *Doyle*, Britax's general, points-based policy may not form the basis of a finding of substantial fault where Davis never accumulated the twenty-four points necessary to warrant discharge under the policy and Britax did not follow this policy when it fired Davis for absenteeism. The Commission erred in ruling to the contrary, and the superior court erred in affirming the Commission. The superior court's order is reversed, and this case is remanded with instructions to reverse the Commission's decision and remand the matter to the Commission for further proceedings and entry of a decision consistent with this opinion. On remand from the superior court, the Commission should determine (1) whether Britax imposed reasonable employee-specific requirements upon Davis to which she had the ability to conform, and (2) whether Davis violated such requirements.

Reversed and remanded.

Judges HUNTER and McCULLOUGH concur.

HOBBS REALTY & CONSTRUCTION COMPANY, JAMES O. HOBBS, AND JAMES S. HOBBS, PLAINTIFFS v. SCOTTSDALE INSURANCE CO., DEFENDANT

No. COA03-514

(Filed 16 March 2004)

Insurance— commercial liability policy—coverage—rented property—invasion of the right of private occupancy

Summary judgment was improperly granted for defendant commercial general liability insurer in an action to determine coverage of a lawsuit arising from a realtor's denial of the keys to a rented beach house to the 20-year old daughter of the renter, with an accompanying racial remark. The proper inquiry under the policy language is whether there is a legally enforceable right to assume control of the property rather than an actual assumption of control. Here, the allegations sufficiently stated a possessory right such that the alleged refusal to provide the key raised the possibility of liability and thus imposed the duty to defend.

Appeal by plaintiffs from order entered 29 January 2003 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 28 January 2004.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Joseph H. Nanney, Jr., and Kathleen A. Naggs, for plaintiff-appellants.

Anderson, Daniel & Coxe, by Bradley A. Coxe, for defendant-appellee.

LEVINSON, Judge.

This appeal arises from the parties' dispute over coverage provided by a commercial general liability insurance policy issued by defendant to plaintiffs. Plaintiffs appeal from an order granting summary judgment in favor of defendant insurer. We reverse.

The Underlying Lawsuit

Plaintiff Hobbs Realty & Construction Company (Hobbs Realty) is a North Carolina general partnership comprised of two general partners—plaintiff James O. Hobbs (James), and his son James S. Hobbs (Jimmy). Plaintiffs are in the business of renting beach property in Holden Beach, North Carolina. On 30 October 2000 plaintiffs

herein were named as defendants in a lawsuit filed against them by Harvey Bynum (Bynum), his daughter Loren Bynum (Loren), and his wife Frances Solari (Solari). The factual allegations of that complaint included, in pertinent part, the following:

> 1. Plaintiffs [in the underlying lawsuit] . . . are husband and wife[.]
>
> 2. Mr. Bynum is Black; Ms. Solari is White.
>
> 3. [Loren] was born May 14, 1978 and is bi-racial.
>
> . . . .
>
> 14. . . . [Bynum and Solari] planned to take [Loren] and three of her friends to Holden Beach . . . October 2, 1998[.]
>
> 15. . . . Ms. Solari telephoned Hobbs Realty to rent a [house] . . . for the weekend of October 2-3, 1998.
>
> 16. . . . [Solari] paid in full and in advance by credit card.
>
> . . . .
>
> 18. Ms. Solari related to the reservation agent that this would be her daughter's last beach trip for a long while . . .
>
> 19. The reservation agent instructed Ms. Solari that, after business hours, the key to the unit would be in the night pick-up box located near the front door of Hobbs Realty.
>
> 20. At no time did the reservation agent suggest in any way that Plaintiffs' use and possession of the unit was contingent upon arriving . . . before a certain time or date, that Ms. Solari alone was authorized to take the key from the night pick-up box, that Ms. Solari alone was authorized to assume possession of the unit, or that [Loren] was not authorized to take possession of the unit unless she was accompanied by Ms. Solari.
>
> 21. . . . [Loren] invited three friends to join Plaintiffs at Holden Beach . . . [including] Specialist Travis Askridge, who is Black. . . .
>
> . . . .
>
> 24. Mr. Bynum and Ms. Solari were delayed in Durham and planned to join Ms. Bynum and her friends Saturday morning October 3, 1998. . . . .

27. When [Loren] arrived at . . . Hobbs Realty at approximately 11:30 p.m., the key to the unit was not in the night pick-up box as promised.

26. [Loren] followed the written instructions posted on the front of Hobbs Realty and telephoned Defendant James Hobbs to secure a key to the unit.

29. Upon his arrival at Hobbs Realty, Defendant James Hobbs . . . refused to give [Loren] a key to the unit[.]

30. Defendant James Hobbs told [Loren] it was the policy of Hobbs Realty not to rent to "unsupervised teenagers."

31. As proof of their ages, [Loren] and her companions offered their respective identifications to Defendant James Hobbs.

32. Defendant James Hobbs . . . refused to look at the identifications . . .

33. [Loren] explained . . . that her parents Mr. Bynum and Ms. Solari would arrive in Holden Beach the next morning, and offered to call Mr. Bynum on her cellular phone for confirmation.

34. Defendant James Hobbs told [Loren] "There's no use to call anyone. I'm not giving you the key."

35. As he turned away from [Loren] and her companions, Defendant James Hobbs said he had no intention of renting to "ni---rs."

. . . .

40. . . . Mr. Bynum spoke with Defendant James Hobbs by telephone.

41. Mr. Bynum explained . . . that he and Ms. Solari would arrive in . . . a few hours [] and that [Loren] was twenty years of age.

. . . .

44. Defendant . . . again . . . refused to allow [Loren] to take possession of the unit.

45. Neither the vacation brochure . . . nor [the] standard rental contract makes any reference to a practice or policy of Hobbs Realty to deny occupancy to persons below a certain age.

Based on these and other allegations, plaintiffs in the underlying lawsuit asserted claims for race discrimination, in violation of 42 U.S.C. § 1981 and § 1982; unfair or deceptive trade practices, in violation of N.C.G.S. § 75-1.1; and civil conspiracy, in violation of 42 U.S.C. § 1985(3) and N.C.G.S. § 99D-1. Those original plaintiffs sought compensatory and punitive damages for "economic loss, personal injury, emotional distress, and great mental anguish."

Hobbs v. Scottsdale Lawsuit

The present appeal arises from a suit brought by plaintiffs (defendants in the underlying action) against Scottsdale Insurance Company, challenging the insurer's refusal to defend or indemnify them in the underlying lawsuit.

The parties do not dispute that at the time of the events alleged in the underlying suit plaintiffs had in force a general commercial liability policy issued by defendant. The policy provided, in relevant part, coverage for the following losses: (1) damages for bodily injury and property damage if such damage were caused by an "occurrence," defined in the policy as an accident; and (2) damages for "personal injury," defined in the policy to include injury, other than bodily injury, arising from "wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies[.]"

The complaint in the underlying lawsuit was filed on 30 October 2000. On 22 December 2000 defendant informed plaintiffs that it would neither defend plaintiffs in the lawsuit, nor indemnify them for liability arising from the suit, on the basis that the policy did not provide coverage for the acts alleged in the Bynum complaint. In its correspondence with plaintiff, defendant took the position that the "conduct alleged is of a voluntary, deliberate nature, so it could not be construed as an 'occurrence' " and thus that coverage for bodily injury or property damage is excluded by the terms of the policy. Defendant also contended that the acts alleged in the underlying complaint did not constitute "invasion of the right of private occupancy" of a rental property.

On 18 January 2002 plaintiffs filed suit against defendant, seeking a declaratory judgment that defendant was required to provide a defense under the terms of the policy, an order directing defendant to defend and indemnify them in the underlying lawsuit, and compensatory and punitive damages for breach of contract, bad faith refusal to defend and indemnify, unfair competition, and unfair and deceptive

trade practices. Defendant filed a motion for summary judgment on 1 October 2002, which was granted by the trial court on 29 January 2003. From this order, plaintiffs appeal.

Standard of Review

Plaintiffs appeal from an order of summary judgment in favor of defendant. Summary judgment is properly granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2003). "On appeal, this Court's standard of review involves a two-step determination of whether (1) the relevant evidence establishes the absence of a genuine issue as to any material fact, and (2) either party is entitled to judgment as a matter of law." *Guthrie v. Conroy*, 152 N.C. App. 15, 567 S.E.2d 403, 408 (2002) (citations omitted).

In the instant case, neither party challenges the accuracy or authenticity of the subject insurance policy, or the existence of any relevant facts. Rather, the parties' arguments are based on their respective interpretations of the terms of the insurance policy. Consequently, the record does not present a genuine issue as to any material fact. We next consider whether either party was entitled to judgment as a matter of law.

The issue presented by this appeal is whether defendant insurer has a duty to defend or indemnify the insured plaintiffs in the underlying lawsuit. "An insurer has a duty to defend when the pleadings state facts demonstrating that the alleged injury is covered by the policy[.]" *Penn. Nat'l Mut. Cas. Ins. Co. v. Associated Scaffolders & Equip. Co.*, 157 N.C. App. 555, 558, 579 S.E.2d 404, 407 (2003). Thus:

> An insurance company has a duty to defend its insured against a suit brought by a third party claimant, . . . if in such suit the third party claimant alleged facts which, if true, imposed upon the insured a liability to the claimant within the coverage of the insured's policy. The court must then compare the complaint with the policy to see whether the allegations describe facts which appear to fall within the insurance coverage.

Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 72 N.C. App. 80, 84, 323 S.E.2d 726, 729-30 (1984), *reversed on other grounds*, 315 N.C. 688, 340 S.E.2d 374 (1986) (citation omitted). "Accordingly,

an insurer is excused from its duty to defend the insured only where the complaint against the insured clearly demonstrates no basis upon which the insurer could be required to indemnify the insured under the policy." *Fuisz v. Selective Ins. Co. of America*, 61 F.3d 238, 242 (4th Cir. 1995). Moreover:

> When pleadings allege multiple claims, some of which may be covered by the insurer and some of which may not, the mere possibility the insured is liable, and that the potential liability is covered, may suffice to impose a duty to defend. Any doubt as to coverage is to be resolved in favor of the insured.

Bruce-Terminix Co. v. Zurich Ins. Co., 130 N.C. App. 729, 735, 504 S.E.2d 574, 578 (1998) (citing *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691 n.2, 693, 340 S.E.2d 374, 377 n.2., 378 (1986) (citation omitted)). Finally, in construing an insurance policy, 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." *Woods v. Insurance Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978).

We next consider whether the Bynum/Solari complaint alleges acts that give rise to defendant insurer's duty to defend. The insurance policy at issue herein provides two types of coverage, "A" and "B." The issue raised by this appeal is whether Coverage B applies to the allegations of the complaint.[1] Coverage B provides coverage for "personal injury" which the policy defines, in pertinent part, as follows:

> "Personal injury" means injury, other than "bodily injury", arising out of one or more of the following offenses:
>
> . . . .
>
> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor; . . . .

1. The parties do not dispute that coverage A, insuring property damage and bodily injury arising out of an "occurrence," or accident, does not apply to the facts of this case, inasmuch as the complaint alleges only intentional, willful acts by the Hobbs defendants.

No North Carolina cases have previously addressed the scope of insurance coverage for "invasion of the right of private occupancy." The parties to this appeal advance conflicting interpretations of the coverage provided for personal injury by this policy. Plaintiffs assert that the complaint alleges an invasion of the Bynum's **right** of private occupancy. Plaintiffs also argue that the phrase "invasion of the right of private occupancy" is inherently ambiguous, and therefore should be interpreted in favor of coverage.

Defendant, on the other hand, focuses on the modifier phrase "that a person occupies" and argues that the addition of this phrase to "invasion of the right of private occupancy" serves to deny insurance coverage where plaintiffs in the underlying lawsuit have not physically occupied the premises when the alleged injury occurred. On this basis, defendant contends that without physical occupancy of the subject property, there can be no "invasion of the right of private occupancy of a . . . premises *that a person occupies.*" We disagree.

Appellate analysis of the phrase "invasion of the right of private occupancy," whether or not it is modified by the additional clause "that a person occupies," has generally focused on whether the plaintiff's status is such that the factual allegations of the complaint might be an "invasion of the right of private occupancy" of the subject property by the plaintiff. Defendant argues that insurance coverage requires physical residence or "occupancy" by the plaintiff. However, none of the cases cited by defendant draw such a narrow distinction. Instead, they interpret the policy language to exclude coverage if the plaintiff has no possessory interest, or **right** to occupy, the subject property. For example, appellate cases have denied coverage where the underlying plaintiff alleged deprivation of the right to enter into a housing contract. *See, e.g., Powell v. Alemaz, Inc.*, 335 N.J. Super. 33, 760 A.2d 1141 (2000), wherein the Court held that an insurance policy with the same language as that in the instant case did not cover prospective tenants' allegations of racial discrimination by rental agent:

> "Unquestionably [plaintiff] had no 'right' of 'private occupancy'—no 'right' to occupy the apartment she applied for. Though she was entitled not to be discriminated against in her application, that is not at all the same as a 'right' to occupy: an enforceable claim to occupancy[.]" . . . By . . . adding the phrase, "that a person occupies," to the definition, it can no longer be seriously argued that the phrase, "or invasion of the right of private occu-

> pancy," includes actions for personal injuries arising from racial discrimination to prospective tenants.

Id. at 42-43, 760 A.2d at 1146-47 (quoting *Martin v. Brunzelle*, 699 F. Supp. 167, 170 (N.D. Ill. 1988)).

The parties cite no cases, and we have found none, in which the underlying plaintiffs allege tortious behavior occurring *after* obtaining a possessory right to the subject property, but *before* plaintiffs have physically moved in. However, the appellate jurisprudence interpreting the phrase "invasion of the right of private occupancy of a room, dwelling or premises that a person occupies" have generally distinguished between plaintiffs who own or rent a property, and those who are merely **prospective** tenants, but have not entered into a contract, signed a lease, or otherwise obtained possessory rights to the subject property. We agree with this distinction and conclude that the proper inquiry is not whether a party has physically assumed control of the property, but whether he has obtained a legally enforceable *right* to do so. *See, e.g., United States v. Security Mgmt. Co.*, 96 F.3d 260, 265 (7th Cir. 1996):

> Simply put, coverage is extended to that category of cases which involve the invasion of a person's right of private occupancy. . . . We agree . . . [that] the "that a person occupies" portion of the definition[] does not add much clarity to the clause. We . . . read it as merely attempting to refine the nature of the prerequisite "right" of private occupancy. . . . We believe that a reasonable insured would read the language as excluding cases where the aggrieved individual was not possessed of an existing right of private occupancy.

Ambiguity in the terms of an insurance policy is resolved in favor of the insured:

> The words used in the policy having been selected by the insurance company, any ambiguity or uncertainty as to their meaning must be resolved in favor of the policyholder, or the beneficiary, and against the company. However, ambiguity in the terms of an insurance policy is not established . . . unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend.

Trust Co. v. Insurance Co., 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970) (citation omitted).

We conclude that "[a] reasonable reading of the insurance policy could produce either the reading offered by plaintiff or the reading offered by defendants; therefore, the policy is ambiguous." *Scottsdale Ins. Co. v. Travelers Indem. Co.*, 152 N.C. App. 231, 234, 566 S.E.2d 748, 750 (2002). Because the phrase "invasion of the right of private occupancy of a room, dwelling or premises that a person occupies" is ambiguous, the "ambiguity in the policy language must be resolved against the insurance company and in favor of the insured." *Brown v. Lumbermens Mut. Casualty Co.*, 326 N.C. 387, 392, 390 S.E.2d 150, 153 (1990).

Mindful of the principle that ambiguities are to be resolved in favor of providing coverage, we hold that the phrase "invasion of the right of private occupancy of a room, dwelling or premises that a person occupies" includes situations wherein a party suffers injury after he has entered into a contract for possession of realty and thus has gained a "**right of**" private occupancy, even if he has not yet assumed physical possession of the property. The gravamen of the Bynum/Solari complaint is that (1) the plaintiffs rented a house from defendants; (2) they were told that a key would be left at the house; (3) no restrictions were imposed regarding Solari's allowing a family member or any other person to obtain the key if that person arrived at the beach house before Solari; and (4) when their biracial adult daughter and three friends, including an African American man, arrived in Holden Beach defendants refused to give her a key to the premises, and employed a racial epithet.

We conclude that the allegations of the complaint sufficiently allege a possessory right to the rental house by members of the Bynum/Solari family such that the alleged refusal to provide a key to Solari's adult daughter raises a "possibility the insured is liable and . . . suffice[s] to impose a duty to defend." *Penn. Nat'l*, 157 N.C. App. at 558, 579 S.E.2d at 407.

We conclude the trial court erred by granting summary judgment in favor of defendant. Accordingly, the trial court's order of summary judgment is

Reversed.

Judges HUNTER and McCULLOUGH concur.

RICKY PIERCE, PLAINTIFF v. TAMMY REICHARD, DEFENDANT

No. COA02-1749

(Filed 16 March 2004)

1. **Appeal and Error— appealability—denial of motion to dismiss—judgment on the merits**

Although plaintiff landlord contends the trial court erred in an action seeking summary ejectment by denying his N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss defendant tenant's counterclaims seeking retroactive rent abatement for plaintiff's alleged breach of implied warranty of habitability and compensation for personal and property damage, this assignment of error is dismissed because where an unsuccessful motion to dismiss is grounded on an alleged insufficiency of the facts to state a claim for relief and the case thereupon proceeds to judgment on the merits, the unsuccessful movant may not on appeal from the final judgment seek review of the denial of the motion to dismiss.

2. **Landlord and Tenant— summary ejectment—findings of fact—severity of leaks—fair market rental value**

The trial court did not err in a residential rental dispute action by its finding of fact concerning the severity of leaks in the rental dwelling's roof and the determination of the fair market rental value, because: (1) there was competent evidence to support this finding including that defendant testified about her family's efforts to stop the leaks and the damage caused by the leaks, as well as the fact that she was forced to use one of the bedrooms to store junk; and (2) the record includes substantial testimonial and photographic evidence of the dilapidated conditions caused by the leaks in the ceiling.

3. **Costs— attorney fees—time and labor expended—skill required—customary fee—experience or ability of attorney**

The trial court erred in a residential rental dispute action by its finding of fact stating that defendant's counsel was entitled to be compensated at a rate of $125.00 per hour and she should be compensated at that rate for 33 hours, because: (1) the finding is actually a conclusion of law, and the record does not contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney to support this conclusion of law; (2) even if it were

a finding of fact, the record does not include sufficient evidence to support a finding that the rate is reasonable for the prosecution of a case of this nature, and there was no sworn motion, affidavit, or testimony detailing counsel's time spent or hourly rate; and (3) the court's findings do not address either of the grounds for attorney fees under N.C.G.S. § 75-16.1.

4. Costs— attorney fees on appeal—dismissal without prejudice

Defense counsel's motion for attorney fees during appeal is dismissed without prejudice to her right to refile it in the trial court, because: (1) the matter of attorney fees is remanded to the trial court; and (2) it is more appropriate to have the trial court address the matter of attorney fees on appeal at the same time.

5. Unfair Trade Practices— treble damages—rent abatement

The trial court did not err by awarding defendant tenant treble damages for rent abatement on her claim of unfair and deceptive trade practices, because: (1) plaintiff landlord was aware that the roof was leaking and that repairs were necessary, yet he did not perform the necessary repairs until approximately two years after the defective condition was brought to his attention; and (2) plaintiff's actions in collecting rent after having knowledge of the uninhabitable nature of part of the house constituted unfair trade practices in violation of N.C.G.S. § 75-1.1.

6. Landlord and Tenant— residential rental—yard part of premises warranted fit and habitable

The trial court did not err by awarding defendant tenant $200 for damages to the windshield of her car caused by a falling tree limb on the rental property, because: (1) the yard surrounding a rental unit is deemed part of the premises and is warranted to be fit and habitable; (2) defendant informed plaintiff landlord that the tree was rotten and that it posed a danger to her and her family; and (3) plaintiff thereafter took no action to remove the defective tree from the property, and during a storm, a limb broke off the tree and damaged the windshield of defendant's car.

7. Evidence— expert testimony—general standards of fitness and habitability of rental house

The trial court did not abuse its discretion in a residential rental dispute action by allowing a defense witness to testify as an expert on the subject of home inspections and whether the

rental house met general standards of fitness and habitability, because: (1) for expert testimony to be admissible, the witness need only be better qualified than the finder of fact as to the subject at hand, and the witness's testimony must be helpful to the finder of fact; and (2) the defense witness was a licensed general contractor and licensed home inspector in North Carolina who has been in the construction industry for approximately 30 years and has been performing home inspections for nearly ten years.

Appeal by plaintiff from judgment entered 25 June 2002 by Judge Alma Hinton in the District Court in Halifax County. Heard in the Court of Appeals 16 October 2003.

Jesse F. Pittard, Jr., for plaintiff-appellant.

Janet B. Dudley, for defendant-appellee.

HUDSON, Judge.

Plaintiff Ricky Pierce ("Pierce") owns a house located at 107 Beech Street, Roanoke Rapids, North Carolina. On 5 April 1999, defendant Tammy Reichard ("Ms. Reichard") signed a lease in which she agreed to rent the house from Pierce for $300 per month, plus a $300 security deposit. Approximately two weeks after Ms. Reichard moved into the house, the roof over the living room began to leak after a heavy rainfall. Ms. Reichard and her husband immediately taped up the ceiling to try to stop the leaking. After a period of disputing over the leaks and other matters, Pierce filed a complaint for summary ejectment, claiming that Ms. Reichard had not paid her rent, and also sought money damages for repairs to his truck. The Magistrate ruled in favor of Pierce on both issues. Ms. Reichard appealed to district court and filed a counterclaim seeking retroactive rent abatement for Pierce's breach of the implied warranty of habitability and compensation for personal and property damage. After a bench trial, the court awarded Ms. Reichard treble damages of $14,950, property damages of $200 for a broken windshield, a $200 refund of excessive late fees, the return of her $300 security deposit and attorney's fees of $4,085. The trial court awarded Pierce $318.07 for damage to his truck. Pierce appeals. For the reasons discussed here, we affirm in part, vacate in part and remand for further proceedings.

Ms. Reichard testified in district court that she notified plaintiff of the roof leaks right away and that plaintiff said he would get to it

as soon as he could. However, Pierce's evidence tended to show that Ms. Reichard first complained about the leaks in August or September of 2000, and that he hired a repair person at that time to apply a coat of "Koolseal" to the roof. Ms. Reichard did not notice any reduction in the severity of the leaks after its application. Ms. Reichard further testified that she complained about the leaks and water damage each time she paid her rent. In August 2001, Pierce had the old roof removed and new shingles installed, but did not repair any of the water damage inside the house.

During the time it took to repair the roof a dispute arose between the parties over damage to Pierce's dump truck, sustained when it was parked in front of the house to contain roof debris. Ms. Reichard admitted that her four-year-old son may have sprayed water into the truck's open gas tank. Ms. Reichard and her husband agreed to siphon all of the gas out of the tank, and put in enough gas to get the truck to a gas station. They also agreed to reimburse Pierce for the cost of refilling the tank, but Pierce claimed that the truck broke down within a few yards of leaving the house and that the repairs cost him over $300. Pierce demanded that Ms. Reichard pay the repair bill, and she refused.

During her tenancy, Ms. Reichard complained to Pierce about a rotten tree on the property that she thought endangered her and her family. After Pierce failed to address this issue, a limb broke off the tree during a storm and damaged Ms. Reichard's car.

[1] Pierce first argues that the trial court erred by denying his 12(b)(6) motion to dismiss. For the following reasons, we overrule this assignment of error.

The issue before the trial court on a 12(b)(6) motion to dismiss is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). However, "where an unsuccessful motion to dismiss is grounded on an alleged insufficiency of the facts to state a claim for relief, and the case thereupon proceeds to judgment on the merits, the unsuccessful movant may not on appeal from the final judgment seek review of the denial of the motion to dismiss." *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 682, 340 S.E. 755, 758, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986). Here, the trial court denied Pierce's

motion to dismiss Ms. Reichard's counterclaims pursuant to Rule 12(b)(6), and the case was tried on the merits. Thus, Pierce may not now seek review of the denial of his motion to dismiss.

[2] Pierce next argues that the trial court's findings of fact 20 and 28 are not supported by competent evidence.

Finding of fact 20 reads as follows:

> Defendant notified Plaintiff of the severe leaks in the back bedroom and the living room during the first month of the tenancy. The leak in the bedroom rendered that room uninhabitable. Defendant and her family attempted to keep the water out of said bedroom by applying duct tape to the ceiling panels. This effort was not effective. The dwelling has two (2) bedrooms. Allowing Plaintiff until July 1, 1999 to repair the leaks, the Fair Market Rental Value of said dwelling from July 1, 1999 until March 31, 2002 was $150.00.

After reviewing the entire record, we find competent evidence to support this finding of fact. Ms. Reichard testified that about two weeks after she moved into the two bedroom house, water leaked through the ceiling in the back bedroom and portions of the living room during a strong rain storm. In an effort to stop the leaks, she and her husband put contact paper and duct tape over the leaks, and notified Pierce about the ceiling's condition. Ms. Reichard also testified that ceiling debris often fell through holes in the ceiling where the water leaked, and that when they took down the old tape to replace it, rotten wood fell from the ceiling. Water leaked into the back bedroom, causing mold on the carpets and ruining a mattress. Ms. Reichard was forced to move her daughter out of that bedroom, which she then used to store "junk."

The portion of finding of fact 20 that assigns the house a fair rental value of $150.00 per month is also supported by the evidence. The fair rental value of property may be determined "by proof of what the premises would rent for in the open market, or by evidence of other facts from which the fair rental value of the premises may be determined." *Brewington v. Loughran*, 183 N.C. 558, 565, 112 S.E. 257, 260 (1922). The "other facts" of which *Brewington* speaks include the dilapidated conditions of the premises. Here, the record includes substantial testimonial and photographic evidence of the dilapidated conditions caused by the leaks in the ceiling. This assignment of error is overruled.

[3] Finding of fact 28 reads as follows: "Defendant's counsel is entitled to be compensated at the rate of $125.00 per hour and she should be compensated at that rate for 33 hours." We agree that this finding is not supported by evidence in the record before us.

We note that, although this sentence in the trial court's order is denominated a finding of fact, we are not bound by the label used by the trial court. *See Wachacha v. Wachacha*, 38 N.C. App. 504, 507, 248 S.E.2d 375, 377 (1978). Finding 28 is more aptly considered a conclusion of law. Thus, we review it as such, to determine whether it is supported by sufficient findings of fact in the trial court's order. The remaining findings of fact on the issue of attorney's fees are as follows:

> 25. Defendant made a motion, based on her Counterclaims, for the Court to award attorney's fees pursuant to NCGS 75-16.1.
>
> 26. Defendant's counsel expended time and expenses for the prosecution of this action for Defendant.
>
> 27. Defendant's counsel has been licensed to practice law since 2000 and she is licensed in the state of North Carolina.

We conclude that these findings are insufficient to support the conclusion of law that defendant's attorney is "entitled to be compensated at the rate of $125.00 per hour and she should be compensated at that rate for 33 hours."

In order for us to determine if the award of attorney's fees is reasonable, the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney. *Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989). Where these necessary findings are absent from the trial court's order awarding attorney's fees, we must remand the case to the trial court to take further evidence if necessary and make appropriate findings as to these facts and then make conclusions of law based thereon. *Id.* at 370, 380 S.E.2d at 421. Even if we were to accept the trial court's label of finding 28, the record does not include sufficient evidence to support a finding that Ms. Reichard's attorney spent 33 hours prosecuting this case and that $125.00 per hour is a reasonable rate for the prosecution of a case of this nature. Indeed, the record contains no sworn motion, affidavit or testimony detailing counsel's time spent or hourly rate.

Further, these findings, even if supported by the evidence, are not adequate to justify an award of fees under G.S. § 75-16.1, which reads as follows:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
>
> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

G.S. § 75-16.1 (2001). The court's findings do not address either of the grounds for attorney fees specified in the statute.

We therefore vacate finding of fact 28, conclusion of law number 10, and decretal paragraph number 5, and remand for further proceedings in accordance with this opinion.

[4] In a related issue, Ms. Reichard filed with this Court a motion for attorney's fees during appeal. In *City Finance Co. v. Boykin*, 86 N.C. App. 446, 358 S.E.2d 83 (1987), we granted defendant's motion for attorney's fees during appeal in an action based upon G.S. § 75-1.1. *Id.* at 450, 358 S.E.2d at 85. There, we noted that an award of attorney's fees is in the sound discretion of the trial court and we remanded "to the trial court for a determination of the hours spent on appeal and a reasonable hourly rate and for the entry of an appropriate attorney's fee award." *Id.*; *see also Messina v. Bell*, 158 N.C. App. 111, 581 S.E.2d 80 (2003). In accordance with *City Finance*, we could grant Ms. Reichard's motion for attorney's fees during appeal and remand for the trial court to determine the appropriate award. However, since we must remand the matter of attorney's fees to the trial court as discussed above, we deem it more appropriate to have the trial court address the matter of attorneys' fees on appeal at the same time. Thus, we dismiss the motion without prejudice to the Reichard's right to re-file it in the trial court.

[5] Plaintiff next argues that the trial court erred by awarding defendant treble damages for rent abatement on her claim of unfair and deceptive trade practices. We disagree.

A trade practice is unfair within the meaning of G.S. § 75-1.1 "when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Creekside Apartments v. Poteat*, 116 N.C. App. 26, 36, 446 S.E.2d 826, 833 (citations omitted), *disc. review denied*, 338 N.C. 308, 451 S.E.2d 632 (1994). Chapter 75 applies to residential rentals because the rental of residential housing is commerce pursuant to § 75-1.1. *Love v. Pressley*, 34 N.C. App. 503, 516, 239 S.E.2d 574, 583 (1977), *cert. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978).

In *Allen v. Simmons*, 99 N.C. App. 636, 394 S.E.2d 478 (1990), this Court held that a jury could find that plaintiff committed an unfair trade practice where defendant's evidence was that plaintiff leased defendant a house which contained numerous defects throughout defendant's tenancy and which rendered the house uninhabitable. *Id.* at 645, 394 S.E.2d at 484. Plaintiff failed to respond to numerous notices about the uninhabitable state of the house. Despite the condition of the house, plaintiff attempted to collect rent after defendant discontinued payments. We held that plaintiff's behavior can be considered "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* at 645, 394 S.E.2d at 484. *See also*, *Creekside Apartments*, 116 N.C. App. 26, 36, 446 S.E.2d 826, 833; *Foy v. Spinks*, 105 N.C. App. 534, 414 S.E.2d 87 (1992).

Here, Ms. Reichard testified that she complained about significant leaks in the back bedroom and living room of the house for more than two years and that Pierce continued to collect rent until the day he demanded she vacate the house. Pierce's argument that he had no notice of damage to the interior of the house is to no avail. "[W]here a tenant's evidence establishes the residential rental premises were unfit for human habitation and the landlord was aware of needed repairs but failed to honor his promises to correct the deficiencies and continued to demand rent, then such evidence would support a factual finding . . . that the landlord committed an unfair or deceptive trade practice." *Foy*, 105 N.C. App. at 540, 414 S.E.2d at 89-90. Here, Pierce was aware that the roof was leaking and that repairs were necessary, yet did not perform necessary repairs until approximately two years after the defective condition was brought to his attention. Thus,

as in *Allen* and *Foy*, the trial court correctly concluded that plaintiff's actions in collecting rent after having knowledge of the uninhabitable nature of part of the house constituted unfair trade practices and was thus a violation of G.S. § 75-1.1.

[6] Plaintiff argues next that the trial court erred by awarding defendant $200.00 for damage to the windshield of her car caused by a falling tree limb. We find no error.

By enactment of the Residential Rental Agreements Act, the General Assembly mandated that a landlord shall "[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." G.S. § 42-42(a)(2). Under the Act, premises is defined as "a dwelling unit . . . and the structure of which it is a part and facilities and appurtenances therein and grounds, areas, and facilities normally held out for the use of residential tenants." Thus, the yard surrounding a rental unit are deemed part of the premises and are warranted to be fit and habitable.

Here, Ms. Reichard informed Pierce that the tree was rotten and that it posed a danger to her and her family. Thereafter, Pierce took no action to remove the defective tree from the property, and during a storm, a limb broke off the tree and damaged the windshield of defendant's car. Thus, the trial court did not err when it awarded damages for the broken windshield.

[7] Plaintiff next argues that the trial court erred by allowing a defense witness to testify to his opinion that the rental house was in substandard condition. We disagree.

N.C. R. Evid. 702(a) provides that an expert, qualified by knowledge, skill, experience, training, or education, may testify in the form of opinion if his specialized knowledge will assist the trier of fact to determine a fact in issue. The trial judge is afforded wide discretion when making a determination about the admissibility of expert testimony. *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). "For expert testimony to be admissible, the witness need only be better qualified than the [finder of fact] as to the subject at hand, and the witness' testimony must be helpful to the [finder of fact]." *Conner v. Continental Industrial Chemicals*, 123 N.C. App. 70, 77, 472 S.E.2d 176, 181 (1996). "A finding by the trial judge that the witness qualifies as an expert is exclusively within the discretion of the trial judge and is not to be reversed on appeal absent a complete lack of evidence to support his ruling." *Id.*

The witness here, Mr. R. J. Burke, is a licensed general contractor and licensed home inspector in North Carolina. He has been in the construction industry for approximately thirty years and has been performing home inspections for nearly ten years. Thus, we conclude the trial court did not abuse its discretion by accepting Mr. Burke as an expert on the subject of home inspections and whether the rental house met general standards of fitness and habitability.

Affirmed in part, vacated in part, and remanded.

Motion for attorney's fees under G.S. § 75-16.1 dismissed without prejudice.

Judges McGEE and CALABRIA concur.

EARLENE B. HENSLEY, PLAINTIFF v. SANFORD SAMEL AND WIFE ROBERTA J. SAMEL; KEITH PRESNELL AND WIFE MICHELE PRESNELL; AND LLOYD A. ALLEN AND WIFE IMAJEAN ALLEN, DEFENDANTS

No. COA02-1435

(Filed 16 March 2004)

1. **Real Property— tract revealed by new survey—action to quiet title**

Partial summary judgment was properly granted for plaintiff on her claim to quiet title to a tract revealed by a new survey. Although plaintiff and her husband may have mistakenly believed that they had conveyed away all of the property in the subdivision, plaintiff's evidence clearly showed that she has superior title to the additional tract.

2. **Real Property— subdivision roads—use by owner of original tract**

The trial court erred by finding that plaintiff was estopped from using the roads in a subdivision developed by plaintiff and her husband after a new survey added land to the original tract. Those who purchase lots in a subdivision by reference to a plat without receiving an ownership interest in the roads have only an expectation that the roads will remain open, and the fee simple

owner may use those roads to access property outside the subdivision as long as the use does not interfere with that of the lot owners. Defendants here made no showing that plaintiff's use of the roads would interfere with their use, and summary judgment should have been granted for plaintiff.

Appeal by plaintiff from order entered 19 July 2002 by Judge Hal Harrison; and appeal by defendants from order entered 2 November 2001 by Judge James L. Baker, Jr., both in the Superior Court of Yancey County. Heard in the Court of Appeals 26 August 2003.

Roberts & Stevens, P.A., by Wyatt S. Stevens and Kenneth R. Hunt, for plaintiff.

Little & Sheffer, P.A., by Stephen R. Little, for defendants.

HUDSON, Judge.

At its core, this case involves a dispute over the ownership and access to a small (1.826 acre) tract of land. The trial court ruled that the plaintiff owned the tract as well as the roadways in the subdivision, but that she was estopped from using the roads to access the tract. For the reasons discussed below, we affirm in part, reverse in part, and remand.

In 1969, Plaintiff, Earlene B. Hensley, and her husband, Ben Hensley ("the Hensleys"), received by warranty deed from Charlie Fox and the guardian for Lubriga Fox an approximately fourteen acre tract of land in Burnsville, North Carolina. The "Fox Deed" describes the northern boundary of this fourteen acre tract of land as being "Dodd's line." The Hensleys created a subdivision ("the Hensley Subdivision") consisting of thirty-two individual lots from what they believed to be the entire fourteen acre parcel. They recorded a plat of the Hensley Subdivision in the Yancey County Registry, and began to convey the lots to purchasers. By the early 1980s, they had sold all thirty-two lots. Related to this appeal are lots 6, 7, 8, 9, 30, and 31, all located on the northeastern boundary of the Hensley Subdivision and abut the disputed tract of land.

Defendants Keith and Michele Presnell ("the Presnells") purchased lots 6 and 7 from the Hensleys in 1988. The deed to the Presnells describes the lots as "adjoining . . . the Dodd lands on the north and east" and contains the following metes and bounds description of lot 7:

> BEGINNING on an iron pipe, the northeast corner of the Ben Lee Hensley Sub-division and runs S 26% 15 min E 99.5 feet to an iron pin, northeast corner of Lot No. 6; thence N 89% 42 min W 138.88 feet to a point in the eastern margin of a road right of way; thence with the eastern margin of said road right of way N 33% 37 min W 78.4 feet to an iron pin in the northern boundary line of said subdivision; thence with the Dodd line N 80% 00 min E 142.7 feet to the BEGINNING.
>
> These descriptions are according to a survey and plat dated 26 August 1969, recorded in Yancey County Map Book 1, page 115.

Defendants Sanford and Roberta J. Samel ("the Samels") own lots 8 and 9, which they purchased in 1994 from Jean Ellis, who purchased the lots from the Hensleys in 1969. The deed from Jean Ellis to the Samels contains the following description of lots 8 and 9:

> Lots 8 and 9 as shown by plat of the property dated 26 August, 1969, entitled "Property of Ben Lee Hensley" on file in the Office of the Register of Deeds for Yancey County in Map Book 1, page 115, and reference is hereby made to such public record for a more definite description.

In 1996, defendants Lloyd A. and Ima Jean Allen ("the Allens") purchased lots 30, 31 and 32, also from Jean Ellis. The deed from Jean Ellis to the Allens similarly referred to the plat of the Hensley Subdivision to describe the lots.

In 1997, defendant Lloyd Allen had lots 30 and 31 surveyed, which revealed that the "Dodd line" was actually further north than shown on the Hensley Subdivision survey prepared in September 1969. All three of these defendants then arranged for a survey to determine the true location of the "Dodd line." The survey revealed a 1.826 acre triangle-shaped tract of land abutting lots 7, 8, 30 and 31, which is the subject of this appeal. Also in 1997, after the existence of this tract of land was brought to the attention of Ben Lee Hensley, he had a survey conducted on the land in question. Plaintiff's surveyor, John Young, agreed with defendants' surveyor regarding the northern boundary of the defendants' lots (the northern boundary of the subdivision) and the true location of the so-called "Dodd line." Both surveys showed the 1.826 acre tract of land between the northern boundary of the subdivision and the "Dodd line." That same year, Ben Lee Hensley and his wife Earlene Hensely conveyed title to the 1.826 acre tract of land to plaintiff Earlene Hensley individually.

In September 1999, the three defendants entered into an agreement whereby they divided among themselves this "newly discovered" tract of land through quitclaim deeds. This document entitled "Agreement Establishing Boundary" was filed in the Yancey County Register of Deeds on 14 September 1999. Upon learning of this agreement, plaintiff filed an action to quiet title to this tract of land.

On 16 October 2001, plaintiff moved for partial summary judgment on the issue of ownership of the 1.826 acre tract of land. After a hearing, the court granted plaintiff's motion, quieting title to her in the disputed land. On 30 April 2002, defendants' motion for a new trial was denied. On 29 May 2002, plaintiff moved for partial summary judgment on her claim that she is the fee simple owner of the roads in the Hensley Subdivision, while defendants moved for partial summary judgment that plaintiff should be equitably estopped from using the roads in the Hensley Subdivision to access the 1.826 acre tract of land. After a hearing on these motions, the court granted partial summary judgment to plaintiff, declaring her the fee simple owner of the roadways in the Hensley Subdivision, but the court also granted partial summary judgment to defendants, ruling that plaintiff is estopped from using the roadways to access her property.

Plaintiff then moved for partial summary judgment on her claim of a reverse implied easement on 16 July 2002. After a hearing, the court denied this motion. Thereafter, on 5 August 2002, plaintiff voluntarily dismissed her remaining claims and on 15 August 2002, filed notice of appeal from the trial court's orders estopping her from using the roadways to access her property and denying her a reverse implied easement. On 19 August 2002, defendants appealed the trial court's order quieting title to the disputed land in plaintiff and to the trial court's denial of their motion for a new trial.

I.

[1] Defendants first argue that the trial court erred in granting partial summary judgment to plaintiff quieting title to the 1.826 acre tract of land. For the following reasons, we disagree.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c).

> An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. [T]he party moving for summary judgment has the burden of establishing the lack of any triable issue of fact. Furthermore, the evidence presented by the parties must be viewed in the light most favorable to the non-movant.

Adams v. Jefferson-Pilot Life Ins. Co., 148 N.C. App. 356, 358, 558 S.E.2d 504, 506 (2002) (internal citations and quotation marks omitted), *disc. review denied*, 356 N.C. 159, 568 S.E.2d 186 (2002).

G.S. § 41-10 provides that "[a]n action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims." G.S. § 41-10 (1999). "The purpose of this statute is to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion." *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 461, 490 S.E.2d 593, 597 (1997) (quotations and citations omitted), *disc. review denied*, 347 N.C. 574, 498 S.E.2d 380 (1998).

To establish a *prima facie* case for removing a cloud upon title, two requirements must be met: (1) the plaintiff must own the land in controversy, or have some estate or interest in it; and (2) the defendant must assert some claim in the land adverse to plaintiff's title, estate or interest. *Id.* "[O]nce a plaintiff establishes a *prima facie* case for removing a cloud on title, the burden rests upon the defendant to establish that his title to the property defeats the plaintiff's claim." *Id.*

At the summary judgment hearing, plaintiff submitted a connected chain of title to the disputed 1.826 acre tract of land dating back to 1958. In 1997, the 1.826 acre tract was deeded to plaintiff from herself and her husband Ben Lee Hensley. In 1969, the plaintiff and Ben Lee Hensley received by warranty deed an approximately 14 acre tract of land, which included the disputed 1.826 acre tract, from Charlie Fox and Lubriga Fox's guardian. In 1958, Charlie Fox had received title to this same piece of land by warranty deed from Vincent Westall, agent and attorney-in-fact for Louise S. Calvert. In both the 1969 deed from Fox to plaintiffs and the 1958 deed from Westall to Fox, "Dodd's line" was designated as the northern boundary of the property.

In 1997, defendants and plaintiff both hired surveyors to locate the northern boundaries of the lots as well as the "Dodd line," and both surveys revealed the 1.826 acre tract of land located outside the northern border of the Hensley Subdivision between the Hensley Subdivision and the "Dodd line." Subsequent to defendants' survey, the defendants executed the "Agreement Establishing Boundary" in which they quitclaimed to one another the entire 1.826 acre tract to divide it among themselves, thus casting a cloud upon plaintiff's title. Although the Hensleys may have mistakenly believed that they had conveyed away all of the property they owned, plaintiff's evidence clearly showed that she has superior title to the 1.826 acre tract in dispute, and the trial court did not err in entering summary judgment in her favor on this issue.

Based upon the foregoing, we also hold that the trial court did not abuse its discretion in denying defendants' motion for a new trial.

II.

[2] Next, plaintiff argues that the trial court erred by finding that plaintiff is estopped from using the roads in the Hensley Subdivision to access the 1.826 acre tract of land discussed above. For the following reasons we agree and reverse the trial court.

On 19 July 2002, the trial court ruled on partial summary judgment motions filed by both parties that plaintiff is the fee simple owner of the roadways in the Hensley Subdivision, but that she is estopped from using the roadways to access the "newly discovered" 1.826 acre tract of land. Plaintiff then moved for a new trial on the estoppel issue and alternatively for partial summary judgment seeking an easement by necessity to use the roadways to access her property. The trial court denied both motions.

As purchasers of lots in the Hensley Subdivision, whose deeds did not purport to give them any ownership interest in the roads, defendants "acquired no interest in the subdivision streets other than the right to use them in getting to and going from their lots." *Rudisill v. Icenhour*, 92 N.C. App. 741, 743, 35 S.E.2d 682, 684. In *Russell v. Coggin*, our Supreme Court noted that:

> where lots are sold and conveyed by reference to a map or plat which represent a division of a tract of land into subdivisions or 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 or accepted by the governing boards of towns or cities if they lie within municipal corporations. There is a dedication, and if they are not actually opened at the time of sale, they must be at all times free to be opened as occasion may require.

232 N.C. 674, 675-76, 62 S.E.2d 70, 72 (1950) (citations omitted). Our case law often refers to a lot purchaser's right to use the streets as having been dedicated to him by the owner. *Johnson v. Skyline Telephone Membership Corp.*, 89 N.C. App. 132, 134, 365 S.E.2d 164, 165 (1988). However, as this Court noted in *Johnson*,

> It does not follow from defendants' right, as purchasers of the lots in the subdivision, to use the streets shown on the recorded plat, that their easement is exclusive or that [the person that recorded the plat] was divested of all interest in the streets. The grantor of an easement retains fee title to the soil, subject to the burdens which the easement imposes. Consequently, the fee holder may use the land or convey additional easements over it so long as the use or conveyance does not interfere with the original easement.

Id. at 134, 365 S.E.2d at 165.

The present case is analogous to *Rudisill*, in which a decedent's (Finley Wilson's) will directed his estate to plat and record the Wilson Heights subdivsion, which was done in 1968. *Rudisill*, 92 N.C. App. at 742, 35 S.E.2d at 683. The estate then sold the lots in the subdivision. In 1986, the decedent's heirs, who had fee simple title to the roads in the subdivision, conveyed to defendants an easement to one of the previously unopened streets (Ethel Street) in the subdivision. *Id.* at 743, 35 S.E.2d at 684. The defendants intended to open and use Ethel Street to access their 2.3 acre tract of land situated outside of the subdivision.

The plaintiffs in *Rudisill*, who owned lots that fronted Ethel Street, sued to enjoin defendants from using Ethel Street to access their land. *Id.* The trial court granted plaintiff's motion for summary judgment thereby permanently enjoining defendants from using Ethel Street for access to and from their land. This Court vacated the trial court's order, holding that the fee simple owners of the streets in the Wilson Heights subdivision could convey to a third party an easement to use a platted, but previously unopened, street in the subdivision to access land lying outside the subdivision. This Court concluded by stating that:

> Since plaintiffs' only legal right in regard to Ethel Street is to use it as a *street* and to have such use not interfered with, their action to prevent the street from being opened and used as a street has no legal basis and should have been dismissed by summary judgment pursuant to defendants' motion.

Id. at 743-44, 375 S.E.2d at 684 (citations omitted).

Like the plaintiffs' suit in *Rudisill*, defendants here base their estoppel defense upon the argument that the plat did not show the road extending beyond the boundary of the Hensley Subdivision. As *Rudisill* makes clear, those who purchase lots in a subdivision by reference to a plat without receiving any ownership interest in the roads have only an expectation that the roads will be kept open as streets, and that the fee simple owner of the roads may use them to access property lying outside the subdivision, so long as such use does not interfere with the lot owners' use of their easement. Defendants argue that to allow plaintiff to now use this road would cause an increase in traffic and noise and diminish the value of their lots. However, in accord with *Rudisill*, *Johnson* and other authorities, defendants must show that plaintiff's use of the roads to access her property outside the Hensley Subdivision would somehow interfere with their easement (their use of the roads). We see no evidence that defendants made such a showing, and the trial court made no such finding. Thus, as in *Rudisill*, defendants' action to prevent plaintiff from using the road to access her property has no legal basis and summary judgment for plaintiff should have been granted.

Conclusion

For the foregoing reasons, we affirm the trial court's grant of summary judgment on the issue of title to the 1.826 acre tract of land, reverse the trial court's grant of partial summary judgment estopping plaintiff from using the roadways in the Hensley Subdivision to access such land, and remand to the trial court for entry of judgment in plaintiff's favor on defendants' affirmative defense of estoppel.

Affirmed in part, reversed in part, and remanded.

Judges WYNN and CALABRIA concur.

BECK v. BECK

[163 N.C. App. 311 (2004)]

EVELYN BARTON BECK, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF AVERY EDWARD BECK, PLAINTIFFS v. LARRY EUGENE BECK, DEFENDANT

No. COA03-293

(Filed 16 March 2004)

Deeds— motion to set aside—incompetency—quasi-estoppel—estoppel by deed

The trial court erred by granting defendant son's motion to dismiss under N.C.G.S. § 1A-1, Rule 41 an action seeking to set aside a deed executed in 1998 by plaintiff mother and her late husband based on decedent's incompetency, because: (1) the court's order fails to specify what theory of estoppel it applied, and the court did not make any finding that plaintiff received a benefit of any kind which would be necessary to support the application of quasi-estoppel; (2) the findings are insufficient to support the court's conclusion that plaintiff was estopped from challenging her husband's capacity when the stipulation of the parties barred the court from using the fact of plaintiff's qualification as personal representative as evidence of decedent's competence in 1998; and (3) the court's findings are insufficient to support the conclusion that the property in dispute would pass to defendant regardless of whether the court finds decedent incompetent, and if the court based its decision on the doctrine of estoppel by deed, additional findings are needed to support such a conclusion.

Appeal by plaintiffs from order entered 13 September 2002 by Judge Christopher M. Collier in the Superior Court in Davidson County. Heard in the Court of Appeals 20 November 2003.

Brinkley Walser, P.L.L.C., by Walter F. Brinkley and April D. Craft, for plaintiff-appellants.

Cunningham & Crump, P.L.L.C., by R. Flint Crump, for defendant-appellee.

HUDSON, Judge.

On 18 February 2000, plaintiffs filed suit seeking to set aside a deed executed in 1998 by plaintiff and her late husband. Following Avery Edward Beck's ("Mr. Beck") death on 22 September 2000, two writings were discovered, one dated 1995 and the other 1998, each

purporting to be Mr. Beck's will. Both wills named Evelyn Barton Beck ("plaintiff") as the sole devisee and executor. Though plaintiff contended that Mr. Beck had not been competent to execute a will in 1998, the Clerk of Superior Court of Davidson County probated the 1998 will as the decedent's last known testamentary instrument. On 9 January 1998, the parties stipulated that evidence of plaintiff's qualification as executor under the 1998 will would not be admissible "for purposes of proving that Avery Edward Beck was competent on January 19, 1998." The court entered an order 24 July 2002 granting partial summary judgment and limiting the issue for trial to a determination of Mr. Beck's mental capacity to execute the 1998 deed. Shortly thereafter, on 20 August 2002, defendant gave "Notice of Intention to Plead Title by Estoppel." At the close of plaintiffs' evidence, defendant moved for dismissal under Rule 41(b), arguing title by estoppel. The court granted the motion and plaintiffs appeal. For the reasons discussed below, we reverse.

Plaintiff is Mr. Beck's widow and the mother of defendant Larry Beck ("defendant"). She testified that in 1980 Mr. Beck retired from his career as a professional golfer. Between 1985 and 1990, she began to see behavioral changes in her husband, including disorientation, forgetfulness and physical frailty. In 1995, Mr. and Mrs. Beck moved from Wake Forest back to their hometown of Lexington. Mr. Beck owned a six acre tract there, and the Becks owned an adjacent eight acre tract as tenants by the entirety. Larry Beck lived in a home on the six acre tract, and operated a driving range located partly on the six acre tract and partly on the eight acre tract. Plaintiff and her husband surveyed off a .96 acre portion of their tenants by the entirety property and built a home there.

Plaintiff testified that her husband's condition continued to decline after the move, and that eventually she placed a lock on his bedroom door to prevent him from wandering alone. In August 1998, plaintiff placed her husband in a nursing home. At that time she discussed options for paying for Mr. Beck's care with her son, defendant Larry Beck. Defendant suggested that his parents convey their property to him to enable Mr. Beck to qualify for Medicaid, and trust him to return the property when paying for Mr. Beck's care was no longer an issue. Defendant introduced his mother to his attorney, Steven Holton ("Mr. Holton"), and accompanied Mr. Holton on his visits to speak with plaintiff.

On 19 January 1998, defendant, plaintiff, Mr. Holton and two of his paralegals gathered at the Beck's home to execute the deed and

other papers. According to plaintiff, her husband sat across the room facing the television and did not participate in any discussions. Defendant brought his father over to sign the papers at the appropriate time and then returned him to his chair in the living room. Several documents were executed by the Becks, including: a deed conveying the eight and six acre tracts to Larry Beck, less the .96 acre tract on which the Beck home sat; a deed conveying the .96 acre tract to the Becks' daughter Anita and reserving a life estate for themselves, and several other documents plaintiff testified that she did not clearly understand. Defendant paid no consideration for the property he received from his parents.

Some time later, plaintiff contacted Mr. Holton for advice about regaining the property, but Mr. Holton continued to represent Defendant and suggested that plaintiff seek other counsel. Mr. Beck died on 22 September 2000. At trial in September 2002, plaintiff, Anita Beck, Anita's former husband, James Johnson, Jr., and Mr. Beck's primary care physician each testified that Mr. Beck did not have the capacity to execute a deed on 19 January 1998.

Plaintiff first argues that dismissal was improper because it was based on documents which were not introduced into evidence. Specifically, plaintiff objects to finding of fact one, in which the court found that she executed several documents on 19 January 1998, including the deed at issue here, which was introduced. Finding one also includes other documents executed by Mr. Beck on that date, which were not introduced in evidence. However, all of the documents were widely discussed by plaintiff in her testimony before the court. We find no error in the court's consideration of testimony about the documents not formally admitted into evidence.

Next, plaintiff challenges the court's conclusions 1) that she was estopped from challenging her husband's mental capacity and 2) that the property in question would pass to defendant regardless of Mr. Beck's capacity at the time of the deed's execution. Because the court's findings of fact are inadequate to support its conclusions, we reverse and remand for further proceedings.

The court granted defendant's motion to dismiss, based in part on the following conclusions of law:

> 1. The Plaintiff, Evelyn Barton Beck, is estopped from challenging the mental capacity of her deceased husband as of January 19, 1998.

2. The property would pass to the Defendant herein regardless of whether the Court finds the decedent Avery Edward Beck incompetent or not.

These conclusions of law purport to be based upon the court's eight findings of fact:

1. That Avery Edward Beck executed a number of legal documents on January 19, 1998 which documents include the following:

a. A Last Will and Testament;

b. A Power of Attorney in favor of his wife, Evelyn Barton Beck;

c. A Revocation of a previous Power of Attorney;

d. A Healthcare Power of Attorney in favor of his wife, Evelyn Barton beck;

e. A Declaration of a Desire for a Natural Death;

f. A Deed from Avery Edward Beck and Wife, Evelyn Barton Beck [sic] to Anita Beck; and

g. A Deed from Avery Edward Beck and wife, Evelyn Barton Beck, to Larry Eugene Beck, which Deed is the subject matter of this action.

2. That the Plaintiff now seeks to challenge that Deed referenced in Finding of Fact 1g, [sic] above, on the grounds of Avery Edward Beck's alleged incompetence or lack of mental capacity at the time of the execution of the Deed.

3. That Plaintiff asserts in the Complaint herein that she was Avery Edward Beck's "duly appointed attorney-in-fact."

4. That the Power of Attorney referenced above was executed contemporaneously with the Deed being challenged herein.

5. That Plaintiff filed a wrongful death lawsuit against another party as his personal representative by virtue of his Last Will and Testament, also executed contemporaneously with the Deed challenged herein.

6. That the Plaintiff is estopped from now challenging Avery Edward Beck's mental capacity as to one document when Plaintiff has accepted the validity of and exercised her rights

under powers granted in documents executed contemporaneously therewith.

7. That there is currently no challenge as to the validity of Plaintiff's execution of the Deed individually.

8. That assuming that Plaintiff is not equitably estopped from challenging her deceased husband's mental capacity as of January 19, 1998, and that he was in fact incompetent, she cannot challenge her own conveyance of the property under the Deed in dispute.

"Findings" six and eight are actually conclusions of law, essentially restating the court's two denominated conclusions. Standing alone, they cannot be a basis for the conclusion that defendant would own the property regardless of Mr. Beck's mental capacity.

In reaching its first conclusion of law, the court's order fails to specify what theory of estoppel it applied here. Defendant argues in his brief that the conclusion was proper under either the theory of quasi-estoppel or equitable estoppel. The doctrine of quasi estoppel appears most applicable here, but, even assuming this issue was addressed at trial, the court's findings are insufficient to support the court's first conclusion on that basis.

"Quasi-estoppel is based on a party's acceptance of the benefits of a transaction, and provides where one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it." *Parkersmith Props. v. Johnson*, 136 N.C. App. 626, 632, 525 S.E.2d 491, 495 (2000) (internal quotation marks omitted). Thus, the court must determine whether plaintiff ratified the deed and other instruments executed 19 January 1998 by accepting benefit under them, such that she may not now take an inconsistent position.

Finding five, that Mrs. Beck filed a wrongful death suit as personal representative of the estate, is the only finding relating to a possible benefit received by plaintiff, but the court did not specify how she benefitted, if at all. In his brief, defendant summarizes a number of "facts" which he contends are relevant to these issues and which address possible benefits to plaintiff from the execution from these documents. However, the court did not make these or any other specific findings that plaintiff received a benefit of any kind, which would be necessary to support the application of quasi-estoppel.

Further, the stipulation of the parties barred the court from using the fact of her qualification as personal representative as evidence of Mr. Beck's competence in 1998. After Mr. Beck's death, two wills appeared, one executed in 1995 and the other executed in 1998, at the time of the deed execution. After the Clerk of Superior Court in Davidson County insisted on probating only the 1998 will, the parties stipulated that:

> 6. Rather than subject the estate to the expense which would be involved in determining the validity of the 1998 will, the parties have agreed to stipulate that, if Evelyn Barton Beck qualifies as the executor of Avery Edward Beck under the 1998 will, evidence of this fact will not be admissible in the present action for the purpose of proving that Avery Edward Beck was competent on January 19, 1998.

This stipulation is binding on the court and prevents it from considering the plaintiff's appointment as personal representative under the 1998 will as evidence of Mr. Beck's mental capacity to execute that will. Thus, the findings are insufficient to support the court's first conclusion that plaintiff was estopped from challenging her husband's capacity.

Plaintiff next argues that the court erred in concluding that the property in dispute would pass to defendant "regardless of whether the Court finds the decedent Avery Edward Beck incompetent or not." For the reasons discussed below, we hold that the court's findings are insufficient to support this second conclusion, and we thus remand the case to the trial court for additional findings.

The court's second conclusion of law, that "[t]he property would pass to the defendant herein regardless of whether the Court finds the decedent Avery Edward Beck incompetent or not," appears to be based on "findings" 7 and 8:

> 7. That there is currently no challenge as to the validity of Plaintiff's execution of the Deed individually.
>
> 8. That assuming that Plaintiff is not equitably estopped from challenging her deceased husband's mental capacity as of January 19, 1998, and that he was in fact incompetent, she cannot challenge her own conveyance of the property under the Deed in dispute.

Finding 8, as we explained earlier, is actually a conclusion of law.

Although the order does not refer expressly to estoppel by deed, we believe that the conclusion may be referring to this theory. Estoppel by deed provides that "[i]f a grantor having no title, a defective title, or an estate less than that which he assumed to grant, conveys with warranty or covenants of like import, and subsequently acquires the title or estate which he purported to convey . . . such after-acquired . . . will inure to the grantee . . . by way of estoppel. *Baker v. Austin*, 174 N.C. 433, 434, 93 S.E. 949, 950 (1917). "This is well settled: Where a deed is sufficient in form to convey the grantor's whole interest, an interest afterwards acquired passes by way of estoppel to the grantee." *Id. See also Barnes v. House*, 253 N.C. 444, 449, 117 S.E.2d 265, 268-69 (1960) ("Where one has only a contingent interest in land and conveys such interest by warranty deed, such deed passes the contingent interest in the land, by way of estoppel, to the grantee as soon as remainder vests by the happening of contingency upon which such vesting depends"); *Sparkes v. Choate*, 22 N.C. App. 62, 62, 205 S.E.2d 624, 625 (1974) (holding as a matter of law that a person who joins in the execution of a general warranty deed without limitation, reservation, or exception, and who later obtains an interest through a conveyance from an independent source, is later estopped to assert a claim of right of way over the land conveyed by such deed).

If the court is basing its decision on the doctrine of estoppel by deed, additional findings are needed to support such a conclusion. Estoppel by deed requires a showing 1) that plaintiff Mrs. Beck had no title, a defective title, or an estate less than that which she assumed to grant at the time of the deed execution, 2) that she purported to convey the property in dispute with warranty or covenants of like import, and 3) that she subsequently acquired the title or estate which she had previously purported to convey. *See Baker*, 174 N.C. at 434, 93 S.E. at 950.

Because the findings of fact are insufficient to support the court's conclusions and the order granting defendant's motion to dismiss pursuant to Rule 41 we vacate the order and remand for additional findings consistent with this opinion.

Vacated and remanded for additional findings of fact.

Judges TYSON and STEELMAN concur.

NORTH CAROLINA FARM PARTNERSHIP, NORTH CAROLINA FARM OF WISE, L.L.C. AND NCF INVESTMENTS, L.L.C., PLAINTIFFS v. PIG IMPROVEMENT COMPANY, INC., DEFENDANT

No. COA03-328

(Filed 16 March 2004)

1. **Appeal and Error— appealability—denial of preliminary injunction—trade secrets and collateral estoppel**

   An order denying a preliminary injunction was interlocutory but immediately reviewable because it raised issues of collateral estoppel and trade secrets and affected a substantial right.

2. **Collateral Estoppel and Res Judicata— collateral estoppel—preliminary injunction**

   An Iowa preliminary injunction was not binding on a North Carolina trial court under collateral estoppel because the Iowa injunction remained preliminary in nature.

3. **Injunctions; Unfair Trade Practices— genetic information in pigs—not trade secret—preliminary injunction denied**

   Defendant was not entitled to a preliminary injunction to protect the genetic information in pigs as a trade secret because it failed to provide specific scientific evidence to support its allegations. N.C.G.S. § 66-152(3).

Appeal by defendant from orders filed 10 June 2002 and 3 September 2002 by Judge Howard E. Manning, Jr. in Warren County Superior Court. Heard in the Court of Appeals 19 November 2003.

Boxley, Bolton & Garber, L.L.P., by Ronald H. Garber; and The Law Office of John T. Benjamin, Jr., by John T. Benjamin, Jr., for plaintiff-appellees.

Parker, Poe, Adams & Bernstein L.L.P., by Jack L. Cozort, Robert H. Tiller, and John J. Butler, for defendant-appellant.

BRYANT, Judge.

Pig Improvement Company, Inc. (PIC) appeals orders filed 10 June 2002 and 3 September 2002 denying its motion for a preliminary injunction.

In 1996, North Carolina Farm Partnership (NCF), a North Carolina partnership, and PIC, a Wisconsin corporation, entered into a contract whereby NCF agreed to lease pigs and facilities in Warren County, North Carolina for pig breeding and nursery to PIC. At the expiration of the lease term, NCF was to retain possession of the pigs and the facilities, subject to the contractual options available to both parties on or before the termination of the lease.

Following expiration of the lease on 31 March 2000, NCF filed a complaint in Wake County, North Carolina on 27 July 2000 alleging breach of the lease terms by PIC. In its answer and counterclaim, PIC in turn alleged NCF breached the lease terms by continuing, "after termination of the lease, to use the progeny of [pigs] in the breeding herd as breeding stock in [NCF's] own herd and/or [by] transferr[ing] and/or s[elling] said progeny to other herds, rather than selling said progeny to slaughter as permitted in the lease." The answer and counterclaim also sought injunctive relief because "[t]he genetics incorporated into [PIC's] breeding animals are confidential, proprietary and secret information." In January 2001, this case was transferred to Warren County.

Iowa Proceedings

While the case was pending in North Carolina, PIC filed a "Petition for Temporary Injunction" in Iowa on 26 November 2001. PIC attached to the motion the 1 November 2001 deposition of Martin Engel, a NCF partner, stating NCF had placed 450 female pigs, progeny of the herd inventory under the NCF-PIC lease, in Iowa with the intent to sell them for breeding. On 26 November 2001, the Iowa trial court issued a temporary restraining order, enjoining NCF, "[p]ending a final decision of the [c]ourt, . . . from removing, transferring, or otherwise disposing or selling any of the 450 breeding females containing [PIC pig] genetic material from the State of Iowa."

On 7 December 2001, the Iowa trial court held a hearing to consider whether the temporary restraining order granted on 26 November 2001 should be continued or dissolved. Following the hearing, the Iowa trial court issued an order on 4 January 2002, keeping the restraining order in effect. On 22 May 2002, the Iowa trial court issued an order releasing the earlier injunction bond. In that order, the trial court further ruled:

> [NCF] remain[s] enjoined under the terms of the January 4, 2002[] ruling, which has not been vacated or modified and was

> never appealed. The purpose of a bond is to protect against potential damages that may result from a temporary injunction that was improvidently or erroneously issued and which may be vacated rather than continued. . . . In spite of what label one might put on it, a temporary injunction which, after hearing, was continued indefinitely and which has never been vacated or modified and has never been appealed becomes, for all practical purposes, permanent in nature.

NCF appealed, and the Iowa Supreme Court held that the Iowa trial court abused its discretion "when it in effect converted the TRO [(temporary restraining order)] into a permanent injunction without a final hearing on the merits." *PIC USA v. N.C. Farm P'ship*, 672 N.W.2d 718, 723, 726 (Iowa 2003). The Iowa Supreme Court concluded "the TRO remained a TRO."[1] *Id.* at 726.

North Carolina Proceedings

On 12 April 2002, PIC filed a motion for a temporary injunction in Warren County, North Carolina, alleging NCF:

> transferred swine within the [S]tate of North Carolina . . . and continue[s] to use and sell [them] for breeding purposes . . . contrary to the terms of the [lease]. . . . Actions and conduct of [NCF] . . . are occurring within the State of North Carolina[,] and it is appropriate and necessary for the [trial court] to exercise jurisdiction and issue appropriate injunctive relief.

The North Carolina trial court requested the parties to submit arguments on the effect of the Iowa injunctive orders on the North Carolina action under the doctrines of collateral estoppel and res judicata. In an order filed 10 June 2002, the trial court denied PIC's motion for a temporary injunction on the basis that it was not bound by the 26 November 2001 and 4 January 2002 Iowa orders since they authorized only a preliminary injunction that did not result from a trial on the merits.

In an order filed 3 September 2002, the North Carolina trial court again denied PIC's motion for a preliminary injunction after addressing two additional grounds relied upon by PIC: misappropriation of a trade secret and breach of contract. On the trade secret issue, the trial court concluded:

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1. The decision of the Iowa Supreme Court was not entered until after the filing of PIC's appeal to the North Carolina Court of Appeals.

> The [c]ourt accepts PIC's contention, as supported by the evidence, that each pig contains unique genetics in its make-up and that the genetics and breeding processes which led to the breeding of the pigs containing such genetics are valuable intellectual property. However, this fact does not make a pig[] a trade secret. Because of the pig's genetic makeup, it may be a valuable pig, but it is not a trade secret.

On the contract issue, the trial court concluded NCF was not restricted in its use of the breeding herd left on the leased premises at the expiration of the lease.

The issues are whether: (I) collateral estoppel operates to bar relitigation of the issues addressed in the Iowa orders granting PIC a temporary injunction and (II) PIC has shown irreparable harm from the misappropriation of a trade secret.

[1] An appeal of a denial of a preliminary injunction is interlocutory and generally not immediately reviewable. *N.C. Elec. Membership Corp. v. N.C. Dept. of Econ. & Comm. Dev.*, 108 N.C. App. 711, 716, 425 S.E.2d 440, 443 (1993) (citing *A.E.P. Indus. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983)). In the case *sub judice*, however, our review of PIC's appeal is proper as it raises issues of collateral estoppel and trade secrets and consequently affects a substantial right. *See McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (2001) (a denial of summary judgment based on collateral estoppel may affect a substantial right and is thus immediately appealable); *N.C. Elec. Membership*, 108 N.C. App. at 716, 425 S.E.2d at 443 (an agency's decision requiring disclosure of documents alleged to contain trade secrets affects a substantial right and is thus immediately appealable).

I

Collateral Estoppel

[2] PIC first argues the Iowa injunction was binding on the North Carolina trial court under the doctrine of collateral estoppel.[2] In its brief, PIC concedes the Iowa court issued a preliminary injunction yet contends NCF's failure to request reconsideration of or to appeal the

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2. The trial court considered PIC's argument on collateral estoppel and res judicata. In its brief to this Court, PIC argued the issue of collateral estoppel only and has therefore abandoned the issue of res judicata for appeal. *See* N.C.R. App. P. 28(a) ("[q]uestions raised by assignments of error . . . but not then presented and discussed in a party's brief, are deemed abandoned").

injunction transformed it into a final judgment on the merits. We note that since the filing of the briefs in this case, the Iowa Supreme Court has ruled that the very orders at issue here retained their temporary status and never became final because they were not based on a hearing on the merits. *See PIC USA*, 672 N.W.2d at 726. As the Iowa Supreme Court's reasoning comports with this State's law on collateral estoppel and final judgments, we likewise hold that the Iowa injunction remained preliminary in nature. *See State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 414, 474 S.E.2d 127, 128 (1996) ("[u]nder the doctrine of collateral estoppel, or issue preclusion, 'a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies' ") (citation omitted); *Milner Airco, Inc. v. Morris*, 111 N.C. App. 866, 868, 433 S.E.2d 811, 813 (1993) ("[t]he purpose of a preliminary injunction is to preserve the status quo of the parties pending trial on the merits") (emphasis omitted). Accordingly, the North Carolina trial court did not err in concluding that the Iowa temporary injunction has no binding effect with respect to the issues presented in this case.

II

Trade Secret

[3] Alternatively, PIC contends it was entitled to a preliminary injunction because the genetic information contained in the pigs is a trade secret at risk of being misappropriated by NCF.

"The scope of appellate review in the granting or denying of a preliminary injunction is essentially *de novo*. 'An appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself.' " *Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 147 N.C. App. 463, 467, 556 S.E.2d 331, 334 (2001) (quoting *A.E.P.*, 308 N.C. at 402, 302 S.E.2d at 760). The trial court's ruling, however, is presumed to be correct, and the appellant bears the burden to show error. *Id.*

> "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
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> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by

persons who can obtain economic value from its disclosure or use; and

b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C.G.S. § 66-152(3) (2003).

The "actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of [an] action." N.C.G.S. § 66-154(a) (2003). Because a preliminary injunction is "an extraordinary measure," it is to be issued only upon a showing by the movant that: (1) there is a "*likelihood* of success on the merits of his case" and (2) the movant will likely suffer "irreparable loss unless the injunction is issued, or . . . , in the opinion of the Court, issuance is necessary for the protection of his rights during the course of litigation." *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). If irreparable injury is not shown, the preliminary injunction will be denied. *Telephone Co. v. Plastics, Inc.*, 287 N.C. 232, 236, 214 S.E.2d 49, 52 (1975); *see Coble Dairy v. State ex rel. Milk Comm'n*, 58 N.C. App. 213, 214, 292 S.E.2d 750, 751 (1982).

In this case, PIC fails to meet the element of irreparable harm and is therefore not entitled to a preliminary injunction.

> An applicant for a preliminary injunction must do more than merely allege that irreparable injury will occur. The applicant is required to set out with particularity facts supporting such statements so the court can decide for itself if irreparable injury will occur.

Telephone Co., 287 N.C. at 236, 214 S.E.2d at 52; *see Coble*, 58 N.C. App. at 214, 292 S.E.2d at 751. PIC does not cite, and our research did not reveal, any cases involving the application of trade secrets law to animals. Furthermore, PIC provided two affidavits containing general allegations but no specific scientific evidence to support those allegations. *See* Telephone Co., 287 N.C. at 236, 214 S.E.2d at 52 (the movant was not entitled to a preliminary injunction because it did not provide information on how the opposing party's acts affected its income); *Coble*, 58 N.C. App. at 214, 292 S.E.2d at 751 (unsupported statements in the affidavits of two employees of a corporation that requested a preliminary injunction were insufficient to show irreparable harm). PIC's technical director in one affidavit states generally that PIC has used "molecular biological research and . . . selective breeding" to develop favorable traits in pigs and that PIC's competi-

tors could use the pure-line pigs in NCF's possession to duplicate those traits. The other affidavit, by a doctorate holder who provides no information on his specialty and other credentials, simply states that the breeding of great-grandparent female pigs in NCF's possession with pure-line boars would produce offspring with "one-half of the positive genetic qualities and characteristics" of the sow.

On the other hand, NCF provided a detailed affidavit of a North Carolina State University professor, explaining the current selection methodology for breeding swine, the feasibility of obtaining PIC pigs on the market, and the degree of difficulty competitors would face in attempting to discover and exploit favorable traits in PIC pigs. The professor, a published Professor of Animal Science and Genetics, has taught at the university since 1959 and been involved in research in the swine industry for more than thirty years. According to the professor: selective breeding is the exclusive method of genetic improvement in the swine industry and is not a secret; "[a]ny competitor could buy a[] sample of PIC product on the open market and test against these pigs"; and PIC's competitors would not be able to "work backwards to figure out what [PIC] did to develop [a] pig" or "to take the pigs in the possession of [NCF] and determine whether the PIC line was a superior line of pigs without first performing years of tests."

As PIC fails to show irreparable harm, it cannot overcome the presumption that the trial court's ruling denying preliminary injunction was correct. Therefore, PIC's assignment of error is overruled. We do not address the issue of breach of contract for the reason that, even if breach of contract were assumed, PIC's failure to show (1) the existence of a trade secret and (2) the likelihood of irreparable harm precludes the grant of a preliminary injunction. *See A.E.P.*, 308 N.C. at 406, 302 S.E.2d at 762 (equitable relief such as an injunction is generally not granted due to breach of contract when an adequate remedy at law for money damages is available); *Light and Water Comrs. v. Sanitary District*, 49 N.C. App. 421, 423, 271 S.E.2d 402, 404 (1980) ("[w]here there is a full, complete and adequate remedy at law, the equitable remedy of injunction will not lie").

Affirmed.

Judges CALABRIA and ELMORE concur.

BEAU RIVAGE HOMEOWNERS ASSOCIATION, PLAINTIFF v. BILLY EARL, L.L.C. AND CAROLINA GREEN ESTATES, L.L.C., DEFENDANTS

No. COA03-307

(Filed 16 March 2004)

1. **Appeal and Error— judicial notice—ordinance not in appellate record**

An appellate court is not permitted to take judicial notice of a county ordinance not in the appellate record.

2. **Pleadings— amendment denied—issues in pending action**

The trial court did not abuse its discretion by denying plaintiff's motion to amend its complaint where the issues were at the heart of a pending case. Parties should not be afforded concurrent actions on the same legal arguments.

3. **Injunctions— pleading—prayer for permanent relief—not sufficient**

Language requesting a temporary restraining order and "such other and further relief as the plaintiff might be entitled" was insufficient to allege a prayer for permanent relief.

Appeal by plaintiffs from order entered 13 August 2002 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 13 January 2004.

Susan J. McDaniel for plaintiff appellant.

Kenneth A. Shanklin and Matthew A. Nichols for defendant appellees.

TIMMONS-GOODSON, Judge.

The Beau Rivage Homeowners Association ("plaintiff") appeals the order of the trial court denying its Motion to Amend Complaint and Add Additional Parties and granting the motion to dismiss of Billy Earl, L.L.C., and Carolina Green Estates, L.L.C., ("defendants"). For the reasons addressed herein, we affirm the order of the trial court.

The pertinent facts to the instant appeal are as follows: Plaintiff is the homeowners association of what it describes as "a private, upscale residential community" in New Hanover County, North Carolina. On 13 November 2001, Beau Rivage Plantation, Inc. con-

veyed to defendants approximately 2 acres of land. Defendants are not members of the homeowners association.

Fifteen years before Beau Rivage Plantation, Inc. conveyed said property to defendants, a preliminary site plan of Phase I, Beau Rivage Plantation was approved in accordance with the New Hanover County Zoning Ordinances which depicted tennis courts on the property that is now owned by defendants. On 14 March 2002, three months after defendants took title to said property, the Technical Review Committee ("TRC") of the New Hanover County Planning Board approved a preliminary site plan submitted by defendants for the creation of a 32 unit, subsidized housing development. The TRC concluded that defendant "must join the Beau Rivage Homeowners Association for the maintenance of the road, liability insurance, and other expenses incurred with a private development."

Plaintiff appealed the TRC's decision to approve defendants' site plan to the New Hanover County Commissioners ("County Commissioners"), who later affirmed the TRC's decision on 20 May 2002. Plaintiff appealed the County Commissioners' order to the Superior Court. The Superior Court has not rendered judgment in the matter.

After plaintiff appealed to the County Commissioners, plaintiff filed a civil complaint in the Superior Court of New Hanover County praying for a temporary restraining order and a preliminary injunction preventing defendants from using the private roads of Beau Rivage Plantation and prohibiting all activities in furtherance of the development of defendants' land.

On 1 April 2002, Judge Paul Jones entered an order temporarily enjoining defendants' use of plaintiff's private roads for the purpose of accessing defendants' property. Defendants submitted a response in opposition to plaintiff's application for a preliminary injunction and temporary restraining order, which included a motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(1), 12(b)(6), and Rule 17(a). A hearing on plaintiff's motion for a preliminary injunction and restraining order and defendants' motion to dismiss was scheduled for 3 June 2002, but scheduling conflicts within the trial court caused the parties to continue the motion hearing until 3 July 2002.

At the end of June 2002, plaintiff filed a Motion to Amend Complaint and Add Additional Parties pursuant to Rules 15 and 21 of

the North Carolina Rules of Civil Procedure. Defendants filed a response in opposition to plaintiff's motion to amend. On 3 July 2002, the trial court's order enjoining defendants from using the private roads of Beau Rivage Plantation and developing their land expired by its own terms.

On 3 August 2002, the trial court entered an order granting defendants' motion to dismiss and denying plaintiff's motion to amend its complaint and add additional parties. Plaintiff appeals.

The issues presented by the appeal are whether the trial court erred by: (1) denying plaintiff's motion to amend its pleading; and, (2) granting defendants' motion to dismiss. For the reasons stated herein, we affirm the order of the trial court.

[1] Before we address the merits of plaintiff's appeal, we note that the record before us is incomplete. The focus of the arguments presented in both briefs on appeal is plaintiff's "failure to exhaust administrative remedies." Generally, defendants argue that plaintiff's amended complaint seeks to circumvent the administrative process provided in the New Hanover zoning ordinances. Plaintiff argues that its amended complaint does not seek to circumvent said ordinances. The New Hanover zoning ordinances are absent from the record on appeal.

This Court must limit its review to the arguments and record presented on appeal. The North Carolina Rules of Appellate Procedure "requires the appellant to include in the record on appeal 'so much of the evidence . . . as is necessary for an understanding of all errors assigned.' " *Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 414 (2003), *quoting* N.C.R. App. P. 9(a)(1)(e) (2003). When no ordinance is presented to the appellate court through the record on appeal, the appellate court is not permitted to take judicial notice of the ordinance if it exists. *See Town of Scotland Neck v. Surety Co.*, 301 N.C. 331, 338, 271 S.E.2d 501, 505 (1980). Thus, our review of the matter herein is limited in form and substance to the information presented on appeal.

[2] We first consider whether the trial court erred by denying plaintiff's motion to amend its complaint and add additional parties. Rule 15(a) of the North Carolina Rules of Civil Procedure provides that after the time for amendment as a matter of right expires, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so

requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2003). A motion to amend is "addressed to the sound discretion of the court, and its decision will not be disturbed on appeal without a clear showing of abuse of discretion." *Patrick v. Williams*, 102 N.C. App. 355, 360, 402 S.E.2d 452, 455 (1991). "Where there is no declared reason for the denial of a motion to amend, an appellate court 'may examine any apparent reasons for such denial.' " *Id.*, *quoting United Leasing Corp. v. Miller*, 60 N.C. App. 40, 43, 298 S.E.2d 409, 411 (1982).

While appearing before this Court, plaintiff is also appearing before the Superior Court to determine the validity of the site plan approval. After reviewing the entire record, it appears that the issues presented in plaintiff's amended complaint are at the heart of the site plan approval pending before the Superior Court. This Court determined in *Swain v. Elfland* that "allow[ing] plaintiff two bites of the apple[] could lead to the possibility that different forums would reach opposite decisions, as well as engender needless litigation in violation of the principles of collateral estoppel." *Swain*, 145 N.C. App. 383, 389, 550 S.E.2d 530, 535 (2001). There is evidence within the record to support the trial court's denial of plaintiff's motion to amend based on the theory that plaintiff should not be afforded concurrent actions of the same legal arguments. *See Swain*, 145 N.C. App. at 389, 550 S.E.2d at 535. Thus, plaintiff has failed to evidence that the trial court abused its discretion by denying plaintiff's motion to amend its complaint.

[3] Plaintiff's second assignment of error asserts that it was error for the trial court to dismiss its complaint. Plaintiff contends that its amended complaint corrects any deficiencies in the original complaint. However, as we determined that the trial court did not err in denying plaintiff's motion to amend its complaint, the question before us is whether the trial court erred in dismissing plaintiff's original complaint.

On appeal from a motion to dismiss, this Court must determine "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). An action may be dismissed for failure to state a claim if no law supports the claim, if sufficient facts to state a good claim are absent, or if a fact is asserted that defeats the claim. *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 517 S.E.2d 406 (1999).

" 'The primary purpose of a temporary restraining order is usually to meet an emergency when it appears that any delay would materially affect the rights of a plaintiff.' " *Hutchins v. Stanton*, 23 N.C. App. 467, 469, 209 S.E.2d 348, 349 (1974), *quoting Register v. Griffin*, 6 N.C. App. 572, 575, 170 S.E.2d 520, 523 (1969). A temporary restraining order "is only an ancillary remedy for the purpose of preserving the status quo or restoring a status wrongfully disturbed pending the final determination of the action." *Hutchins*, 23 N.C. App. at 469, 209 S.E.2d at 349. The process of seeking a temporary restraining order or a preliminary injunction assumes that eventually the moving party wants permanent relief. *Id.*; *A.E.P. Industries v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). After a temporary restraining order or a preliminary injunction is granted, it is believed that the case finally will be resolved after a full evidentiary hearing. *Id.*

Plaintiff's original complaint alleges that it will suffer "immediate and irreparable injury, loss, and/or damage" if defendants are not ordered to "refrain, during the pendency of this action, from using the private roads of Beau Rivage Plantation and from activities which constitute development" of defendant's property. Plaintiff further states that "a temporary restraining order and preliminary injunction during the pendency of Plaintiff's action are necessary to prevent Defendants from using the private roads of Beau Rivage Plantation and to prevent Defendants from developing" their land.

Plaintiff's original complaint requests a temporary injunction and "such other and further relief as the Plaintiff might be entitled." However, in *Hutchins*, this Court determined that the phrase "other and further relief as the Court may deem proper" was insufficient to allege a permanent prayer of relief. Therefore, plaintiff's prayer for relief in its original complaint is only of a temporary nature and does not seek permanent relief. *See Hutchins*, 23 N.C. App. at 469, 209 S.E.2d at 349; *Artis & Assocs. v. Auditore*, 154 N.C. App. 508, 510, 572 S.E.2d 198, 199 (2002). Thus, it was proper for the trial court to dismiss plaintiff's original complaint.

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

Affirmed.

Judges WYNN and McCULLOUGH concur.

MARIA C. BONEY, WIDOW OF LLOYD W. BONEY, DECEASED, EMPLOYEE, PLAINTIFF-APPELLANT v. WINN DIXIE, INC., EMPLOYER, SELF-INSURED (SEDGWICK OF THE CAROLINAS, SERVICING AGENT), DEFENDANTS-APPELLEES

No. COA02-1444

(Filed 16 March 2004)

Workers' Compensation— average weekly wage—intermittent, part-time worker

A workers' compensation case was remanded to the Industrial Commission for appropriate findings and the recalculation of the average weekly wage of an 81-year-old man who was retired but worked part time as needed as a fruit and vegetable inspector. The Commission did not clearly state the method it used to calculate his average weekly wage.

Appeal by plaintiff from an opinion and award entered 12 August 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 August 2003.

Mark T. Sumwalt, P.A., by Mark T. Sumwalt and Vernon Sumwalt, for plaintiff-appellant.

Morris York Williams Surles & Barringer, LLP, by Amy Kushner, for defendants-appellees.

McGEE, Judge.

The Industrial Commission (Commission) entered an opinion and award on 12 August 2002 awarding compensation to Maria C. Boney (plaintiff), widow of Lloyd W. Boney (decedent), in the amount of $129.93 per week for 400 weeks, as well as payments for medical treatment arising from the compensable injury decedent suffered while employed by Winn Dixie, Inc. (employer), burial expenses for decedent, and costs, including attorneys' fees. Plaintiff appeals the Commission's opinion and award determining decedent's average weekly wage and the resulting compensation rate.

The Commission found as fact and concluded as a matter of law that decedent suffered a compensable injury on 21 August 1998 when he fell while working for employer. As a consequence of that fall, decedent suffered blunt trauma, resulting ultimately in decedent's death on 24 August 1998. The Commission also made the following pertinent findings of fact:

1. On August 21, 1998 decedent, who was eighty-one (81) years old, was employed by defendant on a part-time basis as a fruit and vegetable inspector. Decedent had previously worked for defendant in that capacity on a full-time basis until he retired in 1988. After decedent's retirement, he would fill in for vacationing or absent employees working some days every month resulting in a fluctuating work schedule.

. . .

17. Decedent's average weekly wage calculated by the Industrial Commission pursuant to the Form 22 *Statement of Days Worked and Earnings of Injured Employee* that is a part of the evidentiary record in this matter is $194.88 resulting in a weekly compensation rate of $129.93.

Based upon its findings of fact, the Commission made the following pertinent conclusion of law:

4. Decedent was engaged in part-time employment. A part-time job or intermittent part-time job shall not be converted to a full-time or continuous job when calculating the average weekly wage. *Joyner v. A.J. Carey Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966). Consequently, decedent's average weekly wage of $194.88 yields a weekly compensation rate of $129.93 payable to decedent's only dependent, Maria Boney, for four hundred (400) weeks beginning August 24, 1998. N.C.G.S. §§ 97-2(5), 97-38.

Plaintiff argues the Commission erred in its determination of decedent's average weekly wage and the resulting compensation rate. For the reasons discussed below, we agree and must remand the case for recalculation of decedent's average weekly wage and the resulting compensation rate.

This Court's review of an opinion and award of the Commission is limited to a determination of whether the findings of fact are supported by competent evidence and whether the conclusions of law are supported by the findings of fact. *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980). However, we review *de novo* the conclusions of law of the Commission. *Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 127, 532 S.E.2d 583, 585 (2000). "The determination of the plaintiff's 'average weekly wages' requires application of the definition set forth in the Workers' Compensation Act, [N.C. Gen.

Stat. § 97-2(5) (2001)], and the case law construing that statute and thus raises an issue of law, not fact." *Swain v. C & N Evans Trucking Co.*, 126 N.C. App. 332, 335-36, 484 S.E.2d 845, 848 (1997).
N.C.G.S. § 97-2(5) provides in pertinent part:

> [1] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52; [2] but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. [3] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. [4] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
>
> [5] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

This statute provides a hierarchy of the methods for computing the average weekly wage of an injured employee, with the primary method being the first option listed; the fifth option is only used when use of the other methods would create results not "unjust results." *McAninch v. Buncombe County Schools*, 347 N.C. 126, 129-30, 489 S.E.2d 375, 377-78 (1997); *Abernathy v. Sandoz Chems./Clariant Corp.*, 151 N.C. App. 252, 258, 565 S.E.2d 218, 222, *cert. denied*, 356 N.C. 432, 572 S.E.2d 421 (2002). In fact, the fifth, catchall provision may not be used by the Commission "unless there has been a finding

that unjust results would occur by using the previously enumerated methods." *McAninch*, 347 N.C. at 130, 489 S.E.2d at 378. Whether the results of calculating the average weekly wage by the applicable enumerated method would be unfair to either employer or employee is a question of fact, and the Commission's determination on this issue would control, unless there was no competent evidence in the record to support the determination. *Id.*

In the present case the Commission did not clearly state what method it used to calculate decedent's average weekly wage. We must therefore remand to the Commission for recalculation of decedent's average weekly wage. *Barber v. Going West Transp., Inc.*, 134 N.C. App. 428, 437, 517 S.E.2d 914, 921 (1999) (remand to the Commission where there were no findings indicating how the average weekly wage was derived). We note, in examining the record, that it appears the Commission used the first method listed in N.C.G.S. § 97-2(5), dividing decedent's gross income of $10,133.98 during the 52 week period prior to his injury by 52 weeks, equaling $194.88. Since the Commission made no findings regarding the "fair and just" method for calculating decedent's average weekly wage, it could not have been operating under the fifth method for determining average weekly wage for decedent. *Clark v. ITT Grinnell Ind. Piping, Inc.*, 141 N.C. App. 417, 435, 539 S.E.2d 369, 379-80 (2000), *remanded for reconsideration on other grounds*, 354 N.C. 572, 558 S.E.2d 867 (2001) ("Without any findings regarding the 'fair and just' method for calculating plaintiff's average weekly wage, we must assume that the Commission was attempting to rely upon the first method set forth in N.C.G.S. § 97-2(5)."). The Commission found as fact that decedent "was employed by defendant on a part-time basis" and that "he would fill in for vacationing or absent employees working some days every month resulting in a fluctuating work schedule." In other cases dealing with part-time or intermittent employees our Courts have found that the first method of calculating average weekly wage was inappropriate. *See Joyner v. Oil Co.*, 266 N.C. 519, 522-23, 146 S.E.2d 447, 450 (1966); *Liles v. Electric Co.*, 244 N.C. 653, 659-60, 94 S.E.2d 790, 795-96 (1956); *see also Bond*, 139 N.C. App. at 129, 532 S.E.2d at 587; *Postell v. B&D Construction Co.*, 105 N.C. App. 1, 4-7, 411 S.E.2d 413, 415-17, *disc. review denied*, 331 N.C. 286, 417 S.E.2d 253 (1992). Therefore, if in fact the Commission used the first method to calculate decedent's average weekly wage, it erred in doing so.

Plaintiff argues the Commission should have calculated decedent's average weekly wage using the second method in N.C.G.S. § 97-2(5), ("but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted"). Plaintiff specifically argues that according to decedent's Form 22, there were numerous seven day periods in which decedent did not work for employer during the 52 weeks preceding decedent's injury. In fact, plaintiff contends that the Commission must use the second method in determining decedent's average weekly wage and is prohibited from using the fifth method of calculation. However, as stated in *Joyner*, the calculation of an injured employee's average weekly wage, when that employee is a part-time or intermittent employee, should not convert the job into full-time or continuous employment. *Joyner*, 266 N.C. at 523, 146 S.E.2d at 450 (citing *Liles*, 244 N.C. 653, 94 S.E.2d 790). As stated above, if one of the four enumerated methods in N.C.G.S. § 97-2(5) is appropriate to calculate the injured employee's average weekly wage and the Commission does not make a finding that the result is unjust, that method must be used. *McAninch*, 347 N.C. at 130, 489 S.E.2d at 378. However, where the Commission makes a finding that the result of using such a method would be unjust, and that finding is supported by the evidence, the Commission may calculate the average weekly wage under the fifth method in N.C.G.S. § 97-2(5). *Id.* When using the fifth method the Commission is to calculate the average weekly wage "as will most nearly approximate the amount which [decedent] *would be earning* were it not for the injury[.]" *Liles*, 244 N.C. at 660, 94 S.E.2d at 796.

We hold that if the Commission finds that the calculation of decedent's average weekly wage by use of the second method in N.C.G.S. § 97-2(5) would create an unfair result since the Commission found as fact that decedent was a part-time employee, the Commission may use an appropriate method to calculate decedent's average weekly wage "as will most nearly approximate the amount which [decedent] *would be earning* were it not for the injury" under the fifth method in N.C.G.S. § 97-2(5). *Liles*, 244 N.C. at 660, 94 S.E.2d at 796.

The Commission's award does not contain findings indicating its consideration of the methods for computing the average weekly wage. We therefore remand this case to the Commission for recalcu-

lation of decedent's average weekly wage and appropriate findings of fact to support that recalculation consistent with this opinion.

Reversed and remanded.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA v. MARY COBLE

No. COA03-185

(Filed 16 March 2004)

1. Animals— cruelty—sufficiency of evidence

There was sufficient evidence to submit a charge of misdemeanor cruelty to animals to the jury where two dogs in defendant's yard had been tied but not fed or watered, and one had died. Defendant's assertion that the dogs should have been fed by a relative is for the jury to weigh and is not grounds for dismissal.

2. Appeal and Error— argument on appeal—argument on different grounds from trial—not considered

An argument was not considered on appeal where defendant contended that an animal control officer's dismissal was relevant to his credibility and should have been admitted in defendant's animal cruelty prosecution, but defendant's counsel had expressly stated at trial that the evidence was not offered to attack the officer's credibility.

3. Criminal Law— instructions—admissions

The trial court did not err by instructing the jury that it could consider admissions made by the defendant in an animal abuse prosecution.

Appeal by defendant from judgment entered 4 September 2002 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 14 January 2004.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Angel E. Gray, for the State.

Kay S. Murray for defendant-appellant.

HUNTER, Judge.

Mary Coble ("defendant") appeals from a judgment dated 4 September 2002 entered consistent with a jury verdict finding her guilty of misdemeanor cruelty to animals. As a result of her conviction, defendant was sentenced to a jail term of forty-five days. We conclude there was no error in defendant's trial.

The State's evidence presented at trial beginning on 3 September 2002 tends to show that on 23 May 2001 Scott Townsend ("Townsend"), a deputy with the animal control department, responded to a report of cruelty to animals at defendant's address. From a vantage point at a neighboring house, Townsend looked into defendant's backyard and observed two animals. One of the animals was an emaciated tan and white chow mix dog tied to a tree with a broken dog house nearby. Townsend was unable to identify the other animal. He observed that neither of the animals had any food or water. Townsend then went to defendant's house and informed her of the poor conditions of the animals. Defendant and Townsend went to the backyard and walked over to the unidentified animal. Townsend saw that it was a deceased apricot poodle. Townsend asked defendant if she had fed the dogs, and defendant replied that she worked twenty hours a day and did not have time to feed the dogs, asserting that they were supposed to be fed by a relative who did not live in the house. Defendant did not know how long the dead poodle had been tied to the fence, but did not act surprised when it was shown to her. Townsend testified that defendant told him she believed the dogs were skinny because she had given them too much worming medicine. Townsend also stated that he did not observe any other adults around defendant's house.

On cross-examination, Townsend admitted that he no longer worked for the animal control department. Defendant, however, was not permitted to examine Townsend as to the circumstances surrounding his dismissal. In an offer of proof, Townsend stated that his employment was terminated on 5 July 2002, apparently as a result of a separate investigation in which the copy of a warrant he had issued did not match the original. Defendant's attorney informed the trial court that this proof was being offered to show "the quality or the nature of the investigative environment," and was not being offered to "challenge [Townsend's] credibility."

Scott Benard, a veterinarian at the Forsyth Emergency Clinic testified that he examined the dogs when they were brought in. The

chow mix was very emaciated and dehydrated, showing signs of malnutrition, and likely had parasitic problems. The dead poodle was also severely emaciated. Severe rigor mortis had set in and there were signs of early decay of the poodle's body, which included the existence of fly eggs in the poodle's skin.

Defendant testified on her own behalf that she worked sixteen to twenty hours a day and was not responsible for feeding the dogs as they belonged to relatives. She further testified that she told Townsend that her relatives had given the dogs too much worming medicine. During its charge to the jury, the trial court instructed it that there was evidence tending to show that defendant had admitted a fact or facts related to the crime charged, and if the jury found that an admission had been made they were to consider whether it was truthful and the weight to be given to it.

The issues are whether: (I) there is sufficient evidence defendant intentionally deprived the dogs of necessary sustenance to withstand a motion to dismiss; (II) the trial court erred in excluding evidence of the circumstances surrounding Townsend's dismissal; and (III) there was evidence to support an instruction on admissions by defendant.

I.

[1] Defendant first argues there was insufficient evidence that defendant intentionally starved the dogs, as there was evidence that defendant was not responsible for feeding them. We disagree.

"When a defendant moves for dismissal, 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). "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 (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). In deciding a motion to dismiss, the evidence should be viewed in the light most favorable to the State. *See id.* at 67, 296 S.E.2d at 652. "In so doing, the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence; contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *Id.* at 67, 296 S.E.2d at 653. "The [trial] court is to consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State.

The defendant's evidence, unless favorable to the State, is not to be taken into consideration." *Id.* (citations omitted).

In order to prove the offense of misdemeanor cruelty to animals, the State is required to present substantial evidence that a defendant did "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[.]" N.C. Gen. Stat. § 14-360(a) (2003). Under the cruelty to animals statute, "intentionally" refers to an act or omission "committed knowingly and without justifiable excuse." N.C. Gen. Stat. § 14-360(c). Thus in this case, the State was required to present substantial evidence that defendant knowingly, and without justifiable excuse, deprived the dogs, or caused them to be deprived, of necessary sustenance. "Knowledge or intent 'is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred.' " *Semones v. Southern Bell Telephone & Telegraph Co.*, 106 N.C. App. 334, 340, 416 S.E.2d 909, 913 (1992) (quoting *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974)).

The evidence taken in the light most favorable to the State shows that defendant knew the dogs were being kept, with her consent, at her home and in her backyard. The dogs were tied up with no shelter, food, or water. Both dogs had been allowed to become emaciated and the dead poodle had been left, still tied up, to the point of decay. Defendant did not act surprised to see the dead poodle and admitted that she did not have time to feed the dogs and no other adults were observed around the home. Townsend also testified that his notes from the investigation showed defendant admitted to having given the dogs too much worming medicine.

This is all evidence that both dogs had been neglected for a substantial and inexcusable amount of time, such that it precludes any possibility of the failure to care for the animals being just temporary or a minor oversight. It is also evidence tending to show that defendant knew the dogs were at her house, as well as the condition they were in, and did not feed or water them. Moreover, because the dogs were tied up, they were unable even to provide for their own sustenance, thereby leaving them at the mercy of human care and serving to magnify their predicament. The evidence that defendant may have given the dogs too much worming medicine tends to show that defendant was not only aware of the dogs kept at her home but actually had an active role in their care. We conclude this evidence, taken

in the light most favorable to the State, constitutes substantial circumstantial evidence that defendant, who knew the dogs were kept at her home and did not feed them, knowingly deprived the dogs of necessary sustenance. Thus, there was sufficient evidence that defendant acted intentionally under the cruelty to animals statute.

Defendant's assertions, both during Townsend's investigation and in her testimony at trial, that she thought the dogs were fed by a relative who did not live in the house is not grounds for dismissal. *See State v. Fowler*, 22 N.C. App. 144, 147, 205 S.E.2d 749, 751 (1974) (evidence of a defendant's excuse for the killing of a dog, while tending to negate the required mental state, did not entitle the defendant to a nonsuit as the jury was not required to believe that explanation). Instead, evidence of defendant's excuse is for the jury to weigh and consider in reaching its verdict. Accordingly, there was sufficient evidence upon which to submit the charge of misdemeanor cruelty to animals to the jury.

II.

[2] Defendant next contends that it was error to exclude evidence of the circumstances surrounding the termination of Townsend's employment, arguing it was relevant to call into question Townsend's credibility. This ignores the fact that at trial, defendant, through counsel, expressly and unambiguously stated that this evidence was *not* being offered for the purpose of attacking Townsend's credibility. We will not now allow defendant to "swap horses" on appeal. *See State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (noting our Courts do not permit a new theory, not argued at trial, to be asserted on appeal so as to allow a party to swap horses in order to get a better mount). As such, defendant has waived this argument on appeal. *See id.*

III.

[3] Defendant finally argues it was error to instruct the jury that they may consider evidence of admissions made by defendant. We disagree. "It is well settled that instructions are not improper if based upon 'some reasonable view of the evidence.' " *State v. Garner*, 330 N.C. 273, 295, 410 S.E.2d 861, 874 (1991) (quoting *State v. Buchanan*, 287 N.C. 408, 421, 215 S.E.2d 80, 88 (1975)).

In this case a reasonable view of the evidence shows that defendant admitted to Townsend that she did not feed the dogs and had given the dogs too much worming medicine. As such, the instruction

on admissions made by defendant was based upon a reasonable view of the evidence presented. Accordingly, the trial court did not err in giving the instruction on admissions to the jury.

No error.

Judges McGEE and GEER concur.

LARRY FRANCE, EMPLOYEE, PLAINTIFF v. MURROW'S TRANSFER, EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT, SERVICING AGENT), AND/OR THE HARLEYSVILLE INSURANCE COMPANIES, CARRIER, DEFENDANTS

No. COA03-377

(Filed 16 March 2004)

1. **Workers' Compensation— disability payments—pre-existing injury**

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee was entitled to disability payments for an upper back injury suffered on 9 December 1999 but not for his pre-existing lower back injury, because: (1) although plaintiff continued to receive treatment for his lower back injury along with the new upper back injury, these injuries were distinct and there was no aggravation of the lower back injury; and (2) any treatment received for the lower back was simply a continuation of the prior treatment.

2. **Workers' Compensation— temporary total disability—credibility**

The Industrial Commission did not err in a workers' compensation case by awarding plaintiff truck driver $136.17 per week in temporary total disability for the time period between 14 June 2000 and 28 August 2000, because: (1) the Commission found that plaintiff's explanation for not seeking medical treatment earlier than 14 June 2000 was not credible, and there was no other evidence that plaintiff was unable to work between December 1999 and June 2000; (2) the Commission found that plaintiff's explanation for not taking an offered switch-out position was not credible; (3) N.C.G.S. § 97-29 provides that an employee is entitled to sixty-six and two-thirds percent of his average weekly wages,

which was the exact amount that plaintiff was awarded; and (4) contrary to plaintiff's assertion that he was entitled to the same disability compensation rate that he was awarded for his lower back injury, that injury was a separate and unrelated occurrence.

Appeal by plaintiff from an opinion and award entered 18 December 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 January 2004.

Franklin Smith for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, L.L.P., by Elizabeth M. Stanaland and Paul A. Daniels, for defendant-appellees Murrow's Transfer and The Harleysville Insurance Companies.

Young Moore and Henderson, P.A., by J. D. Prather and Jennifer Terry Gottsegen, for defendant-appellee Murrow's Transfer in its self-insured capacity.

HUNTER, Judge.

Larry France ("plaintiff") appeals from an opinion and award of the Full Commission of the North Carolina Industrial Commission ("the Commission") filed 18 December 2002. We conclude that the Commission's findings of fact are supported by competent evidence and in turn those findings support the Commission's conclusions of law. Accordingly, we affirm the opinion and award of the Commission.

The evidence before the Commission tends to show that on 17 May 1994, while working for Murrow's Transfer ("defendant") as a truck driver, plaintiff suffered an admittedly compensable injury to his lower back when he slipped as he was unloading furniture. As a result of this injury, plaintiff received benefits pursuant to a Form 21 settlement approved by the Commission. Plaintiff primarily received treatment for this injury from Dr. O. Dell Curling ("Dr. Curling"). Plaintiff continued receiving treatment for his lower back injury through October 1999 and received benefits for that injury through 15 February 2000. Plaintiff returned to work, performing some of his hauling responsibilities.

On 14 February 2000, plaintiff completed a Form 18 notifying defendant that he had been injured on 9 December 1999. Plaintiff had allegedly been attempting to unload a desk weighing close to 300 pounds with only the aid of an eighty-year old woman. The store to

which plaintiff was delivering the desk had apparently hired someone to assist plaintiff in unloading the desk, but no one was there on the two occasions plaintiff tried to make the delivery. After the two unsuccessful delivery attempts, plaintiff's supervisor told plaintiff not to bring the desk back again. It was this ultimatum which resulted in plaintiff's injury. As plaintiff removed the desk from the truck, the desk began to fall. In an effort to prevent the desk from breaking apart on impact with the ground, plaintiff attempted to hold it up and in the process strained his shoulder, neck, and upper back.

Plaintiff did not receive medical treatment for this new injury until 14 June 2000, but testified he had attempted to contact Dr. Curling approximately fifty times during the intervening six-month period. Although plaintiff had not worked after the 9 December 1999 incident, there was no evidence other than his own testimony that he was unable to work during this time. After continuing to receive treatment for both upper and lower back injuries, plaintiff was allowed to return to work with restrictions in August 2000. Because of the restrictions placed upon him, he was no longer permitted to do truck hauling. Defendant did, however, offer to allow plaintiff to perform "switch-out" work on 28 August 2000. Plaintiff did not accept this position.

In its opinion and award, the Commission found that the 9 December 1999 incident, in which plaintiff strained his upper back and neck was a "new incident and injury, distinct from his prior lower back injury." The Commission also found that plaintiff's reasons for not seeking medical treatment for this new injury were "not credible." Although the Commission awarded temporary total disability payments to plaintiff as a result of the upper back injury suffered on 9 December 1999, it did so only for the period from 14 June 2000 to 28 August 2000. This limitation was based on the lack of evidence that plaintiff was disabled between the 9 December incident and his 14 June 2000 visit to Dr. Curling, and plaintiff's refusal to accept the "switch-out" position offered to him on 28 August 2000. The Commission also declined to award additional disability for plaintiff's lower back injury finding there was no evidence that the 9 December 1999 incident had caused any aggravation to this pre-existing lower back injury from the 1994 incident. Plaintiff was awarded temporary total disability in the amount of $136.17 per week from 14 June 2000 until 28 August 2000.

The issues on appeal are whether (I) plaintiff is entitled to additional disability compensation for his lower back injury as a result of

the 9 December 1999 incident, and (II) plaintiff's award of temporary total disability was properly calculated.

"In reviewing an order and award of the Industrial Commission in a case involving workmen's compensation, [an appellate court] is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980).

I.

[1] Plaintiff first contends the evidence before the Commission shows that the 9 December 1999 incident, despite being a new accident resulting in injury to his upper back, also aggravated his lower back injury, which he had suffered in 1994. Thus, plaintiff further contends that he is entitled to a continuation of disability payments for his lower back injury, which expired on 15 February 1999, the day after he filed the Form 18 for the 9 December 1999 incident. We disagree.

The evidence reveals that although plaintiff continued to receive treatment for his lower back injury along with the new upper back injury, these injuries were distinct and there was no aggravation of the lower back injury and any treatment received for the lower back was simply a continuation of the prior treatment. As such, the Commission's findings are supported by competent evidence and in turn support the conclusions of law that plaintiff was entitled to disability payments for this upper back injury suffered on 9 December 1999, but not for his pre-existing lower back injury.

II.

[2] Plaintiff also contends the Commission erred in awarding him only $136.17 per week in temporary total disability and doing so only for the time period between 14 June 2000 and 28 August 2000. As to the time limitation, the Commission found that plaintiff's explanation for not seeking medical treatment earlier than 14 June 2000 was not credible, and further that there was no other evidence that plaintiff was unable to work between December 1999 and June 2000. Furthermore, the Commission also found plaintiff's explanation for not taking the "switch-out" position not credible. " 'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Adams v. AVX Corp.*, 349 N.C.

676, 680, 509 S.E.2d 411, 413 (1998) (citation omitted). As a result, this Court " 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. . . .' " *Id.* at 681, 509 S.E.2d at 414 (citation omitted). Thus, this Court will not review the credibility determinations of the Commission.

As to the amount awarded to plaintiff, under N.C. Gen. Stat. § 97-2(5), average weekly wage is primarily defined as "the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury." N.C. Gen. Stat. § 97-2(5) (2003); *see also McAninch v. Buncombe County Schools*, 347 N.C. 126, 129-30, 489 S.E.2d 375, 377 (1997) (discussing role of the Commission as fact finder and calculation of average weekly wage). We further note that plaintiff does not contend an alternate calculation of his average weekly wage under N.C. Gen. Stat. § 97-2(5) should apply. In this case, there is evidence in the record that in the fifty-two weeks preceding his injury plaintiff's wages were $10,620.75 or an average weekly wage of $204.25. An employee is entitled to sixty-six and two-thirds percent of his average weekly wages, *see* N.C. Gen. Stat. § 97-29 (2003), which results in an award of $136.17, the exact amount plaintiff was awarded.

Plaintiff argues that he is entitled to the same disability compensation rate he was awarded for his lower back injury. As we have already noted, the evidence supported the Commission's conclusion that these were two separate and unrelated occurrences. Thus, the Commission did not err in awarding plaintiff only temporary total disability in the amount of $136.17 from 14 June 2000 to 28 August 2000.

Affirmed.

Judges McGEE and GEER concur.

DAVID MICHAEL MOQUIN, LYNN MOQUIN AND ELIZABETH MOQUIN, PLAINTIFFS V. KENNETH EUGENE HEDRICK, DEFENDANT

No. COA03-502

(Filed 16 March 2004)

Costs— attorney fees—$10,000 maximum judgment—separate awards to parents and child

An award of attorney fees under N.C.G.S. § 6-21.1 was affirmed where it was based on a negligence award of $6,700 to a daughter and $4,500 to her parents. The statutory $10,000 maximum for the award of attorney fees as costs applies to a joint cause of action in which the parties act as one litigant, but not to several causes of action tried jointly pursuant to a state policy encouraging judicial economy. Independent causes of action by a child and its parents arise when an unemancipated minor is injured through the negligence of another, and the separate awards here were less than $10,000.

Appeal by defendant from order dated 17 February 2003 by Judge William C. Gore, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 29 January 2004.

R. Clarke Speaks for plaintiff-appellees.

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

BRYANT, Judge.

Kenneth Eugene Hedrick (defendant) appeals an order filed 17 February 2003 awarding attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1 to plaintiffs David Michael Moquin, Lynn Moquin (the parents), and Elizabeth Moquin (the daughter).

On 15 August 2001, plaintiffs filed a negligence action against defendant and NPC International, Inc. d/b/a Pizza Hut Store No. 2578 for personal injuries sustained by the minor daughter in a car accident and for medical expenses to compensate the parents. Following a jury trial, the trial court entered judgment in favor of plaintiffs, awarding the daughter $6,700.00 in compensation for her personal injuries and the parents $4,500.00 for medical expenses related to their daughter's injuries. Subsequently, the trial court, in an order filed 17 February 2003, awarded plaintiffs attorney's fees under N.C.

Gen. Stat. § 6-21.1 in the amount of $5,000.00 for the representation of the daughter and $5,000.00 for the representation of the parents, for a total of $10,000.00.

The sole issue on appeal, and one of first impression, is whether the trial court erred in finding N.C. Gen. Stat. § 6-21.1 applicable where the combined recovery for damages under the judgment exceeded $10,000.00.

Although awards for attorney's fees are commonly made under section 6-21.1 and appealed, this Court has had little opportunity in the past to construe the language of the statute itself. Our Supreme Court has stated that for purposes of statutory construction:

> [T]his Court must first ascertain legislative intent to assure that both the purpose and the intent of the legislation are carried out. In undertaking this task, we look first to the language of the statute itself. When language used in the statute is clear and unambiguous, this Court must refrain from judicial construction and accord words undefined in the statute their plain and definite meaning.

Poole v. Miller, 342 N.C. 349, 351, 464 S.E.2d 409, 410 (1995) (citations omitted).

We thus begin our analysis with section 6-21.1, which provides:

> In any personal injury or property damage suit, . . . upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, *where the judgment for recovery of damages is ten thousand dollars ($10,000) or less*, the presiding judge *may*, in his discretion, *allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages* in said suit, said attorney's fee to be taxed as a part of the court costs.

N.C.G.S. § 6-21.1 (2003) (emphasis added).

> The obvious purpose of this statute is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that [it] is not economically feasible to bring suit on his claim. In such a situation the Legislature

> apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations. . . . This statute, being remedial should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.

Hicks v. Albertson, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973).

Both parties agree that this case turns on the definition of the term "judgment," which is undefined by the statute. In *Poole*, our Supreme Court, interpreting N.C. Gen. Stat. § 1A-1, Rule 68, stated: "Judgment means '[t]he final decision of the court resolving the dispute and determining the rights and obligations of the parties,' and '[t]he law's last word in a judicial controversy.' " *Poole*, 342 N.C. at 352, 464 S.E.2d at 411 (quoting *Black's Law Dictionary* 841-42 (6th ed. 1990)) (alteration in original) (emphasis omitted); *see also* 49 C.J.S. *Judgments* § 2, at 52 (1997) ("[i]t has been held that a judgment is a confirmation and formalization of a party's damage award indicating how much a person has been injured"). This definition, however, affords little guidance on how to interpret the legislative intent behind the use of the word "judgment" in relation to recoveries by multiple plaintiffs.

Although defendant contends "judgment for recovery of damages" under section 6-21.1 must be narrowly construed to mean the combined, total recovery of the plaintiffs under the judgment in any case, this reading of the statute is too simplistic and does not comport with the plain language or the purpose behind the statute. The application of section 6-21.1 is triggered by a "judgment for recovery of damages [that] is ten thousand dollars ($10,000) or less"; however, a reading of the statute as a whole reveals an additional emphasis on a party's status as "the litigant obtaining a judgment [for damages]." *Mickens v. Robinson*, 103 N.C. App. 52, 58, 404 S.E.2d 359, 363 (1991); N.C.G.S. § 6-21.1. This focus on the "judgment for recovery of damages" in relation to the individual "litigant" is consistent with the law on joint and several judgments.

Section 6-21.1 uses the general heading of "judgment" without differentiating between the subcategories of joint and several judgments. A joint judgment is one that is "shared by two or more persons," *Black's Law Dictionary* 841 (7th ed. 1999) (defining "joint"), and is entered in cases involving joint plaintiffs who have brought a cause of action that is joint, 49 C.J.S. *Judgments* § 33, at 87. Vice versa, if the causes of action brought by the plaintiffs are several, i.e.

"separate" or "distinct," *Black's Law Dictionary* 1378, and have been either consolidated for trial or joined under the North Carolina Rules of Civil Procedure, a trial court is required to enter a several judgment. 49 C.J.S. *Judgments* § 33, at 87 ("a joint recovery on separate, several, and independent causes of action in favor of separate plaintiffs is improper"); N.C.G.S. § 1A-1, Rules 19 and 20(a) (2003) (necessary and permissive joinder of parties); N.C.G.S. § 1A-1, Rule 42(a) (2003) (rules for consolidation).

By focusing on the "judgment for recovery of damages" with respect to "the litigant obtaining a judgment for damages," section 6-21.1 allows for the recognition of both types of judgments. When a cause of action is joint, the parties represent a united front sharing in the judgment and thus ultimately act as one, joint litigant. In that case, the $10,000.00 maximum triggering application of section 6-21.1 applies to the joint, total judgment for damages by the plaintiffs. On the other hand, with respect to several causes of action by plaintiffs in a consolidated or joint suit, for which a several judgment is required, *see* 49 C.J.S. *Judgments* § 33, at 87, the $10,000.00 maximum applies to each several recovery of damages under the judgment.[1] Such a construction is consistent with the purpose behind the statute to encourage parties with small claims for personal injury or property damage to bring those actions despite the cost of litigation and the policy of this State to encourage parties to join or seek consolidation with similarly situated parties to further reduce their litigation costs and increase judicial economy. *See Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 687, 562 S.E.2d 82, 93 (2002) (noting that "[o]ur courts have encouraged parties to join in lawsuits to better consolidate and facilitate cases" and opposing statutory construction that would discourage parties from joining). To add separate damage awards under a several judgment for purposes of determining the $10,000.00 maximum would have the effect of punishing, through the denial of attorney's fees, those plaintiffs who sought to join suit with other similarly situated individuals instead of initiating numerous, individual low-recovery lawsuits.

1. The soundness behind this bifurcated construction of the statute is best illustrated by the following example: "[I]n a suit for a money judgment where there is one count in the petition and one in a counterclaim, there can be only one judgment even though the court makes separate findings as to the plaintiff's cause and the defendant's counterclaim." 46 Am. Jur. 2d *Judgments* § 9 (1994). Supposing the trial court awarded damages to both the plaintiff and the defendant and the sum of both awards exceeded $10,000.00, but individually at least one award remained below that amount, the use of the word "judgment" in section 6-21.1 could not be construed irrespective of the parties and causes of action involved so as to preclude an award of attorney's fees.

We now consider whether plaintiffs' complaint states a joint cause of action or several causes of action. In North Carolina, two independent causes of action arise when an unemancipated minor is injured through the negligence of another: (1) a claim on behalf of the child for her losses caused by the injury, and (2) a claim by the parent for loss of services during the child's minority and for medical expenses to treat the injury. *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 713, 365 S.E.2d 898, 902 (1988); *Flippin v. Jarrell*, 301 N.C. 108, 120, 270 S.E.2d 482, 490 (1980); *West v. Tilley*, 120 N.C. App. 145, 150-51, 461 S.E.2d 1, 4 (1995); *Brown v. Lyons*, 93 N.C. App. 453, 458, 378 S.E.2d 243, 246 (1989). The parents' right of action is based upon their duty to care for and maintain their child. *Flippin*, 301 N.C. at 120, 270 S.E.2d at 490. Accordingly, plaintiffs' causes of actions, one for personal injuries to the daughter and one for medical expenses incurred by the parents, must be categorized as several.[2] *See also Black's Law Dictionary* 1378 (defining "several" as "separate; particular; distinct"). Under these circumstances, the judgment awarded by the trial court was a several (separate) judgment, requiring the trial court to consider each several (separate) recovery of damages under the judgment by plaintiffs for purposes of determining whether section 6-21.1 applied. Because plaintiffs' separate damage awards were less than $10,000.00, application of section 6-21.1 was triggered, and the trial court had the discretion to award attorney's fees thereunder.

Affirmed.

Judges TIMMONS-GOODSON and ELMORE concur.

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2. We note that the daughter and the parents were properly joined as parties under Rule 20 permitting:

> All persons [to] join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action.

N.C.G.S. § 1A-1, Rule 20(a).

JOSEPH ALES, JR., PLAINTIFF v. T. A. LOVING COMPANY, AND SHIELDS, INC., DEFENDANTS, T. A. LOVING COMPANY, AND SHIELDS, INC., DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. ORDERS DISTRIBUTING COMPANY, INC., AND TARKETT, INC., THIRD-PARTY DEFENDANTS

No. COA03-589

(Filed 16 March 2004)

Workers' Compensation— settlement agreement—lien extinguished

An order extinguishing a workers' compensation lien based on a contingent settlement agreement was vacated and remanded. An agreement with a condition precedent does not give the trial court jurisdiction under N.C.G.S. § 97-10.2(j).

Appeal by unnamed defendants from order entered 19 March 2003 by Judge Ola M. Lewis in Columbus County Superior Court. Heard in the Court of Appeals 4 February 2004.

The McGougan Law Firm, by Paul J. Ekster and Kevin J. Bullard, for plaintiff-appellee.

Hedrick & Morton, L.L.P., by B. Danforth Morton, for defendant-appellants Columbus County Hospital, Reliance Insurance Company and Cambridge Integrated Services Group.

MARTIN, Chief Judge.

The unnamed defendants appeal from an order of the superior court extinguishing their workers' compensation lien against the proceeds of plaintiff's third-party recovery against defendants T.A. Loving Company (Loving), Shields, Inc. (Shields), and third-party defendant Tarkett, Inc. (Tarkett). The unnamed defendants include plaintiff's former employer, Columbus County Hospital (Hospital); the employer's workers' compensation insurance carrier, Reliance Insurance Company; and the insurance carrier's bankruptcy receiver, Cambridge Integrated Services Group. Loving, a general contractor remodeling part of the Hospital, and Shields, a subcontractor repairing flooring in the Hospital, are named defendants but are not parties to this appeal. Likewise, third-party defendants Orders Distributing Company, Inc. (Orders), a tile and floor products distributor, and Tarkett, manufacturer of the flooring tile used at Hospital, are not involved as parties in this appeal.

On 20 August 1999, plaintiff injured his back and knee in a fall during the course of his employment as a nurse anesthetist at Hospital. Plaintiff sued Hospital, Loving and Shields to recover for his personal injuries. Defendant Shields filed a third-party complaint against third-party defendants Orders and Tarkett.

Plaintiff also pursued a workers' compensation claim against Hospital, which was settled through a clincher agreement approved by the North Carolina Industrial Commission in July 2001. In addition to medical expenses paid on plaintiff's behalf, the clincher required a one-time payment of $120,000, which discharged the Hospital's liability to plaintiff. The Hospital's motion to dismiss plaintiff's lawsuit against it was allowed by order of the trial court on 17 July 2002, *nunc pro tunc* 3 June 2002. Defendants Loving and Shields, along with plaintiff and third-party defendants Orders and Tarkett, attempted to mediate plaintiff's claim on 16 October 2002, but reached an impasse.

On 9 January 2003, plaintiff's attorney wrote a letter to the attorneys for defendants Loving and Shields and third-party defendant Tarkett, stating in part:

> Pursuant to our agreement, it is my understanding that we have settled the above matter with all Defendants for the total sum of $145,000.00 contingent upon a waiver of the workers' compensation lien.

Plaintiff filed a motion on 24 January 2003 to extinguish the workers' compensation subrogation lien in the amount of $206,669.93 claimed by defendant insurance carrier. The motion was heard on 3 March 2003 in Columbus County Superior Court. At the hearing, plaintiff offered a copy of the 9 January 2003 letter as his sole exhibit in support of his motion. The court found:

> 19. That in order to resolve this disputed claim, and in order to bring about a final resolution to all matters in dispute, a settlement has been agreed upon by the Plaintiff and the above-captioned third parties in the above-entitled action.

On 19 March 2003, the trial court ordered that the workers' compensation lien of $206,669.93 should be waived in its entirety.

The record on appeal contains six assignments of error, which are presented in two arguments by defendant Hospital in its brief. Defendant Hospital argues that the trial court did not have jurisdic-

tion to reduce the worker's compensation lien or, alternatively, that the trial court did not hold a hearing sufficient to protect Hospital's rights to due process of law. We agree with defendant's first argument and vacate the trial court's order.

The question presented here is whether N.C. Gen. Stat. § 97-10.2(j) provides the superior court with jurisdiction to adjust the amount of a worker's compensation lien when the terms of the settlement agreement are contingent upon such adjustment. The statute provides, in pertinent part:

> (j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that **a settlement has been agreed upon by the employee and the third party**, either party may apply to the resident superior court judge of the county in which the cause of action arose, where the injured employee resides or the presiding judge before whom the cause of action is pending, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the 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 the employer.

N.C. Gen. Stat. § 97-10.2(j) (2003) (Emphasis added).

We note that whether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo*. *See Harper v. City of Asheville*, 160 N.C. App. 209, 213, 585 S.E.2d 240, 243 (2003). Here, the trial court concluded that it had jurisdiction because a settlement agreement existed between the plaintiff and the third-party defendants. Plaintiff, as a proponent of the settlement agreement, offered only the 9 January 2003 letter between counsel as evidence of the existence of a final written agreement. According to the letter, the parties had determined liability and a settlement amount, but the entire agreement was contingent upon the trial court's decision regarding the motion to waive the subrogation lien.

A mediated settlement agreement, such as the one here, is "governed by general principles of contract law." *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001). Contract law defines a con-

dition precedent as "an event which must occur before a contractual right arises . . . ." *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993). Plaintiff's agreement with the third-party defendants and named defendants was subject to a condition precedent, namely, a specific ruling by the superior court on the motion to set the subrogation amount. We interpret N.C. Gen. Stat. § 97-10.2(j) as permitting the superior court to adjust the amount of a subrogation lien if the agreement between the parties has been finalized so that only performance of the agreement is necessary to bind the parties. An agreement containing a condition precedent which must be fulfilled before either party is bound to the contract terms does not give the trial court jurisdiction under N.C. Gen. Stat. § 97-10.2(j). Thus, the trial court's reduction of Hospital's lien was erroneous because the court based its jurisdiction upon a contingent settlement agreement containing an unfulfilled condition precedent. Because we vacate the trial court's order based upon defendant's first argument, we need not address the second argument. The trial court's order waiving defendant-employer Hospital's workers' compensation lien in its entirety is vacated and this cause is remanded for such further proceedings as may be required for its resolution.

Vacated and remanded.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA, BY AND THROUGH ITS CRAVEN COUNTY CHILD SUPPORT ENFORCEMENT AGENCY, *EX REL.*, MARY B. GODWIN, PLAINTIFFS-APPELLEES v. JOSHUA H. WILLIAMS, DEFENDANT-APPELLANT

No. COA03-268

(Filed 16 March 2004)

1. Child Support, Custody, and Visitation— support—Guidelines—current version

The trial court correctly applied the version of the Child Support Guidelines in effect at the time of the hearing and the announcement of the decision in open court, even though a new version had come into effect by the time the written order was entered.

2. Child Support, Custody, and Visitation— support—earning capacity—no findings of suppressed income

An order determining child support to be paid by a student was remanded where the court used earning capacity rather than actual income without findings of bad faith.

Appeal by defendant from order entered 16 December 2002 by Judge Karen A. Alexander in District Court, Craven County. Heard in the Court of Appeals 19 November 2003.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Eaddy, for plaintiffs-appellees.

Jeffrey L. Miller for defendant-appellant.

McGEE, Judge.

Defendant appeals from an order awarding Mary B. Godwin (plaintiff) $95.00 per month in child support, in addition to providing medical insurance should it become available at a reasonable cost through defendant's employment.

Defendant is the biological father of a minor child, Peyton E. Godwin (Peyton), born 3 July 2001. Plaintiff is the biological mother of Peyton and has custody of the child. At the time of Peyton's birth, defendant and plaintiff were seventeen-year-old minors in their junior year of high school. Prior to defendant's graduation from high school in June 2002, defendant was accepted for enrollment as a student at East Carolina University.

In 2001, defendant earned an average monthly gross income of $478.01, derived from his after-school part-time and summer seasonal employment at Outback Steakhouse in New Bern, North Carolina. In 2002, while still in high school, defendant continued to work after school at the Outback Steakhouse. After his high school graduation in June 2002, and prior to his college enrollment in August 2002, defendant worked full-time as a busboy at Clawson's restaurant (Clawson's) in Beaufort, North Carolina. At Clawson's, he earned approximately $5.25 per hour. At the time of the trial court's hearing on the matter of child support in September 2002, defendant was enrolled as a full-time student at East Carolina University and was seeking part-time employment.

After hearing evidence regarding Peyton's needs and testimony on defendant's financial status, the trial court utilized an earning

capacity standard to calculate defendant's monthly child support obligation, rather than relying on defendant's actual income. The trial court found that defendant was an able-bodied person capable of earning income at the minimum wage of $5.15 per hour, on a full-time basis. The trial court computed his imputed gross income to be $892.67 per month. Based upon the 1998 North Carolina Child Support Guidelines, the trial court announced its order in open court in September 2002, directing defendant to pay child support in the amount of $95.00 per month. The written order was entered on 16 December 2002. Defendant appeals.

[1] Defendant first assigns error to the trial court's use of the 1998 version of the North Carolina Child Support Guidelines (Guidelines) instead of the 2002 version. Defendant emphasizes that while the trial court announced its order in open court on 3 September 2002, the order was not entered until 16 December 2002, after the effective date of the 2002 version of the Guidelines.

Although defendant did not include this issue in his assignments of error and thus has failed to preserve the issue for appellate review, this Court elects in the interest of judicial economy to consider the merits of defendant's argument. N.C.R. App. P. 2.

N.C. Gen. Stat. § 1A-1, Rule 58 (2003) provides that "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." This Court has held that Rule 58 applies to orders as well as to judgments. *West v. Marko*, 130 N.C. App. 751, 756, 504 S.E.2d 571, 574 (1998). As with a judgment, "an order rendered in open court is not enforceable until it is 'entered.' " *Id.* at 756, 504 S.E.2d at 574. Thus, in the case before us, the trial court's child support order was not enforceable between the parties until it was entered on 16 December 2002.

N.C. Gen. Stat. § 50-13.4(c) (2003) mandates that the trial court in an action for support of a minor child is to "determine the amount of child support payments by applying the presumptive guidelines[.]" None of the exceptions to this legislative directive are applicable in the case before this Court. The Guidelines are reviewed every four years and modified as necessary. At the time of the trial court's hearing and subsequent pronouncement in open court, the 1998 version of the Guidelines was in effect and the trial court was under a statutory obligation to follow the Guidelines current at that time. The 2002 version of the Guidelines became effective as of 1 October 2002.

The introductory portion of the 2002 version of the Guidelines does not elaborate as to whether it is applicable to orders not yet entered as of 1 October 2002. Defendant stresses that the introduction to the 2002 version of the Guidelines proscribes that "[t]he guidelines must be used when the court enters a temporary or permanent child support order in a non-contested case or contested hearing." Defendant thus argues that since the order was not *entered* until after 1 October 2002, the 2002 version is controlling. We construe this directive to be only a restatement of the presumptive nature of the Guidelines as mandated by N.C. Gen. Stat. § 50-13.4(c).

We recognize that the trial court was not required to announce its order in open court. However, by doing so, the trial court was required by statute to apply the presumptive Guidelines in effect on 3 September 2002. At that time, the revised 2002 version of the Guidelines was not yet applicable. In the absence of guidance from the General Assembly as to what cases were impacted by the 2002 version's stated effective date of 1 October 2002, we conclude that the trial court acted appropriately in applying the 1998 version of the Guidelines at the time the trial court announced its decision and subsequently entered its order. We find defendant's argument is without merit.

[2] Defendant next contends the trial court erred in using an earning capacity standard, instead of defendant's actual earnings, for the purpose of determining defendant's child support payments. Defendant argues the trial court, in imputing income to defendant, did not make the requisite findings or conclusions indicating any deliberate or bad faith conduct by defendant to suppress his income or otherwise avoid his child support obligation.

Upon appellate review, a trial court's determination of the proper child support payment will not be disturbed absent a clear abuse of discretion. *Bowers v. Bowers*, 141 N.C. App. 729, 731, 541 S.E.2d 508, 509 (2001). To support such a reversal, an appellant must show that the trial court's actions were manifestly unsupported by reason. *Id.*

Child support payments are ordinarily determined based on a party's actual income at the time the award is made. *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997). Our appellate Courts have repeatedly held that the earning capacity standard can only be used in calculating child support payments where there are

"findings, based on competent evidence, to support a conclusion that the supporting . . . parent is deliberately suppressing his or her income to avoid family responsibilities." *Bowers*, 141 N.C. App. at 732, 541 S.E.2d at 510; *see Kowalick v. Kowalick*, 129 N.C. App. 781, 787-88, 501 S.E.2d 671, 676 (1998); *Ellis v. Ellis*, 126 N.C. App. 362, 364-65, 485 S.E.2d 82, 83 (1997); *Whitley v. Whitley*, 46 N.C. App. 810, 812, 266 S.E.2d 23, 27 (1980). Standing alone, evidence that a defendant voluntarily depressed his income is insufficient to support the application of the earning capacity standard. *Cook v. Cook*, 159 N.C. App. 657, 662, 583 S.E.2d 696, 699 (2003). In this case, the trial court's order lacks any finding or conclusion that defendant depressed his income in bad faith. Therefore, we reverse and remand for an appropriate determination of defendant's child support obligation in accordance with this opinion.

Affirmed in part, reversed and remanded in part.

Judges HUNTER and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

ELAM v. GOULD No. 03-511	Mecklenburg (02CVS9894)	Affirmed
IN RE APPEAL OF SCHWARZ & SCHWARZ, INC. No. 03-641	Property Tax Comm. (01PTC242)	Affirmed
PARKER v. ALSTON No. 03-477	Wake (97CVD9606)	Affirmed in part, reversed in part and remanded
STATE v. PRATT No. 03-591	Dare (02CRS618) (02CRS619) (02CRS620) (02CRS621) (02CRS622) (02CRS623)	No error
TOWN OF RED SPRINGS v. WILLIAMS No. 03-561	Robeson (02CVS3098)	Affirmed

STATE OF NORTH CAROLINA v. DERRICK JOVAN McRAE

No. COA03-261

(Filed 6 April 2004)

1. Criminal Law— competency to stand trial—retrospective hearing—trial judge as presiding judge—failure to show bias

It was not error in a first-degree murder case for the same trial judge to have been the hearing judge in a retrospective competency hearing, because: (1) there was nothing in the transcript or record that suggested that the trial judge intervened as a witness in this case over a disputed fact; (2) defendant failed to show any bias, interest, or prejudice by the trial judge in conducting the retrospective competency hearing; and (3) no constitutional, statutory, or code of judicial conduct requires a per se recusal of a trial judge in a retrospective competency hearing.

2. Criminal Law— competency to stand trial—retrospective hearing—findings—observations of trial judge

The trial judge did not err in an order following a retrospective competency hearing by making a finding referring to his observations as judge at defendant's original murder trial and retrial without making findings as to what those observations were where the reference to his observations did not involve disputed facts but was used only to corroborate the undisputed facts in the record.

3. Criminal Law— competency to stand trial—retrospective hearing—motion for new trial

The trial court did not abuse its discretion in a first-degree murder case by concluding that a meaningful retrospective competency hearing was possible in this case and that defendant was not entitled to a new trial, because: (1) despite the passing of three years, the trial court had before it medical records leading up to three days before the 11 May 1998 trial and testimony of the last examining doctor; (2) the original trial judge conducted the retrospective hearing, and he was familiar with the parties and issues; (3) there was competent evidence that defendant was competent throughout his trial beginning 11 May 1998 including that defendant was on an antipsychotic medication during the trial; (4) contrary to defendant's contention, a doctor's 6 and 8

May 1998 exams of defendant were not cursory when they were based on six previous evaluations of defendant that had been conducted by both that doctor and another doctor; and (5) defendant's counsel raised no issue of defendant's competency, thus presenting defendant as competent.

4. **Constitutional Law— competency to stand trial—competency at retrospective hearing**

The trial court did not err in a first-degree murder case by finding that defendant was competent to proceed at a 7 June 2001 retrospective competency hearing and by proceeding with the hearing without defendant's presence, because competency hearings do not implicate defendant's confrontation rights and do not have a substantial relation to his opportunity to defend. Therefore, whether defendant was competent at the retrospective hearing did not implicate his constitutional or statutory rights.

5. **Constitutional Law— competency to stand trial—conjecture of incompetency**

The trial court did not violate the Court of Appeals' mandate in a 1 August 2000 opinion when it found defendant was competent to stand trial on 11 May 1998 but did not make such a determination as to the entire trial, because when there is no evidence beyond conjecture of a defendant's incompetency during trial, a finding of defendant's competency at the commencement of the trial is sufficient for showing he was competent throughout the trial.

6. **Criminal Law— order entered out of term and out of session—implied consent**

The trial court's 31 August 2002 order in a first-degree murder case is not null and void even though it was entered out of term and out of session, because defendant impliedly consented when he raised a new constitutional issue in his closing statement for which he tendered an extensive United States Supreme Court opinion for the trial court's review.

Judge TIMMONS-GOODSON concurring in the result.

Appeal by defendant from an order entered 17 September 2002 by Judge Sanford L. Steelman, Jr., in Richmond County Superior Court. Heard in the Court of Appeals 2 December 2003.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant appellant.

McCULLOUGH, Judge.

Defendant, Derrick McRae, was first indicted for murder on 18 March 1996. Prior to his first trial, defendant underwent six psychiatric evaluations with intervening medications: (1) On 13 December 1996, defendant was diagnosed by Dr. Nicole F. Wolfe (Dr. Wolfe) as schizophrenic and psychotic, incompetent to stand trial; (2) on 7 April 1997, defendant was found by Dr. Robert Rollins (Dr. Rollins) to be competent to stand trial if he remained on his medication; (3) on 17 September 1997, at a competency hearing, both Dr. Wolfe and the court found defendant incompetent to stand trial; (4) on 11 February 1998, Dr. Wolfe again found defendant incompetent to stand trial; on 15 March 1998, defendant was first injected with the antipsychotic drug Haldol; (5) on 6 April 1998, Dr. Wolfe found defendant capable to stand trial; on 15 April 1998, defendant was given a second injection of Haldol; and (6) on 27 April 1998, the day defendant's trial began, Dr. Wolfe again found defendant capable to stand trial. The jury rendered a deadlock verdict.

After the mistrial, a second trial was held before the same trial court. Before the defendant's second trial, Dr. Rollins gave defendant a seventh evaluation on 6 May 1998 where he was found competent to stand trial. The trial began 11 May 1998, and defendant was found guilty on 14 May 1998 of first-degree murder. He was sentenced to life without parole. Defendant appealed his judgment to this Court. In the 1 August 2000 opinion, we held that defendant had been denied due process by the trial court in failing to conduct a competency hearing on the day the trial began as seven prior and conflicting evaluations raised a *bona fide* doubt of competency pursuant to *Meeks v. Smith*, 512 F. Supp. 335, 338 (W.D.N.C. 1981). We remanded defendant's case to determine whether it was possible for a retrospective competency hearing to be held effectively, and if so, to hold such a hearing to determine defendant's competency at the time of trial.

The original trial court then held a retrospective competency hearing on 7 June 2001 and 31 August 2001. The retrospective competency hearing was found to be possible, and defendant was found to be competent at the time of the 11 May 1998 trial. The findings of

fact and conclusions of law were then entered in an order dated 17 September 2002. Defendant's prior judgment was thereby sustained. Defendant appealed.

Defendant raises seven issues on appeal. Issues (I) and (II) of defendant's brief contend that the same trial judge should not have been the hearing judge in the retrospective competency hearing as he was a witness to the 11 May 1998 trial; issue (III) alleges that the trial judge did not make adequate findings as to his impressions of defendant during the 11 May 1998 trial; issue (IV) alleges that it was impossible to hold a retrospective determination of competency; issue (V) alleges defendant was incompetent to participate in the retrospective competency hearing and should have been granted his motion for rehearing; issue (VI) alleges the trial court did not follow the mandate of our 1 August 2000 opinion regarding a finding of defendant's competency at the time of trial; and finally, defendant argues in issue (VII) that the trial court's 31 August 2002 order is null and void because it was entered out of term and out of session. Pursuant to the legal analysis on each of these issues set out below, we find there was no error in the trial court's 7 June 2001 and 31 August 2001 retrospective competency hearing, nor in the subsequent 31 August 2002 written order.

I. Original Trial Judge Conducting the Retrospective Competency Hearing

[1] Defendant contends that the 11 May 1998 trial judge was the improper judge to make the retrospective competency determinations. Defendant argues he was denied his constitutional right to confront witnesses against him because the trial judge was not subject to cross-examination as to his observations of defendant during the second trial, observations which defendant alleges were the basis of the court's finding of competency. In a separate issue, consolidated in this opinion, defendant argues that the trial judge should have disqualified himself under N.C. Gen. Stat. § 15A-1223(e) (2003). We disagree and conclude that the trial judge acted without error in presiding over the retrospective competency hearing.

A. Constitutional Right to Confront Witnesses

Defendant argues that his state and federal constitutional rights were violated when the trial court took into account its own recollections from the 11 May 1998 trial for its findings in the order from the retrospective competency hearing. Specifically, defendant cites

Tyler v. Swenson, 427 F.2d 412, 416 (8th Cir. 1970), a federal habeas corpus case where the trial judge also presided over a post-conviction evidentiary hearing to determine whether the petitioner's plea had been made involuntarily. Defendant cites *Tyler*, arguing it is error for a trial judge to "weigh[] his own *recollection* of events in making his findings." *Id.*

While we note the importance of the principles set forth in *Tyler* and its recitation of applicable law, we conclude that the facts of this case are distinguishable from that case's narrow and egregious circumstances. In *Tyler*, during the post-conviction hearing, the trial judge became engaged with the petitioner's trial counsel in a dispute over their respective recollections of the facts. This escalated to the point that petitioner's attorney was ultimately held in contempt of court. Also during the hearing, after testimony by petitioner's mother as to what occurred in her presence while in the judge's chambers, the trial judge made a statement that petitioner's mother had in fact never been in the court's chambers. Ultimately, the trial judge made findings of disputed facts that the events had not taken place as petitioner and the other witnesses had testified, but as he recalled.

The Eighth Circuit found that the trial judge had violated the petitioner's right to confrontation and due process when his statements during the rehearing were the only testimony offered to dispute defendant's claim of an involuntary plea. The court in *Tyler* stated:

> To avoid misunderstanding, we note that it is not our intention by this decision to retreat from the federal and state decisions which accurately point up the recognition that the trial court, familiar with the prior proceedings, generally represents the better and more expeditious forum for post-conviction proceedings.
>
> We thus make clear, as do the above cases, that a trial judge is not to be disqualified simply because he is familiar with the proceedings and supplements the record with *observations*. Nor do a trial judge's supplemental statements into the record make him a material witness, unless he offers *disputed and material testimony* which is challenged by the petitioner. In the instant case it is particularly significant that the trial judge's recollection was the *only* testimony which refuted petitioner's claim, a claim which challenged the propriety of the judge's prior conduct.

Tyler, 427 F.2d at 417 (citations omitted) (emphasis added).

The facts of this case do not implicate the holding in *Tyler*. Defendant points to nothing in the transcript from the retrospective competency hearing, neither in the form of questions nor assertions, as material testimony by the trial judge as to a disputed fact. The trial judge asked Dr. Rollins only a few questions relating to the timing and dosage of defendant's medication around the 11 May 1998 trial. Furthermore, the State elicited ample undisputed testimony of defendant's competency before the 11 May 1998 trial in the cross-examination of Dr. Rollins.

In finding of fact no. 8 in his written 31 August 2002 order, the trial judge stated, "The undersigned Judge was also present at both trials of the defendant, and observed everything that transpired in the course of these trials." In this finding, the trial judge is merely acknowledging the point reiterated in *Tyler* that the trial court, "familiar with the prior proceedings, generally represents the better and more expeditious forum for post-conviction proceedings." *Id.* There is nothing in the transcript or record that suggests that the trial judge intervened as a witness in this case over a disputed fact. While it is unclear what the trial judge's observations were, even assuming he observed defendant to be competent at the original two trials, this is only corroborative of evidence elicited by the State at the retrospective competency hearing that was undisputed. *See United States v. Smith*, 337 F.2d 49, 54 (4th Cir. 1964), *cert. denied*, 381 U.S. 916, 14 L. Ed. 2d 436 (1965).

B. Judicial Disqualification

Defendant next contends that the trial judge should have disqualified himself from the retrospective competency hearing pursuant to N.C. Gen. Stat. § 15A-1223(e), which states in relevant part: "A judge must disqualify himself from presiding over a criminal trial or proceeding if he is a witness for or against one of the parties in the case." Defendant argues that, because the trial judge witnessed the 11 May 1998 trial, and because he was essentially a witness for the State as to his observations, he was bound by this statute. We cannot agree and find the State's argument persuasive on this point.

Our Supreme Court has held that N.C. Gen. Stat. § 15A-1223 and Canon 3 of the Code of Judicial Conduct "control the disqualification of a judge presiding over a criminal trial." *State v. Scott*, 343 N.C. 313, 325, 471 S.E.2d 605, 612 (1996). Under Canon 3(C)(1)(a) of the North Carolina Code of Judicial Conduct,

> (1) [A] judge should disqualify himself in a proceeding in which his impartiality may reasonably be questioned, including but not limited to instances where:
>
> > (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings[.]

Upon our review to determine whether a judge should have disqualified himself under N.C. Gen. Stat. § 15A-1223(e) and Cannon 3, the burden is placed upon the defendant to show

> " 'objectively that grounds . . . exist . . . consist[ing] of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially.' " The bias, prejudice, or interest which requires a trial judge to be recused from a trial has reference to the personal disposition or mental attitude of the trial judge, either favorable or unfavorable, toward a party to the action before him.

Scott, 343 N.C. at 325, 471 S.E.2d at 612.

Defendant has failed to show any bias, interest, or prejudice by the trial judge in conducting the retrospective competency hearing. A reading of the transcript reveals nothing but an impartial hearing, during which any question or point made by the trial judge was for clarification to benefit himself and both parties. Defendant's argument is one requiring *per se* recusal by the trial judge in a retrospective competency hearing. We conclude no constitutional, statutory, or code of judicial conduct requires this; and we hold such a *per se* rule would be inconsistent with considerations of efficient judicial administration favoring a presiding judge's familiarity with relevant matters.

Therefore, we overrule issues (I) and (II) concerning the propriety of the same trial judge presiding over a subsequent retrospective competency hearing, as the record and transcript show no evidence of constitutional, statutory, or code of conduct violations.

II. Trial Judge Did Not Specify His Observations During the First Two Trials

[2] In his written order, the trial judge made finding of fact no. 8, stating: "[t]he undersigned Judge was also present at both of the trials of the defendant, and observed everything that transpired in the course of these trials." Defendant contends this finding is insufficient because the trial judge failed to make any findings as to what his

observations were, and thus a reviewing court cannot determine whether his observations are actually disputed facts for which the court must provide a basis.

We agree with defendant that finding of fact no. 8 suggests or implies that the trial judge observed the defendant to be competent during both trials. However, considering that a trial judge has a duty, *sua sponte*, to call a competency hearing when there is a *bona fide* question during the course of a trial as to whether defendant is competent to stand trial, the fact that he did not call such a hearing already suggests he found defendant competent during the second trial. *See State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977). Therefore, nothing is added by finding of fact no. 8 that is not already implied by the fact that we remanded the case back to the trial level to conduct the competency hearing. The finding suggests that the only weight that was placed on his observations was to corroborate the undisputed facts presented at the hearing. *See State v. Chaplin*, 122 N.C. App. 659, 663, 471 S.E.2d 653, 656 (1996) (failure to make findings does not prevent review by the appellate court if the information before the trial court is not in dispute).

At the hearing, upon the cross-examination of Dr. Rollins, the State elicited the following undisputed testimony:

> Q: Did you notice anything about Mr. McRae, again, just with the observation in May of 1998, which would determine his competency to stand trial? Did you notice any indication from Mr. McRae where any of the other tests that Mr. Goodwin talked about, CAT scans, short-term memory tests, visual recall tests, information processing, did you find any indication any of those were necessary for you to form an opinion based on your training and experience?
>
> A: No, they were not indicated, in my opinion.

Furthermore, it is undisputed that defendant received two injections of Haldol to treat his mental disorder, the second dosage administered on 15 April 1998. It is also undisputed that the 11 May 1998 trial was conducted within the approximate window of the medication's stabilizing effect. Defendant offered no testimonial evidence that he was not competent to stand trial on 11 May 1998, and only offered testimony at the hearing questioning Dr. Rollins' methodology. Defendant's only real disputed fact is whether the Haldol had worn off before the end of the 11 May trial, a contention supported only by

conjecture. Therefore, the trial judge did not err in making his finding of fact no. 8 referring to his observations as judge where the reference to his observations were only used to corroborate the undisputed facts in the record.

III. Retrospective Competency Hearing and Defendant's Competency

[3] Defendant next argues that it was impossible to hold a meaningful retrospective competency hearing in this case, and therefore he should have been granted a new trial. He argues that the hearing was not possible because there was a three-year hiatus between the trial at issue and the retrospective hearing, that the defendant's competency fluctuated for the two years preceding the trial, and that the last competency evaluation, conducted by Dr. Rollins, occurred several days before the trial and was cursory. As to each of these arguments, we disagree.

The defendant's case is the first in North Carolina to utilize the retrospective competency hearing as an alternative remedy to a new trial in cases where the trial judge failed to conduct a necessary competency hearing at the initial trial. This remedy is disfavored due to the inherent difficulty in making such *nunc pro tunc* evaluations. *See Drope v. Missouri*, 420 U.S. 162, 183, 43 L. Ed. 2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 15 L. Ed. 2d 815 (1966); *Dusky v. United States*, 362 U.S. 402, 4 L. Ed. 2d 824 (1960). This Court, when remanding defendant's case to the trial court to determine whether a meaningful retrospective competency hearing could be held, stated:

> The trial court is in the best position to determine whether it can make such a retrospective determination of defendant's competency. Thus, if the trial court concludes that a retrospective determination is still possible, a competency hearing will be held, and if the conclusion is that the defendant was competent, no new trial will be required.

State v. McRae, 139 N.C. App. 387, 392, 533 S.E.2d 557, 560-61 (2000) (*McRae I*); *see also United States v. Di Gilio*, 538 F.2d 972 (3d Cir. 1976), *cert. denied*, *Lupo v. United States*, 429 U.S. 1038, 50 L. Ed. 2d 749 (1977). Once remanded under this remedy, competency is determined under appropriate standards pursuant to N.C. Gen. Stat. § 15A-1001(a); *see also State v. Davis*, 349 N.C. 1, 21-22, 506 S.E.2d 455, 466 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). It is defendant's burden of proof to show that he lacked the capacity

to proceed. *State v. O'Neal*, 116 N.C. App. 390, 395, 448 S.E.2d 306, 310, *disc. review denied*, 338 N.C. 522, 452 S.E.2d 821 (1994).

While the retrospective competency hearing is a disfavored remedy, once an appellate court remands the case on the grounds that such a hearing be held, the trial court's conclusions as to whether a meaningful hearing can be held should be reviewed under an abuse of discretion standard as if making the determination before trial. *See United States v. Mason*, 52 F.3d 1286, 1289-90 (1995). As for the ultimate issue of defendant's competency to stand trial, the court's findings of fact on this issue, if supported by "competent evidence," are then conclusive on appeal. *State v. Willard*, 292 N.C. 567, 575, 234 S.E.2d 587, 592 (1977).

We hold the court did not abuse its discretion in making its determination that a meaningful competency hearing could be held. Despite the passing of three years, before the court were numerous medical records leading up to three days before the 11 May 1998 trial, and testimony of the last examining doctor, Dr. Rollins. Additionally, having the original trial judge conduct the retrospective competency hearing would benefit a meaningful hearing due to his familiarity with the parties and issues.

Furthermore, we conclude there is "competent evidence" that defendant was competent throughout his trial beginning 11 May 1998. There is a significant and undisputed quantum of evidence that during the times defendant was on an antipsychotic medication, he was found competent by Dr. Rollins and Dr. Wolfe: on 7 April 1997 (Dr. Rollins); on 6 April 1998 (Dr. Wolfe); on 27 April 1998 (Dr. Wolfe); and on 6 & 8 May 1998 (Dr. Rollins). Defendant's competency did not necessarily fluctuate as defendant argued in his brief. Dr. Rollins' testimony and the record show defendant's competency was actually constant so long as he remained on his medication. While at the end of the Haldol medication's approximate coverage term (4 weeks), defendant was under the antipsychotic medication at all times during the second trial. *See State v. Buie*, 297 N.C. 159, 160-61, 254 S.E.2d 26, 27-28, *cert. denied*, 444 U.S. 971, 62 L. Ed. 2d 386 (1979) (where our Supreme Court held that the fact defendant was competent to stand trial only as a result of taking medication for paranoid schizophrenia did not change the result of his competency).

Defendant also argues that Dr. Rollins' 6 and 8 May 1998 exams were cursory, and put on the testimony of Dr. Nathan Strahl in support of this. However, Dr. Rollins' experience and his evaluation was

based on the six previous evaluations of defendant that had been conducted by both Dr. Wolfe and him.

Finally, courts often look to whether the defense attorney has disputed competency before trial as evidence of competency. Because defense counsel is usually in the best position to determine that the defendant is able to understand the proceedings and assist in his defense, it is well established that significant weight is afforded to a defense counsel's representation that his client is competent. *See United States v. Morgano*, 39 F.3d 1358, 1374 (7th Cir. 1994); *United States v. Teague*, 956 F.2d 1427, 1432 (7th Cir. 1992). At the 11 May 1998 trial, defendant's counsel raised no question of his competency, thus presenting defendant as competent. We hold this to be "competent evidence" supporting the trial judge's determination that defendant was competent during the 11 May 1998 trial.

Therefore, the trial judge faithfully carried out the first order from this Court, and did not abuse its discretion for finding that a meaningful competency hearing could still be held. Furthermore, there is evidence of record to support the finding of competency.

IV. 7 June 2001 Retrospective Competency Hearing

[4] Defendant next contends that the trial court erred in when it found that defendant was competent to proceed at the 7 June 2001 retrospective competency hearing. Additionally, he argues the court erred in proceeding with the hearing without the presence of defendant, violating his constitutional and statutory rights. We disagree.

The applicable statute for determining competency is N.C. Gen. Stat. § 15A-1001(a) (2003), the purpose of which is to determine whether defendant is or was capable to stand trial. Our Supreme Court has held that these hearings "[do] not implicate defendant's confrontation rights and [do] not have a substantial relation to his opportunity to defend." *Davis*, 349 N.C. at 18, 506 S.E.2d at 464. Therefore, whether or not defendant was competent at the 7 June 2001 retrospective competency hearing does not implicate his constitutional or statutory rights.

Pursuant to *Davis*, we overrule this assignment of error.

V. Competency based on Evidence Preceding the Second Trial

[5] Defendant next argues that the trial judge did not follow the mandate of this Court when he found defendant was competent to stand

trial on 11 May 1998, but did not make such a determination as to the entire trial. We disagree.

In our remand order, this Court stated:

> [W]e remand this case for a hearing to determine the defendant's competency at the time of trial, pursuant G.S. 15A-1002. If the trial court determines that a retrospective determination is still possible, the court should review the evidence which was before it *preceding defendant's second trial*, to wit, any psychiatric evaluations and presentations by counsel. If the trial court concludes from this retrospective hearing that defendant was competent at the time of trial, no new trial is required.

McRae I, 139 N.C. App. at 394, 533 S.E.2d at 562 (emphasis added). This was ordered because a trial judge is required to hold a competency hearing when there is a *bona fide* doubt as to the defendant's competency. *Meeks*, 512 F. Supp. at 338.

The *bona fide* doubt in this case requiring the trial court to hold the competency hearing was due to the evidence of the temporal nature of defendant's competency and his unwillingness to take his medication. All of this evidence came before defendant's second trial. The only evidence that defendant may not have been competent during the second trial was that he was due for another injection of Haldol on the last day of trial, 14 May 1998. We hold that this conjecture, without more, does not raise a *bona fide* doubt that would require the trial judge to include in his competency hearing a determination of defendant's competence throughout the entire trial. Defendant offered no evidence to bolster the conjecture that his medication had worn off before the end of the second trial.

We remanded the case to determine competency upon the evidence where the *bona fide* doubt actually existed. Thus, we held the trial court had not reacted properly to the evidence "preceding defendant's second trial." We did not order a finding of defendant's competency during the trial as no evidence of incompetence during the second trial was offered. *McRae I*. When there is no evidence beyond conjecture of a defendant's incompetency during trial, we hold that a finding of defendant's competency at the commencement of the trial is sufficient for showing he was competent throughout the trial.

The trial judge correctly followed the mandate of our remand order, and properly considered the evidence of defendant's compe-

tency at the time of trial. Thus, we overrule all assignments of error as to this argument.

VI. Order Entered Out of Term and Out of Session

[6] In his last contention, defendant argues that, because the trial judge's order was entered out of term and out of session on 31 August 2002, a year after the retrospective competency hearing adjourned, the order is null and void. Under the circumstances of this case, we disagree.

In *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984), our Supreme Court stated that

> "judgments and orders substantially affecting the rights of parties to a cause pending in the Superior Court at a term must be made in the county and at the term when and where the question is presented, and . . . except by *agreement of the parties* or by reason of some express provision of law, they cannot be entered otherwise, and assuredly not in another district and without notice of the parties interested."

Id. at 287, 311 S.E.2d at 555 (emphasis added) (quoting *State v. Humphrey*, 186 N.C. 533, 535, 120 S.E.2d 85, 87 (1923)). An "agreement of the parties" may be one of implied consent reasonably deduced from the circumstances of the case. *State v. Abney*, 318 N.C. 412, 348 S.E.2d 813 (1986).

Though not an issue under mandate by the previous opinion of this Court, the defendant's counsel, in his closing argument of the retrospective competency hearing, argued that defendant had unconstitutionally been forcibly injected with Haldol. Defendant argued:

> And the court can look at that, I think, sua sponte if you care to. And I'm going to ask the court to address that issue in this case about whether or not he was forcible medicated[.]

And then, just before finishing his closing statement, defendant offered to the court a United States Supreme Court case on the issue, stating:

> Schizophrenia has negative symptomatology, Your Honor. And that's hard to identify. Judge, I've got the case for you in dealing with the injection issue. It's Riggins versus Nevada. Again, a long case. But I would certainly ask, Judge, if you would review this case—

(Document tendered to the Court.)

Mr. Goodwin: —prior to making any ruling on these matters.

We hold defendant, raising a new constitutional issue in his closing statement for which he tendered an extensive United States Supreme Court opinion, impliedly consented to the trial judge issuing an order out of term and out of session. Therefore, we find the trial court's order valid and in effect.

After a close reading of the briefs, the record, and the transcript, we conclude that the trial judge followed the mandate of this Court without error.

No error.

Judge WYNN concurs.

Judge TIMMONS-GOODSON concurs in the result with separate opinion.

TIMMONS-GOODSON, Judge, concurring in the result.

I agree with the majority's conclusion that the trial court did not err in its decision to hold a retrospective competency hearing or its conclusion that defendant was competent at his 11 May 1998 trial. However, because this case involves the Court's first opportunity to focus on retrospective competency hearings and their requirements, I write separately to emphasize the inherent difficulties associated with retrospective competency hearings and to distinguish this case from those cases where the decision to hold a retrospective competency hearing would be in error.

As the majority points out, in our first inquiry into this matter, we remanded the case to the trial court, whom we concluded was in the best position to determine whether "a meaningful hearing on the issues of the competency of the defendant at the prior proceedings [was] still possible." *State v. McRae*, 139 N.C. App. 387, 392, 533 S.E.2d 557, 561 (2000). I believe the difficulties in making such a determination should not be underestimated. Trial judges in this state try hundreds of different cases involving hundreds of different criminal defendants each year and thousands of cases involving thousands of different criminal defendants over the course of their term. Therefore, recollecting with certainty the competence of one particu-

lar defendant tried several years ago is a monumental task, ripe with inherent difficulties that have been repeatedly noted by the United States Supreme Court and other courts in this country. *See, e.g., Drope v. Missouri*, 420 U.S. 162, 183 (1975); *Pate v. Robinson*, 383 U.S. 375, 387 (1966); *Dusky v. United States*, 362 U.S. 402, 403 (1960); *McGregor v. Gibson*, 248 F.3d 946, 963 (10th Cir. 2001); *Lafferty v. Cook*, 949 F.2d 1546, 1556 (10th Cir. 1991), *cert. denied*, 504 U.S. 911 (1992).

In the case *sub judice*, the trial court was asked to determine the competence of a defendant indicted and tried for murder four years earlier and again tried two years earlier. In September 2002, when the trial court issued its order regarding defendant's competence at trial, the relevant trial had taken place over four years earlier. In *Lafferty*, the 10th Circuit Court of Appeals held a retrospective hearing impractical because the inherent difficulties of the hearing were aggravated by a six-year delay. 949 F.2d at 1556. Similarly, in *United States v. Roca-Alverez*, 474 F.2d 1274, 1274 (5th Cir. 1973), the 5th Circuit Court of Appeals held that a retrospective competency hearing was impractical because the inherent difficulties of the hearing were aggravated by a two-year delay.

However, the mere passage of time between the trial and a retrospective competency hearing has not been determinative where there has been sufficient evidence made contemporaneous with the trial regarding the defendant's competency. *See* United *States v. Makris*, 535 F.2d 899, 904 (5th Cir. 1976), *cert. denied*, 430 U.S. 954 (1976) (two-and-one-half years between trial and retrospective competency hearing); *Bruce v. Estelle*, 536 F.2d 1051, 1057 (5th Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977) (nine years between trial and retrospective competency hearing); *Conner v. Wingo*, 429 F.2d 630, 637 (6th Cir. 1970), *cert. denied*, 406 U.S. 921 (1972) (four-and-one-half years between trial and retrospective competency hearing). In *Bruce*, the 10th Circuit Court of Appeals held that "[a] reliable reconstruction of petitioner's mental status [at the time of trial] depends less on time than on the state of the record. Especially where medical information substantially contemporaneous to trial is available, the chances for an accurate assessment increase." 536 F.2d at 1057 (citing *Holloway v. United States*, 343 F.2d 265 (D.C. Cir. 1964)); *See United States v. Mason*, 52 F.3d 1286, 1293 (4th Cir. 1995).

In the case *sub judice*, I believe there was substantial evidence made contemporaneous to trial that was available to the trial court

when it made its determination to proceed with the retrospective competency hearing. As the majority points out, the trial court had before it numerous records from defendant's examiners leading up to three days before trial. The trial court could also consider the testimony of four examining doctors, including defendant's last examining doctor, Dr. Robert Rollins. Finally, the trial court judge could properly consider the recollections of non-experts as well as his own observations, because even non-experts "had the opportunity to interact with defendant during the relevant period [and] may in some instances provide a sufficient base upon which a factfinder may rest decision that even a belated determination will be accurate." *Makris*, 535 F.2d at 905.

While I agree with the decision today, I write separately to underscore the critical significance the sufficiency of the trial court record had upon my conclusion that the trial court acted properly in proceeding with the retrospective competency hearing. As noted *supra*, the time between the trial and the retrospective competency hearing becomes critical where the record of a defendant's competency contemporaneous with trial is deficient. Therefore, where a retrospective competency hearing and determination is based upon "conflicting reports, a cold, sparse record, and the recollection of those who saw and dealt with [defendant] . . . years ago," that hearing will be a "wholly inadequate substitute" for a concurrent hearing, and its determination will be reversed. *Silverstein v. Henderson*, 706 F.2d 361, 369 (2nd Cir. 1983), *cert. denied*, 464 U.S. 864 (1983) (citations omitted). However, because the quality of the record before the trial court when the competency determination was made in the case *sub judice* was substantial and allowed a detailed inquiry into defendant's competence on 11 May 1998, I feel that the retrospective competency hearing was an adequate substitute for the concurrent hearing provided by N.C. Gen. Stat. § 15A-1002 (2003). Therefore, I conclude that the trial court did not err in its decision to hold a retrospective competency hearing or its conclusion that defendant was competent at his 11 May 1998 trial.

STATE OF NORTH CAROLINA v. DARREN WILLIAM DENNISON, DEFENDANT

No. COA02-1512

(Filed 6 April 2004)

1. Appeal and Error— preservation of issues—introduction of character evidence

Defendant preserved an evidence issue for appeal where his pre-trial motion in limine was granted; he objected at trial when the prosecutor raised the subject on cross-examination; the basis of his assignment of error was the same as the argument at trial; he moved that the testimony be stricken; and he moved for a mistrial.

2. Evidence— prior acts of violence—door not opened by defense

Testimony about unrelated prior acts of violence against a former girlfriend was erroneously admitted and prejudicial in defendant's prosecution for first-degree murder in a bar fight. The defense's testimony was limited to defendant's actions and state of mind on the night in question and did not open the door, nor did testimony that defendant was not the initial aggressor in the bar fight. Testimony elicited by the State on cross-examination does not open the door because it is not testimony offered by the defendant. Finally, there was prejudice in the incendiary nature of the evidence and the emphasis it received.

Judge TIMMONS-GOODSON dissenting.

Appeal by defendant from judgment entered 20 May 2002 by Judge A. Moses Massey in Guilford County Superior Court. Heard in the Court of Appeals 10 September 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Steven M. Arbogast, for the State.

Daniel Shatz for defendant-appellant.

ELMORE, Judge.

Darren William Dennison (defendant) appeals from judgment entered 20 May 2002 consistent with a jury verdict finding him guilty of the first degree murder of Chad Everette Spaul (Mr. Spaul), and the trial court's subsequent imposition of a sentence of life imprisonment

without parole. The underlying facts tend to show that Mr. Spaul died from knife wounds inflicted by defendant during an altercation between defendant and Mr. Spaul outside a bar. Because we conclude that on the facts of this case defendant's right to a fair trial was unfairly prejudiced by the admission of evidence regarding prior acts of violence allegedly perpetrated by defendant upon his former girlfriend, we reverse defendant's conviction and remand for a new trial.

The evidence presented at trial tended to show that on the evening of 21 September 2001, defendant, defendant's girlfriend Melanie Gammons, and Charlene Waller traveled together to the Challenger Sports Bar in High Point, North Carolina. Among those also present at the crowded bar that evening were Delores Vail and her sister Diane Lovern; Lovern's daughter Tracy Boone and Boone's boyfriend, Jeff Peele; and Mr. Spaul and Mr. Spaul's coworker, David Moore.

Waller testified that after she, defendant, and Gammons played two games of a NASCAR-themed board game popular with the bar's patrons, they stepped outside along with Vail, and that Moore, whom she did not know, then approached the group and "got in [her] face." Waller briefly went back inside the bar with Vail, only to re-emerge after Moore followed them inside. Waller testified that when she and Vail exited the bar the second time, they went around to the side of the building, where they encountered Michael Crane, and that they were soon joined there by defendant, Gammons, and Moore. Several witnesses testified that Moore had been trying unsuccessfully throughout the evening to speak with Vail, with whom he had been romantically involved several years earlier, and Waller testified that Moore was continuing to do so at this point.

According to the testimony of various witnesses, Mr. Spaul then came outside the bar and approached the group, just as a visibly upset Moore was walking away, and Mr. Spaul and Moore spoke briefly outside the hearing of the others before Moore re-entered the bar. Lovern, who had by this time stepped outside the bar, testified that Mr. Spaul then began "arguing and carrying on with . . . mostly [Gammons] and [Waller] . . . but he was trying to start with [defendant]." Waller and Lovern each testified that Mr. Spaul then began calling defendant "faggot," "fag," and "queer." At that point, defendant, Gammons, Waller, and Crane walked back around to the front of the building in an attempt to get away from Mr. Spaul, who followed the group and continued to call defendant names. The

group moved three or four times to various locations around the building in an effort to defuse the situation, but Mr. Spaul continued to follow the group and continued to behave belligerently towards defendant. Lovern, Moore, and the bar's owner each tried, to no avail, to get Mr. Spaul to desist.

According to Waller, Mr. Spaul then briefly re-entered the bar, but shortly thereafter he emerged with a bottle of beer and resumed calling defendant a "faggot." Mr. Spaul exchanged words with Waller and Gammons and then stated that he was going to hit Crane, who was standing next to defendant. According to the testimony of Waller, Lovern, and Peele, each of whom witnessed this portion of the fatal confrontation between defendant and Mr. Spaul, Mr. Spaul first struck Crane, and then defendant, in rapid succession with his fist, causing Crane to fall to the ground and defendant to be knocked down and against a post. Waller testified that after Mr. Spaul hit Crane and defendant, she ran into the bar to get help. Lovern testified that when "[defendant] got up, he went to swinging" at Mr. Spaul, at which point she "was pushed out of the way, and that's all [she] saw" until she turned back around and saw Mr. Spaul on the ground "and a lot of blood." Lovern's testimony was generally corroborated by that of Peele. Defendant was six feet, two inches tall and weighed approximately 215 pounds at the time, while Mr. Spaul was five feet, eleven inches tall and weighed approximately 165 pounds. Both defendant and Mr. Spaul had been drinking before the altercation.

Dr. Thomas Clark, the forensic pathologist who performed Mr. Spaul's autopsy, testified that Mr. Spaul suffered eight sharp-force injuries inflicted with a knife. The most significant wound went "across the middle of the body and the right side of the neck . . . [and] cut both of the carotid arteries," which, in Dr. Clark's opinion, caused Mr. Spaul to bleed to death. None of the other seven wounds were as significant, and several were described as "superficial" by Dr. Clark. In Dr. Clark's opinion, all of Mr. Spaul's injuries could not have been inflicted by a single swing of a knife, although some of the wounds were on a linear track.

Defendant testified at trial and admitted cutting Mr. Spaul with a knife he regularly carried, but only after Mr. Spaul repeatedly called defendant names, followed defendant around outside the bar when defendant tried to avoid confrontation, and eventually struck defendant in the head. Defendant testified he "believe[d he] was hit with a beer bottle," but neither defendant nor any other witness testified that they actually saw Mr. Spaul wield a beer bottle when he struck

defendant. Defendant testified that as Mr. Spaul was attempting to strike him a second time, defendant pulled his knife out of his pocket and pushed upward with the knife, cutting Mr. Spaul. Defendant testified that he "did not mean to kill [Mr. Spaul]," but rather that he "meant . . . to cut [Mr. Spaul] to get him off of me."

Defendant, Gammons, and Waller then got in Waller's car and left the scene. Defendant testified that he left because he was scared of Moore, who upon seeing Mr. Spaul prone and bleeding profusely threatened to kill defendant, and beat on Waller's car as the car pulled out of the parking lot. Defendant, Gammons, and Waller proceeded to Waller's home, where defendant showered and changed his clothes, which were stained with Mr. Spaul's blood. Defendant testified that because he feared the police would find him at Waller's house, the group was then driven to a motel by a third person, at which point defendant telephoned the bar and was informed that Mr. Spaul was dead. After contacting the High Point police department, defendant turned himself in at 5:00 p.m. the following afternoon.

On cross examination at trial, the following exchange took place, with no objection from defendant:

Q. Mr. Dennison, do you consider yourself to be even-tempered?

A. Yes.

Q. You don't consider yourself to be hot-tempered?

. . . .

A. As to me, hot-tempered means extremely hot.

Q. So the answer to that is yes or no?

A. No.

Q. Do you get easily agitated, Mr. Dennison?

A. Not easily agitated[.]

. . . .

Q. Do you consider yourself to be a person of violence?

A. No.

. . . .

Thereafter, over defendant's objection, the prosecutor was allowed to question defendant about acts of violence allegedly perpe-

trated by defendant upon his ex-girlfriend Melanie Tellado in 2001. Defendant admitted being "mad at [Tellado] because she was screwing around on me" and acknowledged arguing and fighting with Tellado at times. Defendant specifically denied punching out the right driver's side window of Tellado's car and striking her in the head in March 2001, although he testified that Tellado sought medical attention that night for cuts suffered when she tried to roll up her car window on his hand and the glass shattered. Defendant also denied attacking Tellado with a knife or holding her at knifepoint in her apartment in January 2001, although he admitted kicking in the door to her apartment on one occasion around that time and being present in her apartment when Tellado called the police on another occasion.

In its case in rebuttal, the State called Tellado, who testified that on three occasions she sought medical attention as a result of being hit by defendant. Tellado testified that on one such occasion, defendant hit her, and that "[w]hen [the police] came to the door, [defendant] put a knife to [her] throat and told [her] that if [she] told them that he was there, that he would kill [her]." According to Tellado, the knife defendant put to her throat on that occasion was the same knife defendant used to kill Mr. Spaul. Tellado testified that on another occasion she sought treatment for cuts and scratches to her face suffered when defendant shattered her car window, reached inside, and grabbed her around the neck. Finally, Tellado testified that defendant once kicked down the door to her apartment after becoming angry at her for leaving town. The trial court denied defendant's motion to strike Tellado's testimony.

Defendant moved to dismiss the charges against him at the close of the State's evidence and again at the close of all evidence; each motion was denied. Prior to the jury charge, defendant moved for a mistrial based on the improper admission of evidence concerning defendant's character, which motion was also denied. The jury subsequently returned a verdict finding defendant guilty of first-degree murder, and the trial court sentenced defendant to life imprisonment.

On appeal, defendant contends the trial court committed prejudicial error by allowing the State to present evidence of defendant's alleged prior acts of violence towards Tellado, his former girlfriend, arguing that such testimony constituted inadmissible character evidence under Rules 404 and 405(b) of our statutes. We agree.

[1] First, we note that defendant has properly preserved this issue for appellate review. The trial court granted a pre-trial motion *in lim-*

ine filed by defendant's trial counsel, which precluded the State from presenting evidence concerning defendant's alleged acts of violence towards Tellado during its case in chief. Moreover, defendant's trial counsel interposed a timely objection as soon as the prosecutor, on cross examination, began to question defendant about his alleged conduct regarding Tellado. Defendant's trial counsel thereafter argued vigorously that this evidence should be excluded, on the same grounds defendant's appellate counsel now cites as the basis for this assignment of error. While defendant's trial counsel did not initially object to Tellado's direct testimony, at the conclusion of her testimony he moved to strike her entire testimony as impermissible character evidence. Finally, defendant's trial counsel moved for a mistrial based on the admission of the evidence which is the basis of this assignment of error. Based on the foregoing, we conclude that this issue has been properly preserved for appellate review. *See* N.C.R. App. P. 10(b)(1) (2004) ("Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal . . . may be made the basis of an assignment of error in the record on appeal.")

[2] Regarding the admissibility of character evidence, Rule 404(a) provides as follows:

> (a) *Character evidence generally.*—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:
>
> (1) *Character of accused.*—Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
>
> . . . .

N.C. Gen. Stat. § 8C-1, Rule 404(a) (2003). "Such character evidence is admissible when the *defendant* has first 'opened the door' to a pertinent trait of his character." *State v. Stafford*, 150 N.C. App. 566, 571, 564 S.E.2d 60, 63 (2002), *cert. denied*, 357 N.C. 169, 581 S.E.2d 444 (2003) (emphasis added).

In the case *sub judice*, the State contends that defendant "opened the door" to admission of evidence regarding his character for violence "by the manner that he sought to portray himself during the defense case." Specifically, the State asserts that testimony by defendant and his witnesses tending to portray defendant as "calm,

level-headed, and doing everything he could to avoid a confrontation" with Mr. Spaul on the night in question constituted evidence of a pertinent trait of defendant's character, offered by *defendant*, which the State was authorized under Rule 404(a)(1) to rebut by presenting evidence of defendant's allegedly violent character.

After carefully reviewing the trial transcript, other record evidence, and arguments of the parties, we conclude that the evidence regarding defendant's alleged prior violent acts against his former girlfriend was not properly admitted under Rule 404(a). As noted above, Rule 404(a)(1) permits the prosecution to present evidence concerning the defendant's character only *after* the defendant has first interjected his character into the proceedings by offering his own evidence tending to show defendant possesses a certain character trait. N.C. Gen. Stat. § 8C-1, Rule 404(a)(1); *Stafford*, 150 N.C. App. at 571, 564 S.E.2d at 63. In the present case, the testimony of defendant and the several other defense witnesses was strictly limited to defendant's actions and state of mind *on the night in question*. While much of this testimony focused on defendant's initial unwillingness to respond belligerently to Mr. Spaul's taunts and defendant's attempts to avoid a confrontation with Mr. Spaul by repeatedly walking away, we do not find any instance where defendant interjected his character into the proceedings by proffering testimony tending to show he possessed a generally peaceful or non-violent disposition. To the contrary, before introducing into evidence Waller's statement to the police, defendant's trial counsel carefully redacted the statement to remove all references to defendant's general character traits.

We find unpersuasive the State's argument that by presenting testimony tending to show that defendant was not the initial aggressor in his confrontation with Mr. Spaul, defendant "opened the door" under Rule 404(a) for the prosecution to offer evidence of defendant's violent character. *See State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12 (2000) ("[d]efendant placed his character at issue by having members of his family testify about his reputation for nonviolence or peacefulness.") We also conclude that while defendant, on cross examination, answered in the negative the prosecutor's queries as to whether defendant considered himself to be "hot-tempered," "easily agitated," or "a person of violence," this testimony did not suffice to interject defendant's character into the trial proceedings. Because defendant's testimony in this regard was elicited by the State, we hold that it was not character evidence "offered by an accused" such that it would "open the door" under Rule 404(a)(1) for the State to intro-

duce its own character evidence in rebuttal. N.C. Gen. Stat. § 8C-1, Rule 404(a)(1); *State v. Gappins*, 320 N.C. 64, 70, 357 S.E.2d 654, 658 (1987) ("In the present case, the defendant put his character in issue by having witnesses testify concerning his reputation for peacefulness . . . . Only then did the prosecutor . . . cross examine the witnesses about specific instances of conduct by the defendant, in an effort to rebut their prior testimony as to the defendant's character for peacefulness.")

Nor are we persuaded by the State's argument that evidence regarding defendant's alleged prior acts of violence towards his former girlfriend was properly admitted under Rule 404(b), which provides as follows:

> (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. . . .

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). We do not discern sufficient similarities in the circumstances surrounding Mr. Spaul's death and those surrounding defendant's violent acts allegedly directed towards Tellado to render evidence regarding the latter admissible for any purpose sanctioned by Rule 404(b).

Finally, we do not agree with the State's assertion that this evidence was properly admitted under Rule 405(b), which provides that "[i]n cases in which character or a trait of character or a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct." N.C. Gen. Stat. § 8C-1, Rule 405(b) (2003). Defendant maintained at trial that he used a knife in striking Mr. Spaul because he felt it was necessary to do so in order to defend himself from Mr. Spaul, whom defendant testified he believed had just struck him in the head with a beer bottle. In *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986), our Supreme Court found error in the admission of testimony regarding a first-degree murder defendant's prior assaultive behavior towards a person other than the victim where the defendant claimed he acted in self-defense, stating as follows:

> The proper inquiry in a self-defense claim focuses on the reasonableness of defendant's belief as to the apparent necessity for,

> and reasonableness of, the force used to repel an attack upon his person. The fact that defendant may have pointed a gun at another person sometime in the past, without more, has no tendency to show that the defendant did not fear [the victim] or to make the existence of his belief as to the apparent necessity to defend himself from an attack "more or less probable than it would be without the evidence."

Morgan, 315 N.C. at 639, 340 S.E.2d at 92; *accord*, *State v. Mills*, 83 N.C. App. 606, 351 S.E.2d 130 (1986). We therefore conclude that since raising a self-defense claim does not interject a defendant's character into the proceedings, and a defendant's character is not an essential element of a self-defense claim, admission of the challenged evidence in the instant case was not justified under Rule 405(b).

Having concluded that the trial court erred by admitting evidence of defendant's alleged violent acts towards Tellado, we must now determine whether defendant was prejudiced by the error. A non-constitutional error is deemed prejudicial "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Maske*, 358 N.C. 40, 50, 591 S.E.2d 521, 528 (2004) (quoting N.C. Gen. Stat. § 15A-1443(a) (2003)).

In the present case, the State elicited testimony concerning defendant's violent acts toward Tellado both by questioning defendant about them on cross examination, and by calling Tellado as a rebuttal witness. Tellado testified that on three separate occasions during and immediately after their six-month courtship, defendant damaged both her car and her home and struck her with sufficient force that she had to go to the hospital. The prosecutor referred to defendant's prior bad acts regarding Tellado three times in his closing argument, including one occasion where he stated "You saw how [defendant] acted with Melanie Tellado in their relationship." We conclude that on these facts, as in *State v. Mills*, 83 N.C. App. 606, 351 S.E.2d 130 (1986), "[d]ue to the incendiary nature of the evidence improperly admitted, and the emphasis placed on that evidence at trial, we find that its admission was prejudicial error requiring a new trial."

Because we hold that, on these facts, the admission of evidence of defendant's violent acts toward his former girlfriend was prejudicial error requiring a new trial, we need not address defendant's remaining assignments of error.

New trial.

Judge HUDSON concurs.

Judge TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge, dissenting.

Because I conclude that the trial court did not err in allowing the prosecution to cross-examine defendant with specific bad acts and elicit testimony from defendant's former girlfriend, I respectfully dissent.

"A criminal defendant is entitled to introduce evidence of his good character [on direct], thereby placing his character at issue. The State in rebuttal can then introduce evidence of defendant's bad character." *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12, *cert. denied*, 531 U.S. 1019 (2000). As the Court stated in *State v. Gappins*, 320 N.C. 64, 69-70, 357 S.E.2d 654, 658 (1987), Rule 404(a)(1) limits the admission of character evidence introduced on direct to "pertinent traits" of character. However, in contrast to the common law, Rule 405(a) specifically allows the prosecutor to cross-examine a witness concerning relevant and specific instances of the defendant's conduct when rebutting character evidence. *Id.* at 70, 357 S.E.2d at 658.

In *Gappins*, the Court concluded that the defendant's "reputation for peacefulness" was "a pertinent trait of his character" in a murder trial. *Id.* After "character witnesses testified concerning the defendant's reputation for peacefulness, the prosecutor asked the witnesses on cross examination whether they had heard or knew about certain instances including acts of domestic cruelty and rowdy and abusive conduct by the defendant when he was drinking." *Id.* at 69, 357 S.E.2d at 658. The Court held that these questions were permissible under the Rules of Evidence. *Id.*

Similarly, in *State v. Garner*, 330 N.C. 273, 289-90, 410 S.E.2d 861, 870 (1991), the defendant "put his character into evidence" by "paint[ing] a picture of himself as a level-headed, peaceful individual who constantly was fending off verbal and physical attacks from the victim." The Court concluded that it was proper for the prosecution to cross-examine defendant "concerning this 'pertinent' trait of character," and the Court held that the trial court did not err in allowing

the prosecution to elicit details of the defendant's prior assault convictions. *Id.* at 290, 410 S.E.2d at 870.

As the Court noted in *Garner*, these holdings are "consistent with two other well-established principles of law." 33 N.C. at 290, 410 S.E.2d at 870. In *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981), a pre-Rules case, the Court stated:

> [T]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.

(citations omitted). In *State v. Warren*, 327 N.C. 364, 373, 395 S.E.2d 116, 121-22 (1990), the Court stated:

> Generally, much latitude is given counsel on cross-examination to test matters related by a witness on direct examination. The scope of cross-examination is subject to two limitations: (1) the discretion of the trial court; and (2) the questions offered must be asked in good faith. Furthermore, the questions of the State on cross-examination are deemed proper unless the record discloses that the questions were asked in bad faith.

(citations omitted).

Therefore, where a defendant in a murder case presents evidence that he is peaceful or has a nonviolent disposition, that evidence goes to a "pertinent trait" of his character. The door is thus deemed "open" to the prosecution, which may introduce its own character evidence on cross to rebut the defendant's evidence.

In the case *sub judice*, defendant's witnesses "painted [him] as calm, level-headed, and doing everything he could to avoid a confrontation, reacting to [the victim's] provocations with logic and a lack of concern." Defendant also presented evidence that he "don't like this stuff," and that he is "not into [fighting]." Therefore, defendant introduced evidence concerning a "pertinent trait" of his character and thus opened the door for rebuttal by the prosecution.

Nevertheless, the majority argues that the evidence was strictly limited to the state of mind of defendant "*on the night in question.*"

(emphasis in original). However, our Supreme Court has allowed the prosecution to rebut a favorable inference established by a defendant on direct with specific evidence of its own during cross-examination. *State v. Bullard*, 312 N.C. 129, 157-58, 322 S.E.2d 370, 386 (1984). In the case *sub judice*, even if defendant's witnesses were asked only about defendant's character on the evening of the murder, the impression these questions created in the minds of the jury is not so limited. Instead, the clear inference from the testimony is that defendant possesses a peaceful character. Furthermore, even if the majority's argument is accepted, "[t]he admission of relevant evidence is left to the sound discretion of the trial court." *State v. Hall*, 134 N.C. App. 417, 427, 517 S.E.2d 907, 914 (1999), *disc. review denied*, 351 N.C. 364, 542 S.E.2d 647 (2000), *cert. denied*, 531 U.S. 1085 (2001). Additionally, a trial court's evidentiary ruling should be overturned "only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted).

Considering the discretion granted to the trial court in ruling on evidentiary issues, in the case *sub judice*, the trial court's decision to allow the prosecution to cross-examine defendant with specific bad acts and elicit testimony from defendant's former girlfriend was correct. The ruling was not "so arbitrary it could not have been the result of a reasoned decision." *Id.* Given the testimony of defendant's witnesses and the logical inferences created therein, the trial court was reasonable in believing that defendant was attempting to paint himself as a peaceful and nonviolent individual—a pertinent character trait in a murder trial with self-defense undertones. Therefore, the defendant opened the door to cross-examination and rebuttal by the prosecution, and the trial court did not err in allowing the prosecution to rebut defendant's evidence with specific bad act evidence of its own.

Accordingly, I dissent from the majority opinion.

FINANCIAL SERVICES OF RALEIGH, INC., PLAINTIFF v. ROSSIE DARRELL BAREFOOT AND ROSSIE KEITH BAREFOOT, CO-EXECUTORS OF THE ESTATE OF ROSSIE B. BAREFOOT; ADA MAE BAREFOOT; ROSSIE KEITH BAREFOOT, INDIVIDUALLY; AND ROSSIE DARRELL BAREFOOT, INDIVIDUALLY, DEFENDANTS

No. COA02-1665

(Filed 6 April 2004)

1. Judges— questions to parties—ex parte

Trial judges who have taken a motion under advisement should take care to pose questions to the parties jointly to ensure that no ex parte communications occur.

2. Compromise and Settlement— settlement in prior action—scope

Summary judgment was properly granted for defendants in an action arising from a family real estate matter where there had been a settlement and release which encompassed all claims arising from the original conveyance and which had language broad enough to include claims then unknown.

3. Real Estate— conveyance—family transaction—deceased father—summary judgment for brothers

The trial judge correctly granted summary judgment for defendants sued in their individual capacities rather than as executors in a family real estate action matter. There was no theory or evidence of any wrongdoing by the defendants (as opposed to their deceased father), and any claim of reformation is barred by the settlement in a prior action.

Appeal by plaintiff from judgment entered 22 July 2002 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 17 September 2003.

Narron, O'Hale & Whittington, P.A., by O. Hampton Whittington, Jr. and E. Scott Tart, for plaintiff-appellant.

Mast, Schulz, Mast, Mills, Stem & Johnson, P.A., by George B. Mast and Bradley N. Schulz, for defendants-appellees.

GEER, Judge.

The question presented by this appeal is whether a settlement agreement releasing "all claims of any kind" arising out of a conveyance of real property bars subsequent claims of fraud, unfair and

deceptive trade practices, negligent misrepresentation, and mutual mistake in connection with that conveyance. We hold that it does and that the trial court properly granted defendants' motion for summary judgment.

Facts

This appeal arises out of an ongoing family dispute. By deed dated 30 December 1993, the late Rossie B. Barefoot, his wife, Ada Mae Barefoot, and their company Property Investors, Inc. ("the Barefoots") conveyed several tracts of land to Financial Services of Raleigh, Inc. ("FSR") for $400,000.00. FSR is a North Carolina corporation whose primary shareholder and chief executive officer is Ruth B. Thompson, Rossie B. Barefoot's daughter. Included in the properties conveyed to FSR was a tract of land in Benson, North Carolina on which was located a warehouse ("the warehouse property"). The deed contained a metes-and-bounds description of this property and stated that it comprised 1.85 acres.

On 1 November 1995, the Barefoots sued FSR, alleging that prior to the conveyance of the properties to FSR, FSR had agreed to take title only in trust for the Barefoots, to manage and/or sell the properties, to apply any proceeds from the sale of the properties to a mortgage on the properties, and to deed any remaining properties back to the Barefoots upon request. According to the Barefoots' 1995 complaint, FSR refused to reconvey the remaining properties to the Barefoots when requested to do so. The Barefoots' complaint sought specific performance of the alleged agreement to reconvey all remaining properties upon request. FSR filed an answer and counterclaims alleging that the Barefoots' actions in connection with the properties at issue, including the warehouse property, constituted unfair and deceptive trade practices, abuse of process, and slander of title. FSR's counterclaims attached a metes-and-bounds description of each of the properties involved in the counterclaims, including a description of the warehouse property.

On 6 February 1997, Judge Knox V. Jenkins, Jr. granted summary judgment to FSR on the issue of the ownership of the properties and dismissed the Barefoots' claims. The Barefoots appealed to this Court, which affirmed the entry of summary judgment in *Barefoot v. Financial Servs. of Raleigh, Inc.*, 129 N.C. App. 646, 504 S.E.2d 589 (unpublished), *disc. review denied*, 349 N.C. 351, 517 S.E.2d 885 (1998).

Upon remand, FSR's counterclaims were scheduled for trial during the 24 August 1999 session of Johnston County Superior Court, with Judge Henry W. Hight, Jr. presiding. On 24 August 1999, immediately before trial, the parties entered into a settlement agreement resolving FSR's counterclaims against the Barefoots. The handwritten settlement agreement signed by the parties provided, in pertinent part:

> The parties release one another for [sic] all claims of any kind arising out of the subject matter of this litigation except that FSR's obligations under the note & Rossie Barefoot's rights under the note & deed of trust shall remain in full force & effect.

The settlement agreement was presented to Judge Hight who read it into the record.

Later, in the fall of 1999, the Barefoots moved to enforce the settlement agreement. At the hearing on this motion, FSR claimed it was not bound by the settlement agreement because, in part, of misrepresentations by Rossie Barefoot regarding access to the warehouse property. Judge Donald M. Jacobs allowed the motion to enforce the agreement, entering a judgment filed 22 November 1999 that included the following pertinent findings:

> 4. [The Barefoots] and [FSR] voluntarily entered into an agreement to settle all of the issues pending in this action.
>
> 5. The handwritten settlement agreement was represented by the parties, including [FSR,] to Judge Hight to be a final settlement of all issues pending in this litigation.
>
> 6. The settlement was accepted by Judge Hight as a complete settlement of this litigation.
>
> 7. The handwritten settlement agreement constitutes a valid . . . agreement enforceable by the Judgment of this Court.

The 1999 judgment also expressly incorporated the provisions of the handwritten settlement agreement, stating:

> The parties release one another for [sic] all claims of any kind arising out of the subject matter of this litigation except that defendant's obligations under the Promissory Note and plaintiff Rossie Barefoot's rights under the Promissory Note and Deed of Trust shall remain in full force and effect. This release is only as to the parties to the lawsuit.

There is nothing in the record to indicate that FSR ever appealed from or moved to set aside the 22 November 1999 judgment.

Although FSR had owned the warehouse property since 1993, FSR did not have a survey of the warehouse property performed until the fall of 1999. That survey, which was based on the metes-and-bounds description of the property contained in the 1993 deed and was completed on 30 December 1999, revealed that the warehouse property encompassed less acreage than thought, that the access road for the warehouse property was outside the property boundary, that half of the loading dock on the north side of the warehouse was outside the property boundary, and that the southern boundary line for the warehouse property was too close to the building to allow adequate access to the building. The surrounding property was owned by Rossie Keith Barefoot, another child of the Barefoots, who refused to allow FSR to use his property to obtain access.

On 8 May 2001, FSR initiated the current action against the co-executors of the Estate of Rossie B. Barefoot (Rossie Darrell Barefoot and Rossie Keith Barefoot), Ada Mae Barefoot, Rossie Keith Barefoot individually, and Rossie Darrell Barefoot individually. The complaint alleged claims for fraud, unfair and deceptive trade practices, negligent misrepresentation, and mutual mistake, all in connection with the 1993 conveyance of the warehouse property. FSR sought reformation of the 1993 deed to the warehouse property to include the entrance and exit for the access road, the loading dock, and sufficient land to allow reasonable access to the loading dock and to the south side of the building. Alternatively, FSR requested compensatory damages. Attached to the complaint was the 1993 deed with the same metes-and-bounds legal description of the warehouse property that was attached to FSR's 1995 counterclaims.

Defendants moved for summary judgment. Judge Knox V. Jenkins, Jr. granted defendants' motion based on *res judicata* and on the existence of the signed settlement and release. Plaintiff appeals from the trial court's grant of summary judgment.

Standard of Review

A trial court's ruling on a motion for summary judgment is fully reviewable on appeal because the trial court rules only on questions of law. *Virginia Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). On appeal, this Court's task is to determine whether, on the basis of the materials presented to the trial court, there is a genuine issue

as to any material fact and whether the moving party is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, — N.C. —, 276 S.E.2d 283 (1981). The burden is on the moving party to show that there is no triable issue of fact and that he is entitled to judgment as a matter of law. *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 86, 249 S.E.2d 375, 378 (1978). In deciding the motion, " 'all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.' " *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting 6 James W. Moore, *Moore's Federal Practice* § 56.15[3], at 2337 (2d ed. 1971)).

[1] Our review of the transcript of the summary judgment hearing raises a concern we believe important to mention. At the close of the hearing, the trial judge asked: "If I run into some questions concerning one party or the other, do you have any objection to me calling one party or the other attorney?" The judge noted that he had "done that before." Although both counsel expressed no objection, we are concerned that such a practice risks violation of Canon 3A(4) of the North Carolina Code of Judicial Conduct. That canon provides that "[a] judge should . . . except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding." Questions regarding a pending motion posed to only one party, whether relating to the facts or the governing law, are likely to constitute unlawful *ex parte* communications.

Requesting the attorneys' consent does not alleviate our concern. As the Arizona Supreme Court noted in *McElhanon v. Hing*, 151 Ariz. 403, 409, 728 P.2d 273, 279 (1986), *cert. denied*, 481 U.S. 1030, 95 L. Ed. 2d 529, 107 S. Ct. 1956 (1987):

> The error was not cured by the judge either telling opposing counsel of his intentions or obtaining consent for the *ex parte* contact. Counsel reasonably might feel constrained from objecting to the judge's request for a conference. Canon 3(A)(4) . . . does not permit the judge to solicit a party's consent to the judge's *ex parte* discussions with another party; rather it prohibits the judge from initiating *ex parte* communications about the pending case. In our view, the judge's solicitation of consent is a form of initiation.

We believe that a request that counsel consent to otherwise *ex parte* communications places the attorneys in a very awkward position. If

trial judges, who have taken a motion under advisement, have additional questions, we urge them to take care to pose those questions to the parties jointly in order to ensure that no *ex parte* communications occur.

I

[2] The primary question presented by this appeal is whether FSR's claims are barred by the settlement and release signed 24 August 1999 and incorporated into an unappealed judgment on 22 November 1999. We hold that FSR's claims against Ada Mae Barefoot and the co-executors of the Estate of Rossie B. Barefoot are barred by that settlement and release.

"A release is a private agreement amongst parties which gives up or abandons a claim or right to the person against whom the claim exists or the right is to be enforced or exercised." 66 Am. Jur. 2d *Release* § 1 (2001). Our Supreme Court has described the effect of a settlement and release as follows:

> A completed compromise and settlement fairly made between persons legally competent to contract and having the authority to do so with respect to the subject matter of the compromise, and supported by sufficient consideration, operates as a merger of, and bars all right to recover on, the claim or right of action included therein, as would a judgment duly entered in an action between said persons.

Jenkins v. Fields, 240 N.C. 776, 778, 83 S.E.2d 908, 910 (1954). Therefore, if FSR's current claims fall within the scope of the 1999 release, then FSR is barred from recovering on those claims. *Id.*

There is no dispute that FSR and Rossie B. and Ada Mae Barefoot entered into a mutual release of "all claims of any kind arising out of the subject matter of [the 1999] litigation[.]"[1] Further, FSR does not challenge the validity of the release. Indeed, Judge Jacobs has already upheld the settlement agreement including the release in a decision not appealed by FSR. The question before this Court is, therefore, limited to whether FSR's claims fall within the scope of the release.

FSR first contends that its current claims do not arise "out of the subject matter" of the settled litigation. The term "subject matter" has

1. The release included only a single exception to the broad release: "FSR's obligations under the note & Rossie Barefoot's rights under the note & deed of trust shall remain in full force & effect." That exception is not applicable here.

been defined as "the topic of dispute in a legal matter," *Webster's Third New International Dictionary* 2276 (3d ed. 1968), and "the thing in which a right or duty has been asserted; the thing in dispute," *Black's Law Dictionary* 1438 (7th ed. 1999). Here, "the topic of dispute" or "the thing in dispute" in the settled litigation was the 1993 conveyance of property, including the warehouse property, by the Barefoots to FSR. The release thus encompasses "all claims of any kind arising out of [the 1993 conveyance of property by the Barefoots to FSR]."

FSR's current claims allege that Rossie B. Barefoot, in selling the property in 1993 to FSR, either fraudulently or negligently misrepresented to FSR the boundary lines of the warehouse property. FSR alleges that it would not have purchased the warehouse property but for the misrepresentations of Mr. Barefoot. With respect to the mutual mistake claim, FSR seeks to reform the deed filed in 1993 because of the parties' mistaken understanding in 1993 of the precise boundaries of the property. In short, each of FSR's claims arises out of the conveyance of the warehouse property by the Barefoots to FSR in 1993 and thus each claim falls within the scope of the release.

Alternatively, FSR contends that because it was not aware of the existence of its claims at the time it signed the release, those claims cannot fall within the scope of the release. Citing *Travis v. Knob Creek, Inc.*, 321 N.C. 279, 283, 362 S.E.2d 277, 279 (1987), FSR contends that there was no bar because the release did not include "future claims or existing non-asserted rights."

In *Travis*, our Supreme Court expressed the "general rule" regarding the scope of a release:

> "A release ordinarily operates on the matters expressed therein which are already in existence at the time of the giving of the release. Accordingly, demands originating at the time a release is given or subsequently, and *demands subsequently maturing or accruing, are not as a rule discharged by the release unless expressly embraced therein or falling within the fair import of the terms employed.*"

Id. at 282, 362 S.E.2d at 279 (quoting 76 C.J.S. *Release* § 53 (1952); emphasis original). In *Travis*, the plaintiff, an employee and stockholder of defendant Knob Creek, had signed a general release in connection with the sale of Knob Creek's stock to defendant Ethan Allen. Four years later, the plaintiff's employment was terminated. The

Court held that the release did not bar the plaintiff's claim for breach of his employment contract because, at the time he signed the release, he "neither had a cause of action nor had he asserted a legal right to continue working for Knob Creek." *Id.* at 283, 362 S.E.2d at 279. The Court reasoned that a release of "all claims" is a release of "then existing or matured causes of action." *Id.*

In *Sims v. Gernandt*, 341 N.C. 162, 459 S.E.2d 258 (1995), the Supreme Court explained that *Travis* applied when, at the time of the signing of the release, a potential defendant's "obligations had not yet fully matured or accrued." *Id.* at 165, 459 S.E.2d at 260. In *Sims*, the Court affirmed a grant of summary judgment based on a release because "[a]ny responsibility of defendant to plaintiff was already in existence at the time plaintiff signed the document and was therefore released by that document." *Id.*

Travis and *Sims* reflect the general rule that "a general release cannot be held to bar a claim which did not exist when it was signed." 76 C.J.S. *Release* § 67, at 619 (1994). In deciding whether a claim not asserted at the time of the release falls within the scope of the release, "[t]he critical inquiry is whether the claim or right can be said to exist such that a party is capable of waiving it or preserving it." *Id.* at 619-20.

As in *Sims*, any legal responsibility of Rossie Barefoot and Ada Mae Barefoot was already in existence when FSR signed the release. As of 1999, the Barefoots had already made the representations that form the basis for the fraud, unfair and deceptive trade practices, and negligent misrepresentation claims. Further, any mutual mistake had occurred six years earlier when the parties entered into the contract for the sale of the property. At the time FSR signed the release, every act necessary to establish liability by the Barefoots had already occurred. *See Hardee's Food Sys., Inc. v. Oreel*, 32 F. Supp. 2d 342, 345 (E.D.N.C. 1998) (release signed on 19 June 1996 barred any claims based on misconduct occurring prior to that date).

FSR relies upon the fact that it had not yet discovered its claims, arguing that it could not release unknown claims. Our courts have, however, long recognized that parties may release existing but unknown claims. In *Merrimon v. Postal Telegraph-Cable Co.*, 207 N.C. 101, 105-06, 176 S.E.2d 246, 248 (1934) (quoting *Houston v. Trower*, 297 F. 558, 561 (8th Cir. 1924)), our Supreme Court recognized that " '[t]he language in a release may be broad enough to cover

all demands and rights to demand or possible causes of action, a complete discharge of liability from one to another, whether or not the various demands or claims have been discussed or mentioned, and whether or not the possible claims are all known." *See also Talton v. Mac Tools, Inc.*, 118 N.C. App. 87, 90-91, 453 S.E.2d 563, 565 (1995) ("Since this language was broad enough to cover all possible causes of action, whether or not the possible claims are all known, plaintiffs cannot rely on their ignorance of facts giving rise to a claim for fraud as a basis for avoiding the release.").

We must determine whether FSR's release encompassed "unknown" claims. The release included "all claims of any kind . . . ." The release excepted only claims under the promissory note from FSR to Rossie Barefoot. Since releases are contractual in nature, we apply the principles governing interpretation of contracts when construing a release. *Chemimetals Processing, Inc. v. Schrimsher*, 140 N.C. App. 135, 138, 535 S.E.2d 594, 596 (2000). Under North Carolina law, "[w]hen the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court[,] and the court cannot look beyond the terms of the contract to determine the intentions of the parties." *Piedmont Bank & Trust Co. v. Stevenson*, 79 N.C. App. 236, 240, 339 S.E.2d 49, 52 (internal citations omitted), *aff'd per curiam*, 317 N.C. 330, 344 S.E.2d 788 (1986). Thus, "[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean." *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (internal citations omitted).

As a result, when the parties stated that they were releasing "all claims of any kind," we must construe the release to mean precisely that: an intent to release all claims of any kind in existence. FSR seeks to add an exception for claims of which it was unaware. We cannot judicially edit the release to provide an exception not agreed to by the parties when they entered into the release. A federal court applying North Carolina law to a release stating that "[the parties] do hereby release the other party . . . from any claims . . . of whatever sort," has held: "The release language does not distinguish between known and unknown claims and the court will not unilaterally graft such a distinction into an otherwise clear provision." *Cardiovascular Diagnostics, Inc. v. Boehringer Mannheim Corp.*, 985 F. Supp. 615, 618-19 (E.D.N.C. 1997), *aff'd without opinion*, 185 F.3d 882 (Fed. Cir. 1999). Similarly, we hold that the language of FSR's release was

broad enough to include unknown claims and that it, therefore, bars the claims asserted by FSR against the estate of Rossie B. Barefoot and Ada Mae Barefoot in this case. The trial court properly granted summary judgment.

II

[3] FSR sued defendants Rossie Keith Barefoot and Rossie Darrell Barefoot individually as well as in their capacity as co-executors of Rossie B. Barefoot's estate. Judge Jacobs specified in the 1999 judgment that the "release is only as to the parties to the lawsuit." Rossie Keith and Rossie Darrell Barefoot, who were not parties to the prior litigation, make no argument that would allow them to benefit from the release. Defendants, however, contended in their motion for summary judgment that "plaintiff can present no evidence to support the claims of fraud, negligent misrepresentation, mutual mistake and unfair trade practice." We hold that summary judgment as to Rossie Keith Barefoot and Rossie Darrell Barefoot was properly entered on that ground.

The complaint asserts no express claim for relief against either Rossie Keith or Rossie Darrell Barefoot and the record before this Court reflects no theory or evidence of any wrongdoing by the Barefoot brothers. The claims for fraud, unfair and deceptive trade practices, and negligent misrepresentation are based solely on the acts of Rossie B. Barefoot. Since neither Rossie Keith nor Rossie Darrell Barefoot was a party to the 1993 conveyance, FSR cannot contend that they participated in any alleged mutual mistake. *Mock v. Mock*, 77 N.C. App. 230, 231, 334 S.E.2d 409, 409 (1985) ("While a written instrument may be reformed on the grounds of mutual mistake, the mistake that the law requires is that of both parties to the instrument.").

Because of the lack of any factual allegations regarding Rossie Darrell Barefoot in the complaint or other materials filed with this Court, it is unclear why he was named as a defendant. We can discern no basis for imposing any liability on Rossie Darrell Barefoot.

It appears, however, that Rossie Keith Barefoot, who owns the property surrounding the warehouse as a result of a 1999 deed from Rossie B. Barefoot, may have been included as a defendant in order to obtain the relief sought: reformation of the 1993 deed. Reformation of the deed would lead to a decrease in the land now owned by Rossie Keith Barefoot. Since, however, the underlying causes of action

allegedly justifying reformation are barred by the release, judgment was also properly entered as to Rossie Keith Barefoot. *See Strickland v. Shearon*, 193 N.C. 599, 603, 137 S.E. 803, 805 (1927) (when court held plaintiff could not proceed against original party to deed as to claim of mutual mistake, plaintiff also not entitled to proceed against grantee in privity with that original party).

For the foregoing reasons, the trial court correctly granted summary judgment as to all defendants. Because of our resolution of this appeal, we need not address plaintiff's *res judicata* argument.

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

VIRGINIA L. LIVINGSTON, INDIVIDUALLY AND AS ADMINISTRATRIX C.T.A. OF THE ESTATE OF VIRGINIA H. LINDLEY, PLAINTIFF-APPELLANT v. ADAMS KLEEMEIER HAGAN HANNAH & FOUTS, P.L.L.C., A NORTH CAROLINA PROFESSIONAL LIMITED LIABILITY COMPANY, FORMERLY ADAMS KLEEMEIER HAGAN HANNAH & FOUTS, L.L.P., A NORTH CAROLINA LIMITED LIABILITY PARTNERSHIP, FORMERLY ADAMS KLEEMEIER HAGAN HANNAH & FOUTS, A NORTH CAROLINA GENERAL PARTNERSHIP, WALTER L. HANNAH, INDIVIDUALLY AND AS CO-EXECUTOR OF THE ESTATE OF JOHN VAN LINDLEY, DANIEL W. FOUTS, ROBERT G. BAYNES, M. JAY DEVANEY, MICHAEL H. GODWIN, W. WINBURNE KING III, F. COOPER BRANTLEY, CHARLES T. HAGAN III, LARRY I. MOORE III, W.B. RODMAN DAVIS, MARGARET SHEA BURNHAM, PETER G. PAPPAS, WILLIAM M. WILCOX IV, DAVID A. SENTER, J. ALEXANDER BARRETT, CHRISTINE L. MYATT AND LOUISE A. MAULTSBY, DEFENDANTS-APPELLEES

No. COA03-22

(Filed 6 April 2004)

1. Attorneys— deed of trust—loan—additional collateral

The trial court did not err by granting partial summary judgment in favor of defendant attorneys as to plaintiff's claim against defendants for failing to obtain a bank's agreement to accept a deed of trust on two tracts of land as additional collateral for a $750,000 loan, because: (1) defendants did not conceal these properties from the bank; and (2) testimony of bank employees established that the bank was aware of the pertinent properties and simply made a business decision not to accept the properties as collateral.

2. Attorneys— professional negligence—ratification of release

The trial court did not err by granting partial summary judgment in favor of defendants as to plaintiff's claim against defendants for professional negligence for failing to institute an inverse condemnation action against DOT, because plaintiff released defendants from such a claim when there was evidence that both decedent and her estate ratified a release contained in the Inter-Creditor Agreement, that limited defendants' liability, by accepting the benefits provided for in said release.

3. Corporations— shareholder action—standing—special duty

The trial court did not err by concluding that plaintiff lacked standing to bring an action against defendants as a shareholder for injuries to her corporation, because: (1) the general rule is that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock; and (2) no facts have been alleged which lead to the inference of a special duty being owed to plaintiff that is separate and distinct from that owed to the other entities.

4. Attorneys— malpractice—applicable standard of care

The trial court did not err by concluding that defendant attorneys and their law firm did not breach the applicable standard of care by failing to file an inverse condemnation action when DOT was only in the preliminary stages of planning a road which might have involved the taking of a client's property, because plaintiff failed to present any affidavits to sufficiently forecast evidence that would show defendants breached the applicable standard of care.

5. Statutes of Limitation and Repose— professional malpractice—disability—incompetency

The trial court did not err by concluding that plaintiff's professional malpractice claim against defendant attorneys was barred by statutes of repose and limitation even though plaintiff contends the statutes were tolled based on the disability of incompetency, because: (1) a statute of repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue; and (2) there is no express statutory authority to toll the statute of repose which is a bar to plaintiff's claim.

Appeal by plaintiff from order entered 30 August 2002 by Judge Forrest D. Bridges and appeal by defendants Walter L. Hannah, Daniel W. Fouts, Robert G. Baynes, M. Jay Devaney, W. Winburne King III, F. Cooper Brantley, Charles T. Hagan III, Larry I. Moore III, W.B. Rodman Davis, Margaret Shea Burnham, Peter G. Pappas, William M. Wilcox IV, David A. Senter, J. Alexander Barrett and Christine L. Myatt, from order entered 6 March 2002 by Judge L. Todd Burke in Superior Court, Guilford County. Heard in the Court of Appeals 16 October 2003.

Jerry R. Everhardt for plaintiff-appellant.

Barron & Berry, L.L.P., by Vance Barron, Jr. and Jamie Lisa Forbes, for defendants-appellees.

McGEE, Judge.

Virginia L. Livingston (plaintiff), individually and as Administratrix C.T.A. of the estate of Virginia H. Lindley, filed suit against Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C. (defendant firm) and individual lawyers within the firm (collectively defendants) on 28 February 2001. Defendants Adams Kleemeier Hagan Hannah and Fouts, P.L.L.C., Michael Godwin, and Louise Maultsby filed an answer and counterclaims on 11 February 2002. Plaintiff filed a response to these counterclaims on 12 March 2002. Subsequently, the remaining individual defendants filed an answer on 21 March 2002. Defendants filed a motion for summary judgment on all claims in the complaint on 5 July 2002. An order granting partial summary judgment in favor of defendants was entered on 30 August 2002. Plaintiff filed a notice of voluntary dismissal without prejudice of all remaining claims on 27 September 2002. Defendants likewise filed a notice of voluntary dismissal of counterclaims without prejudice on 27 September 2002. Plaintiff appeals the order granting partial summary judgment. We also note that the individual defendants filed notice of appeal but failed to perfect their appeal.

Plaintiff is the daughter of the late John Van Lindley (Jack Lindley) and the late Virginia H. Lindley (Virginia Lindley). Jack Lindley established several closely held corporations during his lifetime, including Lindley Nurseries, Inc. (LNI) and Tri-City Terminals, Inc. (TCT). Jack Lindley was in the business of buying and selling real estate. Most of the real estate was owned by Jack Lindley, LNI and TCT. In order to finance the real estate business, Jack Lindley, LNI and TCT borrowed significant sums of money. In particular, Southern

National Bank (Southern National) loaned LNI $750,000, which Jack Lindley and Virginia Lindley personally guaranteed.

At the time of Jack Lindley's death on 20 October 1990, he, LNI and TCT owned only two unencumbered pieces of real property. These two tracts of undeveloped land were located in Rockingham County along the Mayo River. The lower tract consisted of approximately 350 acres and the upper tract comprised approximately 119 acres. Upon Jack Lindley's death, Southern National became concerned about repayment of the $750,000 loan and requested the estate of Jack Lindley, Virginia Lindley, and LNI to provide additional collateral to secure the loan. In March 1991, an attorney with defendant firm sent a letter to Southern National with financial statements of LNI and TCT and a draft of estate tax return schedules for Jack Lindley's estate. Schedule A indicated that Jack Lindley's estate owned the two unencumbered tracts along the Mayo River. Kemp Mattocks (Mattocks) and Richard Tucker (Tucker), officers at Southern National, reviewed Schedule A and were aware that the Mayo River tracts were available as collateral, but they rejected the property as additional collateral.

Toward the end of 1991, Southern National requested a confession of judgment from Virginia Lindley to satisfy her guaranty of the $750,000 loan. She refused but offered another parcel of real estate and her shares of common stock in First Polk Bankshares as collateral. On 20 April 1992, Southern National, Jack Lindley's estate, Virginia Lindley, LNI and TCT entered into a forbearance agreement whereby Southern National promised to forbear foreclosing on the real property of LNI and to forbear bringing suit on Virginia Lindley's guaranty in exchange for 8,000 shares of her stock in First Polk Bankshares and a first deed of trust on a contaminated piece of property. The shares were to be released if the property appraised at a sufficient amount to cover the guaranty. However, the property never appraised at an adequate amount, so the shares were sold and the proceeds were paid to Southern National.

After Southern National refused the two Mayo tracts as additional collateral, defendant Walter Hannah (Hannah) and Jack Lindley's estate entered into a Naked Trust Agreement on 10 June 1992 in which Hannah agreed to hold title to the upper Mayo tract for the estate. Subsequently, Hannah and Jack Lindley's son, John Lindley, as co-executors of the estate, directed Hannah, as trustee, to place a lien on the upper Mayo tract to defendant firm to secure payment of legal

fees. In addition, at about the same time, a security interest in the lower Mayo tract was granted to defendant firm to secure fees.

In early 1992, the North Carolina Department of Transportation (DOT) announced proposed alternative locations for a new beltway around Greensboro. One of the proposed routes impacted a tract owned by LNI and a tract owned by TCT. The LNI tract was encumbered by a $750,000 deed of trust to Southern National. The TCT tract was encumbered by a first deed of trust in the amount of $1,800,000 and also by a second deed of trust. Hannah contacted DOT and requested that DOT identify the property to be taken and requested that DOT enter a settlement based on a hardship acquisition. Hannah wrote to DOT on 9 October 1992 informing DOT that the properties referred to in his earlier letter could not be sold. In the letter, Hannah stated "[t]his situation creates an inverse condemnation and the only way we can properly represent our clients is to initiate an action in the courts for the taking." Several attorneys at defendant firm researched the issue but no inverse condemnation action was ever filed. Eventually, Hannah was able to reach an agreement with DOT regarding the LNI property. However, in the fall of 1993, Jefferson-Pilot commenced foreclosure proceedings on the TCT tract.

An Inter-Creditor Agreement was executed by LNI, TCT, Jack Lindley's estate, and Virginia Lindley as debtors and defendant firm and others as creditors on 31 December 1994. Paragraph Five of the agreement provided the following:

> 5. Release of Claims by Tri-City, Lindley Nurseries, Mrs. Lindley, and the Estate.
>
> Tri-City, Lindley Nurseries, Mrs. Lindley, and the Estate hereby waive, release, discharge and acquit all of the Creditors and their successors, assigns, officers, directors, partners, members, employees and agents from any and all actions, causes of action, claims, and defenses, whether known or unknown, which they now have or may have had prior to the date of this Agreement, on account of or arising out of Creditors' Claims and any other dealings between the Obligors and the Creditors.

This Inter-Creditor agreement also established the Lindley Property Trust Agreement and the Lindley Property Trust (the trust). The purpose of the trust was to permit an orderly sale of the real property which secured obligations to the creditors. The Lindley Property Trust Agreement provided that Virginia Lindley would receive a por-

tion of the net proceeds from the trust. In fact, after her death in February 1997, her estate received $101,717.45 in distribution of proceeds from the trust.

[1] Plaintiff's first assignment of error asserts that the trial court erred in granting partial summary judgment to defendants as to plaintiff's claim against defendants for failing to obtain the agreement of Southern National to accept a deed of trust on the upper Mayo tract or a security agreement on the interest of Jack Lindley's estate in the lower Mayo tract as additional collateral for the $750,000 loan to LNI.

> It is well established that the standard of review of the grant of a motion for summary judgment requires a two-part analysis of whether, "(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law."

Von Viczay v. Thoms, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000), *aff'd*, 353 N.C. 445, 545 S.E.2d 210 (2001) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 401 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810, 534 U.S. 950, 151 L. Ed. 2d 261 (2001)). " 'An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action.' " *Thompson v. First Citizens Bank & Tr. Co.*, 151 N.C. App. 704, 706, 567 S.E.2d 184, 187 (2002) (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972)). " '[A]n issue is genuine if it is supported by substantial evidence, which is that amount of relevant evidence necessary to persuade a reasonable mind to accept a conclusion.' " *Fox v. Green*, 161 N.C. App. 460, 464, 588 S.E.2d 899, 903 (2003) (quoting *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citations omitted)). " '[T]he party moving for summary judgment has the burden of establishing the lack of any triable issue of fact. Furthermore, the evidence presented by the parties must be viewed in the light most favorable to the nonmovant.' " *Blair Concrete Servs. v. Van-Allen Steel Co.*, 152 N.C. App. 215, 217, 566 S.E.2d 766, 767 (2002) (quoting *Adams v. Jefferson-Pilot Life Ins. Co.*, 148 N.C. App. 356, 358, 558 S.E.2d 504, 506, *disc. review denied*, 356 N.C. 159, 568 S.E.2d 186 (2002) (citations omitted)).

In light of this standard, we hold the trial court did not err in granting partial summary judgment to defendants on plaintiff's claim

against defendants for failure to obtain Southern National's agreement to accept the Mayo tracts as additional collateral. Plaintiff generally alleges in the complaint that defendants failed to obtain Southern National's agreement in an effort to maintain the unencumbered status of the tracts in order to preserve the availability of those assets for securing legal fees owed to defendants. However, both Mattocks and Tucker, the officers at Southern National who were involved with this particular loan, testified they knew the Mayo tracts were available as collateral but decided to reject these properties. Mattocks testified that he and Tucker "concluded that these properties had no potential for immediate sale" because of their location. Since Southern National only wanted property with "immediate marketability," the Mayo tracts were not suitable. Similarly, Tucker testified about discussions he had with Mattocks about these properties. Tucker knew the properties were available but decided not to take them because they "would have been difficult to sell" and they were concerned about "environmental issues."

In opposition to the motion for summary judgment, plaintiff referenced a 30 January 1992 letter written by Rodman Davis, an attorney with defendant firm, to Southern National's attorney, as support that there was a genuine issue of material fact. Plaintiff notes that the letter provided information about possible collateral that defendants had offered to Southern National, but the Mayo properties were not mentioned as having been offered. Plaintiff contends this letter is sufficient to establish an issue of material fact regarding the efforts put forth by defendants in attempting to obtain the agreement of Southern National. Despite the fact that the Mayo properties were not mentioned in the 30 January 1992 letter, the testimony of Mattocks and Kemp clearly established that Southern National was aware of the Mayo properties and simply made a business decision not to accept the properties as collateral. Defendants did not conceal these properties from Southern National. Rather, they offered the Mayo tracts and Southern National decided against accepting them as collateral. Thus, the trial court did not err in granting summary judgment on this issue. Plaintiff's first assignment of error is overruled.

[2] Plaintiff's remaining assignments of error (numbers two, three, four, five, and six) assert various reasons why the trial court erred in granting partial summary judgment to defendants on plaintiff's claim against defendants for professional negligence for failing to institute an inverse condemnation action against DOT. Plaintiff first argues that the undisputed facts show that plaintiff neither released defend-

ants from such a claim, nor ratified the release of defendants. Plaintiff asserts that the release in the Inter-Creditor Agreement is a violation of Rule 5.8 of the *N.C. Rules of Professional Conduct* that were in effect in 1994 and is thus void as a matter of public policy. Rule 5.8 provided that "[a] lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice." *N.C. Rules of Professional Conduct*, Rule 5.8 (1985). Although the release in the Inter-Creditor Agreement did limit defendants' liability, "a violation of a Rule of Professional Conduct does not constitute civil liability *per se*." *Booher v. Frue*, 98 N.C. App. 570, 581, 394 S.E.2d 816, 821, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 674 (1990). The release is therefore not invalid. However, it is immaterial whether this release is valid on its face because of the reasons stated below that plaintiff ratified the release through her actions.

> A release, originally invalid or voidable, for any reason may be ratified and affirmed by the subsequent acts of the persons interested. Thus if one, who has been induced by fraud and misrepresentation to execute a release and subsequently learns the true import thereof, knowingly takes the benefits of it he thereby ratifies and gives it force and effect. If the plaintiff knew the facts and circumstances of the execution of the release and knew its provisions, and then accepted its benefits he is thereby estopped to deny its validity. With full knowledge of its contents, he cannot accept the benefits and deny the liabilities of the instrument—he cannot ratify it in part and reject it in part.

Presnell v. Liner, 218 N.C. 152, 154, 10 S.E.2d 639, 640 (1940). It is undisputed that Virginia Lindley's estate never attempted to repudiate the Inter-Creditor Agreement after Virginia Lindley's death. In fact, plaintiff testified she thought having Hannah execute the agreement on Virginia Lindley's behalf "was the right thing for him to do at that time." Further, there is evidence that both Virginia Lindley and her estate in fact ratified the release contained in the agreement by accepting the benefits provided for in said release. For example, Virginia Lindley was absolved of her guaranty obligation on the loan from Southern National to LNI in exchange for the release. Further, Virginia Lindley's estate received a $50,000 distribution on 12 December 1997 and a $25,000 distribution on 31 December 1998 from the trust. Also, pursuant to the 11 December 2000 Memorandum of Mediated Settlement Agreement, Virginia Lindley's estate received a $26,717.45 distribution. Thus, there is no question that the benefits of the release were readily accepted by Virginia Lindley

and by her estate. Accordingly, assignments of error numbers two and three are overruled.

[3] Plaintiff next argues that the undisputed facts show that plaintiff had standing to assert such a claim. "The well-established general rule is that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997). However,

> "[t]here are two major, often overlapping, exceptions to the general rule that a shareholder cannot sue for injuries to his corporation: (1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder, and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders."

Barger, 346 N.C. at 658, 488 S.E.2d at 219 (quoting 12B *Fletcher Cyclopedia of the Law of Private Corporations §* 5911, at 484 (perm. ed. 1993)). Plaintiff argues that her relationship with defendants fits within the first exception. "To proceed with their lawsuit under the first exception to the general rule, plaintiffs must allege facts from which it may be inferred that defendants owed plaintiffs a special duty." *Barger*, 346 N.C. at 659, 488 S.E.2d at 220. In this case, defendants admitted they owed a duty both to Virginia Lindley and to plaintiff to exercise their best professional judgment to preserve the value of Jack Lindley's estate. However, this duty does not rise to the level contemplated under the *Barger* exception.

For further support of this argument, plaintiff alleged that defendants owed a fiduciary duty to her and to LNI, TCT, and the estate of Jack Lindley. "The existence of a special duty [] would be established by facts showing that defendants owed a duty to plaintiffs that was personal to plaintiffs as shareholders and was separate and distinct from the duty defendants owed the corporation." *Id.* Plaintiff correctly contends that defendants did admit that they owed fiduciary duties to plaintiff and the other named entities. Although a fiduciary duty may qualify as a special duty sufficient to fit within the *Barger* exception, plaintiff's claim fails because she was not owed a duty separate and distinct from the duty owed to the other entities. In fact, a fiduciary duty was owed to all individuals and entities involved, including plaintiff, Jack Lindley's estate, and both corporations. Since no facts have been alleged which lead to the inference of a special

duty being owed to plaintiff that is separate and distinct from that owed to the other entities, plaintiff lacks standing. Accordingly, assignment of error number four is overruled. In addition, we note that even if plaintiff had standing to sue under the *Barger* exception, her capacity to sue is not relevant based on our determination below concerning plaintiff's claim alleging defendants' breach of the standard of care.

[4] Plaintiff next argues the undisputed facts show that defendants breached the applicable standard of care and that as a result plaintiff suffered damage. An attorney's legal obligation to a client has been described in the following manner:

> "An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers."

Rorrer v. Cooke, 313 N.C. 338, 341, 329 S.E.2d 355, 358 (1985) (quoting *Hodges v. Carter*, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954)). In this case, defendants supported their motion for summary judgment with the affidavit of John B. McMillan (McMillan), a North Carolina attorney with more than twenty years of experience in eminent domain cases. McMillan testified that defendants did not violate the standard of care by failing to file an inverse condemnation action when DOT was only in the preliminary stages of planning a road which might or might not have involved the taking of a client's property. McMillan further testified that he believed defendants "exercised good judgment consistent with the standard of practice for attorneys practicing in the same, or a similar, locality."

Plaintiff failed to present an affidavit in opposition to the motion for summary judgment which would establish that defendants breached the applicable standard of care. Rather, plaintiff relied solely on a single sentence in a letter written by Hannah to DOT on 9 October 1992. The sentence was as follows: "This situation creates an inverse condemnation and the only way we can properly represent our clients is to initiate an action in the courts for the taking." Rather than establishing a standard of care, this sentence was merely used by Hannah to exert pressure on DOT to settle a potential claim.

> "In a negligence action, summary judgment for defendant is proper where the evidence fails to establish negligence on the

> part of defendant, establishes contributory negligence on the part of plaintiff, or establishes that the alleged negligent conduct was not the proximate cause of the injury."

Rorrer, 313 N.C. at 355, 329 S.E.2d at 366 (quoting *Williams v. Power & Light Co.*, 36 N.C. App. 146, 147, 243 S.E.2d 143, 144 (1978), *rev'd on factual grounds*, 296 N.C. 400, 250 S.E.2d 255 (1979)). In our case, plaintiff failed to present any affidavits to sufficiently forecast evidence that would show that defendants breached the applicable standard of care. Accordingly, assignment of error number five is overruled.

[5] Plaintiff's final argument is that the undisputed facts show that plaintiff's claim was not barred by statutes of repose and limitation. N.C. Gen. Stat. § 1-15(c) provides in part the following:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action . . . . Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . . .

N.C. Gen. Stat. § 1-15(c) (2003). Plaintiff argues this statute must be construed with N.C. Gen. Stat. § 1-17, which provides for a tolling of the statute of limitations if a plaintiff is under a specified disability. Plaintiff contends that this tolling provision is also applicable to the four year statute of repose. However, a statute of repose "serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce." *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985).

The cases relied upon by plaintiff are distinguishable because they involve specific circumstances not applicable to plaintiff's case. *Osborne v. Annie Penn Memorial Hospital*, 95 N.C. App. 96, 381 S.E.2d 794, *disc. review denied*, 325 N.C. 547, 385 S.E.2d 500 (1989) involved the tolling of a malpractice action of a minor. The case before us involves the disability of incompetency rather than minority. *Osborne* was based on N.C. Gen. Stat. § 1-17(b) rather than the general tolling provision under subsection (a), which is at issue in this case. Secondly, *Bryant v. Adams*, 116 N.C. App. 448, 448 S.E.2d

832 (1994), *disc. review denied*, 339 N.C. 736, 454 S.E.2d 647 (1995) allowed the tolling of a statute of repose because of an express provision in the Products Liability Act which incorporated the tolling provisions of N.C. Gen. Stat. § 1-17. However, the Products Liability Act is not involved in the case before us and *Bryant* is therefore not controlling. In this case, there is no express statutory authority to toll the statute of repose, which is a bar to plaintiff's claim. Accordingly, plaintiff's assignment of error number six is overruled.

Affirmed.

Judges HUDSON and CALABRIA concur.

DOROTHY S. LEWIS, EMPLOYEE, PLAINTIFF v. DUKE UNIVERSITY, EMPLOYER, SELF-INSURED, DEFENDANT

No. COA03-480

(Filed 6 April 2004)

Workers' Compensation— nursing—depression—occupational disease—insufficient evidence

The denial of workers' compensation to a nurse was affirmed where plaintiff contended that her depression was an occupational disease arising from her employment, but did not present sufficient evidence that the workplace stresses contributing to her condition were characteristic of and peculiar to her position as a registered nurse.

Appeal by plaintiff from opinion and award of the North Carolina Industrial Commission entered 15 November 2002. Heard in the Court of Appeals 24 February 2004.

J. Randolph Ward for plaintiff appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Jaye E. Bingham, for defendant appellee.

WYNN, Judge.

In her appeal from an opinion and award of the Industrial Commission denying her claim for benefits, Dorothy Lewis, Plaintiff,

contends the Commission erred in finding and concluding that she failed to prove she sustained an occupational disease in her position as a registered nurse at the medical center of Defendant Duke University. For the reasons hereafter stated, we affirm the opinion and award of the Commission.

The pertinent history of the instant appeal is as follows: On 24 April 2000, Plaintiff filed a claim for workers' compensation benefits, alleging she was permanently and totally disabled due to "major depressive disorder, recurrent, severe with melancholic features, and dysthymic disorder." On 25 February 2002, Plaintiff's claim for benefits came before the Commission. Dr. Nancy L. Roman, Plaintiff's treating psychiatrist, and Milton Lewis, Plaintiff's husband, testified on behalf of Plaintiff. Plaintiff was unable to testify. The evidence before the Commission tended to show the following:

Plaintiff began her employment as a registered nurse with Defendant in 1973 and worked continuously in that capacity until 15 August 1998, her last date of work. During the time period of 1989 until 1992, Plaintiff worked primarily with terminally ill patients, which she found "extremely disturbing." According to Dr. Roman, "some of these patients might be there for a month or two, or longer, before they died, so that you'd get attached to these patients, and then they would die. . . . there were several deaths, and that . . . was very difficult for [Plaintiff]." Defendant had "no support in place to help the staff cope with this kind of experience" or "deal with all these losses." Mr. Lewis testified that "death was something that [Plaintiff] had never really dealt with that well from her childhood" and it was "hard for her, it was difficult."

In 1993, the hospital reorganized "and all of the operating rooms were merged, and four different . . . nursing staffs were merged." Following the merger, Plaintiff was assigned to care for post-anesthesia patients. The reassignment caused stress to Plaintiff, who felt inadequately trained to handle the work. Plaintiff "did not feel comfortable with it, so not adequately trained on the—with the equipment, and she felt it was risking the patients, it was not good patient care." During the restructuring, some nurses were moved from Plaintiff's unit, which caused Plaintiff to "feel badly about being left behind." According to Dr. Roman, Plaintiff characterized the situation as "an injustice [because] they had been promised that they would be moving to the new building, and then they were not going to—they were told they would not be. The ones remaining were not going to the new building. And it was never clear why some people

were picked and others weren't." Plaintiff believed that some of the people picked "were [not] as hard working as she was. So it was a difficult time for her . . . ." Moreover, loss of nursing staff resulted in Plaintiff working longer hours to accomplish the work load. Plaintiff encountered additional stress when a supervisor whom Plaintiff trusted and with whom she had a good relationship lost her position. Frequent changes in Plaintiff's shifts caused Plaintiff to suffer from acute insomnia, which added to her stress.

Although Plaintiff applied for other positions at the hospital, she was not granted any interviews, "[a]nd she became, not only discouraged, but kind of suspicious as to what this whole process was. And she was frustrated, because she was trying to get to a . . . different position that might be less stressful for her." Mr. Lewis confirmed that Plaintiff "felt she was being discriminated against at times." Plaintiff "certainly had no full explanation for why she wasn't getting hired, and she knew of other people with less credentials and qualifications who were being hired with less experience and ability than herself, and that took a lot out of her emotionally."

Dr. Roman testified that Plaintiff experienced particular stress and anxiety over her job security. Because Plaintiff was an experienced nurse, she earned a higher salary than many other nurses, and "there was a feeling that they were trying to get rid of—the nurses at the higher end [of the pay scale]." Plaintiff also felt her assertiveness and willingness to "stand up for herself" and other nurses put her at greater risk of losing her position. According to Dr. Roman, Plaintiff believed Defendant was "scrutinizing her every action, and trying to come up with reasons to terminate her." Mr. Lewis testified that "the advent of managed care had taken full root . . . [and Plaintiff] was almost like a dinosaur in the way, and so she felt that they wanted to get rid of her." Mr. Lewis advised his wife at the time that "[w]hen people want to get rid of you, they have ways of setting you up for that."

In addition to the workplace stress, Dr. Roman and Mr. Lewis testified that events personal to Plaintiff caused her great distress. Specifically, the death of Plaintiff's father approximately eight months before the onset of Plaintiff's disability caused Plaintiff "intense and prolonged" grief. Plaintiff's father died after receiving treatment at Defendant hospital. Mr. Lewis stated Plaintiff had been "very, very close to her father" and she "felt a lot of guilt" about her father's death, in that her father sought treatment at the hospital upon Plaintiff's recommendation. Two weeks after her father died,

Plaintiff's half-sister also died. Dr. Roman opined that Plaintiff's depression would not have "progressed to this degree without the personal stressors."

Plaintiff was first referred to Dr. Roman in August of 1998 for severe depression. Dr. Roman opined that the duties of Plaintiff's employment substantially contributed to the development of her depression, and that Plaintiff's employment placed her at a greater risk of developing depression than the public in general. When asked to identify specific workplace stressors, Dr. Roman stated that "the amount of stress in the job place just really increased and increased. There was no support system at—in her job, and . . . it got to the point where they were giving the staff on the unit she worked on much more responsibilities than was possible to—to manage." Dr. Roman added that "there was a lot of staff turnover, and in particular, what I guess was labeled unfair turnover, or discriminatory turnover." Dr. Roman noted that, until 2001, Plaintiff "was not able to discuss" her workplace during her therapy with Dr. Roman, as the issue was too emotionally difficult for Plaintiff to address without "breaking down."

When asked to identify specific workplace "triggering factors" for Plaintiff's stress and resulting depression, Mr. Lewis testified as follows:

> [Plaintiff] felt that she was being written up for things she didn't do. She's been falsely accused. She was trying to get out of the vacuum of where she was because there was so much intense pressure and stress. Again, there was a dilution of the staff, she's being asked to do a lot more work in a shorter period of time with less personnel. Okay. The game had changed dramatically in terms of expectations. The managed care policies that she was being forced to deal with caused a lot of turmoil in the area where she was . . . . [s]he just didn't get any jobs, and that grew more and more frustrating for her. She felt that something was going on that she had no control over and that she was literally being forced out. And then they created—they built a new building that was going to take the surgical unit over to that area, and they found out that everybody wasn't going, so this created anxiety in her about whether or not she was going to have a job again. . . . One young lady, who was her supervisor at the time, ended up without a job and nowhere to go and was out of work for a while . . . it was a difficult time for a lot of people, not just for [Plaintiff], but for a lot of other people . . . on that staff, and particularly the African-American nurses.

Based on the foregoing and other evidence, the Commission found, *inter alia*, that

> 8. Plaintiff suffered from depression as a result of her perception that defendant's procedures were unjust and the workload unjustified, her concern about the economic consequences of losing her position and benefits, her fear that she would lose the career which she highly valued, her perception that her skills as a nurse were not appreciated, and her perception that she was being "watched" and was not being treated fairly.
>
> . . . .
>
> 12. The Full Commission finds that plaintiff's employment stressors—the personnel conflicts, a demanding workload, job security issues, and her feelings of being undervalued as a professional—did cause or substantially contribute to her depressive disorder. The Commission further finds that these stressors are not characteristic of nursing work as opposed to occupations in general and that her employment as a nurse did not place her at an increased risk of contracting a depressive disorder as opposed to the general public not so employed.

The Commission concluded that Plaintiff failed to prove she sustained an occupational disease and entered an opinion and award denying Plaintiff's claim for benefits. Plaintiff appealed.

Plaintiff's primary contention on appeal is that the Commission erred in finding and concluding that she did not sustain an occupational disease. We conclude Plaintiff failed to present sufficient evidence to support her claim, and we therefore affirm the opinion and award of the Commission.

Appellate review of an opinion and award of the Commission 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. *See Smith-Price v. Charter Pines Behavioral Ctr.*, 160 N.C. App. 161, 584 S.E.2d 881, 884 (2003). Where there is " 'evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary.' " *Shah v. Howard Johnson*, 140 N.C. App. 58, 61-62, 535 S.E.2d 577, 580 (2000) (quoting *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980)), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001).

An occupational disease is defined as "[a]ny disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." N.C. Gen. Stat. § 97-53(13) (2003). "The claimant bears the burden of proving the existence of an occupational disease." *Norris v. Drexel Heritage Furnishings, Inc.*, 139 N.C. App. 620, 621, 534 S.E.2d 259, 261 (2000), *cert. denied*, 353 N.C. 378, 547 S.E.2d 15 (2001).

It is well established that work-related depression or other mental illness may qualify as compensable occupational diseases under appropriate circumstances. *See, e.g., Smith-Price*, 160 N.C. App. at 168, 584 S.E.2d at 888 (affirming award of benefits to a registered nurse who suffered from post-traumatic stress disorder); *Jordan v. Central Piedmont Community College*, 124 N.C. App. 112, 117, 476 S.E.2d 410, 413 (1996) (stating that case law "recognized depression, a mental condition, as an occupational disease and compensable under the [Workers' Compensation] Act"), *disc. review denied*, 345 N.C. 753, 485 S.E.2d 53 (1997); *Pulley v. City of Durham*, 121 N.C. App. 688, 694, 468 S.E.2d 506, 510 (1996) (affirming an award of benefits to a police officer who developed post-traumatic stress disorder and depression). The claimant must first establish, however, that "the mental illness or injury was due to stresses or conditions different from those borne by the general public." *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 648, 566 S.E.2d 807, 813 (2002). To do so, the claimant must show that her psychological condition, or the aggravation thereof, was (1) "due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment" and that it is not (2) an "ordinary disease[] of life to which the general public is equally exposed." N.C. Gen. Stat. § 97-53(13); *Clark v. City of Asheville*, 161 N.C. App. 717, 589 S.E.2d 384, 386-87 (2003); *Smith-Price*, 160 N.C. App. at 166, 584 S.E.2d at 885. These elements are met "if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93-94, 301 S.E.2d 359, 365 (1983). "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workman's compensation." *Booker v. Medical Center*, 297 N.C. 458, 475, 256 S.E.2d 189, 200 (1979); *James v. Perdue Farms, Inc.*, 160 N.C. App. 560, 586 S.E.2d 557, 560 (2003).

The issue of whether a claimant's particular occupation places him or her at an increased risk of contracting depression or other mental illness has arisen in several recent cases. In *Woody v. Thomasville Upholstery, Inc.*, 146 N.C. App. 187, 552 S.E.2d 202 (2001), *reversed per curiam*, 355 N.C. 483, 562 S.E.2d 422 (2002), the plaintiff sought compensation for depression she alleged was caused by her employment as a marketing assistant with the defendant company. The evidence tended to show that the plaintiff suffered from pressure and stress at her work, in large measure due to conflict with an abusive supervisor. *Id.* at 189-90, 552 S.E.2d at 204-05. The Industrial Commission awarded the plaintiff benefits, and a divided panel of the Court of Appeals affirmed the opinion and award. The Court of Appeals concluded that plaintiff's employment exposed her to a greater risk of contracting depression than the public generally, in that it involved

> (1) an extremely stressful and verbally abusive relationship with her emotionally unstable supervisor, which caused plaintiff to feel demeaned, embarrassed, humiliated, and worthless; and (2) a workplace environment in which plaintiff justifiably felt powerless over the situation and betrayed by her employer because her employer appeared to care more about the supervisor's financial value to the company than her abusive treatment of employees.

Id. at 201, 552 S.E.2d at 211.

Judge Martin dissented from the majority opinion, stating that

> [n]otwithstanding the fact that plaintiff's job-related stress caused her depression and aggravated her fibromyalgia, such facts cannot support the conclusion that plaintiff's mental and physical conditions were occupational diseases as defined by the statute. The findings indicate merely that plaintiff suffered from depression and fibromyalgia after being placed in the unfortunate position of working for an abusive supervisor, which can occur with any employee in any industry or profession, or indeed, in similar abusive relationships outside the workplace. Therefore, I do not believe plaintiff's conditions can be construed as "characteristic of and peculiar to" her particular employment; they are ordinary diseases, to which the general public is equally exposed outside the workplace in everyday life.

Id. at 202, 552 S.E.2d at 211 (Martin, J., dissenting). Our Supreme Court adopted Judge Martin's dissent and reversed the decision of the Court of Appeals.

This Court examined *Woody* in the context of an award of benefits by the Commission to a registered nurse who suffered post-traumatic stress disorder arising from her employment with the defendant psychiatric hospital. *See Smith-Price,* 160 N.C. App. at 161, 584 S.E.2d at 881. The evidence tended to show that the plaintiff worked with "patients whose problems ranged from being suicidal, homicidal, or otherwise disturbed due to mental disease and/or substance abuse." *Id.* at 162, 584 S.E.2d at 882. In addition, the defendant psychiatric hospital had administrative and staffing problems that created a "chaotic atmosphere." *Id.* at 164, 584 S.E.2d at 884. The plaintiff also encountered stress and conflict in dealing with her co-workers and supervisors. The Commission moreover found that "[m]any incidents occurred at [defendant hospital] that caused stress to plaintiff, including plaintiff's concern about the safety of the [patients], improper staffing, and being instructed to clock out while still being required to continue working. Plaintiff received no support from supervisors, which caused her a great deal of stress." *Id.* at 163, 584 S.E.2d at 883. The Commission concluded that the plaintiff's employment placed her at a greater risk for contracting post-traumatic stress disorder than members of the general public and awarded her benefits. Upon appeal, this Court examined the precedent set forth in *Woody* and affirmed the award of benefits to the plaintiff as follows:

> In the present case we find that plaintiff presented evidence which supports the Commission's determination that her mental disorders stem from a job which has unique stresses to which the general public is not exposed. Plaintiff was caring for the mentally ill whose problems ranged from the suicidal to those who were severely anxious or depressed. There had already been one death at [defendant psychiatric hospital] which resulted in local and national news coverage of the conditions at [the hospital] under which plaintiff labored. This case presents a situation far more severe than merely an employee's relationship with an abusive supervisor as was the case in *Woody*.
>
> We believe plaintiff worked in an atmosphere permeated with stress and this case is much more analogous to *Pulley* due to the fact that she worked with an aberrant population where treatment errors could (and did at least once) result in death. These are not common workplace stresses.
>
> Thus we hold that the Commission could properly find, on the record before it, that plaintiff suffered from a compensable

> occupational disease, even though evidence to the contrary existed.

Id. at 171, 584 S.E.2d at 887-88.

More recently, this Court addressed the issue of whether a mental disease was due to conditions "characteristic of and peculiar to" employment in the case of *Clark v. City of Asheville*, 161 N.C. App. 717, 589 S.E.2d 384 (2003). There, a firefighter with the City of Asheville filed a claim for workers' compensation benefits, alleging he had suffered an occupational disease, post-traumatic stress disorder, after failing a driving test and being told he could no longer drive fire trucks for the city. The Commission denied the plaintiff's claim, noting that although "[t]he position of firefighter may be considered inherently dangerous and exposes firefighters to many traumatic events not usually witnessed by the general public," the plaintiff "fail[ed] to show that such events were factors significantly contributing to [his] psychological problems, including [post-traumatic stress disorder], depression and anger." *Id.* at 719, 589 S.E.2d at 386. The Commission further found that

> [f]ailing an employment test and perceiving demotion are not uncommon circumstances in the workplace. Such occurrences are not characteristic to employment as a firefighter, and employment as a firefighter does not increase one's risk of experiencing stress as a result of failing a test or perceiving demotion. Neither plaintiff's [post-traumatic stress disorder] nor his mental state in dealing with the driver's test or [his supervisor] were the result of any traumatic event or events characteristic of employment as a firefighter.

Id. at 720, 589 S.E.2d at 386. On appeal, we affirmed the Commission's denial of benefits, concluding that the plaintiff failed to show that his psychological condition was due to causes and conditions characteristic of and peculiar to his employment as a firefighter. We agreed with the Commission that "[t]he giving of tests . . . can be expected in any work setting" and that "working for an abusive supervisor . . . 'can occur with any employee in any industry or profession.' " *Id.* at 721, 589 S.E.2d at 387 (quoting *Woody*, 146 N.C. App. at 202, 552 S.E.2d at 211 (Martin, J., dissenting)).

In the instant case, we agree with the Commission that Plaintiff presented insufficient evidence to demonstrate that the workplace stressors contributing to the development of her depression were causes and conditions characteristic of and peculiar to her position

as a registered nurse. Although nursing can and may have exposed Plaintiff to traumatic events and unique stress unlike that experienced by the general public, Plaintiff, like the plaintiff in *Clark*, failed to show that it was such untoward exposure in her employment that caused her disability. The testimony by Dr. Roman and Mr. Lewis tended to show that the workplace stressors contributing to Plaintiff's depression included (1) a demanding workload; (2) the lack of support system at her employment; (3) staffing decisions Plaintiff considered unfair or discriminatory; (4) her perception that she was undervalued at her work; (5) management restructuring and changes in hospital policies; (6) changes in shifts contributing to insomnia; and (7) Plaintiff's anxiety over her job security. None of these stressors is characteristic to or peculiar to the nursing profession; rather, they are general stressors common to many workplaces. Thus, Plaintiff failed to prove that her employment placed her at a greater risk of developing depression than the public generally. *See Rutledge*, 308 N.C. at 93-94, 301 S.E.2d at 365.

Nonetheless, Plaintiff argues the Commission failed to properly evaluate Plaintiff's evidence in the context of the nursing profession, where the "work literally involved matters of life and death." She contends her sensitivity to death, and her exposure to the terminally ill patients substantially contributed to the development of her depression. We must disagree. Although Plaintiff's exposure to terminally ill patients could be considered a stressor characteristic of and peculiar to the nursing profession, *see Smith-Price*, 160 N.C. App. at 171, 584 S.E.2d at 888 (stating that working with an aberrant population where treatment error could result in death did not involve common workplace stresses), she failed to prove that her work with such patients substantially contributed to her illness. Plaintiff stopped working with terminally ill patients approximately six years before she ended work at Defendant hospital. Given the length of time between Plaintiff's exposure to the terminally ill patients and the onset of her disability, the Commission could properly find that Plaintiff's exposure to death "was not a significant [factor] in the development of [P]laintiff's depressive disorder."

Plaintiff further contends it was her deep concern for her patients' welfare that was the underlying factor placing intense stress on Plaintiff. Plaintiff, however, presented inadequate evidence to support her contention. When asked to articulate the workplace stressors identified by Plaintiff, Dr. Roman and Mr. Lewis focused almost exclusively on issues of Plaintiff's dissatisfaction with staffing and

changes in management policy, anxiety over job stability, perceived discrimination, and the general demanding nature of the job. Given this evidence, the Commission could properly find and conclude that "[P]laintiff's employment stressors—the personnel conflicts, a demanding workload, job security issues, and her feelings of being undervalued as a professional" were "not characteristic of nursing work as opposed to occupations in general and that her employment as a nurse did not place her at an increased risk of contracting a depressive disorder as opposed to the general public not so employed."

Finally, Plaintiff contends the Commission failed to give proper weight to the testimony by Dr. Roman. It is well established, however, that the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Matthews v. City of Raleigh*, 160 N.C. App. 597, 586 S.E.2d 829, 833 (2003). Further, although Dr. Roman testified that Plaintiff's employment placed her at greater risk of developing depression, she did not identify specific factors unique to Plaintiff's job that led to the development of Plaintiff's depression. Moreover, Dr. Roman testified that Plaintiff did not speak of her employment with Defendant until three years after she left her position. Under these circumstances, the Commission could properly find that, contrary to Dr. Roman's assertions, Plaintiff's employment did not place her at an increased risk of contracting a depressive disorder.

We therefore affirm the opinion and award of the Commission.

Affirmed.

Judges McGEE and TYSON concur.

PHARMARESEARCH CORPORATION, PLAINTIFF v. JAMES M. MASH, DEFENDANT

No. COA03-213-2

(Filed 6 April 2004)

1. Statutes of Limitation and Repose— breach of contract—breach of shareholders agreement—counterclaims—relation back

The trial court did not err by granting summary judgment in favor of plaintiff corporation on defendant former employee's counterclaims for alleged breach of a shareholders agreement based on expiration of the statute of limitations, because: (1) N.C.G.S. § 1-52(1) establishes a three-year statute of limitations for an action brought upon a contract, obligation, or liability arising out of an express or implied contract; (2) assuming arguendo that plaintiff's actions were a breach of the shareholders agreement, defendant's right to sue for breach of contract arose at the latest when defendant received a letter from plaintiff on 1 June 1998 informing him unequivocally that he had been terminated for cause and that plaintiff was exercising its option to repurchase all of defendant's shares of company stock; (3) plaintiff failed to file his counterclaims until 21 August 2001 when his claims expired on 1 June 2001; (4) contrary to defendant's assertion that plaintiff's claim and his counterclaims accrued on the same date, plaintiff's cause of action against defendant for specific performance of the shareholder's agreement arose on 31 May 2001 when defendant expressly refused to return the certificate or to sign an acknowledgment that it was destroyed; and (5) contrary to defendant's assertion, counterclaims do not relate back to the date plaintiff filed its original action.

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

Although defendant contends the trial court erred by granting plaintiff's motion for costs in an action involving breach of a shareholders agreement, this issue is dismissed because: (1) defendant failed to present any argument or authority in support of its contention, and defendant failed to assert any basis upon which to conclude that the trial court erred; and (2) issues raised in defendant's brief but not supported by argument or authority are deemed abandoned under N.C. R. App. P. 28(b)(6).

3. Costs— voluntary dismissal without prejudice—expenses listed in statutes

The trial court did not err by denying defendant's motion for costs under N.C.G.S. § 1A-1, Rule 41 in an action involving breach of a shareholders agreement where plaintiff filed a voluntary dismissal without prejudice pursuant to Rule 41(a), because: (1) expenses not listed as costs in the North Carolina General Statutes will not be accommodated; and (2) defendant's motion for costs pursuant to Rule 41(d) referenced two items which were not enumerated in N.C.G.S. § 7A-305(d).

Appeal by defendant from orders entered 15 July 2002 and 14 October 2002 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Originally heard in the Court of Appeals 1 December 2003, and opinion affirming the order of the trial court was filed on 6 January 2004, *PharmaResearch Corp. v. Mash*, 162 N.C. App. 180, —— S.E.2d —— (2004 N.C. App. LEXIS 70). Defendant's Petition for Rehearing was filed on 10 February 2004, and granted on 2 March 2004. This opinion supersedes the opinion filed 6 January 2004.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Pressly M. Millen, for plaintiff-appellee.

Fletcher, Ray & Satterfield, L.L.P., by R. Jay Short, Jr. and Kimberly L. Moore, for defendant-appellant.

LEVINSON, Judge.

Defendant (James Mash) appeals from entry of summary judgment on his counterclaims, and from the award of costs to plaintiff and the denial of his motion for costs. We affirm.

The relevant evidence is summarized as follows: Plaintiff (PharmaResearch Corporation) is a pharmaceutical development service company with corporate offices in Wilmington, North Carolina. In 1997, defendant was plaintiff's president, CEO, and one of plaintiff's shareholders. On 13 August 1997 plaintiff's shareholders, including defendant, executed an Amended and Restated Shareholders Agreement (the Shareholders Agreement). Paragraph 11 of the Shareholders Agreement gives plaintiff the right to repurchase an employee-shareholder's shares upon the occurrence of certain "option events," including "termination for Cause by the Company[.]" Paragraph 11 also states that:

> Upon the occurrence of any of the Option Events . . . the Company shall have the option . . . to purchase . . . the Stockholder Shares of . . . [the terminated employee] provided that the Company shall have first given written notice . . . [to the ex-employee] within sixty (60) days after the date that the Company receives notice of the [termination].

On 20 February 1998 plaintiff's board of directors held a meeting, attended by defendant. Members of plaintiff's board confronted defendant with their recent discovery of financial misconduct on defendant's part, including evidence that defendant had (1) paid himself an unauthorized $75,000 bonus which he concealed from plaintiff, and (2) failed to reimburse plaintiff for thousands of dollars in personal expenses that defendant charged to the company credit card. Plaintiff informed defendant that he was dismissed from his employment with plaintiff, effective immediately. Defendant's personal effects were removed from the building, and he did not perform any work for plaintiff after 20 February 1998.

Although defendant may have been, in the ordinary sense of the word, "fired" at the 20 February 1998 board meeting, the meeting did not resolve the issue of how defendant's separation would be structured. At the meeting, the board informed defendant that they had sufficient grounds to have defendant formally terminated for cause. However, because plaintiff also wished to avoid negative publicity about the company, the board offered defendant an opportunity to resign voluntarily, provided he agreed to certain conditions. At defendant's request, plaintiff sent defendant a proposed agreement setting out the terms for defendant's voluntary resignation from plaintiff. The proposed agreement provided that defendant would be allowed to resign voluntarily and would receive $50,000 in severance pay. In return, defendant had to sign a release of all claims against plaintiff, sell his shareholder stocks to plaintiff, and limit public comment about his separation from plaintiff to a statement that he "resigned to pursue other opportunities."

Defendant did not respond to plaintiff's proposal, which he received on 10 March 1998 *via* certified mail, return receipt requested. On 29 May 1998, plaintiff sent defendant another letter, also sent *via* certified mail, return receipt requested, and received by defendant on 1 June 1998. This letter stated in pertinent part:

> To date we have not received any response from you to our letter dated March 10, 1998. . . . [T]his letter shall confirm that **your**

> **employment with the Company has been terminated for cause**. Accordingly, pursuant to the provisions of Section 11 of the . . . [Shareholders Agreement], this letter shall serve as notice to you that the **Company has chosen to exercise its option to purchase . . . the Company's common stock held by you**. . . . [P]lease return your stock certificate . . . and we will mark it cancelled.

(emphasis added). Thereafter, plaintiff repurchased defendant's shares of stock and "marked its stock ledger and other corporate records to reflect the fact that the shares it had repurchased" from defendant were cancelled. Defendant failed to return the cancelled stock certificate to plaintiff, as requested in the letter of 29 May 1998. On 30 May 2001, defendant informed plaintiff's CEO that the stock certificate had been destroyed, and agreed to sign an acknowledgment to that effect. However, when defendant met with plaintiff's CEO on 31 May 2001, defendant refused either to return the stock certificate or to sign a form acknowledging that it had been destroyed. On 31 May 2001 plaintiff commenced the present action against defendant for breach of the Shareholders Agreement and conversion of the stock certificate by service of a civil summons on defendant accompanied by an order extending the time for plaintiff to file its complaint. Plaintiff timely filed a complaint on 20 June 2001. In its complaint, plaintiff sought an injunction directing defendant's specific performance of the Shareholders Agreement, "namely to surrender to PharmaResearch the cancelled certificate or, in the alternative, to execute a written acknowledgment that the certificate was destroyed[.]"

Defendant filed an answer and counterclaims on 21 August 2001. Defendant asserted various defenses, and also made counterclaims against plaintiff for: (1) declaratory relief, seeking a judgment declaring him to be the owner of the cancelled shares of stock; (2) unfair and deceptive trade practices; (3) breach of contract, alleging that plaintiff breached the Shareholders Agreement by wrongfully terminating defendant's employment without good cause and failing to notify defendant of plaintiff's exercise of its repurchase option within 60 days of defendant's termination; (4) injunctive relief, seeking to bar plaintiff from acting as owner of the subject shares of stock, and; (5) constructive trust.

Plaintiff filed its answer to defendant's counterclaims on 23 October 2001. Plaintiff sought dismissal of defendant's claims for unfair and deceptive trade practices and imposition of a constructive

trust pursuant to N.C.R. Civ. P. 12(b)(6). This motion was granted on 24 January 2002 and, accordingly, these claims are not before this Court. Plaintiff also sought dismissal of defendant's other counterclaims, asserting, *inter alia*, that the claims were barred by the applicable statute of limitations.

On 14 June 2002 defendant filed a motion for summary judgment on his three remaining counterclaims, based on plaintiff's alleged failure to give defendant "written notice of its intention to exercise its option to purchase" defendant's shares of stock within 60 days of his termination for cause. On 17 June 2002 plaintiff filed a motion for summary judgment and again asserted that defendant's claims "are time-barred as indicated on the face of the Counterclaim." On 15 July 2002, the trial court entered an order granting plaintiff's motion for summary judgment on defendant's counterclaims and denying plaintiff's motion for summary judgment on its own claims. The court also denied defendant's summary judgment motion. The trial court's order does not state the legal basis for its rulings.

On 22 August 2002, plaintiff voluntarily dismissed its action against defendant under N.C.R. Civ. P. 41(a). Defendant then filed a motion, pursuant to N.C.R. Civ. P. 41(d), seeking an award of costs based on plaintiff's voluntary dismissal. Plaintiff also moved the trial court for an award of costs incurred in its defense of defendant's counterclaims. On 14 October 2002, the trial court granted plaintiff's motion for costs, but denied defendant's motion. Defendant appeals from the court's summary judgment order, and from its order awarding costs to plaintiff, and denying defendant's motion for costs.

Standard of Review

Defendant appeals the trial court's entry of summary judgment. Under N.C.R. Civ. P. 56(c), summary judgment is properly granted 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." Thus, "the standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Further, the evidence presented by the parties must be viewed in the light most favorable to the nonmovant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted).

[1] Defendant presents several arguments on appeal regarding his counterclaims. We conclude, however, that the defendant's counterclaims were barred by the statute of limitations, and find this dispositive of the issues on appeal.

"Ordinarily, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, and summary judgment is appropriate." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citing *Ports Authority v. Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978), and *Little v. Rose*, 285 N.C. 724, 208 S.E.2d 666 (1974)). Further, when the party moving for summary judgment pleads the statute of limitations, "the burden is then placed upon the [non-movant] to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action." *Id.* In the instant case, we conclude that the facts relevant to whether the statute of limitations has expired on defendant's counterclaims are not in dispute.

Defendant's counterclaims were based on plaintiff's alleged breach of the Shareholders Agreement. Specifically, defendant asserted that plaintiff (1) terminated him without cause and (2) exercised its option to repurchase his shares of stock without properly notifying him within sixty days of his termination. N.C.G.S. § 1-52(1) (2003) establishes a three year statute of limitations for an action brought "[u]pon a contract, obligation or liability arising out of a contract, express or implied[.]" Moreover:

> 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. G.S. 1-15(a). The statute begins to run on the date the promise is broken. . . . [T]he right to institute an action commenced, . . . when defendant broke her promise or took action inconsistent with the promise[.]

Penley v. Penley, 314 N.C. 1, 20, 332 S.E.2d 51, 62-63 (1985) (citation omitted). Therefore, "[i]n a contract action . . . to determine if plaintiff's lawsuit is barred by the three year statute of limitations, this Court must first determine when the breach occurred which caused the cause of action to accrue." *Pearce v. Highway Patrol Vol. Pledge Committee*, 310 N.C. 445, 448, 312 S.E.2d 421, 424 (1984) (citation omitted).

Defendant argues that the statute of limitations did not begin to run until the unspecified date on which plaintiff physically marked its ledgers to reflect that defendant's shares of stock were cancelled. This argument is without merit. It has long been the law that:

> "Where there is a breach of an agreement or the invasion of an agreement . . . the law infers some damage. . . . The accrual of the cause of action must therefore be reckoned from the time when the first injury was sustained. . . . When the right of the party is once violated, even in ever so small a degree, the injury . . . at once springs into existence and the cause of action is complete."

Matthieu v. Gas Co., 269 N.C. 212, 215, 152 S.E.2d 336, 339 (1967) (quoting *Mast v. Sapp*, 140 N.C. 533, 537, 53 S.E. 350, 351 (1906)). *See also Fulp v. Fulp*, 264 N.C. 20, 26, 140 S.E.2d 708, 714 (1965) ("the statute of limitations began to run against plaintiff's claim . . . [when he issued] a flat repudiation of his agreement and [gave] notice to plaintiff that he intended to misappropriate the funds").

In the instant case, it is undisputed that on 1 June 1998 defendant received a letter from plaintiff informing defendant unequivocally (1) that he had been terminated for cause, and (2) that plaintiff was exercising its option to repurchase all of defendant's shares of company stock. Assuming, *arguendo*, that plaintiff's actions were a breach of the Shareholders Agreement, defendant's right to sue for breach of contract arose, **at the latest**, upon receipt of this letter. Accordingly, we conclude that the statute of limitations on defendant's counterclaims began to run no later than 1 June 1998, when this letter was received, and expired 1 June 2001. We further conclude that on 21 August 2001, when defendant filed his counterclaims, they were barred by the statute of limitation.

Defendant argues that plaintiff's claim and his counterclaims accrued on the same date, and thus that "the only way that Plaintiff's statute of limitations can prevail is if Plaintiff['s] . . . action was not timely filed." We disagree. The letter of 29 May 1998 simply requested defendant to return the stock certificate, and did not thereby give plaintiff a valid cause of action against defendant. The record evidence indicates that on 31 May 2001 defendant expressly refused to return the certificate or to sign an acknowledgment that it was destroyed. Based upon the evidence in the record, we conclude that plaintiff's cause of action against defendant for specific performance of the Shareholders Agreement arose on that date.

Defendant also argues that the filing of his counterclaims should be deemed to "relate back" to the date that plaintiff filed its original complaint. On this basis defendant argues that if his counterclaims "would have been timely when the action was commenced" the statute of limitations is then tolled indefinitely as to any counterclaims. We disagree.

In support of his "relation back" argument, defendant cites two cases. One of these, *Brumble v. Brown*, 71 N.C. 513 (1874), predates the adoption of the Rules of Civil Procedure by almost a century. In *Burcl v. Hospital*, 306 N.C. 214, 293 S.E.2d 85 (1982), the North Carolina Supreme Court held that if application of the Rules of Civil Procedure dictates a result different from that arrived at in a pre-rules case, the Rules should be applied:

> The Court of Appeals . . . relied on several . . . decisions of this Court made before the adoption of our present Rules of Civil Procedure. We conclude that present Rules 15 and 17(a) dictate a different result from that which . . . was reached by our cases decided before the enactment of these rules. We, therefore, reverse the Court of Appeals. . . .

Burcl at 217, 293 S.E.2d at 87. Accordingly, we first consider whether the pertinent statutes and Rules of Civil Procedure allow "relation back," or provide that a counterclaim is deemed to have been filed on the same date as the filing of the original action.

Under N.C.G.S. § 1-15(a) (2003), "[c]ivil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute." Counterclaim procedure is governed by N.C.G.S. § 1A-1, Rule 13 (2003), which defines compulsory counterclaims, in relevant part, as claims "which at the time of serving the pleading the pleader has against any opposing party[.]" Thus, "a counterclaim is compulsory only [if] it is in existence at the time of serving the pleading against the opposing party[.]" *Faggart v. Biggers*, 18 N.C. App. 366, 370, 197 S.E.2d 75, 78 (1973). The absence of any exceptions in Rule 13 from otherwise applicable statutes of limitation stands in contrast to N.C.G.S. § 1A-1, Rule 15(c) (2003), which provides in pertinent part that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed[.]" Had the General Assembly intended for counterclaims to "relate back" to the date of filing of plaintiff's complaint, it could have so provided. *See Conover v.*

Newton and Allman v. Newton and In re Annexation Ordinance, 297 N.C. 506, 519, 256 S.E.2d 216, 224-25 (1979) ("If the General Assembly had intended to authorize [particular procedure] it would have so provided as it has explicitly done in [companion statute]. The absence of such statutory authorization, in light of the explicit provisions for it in the [other statute], is cogent evidence [of] the General Assembly['s] inten[t]"). We conclude that the pertinent Rule of Civil Procedure, Rule 13, does not support defendant's assertion that his counterclaim should be deemed to "relate back" to the date that plaintiff filed its original action. We also conclude that we should apply the North Carolina Rules of Civil Procedure, rather than relying on language in *Brumble*.[1]

Finally, a recent case from this Court also supports our conclusion that counterclaims do not "relate back" to the date the plaintiff's action was filed. In *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 589 S.E.2d 391 (2003), the plaintiff filed its complaint on 4 February 2000. This Court determined that the statute of limitations on defendant's counterclaims started running sometime within a year after the accident of 29 October 1996 and that when defendant filed her counterclaims on 10 May 2001, they were barred by the statute of limitations. However, calculating from the date that the Court determined defendant's cause of action accrued, the counterclaim was *not* time-barred when plaintiff filed its original action on 4 February 2000. Significantly, the Court did not apply relation back to "save" defendant's counterclaims.

We conclude that defendant's counterclaims were barred by the statute of limitations and that the trial court did not err by granting summary judgment to plaintiff on the counterclaims. This assignment of error is overruled.

Defendant also appeals from the trial court's order awarding costs to plaintiff, and denying defendant's motion for costs. Following the trial court's entry of summary judgment against defendant on his counterclaims, and plaintiff's subsequent dismissal of its original claim, both parties applied to the court for award of costs. Defendant's motion for costs under Rule 41(d) was denied. Plaintiff's motion for costs incurred in its defense against defendant's counterclaims was granted.

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1. Defendant also cites *In re Gardner*, 20 N.C. App. 610, 202 S.E.2d 318 (1974). *In re Gardner*, however, bases its holding on *Brumble*, *id.*, which, as discussed above, was superceded by the adoption of our Rules of Civil Procedure.

[2] We first address the trial court's granting of plaintiff's motion for costs. Defendant's brief states that the trial court "erroneously granted plaintiff's motion." These four words constitute defendant's appellate argument in its entirety. Defendant has therefore failed to present any argument or authority in support of its contention, and does not assert any basis upon which we might conclude the trial court erred. Issues raised in defendant's brief, but not supported by argument or authority, are deemed abandoned. N.C.R. App. P. 28(b)(6). The trial court's award of costs to plaintiff is affirmed.

[3] We next turn to defendant's argument that the trial court erred by failing to award him costs under N.C.R. Civ. P. 41. Rule 41(d) provides in pertinent part that a plaintiff "who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis." Plaintiff's counsel argued to the superior court, *inter alia*, that Rule 41(d) is inapplicable because plaintiff was precluded from voluntarily dismissing its claim once defendant filed a counterclaim. Because we affirm the trial court's order on alternative grounds, we have no occasion to address this argument.

In North Carolina "costs may be taxed solely on the basis of statutory authority . . . [and] courts have no power to adjudge costs against anyone on mere equitable or moral grounds." *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972) (internal quotations omitted). This Court recently addressed the current status of our jurisprudence concerning costs in general, *DOT v. Charlotte Area Manufactured Hous. Inc.*, 160 N.C. App. 461, 586 S.E.2d 780 (2003), and costs in the Rule 41 context, *Cosentino v. Weeks*, 160 N.C. App. 511, 586 S.E.2d 787 (2003).

> Rule 41(d) requires an award of costs, upon motion by a defendant, where a plaintiff takes a voluntary dismissal[.] . . . [W]here Rule 41(d) applies, . . . the discretion to award costs, is inapplicable because Rule 41(d) mandates that costs 'shall be awarded.'

Cosentino, 160 N.C. App. at 518, 586 S.E.2d at 790. This Court has held that "[t]he 'costs' to be taxed under . . . Rule 41(d) against a plaintiff who dismisses an action under . . . Rule 41(a), means the costs recoverable in civil actions as delineated in [N.C.G.S.] § 7A-305(d)[.]" *Sealy v. Grine*, 115 N.C. App. 343, 347, 444 S.E.2d 632, 635 (1994) (citing *McNeely*, 281 N.C. at 691, 190 S.E.2d at 185). Moreover, consistent with the Supreme Court's holding in *McNeely* this Court has held that

expenses not listed as costs in the North Carolina General Statutes will not be accommodated. *Charlotte Manufactured Housing, Inc.*, 160 N.C. App. at 472, 586 S.E.2d at 786; *accord Cosentino*, 160 N.C. App. at 518, 586 S.E.2d at 791.

In the instant case, plaintiff filed a voluntary dismissal without prejudice pursuant to Rule 41(a). Defendant's motion for costs pursuant to Rule 41(d) referenced two items which are not enumerated in G.S. § 7A-305(d). Based on the principles set forth in *McNeely*, *Sealy*, *Charlotte Area Manufactured Housing*, and *Cosentino*, the trial court did not err in denying defendant's motion to tax these expenses against the plaintiff.

The trial court's orders entering summary judgment, awarding costs to plaintiff, and denying defendant's motion for costs are affirmed.

Affirmed.

Chief Judge MARTIN and Judge McGEE concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. DAVID FRANKLIN HURT, DEFENDANT

No. COA03-26

(Filed 6 April 2004)

Sentencing— aggravating factor—joined with one other person in committing robbery

The trial court erred in a second-degree murder case by finding as an aggravating factor that defendant, who was not charged with conspiracy, joined with one other person in committing the offense of robbery because the trial court did not find that defendant had joined with more than one other person in committing an offense which is required to find an aggravating factor under N.C.G.S. § 15A-1340.16(d)(2).

Judge WYNN dissenting.

Appeal by defendant from judgment entered 26 August 2002 by Judge Claude S. Sitton in Caldwell County Superior Court. Heard in the Court of Appeals 28 October 2003.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Bradley Dawson, for the State.

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

ELMORE, Judge.

David Franklin Hurt (defendant) appeals from judgment imposing a sentence from the aggravated range following his plea of guilty to second degree murder. Because we conclude the trial court erred by finding as an aggravating factor that defendant joined with *one* other person in committing the offense of robbery and was not charged with conspiracy, we vacate defendant's sentence and remand to the trial court for re-sentencing.

Defendant was indicted on 15 March 1999 for first degree murder, first degree burglary, and common-law robbery arising from the 26 February 1999 slaying of Howard Cook (Mr. Cook). On 26 August 2002, defendant pled guilty to second degree murder in exchange for dismissal of the remaining charges.[1] The evidence presented at the plea hearing tended to show Mr. Cook died in his own home as a result of multiple stab wounds to his neck, head, chest, abdomen, and back. Hours after Mr. Cook was murdered, a police officer discovered Mr. Cook's nephew, William Parlier (Parlier), extremely intoxicated and lying in a ditch. Parlier told the officer his uncle had been murdered the night before and identified defendant as the murderer. Over the next several hours Parlier gave the police three statements concerning the previous night's events. Some of the details varied, but each statement implicated defendant as Mr. Cook's killer.

According to Parlier's third statement, which the State relied on as the factual basis for the plea agreement, Parlier and defendant were riding around in defendant's van drinking the night of Mr. Cook's murder. Defendant and Parlier pulled into a Hardee's parking lot and considered robbing it, but decided not to. They drove to Mr. Cook's home and knocked on the door. The fifty-seven year-old Mr. Cook, clad in pajamas, cracked the door, at which point defendant pushed the door open, causing Mr. Cook to fall. According to Parlier, defendant then hit Mr. Cook with his fists three or four times in the face. Defendant demanded money from Mr. Cook and instructed Parlier to remove the contents of Mr. Cook's wallet, which amounted to four

1. Defendant stipulated to having eight prior record points, for a prior record level of III.

dollars. Mr. Cook then grabbed a knife, which defendant immediately took from him. According to Parlier, defendant then told Mr. Cook that he was going to die, and Mr. Cook begged defendant to let him pray before defendant killed him. After briefly reading from his Bible, Mr. Cook ran into his bedroom and locked the door, and defendant kicked in the door. Mr. Cook then retreated into the bedroom closet and fell to the floor when defendant pushed open the closet door. According to Parlier, defendant again told Mr. Cook he was going to die before placing a blanket over Mr. Cook's head. Mr. Cook begged Parlier to help him and Parlier stated that he pleaded with defendant not to kill his uncle, but defendant stabbed Mr. Cook three or four times in the chest and abdomen. Mr. Cook again asked Parlier to help him and Parlier again pleaded with defendant to spare his uncle's life. Defendant walked away from Mr. Cook and Parlier removed the blanket from Mr. Cook's head and tried to stop the bleeding from his uncle's chest. According to Parlier, defendant then placed the blanket back over Mr. Cook's head and stabbed him repeatedly in the neck, chest, and abdomen. Defendant then cut the telephone cord and handed it, along with the knife and Mr. Cook's jacket and belt, to Parlier and told him they were leaving. After wiping down all the door handles to remove fingerprints, defendant and Parlier drove to the Rhodhiss Dam, where Parlier threw the knife, jacket, and belt into the water.

Based on Parlier's statements, defendant was questioned and denied being at Mr. Cook's home on the night of the murder or having any involvement in Mr. Cook's murder. Defendant stated that he and Parlier were drinking at defendant's trailer that night and that at some point Parlier borrowed defendant's van and left the trailer. Defendant stated that Parlier returned after about one hour and borrowed a pair of defendant's pants; Parlier told defendant he had "fallen in some mud and gotten his blue jeans muddy." Defendant stated that he and Parlier then went to the residence of a female acquaintance, where defendant went to sleep and awoke early the next morning to see Parlier driving off in defendant's van. Defendant was allowed to leave after giving this statement, but he was arrested the next day. After stating "[Parlier] was the one with blood all over him, and he had the money[,] [w]hat does that tell you?" defendant invoked his right to counsel. Later, in an interview with representatives of the district attorney's office, Mr. Cook's niece stated that Mr. Cook had loaned Parlier money in the past, that Parlier wanted more money, and that Parlier had threatened Mr. Cook a couple of weeks before the murder.

The physical evidence collected by the police included four bloody one-dollar bills found in Parlier's possession; testing revealed the blood matched Mr. Cook's DNA profile. Blood on Parlier's shirt was also tested and found to match his uncle's DNA profile, as was blood from a pair of jeans found in defendant's van. Blood found on defendant's shirt and boot also matched Mr. Cook's DNA, and saliva on a cigarette butt found at the front door of Mr. Cook's residence matched defendant's DNA.

Defendant and Parlier were each arrested and charged with first degree murder, and Parlier pled guilty in April 2002 and was sentenced to life imprisonment in exchange for agreeing to testify against defendant. However, shortly before defendant was to stand trial, Parlier indicated he would not testify. The State thereafter agreed to accept defendant's plea of guilty to second degree murder.

At defendant's plea hearing, after presenting the State's factual basis for the plea as described above, the assistant district attorney stated that, in his opinion, "when [Parlier] described what [defendant] did in those statements [Parlier] was describing his own activities. . . . And based on that I came to the conclusion that William Parlier is the actual killer. . . . The more I talked to Mr. Parlier the more I realized that he did it." Nevertheless, the trial court found there were sufficient facts to accept defendant's plea of guilty to second degree murder and proceeded to sentencing.

Prior to sentencing, defendant presented evidence that he and his mother were repeatedly abused during his childhood by defendant's father. At the time of his incarceration, defendant was gainfully employed and his alcoholic mother and brother were living with him. Evidence was presented tending to show that defendant has a drinking problem and has four DWI convictions. Defendant presented statements from six inmates, each of whom claim Parlier admitted to them while incarcerated that he, not defendant, killed Mr. Cook. Defendant has had no disciplinary infractions while incarcerated. Since his incarceration defendant has been regularly ministered to by his uncle, a pastor, and has corresponded with congregants of his uncle's church.

At the close of evidence, the trial court found by the preponderance of the evidence the following statutory mitigating factors, pursuant to N.C. Gen. Stat. § 15A-1340.16(e) (2003): defendant (1) has supported his family in the past, (2) has a support system in a

Christian community, and (3) has a positive employment history, as well as two non-statutory mitigating factors, that defendant (1) has been a good inmate while incarcerated and (2) may have had a lesser role in the commission of the offense. The trial court also found by the preponderance of the evidence the following two statutory aggravating factors, pursuant to N.C. Gen. Stat. § 15A-1340.16(d) (2003): (1) defendant joined with *one other person*, Parlier, in robbing Mr. Cook and was not charged with committing conspiracy; and (2) the offense was especially heinous, atrocious, or cruel, as well as one non-statutory aggravating factor, that defendant took four dollars from Mr. Cook by force and by placing Mr. Cook in fear of bodily harm. The trial court found that the aggravating factors outweighed the mitigating factors and sentenced defendant to between 276 and 341 months imprisonment, the maximum aggravated range term for a class B2 felony at defendant's prior record level III. Defendant received credit for 1,277 days spent in confinement prior to the date of the judgment. Defendant appeals.

The single issue on appeal is whether the trial court's findings regarding aggravating and mitigating factors were supported by the evidence and were properly utilized by the trial court to support the sentence imposed from the aggravated range. We hold that they were not, and we therefore vacate defendant's sentence and remand to the trial court for re-sentencing.

Section 15A-1340.16(a) of our General Statutes states the trial court "shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court." N.C. Gen. Stat. § 15A-1340.16(a) (2003). Moreover, "[i]f the court finds that aggravating factors are present and are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range described in G.S. 15A-1340.17(c)(4)." N.C. Gen. Stat. § 15A-1340.16(b) (2003). It is well settled that "[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).

Defendant contends the trial court erred in finding as an aggravating factor that defendant joined with *one* other person, Parlier, in committing the offense of robbery and was not charged with conspiracy. We agree.

Our legislature has provided that grounds for sentencing a criminal defendant from the aggravated range exist where "[t]he defendant joined with *more than one* other person in committing the offense and was not charged with committing a conspiracy." N.C. Gen. Stat. § 15A-1340.16(d)(2) (2003) (emphasis added). Our examination of the record reveals that the trial judge marked through the words "more than" immediately preceding "one" and added the words "for robbery of victim" immediately following "conspiracy" in the space on the findings worksheet corresponding to this statutory aggravating factor. Likewise, the transcript of the plea hearing shows the trial court found as an aggravating factor "[t]hat the defendant joined *with his co-defendant*, William Wayne Parlier, in committing an offense of robbery from the person of the victim, Mr. Cook, and was not charged with committing conspiracy."

It is unclear from the record whether the trial court intended for this finding to constitute a statutory or a non-statutory aggravating factor. Because the trial court clearly did not find that defendant had joined with "more than one other person" in committing any offense, as required to find an aggravating factor under N.C. Gen. Stat. § 15A-1340.16(d)(2) (2003), and because no evidence was presented tending to show involvement by any party other than defendant and Parlier in Mr. Cook's murder, we conclude that, to the extent the trial court intended this finding to constitute a statutory aggravating factor, the trial court erred.

We are mindful that, when proved by a preponderance of the evidence, the trial court may find a non-statutory aggravating factor where it is "reasonably related to the purposes of sentencing." N.C. Gen. Stat. § 15A-1340.16(d)(20) (2003); *State v. Taylor*, 322 N.C. 280, 286, 367 S.E.2d 664, 668 (1988). Our legislature has provided that one of the primary purposes of sentencing is to "impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability." N.C. Gen. Stat. § 15A-1340.12 (2003). Moreover, our appellate courts have consistently stated that "the enhancement of a defendant's sentence must be based upon conduct which goes beyond that normally encompassed by the particular crime for which the defendant is convicted." *State v. Jones*, 104 N.C. App. 251, 257, 409 S.E.2d 322, 325 (1991).[2] "[A]ny factor used to increase or decrease a pre-

2. Although *Jones* was decided under the predecessor to the Structured Sentencing Act, our analysis is not affected. Under both the Structured Sentencing Act and the Fair Sentencing Act, the State is required to prove aggravating factors by a pre-

sumptive term must relate to the character or conduct of the offender." *Id.* at 257, 409 S.E.2d at 326. With respect to joining with others in the commission of an offense, our legislature has carefully crafted the statutory language to require that a defendant join with *more than one* other person to support the finding of an aggravating factor on these grounds. *See* N.C. Gen. Stat. § 15A-1340.16(d)(2). Presumably, this is so because our legislature has ascribed a higher degree of culpability to a defendant who joins with more than one accomplice to carry out a criminal enterprise. Therefore, we conclude the trial court erred to the extent that it intended for its finding that defendant joined with *one* other person, Parlier, in committing the offense of robbery and was not charged with conspiracy to constitute a non-statutory aggravating factor.

Our Supreme Court, reasoning that "it must be assumed that every factor in aggravation measured against every factor in mitigation, with concomitant weight attached to each, contributes to the *severity* of the sentence—the quantitative variation from the norm of the presumptive term[,]" has held that "in every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing." *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983). In light of the foregoing, we need not address defendant's contentions that the trial court erred in finding additional aggravating factors.

Because the trial court erred in finding as an aggravating factor that defendant joined with *one* other person, Parlier, in committing the offense of robbery and was not charged with conspiracy, we vacate defendant's sentence and remand to the trial court for re-sentencing.

Vacated and remanded.

Judge TIMMONS-GOODSON concurs.

Judge WYNN dissents.

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ponderance of the evidence. See N.C. Gen Stat. §15A-1340.16(a) (2003) (Structured Sentencing Act); N.C. Gen. Stat. § 15A-1340.4(a) (repealed 1995) (Fair Sentencing Act).

WYNN, Judge, dissenting.

Because I conclude the trial court did not abuse its discretion by finding as an aggravating factor that Defendant joined with another person in the commission of the offense, I respectfully dissent from the majority opinion of my well-learned colleagues.

The State is required to prove the existence of an aggravating factor by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.16(a) (2003). In addition to the aggravating factors listed in section 15A-1340.16(d) of the General Statutes, the trial court in its discretion may find "[a]ny other aggravating factor reasonably related to the purposes of sentencing." N.C. Gen. Stat. § 15A-1340.16(d)(20) (2003). The purposes of sentencing are to

> impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

N.C. Gen. Stat. § 15A-1340.12 (2003). As noted by the majority, the trial court's decision to find a nonstatutory aggravating factor may be reversed only upon a showing that its decision is manifestly unsupported by reason.

In *State v. Manning*, 327 N.C. 608, 398 S.E.2d 319 (1990), our Supreme Court held the trial court could properly use as a nonstatutory aggravating factor the fact that the offense was committed for pecuniary gain, thereby reversing a decision by the Court of Appeals. The trial court in *Manning* sentenced the defendant for his convictions of the crimes of aiding and abetting in the solicitation to commit murder and conspiracy to commit murder. As a nonstatutory aggravating factor, the trial court found the crimes were committed for pecuniary gain. Although there was substantial evidence to support the factor, there was no evidence that the defendant was hired or paid to commit an offense. At the time, the Fair Sentencing Act allowed a trial court to find as a statutory aggravating factor that "[t]he defendant was hired or paid to commit the offense." N.C. Gen. Stat. § 15A-1340.4(a)(1)(c) (1988). The Court of Appeals reversed the decision of the trial court, holding the trial court could not use pecuniary gain as a nonstatutory aggravating factor where it could not be used as a statutory aggravating factor. *See State v. Manning*, 96 N.C.

App. 502, 504-05, 386 S.E.2d 96, 97 (1989), *reversed*, 327 N.C. 608, 398 S.E.2d 319 (1990). The Court of Appeals examined the statutory aggravating factor and the intent of the General Assembly in its enaction, reasoning that

> [t]he North Carolina Legislature has indicated that pecuniary gain may be considered as an aggravating factor only in very peculiar circumstances. In essence, the "hired or paid" language of N.C.G.S. § 15A-1340.4(a)(1)(c) requires the criminal act occur as a result of a bargained for arrangement. . . . [T]he Legislature sought to impose greater punishment where the crime arose from a contractual agreement involving pecuniary compensation.

Manning, 96 N.C. App. at 504, 386 S.E.2d at 97 (citation omitted). Because "the State did not prove by a preponderance of the evidence that the defendant participated in the crime as a result of a bargained for arrangement," the Court of Appeals held that pecuniary gain could not be used by the trial court as a nonstatutory aggravating factor and reversed the trial court. *See id.* at 504-05, 386 S.E.2d at 97.

On further appeal, our Supreme Court reversed the decision by the Court of Appeals, stating that "[b]ecause the evidence would not support the statutory aggravating factor in N.C.G.S. § 15A-1340.4(a)(1)(c) . . . does not mean that it cannot be used to support a nonstatutory aggravating factor" as long as it was reasonably related to the purposes of sentencing. *Manning*, 327 N.C. at 613-14, 398 S.E.2d at 322. The Supreme Court stated that "[a] person who conspires and solicits the taking of a person's life, so that he may live off the insurance proceeds from that person's death and live in that person's home, is more culpable by reason of those motives, and a sentence greater than the presumptive is warranted for purposes of deterrence as well as protection of the unsuspecting public." *Id.* at 615, 398 S.E.2d at 323. Because the Supreme Court deemed pecuniary gain as an incentive to commit a crime to be reasonably related to the purposes of sentencing, it explained that pecuniary gain "can be a nonstatutory aggravating factor unless there is something to preclude its use." *Id.* at 614, 398 S.E.2d at 322. For example, pecuniary gain could not be used as an aggravating factor if it was also used to support an essential element of the crime. As pecuniary gain was not an element essential to the crimes of solicitation to commit murder or conspiracy to commit murder, the *Manning* Court held that there was "nothing to prevent use of pecuniary gain as a *nonstatutory* aggravating factor." *Id.* at 615, 398 S.E.2d at 323.

In the instant case, the majority opinion concludes the trial court erred in finding as an aggravating factor that Defendant committed the offense with another person. The majority opinion examines the language of the statutory aggravating factor of section 15A-1340.16(d)(2) allowing aggravation where the defendant joins with more than one person to commit the offense and concludes that "our legislature has ascribed a higher degree of culpability to a defendant who joins with more than one accomplice to carry out a criminal enterprise." With no further explanation or analysis, the majority opinion concludes "the trial court erred to the extent that it intended for its finding that defendant joined with one other person, Parlier, in committing the offense of robbery and was not charged with conspiracy to constitute a non-statutory aggravating factor." I disagree with this conclusion.

There is substantial evidence of record tending to show Defendant joined with Parlier in committing the offense. This fact could be properly used by the trial court as a nonstatutory aggravating factor as long as it was reasonably related to the purposes of sentencing and nothing precluded its use. The fact that Defendant joined with another person in committing the crime, thereby committing the separate crime of criminal conspiracy, increased Defendant's culpability and was therefore reasonably related to the purposes of sentencing. As there were no grounds to preclude its use, the trial court acted within its discretion in using the factor that Defendant joined with another person to commit the crime as a nonstatutory aggravating factor. *See Manning*, 327 N.C. at 613-15, 398 S.E.2d at 322-23.

IN THE MATTER OF: H. W., DOB: 11/12/1995; R. W., DOB: 2/23/1998

No. COA03-679

(Filed 6 April 2004)

1. Child Abuse and Neglect— psychological testing of parents—willful noncompliance

The trial court did not err in a child abuse and neglect case by finding that respondent parents' noncompliance with court orders requiring psychological testing of the parents was willful and not due to their financial circumstances, and by ordering DSS to cease reunification efforts with respondents because: (1)

respondent mother received disability payments from Social Security; (2) respondent father received no income, provided no explanation to the trial court as to why he did not work, and there was nothing in the record to indicate that respondent father was unable to work; and (3) evidence was presented that respondent mother was able to produce $600 to post bond when respondent father was arrested for larceny sometime after the psychological testing was ordered by the court, even though she claimed she borrowed the money from neighbors.

2. Child Abuse and Neglect— reunification—findings of fact

The trial court did not fail to make the requisite findings of fact as required by N.C.G.S. § 7B-907 in a child abuse and neglect case to support its order ceasing reunification efforts with respondent parents, because: (1) the trial court expressly designated its 20 August 2002 order as a regularly scheduled review and placed the matter on the 17 September 2002 calendar for a permanency planning hearing, and thus, the trial court was not conducting, nor was it required to conduct, a permanency planning hearing as specified in N.C.G.S. § 7B-907 at that time; and (2) a trial court may order DSS to cease reunification efforts with a natural parent during a regularly scheduled review if it makes certain written findings of fact under N.C.G.S. § 7B-907(b), and the required written findings were made.

3. Guardian and Ward— guardian ad litem—dependency—parent's substance abuse

The trial court did not err in a child abuse and neglect case by failing to appoint a guardian ad litem for respondent father, because: (1) the trial court does not need to appoint a guardian ad litem under N.C.G.S. § 7B-602(b)(1) unless the petitioner specifically alleges dependency and the majority of the dependency allegations tend to show that a parent or guardian is incapable as the result of some debilitating condition listed in the statute of providing for the proper care and supervision of his child; (2) in this case, the petition did not specifically allege dependency as a result of respondent's substance abuse, nor did the majority of the petition's allegations against respondent focus on his alleged substance abuse as the cause of the children's dependency; and (3) the majority of the dependency allegations in this case focused on respondent's alleged abuse and neglect as exhibited by his noncompliance with court-ordered domestic violence counseling and a pattern of abuse against his wife and other chil-

dren, which did not tend to show incapacity by respondent as defined by the statute.

4. Guardian and Ward— guardian ad litem—timely appointment—incompetent person

The trial court did not err in a child abuse and neglect case by allegedly failing to make a timely appointment of a guardian ad litem for respondent mother, because: (1) N.C.G.S. § 7B-602(b)(1) does not require reversal where the court makes an appointment sometime after the actual commencement of the action unless that appointment is so untimely that it results in prejudice to the incompetent person's case; and (2) assuming arguendo that N.C.G.S. § 7B-602(b)(1) required the appointment of a guardian ad litem for respondent in this case, the trial court's one and a half month delay in appointing a guardian ad litem did not cause prejudice to respondent's case.

Appeals by respondent mother and respondent father from order entered 1 November 2002 by Judge T.S. Royster, Jr. in Davidson County District Court. Heard in the Court of Appeals 1 March 2004.

Davidson County Department of Social Services, by Staff Attorney Charles E. Frye, III, for petitioner-appellee.

Nancy R. Gaines, for respondent-appellant mother.

Katherine Chester, for respondent-appellant father.

Laura B. Beck, for the Guardian ad Litem.

MARTIN, Chief Judge.

Respondent-mother and respondent-father are the parents of H.W., born 12 November 1995, and R.W., born 23 February 1998. On 22 June 2001, the Davidson County Department of Social Services ("DSS") filed a petition alleging the minor children were neglected and dependent. Nonsecure custody of the children was given to DSS, and on 31 August 2001, following hearings conducted on 24 July, 7 August, and 13 August 2001, the trial court found, *inter alia*, that on 18 April 1991, respondent-father had been convicted of feloniously abusing the twenty-month-old son of his girlfriend resulting in the child suffering a closed head injury, brain damage, numerous bruises on his body, and permanent paralysis; that respondent-mother suffered domestic violence from respondent-

father and had mental limitations which caused her to receive disability payments; and that respondent-father suffered from blackouts, uncontrollable bouts of anger, and loss of memory. The trial court concluded the children were living in an environment injurious to their welfare and adjudicated the children to be neglected. Respondents were granted supervised visitation with the children for one hour per week and the matter was placed on the 27 August 2001 calendar for disposition.

Several hearings were scheduled and continued over the next four months. During this time, respondents underwent counseling and participated in supervised visitation with the children. In addition, DSS provided services and recommended treatment options to respondents in an effort to reunite the family.

On 25 January 2002, DSS filed additional petitions alleging the children were abused, neglected, and dependent. In light of these newly filed petitions, disposition of the 13 August 2001 adjudication of neglect was continued several more times. The record does not indicate whether disposition was ever conducted for the 13 August 2001 adjudication of neglect.

On 19 February 2002, the court heard and denied a motion by respondent-mother for substitute counsel. On 11 March 2002, the court allowed a motion by respondent-mother's attorney to withdraw and appointed a Guardian ad Litem for respondent-mother, due to her cognitive limitations.

On 17 May 2002, after hearings conducted on 25 April, 9 May, and 17 May 2002, the trial court entered adjudication and disposition orders for the 25 January 2002 petitions. It found, *inter alia*, that respondent-father continued to deny responsibility for the previous felony child abuse conviction and for any acts of domestic violence against respondent-mother; that the juvenile, R.W. had been observed eating feces and that he claimed that his "Da" would put it in his mouth whenever he had an accident in his pants; that the juvenile, H.W., would become sick and wet her bed almost every time prior to visitation with respondents; that a Child Mental Health Evaluation Program had been completed and it concluded that the children had been physically and emotionally abused by respondents and that respondents lacked the insight, motivation, and ability to work with professionals to correct the problem; and that respondent-mother, due to her cognitive limitations, was unable to protect her children, intervene on their behalf, or be truthful with professionals about

what was occurring in the home. The trial court adjudicated the juvenile, R.W., to be abused and neglected, and it adjudicated the juvenile, H.W., to be neglected. Visitation with respondent-parents was ordered to be "at the discretion of the juvenile's (sic) therapists." Respondent-father was ordered to complete the Abusers' Intervention Program and undergo a sexual disorders specific evaluation; respondent-mother was ordered to complete a full-scale psychological evaluation; and both parents were ordered to cooperate with DSS in locating funds to pay for the court ordered evaluations. The permanent plan of care for the children was decreed to be a concurrent plan of reunification with respondent-parents and guardianship with a relative. No appeal was taken from that order.

On 20 August 2002, the trial court conducted a regularly scheduled review of the matter and considered a motion from respondent-mother for visitation with the children. The trial court found, *inter alia*, that respondent-parents had wilfully failed to complete the previously ordered evaluations; that the children's circumstances improved significantly after visitation with the respondent-parents ceased on 12 March 2002; and that efforts to reunite the family were inconsistent with the children's health, safety, and need for a permanent home within a reasonable period of time. It denied respondent-mother's motion for visitation with the children and ordered that the permanent plan of care for the children be changed to a concurrent plan of guardianship with a relative and termination of parental rights and adoption. The matter was placed on the 17 September 2002 calendar for a permanency planning hearing. Respondents appeal from this order.

Respondents present arguments supporting four of the ten assignments of error contained in the record on appeal. The remaining assignments of error are deemed abandoned. N.C. R. App. P. 28(a).

[1] In their first and fourth assignments of error, respondents argue the trial court's finding of fact #4 was not supported by competent evidence in the record and the trial court erred when it ordered DSS to cease reunification efforts with respondents based on their financial inability to comply with court orders. Because we find competent evidence in the record to support the trial court's finding of fact #4 that respondents' noncompliance with court orders was not due to their financial circumstances, we find no error in either respect.

A trial court's findings of fact are conclusive if supported by competent evidence in the record. *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991). Finding of fact #4 states:

> 4. That counsel for Respondent-Mother made a motion at this hearing that the Davidson County Department of Social Services be required to pay for court ordered psychological testing of the Respondent-Parents due to their indigency. The Court does not accept their excuses for the failure to obtain such evaluations and notes that the Respondent-Father does not work; is not receiving disability; and was able to borrow funds from neighbors in order to post bond to be released on a pending charge of felony larceny. The Court finds that the failure of the Respondent-Parents to obtain said evaluations is not due to their financial circumstances but rather to their unwillingness to either cooperate with the Davidson County Department of Social Services or to comply with the directives of this Court.

Respondents claim their indigence prevented them from complying with the court ordered psychological testing, which was estimated to cost approximately $600 for respondent-father and between approximately $550 and $750 for respondent-mother. Ms. Gould, the DSS social worker, testified that she had worked to find an agency who would conduct the testing for free, but was unable to do so. She testified that respondents made no efforts to assist in this endeavor. Evidence received at hearing indicated that respondent-mother received disability payments from Social Security due to her mental limitations, which she used to support herself and respondent-father. Respondent-father received no income and provided no explanation to the trial court, upon inquiry, as to why he did not work. Furthermore, there is nothing in the record to indicate that respondent-father is unable to work. The trial court found it significant that when respondent-father was arrested for larceny in Guilford County sometime after the psychological testing was ordered by the court, respondent-mother was able to produce $600, which she claims she borrowed from neighbors, to post bond. The evidence was sufficient to support the trial court's finding that respondent-parents wilfully failed to comply with a court order and that such noncompliance was not due to their financial circumstances. Accordingly, we overrule respondents' assignments of error.

[2] Next, respondents argue the trial court did not make the requisite findings of fact as required by G.S. § 7B-907 to support its order ceas-

ing reunification efforts with respondent-parents. This argument has no merit.

N.C. Gen. Stat. § 7B-907(a) (2003) requires the trial court to conduct a permanency planning hearing within 12 months of an initial order removing custody from a parent or guardian. The statute defines a permanency planning hearing as follows:

> (a) In any case where custody is removed from a parent, guardian, custodian, or caretaker, the judge shall conduct a review hearing designated as a permanency planning hearing within 12 months after the date of the initial order removing custody, and the hearing may be combined, if appropriate, with a review hearing required by G.S. 7B-906. The purpose of the permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time.

Id.

At the conclusion of the permanency planning hearing, if the juvenile is not returned home, the trial court must consider the following criteria and make written findings regarding those that are relevant:

> (1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;
>
> (2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;
>
> (3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption;
>
> (4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;
>
> (5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile;

(6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-907(b) (2003).

In this case, the trial court expressly designated its 20 August 2002 order as a regularly scheduled review and placed the matter on the 17 September 2002 calendar for a permanency planning hearing. Thus, the trial court was not conducting, nor was it required to conduct, a permanency planning hearing as specified in G.S. § 7B-907 at that time. Instead, the court was conducting a review hearing as required by G.S. § 7B-906. N.C. Gen. Stat. § 7B-906 (2003) (requiring regularly scheduled reviews by the trial court whenever custody is removed from a parent or guardian).

A trial court may order DSS to cease reunification efforts with a natural parent during a regularly scheduled review if it makes written findings of fact that:

(1) Such [reunification] efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time;

(2) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101;

(3) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent; or

(4) A court of competent jurisdiction has determined that: the parent has committed murder or voluntary manslaughter of another child of the parent; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; or has committed a felony assault resulting in serious bodily injury to the child or another child of the parent.

N.C. Gen. Stat. § 7B-507(b) (2003). The required findings were made by the trial court in its order and after careful review, we hold that such findings are supported by competent evidence in the record. Respondents' assignment of error is overruled.

Finally, respondents argue the trial court erred in failing to appoint a guardian ad litem for the respondent-father, and failing to

make a timely appointment of a guardian ad litem for respondent-mother pursuant to G.S. § 7B-602(b)(1). We disagree.

[3] Respondents first argue that G.S. § 7B-602(b)(1) required the appointment, *sua sponte*, of a guardian ad litem for respondent-father in this case. N.C. Gen. Stat. § 7B-602(b)(1) (2003) states that where a petition alleges that a juvenile is abused, neglected, or dependent:

> (b) In addition to the right to appointed counsel set forth above, a guardian ad litem shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent in the following cases:
>
> (1) Where it is alleged that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101 in that the parent is incapable as the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition of providing for the proper care and supervision of the juvenile[.]

This provision was enacted in 2001 and is applicable to actions filed on or after 1 January 2002. 2001 N.C. Sess. Laws 2001-208, s. 2. When construing the meaning of a newly enacted statute, our Supreme Court stated in *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993) (citations omitted):

> [T]he Court must first ascertain the legislative intent to assure that the purpose and intent of the legislation are carried out. To make this determination, we look first to the language of the statute itself. If the language used is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.

Respondents appeal from an order reviewing the disposition of juvenile petitions filed on 25 January 2002. The petitions alleged that the children were dependent juveniles as defined by G.S. § 7B-101 in that they were abused and neglected by respondents. There is no allegation in the petitions that the children were dependent "as the result of [respondent-father's] substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition. . . ." N.C. Gen. Stat. § 7B-602(b)(1) (2003). However, the neglect allegations do contain an allegation of substance abuse by respondent-father.

Respondent-father argues that these allegations are sufficient to trigger the appointment of a guardian ad litem pursuant to G.S. § 7B-602(b)(1). We first note that G.S. § 7B-602(b)(1) is narrow in scope and does not require the appointment of a guardian ad litem in every case where dependency is alleged, nor does it require the appointment of a guardian ad litem in every case where substance abuse or some other cognitive limitation is alleged. To be sure, we look to the language of the statute itself which requires the appointment of a guardian ad litem only in cases where (1) it is alleged that a juvenile is dependent; and (2) the juvenile's dependency is alleged to be caused by a parent or guardian being "***incapable*** as the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition of providing for the proper care and supervision of the juvenile." N.C. Gen. Stat. § 7B-602(b)(1) (2003) (emphasis added). Thus, a trial court need not appoint a guardian ad litem pursuant to G.S. § 7B-602(b)(1) unless (1) the petition specifically alleges dependency; and (2) the majority of the dependency allegations tend to show that a parent or guardian is incapable as the result of some debilitating condition listed in the statute of providing for the proper care and supervision of his or her child. *See In re Estes*, 157 N.C. App. 513, 518, 579 S.E.2d 496, 499, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 390 (2003) (interpreting an analogous provision for the appointment of a guardian ad litem at a termination of parental rights proceeding).

In this case, the petition did not specifically allege dependency as a result of respondent-father's substance abuse, nor did the majority of the petition's allegations against respondent-father focus on his alleged substance abuse as the cause of the children's dependency. Rather, the majority of the dependency allegations in this case focused on the respondent-father's alleged abuse and neglect as exhibited by his noncompliance with court-ordered domestic violence counseling and a pattern of abuse against his wife and other children. Such allegations do not tend to show incapacity by respondent-father as defined by the statute and thus, G.S. § 7B-602(b)(1) did not require the appointment of a guardian ad litem for respondent-father in this case.

[4] Respondents next argue the trial court erred by delaying the appointment of a guardian ad litem for respondent-mother pursuant to G.S. § 7B-602(b)(1) and that such delay resulted in prejudice to her. Assuming, *arguendo*, that G.S. § 7B-602(b)(1) required the appointment of a guardian ad litem for respondent-mother in this case, we

conclude the trial court's one and a half month delay in appointing a guardian ad litem was not prejudicial to her and thus, reject respondents' argument.

N.C. Gen. Stat. § 7B-602(b)(1) (2003) states "a guardian ad litem shall be appointed in accordance with the provisions of G.S. [§] 1A-1, Rule 17." Rule 17 directs that "[w]hen an insane or incompetent person is defendant and service by publication is not required," a guardian ad litem should be appointed for that person "prior to or at the time of the commencement of the action." N.C. Gen. Stat. § 1A-1, Rule 17(c)(4) (2003).

We first must determine whether failure to appoint a guardian ad litem prior to or at the commencement of the action pursuant to Rule 17 is prejudicial error *per se*. *See Richard v. Michna*, 110 N.C. App. 817, 822, 431 S.E.2d 485, 488 (1993) (holding that failure to comply with the clear mandate of a statute is prejudicial error *per se*). While the appointment of a guardian ad litem is clearly mandatory under G.S. § 7B-602(b) and thus, failure to appoint a guardian ad litem in any appropriate case is deemed prejudicial error *per se*, *see In re Estes*, 157 N.C. App. 513, 515, 579 S.E.2d 496, 498, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 390 (2003) (holding that reversal was required where a trial court failed to appoint a guardian ad litem at a termination of parental rights proceeding pursuant to an analogous statutory provision), we find that the clear mandate of the statute does not require reversal where the court makes an appointment sometime after the actual commencement of the action unless that appointment is so untimely that it results in prejudice to the incompetent person's case.

In this case, the petition alleging abuse, neglect, and dependency was filed on 25 January 2002 and at that time, respondent-mother was represented by counsel. A guardian ad litem was not appointed for respondent-mother until 11 March 2002. During the time between the filing of the petition and the appointment of a guardian ad litem, no proceedings occurred except a motion by respondent-mother for substitute counsel which was heard and denied by the trial court. Before the adjudication and disposition hearings held on 25 April, 9 May, and 17 May 2002, and the regularly scheduled review hearing, from which respondent appeals, held on 20 August 2002, a guardian ad litem had been appointed and appeared with respondent-mother at every stage. Respondents do not contend, nor is there any evidence in the record to show, that respondent-mother was not adequately assisted by her guardian ad litem at these hearings.

From this evidence, we are persuaded that respondent-mother was adequately represented by the guardian ad litem at every critical stage of the case. Thus, the one and a half month delay in appointing a guardian ad litem for respondent-mother did not cause prejudice to her case. Accordingly, we overrule respondents' assignment of error.

Affirmed.

Judges TIMMONS-GOODSON and LEVINSON concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. RONDA TENEILLE SINGLETARY, DEFENDANT

No. COA03-172

(Filed 6 April 2004)

1. Evidence— prior convictions—admissions not plain error

The cross-examination of an assault defendant about prior convictions was not plain error where the evidence against the defendant was overwhelming.

2. Robbery— sufficiency of evidence—use of dangerous weapon

There was sufficient evidence that defendant used a dangerous weapon in a robbery where the victim did not see the weapon, no weapon was produced at trial, but medical testimony indicated that the victim's injuries were consistent with the use of a foreign instrument against the back of her head and the doctor's opinion was that her injuries had occurred before she fell to the curb.

3. Assault— on a handicapped person—sufficiency of evidence

There was sufficient evidence that a defendant in a prosecution for assault on a handicapped person knew or should have known of the handicap. Although N.C.G.S. § 14-32.1(e) does not specifically require that a defendant know that his victim is handicapped, the knowledge requirement is in keeping with the purpose and intent of the legislature and is consistent with the interpretation of the statute for assault on a law enforcement officer.

4. Sentencing— aggravating factor—position of leadership—sufficiency of evidence

There was sufficient evidence in an assault sentencing proceeding to find that defendant occupied a position of leadership.

Appeal by defendant from judgment entered 4 April 2002 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 18 November 2003.

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

Belser & Parke, P.A., by David G. Belser, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Ronda Teneille Singletary ("defendant") appeals her convictions of robbery with a dangerous weapon and aggravated assault on a handicapped person. For the reasons stated herein, we hold that defendant received a trial free of prejudicial error.

The pertinent facts of the instant appeal are as follows: Deloris Sampedro ("Sampedro") is a sixty-five year old woman who weighs approximately 105 pounds and is hearing impaired. At approximately 6 p.m. on 14 June 2001, Sampedro left her work at the Forsyth County Public Library. While Sampedro was stopped at a stop sign on her way home, Sampedro's vehicle was struck from behind by another vehicle. Sampedro exited her vehicle to talk to the driver of the other vehicle, whom she later identified as defendant. Defendant's cousin, Celeste Hines ("Hines"), sat in the front passenger seat of defendant's vehicle.

Defendant apologized for the accident and suggested that she and Sampedro move their vehicles to a side road, so as not to block traffic. After the two moved their vehicles, defendant suggested that she and Sampedro exchange their names, addresses, telephone numbers, and insurance information. Defendant then returned to her vehicle and began to write something down on an envelope while Sampedro turned to her vehicle and assessed its damage. Sampedro then attempted to retrieve defendant's contact information, but defendant handed the envelope to Hines and instead asked Sampedro for her contact information. After Sampedro provided defendant with her information, defendant suggested that Sampedro return to her vehicle

to ensure it started. Sampedro returned to her vehicle and started it, but then remembered that she never received defendant's contact information. The last thing Sampedro remembered before waking up in Forsyth Memorial Hospital's emergency room was checking her side mirror to ensure it was safe to get out of her vehicle and retrieve defendant's contact information.

Dr. C.J. Lepak ("Dr. Lepak") treated Sampedro at Forsyth Memorial Hospital's emergency room. Dr. Lepak testified that when Sampedro arrived, she had "blood coming down the right side of her face and into her right ear," and several abrasions and scratches on her body. Dr. Lepak later discovered that Sampedro had a broken clavicle and a "closed head injury." Dr. Lepak testified that Sampedro's head injury was consistent with someone beating Sampedro's head with a baseball bat, crowbar, baton, or a similar instrument. Dr. Lepak also testified that although Sampedro's abrasions and broken clavicle may have been caused by a fall, her head injuries were inconsistent with a fall. At the close of the State's evidence, defendant moved to dismiss the charges against her.

On direct examination, defendant testified that she intentionally ran into Sampedro's vehicle on the night of the accident, and that Hines "snatched [Sampedro's] pocketbook and I sped off." Defendant also testified that after she drove away, she looked in her rearview mirror and saw Sampedro lying on the ground. Defendant testified that she did not call for an ambulance. Instead, she drove to Wal-Mart and used Sampedro's credit cards for a "shopping spree."

During her direct examination, defendant admitted to her prior convictions for possession of cocaine, common law robbery, financial credit card fraud, and injury to personal property. Defendant testified that these convictions were the extent of her criminal record. However, on cross-examination, defendant admitted to a series of other convictions, including attempted common law robbery, financial card theft, multiple counts of misdemeanor larceny, and possession with the intent to make, sell, or deliver cocaine. Defendant was also questioned on cross-examination about the facts of her previous robbery convictions. At the end of these questions, defendant objected. The trial court sustained defendant's objection. However, defendant did not move to strike the relevant testimony.

At the close of defendant's evidence, defendant renewed her motion to dismiss the charges against her. The trial court again denied the motion. On 4 April 2002, the jury convicted defendant of

robbery with a dangerous weapon and aggravated assault on a handicapped person. At defendant's sentencing hearing, the trial court found as aggravating factors that defendant occupied a position of leadership or dominance in committing the offenses and that the victim was elderly. The trial court also found as a mitigating factor that defendant voluntarily acknowledged wrongdoing in connection with the offenses at an early stage of the criminal process. Defendant appeals.

The issues on appeal are whether the trial court erred (1) by allowing the State to cross-examine defendant regarding her prior convictions; (2) by denying defendant's motion to dismiss the robbery with a dangerous weapon charge; (3) by denying defendant's motion to dismiss the charge of aggravated assault on a handicapped person; and (4) in finding as an aggravating factor that defendant occupied a position of leadership in the commission of the offenses.

[1] Defendant first assigns error to the trial court permitting questions regarding her prior convictions. Defendant argues that the State's cross-examination of defendant was beyond the scope allowed under Rule 609(a). We disagree.

In *State v. Warren*, 327 N.C. 364, 395 S.E.2d 116 (1990), we stated:

> Generally, much latitude is given counsel on cross-examination to test matters related by a witness on direct examination. The scope of cross-examination is subject to two limitations: (1) the discretion of the trial court; and (2) the questions offered must be asked in good faith. Furthermore, the questions of the State on cross-examination are deemed proper unless the record discloses that the questions were asked in bad faith.

327 N.C. at 373, 395 S.E.2d at 121-22 (citations omitted). The trial judge "sees and hears the witnesses, knows the background of the case, and is in a favorable position to control the proper bounds of cross-examination." *State v. Edwards*, 305 N.C. 378, 381, 289 S.E.2d 360, 362-63 (1982). Therefore, since it is in the discretion of the trial judge to determine the limits of legitimate cross-examination, his rulings thereon are not prejudicial error absent a showing that the verdict was improperly influenced by the ruling. *Id.* at 381-82, 289 S.E.2d at 363.

Under Rule 609(a) of the North Carolina Rules of Evidence, the credibility of a witness can be attacked by evidence that the witness

was convicted of a felony. N.C. Gen. Stat. § 8C-1, Rule 609(a) (2003). However, during the guilt-innocence phase of a criminal trial, the use of prior felony convictions on cross-examination has been limited to the name, date, place, and punishment of the crime, unless the information is introduced to correct inaccuracies or misleading omissions in defendant's direct testimony. *State v. Lynch*, 334 N.C. 402, 410, 412, 432 S.E.2d 349, 353, 354 (1993). Thus, where a defendant "opens the door" by misstating his criminal record or the facts of crimes or actions, or where a defendant uses his criminal record to create inferences in his favor, the State is allowed to cross-examine the defendant about the details of those prior crimes or actions. *Id.* at 412, 432 S.E.2d at 354.

Defendant asserts that the trial court committed plain error by allowing the State to cross-examine defendant as follows:

> STATE: . . . you used a gun the first time you robbed somebody, didn't you?
>
> DEFENDANT: No.
>
> STATE: You didn't confess to the police you used a gun the first time?
>
> DEFENDANT: No.
>
> STATE: You didn't tell the police you used a .22 gun the first time you robbed somebody?
>
> DEFENDANT: No.
>
> STATE: So they would be incorrect, is that right?
>
> DEFENDANT: Must have to be because I never told anyone that.
>
> STATE: But you're telling us the truth, right?
>
> DEFENDANT: I'm saying that if they're saying that I said something I didn't, of course I'm telling the truth.
>
> STATE: Ms. Singletary, back when you made your first robbery isn't it interesting that you also tried to limit your involvement in that crime as well, didn't you?
>
> DEFENDANT: No.
>
> STATE: Like you're doing right now, telling me you didn't have a gun the first time?

DEFENDANT: No, that's not true because from the first time that they had spoke to me about this crime I have told the truth. I never even went around it. I told them the truth since day one.

STATE: So if the detective back in your first robbery said that Singletary tried at first to limit her culpability by saying she was along for the ride and did not participate in the crimes, he wouldn't be telling the truth, would he?

DEFENDANT: Huh-uh.

DEFENSE COUNSEL: Objection, Your Honor.

THE COURT: Sustained.

Under plain error, this Court reviews the entire record and determines whether the alleged error is so fundamental and prejudicial that justice could not have been done. *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602, *cert. denied*, 124 S. Ct. 475 (2003); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). To prevail on plain error, defendant must not only convince this Court that there was error, she must also convince us that absent the error, the jury probably would have reached a different result. *Haselden*, 357 N.C. at 13, 577 S.E.2d at 602 (citations omitted).

We conclude that defendant has failed to meet this burden. The evidence presented at trial was overwhelmingly in favor of the State. Defendant testified that she intentionally ran into Sampedro's vehicle for the purpose of stealing her pocketbook. Defendant also testified that, with the help of Hines, she stole Sampedro's pocketbook and used Sampedro's credit cards. Defendant admitted that she used Sampedro's credit cards at various locations that evening and the following day because she knew that Sampedro would soon cancel the cards. Defendant further testified that while fleeing the scene, she saw Sampedro on the ground. Dr. Lepak testified that Sampedro suffered from head injuries consistent with trauma directed at the head by the use of a baseball bat, crowbar, baton, or similar instrument. Dr. Lepak opined that Sampedro's head injuries were not the result of a fall, but the result of someone hitting her with a foreign instrument. We conclude that the foregoing evidence would allow a reasonable jury to convict defendant of robbery with a dangerous weapon and aggravated assault on a handicapped person. Defendant has failed to convince this Court that, absent the cross-examination by the State, the jury would have reached a different result. Therefore, defendant's first assignment of error is overruled.

[2] Defendant next assigns error to the trial court's denial of defendant's motions to dismiss the charges against her. In ruling on a motion to dismiss made at the close of evidence, the trial court must determine whether the State has produced substantial evidence of each essential element of the offense charged. *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993). Whether the State's evidence is substantial is a question of law for the trial court. *State v. Lowe*, 154 N.C. App. 607, 609, 572 S.E.2d 850, 853 (2002). Substantial evidence is the amount of "relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002). The motion to dismiss must be denied if the evidence, viewed in the light most favorable to the State, would allow a jury to reasonably infer that the defendant is guilty. *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620-21 (2002).

The essential elements of robbery with a dangerous weapon are (1) the possession, use or threatened use of a dangerous weapon; (2) threatening or endangering the life of a person; (3) while taking or attempting to take personal property; (4) from another or from a residence or any other place where there is a person in attendance, at any time, day or night; (5) or aiding or abetting others in the commission of such a crime. N.C. Gen. Stat. § 14-87(a) (2003).

Defendant argues that the State failed to produce sufficient evidence that defendant used a dangerous weapon in the robbery, and that therefore the charge of robbery with a dangerous weapon should have been dismissed. We disagree.

In the case *sub judice*, Sampedro testified that the last thing she remembered before waking up in Forsyth Memorial Hospital's emergency room was getting out of her vehicle to speak with defendant. Although no weapon was produced at trial, Dr. Lepak testified that Sampedro received head injuries consistent with the use of a foreign instrument against the back of Sampedro's head. Dr. Lepak further testified that, although Sampedro's other injuries were consistent with a fall, in his opinion her head injuries occurred before she fell to the curb. Viewing the evidence in the light most favorable to the State, we conclude that there was substantial evidence that defendant used a dangerous weapon to rob Sampedro. Therefore, we hold that the trial court did not err in denying defendant's motion to dismiss the charge of robbery with a dangerous weapon.

[3] Defendant also argues that the State failed to present sufficient evidence that defendant knew of Sampedro's handicap, and that therefore the charge of aggravated assault on a handicapped person should have been dismissed. We disagree.

North Carolina General Statute § 14-32.1(e) (2003) provides:

> A person commits an aggravated assault or assault and battery upon a handicapped person if, in the course of the assault or assault and battery, that person:
>
> (1) Uses a deadly weapon or other means of force likely to inflict serious injury or serious damage to a handicapped person; or
>
> (2) Inflicts serious injury or serious damage to a handicapped person; or
>
> (3) Intends to kill a handicapped person.

Although this statute does not specifically require that defendant know his victim is handicapped, defendant urges this Court to adopt such a requirement based on the pattern jury instructions. The pattern jury instructions for N.C. Gen. Stat. § 14-32.1(e) require the jury to find that defendant knew or had reasonable grounds to know the victim was a handicapped person. N.C.P.I.—Crim. 208.50A (2002). However, because there is no North Carolina case law previously applying this statute, this is a matter of first impression for this Court. As discussed herein, we conclude that in order to convict an individual under N.C. Gen. Stat. § 14-32.1(e), the jury must find that defendant knew or had reasonable grounds to know the victim was a handicapped person.

"Statutes should be construed to ensure that the purpose of the legislature is accomplished." *State v. Thompson*, 157 N.C. App. 638, 644, 580 S.E.2d 9, 13, *stay denied, disc. review denied*, 357 N.C. 469, 587 S.E.2d 72 (2003). In 1981, a study was presented to the Legislative Program of the Governor's Crime Commission in support of the enactment of N.C. Gen. Stat. § 14-32.1(e). The study recommended that the General Assembly enact legislation to require that judges consider the physical condition of the victim prior to passing sentences for felony convictions. "Very often one who is elderly or who is physically or mentally infirm is the prey of the criminal . . . some offenders may even 'lie in wait' for one whose frailties are obvious." An Agenda in Pursuit of Justice, p. 17. Thus, we believe that the

knowledge requirement is in keeping with the purpose and intent of the legislature in enacting N.C. Gen. Stat. § 14-32.1(e).

We derive further guidance on the issue from examination of N.C. Gen. Stat. § 14-34.2 (2003), which defines the charge of assault with a firearm on a law enforcement officer. Our courts have determined that a charge of assault with a firearm on a law enforcement officer requires that the State prove that the defendant knew or should have known that the victim was an officer performing his official duties. *See State v. Page*, 346 N.C. 689, 699, 488 S.E.2d 225, 232 (1997), *cert. denied*, 522 U.S. 1056 (1998); *State v. Avery*, 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985). The knowledge requirement has been imposed although the underlying statute is silent on the question of knowledge. N.C. Gen. Stat. § 14-34.2. Therefore, we likewise interpret N.C. Gen. Stat. § 14-32.1(e), assaults on a handicapped person, to require the State to prove that the defendant knew or should have known that the victim was handicapped.

In the case *sub judice*, Sampedro testified that she suffers from "profound sensory neural hearing loss," which requires her to wear a hearing aid. Sampedro showed the jury the hearing aid she wore on the evening in question. The hearing aid was an external piece Sampedro wore over her ear. Sampedro further testified that she wore the hearing aid on the evening of the accident, and that she had several conversations with defendant and repeatedly walked to and from defendant's car. We conclude that the foregoing evidence is sufficient to allow a reasonable juror to find that defendant knew or should have known of Sampedro's handicap. Therefore, we hold the trial court did not err in denying defendant's motion to dismiss the charge of aggravated assault against a handicapped person.

[4] Defendant last assigns error to the trial court finding as an aggravating factor that defendant occupied a position of leadership in the commission of the offenses. We note initially that this issue is not properly before this Court. Because defendant did not object to this alleged error at the sentencing hearing, she has waived her right to appellate review of the alleged error. N.C.R. App. P. 10(b)(1) (2004). Nevertheless, pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, we have elected to examine defendant's argument, and we conclude that it is without merit.

Under Structured Sentencing, the trial court may find as an aggravating factor that defendant occupied a position of leadership in the commission of the offense charged. N.C. Gen. Stat. § 15A-1340.16(d)(1) (2003). However, the State bears the burden of

proving by a preponderance of the evidence that the aggravating factor exists. N.C. Gen. Stat. § 15A-1340.16(a) (2003). Furthermore, "[t]he trial court's finding of an aggravating factor must be supported by 'sufficient evidence to allow a reasonable judge to find its existence by a preponderance of the evidence.' " *State v. Hughes*, 136 N.C. App. 92, 99, 524 S.E.2d 63, 67 (1999), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 878 (2000) (quoting *State v. Hayes*, 102 N.C. App. 777, 781, 404 S.E.2d 12, 15 (1991)).

In the case *sub judice*, the State presented evidence that defendant was the driver of the vehicle that collided with Sampedro's vehicle, that defendant intended the collision, and that defendant was the only person to speak with Sampedro after the collision. The State also presented evidence that, in an attempt to facilitate the robbery, defendant suggested Sampedro return to her vehicle to ensure it started. Finally, the State presented evidence that defendant was driving when she and Hines fled the scene. Although defendant testified that it was Hines who stole Sampedro's pocketbook, the State's evidence tended to show that Hines' only participation in the actual robbery and assault was the taking of an envelope from defendant before defendant requested Sampedro's contact information. We conclude that the evidence before the trial court at the sentencing hearing was sufficient to allow the trial court to find by a preponderance of the evidence that defendant occupied a position of leadership in the commission of the offenses. Therefore, defendant's last assignment of error is overruled.

No error.

Judges WYNN and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. JAMES McDONALD
AND
STATE OF NORTH CAROLINA v. LINWOOD EARL FORTE

No. COA03-1

(Filed 6 April 2004)

1. Sentencing— aggravating factors—preponderance of evidence

The trial court did not err by using a preponderance of the evidence standard in finding aggravating factors in sentencing where defendant's sentence in the aggravated range was within

the statutory maximum. A finding of fact used to increase a sentence from the presumptive to the aggravated range set by statute is not required to be found by the jury using the beyond a reasonable doubt standard.

2. Criminal Law— severance of joint trials denied—same offenses and same facts

The trial court did not abuse its discretion by denying a defendant's motion to sever his trial for felonious escape from that of a codefendant. Defendant waived any right to severance by not renewing his motion at the close of the evidence and there was no abuse of discretion in the denial because both defendants were charged with the same offenses arising from the same facts.

3. Criminal Law— continuance denied—time to prepare

There was no abuse of discretion in the denial of a motion to continue where the record did not support defendant's contention on appeal that his counsel did not have time to prepare.

4. Escape— reason for incarceration—admissible

Testimony that a felonious escape defendant was in jail awaiting trial for murder was admissible. Felonious escape requires proof that the defendant was charged with a felony and was committed to the custody of the Department of Correction.

5. Sentencing— re-weighing aggravating and mitigating factors—exercise of discretion

The trial court did not abuse its discretion by not re-weighing aggravating and mitigating factors after the inapplicability of one of the aggravating factors was brought to the court's attention. The trial judge's words and actions sufficiently indicate that he exercised his discretion appropriately.

6. Sentencing— within presumptive range—mitigating factor not found—no appeal of right

Where a sentence was in the presumptive range, there was no appeal as a matter or right from the failure to find a nonstatutory mitigating factor.

Appeal by defendants from judgments entered 26 June 2002 by Judge Benjamin G. Alford in Superior Court in Craven County. Heard in the Court of Appeals 16 October 2003.

Attorney General Roy Cooper, by Assistant Attorney Generals Lauren M. Clemmons and Kimberly W. Duffley, for the State.

Rudolf, Maher, Widenhouse & Fialko, by Andrew G. Schopler, for defendant-appellant James McDonald.

Joal H. Broun, for defendant-appellant Linwood Earl Forte.

HUDSON, Judge.

On 18 February 2002, a Craven County Grand Jury indicted defendants James McDonald and Linwood Earl Forte on charges of felonious escape, attempted felonious escape, and assault on a correctional officer with a deadly weapon with intent to kill inflicting serious injury. The court dismissed the felonious escape charge at the close of the State's evidence. On 26 June 2002, a jury found both defendants guilty of attempted felonious escape and assault with a deadly weapon inflicting serious injury. The court sentenced McDonald to prison for 8 to 10 months for the attempted escape charge and 58 to 79 months for the assault charge, with the sentences to run consecutively. The court sentenced Forte to prison for 9 to 11 months for the attempted escape and 66 to 89 months for the assault, with the sentences to run consecutively. Defendants appeal. For the reasons discussed here, we find no error as to either defendant.

Factual Background

The State's evidence at trial tended to show that on 26 January 2002, defendants McDonald and Forte were incarcerated in the "safe-keeping" unit at the Craven Correctional Institution in Vanceboro awaiting trial on murder charges. The "safe-keeping" unit houses inmates from various other jails who have medical, physical or behavioral problems.

In the afternoon of 26 January 2002, defendants as well as several other inmates were in the recreational yard at the facility. The yard was enclosed by a series of three fences: the inner and outer fences were chain-link fences with razor-wire tops, and the middle fence was a barbed wire electric fence.

During a recreational period that day, the defendants asked officer Jeffrey Johnson, an employee of the Craven Correctional Institution, to escort them from the recreation area to their cells. When Officer Johnson placed his key in the door, McDonald slammed him into the wall. Thereafter, the defendants kicked and hit Officer

Johnson, and struck him with a padlock wrapped in a sock until the Officer fell to his knees. Officer Johnson ordered the defendants to stop, but they did not. He tried to radio for help, but his radio was knocked out from his hands and under a stairwell. Officer Johnson attempted to get into the building, but defendants pushed him away, pulled his keys from the door and threw them away. The defendants then dragged Officer Johnson, and handcuffed him to a fence and continued to beat on him until the lock came out of the sock. Then the defendants began climbing the first fence.

Corrections Officer Taylor Lorenzo Biggs was driving his vehicle on perimeter patrol duty that day when he received an alarm near the "safe-keeper" unit. He responded to the area and saw McDonald between the second and third fences, Forte tangled in the barbed wire of the first fence, and Officer Johnson leaning against the fence to which he was handcuffed.

McDonald ran toward Forte and tried to untangle him from the barbed wire. Officer Biggs ordered the defendants to get down from the fence and aimed his rifle at McDonald, who said, "You're going to have to shoot me." Other officers soon arrived and surrounded the defendants. They were handcuffed and taken back into custody.

Eventually another inmate came to Officer Johnson's aid. At the hospital he was treated for blunt force trauma wounds to the top of his head and left temple area, and received approximately twenty stitches. Officer Johnson also had wounds from being kicked in the groin area, including a swollen testicle and an enlarged prostate gland, as well as abrasions on his right knee and right arm.

At the trial, Officer Johnson testified that he had several ongoing problems from the incident, including problems with his left hip, an injured disc in his back and a pinched nerve. He was undergoing physical therapy two or three times per week because the ear tube that controls his balance was crushed in the assault. He also testified that periodically he had foggy vision in his left eye, and had not returned to work.

Defendants did not present any evidence.

I. Defendant Forte

A.

[1] Defendant Forte first argues that the "trial court used the unconstitutionally invalid standard of preponderance of the evidence

instead of beyond a reasonable doubt" in finding aggravating factors during sentencing. For the reasons discussed herein, we overrule this assignment of error.

Defendant draws this Court's attention to the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. E. 2d 435 (2000) and *Ring v. Arizona*, 536 U.S. 584, 153 L. E. 2d 556 (2002), which held that any aggravating factor that increases the penalty for a crime beyond the statutory maximum, other than the fact of a prior conviction, must be submitted to the jury and proven by beyond a reasonable doubt, to argue that the trial court erroneously sentenced him in the aggravated range by using the preponderance of the evidence standard to find the aggravating factor that Forte assaulted an employee of the Department of Correction.

In *Apprendi*, the defendant was convicted of possession of a firearm for an unlawful purpose for shooting into the house of an African-American family. *Id.* at 469, 147 L. Ed. 2d at 442. The trial court found that the crime was motivated by racial bias, which made New Jersey's hate crime statute applicable resulting in a doubling of the maximum punishment for the underlying crime. The Supreme Court held that a jury must determine that the defendant is guilty of each and every element of the crime charged beyond a reasonable doubt and that the court cannot increase a defendant's punishment beyond the statutory maximum based upon a finding of fact, no matter how the state labels it, without that fact being found by a jury. *Id.* at 494, 147 L. Ed. 2d at 457. However, the Court was cautious to note that:

> nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case.

Id. at 481, 147 L. Ed. 2d at 449 (emphasis in original). Defendant here argues that any sentence greater than one that falls within the presumptive range under our Structured Sentencing is an enhancement of the maximum penalty allowed by statute and any finding of fact that thus increases this punishment must be found by a jury. We disagree.

In North Carolina, the statutory maximum penalty is determined either by reference to the criminal statute setting forth the elements of the offense, or to the Structured Sentencing Act found in Chapter 15A, Article 81B of the General Statutes. Most criminal statutes in North Carolina do not specify a punishment, but rather establish the class of felony or misdemeanor. One must refer to the sentencing charts in G.S. § 15A-1340.17 to determine the maximum penalty for a class of offense. *See State v. Lucas*, 353 N.C. 568, 595, 548 S.E.2d 712, 730 (2001).

Pursuant to G.S. § 15A-1340.16(a), a trial court "shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court." If the trial court finds that the aggravating factors outweigh the mitigating factors, it may impose a sentence in the aggravated range. G.S. § 15A-1340.16(b).

The minimum term in the aggravated range based upon a class E felony and prior record level V is 53-66 months. G.S. § 15A-1340.17(c). The trial court sentenced defendant to a minimum term of 66 months, at the high end of that range. The trial court then applied the correct corresponding maximum term of 89 months, within the statutory maximum. G.S. § 15A-1340.17(e). In sentencing defendant Forte, the trial court did not "increase[] the penalty for a crime beyond the prescribed statutory maximum," *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455, and thus did not violate defendant Forte's constitutional rights as expressed in *Apprendi*.

B.

[2] Next, defendant Forte argues that the trial court erred by refusing to grant his motion to sever his trial from co-defendant McDonald's. We do not agree.

A trial court's denial of a motion to sever will not be disturbed on appeal absent an abuse of discretion. *State v. Brower*, 289 N.C. 644, 658-59, 224 S.E. 2d 551, 562 (1976), *recons. denied*, 293 N.C. 259, 243 S.E.2d 143 (1977). G.S. § 15A-927(a)(2) provides that when a pre-trial motion to sever is made, failure to renew the motion "before or at the close of all the evidence" waives any right to severance. This Court has also held that failure to renew a motion to sever as required by G.S. 15A-927(a)(2) waives any right to severance and that on appeal the Court is limited to reviewing whether the trial

court abused its discretion in ordering joinder at the time of the trial court's decision to join. *State v. Agubata*, 92 N.C. App. 651, 660-61, 375 S.E.2d 702, 708 (1989).

Here, defendant Forte moved pre-trial to sever his trial from co-defendant McDonald's, but failed to renew his motion to sever at the close of all of the evidence, as required by G.S. § 15A-927(a)(2). Thus, he waived his right to severance. Therefore, the question remaining is whether joinder of defendants' cases for trial was an abuse of discretion.

Pursuant to G.S. § 15A-926(b)(2)(a), the court may join defendants when "each of the defendants is charged with accountability for each offense." Here, both defendants were charged with escape, attempted escape, and assault with a deadly weapon with intent to kill inflicting serious injury, these offenses arising out of the same set of operative facts. Therefore, the prerequisite necessary for the trial court to consider joinder was satisfied and we find no abuse of discretion in the joinder of these trials. We overrule this assignment of error.

C.

[3] Defendant Forte next argues that the trial court abused its discretion by denying his motion to continue, asserting that he met with his defense counsel one day before trial, which gave them insufficient time to prepare a defense. For the following reasons, we find no abuse of discretion.

A motion to continue a proceeding is addressed to the sound discretion of the trial court and a ruling on a motion to continue will not be disturbed on appeal absent an abuse of that discretion. *State v. Beck*, 346 N.C. 750, 756, 487 S.E.2d 751, 755 (1997).

Here, the record does not support the assertion that counsel first spoke with defendant Forte the day before trial and thus had inadequate time to prepare for trial, or even that this was the basis upon which he sought the continuance. In his written motion as well as his oral argument in support of the motion, defense counsel indicated that the present charges should be tried after his trial on his pending murder charges because "the outcome of this trial may affect the sentencing of [defendant Forte] should he be found guilty in the . . . murder charges." Indeed, there is nothing in the record to indicate that defense counsel was inadequately prepared to try the case: he filed a motion to sever, the motion to continue, and a motion in limine; he

argued for dismissal of the charges against his client; he cross-examined the State's witnesses; he participated in the charge conference; he presented a closing argument; and argued for mitigating factors at the sentencing hearing. Thus, from this record, we cannot conclude that the trial court abused its discretion in denying the motion to continue.

D.

[4] Defendant Forte argues finally that the trial court erred by denying his motion in limine to disallow evidence that defendant Forte was incarcerated awaiting trial on murder charges. We find no error.

Our Courts have consistently held 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. Bonnett*, 348 N.C. 417, 437, 502 S.E.2d 563, 576 (1998), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999) (*quoting State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995)). Rulings on motions in limine are preliminary in nature and subject to change at trial, depending on the evidence offered, and "thus an objection to an order granting or denying the motion 'is insufficient to preserve for appeal the question of the admissibility of the evidence.' " *T&T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-349, *disc. review denied*, 346 N.C. 185, 486 S.E.2d 219 (1997) (*quoting Conaway*, 339 N.C. at 521, 453 S.E.2d at 845).

Here, defendant assigned error to the denial of his motions in limine, and also objected to the admission of the testimony when offered at trial. Thus, the issue is properly before us.

The State charged defendant Forte with felonious escape, or attempted felonious escape, under G.S. § 148-45(b), which provides in pertinent part:

> (b) Any person in the custody of the Department of Correction, in any of the classifications hereinafter set forth, who shall escape from the State prison system, shall, except as provided in subsection (g) of this section, be punished as a Class H felon.
>
> ***

> (2) A person who has been charged with a felony and who has been committed to the custody of the Department of Correction under the provisions of G.S. 162-39.

G.S. § 148-45(b). Thus, under subsection (b)(2), to prove felonious escape, the State must prove that the defendant has been charged with a felony and has been committed to the custody of the Department of Correction. In *State v. Hammond*, 307 N.C. 662, 300 S.E.2d 361 (1983), our Supreme Court held that "[t]estimony concerning the kind of crimes for which defendant was sentenced to prison is relevant and competent evidence which the state may introduce in order to meet its burden of proof on this issue." *Id.* at 665, 300 S.E.2d at 663.

Here, the State introduced evidence that defendant Forte was being held in the "safe-keeping" unit of the Craven Correctional Institution pending trial on murder charges. This evidence satisfies the State's burden of proof that defendant was charged with a felony and was in custody. Thus, the trial court did not err in admitting this testimony.

II. Defendant McDonald

A.

[5] Defendant McDonald first argues that the trial court erred by failing to re-weigh the aggravating and mitigating factors in imposing an aggravated sentence in the assault conviction after the inapplicability of one of the aggravating factors was brought to the court's attention. For the following reasons, we overrule this assignment of error.

During defendant McDonald's sentencing for the assault conviction, the trial court initially found two aggravating factors (that defendant joined with more than one other person to commit the offense and that the offense was committed against an employee of the Department of Correction) and one mitigating factor (that defendant agreed to plead guilty to the charge for which the jury convicted him). The trial court found that the factors in aggravation outweighed the factors in mitigation. Immediately after these findings, the State informed the court that aggravating factor number 2 (defendant joined with more than one other person) did not apply. After considering the State's information, the trial court stated the following:

> Alright, then, strike number 2. That will be the judgment. Thank you sir, you may sit down.

The trial court completed and signed the AOC form indicating that it found the remaining aggravating factor and the mitigating factor mentioned above. The AOC form indicates that the trial court determined that the aggravating factor outweighed the mitigating factor, thus warranting an aggravated sentence.

This Court has previously noted that, in reviewing sentencing issues:

> rules of mathematical certainty and rigidity cannot be applied to the sentencing process. Justice may be served more by the substance than by the form of the process. We prefer to consider each case in the light of its circumstances. . . . Sentencing is not an exact science, but there are some well established principles which apply to sentencing procedure. The accused has the undeniable right to be personally present when sentence is imposed. Oral testimony, as such, relating to punishment is not to be heard in his absence. He shall be given full opportunity to rebut defamatory and condemnatory matters urged against him, and to give his version of the offense charged, and to introduce any relevant facts in mitigation.
>
> . . .
>
> In our opinion it would not be in the interest of justice to put a trial judge in a straitjacket of restrictive procedure in sentencing. . . . He should be permitted wide latitude in arriving at the truth and broad discretion in making judgment. . . . There is a presumption that the judgment of a court is valid and just. The burden is upon appellant to show error amounting to a denial of some substantial right. A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.

State v. Davis, 58 N.C. App. 330, 335, 293 S.E.2d 658, 661-62 (1982) (citations omitted).

In *Davis*, the trial court initially found in its written judgment the aggravating factor that the defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. The following day, the court amended that judgment to strike

this aggravating factor and stated that the court "finds again that the factors in aggravation outweigh the factors in mitigations (sic)," and thus refused to reduce the defendant's aggravated sentence. *Id.* at 331, 293 S.E.2d at 660. We upheld the trial court's action, noting that "the deletion was in defendant's favor and could not be prejudicial." *Id.* at 333, 293 S.E.2d at 660.

We do not believe that a trial judge should be put in the "straight-jacket of restrictive procedure" that would require him to recite that he "re-weighs" or "finds again" in a situation like this one. He did indicate that he deleted factor number two and thereafter reaffirmed the sentence. His words and actions sufficiently indicate that he exercised his discretion appropriately. As such, we find no abuse of discretion on the part of the trial court in sentencing defendant in the aggravated range on the assault conviction.

B.

[6] In his final argument, McDonald contends that the trial court erred in sentencing defendant in the presumptive range for the attempted escape conviction by failing to find a nonstatutory mitigating factor. Because defendant's sentence is in the presumptive range, he has no direct appeal as a matter of right. G.S. § 15A-1444(a1). Defendant McDonald, therefore, requests that we consider this assignment of error as a petition for writ of certiorari. Because the issue of a trial court's discretion to departing from the presumptive range in sentencing a defendant has been adequately addressed by this Court in the past, we deny defendant's petition for writ of certiorari and decline to address this issue.

Conclusion

For the foregoing reasons, we find no error in the trial or sentencing of either defendant McDonald or defendant Forte.

No error.

Judges McGEE and CALABRIA concur.

STATE OF NORTH CAROLINA v. MELVIN WAYNE BECK

No. COA03-466

(Filed 6 April 2004)

1. Homicide— first-degree murder—instruction on lesser-included offenses—second-degree murder—voluntary manslaughter

The trial court did not err in a first-degree murder case by instructing the jury on the lesser-included offenses of second-degree murder and voluntary manslaughter, because: (1) words or conduct not amounting to an assault or a threatened assault may be enough to arouse a sudden and sufficient passion in the perpetrator to negate deliberation and reduce a homicide to second-degree murder; (2) defendant's consumption of alcohol and testimony that he was mad could allow a jury to conclude that defendant was not acting in a cool state of blood and did not form the intent to kill over some period of time; and (3) the evidence introduced could allow the jury to find legal provocation for voluntary manslaughter when the two men argued about defendant's son, the victim struck defendant as he was trying to leave, the two men quarreled and wrestled for a time before ceasing the struggle to drink beer, the victim brandished a knife, and defendant obtained possession of the knife during the struggle and used it to stab the victim.

2. Identification of Defendants— in-court identification—voir dire

Although the trial court erred by overruling defendant's objection to a witness's in-court identification of defendant without allowing voir dire, defendant failed to show prejudicial error to warrant a new trial because: (1) the witness testified that she was present outside the victim's home on the night he died and recalled several specific identifying characteristics of both the victim and defendant, including skin tone, clothing, and facial features; and (2) defendant's ex-wife and son testified that defendant confessed that he killed the victim.

3. Sentencing— aggravating factors—fugitive—pretrial release

The trial court erred by finding as aggravating factors that defendant was a fugitive from Florida and that he was on pretrial release at the time of the victim's death because while the evi-

dence was sufficient to establish one of these aggravating factors, the trial court erred by relying on the same evidence to find two distinct aggravating factors.

Appeal by defendant from judgment entered 30 August 2002 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 24 February 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Tiare B. Smiley, for the State.

Daniel Shatz, for defendant-appellant.

TYSON, Judge.

Melvin Wayne Beck ("defendant") appeals from a judgment entered after a jury found him guilty of second-degree murder. We find no prejudicial error at trial, vacate defendant's sentence, and remand for resentencing.

I. Background

On 1 July 2000, Timothy McBride's ("McBride") brother arrived at McBride's house and found him dead in his bed, concealed by bed coverings. The brother observed extensive bruising and abrasions on McBride's face, a cut on his throat from ear to ear, wounds around his neck, stab wounds in his chest, and a large incision across his abdomen with his intestines protruding. McBride was naked from his waist up and his lower body was clad with blue jeans. Police officers responded and discovered a cigarette butt with a blood stain, small drops of blood on an end table near the body, and a baseball bat in the bedroom closet with blood drops. No knife or other murder weapon was found in the house.

Jan Stewart ("Stewart"), a taxi driver, testified that at 1:37 a.m. on 30 June 2002 she was parked on the street waiting to pick up a fare. Her cab faced the front porch of McBride's house. Her headlights shone on the front door, which was open, and brightly lit. She saw a man who was "suntanned," with no shirt, and wearing blue jeans. Stewart also observed a second man emerge from the darkened hallway, grab the first man in a headlock, and slam him down to the floor. The second man stood up, looked out, and slammed the front door shut. Stewart later identified the man she saw assaulted as McBride and identified defendant as his attacker.

Cathy Juma ("Juma"), defendant's ex-wife, testified that in the early morning hours of 30 June 2000 defendant entered his residence, began yelling about fighting with a man, and indicated to her that he thought he had beaten a man to death. Defendant told his son, Clayton, that he had lost his knife while running home. He ordered Clayton to get a knife and go back with him to McBride's house, so Clayton could "look death in the eye."

Clayton testified that he did not know whether defendant was serious or "just drunk," but he did not leave the house with his father. The next day, after consuming several alcoholic beverages at home, defendant told his wife that he and McBride had fought. McBride had hit him, causing bruising and swelling. Defendant stated, "[i]t just made me mad and I just jumped up and started fighting." Defendant also told Juma that he left McBride's house, and later went back, "slashed his throat, and gutted him." Juma called her sister several days later, informed her of the conversation with defendant, and contacted police. Juma related her conversation with defendant to detectives and arranged for the investigators to speak with Clayton.

After defendant was arrested and informed of his rights, he made a signed confession to Detective E.P. Reese and Detective Kearns. Defendant told the detectives about disputes, which had arisen between McBride and Clayton over a moped, and which resulted in Clayton giving his moped to McBride. McBride had stopped by defendant's house on the day of the murder and had left a message. Defendant went to McBride's house that night to talk about his son, Clayton, and the problems that existed between them concerning the moped. McBride had threatened Clayton and stated he would take care of him the next time he "ran his mouth at him." Defendant told McBride to call him instead if he had any problems with Clayton. Defendant attempted to leave the house, but McBride attacked him, hitting him in the leg with a "stick or ax handle." The two men began fighting. Defendant grabbed McBride and punched him.

The men stopped fighting and defendant started to leave when McBride apologized and asked defendant to stay and drink another beer. The men drank some beer, smoked a cigarette, and defendant again started to leave. McBride again threatened Clayton if he came by "acting smart." Defendant told McBride not to worry about Clayton, because if McBride called him, defendant would come and get Clayton. McBride swung at defendant and another fight ensued. McBride punched defendant and knocked him to the floor. Defendant got up, ran towards McBride, kicked him in the head, and slammed

him into the door frame. The fight moved to the bedroom, where defendant continued hitting McBride in the face. McBride said, "I'll kill you," jumped on top of defendant, and pulled out a knife. According to defendant, as the men were struggling, McBride was struck in the stomach and chest with the knife. Defendant thought McBride's injuries to the neck occurred when defendant slung the knife while trying to escape.

Defendant left the house and used the outside water hose to wash his hands. He walked up the street, threw the knife in the grass near a church, and continued walking home. Defendant denied taking anything from McBride's house and admitted having a conversation with his son, Clayton, about the events of that night. Defendant explained that although he told Clayton he needed to go back and "finish," "it [had] already happened," and "it was all over with." Defendant also admitted to telling his ex-wife Juma about what had occurred.

The jury convicted defendant of second-degree murder and acquitted him of first-degree burglary. He was sentenced to a minimum term of 313 months and a maximum of 385 months. Defendant appeals.

II. Issues

The issues on appeal are whether the trial court erred by: (1) instructing the jury on the lesser-included offenses of second-degree murder and voluntary manslaughter, (2) overruling defendant's objection to Stewart's in-court identification of him without allowing *voir dire*, and (3) finding as aggravating factors that defendant was a fugitive from Florida and was on pretrial release at the time of McBride's death.

III. Lesser-Included Offenses

[1] Defendant argues that no evidence supports the trial court's instructions to the jury on the lesser-included offenses of second-degree murder and voluntary manslaughter. We disagree.

"[A] defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support it," *State v. Johnson*, 317 N.C. 193, 205, 344 S.E.2d 775, 782 (1986), and where " 'the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.' " *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (quoting *Keeble v. United States*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847 (1973)). "This rule

enhances the reliability of the fact-finding process and provides a 'necessary additional measure of protection for . . . defendant.' " *Leazer*, 353 N.C. at 237, 539 S.E.2d at 924 (quoting *Beck v. Alabama*, 447 U.S. 625, 645, 65 L. Ed. 2d 392, 407 (1980)). If the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is *no* evidence to negate these elements other than the defendant's denial that he committed the offense, the defendant is not entitled to an instruction on a lesser offense. *Leazer*, 353 N.C. at 237, 539 S.E.2d at 925.

Here, the trial court instructed the jury on first-degree murder, second-degree murder, and voluntary manslaughter. Defendant initially requested all three instructions during the jury charge conference. After closing arguments and before the trial court instructed the jury, defense counsel objected to instructions on the lesser-included offenses. The trial court overruled defendant's objection. Defendant now assigns error to the jury instructions being given on lesser-included offenses of first-degree murder.

A. Second-Degree Murder

First-degree murder is "the unlawful killing of a human being with malice and with premeditation and deliberation." *Johnson*, 317 N.C. at 202, 344 S.E.2d at 781. Second-degree murder, a lesser-included offense, "is the unlawful killing of a human being with malice but without premeditation and deliberation." *Leazer*, 353 N.C. at 237, 539 S.E.2d at 924-25 (quoting *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998)).

"Premeditation means that the act was thought over beforehand for some length of time, however short. Deliberation means an intent to kill, carried out in a cool state of blood, . . . and not under the influence of a violent passion or a sufficient legal provocation." *Leazer*, 353 N.C. at 238, 539 S.E.2d at 925 (citations omitted). " 'Premeditation and deliberation are ordinarily not susceptible to proof by direct evidence and therefore must usually be proven by circumstantial evidence.' " *Id.* (quoting *State v. Alston*, 341 N.C. 198, 245, 461 S.E.2d 687, 713 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996)).

Here, the evidence showed that defendant and McBride had been drinking beer the night of the murder. Clayton and Juma testified that defendant was "very drunk" when he left their house and went to see

McBride. McBride struck defendant when defendant attempted to leave. Evidence also showed that McBride was the first person to grab the knife. During the entire fight, McBride made threats to defendant regarding his son, Clayton.

Our Supreme Court has recognized that " 'words or conduct not amounting to an assault or a threatened assault may be enough to arouse a sudden and sufficient passion in the perpetrator to negate deliberation and reduce a homicide to murder in the second degree.' " *State v. Huggins*, 338 N.C. 494, 498, 450 S.E.2d 479, 482 (1994) (quoting *State v. Watson*, 338 N.C. 168, 177, 449 S.E.2d 694, 700 (1994)). Further, defendant's consumption of alcohol and testimony that he was "mad" could allow a jury to conclude that defendant was not acting in a "cool state of blood" and did not form the intent to kill over some period of time. *Huggins*, 338 N.C. at 498, 450 S.E.2d at 482; *see Leazer*, 353 N.C. at 238, 539 S.E.2d at 925.

Substantial evidence was admitted such that the jury could find negated defendant's premeditation and deliberation. The trial court did not err by instructing the jury on second-degree murder. This assignment of error is overruled.

B. Voluntary Manslaughter

Voluntary manslaughter is the "unlawful killing of a human being without malice and without premeditation and deliberation" and "often occurs when the defendant acts in a heat of passion produced by legal provocation." *State v. Camacho*, 337 N.C. 224, 233, 446 S.E.2d 8, 13 (1994) (citations omitted).

> Legal provocation exists when the victim's actions against the defendant rise to the level of an assault or threatened assault. The doctrine of heat of passion is meant to reduce murder to manslaughter when defendant kills without premeditation and without malice, but rather under the influence of the heat of passion suddenly aroused which renders the mind temporarily incapable of cool reflection.

Id. (citations omitted). In *Camacho*, the defendant had consumed alcohol and was attacked with a knife by the victim. Our Supreme Court held that the victim's charging at and wrestling with the defendant was sufficient legal provocation to instruct the jury on voluntary manslaughter. *Id.* at 233-34, 446 S.E.2d at 13 (citing *State v. McConnaughey*, 66 N.C. App. 92, 311 S.E.2d 26 (1984)).

Here, the evidence indicated that the men argued over Clayton and McBride struck defendant as he tried to leave. The two men quarreled and wrestled for a time before ceasing the struggle to drink beer. After McBride made further threats against Clayton, the two men resumed fighting. McBride brandished a knife. During the struggle, defendant obtained possession of the knife and used it to stab McBride. The trial court did not err in instructing the jury on voluntary manslaughter. The evidence introduced could allow the jury to find legal provocation. This assignment of error is overruled.

IV. In-Court Identification

[2] Defendant contends the trial court erred by failing to *voir dire* a witness who made an in-court identification. Defendant argues that Stewart's identification of him as being present at McBride's house on the night of the murder did not originate with her observation at the time of the offense. He contends the trial court's failure to *voir dire* the witness before allowing the in-court identification was prejudicial error. We disagree.

Our Supreme Court has discussed this issue and held,

> [b]efore admitting challenged in-court identification testimony, the trial court should conduct a voir dire, find facts, and determine the admissibility of the testimony. Failure to conduct a voir dire will be deemed harmless where the evidence is clear and convincing that the witness's in-court identification of defendant originated with the witness's observation of defendant at the time of the crime and not from an impermissibly suggestive pretrial identification procedure.

State v. Flowers, 318 N.C. 208, 216, 347 S.E.2d 773, 778 (1986) (citations omitted). In *Flowers*, the Supreme Court held that the trial court's error in admitting the in-court identification without conducting a *voir dire* was not harmless because the witness "*concluded* [defendant] was one of her attackers because of what [defendant] admitted and not by any other identifying characteristic." *Id.*

Here, the State presented the testimony of Stewart, a taxi driver, who observed a fight between McBride and defendant in the lighted doorway of McBride's house on the night he was murdered. Stewart testified to several "identifying characteristics." *Id.* Stewart stated that her vehicle's high beams were directed towards McBride's brightly lit house. She saw a person "wearing blue jeans and no shoes

and no shirt," who was "suntanned" with "scraggly" blonde hair. Detective Michael Saunders testified that McBride was wearing blue jeans and did not have on a shirt when he inspected the body. Stewart recalled that another man, with long and uncombed hair, grabbed the first man. She testified that the second man was taller, with a "rather large nose" and slender face. She remembered the second man gritting his teeth and grimacing as he looked out of the house. During her testimony, Stewart identified defendant as the second man.

Stewart initially told detectives that she did not think she could identify the men because of the distance between her cab and the house. She was not shown a photographic line-up by police detectives. Detectives did show her two photographs of two men the day before she testified. She was not told the identity of the two men in the photographs and was shown both photographs at the same time. She identified defendant in one of the photographs and McBride in the other.

Although the trial court erred by denying defendant's request to *voir dire* the witness before her in-court identification, defendant has not shown prejudicial error to warrant a new trial. Stewart testified that she was present outside the victim's home on the night he died and recalled several specific "identifying characteristics" of both the victim and defendant, including skin tone, clothing, and facial features. *Id.* Additionally, Juma and Clayton testified that defendant confessed that he killed McBride. The trial court's error was harmless beyond a reasonable doubt.

V. Aggravating Factors in Sentencing

[3] Defendant contends the trial court erred in finding as aggravating factors during sentencing that defendant was a fugitive from Florida and that the offense was committed by defendant while he was on release facing other charges. He argues these two aggravating factors are not supported by separate evidence. We agree.

N.C. Gen. Stat. § 15A-1340.16(a) (2003) requires the State to prove by a preponderance of the evidence that an aggravating factor exists. N.C. Gen. Stat. § 15A-1340.16(d) (2003) lists several aggravating factors, including: "(12) The defendant committed the offense while on pretrial release on another charge" and "(20) Any other aggravating factor reasonably related to the purposes of sentencing." The statute also states, "the same item of evidence shall not be used to prove more than one factor in aggravation." *Id.*

During the sentencing hearing, the State handed to the trial court a certified true copy of the warrant and accompanying documents showing defendant failed to appear in court for a burglary allegedly committed in Florida. Defense counsel did not object to this document or during the State's presentation of the argument that defendant committed the offense while on pretrial release and was a fugitive. Defense counsel later argued against using fugitive status as an aggravating factor because Florida did not seek to extradite defendant. Defendant did not challenge the accuracy of the fugitive warrant or the State's method of establishing the aggravating factors by handing the documents to the trial court.

Relevant to this assignment of error, the trial court found as aggravating factors that "12. The defendant committed the offense while on pretrial release on another charge," and "20. The defendant was a fugitive from Florida." The only evidence presented by the State to support these findings is the warrant. While this evidence is sufficient to establish *one* of these aggravating factors, the trial court erred in relying on the same evidence to find *two* distinct aggravating factors. *Id.* We vacate defendant's sentence and remand to the trial court to strike one of the aggravating factors, either finding No. 12 that defendant committed the offense while on pretrial release or the finding under No. 20 that defendant was a fugitive from Florida. Defendant should be resentenced accordingly.

VI. Conclusion

The trial court did not err by instructing the jury on the lesser-included offenses to first-degree murder. Evidence was presented to show a lack of premeditation and deliberation, as well as legal provocation. The trial court erred by failing to *voir dire* Stewart before she made an in-court identification. This error was harmless considering the witness's testimony regarding identifying characteristics and the other evidence presented at trial. We find no prejudicial error at trial.

The trial court erred in relying on the same evidence to find two different aggravating factors during sentencing. We vacate defendant's sentence and remand to the trial court for resentencing.

No prejudicial error at trial. Remand for resentencing.

Judges WYNN and McGEE concur.

STATE OF NORTH CAROLINA v. ROY EUGENE BRYANT, DEFENDANT

No. COA02-1706

(Filed 6 April 2004)

Constitutional Law— due process—sex offender registration

The North Carolina statute requiring registration of sex offenders, N.C.G.S. § 14-208.11, is unconstitutional as applied to a person convicted in another state who has moved to North Carolina and lacks notice of his duty to register in North Carolina. Due process requires that a defendant have knowledge, actual or constructive, of the statutory requirements, and the statute as written does not adequately address the reality of our mobile society.

Appeal by defendant from judgment entered 21 February 2002 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 3 December 2003.

Attorney General Roy C. Cooper, by Special Deputy Attorney General John J. Aldridge, III, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Janet Moore, for defendant-appellant.

GEER, Judge.

Defendant Roy Eugene Bryant, formerly a resident of South Carolina, appeals from his conviction for failure to register in North Carolina as a sex offender when he moved to this State from South Carolina. He also appeals from his conviction as a habitual felon. We hold that North Carolina's sex offender registration statute is unconstitutional as applied to an out-of-state offender who lacked notice of his duty to register upon moving to North Carolina. We therefore reverse defendant's convictions.

Facts

On 19 November 1991, in Pickens County, South Carolina, defendant pled guilty to third degree criminal sexual conduct and was sentenced to a term of ten years imprisonment. Prior to his 9 April 2000 release from the custody of the South Carolina Department of Corrections, defendant signed a "Notice of Sex Offender Registry" form. On the form, he indicated that he would be living with his

mother in Greenville, South Carolina. On 17 August 2000, defendant completed a registration form notifying authorities that he had moved to Pickens County, South Carolina.

In the fall of 2000, defendant was working with a traveling fair. While the fair was in Winston-Salem, North Carolina, defendant suffered a broken jaw. After being treated at a hospital, defendant chose to remain in Winston-Salem rather than moving on with the fair. In November 2000, defendant moved in with a woman he had met at the fair and lived with her at 4373 Grove Avenue in Winston-Salem.

On 30 March 2001, Kelly Wilkinson, a detective with the Winston-Salem Police Department, had occasion to perform a check of defendant's criminal record. She discovered that defendant was registered as a sex offender in South Carolina, but was not registered in North Carolina. During an interview at the police department, defendant told the detective that his address was currently 4373 Grove Avenue in Winston-Salem.

On 2 April 2001, Wilkinson contacted Sharon Reid, the deputy sheriff with the Forsyth County Sheriff's Department responsible for maintaining the county's sex offender registry, and notified her that defendant was a convicted sex offender who was not registered in North Carolina. After verifying this information, Reid determined that the offense for which defendant was convicted in South Carolina had a statutory equivalent in North Carolina that would trigger the duty to register. Defendant was then arrested and indicted for failure to register as a sex offender. He was subsequently also indicted for having attained the status of habitual felon.

Prior to trial, defendant filed a motion seeking a declaration that the North Carolina sex offender registration statute's failure to provide out-of-state persons with notice of the duty to register in North Carolina violated defendant's equal protection and due process rights under the Fourteenth Amendment of the United States Constitution. Following the trial court's denial of the motion, a jury found defendant guilty as to both the failure to register and habitual felon charges. The trial court sentenced defendant to 133 to 169 months imprisonment.

Discussion

Defendant assigns as error the trial court's denial of his motion to declare N.C. Gen. Stat. Chapter 14, Article 27A unconstitutional as applied to residents of other states who move to North Carolina.

Defendant's central argument is that the statutory scheme, which imposes a duty to register with county authorities on certain sex offenders, violates the right to due process of out-of-state residents who move to North Carolina by allowing them to be convicted of the offense without notice of the duty to register.

N.C. Gen. Stat. § 14-208.7 (2003) establishes a duty to register for certain sex offenders who reside within North Carolina, as well as those who move into North Carolina from other states:

> 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. If the person moves to North Carolina from outside this State, the person shall register within 10 days of establishing residence in this State, or whenever the person has been present in the State for 15 days, whichever comes first.

N.C. Gen. Stat. § 14-208.7(a). A person required to register must notify the sheriff of the county with whom the person last registered of any change of address within ten days. N.C. Gen. Stat. § 14-208.9(a) (2003). Failure to comply with the registration and change-of-address provisions is a felony:

> (a) A person required by this Article to register who does any of the following is guilty of a Class F felony:
>
> (1) Fails to register.
>
> (2) Fails to notify the last registering sheriff of a change of address.

N.C. Gen. Stat. § 14-208.11(a)(1), (2) (2003).

With respect to in-state sex offenders, the statute provides that a prison official shall notify the offender of the duty to register at least ten days, but not more than 30 days, before the offender is due to be released from a penal institution. N.C. Gen. Stat. § 14-208.8(a)(1) (2003). The statute contains no provision for notification of sex offenders moving to North Carolina from another state of North Carolina's registration requirements.

This Court has previously held that the registration statute "has no requirement of knowledge or intent, so as to require that the State prove either [a] 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 denied*, 353 N.C. 397, 547 S.E.2d 430 (2001). *See also State v. White*, 162 N.C. App. 183, 189, 590 S.E.2d 448, 452 (2004) ("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."). Nevertheless, as this Court observed in *Young*, "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 [a] defendant have knowledge, actual or constructive, of the statutory requirements before he can be charged with its violation." *Young*, 140 N.C. App. at 12, 535 S.E.2d at 386 (emphasis original; holding that sex offender registration statute violated due process as applied to a defendant who had been adjudicated incompetent).

The *Young* Court based its holding on *Lambert v. California*, 355 U.S. 225, 2 L. Ed. 2d 228, 78 S. Ct. 240 (1957), in which the United States Supreme Court confronted the question whether a municipal ordinance imposing a registration requirement on convicted felons who remained in the city of Los Angeles for more than five days violated due process. Emphasizing that the conduct involved was wholly passive (a mere failure to register), the Court noted that the defendant "on first becoming aware of her duty to register was given no opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent." *Id.* at 229, 2 L. Ed. 2d at 232, 78 S. Ct. at 243. The Supreme Court held:

> We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. . . . Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process.

Id. at 229-30, 2 L. Ed. 2d at 232, 78 S. Ct. at 243-44.

This Court observed in *Young* that "in line with due process notice requirements, our Legislature has written the [sex offender registration] statute such that it mandates a convicted sex offender be notified of the registration requirements. *Under ordinary circumstances* such a provision would work to remove the statute from due process notice attacks." *Young*, 140 N.C. App. at 8, 535 S.E.2d at 384 (internal citations omitted; emphasis added). The Court further held, however: "N.C. Gen. Stat. § 14-208.11 does not provide adequate

notice for an incompetent sex offender to comply with the statute's requirements. Due process requires not just the mechanical act of notifying a defendant or the automatic assumption that the notice is good, but in fact, we believe due process requires that notice be synonymous with the ability to comply." *Id.* at 10, 535 S.E.2d at 385.

This Court reasoned that although Young, who had been adjudicated incompetent, was provided with sufficient notice of the registration requirement to satisfy due process for any reasonable and prudent man, Young was not a reasonable and prudent man. *Id.* at 9, 535 S.E.2d at 385. Therefore, what constituted "actual notice" to a reasonable and prudent man was not sufficient notice to Young. *Id.* *Compare State v. Holmes*, 149 N.C. App. 572, 577, 562 S.E.2d 26, 30 (2002) (notification to defendant of duty to register was "sufficient notice for a reasonable and prudent person" and thus adequate to satisfy constitutional due process requirements where defendant had not been adjudicated incompetent).

Under *Young*, the question presented by this appeal is whether Article 27A of the General Statutes, although sufficient to supply notice to reasonable and prudent residents of North Carolina "[u]nder ordinary circumstances," *Young*, 140 N.C. App. at 8, 535 S.E.2d at 384, provides adequate notice for due process purposes to offenders moving into North Carolina from other states. To comply with *Lambert* and *Young*, due process requires either a showing of actual or constructive notice.

We first observe that defendant was not given actual notice of his duty to register by North Carolina authorities. The North Carolina sex offender registration statute lacks any provision for providing notice of the registration duty to new residents; its notice provisions are limited to defendants who are convicted in North Carolina courts and released from North Carolina prisons. In contrast, other states employ various procedures designed to notify new residents who are sex offenders of their duty to register. *See, e.g.*, N.J. Stat. § 2C:7-3 (1995) (in addition to notification by Department of Motor Vehicles ("DMV") upon application for a driver's license, requiring Attorney General to "cause notice of the obligation to register to be published in a manner reasonably calculated to reach the general public"); S.C. Code Ann. § 23-3-460 (2003) (requiring DMV to give written notice of the duty to register to any new resident who applies for a driver's license, chauffeur's license, vehicle tag, or state identification card); Tenn. Code Ann. § 40-39-105(e) (2003) (requiring state law enforce-

ment agency to "attempt to ensure that all sexual offenders, including those who move into this state, are informed and periodically reminded of the registration and verification requirements and sanctions of this chapter" through press releases, public service announcements, or other appropriate public information activities). North Carolina's statutory notice found sufficient in *Holmes* and held to be sufficient under ordinary circumstances in *Young* is inapplicable here because it does not encompass new residents of North Carolina.

Young and *Lambert*, however, both recognize that even in the absence of statutorily required notification, a defendant may have received sufficient notice through other means to comply with due process. The State contends that defendant received notice in South Carolina of his obligation to register in any new state to which he moved. We do not believe that South Carolina's notification procedures, as they existed during the pertinent time period, were sufficient to give defendant notice that he was required to register in North Carolina.

The State's witness Michael Stobbe, an employee with the Inmates Records Section of the South Carolina Department of Corrections ("SCDOC"), testified that a "Notice of Sex Offender Registry" form is routinely used to notify inmates being released from SCDOC custody of their duty to register. The inmate signs and dates the form, and an employee witnesses the form. In this case, the form was duly signed by defendant on 20 March 2000. The form stated, in pertinent part:

> Pursuant to Section 23-3-430 of [the] Code of Laws of South Carolina, any person who has been convicted, pled guilty or nolo contendere of offenses deemed sexual in nature must register with the Sheriff's Office in their county of residence. . . .
>
> Inmates being released from the South Carolina Department of Corrections at the completion of their sentence to any early release program, to community supervision, or upon parole must register with the Sheriff's Office in their county of residence within 24 hours of release.
>
> If an inmate who is required to register moves out of the State of South Carolina, s/he is required to provide written notice to the county sheriff where s/he was last registered in South Carolina within 10 days of the change of address to a new state.

> A person must send written notice of change of address to the county Sheriff's Office in the new county and the county where s/he previously resided within 10 days of moving to a new residence. Any person required to register under this program shall be required to register annually for life.

The form specified that defendant had been informed orally and in writing that he was required to "abide by the registry conditions set forth in Title 23, Chapter 3, Article 7 [of the South Carolina Code]." There was no reference to the laws of any other state.

With respect to offenders moving out of South Carolina to another state, SCDOC's "Notice of Sex Offender Registry" form gives clear notice only of a duty to report the move to the Sheriff's Office in the former county of residence. Although in addition to requiring that notice, the form contains a separate paragraph referring to a duty to inform the Sheriff's Office in "the new county," the form is ambiguous as to whether "the new county" means only a county within South Carolina or also applies to counties within a new state. This form should be construed with reference to the statute on which it is modeled, which provides:

> If any person required to register under this article changes his address into *another county in South Carolina*, the person must register with the county sheriff in the new county within ten days of establishing the new residence. The person must also provide written notice within ten days of the change of address in the previous county to the county sheriff with whom the person last registered.

S.C. Code Ann. § 23-3-460 (emphasis added). The statute contains no like provision for moves outside South Carolina. The statute thus suggests that the "the new county" referred to in the form means a new county within South Carolina. In order to find notice, we would have to conclude that an offender in South Carolina would construe a form in a manner inconsistent with the statute on which it was based. We are unwilling to do so.

Although *Young* and *White* hold that notice may also be received orally, the record contains no indication that defendant had been told by anyone of his need to register in any state to which he moved. Stobbe admitted that he did not know whether anyone read the form to defendant. The form, in any event, states only that defendant was orally advised of the requirement that he comply with South Carolina law. Detective Wilkinson, who interviewed defendant in

March 2001, testified only that when she asked defendant, "Why have you not bothered to register in the State of North Carolina?" he "had no real answer for that"—a response arguably consistent with a lack of knowledge. Detective Wilkinson acknowledged that defendant never gave any indication that he knew he had to register in North Carolina.

The State alternatively contends that defendant had constructive notice of his duty to register. The State argues, citing a New York trial court decision, *People v. Patterson*, 185 Misc. 2d 519, 708 N.Y.S.2d 815 (2000), that sex offender registration laws are so pervasive that defendant must have known that he was required to register in other states. The court observed in *Patterson* that "[a]s time goes on and these State laws lose their novelty, it will be increasingly difficult to say that sex offenders do not have fair warning that sex offender registration laws exist, even in the absence of mandatory individual notice requirements like those set out in [the New York statute]." *Id.* at 534 n.5, 708 N.Y.S.2d at 826 n.5. We do not, however, believe that mere knowledge that most states have registration requirements is sufficient today to establish knowledge that an offender must register in states other than the one in which he was originally convicted.

In this regard, it is significant that in 1997, the federal Jacob Wetterling Act, 42 U.S.C. § 14071 (2003),[1] was amended to provide that in order to have an approved state registration program, state officials must

> inform the person that if the person changes residence to another State, the person shall report the change of address as provided by State law and comply with any registration requirement in the new State of residence, and inform the person that the person must also register in a State where the person is employed, carries on a vocation, or is a student.

42 U.S.C. § 14071(b)(1)(A)(iii) (as amended Nov. 26, 1997, P.L. 105-119, Title I, § 115(a)(1)-(5), 111 Stat. 2461). States were granted three years from 26 November 1997 to comply with this change. P.L. 105-119, Title I, § 115(c), 111 Stat. 2467. The fact that Congress found it necessary to amend the Jacob Wetterling Act to clarify that state officials are required to inform an offender of his duty to register in a new state shows that sex offender registration laws have not yet achieved such general recognition among the public that a defendant

1. The Jacob Wetterling Act ties federal funding for crime control to enactment of sex offender registration programs by the states. *See* 42 U.S.C. § 14071(g)(2)(a).

may be charged with knowledge of a duty to register upon moving to a new state.

We note that had South Carolina officials complied with the mandate of 42 U.S.C. § 14071(b)(1)(A)(iii), or had the North Carolina legislature enacted a provision requiring state officials to inform new residents with reportable convictions of their duty to register, this defendant's due process argument would likely have failed. As written, our current sex offender registration statute does not adequately address the reality of our mobile society, in which people frequently move across state lines. Our General Assembly should revisit this statute to provide a procedure enabling the State to ensure that convicted sex offenders who move to North Carolina from another state comply with North Carolina's registration requirements.

We hold that N.C. Gen. Stat. § 14-208.11 is unconstitutional as applied to a person convicted in another state who has moved to North Carolina and lacks notice of his duty to register in North Carolina. Defendant's conviction under N.C. Gen. Stat. § 14-208.11 must, therefore, be reversed. As defendant's habitual felon conviction was dependent on that conviction, it too must be reversed. Because of our disposition of this matter, we need not address defendant's remaining assignments of error.

Reversed.

Judges McGEE and HUNTER concur.

STATE OF NORTH CAROLINA v. LORENZO LEE POPE AND DEMETRI MONTE BELL

No. COA03-557

(Filed 6 April 2004)

1. Homicide— first-degree murder—instructions on elements—lapsus linguae

The trial court did not commit structural or plain error by its jury instruction on the elements of first-degree murder when it stated that "it would be good" of the jury to return a verdict of not guilty if it had reasonable doubt, because: (1) although the trial court's statement was erroneous, it was merely a lapsus linguae and was immediately corrected twice when the trial court

charged the jury in final mandates as to each defendant that if the jury did not find or had a reasonable doubt as to the existence of any element, it was the jury's duty to return a verdict of not guilty; and (2) in viewing the jury instructions as a whole, the jury could not have been misled in this case and the misstatement had no probable impact on the outcome of the trial.

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

A short-form indictment used to charge a defendant with first-degree murder is constitutional.

3. Criminal Law— instructions—recess

The trial court did not err in a first-degree murder case by its instructions at recess, because: (1) defendant waived this issue by failing to object to the instructions given, failed to request additional instructions and also failed to contend plain error in his assignment of error; and (2) even if the issue had been preserved, the trial court gave instructions on two occasions which complied with the requirements of N.C.G.S. § 15A-1236 and reminded the jury of those instructions on other occasions.

4. Homicide— first-degree murder—instructions on lesser-included offense—second-degree murder

The trial court did not err by denying defendant's request to instruct the jury on second-degree murder as a lesser-included offense of first-degree murder, because: (1) the evidence overwhelmingly supports a finding of premeditation and deliberation, and thus, there is no evidence to support a finding of a lesser offense which does not include those elements; and (2) whether defendant believed the victim to be dead after the shooting is not evidence as to whether he intended to kill the victim before the shooting, and even if he believed the victim had not been killed, defendant made no effort to seek medical assistance which further suggested that defendant intended to kill the victim.

5. Homicide— first-degree murder—instructions—acting in concert

The trial court did not err in a first-degree murder case by instructing the jury on the doctrine of acting in concert, because the evidence revealed that defendants were acting together in pursuit of a common purpose to kill the victim including that: (1) defendants left another man's car together just before the shots

were fired, pulling up their hoods as they walked away, and they returned to the car together just after the shooting; and (2) both defendants bore ill-will toward the victim, both had weapons, and both fired their weapons.

6. Jurors— inquiry—possible exposure to pretrial publicity

The trial court did not abuse its discretion in a first-degree murder case by its handling of defendants' request that the trial court inquire of the jurors regarding their possible exposure to a newspaper article concerning the trial, because: (1) the court inquired of the jurors as to whether any of them had contact with the news article and whether all had followed the instruction the trial court gave at the beginning of the trial; and (2) on the last day of trial, the court again inquired as to whether any juror had an occasion to violate the rule and read the paper the prior night.

Appeal by defendants from judgments entered 16 August 2002 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 4 February 2004.

Attorney General Roy Cooper, by Assistant Attorneys General David J. Adinolfi, II and H. Dean Bowman, for the State.

Nora Henry Hargrove, for defendant-appellant Pope and Richard E. Jester for defendant-appellant Bell.

MARTIN, Chief Judge.

Defendants Lorenzo Lee Pope ("Pope") and Demetri Monte Bell ("Bell") were indicted for the first-degree murder of Jimmy Battle. A jury convicted both defendants of first-degree murder based on malice, premeditation, and deliberation. The trial court entered judgment in accordance with the verdict and sentenced both defendants to life imprisonment without parole. Defendants appeal. After careful review, we conclude defendants received a fair trial, free of prejudicial error.

The State's evidence at trial tended to show that on the evening of 25 November 2000, defendants were at defendant Bell's mother's house in Rocky Mount with Milton Latrell Freeman and Kelly Davis. The four men left together, with Freeman driving, traveling to "Little Raleigh" in south Rocky Mount to see some girls. As they were traveling, they passed a red car parked on the side of the road, apparently

having some kind of mechanical trouble. Either Pope or Bell stated "there goes that guy right there." Bell instructed Freeman to park the car, and Freeman did so approximately two blocks from where the red car was located. Bell and Pope got out of the car and Freeman saw them pull on their hoods as they walked away. Several minutes later, Freeman and Davis heard a number of gunshots. Bell and Pope came back to the car and told Freeman to drive away; both men had pistols. Davis testified that Pope had a black .45 caliber pistol and that the magazine was empty; Bell had a silver and black nine millimeter pistol. Pope stated "I think he's dead," to which Bell responded, "No, I don't think he's dead." The group drove to Bell's aunt's house, then to Davis' girlfriend's house, where they hid the pistols in a closet. Afterwards, they smoked some marijuana, went to a club in Scotland Neck, and spent the night in a motel in Roanoke Rapids.

There was also evidence tending to show that Bell had a previous disagreement with Jimmy Battle and had told Milton Freeman the day before the shooting that he had a "beef" with Battle. On 25 November 2000, Battle had car trouble near Wiley Neal's house in the "Little Raleigh" area of Rocky Mount. Battle asked Jessie Smith to help him try and start the car. While Smith was working underneath the hood of the car, he heard a number of shots; he saw two men running away and saw Jimmy Battle lying on the ground. Neal also heard the shots and when he looked out, he saw Battle on the ground. When police arrived, Battle was not breathing and had no pulse. Police found ten shell casings, both nine millimeter and .45 caliber, on the ground near Battle's body. A forensic pathologist testified that Battle had suffered two separate bullet wounds and that death had resulted from a wound to the chest which had severed his aorta. An SBI weapons expert testified that four .45 caliber shell casings found at the scene had been fired by Pope's pistol and that six nine millimeter shell casings found at the scene had been fired from Bell's pistol.

Neither defendant offered evidence.

****

Defendant Pope's Appeal

Defendant Pope brings forward only three of his twelve assignments of error contained in the record on appeal. The nine assignments of error not addressed in his brief are deemed abandoned. *See* N.C.R. App. P. 28(a), 28(b)(6).

[1] In his first argument, Pope asserts he is entitled to a new trial due to an error in the jury instructions. When instructing the jury on the elements of first degree murder, the trial judge stated:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally killed the victim with a deadly weapon thereby proximately causing the victim's death, and that the defendant acted with malice, with premeditation, and with deliberation, it would be your duty to return a verdict of guilty of first degree murder. If you do not so find or have a reasonable doubt as to one or more of these things, *it would be good for you* to return a verdict of not guilty.

(Emphasis added). Though no objection was made, and the misstatement was not otherwise brought to the court's attention at trial, defendant Pope argues the instruction constitutes both structural error and plain error, entitling him to a new trial.

Structural error is rarely found to exist and consists of "a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.' " *State v. Anderson*, 355 N.C. 136, 142, 558 S.E.2d 87, 92 (2002) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L. Ed. 2d 302, 331 (1991)). The trial court's misstatement in this case was not of such a nature as to constitute structural error. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L. Ed. 2d 182 (1993) (erroneous instruction to jury on reasonable doubt); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L. Ed. 2d 598 (1986) (unlawful exclusion of jurors of defendant's race); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L. Ed. 2d 31 (1984) (deprivation of right to public trial); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L. Ed. 2d 122 (1984) (deprivation of right to self-representation at trial); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L. Ed. 2d 799 (1963) (total deprivation of the right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (absence of impartial trial judge).

Plain error entitles a defendant to a new trial "only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002). Defendant Pope argues that conflicting instructions upon a material point entitles him to a new trial. It is true that "[a]n erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is cor-

rectly stated." *State v. Ellerbe*, 223 N.C. 770, 775, 28 S.E.2d 519, 522 (1944). However, where "the inadvertence complained of occurs early in the charge but is not called to the attention of the court at the time, and is later corrected, the occurrence will not be held for prejudicial error when it is apparent from the record that the jury could not have been misled." *State v. Wells*, 290 N.C. 485, 498, 226 S.E.2d 325, 334 (1976), *superseded in part on other grounds by statute*, N.C. Gen. Stat. § 15A-924(a)(5) (2003).

In the present case, the trial court's misstatement, though erroneous, was merely a *lapsus linguae* and was immediately corrected, twice, when the trial court charged the jury in final mandates as to each defendant that if the jury did not find, or had a reasonable doubt as to the existence of, each element it was their "duty to return a verdict of not guilty." In viewing the jury instructions as a whole, the jury could not have been misled in this case and, therefore, the misstatement had no probable impact on the outcome of the trial. *See State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981), *overruled on other grounds*, *State v. Sanderson*, 346 N.C. 669, 488 S.E.2d 133 (1997). Thus, defendant has not shown plain error. *See State v. Odom*, 307 N.C. 655, 661-62, 300 S.E.2d 375, 378-79 (1983).

[2] Though defendant Pope assigns error to the use of the "short form" indictment to charge him with first-degree murder, he concedes the short form indictment has been repeatedly upheld by the North Carolina Supreme Court. *See State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593, *cert. denied*, 124 S.Ct. 44, 156 L. Ed. 2d 702 (2003). This assignment of error is overruled.

[3] By the final assignment of error argued in his brief, defendant Pope contends the trial court gave insufficient instructions to the jury at recess. Defendant cites four instances where he claims the court failed to appropriately instruct the jury as to its conduct during recess. However, defendant did not object to the instructions given by the trial court, nor did he request additional instructions. He has also failed, in his assignment of error, to contend plain error with respect to the instructions as required by N.C.R. App. P. 10(c)(4). Therefore, he has waived review. *State v. Moore*, 132 N.C. App. 197, 511 S.E.2d 22, *appeal dismissed*, 350 N.C. 103, 525 S.E.2d 469 (1999), *and denial of habeas corpus aff'd sub nom. Moore v. Brown*, 215 F.3d 1320 (4th Cir. 2000). However, even if the issue had been preserved, defendant's contention would have no merit. The trial court gave instructions on two occasions which complied with the requirements of N.C. Gen.

Stat. § 15A-1236 (2003), and reminded the jury of those instructions on other occasions. We hold the instructions to have been adequate and overrule defendant's assignment of error to the contrary. *See State v. Larrimore*, 340 N.C. 119, 142, 456 S.E.2d 789, 801 (1995).

Defendant Bell's Appeal

Defendant Bell brings forward in his brief four of the eight assignments of error contained in the record on appeal. His remaining assignments of error are deemed abandoned. *See* N.C.R. App. P. 28(a), 28(b)(6).

[4] Defendant Bell first assigns error to the trial court's denial of his request to instruct the jury on second-degree murder as a lesser-included offense of first-degree murder. First-degree murder is the "unlawful killing of another human being with malice and with premeditation and deliberation." *State v. Watson*, 338 N.C. 168, 176, 449 S.E.2d 694, 699 (1994), *cert. denied*, 514 U.S. 1071, 115 S.Ct. 1708, 131 L. Ed. 2d 569 (1995). "Murder in the second degree is the unlawful killing of another human being with malice but without premeditation and deliberation." *Id.* In a first-degree murder case, if "there is any evidence or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial judge, under appropriate instructions, to submit that view to the jury." *State v. Strickland*, 307 N.C. 274, 285, 298 S.E.2d 645, 653 (1983) (citation omitted), *overruled on other grounds*, *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

> "Premeditation" means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. "Deliberation" means an intent to kill executed by the defendant 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. Bonney, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991) (citation omitted). Circumstances to be considered in determining whether a killing was done with premeditation and deliberation include: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing

of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. *See State v. Jackson*, 317 N.C. 1, 23, 343 S.E.2d 814, 827 (1986), *vacated on other grounds*, 479 U.S. 1077, 107 S.Ct. 1271, 94 L. Ed. 2d 133 (1987); *State v. Brown*, 315 N.C. 40, 59, 337 S.E.2d 808, 823 (1985), *cert. denied*, 476 U.S. 1165, 106 S.Ct. 2293, 90 L. Ed. 2d 733 (1986), *overruled on other grounds*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

In the present case, the evidence overwhelmingly supports a finding of premeditation and deliberation; thus, there is no evidence to support a finding of a lesser offense which does not include those elements and the trial court did not err in refusing to submit second-degree murder as a lesser included offense. *State v. Strickland* at 291, 298 S.E.2d at 657. There was no evidence that Battle provoked either defendant; he was merely working on his car on the side of the road when defendants walked up and started shooting. There was also evidence that Bell had ill-will toward Battle prior to the incident. When Battle was seen by defendants, they calmly instructed Freeman to park the car and to wait for them. They were seen pulling up the hoods on their jackets as they walked away from Freeman's car. Upon returning to the car, defendants discussed whether they had killed Battle and undertook to hide their weapons. After they had hidden their weapons, they smoked marijuana and went to a club. There was no evidence that Bell's demeanor was anything but calm. Additionally, ten shell casings were found, six of which had been fired by Bell's pistol, suggesting that potentially lethal shots were fired after Battle had been struck and rendered helpless and that the killing was done in a brutal manner.

Bell argues his intent to kill Battle was negated by evidence tending to show that when he returned to the car after the shooting, he stated that he did not believe the victim to be dead. This argument does not flow from his statement; whether Bell believed the victim to be dead after the shooting is not evidence as to whether he intended to kill the victim before the shooting. Moreover, even if Bell believed that Battle had not been killed, he made no effort to seek medical assistance, further suggesting that he intended that Battle be killed.

In sum, the evidence presented supports a finding of premeditation and deliberation and does not support an instruction for a lesser degree of murder. This assignment of error is overruled.

[5] Defendant Bell next argues the trial court erred by instructing the jury as to the doctrine of acting in concert. Pursuant to the doctrine of acting in concert

> [I]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.

State v. Barnes, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997), *cert. denied*, 523 U.S. 1024, 118 S.Ct. 1309, 140 L. Ed. 2d 473 (1998) (citations omitted).

Defendant Bell argues the evidence of his statement questioning whether Battle had been killed shows that he was not acting together with defendant Pope with a specific intent to kill Battle, and that Pope acted independently. We disagree. The evidence shows the defendants left Freeman's car together just before the shots were fired, pulling up their hoods as they walked away, and they returned to the car together just after the shooting. Both Bell and Pope bore ill-will toward Battle, both had weapons, and both fired their weapons. Such evidence does not suggest independent acts by defendants; rather, it shows they were acting together in pursuit of a common purpose to kill Battle. This assignment of error is overruled.

[6] By his final two assignments of error, defendant Bell contends the trial court erred in its handling of defendants' request that the court inquire of the jurors regarding their possible exposure to a newspaper article concerning the trial. In responding to the request, the trial court inquired of defense counsel as to whether either of them had information of juror misconduct or that any juror had read the article. Both counsel responded that they had no such information. The trial court then inquired of the jurors, as a body, as to whether any of them had seen a news article concerning the trial. No juror responded. Defendant Bell argues that the manner in which the trial court inquired of the jurors discouraged any juror from admitting that he or she had viewed the article.

The manner in which a trial court conducts an inquiry into whether a juror has been exposed to publicity or other external influences is reviewed for an abuse of discretion. *See State v. Denny*, 294 N.C. 294, 299, 240 S.E.2d 437, 440, (1978); *State v. McVay*, 279 N.C. 428, 432-33, 183 S.E.2d 652, 655 (1971). Our review of the procedure

used by the trial court here discloses no abuse of discretion. The court simply inquired of the jurors as whether any of them had contact with the news article and whether all had followed the instruction he had given at the beginning of the trial. On the last day of the trial, the court again inquired as to whether any juror "had an occasion to violate my rule and read the paper last night?" The trial court's inquiries were entirely appropriate and the assignments of error to the contrary are overruled.

Defendants received a fair trial, free of prejudicial error.

No Error.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA v. TYRONE ANTHONY LANE

No. COA03-510

(Filed 6 April 2004)

1. **Drugs— maintaining vehicle for keeping or selling controlled substances—motion to dismiss—plain error analysis**

The trial court did not commit plain error by failing to dismiss the charge of maintaining a vehicle for the purpose of keeping or selling controlled substances based on the holding in *State v. Best*, 292 N.C. 294 (1977), because that case focused solely on the role of medical practitioners and there is no indication that it applies to laymen.

2. **Drugs— maintaining vehicle for keeping or selling controlled substances—motion to dismiss—sufficiency of evidence**

The trial court erred by denying defendant's motion to dismiss the charge of maintaining a vehicle for the purpose of keeping or selling controlled substances because the evidence does not indicate possession of cocaine in the vehicle that occurred over a duration of time, nor is there evidence that defendant had used the vehicle on a prior occasion to sell cocaine.

3. Drugs— possession of cocaine with intent to sell or deliver—motion to dismiss—constructive possession

The trial court did not err by denying defendant's motion to dismiss the charge of possession of cocaine with intent to sell or deliver based on his constructive possession of cocaine found in a car driven by defendant but owned by another, because sufficient incriminating circumstances supported an inference of constructive possession including the officer's investigation of defendant, their later struggle, the subsequent police search for defendant, and the fact that the vehicle defendant had driven where the controlled substance was found remained locked.

4. Constitutional Law— double jeopardy—multiple punishment—credit for days served

The trial court did not err by failing to dismiss the habitual felon indictment based on double jeopardy even though defendant was served with a warrant for his arrest on the habitual felon indictment and spent four days in jail until he could post an additional bond, because the record reflects that the trial court gave defendant credit for those four days when it sentenced defendant on the substantive felonies.

5. Sentencing— habitual felon indictment—right to arraignment—waiver

The trial court did not err by proceeding to trial, over defendant's objection, on the habitual felon indictment during the same week as his arraignment on that charge, because defendant waived his right to arraignment and cannot raise violations of N.C.G.S. § 15A-943 as grounds for a new trial when he failed to make a written request for an arraignment on the habitual felon charge.

Appeal by defendant from judgments dated 6 September 2002 by Judge Thomas D. Haigwood in New Hanover County Superior Court. Heard in the Court of Appeals 26 February 2004.

Attorney General Roy Cooper, by Assistant Attorney General Newton Pritchett, for the State.

Robert T. Newman, Sr. for defendant-appellant.

BRYANT, Judge.

Tyrone Anthony Lane (defendant) appeals judgments dated 6 September 2002 entered consistent with a jury verdict finding him guilty of possession of cocaine with intent to sell or deliver, assault on a law enforcement officer, resisting, delaying or obstructing a public officer, driving while license revoked (01 CRS 29254), intentionally keeping or maintaining a vehicle for the purpose of keeping or selling controlled substances (01 CRS 29255), and having attained the status of habitual felon (02 CRS 1919).

At trial, Deputy Michael Howe testified he was in uniform but driving an unmarked patrol car on 5 December 2001. He was on the lookout for two brothers for whom arrest warrants had been issued when he spotted defendant driving a vehicle "at a low rate of speed." Defendant was driving in an area Deputy Howe often frequented when "attempting to locate subjects" with outstanding arrest warrants. Deputy Howe observed that defendant was not wearing a seatbelt. His suspicion aroused, Deputy Howe pulled in behind defendant's vehicle to follow it. Defendant operated his right turn signal but, after making "a few jerky motions with his head," turned left while the right turn signal was still blinking. Deputy Howe thought defendant might have recognized the license plates on his vehicle and become nervous. The officer was about to conduct a stop of defendant's vehicle when defendant made "a sharp, last-minute" turn onto another street. After following defendant to a parking lot, Deputy Howe next saw defendant standing on the driver's side of his vehicle and then observed his walking away. In fear that defendant "was going to take off running," Deputy Howe continued to follow defendant in his patrol car. No other person was in the vicinity.

Deputy Howe finally approached defendant and explained he had observed defendant driving without his seatbelt. Defendant nodded in response and stopped walking. When Deputy Howe asked to see defendant's driver's license, defendant replied he did not have one. After Deputy Howe had written down defendant's name, defendant started to walk away. Deputy Howe requested defendant to "step back towards [him]." Instead of complying, defendant pointed between two buildings, stating his intention to walk toward them, and continued in that direction. Deputy Howe warned defendant that he was conducting an investigation and would detain defendant if he did not stop walking. Deputy Howe spoke in a calm voice because defendant "appeared to be very nervous about something." Deputy

Howe asked defendant to step over to his patrol car where he conducted a pat-down search of defendant to check for weapons. During the frisk, Deputy Howe came across an object in defendant's left jeans pocket. When Deputy Howe squeezed the item from the outside of defendant's clothing, defendant "jerked around," almost hitting the officer's face with his elbow. During the struggle that ensued, defendant "was able to throw something [in]to his mouth." Deputy Howe did not get a chance to see what that "something" was but noted that it came from defendant's pocket. As Deputy Howe "attempted to take [defendant] down to the ground" to place him under arrest for resisting an officer, defendant "repeatedly struck [him] in the face." Deputy Howe tried to get to his radio to call for assistance, but defendant struck "the mike" with his hand foiling the officer's attempt. Defendant then started running. Deputy Howe initially gave chase. After a short distance, however, Deputy Howe returned to his vehicle, which was still running, and radioed for assistance in setting up a perimeter to detain defendant. Defendant was eventually found hiding underneath a pickup truck.

Following defendant's arrest, Deputy Howe returned to the parking lot to check on defendant's vehicle. Deputy Howe walked around the vehicle, noting that all the doors were locked and windows closed. Unable to find the keys to the vehicle, Deputy Howe ran its tags to contact the owner but was unsuccessful. A "wrecker service" was called to unlock the vehicle doors. After unlocking the doors, a canine unit conducted an exterior and interior sniff of the vehicle. On the exterior, the police dog alerted to the driver's door handle; and in the interior, it alerted "to the area of the front seat in between the front driver seat and the front passenger seat." When the canine officer checked the area between the front seats, he found a white envelope containing eight small Ziploc bags of cocaine. The parties stipulated that the envelope contained 4.4 grams of cocaine.

The issues are whether the trial court erred in: (I) denying defendant's motion to dismiss the charges of maintaining a vehicle for the purpose of keeping or selling controlled substances and possession of cocaine with intent to sell or deliver; (II) failing to dismiss the habitual felon indictment based on double jeopardy; and (III) overruling defendant's objection to being tried on the habitual felon charge during the same week as his arraignment on that charge.

I

Maintaining a Vehicle

[1] Defendant first argues the trial court committed plain error by failing to dismiss the charge of maintaining a vehicle for the purpose of keeping or selling controlled substances based on our Supreme Court's holding in *State v. Best*, 292 N.C. 294, 233 S.E.2d 544 (1977). We disagree. In *Best*, our Supreme Court analyzed the North Carolina Controlled Substances Act and determined that a medical doctor could not be convicted for the sale and delivery of a controlled substance pursuant to N.C. Gen. Stat. § 90-95. *Id.* Instead, any violation by a medical professional would be governed by N.C. Gen. Stat. § 90-108. *Id.* at 310, 233 S.E.2d at 554. In this case, defendant appears to be basing his argument on the proposition that the holding in *Best* extends to laymen and therefore precludes a conviction of maintaining a vehicle for the purpose of keeping or selling controlled substances under N.C. Gen. Stat. § 90-108(a)(7). As the decision in *Best* focused solely on the role of medical practitioners, there is no indication that it applies to laymen. Accordingly, this assignment of error is overruled.

[2] Alternatively, defendant assigns as error the trial court's denial of his motion to dismiss the charge due to insufficiency of the evidence. Specifically, defendant contends that evidence of drugs found in a vehicle on one occasion, without more, is insufficient to support the conclusion he maintained a vehicle for the purpose of keeping or selling controlled substances.

Upon review of a motion to dismiss, the court determines whether there is substantial evidence, viewed in the light most favorable to the State, of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Stancil*, 146 N.C. App. 234, 244, 552 S.E.2d 212, 218 (2001), *aff'd as modified*, 355 N.C. 266, 559 S.E.2d 788 (2002) (per curiam); *State v. Compton*, 90 N.C. App. 101, 103, 367 S.E.2d 353, 355 (1988). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990).

In *State v. Dickerson*, this Court held that one isolated incident of a defendant having been seated in a motor vehicle while selling a controlled substance is insufficient to warrant a charge to the jury of keeping or maintaining a motor vehicle for the sale and/or delivery of

that substance. *State v. Dickerson*, 152 N.C. App. 714, 716, 568 S.E.2d 281, 282 (2002). This Court reasoned:

> Pursuant to N.C. Gen. Stat. § 90-108(a)(7), it is illegal to "knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances]." The statute thus prohibits the keeping or maintaining of a vehicle only when it is used for "keeping or selling" controlled substances. As stated by our Supreme Court in *State v. Mitchell*, the word " '[k]eep' . . . denotes not just possession, but possession that occurs over a duration of time." Thus, the fact "[t]hat an individual within a vehicle possesses marijuana on one occasion cannot establish . . . the vehicle is 'used for keeping' marijuana; nor can one marijuana cigarette found within the car establish that element." Likewise, the fact that a defendant was in his vehicle on one occasion when he sold a controlled substance does not by itself demonstrate the vehicle was kept or maintained to sell a controlled substance.

Id. (quoting N.C.G.S. § 90-108(a)(7) (2001) and *State v. Mitchell*, 336 N.C. 22, 32-33, 442 S.E.2d 24, 30 (1994)) (alteration in original). The evidence in the case before us does not indicate possession of cocaine in the vehicle that occurred over a duration of time, nor is there evidence that defendant had used the vehicle on a prior occasion to sell cocaine. We therefore agree with defendant that his motion to dismiss should have been granted.

Possession of Cocaine

[3] Defendant next contends the trial court erred in denying his motion to dismiss the charge of possession of cocaine with intent to sell or deliver because the evidence was insufficient on the element of constructive possession.

> An accused has possession of [a controlled substance] within the meaning of the [North Carolina] Controlled Substances Act when he has both the power and intent to control its disposition. The possession may be either actual or constructive. Constructive possession of [a controlled substance] exists when the accused is without actual personal dominion over the material, but has the intent and capability to maintain control and dominion over it.

State v. Wiggins, 33 N.C. App. 291, 292-93, 235 S.E.2d 265, 267 (1977). Naturally, "power and intent to control [a] controlled substance can

exist only when one is aware of its presence." *State v. Matias*, 143 N.C. App. 445, 448, 550 S.E.2d 1, 3, *aff'd*, 354 N.C. 549, 556 S.E.2d 269 (2001). This Court has previously emphasized that " 'constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury.' " *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001) (citation omitted) (emphasis omitted), *aff'd*, 356 N.C. 141, 567 S.E.2d 137 (2002). "The State is not required to prove that the defendant . . . was the only person with access to [the controlled substance]," *State v. Rich*, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987); however, if control of the area in which the controlled substance is found is not exclusive, "constructive possession of the contraband materials may not be inferred without other incriminating circumstances." *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984).

Here, defendant contends his control over the vehicle he was driving was not exclusive because he was not the vehicle's owner and he had left it unattended after Deputy Howe approached him. As such, defendant argues the State's evidence of his presence in the vehicle was insufficient to support the charge in the absence of additional incriminating circumstances. Concluding that this case presents sufficient additional incriminating circumstances, we disagree.

The evidence showed Deputy Howe observed defendant driving "at a low rate of speed" in a vehicle containing an envelope with eight small Ziploc bags of cocaine apparently prepackaged for sale. Defendant's driving became evasive after Deputy Howe's patrol car approached defendant's vehicle from behind. When Deputy Howe finally confronted defendant in the parking lot, "[i]t was apparent [to Deputy Howe] that [defendant] was attempting to . . . get away from [him]." The subsequent weapon's frisk resulted in forceful resistance by defendant after Deputy Howe began inspecting an object in defendant's jeans pocket. During the struggle that followed, defendant appeared to be destroying evidence by placing an object in his mouth. Ultimately, defendant fled. *See, e.g., State v. Neal*, 109 N.C. App. 684, 687-88, 428 S.E.2d 287, 290 (1993) (sufficient incriminating circumstances supporting an inference of constructive possession where a large amount of cash was found on the defendant's person at the time of arrest and there was evidence from which a jury might infer an attempt to flee from the area where illegal drugs were found); *see also State v. Weems*, 31 N.C. App. 569, 571, 230 S.E.2d 193, 194 (1976) ("evidence which places an accused within close juxtaposition

to a narcotic drug under circumstances giving rise to a reasonable inference that he knew of its presence may be sufficient to justify the jury in concluding that it was in his possession"). We further note that during the officer's investigation of defendant, their later struggle, and the subsequent police search for defendant, the vehicle defendant had driven remained locked. Based on these "other incriminating circumstances," defendant's argument notwithstanding, a juror could reasonably infer defendant had the power and intent to control the cocaine found next to the driver's seat in the vehicle and therefore constructively possessed the cocaine. The trial court thus did not err in denying defendant's motion to dismiss the possession charge.

II

[4] Defendant also assigns as error the trial court's failure to dismiss the habitual felon indictment based on double jeopardy. In his brief to this Court, defendant states he was served with the substantive felony warrants, arrested, and later released on bond. Approximately two months later, defendant was served with a warrant for his arrest on the habitual felon indictment, whereupon he spent four days in jail until he could post an additional bond. Defendant now argues the four days he was imprisoned on the habitual felon warrant amounted to multiple punishments for the same offense in violation of double jeopardy. The record, however, reflects that the trial court, in sentencing defendant on the substantive felonies, gave defendant credit for those four days. Defendant's argument is therefore without merit.

III

[5] Finally, defendant asserts the trial court erred in proceeding to trial, over his objection, on the habitual felon indictment in the same week as his arraignment on the charge. Defendant relies on N.C. Gen. Stat. § 15A-943, which provides in subsection (a) that in counties where there are twenty or more weeks per year of trial sessions of superior court at which criminal cases are heard, arraignments must be scheduled "on at least the first day of every other week in which criminal cases are heard," and in subsection (b) that "[w]hen a defendant pleads not guilty at an arraignment required by subsection (a), he may not be tried without his consent in the week in which he is arraigned."[1] N.C.G.S. § 15A-943 (2003). Defendant argues that no

1. The State argues in its brief to this Court that a defendant need not be arraigned on a habitual felon charge. Considering the purpose of an arraignment and this Court's previous application of the law on arraignments in the habitual felon context, we reject this proposition. *See* N.C.G.S. § 15A-941(a) (2003) ("[a]rraignment con-

arraignment was scheduled according to section 15A-943(a) and, when the trial court did arraign him on 3 September 2002 on the habitual felon charge, he objected to proceeding to trial on the same day he was arraigned but was denied the one-week interval between arraignment and trial to which he was entitled under section 15A-943(b).

Our Supreme Court has held that it is reversible error to proceed with trial on the same day as arraignment without the defendant's consent. *State v. Shook*, 293 N.C. 315, 319-20, 237 S.E.2d 843, 847 (1977). Where, however, a defendant fails to file "a written request with the clerk of superior court for an arraignment not later than 21 days after service of the bill of indictment . . . [or, if applicable,] not later than 21 days from the date of the return of the indictment as a true bill,"[2] N.C.G.S. § 15A-941(d) (2003), he has waived his right to arraignment and cannot raise violations of section 15A-943 as grounds for a new trial, *see State v. Trull*, 153 N.C. App. 630, 633-34, 571 S.E.2d 592, 595 (2002) (rejecting the defendant's claim of section 15A-943 violations in the absence of a written arraignment request in the record), *disc. review denied and appeal dismissed*, 356 N.C. 691, 578 S.E.2d 597 (2003). As previously held by this Court, "it would be illogical to require the State to schedule an arraignment pursuant to one statute where the right to such has been waived pursuant to another." *Id.* at 634, 571 S.E.2d at 595. As the record in this case contains no written request by defendant for an arraignment on the habitual felon charge, this assignment of error is overruled.

Defendant's conviction of maintaining a vehicle for the purpose of keeping or selling controlled substances is vacated and this case remanded for resentencing.

Vacated in part and remanded.

Judges TIMMONS-GOODSON and ELMORE concur.

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sists of bringing a defendant in open court . . . , advising him of the charges pending against him, and directing him to plead"); *e.g.*, *State v. Brunson*, 120 N.C. App. 571, 578, 463 S.E.2d 417, 421 (1995) (applying standard arraignment law to habitual felon charge).

2. The habitual felon indictment in this case was returned as a true bill on 29 January 2002.

LAURA TARRANT, PLAINTIFF v. FREEWAY FOODS OF GREENSBORO, INC., D/B/A WAFFLE HOUSE, FREEWAY FOODS, INC., D/B/A WAFFLE HOUSE, JESSE YUN, DOUG KINGTON, SR., AND JOHN DOE, DEFENDANTS

No. COA03-210

(Filed 6 April 2004)

1. **Appeal and Error— appealability—dismissal of two claims—voluntary dismissal of remaining claims**

An appeal was not interlocutory where only two of four claims were dismissed by the trial court, but the other two were later voluntarily dismissed by plaintiff as part of a settlement. There is nothing left for the trial court to adjudicate; any delay would impede rather than expedite resolution of the matter.

2. **Employer and Employee— wrongful termination—workers' compensation claim**

The trial court erred by dismissing plaintiff's claim for wrongful termination in violation of public policy for asserting her workers' compensation rights where plaintiff was injured, collected temporary disability, returned to work, and was then terminated because she had "cost the company a lot of money."

3. **Employer and Employee— retaliatory discharge—temporal requirement**

The trial court erred by dismissing plaintiff's claim under REDA (the Retaliatory Employment Discrimination Act) where the employer admitted that plaintiff's firing was in retaliation for a workers' compensation claim and the question was the length of time between the filing of the claim and the retaliation. The major concern is whether plaintiff was fired for asserting her workers' compensation claim; strictly requiring a close temporal relationship between the claim and the retaliation would allow employers to circumvent the statute.

4. **Arbitration and Mediation— employment contract—existence of arbitration agreement**

Claims arising from an employment termination were remanded for determination of whether there was a valid arbitration agreement between the parties.

Appeal by plaintiff and defendant Freeway Foods, Inc., from order entered 8 October 2002 by Judge John R. Jolly, Jr., in

Wake County Superior Court. Heard in the Court of Appeals 13 January 2004.

Faith Herndon for plaintiff appellant-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by John W. Ormand III and Charles E. Coble, for defendant appellant-appellee.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher; and Ferguson, Stein, Chambers Wallas, Adkins, Gresham & Sumter, P.A., by Margaret Errington for North Carolina Academy of Trial Lawyers Amicus Curiae.

McCULLOUGH, Judge.

This case arises out of plaintiff's termination from employment. Plaintiff asserted one claim under the Retaliatory Employment Discrimination Act (REDA) and one claim for wrongful discharge in violation of public policy. Plaintiff also sued for slander and conversion. In response, defendant filed a motion to compel plaintiff to arbitrate her claims.

Plaintiff Laura Tarrant was employed by defendant Freeway Foods of Greensboro, Inc., in 1989. In 1993, plaintiff sustained a work-related back injury and was compensated under North Carolina's Workers' Compensation Act. For the first several years after the injury, plaintiff continued to work.

In 1996, plaintiff's compensable back injury worsened, and she required surgery. Around June of 1996, she was put on a leave of absence because of her back surgery and condition. At this time, defendant paid temporary total disability benefits during plaintiff's period of disability. In early 1997, plaintiff's physician assigned restrictions, including limiting plaintiff to lifting items no greater than thirty pounds. Also, in 1997 and 1998, plaintiff's doctors indicated that she was still disabled from working part time and recommended further surgical procedures.

During 1997 and most of 1998, defendant and its insurance carriers paid plaintiff total disability benefits. Plaintiff was unable to work for defendant or any other employer. On or about 23 October 1998, the parties settled plaintiff's workers' compensation claim. The agreement did not prevent plaintiff from working for defendant in the future.

In 1999, plaintiff worked for other employers. Later that year, she applied to work for defendant and was rehired by Larry Davis, a Unit Manager. At that time, plaintiff was physically able to do the job. Plaintiff claims that when she was leaving the store after being hired, the District Manager for defendant, Ken Tindall, inquired about plaintiff's back condition and expressed concerns about whether plaintiff could do the job. According to plaintiff, Tindall asked her if she was going to behave and stated, "You're not going to fall again, are you?"

Plaintiff reported to work on 2 November 1999. On 4 November 1999, Larry Davis told plaintiff that her employment with defendant had been terminated. Plaintiff alleges that Davis told her that her job performance was fine, but she "cost the company a lot of money."

Plaintiff contacted Ken Tindall and other managers and told them that she was not too disabled to do the job. However, the managers disagreed. They told plaintiff that she agreed that she could not work for defendant again when she settled her workers' compensation claim. Plaintiff filed claims for (1) violation of North Carolina's Retaliatory Employment Discrimination Act (REDA), (2) wrongful discharge in violation of public policy, (3) slander, and (4) wrongful conversion.

In response, defendant filed a motion to dismiss or in the alternative, to stay action and compel plaintiff to submit her claims to binding arbitration. In support of its motion to compel arbitration, defendant presented evidence tending to show that when she was rehired in 1999, plaintiff completed and signed the standard "Waffle House" employment application. The documents in the application include an Application for Hourly Employment, a form which contains an arbitration clause. In the arbitration clause, employees agree to resolve all disputes arising out of employment through binding arbitration. Although plaintiff acknowledged signing some application documents, defendant was unable to locate the actual Application for Hourly Employment that plaintiff signed.

The trial court dismissed plaintiff's REDA claim and claim for wrongful discharge in violation of public policy, but did not dismiss the slander and conversion claims. The court denied defendant's motion to stay action and compel arbitration.

Both sides appeal. On appeal, plaintiff argues that the trial court erred by: (1) dismissing the REDA claim and (2) dismissing

the claim for wrongful termination in violation of public policy. In contrast, defendant asserts that the trial court erred by (1) denying defendant's motion to stay action and compel arbitration or, in the alternative, (2) by failing to make and enter sufficient findings of fact. Before addressing these issues, we must evaluate defendant's contention that this appeal should be dismissed as interlocutory.

I. Interlocutory Appeal

[1] Defendant argues that plaintiff's appeal should be dismissed as interlocutory. We disagree.

Under N.C. Gen. Stat. § 1A-1, Rule 54(a) (2003), a judgment is either final or interlocutory. Our Supreme Court has explained this distinction:

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Veazey v. Durham, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Under N.C. Gen. Stat. § 7A-27 (2003), final judgments are immediately appealable. However, interlocutory orders are only appealable in a limited set of circumstances. The purpose of the restrictions on the right to appeal immediately from an interlocutory ruling "is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division." *Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978).

We decline to dismiss this case because plaintiff's appeal is not interlocutory. Originally, plaintiff filed four causes of action. The first two claims were for violations of the Retaliatory Employment Discrimination Act (REDA) and for wrongful discharge in violation of public policy. The remaining two claims were for slander and wrongful conversion.

On 4 October 2002, the trial court dismissed plaintiff's REDA claim and plaintiff's claim for wrongful discharge in violation of public policy, but refused to dismiss the other two claims for slander and wrongful conversion. At that point, plaintiff's appeal would have been

interlocutory because the entire case was not disposed of. However, on 7 February 2003, plaintiff voluntarily dismissed the claims for slander and wrongful conversion as part of a settlement agreement with defendant.

At this juncture, we believe that the interests of justice would be furthered by hearing the appeal. All claims and judgments are final with respect to all the parties, and there is nothing left for the trial court to determine. Therefore, the rationale behind dismissing interlocutory appeals, the prevention of fragmentary and unnecessary appeals, does not apply in this case. In fact, any delay on our part would impede, rather than expedite, the efficient resolution of this matter. For these reasons, we decline to dismiss the appeal and will consider the case on the merits.

II. Wrongful Termination in Violation of Public Policy

[2] Plaintiff argues that the trial court erred in dismissing plaintiff's claim for wrongful discharge in violation of public policy. We agree.

Under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2003), a party may file a motion to dismiss for failure to state a claim upon which relief can be granted. In considering the motion, the court evaluates "whether the facts alleged in the complaint, when viewed in the light most favorable to the plaintiff[], give[s] rise to a claim for relief on any theory." *Ford v. Peaches Entertainment Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986), *disc. review denied*, 318 N.C. 694, 351 S.E.2d 746 (1987).

North Carolina adheres to the at-will employment doctrine which states that "in the absence of a contractual agreement . . . establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party." *Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997), *reh'g denied*, 347 N.C. 586, 502 S.E.2d 594 (1998). However, there is a public policy exception to the rule. *Brackett v. SGL Carbon Corp.*, 158 N.C. App. 252, 259, 580 S.E.2d 757, 761 (2003). While there is not a specific list of what actions constitute a violation of public policy, the exception has applied where the employee is fired " '(1) for refusing to violate the law at the employer[']s request, (2) for engaging in a legally protected activity, or (3) based on some activity by the employer contrary to law or public policy.' " *Id.* (citation omitted).

This Court has considered whether "a claim of wrongful discharge based upon North Carolina public policy of not punishing employees for exercising their statutory rights under the Workers' Compensation Act was tenable[.]" *Salter v. E & J Healthcare, Inc.*, 155 N.C. App. 685, 697, 575 S.E.2d 46, 54 (2003). In *Salter*, we concluded that such a cause of action probably does exist, but plaintiff's claim could not succeed because there was insufficient evidence. *Id.* The next time this Court considered the issue we stated unequivocally, "we agree with the reasoning of *Salter* on this issue." *Brackett*, 158 N.C. App. at 259, 580 S.E.2d at 762. "[A] plaintiff may state a claim for wrongful discharge in violation of public policy where he or she alleges the dismissal resulted from an assertion of rights under the Workers' Compensation Act." *Id.* at 260, 580 S.E.2d at 762.

In this case, plaintiff has alleged sufficient facts to survive a motion to dismiss on the claim of wrongful discharge in violation of public policy. Plaintiff claims that she was fired because she asserted her rights under the Workers' Compensation Act. Evidence in the record reveals that plaintiff sustained a back injury in 1993 while working for defendant. The injury was compensable under North Carolina's Workers' Compensation Act. For the first few years after the injury, plaintiff was able to continue working. However, in 1996, the injury worsened, and plaintiff required surgery. At that time, defendant paid temporary total disability benefits. During 1997 and most of 1998, plaintiff received total disability benefits because she could not work for defendant or any other employer. On 1 November 1999, defendant rehired plaintiff.

Plaintiff's allegations of the events regarding her hiring and firing tend to show that she was fired because she filed a workers' compensation claim. When plaintiff was leaving the store after being rehired, plaintiff claims that the District Manager, Ken Tindall, asked her, "Are you going to behave? You're not going to fall again, are you?" Plaintiff also produced evidence showing what happened on the day she was terminated. A manager told plaintiff that her job performance was fine, but the company did not want her around because she cost them a lot of money. We conclude that this is sufficient evidence to allow plaintiff's wrongful discharge claim to go forward. Therefore, we reverse the trial court's dismissal of this claim.

III. REDA Claim

[3] Plaintiff also argues that the trial court erred by dismissing her claim under the Retaliatory Employment Discrimination Act (REDA).

Enacted in 1992, REDA prohibits discrimination against an employee who has filed a workers' compensation claim. N.C. Gen. Stat. § 95-240, *et. seq.* (2003). N.C. Gen. Stat. § 95-241(a)(1)(a), prevents discrimination or retaliation against an employee who does or threatens to

> [f]ile a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to . . . Chapter 97 of the General Statutes.

REDA replaced N.C. Gen. Stat. § 97-6.1 which sought to allow employees to "pursue remedies under the Workers' Compensation Act without fear of retaliation from their employers." *Salter*, 155 N.C. App. at 691, 575 S.E.2d at 50. The issue in the present case is whether a plaintiff must show a close temporal connection between the filing of the claim and the alleged retaliatory act when the employer or the employer's agent has admitted that plaintiff was fired because she asserted her rights under the Workers' Compensation Act.

"[O]ur appellate courts indicated *in applying the former provision* that a plaintiff fails to make out a case of retaliatory action where there is no close temporal connection between the filing of the claim and the alleged retaliatory act." *Id.* (emphasis added). However, we note that at least two of the cases that have dismissed these claims have considered the lack of a close temporal connection as one of many factors.

For example, in a case that applied the former statute (N.C. Gen. Stat. § 97-6.1), this Court affirmed a jury verdict that denied relief to plaintiff where the evidence showed that defendant did not question the fact that plaintiff was disabled, but terminated plaintiff for misrepresenting the extent of the disability. *Shaffner v. Westinghouse Electric Corp.*, 101 N.C. App. 213, 398 S.E.2d 657 (1990), *disc. review denied*, 328 N.C. 333, 402 S.E.2d 839 (1991). Although we stated that there was no close temporal connection between the initiation of the workers' compensation claim and the termination, the key factor was causation. *Id.* at 216, 398 S.E.2d at 659. Plaintiff was not fired because he instituted a workers' compensation claim; he was terminated because he lied about the gravity of his injuries. *Id.*

In *Salter*, "[s]everal things . . . [were] wrong with plaintiff's claim." *Salter*, 155 N.C. App. at 691, 575 S.E.2d at 50. We acknowledged that

there was no close temporal connection between the filing of the workers' compensation claim and plaintiff's termination. *Id.* However, we also indicated that plaintiff offered "little more than mere speculation" that defendant fired her "because she filed a workers' compensation claim." *Id.* at 692, 575 S.E.2d at 50. Thus, our major concern was whether plaintiff was terminated because she filed a workers' compensation claim, rather than timing alone. Perhaps, if plaintiff offered more evidence, there would have been a triable issue.

We are not aware of any REDA case in which the employer admitted that the employee was terminated for pursuing her workers' compensation rights. However, that is precisely what happened here. When plaintiff was rehired by defendant, a district manager allegedly asked plaintiff if she was going to behave and stated, "You're not going to fall again, are you?" Similarly, when she was fired, plaintiff was told that her job performance was fine, but she was being terminated because "she cost the company a lot of money." These statements strongly suggest that plaintiff was terminated because she instituted and later settled a workers' compensation claim. We recognize that a long interval between the filing of a workers' compensation claim and the termination of the employee could reveal that the two events were not causally related. However, such a concern does not arise where the employer openly admits that the firing was retaliatory.

We believe that strictly requiring a close temporal connection would allow employers to circumvent the statute. By simply delaying the retaliatory firing for several months, an employer could prevent a REDA claim from ever going forward, even where there is direct evidence of a wrongful motive.

At the very least, this case presents a triable issue. Ultimately, if this matter is not settled or resolved through binding arbitration, the jury should determine whether plaintiff was wrongfully terminated because she pursued her rights under the Workers' Compensation Act. For these reasons, we reverse the trial court's decision to dismiss plaintiff's REDA claim.

IV. Arbitration Agreement

[4] The final issue we must consider is whether the parties agreed to settle their disputes through binding arbitration. When a party denies the existence of an arbitration agreement, a court must "summarily

determine whether a valid arbitration agreement exists." *Barnhouse v. American Express Fin. Advisors, Inc.*, 151 N.C. App. 507, 508, 566 S.E.2d 130, 131 (2002). "Failure of the court to determine this issue, where properly raised by the parties, constitutes reversible error." *Id.*

After a careful review of the record, we are unable to clearly determine if the trial court found that there was a valid arbitration agreement. Therefore, we respectfully remand this issue for the purpose of clarification. If there was a valid arbitration agreement, plaintiff's claims will be settled through binding arbitration. If there was not a valid agreement, plaintiff should be allowed to pursue her claims in court.

For these reasons, the decision of the trial court is

Reversed and remanded.

Judges WYNN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. IGNACIO GARCIA TREJO

No. COA03-658

(Filed 6 April 2004)

1. Drugs— indictment—trafficking in marijuana—amount—overbroad drafting

Indictments for trafficking in marijuana by possession and transportation were not fatally defective where they alleged that defendant possessed "ten pounds or more" while the statutory amount is "more than ten pounds". Drafting that is too broad but includes the statute and affirmatively alleges the elements may be addressed through proper jury instructions.

2. Drugs— trafficking in marijuana—instructions—ten pounds or more

Jury verdicts for trafficking in marijuana by possession and transportation were ambiguous and were remanded where the jury was erroneously instructed that proof of possession of ten pounds or more was needed (the statute does not cover posses-

sion of exactly ten pounds) and the evidence could support the inference that defendant possessed ten pounds.

Judge HUNTER concurring in part and dissenting in part.

Appeal by defendant from judgment entered 18 April 2001 by Judge Kimberly S. Taylor in Rowan County Superior Court. Heard in the Court of Appeals 4 February 2004.

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

Jarvis John Edgerton, IV, for defendant-appellant.

LEVINSON, Judge.

Defendant (Ignacio Garcia Trejo) was indicted for trafficking in marijuana by possession and trafficking in marijuana by transportation in violation of N.C.G.S. § 90-95(h)(1)(a). Both indictments alleged that the amount of marijuana involved was "10 pounds or more but less than 50 pounds[.]" Defendant also was indicted for conspiracy to traffic in more than ten but less than fifty pounds of marijuana pursuant to N.C.G.S. § 90-95(i).

At trial, a detective with the Rowan County Sheriff's Department testified that he observed defendant and another individual arrive at a residence in a blue Geo Prism and carry a large cardboard box taken from the car into the residence. The detective testified that, shortly thereafter, the box was found by police in a spare room in the residence. An agent working in the laboratory of the State Bureau of Investigation testified that she had determined the contents of the box to be marijuana in an amount weighing eighteen pounds. Defendant testified that he did not know that the box contained marijuana, and he estimated that the box and its contents weighed "six or seven pounds" at the time he carried it.

The trial court instructed the jury that it should find defendant guilty of trafficking in marijuana by possession if it found that he possessed "ten pounds or more but less than fifty pounds" of marijuana, and that it should find defendant guilty of trafficking in marijuana by transportation if it found that he transported "ten pounds or more but less than fifty pounds" of marijuana. A jury convicted defendant of both trafficking offenses, as well as conspiracy to traffic in marijuana. The conspiracy conviction was obtained

pursuant to a proper indictment and proper jury instructions, and is not at issue in this appeal.

Defendant appeals by writ of *certiorari* allowed 6 March 2002 from his convictions for trafficking in marijuana by possession and trafficking in marijuana by transportation, contending that these convictions must be vacated because they (1) have been obtained pursuant to invalid indictments, and (2) are the products of ambiguous jury verdicts in violation of the North Carolina Constitution. We conclude the indictments are not invalid but that defendant's drug trafficking convictions must be reversed.

[1] In his first argument on appeal, defendant contends that the indictments charging him with trafficking in marijuana by possession and trafficking in marijuana by transportation are fatally defective because each indictment fails to correctly specify the quantity of marijuana necessary for conviction of each offense. We do not agree.

To be constitutionally valid, an indictment " 'must allege lucidly and accurately all the essential elements of the offense endeavored to be charged.' " *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) (quoting *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953)). To comport with our Criminal Procedure Act, an indictment must "assert[] facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C.G.S. § 15A-924(a)(5) (2003). An indictment meets minimum standards for validity if it:

> "(1) [provides] such certainty . . . as will identify the offense with which the accused is sought to be charged; (2) [protects] the accused from being twice put in jeopardy for the same offense; (3) [enables] the accused to prepare for trial, and (4) [enables] the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case."

State v. Sparrow, 276 N.C. 499, 510, 173 S.E.2d 897, 904 (1970) (quoting *Greer*, 238 N.C. at 327, 77 S.E.2d at 919); *see also Hunt*, 357 N.C. at 267, 582 S.E.2d at 600. An indictment

> is sufficient in form . . . if it express [sic] the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the

> bill . . . , sufficient matter appears to enable the court to proceed to judgment.

N.C.G.S. § 15-153 (2003). "[A]n indictment which avers facts which constitute every element of an offense does not have to be couched in the language of the statute [codifying the offense]." *State v. Hicks*, 86 N.C. App. 36, 40, 356 S.E.2d 595, 597 (1987).

The instant case involves separate indictments for trafficking in marijuana by possession and trafficking in marijuana by transportation pursuant to N.C.G.S. § 90-95(h)(1)(a) (2003), which provides:

> Any person who . . . transports, or possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved . . . [i]s **in excess of 10 pounds, but less than 50 pounds**, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 30 months in the State's prison and shall be fined not less than five thousand dollars ($ 5,000).

(emphasis added). "Weight of the marijuana is an essential element of trafficking in marijuana under G.S. 90-95(h)." *State v. Goforth*, 65 N.C. App. 302, 306, 309 S.E.2d 488, 492 (1983); *State v. Anderson*, 57 N.C. App. 602, 608, 292 S.E.2d 163, 167 (1982).

In the instant case, the indictment charging defendant with trafficking in marijuana by possession alleges that the defendant "possess[ed] 10 pounds or more but less than 50 pounds" of marijuana, and the indictment charging defendant with trafficking in marijuana by transportation alleges that defendant "transport[ed] 10 pounds or more but less than 50 pounds" of marijuana. Relying on *Goforth*, defendant contends that neither indictment alleges that the amount of marijuana possessed or transported by the defendant was "in excess of 10 pounds, but less than 50 pounds" as is required pursuant to G.S. § 90-95(h)(1)(a). We do not agree.

In *Goforth*, 65 N.C. App. at 306, 309 S.E.2d at 492, three defendants were indicted for conspiring to traffic "in **at least** 50 pounds of marijuana" where the conduct proscribed by law was conspiring to traffic "in **excess of** 50 pounds of marijuana" (emphasis added). This Court held that the indictments were invalid "because 'in at least 50 pounds' is not 'in excess of 50 pounds.' " *Id.* The conduct alleged in the *Goforth* indictments did not necessarily allege that defendants

had conspired to traffic marijuana in an amount that was more than fifty pounds, which was an essential element of the crime charged. Rather, the *Goforth* indictments alleged that defendants had conspired to traffic marijuana in an amount that was, at the very least, fifty pounds. Though the phrase "at least 50 pounds" implied that the *Goforth* defendants in fact conspired to traffic in more than fifty pounds of marijuana, this phrase, standing alone, did not explicitly set forth the essential weight element of the crime. Thus, the *Goforth* indictments were fatally flawed because they were not drafted in such a way as to affirmatively allege the requisite weight element of the charged offense.

Quite differently, the indictments in the instant case, though overbroad, do allege the required amount of marijuana. G.S. § 90-95(h)(1)(a) criminalizes trafficking marijuana in an amount "in excess of 10 pounds, but not more than 50 pounds." Defendant's trafficking indictments allege that he trafficked in marijuana by possessing and transporting "10 pounds or more, but less than 50 pounds." "[Ten] pounds or more" includes "more than ten pounds," which is the same as "in excess of 10 pounds." Therefore, the indictments charging defendant with trafficking marijuana by possession and trafficking marijuana by transportation do allege that the required amount of marijuana was involved in each offense.

The problem with the challenged indictments is that they are drafted in such a way as to include the possibility that defendant possessed and transported exactly ten pounds of marijuana, which does not constitute trafficking in marijuana. G.S. § 90-95(h). However, such over-inclusive drafting does not invalidate the indictments. Here, where the indictment lists the statute under which the defendant is charged and the indictment affirmatively alleges the elements of the such offense, the overbroad language of the indictment may be addressed through, *e.g.*, proper jury instructions that inform the jury of the conduct for which defendant may be convicted. This assignment of error is overruled.

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[2] Defendant's second contention on appeal is that his marijuana trafficking convictions must be reversed because they are the result of ambiguous jury verdicts in violation of the State Constitution. Defendant argues that the guilty verdicts are ambiguous because the jury was instructed that trafficking in marijuana pursuant to G.S. § 90-95(h)(1)(a) requires proof of "ten pounds or more but less than fifty pounds" of marijuana, when in fact, possession and/or trans-

portation of exactly ten pounds is not made criminal in this statute. The State concedes that the trial court's instructions were erroneous, but claims that the error is harmless.

Our State Constitution provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury[.]" N.C. Const. Art. I, § 24. "To convict a defendant, the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged." *State v. Jordan*, 305 N.C. 274, 279, 287 S.E.2d 827, 831 (1982).

Moreover, our appellate courts have addressed ambiguity in analogous circumstances. "If the trial court instructs a jury that it may find the defendant guilty of the crime charged on either of two alternative grounds, some jurors may find the defendant guilty of the crime charged on one ground, while other jurors may find the defendant guilty on another ground." *State v. Petty*, 132 N.C. App. 453, 460, 512 S.E.2d 428, 433 (1999). "Submission of an issue to the jury in the disjunctive is reversible error if it renders the issue ambiguous and thereby prevents the jury from reaching a unanimous verdict." *State v. Diaz*, 317 N.C. 545, 553-54, 346 S.E.2d 488, 494 (1986) (jury instructions that the defendant could be found guilty of trafficking if he either possessed or transported marijuana resulted in a verdict which risked lack of unanimity because "transportation . . . and possession of . . . marijuana are separate trafficking offenses for which a defendant may be separately convicted and punished"); *State v. McLamb*, 313 N.C. 572, 577, 330 S.E.2d 476, 480 (1985) (verdict finding that defendant "feloniously did sell or deliver" cocaine held "fatally defective and ambiguous" as sale and delivery are separate offenses).

G.S. § 90-95(h)(1)(a) criminalizes trafficking in an amount of marijuana "in excess of 10 pounds, but less than 50 pounds." "Weight of the marijuana is an essential element of trafficking in marijuana under G.S. [§] 90-95(h)." *Goforth*, 65 N.C. App. at 306, 309 S.E.2d at 492. "The weight element upon a charge of trafficking in marijuana becomes more critical if the . . . evidence . . . approaches the minimum weight charged." *Anderson*, 57 N.C. App. at 608, 292 S.E.2d at 167.

In the present case, the trial court deviated from the language used in G.S. § 90-95(h)(1)(a) to describe the weight element of marijuana trafficking. Specifically, the trial court instructed the jury that it should convict defendant of trafficking in marijuana by possession under G.S. § 90-95(h)(1)(a) if it found that defendant possessed "ten

pounds or more but less than fifty pounds" of marijuana and that it should convict defendant of trafficking in marijuana by transportation under G.S. § 90-95(h)(1)(a) if it found that defendant transported "ten pounds or more but less than fifty pounds" of marijuana. At trial, evidence presented by the State tended to show that the marijuana possessed and transported by defendant weighed eighteen pounds; however, defendant testified that the weight of the box containing the marijuana was "about six or seven pounds[.]" Thus, the evidence could support an inference that defendant possessed and/or transported ten pounds of marijuana, which does not qualify as trafficking in marijuana under G.S. § 90-95(h)(1)(a). Considering the evidence and erroneous jury instructions, we cannot conclude the jury unanimously convicted defendant of the conduct proscribed by G.S. § 90-95(h)(1)(a). Therefore, defendant's convictions for trafficking in marijuana by possession and trafficking in marijuana by transportation must be reversed.

Furthermore, because the convictions for conspiracy to traffic in marijuana and trafficking in marijuana by transportation were consolidated in one of the judgments imposing sentence, defendant must be resentenced for his conviction for conspiracy to traffic in marijuana.

The convictions for trafficking in marijuana by possession and transportation are reversed; the State is not precluded from retrying defendant on these charges. The conviction for conspiracy to traffic in marijuana is remanded for resentencing.

Reversed; remanded for resentencing.

Judge HUNTER concurs in part and dissents in part.

Judge McCULLOUGH concurs.

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

I respectfully dissent from the majority's conclusion that the indictments charging defendant with trafficking in marijuana by possession and trafficking in marijuana by transportation were not facially defective because each failed to correctly specify the quantity of marijuana necessary for conviction of each offense.

As recognized by the majority, one of the minimum standards for an indictment to be valid is that it provides "such *certainty* in the

statement of accusation as will . . . identify the offense with which the accused is sought to be charged[.]" *State v. Goforth*, 65 N.C. App. 302, 305, 309 S.E.2d 488, 491 (1983) (emphasis added). In *Goforth*, this Court concluded that such certainty was not present to render the indictments against those defendants valid. Specifically, the indictments in *Goforth* charging the defendants with conspiring to traffic " 'in at least 50 pounds of marijuana[]' " allowed for two interpretations—that the defendants either conspired to traffic *in exactly* 50 pounds of marijuana or *in excess of* 50 pounds of marijuana. *Id.* at 306, 309 S.E.2d at 491-92. However, the relevant statute clearly provided for only one interpretation—trafficking " '*in excess of* 50 pounds (avoirdupois) of marijuana.' " *Id.* at 305, 309 S.E.2d at 491 (emphasis added) (citation omitted). The *Goforth* Court concluded that the uncertainty as to the offense charged constituted a fatal error in the indictments since the weight of the marijuana was an essential element of that offense. *Id.* at 306, 309 S.E.2d at 492.

The majority attempts to distinguish *Goforth* by concluding that "the indictments in the instant case, though overbroad, do allege the required amount of marijuana[]" and thus, "such over-inclusive drafting does not invalidate the indictments." I do not agree with this distinction, believing instead that *Goforth* is analogous to the case *sub judice*. Here, as in *Goforth*, the indictments alleging that the amount of marijuana be either "10 pounds or more" were subject to two different interpretations despite N.C. Gen. Stat. § 90-95(h)(1)(a) (2003) requiring that the amount of marijuana defendant possessed and transported be "in excess of 10 pounds[.]" The State's overboard misstatement of the statute in the indictments provides the same level of uncertainty as to the offense for which defendant was charged that the *Goforth* Court sought to prevent, precedent by which I feel this Court is bound. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Accordingly, the judgments based on these indictments should be arrested and the verdicts and sentences vacated. This finding would not prevent the State from proceeding against defendant upon new and sufficient bills of indictment if it so desires. *See Goforth*, 65 N.C. App. at 306, 309 S.E.2d at 492. Finally, while I agree with the majority's conclusion regarding defendant's second contention, there would have been no need to reach that contention had the majority found that the indictments were facially defective.

BRENDA HOUSE, PLAINTIFF v. LEVI STONE, DEFENDANT

No. COA03-671

(Filed 6 April 2004)

1. Costs— attorney fees—amount of offer and judgment

Findings regarding the denial of attorney fees in a personal injury case were sufficient where they reflected the court's weighing of the offer of judgment and the judgment finally obtained when it decided not to award attorney fees.

2. Costs— attorney fees—findings

The findings on a denial of attorney fees were supported by the entire record.

3. Costs— attorney fees—amount of judgment

There was no error in the trial court's findings on the amount of the judgment finally obtained where defendant contended that the court did not take into account the interest added to the judgment.

4. Costs— attorney fees—consideration of record—*Washington* factors—no abuse of discretion

There was no abuse of discretion in the denial of a motion for attorney fees where the court properly considered the entire record and made findings on the *Washington* factors.

Appeal by plaintiff from order entered 5 March 2003 by Judge Jack A. Thompson in Johnston County Superior Court. Heard in the Court of Appeals 1 March 2004.

Armstong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for plaintiff-appellant.

Robert E. Ruegger for defendant-appellee.

TIMMONS-GOODSON, Judge.

Brenda House ("plaintiff") appeals the trial court's order denying attorney's fees. For the reasons stated herein, we affirm the trial court's order.

The facts tend to show the following: On 15 July 1996, plaintiff was involved in an automobile accident. Plaintiff's minor daughter,

LaShay House ("House"), suffered personal injuries as a result of the accident. On 9 July 1999, plaintiff filed a complaint against the driver of the other vehicle involved in the accident, Levi Stone ("defendant"), as well as the owner of the vehicle, Maggie Miller Corprew ("Corprew"), seeking recovery for her payment of House's medical bills. Luther D. Starling ("Starling"), guardian *ad litem* for House, also filed a claim. Starling's claim was later voluntarily dismissed without prejudice. Defendant and Corprew filed an answer denying liability. Plaintiff later dismissed her claim against Corprew.

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 68, defendant filed an Offer of Judgment on 25 July 2000 in the amount of $1,264, which was "inclusive of all damages [and] attorney's fees taxable as costs[.]" Following a jury trial on 13 November 2000, defendant was found negligent and plaintiff was awarded $2,348 in damages.

Pursuant to N.C. Gen. Stat. § 6-20 and § 6-21.1, plaintiff filed a motion on 21 November 2000 for costs and reasonable attorney's fees. Plaintiff's counsel, L. Lamar Armstrong, Jr. ("Armstrong"), filed an affidavit in support of the motion. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 52, on 4 January 2001, plaintiff filed a motion requesting the trial court make "specific findings of fact and conclusions of law with respect to [its] ruling on plaintiff's motion to tax reasonable attorney's fees."

In an order filed 8 January 2001, the trial court denied plaintiff's motion for attorney's fees but granted plaintiff's request for costs in the amount of $1,692. In *House v. Stone*, 150 N.C. App. 713, 564 S.E.2d 319 (2002) (unpublished) ("*House I*"), plaintiff appealed the order, arguing that (I) the trial court failed to make sufficient findings of fact and conclusions of law as required by our Court in *Washington v. Horton*, 132 N.C. App. 347, 513 S.E.2d 331 (1999) and by N.C. Gen. Stat. § 1A-1, Rule 52(a)(2); (II) the trial court's findings of fact were not supported by competent evidence; and (III) the trial court abused its discretion in failing to award attorney's fees. This Court overruled plaintiff's contention that the trial court's findings of fact were not supported by competent evidence, but we reversed and remanded after we determined the trial court failed to make sufficient findings for appellate review, specifically whether the "judgment finally obtained" was more favorable than offers of judgment made pursuant to Rule 68. The Court did not address plaintiff's third assignment of error.

On remand, plaintiff again requested the trial court make specific findings of fact and conclusions of law with respect to its ruling. On 5 March 2003, the trial court again denied plaintiff's motion for attorney's fees. It is from this order that plaintiff appeals.

The issues presented on appeal are whether (I) the trial court violated Rule 52(a)(2) by failing to make appropriate findings requested by plaintiff; (II) the trial court's findings were erroneous and unsupported by the record; (III) the trial court made sufficient findings as required by *Washington*; and (IV) the trial court abused its discretion in denying plaintiff's motion for attorney's fees.

[1] Plaintiff first argues that the trial court violated Rule 52(a)(2) by failing to make the appropriate findings of fact as plaintiff requested. Plaintiff also argues that the trial court failed to make sufficient findings as required by *Washington*. Because of the inherent similarities in the two arguments, we will consider them jointly.

As a general rule, attorney's fees are not recoverable as a part of court costs by the successful party at trial. *Washington*, 132 N.C. App. at 349, 513 S.E.2d at 333. However, attorney's fees are recoverable under N.C. Gen. Stat. § 6-21.1 (2003), which provides:

> In any personal injury or property damage suit, . . . instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as part of the court costs.

In *Washington*, we listed several factors the trial court must examine when determining whether to award attorney's fees. We required that the trial court:

> 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 set-

> tlement offers . . . (6) the amounts of the settlement offers as compared to the jury verdict; and the whole record[.]

Washington, 132 N.C. App. at 351, 513 S.E.2d at 334-35 (citations omitted).

Findings of fact made pursuant to a Rule 52(a)(2) motion need only be sufficiently detailed to allow for meaningful appellate review. *Andrews v. Peters*, 75 N.C. App. 252, 258, 330 S.E.2d 638, 642 (1985), *aff'd*, 318 N.C. 133, 347 S.E.2d 409 (1986). Thus, when we examine a trial court's decision concerning whether to award attorney's fees, we require more than "[m]ere recitation by the trial court that it has considered all *Washington* factors." *Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 572, 551 S.E.2d 852, 857 (2001). However, the trial court is not required to make detailed findings of fact as to each factor. *Tew v. West*, 143 N.C. App. 534, 537, 546 S.E.2d 183, 185 (2001). Instead, the trial court is required only to make the additional findings necessary to preserve its ruling on appeal. *Thorpe*, 144 N.C. App. at 573, 551 S.E.2d at 857.

In *House I*, we held that the trial court made sufficient findings for all but the second of the six factors enumerated in *Washington*. We determined that because the trial court failed to properly assess the second *Washington* factor, the trial court also failed to make sufficient findings pursuant to Rule 52. Therefore, on remand we mandated that the trial court make "additional findings showing that [it] properly utilized the 'judgment finally obtained' in consideration of the second *Washington* factor and in its determination as to whether to award attorney's fees." Thus, if the trial court utilized the "judgment finally obtained" in its consideration of the second *Washington* factor on remand, then not only will the trial court have made sufficient findings as required by *Washington*, it will also have made sufficient findings pursuant to Rule 52.

On remand, the trial court made the following findings with respect to the second *Washington* factor:

> 5. In response to plaintiffs' demands, the defendant served a lump sum offer of judgment to Brenda House in the amount of $1,264.00 on July 24, 2000.
>
> . . . .
>
> 10. This Court determined that the plaintiff was entitled to recover costs from the defendant of $1,692.00, which resulted in plaintiff's final judgment against defendant being $4,040.00. The

"judgment finally obtained" was therefore greater than the Offer of Judgment.

11. The final judgment for the plaintiff was $2,500 less than the plaintiff had originally asked for in medical damages and $2,300 more than defendant's last offer.

It is clear from these findings that the trial court did not merely recite that it had considered the second *Washington* factor in making its decision. Instead, the trial court made additional findings of fact that reflect that the trial court weighed the "judgment finally obtained" and the Offer of Judgment when it made its decision not to award attorney's fees. These findings allow meaningful appellate review of the decision. Therefore, we hold that the trial court considered the second *Washington* factor in its decision not to award attorney's fees, and that its findings are sufficient under the requirements of both *Washington* and Rule 52.

[2] Plaintiff next argues that the trial court's findings of fact were unsupported by the record. We disagree.

As discussed above, in *House I* we held that the trial court made sufficient findings for all but the second of the six factors enumerated in *Washington*. We therefore remanded the case and instructed the trial court to assess the second *Washington* factor properly by examining whether the "judgment finally obtained" was larger than the Offer of Judgment filed pursuant to Rule 68. However, before remanding the case, we concluded that "the trial court [had] properly considered the entire record in determining whether to award an attorney fee." In support of this conclusion, we cited to the trial court's 2 January 2001 order, which stated that prior to making its decision, the trial court had "reviewed the court file, heard arguments from counsel, [reviewed] the Affidavit of L. Lamar Armstrong, Jr., and . . . received, reviewed, and considered relevant case law, including [*Washington*]." Thus, because we determined *supra* that the trial court assessed the second *Washington* factor properly on remand, we necessarily now hold that its findings are supported by the entire record.

[3] Plaintiff further asserts that the trial court made erroneous findings in its review. We disagree.

Despite our instructions to focus its review solely on the second *Washington* factor, the trial court made numerous other findings of

fact. Only numbers 5, 10, and 11 concern either the "judgment finally obtained" or the Offer of Judgment. Plaintiff submits that finding of fact number 10 is erroneous because the trial court incorrectly found that the "judgment finally obtained" was $4,040 rather than $4,340. According to plaintiff, the trial court failed to take into account the eight-percent interest added to the jury verdict pursuant to N.C. Gen. Stat. § 24-1. However, we are not convinced that the trial court found that $4,040 was the "judgment finally obtained" by plaintiff. As detailed above, in the second sentence of finding of fact number 10, the trial court put the term "judgment finally obtained" in quotation marks. This was presumably done to distinguish the term "judgment finally obtained" from the "final judgment against defendant" that the trial court referenced without quotation marks in its previous sentence. Furthermore, we fail to see how a $300 increase in the "judgment finally obtained" would have influenced the trial court's ultimate finding that the "judgment finally obtained" was greater than the Offer of Judgment. Therefore, we hold that the trial court did not err in making its findings on remand.

[4] Plaintiff next argues that the trial court abused its discretion in denying plaintiff's motion for attorney's fees. We disagree.

The decision to award attorney's fees pursuant to N.C. Gen. Stat § 6-21.1 is discretionary. *Washington*, 132 N.C. App. at 351, 513 S.E.2d at 334. However, the trial court's discretion is not "unbridled." *Id.* If the trial court is shown to have abused its discretion, its decision will be overturned. *Whitfield v. Nationwide Mutual Ins. Co.*, 86 N.C. App. 466, 469, 358 S.E.2d 92, 94 (1987); *Hillman v. United States Liability Ins. Co.*, 59 N.C. App. 145, 156, 296 S.E.2d 302, 309 (1982), *disc. review denied*, 307 N.C. 468, 299 S.E.2d 221 (1983). "An abuse of discretion occurs when the trial court's ruling 'is so arbitrary that it could not have been the result of a reasoned decision.' " *Sowell v. Clark*, 151 N.C. App. 723, 727, 567 S.E.2d 200, 202 (2002) (quoting *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997)). However, when reviewing a decision concerning attorney's fees, we must "also [be] mindful that '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.' " *Robinson v. Shue*, 145 N.C. App. 60, 65, 550 S.E.2d 830, 833 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). Therefore, a trial court has properly exer-

cised its discretion unless it either fails to consider both the entire record and all the factors enumerated in *Washington* or its decision is unsupported by the record before it. *Messina v. Bell*, 158 N.C. App. 111, 115, 581 S.E.2d 80, 84 (2003).

With respect to the first *Washington* factor, the trial court found that plaintiff made no attempt prior to the institution of litigation to negotiate a settlement with defendant or his insurance carrier. With respect to the second *Washington* factor, the trial court found that the Offer of Judgment made by defendant was much less than the "judgment finally obtained" by plaintiff. With respect to the third *Washington* factor, the trial court found that defendant did not unjustly exercise "superior bargaining power." The trial court did not need to make a finding with respect to the fourth *Washington* factor because this action was not instituted by an insured or a beneficiary against an insurance company defendant. With respect to *Washington's* fifth and sixth factors, the trial court found that (a) plaintiff notified defendant on 17 July 2000 that the value of plaintiff and House's claim exceeded $75,000 and that plaintiff would try her claim for $6,500 in medical bills; (b) defendant responded with an Offer of Judgment of $1,264 on 24 July 2000, which included attorney's fees; (c) mediation was conducted and ended in an impasse on 20 October 2000, plaintiff's last offer being $4,741 and defendant's last offer being $1,788; and (d) the jury returned a verdict in plaintiff's favor, awarding $2,348 in damages.

Case law suggests that where the trial court makes findings on the entire record, we should defer to the trial court's discretion in determining how much weight to give its findings. *See Olson v. McMillian*, 144 N.C. App. 615, 618-19, 548 S.E.2d 571, 573-74 (2001) (holding that the absence of a finding concerning "superior bargaining power" does not require reversal where the trial court makes adequate findings on the whole record to support its award of attorney's fees); *see also Culler v. Hardy*, 137 N.C. App. 155, 159, 526 S.E.2d 698, 702 (2000) ("timing and amount of settlement offers and the amount of the jury verdict are significant factors for the trial court to consider in determining whether to award attorney's fees.") In the case *sub judice*, we concluded *supra* that the trial court properly considered *Washington's* six enumerated factors in making its decision to deny attorney's fees. Furthermore, based on the law of the case established in *House I*, we also concluded that the trial court properly considered the entire record in making its decision, and that the trial court did not err in making its findings of fact. Accordingly,

we hold that the trial court did not abuse its discretion in denying plaintiff's motion for attorney's fees.

Affirmed.

Judges WYNN and LEVINSON concur.

SARA KATHERINE PAINTER-JAMIESON, PERSONAL REPRESENTATIVE OF ESTATE OF CARROLL JOHN PAINTER, PLAINTIFF v. DEBORAH WOODWARD PAINTER, DEFENDANT

No. COA02-1752

(Filed 6 April 2004)

Divorce— equitable distribution—distributive award—death of spouse—not claim against estate

The trial court did not err by requiring prompt payment of a $167,413.48 distributive award to defendant based on the conclusion that it resulted from the equitable distribution of the marital estate rather than a claim against decedent husband's estate subject to N.C.G.S. § 28A-19-6, because: (1) although decedent's assets include those he acquired from the equitable distribution order, his assets do not include those marital assets awarded to his former spouse since a party's right to an equitable distribution of property from a marital estate vests at the time of the parties' separation; (2) decedent's possession of the distributive award at the time of his death does not grant him the authority to consider the award as a portion of his estate; (3) if the Court of Appeals were to consider the distributive award a claim against decedent's estate under Chapter 28A, it would permit a decent who dies with possession of his former spouse's portion of the marital estate to usurp equitable distribution and consider the property his, and in exchange, the former spouse would retain a mere claim against the possessor's estate; (4) where payment is due from a decedent to a former spouse to account for the former spouse's portion of the marital estate, that payment must be made first and only after the marital estate is separate from decedent's estate can the administrator determine decedent's assets and proceed to pay the creditors and distribute the assets of the estate pursuant to Chapter 28A; and (5) the 2003 amendments to

Chapters 28A and 50 are not applicable to the case at bar when it was a pending action and no statute can be retroactively applied to impinge vested rights.

Appeal by plaintiff from order entered 9 December 2002, *nunc pro tunc*, 24 October 2002, by Judge Charlie Brown in Rowan County District Court. Heard in the Court of Appeals 16 October 2003.

Doran, Shelby, Pethel & Hudson, by John T. Hudson, for plaintiff-appellant.

Robert L. Inge, for defendant-appellee.

CALABRIA, Judge.

Sara Katherine Painter-Jamieson ("plaintiff"), serving as personal representative of the estate of Carroll John Painter ("Dr. Painter"), her deceased father, appeals the order of the trial court requiring prompt payment of a $167,413.48 distributive award to Deborah Woodward Painter ("defendant"). The court found that because the distributive award resulted from the equitable distribution of the marital estate, the award belongs to defendant and is not a claim against decedent's estate subject to N.C. Gen. Stat. § 28A-19-6. We affirm.

Dr. Painter and defendant were married in 1979 and divorced in 1995. On 31 May 2000, during the pendency of the equitable distribution action, Dr. Painter died. Dr. Painter's daughter, as personal representative of his estate, was substituted as plaintiff. The parties agreed upon a distribution of the marital assets: plaintiff was awarded property valued at $534,067.71; defendant was awarded property valued at $199,240.75. Thereafter, the parties sought the court's determination of two remaining issues: (1) whether an equal distribution was equitable and (2) the amount, if any, of a distributive award. On 21 September 2000, the court announced its Equitable Distribution Order awarding the property as stipulated by the parties, determining an equal distribution was equitable, and ordering plaintiff to pay defendant $167,413.48 as a distributive award. No appeal was taken from this order.

In May 2002, after waiting twenty months for plaintiff to pay the $167,413.48 award, defendant filed a motion for contempt and immediate payment of the distributive award. At a hearing on 24 October 2002, plaintiff asserted the distributive award is like any other claim

against the estate and must be paid in accordance with the priority system for claims against the estate as set forth in N.C. Gen. Stat. § 28A-19-6. Defendant asserted the distributive award represents her portion of the marital property, does not constitute a claim against the estate, and is not governed by North Carolina estate law. The court found "the distributive award owed to the Defendant is her own money [from the marital estate], and does not [] belong to the estate" and ordered plaintiff to pay the award within thirty days. Plaintiff appeals.

This appeal presents two issues: (I) how to reconcile certain provisions of Chapters 28A and 50 of the North Carolina General Statutes; and (II) the effect, if any, of the 2003 amendments to Chapters 28A and 50 to the case at bar.

I. Construction of Chapters 28A and 50

The essential question presented by this case is how the law treats an equitable distribution award in relation to a decedent's estate. Plaintiff argues defendant's right to the distributive award constitutes a claim against decedent's estate governed by N.C. Gen. Stat. § 28A-19. Defendant argues the distributive award represents her portion of the marital property, not part of decedent's assets.

Equitable distribution represents the cessation of common ownership and the division of property belonging to the marriage between the parties of the marriage. N.C. Gen. Stat. § 50-20 (2003). Although in-kind distribution of the property is preferred, a court may provide for a distributive award "to facilitate, effectuate or supplement a distribution of" the property. N.C. Gen. Stat. § 50-20(e). The distributive award may be "payable either in a lump sum or over a period of time in fixed amounts." N.C. Gen. Stat. § 50-20(b)(3). If the award is payable over a period of time in fixed amounts, it may be secured by a lien on specific property. N.C. Gen. Stat. § 50-20(e).

In the case at bar, the parties agreed that Dr. Painter would retain, *inter alia*, his IRA, valued at $289,376.00, and his medical practice, valued at $172,000.00. In total, the settlement provided Dr. Painter would receive property valued at $534,067.71 and defendant would receive property valued at $199,240.75. The trial court determined an equal distribution of the property was equitable, and further ordered payment of a $167,413.48 distributive award to defendant "to equalize the marital distribution." The payment was a lump sum payment and was not secured by a specific lien.

Chapter 28A of the North Carolina General Statutes provides the structure for the administration of decedents' estates. After appointment of a personal representative, the representative must follow the requirements of Chapter 28A, which include: giving notice to creditors; discovering the assets of the estate; paying claims against the estate; completing an inventory; filing accountings; and distributing and settling the estate. N.C. Gen. Stat. § 28A-6 to -23 (2003). Since the issue presented is whether the distributive award is a claim against decedent's estate, we set forth the priority scheme for paying claims:

> After payment of costs and expenses of administration, the claims against the estate of a decedent must be paid in the following order:
>
> First class. Claims which by law have a specific lien on property to an amount not exceeding the value of such property.
>
> Second class. Funeral expenses to the extent of two thousand five hundred dollars ($2,500). This limitation shall not include cemetery lot or gravestone. The preferential limitation herein granted shall be construed to be only a limit with respect to preference of payment and shall not be construed to be a limitation on reasonable funeral expenses which may be incurred; nor shall the preferential limitation of payment in the amount of two thousand five hundred dollars ($2,500) be diminished by any Veterans Administration, social security or other federal governmental benefits awarded to the estate of the decedent or to his or her beneficiaries.
>
> Third class. All dues, taxes, and other claims with preference under the laws of the United States.
>
> Fourth class. All dues, taxes, and other claims with preference under the laws of the State of North Carolina and its subdivisions.
>
> Fifth class. Judgments of any court of competent jurisdiction within the State, docketed and in force, to the extent to which they are a lien on the property of the decedent at his death.
>
> Sixth class. Wages due to any employee employed by the decedent, which claim for wages shall not extend to a period of more than 12 months next preceding the death; or if such employee was employed for the year current at the decease, then from the time of such employment; for medical services within the 12 months preceding the decease; for drugs and all other medical

supplies necessary for the treatment of such decedent during the last illness of such decedent, said period of last illness not to exceed 12 months.

Seventh class. All other claims.

N.C. Gen. Stat. § 28A-19-6.

Under the statute, all creditors are subordinate to the costs and administration of the estate. *Id.* In the case at bar, because the distributive award was not secured by a specific lien it would not be paid as a first class claim. *Id.* Although the parties disagreed as to whether defendant would be a fourth or seventh class claimant, applying Chapter 28A would, at a minimum, require defendant's share of the marital property to be utilized to pay for the administration of the estate, funeral expenses and taxes. Moreover, the impact of this priority system is most extreme where, as here, the estate does not contain sufficient assets to pay all the claims and decedent's estate is extinguished after satisfying the third class claimants.[1]

A thorough review of the applicable statutes and conflicting policy issues requires that the distributive award should not be treated as a claim under Chapter 28A. Plaintiff correctly asserts that Chapter 28A is the sole authority on administering a decedent's estate. However, the statute provides that decedent's estate is comprised of *decedent's* assets, including all *decedent's* real and personal property. N.C. Gen. Stat. § 28A-15-1(a). Although decedent's assets include those he acquired from the equitable distribution order, his assets do not include those marital assets awarded to his former spouse. Here, the value of the distributive award belongs solely to the former spouse. A party's right to an equitable distribution of property from a marital estate "vest[s] at the time of the parties' separation." N.C. Gen. Stat. § 50-20(k). Decedent's possession of the distributive award at the time of his death does not grant him the authority to consider the award as a portion of his estate.

We also recognize the obvious conflict between the policy of equitable distribution and the application of Chapter 28A to unpaid distributive awards ordered pursuant to an Equitable Distribution Order.

1. Plaintiff explained that unexpected taxes burdened the estate. Since Dr. Painter had not changed the beneficiary on a $500,000.00 life insurance policy after his divorce, upon his death defendant received the proceeds from the policy and the associated taxes were levied against the estate. We note the trial court considered these issues in determining equitable distribution and nevertheless found an equal distribution was equitable. Plaintiff chose not to appeal this decision.

The crux of equitable distribution is "the idea of marriage as a partnership in which both spouses contribute to the marital economy." *McLean v. McLean*, 323 N.C. 543, 549, 374 S.E.2d 376, 380 (1988); *See also* Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C.L. Rev. 195, 198-99 (1987). Accordingly, at the end of a marriage, rather than property passing according to the common law title system, property acquired during the marriage is equitably divided between the parties, in recognition that "marital property and divisible property are species of common ownership." N.C. Gen. Stat. § 50-20 (k). Plaintiff asserts that where one party dies before he pays the distributive award Chapter 28A must be utilized to administer the estate and the distributive award becomes a claim against decedent's estate. However, Chapter 28A does not recognize the former spouse's claim in accordance with the partnership theory; rather by applying Chapter 28A to equitable distribution awards we revert back not to a title system, but to a system of simple possession. If this Court were to consider the distributive award a claim against decedent's estate under Chapter 28A, we would permit a decedent who dies with possession of his former spouse's portion of the marital estate to usurp equitable distribution and consider the property his. In exchange, the former spouse would retain a mere claim against the possessor's estate. Such an analysis conflicts with the essence of equitable distribution which provides for division of the marital estate between the parties, and generally does not concern itself with title or possession. Moreover, application of Chapter 28A would require the former spouse not only to pay for the administration of decedent's estate, but also to pay his funeral expenses and taxes. While defendant may choose to bury her former husband or pay his taxes, his estate cannot usurp this choice and treat her portion of the marital estate as though it were his. Finally, in the case at bar, since the higher-priority claims would extinguish decedent's estate, defendant would never receive, as ordered by the court, an equitable distribution of the marital estate.

Accordingly, defendant seeks merely to excise from decedent's assets property rightfully belonging to her, and we concur with the trial court that defendant's award is not a claim against decedent's estate. Therefore, under Chapters 28A and 50, the administrator of a decedent's estate must guard against commingling the assets of decedent's estate with the former spouse's portion of the marital property. Where payment is due from a decedent to a former spouse to account for the former spouse's portion of the marital estate,

that payment must be made first. Only after the marital estate is separated from decedent's estate can the administrator determine decedent's assets and proceed to pay the creditors and distribute the assets of the estate pursuant to Chapter 28A. The order of the trial court is affirmed.

II. Effect of the 2003 Statutory Amendments

We note that Chapters 28A and 50 were recently amended to provide, *inter alia*, "[t]he provisions of Article 19 of Chapter 28A of the General Statutes shall be applicable to a claim for equitable distribution against the estate of the deceased spouse." N.C. Gen. Stat. § 50-20(l)(2) (2003). However, the new law does not state it is applicable to pending actions and it is therefore not applicable to the case at bar.[2] Moreover, no statute can be retroactively applied to impinge vested rights and defendant's right to the distributive award was "immune from further legal metamorphosis." *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980). Therefore, the 2003 amendments to Chapters 28A and 50, as referenced herein, are not applicable to the case at bar.

In conclusion, the trial court properly ordered plaintiff to pay defendant the distributive award, thereby finally severing the parties' property. The amount remaining after the distributive award is paid constitutes decedent's estate. Claims against decedent's estate may be properly paid in accordance with the priority scheme set forth in N.C. Gen. Stat. § 28A-19-6.

Affirmed.

Judges McGEE and HUDSON concur.

2. Although early editions of the bill provided for the act to apply "to actions pending or filed on or after [its effective date]," the enacted bill omitted this language. *See* S.B. 394, 2003 N.C. Gen. Assembly (draft 2, dated 14 April 2003, and draft 3, dated 13 May 2003); Act of June 12, 2003, ch. 168, sec. 4, 2003 N.C. Sess. Laws 150, 151.

LORYN HERRING, A MINOR BY RAYMOND M. MARSHALL, HER GUARDIAN AD LITEM, AND BESSIE HERRING, PLAINTIFFS v. RONALD LINER, DEFENDANT

No. COA03-552

(Filed 6 April 2004)

Immunity— sovereign—insurance—assistant principal—exception to vehicle usage exclusion

The trial court did not err in a negligence, negligent supervision, and constructive fraud based on breach of fiduciary duty case by granting defendant assistant principal's motion for summary judgment in a case where a student was hit by a car while crossing the street to get to her new bus stop even though plaintiffs contend defendant waived the defense of sovereign immunity based on an exception to the vehicle usage exclusion in the pertinent insurance policy regarding an insured who is supervising students entering or exiting a school bus, because: (1) defendant had to be actively directing or inspecting students as they were actually entering or exiting school buses in order to waive his sovereign immunity, and general oversight over school buses was not sufficient to waive sovereign immunity; and (2) regardless of whether defendant actually changed the student's bus stop, this conduct did not meet the conduct necessary under the policy's exception to waive sovereign immunity when neither defendant nor a school bus were present at the time the student was crossing the street on the way to her bus stop, defendant did not direct the student to cross the street at the time she was struck, nor did he watch over her while she was crossing the street, and defendant had no immediate or active control over the student as she crossed the street and was struck by the vehicle.

Appeal by plaintiffs from order entered 12 December 2002 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 24 February 2004.

Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiffs-appellants.

Pinto Coates Kyre & Brown, PLLC, by Richard L. Pinto and Martha P. Brown, for defendant-appellee.

TYSON, Judge.

Loryn Herring ("Loryn"), through her guardian ad litem, and her mother, Bessie Herring ("Herring") (collectively, "plaintiffs"), appeal from an order granting Ronald Liner's ("Liner") motion for summary judgment. We affirm.

I. Background

On 3 June 1998, plaintiffs sued the Winston-Salem/Forsyth County Board of Education and Liner (collectively, "defendants") for negligence, negligent supervision, and constructive fraud based on breach of fiduciary duty. This Court heard the appeal 30 March 2000 and held that sovereign immunity barred plaintiffs' claims. *Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 529 S.E.2d 458, *disc. rev. denied*, 352 N.C. 673, 545 S.E.2d 423 (2000). We incorporate the facts from that opinion here and include additional facts necessary for this appeal. *Id.*

On 4 December 2001, plaintiffs moved to set aside the order granting summary judgment in favor of Liner only, based on the discovery of a separate and additional insurance policy that was not before the superior court or this Court when the initial summary judgment motion or appeal was heard. Employers Reinsurance Corporation had issued an insurance policy ("the policy") to the North Carolina Association of Educators under which Liner was an insured at the time of the accident. Plaintiffs' motion to set aside the judgment regarding Liner only was granted on 31 January 2002. Liner filed a new motion for summary judgment on 7 November 2002, which was granted on 9 December 2002. Plaintiffs appeal.

In January 1995, Loryn was eight years old and attended Lewisville Elementary School in the Winston-Salem/Forsyth County School System. Loryn was violently attacked and beaten by three male students who were also riding on the school bus with her. The following morning, Herring went to Loryn's school and complained. She initially spoke with the principal, who directed her to speak with Liner, the assistant principal. Liner refused to expel or suspend the boys suspected in the attack on Loryn. In an affidavit, Herring claimed that Liner wrote and signed a note in her presence that changed Loryn's bus stop. Herring claims that she never requested a change in Loryn's bus stop. Liner claimed, in his affidavit, that Loryn's stop was changed due to Herring's specific request.

To reach the new bus stop, Loryn was required to cross a heavily traveled street. On the morning of 6 June 1995, Loryn was hit by an automobile as she crossed the street on the way to her bus stop. Loryn suffered serious injuries, including permanent brain damage. At the time of Loryn's injury, no school bus was approaching, present, or waiting at the bus stop. Liner was not present at the bus stop.

II. Issues

The issues are whether the trial court erred in: (1) construing the policy to deny coverage when an exception to the exclusion existed and (2) granting summary judgment when genuine issues of material fact existed.

III. Standard of Review for Summary Judgment

Our standard of review from the grant of a motion for summary judgment is whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 707-08, 582 S.E.2d 343, 345 (2003), (citing *Willis v. Town of Beaufort*, 143 N.C. App. 106, 108, 544 S.E.2d 600, 603, *disc. rev. denied*, 354 N.C. 371, 555 S.E.2d 280 (2001)), *aff'd*, 358 N.C. 137, 591 S.E.2d 520 (2004); *see* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003).

> A defendant may show entitlement to summary judgment by '(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense.'

Draughon, 158 N.C. App. at 708, 582 S.E.2d at 345 (quoting *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. rev. denied*, 340 N.C. 359, 458 S.E.2d 187 (1995)).

" 'Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.' " *Draughon*, 158 N.C. App. at 708, 582 S.E.2d at 345 (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000)).

IV. Insurance Policy Coverage

A. Sovereign Immunity

Plaintiffs argue that Liner's sovereign immunity is waived by an exception to the exclusion of coverage existing in the policy. We disagree.

Sovereign immunity protects the State and its agents from suit. *Ripellino v. N.C. School Bds. Ass'n*, 158 N.C. App. 423, 427, 581 S.E.2d 88, 91-92 (2003), *cert. denied*, 358 N.C. 156, 592 S.E.2d 694 (2004). A county or city board of education is a governmental agency and its employees are not ordinarily liable in a tort action unless the board has waived its sovereign immunity. *Id.* N.C. Gen. Stat. § 115C-42 (2003) provides the only means by which a board of education may waive its sovereign immunity. *Lucas v. Swain Cty. Bd. of Educ.*, 154 N.C. App. 357, 361, 573 S.E.2d 538, 541 (2002). This statute states,

> [a]ny local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.

N.C. Gen. Stat. § 115C-42. The mere purchase of a liability insurance policy by a board of education is insufficient to waive sovereign immunity. *Id.* Immunity is only waived to the extent that the liability insurance policy actually indemnifies the board of education or its employees. *Id.*

Here, under the "vehicle usage" section of the policy insuring Liner, any incidents arising from "[t]he ownership, operation, use, loading or unloading of (a) vehicles of any kind . . . ." by which the insured would normally be liable are excluded from coverage. Liner contends that this exclusion applies here and that sovereign immunity bars plaintiffs' claims.

B. Exceptions to Exclusions

Plaintiffs argue that the policy specifically carves out an exception to this exclusion and waives Liner's sovereign immunity. The exception states, "an insured who *is supervising students entering or exiting a school bus*" is not excluded from liability despite the "vehicle usage" exclusion cited by Liner. (emphasis supplied).

C. Construing Insurance Contracts

" '[A]n insurance policy is a contract and its provisions govern the rights and duties of the parties thereto.' " *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299, 524 S.E.2d 558, 563 (2000) (quoting *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986)). When we construe provisions of an insurance policy, "the goal of construction is to arrive at the intent of the parties when the policy was issued." *Woods v. Insurance Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978). The language in the policy is to be construed as written "without rewriting the contract or disregarding the express language used." *Fidelity Bankers Life Ins. Co.*, 318 N.C. at 380, 348 S.E.2d at 796 (citing *Industrial Center v. Liability Co.*, 271 N.C. 158, 155 S.E.2d 501 (1967)).

"[E]xclusions from, conditions upon and limitations of undertakings by the [insurance] company, otherwise contained in the policy, are . . . construed strictly . . . to provide coverage." *Trust Co. v. Insurance Co.*, 276 N.C. 348, 355, 172 S.E.2d 518, 522-23 (1970). "[P]rovisions which exclude liability of insurance companies are not favored and therefore all ambiguous provisions will be construed against the insurer . . . ." *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986) (citing *Trust Co.*, 276 N.C. at 355, 172 S.E.2d at 522-23). "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." *Gaston County Dyeing Machine Co.*, 351 N.C. at 299, 524 S.E.2d at 563 (quoting *Woods*, 295 N.C. at 505-06, 246 S.E.2d at 777). In determining the ordinary meaning of a word, it is appropriate to look to dictionary definitions. *Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C. App. 506, 512, 428 S.E.2d 238, 241 (1993). Our Supreme Court has held that "[u]se of the plain, ordinary meaning of a term is the preferred construction." *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng. Co.*, 326 N.C. 133, 151, 388 S.E.2d 557, 568 (1990) (citing *Woods*, 295 N.C. at 505-06, 246 S.E.2d at 777).

D. Defining the Terms of the Exception

The determinative issue at bar is the meaning of the exception "is supervising students entering or exiting a school bus." The term "supervising" is not specifically defined in the policy and therefore must be given its ordinary and usual meaning. *Id.* Plaintiffs argue that the definition in *Black's Law Dictionary*, Rev. 4th ed., (1968), which defines one meaning of "supervise" as "to have general oversight over some activity," should be applied. Our Supreme Court has held that in construing the ordinary and plain meaning of disputed terms, " 'standard, nonlegal dictionaries' " should be used as a guide. *C.D. Spangler Constr. Co.*, 326 N.C. at 151, 388 S.E.2d at 568 (quoting *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 438, 146 S.E.2d 410, 416 (1966)). We have routinely referred to the *American Heritage Dictionary* in determining the ordinary and usual meaning of non-technical words contained in insurance policies. *Id.*; *see Kennedy v. Haywood Cty.*, 158 N.C. App. 526, 529, 581 S.E.2d 119, 121 (2003); *Norton v. SMC Bldg., Inc.*, 156 N.C. App. 564, 569-70, 577 S.E.2d 310, 314 (2003); *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 95, 518 S.E.2d 814, 817 (1999), *disc. rev. denied*, 351 N.C. 350, 542 S.E.2d 205 (2000); *Durham City Bd. of Education v. National Union Fire Ins. Co.*, 109 N.C. App. 152, 160, 426 S.E.2d 451, 456, *disc. rev. denied*, 333 N.C. 790, 431 S.E.2d 22 (1993).

The *American Heritage Dictionary*, 2nd ed. (1982), defines "supervise" as "[t]o direct and inspect the performance of; superintend." Under this definition, the ordinary meaning of "supervising" is the directing and inspecting of the performance of a particular activity, not the general oversight of that activity as plaintiffs contend. The term "is," the present tense, third-person form of "be," expresses a "continuous action." *Id.* Thus, the entire phrase "is supervising students entering or exiting a school bus," taken as a whole, based upon the ordinary meanings of "is" and "supervise," requires Liner to be *actively* directing or inspecting students as they are *actually* entering or exiting school buses in order to waive his sovereign immunity. *Id.* General oversight over school buses is not sufficient to waive sovereign immunity when analyzing the exception as a whole.

Plaintiffs argue that Liner changed Loryn's bus stop causing the injuries that were sustained when she was struck by a vehicle crossing the street. As assistant principal, Liner was responsible for the discipline of students, including disciplining students for inappropriate conduct on a school bus. Liner denies that his duties included assigning bus stops or changing bus stops. Regardless of whether

Liner actually changed Loryn's bus stop, this conduct does not meet the conduct necessary under the policy's exception to waive sovereign immunity. Neither Liner nor a school bus were present at the time Loryn was crossing the street on the way to her bus stop. He did not direct her to cross the street at the time she was struck nor did he watch over her while she was crossing the street. Liner had no immediate or active control over Loryn as she crossed the street and was struck by the vehicle. At the time of the accident, Loryn's school bus was neither approaching the bus stop, within sight from the bus stop, nor at the bus stop.

Taking plaintiffs' allegations as true, Liner's conduct of merely changing Loryn's assigned bus stop is insufficient to satisfy the language of the exception that he "is supervising students entering or exiting a school bus" in the policy. Liner's actions fail to meet the requirements of the plain meaning of the exception to the vehicle usage exclusion. Plaintiffs' claim is barred by sovereign immunity. In light of our holding, we do not reach plaintiffs' second assignment of error.

V. Conclusion

Plaintiffs failed to show that Liner's actions were within the policy's exception, "is supervising students entering or exiting a school bus," to waive his sovereign immunity. The judgment of the trial court is affirmed.

Affirmed.

Judges WYNN and McGEE concur.

IN THE MATTER OF: B.S.D.S., A MINOR CHILD

No. COA03-365

(Filed 6 April 2004)

1. Termination of Parental Rights— subject matter jurisdiction—petition

A petition to terminate parental rights was sufficient to invoke subject matter jurisdiction where the petition stated the correct statutory chapter, even though it omitted a phrase from

the statute title, thus inadvertently referring to a previous statute. Both statutes shared the same purpose and there was no danger of prejudice.

2. Termination of Parental Rights— lack of progress in correcting problems—sufficiency of evidence

There was sufficient evidence in a termination of parental rights proceeding to support a finding of lack of progress under N.C.G.S. § 7B-1111(a)(2) (willfully leaving child in foster care for more than 12 months without showing reasonable progress in correcting problems). A respondent's prolonged inability to improve her situation, despite some efforts, supports a finding of wilfulness.

Appeal by respondent from order dated 22 November 2002[1] by Judge Jonathan L. Jones in Burke County District Court. Heard in the Court of Appeals 19 November 2003.

Stephen M. Schoeberle for petitioner-appellee Burke County Department of Social Services.

Susan J. Hall for respondent-appellant.

Attorney Advocate Mary R. McKay, guardian ad litem for minor child-appellee.

BRYANT, Judge.

J.A.C.S. (respondent) appeals an order dated 22 November 2002 terminating parental rights over daughter B.S.D.S. (the child).

The child, born 14 August 1988, was fourteen years old at the time of the termination of parental rights proceeding and had previously been adjudicated neglected in 1994 and 1999. The 17 December 1999 order adjudicating the child neglected was based on the sexual abuse of the child by respondent's boyfriend. As a result of the sexual abuse, the child experienced emotional and behavioral problems, was diagnosed with major depression including psychotic features, and received therapy and psycho-educational classes. The trial court found there to be substantial evidence that respondent was "not capable of making the improvements necessary in order to appropriately care for the [child]" and ordered respondent to comply with the following terms: (1) attending all sessions of the SAIS non-offending

1. The caption has been altered to show only the minor child's initials.

spouse group, (2) ensuring the child received counseling, (3) not allowing anyone to consume drugs or alcohol in the home, (4) not allowing any males unrelated to her in the home, and (5) participating in any evaluations or treatment recommended by the Burke County Department of Social Services (DSS). The trial court continued custody with respondent.

In an order filed 23 March 2000, the trial court granted DSS custody of the child after finding that respondent had failed to comply with all of the terms of the 1999 neglect order. Specifically, the trial court found respondent had failed to comply "with her required attendance at the Foothills SAIS non-offending spouses group" and had violated the requirement that she not "allow any males to whom she was not related to reside in the home." The trial court instructed that in order for reunification to occur, respondent was to "show that she corrected those problems which led to the juvenile's removal." The trial court then ordered respondent to: (1) comply with the conditions previously set in orders by the trial court, (2) visit the child "under such conditions that the Department may impose," (3) submit to a psychological evaluation and any recommended treatment, (4) execute releases for the other parties to obtain information on her evaluation and treatment, (5) submit to random drug and alcohol testing, and (6) be able to present evidence to show that she was capable of caring for a child with special needs.

In a petition dated 22 May 2001, DSS sought the termination of respondent's parental rights over the child. The evidence at the termination of parental rights hearing revealed that respondent had missed several scheduled visitations and had encouraged the child to disobey the rules at the group home where the child lived. During a Christmas visit with the child in 2000, respondent upset the child by removing from the child clothes provided by the group home staff and making derogatory remarks about the staff. A DSS social worker further testified that respondent had failed to comply with the recommendation issued by the therapist who had evaluated respondent between August and September of 2000 that she seek therapy on a regular basis. The documentary evidence submitted at the hearing included a 15 February 2000 report by the child's therapist. The therapist observed that family life "elevat[ed the child's] barely manageable stress to unmanageable levels," that the child needed supervision and support from responsive adults, and that "progress [would] need to be made between [the child] and [respondent] in order for [the child] to feel safe at home." In a 16 February 2000 report, DSS also

noted that respondent would "need much more therapy in order to properly parent her child[]."

Respondent testified she completed the SAIS non-offending spouse group in the winter of 2000. Respondent did not present any documentation in support of her successful completion of the sessions, and DSS was unaware that she had completed her sessions. Respondent admitted that, after her initial psychological evaluation in the fall of 2000, she had not seen a therapist until three weeks before the termination of parental rights hearing.

In an order dated 22 November 2002, the trial court found in pertinent part:

> 4. . . . [The child] has been in the custody of the Burke County Department of Social Services since February 24, 2000 . . . .
>
> . . . .
>
> 6. The minor child was adjudicated to be neglected on December 2, 1999, this being the second such adjudication . . . . [Respondent's] testimony today indicates that she still has not grasped the effects of her behavior on the minor child. . . . Were the minor child returned to her mother's home, there is a substantial likelihood of the repetition of neglect.
>
> 7. Although [respondent] has made some sporadic progress in completing those things that the Court ordered her to do, she never fully cooperated with the Burke County Department of Social Services. She had from February[] 2000, when the minor child was removed from her home, to January[] 2001, when the Court terminated reunification efforts with her and made adoption the permanent plan for the minor child, to make reasonable progress or to show sufficient cooperation, but she failed to do so.

The trial court terminated respondent's parental rights on the grounds of neglect, *see* N.C.G.S. § 7B-1111(a)(1) (2003), and "willfully [leaving] the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile," N.C.G.S. § 7B-1111(a)(2) (2003).

The issues are whether: (I) the DSS petition was sufficient to invoke the trial court's subject matter jurisdiction and (II) the trial court's finding on respondent's lack of progress under N.C. Gen. Stat. § 7B-1111(a)(2) is supported by the evidence.

I

[1] Respondent first argues the trial court did not acquire subject matter jurisdiction because the petition to terminate parental rights failed to state that it had not been filed by DSS to circumvent the provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA).

A petition to terminate parental rights shall state that it "has not been filed to circumvent the provisions of Article 2 of Chapter 50A of the General Statutes, the Uniform Child-Custody Jurisdiction and Enforcement Act." N.C.G.S. § 7B-1104(7) (2003); *In re Humphrey*, 156 N.C. App. 533, 538, 577 S.E.2d 421, 426 (2003). In the instant case, the petition stated: "This petition has not been filed to circumvent the provisions of Chapter 50A of the North Carolina General Statutes, the Uniform Child Custody Jurisdiction Act." By omitting the words "and Enforcement," the petition referenced the UCCJEA's predecessor, the UCCJA. *See In re Brode*, 151 N.C. App. 690, 692, 566 S.E.2d 858, 860 (2002).

Despite the inadvertent reference to the UCCJA, the petition stated the correct statutory chapter containing the UCCJEA—Chapter 50A. Moreover, the omission does not prompt the concern for circumvention expressed in section 7B-1104(7) because both acts share the same objectives with regard to child custody proceedings and determination. *See* Jennifer Marston, *Yesterday, Today, and Tomorrow's Approaches to Resolving Child Custody Jurisdiction in Oregon*, 80 Or. L. Rev. 301, 302-11 (2001) (the UCCJEA and the former UCCJA share the same purposes). Finally, respondent has not shown how she was prejudiced as a result of the petition's reference to the UCCJA instead of the UCCJEA. *See Humphrey*, 156 N.C. App. at 539, 577 S.E.2d at 426 (a respondent must demonstrate how she was prejudiced by the omission of the language required under section 7B-1104(7)). Therefore, this assignment of error is overruled.[2]

2. We note that the trial court in the case *sub judice* also made a similar omission in its order as the DSS petition. As we have held that the petition was not filed to circumvent the UCCJEA, we see no error. In addition, the requirement of section 7B-1104(7) focuses solely on the petition and not the trial court's order. *See* N.C.G.S. § 7B-1104(7).

II

[2] We next address whether the trial court's finding on respondent's lack of progress under N.C. Gen. Stat. § 7B-1111(a)(2) was supported by the evidence.

Section 7B-1111(a)(2) provides for termination of parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2); *In re Pierce*, 356 N.C. 68, 75, 565 S.E.2d 81, 86 (2002) (the twelve-month period envisioned by the Legislature consists of the twelve months leading up to the filing of the petition for termination of parental rights). Willfulness under this section means something less than willful abandonment and does not require a finding of fault by the parent. *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996). Willfulness may be found where a parent has made some attempt to regain custody of the child but has failed to exhibit "reasonable progress or a positive response toward the diligent efforts of DSS." *Id.* at 440, 473 S.E.2d at 398; *see In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995) ("[i]mplicit in the meaning of positive response is that not only must positive efforts be made towards improving the situation, but that these efforts are obtaining or have obtained positive results"). This Court has held that "[e]xtremely limited progress is not reasonable progress." *Nolen*, 117 N.C. App. at 700, 453 S.E.2d at 224-25. This standard operates as a safeguard for children. If parents were not required to show both positive efforts and positive results, "a parent could forestall termination proceedings indefinitely by making sporadic efforts for that purpose." *Id.* at 700, 453 S.E.2d at 225.

In this case, the testimony and documentary evidence before the trial court established that respondent claimed to have completed her SAIS non-offending spouse group sessions in the winter of 2000. At the time of the termination hearing, however, DSS was not aware that respondent had completed her sessions, and respondent was unable to produce any documentary support for her contention. Assuming the trial court accepted respondent's testimony as credible, it still took respondent at least a year from the time of the initial 17 December 1999 order instructing her to attend the non-offending spouse group, and several court orders re-instructing her to comply

with her obligation, before she finished her twelve required sessions. In addition, respondent was evaluated by a psychologist between August and September 2000 who recommended that she undergo therapy. By the time DSS filed its petition dated 22 May 2001 to terminate respondent's parental rights, respondent had not followed through on her obligation to seek therapy. In fact, respondent went to see a counselor only three weeks prior to the termination of parental rights hearing. Such a delayed effort has been deemed to be insufficient progress in *Oghenekevebe*, where this Court found the respondent had willfully left her child in foster care after failing to show any progress in her therapy until her parental rights were in jeopardy. *Oghenekevebe*, 123 N.C. App. at 437, 473 S.E.2d at 397. Finally, respondent's visitation with the child during the year prior to the filing of the termination of parental rights petition illustrates that she failed to exhibit appropriate parenting skills and, as a result, upset the child repeatedly. *See id.* at 440, 473 S.E.2d at 398 (a parent needs to exhibit "reasonable progress or a positive response toward the diligent efforts of DSS"); *Nolen*, 117 N.C. App. at 700, 453 S.E.2d at 225.

As a respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness "regardless of her good intentions," there was sufficient evidence to support the trial court's finding of respondent's lack of progress during the year preceding the DSS petition to warrant termination of her parental rights under section 7B-1111(a)(2). *In re Bishop*, 92 N.C. App. 662, 669-70, 375 S.E.2d 676, 681 (1989) (holding the trial court's finding was supported by clear, cogent, and convincing evidence where "although respondent ha[d] made some progress in the areas of job and parenting skills, such progress ha[d] been extremely limited"); *see also In re Fletcher*, 148 N.C. App. 228, 235-36, 558 S.E.2d 498, 502 (2002) (upholding termination of parental rights order where "even though the respondent mother made some efforts, the evidence support[ed] the trial court's determination that she did not make sufficient progress in correcting conditions that led to the child's removal"). Having concluded that at least one ground for termination of parental rights existed, we need not address the additional ground of neglect found by the trial court. *See In re Swisher*, 74 N.C. App. 239, 240, 328 S.E.2d 33, 35 (1985) ("[i]f either of the[] grounds [for the termination of parental rights] is based upon findings of fact supported by clear, cogent and convincing evidence[,] the order appealed from should be affirmed").

Affirmed.

Judges CALABRIA and ELMORE concur.

THE SHERWIN-WILLIAMS COMPANY, PLAINTIFF v. ASBN, INC. D/B/A FISHMARKET RESTAURANT, INC., FISHMARKET RESTAURANT, INC., NATHAN ALBERTY, BETTY D. ALBERTY, MARIA JANDERA AND JOSEPH ZAHRADNICEK, DEFENDANTS

No. COA03-676

(Filed 6 April 2004)

Guaranty; Landlord and Tenant— default on commercial lease—personal guarantor—estoppel

The trial court did not err by granting summary judgment in favor of plaintiff in an action for monetary damages based on the default of a commercial lease and by concluding that defendant was estopped from denying his liability as a personal guarantor under the new lease even though defendant contends he signed a new lease in his capacity as vice-president of the corporation without executing a personal guaranty in connection with the lease amendment and extension, because: (1) although the record reflected that defendant ultimately suffered pecuniary losses as a result of the new lease, it also reflected that at the time the new lease was executed, the new lease operated to benefit defendant by extending his company's tenancy on the plaintiff's property for several years, giving defendant an opportunity to benefit from the extended operation of the business and the resulting profits; and (2) defendant consented to and authorized the terms in the new lease in order to benefit his company, and consent to an increase in liability can be implied from a guarantor's actions as a corporate officer.

Appeal by defendant from order entered 5 March 2003 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 March 2004.

Robert D. Potter, Jr., for plaintiff-appellee.

Parker, Hanzel, & Newkirk, L.L.P., by M. Clark Parker, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Nathan Alberty ("defendant") appeals the trial court's order granting summary judgment in favor of The Sherwin-Williams Company ("plaintiff"). For the reasons stated herein, we affirm the trial court's order.

The evidence presented at the summary judgment hearing is as follows: On 24 September 1987, plaintiff leased commercial property in Charlotte, North Carolina, to James H. Simmons ("Simmons"). Simmons later assigned his interest in the lease to ASBN, Inc. ("ASBN"). The lease provided that unless ASBN exercised an option to renew included in the lease, the lease was to expire on 30 December 1994. However, the lease also contained a hold-over provision that automatically authorized a year-to-year tenancy if the tenant remained in possession of the premises after the expiration date of the lease and without the consent of plaintiff.

On 26 September 1988, Betty Alberty, Maria Jandera, Joseph Zahradnicek, and defendant all signed a personal guaranty assuring full performance by ASBN of the lease terms. After expiration of the lease, ASBN continued to occupy the premises as a hold-over tenant. On 28 February 1997, plaintiff and ASBN entered into a "lease amendment and extension," which bound ASBN to the lease retroactively from 1 January 1995 until 30 December 1999. While no personal guaranty was executed in connection with the "lease amendment and extension," defendant, the sole signor of the "lease amendment and extension," signed it in his capacity as vice-president of ASBN. ASBN defaulted on its lease after September 1998.

Plaintiff initiated this action on 1 June 1999, seeking damages in connection with ASBN's default on the lease. On 4 November 1999, defendant and Betty Alberty moved for summary judgment against plaintiff. On 10 January 2000, plaintiff responded by filing a cross-motion for summary judgment against all defendants. On 30 March 2000, the trial court granted summary judgment in favor of defendant and Betty Alberty and against plaintiff. The trial court also denied plaintiff's motion for summary judgment against defendant and Betty Alberty, and granted plaintiff's motion for summary judgment against ASBN and defendants Jandera and Zahradnicek.

Plaintiff appealed the denial of its motion for summary judgment against defendant and Betty Alberty. In *Sherwin-Williams Co. v. ASBN, Inc.*, 145 N.C. App. 176, 180, 550 S.E.2d 527, 530 (2001)

("*ASBN, Inc. I*"), this Court affirmed the trial court's judgment as to Betty Alberty and reversed and remanded the judgment as to defendant. On remand, plaintiff again moved for summary judgment against defendant on 20 February 2003. On 5 March 2003, the trial court granted plaintiff's motion. From this order, defendant appeals.

The only issue in the present appeal is whether the trial court properly granted summary judgment in favor of plaintiff. Defendant argues that the trial court erred in its determination that defendant is estopped from denying his personal guaranty continued on the lease after 28 February 1997. For the reasons discussed herein, we conclude that defendant's previous personal guaranty continued on the lease, and we affirm the trial court's order granting summary judgment in favor of plaintiff.

In *ASBN, Inc. I*, we determined that the 28 February 1997 "lease amendment and extension" was a new lease, not an extension or amendment of the 1987 lease. 145 N.C. App. at 179, 550 S.E.2d at 530. Therefore, we affirmed the trial court's order granting summary judgment in favor of Betty Alberty, who had not signed as a guarantor of the new lease. *Id.* at 180, 550 S.E.2d at 530. Although we noted that defendant had not signed as a guarantor of the new lease, we also noted that his signature as vice-president of ASBN authorized the new lease. *Id.* at 179-80, 550 S.E.2d at 530. We recognized that as vice-president of ASBN, defendant "could have benefitted from the new lease[,] which allowed his business to continue in its present location." *Id.* at 180, 550 S.E.2d at 530. We also recognized that if defendant did benefit from the new lease, the law set forth in *Devereux Properties, Inc. v. BBM&W, Inc.*, 114 N.C. App. 621, 442 S.E.2d 555, *disc. review denied*, 337 N.C. 690, 448 S.E.2d 519 (1994) would preclude defendant from denying that his personal liability as guarantor continued under the new lease. *Id.* Therefore, we reversed the summary judgment order as to defendant and remanded to the trial court with instructions to determine whether defendant in fact benefitted under the new lease. *Id.*

On remand, the trial court granted summary judgment in favor of plaintiff. Defendant now argues that the trial court erred in finding that defendant received an individual benefit from the new lease. In support of this argument, defendant submits that he presented the trial court with an affidavit stating that he "invested over $150,000 to keep the restaurant afloat, but to no avail." Defendant further submits that he received no salary or dividend from ASBN, that he

and his wife have twice mortgaged their home, and that he is currently operating an unprofitable tax and accounting business. Defendant's argument that he received no benefit from the new lease is unconvincing.

In *Devereux*, this Court noted an exception to the rule that "a material alteration of a contract between a principal debtor and creditor without the consent of the guarantor discharges the guarantor of [his] obligation." 114 N.C. App. at 623, 442 S.E.2d at 556. The *Devereux* exception "holds the guarantor responsible for any changes to which he has either expressly or impliedly consented." *Id.* at 624, 442 S.E.2d at 556. "Consent to an increase in liability may be implied from a guarantor's actions as corporate officer," particularly where the officer received benefits from the actions. *Id.* at 624, 442 S.E.2d at 557. In formulating the *Devereux* exception, this Court explained that the guarantors in *Devereux* "were not innocent parties; they were experienced businessmen who stood to benefit from the [lease] modifications." 114 N.C. App. at 625, 442 S.E.2d at 557. Thus, " 'having authorized the modifications and received their benefits, they cannot . . . be regarded as innocent third parties such as the law of guaranty is designed to protect.' " *Id.* (quoting *Bank of Commerce v. Riverside Trails*, 52 Ill. App. 3d 616, 623, 367 N.E.2d 993, 999 (Ill. App. Ct. 1977)).

Defendant argues that the new lease only gave him more debt. In *Devereux*, the defendants cited *First Union Nat'l Bank v. King*, 63 N.C. App. 757, 306 S.E.2d 508 (1983) in support of a similar argument. 114 N.C. App. at 624, 442 S.E.2d at 557. In *First Union*, this Court held an uncompensated surety liable on a modified note because the new note decreased the amount the surety guaranteed and therefore benefitted him. 63 N.C. App. at 759-60, 306 S.E.2d at 510. As defendant argues in the case *sub judice*, the defendants in *Devereux* argued that pecuniary gain is necessary to establish continued liability as a guarantor. 114 N.C. App. at 624, 442 S.E.2d at 557. However, we disagreed, holding, as in *Caldwell County v. George*, 176 N.C. 602, 97 S.E. 507 (1918), that a pecuniary gain is not necessary for a guarantor to "benefit" under the *Devereux* exception. *Id.* at 625, 442 S.E.2d at 557.

In *Caldwell*, the defendant was found to be personally liable on checks he guaranteed although there was a delay in cashing the checks. 176 N.C. at 610, 97 S.E. at 510. The Court concluded that the delay was at the "special instance and request of defendant." *Id.* Thus, the Court held, the defendant would not be relieved from liability due

to a modification of the original contract because the modification "was with [the defendant's] knowledge and approval and at his instance." *Id.* In *Devereux*, this Court held the defendants personally liable because the modification of the lease the defendants guaranteed resulted in an extension of the terms of the lease, an expansion of the square footage of the property leased, and a decrease in the amount of rent owed to the lessor by the defendants' corporation. 114 N.C. App. at 622, 442 S.E.2d at 556. We concluded that such contract modifications create benefits for guarantors outside of pecuniary gains, and we held that when guarantors authorize and receive such benefits, the guarantors lose their status as innocent third parties and the protection the law of guaranty provides. *Id.* at 625, 442 S.E.2d at 557.

In the case *sub judice*, defendant received a *Caldwell* and *Devereux*-like benefit when he authorized the new lease. Although the record clearly reflects that defendant ultimately suffered pecuniary losses as a result of the new lease, it also reflects that at the time the new lease was executed, the new lease operated to benefit defendant by extending his company's tenancy on the plaintiff's property for several years. Not only did the new lease therefore give defendant's company an opportunity to continue operating and profiting as a business, it gave defendant—a forty-percent shareholder in the company—an opportunity to benefit from the extended operation and the resulting profits. Furthermore, in his answers to plaintiff's interrogatories, defendant admitted he consented to the execution of the new lease in order to benefit ASBN. We conclude that the foregoing evidence was sufficient to allow the trial court to find that defendant received the type of benefit required by the *Devereux* exception.

Defendant also argues that because he did not negotiate the new lease for ASBN or individually, he should not be held liable as a guarantor of it. In support of this argument, defendant asserts that the affidavit of Ben L. Amoson, Jr. ("Amoson"), plaintiff's director of real estate, does not state that defendant or anyone at ASBN negotiated the new lease. Defendant further asserts that the new lease was prepared and submitted to ASBN for execution by any officer of the corporation, and that "it just happened that defendant executed it as vice-president." We find this argument unconvincing as well.

While Amoson's affidavit does not reference any specific negotiations with defendant, it does reflect that defendant consented to and

authorized the terms included in the new lease. Amoson's affidavit states that prior to the execution of the new lease, defendant signed a proposed lease extension. Although the landowner, Cameron M. Harris ("Harris"), would not consent to the proposal, Amoson's affidavit states that after the dispute with Harris was settled, plaintiff twice sent detailed letters to defendant, explaining how long the lease could be extended and reminding defendant that "the lease amendment and extension" needed to be executed. After defendant did not respond to its letters, plaintiff sent defendant a copy of the new lease, which defendant subsequently signed. Furthermore, defendant admitted in his answers to plaintiff's interrogatories that when he signed the new lease he was acting under authorization by ASBN to sign the lease, and that he personally consented to it. We conclude that the foregoing evidence is sufficient to meet the requirements of the *Devereux* exception, which allows "[c]onsent to an increase in liability" to be implied from "a guarantor's actions as a corporate officer." *Devereux*, 114 N.C. App. at 624, 442 S.E.2d at 557.

In *ASBN, Inc. I*, we recognized that in signing the new lease, defendant might have personally benefitted and thereby become estopped from denying that his personal guaranty continued under the new lease. Therefore, we remanded the case to the trial court to determine whether defendant benefitted under the new lease pursuant to the mandate of *Devereux*. Considering the law of the case and viewing the evidence contained in the pleadings, admissions, affidavits, and answers to interrogatories in the light most favorable to defendant, we conclude that the trial court did not err in determining that defendant consented to the new lease and received the benefit required to hold him liable under *Devereux*. Therefore, the trial court properly concluded that defendant is estopped from denying that his liability as personal guarantor continued under the new lease. Thus, we hold that the trial court did not err in granting summary judgment for the plaintiff.

Affirmed.

Judges HUNTER and LEVINSON concur.

JONATHAN CAMPBELL, PLAINTIFF v. JOHNNY L. McILWAIN, ETHAN ALLEN, INC., AND D.L. PETERSON, INC., DEFENDANTS

No. COA03-5

(Filed 6 April 2004)

1. Motor Vehicles— automobile accident—instruction—duty to reduce speed

The trial court did not err in a negligence action arising out of an automobile accident by refusing to give defendant's requested instruction on plaintiff's duty to reduce speed, because: (1) there is no evidence at all that plaintiff failed to reduce his speed; (2) substantial evidence showed that plaintiff did in fact reduce his speed when he encountered the van driven by defendant on an entrance ramp; and (3) while there was testimony from a witness to the effect that plaintiff pulled out in front of the witness and accelerated rapidly, there was no testimony by that witness that plaintiff did not later reduce his speed in an attempt to avoid the collision.

2. Motor Vehicles— automobile accident—instruction—doctrine of sudden emergency

The trial court did not err in a negligence action arising out of an automobile accident by instructing the jury on the doctrine of sudden emergency, because: (1) defendants pled contributory negligence as a defense to plaintiff's claim, and evidence that plaintiff was confronted with an emergency situation is relevant to this issue; and (2) plaintiff's complaint alleged sufficient facts to give defendant fair notice that plaintiff was presented with a sudden emergency when he got on an entrance ramp to the interstate.

3. Trials— automobile accident—mentioning insurance—motion for mistrial

The trial court did not abuse its discretion in a negligence action arising out of an automobile accident by refusing to declare a mistrial after plaintiff mentioned insurance several times, because: (1) the references were incidental and did not indicate directly as an independent fact that defendant had liability insurance or that the pertinent insurer was his liability carrier; and (2) the trial court gave adequate curative instructions to the jury following the testimony.

4. Motor Vehicles— automobile accident—defendant's driving record—negligent entrustment

The trial court did not err in a negligence action arising out of an automobile accident by allowing plaintiff to inquire into defendant's driving record in order to establish evidence sufficient to warrant an instruction on negligent entrustment.

Appeal by defendants from judgment entered 1 July 2002 by Judge Susan C. Taylor in Superior Court in Mecklenburg County. Heard in the Court of Appeals 16 October 2003.

Kirkley Law Offices, P.L.L.C., by Joel L. Kirkley, III and Timothy M. Stanley, for plaintiff-appellee.

Templeton & Raynor, P.A., by Carrie H. O'Brien and Amy F. Wise, for defendant-appellants.

HUDSON, Judge.

This appeal arises out of an automobile accident that occurred on 20 December 1997. On 18 December 2000, plaintiff, Jonathan Campbell, filed a complaint against defendants Johnny McIlwain, Ethan Allen, Inc., and D.L. Peterson, Inc., alleging that McIlwain negligently operated a vehicle he was driving during the course and scope of his employment with the other two defendants. On 1 July 2002, the trial court entered judgment on a jury verdict finding defendant McIlwain negligent and awarding plaintiff $32,500 in damages. Defendants appeal. For the following reasons, we find no error.

On 20 December 1997, plaintiff was heading west on a 1986 Honda motorcycle on the I-277 entrance ramp in Charlotte, North Carolina. As plaintiff rounded the curve on the ramp, he saw defendant's van backing down the ramp into his path. Plaintiff, who was traveling thirty to forty miles per hour, applied his brakes, which caused his motorcycle to slide on the pavement, ultimately hitting the rear of defendant's van. As a result of the accident, plaintiff sustained injuries that required medical treatment including knee surgery.

Defendant McIlwain disputed plaintiff's version of the accident, claiming that as he was entering the on-ramp to I-277, his van ran out of gas. He was attempting to move the van to the left shoulder, when plaintiff rounded the corner and ran into his van. McIlwain also introduced the deposition testimony of Arnold Sharar, who testified that

just before entering the ramp, plaintiff pulled out in front of him and accelerated rapidly.

In their first two arguments, defendants allege errors in the jury instructions. To present an instruction error properly for appellate review, the defendant must include in the record on appeal "a transcript of the entire charge given." N.C. R. App. P. 9(a)(1)(f). Here, the printed record on appeal includes neither the requested instruction nor the charge given to the jury. Thus, this issue is not presented in compliance with the Rules of Appellate Procedure. While this rule may seem quite technical, it serves an important practical purpose: it facilitates review of an instruction issue by all three members of our panel in that the parties file but a single copy of the trial transcript, but all three members receive the printed record. Nonetheless, in our discretion we undertake a review on the merits. N.C. R. App. P. 2.

[1] Defendants first contend that the trial court erred by refusing to give a requested instruction on plaintiff's duty to reduce speed. A party appealing a trial court's failure to give a requested instruction "must show that substantial evidence supported the omitted instruction and that the instruction was correct as a matter of law." *State v. Farmer*, 138 N.C. App. 127, 133, 530 S.E.2d 584, 588, *disc. review denied*, 352 N.C. 358, 544 S.E.2d 550 (2000). Here, defendants requested pattern jury instruction 220.20A, which provides in pertinent part that:

> the fact that a person is driving his vehicle at a speed lower than the posted speed limit does not relieve him of the duty to decrease his speed as may be necessary to avoid colliding with any [vehicle] on the highway, and to avoid injury . . . .

N.C.P.I.—Civ. 220.20A. The trial court considered and denied this request, instead instructing the jury as to reasonable and prudent speed under the conditions in accordance with N.C.P.I.—Civ. 202.10. In so doing, the court stated:

> THE COURT: I think in considering both of them, the reasonable and prudent speed covers all the possibilities that the jury may find in a clearer way.

Here, there is no evidence at all, let alone substantial evidence, that plaintiff failed to reduce his speed. Quite to the contrary, the substantial evidence in the record shows that plaintiff did in fact reduce his speed when he encountered the van on the entrance ramp. Plaintiff testified that as soon as he rounded the curve and saw

defendant's van backing up towards him, he applied his brakes, which caused his motorcycle to slide and strike the rear of the van. While defendant claims that this instruction was warranted based upon the testimony of Mr. Sharar to the effect that plaintiff pulled out in front of him and accelerated rapidly, there is absolutely no testimony by Mr. Sharar that plaintiff did not later reduce his speed in an attempt to avoid the collision. Since the evidence did not justify the requested instruction, we overrule this assignment of error.

[2] Defendants next argue that the trial court erred by instructing the jury on the doctrine of sudden emergency. Defendants contend that the emergency doctrine was not pled and no evidence was presented warranting the instruction. We disagree.

This Court has previously held that a trial court "is required to state the law and apply the evidence thereto in regard to each substantial and essential feature of the case, even in the absence of a properly submitted request for special instructions." *White v. Greer*, 55 N.C. App. 450, 453, 285 S.E.2d 848, 851 (1982). The sudden emergency doctrine provides that "one confronted with an emergency is not liable for an injury resulting from his acting as a reasonable man might act in such an emergency." *Rodgers v. Carter*, 266 N.C. 564, 568, 146 S.E.2d 806, 810 (1966). The Court in *Rogers* noted further that "[t]he emergency is merely a fact to be taken into account in determining whether he has acted as a reasonable man so situated would have done." *Id.*

Here, the defendants pled contributory negligence as a defense to plaintiff's claim, thus raising the issue of whether plaintiff's own negligence contributed to his injuries. Evidence that plaintiff was confronted with an emergency situation, which was properly admitted, is relevant to this issue. We further note that, under the standard of notice pleading, plaintiff's complaint alleged sufficient facts to give defendant fair notice that plaintiff was presented with a sudden emergency when he got on the entrance ramp to the interstate. Therefore, we overrule this assignment of error.

[3] Next, defendants contend that the trial court erred by refusing to declare a mistrial after plaintiff mentioned insurance. For the following reasons, we disagree.

Generally, "[w]here testimony is given, or reference is made, indicating directly and as an independent fact that defendant has liability insurance, it is prejudicial, and the court should, upon motion there-

for aptly made, withdraw a juror and order a mistrial." *Fincher v. Rhyne*, 266 N.C. 64, 69, 145 S.E.2d 316, 319 (1965). However, "there are circumstances in which it is sufficient for the court, in its discretion, because of the incidental nature of the reference, to merely instruct the jury to disregard it." *Id.* at 69, 145 S.E.2d at 319-20. "The decision of whether a mistrial is required to prevent undue prejudice to a party or to further the ends of justice is a decision vested in the sound discretion of the trial judge." *Medlin v. FYCO, Inc.*, 139 N.C. App. 534, 540, 534 S.E.2d 622, 626 (2000), *disc. rev. denied*, 353 N.C. 377, 547 S.E.2d 12 (2001) (holding that the trial court did not abuse its discretion in denying defendant's motion for a mistrial based on a witness' mention at trial of defendant's relationship with defendant's insurer).

Applying the aforementioned rationale to the present case, we hold that the trial court did not abuse its discretion by refusing to order a mistrial. The first such instance complained of came on direct examination of the plaintiff. When asked whether defendant driver said anything to him after the accident, plaintiff responded: "He apologized several times for the incident. He asked me—to see if we could handle this on an individual basis as opposed to calling in the insurance companies." Defense counsel promptly objected and the court sustained, issuing a curative instruction for the jury not to consider the answer. Later, on cross-examination, defense counsel asked plaintiff when he signed a medical release. Plaintiff replied: "I initially signed it with Debra Ship, the Traveler's adjuster, and then Darryl Robinson." Defense counsel objected and the court sustained, again issuing a curative instruction to disregard the answer. Finally, defendants take issue with a portion of the closing arguments, in which plaintiff's counsel apparently began to refer to an insurance carrier. We are unable to locate this passage in the transcript of counsel's closing argument. However, after plaintiff's counsel completed his closing argument, the following exchange appears:

> MS. WOLFE [defense counsel]: I have one more thing, Your Honor. Not that it is going to matter at this point, because the word insurance has been said so many times throughout this trial. I noticed that the plaintiff started to say "Travelers."
>
> MR. KIRKLEY [plaintiff's counsel]: I did stop. I apologize. I saw the adjuster, and I started to say it. I did stop myself.
>
> MS. WOLFE: I didn't ask for a curative response because it has been said so many times. But once again, for the fourth

time, I just want to preserve the record and make a motion to dismiss.

THE COURT: I heard Mr. Kirkley say "Trav." I had no idea what he was talking about.

***

THE COURT: Like I say, I heard him say "trav." I didn't know what it meant. He didn't say insurance. I am going to deny the motion at this time.

We find that these references were incidental, and did not indicate directly, as an independent fact, that defendant had liability insurance or that Traveler's was his liability carrier. Further, we conclude that the trial court gave adequate curative instructions to the jury following the testimony. Therefore, we hold that the trial court did not abuse its discretion, and we overrule this assignment of error.

[4] Defendants finally argue that the trial court erred by allowing defendant McIlwain to be questioned concerning his driving record. For the following reasons, we disagree.

During cross-examination, plaintiff's counsel asked defendant McIlwain whether he considers himself a safe driver. McIlwain answered: "I try to be safe enough to where I don't infringe on hurting other people. I occasionally consider myself to be the type of driver—if you ask me whether I get speeding tickets and parking tickets, of course I do. It's not like I intend to get them, but, yeah, it happens to the best of us." Counsel for plaintiff then followed by asking, "In fact, you have had 11 traffic citations; correct?" Defense counsel objected and the court sustained and gave the jury a curative instruction. Following arguments by both attorneys, the court ruled that it would "allow [plaintiff's counsel] to ask about those citations where Mr. McIlwain was found to have committed the acts alleged. I am not going to allow any questions about any charges in which he was not convicted. He cannot ask about something if he was not convicted." Thereafter, plaintiff's counsel asked McIlwain regarding three prior speeding convictions and one unsafe movement conviction to establish evidence sufficient to support an instruction on negligent entrustment.

We find guidance on this issue in *Swicegood v. Cooper*, 341 N.C. 178, 459 S.E.2d 206 (1995), which involved a lawsuit over property damage that resulted from a crash between the plaintiff's auto-

mobile (being driven by his son) and the defendant's van. The plaintiff had given his son permission to drive the automobile on this occasion. The trial court granted plaintiff's motion *in limine* prohibiting evidence of prior speeding violations in regard to the issue of contributory negligence based on negligent entrustment. This Court held that as a matter of law traffic violations cannot support a conclusion that a person is an incompetent or reckless driver. Our Supreme Court disagreed, and in reversing the decision of this Court, stated that:

> While the driver in this case does not have convictions for reckless driving or convictions that involve the use of alcohol, his convictions nonetheless indicate that a jury should determine whether he is a reckless or incompetent driver likely to cause injury to others. In the span of six years, this driver accumulated three safe movement violations and six speeding convictions. The plaintiff contends that having only one conviction for speeding over sixty miles per hour mitigates the effect of the other five, which are convictions for speeding fifty miles per hour or below. We are not persuaded by this argument. Speed limits exist to ensure the safety of the driving public. They are set according to the conditions of the road. Whether a driver exceeds the limit by fifteen miles per hour in a thirty-five mile per hour zone or a fifty mile per hour zone, he endangers those around him.

Id. at 181, 459 S.E.2d at 207-08 (citations omitted). The Court further held that "the jury should determine whether the plaintiff knew or should have known the record and propensity of his son to be a reckless driver." *Id.* at 181, 459 S.E.2d at 208.

Thus, based upon *Swicegood*, we conclude that the trial court did not err by allowing plaintiff to inquire into defendant McIlwain's driving record in order to establish evidence sufficient to warrant an instruction on negligent entrustment.

No error.

Judges McGEE and CALABRIA concur.

AUTO OWNERS INSURANCE COMPANY, PLAINTIFF v. CICERO A. GRIER, THE BOUNTY CORPORATION, CHARTER OAK FIRE INSURANCE COMPANY AND VICTOR FIELDS, JR., DEFENDANTS

No. COA03-232

(Filed 6 April 2004)

Insurance— business liability policy—coverage for shooting—exception for intended injury

There was sufficient evidence to support the trial court's judgment that an insurance company was not obligated to defend or indemnify its insured under a business liability policy (Grier) for an incident in which Grier shot Fields following a theft at Grier's business. The facts of the shooting meet the definition of expected or intended injury in a policy exclusion; while there is an exception to the exclusion for the use of reasonable force, there is sufficient evidence that Grier voluntarily became the aggressor.

Appeal by defendants Cicero A. Grier and The Bounty Corporation from judgment entered 6 December 2002 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 2003.

Arthurs and Foltz, by Nancy E. Foltz, for plaintiff appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Richard T. Rice and Candice S. Wooten, for defendant appellee Charter Oak Fire Insurance Company.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendant appellants Cicero A. Grier and The Bounty Corporation.

TIMMONS-GOODSON, Judge.

Cicero A. Grier ("Grier") and The Bounty Corporation ("Bounty Corp.") appeal from a judgment declaring that insurance policies issued by Auto Owners Insurance Company ("Auto Owners") and Charter Oak Fire Insurance Company ("Charter Oak") do not provide coverage or a duty to defend Grier for an incident which occurred on 12 September 2000. For the reasons stated herein, we affirm the judgment of the trial court.

The pertinent facts of the instant appeal are as follows: Grier is the chief executive officer and sole owner of Bounty Corp. Bounty

Corp. consists of three entities, a food mart, laundromat and car wash. All three entities are located on the same premises in Charlotte, North Carolina.

On the morning of 12 September 2000, Grier drove to Bounty Corp. with a loaded gun to complete his "usual chores." When Grier arrived at Bounty Corp., he noticed four figures walking toward the store. Grier recognized one of the figures as an employee who worked in the deli, but did not recognize the three men behind her. Instead of walking into the store as the employee did, the men walked past the van and stopped just a few feet behind it to talk. The men appeared to be a little older than "school age." Grier remained inside the van until the men left.

After the men left, Grier got out of his van and began to remove the coins from the vacuum machines. As Grier was emptying the last vacuum box, he saw the same three men walking toward him. At deposition Grier testified that, "I hurriedly dropped the keys into the money jug with the money that I had taken from the coin boxes, and I walked fast. I really had to walk real fast to get into the equipment room before they got to me." The men followed Grier to the equipment room and began smoking drugs directly beyond the door to the equipment room. Grier stated that he believed the men were trying to "wait me out," but Grier waited until the men moved beyond the door before he left the equipment room and asked the men to leave.

Grier approached Victor Fields, Jr. ("Fields") first, but kept his distance "to where [Fields] would not have been able to attack [him]." When asked to leave, Fields did not respond. Grier moved to the next man and told him to leave. This man did not move, but instead asked Grier for the time. After Grier responded with the time, he looked back at the equipment room and saw the third man leave the room with Grier's money and keys. Grier chased the third man, but did not catch him.

Grier returned to the store for his van to try "to cut this guy off" and bring him to the police. During his drive, Grier spotted Fields walking alongside a street. Grier pulled his gun, jumped out of his van, grabbed Fields by his jacket and told him that he was taking Fields back to Bounty Corp. to await the police. Although Fields initially resisted, Grier drove them back to Bounty Corp. and asked an employee to call the police.

Grier held Fields by the back of his jacket, with his gun drawn, while they awaited the arrival of the police. Before the police arrived, Fields "pulled out" of his jacket and turned to face Grier. Grier fired his gun at the ground to "put some distance between us." The bullet penetrated Fields's hand and leg. Fields was taken to the hospital while Grier was taken to the police station. No charges were filed against either Grier or Fields.

Grier was insured under a homeowners insurance policy provided by Auto Owners. Bounty Corp. was insured under a business liability policy provided by Charter Oak. It is uncontested that the above policies were in effect on the date in question.

Fields initiated a law suit against Grier for damages resulting from the 12 September 2000 injuries. Grier sought a declaratory judgment in Mecklenburg County Superior Court that the Auto Owners and Charter Oak policies required both insurance carriers to defend and indemnify Grier in the lawsuit filed by Fields. The trial court entered a judgment on 6 December 2002 declaring that neither policy provides coverage to Grier for the 12 September 2000 incident. Grier and Bounty Corp. appeal the trial court's declaratory judgment in favor of Charter Oak.

Grier and Bounty Corp.'s sole argument on appeal is that the trial court erred in denying a duty to defend and indemnify Grier under the Charter Oak insurance policy. We disagree.

The standard of appellate review of a declaratory judgment requires this Court to determine if the trial court's findings of fact are supported by competent evidence in the record. *First Union Nat'l Bank v. Ingold*, 136 N.C. App. 262, 264, 523 S.E.2d 725, 727 (1999). If this Court so finds, then "the court's findings of fact are conclusive on appeal . . . even if there exists evidence to the contrary, and a judgment supported by such findings will be affirmed." *Id.* If there is any competent evidence in the record to support the findings, the judgment must be affirmed. *Id.*

Insurance policies are contracts and as such, their provisions govern the rights and duties of the parties thereto. *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299, 524 S.E.2d 558, 563 (2000). Where a policy defines a term, this Court must use that definition. *Id.* If the meaning of the policy is clear on its face, the policy must be enforced as written. *Id.*

The relevant provisions in Charter Oak's insurance policy are as follows:

SECTION I—COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

. . . .

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory" . . . .

. . . .

2. Exclusions

This insurance does not apply to:

a. Expected or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

. . . .

SECTION V—DEFINITIONS

. . . .

12. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

The dispositive issue on appeal is whether the 12 September 2000 incident is excluded from coverage under the "Expected or Intended Injury" exclusion defined above. Charter Oak may deny Grier coverage only if Fields's injury was expected or intended and did not result from Grier's use of reasonable force to protect himself or his property.

This Court has addressed similar circumstances in at least two previous cases. In *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, the insured homeowner shot a rifle in the direction of a prowler running away from his house. 138 N.C. App. 530, 531, 530 S.E.2d 93, 94 (2000). The insured stated that he intended to shoot at the ground and above the prowler's head to scare the prowler, but did not intend to hurt him. *Id.* The parties moved for summary judgment. *Mizell*, 138 N.C. App. at 532, 530 S.E.2d at 94. The trial court granted summary judgment and concluded that the insurance carrier has no responsibility for coverage. *Id.* On appeal, this Court determined that "when a person fires multiple shots from a rifle at night in the direction of a prowler who is approximately fifty feet away, that person could reasonably expect injury or damage to result from the intentional act." *Mizell*, 138 N.C. App. at 533, 530 S.E.2d at 95.

This Court later found in *N.C. Farm Bureau Mut. Ins. Co. v. Allen* that intentionally firing a handgun at another who was three feet away "was sufficiently certain to cause injury that [the insured] should have expected such injury to occur." 146 N.C. App. 539, 546, 553 S.E.2d 420, 424 (2001). In *Allen*, the insured owned an unoccupied house that had been broken into on a previous occasion. 146 N.C. App. at 541, 553 S.E.2d at 421. The insured asked his friend, Yow, to stay overnight in the home with him to guard against a future break-in. The insured took along several firearms, including two handguns and two rifles. Sometime during the night, the insured awoke and heard someone outside the house. The insured, fearing a prowler beyond the door, pointed a gun at the door and fired, striking Yow. In a declaratory judgment action, the trial court concluded that the insured's insurance carrier had no duty to defend or to indemnify the insured against Yow. *Id.* On appeal, this Court determined that the insurance policy's "expected or intended" exclusionary provision precluded coverage for Yow's injuries. 146 N.C. App. at 546, 553 S.E.2d at 424.

Mizell, *Allen*, and the instant case all have facts in common: (1) the insured intentionally carried a gun; (2) the insured admitted to shooting the victim; and, (3) the insured asserted at trial that he did not intend to harm the victim either because he accidentally discharged the gun or because he was not aiming at the victim. In *Mizell* and *Allen*, this Court determined that these facts sufficiently support the exclusion of coverage based on an "expected or intended" provision shared in both insurance policies. *Mizell*, 138 N.C. App. at 533, 530 S.E.2d at 95; *Allen*, 146 N.C. App. at 546, 553 S.E.2d at 424. Charter

Oak's policy provisions pertinent to the instant appeal also include an exclusion for "expected or intended injur[ies]." As such, we conclude that the facts alleged herein meet the definition of "expected or intended" injury. *See Mizell*, 138 N.C. App. 530, 530 S.E.2d 93; *Allen*, 146 N.C. App. 539, 553 S.E.2d 420.

The policy in question provides an exception to the exclusionary provision cited above. If the insured submits that the injury resulted from the use of reasonable force, even if the injury was "expected or intended," the exclusionary provision does not apply.

Grier asserts that because he fired the gun at the ground to "put distance" between himself and Fields, that his actions were the result of reasonable force to protect himself and his property. However, we note that "the right of self-defense is only available to a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so." *Juarez-Martinez v. Deans*, 108 N.C. App. 486, 492, 424 S.E.2d 154, 158 (1993) (quoting *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977)).

Although Grier stated that he was concerned for his safety several times in his interactions with the three men, Grier's fear did not preclude him from leaving his property alone in search of the men, and before notifying the police. Furthermore, when Grier spotted Fields walking down a street approximately 150 feet away from the original incident, he again failed to telephone the police. Instead, Grier grabbed Fields at gunpoint and drove him back to Bounty Corp. where the police were then called. There is enough evidence in the record to support a finding that Grier voluntarily became the aggressor when he forced Fields at gunpoint back to Grier's place of business, which negates Grier's ability to assert that Fields's injuries were the result of self-defense. *See Juarez-Martinez v. Deans*, 108 N.C. App. at 492, 424 S.E.2d at 158.

We conclude that there is sufficient evidence to support the trial court's judgment that Charter Oak is not obligated to defend or indemnify Grier for the incident on 12 September 2000. As such, we affirm the judgment of the trial court.

Affirmed.

Judges WYNN and McCULLOUGH concur.

SANDY R. TOWNS, EMPLOYEE v. EPES TRANSPORTATION, EMPLOYER, SELF INSURED, KEMPER RISK MANAGEMENT, SERVICING AGENT, DEFENDANT

No. COA03-527

(Filed 6 April 2004)

Workers' Compensation— disability—causation—evidence sufficient

There was sufficient evidence of causation to justify an award of temporary total disability where plaintiff suffered two neck injuries at home and then one at work within a short span of time, but the first two left her with a stiff neck and did not interfere with her ability to work while the last, at work, resulted in pain said to be indescribable and a trip to the emergency room with fears of a heart attack, symptoms consistent with ruptured discs.

Appeal by defendant from opinion and award filed 27 January 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 February 2004.

Charles Peed and Associates, PA, by Charles O. Peed, for plaintiff-appellee.

Tuggle, Duggins & Meschan, P.A., by Jospeh F. Brotherton and Steven P. Weaver, for defendant-appellant.

BRYANT, Judge.

Epes Transportation (Epes) and its servicing agent Kemper Risk Management (collectively defendants) appeal an opinion and award filed 27 January 2003 by the North Carolina Industrial Commission (the Commission) awarding temporary total disability compensation to Sandy R. Towns (plaintiff).

At the hearing before the Commission, plaintiff testified she had worked for Epes as a local truck driver since April 1998. Her job involved driving eighteen-wheelers back and forth between Greensboro and Winston-Salem, North Carolina. Upon arrival at her destination, plaintiff's duties included rolling down the truck's landing gear. This manoeuver required plaintiff to position herself between the truck and the trailer to disconnect the air lines, the fifth-wheel pin, and the pigtail. In order to disconnect the fifth-wheel pin, plaintiff "had to use both hands and . . . pull really hard to get it to pull

out and lock." The mechanism for the fifth-wheel pin varied per truck, and the level of difficulty in getting the pin to release increased if the trailer was not level.

On 24 August 1998, plaintiff injured herself at home while trying to avoid stepping on her dog. Plaintiff saw a doctor the next day, who diagnosed her with a pulled rotary cuff in her right arm and prescribed a muscle relaxant for the tightness in her neck. On 1 September 1998, plaintiff again injured herself at home when her bed collapsed while she was lying on it. Although plaintiff's neck felt stiff the next morning, it was no worse than after her previous injury. Plaintiff went to work as usual and did not require a doctor.

At work on 2 September 1998, after "dropping" her fourth trailer of the day, plaintiff was "trying to get the fifth-wheel pin to release." She was on her "third pull," giving "it everything [she] had," when she suddenly "thought someone had stabbed [her] in the neck." She felt an indescribable pain. Her arms went numb, and her knees were in extreme pain. Plaintiff notified her dispatcher that she had injured herself while "trying to drop a trailer" and needed to see a doctor. She then telephoned her fiancé, who took her to the doctor. Within days of the incident at work, plaintiff was diagnosed with two ruptured discs in her neck, requiring two surgeries. From 24 August 1998 until plaintiff sustained her work injuries on 2 September 1998, plaintiff had been able to perform her job duties. Following the incident at work on September 2, plaintiff could no longer work.

When plaintiff initially sought medical help after the 2 September 1998 incident, she explained "everything that [she] had went [sic] through," ranging back to her August 24 accident. Plaintiff told the physician's assistant who initially examined her that she thought her injury stemmed from her attempt to release the fifth-wheel pin and described the pain she had felt at that time. The physician's assistant, however, "led [her] to believe that it was the bed falling" that had caused her injury.[1] Plaintiff was later referred to Dr. Louis Pikula, Jr., a neurosurgeon, who performed the first surgery on plaintiff's neck. At the time of plaintiff's second operation, Dr. Pikula had retired and plaintiff was in treatment with Dr. William R. Brown, Jr. On 13 September 2000, Dr. Brown wrote a "To Whom It May Concern" letter with regard to plaintiff's injury, stating:

> This patient has been under my care for some time. She returns today with clarification of the onset of her illness. The patient

1. Defendants did not object to this testimony.

> states that on 09/01/98 while at home, she had a bed fall on her neck. This produced the immediate onset of neck pain. The next day, she was able to go to work; however, when she was pulling a fifth-wheel pin, she had the sudden onset of increased pain in her neck and numbness in both hands. It was after that she saw Dr. Pikula. Dr. Pikula worked the patient up and found that she had a cervical disc and she subsequently underwent surgery.
>
> It is my opinion that this patient's present problem of neck pain and her surgeries, both by Dr. Pikula in November 1998 and myself in June 1999, were both the result of this injury that she sustained at work.

Plaintiff testified that the letter conformed to her conversations with Dr. Brown on the cause of her neck injury after she had informed him of the incidents involving her dog, the collapsing bed, and the dropping of the trailer.

Dr. Pikula's deposition testimony reveals that he performed surgery on plaintiff's neck on 17 November 1998 to relieve neck and arm pain she was experiencing due to a ruptured disc at C5-6 and C6-7. Dr. Pikula testified "any type of pressure or any type of movement can give you a ruptured disc." Therefore, Dr. Pikula did not know what caused plaintiff's injury. Dr. Pikula stated plaintiff's disc rupture could have been caused by the incident involving plaintiff's dog, the collapsing bed, or the fifth-wheel pin but could not be pinpointed to one specific event absent serial x-rays showing a ruptured disc at one point in time as opposed to another. Dr. Pikula only recalled plaintiff telling him about the bed collapse when plaintiff saw him on 15 September 1998, but added that she had also informed him of returning to work the next day where she had "picked up a paper tin, or . . . something doing [sic] with her truck, and she [had] turned her head and developed pain in her neck at this time." When asked if it were possible that an error had occurred during the dictation of his medical notes resulting in the transcription of "picked up empty paper tin" instead of "pulled fifth-wheel pin," Dr. Pikula responded he did not know because two years had passed since the medical notes were transcribed.

Dr. Brown's deposition testimony tends to show that plaintiff was referred to him with neck pain and pain in both arms in May 1999. Plaintiff told Dr. Brown "her injury had begun after a bed fell on her neck in September [1998]." Because plaintiff complained of worsening symptoms, Dr. Brown obtained a new set of x-rays and performed

a cervical MRI scan of her neck, revealing that level C5-6 had not fused satisfactorily. After Dr. Brown operated on plaintiff to attempt another fusion, her symptoms initially subsided but eventually returned. Based on Dr. Brown's recommendation, plaintiff did not return to work.

At the deposition, Dr. Brown was shown the "To Whom It May Concern" letter he had authored and was asked if he recalled the underlying conversation with plaintiff mentioned in the letter. Dr. Brown responded he did not remember the conversation. When asked what he did remember about the etiology of plaintiff's neck injury, Dr. Brown testified:

> that she first sustained an injury in bed, that the symptoms from this seem to abate, that she is able to return to work, and that the following day she sustained an injury while at work where she was pulling on part of the machinery of her truck and had an episode of neck and arm pain that subsequently brought her to the attention of Dr. Pikula and her first operation.

Dr. Brown expressed the opinion plaintiff "sustained an injury to her neck as a result [of] the lifting of the machinery or what she refers to as her fifth wheel that caused her to have the surgery." Dr. Brown explained his opinion was based not only on the conversation he had with plaintiff leading to the "To Whom It May Concern" letter but on:

> the fact that the patient was able to get up and go to work, that the amount of pain that she had prior to the injury lifting the fifth wheel was not significant enough for her to stop what she was doing, but once she did injure herself, the degree of pain was.

Dr. Brown further testified that plaintiff's symptoms, experienced only after she attempted to pull the fifth-wheel pin, of the sudden onset of pain, numbness, tingling in the musculature, and a mistaken belief of experiencing a heart attack, were consistent with symptoms experienced by people with a ruptured disc. Plaintiff's medical records reveal that she reported to the emergency room on 2 September 1998 with these symptoms and concerns of experiencing a cardiac episode.

In its 27 January 2003 opinion and award, the Commission found in pertinent part:

> Defendant[s] ha[ve] denied [plaintiff's] claim on the basis that the neck condition for which plaintiff was treated was not due to her injury at work but was due to the bed collapsing. It appears that plaintiff did have three neck injuries within a short period of time, including an injury at work which caused the most severe symptoms. She reported her injury at work immediately and sought medical treatment right away. Although there was some misunderstanding by the medical providers regarding what was involved in disconnecting her trailer, her histories were reasonably consistent during the first month. Although she did try to turn the focus towards the bed incident . . . , it was the injury at work which caused her to seek medical treatment due to the severity of the symptoms associated with that final injury.

The Commission concluded plaintiff had sustained an injury by accident arising out of and in the course of her employment and awarded compensation for plaintiff's temporary total disability and medical expenses.

The dispositive issue is whether plaintiff presented sufficient evidence of causation.

For an injury to be compensable under the Workers' Compensation Act, it must be proximately caused by an "accident arising out of and in the course of the employment." N.C.G.S. § 97-2(6) (2003). There must be competent evidence to support the inference that the accident in question caused the injury complained of, i.e. "some evidence that the accident at least might have or could have produced the particular disability in question." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "The quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself." *Id.* There will be "many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of." *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965). Where, however, "the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click*, 300 N.C. at 167, 265 S.E.2d at 391.

Defendants in this case contend that because Dr. Brown could not recall the conversation with plaintiff that prompted him to write his causation opinion in the "To Whom It May Concern" letter, his opinion on the issue of causation was based on mere speculation and conjecture and therefore did not qualify as competent evidence. *See Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000) ("when . . . expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation"). As Dr. Brown testified that he also based his causation opinion on the symptoms experienced by plaintiff while attempting to pull the fifth-wheel pin, defendants' argument is without merit. There was competent evidence in the record, based on plaintiff's testimony and her medical records, that plaintiff's August 24 and September 1 injuries left her with only a stiff neck and did not interfere with her ability to work. It was on 2 September 1998 that plaintiff experienced a stabbing pain in her neck and numbness in her arms. Plaintiff testified the pain was indescribable and reported to the emergency room with fears of suffering a heart attack. Dr. Brown testified at his deposition that the symptoms experienced by plaintiff (the sudden onset of pain, numbness, tingling in the musculature, and a mistaken belief of experiencing a heart attack) are consistent with symptoms experienced by people with a ruptured disc. Because these symptoms did not occur until plaintiff worked on her truck on September 2, Dr. Brown concluded that the work incident caused her injury.

Accordingly, there was sufficient expert medical testimony on the issue of causation justifying the Commission's findings and its ultimate conclusion of a work-related accident.

Affirmed.

Judges TIMMONS-GOODSON and ELMORE concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. DONALD WILLIS AND TELENA GAY WILLIS, DEFENDANTS

No. COA03-681

(Filed 6 April 2004)

Easements— restriction in State's deed—access to oceanfront—walkway

The trial court did not err by granting summary judgment in favor of the State requiring defendants to remove an elevated walkway on the State's property used to access the oceanfront south of their property, because: (1) defendants point to no language within their own deed that either expressly or impliedly grants an easement to defendants or evidences an attempt by the parties to create an easement; (2) a restriction in the State's deed stating that the State "will perform no act in management which would prevent access to the oceanfront by the residents of the village of Salter Path in particular and the public in general" does not translate into an easement grant in favor of defendants or any other third party; (3) defendants presented no evidence that shows the State has prevented access to the oceanfront by defendants, the residents of the pertinent community, or the public in general; (4) the State is properly attempting to avoid significant damage to the property; (5) contrary to defendants' assertion, any rights they may have had in or to the property involved in the Salter Path judgment were terminated by the 1979 judgment and the subsequent transfer of the property from the grantors to defendants; and (6) even though defendants maintain that the walkway is reasonable, the State's complaint concerns the legality of the walkway's construction.

Appeal by defendants from order entered 25 April 2003 by Judge Russell J. Lanier, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 1 March 2004.

Attorney General Roy Cooper, by Assistant Attorney General J. Douglas Hill, for the State.

C.R. Wheatly, III, for defendant-appellants.

TIMMONS-GOODSON, Judge.

Donald Willis and Telena Gay Willis ("defendants") appeal the trial court's order granting summary judgment in favor of the State of

North Carolina ("the State"). For the reasons stated herein, we affirm the trial court's order.

The facts and procedural history are as follows: Salter Path is a community located on Bogue Banks, Carteret County, a small strip of land separating Bogue Sound and the Atlantic Ocean. In 1923, the owner of much of Salter Path, Alice Hoffman, brought suit against a large number of individuals living on her land and utilizing it as their own. In June of 1923, the Carteret County Superior Court issued an order defining the boundaries of the Salter Path community and granting rights to the defendants in the action to further utilize the property ("Salter Path Judgment"). The defendants in the Salter Path Judgment were allowed to continue to live and utilize the property subject to the judgment, and they passed their rights to subsequent heirs, successors, and assignees. Alice Hoffman's interest in the property descended to Cornelius Van Schaak Roosevelt, Theodore and Anne Roosevelt, and their heirs ("the Roosevelts").

In May 1979, Carteret County attempted to establish title in the descendants of the Salter Path Judgment in order to levy tax liability on the individuals claiming and possessing the land. In a case captioned *County of Carteret v. Janice Lewis Austin, et al,* (75 CVS 236), the Superior Court of Carteret County denied title to the descendants of the defendants in the Salter Path Judgment, granted title to the Roosevelts, and authorized Carteret County to file a tax lien on the ad valorem taxes due on the land. In subsequent transactions, the Roosevelts gave deeds deemed transferable by the court to many of the individuals occupying portions of their land.

Defendants occupied land involved in the Salter Path Judgment since 1978. On 1 June 1979, two days after the 1979 Judgment had been entered, the Roosevelts executed a Deed of Conveyance granting a portion of the land to defendants. The Roosevelts deeded the remaining portion of the land, most of which was oceanfront, to the State on 3 June 1980. It consists of approximately 22.5 acres and is commonly known as The Roosevelt Nature Preserve ("Preserve").

The Preserve adjoins the southern border of approximately 24 other parcels, including the one owned by defendants. In order to reach the oceanfront, defendants follow a path over the spiny pear pads and vines growing in the Preserve. To avoid the prickly pads, defendants laid down a wooden walkway across the path to the beach. In 1998, after the vines and pear pads had grown through the

wooden walkway, defendants constructed an elevated walkway adjacent to it.

On 30 July 2001, the State filed this action against defendants, alleging that defendants trespassed on the State's property by constructing and using the elevated walkway. The State sought a mandatory injunction ordering defendants to remove the walkway, and a permanent injunction to restrain defendants from further trespass upon its property. The State also sought to remove the cloud upon its title and to be declared the owner in fee simple of the property, free and clear of any adverse claim of defendants.

On 27 January 2003, the State filed a motion for summary judgment. In support of its motion, the State presented evidence of its ownership of the Preserve by virtue of the 1980 Deed of Gift. It also presented the affidavits of Timothy G. Walton, a Real Property Agent employed by the State, and James T. Barnes, Jr., Director of the North Carolina Aquarium at Pine Knoll Shores. These affidavits identified the property as belonging to the State, and detailed the State's management of the lands since 1980. In response to the State's motion, defendants relied upon their answer as well as two similarly worded affidavits. In these materials, defendants argued that they are entitled to use the property pursuant to the Salter Path Judgment, which they claim created an easement right on the property for the defendants in that action as well as their descendants.

On 11 April 2003, the trial court granted the State's motion for summary judgment. The trial court determined the State was the owner in fee simple of the property, free of any and all rights, claims, or interests of defendants, and the trial court ordered defendants to remove the elevated walkway and permanently enjoined defendants from further construction on the State's property. From this order, defendants appeal.

The only issue on appeal is whether the trial court erred in granting the State's motion for summary judgment. Defendants assert that, as a result of the Salter Path Judgment and the 1979 Judgment, they possess a vested easement to access the oceanfront south of their property, and a right to construct a walkway to do so. We disagree.

Summary judgment is deemed appropriate where:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there

> is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). On appeal, we view the relevant evidence in the light most favorable to the nonmoving party. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). Viewing the evidence before us in the light most favorable to defendants, we conclude that no issue of material fact exists in the case, and that the State is entitled to judgment as a matter of law.

It is important at the outset to note that both the State and defendants received their deeds of title from the same grantors—the Roosevelts. A Deed of Conveyance from the Roosevelts to defendants was duly recorded in Book 427, Page 80 of the Carteret County Public Registry on 12 June 1979, while a Deed of Gift from the Roosevelts to the State was duly recorded in Book 439, Page 335 of the Carteret County Public Registry on 4 June 1980. Defendants point to no language within their own deed that either expressly or impliedly grants an easement to defendants or evidences an attempt by the parties to create an easement. Instead, defendants rely on an expressed restriction on the State's Deed to create their right to construct a walkway over the property. Paragraph 1 of the Deed states:

> 1. The Grantee, its successors and assigns, will perform no act in management which would prevent access to the oceanfront by the residents of the village of Salter Path in particular and the public in general.

We fail to see how this restriction on the State's use of its property translates into an easement grant in favor of defendants or any other third party. Furthermore, defendants presented no evidence in their answer, affidavits, discovery responses or affidavits that shows the State has in fact prevented access to the oceanfront by defendants, the residents of Salter Path, or the public in general. Instead, defendants presented detailed evidence of the various other public access points and walkways across the Preserve that were constructed by the State and available to the public.

Assuming arguendo that an absolute access grant in favor of the public or defendants was created, we fail to see how the State has violated its duty under the grant. Paragraphs 3 and 4 of the Deed state:

> 3. The property shall be made available primarily for the purpose of scientific study and research, and secondarily for recreational

purposes, but provided that these activities shall be conducted in such a fashion as to avoid significant damage to the topography or the flora and fauna of the property.

4. Erection of structures, parking areas, pedestrian walkways, or other alterations shall be limited to those buildings or facilities which may be required to effectuate the purposes set out herein, and shall be so designed as to give primary consideration to maintenance of the property in its natural state.

By limiting the number of walkways constructed over the Preserve to those it constructs, the State is not preventing public or private access to the oceanfront or the Preserve—the State is merely attempting to "avoid significant damage to the topography or the flora and fauna of the property" by giving "primary consideration to maintenance of the property in its natural state."

Defendants argue alternatively that the Salter Path Judgment granted them an easement right over the State's property. The Salter Path Judgment stated that the "named defendants, and each of them and their decendants [sic] under them, may . . . use, occupy and enjoy all that certain strip or tract of land, now termed Salter Path." Defendants argue that as direct descendants of the defendants of the Salter Path Judgment, they are entitled to use, occupy and enjoy the property now possessed by the State. We disagree.

As defendants point out, in 1979, Carteret County brought suit against the descendants of the Salter Path Judgment. In the 1979 Judgment, Judge Robert D. Rouse, Jr., established title in as well as tax liability upon the descendants of the Salter Path Judgment. The Roosevelts, the Grantors from whom both the State and defendants took their property, were found to be proper descendants of the judgment and were named as defendants in the declaratory judgment. Before ordering a tax lien upon the defendants, Judge Robert D. Rouse, Jr., made the following conclusion of law:

5. The consent provision of the Salter Path Judgment vesting possessory and use interests in the descendants of the original defendants is void as an unreasonable restraint on alienation of property.

This judgment was filed on 30 May 1979, and was referenced in the Deed of Conveyance the Roosevelts executed to defendants two days later. There is no evidence of any appeal of the conclusions of law or orders made in this judgment. Therefore, if defendants did have any

rights in or to the property involved in the Salter Path Judgment, those rights were terminated by the 1979 Judgment and the subsequent transfer of the property from the Roosevelts to defendants.

Finally, defendants argue in their brief that the elevated walkway they constructed is consistent with the rules set forth in Title 15A, Subchapter 7H of the North Carolina Administrative Code (2003). Defendants maintain that the walkway is reasonable because it meets the requirements of the Code and is similar to those built near their property. However, the State's complaint against defendants does not concern the reasonableness of their walkway. Instead, as discussed above, the complaint concerns the legality of the walkway's construction.

The evidence presented in the parties' pleadings, answers to interrogatories, admissions on file, and affidavits shows that no genuine issue as to any material fact exists regarding defendants' right to construct and to use the elevated walkway. Plaintiffs are thus entitled to judgment as a matter of law. Therefore, we hold that the trial court did not err in granting summary judgment for the State.

Affirmed.

Chief Judge MARTIN and Judge LEVINSON concur.

MAXINE ELLIOTT, PLAINTIFF v. ESTATE OF GARNET DOUGLAS ELLIOTT, JR., MAXINE JAYNE ELLIOTT, EXECUTRIX, DEFENDANT

No. COA03-775

(Filed 6 April 2004)

1. Trials— dismissal—findings

The trial court did not err by not making findings when dismissing a plaintiff's action where there was no request for findings. N.C.G.S. § 1A-1, Rule 52(a)(2).

2. Statutes of Limitation and Repose— past-due alimony—foreign order—N.C. statute of limitation—periodic sum

A plaintiff seeking past-due alimony, a periodic sum, was barred from seeking sums accruing more than 10 years before the action began. Although this was a California order, statutes

of limitation are procedural and the 10 year limitation of N.C.G.S. § 1-47 applied.

3. Statutes of Limitation and Repose— estates—rejection of claim and offer of settlement

The statute of limitation for claims against estates did not apply where the rejection of the claim was not absolute and unequivocal. N.C.G.S. § 28A-19-16.

4. Laches— spousal support—continual obligation

The doctrine of laches is inapplicable to an action for the continuing obligation of spousal support.

Appeal by plaintiff from judgment entered 28 February 2003 by Judge Jack Jenkins in Brunswick County Superior Court. Heard in the Court of Appeals 4 March 2004.

Gary S. Lawrence, for plaintiff-appellant.

Roger Lee Edwards, P.A., by Roger Lee Edwards, for defendant-appellee.

CALABRIA, Judge.

Maxine Elliott ("plaintiff") filed suit against the estate of her former husband ("defendant") alleging the estate improperly refused to pay her claim for past due alimony. Defendant filed a motion to dismiss arguing plaintiff's claim was barred by the ninety-day statute of limitations pursuant to N.C. Gen. Stat. § 28A-19-16, the ten-year statute of limitations for foreign judgments under N.C. Gen. Stat. § 1-47, and by laches. The trial court granted defendant's motion and plaintiff appealed. We find the court erred and reverse the judgment of the court dismissing plaintiff's action.

In 1979, plaintiff and Garnett Douglas Elliott, Jr. ("Mr. Elliott") were divorced and the Superior Court of California issued a judgment ordering Mr. Elliot to pay alimony in the amount of one-thousand dollars per month. Mr. Elliott ceased making payments in January 1989. Plaintiff was unable to locate Mr. Elliott until February 2000, when a private investigator she hired found him residing in North Carolina. On 14 March 2000, plaintiff's attorney sent Mr. Elliott a letter demanding payment for the past-due alimony and interest. Mr. Elliott did not respond and plaintiff took no further legal action. On 10 December 2001, Mr. Elliott died in Brunswick County, North Carolina.

On 29 April 2002, plaintiff filed a Notice of Claim against her former husband's estate asserting her right to unpaid alimony. On 7 June 2002, the executrix of the estate responded by filing a "Rejection of Claim" on the ground that plaintiff's claim was barred by laches and the statute of limitations for foreign judgments. The "Rejection of Claim" was served on plaintiff and was accompanied by a letter which offered plaintiff "$1,000.00 as a full and final payment of any claim that she may have" and asked plaintiff's attorney to "convey our offer to your client and advise me of her response or counteroffer." Plaintiff did not respond, and, on 28 October 2002, filed the present action. Plaintiff appeals the trial court's judgment granting defendant's motion to dismiss.

[1] Plaintiff's first assignment of error asserts the trial court failed to find facts and conclusions of law as required by Rule 52 of the North Carolina Rules of Civil Procedure. Indeed, the controlling rule regarding involuntary dismissals provides: "[i]f the court renders judgment on the merits [pursuant to a motion to dismiss] against the plaintiff, the court shall make findings as provided in Rule 52(a)." N.C. Gen. Stat. § 1A-1, Rule 41(b) (2003). Accordingly, we turn to Rule 52 which provides, in relevant part, that "[f]indings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b)." N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2003). Since Rule 52(a)(2) clearly requires the judge to make findings only following a request from a party, and the record does not reveal any such request, we overrule plaintiff's first assignment of error. *See* N.C.R. App. P. 10(a), 28(b)(6) (2004) (appellate review is limited to the assignments of error which must reference the evidence within the record on appeal, transcripts or exhibits). Accordingly, we consider whether the trial court's judgment is valid under any of the theories proffered.

[2] Before reaching the merits, however, we must note that the judgment plaintiff seeks to enforce was entered in California and we are bound to apply the Full Faith and Credit Clause of the United States Constitution. *Boyles v. Boyles*, 308 N.C. 488, 490, 302 S.E.2d 790, 793 (1983); U.S. Const. art. IV, § 1. The Full Faith and Credit Clause requires that " 'the judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced.' " *Boyles*, 308 N.C. at 490, 302 S.E.2d at 792-93 (citation omitted). Accordingly, when our courts are presented with a judgment from a foreign jurisdiction, we look to the substantive laws of that jurisdiction to guide our deci-

sions. *See Marketing Systems v. Realty Co.*, 277 N.C. 230, 234, 176 S.E.2d 775, 777 (1970).

The first issue presented is the effect of the statute of limitations controlling foreign judgments. We note that although California law controls our substantive determinations, with respect to statutes of limitations:

> '[i]t has long been established that the enforcement of a judgment of a sister state may be barred by application of the statute of limitations of the forum state. Application of the forum's statute of limitations entails no violation of the full faith and credit clause of the Constitution since such statutes are deemed to affect procedure only and not the substance of the action.'

Wener v. Perrone & Cramer Realty, Inc., 137 N.C. App. 362, 364, 528 S.E.2d 65, 67 (2000) (quotation marks and citation omitted) (applying North Carolina statute of limitations to a Florida judgment). North Carolina imposes a ten-year statute of limitations upon the enforcement of a judgment or decree of any court of the United States. N.C. Gen. Stat. § 1-47 (2003). Moreover, our Court, in an action to recover periodic sums of alimony and child support, interpreted the statute to bar only those sums which became due more than ten years before the institution of the action. *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977). Although defendant seeks to distinguish *Lindsey* on the basis that it involved a North Carolina, rather than a foreign judgment, we find this distinction has no basis in either the plain language of the statute or the spirit of the case. Accordingly, plaintiff is only entitled to recover those sums accruing after 28 October 1992 because this action was not commenced until 28 October 2002.

[3] The next issue presented is whether plaintiff's action is barred by the statute of limitations for presentation of a claim against a decedent's estate pursuant to N.C. Gen. Stat. § 28A-19-16. The statute provides:

> [i]f a claim is presented to and rejected by the personal representative or collector, and not referred as provided in G.S. 28A-19-15, the claimant must, within three months, after due notice in writing of such rejection, or after some part of the claim becomes due, commence an action for the recovery thereof, or be forever barred from maintaining an action thereon.

N.C. Gen. Stat. § 28A-19-16 (2003). Moreover, since the purpose of this statute "is to expedite the administration and settlement of estates" our Supreme Court has held that it "must be enforced in accordance with the plain meaning of its terms." *Rutherford v. Harbison*, 254 N.C. 236, 238, 118 S.E.2d 540, 542 (1961) (analyzing the former N.C. Gen. Stat. § 28-112, presently N.C. Gen. Stat. § 28A-19-16). However, *Rutherford* cautioned that in order to trigger the statute of limitations "it is necessary that there be a rejection of the claim and that the rejection be absolute and unequivocal. An administrator may not claim the benefit of the bar of the statute when the rejection leaves the matter open for further negotiation or adjustment." *Id.*, 254 N.C. at 239, 118 S.E.2d at 542.

Plaintiff asserts that although defendant rejected her claim, the rejection was not "absolute and unequivocal" as required by North Carolina law. In *Rutherford*, correspondence from the attorney for the estate to the plaintiff's attorney stated the claim was "excessive" and invited further discussion about the claims. *Id.*, 254 N.C. at 239, 118 S.E.2d at 543. Therefore, the Court reasoned that the plaintiff "probably inferred . . . that the claim was rejected only as to amount" and implied further negotiations could "result in . . . settlement of the claim in some amount." *Id.* Similarly, in the case at bar, the estate wrote to plaintiff stating the claim was rejected but offered one thousand dollars in settlement "of any claim that [plaintiff] may have" and invited a "response or counter-offer, if any, at [plaintiff's] earliest convenience." The letter was accompanied by a "Rejection of Claim" form, that had been filed with the court, which stated that plaintiff's claim was rejected. However, we find that since the "Rejection of Claim" form was accompanied by a letter inviting negotiations, plaintiff, as the plaintiff in *Rutherford,* could have reasonably inferred "that negotiations [were] in order and . . . a discussion might result in allowance and settlement of the claim in some amount." *Id.* We hold accordingly, finding defendant failed to absolutely and unequivocally reject plaintiff's claim and the statute of limitations contained in N.C. Gen. Stat. § 28A-19-16 does not bar this action.

[4] Finally, defendant asserts that plaintiff's claim is barred by laches. As we have previously explained, the substantive law of the foreign state guides our actions. *Marketing Systems*, 277 N.C. at 234, 176 S.E.2d at 777. However, the application of laches, like a statute of limitations, is a matter of procedural rather than substantive law. Indeed, our Court has followed this general rule and applied North Carolina's law on laches to the enforcement of judgments from for-

eign jurisdictions. *Larsen v. Sedberry*, 54 N.C. App. 166, 282 S.E.2d 551 (1981). Therefore, we analyze the issue of laches in accordance with North Carolina law.

In North Carolina, although our courts have recognized laches as a valid defense in various types of proceedings, we have never allowed the defense of laches in an action seeking the enforcement of a court order for alimony or support. 2 Lee's North Carolina Family Law, § 11.50 (5th ed. 1999). Moreover, our Court has considered whether to apply laches to actions for the enforcement of child and spousal support, and has chosen not to do so. *Larsen*, 54 N.C. App. at 168, 282 S.E.2d at 552 (1981). In *Larsen*, the Court distinguished those types of actions where we have permitted laches from cases such as the one at bar. Since *Larsen* is controlling, we hold the doctrine of laches inapplicable to actions for the continuing obligation of spousal support.

In summary, we hold that the trial court erred by dismissing plaintiff's action. Although plaintiff may only seek recovery of those arrearages accruing within the ten years prior to her filing this action, her claim is not barred by N.C. Gen. Stat. § 28A-19-16 nor by the defense of laches. The judgment of the court is affirmed as to those payments due prior to ten years before the filing of this action and is otherwise reversed. The cause is remanded for further proceedings consistent with this opinion.

Affirmed in part, reversed and remanded in part.

Judges McGEE and STEELMAN concur.

MARTHA HORNE, PLAINTIFF v. TIMBER HILL HOLDINGS; CLIFTON DOTTER, LATROBE, LTD., BARBARA A. CONE, MORTON & OXLEY, LTD., TRUSTEE, DEFENDANTS

No. COA03-504

(Filed 6 April 2004)

Trusts— dissolution—consent—necessity or expediency

The trial court erred by dissolving the pertinent trust, because: (1) the parties did not consent to dissolution of the trust; and (2) dissolution was neither necessary nor expedient when its purpose can still be fulfilled.

Appeal by defendant Barbara A. Cone from an order and final judgment entered 5 July 2002 by Judge James U. Downs in Macon County Superior Court. Heard in the Court of Appeals 28 January 2004.

Jones, Key, Melvin & Patton, P.A., by R. S. Jones, Jr., for plaintiff-appellee.

Philo & Spivey, P.A., by David C. Spivey, for defendant-appellant Barbara A. Cone.

HUNTER, Judge.

Barbara A. Cone ("Cone") appeals an order and final judgment dissolving a trust of which she and Martha Horne ("Horne") were the sole beneficiaries. Having concluded that the parties did not consent to dissolution of the trust or that such dissolution was neither necessary nor expedient, we reverse.

Horne and her former husband, Clifton Dotter ("Dotter"), established a common law business trust organization on or about 29 January 1990 entitled Timber Hill Holdings. The trust was to continue for twenty years; however, the Board of Trustees were allowed to terminate it earlier if "(1) any condition or circumstance . . . threaten[ed] the value or corpus of the [trust]; (2) or any reason determined by the Board of Trustees to be good cause." Horne and Dotter were the sole beneficiaries of the trust, and they both were issued fifty capital units of the trust, the total number of capital units authorized and issued being one hundred. Horne and Dotter subsequently conveyed a four-acre tract of land ("the property") that they had previously acquired in Macon County to the trust by deed dated 1 February 1990. The property constituted the sole asset of the trust.

Horne and Dotter divorced in March of 1993. In January of 1999, Dotter transferred his fifty capital units of the trust to Cone. Around that time, Horne became dissatisfied with the administration of the trust and sought its dissolution by complaint filed 2 May 2000. Specifically, Horne alleged that the trustee of the trust (LaTrobe, Ltd. and its successor, Morton & Oxley, Ltd.) failed to take an active part in the management of the trust, failed to pay real property ad valorem taxes to Macon County on the property, and allowed the trust assets to "lie fallow to the great harm and detriment of the Plaintiff." Thus, Horne prayed that the trust "be terminated and its assets distributed in kind to the unit holders in proportion to their ownership interest."

The matter, deemed to be an action in equity, was heard by the trial court without a jury on 24 June 2002. Based on the evidence offered at trial, the court found that the express purpose of the trust was to insulate the couple's "assets from being seized as a result of some potential judgment or other obligation[.]" However, the trial court further found, *inter alia*:

> That the purposes for which the Trust was originally established no longer exist[ed] in that: (a) the beneficiaries are no longer married to each other, (b) except for the real property that is the sole asset of this Trust, the original beneficiaries have no common interest in any property, and (c) that further one of the beneficiaries has conveyed his interest in the Trust to a lady-friend who happens to be Barbara A. Cone.

Thus, in an order filed 5 July 2002, the court concluded that the trust be "revoked, annulled and dissolved." Cone and Horne were declared "to be tenants in common of all assets of the Trust, specifically including the four acre (4-acre) more or less tract of land described in the deed . . . , each owning an undivided one-half interest therein, without any restrains or prohibitions imposed upon them by the terms of the Trust." Cone appeals.

I.

Cone argues the trial court erred in dissolving the trust because such dissolution was not necessary or expedient, or consented to by all interested parties. We agree.

"[A] court of equity has the power by consent of the interested parties . . . to close a trust and distribute the assets thereof sooner than was contemplated by the trustor[.]" *Trust Co. v. Laws*, 217 N.C. 171, 172, 7 S.E.2d 470, 470 (1940). *See also Cassada v. Cassada*, 103 N.C. App. 129, 137, 404 S.E.2d 491, 495 (1991) ("a trust may be voluntarily terminated by act or agreement of all the beneficiaries"). When there is a lack of consent as to the continuation of a trust,

> ordinarily a court of equity has the power to do what is necessary to be done to preserve a trust from destruction, and in the exercise of that power may, under certain unusual circumstances, modify the terms of the trust to that end, [but] such court has not the power to defeat and destroy the trust.

Duffy v. Duffy, 221 N.C. 521, 528, 20 S.E.2d 835, 839 (1942). However:

> "A court of equity may have the power to terminate a trust and distribute the trust property prior to the happening of the contingency prescribed by the trustor, but only when such action is necessary or expedient." "[T]he condition or emergency asserted must be one not contemplated by the testator and which, had it been anticipated, would undoubtedly have been provided for[.]"

Moore v. Trust Co., 24 N.C. App. 675, 677, 212 S.E.2d 170, 171 (1975) (citations omitted).

By the very nature of this action, it is clear that Horne and Cone did not consent to dissolution of the trust. There was also no evidence that Horne sought the trust's dissolution pursuant to the termination provisions set forth in the trust. Therefore, we must determine whether the trial court's dissolution was necessary or expedient. Horne essentially argues that dissolution of the trust was necessary or expedient because the value of the property would likely erode as a result of she and Cone being unable to reach a viable arrangement regarding the administration of the trust. She contends that the lack of such an arrangement (due in part to their strained relationship) would prevent the purpose of the trust from being fulfilled, i.e., protection of the trust assets.

In *Moore*, this Court addressed a similar argument whereby a plaintiff/beneficiary sought the termination of a trust because she was dissatisfied with the benefits and administration of that trust. We held as follows:

> Although plaintiff's challenge stems from her dissatisfaction with the consideration and benefits of the trust, and with the administration of the trust, we cannot say that these are conditions or emergencies which were not contemplated by the testator. Trusts will not be modified on technical objections merely because interested parties' welfare will be served thereby. Furthermore, the grandchildren of the testor [sic] have, under the terms of the will, an expectancy in the marital trust. As interested parties, the trust cannot be terminated without their consent. "It is not the province of the courts to substitute their judgment or the wishes of the beneficiaries for the judgment and wishes of the testator. The controlling objective is to preserve the trust and effectuate the primary purpose of the testator." The trial court's entry of judgment dismissing the action was correct.

Id. at 677, 212 S.E.2d at 171 (citations omitted).

The purpose of the trust in the instant case was to insulate the trust assets "from being seized as a result of some potential judgment or other obligation[.]" The trial court subsequently dissolved the trust after concluding that the divorce of Horne and Dotter, as well as Dotter transferring his interests in the trust to Cone, was contrary to that original purpose. Yet, there was no evidence, and the trial court did not find, that the continuation of the trust was contingent (1) on the continued marriage of the original beneficiaries, or (2) on either beneficiary agreeing not to transfer some or all of his/her capital units in the trust to another. Without more, all we have is Horne's dissatisfaction with the administration of the trust, which merely amounted to "technical objections" that could have occurred even if she and Dotter had remained the beneficiaries of the trust and regardless of their marital status. As stated previously, "[t]rusts will not be modified on *technical objections* merely because interested parties' welfare will be served thereby." *Id.* (emphasis added). Thus, like the *Moore* Court, we cannot conclude the trial court's reasons for dissolving the trust were not contemplated and/or anticipated when the trust was formed.

Finally, we note that our Supreme Court has recognized that the dissolution of a trust may occur when there is change in conditions regarding the trust parties that was not anticipated by the trustor. Specifically, in *Trust Co. v. Johnston*, 269 N.C. 701, 153 S.E.2d 449 (1967), the Supreme Court stated:

> "Sometimes a settlor gives instructions in the trust instrument with regard to the administration of the trust which turn out to be highly disadvantageous and obstruct the trustee in carrying out the purposes which the settlor expressed. These difficulties are usually due to a change in conditions regarding the trust property or *parties* which have occurred since the trust was established and were not anticipated by the trustor . . . ."

Id. at 708, 153 S.E.2d at 455 (citation omitted) (emphasis added). However, unlike *Johnston*, the present case involved a change in the trust parties and not the trust property. Moreover, the trial court's findings of fact in the instant case do not indicate that the trust administrative instructions themselves are now highly disadvantageous and obstruct protection of the trust assets as a result of that change. Therefore, there is no change of conditions that necessitate the trust being dissolved pursuant to the rule set out in *Johnston*.

Accordingly, in light of a lack of consent between Horne and Cone, as well as dissolution of the trust being neither necessary nor expedient because its purpose can still be fulfilled, we conclude the trial court erred. *See* 90 C.J.S. *Trusts* § 118 (2002) (recognizing that some jurisdictions allow the dissolution of a trust when the purpose of that trust is impossible to fulfill). Based on this conclusion, we need not address Horne's second assignment of error.

Reversed.

Judges McCULLOUGH and LEVINSON concur.

STATE OF NORTH CAROLINA v. ERNEST F. DAVIS

No. COA03-88

(Filed 6 April 2004)

1. Motor Vehicles— felonious operation of a motor vehicle to elude arrest—motion to dismiss—motion for judgment notwithstanding verdict

The trial court did not err by denying defendant's motion to dismiss the charge of felonious operation of a motor vehicle to elude arrest under N.C.G.S. § 20-141.5 and his motion for judgment notwithstanding the verdict following conviction, because: (1) there was substantial evidence from which the jury could find that defendant sped in excess of fifteen miles over the posted speed limit; and (2) there was sufficient evidence that defendant drove recklessly.

2. Sentencing— habitual felon—sufficient record of plea

The trial court did not err in a felonious operation of a motor vehicle to elude arrest and resisting a public officer case by sentencing defendant as an habitual felon, because the trial court established a sufficient record of defendant's plea on the habitual felon charge.

Appeal by defendant from judgments entered 22 August 2002 by Judge Charles H. Henry in Superior Court, Onslow County. Heard in the Court of Appeals 24 February 2004.

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

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

WYNN, Judge.

Ernest F. Davis, Defendant, appeals from his convictions of felonious operation of a motor vehicle to elude arrest and resisting a public officer, arguing the trial court erred by denying his motion to dismiss and sentencing him as an habitual felon. We discern no error by the trial court.

At trial, the State presented evidence tending to show the following: In the early morning hours of 25 January 2002, Sergeant Charles Chadwick of the Onslow County Sheriff's Department observed Defendant driving an automobile in the Sneeds Ferry area of Onslow County. Sergeant Chadwick was acquainted with Defendant and knew that his driver's license was revoked. Sergeant Chadwick activated the blue lights and siren of his patrol vehicle and attempted to follow Defendant. Defendant accelerated, and Sergeant Chadwick, despite driving at a speed of sixty-five to seventy miles per hour, did not catch up to him. The posted speed limits in the area ranged from twenty-five to thirty-five miles per hour. According to Sergeant Chadwick, Defendant sped at a rate "very much" in excess of fifteen miles per hour over the speed limit. Sergeant Chadwick also observed Defendant swerve into the opposing lane for oncoming traffic. Defendant eventually turned into the driveway of an occupied mobile home and slammed the brakes, causing the vehicle to slide approximately twenty feet. Defendant then exited the vehicle and ran into the woods.

Following presentation of the evidence, the jury found Defendant guilty of felonious operation of a motor vehicle to elude arrest, speeding in excess of fifteen miles per hour more than the established speed limit, delaying a public officer in attempting to discharge a duty of his office, and reckless driving. Defendant admitted his status as an habitual felon. The trial court arrested judgment on the charges of reckless driving to endanger and speeding, and sentenced Defendant to a term of 93 to 121 months' imprisonment for the felonious operation of a motor vehicle to elude arrest conviction. The trial court entered a concurrent sentence of thirty days for the conviction of resisting arrest. Defendant appealed.

[1] Defendant has abandoned his first two assignments of error on appeal. By his third assignment of error, Defendant contends the trial court erred in denying his motion to dismiss the charge of felonious operation of a motor vehicle to elude arrest and his motion for judgment notwithstanding the verdict following conviction. Defendant argues there was insufficient evidence from which the jury could find that he sped in excess of fifteen miles over the legal speed limit or drove recklessly. This argument has no merit.

When ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982). In considering a motion for dismissal, 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. If so, the motion to dismiss is properly denied." *Id.* at 65-66, 296 S.E.2d at 651-52. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). The State is entitled to all reasonable inferences to be drawn from the evidence, and the trial court must resolve any contradictions and discrepancies in favor of the State. *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

Defendant was convicted of felonious operation of a motor vehicle to elude arrest under section 20-141.5 of the North Carolina General Statutes, which provides in pertinent part that:

> (a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.
>
> (b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.
>
> (1) Speeding in excess of 15 miles per hour over the legal speed limit.
>
> . . . .

(3) Reckless driving as proscribed by G.S. 20-140.

. . . .

(5) Driving when the person's drivers license is revoked.

. . . .

N.C. Gen. Stat. § 20-141.5 (2003). Section 20-141.5 "seeks to punish a single wrong: attempting to flee in a motor vehicle from a law enforcement officer in the lawful performance of his duties." *State v. Funchess*, 141 N.C. App. 302, 309, 540 S.E.2d 435, 439 (2000). At a minimum, violation of the statute constitutes a Class 1 misdemeanor. N.C. Gen. Stat. § 20-141.5(a). Where at least two of the eight aggravating factors set out in the statute are present, however, the offense is a Class H felony. N.C. Gen. Stat. § 20-141.5(b). "Although many of the enumerated aggravating factors are in fact separate crimes under various provisions of our General Statutes, they are not separate offenses . . . but are merely alternate ways of enhancing the punishment for speeding to elude arrest from a misdemeanor to a Class H felony." *Funchess*, 141 N.C. App. at 309, 540 S.E.2d at 439.

Here, Defendant's conviction was based on the two aggravating factors of speeding in excess of fifteen miles per hour over the legal speed limit and reckless driving. Defendant argues the State presented insufficient evidence in support of these factors. We disagree. Sergeant Chadwick testified that he drove at a rate of speed of sixty-five to seventy miles per hour, but was unable to catch up to Defendant. The highest posted speed limit was only thirty-five miles per hour. Moreover, Sergeant Chadwick stated that Defendant was "very much" speeding in excess of fifteen miles over the speed limit. Defendant asserts Sergeant Chadwick exaggerated his testimony, in that the distance traveled by Defendant and Sergeant Chadwick from the inception of the pursuit to its finish was less than one and one-half miles. Further, Defendant argues he would have lost control of his vehicle had he been traveling at such high rates of speed. These arguments, however, raise nothing more than potential discrepancies in the evidence, the resolution of which was for the jury. We conclude there was substantial evidence from which the jury could find that Defendant sped in excess of fifteen miles over the posted speed limit.

There was moreover sufficient evidence that Defendant drove recklessly. North Carolina General Statutes section 20-140 defines the offense of reckless driving as follows:

(a) Any person who drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly in willful or wanton disregard of the rights or safety of others shall be guilty of reckless driving.

(b) Any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving.

N.C. Gen. Stat. § 20-140 (2003). The evidence tended to show that Defendant drove at speeds well over the posted speed limit of thirty-five miles per hour, and that he swerved into the opposing lane of traffic at least once. At the conclusion of the chase, Defendant braked his vehicle sharply and slid for approximately twenty feet near an occupied residence. We conclude there was sufficient evidence from which the jury could find Defendant guilty of reckless driving, and we overrule Defendant's third assignment of error.

[2] Finally, Defendant argues the trial court failed to establish a proper record of a guilty plea to the status of being an habitual felon. This argument has no merit. The record shows that, after defense counsel informed the trial court that Defendant admitted to his former convictions, the trial court personally addressed Defendant and inquired whether he (1) understood he had the right to remain silent; (2) understood the nature of the habitual felon indictment and had discussed it with his attorney; (3) understood he had the right to deny the convictions and allow a jury to determine the issue; (4) understood that by admitting the convictions he gave up the right to have a jury determine whether he had achieved habitual felon status; and (5) understood that he could face a maximum punishment of 183 months in prison due to the Class C habitual felon sentence enhancement. Defendant responded affirmatively to each of these questions. The trial court found that Defendant's admissions were "the informed choice of the defendant made freely, voluntarily, and understandingly."

Defendant argues the trial court's failure to ask him whether he was pleading guilty to habitual felon status invalidates his plea. An express admission of guilt by a defendant is not required in order for a guilty plea to be valid, however. *State v. Edwards*, 150 N.C. App. 544, 549, 563 S.E.2d 288, 291 (2002). We conclude the trial court established a sufficient record of Defendant's plea on the habitual felon

charge. *See State v. Williams*, 133 N.C. App. 326, 330-31, 515 S.E.2d 80, 83 (1999) (concluding that the trial court established a sufficient record of the defendant's plea to habitual felon status where the defendant stipulated to the status, admitted the underlying felonies, understood she was waiving a jury trial and that she would be sentenced as a Class C felon, and stated she was proceeding voluntarily).

For the reasons stated herein, we conclude Defendant received a fair trial, free from prejudicial error.

No error.

Judges McGEE and TYSON concur.

STATE OF NORTH CAROLINA v. CHARLES DAVID BECTON, DEFENDANT

COA03-682

(Filed 6 April 2004)

Robbery— armed—bank—money obtained from two tellers

The trial court erred by denying defendant's motion for appropriate relief from convictions and consecutive sentences on two bills of indictment charging defendant with the armed robbery of two bank tellers at the same bank arising out of the same wrongful act, because: (1) defendant committed one armed robbery during which the property of the bank was taken; and (2) the fact that the employer's money was obtained from two tellers does not allow the State to indict defendant for two separate armed robberies.

Appeal by defendant from order entered 19 July 2002 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 2 March 2004.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

Nora Henry Hargrove for defendant.

WYNN, Judge.

"When the lives of all employees in a store are threatened and endangered by the use or threatened use of a firearm incident to the theft of their employer's money or property, a single robbery with firearms is committed." *State v. Potter*, 285 N.C. 238, 253, 204 S.E.2d 649, 659 (1974); *see also State v. Ballard*, 280 N.C. 479, 186 S.E.2d 372 (1972); *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760 (1982), *overruled on other grounds by*, *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988). As Defendant received two consecutive sentences for judgments entered on two bills of indictment charging Defendant with the armed robbery of two bank tellers employed by Carolina Telecode Federal Credit Union, the trial court erroneously denied Defendant's motion for appropriate relief.

The facts pertinent to this appeal indicate Defendant was convicted of the 21 January 1999 robbery of the Carolina Telecode Federal Credit Union in Raleigh, North Carolina. Defendant, disguised by a sheer mask, entered the credit union with a silver handgun in one hand and a tote bag in the other. He approached the first teller, demanded money, and received approximately $3200. While Defendant obtained the money from the first teller, the second teller placed money on the counter. After receiving the money from the first teller, Defendant approached the second teller, removed the money, approximately $3600, from the counter and placed it in his bag. Defendant then asked the second teller the location of the bank's safe. As the second teller turned to go and unlock the safe, Defendant's gun fired and the second teller was hit in the elbow. Defendant left the premises. On 15 September 1999, Defendant was convicted of two counts of armed robbery, possession of a firearm by a felon, and speeding to elude arrest.

On appeal to this Court, we concluded no error was committed in Defendant's trial in an unpublished opinion filed 4 June 2002. *See State v. Becton*, 150 N.C. App. 714, 564 S.E.2d 321 (2002) (COA01-954). The issues on appeal before this Court in COA01-954 were (I) whether the trial court violated Defendant's constitutional rights when it refused to allow Defendant to represent himself *pro se*; (II) Did the trial court erroneously recommend Defendant pay restitution to the alleged victims before his release from prison; and (III) Did the trial court erroneously fail to find Defendant was denied effective assistance of counsel which we concluded was essentially another argument related to the trial court's refusal to allow

Defendant to proceed *pro se*. Our Supreme Court denied discretionary review on 19 August 2002.

On 24 June 2002, Defendant filed a *pro se* motion for appropriate relief contending his convictions were in violation of the double jeopardy clause of the United States and North Carolina Constitutions and that said convictions constituted vindictive prosecution. Defendant also contended he received ineffective assistance of trial and appellate counsel. On 19 July 2002, the trial court denied Defendant's motion for appropriate relief without holding an evidentiary hearing. The order indicated "the indictments of record show that the defendant was convicted of armed robbery of two separate victims named in two separate bills of indictment" and that "these were separate crimes for which defendant could and did receive separate convictions and sentences." Accordingly, the trial court concluded "there is no basis in law or fact to support the defendant's motion for appropriate relief." On 21 August 2002, this Court allowed Defendant's petition for writ of certiorari.

Defendant contends he received multiple punishments for one crime in contravention of the double jeopardy clause of the United States and North Carolina Constitutions. *See* U.S. Const. Amend. V; N.C. Const. Art. I, sec. 19. The constitutional prohibition against double jeopardy protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969). In *State v. Potter*, 285 N.C. 238, 204 S.E.2d 649 (1974), our Supreme Court held that "when the lives of all employees in a store are threatened and endangered by the use or threatened use of a firearm incident to the theft of their employer's money or property, a single robbery with firearms is committed." Thus, pursuant to our Supreme Court's decision in *Potter*, Defendant was subjected to multiple punishments for a single armed robbery in violation of the double jeopardy clause. *See also State v. Ballard*, 280 N.C. 479, 186 S.E.2d 372 (1972).

However, in *Potter*, our Supreme Court also stated "we express no opinion as to factual situations in which, in addition to robbery, an employee is physically injured or killed, or to factual situations in which, in addition to the theft of the employer's money or property, the robber takes money or property of an employee or customer." *Potter*, 285 N.C. at 253, 204 S.E.2d at 659. Based upon this statement, the State argues *Potter* does not control this case and that the focus should be upon the assaultive nature of the crime, rather than its larcenous nature. In discussing its statement in *Potter* regarding differ-

ent factual situations, our Supreme Court in *State v. Sanders*, 288 N.C. 285, 293, 218 S.E.2d 352, 359 (1975), explained that "in *Potter*, the Court specifically implied that if other offenses arose out of the same original wrongful act it would not necessarily treat such attendant offenses as part of the original offense."

In *Sanders*, the defendant had been convicted of damage to personal property occupied by an individual in violation of N.C. Gen. Stat. § 14-49.1 and willfully and maliciously injuring an individual by the use of explosives in violation of N.C. Gen. Stat. § 14-49. Our Supreme Court determined that although both charges arose out of one explosion, they constituted separate offenses. Our Supreme Court concluded *Potter* does not prohibit the State from charging an individual with several offenses arising out of the same wrongful act.

Similarly, the State could have charged Defendant with other offenses arising out of his criminal conduct in this case. Indeed, if the bank teller's elbow injury constituted a serious injury, Defendant could have been indicted for assault with a deadly weapon inflicting serious injury, which is not a lesser included offense of armed robbery. *See State v. Richardson*, 279 N.C. 621, 628, 185 S.E.2d 102, 107-08 (1971). Moreover, if Defendant had robbed either of the tellers of their personal property, Defendant could have been charged with a separate count of armed robbery. *See State v. Gibbs*, 29 N.C. App. 647, 225 S.E.2d 837 (1976) (indicating the double jeopardy clause was not violated where Defendant was indicted for two counts of armed robbery where he took a female employee's purse and the corporation's money). Similarly, if Defendant had robbed non-employee during the course of the armed robbery of the credit union, Defendant could have been charged with a separate count of armed robbery. *See State v. Johnson*, 23 N.C. App. 52, 208 S.E.2d 206 (1974) (facts indicated personal property was taken from non-employees).

In light of our Supreme Court's decision in *State v. Potter*, we are compelled to conclude that under the facts of this case, Defendant committed one armed robbery during which the property of Carolina Telecode Federal Credit Union was taken. The fact that the employer's money was obtained from two tellers does not allow the State to indict Defendant for two separate armed robberies. Indeed, in *State v. Potter*, the defendant obtained the $265.00 from two separate cash registers operated by two different employees. Thus, as stated in *State v. Potter*, 285 N.C. 238, 254, 204 S.E.2d 649, 659 (1974),

"the two verdicts are to be considered the same as a single verdict of guilty of armed robbery". In this case, Defendant received two consecutive sentences of 117 to 150 months; accordingly, as in *Potter*, "the judgments pronounced are to be considered as if a single judgment were pronounced which imposed a prison sentence of not less than 117 nor more than 150 months. The judgments are so modified and this cause is remanded to the Superior Court of Wake County with direction to withdraw its prior commitment(s) and issue a new commitment in conformity with this decision.

Judgment modified and cause remanded.

Judges HUNTER and TYSON concur.

MARKETPLACE ANTIQUE MALL, INC., D.G. SAMUEL, JR., INDIVIDUALLY AND D.G. SAMUEL, JR., D/B/A QUEEN STREET ANTIQUES, PLAINTIFFS v. STEVEN M. LEWIS, DEFENDANT

No. COA03-562

(Filed 6 April 2004)

1. Appeal and Error— assignments of error—record references—discussion in brief

Assignments of error without record or transcript references were dismissed, and assignments of error not presented or discussed in the brief were deemed abandoned.

2. Appeal and Error— appealability—denial of judgment on pleadings—not reviewable after verdict

The denial of a motion for judgment on the pleadings is not reviewable on appeal where the court has rendered a final judgment after a trial on the merits.

3. Fraud— constructive—evidence of fiduciary relationship—business partners

There was sufficient evidence of a fiduciary relationship to submit constructive fraud to the jury; business partners are fiduciaries as a matter of law.

4. Appeal and Error— preservation of issues—objection to instruction—different bases at trial and in brief

A jury instruction was not preserved for appeal where bases of the contention in the brief were not the same as bases for the objection at trial.

Appeal by plaintiffs from judgment filed 31 October 2002 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 26 February 2004.

David B. Hough, P.A., by David B. Hough, for plaintiff-appellants.

Forsyth Legal Associates, by William L. Durham; and Michelle D. Reingold, for defendant-appellee.

BRYANT, Judge.

Marketplace Antique Mall, Inc., D.G. Samuel, Jr. (Samuel), individually, and D.G. Samuel, Jr., d/b/a Queen Street Antiques (collectively plaintiffs) appeal a judgment filed 31 October 2002 dismissing plaintiffs' action with prejudice and awarding damages on defendant Steven M. Lewis' counterclaim for constructive fraud and breach of contract.[1]

With respect to his counterclaim, defendant presented evidence at trial establishing that Samuel and he had been life partners who had joined as equal partners in a business venture restoring and selling antique furniture. Defendant had some experience in this field because his family had worked in the antique business. Samuel and defendant opened and operated two stores: Queen Street Antiques and Marketplace Antique Mall. As to Marketplace Antique Mall, defendant testified and the documentary evidence showed that Samuel and defendant signed the lease for the premises "as business partners." In addition, they "filed for a partnership tax number" for the business and submitted their "income tax returns at the end of the year as partners." As to Queen Street Antiques, defendant acknowledged that, for tax purposes, the business was classified as a sole proprietorship run by Samuel. However, he explained the set up was an initial arrangement in order to expedite assignment of the tax number required to operate the business in a booth at an antique mall. Tax numbers for sole proprietorships were issued on the spot whereas a

1. The judgment also included a nominal damage award to defendant of $1.00 for Samuel's conversion of business assets.

partnership tax number could take up to six weeks to be issued. Defendant testified the intent was to get into the booth right away by registering as a sole proprietorship and then to "come back to the tax office and change [the classification] immediately to a partnership." The partnership tax number, however, never came into effect because Samuel did not apply for a change in classification. Defendant reminded Samuel to do this "[m]any, many times," and Samuel "said that he would but never did." When the parties' personal relationship deteriorated, Samuel took defendant's keys to the businesses and changed the locks. Defendant was no longer allowed on the business premises.

Samuel testified that although it was defendant's idea to go into business, Samuel contributed all the working capital. Samuel denied the existence of a business partnership and characterized defendant's contributions to the businesses as those of an employee. Samuel admitted defendant co-signed the lease for Marketplace Antique Mall but explained that he was simply indulging the lessor, who wanted defendant's name on the lease because he was the beneficiary under Samuel's will, and defendant, who "wanted his name on everything." Samuel stated the tax returns for Marketplace Antique Mall were filed as a partnership to allow defendant, his life partner, to use some of the business losses to offset his tax obligations. A few years after its creation, Marketplace Antique Mall was incorporated. The articles of incorporation filed with the North Carolina Secretary of State listed both Samuel and defendant as incorporators.

The sole issue addressed on appeal is whether defendant presented sufficient evidence of a fiduciary relationship between himself and Samuel to warrant submission of the claim of constructive fraud to the jury.

[1] At the outset we note that several of plaintiffs' assignments of error fail to comply with the North Carolina Rules of Appellate Procedure. Assignments of error one through three and eight through nine fail to provide any record or transcript references as required by Rule 10. *See* N.C.R. App. P. 10(c)(1) ("[a]n assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, *with clear and specific record or transcript references*") (emphasis added). "Rule 10 allows our appellate courts to 'fairly and expeditiously' review the assignments of error without making a 'voyage of discovery' through the record in order to determine the legal questions involved." *Rogers v.*

Colpitts, 129 N.C. App. 421, 422, 499 S.E.2d 789, 790 (1998) (quoting *Kimmel v. Brett*, 92 N.C. App. 331, 335, 374 S.E.2d 435, 437 (1988)). Considering the 697 pages of testimony and trial proceedings documented in the transcript, the voluminous exhibits submitted by both parties, and the 85-page record that collectively represents the record on appeal, plaintiffs' omission of the relevant record and transcript references amounts to a substantial violation of the Rules. We thus dismiss assignments of error one through three and eight through nine. Furthermore, as assignments of error two and six are not presented and discussed in plaintiffs' brief to this Court, they are deemed abandoned. *See* N.C.R. App. P. 28(a).

[3] Plaintiffs argue the trial court erred in denying their motions to dismiss, for directed verdict, and for judgment notwithstanding the verdict on defendant's counterclaim for constructive fraud. Specifically, plaintiffs contend the evidence at trial failed to establish a fiduciary relationship between Samuel and defendant.[2]

" 'Constructive fraud arises where a confidential or fiduciary relationship exists, and its proof is less "exacting" than that required for actual fraud.' " *Cash v. State Farm Mut. Auto. Ins. Co.*, 137 N.C. App. 192, 206, 528 S.E.2d 372, 380 (citation omitted), *aff'd*, 353 N.C. 257, 538 S.E.2d 569 (2000) (per curiam).

> In order to show constructive fraud, a plaintiff must establish (1) facts and circumstances creating a relation of trust and confidence; (2) which surrounded the consummation of the transaction in which the defendant is alleged to have taken advantage of the relationship; and (3) the defendant sought to benefit himself in the transaction.

Sullivan v. Mebane Packaging Grp., Inc., 158 N.C. App. 19, 32, 581 S.E.2d 452, 462, *disc. review denied*, 357 N.C. 511, 588 S.E.2d 473 (2003). "Where a fiduciary relationship exists between the parties, the presumption of fraud arises where the superior party obtains a possible benefit." *Id.*; *see Compton v. Kirby*, 157 N.C. App. 1, 16, 577 S.E.2d 905, 914 (2003) ("a breach of fiduciary duty amounts to constructive fraud").

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[2] 2. Plaintiffs also attack defendant's pleadings as insufficient on the element of a fiduciary relationship; however, a trial court's denial of a motion for judgment on the pleadings is not reviewable on appeal where the trial court has rendered a final judgment after a trial on the merits. *Wilson v. Sutton*, 124 N.C. App. 170, 173, 476 S.E.2d 467, 469-70 (1996).

A fiduciary duty in turn " 'exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' " *Compton*, 157 N.C. App. at 15, 577 S.E.2d at 914 (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). With respect to business partners, our Courts have stated:

> "It is elementary that the relationship of partners is fiduciary and imposes on them the obligation of the utmost good faith in their dealings with one another in respect to partnership affairs. Each is the confidential agent of the other, and each has a right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs."

Id. (quoting *Casey v. Grantham*, 239 N.C. 121, 124-25, 79 S.E.2d 735, 738 (1954)). Consequently, it has been held that "[b]usiness partners . . . are each other's fiduciaries as a matter of law." *Hajmm Co. v. House of Raeford Farms*, 328 N.C. 578, 588, 403 S.E.2d 483, 489 (1991); *Stamm v. Salomon*, 144 N.C. App. 672, 680, 551 S.E.2d 152, 158 (2001).

In the case *sub judice*, defendant testified he and Samuel were equal partners in the two antique furniture businesses. Defendant cosigned the lease for Marketplace Antique Mall; defendant and Samuel "filed for a partnership tax number" for the business; and they submitted their "income tax returns at the end of the year as partners." When Marketplace Antique Mall was incorporated, the articles of incorporation listed defendant as one of the two incorporators. The documentary evidence submitted at trial confirmed defendant's testimony. Defendant further testified that although Queen Street Antiques was registered as a sole proprietorship, this was done to expedite the opening of the store. Defendant and Samuel had agreed that Samuel would file for a partnership tax number for Queen Street Antiques as soon as the business became operational, but Samuel never did.

This evidence was sufficient for the jury to find that defendant and Samuel were business partners in Marketplace Antique Mall and Queen Street Antiques. Because business partners are fiduciaries as a matter of law, *Hajmm*, 328 N.C. at 588, 403 S.E.2d at 489, defendant properly presented evidence of a fiduciary relationship. Accordingly, this assignment of error is without merit.

[4] We now turn to plaintiffs' remaining issues raised in their brief to this Court and not related to assignments of error one through three and eight through nine dismissed above. Issues one, three, and five in plaintiffs' brief relate to the submission of certain issues to the jury and the trial court's jury instructions. As a review of the transcript reveals that plaintiffs did not object to the jury instructions on the bases contended in their brief, these issues were not preserved for appeal and are therefore not properly before this Court. *See* N.C.R. App. P. 10(b)(1) ("[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make").

Affirmed.

Judges TIMMONS-GOODSON and ELMORE concur.

DENNIS HUTCHINSON AND LEANNE HUTCHINSON, PLAINTIFFS V. NATIONWIDE MUTUAL FIRE INS. CO., DEFENDANT

No. COA03-69

(Filed 6 April 2004)

Insurance— coverage for water damage—date of damage

Summary judgment was properly granted for defendant-insurer on the question of whether it supplied coverage for water damage to a negligently constructed retaining wall where the damage occurred outside the time when defendant insured the contractor. Even where water damage continues over time, coverage is triggered on the date of the defect from which the subsequent damage flowed. In this case, the contractor's actions when the wall was built caused the subsequent problems with water in the soil around the wall.

Appeal by plaintiffs from order entered 23 October 2002 by Judge Kimberly S. Taylor in Iredell County Superior Court. Heard in the Court of Appeals 28 October 2003.

DeVore, Acton & Stafford, PA, by Fred W. DeVore, III, for plaintiff appellants.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Maria C. Papoulias for defendant appellee.

TIMMONS-GOODSON, Judge.

Dennis and Leanne Hutchinson ("plaintiffs") appeal an order of the trial court granting summary judgment to Nationwide Mutual Fire Ins. Co. ("defendant"). For the reasons stated herein, we affirm the order of the trial court.

The pertinent facts of the instant appeal are as follows: Plaintiffs contracted with Brulen Custom Builders, Inc., ("Brulen") to construct a custom home for plaintiffs. The project included the creation of a retaining wall, which was built during the summer of 1999. Construction ceased on the entire project by the end of October 1999.

Defendant insured Brulen on and before 11 December 1998 and on and after 15 November 1999. Brulen failed to pay the required premiums to defendant for the period between 11 December 1998 and 15 November 1999 and was therefore not insured by defendant during that time. Neither party contests the time frame in which defendant provided insurance coverage to Brulen.

Plaintiffs filed suit against Brulen and Earth Structures, Inc., alleging breach of contract, negligent supervision and negligence per se. The parties entered into binding arbitration wherein the arbitrator concluded that Earth Structures, Inc., was not responsible for the damages associated with the retaining wall. The arbitrator further concluded that the retaining wall was damaged due to "Brulen's negligence, its breach of contract and/or failure to adhere to acceptable standards of construction and project management of similar by [sic] situated general contractors." The arbitrator awarded plaintiffs $67,900 in damages from Brulen.

Plaintiffs argue that defendant, as Brulen's current insurer, is responsible for damages they incurred as a result of Brulen's faulty construction of their retaining wall. Defendant denied coverage for the construction that occurred during the period when Brulen's insurance policy had lapsed.

Plaintiffs brought an action against defendant to recover the damages assessed against Brulen. Defendant moved for summary judg-

ment asserting that the alleged faulty construction occurred during a period when defendant did not insure Brulen. The trial court granted defendant's motion for summary judgment.

Plaintiffs argue that the trial court erred by granting summary judgment in favor of defendant. For the reasons stated herein, we affirm the order of the trial court.

Plaintiffs concede that if this Court concludes that the damages occurred during the period in which defendant did not insure Brulen, plaintiffs' action must fail. Thus, the dispositive issue is whether there is a genuine issue of material fact regarding when the damage to the retaining wall occurred.

Summary judgment is appropriate when then there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001); *Lorbacher v. Housing Authority of the City of Raleigh*, 127 N.C. App. 663, 669, 493 S.E.2d 74, 77 (1997); *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 656, 267 S.E.2d 584, 586 (1980). It is not the court's function to decide questions of fact when ruling on a motion for summary judgment rather, the moving party must establish that there is an absence of a triable issue of fact. *Moore v. Bryson*, 11 N.C. App. 260, 262, 181 S.E.2d 113, 114 (1971). All evidence must be considered in the light most favorable to the non-moving party. *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. 347, 350, 363 S.E.2d 215, 217 (1988).

Insurance policies are contracts and as such, their provisions govern the rights and duties of the parties thereto. *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986). Where a policy defines a term, this Court must use that definition. *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978). If the meaning of the policy is clear on its face, the policy must be enforced as written. *Woods*, 295 N.C. at 506, 246 S.E.2d at 777.

The coverage provisions pertinent to this appeal are as follows.[1]

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1. The record includes Brulen's first insurance policy, the policy that was cancelled due to Brulen's failure to pay its premiums. The insurance policy in effect when the damage was discovered is absent from the record. Plaintiffs argue that the latter policy mirrors the earlier policy. Defendant does not contest the use of the earlier policy to define the terms and conditions of the latter policy.

COVERAGE A. BODILY INJURY AND
PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies . . . .

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and

(2) The "bodily injury" or "property damage" occurs during the policy period.

The policy also contains the following definitions in Section V:

12. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

. . . .

15. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

Under the insurance policy in this case, coverage is triggered by "property damage" when the property damage is caused by an "occurrence" and when the property damage occurs within the policy period. The issue for this Court to determine is whether the property damage occurred within the policy period.

The property damage herein was allegedly caused by either (1) Brulen's failure to install a drainage system in the retaining wall and/or to use proper soil under the retaining wall, or (2) the continual entry of water into the soil from the compacted surface area.

If this Court can determine when the injury-in-fact occurred, the insurance policy available at the time of the injury controls. *Gaston*

County Dyeing Machine Co. v. Northfield Ins. Co., 351 N.C. 293, 303, 524 S.E.2d 558, 564 (2000). It is uncontested that the building was complete before the end of October 1999 and that Brulen's new insurance policy was not available until 15 November 1999. This Court can determine with certainty that Brulen's failure to install a drainage system in the retaining wall or to use the proper soil under the retaining wall occurred before 15 November 1999 and therefore Brulen's later insurance policy is not triggered if the damage was caused under those theories. *See Gaston*, 351 N.C. at 303, 524 S.E.2d at 564.

Plaintiffs' strongest argument is that Brulen failed to construct any alternate means to protect the site and therefore allowed the continual entry of water into the soil under the retaining wall, creating significant damage to the retaining wall. Plaintiffs argue based on the continual entry theory that because the defect in the wall was discovered 18 November 1999, three days after defendant's second policy came into effect, defendant is responsible to plaintiff for the damages created.

In *Gaston*, our Supreme Court held that even in situations where damage continues over time, if the court can determine when the defect occurred from which all subsequent damages flow, the court must use the date of the defect and trigger the coverage applicable on that date. 351 N.C. at 303-04, 524 S.E.2d at 565. Assuming *arguendo* that the damage was caused by the continual entry of water, if it can be determined with certainty that the entry of water was caused by faulty construction pre-dating insurance coverage, defendants are not liable for plaintiffs' damages.

The same evidence plaintiffs argue supports their theory that the damages were caused by the continual entry of water further states that "Brulen was the general contractor on the job and the driveway that would have protected the soil from the entry of water was never constructed and alternate means of protecting that area were not undertaken." Therefore, it is clear that Brulen's actions and inactions at the time the retaining wall was constructed caused the subsequent problems with water entry into the soil surrounding the retaining wall. Plaintiffs fail to point to any evidence in the record that suggests a different result.

Taken in the light most favorable to plaintiffs, the evidence is clear that the damage to plaintiffs' retaining wall occurred outside of the period in which defendant insured Brulen. Without any additional

information suggesting that the damage was caused during the three days of coverage prior to discovery, we affirm the trial court's order granting summary judgment to defendant. It is therefore unnecessary to address plaintiffs' remaining assignments of error.

Affirmed.

Judges WYNN and ELMORE concur.

L&M TRANSPORTATION SERVICES, INC., PLAINTIFF v. MORTON INDUSTRIAL GROUP, INC., D/B/A MORTON CUSTOM PLASTICS OF NORTH CAROLINA, INC. AND D/B/A MORTON CUSTOM PLASTICS, LLC, DEFENDANT

No. COA03-709

(Filed 6 April 2004)

Process and Service— service on business—identity of corporation and agent

There was proper service of process and the court correctly refused to set aside a default judgment where defendant denied that it was doing business in North Carolina or that the person to whom the summons delivered was an employee or agent, but defendant's annual SEC Report was to the contrary.

Appeal by defendant from order entered 3 February 2003 by Judge Mark E. Klass in Cabarrus County Superior Court. Heard in the Court of Appeals 2 March 2004.

Richard M. Koch, for plaintiff-appellee.

Helms Mulliss & Wicker, PLLC, by William C. Mayberry, Robert Muckenfuss, and Tyyawdi M. Baker, for defendant-appellant.

TYSON, Judge.

Morton Industrial Group, Inc. ("defendant") appeals from an order entered after defendant's motion to set aside an entry of default and entry of default judgment was denied. We affirm.

I. Background

L&M Transportation Services, Inc. ("plaintiff") brought an action for breach of contract on 9 October 2002. The unverified complaint identified defendant as "Morton Industrial Group, Inc. dba Morton Custom Plastics of North Carolina, Inc. and dba Morton Custom Plastics, LLC." The complaint alleged, "[a]t the request of the defendant, the plaintiff rendered transportation services on account for which the defendant agreed to pay the plaintiff." Plaintiff did not receive payment under the terms of the agreement and attached statements to the complaint showing the amount due to plaintiff for services rendered. The statements revealed that plaintiff billed "Morton Custom Plastics, LLC" in Harrisburg, North Carolina, and "Morton Custom Plastics" in St. Matthews, South Carolina, in the amount of $61,603.00.

On 14 October 2002, Cabarrus County Sheriff's Deputy D.B. Riley served the summons and complaint to James Ford, General Manager for Morton Custom Plastics, LLC, in Harrisburg, North Carolina. On 14 November 2002, the Cabarrus County Assistant Clerk of Superior Court noted an entry of default and entered an entry of default judgment. The judgment awarded plaintiff $61,603.00 plus interest.

On 27 December 2002, defendant moved to set aside the entry of default and to vacate the default judgment. Defendant argued the default judgment was void. In support of its motion, defendant attached affidavits from Thomas Lauerman, Morton Industrial Group's Vice President of Finance, and James Ford. In its affidavit, defendant denied that it was doing business under the names of Morton Custom Plastics, LLC or Morton Custom Plastics of North Carolina, Inc. and claimed that James Ford was neither an employee nor agent for defendant. Plaintiff also filed an affidavit with the trial court, along with defendant's annual report that had been filed with the Securities and Exchange Commission ("SEC Report"). The SEC Report showed that defendant had a "Southeast Molding Division" in both Harrisburg, North Carolina, and St. Matthews, South Carolina. In addition, the SEC Report lists a fabrication division in both Harrisburg and Concord, North Carolina. The trial court denied defendant's motion to set aside entry of default and vacate the default judgment. Defendant appeals.

II. Issue

The sole issue on appeal is whether the trial court erred in failing to set aside the entry of default and to vacate the default judgment.

III. Service of Process

Defendant argues the trial court's default judgment was void for lack of service of process. We disagree.

N.C.R. Civ. P. 60(b)(4) (2004) allows a trial court to grant relief from a judgment that is void.

> The granting of a Rule 60(b) motion is within the trial court's sound discretion and is reviewable only for abuse of discretion. Abuse of discretion is shown only when the challenged actions are manifestly unsupported by reason. If there is competent evidence of record on both sides of the Rule 60(b) motion, it is the duty of the trial court to evaluate such evidence, and the trial court's findings supported by competent evidence are conclusive on appeal.

Blankenship v. Town & Country Ford, Inc., 155 N.C. App. 161, 165, 574 S.E.2d 132, 135 (2002), *disc. rev. denied*, 357 N.C. 61, 579 S.E.2d 384 (2003).

Here, the trial court's judgment concluded that "based on defendant's annual report, the 7301 Caldwell Road, Harrisburg location is an operating plant of the defendant not disclosed as a separate entity and its general manager is an agent authorized under Rule 4(j)(6) to receive service of process for the defendant." Defendant's SEC Report clearly lists "7301 Caldwell Road, Harrisburg, North Carolina," on the page labeled "Morton Custom Plastics Locations." This is the same address appearing on the summons served on James Ford by the Cabarrus County Sheriff's Department. Although defendant filed affidavits stating that it did not do business in North Carolina, defendant did not present any certificates of existence or corporate documents to rebut the evidence in the annual report, which indicated otherwise. Thus, competent evidence supports the trial court's decision to deny defendant's motion to vacate the default judgment. This assignment of error is overruled.

IV. Entry of Default

Defendant argues the trial court erred in failing to set aside the entry of default. We disagree.

N.C.R. Civ. P. 55(a) (2004) allows the clerk to enter default when "a party against whom a judgment for affirmative relief is sought has failed to plead . . . ." " 'To set aside an entry of default,

good cause must be shown. The trial court's decision whether good cause has been shown is reviewable by this Court only for abuse of discretion.' " *Blankenship*, 155 N.C. App. at 166, 574 S.E.2d at 135 (quoting *Silverman v. Tate*, 61 N.C. App. 670, 673, 301 S.E.2d 732, 734 (1983)).

Defendant argues plaintiff's failure to effectuate service of process constitutes "good cause" to set aside entry of default. We previously held this argument has no merit. This assignment of error is overruled.

V. Conclusion

Plaintiff noted in its brief that portions of defendant's brief setting forth the facts were argumentative in violation of N.C.R. App. P. 28(b)(5). We agree and have not relied upon any argumentative facts in our review.

Defendant has failed to show the trial court abused its discretion in denying defendant's motion to set aside the entry of default and to vacate the default judgment. The judgment is affirmed.

Affirmed.

Judges WYNN and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

BALOCH v. N.C. DEP'T OF CORR. No. 03-491	Wake (02CVS5115)	Affirmed
BULLOCK v. HEADWAY CORPORATE STAFFING SERV. No. 03-434	Ind. Comm. (I.C. 934263)	Affirmed
CINCINNATI INS. CO. v. BROWN & WALKER CO. No. 02-1741	Iredell (01CVS1423)	Reversed and remanded
CRAWFORD v. IMPINK No. 03-710	Macon (01CVS576)	Reversed and remanded
CURETON v. HELMS No. 03-478	Union (01CVS1313)	Affirmed
DOVE v. WIL-O-WISP APARTMENTS OWNER(S) No. 03-1219	Lenoir (02CVS125)	Affirmed
ESTATE OF JUAREZ-GARCIA v. SANDERS CONSTRUCTORS, INC. No. 03-1102	Cabarrus (03CVS227)	Affirmed
GREENLEAF v. GREENLEAF No. 03-771	Buncombe (01CVD6058)	Reversed and remanded
IN RE L.N.B. No. 03-29	Wayne (02J51)	Affirmed
IN RE J.M.C. No. 03-727	Cabarrus (01J148) (01J149) (01J150) (01J151)	Affirmed
IN RE L.C.L. No. 03-646	Scotland (00J82B)	Affirmed
IN RE C.M. No. 03-741	Buncombe (01J338(A-E))	Affirmed
MINTON v. L.D. DOLLAR, III, INC. No. 03-376	Wilkes (02CVS1332)	Dismissed
NEW HANOVER CTY. AIRPORT AUTH. v. STOCKS No. 03-550	New Hanover (01CVS3322)	Affirmed
NIE-HMOK v. AYERS No. 03-604	Mecklenburg (02CVD2732)	Affirmed

OMEGA DRYWALL, INC. v. CM CONSTR. & DEV. SERVS., LLC No. 03-547	Vance (00CVS782)	Reversed and remanded
RICE CONSTR. & DEV. CO. v. BEAM CONSTR. CO. No. 03-1176	Pitt (02CVS3489)	Dismissed
SHOEMAKE v. SIDES No. 02-1611	Yadkin (98CVS816)	No error
SLOAN v. HITT No. 03-455	Pitt (98CVD394)	Affirmed
STATE v. ACKERMAN No. 03-662	Onslow (02CRS58795)	No error
STATE v. ADAMS No. 03-191	Wayne (01CRS55360) (01CRS12147)	No error
STATE v. ALEXANDER No. 03-968	Mecklenburg (01CRS43652)	No error
STATE v. ALFORD No. 03-560	Davidson (93CRS4448)	Affirmed
STATE v. BAKER No. 03-425	Guilford (02CRS83322) (02CRS83327) (02CRS23525)	No error
STATE v. BLACK No. 03-1107	Henderson (03CRS1128) (03CRS51673)	No error
STATE v. BYNUM No. 03-303	Lenoir (02CRS52192) (02CRS52201)	No error
STATE v. COLLINS No. 03-687	Wayne (01CRS55982)	No error
STATE v. CUMMINGS No. 03-803	Robeson (00CRS4487) (00CRS4488) (00CRS4489) (00CRS4490) (00CRS4492) (00CRS17209) (00CRS17210) (00CRS17211) (00CRS17212) (00CRS17213)	No error

	(00CRS17214) (00CRS17215) (00CRS17216)	
STATE v. DUGGINS No. 03-200	Nash (98CRS5348)	No error in part; remanded in part for resentencing
STATE v. EUDY No. 03-443	Cabarrus (99CRS14971) (99CRS14972)	Affirmed
STATE v. FARLEY No. 03-667	Cleveland (02CRS2346) (02CRS50677)	No error
STATE v. FREEMAN No. 03-666	Beaufort (01CRS2696) (02CRS117)	No error
STATE v. GONZALES No. 03-653	Harnett (97CRS3573) (97CRS3574)	No error
STATE v. HARVEY No. 03-622	Wake (02CRS5062) (02CRS5063) (02CRS5064) (02CRS5065) (02CRS5066) (02CRS5067)	No error
STATE v. HAYLOCK No. 03-799	Mecklenburg (01CRS53923) (01CRS53924)	No error
STATE v. JETER No. 03-1126	Guilford (02CRS98903)	No error
STATE v. JOHNSON No. 03-1175	Halifax (01CRS1916)	Affirmed
STATE v. JONES No. 03-623	Halifax (01CRS56443)	No error
STATE v. JONES No. 03-825	Durham (01CRS11523) (01CRS42599) (01CRS42600) (01CRS42601)	No error
STATE v. JONES No. 03-1060	Wake (02CRS48110) (02CRS49831) (02CRS49838)	No error

STATE v. LEWIS No. 03-983	Pitt (02CRS60152)	Dismissed
STATE v. MASON No. 03-166	Mecklenburg (01CRS16172) (01CRS128449)	No error
STATE v. McNEILL No. 03-603	Cumberland (02CRS54468)	No error
STATE v. NANCE No. 03-886	Robeson (02CRS50055) (02CRS50056) (02CRS50057) (02CRS50058)	No error
STATE v. PENLAND No. 03-665	Stokes (01CRS2493) (01CRS50848) (01CRS50849) (01CRS50850) (01CRS50851) (01CRS50852) (01CRS50853) (01CRS50854)	Affirmed
STATE v. PONDER No. 03-3	Henderson (01CRS53116) (01CRS53118) (01CRS53119)	01CRS53116 (Harlan Ponder) No error. 01CRS05318 (Jason Harlan Ponder) No error. 01CRS53119 (Sonja Case Harris) No error, remanded for resentencing.
STATE v. POUNCY No. 03-407	Guilford (01CRS86710) (02CRS23120)	No error
STATE v. RICHARDSON No. 03-1012	Wake (03CRS13319)	Affirmed
STATE v. SEPHES No. 03-640	Onslow (92CRS15141) (92CRS15142) (92CRS15143)	No error in 92CRS15141 and 92CRS15143. Remand for resentenc ing in 92CRS15142 first degree kidnapping.
STATE v. TISDALE No. 03-1167	Guilford (02CRS23736) (02CRS89757)	No error

STATE v. WARREN No. 02-1693	Hyde (00CRS188)	Reversed
STATE v. WILLIAMS No. 03-735	Randolph (00CRS119) (00CRS120) (00CRS121)	No error
STATE v. WILSON No. 03-959	Buncombe (02CRS4286)	No error
STILTNER v. DAVIS No. 03-467	Vance No. 02CVD555)	Reversed and remanded
STOKES v. WILEY No. 03-627	Durham (00CVS2413)	No error
WILLIAMS v. HAIGLER No. 03-387	New Hanover (00CVS1427)	Affirmed

[163 N.C. App. 615 (2004)]

STATE OF NORTH CAROLINA v. MICHAEL JOSEPH MUCCI

No. COA03-631

(Filed 20 April 2004)

1. False Pretense— felonious issuing of worthless checks— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of felonious issuing of worthless checks, because there was sufficient circumstantial evidence to infer that defendant knew that at the time he issued the checks they were worthless including that: (1) not only was there evidence that the checks had been issued with insufficient funds, but also that other checks issued within the same time period had been returned for insufficient funds; and (2) defendant actually requested the general manager of the payee to hold the checks and not deposit them immediately.

2. Judges— expression of opinion—evidence

The trial court did not deny defendant a fair trial in a felonious issuing of worthless checks case by allegedly expressing opinions on the evidence of defendant's guilt and about the weight to be given to the evidence, because: (1) the trial court did not encourage the jury to ignore evidence, but instead let the jurors know they could take their time with the exhibits and that it was not necessary to completely and immediately comprehend everything in the bank records prior to jury deliberations; (2) the probable meaning of the trial court's comment to the jurors that the State was "painting by numbers" on a poster was to tell them that the prosecutor was using numbers on a poster as an illustration of his argument and was not an expression of opinion on defendant's guilt; (3) the totality of circumstances revealed that additional comments noted by defendant were within the trial court's inherent supervisory powers over the conduct of the trial and were not prejudicial to defendant; and (4) the alleged "open hostility" toward defendant were admonishments that fell within the trial court's power to control the examination and cross-examination of witnesses.

3. False Pretense— felonious issuing of worthless checks— instruction—reasonable person standard

The trial court did not improperly instruct the jury to apply a reasonable person standard to the knowledge element of issuing a worthless check when it instructed that a person acts knowingly when the person is aware or conscious of what he is doing and that a person has knowledge about the circumstances surrounding his act or about the results of his act when he is aware of or conscious of those circumstances or of those results.

4. False Pretense— felonious issuing of worthless checks— instruction—corporate officer—plain error analysis

The trial court did not commit plain error in a felonious issuing of worthless checks case by failing to instruct the jury that defendant was charged as a corporate officer drawing a check on a corporate account, because: (1) the elements of issuing a worthless check are the same whether defendant was charged as a corporate officer or as an individual; and (2) it was not probable that a different result would have been reached had the instruction been given.

5. Sentencing; Probation and Parole— probation—community service—restitution

The trial court erred in a felonious issuing of worthless checks case by sentencing defendant to thirty-six months of probation, twenty-five hours per week of community service, and to pay full restitution of $26,239.30, because: (1) N.C.G.S. § 15A-1343.2(d)(3) mandates that where a felon is sentenced to community punishment, probation may not be for more than thirty months unless the trial court specifically finds that a longer term is required, and there was no such finding in this case; (2) the trial court did not consider any of the factors related to defendant's ability to pay the full amount of restitution; and (3) in imposing both restitution and community service conditions upon defendant's probation, the trial court failed to consider defendant's ability to comply with both conditions simultaneously, as well as meeting his other obligations under the sentence of paying costs and fines.

Appeal by defendant from judgments entered 9 October 2002 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 4 February 2004.

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

Daniel Shatz for defendant-appellant.

HUNTER, Judge.

Michael Joseph Mucci ("defendant") appeals from four separate judgments dated 9 October 2002 entered consistent with jury verdicts finding him guilty of four counts of felonious issuing of worthless checks. Defendant was sentenced to four consecutive six to eight month sentences suspended upon his satisfactory completion of thirty-six months probation conditioned on his performance of twenty-five hours of community service per week and paying $26,239.30 in restitution. Defendant was also fined $4,000.00 and required to pay costs. For the reasons stated herein, we uphold defendant's convictions but remand this case for resentencing.

The State's evidence tends to show that defendant was the owner and president of Computer Exchange, Inc., a business that built and sold personal computers. Defendant regularly purchased supplies from Cyberock, Inc., dealing personally with Kevin Thi ("Thi"), Cyberock, Inc.'s General Manager, beginning in June 1999. The original terms of their dealing required defendant to pay on delivery, but later defendant requested "net 20" terms, under which defendant would not have to write a check for the supplies until twenty days after receiving them.

This arrangement continued until 7 September 2000, when defendant presented Thi with a check for $7,535.00 requesting that Thi not deposit the check for thirty days. On 28 September 2000, defendant presented Thi with another check for $6,000.00 requesting that it also be held. On 25 October 2000, defendant gave Thi two more checks. One was in the amount of $7,176.75 and the second was in the amount of $5,527.55. Thi asked if he could deposit the checks and defendant stated that the 25 October check for $7,176.75 could be deposited. Thi attempted to deposit that check but it was returned for insufficient funds. Thi subsequently attempted to deposit the remaining three checks but they were returned marked "[s]top payment."

On 7 September 2000, defendant's company's bank account, on which the checks were written, contained a negative balance of $127.34. On 28 September, the balance was $2,339.24, and on 25 October, the balance was $3,055.82. Furthermore, the company's bank statement showed that eight checks had been returned for

insufficient funds during October 2000. Defendant's company subsequently went out of business in 2001.

The issues are whether: (I) there was sufficient evidence that defendant knowingly issued the worthless checks; (II) comments made by the trial court denied defendant a fair trial; (III) the trial court incorrectly instructed the jury to apply a reasonable person standard to the knowledge element of the offenses; (IV) the trial court committed plain error by failing to instruct the jury that defendant was charged as a corporate officer drawing a check on a corporate account; and (V) the trial court erred in sentencing defendant to thirty-six months of probation, twenty-five hours per week of community service, and to pay full restitution.

Trial Phase

I.

[1] Defendant first contends that the trial court erred by not dismissing the charges because there was insufficient evidence to submit the charges of felonious issuing of a worthless check to the jury. Specifically, defendant argues that there was no evidence that he issued worthless checks knowingly. We disagree.

"When a defendant moves for dismissal, 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). "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 (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). In deciding a motion to dismiss, the evidence should be viewed in the light most favorable to the State. *See id.* at 67, 296 S.E.2d at 652.

N.C. Gen. Stat. § 14-107(a) makes it unlawful for

> any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering the check or draft, that the maker or drawer of it has not sufficient funds on deposit in or credit with the bank or depository with which to pay the check or draft upon presentation.

N.C. Gen. Stat. § 14-107(a) (2003). This Court has recognized that the essential elements of the crime of issuing a worthless check are:

> (1) the person charged issued a check to another; (2) such person had insufficient funds on deposit in or lack of credit with the drawee bank with which to pay the check upon presentation; and (3) at the time the check was written, the issuer knew that there were insufficient funds or lack of credit with which to pay the check upon presentation.

Semones v. Southern Bell Telephone & Telegraph Co., 106 N.C. App. 334, 339-40, 416 S.E.2d 909, 912-13 (1992). "Knowledge in this context 'connotes a certain and definite mental attitude' on the part of the person charged." *Id.* at 340, 416 S.E.2d at 913 (quoting *State v. Miller*, 212 N.C. 361, 363, 193 S.E. 388, 389 (1937)). "Knowledge or intent 'is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred.' " *Id.* (quoting *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974)).

> For example, the knowledge required under Section 14-107 can be inferred from evidence that the defendant issued other worthless checks within the same time period as the check at issue, or from evidence that the defendant issued a check immediately after making a deposit into his account, knowing that the policy of his drawee bank is not to pay checks until deposits made into the drawer's account are actually collected.

Id. "However, the mere issuing of a check which is returned due to insufficient funds or lack of credit, without more, is not evidence from which the requisite knowledge can be inferred." *Id.*

In this case, not only was there evidence that the checks had been issued with insufficient funds, there was also evidence that other checks issued within the same time period had been returned for insufficient funds and that defendant actually requested Thi to hold the checks issued in September 2000 and not deposit them immediately. This is sufficient circumstantial evidence from which to infer that defendant knew that at the time he issued the checks they were worthless. Thus, there was sufficient evidence that defendant issued the worthless checks knowingly and the trial court did not err by denying the motion to dismiss.

II.

[2] Defendant next argues that the trial court improperly expressed opinions on the evidence of defendant's guilt as well as making other remarks that deprived defendant of a fair trial in an atmosphere of judicial calm. A trial court is prohibited from expressing any opinion "in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2003). Similarly, a trial court "[i]n instructing the jury, . . . shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C. Gen. Stat. § 15A-1232 (2003). Whether a trial court's comment constitutes an improper expression of opinion "is determined by its probable meaning to the jury, not by the judge's motive." *State v. McEachern*, 283 N.C. 57, 59-60, 194 S.E.2d 787, 789 (1973). Furthermore, " 'a totality of the circumstances test is utilized' " under which defendant has the burden of showing prejudice. *State v. Anthony*, 354 N.C. 372, 402, 555 S.E.2d 557, 578 (2001) (quoting *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995)). " '[U]nless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless.' " *Larrimore*, 340 N.C. at 155, 456 S.E.2d at 808 (quoting *State v. Perry*, 231 N.C. 467, 471, 57 S.E.2d 774, 777 (1950)).

A.

Prior to the State's publication of exhibits including bank records of defendant's company, the trial court commented to the jury that it recognized that some people were better with numbers than others and then stated:

> So none of you is to feel the least bit inadequate or the least bit unprepared. You may look at these things for as long as you care to look at them. But the good thing about a jury is there is twelve. Thirteen right now of you.
>
> So you are not responsible for understanding everything or even anything. You just look at them and spend as much time as you want. And if anyone needs any assistance, just has a question they want to ask, shoot.

Defendant contends this amounted to an instruction to the jury that they should ignore critical evidence in the case and constituted an improper expression of opinion on the weight to be given to the evidence. We disagree.

It is apparent from the transcript that the trial court was simply informing the jury to take as much time as they wanted or needed in order to look at the exhibits that were being published. The trial court's comments are clarified in subsequent remarks to the jury: "Again, you can have as much time as you care to examine these . . . . And also know that anytime during deliberations that you want to look at these exhibits again as a group, they can be sent back to you." The thrust of these statements to the jury is clear. They were not encouragement to the jury to ignore evidence, but rather to let the jury know they could take their time with the exhibits and that it was not necessary to completely and immediately comprehend everything in the bank records prior to jury deliberations. Thus, the trial court's comment on the exhibits was not an improper expression of opinion on the weight of the evidence. *See* N.C. Gen. Stat. §§ 15A-1222, -1232.

B.

During the State's closing argument, which was not recorded, the prosecutor apparently used a poster to illustrate his argument. After the closing, a jury member asked:

> UNIDENTIFIED JUROR: Your Honor, I am sorry. Can I look at those numbers or will it be in the jury room? I apologize.
>
> THE COURT: You have absolutely nothing to apologize for, sir. We owe you the apology of not thinking ahead. Therefore, yes, of course, you may have an opportunity.
>
> When you come back from your break if you would like to have that poster I am sure [the State] will make it available to you.
>
> Is that the one you are talking about?
>
> UNIDENTIFIED JUROR: The—whatever he had on the easel there. I saw him carry something up and he kept referring to numbers and I could follow what he was pointing at but I couldn't see it.
>
> THE COURT: He was painting by number. But we will make that available to you and I apologize that we didn't think of that ahead of time.

Defendant contends that the trial court's description of the State's closing argument as "painting by number[s]" constitutes an improper

expression of opinion on defendant's guilt. He asserts that the only legitimate interpretation of this remark is that the trial court believed defendant's guilt "was predetermined and that all the prosecutor needed to do was to fill in the details so that the jury would see the picture embedded in the outline."

As we have noted, whether a trial court's comment constitutes an improper expression of opinion "is determined by its probable meaning to the jury, not by the judge's motive." *McEachern*, 283 N.C. at 59-60, 194 S.E.2d at 789. In this case, the probable meaning of the trial court's comment to the jurors was to tell them that the prosecutor was using numbers on the poster as an illustration of his argument. Thus, the trial court was not expressing an opinion on defendant's guilt, but rather explaining for what purpose the State's poster, which at least one juror was unable to see, had been used. Nevertheless, even if this remark could possibly be construed as a statement of opinion regarding defendant's guilt, it is not apparent that it would have had any impact on the verdict returned by the jury, and thus the remark would have been at most harmless error. *See Larrimore*, 340 N.C. at 155, 456 S.E.2d at 808.

C.

Defendant further argues that these two remarks taken together and in combination with other statements by the trial court cumulatively deprived defendant of a trial in an atmosphere of judicial calm. He summarizes the additional comments on at least five occasions in which the trial court disparaged the trial process, the court system or judges, generally; at least seven occasions that the trial court told the jury it was the trial court's courtroom and the trial court made the rules, or encouraged the jury to violate rules about not eating or drinking in the courtroom; four times that the trial court told the jury they were not allowed to bring in alcoholic beverages, but wished they could; and at least five occasions where the trial court disparaged defendant's trial counsel and twice where the trial court "displayed open hostility" toward defendant.

We have reviewed all of the comments referred to by defendant in the context of the totality of the circumstances and conclude that they were within the trial court's inherent supervisory powers over the conduct of the trial and not prejudicial to defendant. *See id.* The majority of the trial court's comments involved the trial court "ordering" the jury to have a good lunch and permitting the jury to bring beverages into the courtroom. The comments to defendant's attorney

were either corrections, mild admonishments, or praise for the manner in which he was conducting himself during the trial. The remarks disparaging judges and the legal system amount to statements that: the greatest fear of judges was tripping and falling over their robes as they took the bench; traditionally judges took lunches lasting an hour and a half to give the judge time to sleep off the meal; jurors should ask the law enforcement officers where to eat, because "nobody knows where to eat better than law enforcement;" and telling one juror who needed to arrange care both for his horses and children that he could bring the horses to court with him, but not the children.

Although we do not necessarily condone these types of comments by the trial court, neither do we believe they were prejudicial to defendant, nor in the context of the entire proceeding did they deprive him of a fair trial in an atmosphere of judicial calm. *See id.* Also, as in *Larrimore*, the trial court instructed the jury that:

> "The law, as indeed it should, requires the presiding judge to be impartial. You are not to draw any inference from any ruling that I have made, or any inflection in my voice or expression on my face, or any question that I have asked a witness or anything else I have said or done during this trial, that I have an opinion or have intimated an opinion as to whether any part of the evidence should be believed or disbelieved, as to whether any fact has or has not been proved, or as to what your findings ought to be."

Furthermore, the alleged "open hostility" towards defendant occurred when, as he was testifying on cross-examination, the trial court admonished defendant to answer the question that was being asked and then if he needed to explain his answer he could do so. The second instance occurred shortly after and the trial court sent the jury out before admonishing defendant a second time to answer the question that was being asked. These admonishments fall within the trial court's power to control the examination and cross-examination of witnesses. *See State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732-33 (1999). Thus, we conclude the trial court's comments did not constitute prejudicial error.

III.

[3] Defendant next argues that the trial court erred in instructing the jury to apply a reasonable person standard to the knowledge element of issuing a worthless check. During its deliberations, the jury sent

out a note inquiring whether knowledge that the check was worthless required actual knowledge on the part of defendant. The trial court, after clarifying what the jury was asking, instructed the jury that "[a] person acts knowingly when the person is aware or conscious of what he is doing. A person has knowledge about the circumstances surrounding his act or about the results of his act when he is aware of or conscious of those circumstances or of those results." Thus, the trial court did not instruct the jury to apply a reasonable person standard to the knowledge element and we reject this assignment of error.

IV.

[4] Defendant assigns plain error to the trial court's failure to instruct the jury that he was being charged as a corporate officer. Defendant was indicted as a corporate officer issuing a worthless check from a corporate account. The trial court instead submitted the case to the jury as though defendant had issued a worthless personal check from a personal account and thus, the charges submitted to the jury did not conform with the theory of the State's case. Because the elements of issuing a worthless check are the same, whether defendant was charged as a corporate officer or as an individual, the trial court did not commit plain error as it is not probable a different result would have been reached. *See State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378-79 (1983).

Sentencing Phase

V.

[5] Defendant finally contends the trial court committed several errors in sentencing him. The trial court sentenced defendant to thirty-six months of probation conditioned upon his payment of restitution in the amount of $26,239.30 and completion of twenty-five hours per week of community service, for a total of 3,600 hours over the entire probationary period. In addition, the trial court fined defendant $1,000.00 per offense, totaling $4,000.00 and ordered him to pay costs in the amount of $500.00.

A.

First, defendant argues the trial court erred in sentencing him to a thirty-six month probation term. We agree. N.C. Gen. Stat. § 15A-1343.2(d)(3) clearly mandates that where a felon is sentenced to community punishment, as was the case here, probation may not

be for more than thirty months, unless the trial court specifically finds that a longer term is required. N.C. Gen. Stat. § 15A-1343.2(d)(3) (2003). The trial court in this case made no such finding, thus it was error to make defendant's probation term exceed thirty months. As a result, we must remand this case for re-sentencing in order for the trial court to either impose a probation term consistent with the statute or to make the appropriate finding of fact that a longer probationary period is necessary. *See State v. Lambert*, 146 N.C. App. 360, 366, 553 S.E.2d 71, 76 (2001).

B.

Defendant next contends the trial court abused its discretion in conditioning his probation on the payment of full restitution in the amount of $26,239.30 and in addition completing twenty-five hours of community service per week for the duration of defendant's probationary period, irrespective of defendant's ability to pay. Again, we agree.

N.C. Gen. Stat. § 14-107 expressly provides for restitution in a worthless check case where no active punishment is imposed.

> In deciding to impose any sentence other than an active prison sentence, the sentencing judge shall consider and may require, in accordance with the provisions of G.S. 15A-1343, restitution to the victim for (i) the amount of the check or draft, (ii) any service charges imposed on the payee by a bank or depository for processing the dishonored check, and (iii) any processing fees imposed by the payee pursuant to G.S. 25-3-506, and each prosecuting witness (whether or not under subpoena) shall be entitled to a witness fee as provided by G.S. 7A-314 which shall be taxed as part of the cost and assessed to the defendant.

N.C. Gen. Stat. § 14-107(e). In ordering a defendant to pay restitution in a worthless check case, the trial court must do so in accordance with N.C. Gen. Stat. § 15A-1343, which provides for conditions of probation. *See id.*

Under Section 15A-1343, community service or reparations, *see* N.C. Gen. Stat. § 15A-1343(b1)(6) (2003), and restitution, *see* N.C. Gen. Stat. § 15A-1343(d), may be imposed as conditions of probation. N.C. Gen. Stat. § 15A-1343(d), furthermore, provides a procedure for the imposition of either restitution or reparation as a condition of probation.

> (d) Restitution as a Condition of Probation.—As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant. When restitution or reparation is a condition imposed, the court shall take into consideration the factors set out in G.S. 15A-1340.35 and G.S. 15A-1340.36. As used herein, "reparation" shall include but not be limited to the performing of community services, volunteer work, or doing such other acts or things as shall aid the defendant in his rehabilitation. As used herein "aggrieved party" includes individuals, firms, corporations, associations, other organizations, and government agencies, whether federal, State or local, including the Crime Victims Compensation Fund established by G.S. 15B-23. A government agency may benefit by way of reparation even though the agency was not a party to the crime provided that when reparation is ordered, community service work shall be rendered only after approval has been granted by the owner or person in charge of the property or premises where the work will be done.

N.C. Gen. Stat. § 15A-1343(d). Thus, the statute clearly requires a trial court to use the same considerations in determining to impose either restitution or community service reparations as a condition of probation.

Among other things, N.C. Gen. Stat. § 15A-1340.36 requires a trial court, when imposing a restitution or reparation requirement on a defendant under Section 15A-1343(d), to consider factors including the defendant's resources, ability to earn, support obligations, and any other matters that pertain to the defendant's ability to pay. N.C. Gen. Stat. § 15A-1340.36(a) (2003). Furthermore, the amount of restitution "must be limited to that supported by the record . . . ." *Id.* Although the statute expressly does not require the trial court to make findings of fact or conclusions of law on the factors, *see id.*, the record in this case reveals that the trial court did not consider any of the factors related to defendant's ability to pay the full amount of restitution and thus this case must be remanded for a new sentencing hearing. *See State v. Smith*, 90 N.C. App. 161, 168, 368 S.E.2d 33, 38 (1988), *aff'd per curiam*, 323 N.C. 703, 374 S.E.2d 866 (1989) (remanded for new determination of restitution where the trial court failed to consider defendant's financial situation).

We further conclude that in imposing both restitution and community service conditions upon defendant's probation, the trial court also failed to consider defendant's ability to comply with both conditions simultaneously, as well as meeting his other obligations under the sentence of paying costs and fines. The conditions of probation in this case would require defendant to be gainfully employed at such a wage as to be able to provide for his family's support in addition to paying on average approximately $10,000.00 per year in restitution, fines, and costs. The imposition of twenty-five hours per week of community service over a three year period as another condition of probation may make it impossible for defendant to be gainfully employed to the extent required to make his restitution payments and support his family. *See id.* (trial court erred in imposing a restitution requirement as a condition of probation in such an amount that defendant "clearly [could not] comply"); *see also State v. Hayes*, 113 N.C. App. 172, 175, 437 S.E.2d 717, 719 (1993) (trial court erred in setting amount of restitution where common sense dictated defendant clearly would be unable to pay). Although the trial court asserted that, each week for three years, defendant could perform ten hours of community service on both Saturdays and Sundays, and then simply perform five more hours of service on other days while maintaining gainful employment, we do not believe this constitutes sufficient consideration of defendant's ability to make both restitution and reparation. On remand, the trial court, if it decides to impose both restitution and reparation requirements, shall take into consideration defendant's ability to comply with the community service requirement while maintaining gainful employment to the extent necessary to make restitution payments and support his family. *See* N.C. Gen. Stat. § 15A-1340.36(a).

On the facts of this case, ordering defendant to pay full restitution of over $26,000.00 in addition to performing twenty-five hours per week of community service for the entire probationary period, for a total of 3,600 hours, while remaining gainfully employed and paying $4,000.00 in fines plus $500.00 in costs, without considering the required statutory factors, pursuant to N.C. Gen. Stat. § 15A-1340.36 and N.C. Gen. Stat. § 14-107, was error. Because the trial court failed to take into consideration these statutory factors in imposing restitution and reparation and further sentenced defendant to a probationary period longer than thirty months without proper findings of fact, defendant is entitled to a new sentencing hearing.

No error at trial.

Remanded for a new sentencing hearing.

Judges McCULLOUGH and LEVINSON concur.

HOWARD C. JONES, II; FRANKIE HAYES SOUTHARD; JIMMY ROY ROGERS AND WIFE, MADILYN KAY ROGERS; GREGORY E. BOWERS AND WIFE, NATALIE W. BOWERS; AND DANIEL RAY SAMMONS AND WIFE, SHARON P. SAMMONS, PLAINTIFFS V. ROBERT WAYNE DAVIS AND WIFE, GLENDA K. DAVIS; JERRY ALLAN ALLRED AND WIFE, YVONNE DAVIS ALLRED, AND SURRY COUNTY, DEFENDANTS

No. COA03-594

(Filed 20 April 2004)

1. **Zoning— subdivision ordinance—leasing of lots—mobile homes**

A county subdivision ordinance which defined subdivision as the division of land "for the purpose of sale or building development" allowed a tract of land to be divided into lots to be leased by the landowners to third parties for the placement of mobile homes thereon.

2. **Zoning— manufactured home ordinance—unsubdivided land**

A manufactured home park ordinance did not prohibit subdivision owners from leasing lots to third parties for placement of mobile homes thereon because the ordinance applied only to a tract of unsubdivided land.

3. **Zoning— subdivision ordinance—use of land not regulated**

A county subdivision ordinance which provided that subdivisions and lots created thereunder "must comply with all applicable local and state laws, including any zoning ordinance which may apply to the area to be subdivided" does not regulate the use of land and thus does not prohibit subdivision lots from being leased to third parties for the placement of mobile homes thereon.

Judge WYNN dissenting.

JONES v. DAVIS

[163 N.C. App. 628 (2004)]

Appeal by plaintiffs from order entered 10 February 2003 and judgment entered 11 February 2003 by Judge John O. Craig, III, in Surry County Superior Court. Heard in the Court of Appeals 3 February 2004.

Elizabeth Horton, Urs R. Gsteiger, and Howard C. Jones, II, for plaintiffs-appellants.

Finger, Parker, Avram & Roemer, L.L.P., by Raymond A. Parker, for defendants-appellees Robert Wayne Davis, and wife, Glenda K. Davis, and Jerry Allan Allred, and wife, Yvonne Davis Allred.

Folger and Folger, by Fred Folger, Jr., for defendant-appellee Surry County.

TYSON, Judge.

Howard C. Jones, II, Frankie Hayes Southard, Jimmy Roy Rogers, Madilyn Kay Rogers, Gregory E. Bowers, Natalie W. Bowers, Daniel Ray Sammons, and Sharon P. Sammons (collectively, "plaintiffs") appeal from the trial court's order granting summary judgment to Robert Wayne Davis ("Davis"), Glenda K. Davis, Jerry Allan Allred, and Yvonne Davis Allred (collectively, "defendants") and the judgment entered following this order in favor of defendants. We affirm.

I. Background

The parties stipulated to the majority of facts found by the trial court. Defendants are owners of approximately forty-one acres of land in Surry County, North Carolina. Plaintiffs are property owners who live in close proximity to defendants' property. One of the defendants, Davis, submitted an application to the Surry County Planning Board ("Planning Board") for approval of a manufactured home park pursuant to the Surry County Manufactured Home and Manufactured Home Park Ordinance ("Manufactured Home Park Ordinance") in September 1997. Defendants took no further steps to have that application considered or approved.

In November 1997, Davis submitted a preliminary subdivision plat of approximately twenty acres ("Section One of Kaye's Subdivision") of defendants' property pursuant to the Surry County Subdivision Ordinance for approval as a homeowners' association subdivision to the Planning Board. The Planning Board preliminarily approved Section One of Kaye's Subdivision on 8 December 1997. The Surry County Board of Commissioners ("County Commissioners")

approved the plat on 15 December 1997. Section One of Kaye's Subdivision contains twenty lots. The plat was never recorded.

Davis also submitted a preliminary plat for "Section Two of Kaye's Subdivision," which the Planning Board preliminarily approved on 12 January 1998. Plaintiffs admit attending the County Commissioners' hearings and assert they "repeatedly requested and were denied enforcement of the [Manufactured Home Park Ordinance]." Plaintiffs did not appeal the decisions of the Planning Board or the County Commissioners' approval of any of defendants' subdivision plats.

Beginning in April 1998, defendants rented several of the lots in Section One of Kaye's Subdivision to tenants, who placed tenant-owned manufactured homes on the subdivided lots. In November 1998, Davis resubmitted a plat of Section One of Kaye's Subdivision for preliminary and final approval because the prior approved plat had not been recorded within six months after approval. He also submitted Section Two of Kaye's Subdivision for final approval. Both subdivisions received final approval as a homeowners' association subdivision.

By the end of 1999, approximately twelve to fourteen of the subdivision lots in Kaye's Subdivision had been rented to third persons. At all times, Surry County had a Subdivision Ordinance and a Manufactured Home and Manufactured Home Park Ordinance in effect. The parties stipulated that all hearings and meetings regarding Kaye's Subdivision were properly scheduled and that all votes were properly taken and recorded by the Planning Board and County Commissioners. At the time all plats were approved, the County Commissioners had not adopted a zoning ordinance to restrict uses on defendants' property.

In addition to these facts stipulated to among the parties, the trial court found that defendants properly obtained approval from Surry County for the subdivision of the land in question. Further, the approved maps of this subdivision were properly recorded with the Surry County Register of Deeds.

On 4 June 2002, this Court reversed the trial court's order awarding summary judgment to plaintiffs in an unpublished opinion. The case was remanded to the trial court for further proceedings. This matter came on for trial in January 2003. The trial court entered summary judgment in favor of defendants based on stipulated facts, affidavits, depositions, and additional arguments. Plaintiffs appeal.

II. Issues

The issues on appeal are whether the trial court erred in: (1) concluding that the definition of a subdivision as the division of land "for the purpose of sale or building development" includes the rental of spaces to third parties for placement of their mobile homes and (2) concluding that the Subdivision Ordinance does not regulate use of land and that the project was properly subdivided.

III. Definition of "Subdivision"

[1] Plaintiffs contend the trial court erred in concluding " 'for the purpose of sale or building development' includes the construction or placing of improvements on lots in the subdivision, so that the lots can be leased to third parties." Plaintiffs argue the definition of a "subdivision," as used in the ordinance does not allow the rental of lots to third parties, who later place their owned mobile homes thereon. We disagree.

"A county may by ordinance regulate the subdivision of land within its territorial jurisdiction." N.C. Gen. Stat. § 153A-330 (2003). Plaintiffs' assignment of error regarding the interpretation of the Subdivision Ordinance is a question of law, requiring this Court to apply *de novo* review of the trial court's judgment. *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 137, 431 S.E.2d 183, 187 (1993).

Here, the Subdivision Ordinance defines a subdivision as "all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose of sale or building development (whether immediate or future) . . . ." The definition lists four exclusions, which the parties do not argue apply to the case at bar. Plaintiffs argue the Subdivision Ordinance does not allow for the rental of spaces to tenants for placement of their mobile homes and the project was not properly subdivided.

"In interpreting a[n] . . . ordinance, 'the basic rule is to ascertain and effectuate the intent of the legislative body.' " *Id.* at 138, 431 S.E.2d at 187 (quoting *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980)). In determining the intent of the legislative body, we must examine the language, spirit, and goal of the ordinance. *Capricorn Equity Corp.*, 334 N.C. at 138, 431 S.E.2d at 188. Further, "some deference is given to the [Board of Commissioners'] interpretation of its own [ordinance]." *Tucker v. Mecklenburg Cty. Zoning Bd. of Adjust.*, 148 N.C. App. 52, 57, 557

S.E.2d 631, 635 (2001), *aff'd in part and rev. improvidently allowed in part*, 356 N.C. 658, 576 S.E.2d 324 (2003).

During oral argument, the parties stipulated that the homes placed on the lots were proper and allowed, and plaintiffs do not contest that the tenants who rented defendants' lots had complied with all applicable Surry County ordinances and permitting requirements for the homes. Plaintiffs also conceded that defendants or their tenants could have constructed site-built homes or moved modular or factory built homes onto the lots. At the time this action arose, Surry County had not adopted a zoning ordinance regulating the use of defendants' land. *See Orange County v. Heath*, 278 N.C. 688, 691, 180 S.E.2d 810, 812 (1971) ("A zoning ordinance is a legislative determination as to what restrictions should be placed on the use of land.").

The phrase "for the purpose of sale or building development," whether immediate or future, is not defined within the Subdivision Ordinance. In Article IV, the Subdivision Ordinance clearly states its purpose and intent to "establish procedures and standards for the development and subdivision of land within Surry County," insure accurate legal identification, promote orderly layout of the land, provide suitable building sites, avoid overcrowding of the land, and protect the health, safety, and welfare of Surry County residents. Nothing in the Subdivision Ordinance addresses or limits the type of buildings or structures that may be placed on the subdivided land. The Subdivision Ordinance also allows subdivisions to be held in single ownership as a "Homeowners' Association Subdivision." Kaye's Subdivision was approved by the County Commissioners as a homeowners' association subdivision.

[2] In contrast, the Manufactured Home Park Ordinance does not conflict with the trial court's ruling, because a "manufactured home park," by its express terms, applies only to a "tract of unsubdivided land." Here, Defendants' land was approved to be *subdivided*. After the maps were recorded, Surry County issued individual *ad valorem* property tax bills for each lot. The Manufactured Home Park Ordinance states that "this ordinance is not intended to interfere with, abrogate, or annul . . . ordinances of [Surry] County." Further, the Planning Board was aware of the project's potential development and use.

The County Commissioners were also aware that Davis intended to rent the subdivided lots to tenants for placement of their mobile homes on the property. Plaintiffs requested the County Commission-

ers to enforce the Manufactured Home Park Ordinance, but they refused to take any enforcement action. The Planning Board and County Commissioners did not condition their approval of the subdivision plats for defendants' property and did not at any time require defendants to obtain manufactured home permits for any of the subdivided lots.

"When zoning restrictions are met, and subdivision regulations as set out in the ordinance are complied with, permits must be issued." *Nazziola v. Landcraft Props., Inc.*, 143 N.C. App. 564, 566, 545 S.E.2d 801, 803 (2001) (citing *Quandrant Corp. v. City of Kinston*, 22 N.C. App. 31, 205 S.E.2d 324 (1974)). The Subdivision Ordinance, Section 31 states, "[n]o real property within the jurisdiction of this Ordinance shall be subdivided . . . until a preliminary and a final plat have been reviewed and approved as provided hereinafter." Article VI of the Subdivision Ordinance, Sections 60 through 65, requires the owner to submit a sketch plan, gain approval of a preliminary plat by the Planning Board, obtain approval of the final plat by the Planning Board and County Commissioners, and record the final plat with the Surry County Register of Deeds. The parties stipulated that defendants complied with all of these conditions.

The preliminary site plans for Kaye's Subdivision received recommended approval by the Planning Board, and the County Commissioners gave its final approval as a homeowners' association subdivision. The plats were properly recorded with the Surry County Register of Deeds. The Subdivision Ordinance states, "[t]he Register of Deeds shall not file or record a plat of a subdivision of land located within the territorial jurisdiction of Surry County that has not been approved in accordance with these provisions . . . ." Plaintiffs do not contest the trial court's conclusion that the approved maps of the subdivision were properly recorded. These uncontroverted facts show that defendants complied with the procedures set forth in the Subdivision Ordinance. The Planning Board and County Commissioners approved the subdivision of defendants' land through proper procedures. The Manufactured Home Park Ordinance expressly applies only to *unsubdivided* land.

The dissenting opinion concludes that the placing of mobile homes on the land does not constitute "for the purpose of sale or building development" under the Subdivision Ordinance. This Court, however, has recognized that a mobile home park can meet the definition of a subdivision. *State v. Turner*, 117 N.C. App. 457, 459, 451 S.E.2d 20 (1994). Although *Turner* is a criminal case, we adopted the

definition of a "subdivision" used in Black's Law Dictionary, 5th ed. (1979) as, "[d]ivision into smaller parts of the same thing or subject-matter. The division of a lot, tract or parcel of land into two or more lots, tracts, parcels or other divisions of land *for sale or development.*" *Id.* (emphasis supplied). This definition is virtually identical to the definition used in the Subdivision Ordinance at bar. In *Turner*, we stated, "[t]he evidence shows that Timberline Mobile Home Park is owned by one individual, who has divided the property into lots for lease. The mobile home park thus fits within the foregoing definition of a subdivision." *Id.*

We hold that the stipulated facts and the approval of Kaye's Subdivision by the County Commissioners support the trial court's conclusion that "for the purpose of sale or building development" includes construction on subdivision lots, which are leased to third parties who place their own improvements on the property. Further, nothing in the Subdivision Ordinance prevents the owner from leasing a lot in the subdivision. This assignment of error is overruled.

IV. Subdivision Ordinance

[3] Plaintiffs contend the trial court erred in concluding that the Subdivision Ordinance does not regulate use of land. Plaintiffs argue both the Subdivision Ordinance and the Manufactured Home Park Ordinance regulate use, and therefore, the Manufactured Home Park Ordinance is the more restrictive and governs the operation of the project. We disagree.

In support of their argument, plaintiffs included in their brief copies of this Court's unpublished opinion and the trial court's order in the case of *Murphy v. McKnight*. Neither our unpublished opinion nor the trial court's order in the *Murphy* case are precedent in this case, and these documents were not part of the record on appeal. We will not consider any argument based on these documents and grant defendants' motion to strike these portions of plaintiffs' brief. *See Horton v. New South Ins.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858, *cert. denied*, 343 N.C. 511, 472 S.E.2d 8 (1996); *see also* N.C.R. App. P. 30(e)(3) (2004).

" 'Every person owning property has the right to make any lawful use of it he sees fit, and restrictions sought to be imposed on that right must be carefully examined . . . .' " *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 401, 584 S.E.2d 731, 736, *reh'g denied*, 357 N.C. 582, 588 S.E.2d 811 (2003) (quoting *Vance S. Harrington & Co.*

v. Renner, 236 N.C. 321, 324, 72 S.E.2d 838, 840 (1952)). The general requirements stated within the Subdivision Ordinance provide, "[a]ll subdivisions and lots created under this Ordinance must comply with all applicable local and state laws, including any zoning ordinance which may apply to the area to be subdivided." Use of these words shows the intent to distinguish between the Subdivision Ordinance and zoning ordinances, which regulate land use, and supports the trial court's conclusion. Further, the County Manager's deposition shows that Surry County has not yet determined "what [constitutes] a valid activity [within] a legal subdivision." He also testified that "the subdivision ordinance does not restrict the activity that occurs there." Because the Subdivision Ordinance does not regulate land use, plaintiffs' assignment of error is overruled.

V. Conclusion

The parties stipulated to the majority of the facts at bar. Based on those stipulations and the clear and unambiguous language of the ordinances, the trial court did not err in concluding that the definition of "for the purpose of sale or building development" in the Subdivision Ordinance includes the rental of subdivided lots to third parties for placement of tenants' mobile homes thereon. The trial court properly concluded that the Subdivision Ordinance does not regulate land use on defendants' property. The trial court's judgment is affirmed.

Affirmed.

Judge McGEE concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

The Surry County Subdivision Ordinance defines subdivision as "all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose of sale or building development (whether immediate or future)." As I believe Defendants' rental or lease of lots to third parties for the placement of mobile or manufactured homes does not constitute a sale of a lot or building development, I dissent.

The terms 'sale' and 'building development' are not defined in the ordinance. "As neither term is defined by [Surry County's Subdivi-

sion] Ordinance, [what constitutes a sale or building development] must be based upon each terms' normal meaning." *See Appalachian Outdoor Advertising Co. v. Boone Board of Adjustment*, 128 N.C. App. 137, 493 S.E.2d 789 (1997).

According to Black's Law Dictionary the term 'sale' constitutes "a contract between two parties, called, respectively, the seller (or vendor) and the buyer (or purchaser), by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and possession of property." In this case, the record indicates Defendants advertised the lots for rent to mobile home owners and rented spaces to 12 to 14 mobile home owners. Defendants also admit they never placed a price on any of the lots, never advertised or offered any of the lots for sale, and never agreed to sell any of the lots to anyone. As the lots were rented or leased to the mobile home owners, a transfer of title did not occur. Although Defendant, Yvonne Allred, testified the lessees had an option to buy the lots, she admitted the lease did not contain a provision to that effect and there were no other writings indicating the lessees had such an option. Moreover, the lessees were not provided with any information as to when they could exercise the option or the lot prices. Thus, at the time of the lawsuit, the land was not for sale.

Moreover, the rent or leasing of the lots to third parties for the placement of mobile or manufactured homes does not constitute building development. According to American Heritage Dictionary, Third Edition, 'develop' means "to cause a (tract of land) to serve a particular purpose and 'development' means "the act of developing; the state of being developed; a significant event, or occurrence, or change, or a group of dwellings built by the same contractor." By statute, a manufactured home is "a structure, transportable in one or more sections, which, in the traveling mode, is eight feet or more in width or is 40 feet or more in length, or when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning and electrical systems contained therein." N.C. Gen. Stat. § 143-143.9(6). Based upon this definition, a manufactured home is assembled in components at a factory and hooked together upon delivery to the mobile home site, which does not constitute a building development on a tract of land.

Defendants merely rented the lots and did not have any involvement with the placement of trailers onto the lots. Relying upon a

criminal case, *State v. Turner*, 117 N.C. App. 457, 451 S.E.2d 19 (1994), the majority concludes lot rentals for mobile homes constitute the sale of land or building development. Unlike the present case where this Court has to construe the meaning of a zoning ordinance and N.C. Gen. Stat. § 153A-335, which provides the statutory definition of subdivision, the issue in *State v. Turner* concerned whether a road in a mobile home park was a public vehicular area within the meaning of N.C. Gen. Stat. § 20-4.01(32). In *Turner*, the defendant was arrested for drunk driving in an area that the facts concede to have been "a privately-owned mobile home park". *Turner*, 117 N.C. App. at 458, 451 S.E.2d at 19. The issue in that case was not whether the county had properly zoned the area as a mobile home park; rather, the issue was whether the defendant was driving on a highway, street or public vehicular area within the meaning of N.C. Gen. Stat. § 20-4.01(32). In reaching the conclusion that a jury could find the street was a public vehicular area within the meaning of N.C. Gen. Stat. § 20-4.01(32), this Court held a mobile home park fits within the definition of a subdivision. Thus, in *Turner*, this Court did not (1) address the present issue, (2) determine whether mobile home lot rentals constituted a sale within the meaning of the Surry County zoning ordinance or N.C. Gen. Stat. § 153A-335, nor (3) determine whether the placement of mobile homes onto a lot constituted building development. Thus, I believe *State v. Turner* does not control the disposition of the legal issues presented by this civil case.

All of the testimony indicates Defendants were developing the lots for trailer hookups and not the construction of dwellings or buildings. Defendants initially sought planning board approval for a mobile home park and, after changing their plans, they sought approval for a subdivision in an attempt to circumvent the requirements of the Surry County Manufactured Home and Manufactured Home Park Ordinance which imposes minimum development standards for a manufactured home park. Indeed, Defendants testified that they did not want to incur the expense of planting the tree screen and wanted to avoid road maintenance expenses. With a subdivision, Defendants did not have to plant a buffer zone (tree screen) and road maintenance could be turned over to the State or a Homeowner's Association. The Defendants' circumvention of the Manufactured Home Park Ordinance should not be sanctioned by this Court. Moreover, as I believe Defendants' lot rentals do not comport with the Surry County Subdivision Ordinance definition of subdivision, I hereby dissent.

GINGER HUBER, PLAINTIFF v. NORTH CAROLINA STATE UNIVERSITY; RALPH HARPER, DIRECTOR OF PUBLIC SAFETY, NORTH CAROLINA STATE UNIVERSITY; JEFF MANN, ASSOCIATE VICE CHANCELLOR FOR BUSINESS, NORTH CAROLINA STATE UNIVERSITY; GEORGE L. WORSLEY, VICE CHANCELLOR OF FINANCE & BUSINESS, NORTH CAROLINA STATE UNIVERSITY; DAVE RAINER, ASSOCIATE VICE CHANCELLOR FOR ENVIRONMENTAL HEALTH AND PUBLIC SAFETY, NORTH CAROLINA STATE UNIVERSITY, DEFENDANTS

No. COA03-145

(Filed 20 April 2004)

1. **Appeal and Error— appealability—interlocutory order—sovereign immunity**

Issues of immunity affect a substantial right and warrant immediate review.

2. **Telecommunications— wiretapping—federal statute—abrogation of state sovereign immunity**

The trial court properly denied a motion to dismiss claims against a state university under federal wiretapping law where defendant claimed sovereign immunity. Congress acted within its constitutional powers by holding governmental entities liable and abrogating state sovereign immunity.

3. **Telecommunications— wiretapping—state university public safety director—qualified immunity**

The trial court properly denied defendant's motion to dismiss claims arising from a state university official recording personal telephone conversations of an employee where defendant claimed qualified immunity, but there was a factual dispute as to whether the recordings were made pursuant to standard procedure.

4. **Telecommunications— wiretapping university employees—public official immunity—scope of duties**

The trial court properly denied a motion to dismiss claims arising from the recording of personal telephone recordings by a university's public safety director where defendant claimed public official immunity, but there were issues as to whether the director was acting outside the scope of his duties.

Appeal by defendants from orders entered 4 October 2002 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 12 November 2003.

Moore & Van Allen, PLLC, by Reed J. Hollander and Ellis & Winters, LLP, by Jonathan D. Sasser, for plaintiff appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Ziko, for defendant appellants North Carolina State University, Jeff Mann, George L. Worsley, Dave Rainer, and Thomas Younce.

Attorney General Roy Cooper, by Assistants Attorney General Deborrah L. Newton and William McBlief, for defendant appellant Ralph Harper.

WYNN, Judge.

By this appeal, defendants North Carolina State University ("NCSU"), Jeff Mann ("Mann"), George Worsley ("Worsley"), Dave Rainer ("Rainer"), and Thomas Younce ("Younce") (collectively hereinafter "Defendants") contend the trial court erred in denying their motion to dismiss claims brought by Plaintiff Ginger Huber ("Plaintiff"). Specifically, Defendants assert that (I) the doctrine of sovereign immunity bars claims brought against NCSU and Younce in his official capacity; (II) the complaint failed to name Mann, Worsley, and Rainer in their individual capacities; and (III) the doctrine of qualified immunity bars Plaintiff's claims against Mann, Worsley and Rainer. In a cross-appeal, defendant Ralph Harper ("Harper") argues the trial court erred in denying his motion to dismiss, in that (I) Plaintiff's complaint failed to name Harper in his individual capacity; (II) the doctrine of qualified immunity bars Plaintiff's claims; and (III) public official immunity bars Plaintiff's claims. After careful consideration, we affirm the orders of the trial court.

On 3 May 2001, Plaintiff filed a complaint, which was later amended, against Defendants and Harper in Wake County Superior Court. According to the pertinent allegations contained in Plaintiff's amended complaint, Plaintiff began employment on 13 October 1997 as personal assistant to Harper, who was at that time the director of the NCSU Department of Public Safety ("Department of Public Safety"). During her orientation, Plaintiff was never notified that any telephone lines within the Department of Public Safety's offices were recorded. Two months later, however, fellow employees informed Plaintiff of the existence of a "Digital Audio Tape" recorder in the Department of Public Safety offices, which, Plaintiff also learned, Harper used to record the personal telephone conversations of a certain employee. When Plaintiff confronted Harper with this informa-

tion, Harper assured Plaintiff that her telephone line was not connected to the Digital Audio Tape system and could not be recorded. Harper explained that he often used Plaintiff's telephone in the evenings and did not want to record his own conversations.

In November of 1998, Harper issued a departmental "Standard Operating Procedure" entitled "Downloading Telephone Calls and Radio Transmissions from the [Digital Audio Tape] Recorder." Under the Standard Operating Procedure, the only personnel granted access to the Digital Audio Tape recorder were the computer support technician and the telecommunications center supervisor. In May of 1999, however, Harper hired Audio Data Systems, Inc. to install computer software on his office computer to enable him to listen to the telephone conversations of Department of Public Safety employees. According to the complaint, Harper did so in order to prevent Department of Public Safety employees from revealing his improper activities. Such alleged activities included unauthorized personal expenditure of departmental funds, misuse of departmental computer systems, inappropriate personal relationships with female employees and retaliation against employees who interfered with his conduct.

In late 1999 and early 2000, Plaintiff became aware that, despite Harper's protestations to the contrary, her personal telephone conversations were being recorded. Harper assured her that any such recording was in error, and told her that he would have her telephone line removed from the Digital Audio Tape recorder. Plaintiff learned in June of 2000 that her line was still being recorded.

On 18 June 2000, a local newspaper published a front-page article detailing its investigation of improper conduct by Harper, including his surreptitious recording of telephone conversations of Department of Public Safety employees. Shortly after publication of the article, NCSU informed Harper that he should retire by 30 June 2000. Defendant Younce subsequently became the new Director of Public Safety.

In her amended complaint, Plaintiff set forth claims against Defendants and Harper for violations of (1) federal wiretapping law; (2) Plaintiff's right to privacy under the Fourth and Fourteenth Amendments to the United States Constitution; (3) State wiretapping law; and (4) Plaintiff's rights under Article I, sections 19 and 20 of the North Carolina Constitution. Defendants and Harper filed motions to

dismiss Plaintiff's complaint, which motions the trial court granted in part and denied in part. Defendants and Harper appealed.

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[1] As a preliminary matter, we note that although the denial of a motion to dismiss is an interlocutory order, where an appeal from an interlocutory order raises issues of sovereign immunity, it affects a substantial right sufficient to warrant immediate appellate review. *Campbell v. Anderson*, 156 N.C. App. 371, 374, 576 S.E.2d 726, 728, *disc. review denied*, 357 N.C. 457, 585 S.E.2d 385 (2003). Defendants and Harper argue, *inter alia*, that the doctrines of sovereign and qualified immunity bar Plaintiff's claims. We therefore address the merits of those arguments set forth by Defendants and Harper concerning immunity.

[2] In general, because NCSU is a State agency, *Wood v. N.C. State Univ.*, 147 N.C. App. 336, 338, 556 S.E.2d 38, 40 (2001), *disc. review denied*, 355 N.C. 292, 561 S.E.2d 887 (2002), NCSU and Younce in his official capacity are entitled to sovereign immunity against Plaintiff's federal wiretap claim. *See Alden v. Maine*, 527 U.S. 706, 712, 144 L. Ed. 2d 636, 652 (1999) (holding that sovereign immunity shields States from private suits in state courts pursuant to federal causes of action). However, Congress may abrogate sovereign immunity of the States when it (1) expresses an unequivocal intention to abrogate such immunity and (2) acts pursuant to a valid grant of constitutional authority. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73, 145 L. Ed. 2d 522, 535 (2000). We therefore examine the federal wiretapping law to determine whether it expresses an intent by Congress to abrogate State sovereign immunity, and, if so, whether Congress acted within its constitutional authority in doing so.

18 U.S.C. Section 2520(a)

Congress enacted section 2520(a) of Title 18 of the United States Code as part of the Omnibus Crime Control and Safe Streets Act in 1968. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §802, 82 Stat. 223 (1968). Section 2520(a) allows an individual whose rights are violated by the interception and disclosure of wire or oral communications to bring a private cause of action against any "person" responsible for such violations. *See* 18 U.S.C. § 2520(a) (2000). The term "person" under section 2520(a) is defined as "any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust or corporation." 18 U.S.C. § 2510(6) (2000).

In 1986, Congress enacted legislation in response to the growing use of electronic communications. The Electronic Communications Privacy Act of 1986 criminalized and created civil liability for intentionally intercepting electronic communications without a judicial warrant. *See* Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986); *Adams v. City of Battle Creek*, 250 F.3d 980, 982 (6th Cir. 2001). In doing so, the Electronic Communications Privacy Act expanded section 2520(a) to allow for recovery for the interception and disclosure of electronic communication, in addition to wire and oral communication. Significantly, the 1986 amendment also added the words "or entity" following "person," allowing for civil action against "the person or entity which engaged in [the] violation." However, Congress did not expressly define the term "entity".

Finally, section 2520(a) was again amended in 2001 by the USA Patriot Act, which added the phrase "other than the United States" following "person or entity." *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). Thus, as currently enacted, section 2520(a) states that "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate." 18 U.S.C.A. § 2520(a) (West Supp. 2003) (emphasis added). The question for this Court is whether the term "entity" includes governmental entities, which would signal that the statute abrogates their sovereign immunity.

Plaintiff asserts Congress abrogated State sovereign immunity by adding the term "entity" to those liable to suit. Defendants contend the statutory language does not express an "unequivocal intention" by Congress to abrogate such immunity. The majority of the federal courts addressing the issue have held that a governmental entity may be liable in a civil suit. *See Organizacion JD LTDA. v. U.S. Dept. of Justice*, 18 F.3d 91, 94-95 (2nd Cir. 1994), *cert. denied*, 512 U.S. 1207, 129 L. Ed. 2d 813 (1994); *Adams*, 250 F.3d at 985-86; *Conner v. Tate*, 130 F. Supp. 2d 1370, 1374-75 (N.D. Ga. 2001); *Dorris v. Absher*, 959 F. Supp. 813, 819-20 (M.D. Tenn. 1997), *affirmed in part and reversed in part on other grounds*, 179 F.3d 420 (6th Cir. 1999); *PBA Local No. 38 v. Woodbridge Police Dept.*, 832 F. Supp. 808, 822-23 (D.N.J. 1993). These courts reasoned that, by adding the word "entity" to those

against whom a suit could be pursued under section 2520(a), Congress could have only meant "governmental entities," inasmuch as the term "person" already included business entities by definition. The addition of the language evinced a clear intent by Congress to abrogate the protections of sovereign immunity to the States.

The United States Court of Appeals for the Seventh Circuit has ruled to the contrary, however. *See Abbott v. Village of Winthrop Harbor*, 205 F.3d 976, 980-81 (7th Cir. 2000); *see also Amati v. City of Woodstock, Ill.*, 829 F. Supp. 998, 1001-03 (N.D. Ill. 1993) (concluding that governmental entities may not be held liable under federal wiretapping law); *but see Bodunde v. Parizek*, 1993 U.S. Dist. LEXIS 7365, 1993 WL 189941 (N.D.Ill. 1993) (stating that "[s]ection 2520(a) expressly provides that municipal entities may be held liable for violations of the Federal Wiretapping Act"), *affirmed*, 108 F.3d 1379 (7th Cir. 1997). The Court in *Abbott* concluded that the plain meaning of the term "person" as defined by section 2510(6) did not include governmental entities, and therefore governmental entities were immune from suit. *Abbott*, 205 F.3d at 980-81.

We agree with the United States Courts of Appeals for the Second and Sixth Circuits that the term "entity" necessarily means governmental entities. A contrary decision renders the term "entity" superfluous. *See Adams*, 250 F.3d at 985; *Organizacion JD LTDA.*, 18 F.3d at 94-95. The definition of "person" includes "partnership, association, joint stock company, trust or corporation;" i.e., business entities. If the term "business entity" is substituted for the word "person," then recovery is possible under section 2520(a) from "the business entity or entity." Unless the term "entity" denotes governmental entities, the phrase is redundant and nonsensical. The addition of the phrase "other than the United States" to section 2520(a) in 2001 provides further support for this conclusion. If Congress did not believe section 2520(a) created liability for governmental entities, there would have been no need to create a special liability exception for the federal government by adding the phrase "other than the United States." We conclude that, by adding the term "entity" to section 2520(a), Congress expressed its clear intent to create civil liability for governmental entities.

Having satisfied the first part of our inquiry, we must now determine whether Congress could properly abrogate sovereign immunity. Section Five of the Fourteenth Amendment grants Congress the authority to abrogate the States' sovereign immunity. *Kimel*, 528 U.S. at 80, 145 L. Ed. 2d at 540. Thus, where Congress enacts legislation

pursuant to its authority under Section Five of the Fourteenth Amendment, such legislation may properly abrogate the sovereign immunity of the States. *Id.* Congress cannot abrogate sovereign immunity pursuant to the Commerce Clause, however. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73, 134 L. Ed. 2d 252, 276-77 (1996).

Defendants assert that the federal wiretapping law was drafted pursuant to authority granted to Congress under the Commerce Clause. *See United States v. Duncan*, 598 F.2d 839, 854 (4th Cir. 1979) (holding that Congress had the constitutional authority to enact 18 U.S.C. § 2511(1)(b)(iv) under the Commerce Clause), *cert. denied*, 444 U.S. 871, 62 L. Ed. 2d 96 (1979). The Court in *Duncan*, however, expressly declined to consider whether other constitutional bases would support the federal wiretapping law. *See id.* at 854 n.11 (stating that, "[s]o holding, we need not decide whether the other constitutional bases advanced by the government would suffice"). However, in a later decision, the United States Court of Appeals for the Ninth Circuit, after examining the legislative history of the federal wiretapping law, concluded that Congress prohibited the interception of oral communications pursuant to both the Commerce Clause *and* the Fourteenth Amendment's grant of privacy. *See United States v. Anaya*, 779 F.2d 532, 535-36 (9th Cir. 1985) (noting that Congress was uncertain as to whether all interceptions of oral communications had an effect on interstate commerce, and therefore legislated pursuant to its authority under the Fourteenth Amendment, as well as the Commerce Clause).

We agree that Congress acted pursuant to its power under both the Commerce Clause and Section Five of the Fourteenth Amendment in legislating the federal wiretapping law. As such, Congress could properly abrogate State sovereign immunity by holding governmental entities liable under section 2520(a). We therefore conclude the doctrine of sovereign immunity does not shield NCSU and Younce from Plaintiff's claim against them for violations of federal wiretapping law. The trial court properly denied the motions by NCSU and Younce to dismiss on this basis, and we overrule this assignment of error.

Qualified Immunity

[3] Defendants and Harper further contend they are entitled to qualified immunity from Plaintiff's federal and constitutional claims. Under the doctrine of qualified immunity, "government officials per-

forming discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 410 (1982); *Corum v. University of North Carolina*, 330 N.C. 761, 772-74, 413 S.E.2d 276, 284, *cert. denied*, *Durham v. Corum*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). In determining whether qualified immunity exists, the initial inquiry is whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 281 (2001). If the facts sufficiently allege a constitutional violation, "the next, sequential step is to ask whether the right was clearly established." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 150 L. Ed. 2d at 282.

In her complaint, Plaintiff alleged that Harper intentionally recorded her personal telephone calls for illicit and "personal purposes and not for any investigative or law enforcement purposes." The complaint also denied that such recording was conducted in the ordinary course of business. Plaintiff further alleged that Defendants "encouraged, ratified, or knowingly acquiesced in the actions of Defendant Harper." These allegations are sufficient to demonstrate a violation of Plaintiff's constitutional and statutory right to privacy. We must therefore determine whether Plaintiff's right to privacy was clearly established at the time.

Defendants and Harper argue that Harper could not have known that his actions violated Plaintiff's privacy rights, asserting that the recordings were made for law enforcement purposes and in the ordinary course of business. Because the office telephone lines were recorded for law enforcement purposes, Defendants submit Plaintiff had no reasonable expectation of privacy in her personal telephone conversations. Whether the recordings were made pursuant to standard departmental procedure or otherwise, however, remains an issue of vital factual dispute between the parties. As such, the trial court properly denied the motions to dismiss on this issue. *See Campbell*, 156 N.C. App. at 375, 576 S.E.2d at 729 (noting that the determination of whether qualified immunity exists " 'may require factual determinations respecting disputed aspects of the officer's conduct. . . . Thus, if there are genuine issues of historical fact respecting the officer's

conduct or its reasonableness under the circumstances, summary judgment is not appropriate, and the issue must be reserved for trial' ") (quoting *Roberts v. Swain*, 126 N.C. App. 712, 718, 487 S.E.2d 760, 765, *cert. denied*, 347 N.C. 270, 493 S.E.2d 746 (1997)).

Public Official Immunity

[4] Harper contends he is also entitled to public official immunity from Plaintiff's claims against him for violations of sections 15A-287 *et seq.* of the North Carolina General Statutes. The public immunity doctrine protects public officials from individual liability for negligence in the performance of their governmental or discretionary duties. *Myer v. Walls*, 347 N.C. 97, 112-13, 489 S.E.2d 880, 888-89 (1997). Public official immunity does not protect a public official from liability based on corrupt or malicious actions, however. *Id.* As was the case with qualified immunity, outstanding issues of fact remain as to whether Harper acted outside the scope of his duties, maliciously or with a corrupt purpose. The trial court therefore properly denied Harper's motion to dismiss on this issue.

Defendants and Harper present additional arguments involving issues unrelated to immunity and requiring factual determinations yet to be resolved by the trial court. As these issues are not properly before this Court, we do not address them. The orders of the trial court are hereby,

Affirmed.

Judges TIMMONS-GOODSON and ELMORE concur.

STATE OF NORTH CAROLINA v. RANDY DARRELL SHEPHERD

No. COA03-404

(Filed 20 April 2004)

1. Confessions and Incriminating Statements— post-polygraph interview—motion to suppress

The trial court did not err in a first-degree statutory rape, first-degree sexual offense, and indecent liberties case by denying defendant's motion to suppress his confession made during the post-test interview after a voluntary polygraph examination,

because: (1) even though the line of questioning during the post-test interview constituted an interrogation, defendant's waiver of rights covered his answers to the questions; (2) several waivers of rights that defendant and his attorney signed leading up to the polygraph examination constituted competent evidence that defendant understood his Miranda rights and waived his right to counsel; and (3) there was competent evidence that the statement was voluntary and within the waiver coverage.

2. Criminal Law— judge questioning witness from bench—clarification—not expression of opinion

The trial court did not commit plain error in a first-degree statutory rape, first-degree sexual offense, and indecent liberties case by interrogating a witness from the bench, because: (1) the trial court questioned the witness to clarify the critical element of penetration; and (2) the jury could not reasonably infer that the judge was expressing an opinion as to the facts of the case.

3. Criminal Law— motion for mistrial—jurors viewed unredacted documentary evidence

The trial court did not commit plain error in a first-degree statutory rape, first-degree sexual offense, and indecent liberties case by failing to declare a mistrial after jurors viewed an unredacted form of documentary evidence, because: (1) when the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured; and (2) any prejudice to defendant's case was cured by the trial court's instructions to those jurors that saw the unredacted statement.

4. Rape; Sexual Offenses— first-degree statutory rape—first-degree sexual offense—indecent liberties—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss the charges of first-degree statutory rape, first-degree sexual offense, and indecent liberties at the close of all evidence, because even though a nurse and doctor who examined the victim testified that they did not find conclusive physical evidence that a sex act occurred, there was evidence, including the victim's testimony, that defendant committed numerous sexual acts against her, and forensic evidence corroborated the victim's testimony.

Appeal by defendant from judgment entered 24 October 2002 by Judge W. Erwin Spainhour in Rockingham County Superior Court. Heard in the Court of Appeals 29 January 2004.

Attorney General Roy Cooper, by Assistant Attorney General Anita LeVeaux, for the State.

Terry W. Alford for the defendant.

TIMMONS-GOODSON, Judge.

Randy Darrell Shepherd ("defendant") was indicted by the Rockingham County Grand Jury on 1 October 2002 on two counts of first-degree rape, one count of first-degree sex offense, and two counts of indecent liberties. Defendant appeals his convictions of first-degree statutory rape, first-degree sexual offense, and indecent liberties. For the reasons stated herein, we hold that defendant received a trial free of prejudicial error.

The factual and procedural history of the case is as follows: On or about 1 August 2001, the victim's mother ("T.S.") was told by a neighbor ("R.H.") that defendant had "grabbed" R.H.'s daughter while they were together on a hiking trail, and suggested that T.S. ask the victim ("A.J.") if defendant had ever molested her. On the same day, T.S. and A.J. had a conversation where A.J. confided that defendant had indeed been molesting her. On 4 August 2001, T.S. went to the local police station to report the inappropriate sexual contact. Criminal charges were subsequently filed against defendant alleging two counts of first-degree rape of a child, and first-degree sexual offense. T.S. also sought a medical examination for A.J. Defendant was arrested 4 August 2001, and the Rockingham County Sheriff's office conducted a forensic investigation in the family's home.

In February 2002, defendant requested from jail, through his attorney, to take a polygraph examination. At the polygraph examination, conducted on 13 February 2002, Detective Tami Howell ("Detective Howell") provided defendant with a document entitled *Statement of Rights and Waiver of Rights*, which was read aloud to him, and which he and his attorney, Stanley Allen ("Attorney Allen"), signed. Detective Howell then provided defendant with a second document stating the following:

> I, Randy Darrell Shepherd am represented by counsel, attorney Stan Allen. I have asked that attorney Allen request a polygraph examination for me. I have been advised of my rights and have

> signed a waiver of these rights. I also waive the presence of my attorney at the polygraph examination. I understand that if I make any statements relevant to my case that my attorney and I waive any Miranda issues that may arise at trial.

Defendant and Attorney Allen also signed this second document. Special Agent Michael Wilson ("Agent Wilson") of the State Bureau of Investigation then conducted the polygraph examination, which consisted of three phases: the "pre-test examination," the "instrumentation phase," and the "post-test interview." Agent Wilson testified describing the polygraph examination process at trial as follows:

> [during the first phase] we talk to the subject and get to know the subject, build some rapport and make the final determination on what questions should be asked. During the second phase . . . we actually measure and evaluate the physiology of the subject. The third phase . . . is a post[-]test interview in which we discuss why or why not a subject may or may not have passed or failed the polygraph examination.

During the pre-test examination, Agent Wilson provided defendant with a written Advice of Rights, which was also read aloud to him, and which he signed. The Advice of Rights reads in pertinent part: "I have the right, at any time, to stop my participation in the interview and polygraph examination by not answering any question . . . ."

After Agent Wilson advised defendant of his rights, Agent Wilson proceeded with the instrumentation phase. After administering the examination and reviewing his findings, Agent Wilson determined that his findings were inconclusive. Agent Wilson testified at trial regarding the post-examination interview as follows:

> During the course of our conversation, I asked him, "How long this," meaning the sexual offenses with [A.J.], "had been going on?" He then stated to me "Not as long as they said." I then asked him, "Then how long?" He then stated to me, "A month." I then asked, "The month before you got arrested?" He then nodded yes to me. . . . After nodding yes, he stated he thought he needed his attorney now—his lawyer now. . . . Immediately after he stated that he thought he needed his lawyer, the interview was terminated.

At trial, defendant moved to suppress the post-examination confession, which the trial judge denied.

Defendant was convicted of first-degree statutory rape, first-degree sex offense, and indecent liberties. It is from these convictions that defendant appeals.

The issues presented on appeal are whether the trial court erred by (I) denying defendant's motion to suppress his statements made during the post-test interview; (II) interrogating a witness from the bench; (III) failing to declare a mistrial after jurors viewed an unredacted form of documentary evidence; (IV) denying defendant's motions to dismiss the charges at the close of State's evidence and at the close of all evidence.

[1] Defendant first argues that the trial court should have granted his motion to suppress the confession made during his post-test examination interview. We disagree.

In ruling on a motion to suppress, "[t]he trial court makes the initial determination as to whether an accused has waived his right to counsel." *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994) *cert. denied sub nom. Eason v. North Carolina*, 513 U.S. 1096 (1995). The trial court must then consider the voluntariness of the confession "in light of the totality of the circumstances." *State v. Barlow*, 330 N.C. 133, 140-41, 409 S.E.2d 906, 911 (1991), *distinguished by State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000). The trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Eason*, 336 N.C. at 745, 445 S.E.2d at 926.

Defendant argues that Agent Wilson's line of questioning during the post-test interview phase strays from the stated purpose of the post-test phase, and thus is not covered by defendant's waiver of rights. Indeed, the trial court addressed this issue to the State during the suppression hearing with the following colloquy:

> THE COURT: Mr. Grogan, what concerns me is that the questions put at that so-called third phase—I see no connection between those questions and what your witness said the purpose of that third phase was. It didn't have any bearing to explaining, if it could be explained, why the test was inconclusive, why someone passes or fails a test. It was further interrogation.

However, after deliberation, the trial court entered the following findings of fact:

> the defendant, Randy Shepherd, knowingly and voluntarily waived his rights with regard to the complete polygraph examination, including waiving his rights with regard to the pre-interview and . . . post-testing procedures. Therefore, these statements that have been made in response to questions were covered by that voluntary waiver and are admissible.

Our Supreme Court notes in *State v. Harris* the following:

> [T]he term "interrogation" under *Miranda* [*Miranda v. Arizona*, 384 U.S. 436 (1966)] refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

67 N.C. App. 97, 100, 312 S.E.2d 541, 542 (1984), *review denied and appeal dismissed*, 311 N.C. 307, 317 S.E.2d 904 (1984); *quoting Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Thus, we agree with the trial court's assessment that Agent Wilson's line of questioning during the post-test interview constitutes an interrogation. We hold that the trial court's findings support the conclusion that defendant's waiver of rights covers his answers to Agent Wilson's questions.

In reaching our conclusion, we find this Court's decision in *State v. Soles* to be instructive. 119 N.C. App. 375, 459 S.E.2d 4 (1995), *discretionary review denied and appeal dismissed*, 341 N.C. 655, 462 S.E.2d 523 (1995). In *Soles*, the defendant voluntarily submitted to a polygraph examination although he was not in police custody. Prior to taking the polygraph, defendant waived his *Miranda* rights. During the examination, "the polygraph examiner confronted defendant about patterns of deception and questioned him off the polygraph." 119 N.C. App. at 381, 459 S.E.2d at 8. The defendant's answers to those questions later formed the basis for several indictments against him. This Court concluded "that neither the polygraph operator asking questions off the polygraph nor questioning by officers vitiated defendant's waiver of his *Miranda* warnings with respect to this . . . statement." *Id.* at 386, 459 S.E.2d at 9.

In accordance with *Soles*, we conclude that the several waivers of rights that defendant and his attorney signed leading up to the polygraph examination constitute competent evidence that defendant understood his *Miranda* rights and waived his right to counsel. The trial court did not err by finding that the waivers apply to all phases of the polygraph examination.

Turning to the question of whether the confession was voluntary, we note that defense counsel conceded this point at trial:

> THE COURT: . . . I take it from the evidence I heard you do not contend that the statement was involuntary?
>
> MR. ALLEN: No, sir.
>
> THE COURT: There was no question about the fact that this was a voluntary statement?
>
> MR. ALLEN: No, sir.

Thus, we must conclude that there is competent evidence to support the determination by the trial court that the confession was voluntary and within the waiver coverage. Accordingly, we hold that the trial court's findings of fact are conclusive on appeal, and that the trial court did not err by admitting defendant's inculpatory statements into evidence.

[2] In his second assignment of error, defendant argues that the trial court committed plain error by interrogating a witness from the bench. We disagree.

In *State v. Torain*, our Supreme Court held as follows:

> A prerequisite to our engaging in a "plain error" analysis is the determination that the [trial court's action] constitutes "error" at all. Then "before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict."

316 N.C. 111, 116, 340 S.E.2d 465, 468 (1986), *cert. denied sub nom. Torain v. North Carolina*, 479 U.S. 836 (1986), *distinguished by State v. Young*, 317 N.C. 396, 346 S.E.2d 626 (1986); *quoting State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

North Carolina Rule of Evidence 614(b) provides that "[t]he court may interrogate witnesses, whether called by itself or by a party." N.C. Gen. Stat. § 8C-1, Rule 614(b) (2003). "The court may also question a witness for the purpose of clarifying a witness' testimony and for promoting a better understanding of it." *State v. Chandler*, 100 N.C. App. 706, 710, 398 S.E.2d 337, 339 (1990), *citing State v. Whittington*, 318 N.C. 114, 347 S.E.2d 403 (1986). "Such examination must be conducted with care and in a manner which avoids prejudice to either party." *Chandler*, 100 N.C. App. at 710, 398 S.E.2d at 339, *cit-*

ing State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968). "No objections are necessary with respect . . . to questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled." N.C. Gen. Stat. § 8C-1, Rule 614(c) (2003).

In the case *sub judice*, to prove first-degree statutory rape, the State must prove, *inter alia*, that there was "penetration, however slight, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.1(4) (2003). The State presented testimony from Dr. Angela Stanley ("Dr. Stanley") who conducted a medical examination of A.J. Dr. Stanley testified that A.J. could not perceive penetration into her vagina because she had a "fixed septum." During Dr. Stanley's testimony the trial judge conducted the following examination of the witness:

THE COURT: Let me ask a question, Doctor. You say it was not possible due to her congenital abnormality to have penetration inside her vagina.

THE WITNESS: Yes, sir.

THE COURT: It is possible, according to your findings to have penetration of her vaginal area, however slight?

THE WITNESS: It is possible to go beyond the labia, the outer lips, and push against her hymen, but because of that fibrous band, then you would—it would be possible to press against her vaginal opening but not inside of her vagina.

THE COURT: But there will be penetration of her vaginal labia?

THE WITNESS: Yes, sir.

"A trial judge's questions, propounded to a witness to clarify his confusing or contradictory testimony, do not constitute an expression of opinion unless a jury could reasonably infer that the questions intimated the court's opinion as to the witness's credibility, the defendants' guilt, or as to a factual controversy to be resolved by the jury." *State v. Yellorday*, 297 N.C. 574, 581, 256 S.E.2d 205, 210 (1979), *citing State v. Tinsley*, 283 N.C. 564, 196 S.E.2d 746 (1973). Having reviewed the trial court's examination of Dr. Stanley, we conclude that the trial judge questioned the witness to clarify a critical element of the case, and the jury could not reasonably infer that the judge was expressing an opinion as to the facts of the case. We hold that the trial

court did not err in posing questions to the witness. Accordingly, there was no plain error.

[3] In his third assignment of error, defendant argues that the trial court committed plain error by not declaring a mistrial after jurors viewed Exhibit 5 in its unredacted form. We disagree.

In *State v. Upchurch*, our Supreme Court held as follows:

> "It is well settled that the decision of whether to grant a mistrial rests in the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of an abuse of discretion. A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision."

332 N.C. 439, 453, 421 S.E.2d 577, 585 (1992), *quoting State v. Barts*, 316 N.C. 666, 682, 343 S.E.2d 828, 839 (1986).

In the present case, the State sought to publish Exhibit 5, a written copy of A.J.'s statement to Detective Howell during the investigation. The statement was redacted to omit statements that did not corroborate A.J.'s testimony. When copies of the statement were handed to the jurors, the trial judge recognized that the original, unredacted version was mistakenly included in the copies. The judge instructed the two jurors that held copies of the original statement to return them to the bailiff. The judge then inquired of those jurors regarding their observations of the unredacted statement. One juror indicated that he glanced at the unredacted statement enough to compare it to the redacted statement and realized that it was not the same page. The other juror stated that he thumbed through the statement, but did not read it for content. The jury then continued to read the exhibits without further inquiry from the trial judge. Defendant raised no objection at the time. At the close of evidence, the judge gave the following instruction to the jury:

> I need to tell you also that with regard to State's Exhibit Number 5 that I asked you about, this statement that some of you looked at the first line or two . . . it's important that you not consider and I instruct you to disregard anything you read in this State's Exhibit Number 5 that had a line through it. That is not admitted into evidence. That's why the copies you received had certain gaps in it. You are to totally disregard anything that you read in the original of State's Exhibit 5 to the extent that it was not

included in the Xerox copies that each of you received that have gaps in each. You are instructed to totally disregard State's Exhibit 5 except those matters which are contained in the Xerox copies of State's Exhibit 5 which you each were given a copy of.

In reviewing this issue, we find the case of *State v. Black* instructive. 328 N.C. 191, 400 S.E.2d 398 (1991), *distinguished on other grounds by State v. Buckner*, 342 N.C. 198, 464 S.E.2d 414 (1995). In *Black*, the trial court granted a motion *in limine* by the defendant to forbid any evidence concerning the defendant's prior drug dealings. At trial, a detective read into evidence a written statement by defendant's co-conspirator, part of which indicated that the defendant had been involved with drugs in the past. The trial court then instructed the jury to disregard the statement. The Supreme Court found that the trial court did not err in failing to declare a mistrial after the detective's testimony, stating that "[w]hen the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." 328 N.C. at 200, 400 S.E.2d at 404, *citing State v. Walker*, 319 N.C. 651, 655, 356 S.E.2d 344, 346 (1987). Likewise, we conclude that any prejudice to defendant's case was cured by the trial judge's instructions to those jurors that saw the unredacted statement. Therefore, we hold that the trial court did not abuse its discretion by not declaring a mistrial. Accordingly, there was no plain error.

[4] In his final assignment of error, defendant argues that the trial court erred by not dismissing the charges for insufficiency of the evidence at the close of the State's evidence, and at the close of all evidence. We disagree.

As an initial matter, we note that once defendant's motion to dismiss at the close of the State's evidence is overruled, "[i]f the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as grounds for appeal." N.C. Gen. Stat. § 15-173 (2003). Thus, we will only consider defendant's motion to dismiss at the close of all evidence.

In ruling on a motion to dismiss based on insufficiency of evidence, "the trial court must determine whether there is substantial evidence of each element of the offense charged." *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).

For the first-degree statutory rape charge, the State is required to prove that (1) defendant engaged in vaginal intercourse (2) with a victim who is a child under the age of thirteen years, and (3) the defendant is at least twelve years old and is at least four years older than the victim. *See* N.C. Gen. Stat. § 14-27.2 (a)(1) (2003).

For the first-degree sexual offense charge, the State is required to prove that (1) defendant engaged in a sexual act, (2) with a victim who is a child under the age of thirteen years old, (3) and the defendant is at least twelve years old and is at least four years older than the victim. *See* N.C. Gen. Stat. § 14-27.4(a)(1) (2003).

To prove the felony of indecent liberties with a child, the State must establish that defendant is (1) sixteen years of age or more and at least five years older than the victim, and that he (2) willfully took or attempted to take any immoral, improper, or indecent liberties with a victim under the age of sixteen years for the purpose of arousing or gratifying sexual desire, or willfully committed or attempted to commit any lewd or lascivious act upon or with the body or any part or member of the body of a victim under the age of sixteen years. *See* N.C. Gen. Stat. § 14-202.1 (2003).

Each of the crimes with which defendant is charged requires the State to prove that defendant engaged in a sex act with the victim. Defendant specifically argues that because the nurse and doctor who examined A.J. testified that they did not find conclusive physical evidence that a sex act occurred, the State lacked sufficient evidence to overcome defendant's motions to dismiss. However, this evidence does not negate A.J.'s testimony that defendant committed numerous sexual acts against her. Furthermore, the forensic evidence corroborates A.J.'s testimony. The State presented evidence of seminal fluid collected from A.J.'s bedroom that matched defendant's DNA. Viewing this evidence in the light most favorable to the State, and giving the State the benefit of every reasonable inference, we conclude that the State presented sufficient evidence from which a jury could find that defendant committed first-degree statutory rape, first-

degree sexual offense, and indecent liberties with a child. Therefore, we hold that the trial court properly submitted these charges to the jury, and that the trial court did not err in denying defendant's motion to dismiss.

No error.

Judges BRYANT and ELMORE concur.

UNIFOUR CONSTRUCTION SERVICES, INC. D/B/A EXTRAORDINARY KITCHENS, DAVID B. NEWTON, AND NANCY B. NEWTON, PLAINTIFFS V. BELLSOUTH TELECOMMUNICATIONS, INC., AND FIRST SOUTH CONSTRUCTION, INC., DEFENDANTS

No. COA02-1640

(Filed 20 April 2004)

1. Appeal and Error— preservation of issues—appellate rules—appendix of brief—portions of transcript

N.C. R. App. P. 28(d)(1)(b) requires an appellant to include in the appendix to his brief those portions of the transcript showing the pertinent questions and answers when a question presented in the brief involves the admission or exclusion of evidence. Compliance by the parties facilitates review of such issues by all three members of the panel since only one complete transcript is filed with the Court, but all three panel members receive copies of the briefs.

2. Evidence— cross-examination—speculation—negligence claims—harmless error

Plaintiffs are not entitled to a new trial on their negligence claims even though the trial court limited their cross-examination of several of defendants' expert witnesses, because: (1) the trial court properly declined to allow an expert to speculate about someone else's observations; (2) one of the questions complained about had previously been answered; and (3) any erroneous rulings excluding proper questions on cross-examination were harmless when the jury returned a verdict finding that defendants' negligence did cause damage.

3. Unfair Trace Practices; Damages and Remedies— misrepresentation of intent to perform act—fraud—sufficiency of evidence

Plaintiffs' evidence was sufficient for the jury on claims for unfair or deceptive trade practices under N.C.G.S. Ch. 75 and punitive damages under N.C.G.S. § 10-15 in their action against defendant telecommunications company and defendant construction company alleging that damages to their property were caused by drilling and installation of cable on adjacent property owned by defendant telecommunications company where plaintiffs' evidence tended to show: (1) defendant telecommunications company assured plaintiffs that no problems would be encountered by the drilling and cable installation and that if problems did arise, any damage to plaintiffs' property would be remedied by defendants; and (2) neither defendant had any intention to follow through on such assurances. The statement of an intention to perform when no such intention exists may constitute fraud when the other elements of fraud are present.

Appeal by plaintiffs from order entered 27 February 2002 and judgment entered 12 March 2002 by Judge Claude S. Sitton in the Superior Court in Burke County. Heard in the Court of Appeals 17 September 2003.

C. Gary Triggs, for plaintiff-appellants.

Cogburn, Goosmann, Brazil & Rose, P.A., by Andrew J. Santaniello and Frank J. Contrivo, Jr., for defendant-appellees.

HUDSON, Judge.

On 26 February 1999, plaintiffs, Nancy Newton (Mrs. Newton) and her son David, filed suit alleging negligence, tortious interference with plaintiff's business, interference with the quiet enjoyment of their property, and unfair or deceptive trade practices on the part of defendants. The jury found that plaintiff Nancy Newton's property was damaged by the acts of defendants in the amount of $6,000, and found that David Newton's property and business were not damaged by defendants. Plaintiffs appeal. For the reasons discussed below, we conclude that no prejudicial error affected the claims tried, but that plaintiffs are entitled to a trial on their claims pursuant to G.S. § 75-1.1, *et. seq.*

On or about 25 May 1995, defendant First South Construction Company, Inc. ("First South") began installing a cross box and cable for defendant Bellsouth Telecommunications, Inc. ("Bellsouth") on property owned by Bellsouth adjacent to property owned by plaintiff Nancy Newton. Mrs. Newton's house and a separate woodworking/cabinet shop operated by plaintiff David Newton ("David") are situated on this property. According to David, he first became aware of the cable project on the day it began, when he went outside and saw the area "full of First South trucks and trailers and [a] couple [of] cars around and [a] backhoe sitting in our front yard and [the] front yard was full of people." David estimated that as many as twenty people were in the yard at one point.

David went out to address the situation and, in his words, "[i]t got acrimonious real quick." Mrs. Newton asked the First South crew to move, but they refused. David then asked them to remove their vehicles from the property. After a two-hour argument that ultimately involved members of the local sheriff's department, First South moved their vehicles off the Newton property and onto Bellsouth's adjacent right-of-way. David complained to Bellsouth, who eventually agreed to build a fence to lessen the noise along the edge of the Newton's property.

In a four-page letter faxed to Bellsouth, David confirmed the agreement and also warned Bellsouth of potential problems that could arise from working on that particular tract. He informed them that the house and cabinet shop were situated above subterranean quartz bedrock and warned of the damage that could result if the bedrock were disturbed. Mr. Newton testified that in the course of sixteen or eighteen conversations, Bellsouth repeatedly assured him and his mother that no mistakes would be made and that Bellsouth would "see to it that First South took care of" any problems. In addition, the parties signed a written agreement in which Bellsouth was to "cut the site level with [the Newton's] yard—taking out existing trees, etc. as needed and to build a fence for noise abatement and site appearance that matches the existing fence on the Newton property within reason."

On or about 28 July 1995, First South began to bore a cable trench under the road using a pneumatic device called a "mole." David was in the cabinet shop at the time, when fluorescent bulbs shook loose and fell, and "[e]verything on the work bench was cascading in the floor." Alarmed, he headed to the house and heard "wham, wham, wham, wham. Whole top of the hill was moving." In the house, every-

thing was moving and falling. The vibration lasted 35 to 40 minutes, during which time Mrs. Newton was "absolutely terrified." She likened it to an earthquake. Books fell from shelves and windows broke, and the house moved on its foundation.

David went to the work site, reported the damage and asked First South to stop. Baxter Hayes, First South's supervisor, replied, "I don't care what it tears up, who it hurts, or what it costs." Only after sheriff's deputies arrived did the crew stop the drilling and leave.

Max Watts, an engineer and expert in contracting and house inspections, testified about the damage to the house and shop, and concluded that the vibration likely caused the damage. He testified "to a reasonable certainty" that the vibrations from the boring operation caused the damage he observed to the house and shop.

Watts inspected the house and shop twice: once a few months after the initial damage and again in 1997 to determine whether the problems were static or ongoing. After the second inspection, he determined that the situation was not stable. He estimated that it would cost $100,000 to re-stabilize the house, and $150,000 to bring the shop back to its original condition. Without stabilizing the foundations, Watts testified, any repairs to the buildings would be temporary. He testified that cosmetic repairs, without re-stabilization, would be a waste of money, but would cost approximately $50,000.

After he contacted Bellsouth about the damage, David received a reply informing him that only First South was responsible, and that Bellsouth would not pay for the damage. Mr. Newton invited representatives from both Bellsouth and First South to inspect the damage. Tom Beggs, defendants' geotechnical engineer, inspected the house once in 2000. In Beggs' opinion, the extensive damage to plaintiffs' house and shop was not caused by vibration, and was cosmetic, rather than structural. He estimated that cosmetic repairs to the house would cost between $3,000 and $5,000. The jury found that Mrs. Newton's property was damaged by defendants' negligence, that David's property was not, and awarded $6,000 to Mrs. Newton. The court entered judgment accordingly, but, with the agreement of the parties, ordered that $3,000 be held by the clerk of court to protect the interests of Mrs. Newton's long-estranged husband. Plaintiffs appeal.

Analysis

Plaintiffs first argue that they are entitled to a new trial on all claims because the trial court limited their cross examination of several of defendants' expert witnesses, which prejudiced them. As discussed below, we agree in part.

[1] We note initially that the appellants have not complied with Appellate Rule 28(d)(1)b, which requires that appellant include in the appendix to his brief "those portions of the transcript showing the pertinent questions and answers when a question presented in the brief involves the admission or exclusion of evidence." N.C. R. App. P. 28(d)(1)(b). Defendants did not raise this issue, but we mention it on our own to draw attention to this oft-ignored provision of the Rules. Compliance by the parties is valuable because it facilitates review of such issues by all three members of the panel, in that only one complete transcript is filed with the Court, but all three panel members receive copies of the briefs.

[2] Turning to the plaintiffs' argument, the decision to grant or deny a motion for a new trial or to set aside a jury verdict rests in the sound discretion of the trial court, and such a ruling will not be disturbed on appeal absent a manifest abuse of that discretion. *Coletrane v. Lamb*, 42 N.C. App. 654, 656, 257 S.E.2d 445, 447 (1979).

The North Carolina Rules of Evidence provide that the court shall exercise reasonable control over the interrogation of witnesses and the presentation of expert opinion evidence "so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." N.C.G.S. § 8C-1, Rule 611(a). Regarding hypothetical questions, the rules of evidence provide, in pertinent part, as follows:

> The 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 . . ., the facts or data need not be admissible in evidence.

G.S. § 8C-1, Rule 703. Additionally, Rule 705 provides in pertinent part that:

> There shall be no requirement that expert testimony be in response to a hypothetical question.

G.S. § 8C-1, Rule 705. Our Courts have held further that even the omission of a material fact from a hypothetical question does not necessarily render the question objectionable, or the answer incompetent. *See Robinson v. J. P. Stevens*, 57 N.C. App. 619, 622, 292 S.E.2d 144, 146 (1982). It is left to the cross-examiner to bring out facts supported by the evidence that have been omitted and thereby determine if their inclusion would cause the expert to modify or reject his or her earlier opinion. *Id.* at 623, 292 S.E.2d at 146.

First, the trial court sustained objections to certain questions during the cross-examination of defendants' expert engineer, Steve Morris. Before the first such instance, testimony had shown that plaintiffs' engineer, Max Watts, crawled under the house and observed that the structural integrity of the piers had been compromised. Mr. Morris testified that he did not crawl under the house to observe these piers, thus prompting plaintiffs' counsel to ask:

> Q. So if a person—a colleague of yours, person in the same type of business, did crawl under there and did test those [piers], would you believe that that's probably what was observed?
>
> THE COURT: Well, the Court on its own SUSTAINS the objection.

In this ruling, the Court properly declined to allow Mr. Morris to speculate about someone else's observations regarding the structural integrity of the piers. Plaintiffs' argument as to this ruling is without merit.

Shortly thereafter, plaintiffs' counsel asked Mr. Morris whether a large vibration affecting the structure of the piers could have affected the integrity of the foundation of the house. The court sustained defense counsel's objection to this question. Only three questions later, plaintiffs' counsel asked Mr. Morris:

> Q. Now, if, in fact, you were to find that those piers under the house had been structurally impaired as a result of vibration, could or would, in your opinion, that affect the structural integrity of that house?

Again, the trial court sustained defense counsel's objection. The trial court also sustained an objection to the very next question that asked Mr. Morris again whether an impairment of the integrity of the piers might have affected the "overall structural stability of the structure that those piers were supporting." We are unable to conclude that the trial court abused its discretion in these rulings.

Later in Mr. Morris' testimony, the trial court disallowed two questions asking whether Mr. Morris looked for a rock outcropping on the property in the vicinity of the vibration:

> Q. Now, if you were out there to discover what the problems were, don't you think it would be rather important to go and see if there was, in fact, an outcropping of rock where this bore took place that you were being told by a homeowner is what was hit and caused vibration?
>
> A. Not specifically, no.
>
> Q. Wasn't important to what you were doing?
>
> A. That's correct.
>
> Q. It was certainly important to what he was claiming.
>
> [Defense counsel]: Objection.
>
> Q. Wasn't it?
>
> THE COURT: Sustained.
>
> Q. Well, did you think that it was significant to check that out if, in fact, you were up there to determine the truth and whatever was going on if the person that you were talking with that was giving you the information that you've told us is important to collect was telling you that there's an outcropping of rock that was hit that caused this vibration that caused the damage?
>
> [Defense counsel]: Objection. Asked and answered.
>
> THE COURT: Sustained.

Here, the court properly sustained both objections; the first was to a statement by counsel, and the second correctly concluded that, as these excerpts reveal, the question was previously answered. We reject plaintiffs' arguments as to these rulings.

However, the court also disallowed a question asking whether it would be reasonable before drilling to investigate whether the presence of a large vein of rock in the area could possibly cause damage if struck by the drill:

> Q. Based on your experience in that field, if you had a client or if you, in construction side of the job, were advised in writing that there was a large quartz vein that if you hit it in a drilling operation could or might cause damage, would you think that it would

be reasonable within your trade to investigate that prior to beginning drilling operation in that area?

[Defense counsel]: Objection.

THE COURT: Sustained.

Finally, the court disallowed two questions to Mr. Morris about a broken a window:

Q. Now, do you have an explanation for why a window that's not broken when the house started shaking and immediately thereafter is broken breaks?

[Defense counsel]: Objection.

THE COURT: Sustained.

***

Q. If you were to find from the evidence that the window, as depicted in your 3-L, immediately before the vibration was not broken and immediately after the vibration was broken, what would you conclude from that?

[Defense counsel]: Objection.

THE COURT: Sustained.

Defendants contend that these were improper hypothetical questions in that they did not contain sufficient factual background. We conclude, that while these questions may not have been model hypothetical questions, they posed appropriate questions for the expert based on matters in evidence. As to the questions regarding the piers, Max Watts testified that he inspected the piers under the house and found that the piers had shifted and that the entire house had moved diagonally on the foundation, which he concluded resulted from strong vibrations. There were also facts in evidence underlying plaintiffs' questions regarding the rock outcropping; David Newton testified that there was a large rock outcropping where the drilling took place and Max Watts testified as to the existence of the rock and the role it could play in transmitting vibrations from the drilling site to the house. David also testified about windows breaking.

In addition to these rulings during Morris' testimony, the trial court also limited plaintiffs' cross-examination of defendants' geotechnical engineer, Tom Beggs. For instance, the trial court sustained an objection to plaintiffs' question asking Mr. Beggs if he would be

surprised that rock had been hit by the drill, although Mr. Beggs testified on direct that there were no rock formations on the property. Nor was counsel allowed to ask whether the operator of the boring device should have recognized the difference between hitting rock and drilling through dirt. And finally, plaintiffs' counsel was not allowed an answer to his question to Mr. Beggs asking whether the vibration caused damage to the house, although he testified on direct that the vibration had not caused the damage.

We conclude from the evidence as a whole that these questions were appropriate cross-examination, and the rulings excluding them were in error. The defendants have cited three cases to support their argument and all three arose under a previous version of the rule, which did require hypothetical questions. *See Powell v. Parker*, 62 N.C. App. 465, 303 S.E.2d 225 , *cert. denied*, 309 N.C. 322, 307 S.E.2d 166 (1983); *Goble v. Helms*, 64 N.C. App. 439, 307 S.E.2d 807 (1983), *cert. denied*, 310 N.C. 625, 315 S.E.2d 690 (1984); *Dean v. Coach Co.*, 287 N.C. 515, 215 S.E.2d 89 (1975). The pertinent rules have provided since 1982 that there is "no requirement that expert testimony be in response to a hypothetical question." G.S. § 8C-1, Rule 705.

These questions to Mr. Morris addressed the extent of his investigation, and his opinions based thereon, as to whether the house sustained structural damage. However, the jury returned a verdict finding that the defendants' negligence did cause damage to Mrs. Newton's property (the house and/or the shop), apparently believing the opinions of plaintiffs' expert Max Watts, and awarded damages of $6,000. Thus, we hold that these erroneous rulings are harmless and do not entitle plaintiffs to a new trial on their claims based on negligence.

[3] Plaintiffs next argue that the trial court erred in dismissing their claim for unfair or deceptive trade practices pursuant to Chapter 75 and their claim for punitive damages. For the following reasons, we agree.

To establish a violation of Chapter 75, plaintiff must show (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury. *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681, *reh'g denied*, 352 N.C. 599, 544 S.E.2d 771 (2000). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. [A] party is guilty of an unfair act or practice when

it engages in conduct that amounts to an inequitable assertion of its power or position." *Coble v. Richardson Corp.*, 71 N.C. App. 511, 520, 322 S.E.2d 817, 823-24 (1984) (citations omitted). Moreover, an act or practice is deceptive if it has the capacity or tendency to deceive. *Horack v. Southern Real Estate Co.*, 150 N.C. App. 305, 310, 563 S.E.2d 47, 51 (2002). Proof of actual deception is not required. *Id.*

A "[s]imple breach of contract . . . [does] not qualify as [a violation of Chapter 75], but rather must be characterized by some type of egregious or aggravating circumstances before the statute applies." *Norman Owen Trucking v. Morkoski*, 131 N.C. App. 168, 177, 506 S.E.2d 267, 273 (1998). In *Mosley & Mosley Builders v. Landin Ltd.*, 97 N.C. App. 511, 389 S.E.2d 576, *disc. review denied*, 326 N.C. 801, 393 S.E.2d 898 (1990), this Court held that a breach of contract accompanied by fraud or deception constitutes an unfair or deceptive trade practice. *Id.* at 518, 389 S.E.2d at 580.

Our Supreme Court has held (1) that the statement of an intention to perform an act, when no such intention exists, constitutes misrepresentation of the promisor's state of mind, an existing fact, and as such may furnish the basis for an action for fraud if the other elements of fraud are present, *Roberson v. Swain*, 235 N.C. 50, 55, 69 S.E.2d 15, 19 (1952); *see also Wilkins v. Finance Co.*, 237 N.C. 396, 75 S.E.2d 118 (1953); and (2) that proof of fraud necessarily constitutes a violation of the statutory prohibition against unfair and deceptive acts, *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975).

Here, when David Newton complained to Bellsouth about First South's intrusion on their property, he and Bellsouth, through an agent of Bellsouth, reached an agreement whereby Bellsouth would build a fence along the edge of the property to baffle the noise. Further, evidence showed that Mr. Newton was repeatedly assured by representatives of Bellsouth that no problems would be encountered, and that if any were, they would see to it that First South remedied any damage done to the property.

Other testimony tended to show that neither Bellsouth nor First South had any intention to follow through on either assurance. For example, First South's supervisor, Baxter Hayes, testified that he had no communication with Bellsouth regarding any agreement with Mr. Newton. Mr. Hayes also stated that "Bellsouth instructed us to do that job and, when we encountered problems with Mr. Newton, we talked to Bellsouth and Bellsouth said to proceed." David's testi-

mony about Mr. Hayes' response to his report of damage, that "[he didn't] care . . ." supports this as well.

Plaintiffs presented evidence that tended to show that, despite its representations to David, Bellsouth had never intended to fulfill its agreement, except for building a small fence along the property line. Indeed, after the incident involving the vibration, Mr. Newton contacted Bellsouth and received a reply letter stating that "As you were advised, First South is responsible for the investigation and settlement, if necessary, of claims resulting from the work which they perform under contract for BellSouth."

In ruling on a motion for a directed verdict,

> The question raised [] is whether the evidence is sufficient to go to the jury. In passing upon such motion the court must consider the evidence in the light most favorable to the non-movant. That is, the evidence in favor of the non-movant must be deemed true, all conflicts in the evidence must be resolved in his favor and he is entitled to the benefit of every inference reasonably to be drawn in his favor. It is only when the evidence is insufficient to support a verdict in the non-movant's favor that the motion should be granted.

Dockery v. Hocutt, 357 N.C. 210, 217, 581 S.E.2d 431, 436 (2003) (citations and internal quotation marks omitted).

We believe that this evidence, taken in the light most favorable to plaintiffs, is sufficient to go to the jury on a claim under Chapter 75, as to both defendants. The same evidence is also sufficient to establish plaintiffs' claim for punitive damages pursuant to G.S. § 1D-15.

Conclusion

For the foregoing reasons, we hold that any error by the trial court excluding evidence was harmless. We also hold that the trial court erred by granting defendants' motion for directed verdicts regarding plaintiffs' claim under Chapter 75 and claim for punitive damages, and that plaintiffs are entitled to a trial on these issues.

Affirmed in part, reversed in part, and remanded.

Judges TIMMONS-GOODSON and ELMORE concur.

JAMES EDWARD IMES, PLAINTIFF v. CITY OF ASHEVILLE, CCL MANAGEMENT, INC., AND ASHEVILLE CITY COACH LINES, INC., DEFENDANTS

No. COA03-218

(Filed 20 April 2004)

Employer and Employee— wrongful discharge—at-will employee—motion to dismiss—sufficiency of evidence

The trial court did not err by granting defendants' motions to dismiss plaintiff at-will employee's claim for wrongful discharge even though plaintiff contends he was terminated in violation of public policy based on his status as a victim of domestic violence, because: (1) the complaint did not allege that defendants' conduct violated any explicit statutory or constitutional provision, nor did it allege defendants encouraged plaintiff to violate any law that might result in potential harm to the public; (2) the complaint did not allege any of the narrow exceptions to the employment-at-will doctrine grounded in considerations of public policy designed either to prohibit status-based discrimination or to insure the integrity of the judicial process or the enforcement of the law; and (3) although domestic violence is a serious social problem, the Court of Appeals cannot create public policy exemptions where none exist.

Judge TIMMONS-GOODSON dissenting.

Appeal by plaintiff from order entered 30 October 2002 by Judge Dennis J. Winner in Superior Court, Buncombe County. Heard in the Court of Appeals 28 October 2003.

Sutton Edmonds & Sutton, by John R. Sutton, Jr. and April Burt Sutton, for plaintiff appellant.

City of Asheville, by Assistant City Attorney Curtis W. Euler, for defendant appellee City of Asheville.

Fred T. Hamlet for defendant appellees CCL Management, Inc. and Asheville City Coach Lines, Inc.

WYNN, Judge.

By this appeal, Plaintiff James Edward Imes contends the trial court erred in granting motions to dismiss his compaint for wrongful discharge against Defendants City of Asheville, CCL Management,

Inc., and Asheville City Coach Lines, Inc. Plaintiff argues the termination of his employment with Defendants violated public policy of this State. We conclude Plaintiff's complaint failed to state a claim for wrongful discharge in violation of public policy, and we therefore affirm the order of the trial court.

The pertinent facts of the instant appeal are as follows: On 22 July 2002, Plaintiff filed a verified complaint in Buncombe County Superior Court alleging wrongful discharge in violation of public policy. The complaint alleged Plaintiff was an employee-at-will with Asheville City Coach Lines, Inc. from 1974 until his termination on 17 August 2001. Plaintiff alleged "Defendants CCL Management, Inc. and/or Asheville City Coach Lines, Inc. acted and served as agents to the City of Asheville." According to the complaint, Plaintiff was terminated after he was hospitalized for serious injuries he sustained when his wife shot him on or about 12 July 2001. Plaintiff alleged his supervisor informed him "he was being terminated due to the Plaintiff being a victim of domestic violence." As a victim of domestic violence, Plaintiff alleged he was a "member of a class of persons sought to be protected by the laws of the state of North Carolina" and therefore his termination violated public policy "in that, termination of any employment based on the employee's status as a victim of domestic violence tends to be injurious to the public and against the public good." On 30 October 2002, the trial court entered an order granting Defendants' motions to dismiss Plaintiff's complaint, from which Plaintiff appealed.

The issue on appeal is whether Plaintiff's complaint states a valid claim for wrongful discharge in violation of public policy. For the reasons stated herein, we conclude the complaint fails to state a claim upon which relief may be based, and we affirm the order of the trial court.

A motion to dismiss for failure to state a claim upon which relief may be granted challenges the legal sufficiency of a pleading. *Considine v. Compass Grp. USA, Inc.*, 145 N.C. App. 314, 316-17, 551 S.E.2d 179, 181, *affirmed per curiam*, 354 N.C. 568, 557 S.E.2d 528 (2001). 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). A complaint may be dismissed for failure to state a claim if no law supports the claim, if sufficient facts to make out a good claim

are absent, or if a fact is asserted that defeats the claim. *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999).

In the instant case, Plaintiff was employed at will. Although at-will employment may be terminated " '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 v. Thomas Manufacturing Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (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), *overruled in part on other grounds*, *Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 493 S.E.2d 420 (1997)). "The narrow exceptions to [the employment-at-will doctrine] have been grounded in considerations of public policy designed either to prohibit status-based discrimination or to insure the integrity of the judicial process or the enforcement of the law." *Kurtzman*, 347 N.C. at 333-34, 493 S.E.2d at 423.

To state a claim for wrongful discharge in violation of public policy, an employee has the burden of pleading that his "dismissal occurred for a reason that violates public policy." *Considine*, 145 N.C. App. at 317, 551 S.E.2d at 181; *see also Kurtzman*, 347 N.C. at 331, 493 S.E.2d at 422; *Salter v. E & J Healthcare, Inc.*, 155 N.C. App. 685, 693, 575 S.E.2d 46, 51 (2003). "Public policy has been defined 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." *Coman*, 325 N.C. at 175 n.2, 381 S.E.2d at 447 n.2. Although this definition of public policy "does not include a laundry list of what is or is not 'injurious to the public or against the public good,' at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes." *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992) (footnote omitted).

Wrongful discharge claims have been recognized in North Carolina where the employee was discharged (1) for refusing to violate the law at the employer's request, *see, e.g.*, *Coman*, 325 N.C. at 175, 381 S.E.2d at 447 (holding the complaint stated a claim for wrongful discharge in violation of public policy where the employee was discharged for refusing to comply with his employer's demand

that he continue to operate a commercial vehicle for periods of time that violated federal regulations); *Sides*, 74 N.C. App. at 343, 328 S.E.2d at 826-27 (holding that the plaintiff's complaint stated an enforceable claim for wrongful discharge where the employee was wrongfully discharged in retaliation for refusing to testify falsely in a medical malpractice case), (2) for engaging in a legally protected activity, *see Vereen v. Holden*, 121 N.C. App. 779, 784, 468 S.E.2d 471, 474 (1996) (holding that the plaintiff alleged sufficient facts in his complaint to state a claim for wrongful discharge where he alleged he was discharged due to his political affiliation and activities), *disc. review denied*, 347 N.C. 410, 494 S.E.2d 600 (1997), or (3) based on activity by the employer contrary to law or public policy. *See Amos*, 331 N.C. at 350, 416 S.E.2d at 167 (holding that firing an employee for refusing to work for less than the statutory minimum wage violated North Carolina public policy); *Simmons v. Chemol Corp.*, 137 N.C. App. 319, 322, 528 S.E.2d 368, 370 (2000) (recognizing claim for wrongful discharge in violation of public policy where the employee alleged he was handicapped and that his employer discharged him because of his handicap in violation of N.C. Gen. Stat. § 143-422.2).

The complaint filed in the instant case does not allege that Defendants' conduct violated any explicit statutory or constitutional provision, nor does it allege Defendants encouraged Plaintiff to violate any law that might result in potential harm to the public. Instead, the complaint alleged that "domestic violence is a serious social problem in North Carolina" and that "termination of any employment based on the employee's status as a victim of domestic violence tends to be injurious to the public and against the public good." Plaintiff acknowledges that "there are no North Carolina cases which specifically carve out a public policy exception to the employment-at-will doctrine based on domestic violence." Nor does Plaintiff cite North Carolina statutory law in support of his position.

While Chapter 50B of our General Statutes contains various protections for victims of domestic violence, *see* N.C. Gen. Stat. § 50B-1 *et seq.*, it does not establish victims of domestic violence as a protected class of persons or extend employment security status to such persons. *Compare* N.C. Gen. Stat. § 143-422.2 (2003) (stating that "[i]t is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.").

We do not dispute Plaintiff's allegation, nor the dissent's position, that domestic violence is a serious social problem for our State and is recognized as such by our General Assembly and the Governor. It is, however, but one of many social problems addressed by our General Statutes. Poverty, child abuse, juvenile delinquency, substance abuse—all are examples of social ills our General Statutes seek to alleviate. *See, e.g.*, N.C. Gen. Stat. § 108A-24 *et seq.* (creating public assistance programs); N.C. Gen. Stat. § 14-313 *et seq.* (protection of minors); N.C. Gen. Stat. § 143B-540 (providing for comprehensive juvenile delinquency and substance abuse prevention plan). All such statutes may be read to express a general public policy in favor of protection of victims of poverty, child abuse, substance abuse, etc. We do not interpret such statutes, however, as creating specialized and protected classes of persons entitled to employment and other status protection. If the General Assembly desires to exempt victims of domestic violence from the at-will employment doctrine, it is free to do so. This Court, however, may not create public policy exemptions where none exist.

Plaintiff has failed to identify any specified North Carolina public policy that was violated by Defendants in terminating his employment. The complaint does not allege that Defendants' conduct violated any explicit statutory or constitutional provision, nor does it allege Defendants encouraged Plaintiff to violate any law that might result in potential harm to the public. *Considine*, 145 N.C. App. at 321-22, 551 S.E.2d at 184. The complaint does not allege any of "the narrow exceptions to [the employment-at-will doctrine] . . . grounded in considerations of public policy designed either to prohibit status-based discrimination or to insure the integrity of the judicial process or the enforcement of the law." *Kurtzman*, 347 N.C. at 333-34, 493 S.E.2d at 423. Any exception to the at-will employment doctrine "should be adopted only with substantial justification grounded in compelling considerations of public policy." *Id.* at 334, 493 S.E.2d at 423. Because Plaintiff's complaint failed to articulate such compelling grounds to justify an exception to Defendants' right to terminate his employment, we must hold the trial court properly granted Defendants' motions to dismiss.

The order of the trial court is hereby,

Affirmed.

Judge ELMORE concurs.

Judge TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge, dissenting.

Because I conclude that plaintiff sufficiently alleged a cause of action for wrongful termination, I respectfully dissent.

In the case *sub judice*, both parties agree that plaintiff was discharged from his employment. Plaintiff asserts that defendants violated public policy when they terminated plaintiff for his involvement in a domestic violence incident. Plaintiff makes the following pertinent allegations in his complaint:

> 7. Plaintiff was employed at will by Asheville City Coach Lines, Inc. for approximately 27 1/2 years, from approximately 1974 until his termination on August 17, 2001.
>
> 8. Prior to his termination, the Plaintiff was a victim of domestic violence, in that, on or about July 12, 2001, he was shot and seriously injured by his wife, Sandra Imes, after she accused Plaintiff of an extramarital relationship.
>
> 9. The gunshot wound sustained by the Plaintiff required him to seek the help of a neighbor to contact the police and to be taken by ambulance to the hospital followed by a several-day hospitalization period and surgery.
>
> 10. Within days of receiving his gunshot injury, the Plaintiff contacted the Defendant Asheville City Coach Lines, Inc. and/or the City of Asheville Transit Services Department to inform his general manager of the circumstances, the Plaintiff's need for surgery, and the Plaintiff's need to miss work.
>
> 11. On or about August 17, 2001, the Plaintiff's general manager, Larnel Blair, informed the Plaintiff that the Plaintiff was terminated from his employment.
>
> . . . .
>
> 13. On August 17, 2001, Larnel Blair informed the Plaintiff that he was being terminated due to the Plaintiff being a victim of domestic violence.
>
> 14. Domestic violence is a serious social problem in North Carolina, recognized as such by the legislative, executive, and judicial branches of the state government.

15. The Plaintiff was a victim of domestic violence and as such was a member of a class of persons sought to be protected by the laws of the state of North Carolina.

16. The termination of Plaintiff's employment by the Defendants based on the Plaintiff's status as a victim of domestic violence violates the public policy of this state, in that, termination of any employment based on the employee's status as a victim of domestic violence tends to be injurious to the public and against the public good.

I agree with the majority that North Carolina has not yet held that an employer violates public policy when the employer discharges an employee solely because of the employee's status as a victim of domestic violence. However, I note that this Court has previously characterized "public policy" as a "vague expression," left to "the appropriate province of the courts to interpret." *McLaughlin v. Barclays American Corp.*, 95 N.C. App. 301, 305, 307, 382 S.E.2d 836, 839, 840, *cert. denied*, 325 N.C. 546, 385 S.E.2d 498 (1989). Thus, "[t]here is no 'bright-line' test for determining when the termination of an at-will employee violates public policy." *Teleflex Info. Sys., Inc. v. Arnold*, 132 N.C. App. 689, 691, 513 S.E.2d 85, 87 (1999). Our Supreme Court has previously explained why no definitive test exists:

> Although it may be tempting to refine the definition of "public policy" in order to formulate a more precise and exact definition, we decline to do so. Any attempt to make the definition more precise would inevitably lead to at least as many questions as answers. True to common law tradition, we allow this still evolving area of the law to mature slowly, deciding each case on the facts before us.

Amos v. Oakdale Knitting Co., 331 N.C. 348, 353, n.1, 416 S.E.2d 166, 169, n.1 (1992). Therefore, as public policy evolves, so must this Court's ability to find a wrongful discharge in violation of public policy.

I find it persuasive that a number of our fellow states have found that assisting victims of domestic violence is a matter of public policy. *See Attorney Grievance Commission of Maryland v. Painter*, 356 Md. 293, 307, 739 A.2d 24, 32 (1999) (respondent attorney disbarred for committing domestic violence against his wife and children "contrary to the policy of this State, which abhors such acts."); *In re Principato*, 139 N.J. 456, 461, 655 A.2d 920, 922 (1995) (attorney

who committed domestic violence on client reprimanded by court, which found that "[i]n enacting the Prevention of Domestic Violence Act of 1991, the Legislature recognized that 'domestic violence is a serious crime against society' that affects people 'from all social and economic backgrounds and ethnic groups.' The policy of New Jersey is 'that violent behavior will not be excused or tolerated.' " (citations omitted)).

I also find persuasive the actions of our own state legislature in defining our laws regarding domestic violence and its victims. In 1979, the North Carolina Legislature enacted the North Carolina Domestic Violence Act, a series of statutes designed to protect victims of domestic violence from perpetrators of domestic violence. N.C. Gen. Stat. ch. 50B (2003). In N.C. Gen. Stat. § 50B-3(a), the Legislature specifically authorized courts to issue protective orders to an aggrieved party in order to "bring about a cessation of acts of domestic violence." The Legislature further authorized courts to order an offending party to "refrain from . . . harassing [an aggrieved party] . . . by . . . visiting the home *or workplace*, or other means[.]" N.C. Gen. Stat. § 50B-3(a)(9) (emphasis added). Nevertheless, if an individual is forced to leave work or is discharged from work "as a result of domestic violence committed upon the [individual]," N.C. Gen. Stat. § 96-14(1f) (2003) ensures that the individual is not denied employment security benefits.

I find the authorizations detailed in N.C. Gen. Stat. §§ 50B-3(a) and 96-14(1f) relevant to the case *sub judice*. While discussing the impetus behind the Domestic Violence Act in *State v. Thompson*, our Supreme Court noted that the Act was a formal recognition by then-Governor James B. Hunt, Jr., that "domestic violence is a 'serious and invisible problem' in North Carolina." 349 N.C. 483, 486, 508 S.E.2d 277, 279 (1998) (quoting North Carolina Legislation 1979, at 61 (Inst. of Gov't, Univ. of N.C. at Chapel Hill, Joan G. Brannon & Ann L. Sawyer eds. 1979)). While I agree with the Court's conclusion that the Domestic Violence Act formally recognized the problems associated with domestic violence, I conclude that the Act also formally recognized that the perils of domestic violence are often experienced in the workplace. In response to this recognition, the Legislature took the affirmative steps detailed in §§ 50B-3(a) and 96-14(1f). Noting that any exception to the at-will employment doctrine "should be adopted only with substantial justification grounded in compelling considerations of public policy," *Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 334, 493 S.E.2d 420, 423 (1997), for the reasons

detailed above, I conclude that the Domestic Violence Act and the pertinent Employment Security Law provisions detailed herein represent an expression of North Carolina's strong public policy aimed not only at supporting victims of domestic violence, but also at preventing the effects of domestic violence from entering the workplace.

In *Considine v. Compass Grp. USA, Inc.*, this Court held that an at-will employee may only bring a wrongful discharge claim based on a violation of established public policy. 145 N.C. App. 314, 317, 551 S.E.2d 179, 183 (2001). In his complaint, plaintiff specifically alleges that his discharge for being the victim of domestic violence was in violation of North Carolina's public policy to protect victims of domestic violence, and that the violation was "injurious to the public and against the public good." I conclude that plaintiff's complaint sufficiently alleges that plaintiff's discharge violated public policy. Therefore, I would hold that no "insurmountable bar to recovery" appears on the face of the complaint. *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981). Furthermore, defendants make no argument, and I perceive no reason to hold, that plaintiff's allegations are insufficient to give defendants "notice of the nature and basis of [plaintiff's] claim[,] so as to enable [defendants] to answer and prepare for trial." *Id.* Thus, I conclude that plaintiff has sufficiently alleged a cause of action for wrongful discharge in violation of public policy. Therefore, I would hold that the trial court erred in dismissing plaintiff's complaint for failure to state a claim upon which relief may be granted.

STATE OF NORTH CAROLINA v. ANGELITO REYES MANIEGO, DEFENDANT

No. COA03-340

(Filed 20 April 2004)

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

The short form indictment for first-degree murder is constitutional.

2. Confessions and Incriminating Statements— voluntary waiver of rights—response to plea bargain request

Statements to officers were properly admitted where defendant asked about a plea bargain, an officer said that all he could do would be to tell the D.A. of defendant's cooperation, and the offi-

cer later called defendant a liar. The findings support the conclusion that defendant knowingly waived his right to remain silent.

3. Criminal Law— opening argument—presence at scene

Defense counsel did not concede guilt in an opening argument which concerned presence at the scene.

4. Criminal Law— instructions—acting in concert—properly defined

The trial court's instruction, taken as a whole, properly defined acting in concert.

5. Criminal Law— instructions—acting in concert—evidence sufficient

An instruction on acting in concert was supported by the evidence.

Appeal by defendant from judgments entered 12 February 2002 by Judge Charles H. Henry in Superior Court in Onslow County. Heard in the Court of Appeals 4 December 2003.

Attorney General Roy Cooper, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

Margaret Creasy Ciardella, for defendant-appellant.

HUDSON, Judge.

On 14 November 2000, the Onslow County Grand Jury returned indictments charging defendant, Angelito Reyes Maniego, with first-degree murder, felonious larceny, felonious possession of stolen property, robbery with a dangerous weapon, first-degree kidnapping, conspiracy to commit robbery with a dangerous weapon, conspiracy to commit first-degree kidnapping, and conspiracy to commit murder. Defendant was tried capitally during the 14 January through 11 February 2002 Criminal Sessions of Superior Court in Onslow County. The jury convicted defendant of one count each of first-degree murder, felonious larceny, first-degree kidnapping, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. After a capital sentencing hearing, defendant was sentenced to life imprisonment without parole for the first-degree murder conviction. The trial court then imposed a consolidated sentence of 95 to 123 months imprisonment for the robbery with a dangerous weapon and felonious larceny convictions. For the first-degree kidnapping

conviction, the trial court sentenced defendant to a term of 125 to 159 months, and ordered all sentences to run consecutively. Defendant appeals. For the following reasons, we find no error.

The State's evidence at trial tended to show that, before he was killed, twenty-two year old David Brandt shared an apartment with his sister. On the night of 13 August 2000, David was supposed to have dinner with his parents, who became worried when he did not arrive at their house. Later, when David did not return to his apartment, his sister began to worry. At approximately 4:00 a.m. the next morning, David's sister and parents filed a missing person's report with the Jacksonville Police Department. About an hour later, David's truck was found abandoned in a Wal-Mart parking lot.

On the morning of 17 August 2000, law enforcement officers found the partially decomposed body of David Brandt in a wooded area near Jacksonville. The body was lying next to a tree, face up. The face was wrapped with electrical tape with a bulge at the mouth. The body had suffered multiple stab wounds.

Dr. Christopher Ingram, an expert in forensic pathology, participated in the autopsy. He testified that electrical tape covered the victim's head, extending from just below the eyes to below the chin, wrapping completely around the victim's head several times. Upon removing the tape from the head, he found a blue racquetball lodged in the mouth. Dr. Ingram also found bruises on both arms consistent with someone grabbing or holding the victim, and noted that the wrists had been bound, possibly with handcuffs. Dr. Ingram testified that he observed approximately thirty-one stab wounds to the neck and upper chest region, several of which were fatal. Although Dr. Ingram testified that suffocation by the tape and ball was a possible cause of death, he opined that the stab wounds were the more likely cause.

Jose Quesada, assistant security director at the Jacksonville Mall, knew the victim as one of the managers at Aladdin's Castle, a video arcade at the mall. Mr. Quesada also knew the defendant, who used to work in the mall. Mr. Quesada testified that he saw the defendant almost every day at the mall, usually at Aladdin's Castle. On Sunday 13 August 2000, at 6:30 p.m., Mr. Quesada saw the victim leave the mall carrying his bank deposit bags. Mr. Quesada also saw the defendant and Clifford Miller, who had been sitting on a bench outside the mall exit, approach the victim and walk with him to his truck. All three men got in the truck and drove off.

On 14 August 2000, the victim's father telephoned Juan Avila, who was working as manager of Aladdin's Castle, and told him that David was missing. Mr. Avila called the bank and found out that David had not made a $2688.25 deposit the previous evening. Mr. Avila also knew the defendant from the arcade, and sometimes saw him with Clifford Miller. Mr. Avila testified that no one associated with Aladdin's Castle permitted either defendant or Clifford Miller to take money belonging to Aladdin's Castle.

Michelle Nevitt, who also worked at Aladdin's Castle, testified that she saw the defendant there every day talking to David and she saw David give defendant rides in his truck on numerous occasions. When she left the mall at 6:00 p.m. on 13 August 2000, Ms. Nevitt saw the defendant and Clifford Miller smoking outside of the mall. She testified that earlier that afternoon, defendant had been rude with her after she told him to pay the victim the money defendant owed him.

David's sister, Laura Hingula, worked at another store in the mall and shared an apartment with him. She knew that her brother and defendant were friends, but she did not like defendant. On 13 August 2000, at around 4:30 p.m., David told Laura that he was going to take the deposits to the bank after he closed and then go to their parents' house for supper. At 6:15 that evening as she was leaving the mall, Laura saw her brother closing the arcade. As she left, she saw defendant and Miller outside the mall. She became worried when her brother did not arrive home by 2:00 a.m. the following morning, and later found out that he had not appeared at their parents' house for dinner.

Toni Cinotti testified that he worked at a Circle K convenience store in Jacksonville. On 13 August 2000, he went to work at 11:10 p.m. relieving Pam Miller, Clifford Miller's wife. About one hour later, defendant and Miller came into the store. Miller had a blue backpack with him. Cinotti testified that it was unusual to see Miller at that hour because he was usually home, and that Miller appeared "clammy," winded, out of breath, nervous, and scared. Miller bought a drink and then left the store.

Pam Miller testified that on 13 August 2000, she finished her shift at the Circle K, and went home. That night, Clifford Miller did not get home until sometime between 1:00 and 2:00 a.m. The next night, Clifford said he wanted a pizza and asked Pam to get his wallet from his backpack. She opened the backpack and found it full of money.

Knowing that the money did not belong to them, she confronted her husband and told him to get rid of it. She found more money hidden in the house and called the police.

Detective Kaderbek was investigating the missing person report on 14 August 2000. He knew that David's truck had been found and that money from Aladdin's Castle was missing. Because Mr. Quesada had seen the victim leave the mall in the company of two men, one of whom was defendant, Det. Kaderbek contacted defendant and asked him to come to the police station for an interview. Defendant agreed, and went in on 15 August 2000. During the interview, defendant stated that he went to the mall to ask David for a ride and that David gave him and "Cliff" a ride home, dropped them off and left, and that was the last time he saw David. Defendant stated that he and Miller played video games at Miller's house until Miller's wife got home from work, after which he left. Det. Kaderbek allowed defendant to leave after the interview, but he asked defendant not to speak to Miller until the police could talk to him.

Pam Miller was also interviewed on 15 August 2000. She stated that no one was home when she returned from work the night of 13 August 2000. Det. Kaderbek and other officers searched Miller's residence, where they found $892 under a sofa cushion and $315.41 in a tin can. Miller said defendant gave him the money. While the police were at Miller's house, defendant called Miller on the telephone. Defendant asked Miller if he had talked to the police yet, and Miller said no. Defendant told Miller to stick with their original story that David dropped them off and that was the last time they saw him. At the request of police, Miller invited defendant to his house. When defendant arrived, both he and Miller were arrested.

At this point, Det. Kaderbek read defendant his *Miranda* rights, which defendant waived and agreed to be interviewed. After initially making some inconsistent statements, defendant stated that when David left the mall, he had three bank deposit bags. David, defendant and Miller got into David's truck and Miller asked David to take them to Wal-Mart. Miller then pulled out a knife and stuck it in David's side. Then they stopped at a school parking lot where defendant moved into the driver's seat with David in the middle and Miller in the passenger's seat. Defendant had planned to drive to Greenville, but got lost, so they stopped at a wooded area and got out of the truck. They told David to remove his shirt, then handcuffed him and led him into the woods, where they handcuffed him around a tree and removed his pants. They then placed a ball in his mouth and taped his face. David

started struggling, then passed out. Miller then stabbed David about thirty times in the neck and throat. They left in David's truck, cleaned it and parked it in a Wal-Mart parking lot. When defendant was arrested, he had $635.96 on his person and another $407 was found at his residence.

Defendant presented no evidence.

I.

[1] First, defendant argues that the short form indictments used to indict him for first-degree murder were unconstitutional as they failed to allege all of the elements of first-degree murder. In *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001), our Supreme Court examined the validity of short form indictments in light of the United States Supreme Court's decisions in *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999) and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), and concluded that the short form murder indictments are in compliance with the North Carolina and United States Constitutions. *Id.* at 175, 531 S.E.2d at 438. As we are bound by the decisions of the North Carolina Supreme Court, we overrule this assignment of error.

II.

[2] Next, defendant argues that the trial court erroneously denied his motion to suppress statements he made to law enforcement officers and in allowing the subsequent admission of those statements at trial. Defendant contends that any statements he made to the officers were involuntary and the result of coercion. We disagree.

In reviewing a trial court's ruling on a motion to suppress, the trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995). In turn, the trial court's conclusions of law regarding whether defendant was in custody "must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997).

Here, the trial court made extensive findings of fact regarding defendant's interrogation. Among them, the court found as fact that defendant was advised of his *Miranda* rights, that defendant stated

that he understood his rights and was willing to waive those rights, that defendant waived those rights both orally and in writing, that defendant then gave the investigating officers an oral statement regarding the disappearance of David Brandt, and that defendant then gave the officers a written statement regarding the same. Defendant does not challenge any of these findings.

The determination of whether defendant's statements are voluntary and admissible "is a question of law and is fully reviewable on appeal." *State v. Greene*, 332 N.C. 565, 580, 422 S.E.2d 730, 738 (1992). A statement is admissible if it "was given voluntarily and understandingly." *State v. Schneider*, 306 N.C. 351, 355, 293 S.E.2d 157, 160 (1982). On review, "[t]he court looks at the totality of the circumstances of the case in determining whether the confession was voluntary." *State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983). Factors to be considered include whether defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant. *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994).

The defendant does not challenge the findings of fact of the superior court but does contend that considering the totality of the circumstances, his confession was coerced, and thus inadmissible, because of certain questioning tactics employed by Dets. Condry and Kaderbek. First, in response to defendant asking the detectives whether there is going to be a plea bargain, Det. Condry stated:

> I can't make deals with you, okay? The only thing I can make sure of is that the district attorney knows when me and you talked you cooperated with me fully. That's the best I can offer you. But for me to even say that to the district attorney or the judge, you've got to tell me the truth and you haven't so far.

Our Supreme Court has held that "[p]romises or other statements indicating to an accused that he will receive some benefit if he confesses do not render his confession involuntary when made in response to a solicitation by the accused." *State v. Richardson*, 316 N.C. 594, 604, 342 S.E.2d 823, 831 (1986). Additionally, our Courts have held that it is acceptable to tell the accused that his cooperation

will be made known to the district attorney. *State v. Williams*, 314 N.C. 337, 346, 333 S.E.2d 708, 715 (1985).

Defendant also contends that his confession was coerced because the detectives called him a "liar," told him that his story was "bull," and told him that they held his life in their hands. In *State v. Jackson*, 308 N.C. 549, 304 S.E.2d 134 (1983), our Supreme Court upheld the admission of the defendant's confession after investigators told him that "it would be best if the defendant would just tell the truth in the long run." *Id.* at 560, 304 S.E.2d at 150. Similarly, in *State v. Corley*, 310 N.C. 40, 311 S.E.2d 540, (1984), the trial court did not err by admitting defendant's statement after an officer told him that "things would be a lot easier on him if he went ahead and told the truth". *Id.* at 52, 311 S.E.2d at 547.

The trial court's findings support its conclusion that defendant freely, knowingly, understandingly, and voluntarily waived his right to remain silent and his right to counsel after being advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). The conclusions support the ruling denying defendant's motion to suppress. Thus, considering the totality of the circumstances, we conclude that the trial court did not err by admitting defendant's statements.

III.

[3] Next, defendant contends that the trial court committed reversible error by failing to inquire of defendant whether he knowingly, intelligently and voluntarily consented to concessions of guilt made by his attorney during opening statements in violation of *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). We disagree.

To establish a *Harbison* claim, the defendant must first show that his trial attorney has made a concession of guilt. *State v. Strickland*, 346 N.C. 443, 488 S.E.2d 194 (1997), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998). Here, defendant claims that the following from the opening statement violates *Harbison*:

> Remember that Angelito Maniego is presumed innocent and this presumption follows him throughout this trial unless and until you're convinced that he committed these crimes, any one of them or all of them. He does not have to testify in the case or present any evidence of, and I think we've been over that with you. But you must consider, we ask you to consider any questions

> that we ask witnesses and their answers in reaching your decision in this case. We contend to you further that there's no physical evidence putting Angelito Maniego at the scene of this killing by Clifford Miller of David Brandt. That there's no physical evidence put him in the vehicle with David Brandt and Clifford Miller. That there's no physical evidence at all connecting Angelito Maniego with these crimes. Angelito Maniego put himself in the vehicle with Clifford Miller and David Brandt. He put himself driving the vehicle, he put himself at the scene where David Brandt was murdered by Clifford Miller. Through his statements, you'll hear his testimony in this case and he did make three different statements. The first two are incomplete. The third one is the final version. It's the truth about his involvement in these crimes, and it will show to you that he did not aid and abet in the killing of David Brandt by Clifford Miller, nor did he act in concert with Clifford Miller to kill David Brandt. The fact that he's at the scene where these acts occurred is not enough for you to find him guilty of these crimes.

Defense counsel then concluded his opening statement by asking the jury to keep an open mind, and further states:

> That's all we ask, and we feel that if you do, you will not find Angelito Maniego guilty of murder or these other charges.

Contrary to defendant's argument, we find no admission of guilt in this excerpt. At most, defense counsel admits the fact that defendant's statement places him at the scene of the crime, though he argues that the "fact that he's at the scene where these acts occurred is not enough for you to find him guilty of these crimes." Admitting a fact is not equivalent to admitting guilt. *State v. Wiley*, 355 N.C. 592, 620, 565 S.E.2d 22, 42 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). In addition, counsel's opening statement in its entirety is consistent with defendant's theory of the case, that he was not guilty because Clifford Miller committed the crimes. Thus, we conclude that there was no *Harbison* violation here, and accordingly we overrule this assignment of error.

IV.

[4] Finally, defendant argues that the trial court erred by instructing the jury on acting in concert, contending that there was insufficient evidence to support the instruction and that the instruction given was an incorrect statement of the law. We disagree.

> On this point, the trial court instructed the jury as follows:
>
> For a person to by guilty of a crime, it is not necessary that he, himself, do all the acts necessary to constitute the crime. If two or more persons join in a purpose, to commit a particular crime, each of them if actually or constructively present is not only guilty of that crime if the other commits the crime, but he's also guilty of any other crime committed by the other in pursuance of the common purpose, to commit the particular crime, or as a natural or probable consequence thereof. However, the mere presence of the defendant at the scene of a crime, even though he is in sympathy with a criminal act and does nothing to prevent its commission, does not make him guilty of the offense.

While defendant agrees that this is a correct statement of the law, he argues that the trial court did not identify this passage as the definition of acting in concert, and subsequently erred during the charge on each offense by stating that "the defendant, acting either by himself or acting in concert with another" rather than reciting "the defendant, acting by himself or together with someone else."

> In reviewing jury instructions, our Supreme Court has noted that:
>
> The charge of the court must be read as a whole . . ., in the same connected way that the judge is supposed to have intended it and the jury to have considered it . . . . It will be construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.

State v. Hooks, 353 N.C. 629, 634, 548 S.E.2d 501, 505 (2001), *cert. denied*, 534 U.S. 1155, 151 L. Ed. 2d 1018 (2002) (citations omitted). Additionally,

> If, when so construed, it is sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed, any exception to it will not be sustained even though the instruction could have been more aptly worded.

State v. Williams, 299 N.C. 652, 660, 263 S.E.2d 774, 779-80 (1980). Here, in the charge as a whole, the trial court properly defined and conveyed to the jury the legal principle of acting in concert.

[5] We next consider whether the evidence supported this instruction, and we conclude that it did. The State's evidence tended to show that witnesses saw the victim leaving the mall with his bank deposit bags, and also saw him driving off in his truck with defendant and Clifford Miller. Other evidence showed that in the truck, Clifford Miller stuck a knife in the victim's side, and that defendant ordered Miller to stop the truck, so that defendant could take over the driving. Defendant drove the truck for over three hours, eventually stopping near a wooded area. Together, Defendant and Miller led the victim on a fifteen minute walk into the woods, where they handcuffed him to a tree, stripped off his clothes, and gagged him. After Miller stabbed the victim many more times, defendant helped clean up the truck and dispose of evidence in a dumpster. Defendant and Miller then split the money from the bank deposit bags and agreed on a story. Importantly, much of this evidence is from defendant's detailed description of the robbery and killing. Thus, we conclude that the evidence was sufficient to support the instruction on acting in concert, and conclude that this assignment of error lacks merit.

No error.

Judges TYSON and STEELMAN concur.

SANDRA J. CLARK, EMPLOYEE, PLAINTIFF v. WAL-MART, EMPLOYER, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, CARRIER, DEFENDANTS

No. COA03-435

(Filed 20 April 2004)

1. Workers' Compensation— alternative employment—capacity to work

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee was incapable of work in any employment, because the finding was supported by competent evidence based on a doctor's testimony.

2. Workers' Compensation— presumption of ongoing disability—shifting burden of proof—ability to earn pre-injury wages

The Industrial Commission did not err in a workers' compensation case by giving plaintiff employee the benefit of the presumption of ongoing disability and shifting the burden to defendants to prove plaintiff's ability to earn pre-injury wages, because: (1) notwithstanding whether a form agreement was filed in this case, there was sufficient evidence that defendants stipulated to the compensability of the claim and had been paying ongoing benefits since the time of the injury; and (2) that evidence, along with a doctor's testimony concerning plaintiff's inability to return to work, was sufficient to support a finding of plaintiff's ongoing disability.

3. Workers' Compensation— permanent disability—total disability—incapacity to earn pre-injury wages

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee suffered permanent and total disability as a result of her back injury, because: (1) the findings demonstrated that the injury caused plaintiff's incapacity to earn pre-injury wages in any employment; (2) defendants did not present any evidence that employment opportunities exist for plaintiff which she has not explored given her age, education, physical limitations, vocational skills, and experience; (3) the doctor's opinion that plaintiff would not be able to return to work and his reservation of plaintiff's ability to perform a sedentary job with no lifting requirements show her incapacity to earn any wages on a permanent basis; and (4) contrary to defendants' assertion, a finding of maximum medical improvement is not a prerequisite for an award of benefits under N.C.G.S. § 97-29.

4. Workers' Compensation— failure to authorize ordered bone scan

The Industrial Commission did not err in a workers' compensation case by concluding that defendants failed to authorize plaintiff employee's bone scan after being so ordered.

Appeal by defendants from opinion and award filed 31 January 2002 and from order filed 21 November 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 January 2004.

Crumley and Associates, PC, by Daniel L. Deuterman and Amy S. Berry, for plaintiff-appellee.

Young Moore and Henderson, P.A., by J.D. Prather and Jennifer Terry Gottsegen, for defendant-appellees.

BRYANT, Judge.

Wal-Mart Stores, Inc. and Insurance Company of the State of Pennsylvania (collectively defendants) appeal an opinion and award filed 31 January 2002 by the Full Commission of the North Carolina Industrial Commission (the Commission) awarding Sandra J. Clark (plaintiff) ongoing permanent and total disability compensation pursuant to N.C. Gen. Stat. § 97-29, and an order filed 21 November 2002 denying defendants' motion for reconsideration.

On 22 December 1999, plaintiff filed an amended claim for workers' compensation based on work-related injuries to her back on 21 December 1998. Defendants admitted compensability of the injury on a Form 33R but disputed the permanent nature of the injury. This matter came for hearing on 21 March 2000 before Deputy Commissioner Kim L. Cramer. By order filed 29 December 2000, the deputy commissioner concluded plaintiff was permanently and totally disabled as a result of the back injury, and awarded plaintiff ongoing benefits. Defendants appealed the order to the Full Commission (Commission).

This matter came for hearing before the Commission on 24 August 2001. By order filed 31 January 2002, the Commission preliminarily noted:

> Following oral arguments before the Full Commission, at the request of defendants the parties were allowed 15 days in which to schedule a bone scan for plaintiff. By letter dated September 17, 2001 plaintiff informed the Commission that the bone scan scheduled for September 11, 2001 was cancelled because defendants failed to authorize the scan. Defendants have not explained this failure to authorize the scan or requested an extension of time within which to complete the scan. Therefore, by [o]rder dated September 28, 2001 the Full Commission closed the record and informed the parties that the Full Commission would proceed to decide the case based upon the evidence in the record.

The Commission also noted the parties' stipulation that defendants had paid plaintiff temporary total disability since the date of the injury. The Commission made these relevant findings of fact:

1. On the date of the hearing before the Deputy Commissioner, plaintiff was 66 years of age. . . .

. . . .

7. On July 16, 1998 plaintiff began working for Wal-Mart Stores as a door greeter. . . .

. . . .

13. On December 21, 1998 plaintiff was helping to straighten merchandise on store shelves. She was asked to move a "sled" that was used for displays during the holidays. The sled was on the top shelves and plaintiff had to use a ladder to get to it. When she moved the sled, plaintiff found that it was heavy and weighed over 20 pounds. As she moved the sled, plaintiff felt a sharp pain in her lower back.

14. Plaintiff went to Prime Care on December 26, 1998, seeking treatment for her back. She was initially taken out of work for two days. When plaintiff returned to the clinic with continued pain complaints on December 28, 1998, she was continued out of work through December 31, 1998. Although she was tentatively released to return to work with restrictions in early January 1999, on January 19, 1999 plaintiff was taken out of work pending an orthopaedic evaluation.

15. Plaintiff . . . saw [Dr. Charles Taft, an orthopaedic specialist] for her back complaints on March 24, 1999. . . . He assessed new compression fractures at L1 and L2, which were caused or aggravated by the incident of moving the sled on December 21, 1998.

16. In assessing plaintiff's condition, Dr. Taft . . . stated his opinion that he did not believe plaintiff would be able to return to work due to her osteoporosis and the compression fractures. The compression fractures should have healed within 8 months, but the healing process has been slowed by . . . plaintiff's smoking habit of one pack per day. Smoking decreases the oxygen flow in the blood and slows the healing of the bone.

17. Plaintiff was also examined by Dr. Frank J. Rowan, an orthopaedic specialist, whom defendants hired to conduct an independent medical examination. Dr. Rowan saw plaintiff on August 10, 1999. Dr. Rowan agreed with Dr. Taft's assessment. As both physicians testified, plaintiff had pre-existing osteoporosis,

which made her more susceptible to compression fractures in her spine. The compression fractures at L1 and L2 were caused or significantly aggravated by plaintiff's accident of December 21, 1998.

18. Dr. Rowan also agreed with Dr. Taft's assessment that plaintiff's smoking interferes with the healing of the compression fractures. . . . Although the compression fractures should have healed at the time of his examination, Dr. Rowan could not tell whether that was the case without a current bone scan, which he recommended.

19. Both Dr. Taft and Dr. Rowan have emphasized the importance of ongoing treatment of plaintiff's osteoporosis. However, this was a pre-existing condition which was not caused or aggravated by plaintiff's employment with Wal-Mart. Ongoing medical treatment for plaintiff's osteoporosis was not necessitated by plaintiff's work-related injur[y] of . . . December 21, 1998.

20. Ongoing treatment for plaintiff's osteoporosis would include use of Fosamax or Miacalcin. Neither has a primary purpose of pain treatment, although there are indications that Miacalcin mitigates the pain of compression fractures secondary to osteoporosis. These medications aid in adding calcium to the bone and in preventing future compression fractures.

21. As both Dr. Taft and Dr. Rowan have testified, the primary limiting factor in plaintiff's ability to return to any type of employment is her osteoporosis, not the compression fractures. However, the compression fractures are also a contributing factor in plaintiff's disability.

22. Both Dr. Taft and Dr. Rowan have stated their opinions that plaintiff might be able to perform a sedentary job with no lifting requirements, although Dr. Taft is not optimistic about such possibilities. . . . Any job which would require lifting would put plaintiff at risk for further injury to her back.

. . . .

28. Although the osteoporosis is the primary limiting factor in plaintiff's ability to return to gainful employment, the compression fractures are also a significant contributing factor, especially with regard to any pain that may be produced.

29. . . . Given plaintiff's age and lack of education and experience, and considering her other physical limitations, neither

pursuit of further employment opportunities nor retraining appear to be reasonable or viable options. Due to the combination of her osteoporosis and fractures, plaintiff will be very limited in anything she can do, especially lifting, and would be restricted to a sedentary position. Even then, it does not appear that plaintiff could work a full 6 to 8-hour day.

30. At the time of the hearing before the Deputy Commissioner, plaintiff was receiving ongoing benefits for total disability. Defendants have failed to present evidence that plaintiff is capable of earning wages in the same or any other employment, or that vocational retraining is viable.

The Commission concluded:

2. On December 21, 1998, plaintiff sustained an injury by accident arising out of and in the course of her employment with defendant Wal-Mart, as a result of which she sustained an injury to her back, compression fractures at L1 and L2. . . .

3. . . . Because defendants failed to schedule a bone scan as ordered by the Commission, the Full Commission cannot determine at this time whether the compression fractures at L1 and L2 have healed. Therefore, defendants shall be responsible for ongoing medical treatment for plaintiff's back condition. The prudent medical treatment includes medication which primarily treats the osteoporosis but also mitigates the pain associated with compression fractures . . . .

4. As a result of her back injury of December 21, 1998, compounded on her pre-existing osteoporosis of her spine, plaintiff had been and remains incapable of earning wages in the same or any other employment. As plaintiff has been receiving ongoing benefits, the burden is on defendants to show that she is capable of returning to gainful employment. The greater weight of the evidence shows that it is unlikely . . . plaintiff will ever be able to return to gainful employment and that she is totally and permanently disabled. Plaintiff is entitled to ongoing benefits for total and permanent disability [pursuant to] N.C. Gen. Stat. §97-29.

The Commission awarded plaintiff ongoing benefits and ordered defendants to pay all medical expenses associated with the treatment of plaintiff's back condition.

The issues are whether the Commission erred in: (I) finding plaintiff incapable of work in any employment; (II) concluding plaintiff suffered permanent and total disability; and (III) concluding defendants failed to authorize plaintiff's bone scan after being so ordered.

I

[1] Defendants first argue the Commission's finding of plaintiff's incapacity to work in any employment is not supported by the evidence. In support of their argument, defendants point to Dr. Rowan's testimony that plaintiff would be able to work in a sedentary job with frequent changes in position and without significant lifting.

"If supported by competent evidence, the Commission's findings are binding on appeal[,] even when there exists evidence[] to support findings to the contrary." *Ward v. Long Beach Volunteer Rescue Squad*, 151 N.C. App. 717, 720, 568 S.E.2d 626, 628, *disc. review denied*, 356 N.C. 314, 571 S.E.2d 219 (2002). Here, Dr. Charles Taft, an orthopaedic specialist, opined plaintiff would not be able to return to work because of her osteoporosis and compression fractures, and he was not optimistic of plaintiff's ability to perform a sedentary job with no lifting requirements. In his medical notes of 1 April 1999, Dr. Taft entered: "[Plaintiff] is not going to be able to return to work at Wal[-M]art and I don't think that with her osteoporosis and multiple compression fractures, that she is going to be able to be gainfully employed." On 6 June 2000, Dr. Taft testified he was not optimistic of plaintiff's ability to resume the greeter position, which involves "continuous standing" and "frequent walking" but "no lifting," and earn wages in general. Further, Dr. Taft testified plaintiff would be "at great risk of reinjuring herself if she [were] to go back . . . to work that would involve . . . lifting." The Commission's finding of plaintiff's incapacity to work in any employment is supported by competent evidence based on Dr. Taft's testimony.

[2] Defendants also argue that the Commission erred by giving plaintiff the benefit of the presumption of ongoing disability, even though a form agreement (e.g. Form 21) was not entered in this case. Specifically, defendants argue the Commission incorrectly shifted the burden to defendants to rebut the presumption of ongoing disability without first requiring plaintiff to prove the existence and degree of her disability. We find defendants' argument is without merit.

On the Form 33R filed by defendants, they specifically admitted the compensability of plaintiff's back injury. Stipulation three of the

Commission's opinion and award stated that defendants accepted liability for plaintiff's back injury, and had been paying ongoing benefits since the time of the injury. In addition, by administrative decision and order filed 4 August 1999 denying defendants' Form 24 application to terminate compensation, the special deputy commissioner stated defendants had not rebutted the presumption of plaintiff's ongoing total disability.

Notwithstanding whether a form agreement was filed in this case, there is sufficient evidence that defendants stipulated to the compensability of the claim, and had been paying ongoing benefits since the time of the injury. The above stated evidence, in addition to Dr. Taft's testimony concerning plaintiff's inability to return to work, was sufficient to support a finding of plaintiff's ongoing disability. Because the finding of ongoing disability is supported by competent evidence, the Commission was correct in shifting the burden to defendants to prove plaintiff's ability to earn pre-injury wages. Therefore, this assignment of error is overruled.

II

[3] Defendants next contend the Commission erred in concluding plaintiff suffered permanent and total disability as a result of the back injury.

> In a workers' compensation case, the plaintiff has the burden of proving she suffers from a disability as a result of a work-related injury. "Disability" is defined by statute as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.". . . To support a conclusion of disability, the Industrial Commission must thus find facts indicating: "(1) [the plaintiff] was incapable of earning pre-injury wages in the same employment, (2) she was incapable of earning pre-injury wages in any other employment, and (3) the incapacity to earn pre-injury wages in either the same or other employment was caused by [the] plaintiff's injury."

Parker v. Wal-Mart Stores, Inc., 156 N.C. App. 209, 211-12, 576 S.E.2d 112, 113-14 (2003) (citations omitted) (alterations in original). The plaintiff may prove such incapacity by " 'the production of medical evidence that [s]he is physically or mentally, as a consequence of the work[-]related injury, incapable of work in any employment.' " *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 7, 562 S.E.2d 434, 439 (quot-

ing *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)), *aff'd*, 357 N.C. 44, 577 S.E.2d 620 (2003). Moreover, a "work-related injury need not be the sole causative force to render an injury compensable." *Brafford v. Brafford's Constr. Co.*, 125 N.C. App. 643, 646, 482 S.E.2d 34, 37 (1997).

The Commission made the following findings: Plaintiff felt a sharp pain in her lower back when moving the sled at work on 21 December 1998 and continued to suffer back pain afterward; orthopaedic specialists Dr. Taft and Dr. Frank Rowan determined the incident caused or aggravated plaintiff's compression fractures; plaintiff took medications to mitigate the pain of compression fractures; Dr. Taft opined plaintiff would not be able to return to work because of her osteoporosis and compression fractures; and Dr. Taft was not optimistic that plaintiff would be able to perform a sedentary job with no lifting requirements. These findings support the conclusion of disability, as they demonstrate that the injury caused plaintiff's incapacity to earn pre-injury wages in any employment. *See Knight*, 149 N.C. App. at 6-8, 562 S.E.2d at 439-40 (a physician's testimony that the plaintiff, who had a history of back injuries, continued to suffer from pain due to the back injury at issue and the plaintiff's credible testimony that the severe back pain did not permit him to work supported the Commission's conclusion of total disability).

Furthermore, as the Commission found, defendants did not present any "evidence that employment opportunities exist for plaintiff which [s]he has not explored given h[er] 'age, education, physical limitations, vocational skills, and experience.' " *Webb*, 141 N.C. App. at 513, 540 S.E.2d at 794 ("[o]nce the employee has shown a disability, the burden then shifts to the employer to 'produce evidence that suitable jobs are available for the employee and that the employee is capable of getting one, taking the employee's physical and vocational limitations into account' ") (citation omitted).[1]

The findings also support the conclusion that the disability is permanent and total. A permanent and total disability occurs when an employee is incapable of earning any wages on a permanent basis. *See McKenzie v. McCarter Elec. Co.*, 86 N.C. App. 619, 621, 359 S.E.2d

1. In their brief to this Court, defendants suggest that Wal-Mart may possibly offer plaintiff employment compatible with her work restrictions. However, the record and the transcripts do not show evidence of such an intention, and we therefore do not consider defendants' suggestion. *See* N.C.R. App. P. 9(a) (this Court's "review is solely upon the record on appeal and the verbatim transcript of proceedings").

249, 250 (1987) (a permanent and total disability occurs when "an employee sustains an injury which results in [her] inability to function in any work-related capacity at any time in the future"). Dr. Taft's opinion that plaintiff would not be able to return to work and his reservation of plaintiff's ability to perform a sedentary job with no lifting requirements show her incapacity to earn any wages on a permanent basis.

In addition, contrary to defendants' assertion, a finding of maximum medical improvement (MMI) is not a prerequisite for an award of benefits pursuant to N.C. Gen. Stat. § 97-29. "The point at which the injury has stabilized is often called [MMI,] although that term is not found in the statute itself." *Carpenter v. Indus. Piping Co.*, 73 N.C. App. 309, 311, 326 S.E.2d 328, 330 (1985). MMI is "a purely medical determination." *Walker v. Lake Rim Lawn & Garden*, 155 N.C. App. 709, 717, 575 S.E.2d 764, 769, *disc. review denied*, 357 N.C. 67, 579 S.E.2d 577 (2003). In contrast, " 'disability' is not simply a medical question, but includes an assessment of other vocational factors, including age, education, and training." *Russos v. Wheaton Indus.*, 145 N.C. App. 164, 168, 551 S.E.2d 456, 459 (2001) (citation omitted), *disc. review denied*, 355 N.C. 214, 560 S.E.2d 135 (2002). MMI, "which does not include these other aspects of disability as defined by the Workers' Compensation Act, therefore cannot by itself establish a resumption of wage earning capacity." *Id.* In other words, "MMI does not represent the point in time at which a loss of wage-earning capacity under N.C. Gen. Stat. § 97-29 . . . automatically converts from 'temporary' to 'permanent.' " *Knight*, 149 N.C. App. at 16, 562 S.E.2d at 445. This assignment of error is overruled.

III

[4] Last, defendants argue the Commission erred in concluding that defendants were ordered to schedule a bone scan, and further erred in finding that defendants had not complied with said order.

Paragraph 2 under the award section of the deputy commissioner's 29 December 2000 opinion and award clearly states: "Defendants shall pay for a current bone scan, to be directed by Dr. Taft, the current treating physician, to determine whether the compression fractures at L1 and L2 have healed." Subsequently, plaintiff informed the Commission, via letter dated 17 September 2001, the bone scan scheduled for 11 September 2001 was cancelled because defendant had failed to authorize the scan.

There is sufficient evidence that defendants were under order to authorize a bone scan, and had failed to do such. This assignment of error is overruled.

Affirmed.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA v. JARVIS PULLEN, DEFENDANT

No. COA03-234

(Filed 20 April 2004)

1. Robbery— sufficiency of evidence—recanted confession of codefendant

There was sufficient evidence of defendant's guilt of robbery with a dangerous weapon even though a codefendant's confession was recanted at trial. The jury decides whether to give more weight to the original statement or to the testimony, and there was other evidence implicating defendant.

2. Evidence— denial of motion in limine—no objection at trial

Defendant did not fully preserve the issue of the admissibility of a codefendant's confession where defendant's motion in limine was denied and defendant did not object at trial. The amendment to N.C.G.S. § 8C-1, Rule 103(a)(2) (objection need not be renewed after definitive ruling on evidence) applies only to rulings made on or after 1 October 2003.

3. Confessions and Incriminating Statements— confession—unavailable codefendant

The confession of an unavailable codefendant in a robbery trial was erroneously admitted but did not constitute plain error in light of other evidence. The testimony was given during the police interrogation of a witness who had given notice that he intended to invoke his Fifth Amendment rights, there was no opportunity for cross-examination, and admission of the statement violated the Confrontation Clause under *Crawford v. Washington*, 541 U.S. —— (2004).

Appeal by defendant from judgments entered 10 September 2002 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 14 January 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Victoria L. Voight, for the State.

Thomas R. Sallenger, for defendant-appellant.

GEER, Judge.

Defendant Jarvis Pullen appeals from his conviction on two counts of robbery with a dangerous weapon. We hold that the trial court properly denied defendant's motion to dismiss, but that the court erred, under the Confrontation Clause, in admitting the out-of-court confession of a non-joined co-defendant. Although defendant moved to suppress the confession prior to trial, he failed to repeat his objection when the confession was ultimately offered into evidence and, therefore, failed to preserve his objection for appellate review. Based on our review of the record, we conclude that defendant has failed to meet the standard required for reversal under the plain error doctrine.

Facts

Between 5:00 p.m. and 6:00 p.m. on 12 April 2002, three young males—two of them wielding guns—robbed Darryl Lawrence, Jr. and Jacqueline Jones as they sat on the porch of the Raleigh, North Carolina house of Darryl's brother, Montrell Lawrence. Darryl Lawrence, who had injured his leg, was wearing an orthopedic boot and using crutches. Having just cashed his paycheck, he had approximately $3,225.00 in his pockets. Jones' purse contained $250.00.

Two of the robbers jumped onto the porch. The third remained on the ground, holding a gun. One of the robbers on the porch pointed a gun at Lawrence while the other pushed him down. The robbers removed the cash from Lawrence's pocket and took jewelry from him valued at approximately $3,700.00. The armed robber on the porch told Jones not to speak or he would shoot her, grabbed her purse, and emptied it of the cash. He then hit Lawrence across the face with his gun.

When Montrell Lawrence, who was across the street, heard that his brother was being robbed, he ran towards his house and witnessed the robberies in progress. The robbers ultimately fled by run-

ning around the right side of the house. Darryl Lawrence called the police on his cellular phone.

Although the victims testified that they did not see the robbers' faces clearly because their attention was focused on the guns, they and Montrell Lawrence described the general appearance of each of the three robbers, all of whom were African-American and were between the ages of 15 and 20. The robber on the porch holding the gun had a medium complexion and was wearing a dark baseball cap, a white basketball jersey with blue lettering on it, and bleach-spotted, faded jeans. The second robber on the porch was small and had a light complexion. The robber who remained on the ground had a dark complexion, gold front teeth, and ear-length dreadlocks. He was dressed all in black and was wearing a black knit hat.

A short time after the robbery, at approximately 6:15 p.m. to 6:20 p.m., police briefly detained Terrence Little, Courtney Barnes, and defendant, who were walking along Alston Street, a few blocks from where the robbery had occurred on Cabarrus Street. A police officer drove Darryl Lawrence to the detained suspects. Lawrence was shown Little and defendant, but was unable to positively identify either of them as the robbers.

After further investigation, the police located Barnes and interviewed him at the police station in the presence of his mother. Although first denying any involvement in the robbery, Barnes later orally confessed and identified Little and defendant as being the other two robbers.

The police located Little and brought him to the police station. When taken into custody, Little was wearing a white basketball jersey with blue lettering and faded, bleached jeans. After being told that Barnes was in custody, Little gave both an oral and written confession that also identified defendant as the third robber.

Little told police that he had gotten a room at a Red Roof Inn for defendant because defendant lacked identification. The police located defendant in the room and arrested him. A search of the room produced a bag of marijuana, $97.00 in cash, jewelry belonging to defendant's girlfriend, a black toboggan hat, and false teeth. The police found none of the victims' money or jewelry in the room; nor was there any evidence of a gun.

Barnes entered into an agreement with the State under which he agreed to give testimony consistent with his confession at defendant's

trial in exchange for being adjudicated as a juvenile. At defendant's trial, however, he recanted his confession, testifying that he had lied both to the police and to the juvenile court when he confessed to participating in the robbery.

Although Darryl Lawrence was unable at trial to identify defendant as one of the robbers, he confirmed that Barnes was the robber on the porch who pushed him. After being shown a photograph taken of Little on the night of the robbery, Jones identified the basketball jersey as the one being worn by the robber with the gun on the porch. Jones also testified that defendant was *not* one of the robbers based on his hair and his weight at the time of the trial. Barnes and other witnesses, however, testified that defendant's hair and weight had changed significantly by the time of trial.

Defendant presented only one witness, a friend of defendant's girlfriend, who testified that she saw three males running down Cabarrus Street at about the time of the robbery. She testified that she briefly saw their faces, that she did not recognize them, and that none of them was defendant. She reported that all three were wearing black "hoodies."

I

[1] Defendant first argues that the trial court erred in failing to dismiss the charges against him. Defendant contends that the State's evidence was insufficient to prove that he committed the robberies. We disagree.

Upon a defendant's motion for dismissal, the question for the court is whether substantial evidence exists (1) of each essential element of the offense charged, and (2) that defendant was the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is that amount of "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). The evidence must be viewed in the light most favorable to the State, allowing the State every reasonable inference to be drawn from the evidence. *State v. Johnson*, 310 N.C. 574, 577, 313 S.E.2d 560, 563 (1984). Circumstantial evidence may be sufficient to support a conviction even when " 'the evidence does not rule out every hypothesis of innocence.' " *State v. Haselden*, 357 N.C. 1, 18, 577 S.E.2d 594, 605 (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382, 124 S. Ct. 475 (2003).

"If 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, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). Contradictions or inconsistencies in the evidence do not warrant dismissal. *State v. Williams*, 355 N.C. 501, 579, 565 S.E.2d 609, 654 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808, 123 S. Ct. 894 (2003).

Here, Barnes' confession, identifying defendant as the robber who remained on the ground, was sufficient to defeat defendant's motion to dismiss. Although he recanted that confession at trial, it was the responsibility of the jury, and not the trial court, to decide whether to give greater weight to Barnes' trial testimony than his original confession. *Id.* Further, the State offered evidence that defendant, Little, and Barnes were all found shortly after the robbery only a few blocks away; that the three, at the time they were stopped, matched the descriptions of the robbers, including their clothes and physical appearance; and that Darryl Lawrence identified Barnes as one of the robbers, while Jones identified the clothes Little was wearing as being the same as a second robber. Since Barnes testified at trial that he and Little were with defendant during the time of the robbery, these identifications also implicate defendant. This evidence, both direct and circumstantial, was sufficient to defeat defendant's motion to dismiss.

II

[2] Defendant next contends that the trial court violated the Confrontation Clause of the United States Constitution by admitting into evidence the oral and written confessions of non-joined co-defendant Terrence Little. Defendant properly sought to suppress Little's statements based on the Confrontation Clause by filing a motion *in limine*, which was denied. He subsequently, however, failed to object when those statements were actually admitted into evidence.

Our Supreme Court has held 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 ultimately offered at trial. *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999). The General Assembly, however, recently amended Rule 103(a) of the Rules of Evidence to provide: "Once the court makes a definitive ruling on the record admitting or excluding

evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2003). This amendment, however, applies only to rulings made on or after 1 October 2003. 2003 N.C. Sess. Laws ch. 101. Since the pre-existing rule applies to this case, we must hold that defendant failed to fully preserve the issue of the admissibility of the Little confession for appellate review.

Defendant has assigned plain error to the admission of Little's confession. In deciding whether an error by the trial court constituted plain error, "the appellate court must examine the entire record and determine if the . . . 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, 379 (1983). Phrased alternatively, we must determine whether any error "might have . . . tilted the scales and caused the jury to reach its verdict convicting the defendant." *State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986) (internal quotation marks omitted).

[3] The first question before this Court is whether the trial court erred in admitting Little's confession. Applying the United States Supreme Court's recent decision in *Crawford v. Washington*, 541 U.S. —, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004), we hold that the Confrontation Clause barred admission of Little's confession.

When construing the Confrontation Clause in *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608, 100 S. Ct. 2531, 2539 (1980), the Supreme Court originally conditioned the admissibility of hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." In *Crawford*, the Supreme Court rejected this rule as applied to "testimonial statements" because of the rule's "demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." 541 U.S. at —, 158 L. Ed. 2d at 200, 124 S. Ct. at 1371.

Under *Crawford*, "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." 541 U.S. at —, 158 L. Ed. 2d at 203, 124 S. Ct. at 1374. The Court did not set out a comprehensive definition of "testimonial evidence," but did expressly hold that "[s]tatements taken by police officers in the course of interrogations" are testimonial. 541 U.S. at —, 158 L. Ed. 2d at 193, 124 S. Ct. at 1364.

Because Little's statements were made to police officers in the course of an interrogation, those statements constitute testimonial evidence under *Crawford*. They would only be admissible if Little was unavailable at trial and if defendant had a prior opportunity for cross-examination. The parties do not dispute that Little was "unavailable" given that his attorney notified both parties that Little would invoke his Fifth Amendment rights if called to testify. Since, however, defendant had no prior opportunity to cross-examine Little as to his statements, Little's confession could not be admitted at defendant's trial without violating the Confrontation Clause.

While the trial court did err in admitting the confession, we do not believe that this error amounts to plain error. While we might reach a different result if we were applying the constitutional "harmless beyond a reasonable doubt" standard, our review of the record does not lead to the conclusion that the error "might have . . . tilted the scales and caused the jury to reach its verdict convicting the defendant." *Tucker*, 317 N.C. at 540, 346 S.E.2d at 422 (internal quotation marks omitted).

Barnes' confession was admitted without objection and is not challenged on appeal. In that confession, Barnes confirmed that defendant, Little, and he were the robbers. While Barnes purported to recant that confession on the stand, he still maintained at trial that he, Little, and defendant were together and were in the vicinity of the robbery at the precise time of the robbery. In fact, defendant, Little, and Barnes were stopped by police only a few blocks from the robbery shortly after the robbery occurred.

Darryl Lawrence positively identified Barnes as one of the robbers, while Jones, after seeing a photograph of Little, positively identified the basketball jersey as being the one worn by the armed robber on the porch. When taken into custody, Little was dressed as described by the victims and Montrell Lawrence. The witnesses testified that the third robber was dressed all in black, had gold front teeth, wore a black knit hat, and had short dreadlocks. On the day of the robbery, defendant was wearing all black, had a black knit hat, and had short dreadlocks; defendant also has gold front teeth. While Jones denied at trial that defendant was the third robber, she explained that she was relying upon the fact that his hair and weight were different. Other witnesses, including Barnes, all confirmed that defendant's hair had changed significantly by the time of trial and that he had lost weight.

In short, the evidence at trial established that defendant, Little, and Barnes were together at the time of the robbery and almost precisely at the location where the robbery occurred. Defendant has pointed to no contrary evidence. Since Barnes was positively identified as a robber and both Little and defendant matched the victims' descriptions of the other two robbers precisely, we conclude that it would be unlikely that the jury would have reached a different verdict even in the absence of the Little confession. This is especially true given the Barnes confession. We therefore hold that the admission of the Little confession did not constitute plain error.

No error.

Judges McGEE and HUNTER concur.

PAGE C. KEEL, JR., PLAINTIFF v. PRIVATE BUSINESS, INC., DFENDANT

No. COA03-703

(Filed 20 April 2004)

1. **Appeal and Error— appealability—order denying arbitration—substantial right affected**

An order denying arbitration is interlocutory but affects a substantial right and is immediately appealable.

2. **Arbitration and Mediation— agreement to arbitrate non-compete agreement—assets of company purchased—arbitration stayed**

The trial court had jurisdiction pursuant to the Federal Arbitration Act to stay the pending arbitration of a non-compete agreement signed by plaintiff with a company whose assets were subsequently acquired by defendant. The question of whether defendant was the valid successor or assignee of the first company goes directly to the issue of whether the parties agreed to arbitrate their claims.

3. **Employer and Employee— non-compete agreement—assignment**

The trial court's conclusion that a company (Cam Commerce) did not assign its rights under a non-compete agreement to

defendant was supported by the findings and the evidence. A finding of fact may be supported by competent evidence even if there is evidence to the contrary.

4. Injunctions— preliminary—success on merits—irreparable injury

The trial court did not err by granting a preliminary injunction against arbitration and the enforcement of a non-compete agreement where plaintiff showed a likelihood of success on the merits and irreparable harm.

Appeal by defendant from order entered 11 February 2003 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 3 March 2004.

Murchison, Taylor & Gibson, P.L.L.C., by Andrew K. McVey and James W. Latshaw, for plaintiff-appellee.

Vaiden P. Kendrick and Harwell, Howard, Hyne, Gabbert & Manner, P.C., by Leilani Boulware, for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from an interlocutory order entered by the trial court on 11 February 2003 staying an arbitration action previously commenced by the defendant and enjoining the defendant from proceeding with arbitration and engaging in anti-competitive practices.

The plaintiff, Page Keel, filed a complaint on 16 September 2002, seeking declaratory relief, injunctive relief, and damages arising from a dispute over a non-compete agreement entered into between plaintiff and a third party, Cam Data Systems, Inc. ("Cam Data"), now known as Cam Commerce Solutions, Inc. ("Cam Commerce"). Cam Commerce later entered into an asset purchase agreement with defendant, pursuant to which defendant claims it was assigned Cam Commerce's rights in the non-compete agreement. Plaintiff sought a declaration that the non-compete agreement is unenforceable, as well as preliminary and permanent injunctive relief enjoining defendant from proceeding with an arbitration action instituted, pursuant to the agreement, before the American Arbitration Association on or about 19 August 2001 in Fresno, California.

Defendant filed an affidavit from its chief executive officer, Thomas Lynn Black, in opposition to plaintiff's request for injunctive

relief and the matter was heard in the superior court on 26 September 2002. Prior to an order being entered, however, the defendant removed the action to the United States District Court for the Eastern District of North Carolina and filed its answer in that court on 8 November 2002. On 7 January 2003, the United States District Court for the Eastern District of North Carolina remanded the action to the New Hanover County Superior Court. The superior court then entered an order on 11 February 2003, granting plaintiff's request to stay defendant's pending arbitration action in Fresno, California and issuing a preliminary injunction enjoining defendant from proceeding with the arbitration during the pendency of the litigation and from engaging in anti-competitive practices aimed at interfering with the plaintiff's ability to earn a livelihood. Defendant appeals.

Defendant presents arguments addressing seven out of eighteen assignments of error. The remaining assignments of error are deemed abandoned. N.C. R. App. P. 28(a).

[1] Defendant appeals from an interlocutory order. An appeal from an interlocutory order is generally barred unless "the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881, *disc. review denied*, 350 N.C. 832, 539 S.E.2d 288 (1999), *cert. denied*, 528 U.S. 1155, 145 L. Ed. 2d 1072 (2000) (internal quotation omitted). Our courts have held that an order denying arbitration affects a substantial right. *Id.* Accordingly, defendant's appeal is properly before us.

[2] Defendant first argues the trial court did not have jurisdiction to stay the pending arbitration proceeding because plaintiff's challenge to whether defendant was a valid assignee of Cam Data/Cam Commerce's rights under the non-compete agreement is an issue which must be determined by the arbitrator rather than the trial court. At oral argument, plaintiff conceded that the non-compete agreement from which this dispute arises involves interstate commerce. Thus, we review this issue pursuant to the provisions of the Federal Arbitration Act ("FAA"). *Boynton v. ESC Med. Sys., Inc.*, 152 N.C. App. 103, 107-08, 566 S.E.2d 730, 733 (2002) (contracts involving interstate commerce are governed by the FAA).

It is well settled under the FAA that a trial court has jurisdiction to stay arbitration proceedings pursuant to contract only upon grounds that "relate specifically to the arbitration clause and not just

to the contract as a whole." *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 636 (4th Cir.) (quoting *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)), *cert. denied*, 537 U.S. 1087, 154 L. Ed. 2d 631 (2002). In other words, in cases where parties dispute whether their claims are subject to binding arbitration, a trial court's jurisdiction under the FAA is limited to determining issues related to the making and performance of the agreement to arbitrate. *Id.* at 636-37. Where a party challenges the enforceability or validity of the contract containing the arbitration clause as a whole, it is within the exclusive jurisdiction of the arbitrator to determine those claims. *Id.* at 637 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04, 18 L. Ed. 2d 1270, 1277 (1967) (holding that, pursuant to the FAA, arbitration clauses are severable from the contracts in which they are included and thus, a broad arbitration clause encompasses arbitration of claims that the contract itself is not enforceable)).

This rule has come to be known as the severability doctrine. *Id.* at 637. The severability doctrine has been applied to claims that an entire contract was unenforceable due to unconscionability or fraud. *See Prima Paint*, 388 U.S. at 404, 18 L. Ed. 2d at 1277 (claim of fraud in the inducement of the contract generally must be considered by arbitrator, not trial court); *Snowden*, 290 F.3d at 637 (allegations of usurious rates of interest and nonlicensure not related to making of arbitration agreement); *Eddings v. S. Orthopedic & Musculoskeletal Assocs., P.A.*, 147 N.C. App. 375, 384, 555 S.E.2d 649, 655 (2001), *rev'd on other grounds*, 356 N.C. 285, 569 S.E.2d 645 (2002) (claim of unconscionability not directed towards the arbitration provision itself must be decided by arbitrator).

The trial court found, "that as between the plaintiff and the defendant, there exists no agreement to arbitrate the parties' disputes, inasmuch as Cam Data [now known as Cam Commerce] did not assign its rights under the [non-compete agreement]." Defendant argues the severability doctrine applies in this case, as well, because a determination of whether a contract was assigned to a third party goes to the validity of the contract as a whole and not to the making or performance of the agreement to arbitrate. We disagree.

"The question of whether a valid agreement to arbitrate exists" is an issue properly before the trial court. *Snowden*, 290 F.3d at 637. Generally, "if a party never assented to the overall contract containing the arbitration provision, then the party never assented to the arbitration provision." *Id.* Thus, the trial court "is required to decide

the assent issue even though the issue goes to the making of the entire agreement." *Id.*

In this case, plaintiff entered the contract with Cam Data, now known as Cam Commerce, and for the sake of argument, its successors or assignees.[1] Thus, by implication, plaintiff's assent to arbitrate was limited to disputes arising under the contract with Cam Data/Cam Commerce or Cam Data/Cam Commerce's valid successors or assignees. *See id.* It was, therefore, within the province of the trial court to consider the question of whether defendant was Cam Commerce's valid successor or assignee, as such a question goes directly to the issue of whether the parties' assented to arbitrate their claims. Defendant's assignment of error to the contrary is overruled.

[3] Next, defendant contends the trial court's findings do not support its conclusion that Cam Commerce did not assign its rights under the non-compete agreement to defendant. After careful review, we hold there is competent evidence in the record to support the trial court's determination.

"The party seeking to compel arbitration must prove the existence of a mutual agreement to arbitrate." *Boynton*, 152 N.C. App. at 110, 566 S.E.2d at 734 (internal quotation omitted). In this case, defendant offered into evidence a copy of the non-compete agreement entered into by Cam Commerce and plaintiff, titled "Employee Confidentiality & Property Rights Agreement," and an affidavit by its chief executive officer stating that among the assets it purchased from Cam Commerce pursuant to the asset purchase agreement was Cam Commerce's rights under the non-compete agreement with plaintiff. The trial court determined that these documents were insufficient to prove the existence of an agreement to arbitrate between the parties. We agree.

"It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal 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." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). Whether a contract was validly assigned to a third party is an

1. The trial court notes that there is no reference to Cam Data's heirs, successors, or assigns anywhere in the non-compete agreement and that the document provides solely for arbitration of disputes between Cam Data and "employee." However, despite these observations, the trial court made no ruling regarding the assignability of the non-compete agreement.

issue of contract interpretation, and thus, is characterized as a conclusion of law. *See Parkersmith Properties v. Johnson*, 136 N.C. App. 626, 632, 525 S.E.2d 491, 495 (2000).

The trial court made the following findings of fact to support its conclusion that Cam Commerce did not assign its rights under the non-compete agreement to defendant:

> 14. In or about March of 1998, plaintiff accepted employment with Access Retail Management ("Access"), a business division of Cam Data Systems, Inc. ("Cam Data") [now known as Cam Commerce Solutions, Inc. ("Cam Commerce")], a Delaware corporation.
>
> . . .
>
> 19. On or about May 28, 2002, Cam Commerce sold the assets of Access to defendant pursuant to an Asset Purchase Agreement. A copy of the Asset Purchase Agreement filed with the Securities and Exchange Commission reveals that Cam Commerce had no employment agreements of any sort with any of the Access employees at the time Cam Commerce sold the assets of Access to defendant and, by implication, there were no non-competition agreements with Access employees which were to be the subject of the Asset Purchase Agreement . . . .
>
> . . .
>
> 21. On or about May 28, 2002, plaintiff was orally notified of the asset purchase and was further notified that defendant Private Business intended to employ plaintiff through its RMSA division. Plaintiff decided within a matter of weeks that he could not continue with the employment relationship.
>
> . . .
>
> 24. On or about July 23, 2002, defendant's in-house counsel sent plaintiff correspondence in which counsel stated, on behalf of plaintiff, "As you area [sic] aware, PBI acquired Access, a division of CAM DATA Systems on May 28, 2002. In the acquisition, PBI acquired all rights, title and interests in the employees of Access from Cam, including all existing employee contracts," notwithstanding the fact that Cam and defendant had agreed that Cam had not assigned employment contracts with its employees. In addition, the letter demanded that the plaintiff refrain from

engaging in any competitive business for a period of two years subsequent to July 31, 2002.

25. Enclosed with the letter was a document captioned, "CAM DATA SYSTEMS, INC. EMPLOYEE CONFIDENTIALITY AND PROPERTY RIGHTS AGREEMENT" and bearing a signature purporting to be the plaintiff's. For purposes of the hearing, plaintiff does not refute that he signed the document. The document makes no reference to Cam's heirs, successors, or assigns. Section 10 of the document provides for the arbitration of disputes between Cam and "EMPLOYEE" in Orange County, California.

. . .

32. Having heard the positions of both parties, the Court summarily concludes that as between the plaintiff and the defendant, there exists no agreement to arbitrate the parties' disputes, inasmuch as Cam Data did not assign its rights under the document captioned "CAM DATA SYSTEMS, INC. EMPLOYEE CONFIDENTIALITY AND PROPERTY RIGHTS AGREEMENT."

Defendant argues the representation and warranty made by Cam Commerce in the asset purchase agreement that it "has no employment agreements with its employees" does not imply that Cam Commerce did not intend to assign its rights under a non-compete agreement with one of its employees to defendant. Defendant asserts that an affidavit from its chief executive officer stating that the non-compete agreement was assigned to defendant, coupled with the non-compete agreement being sent to it by Cam Commerce in response to a due diligence request made in connection with the asset purchase agreement, supports this contention and compels a conclusion that Cam Commerce did assign its rights under the non-compete agreement to defendant.

A finding of fact may be supported by competent evidence even if there is evidence to the contrary in the record. *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983). Despite the contrary evidence presented by defendant, there is also evidence in the record to show that in addition to the representation made by Cam Commerce in the asset purchase agreement that it had no employment agreements with its employees, defendant specifically made an assertion that it did not assume "any debt, account payable, liability, obligation, ***agreement***,

contract, or lease" of Cam Commerce that was not specifically listed in an attached exhibit[2]. (Emphasis added). Furthermore, the asset purchase agreement stated that Cam Commerce was required to deliver to defendant copies of all documents "affecting or relating to the Business," and not just those assigned to and assumed by the defendant. Thus, delivery of the non-compete agreement with plaintiff to defendant does not necessarily evidence an intent by Cam Commerce to assign its rights under the non-compete agreement to defendant. Accordingly, we hold the trial court's findings are supported by competent evidence and those findings support its conclusion that Cam Commerce did not assign its rights under the non-compete agreement with plaintiff to defendant.

[4] Finally, defendant argues the trial court erred by granting plaintiff's motion for a preliminary injunction. The preliminary injunction in this case enjoined the defendant, during the pendency of the litigation, from "proceeding with arbitration and from engaging in [anti-]competitive practices aimed at interfering with the plaintiff's ability to earn a livelihood . . . ."

A preliminary injunction may be issued only "(1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 577, 561 S.E.2d 276, 281 (2002), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 113 (2003) (internal quotation omitted). "[W]hile this Court is not bound by the findings or ruling of the lower court [issuing the preliminary injunction], there is a presumption that the lower court's decision was correct, and the burden is on the appellant to show error." *Id.* at 578, 561 S.E.2d at 281-82. Defendant has failed to carry its burden to show error in this case.

Defendant first contends that plaintiff failed to show a likelihood of success on the merits of his case. Plaintiff sought judgment declaring the non-compete agreement unenforceable by defendant. Since there was competent evidence in the record to support the trial court's conclusion that Cam Commerce did not assign its rights under the non-compete agreement with plaintiff to defendant, it is likely

2. Notably, defendant neglected to submit to the trial court or to this Court a copy of the exhibit which lists the assumed leases and contracts under the asset purchase agreement between Cam Commerce and defendant.

that plaintiff will succeed on this claim. Accordingly, defendant's assignment of error is overruled.

Defendant next contends that plaintiff failed to show that he would suffer irreparable injury if the injunction was not issued. The record indicates that if defendant were not enjoined from proceeding with the pending arbitration, conducted in Fresno, California, plaintiff would lose his right to have his dispute determined exclusively by the courts of this state and would have to undergo considerable expense and inconvenience responding to proceedings in another state. Moreover, plaintiff asserted in his verified complaint that he has spent thirty years investing substantial time, energy, and personal services to the development of a client base upon which his livelihood is based. This client base would reasonably be at risk if defendant were permitted to engage in anti-competitive practices aimed at interfering with plaintiff's ability to earn a livelihood. Accordingly, plaintiff made a sufficient showing that he would suffer irreparable harm for which there is no adequate remedy at law without the issuance of the preliminary injunction.

Affirmed.

Judges HUDSON and GEER concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. LESTER DISTANCE AND TREMAINE LANGLEY, DEFENDANTS

No. COA03-165

(Filed 20 April 2004)

1. Criminal Law— joint trial—motion to sever

The trial court did not abuse its discretion in a robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon case by denying defendant's motion to sever his trial from that of his codefendant based on an alleged prior statement by the codefendant providing exculpatory evidence in favor of defendant, because: (1) a bald assertion of hearsay information from an interested witness coupled with the theoretical possibility that the codefendant might testify on defendant's behalf if the trial was severed was insufficient to show that

defendant was deprived of an opportunity to present his defense; and (2) the codefendant's alleged statement is a far cry from the sworn statement made by the codefendant in *State v. Alford*, 289 N.C. 372 (1976).

2. Identification of Defendants— in-court—motion to suppress

The trial court did not err in a robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon case by denying defendant's motion to suppress the victim's in-court identification, because: (1) the identification was not inherently incredible given all the circumstances of the victim's ability to view the accused at the time of the alleged crime; and (2) any uncertainty in an in-court identification goes to the weight and not to the admissibility of the testimony.

3. Sentencing— aggravating factor—victim very old and physically infirm

The trial court did not err in a robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon case by finding as an aggravating factor under N.C.G.S. § 15A-1340.16(d)(11) that the victim was very old and physically infirm, because the evidence was sufficient to allow the trial court to find that defendants: (1) targeted the video store since the victim was very old and physically infirm; and (2) took advantage of the victim's age (65) and infirmity during the commission of the robbery.

Appeal by defendants from judgments entered 12 April 2002 by Judge Thomas D. Haigwood in Dare County Superior Court. Heard in the Court of Appeals 13 January 2004.

Attorney General Roy Cooper, by Assistant Attorney General David J. Adinolfi, II, and Assistant Attorney General H. Dean Bowman, for the State.

Adrian M. Lapas for defendant-appellant Lester Distance.

Richard E. Jester for defendant-appellant Tremaine Langley.

TIMMONS-GOODSON, Judge.

Lester Distance ("Distance") and Tremaine Langley ("Langley") (collectively, "defendants") appeal their convictions for robbery with a dangerous weapon and conspiracy to commit robbery with a dan-

gerous weapon. For the reasons stated herein, we hold that defendants received a trial free of prejudicial error.

On 30 January 2002, defendants were indicted for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. The trial court granted the State's pretrial motion to join defendants' trials. On 3 April 2002, Distance filed a motion to sever the trial. At the *voir dire* hearing on the motion to sever, Julia Distance, Distance's wife, testified that Langley told her that "if it came down to it that [Langley] would, if [Langley] had to make a statement or talk to the police about what happened, that [Langley] would make sure that they knew that [Distance] was not the one in there." On 3 April 2002, the trial court denied Distance's motion to sever.

Defendants' trial began on 8 April 2002. The State presented evidence that tended to show the following: On 7 November 2001, Carolyn Simpson ("Simpson") was working alone at Carolina Video, a video rental store in Kitty Hawk, North Carolina. Simpson is sixty-five years old and has had two knee replacement surgeries. At approximately 8:30 p.m. on 7 November 2001, as Simpson prepared to close Carolina Video for the evening, Distance, Langley, and Michael Pratt ("Pratt") entered the store. After the three men browsed the video rental section for approximately five minutes, Pratt left the store. Distance and Langley then approached the front counter of the store and attempted to rent two videos. As another customer entered the store, Distance and Langley walked away from the counter and began browsing the "new release" section of the store. Simpson then waited on the other customer.

After the customer left the store, Distance and Langley ran towards the counter and demanded money from Simpson. Langley pushed Simpson to the floor and stood over her, placing a box cutter to her throat. Langley threatened to cut Simpson unless she gave them the store's money. Langley told Simpson that he and Distance had watched Simpson for ten to fifteen minutes, and that they knew that she had placed money in a bank bag. After Simpson told defendants the bank bag was kept in the bathroom, Langley ordered Simpson to go to the bathroom and retrieve the bank bag. Simpson responded, "I cannot crawl because I have had two knee replacements and I do not have any support on my legs." After Distance retrieved the bank bag, Langley asked Simpson how to open the cash register. Distance then made several failed attempts to open the cash register, prompting Langley to allow Simpson to stand up to show

defendants how to open the cash register. After the cash register was emptied, Langley found Simpson's pocketbook and forced Simpson to give him the money in her wallet. Langley then forced Simpson into the bathroom of the video store, and he and Distance fled the scene with $380 in cash.

At trial, Simpson identified both Distance and Langley as the perpetrators of the robbery. Langley moved to suppress the in-court identification. In a *voir dire* hearing, the State, defense counsel for Distance, and defense counsel for Langley questioned Simpson regarding her identification of defendants. Investigator Eugene McLawhorn of the Kitty Hawk Police Department ("Investigator McLawhorn") also testified at the *voir dire* hearing. Investigator McLawhorn testified that he arranged for Simpson to view a suspect in custody on the night of the robbery. After another investigator brought Distance to the front of the patrol car where Simpson and Investigator McLawhorn were sitting, Simpson told Investigator McLawhorn that she could not determine whether Distance was one of the men who robbed her. Nevertheless, the trial court denied defendants' motions to suppress, concluding that Simpson's in-court identification of defendants was not "inherently incredible, given all the circumstances of [Simpson's] ability to view each of the accused at the time of the alleged crime." The trial court further concluded that "the credibility of the identification evidence is for the jury to weigh."

On 11 April 2002, the jury convicted both defendants for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. At defendants' sentencing hearing, the trial court found as aggravating factors that Simpson was very old and physically infirm. The trial court also found that Simpson was specifically targeted by defendants because of her age. Defendants appeal.

Defendants filed separate appellate briefs to this Court. As an initial matter, we note that the briefs of both defendants fail to support all of their original assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2004), the omitted assignments of error are deemed abandoned. Therefore, we limit our present review to those assignments of error properly preserved by defendants for appeal.

Distance assigns error to the trial court's denial of his motion to sever the trial. Langley assigns error to the trial court's denial of his motion to suppress Simpson's in-court identification. Both defend-

ants assign error to the trial court's finding as an aggravating factor that the victim of their crime was very old and physically infirm.

[1] Distance first assigns error to the trial court's denial of his motion to sever. Distance argues that defendants' trial should have been severed because a prior statement by Langley provided exculpatory evidence in favor of Distance. We disagree.

Where two defendants are being held accountable for the same crime or crimes, "public policy strongly compels consolidation as the rule rather than the exception." *State v. Nelson*, 298 N.C. 573, 586, 260 S.E.2d 629, 639 (1979), *cert. denied sub nom. Jolly v. North Carolina*, 446 U.S. 929 (1980). Consolidation is "in the discretion of the trial judge, and, in the absence of a showing that a joint trial has deprived a defendant of a fair trial, the exercise of the judge's discretion will not be disturbed on appeal." *State v. Craft*, 32 N.C. App. 357, 360, 232 S.E.2d 282, 284, *disc. review denied*, 292 N.C. 642, 235 S.E.2d 63 (1977). In the case *sub judice*, Distance's wife, Julia Distance ("Julia"), testified during the *voir dire* hearing of Distance's motion to sever. Julia stated that Langley told her that "if it came down to it that [Langley] would, if [Langley] had to make a statement or talk to the police about what happened, that [Langley] would make sure that they knew that [Distance] was not the one in there." Distance argued at the *voir dire* hearing that Julia's testimony suggested that there was exculpatory evidence of Distance's innocence, and that this evidence could not be presented at a consolidated trial because the statement would implicate Langley in the robbery. Distance further argued that "were Langley not at jeopardy, . . . [it] would certainly make it likely that [Langley] would present this evidence."

Distance now argues that *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222, *death penalty vacated sub nom. Carter v. North Carolina*, 429 U.S. 809 (1976), requires severance in the case *sub judice*. In *Alford*, the defendant argued that he was prejudiced by a joint trial with his co-defendant, Carter, because Carter could not be called as a witness to bolster the defendant's alibi defense. *Id.* at 389, 222 S.E.2d at 233. Carter had previously provided the police with a signed statement in which he had admitted that he was involved in the crime and stated that an individual other than Alford had committed the crime. *Id.* at 386-87, 222 S.E.2d at 231. The Court reversed the trial court's order denying the motion to sever, and the Court ordered a new trial for Alford. *Id.* at 389, 222 S.E.2d at 233.

We find the facts of *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986), more analogous to the case *sub judice*. In *Paige*, our Supreme Court held that the trial court did not err in denying the the defendant's motion to sever. *Id.* at 643, 343 S.E.2d at 857. The only suggestion that Paige's co-defendant Lowery could aid Paige in his defense was an unsupported assertion by Paige's counsel that "suspect Lowery said that Arnold Lorenzo Paige was not present during any crime and could be a witness for Arnold Lorenzo Paige were the joinder not ordered." *Id.* at 641, 343 S.E.2d at 856. The Court noted that Paige made no attempt to corroborate Lowery's statement at the pretrial *voir dire* hearing, and the Court distinguished the facts before it from the facts of *Alford*, finding that Lowery's statement was "a far cry from a signed, sworn statement by a co-defendant admitting his own guilt and identifying some person other than the defendant as the other guilty party." *Id.* at 641-42, 343 S.E.2d at 856.

In the case *sub judice*, Distance failed to provide any evidence to corroborate the testimony of Julia, an interested witness providing hearsay testimony. Furthermore, Distance made no attempt during the *voir dire* hearing or at trial to corroborate his assertion that Langley would have testified on Distance's behalf were their trial severed. This "bald assertion of hearsay information" coupled with the "theoretical possibility" that Langley might testify for Distance if the trial was severed is insufficient to show that Distance was deprived of an opportunity to present his defense. *Id.* at 642, 343 S.E.2d at 856. Furthermore, as in *Paige*, Langley's alleged statement is a far cry from the sworn statement made by the co-defendant in *Alford*. Thus, we conclude that Distance has failed to show that the trial court abused its discretion in consolidating the trial or that the consolidation deprived Distance of a fair trial. Therefore, we hold that the trial court did not err in denying Distance's motion to sever the trial.

[2] Langley first assigns error to the trial court's denial of his motion to suppress Simpson's in-court identification. Langley argues that the in-court identification was impermissibly suggestive. We disagree.

Langley contends that the only reason Simpson identified him was because he was present in court and seated in the defendant's chair. However, in ruling on the motion to suppress, the trial court found that Langley "came within arm['s] reach of [Simpson] at the counter," that Langley "came to be side-by-side or with [Simpson] as she opened the cash register for him," that Simpson "had ample

opportunity to view [Langley's face]," and that while in court five months later, Simpson "recognized [Langley] immediately as being the person[] who held the box cutter to her throat."

An identification procedure is impermissibly suggestive only if the totality of the circumstances surrounding the identification indicate that the procedure resulted in a very substantial likelihood of irreparable misidentification. *State v. Lyszaj*, 314 N.C. 256, 264, 333 S.E.2d 288, 294 (1985). The factors for the court to consider when reviewing an identification include: the opportunity of the witness to view the perpetrator at the time of the crime; the witness's degree of attention; the accuracy of the witness's prior description of the perpetrator; the level of certainty demonstrated by the witness at the identification; and the length of time between the crime and the identification. *Id.* In the case *sub judice*, after making the findings of fact detailed above, the trial court concluded as a matter of law that Simpson's in-court identification of Langley was not "inherently incredible, given all the circumstances of [Simpson's] ability to view each of the accused at the time of the alleged crime."

We conclude that the trial court's findings of fact support its conclusion of law that Simpson's in-court identification of defendants was credible. Langley maintains that Simpson's level of attention was impaired the night the video store was robbed, and that her prior description of what Langley was wearing was incorrect. However, an in-court identification is considered competent where the identification is independent in origin and based upon the witness's observations at the time and scene of the crime. *State v. Miller*, 69 N.C. App. 392, 396, 317 S.E.2d 84, 88 (1984). Furthermore, any uncertainty in an in-court identification goes to the weight and not the admissibility of the testimony. *Id.* Therefore, we hold that the trial court did not err in denying Langley's motion to suppress Simpson's in-court identification.

[3] Both defendants assign error to the trial court's finding as an aggravating factor that the victim was very old and physically infirm. We note as an initial matter that, because neither defendant objected to the trial court's finding at the sentencing hearing, this issue is not properly before this Court. *See* N.C.R. App. P. 10(b)(1) (2004). Nevertheless, pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, we have elected to examine defendants' arguments, and we conclude that they are without merit. N.C.R. App. P. 2 (2004).

Under Structured Sentencing, the trial court may find as an aggravating factor that the victim was very young or very old, or mentally or physically infirm, or handicapped. N.C. Gen. Stat. § 15A-1340.16(d)(11) (2003). The State bears the burden of proving by a preponderance of the evidence that the aggravating factor exists. N.C. Gen. Stat. § 15A-1340.16(a) (2003). Furthermore, the trial court's finding of an aggravating factor must be supported by "sufficient evidence to allow a reasonable judge to find its existence by a preponderance of the evidence." *State v. Hayes*, 102 N.C. App. 777, 781, 404 S.E.2d 12, 15 (1991).

A defendant may take advantage of a victim's age in at least two ways. *State v. Thompson*, 318 N.C. 395, 398, 348 S.E.2d 798, 800 (1986). First, a defendant may target the victim of a crime because of the victim's age, knowing that the chances of success are greater where the victim is very old. *Id.* Second, a defendant may take advantage of a victim's age during the actual commission of the crime, knowing that the victim is unlikely to effectively intervene or defend him or herself if the victim is very old or physically infirm. *Id.* In the case *sub judice*, defendants argue that the State failed to prove that defendants took advantage of Simpson because of her age and physical infirmity. We disagree.

Simpson testified at trial that she is sixty-five years old, has had two knee replacement surgeries, and has difficulty kneeling and walking. Simpson also testified that as Langley held a razor blade to her throat, he ordered her to retrieve the bank bag. Simpson testified that she responded by telling Langley that she had knee problems and therefore could not crawl to the bathroom to retrieve the bank bag. Simpson further testified that she needed the help of a chair to stand up and show defendants how to open the cash register. Michael Pratt testified that before defendants robbed the store, one of them said that he saw "an old lady in the movie store." Pratt further testified that, as the three walked past the video store, Langley said, "yeah, she's in there by herself. Let's go in there and get her." Simpson also testified that Langley told her after he forced her to the ground that defendants had been watching her for ten to fifteen minutes before they entered the store.

We conclude that the evidence was sufficient to allow the trial judge to find that defendants targeted the video store because Simpson was very old and physically infirm, and that defendants took advantage of Simpson's age and infirmity during the commission of the robbery. Therefore, we hold that the trial court did not err in

finding as an aggravating factor that the victim was very old and physically infirm.

No error.

Judges WYNN and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. GENE PATRICK OAKS

No. COA02-1713

(Filed 20 April 2004)

1. **Firearms and Other Weapons— forfeiture—drug use**

The trial court had the authority to order the forfeiture and destruction of firearms seized from a home where it found that defendant was an unlawful user of a controlled substance.

2. **Firearms and Other Weapons— forfeiture—evidence of drug use—not concurrent—opportunity to object**

The court abused its discretion by ordering that firearms belonging to defendant's wife be destroyed because she was an unlawful user of controlled substances where the evidence against her consisted of hearsay testimony from her husband's plea hearing and marijuana convictions from 1992 and 1988. She had no notice or opportunity to object to the testimony at the time it was given, and the drug use was not concurrent with the firearms possession.

3. **Firearms and Other Weapons— forfeiture—federal law applied in state court**

The trial court properly based its decision not to return weapons to a marijuana user on federal law despite defendant's contention that the court lacked jurisdiction to apply federal law in a state criminal proceeding. The court cannot issue an order that would place the court and defendant in violation of federal law.

4. **Firearms and Other Weapons— forfeiture order—indefinite time**

A trial court conclusion that defendant and his wife (who are marijuana users) may not possess firearms on their premises was

vacated because it was for an indefinite time. The order apparently presumes that defendant will always be an unlawful user of controlled substances.

Appeal by defendant from judgment entered 2 July 2002 by Judge Melzer A. Morgan, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 17 September 2003.

Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham and Special Deputy Attorney General John J. Aldridge, III, for the State.

Robert A. Hassell for defendant.

TIMMONS-GOODSON, Judge.

Gene Patrick Oaks ("defendant") appeals from a trial court order providing that the Rockingham County Sheriff destroy weapons and ammunition seized during defendant's arrest on drug and weapons charges. For the reasons stated herein, we affirm in part, vacate in part, and remand the trial court's order.

The factual and procedural history of this case is as follows: On 19 September 2001, Deputy F. K. Woods ("Deputy Woods") of the Rockingham County Sheriff's Department executed a search warrant at defendant's residence. The search warrant was issued based on information provided by a confidential source claiming that marijuana was present in the home. The warrant alleged that defendant's wife, Elizabeth Shackleford Oaks ("Elizabeth"), maintained and sold drugs at the home. When Deputy Woods arrived at the house, defendant was in the backyard on his lawn mower. Deputy Woods and another deputy approached defendant and explained that they had a warrant to search the residence. The three of them entered the house, where Elizabeth was located. Deputy Woods advised both defendant and Elizabeth of their *Miranda* rights and conducted a search of the residence.

During the search, Deputy Woods found less than one-half ounce of marijuana, digital scales, rolling papers and a pipe. Deputy Gray Smith ("Deputy Smith") found a fully automatic MAK 90 rifle and thirty other firearms in defendant's bedroom. Defendant was arrested and charged with the following crimes: one count of possession of a weapon of mass death and destruction, pursuant to N.C. Gen. Stat. § 14-288.8, based on his possession of the MAK 90 rifle; misdemeanor possession of drug paraphernalia, pursuant to N.C.

Gen. Stat. § 90-113.22; and simple possession of marijuana, pursuant to N.C. Gen. Stat. § 90-95(d)(4). The record does not reflect that Elizabeth was arrested or charged with any crimes.

Defendant pled not guilty to the misdemeanor charges of possession of marijuana and possession of drug paraphernalia in district court, but was convicted of both charges. He appealed the judgments to the superior court for trial *de novo*. Prior to trial in superior court, the State and defendant entered into a negotiated plea whereby the felony charge of possession of a weapon of mass destruction was dismissed in return for defendant's pleas of guilty to the misdemeanors of simple possession of marijuana and possession of drug paraphernalia. At defendant's guilty plea hearing on 4 June 2002, Deputy Woods testified as follows about the search of defendant's residence: "I asked Mr. Oaks if he had narcotics in the house. He stated he had a small smoke sack in the kitchen behind the curtains, and told me at the time him and his wife smoked pot about every other day."

At the conclusion of the plea hearing, the State notified defendant and the trial court that it would file a motion to have all of the firearms and ammunition seized from the residence destroyed. The trial court instructed the State to serve notice of the motion on defendant. In response to an inquiry from the State, defendant's attorney stated that he represented Elizabeth as well, and would accept service on her behalf. With the agreement of both counsel, the trial court scheduled the hearing for the disposition of the firearms for 28 June 2002.

On 28 June 2002, a hearing was conducted on the State's motion for an order of disposition of the firearms pursuant to N.C. Gen. Stat. § 15-11.1(b1) and 18 U.S.C. §§ 922(d)(3) and (g)(3). Defendant conceded that the MAK 90 rifle should be forfeited, but contested the motion as it pertained to the remaining non-automatic firearms. After the hearing, the trial court entered an order containing the following pertinent findings of fact:

4. That the thirty-one firearms on the attached "List of Firearms Still in Custody of Sheriff's Dept." were seized pursuant to a valid search warrant;

5. That the ammunition was seized pursuant to a valid search warrant;

6. That the firearms seized were manufactured outside of North Carolina and are "in commerce";

7. That the Defendant and Mrs. Oakes [sic] are unlawful users of the controlled substance marihuana;

8. That the following items in the above mentioned attached list; namely, items 26-33, 26-24, 26-25, 25-28, 25-29, and 25-30 were purchased by Mrs. Oakes [sic];

9. That the following items in the above mentioned attached list were not inherited by Mrs. Oakes [sic] from her father; namely, items 22, 24, 9, 14, and 8, having a value of at least $4,000.00;

10. That all items except those listed in paragraph 8 and items 4, 17, and 15 belong to the Defendant. These excepted items belong to Mrs. Oakes [sic];

The trial court then concluded as a matter of law that defendant and Elizabeth were prohibited from possessing "firearms or ammunition on their own premises even for their own personal protection." The trial court ordered the destruction of all weapons and ammunition seized from the house. It is from this order that defendant appeals.

Defendant argues that the trial court erred by ordering the weapons and ammunition destroyed because (I) the trial court lacked authority to order the forfeiture and destruction of the firearms; (II) the decision not to return the weapons was improperly based on federal law; and (III) some of the weapons were the property of defendant's wife, who was not a defendant in the instant criminal action.

[1] Defendant first argues that the trial court did not have authority to order the forfeiture and destruction of the firearms seized from the house. We disagree.

North Carolina General Statutes provide for the disposition of firearms seized pursuant to a search warrant as follows:

> [If] the district attorney determines the firearm is no longer necessary or useful as evidence in a criminal trial, the district attorney, after notice to all parties known or believed by the district attorney to have an ownership or a possessory interest in the firearm, including the defendant, shall apply to the court for an order of disposition of the firearm. The judge, after hearing, may order the disposition of the firearm in one of the following ways:
>
> (1) By ordering the firearm returned to its rightful owner, when the rightful owner is someone other than the defendant and

upon findings by the court (i) that the person, firm, or corporation determined by the court to be the rightful owner is entitled to possession of the firearm and (ii) that the person, firm, or corporation determined by the court to be the rightful owner of the firearm was unlawfully deprived of the same or had no knowledge or reasonable belief of the defendant's intention to use the firearm unlawfully.

(2) By ordering the firearm returned to the defendant, but only if the defendant is not convicted of any criminal offense in connection with the possession or use of the firearm, the defendant is the rightful owner of the firearm, and the defendant is not otherwise ineligible to possess such firearm.

(3) By ordering the firearm turned over to be destroyed by the sheriff of the county in which the firearm was seized or by his duly authorized agent. The sheriff shall maintain a record of the destruction of the firearm.

N.C. Gen. Stat. § 15-11.1(b1) (2003). Because the language of the statute authorizes the trial court to dispose of firearms at its discretion, we will not disturb such rulings unless an abuse of discretion is established. "An abuse of discretion occurs where the trial judge's determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision." *State v. Reed*, 355 N.C. 150, 155, 558 S.E.2d 167, 171 (2002) (citations omitted).

In the case *sub judice*, the trial court ordered defendant's firearms destroyed because it found as fact that defendant is an unlawful user of the controlled substance marijuana. This finding of fact is supported by Deputy Woods's testimony that defendant "told me at the time him and his wife smoked pot about every other day." Based on this evidence, the disposition of the weapons to defendant would have placed the trial court in violation of 18 U.S.C. § 922(d)(3) (2000), which prohibits disposing of firearms to an unlawful user of controlled substances, and it would have placed defendant in violation of 18 U.S.C. § 922(g)(3), which prohibits an unlawful user of controlled substances from receiving firearms that have been shipped or transported in interstate commerce.[1] Thus, the trial court acted in accordance with N.C. Gen. Stat. § 15-11.1(b1)(2), which permits the trial court to return firearms to a defendant only if the defendant is not otherwise ineligible to possess the firearm. Defendant may not

1. The trial court took judicial notice that "the firearms seized were manufactured outside of North Carolina."

receive those firearms as an unlawful user of controlled substances. Therefore, we conclude that the trial court acted properly within its discretion, and we affirm the trial court's decision to destroy defendant's weapons.

[2] The trial court ordered Elizabeth's firearms destroyed because it found as fact that Elizabeth is also an unlawful user of the controlled substance marijuana.[2] This finding of fact is supported by the following evidence entered at the hearing: (1) Deputy Woods's testimony that defendant "told me at the time him and his wife smoked pot about every other day;" and (2) Elizabeth's prior convictions for simple possession of marijuana in 1992 and simple possession of marijuana and possession of drug paraphernalia in 1988. The State argued at the disposition hearing that Deputy Woods's testimony regarding marijuana smoking was admissible against Elizabeth because Elizabeth's prior convictions corroborate Deputy Woods's testimony. We disagree.

Deputy Woods's testimony at defendant's guilty plea hearing that "defendant told me at the time him and his wife smoked pot about every other day" is hearsay without exception as it pertains to Elizabeth. " '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, N.C. R. Evid. 801(c) (2003). Elizabeth became involved in this case after the trial court accepted defendant's guilty plea, when the district attorney notified her that he would file a motion seeking the destruction of her firearms. Because Elizabeth was not a defendant in this case, and was not represented by counsel until the conclusion of the guilty plea hearing, it follows that she did not have the opportunity to object to this testimony at the time it was given. She had no notice, according to the record, that this testimony was to be offered to prove that she smokes marijuana on a regular basis until after it was entered into evidence. Therefore, we hold that this statement cannot be used to support a conclusion of law that Elizabeth is an unlawful user of controlled substances. To permit the use of this testimony against Elizabeth violates her rights of due process and constitutes an abuse of discretion by the trial court.

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2. This Court notes that neither the State nor defendant raises the question of whether defendant has standing to contest the destruction of Elizabeth's weapons. Hence, the question of standing is not before this Court and we will not address that question in our analysis.

Elizabeth's prior convictions for possession of marijuana in 1992 and 1988 are also not sufficient to support a finding of fact that she is currently an unlawful user of a controlled substance. The federal courts have consistently held that 18 U.S.C. § 922(d)(3) applies where a defendant's possession of a firearm is concurrent with his or her habitual drug use. *See United States v. Purdy*, 264 F.3d 809, 812 (9th Cir. 2001); *United States v. Williams*, 216 F.Supp. 2d 568, 575 (E.D. Va. 2002); *United States v. Collins*, 350 F.3d 773, 775-76 (8th Cir. 2003); *United States v. Bennett*, 329 F.3d 769, 776-77 (10th Cir. 2003); *United States v. Edmonds*, 348 F.3d 950, 953 (11th Cir. 2003). Because we conclude that the trial court may not use Deputy Woods's testimony as evidence of Elizabeth's recent drug use, we hold that evidence tending to show drug use ten to fourteen years prior is not sufficient to support a finding or conclusion that Elizabeth is presently an unlawful user of controlled substances. Accordingly, we vacate the conclusions of law by the trial court pertaining to Elizabeth. For the reasons stated above, the trial court abused its discretion by ordering Elizabeth's weapons destroyed.

[3] Defendant next argues that the trial court erred because the decision not to return the weapons was improperly based on federal law. We disagree.

The United States Code provides for the disposition of firearms as follows:

> It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . is an unlawful user of or addicted to any controlled substance;
>
> . . . .
>
> It shall be unlawful for any person . . . who is an unlawful user of or addicted to any controlled substance . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. §§ 922(d)(3) and (g)(3) (2000).

In the case *sub judice*, the trial court concluded that "it would be inappropriate for the Court to return the ammunition and guns to the Defendant . . . ." This conclusion is supported by the finding of fact

that defendant is an unlawful user of the controlled substance marijuana. Defendant argues that the trial court "lacks jurisdiction to apply federal law in a state criminal proceeding." However, the trial court cannot issue an order that would place the court and defendant in violation of federal law. Accordingly, the trial court sought to comply with 18 U.S.C. § 922(d)(3) by not disposing of the firearms to a defendant that it recognized as an unlawful user of controlled substances, and it sought to comply with 18 U.S.C. § 922(g)(3) by not allowing an unlawful user of controlled substances to receive firearms that have been shipped or transported in interstate commerce. We affirm the trial court's order in this regard.

[4] We do, however, take exception to the trial court's conclusion of law[3] that defendant and Elizabeth "may not possess firearms or ammunition on their own premises even for their own personal protection." Our concern is that the trial court's language is unconditional and without any time limits.

North Carolina courts have long deemed it reasonable to regulate, without infringing upon, the right to bear arms under certain circumstances. We have prohibited " 'the carrying of deadly weapons when under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror . . . .' " *State v. Dawson*, 272 N.C. 535, 546, 159 S.E.2d 1, 10 (1968) *quoting State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921). *See* N.C. Gen. Stat. § 14-415.1 (2003).

However, in the case *sub judice*, for the trial court to decree that defendant may not possess firearms for an indefinite time is too open-ended to be reasonable. Even when we consider the fact that defendant is currently an unlawful user of controlled substances for the purposes of 18 U.S.C. § 922, we cannot affirm an order that apparently presumes that he will always be an unlawful user of controlled substances, and therefore may never possess firearms. Accordingly, we vacate the trial court's conclusions of law that defendant may not possess firearms or ammunition on his own premises, even for his own protection, without time limitation.

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3. We note that a "conclusion of law" is typically a statement by which a trial court subjects the facts of a case to the applicable common or statutory law. However, a conclusion of law may also be a "final judgment or decree which the law requires in view of the facts found." *Cf. Peoples v. Peoples*, 10 N.C. App. 402, 408, 179 S.E.2d 138, 141 (1971). By both definitions, a conclusion of law may be reviewed on appeal for errors in the underlying findings of fact or, as in the case *sub judice*, for errors in the application of the law.

For the aforementioned reasons, we affirm the trial court's order in part, vacate in part, and remand to the trial court for further proceedings consistent with this opinion.

Affirmed in part, vacated in part, and remanded.

Judges HUDSON and ELMORE concur.

STATE OF NORTH CAROLINA v. WAYNE LEROY COUSER

No. COA03-611

(Filed 20 April 2004)

1. Evidence— medical opinion of sexual abuse—physical evidence not sufficient

The admission of a doctor's testimony that the victim in an attempted rape and indecent liberties prosecution had probably been abused was plain error. The physical evidence did not sufficiently support the doctor's opinion, and it had a probable impact on the outcome because it amounted to an improper opinion on the victim's credibility, the central issue in the case. Moreover, the acquittal on rape did not render the error harmless because the doctor's opinion could be construed to include attempted rape.

2. Evidence— prior convictions—irrelevant

The prior sexual assault convictions of an attempted rape victim's father were properly excluded from the attempted rape prosecution as irrelevant where the father was not the defendant, the prior convictions were not enough to implicate him in this assault, and the prior convictions were not inconsistent with defendant's guilt.

3. Evidence— witness's prior conviction—failure to mention during interview—properly excluded

The failure of an attempted rape victim's sister and father (not the defendant here) to mention the father's prior sexual assault upon the sister during their interview with an officer was properly excluded from this trial. This was not a material circumstance that would naturally be mentioned.

4. Rape— attempted as lesser included offense—doubtful evidence of penetration

There was sufficient evidence to submit the lesser offense of attempted rape to the jury where most of the victim's testimony was that the rape was completed, but other evidence placed penetration in doubt.

Appeal by defendant from judgment entered 15 August 2002 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 4 February 2004.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jane Rankin Thompson, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

HUNTER, Judge.

Wayne Leroy Couser ("defendant") appeals from a judgment dated 15 August 2002 entered consistent with jury verdicts finding him guilty of attempted statutory rape of a minor and taking indecent liberties with a child. The charges were consolidated for sentencing resulting in an active prison sentence with a minimum term of 251 months and a corresponding maximum term of 311 months. Because the admission of expert testimony in this case resulted in plain error, we grant a new trial on both counts.

The State's evidence presented at trial tends to show that on 23 May 2001, S.D., the thirteen year-old minor victim ("the victim"), was in her house taking a shower when defendant, who occasionally stayed at the house, knocked on the door and asked to use the bathroom. The victim finished her shower, dressed, and started to walk out of the bathroom. Defendant grabbed the victim and threw her to the floor and engaged or attempted to engage in vaginal intercourse with the victim and fondled her breasts. On cross-examination, the victim testified that during the assault, her underwear was pulled down to her thighs and that although defendant did not remove his pants they were undone. On redirect examination, when asked by the State how defendant managed to penetrate her, the victim testified that she was "not sure [defendant] got it in."

The investigating detective corroborated the victim's account, testifying that the victim stated to her that defendant had pulled her

shorts down to her thighs and tried to insert his penis into the victim's vagina. The State offered further corroborating evidence from the victim's mother, father, sister, and another acquaintance, including testimony that following the assault, the victim told her mother that defendant had "tried to do it with [her]," and subsequently told the acquaintance that defendant "tried to go in [her]."

Dr. Jennifer Helderman ("Dr. Helderman") testified that she performed an examination on the victim and that her only abnormal finding was the presence of two abrasions on either side of the introitus. Based on her examination, Dr. Helderman testified that her diagnosis was probable sexual abuse with abrasions consistent with the victim's history of sexual assault. On cross-examination, Dr. Helderman testified that the abrasions on the introitus could be caused by something other than a sexual assault and are not, in themselves, diagnostic or specific to sexual abuse.

Defendant's evidence included testimony from the lead investigator on the case that defendant had submitted to a rape suspect kit. Subsequent testing of that kit was negative and revealed none of defendant's hair on the victim, none of the victim's hair on defendant, and no semen in the victim or on her clothes. Defendant was indicted for first degree statutory rape and taking indecent liberties with a minor. The trial court, without objection by defendant, included attempted rape in its charge to the jury. The jury acquitted defendant of rape but returned its convictions on both the attempted rape and taking indecent liberties with a child charges.

The issues are whether (I) it was plain error to admit testimony by Dr. Helderman that her diagnosis of the victim was "probable sexual abuse;" (II) the trial court erred in not allowing testimony that the victim's father had been convicted of sexual abuse of the victim's sister in 1985 and that neither the victim's father nor her sister informed police of this during an interview; and (III) submission of the attempted rape charge to the jury was supported by the evidence.

I.

[1] Defendant argues it was error to admit testimony of Dr. Helderman that her diagnosis of the victim was probable sexual abuse. Defendant, however, did not object to this testimony, instead only lodging a general objection to Dr. Helderman's qualifications as an expert witness.

> [A]n expert medical witness may render an opinion pursuant to Rule 702 that sexual abuse has in fact occurred if the State establishes a proper foundation, i.e. physical evidence consistent with sexual abuse. . . . However, in the absence of physical evidence to support a diagnosis of sexual abuse, expert testimony that sexual abuse has in fact occurred is not admissible because it is an impermissible opinion regarding the victim's credibility.

State v. Dixon, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598, *per curiam aff'd*, 356 N.C. 428, 571 S.E.2d 584 (2002) (citing *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002)).

In this case, Dr. Helderman's opinion was based on her examination and the history of the victim as given to her. Dr. Helderman admitted on cross-examination that the abrasions she observed on the introitus were not diagnostic nor specific to sexual abuse. We conclude that this is insufficient physical evidence to support Dr. Helderman's testimony of her diagnosis and opinion that the victim was probably sexually abused. *See id.* at 48-53, 563 S.E.2d at 596-99 (evidence of only non-specific genital irritation insufficient to support opinion of sexual abuse); *see also State v. Trent*, 320 N.C. 610, 614-15, 359 S.E.2d 463, 465-66 (1987) (evidence that hymen was not intact was alone insufficient to support evidence of a diagnosis of sexual abuse). Thus, the trial court erred in admitting this testimony.

Because defendant failed to object or move to strike this testimony, however, we must further determine whether this error amounted to plain error. Under plain error review "the burden is on the defendant to show that 'absent the error the jury probably would have reached a different verdict.' " *State v. Bellamy*, 159 N.C. App. 143, 147, 582 S.E.2d 663, 667 (2003) (quoting *State v. Hartman*, 90 N.C. App. 379, 383, 368 S.E.2d 396, 398-99 (1988)).

Our Supreme Court in a *per curiam* opinion in *Stancil* held that it was not plain error to admit an expert opinion that a victim had in fact been sexually abused absent a proper foundation where there was "overwhelming" evidence of the defendant's guilt. *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789. Although the Supreme Court did not reveal what evidence it relied upon, the prior Court of Appeals opinion in that case noted in addition to testimony of the victim and other corroborating evidence there were two permissible expert opinions that the victim exhibited characteristics consistent with sexual abuse. *State v. Stancil*, 146 N.C. App. 234, 240, 552 S.E.2d 212, 215-16

(2001), *per curiam modified and aff'd*, 355 N.C. 266, 559 S.E.2d 788. Further, there was evidence that the defendant had performed oral sex upon the victim and thus it was unlikely any physical evidence would have been left and that the rape suspect kit returned inconclusive. *Id.* Moreover, the victim in that case continued to show symptoms of having been sexually abused five days after the incident and showed intense and immediate emotional trauma after the incident. *Id.* This Court stated that this evidence was sufficiently "overwhelming," such that any error in admitting the improper expert opinion would not amount to plain error. *Id.* Therefore it is logical to conclude that this was the same overwhelming evidence relied upon by our Supreme Court in reaching its own holding.

In this case, instead of the "overwhelming" evidence of *Stancil*, the only direct evidence for the State was the victim's testimony corroborated by other witnesses. There was no evidence that the victim's behavior or symptoms following the assault were consistent with being sexually abused. The only medical evidence for the State was of abrasions that were not specific to, nor diagnostic of, sexual abuse. Defendant introduced evidence showing that the results of a rape suspect kit were negative, not merely inconclusive, and revealed that the victim had no semen in her or on her clothing and that neither the victim nor defendant had transmitted hairs to each other.

Without the kinds of expert or medical evidence in *Stancil*, the jury in the case *sub judice* would have been left with only the testimony of the victim and corroborative testimony along with evidence of abrasions not necessarily caused by sexual assault. Thus, the central issue to be decided by the jury was the credibility of the victim. We conclude that the impermissible expert medical opinion evidence had a probable impact on the jury's result because it amounted to an improper opinion on the victim's credibility, whose testimony was the only direct evidence implicating defendant. *See State v. O'Connor*, 150 N.C. App. 710, 712, 564 S.E.2d 296, 297, *disc. review denied*, 356 N.C. 173, 567 S.E.2d 144 (2002) (deciding subsequent to *Stancil* that it was plain error to admit expert testimony on the credibility of the victim in a sexual offense case where the State's case was almost entirely dependent on the credibility of the victim and corroboration testimony of others); *compare State v. Wade*, 155 N.C. App. 1, 19-20, 573 S.E.2d 643, 655-56 (2002) (Greene, J. concurring) (two judges concurring that there was no plain error where in addition to testimony of the victim and corroborating testimony, there was evidence of prior sexual assaults by defendant, evidence that victim exhibited

characteristics consistent with sexual abuse, and the victim and defendant had been treated for the same sexually transmitted disease at about the same time).

Furthermore, defendant's acquittal on the completed rape offense and conviction of only attempted rape does not render the admission of this testimony harmless. Dr. Helderman's testimony was that the victim had suffered "probable sexual abuse." Sexual abuse is a broad term that could easily be construed by the jury to include both an assault on the victim in an attempt to rape her as well as the completed offense. *See Black's Law Dictionary*, 10 (7th ed. 1999) (defining "sexual abuse" as "[a]n illegal sex act, esp. one performed against a minor by an adult); *see also The American Heritage College Dictionary*, 1249-50 (3rd ed. 1997) (defining "sexual assault" as "[i]ndecent conduct of a man toward another man, a woman, or a child or of a woman toward a child, accompanied by the threat or danger of physical suffering or injury or inducing fear, shame, humiliation, and mental anguish").

Moreover, defendant was also convicted of taking indecent liberties for the act of fondling the victim's breasts, which a jury may also have reasonably construed as a form of sexual assault or sexual abuse. Thus, the admission of the expert opinion that the victim was diagnosed as having suffered "probable sexual abuse" was plain error and accordingly, defendant is entitled to a new trial. Although we grant defendant a new trial, we nevertheless address two additional assignments of error likely to arise upon retrial of this matter.

II.

We next address defendant's argument that it was error to exclude evidence that (A) the victim's father had been convicted of sexually abusing the victim's sister, and (B) neither the victim's father nor her sister informed the police of that fact in an interview.

A.

[2] Defendant contends that the victim's father's prior conviction was admissible as evidence tending to show the victim's father committed the crime and not defendant. We disagree.

> "Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this

> regard. It must point directly to the guilt of the other party. Under Rule 401 such evidence must tend both to implicate another and [to] be inconsistent with the guilt of the defendant."

State v. Williams, 355 N.C. 501, 532, 565 S.E.2d 609, 628 (2002) (emphasis omitted) (quoting *State v. Cotton*, 318 N.C. 663, 667, 351 S.E.2d 277, 279-80 (1987)).

In this case, evidence that the victim's father had been convicted of the sexual assault of the victim's sister in 1985 is insufficient to implicate the victim's father in the sexual assault of the victim in 2002. Nor is the fact that the victim's father was previously convicted of sexual assault almost two decades earlier in a completely different case inconsistent with defendant committing the assault in this case. Thus, the trial court did not err in excluding this evidence as irrelevant.

B.

[3] Defendant also argues that he should have been allowed to impeach the testimony of the victim's father and the victim's sister on the fact that during an interview with the police neither mentioned the prior sexual assault by the victim's father on her sister. "Under the North Carolina Rules of Evidence, a prior statement is considered inconsistent if it fails to mention a material circumstance presently testified to which would have been natural to mention in the prior statement." *State v. Fair*, 354 N.C. 131, 157, 557 S.E.2d 500, 519 (2001). In this case, because the trial court properly excluded evidence of the victim's father's prior conviction it was not testified to at trial and thus there was no inconsistency in the testimony given and the statement made to police. Furthermore, that prior conviction was not a material circumstance to the present investigation and would not naturally have been mentioned during an interview with the police on the facts surrounding the sexual assault in this case.

III.

[4] Defendant next asserts that his attempted rape conviction should be reversed because there was no evidence to support it. He contends instead that the evidence could only support a conviction of the completed rape offense or result in his acquittal on the rape charge as there was no evidence of an attempt. We disagree.

"[I]t is error for the trial court to submit as an alternative verdict a lesser included offense which is not actually supported by any evi-

dence in the case." *State v. Ray*, 299 N.C. 151, 163, 261 S.E.2d 789, 797 (1980). "Instructions on the lesser included offenses of first degree rape are warranted only when there is some doubt or conflict concerning the crucial element of penetration." *State v. Wright*, 304 N.C. 349, 353, 283 S.E.2d 502, 505 (1981).

In this case, although the majority of the victim's testimony was that defendant did in fact penetrate her vagina, there is other evidence in the case that puts the fact of penetration in doubt or conflicts with the victim's testimony. The victim testified in one instance that she was not sure the defendant penetrated her vagina and in reporting the rape to others stated defendant had attempted to rape her. The medical evidence consisted of testimony that the only abnormalities observed were the abrasions to the introitus, located at the opening of the vagina, which were not specific to, nor diagnostic of, sexual abuse. Further, defendant presented evidence that the rape suspect kit revealed that none of defendant's hairs were found on the victim, none of the victim's hairs were found on him, and further no semen was found inside the victim or on her clothes. This is all evidence supporting an attempted rape conviction and the trial court did not err in submitting this charge to the jury and therefore, defendant is not entitled to reversal of his attempted rape conviction.

We nevertheless remand this case for a new trial on the charges of attempted rape and taking indecent liberties with a minor due to the improper admission of Dr. Helderman's opinion testimony. Because we grant defendant a new trial, it is not necessary to address further assignments of error asserting plain error or related to his sentencing hearing.

New trial.

Judges McCULLOUGH and LEVINSON concur.

FINLEY FOREST CONDOMINIUM ASSOCIATION, INC., PLAINTIFF-APPELLANT v. BILL PERRY AND WAYNE DENTON, D/B/A NEUSE RIVER CONSTRUCTION AND DHC CONSTRUCTION, INC., DEFENDANTS-APPELLEES

No. COA03-155

(Filed 20 April 2004)

1. **Appeal and Error— appealability—trial court not ruling on motion**

The Court of Appeals was not able to review an issue involving the use of expert affidavits in a summary judgment where the trial court never ruled on plaintiff's objection and motion to strike.

2. **Construction Claims— roofing—subcontractor assisting prior stage work—no assumption of duty**

The trial court did not err by granting summary judgment to DHC where DHC was a subcontractor on a roofing project, DHC's task was to install roofing trusses and plywood, DHC assisted in the removal of the old roofs after it arrived on the scene solely to stay within the allotted time for the trusses, and a rainstorm came during the work, damaging the buildings. The evidence did not establish that DHC assumed a duty to weatherproof the buildings.

3. **Appeal and Error— appealability—no notice of appeal**

The Court of Appeals was without jurisdiction to consider a partial summary judgment involving costs where plaintiff did not file a notice of appeal from the order.

Appeal by plaintiff from an order entered 25 October 2002 by Judge Wade Barber in Superior Court, Orange County. Heard in the Court of Appeals 30 October 2003.

Alexander & Miller, L.L.P., by Phaedra A.O. Kelly, Sydenham B. Alexander, Jr., and Jo Ann Ragazzo, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Gregory W. Brown and Katherine Hilkey-Boyatt, for DHC Construction, Inc., defendant-appellee.

McGEE, Judge.

Finley Forest Condominium Association, Inc. (plaintiff) appeals from summary judgment entered in favor of DHC Construction, Inc. (defendant).

Pursuant to plaintiff's Declaration of Condominium, filed in Orange and Durham counties, plaintiff is responsible for the maintenance and repair of common property of the condominium. Plaintiff contracted in the fall of 2000 with James Kramer (Kramer), an engineer, to draft plans and specifications for the replacement of roofs on five buildings, numbered 26, 27, 28, 47, and 52. Each building contained several individual condominium units. Plaintiff wished to replace the flat style roof of the buildings with a pitched roof in order to prevent future water damage. Once the plans were completed and approved by plaintiff's board of directors, the specifications were submitted for bid to general contractors licensed in North Carolina.

Plaintiff contracted on 20 August 2001 with Bill Perry and Wayne Denton, doing business as Neuse River Construction (Neuse River), to replace the roofs in accordance with the specifications drawn up by Kramer. Unbeknownst to plaintiff, Neuse River hired DHC Construction, Inc. (DHC) as a subcontractor to install pre-manufactured trusses and to lay plywood over the trusses on the roofs of buildings 47 and 52. Neuse River informed DHC that another party would lay tarpaper over the plywood and install the roof shingles. According to the agreement, DHC was to complete the framing by 2 September 2001 and DHC would be penalized for any delay thereafter. All construction materials were supplied by Neuse River. The record on appeal does not include a copy of the contract between Neuse River and DHC.

DHC arrived at the job site on 30 August 2001 to begin work on buildings 47 and 52. At that time, several Neuse River employees had already begun to remove a significant portion of the rubber membrane that served to weatherproof the flat roof of building 52. In addition, some plywood had been cut away. DHC assisted Neuse River in removing the remaining plywood on building 52 in order that plaintiff could begin installation of the support system necessary for the new trusses.

Meanwhile, on building 47, Neuse River employees had removed two feet of the rubber membrane from around the roof's perimeter. DHC employees assisted Neuse River employees in laying two-by-eight lumber around the sides of the roof. In addition, DHC employees were engaged in modifying the pre-manufactured trusses provided by Neuse River because the trusses were not the correct size for the project.

In the early afternoon, a heavy rain storm caused substantial water damage to buildings 47 and 52, damaging the eight units in each building. At the time of the storm, portions of buildings 47 and 52 were covered by tarps supplied by Neuse River. Bill Perry, a foreman with Neuse River attempted to purchase additional tarps at the time of the storm. At the request of Neuse River, DHC employees assisted in laying the tarps.

Following the rain storm, DHC employees left the job site and did not return until the next day, 31 August 2001. At that time, DHC employees completed laying the plywood on building 52 and agreed with Neuse River to lay the tarpaper over the plywood. Over the course of the next two days, DHC agreed to Neuse River's additional requests that DHC remove the remaining rubber membrane and plywood on building 47, prepare the roof for the new trusses, and lay the tarpaper. DHC completed all the work initially covered by the original contract and all the work negotiated thereafter by Neuse River.

Neuse River eventually abandoned the project and plaintiff hired another contractor to complete the work detailed in plaintiff's contract with Neuse River. The contractor also repaired the damage resulting from the water intrusion to the common areas and individual units of buildings 47 and 52.

According to the testimony of Kramer and others, the weather forecast on 30 August 2001 had called for thunderstorms. A light rain preceded the heavy storm that day. Kramer, who was unaware of DHC's involvement, raised his concern to individuals on the job site that the roofs were not adequately protected in the event of rain.

The specifications for the project, as incorporated in the contract between plaintiff and Neuse River, explicitly required that all work be left weathertight each night. According to the written agreement, the general contractor was responsible for all weather damage when the building was left exposed to the elements. The possibility of thunderstorms in the summer months was noted in the contract.

Plaintiff filed a complaint on 22 October 2001 asserting numerous claims against Neuse River and DHC. Neuse River failed to file an answer and an entry of default was made against Neuse River. Neuse River is not a party to this appeal. Both plaintiff and DHC filed motions for summary judgment. The trial court granted summary judgment in favor of DHC and taxed costs against plaintiff. Plaintiff appeals.

[1] Plaintiff first assigns error to the trial court's alleged admission and consideration of DHC's expert affidavits in determining summary judgment. DHC submitted the affidavits at issue in opposition to plaintiff's motion for partial summary judgment and in support of DHC's own motion for summary judgment.

Plaintiff filed an objection and a motion to strike the affidavits on the grounds that the affidavits failed to comply with the requirements of Rule 56 of the North Carolina Rules of Civil Procedure. According to the record, the trial court never ruled on plaintiff's objection and motion to strike the affidavits. This Court is unable to review the issue concerning the trial court's admission and consideration of the affidavits since there is nothing before this Court indicating the trial court's ruling on the question. N.C.R. App. P. 10(b)(1) provides that in order to preserve a question for appellate review, it is "necessary for the complaining party to obtain a ruling upon the party's request, objection or motion." Because plaintiff failed to obtain such a ruling, plaintiff's assignment of error number one is overruled.

[2] Plaintiff next contends the trial court erred in denying plaintiff's motion for partial summary judgment and in granting DHC's motion for summary judgment as to the issue of liability.

N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003) proscribes that summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that any party is entitled to a judgment as a matter of law." An issue is deemed 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), and "a fact is material if it would constitute or would irrevocably establish any material element of a claim or a defense." *Bone International, Inc. v. Brooks*, 304 N.C. 371, 375, 283 S.E.2d 518, 520 (1981).

In order to prevail on a motion for summary judgment, a moving party meets its burden by "proving 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 or cannot surmount an affirmative defense which would bar the claim." *Collingwood v. G. E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). " 'Once the moving party meets this burden, the burden is then on the opposing party

to show that a genuine issue of material fact exists. . . . If the opponent fails to forecast such evidence, then the trial court's entry of summary judgment is proper.' " *Mozingo v. Pitt County Memorial Hospital*, 101 N.C. App. 578, 583, 400 S.E.2d 747, 750 (quoting *White v. Hunsinger*, 88 N.C. App. 382, 383, 363 S.E.2d 203, 204 (1988)), *cert. denied*, 329 N.C. 498, 407 S.E.2d 537 (1991). The trial court is to consider all evidence in the light most favorable to the opposing party. *DeWitt*, 355 N.C. at 682, 565 S.E.2d at 142.

Summary judgment is "rarely appropriate in a negligence action because ordinarily it is the duty of the jury to apply the standard of care of a reasonably prudent person." *Abner Corp. v. City Roofing & Sheetmetal Co.*, 73 N.C. App. 470, 472, 326 S.E.2d 632, 633 (1985). To survive a motion for summary judgment, plaintiff must have established a *prima facie* case of negligence by showing: "(1) defendant failed to exercise proper care in the performance of a duty owed to plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances as they existed." *Lavelle v. Schultz*, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995), *disc. review*, 342 N.C. 656, 467 S.E.2d 715 (1996). In the case before us, plaintiff alleges that DHC was negligent in failing to provide buildings 47 and 52 with adequate protection from water intrusion.

Generally, where the facts are undisputed, "[t]he issue of whether a duty exists is a question of law for the court." *Mozingo*, 101 N.C. App. at 588, 400 S.E.2d at 453; *see* 57A *Am. Jur. 2D Negligence* § 86 (court is to determine as a matter of law, the existence, scope or range of the duty). Because no contract existed between plaintiff and DHC, plaintiff does not present a contract claim, but instead correctly argues that it need not prove privity of contract in order to prove the existence of a duty. *See Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 363 S.E.2d 367, *disc. review denied*, 321 N.C. 744, 366 S.E.2d 862 (1988).

In tort, no liability exists unless the law imposes a duty. "It is well settled law in North Carolina that privity of contract is not required in order to recover against a person who negligently performs services for another and thus injures a third party." *Ingle v. Allen*, 71 N.C. App. 20, 26, 321 S.E.2d 588, 594 (1984), *disc. review denied*, 313 N.C. 508, 329 S.E.2d 391 (1985), *overruled in part on other grounds*, 351 N.C. 172, 521 S.E.2d 707 (1999).

This Court has recognized six factors to be balanced in determining

> [w]hether a party has placed himself in a position where his affirmative conduct may be expected to affect the interest of another person, so that tort law will impose upon him an obligation to act in such a way that the other person will not be injured. . . .
>
> > (1) the extent to which the transaction was intended to affect the other person; (2) the foreseeability of harm to him; (3) the degree of certainty that he suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm.

Ingle, 71 N.C. App. at 27, 321 S.E.2d at 594 (citations omitted).

Neuse River originally contracted with DHC solely to install the pre-manufactured trusses and to lay plywood over those trusses. All supplies were to be provided by Neuse River. At no time was plaintiff aware of DHC's presence nor did plaintiff and DHC ever converse. The evidence indicates that it was only upon DHC's arrival on the job site on the day following the damaging rainstorm, that DHC assumed additional duties which extended to the installation of the tarpaper.

Plaintiff emphasizes that in order to install the trusses, the old roofs had to be removed, leaving the buildings unprotected. Thus, plaintiff argues the exposure of the roofs were part of the process undertaken by DHC as per DHC's original agreement with Neuse River. Although on the day of the storm, DHC assisted Neuse River to a limited extent in the removal of the old roofs and in the preparation for the installation of the new roofs, DHC's sole motivation for assisting in the removal was a desire to stay within the time allotted by contract for the installation of the trusses.

These actions do not establish that DHC assumed a duty to weatherproof the buildings. It was Neuse River that left the buildings exposed to the weather when it removed the rubber membrane without providing adequate protection in violation of its expressed contractual obligation. DHC did not assume any responsibility for laying the tarpaper, hence weatherproofing, until after the damage had occurred. Plaintiff's evidence is insufficient to create a genuine issue that DHC owed a duty to plaintiff to waterproof the buildings. Therefore, an essential element of plaintiff's claim is non-existent

and subsequently plaintiff has failed to present a *prima facie* case of negligence. The trial court did not err in granting summary judgment to DHC. Plaintiff's assignments of error numbers two and three are overruled.

[3] Plaintiff argues the trial court's order erred in granting DHC's motion to tax plaintiff with the costs of the action pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(d) (2003). Rule 3(d) of the North Carolina Rules of Procedure provides that the notice of appeal filed by the appellant "designate[s] the judgment or order from which appeal is taken[.]" "Without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2." *Bromhal v. Stott*, 116 N.C. App. 250, 253, 447 S.E.2d 481, 483 (1994), *disc. review denied*, 339 N.C. 609, 454 S.E.2d 246, *aff'd*, 341 N.C. 702, 462 S.E.2d 219 (1995). In the case before us, plaintiff failed to file notice of appeal from the trial court's order permitting costs to be taxed against plaintiff; therefore, this Court is without jurisdiction to consider this issue.

Having considered DHC's cross-assignments of error, this Court finds DHC's arguments to be without merit. DHC's cross-assignments of error numbers one and two are overruled.

Affirmed.

Judges HUDSON and CALABRIA concur.

STATE OF NORTH CAROLINA v. JEFFREY CRAIG POTEAT, DEFENDANT

No. COA03-764

(Filed 20 April 2004)

1. Bail and Pretrial Release— bond forfeiture—motion to set aside—constructive notice

The trial court did not err by denying a professional bail bondsman's motion to set aside forfeiture of an appearance bond he posted on behalf of defendant for the purpose of securing defendant's appearance in court to answer charges of driving while license revoked and failure to appear, because: (1) N.C.G.S.

§ 15A-544.5(f) does not require that a surety or bail agent have actual, rather than constructive, notice that a defendant has failed to appear on two or more prior occasions before the surety is precluded from having the forfeiture set aside; (2) a professional bondsman should reasonably be expected to understand an "OFA/FTA" notation on a release order as standing for "order for arrest/failure to appear," and the bondsman could have discovered the earlier bond forfeiture notices, arrest warrants and arrest orders by exercising proper diligence; and (3) the professional bondsman had a duty of inquiring further into the background of this matter before executing the appearance bond at issue.

2. Bail and Pretrial Release— bond forfeiture—motion to set aside—prior failures to appear

The trial court did not err in a driving while license revoked and failure to appear case by finding that defendant had two prior failures to appear and by denying a professional bail bondsman's motion to set aside the bond forfeiture on this basis even though the bondsman contends that defendant's failure to appear on 25 September 1995 by citation instead of under a bond should not count as a "failure to appear on two or more prior occasions" for purposes of N.C.G.S. § 15A-544.5(f), because: (1) the plain language of N.C.G.S. § 15A-544.5(f) provides only that the State must prove that defendant had already failed to appear on two or more prior occasions before forfeiture of the bond becomes absolute; and (2) even though the bondsman correctly notes that the subsection title of the statute states "No More Than Two Forfeitures May Be Set Aside Per Case," the language of the title of a statute is not permitted to control expressions in the body of a statute that conflict with it.

Appeal by bondsman-appellant from order denying motion to set aside forfeiture of a bail bond entered 21 April 2003 by Judge Donald W. Stephens in Alamance County Superior Court. Heard in the Court of Appeals 3 March 2004.

Aaron E. Michel for bondsman-appellant.

David K. Holley for appellee Alamance-Burlington Board of Education.

ELMORE, Judge.

In this appeal we must determine whether the trial court erred by denying professional bail bondsman Tim Mathis' (Mathis) motion to set aside forfeiture of an appearance bond Mathis posted on behalf of Jeffrey Craig Poteat (Poteat) for the purpose of securing Poteat's appearance in court to answer charges of driving while license revoked and failure to appear. Because we conclude that the trial court correctly denied Mathis' motion, we affirm the trial court's order.

The underlying facts are as follows: on 29 August 1995, a North Carolina State Highway Patrol officer cited Poteat for driving while license revoked, a misdemeanor, on Interstate 40 near Burlington, North Carolina. The citation directed Poteat to appear in Alamance County District Court to answer the charge on 25 September 1995. After Poteat failed to appear in court on 25 September 1995, a warrant for his arrest for failure to appear as directed by the citation was issued on 4 October 1995, with bond set at $200.00 secured. On 5 November 1995, this warrant was returned unexecuted because the North Carolina State Highway Patrol was unable to locate Poteat.

Thereafter, on 30 September 1997, a new warrant for Poteat's arrest was issued based on the same facts and circumstances stated in the 4 October 1995 arrest warrant, with bond increased to $400.00 secured. As with the earlier arrest warrant, this warrant was returned unexecuted on 15 October 1997, this time by the Alamance County Sheriff's Department. The arrest warrant for failure to appear was reissued on 8 June 2001, and Poteat was arrested the same day. Poteat was released from jail later that day after Adean McBroom (McBroom), Poteat's mother, became surety for Poteat by posting an appearance bond for pretrial release in the amount of $400.00. Pursuant to a release order executed by an Alamance County Magistrate, Poteat was ordered to appear in Alamance County District Court on 11 June 2001.

On 11 December 2001, the Alamance County Clerk of Superior Court issued an order for Poteat's arrest after Poteat failed to appear in court on that date as directed.[1] The record on appeal does not contain a release order directing Poteat to appear in court on 11 December 2001, although the 11 December 2001 order for Poteat's

1. The record on appeal is silent as to what action, if any, was taken regarding the charges pending against Poteat, or his failure to appear regarding same, between 8 June 2001 and 11 December 2001.

arrest states Poteat "has been arrested and released from custody and has failed to appear on 12/11/01 as required by the release order." On 31 December 2001, a bond forfeiture notice was entered notifying McBroom that the appearance bond she posted as surety for Poteat had been ordered forfeited due to Poteat's failure to appear in court on 11 December 2001. Meanwhile, Alamance County sheriff's deputies were unable to locate Poteat, and the 11 December 2001 order for his arrest was returned unserved on 20 February 2002.

In May 2002, a writ of execution was issued against Poteat, and McBroom as surety, seeking recovery by the State of North Carolina of the $400.00 appearance bond which had been forfeited by Poteat's failure to appear on 11 December 2001. This writ of execution was returned on 3 June 2002 because appellee Alamance-Burlington Board of Education (School Board) refused to advance the required levy fees.[2]

On 6 September 2002, a Mecklenburg County sheriff's deputy arrested Poteat after receiving the 11 December 2001 order for Poteat's arrest. A release order issued 6 September 2002 in Mecklenburg County set Poteat's bond at $9,200.00 secured and ordered him held in the Mecklenburg County jail for "pick-up by Alamance County." The portion of the release order entitled "Offense(s)" contained the following entries: "DWLR" for "driving while license revoked," and what appears to be "OFA/FTA," which, while somewhat difficult to read on the copy contained in the record, appears to stand for "order for arrest/failure to appear."

Appellant Mathis, a professional bail bondsman from Monroe, North Carolina who testified that he writes most of his bonds in Mecklenburg and Union counties, first became involved in these proceedings on 12 September 2002, when he entered into an appearance bond for Poteat's pretrial release in the amount of $9,200.00. On 30 September 2002, the Alamance County Clerk of Superior Court issued another order for Poteat's arrest, stating again that Poteat "has been arrested and released from custody and has failed to appear on 12/11/01 as required by the release order." The Alamance County Clerk's office then issued a second bond forfeiture notice, this time to Mathis as surety, indicating "Date of Forfeiture" as 30 September 2002, "Date of Notice Given" as 12 October 2002, and "Final Judgment

2. The Alamance-Burlington Board of Education's posture as the appellee in the instant appeal is due to its status as the ultimate recipient of the "clear proceeds" of the forfeited appearance bond at issue herein, pursuant to Article IX, Section 7 of the North Carolina Constitution.

Date" as 11 March 2003. Thus, it appears from the record that following Poteat's release on the appearance bond executed by Mathis on 12 September 2002, Poteat was directed to appear in court on 30 September 2002, and that Poteat failed to appear, for a third time, on that date.

On 10 March 2003, one day before the "Final Judgment Date" as indicated on the bond forfeiture notice served upon Mathis in October 2002, Mathis moved to set aside forfeiture of the $9,200.00 appearance bond he entered into as surety for Poteat on 12 September 2002. The School Board filed an objection to Mathis' motion on 20 March 2003. The trial court heard arguments on Mathis' motion on 21 April 2003 and denied the motion, on the grounds that Mathis had notice of Poteat's two prior failures to appear before entering into the 12 September 2002 appearance bond for Poteat's pretrial release. From this order, Mathis now appeals.

The issues are whether the trial court erred by (1) denying Mathis' motion to set aside the bond forfeiture where he had constructive notice of Poteat's two prior failures to appear, and (2) finding that Poteat had two prior failures to appear and denying Mathis' motion to set aside the bond forfeiture on this basis.

[1] By his first assignment of error, Mathis contends that N.C. Gen. Stat. § 15A-544.5(f) should be construed as requiring that a surety or bail agent have *actual*, rather than *constructive*, notice that a defendant has failed to appear on two or more prior occasions before the surety is precluded from having the forfeiture set aside. We disagree.

N.C. Gen. Stat. § 15A-544.5(f) provides as follows:

> (f) No More Than Two Forfeitures May Be Set Aside Per Case.—In any case in which the State proves that the surety or the bail agent had *notice or actual knowledge*, before executing a bail bond, that the defendant had already failed to appear on two or more prior occasions, no forfeiture of that bond may be set aside for any reason.

N.C. Gen. Stat. § 15A-544.5(f) (2003) (emphasis added).

The record in the present case clearly shows that Poteat failed to appear in court as directed on at least two occasions, those being 25 September 1995 and 11 December 2001, before Mathis executed an appearance bond securing Poteat's appearance on 30 September 2002, and that Poteat subsequently failed to appear in court on that

date as well, resulting in forfeiture of the bond executed by Mathis. Because Mathis maintains that he was not aware of these two prior failures to appear before he executed the appearance bond at issue herein, we must determine whether the type of "notice" contemplated by N.C. Gen. Stat. § 15A-544.5(f) includes constructive notice. We conclude that it does.

In defining "notice," *Black's Law Dictionary* provides that "notice" may be either "actual, which brings the knowledge of a fact directly home to the party[,]" or "constructive," which is defined as "information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it." *Black's Law Dictionary* 1061-62 (6th ed. 1990).

"The cardinal principle of statutory construction is that the intent of the legislature is controlling." *Nationwide Mutual Ins. Co. v. Mabe*, 342 N.C. 482, 494, 467 S.E.2d 34, 41 (1996). Adopting Mathis' interpretation of N.C. Gen. Stat. § 15A-544.5(f) as requiring only *actual* notice would render the statute's language concerning "actual knowledge" redundant and superfluous, and it is "a well settled principle of statutory construction that words of a statute are not to be deemed merely redundant if they can reasonably be construed 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 purpose of [N.C. Gen. Stat. § 15A-544] is to regulate the forfeiture of bonds in criminal proceedings and to establish 'an orderly procedure for forfeiture.' " *State v. Cox*, 90 N.C. App. 742, 744, 370 S.E.2d 260, 261 (1988) (quoting *State v. Moore*, 57 N.C. App. 676, 678, 292 S.E.2d 153, 155 (1982).

We conclude that construing the term "notice" in N.C. Gen. Stat. § 15A-544.5(f) to include constructive, as well as actual, notice is in harmony with this statute's purpose. In the present case, when Mathis executed the appearance bond for Poteat in Mecklenburg County on 12 September 2002, the release order issued on 6 September 2002 upon Poteat's arrest in Mecklenburg County was available for Mathis' review as part of Poteat's Mecklenburg County court file. As noted above, this release order contained the notations "DWLR" and "OFA/FTA" in the section of the release order labeled "Offense(s)." A professional bondsman such as Mathis should reasonably be expected to understand an "OFA/FTA" notation on a release order as

standing for "order for arrest/failure to appear." Mathis, especially in light of his status as a professional bondsman, could have discovered the 6 September 2002 release order by exercising proper diligence. Further, upon discovering that Poteat had at least one prior failure to appear, Mathis through the exercise of proper diligence could have readily discovered the earlier bond forfeiture notices, arrest warrants, and orders for Poteat's arrest, any of which would have indicated that Poteat had a second prior failure to appear. These are all public documents and were all part of Poteat's Alamance County court file. Mathis' situation as a professional bondsman, albeit one who writes bonds primarily in Mecklenburg and Union counties, cast upon him the duty of inquiring further into this matter's Alamance County background before executing the appearance bond at issue. Mathis' first assignment of error is overruled.

[2] By his second assignment of error, Mathis asserts that because Poteat was directed to appear in court on 25 September 1995 by citation and was not then under bond, his failure to appear on that date should not count as a "fail[ure] to appear on two or more prior occasions" for purposes of N.C. Gen. Stat. § 15A-544.5(f). Mathis argues that the statute is only intended to cover failures to appear which occur upon forfeiture of a bond. However, the statute's plain language states only that the State must prove that the defendant "had already failed to appear on two or more prior occasions" before forfeiture of the bond becomes absolute. *See* N.C. Gen. Stat. § 15A-544.5(f). When construing a statute, the words are to be given their ordinary meaning, unless it appears from the context that they should be used in a different sense. *Jordan v. Central Piedmont Community College*, 124 N.C. App. 112, 116, 476 S.E.2d 410, 412 (1996), *disc. review denied*, 345 N.C. 753, 485 S.E.2d 53-54 (1997). Mathis correctly notes that the subsection title of N.C. Gen. Stat. § 15A-544.5(f) is "No More Than Two Forfeitures May Be Set Aside Per Case[;]" however, our Supreme Court has stated that "the language of the title is not permitted to control expressions in the body of a statute that conflict with it." *State v. Bell*, 184 N.C. 701, 707, 115 S.E. 190, 193 (1922). Mathis' second assignment of error is overruled.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

ATLANTIC AND EAST CAROLINA RAILWAY COMPANY, PLAINTIFF v. WHEATLY OIL CO., INC., DEFENDANT

No. COA03-515

(Filed 20 April 2004)

1. Parties— real party in interest—property leased and subleased

There was no issue of fact as to whether plaintiff was a real party in interest, and summary judgment was correctly granted for plaintiff, where plaintiff (Railway) had leased the property in question; Railway subleased the property to SOA, which sublet it to defendant; SOA obtained a judgment of possession against defendant; SOA's lease with Railway was terminated; and Railway demanded possession from defendant. Although defendant contended that Railway's original lease had expired and that it had no interest in the property, there was an agreement allowing Railway to continue in possession indefinitely. A tenant is estopped to deny title when the landlord's right to possession has not ceased.

2. Landlord and Tenant— ejectment—sublease rather than assignment—language of agreement

Plaintiff was not estopped from bringing a summary ejectment action based on defendant being an assignee rather than sublessor. Plaintiff (Railway) was the original long-term lessor, SOA was the original sublessee, and defendant (Wheatly) was the second sublessee. The plain language of the consent to sublease signed by Railway, SOA, and Wheatly states that Wheatly's right to use the property terminated upon the termination of the Railway/SOA lease, which happened before this action was brought. Moreover, SOA had obtained a judgment giving it the right of possession before its sublease was terminated.

3. Unjust Enrichment— termination of sublease agreement—no implied contract

The trial court correctly granted summary judgment for plaintiff on defendant's counterclaim for unjust enrichment in a summary judgment action. Unjust enrichment is based on an implied contract theory and does not apply if there is a contract between the parties, as here.

4. Landlord and Tenant— betterments—claim of title required

The trial court correctly granted summary judgment for plaintiff on defendant-tenant's counterclaim for betterments in a summary ejectment action. Defendant did not make a claim or showing of a reasonable belief of good title to the property, as required by N.C.G.S. § 1-340.

5. Continuances— denied—discovery not material to claim

A motion for a continuance for further discovery in an ejectment action was properly denied where the matter to be investigated did not affect defendant's right to the property.

6. Appeal and Error— preservation of issues—failure to appeal order—cross-appeal proper

Plaintiff's failure to appeal the trial court's order setting an appeal bond and staying execution waived the issue. A cross-assignment of error on this issue was not properly before the court; a cross-appeal would have been the proper method to raise these issues.

Appeal by defendant from order and judgment entered 2 December 2002 by Judge Benjamin G. Alford in the Superior Court in Carteret County. Heard in the Court of Appeals 17 March 2004.

Sumrell, Sugg, Carmichael, Hicks & Hart, P.A., by James R. Sugg and Arey W. Grady, III, for the plaintiff-appellee.

Wheatly, Wheatly, Nobles, Weeks, Valentine & Lupton, P.A., by C. R. Wheatly, Jr. and C. R. Wheatly, III, for defendant-appellant.

Ward and Smith, P.A., by Frank H. Sheffield, Jr., for North Carolina Railroad Company, amicus curiae.

HUDSON, Judge.

On 24 May 2002, Atlantic and East Carolina Railway ("Railway") filed a complaint seeking summary ejectment of Wheatly Oil Company, Inc. ("Wheatly") from property located at 2506 Arendall Street in Morehead City. Railway alleged that it owned a leasehold interest in the property, which it had sublet to Southern Outdoor Advertising, Inc. ("SOA"), which in turn had sublet the property to Wheatly. Railway alleged that as a result of the termination of the lease between it and SOA, and by virtue of a judgment entered in liti-

gation between Wheatly and SOA, Railway was entitled to be put in immediate possession of the property and Wheatly should be ejected.

On 18 July 2002, after Wheatly filed its answer and raised various defenses and counterclaims, Railway moved for summary judgment, filing supporting affidavits and memoranda of law. The court heard the motion 29 July 2002, and granted summary judgment to Railway 2 December 2002. Wheatly appeals. For the reasons discussed below, we affirm.

Background

The property at issue here was originally leased by Railway's predecessor in interest under a lease which expired in 1994. On expiration of that lease, however, the owner of the property, the North Carolina Railroad Company ("NCRR"), specifically negotiated Railway's continued use and occupation of the property for an indefinite time. Railway then leased the property to SOA on 15 November 1984, with terms allowing SOA to renew the lease through 14 November 2014. Also on 15 November 1984, SOA sublet the property to Wheatly, with provisions that also extended through 14 November 2014. A Consent to Sublease ("consent contract") executed among Railway, SOA and Wheatly specified that Wheatly's "right to use [the property] shall terminate at all events upon the termination in any manner of [the Railway/SOA lease]."

In 1999, SOA sued Wheatly regarding the property, resulting in a judgment entered 17 October 2001 providing that Wheatly pay damages to SOA for unpaid rent, that SOA pay damages to Wheatly for unfair trade practices, and that SOA be put in possession of the property and Wheatly be removed from it. Neither party appealed. In late 2001, SOA terminated its lease with Railway, who subsequently demanded possession of the property. In November 2001, Wheatly tendered a rental payment to Railway, as specified under the lease between SOA and Railway. Railway refused payment, stating that SOA was a holdover tenant and that there was no privity between Wheatly and Railway. This action ensued.

Analysis

The standard of review on appeal of a grant of summary judgment is well established:

> 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. 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.

Belcher v. Fleetwood Enters., 162 N.C. App. 80, 84-85, 590 S.E.2d 15, 18 (2004) (internal citations omitted).

[1] Wheatly first contends that the court erred in granting summary judgment because there was a genuine issue of material fact as to whether Railway was the real party in interest. We disagree.

Wheatly contends that Railway had no leasehold interest in the property because Railway's original lease with NCRR had expired in 1994. However, "[t]he general rule denies a tenant in possession any right to challenge his landlord's title to the property . . . ." *Turner v. Weber*, 16 N.C. App. 574, 579, 192 S.E.2d 601, 605 (1972), *cert. denied* 282 N.C. 584, 193 S.E.2d 747 (1974). Wheatly cites case law discussing an exception when a landlord's own title has ceased. *See Lassiter v. Stell*, 214 N.C. 391, 392, 199 S.E. 409, 410 (1938) ("While the rule that a tenant is estopped to deny the title of his landlord is too well settled to require citation of authority, this rule applies to the title of the landlord as it existed at the time he entered into the lease with the tenant under which the tenant entered the premises, and does not preclude the tenant from showing that during the tenancy the landlord's title had terminated or had been extinguished, and the former landlord was therefore without authority to maintain a proceeding in summary ejectment against his former tenant.") However, the record here contains affidavits filed by Railway's counsel and by the president of NCRR, stating that, by agreement of NCRR, Railway was entitled to continue in possession of the property indefinitely, until NCRR demanded its return. Thus, Railway's right to possession had not ceased and Wheatly was estopped from challenging its title.

[2] Wheatly next argues that it should have been granted summary judgment because it was an assignee rather than a sublessor, and that

Railway was thus estopped from bringing this ejectment action. For the reasons discussed below, we disagree.

Wheatly contends in its brief that because its sublease from SOA was co-terminus with the sublease between Railway and SOA, Wheatly was actually an assignee. *Krider v. Ramsay*, 79 N.C. 354, 357 (1878). "Where a lessee for a term of years parts with his whole term to a third party, it is called an assignment, and the assignee thereby becomes the tenant of the original lessor and subject to all the covenants in the lease, which run with the land, just as the lessee was. The privity of estate and privity of contract still subsist between the lessor and assignee, as it did between the lessor and lessee." *Id.* In *Krider*, the lessee surrendered its lease to the lessor (as here SOA surrendered its lease to Railway) and then the lessor attempted to take possession of the property from the sublessee. *Id.* at 356. The court held that the lessor could not, in these circumstances, eject the sublessee from the property. "A surrender is never allowed to operate injuriously upon the right of third parties, or to affect the estate of the underlessee." *Id.* at 358. The facts here, however, differ from those in *Krider* in two important respects which make that case inapplicable.

First, the Consent to Sublease signed by Railway, SOA and Wheatly clearly and explicitly states that Wheatly's "right to use [the property] shall terminate at all events upon the termination in any manner of [the Railway/SOA lease]." Thus, the plain language of the consent contract specifies that Wheatly's right to the property cannot continue after SOA's lease is ended *for any reason.* At the moment that SOA surrendered its lease, Wheatly's right to possession of the property ended. In *Knight*, the Court stated, "[i]t was the fault of the lessor in making the lease to Dyson that he did not insert a covenant against underletting, and in accepting the surrender of the lease; it was again his fault that *he made no provision to meet a contingency like this.*" *Id.* at 359 (emphasis added). In the consent contract here, however, Railway did provide to meet the contingency in which SOA terminated its sublease before the end of SOA's sublease to Wheatly. "When the language of a written contract is plain and unambiguous, the contract must be interpreted as written and the parties are bound by its terms." *Five Oaks Homeowners Asso. v. Efirds Pest Control Co.*, 75 N.C. App. 635, 637, 331 S.E.2d 296, 298 (1985).

Second, before SOA surrendered its sublease to Railway, the property had already been the subject of a lawsuit between SOA and

Wheatly, in which SOA had obtained a final judgment entitling it to possession of the property. *See Southern Outdoor Advertising, Inc. v. Wheatly Oil Co.*, No. 99 CVS 748 (Carteret County Superior Court) (17 October 2001) ("the Court, having determined that [SOA] were entitled to a directed verdict in its favor in which [SOA] were entitled to recover from [Wheatly] possession [of the property]. . . . [Thus, it is ordered that Wheatly] be removed from and [SOA] be put in possession of the [property].") Wheatly asserts that the judgment is somehow ambiguous because it awarded possession of the property and arrearages in rent to SOA, and also awarded money damages to Wheatly in excess of the rental arrearages amount. Wheatly contends that this purported ambiguity would allow this Court to construe the judgment in a manner which would allow Wheatly to maintain possession of the property. We disagree, finding nothing ambiguous about the judgment and its award of possession of the property to SOA over Wheatly.

[3] Wheatly next argues that the court erred in failing to allow its counterclaim for betterments and unjust enrichment against Railway. We disagree, finding no error in the court's judgment.

The doctrine of unjust enrichment is based on "quasi-contract" or contract "implied in law" and thus will not apply here where a contract exists between two parties. *Delta Envtl. Consultants, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165, 510 S.E.2d 690, 694, *disc. review denied* 350 N.C. 379, 536 S.E.2d 70 (1999) ("It is well established that if there is a contract between the parties, the contract governs the claim and the law will not imply a contract. . . . [in such cases] an action for breach of contract, rather than unjust enrichment, is the proper cause of action") (internal citations and quotation marks omitted). The Consent to Sublease signed by all parties states that Wheatly agrees to be bound by any and all provisions contained in the sublease between SOA and Railway. The agreement between SOA and Railway specifically provides that if SOA's lease were terminated for any reason, it would remove any and all improvements placed on the property. Thus, SOA would not be permitted to receive compensation for any improvements made to property, and Wheatly, in turn, is also barred from seeking any such compensation.

[4] Wheatly's claim for betterments likewise fails based on its status as a tenant. "To be entitled to compensation for betterments under N.C. Gen. Stat. § 1-340, defendant must show that he made permanent improvements on the property under a bona fide, reasonable belief of

good title." *Hackett v. Hackett*, 31 N.C. App. 217, 220, 228 S.E.2d 758, 760, *cert. denied* 291 N.C. 448, 230 S.E.2d 765 (1976). Here, Wheatly is a tenant, and has made no claim or showing of a reasonable belief that it had good title to the property.

[5] Wheatly also argues that the court erred in denying its motion for a continuance to allow for further discovery. Because we find no abuse of discretion by the court, we disagree and overrule these assignments of error.

"[C]ontinuances are not favored and the party seeking [one] has the burden of showing sufficient grounds for it." *Peace River Elec. Coop. v. Ward Transformer Co.*, 116 N.C. App. 493, 511, 449 S.E.2d 202, 215 (1994), *disc. review denied* 339 N.C. 739, 454 S.E.2d 655 (1995). "[T]he question of whether or not to grant a continuance is a matter solely within the discretion of the trial court; absent a manifest abuse of discretion, this Court will not disturb the decision made below." *Id.* Wheatly sought a continuance in order to further investigate the relationship between Railway and NCRR. As discussed previously, the relationship between Railway and NCRR does not effect Wheatly's right or lack of right to the property. Thus, we find no manifest abuse of discretion.

[6] Railway cross assigns as error the setting of an appeal bond in this matter, in an order entered 2 January 2003, which also stayed execution pending appeal. Railway did not appeal from this order. Thus, this cross-assignment is not properly before the Court. *See Capitola, LLC v. Triangle Labs., Inc.*, 144 N.C. App. 212, 219, 550 S.E.2d 31, 36 (2001) ("Plaintiff cross-assigns error to the trial court's order staying execution of the judgment pending appeal. Plaintiff's arguments concerning its cross-assignment of error are reasons the trial court erred in staying execution of the judgment and those reasons do not provide an alternative basis in law for supporting the judgment. The proper method to raise these arguments would have been a cross-appeal. Accordingly, Plaintiff's failure to appeal the trial court's order waives this Court's consideration of the matter on appeal") (internal quotation marks and citations omitted). Based on *Capitola*, we conclude that Railway has waived this issue by not appealing the order.

Conclusion

For the reasons stated above, we find no error in the grant of summary judgment in favor of Railway, and overrule as waived the cross-assignment of error brought by Railway.

Affirmed.

Judges MARTIN and GEER concur.

HETTIE M. FAISON, EMPLOYEE, PLAINTIFF v. ALLEN CANNING COMPANY, EMPLOYER, SELF-INSURED, DEFENDANT

No. COA03-757

(Filed 20 April 2004)

Workers' Compensation— carpal tunnel syndrome—causation

The Industrial Commission did not err by concluding that there was no causal relationship between plaintiff's carpal tunnel syndrome (CTS) and her job duties, and by denying her workers' compensation benefits, because: (1) a doctor's testimony only established a possibility that plaintiff's injuries were causally related to her employment; and (2) the causation evidence failed to meet the standard of a reasonable degree of medical certainty that is necessary to establish a causal link between plaintiff's injuries and her employment.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 19 February 2003 by Chairman Buck Lattimore. Heard in the Court of Appeals 16 March 2004.

Brumbaugh, Mu & King, P.A., by Nicole D. Wray, for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Joy H. Brewer and Dana C. Moody, for defendant-appellee.

TYSON, Judge.

Hettie M. Faison ("plaintiff") appeals from the Opinion and Award of the Full Commission of the North Carolina Industrial Commission ("Commission") denying her workers' compensation claim. We affirm.

I. Background

Beginning in 1992, plaintiff worked on and off for Allen Canning Company ("defendant") for approximately six years as a permanent

seasonal production associate. Each year, plaintiff worked from March to either October or November and did not work again until the following year. Plaintiff was responsible for running a seamer, which included taking the lids from cans and stacking them on top of three different machines. Plaintiff also inspected goods on the product line. Mr. Robert Caldwell testified for defendant that the weight of the lids plaintiff handled before being transferred to the inspection line weighed 2.5 to 2.8 pounds. He also stated there was very little repetition in loading the sleeves onto the machine. Plaintiff complained that she had developed carpal tunnel syndrome ("CTS") on 2 November 1998.

Plaintiff began seeing Dr. Eddie Powell ("Dr. Powell") on 2 February 1999. Dr. Powell testified that plaintiff revealed very little of her job duties and that on five separate visits, he unsuccessfully attempted to obtain a better description of plaintiff's job duties. At the time of his deposition, Dr. Powell continued to be unaware of plaintiff's job duties.

Dr. Powell diagnosed plaintiff with severe shoulder bursitis and held plaintiff out of work from 2 February 1999 through 2 March 1999. On 5 March 1999, Dr. Powell completed a Request for Disability Benefits Form noting that plaintiff was taken out of work for reasons unrelated to an alleged injury or sickness arising out of her employment. On 6 March 1999, plaintiff filed a claim for short-term disability, listing her condition as bursitis. Plaintiff received short-term disability benefits from 2 February 1999 through 16 August 1999. At this time, plaintiff was working solely on the inspection line due to chest pains.

Dr. Powell continued to treat plaintiff during this time and further diagnosed her as having peripheral neuropathy with left CTS and arm neuropathy with left CTS. Upon the expiration of her short-term disability benefits, plaintiff filed her workers' compensation claim. Dr. Powell authorized plaintiff to be out of work from 15 August 1999 through 22 September 1999. On 21 September 1999, plaintiff returned to Dr. Powell. Dr. Powell's diagnosis changed to peripheral neuropathy and second trimester pregnancy with CTS. Plaintiff was held out of work from 21 September 1999 through 2 November 1999. As of 2 November, plaintiff's condition remained unchanged and she was authorized to be out of work until 29 May 2000. In March 2000, plaintiff gave birth to her child. On 23 October 2000, Dr. Powell found plaintiff to be fully recovered from all conditions.

Deputy Commissioner Edward Garner, Jr., heard plaintiff's workers' compensation claim on 25 May 2001. Plaintiff's claims for workers' compensation benefits were denied and plaintiff appealed to the Full Commission. The Full Commission upheld the Deputy Commissioner's denial of plaintiff's claim for workers' compensation benefits. Plaintiff appeals.

II. Issues

The issues are whether the Full Commission erred in: (1) concluding that there was no causal relationship between plaintiff's CTS and her job duties and denying her workers' compensation benefits and (2) finding that plaintiff's weight and pregnancy could potentially have caused her CTS.

III. Standard of Review

On appeal, the standard of review of a workers' compensation case "is whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001). This Court's " 'duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *rehr'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

The Commission's findings of fact are conclusive on appeal when they are supported by competent evidence, even when there is evidence to support contrary findings. *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999). "[T]he Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony . . . ." *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (citation omitted), *disc. rev. denied*, 300 N.C. 196, 269 S.E.2d 623 (1980).

IV. Causal Relationship Between Injuries and Job Duties

Plaintiff contends that the Commission's findings of fact and conclusion of law that her condition was not related to her employment are not supported by competent evidence. We disagree.

To establish a right to workers' compensation benefits under N.C. Gen. Stat. § 97-53(13) (2003), plaintiff must prove the disease is:

> (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be a causal connection between the disease and the claimant's employment.

Rutledge v. Tultex Corp., 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citations omitted). The plaintiff has the burden of proving all three elements by the greater weight of or a preponderance of the evidence. *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541-42, 463 S.E.2d 259, 261 (1995), *aff'd*, 343 N.C. 302, 469 S.E.2d 552 (1996).

In *Holley v. ACTS, Inc.*, plaintiff was diagnosed with deep vein thrombrosis ("DVT"). 357 N.C. 228, 229, 581 S.E.2d 750, 751 (2003). Plaintiff's doctors were unable to express an opinion to reasonable degree of medical certainty whether plaintiff's injuries were causally related to her employment. *Id.* at 233, 581 S.E.2d at 753. One doctor testified that it was "a low possibility" that the plaintiff's condition was caused by her accident at work. *Id.* Another doctor testified, "I don't really know what caused the DVT." *Id.* at 233, 581 S.E.2d at 753-54.

Our Supreme Court held that the doctors' testimony was insufficient to show a causal relationship and stated, "[i]n cases involving 'complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.' " *Id.* at 232, 581 S.E.2d at 753 (quoting *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)). " '[W]hen such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation.' " *Id.* (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)).

" 'The evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation.' " *Id.* (quoting *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942)). "Although expert testimony as to the *possible* cause of a medical condition is admissible if helpful to the jury, it is insufficient to prove causation, particularly 'when there is additional evidence or testimony showing the expert's opinion to be a guess or

mere speculation.' " *Id.* at 233, 581 S.E.2d at 753 (citation omitted) (quoting *Young*, 353 N.C. at 233, 538 S.E.2d at 916).

When asked whether plaintiff's CTS was related to her employment, Dr. Powell testified, "[t]here's a probability that her carpal tunnel syndrome come [sic] from her occupation . . . *I really don't know.*" (emphasis supplied). Dr. Powell stated that the main reason he could not opine to a reasonable degree of medical certainty was due to plaintiff's failure to provide him with sufficient information of her job duties. When asked whether plaintiff *could have* developed her condition from her employment, Dr. Powell further stated,

> I—I don't like to look back in retrospect and try to change an answer that I didn't have that history when it was—when it was presented to me. That's unfair to the defendant. That's unfair to the patient. And furthermore, it's unfair to the education that's been bestowed upon me by God and man about medicine. If that patient can't give me a reliable history, that is the patient's fault. It's not the company's fault. It's not the doctor's fault.

Based on this testimony, the Commission concluded that plaintiff "failed to prove by the greater weight of the evidence that her condition was linked to her employment," and that "plaintiff has not shown enough evidence through testimony or medical evidence to overcome her burden of proving a link between her job duties and her condition."

The testimony of Dr. Powell only established a possibility that plaintiff's injuries were causally related to her employment. "Doctors are trained not to rule out medical possibilities no matter how remote; however, mere possibility has never been legally competent to prove causation." *Id.* at 234, 581 S.E.2d at 754; *see also Young*, 353 N.C. at 233, 538 S.E.2d at 916. The entirety of causation evidence before the Commission failed to meet the standard of a reasonable degree of medical certainty that is necessary to establish a causal link between plaintiff's injuries and her employment. *Id.* The Full Commission properly denied plaintiff's workers' compensation benefits. Plaintiff's assignment of error is overruled. In light of our holding, we do not address plaintiff's second assignment of error.

V. Conclusion

The Commission's findings of fact and conclusions of law concerning a causal relationship between plaintiff's injuries and her

employment are supported by competent evidence. The opinion and award of the Commission is affirmed.

Affirmed.

Judges WYNN and HUNTER concur.

CYNTHIA BOBBITT GARRETT, PLAINTIFF v. BETTY J. SMITH GUARDIAN AD LITEM FOR SARAH LYNN SMITH, DEFENDANT

No. COA03-719

(Filed 20 April 2004)

1. Appeal and Error— preservation of issues—motion in limine

The admissibility of certain evidence was not preserved for appeal because there was no objection at trial after a motion in limine was not ruled upon. The case was tried before the effective date of the recent amendment to N.C.G.S. § 8C-1, Rule 103 (which allows appeals with no further objection after denial of a motion in limine) and, in any case, the court here did not rule on plaintiff's motion in limine, as required by the statute.

2. Evidence— letter from insurance company—settlement—not admission

The trial court correctly excluded from an automobile negligence action a letter from an insurance company regarding settlement of a property damage claim which had been used to dismiss the criminal citation. The letter expressly said that it was merely a settlement and was not an admission of liability.

3. Motor Vehicles— sudden stop—rear end collision—directed verdict denied

The evidence was not sufficient to establish negligence as a matter of law in an automobile accident case, and the trial court did not err by denying plaintiff's motion for a directed verdict and J.N.O.V., where defendant was unable to avoid hitting plaintiff's car when plaintiff stopped suddenly ten car lengths from a traffic light after looking in her rear view mirror and making eye contact with defendant. The evidence permitted but did not compel the

conclusion that defendant was not maintaining a proper lookout or following too closely.

Appeal by plaintiff from judgment entered 8 November 2002 and orders entered 10 January 2003 and 14 January 2003 by Judge Alice Stubbs in Wake County District Court. Heard in the Court of Appeals 2 March 2004.

E. Gregory Stott for plaintiff-appellant.

Yates, McLamb & Weyer, L.L.P., by John T. Honeycutt, for defendant-appellee.

HUNTER, Judge.

Cynthia Bobbitt Garrett ("plaintiff") appeals from an 8 November 2002 judgment entered consistent with a jury verdict finding that plaintiff was not injured by the negligence of Sarah Lynn Smith ("defendant"). Plaintiff further appeals from orders dated 10 January 2003 denying her motions for Judgment Notwithstanding the Verdict ("J.N.O.V") and a new trial, and 14 January 2003 taxing costs against plaintiff. We conclude there was no error.

The evidence presented at trial on 4-5 November 2002, and preserved in the record on appeal to this Court, tends to show the following. Plaintiff testified that on 6 March 2001 she was in an automobile driving southbound on Kildaire Farm Road in Cary, North Carolina. As she approached a traffic light at the intersection of Kildaire Farm Road and Cary Parkway, the vehicles in front of her began to slow down and the traffic light turned red; so plaintiff stopped her car. All of a sudden, a vehicle driven by defendant hit plaintiff's automobile from behind. Plaintiff testified that she was by the Goodberry's store when the accident occurred.

Defendant testified that there was a maroon colored "SUV type" vehicle in between her vehicle and plaintiff's automobile as they approached the intersection. The SUV pulled around plaintiff's vehicle because plaintiff kept stopping and going. Defendant testified that she saw plaintiff look in her rearview mirror, making eye contact with defendant, and then suddenly "slam[] on her brakes." Defendant attempted to stop by applying her brakes but was unable to avoid hitting plaintiff's automobile. She further testified that the Goodberry's store was about ten car lengths from the intersection. Defendant testified on cross-examination that as they approached the intersection,

she was a car length or more behind plaintiff. There were only two cars in front of plaintiff as they came to the intersection, and when plaintiff suddenly came to a stop there were no cars in front of her. Defendant further maintained that there were about ten car lengths between where plaintiff stopped and the intersection.

On 24 May 2001, plaintiff filed a complaint seeking damages based upon defendant's negligence. Defendant submitted an answer to the complaint dated 2 July 2001, denying negligence but not alleging contributory negligence on the part of plaintiff. Plaintiff filed a pre-trial motion *in limine* seeking to exclude any evidence that plaintiff intentionally slammed on her brakes or evidence of contributory negligence. There is no indication in the record that this motion was ever ruled on by the trial court and this testimony was admitted without objection during trial.

Plaintiff also made an offer of proof regarding a citation defendant received as a result of the accident. In this offer of proof, defendant testified on *voir dire* that when she received the citation from the police officer following the accident, he told her to contact her insurance company to resolve the matter. Defendant's insurance company provided a letter, which defendant gave to the Wake County District Attorney and the citation was dismissed. The letter, preserved in the record on appeal, states that defendant's insurance company would pay for any property damage arising from the accident and would consider any claim for personal injury that was submitted. The letter expressly notes that it was not to serve as an admission of liability or fault, but was a settlement to resolve a disputed claim. The trial court ruled this evidence was inadmissible.

The issues presented are whether: (I) plaintiff's motion *in limine* is sufficient to preserve her objection to testimony that plaintiff looked in the rearview mirror and then slammed on her brakes; (II) evidence of the insurance letter used by defendant to obtain a dismissal of the criminal citation was admissible; (III) there was sufficient evidence to establish defendant's negligence as a matter of law; and (IV) the trial court erred in taxing costs against plaintiff.

I.

[1] Plaintiff contends that evidence she looked in her rearview mirror, made eye contact with defendant, and then slammed on her brakes is inadmissible evidence that plaintiff negligently contributed to the accident, as defendant did not plead contributory negligence as a defense. Plaintiff sought to exclude this evidence through her

motion *in limine*, but did not object to the submission of this testimony at trial. Furthermore, the trial court's ruling on the motion *in limine* is not included in the record on appeal.

As this Court has previously noted, " 'a motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the [movant] fails to further object to the evidence at the time it is offered at trial.' " *Nunnery v. Baucom*, 135 N.C. App. 556, 566, 521 S.E.2d 479, 486 (1999) (citation omitted). Thus, plaintiff has failed to preserve this issue on appeal and we decline to address the merits of this argument.[1]

II.

[2] Plaintiff next argues that the trial court erred in excluding evidence of the letter from defendant's insurance company regarding the settlement of the property damage claim used to dismiss the criminal citation.

Rule 411 of the North Carolina Rules of Evidence provides, with certain exceptions, "[e]vidence that a person was or was not insured against liability is not admissible upon the issue [of] whether [s]he acted negligently or otherwise wrongfully." N.C. Gen. Stat. § 8C-1, Rule 411 (2003). Furthermore, under N.C. Gen. Stat. § 1-540.2:

> In any claim, civil action, or potential civil action which arises out of a motor vehicle collision or accident, settlement of any property damage claim arising from such collision or accident, whether such settlement be made by an individual, a self-insurer, or by an insurance carrier under a policy of insurance, shall not constitute an admission of liability on the part of the person, self-insurer or insurance carrier making such settlement, which arises out of the same motor vehicle collision or accident. It shall be incompetent for any claimant or party plaintiff in the said civil action to offer into evidence, either by oral testimony or paper writing, the fact that a settlement of the property damage claim arising from such collision or accident has been made . . . .

N.C. Gen. Stat. § 1-540.2 (2003).

1. We note that the General Assembly amended N.C. Gen. Stat. § 8C-1, Rule 103, effective 1 October 2003, to provide that a motion *in limine*, upon which a trial court has made "a definitive ruling on the record," is sufficient to preserve a claim of error on appeal notwithstanding a party's failure to object to the evidence at the time it is admitted at trial. 2003 N.C. Sess. Laws ch. 101, § 1. The amendment is not applicable to this case because this matter was tried prior to the effective date of the act. Furthermore, the record does not reveal any ruling on the motion *in limine* as would be required by the amended statute.

The letter in this case confirming that defendant's insurance company would pay for property damage expressly stated that it was merely a settlement of a disputed claim and was not an admission of liability or fault. As such, evidence that defendant's insurance company had agreed to settle any claim for property damage arising out of this accident was inadmissible in the subsequent action for personal injury damages as proof that defendant was liable for the accident.

III.

[3] Plaintiff further contends that the trial court erred in denying her motions for a directed verdict, J.N.O.V, and new trial. Specifically, plaintiff argues that the evidence presented was sufficient to establish defendant's negligence as a matter of law. We disagree.

This Court has recently summarized the law regarding the standard of review in this situation.

> "The test for determining whether a motion for directed verdict is supported by the evidence is identical to that applied when ruling on a motion for judgment notwithstanding the verdict." *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002) (quoting *Smith v. Price*, 315 N.C. 523, 340 S.E.2d 408 (1986)). "In ruling on the motion, the trial court must consider the evidence in the light most favorable to the nonmoving party, giving him the benefit of all reasonable inferences to be drawn therefrom and resolving all conflicts in the evidence in his favor." *Id.* (quoting *Taylor v. Walker*, 320 N.C. 729, 733-34, 360 S.E.2d 796, 799 (1987)). "The party moving for judgment notwithstanding the verdict, like the party seeking a directed verdict, bears a heavy burden under North Carolina law." *Id.* (quoting *Taylor*, 320 N.C. at 733, 360 S.E.2d at 799).

Griffis v. Lazarovich, 161 N.C. App. 434, 443, 588 S.E.2d 918, 924 (2003). Furthermore, " '[g]enerally, 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.' " *Id.* at 443, 588 S.E.2d at 924-25 (quoting *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000)).

In this case, the evidence viewed in the light most favorable to defendant reveals that despite being more than a car length behind plaintiff and applying her brakes to come to a stop, defendant was unable to avoid hitting plaintiff's car when plaintiff suddenly stopped

ten car lengths from a traffic light and after plaintiff had looked in her rearview mirror making eye contact with defendant.

Although the admission by defendant that her car collided with the rear of plaintiff's vehicle permits a legitimate inference that defendant was not maintaining a proper lookout or was following plaintiff too closely, it does not, however, compel either of those conclusions but instead simply raises the question for the jury's ultimate determination. *See Scher v. Antonucci*, 77 N.C. App. 810, 812, 336 S.E.2d 434, 435 (1985). Thus, even though plaintiff's evidence and defendant's admission that a rear-end collision occurred produced sufficient evidence to raise an inference that defendant was negligent in order for plaintiff's case to reach a jury, we conclude that there is not sufficient evidence to establish defendant's negligence as a matter of law. Thus, the trial court did not err in denying plaintiff's motions for directed verdict and J.N.O.V; nor did the trial court abuse its discretion by denying plaintiff a new trial.

IV.

Plaintiff finally contests the taxing of costs against her arguing only that as she is entitled to a new trial based upon her arguments to this Court, the entry of costs should necessarily be vacated. Because, however, we have rejected plaintiff's arguments on appeal, we reject plaintiff's argument on this issue. Accordingly, we conclude there was no error in the trial of this matter.

No error.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA v. GENE ANDERSON WHITE

No. COA03-742

(Filed 20 April 2004)

Criminal Law— judge's exercise of discretion—contradictory statements

Convictions for second-degree burglary and felonious breaking and entering were upheld where the court denied the jury's request that certain evidence be restated, saying both that it

"could not" provide a transcript and that it was exercising its discretion in denying the request. Reading the court's statements as a disavowal of its discretion would make them nonsensical and contradictory. N.C.G.S. § 15A-1233(a).

Appeal by defendant from judgments entered 17 May 1996 by Judge Beverly T. Beal in Superior Court, Mecklenburg County. Heard in the Court of Appeals 16 March 2004.

Attorney General Roy Cooper, by Assistant Attorney General Joyce S. Rutledge, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for defendant appellant.

WYNN, Judge.

Following his convictions on charges of second-degree murder and felonious breaking or entering, Gene Anderson White, Defendant, contends the trial court erred by denying jury requests to review evidence presented at his trial. Upon review, we find no error in his trial.

The State presented evidence at trial tending to show that, in the early morning of 1 July 1995, Defendant shot and killed Ephraim Allen Beatty. After the jury began its deliberations, it sent a message to the trial court requesting to review the testimony of one of the witnesses and the gunshot residue tests of two people. Before bringing the jury back into the courtroom, the trial court informed counsel for Defendant and the State that

> it is impossible to provide the testimony, and in my discretion I will advise them that I cannot provide that. The [gunshot residue] test results were part of the testimony of witnesses, but there has not been any documentation introduced into evidence, so I guess we can't give them that information. We can just tell them that is the way it is.

Neither the State nor defense counsel objected to the trial court's decision. The jury was brought into the courtroom and the trial court addressed it as follows:

> Members of the jury, remember that I said in my instructions that it is your duty to recall the evidence. In my discretion, I cannot provide a written transcript of the evidence, so it is not possible to give you [the witness's] testimony and the [gunshot

residue] test results were part of the evidence, not a document that was introduced into evidence as to what the results were.

If you will recall the evidence, and I am not going to attempt to recall it for you for to do so might mean that I would comment on the evidence or point out some evidence over and above other evidence, and all evidence is important. So, I am not in a position to do so, and I cannot do that. It is your recollection of the evidence which is important and upon which you must deliberate.

Later during its deliberations, the jury sent a second note to the trial court requesting a witness's police statements. The trial court noted that

what I understand that to mean is that [the witness] was cross[-]examined about the statements that she made to the officers and some of those statements the jury heard about in the process of cross[-]examination, but the statements themselves are not in evidence . . . . so I will tell them that they cannot have the statements and it is their duty to recall the evidence and I have instructed the jury on prior inconsistent statements. So, I cannot give them the statements and they indicate that they understand.

When the jury returned to the courtroom, the trial court addressed the jury foreperson to ensure that it correctly comprehended the jury's request. The foreperson responded that the jury "wanted to get the statements, if they were admitted into evidence, but we weren't really sure of the specifics of the statement and we wanted to make sure that we were wording it correctly." The trial court thereafter instructed the jury that

[i]n fact no written document was introduced into evidence in regards to that. The witness was asked questions about things she said at an earlier time and she answered those questions. That is part of the evidence in the case and not in a document that I can give you. So, that is just as when we were dealing with some things yesterday that are not in evidence. . . . What is in evidence is only the questions and answers about her statements made at an earlier time. You will recall what I instructed you in regard to statements given by a witness at an earlier time. . . .

When the foreperson noted that the jury was particularly interested in reviewing the evidence as to what point in time the witness made her earlier statements, the trial court responded as follows:

> And here, again, we are at a point where the Court is prohibited, if you will, from me trying to recapitulate the evidence for fear that my recollection is erroneous. It is the duty of the jury to recall and remember all of the evidence. I am not in a position now, and in my discretion I cannot provide you with that information. That is what you all, in your deliberations, determine the facts to be.

Neither party's attorney objected to the trial court's response to the jury.

The jury found Defendant guilty of second-degree murder and felonious breaking or entering. The trial court sentenced Defendant to a minimum term of imprisonment of 188 months, and a maximum term of 235 months for the second-degree murder conviction. The trial court sentenced Defendant to a ten to twelve month term for his conviction of felonious breaking or entering. Although Defendant gave notice of appeal, his counsel failed to perfect the appeal. On 21 November 2001, this Court allowed Defendant's petition for writ of *certiorari* to review the trial court's judgments.

Defendant's sole contention on appeal is that the trial court committed prejudicial error by failing to affirmatively exercise its discretion under section 15A-1233 of the General Statutes, thereby entitling him to a new trial.

Section 15A-1233(a) of the General Statutes provides:

> (a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C. Gen. Stat. § 15A-1233(a) (2003). Section 15A-1233's requirement that the trial court exercise its discretion "is a codification of the long-standing common law rule that the decision whether to grant or refuse a request by the jury for a restatement of the evidence lies within the discretion of the trial court." *State v. Barrow*, 350 N.C. 640, 646, 517 S.E.2d 374, 378 (1999). It is well established that, where the

trial court denies a request by the jury to review a transcript based upon its erroneous belief that it has no power or discretion to grant the request, such a denial is error and is reviewable. *See id*; *State v. Johnson*, 346 N.C. 119, 124, 484 S.E.2d 372, 375-76 (1997) (stating that " 'there is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented. Where the error is prejudicial, the defendant is entitled to have his motion reconsidered and passed upon as a discretionary matter.' ") (quoting *State v. Lang*, 301 N.C. 508, 510, 272 S.E.2d 123, 125 (1980)).

Our Supreme Court has ruled numerous times that where the trial court denies a request by the jury to review evidence based upon its erroneous perception that it has no discretion to grant the request, such denial constitutes error. For example, in *Barrow*, our Supreme Court concluded the trial court erred by failing to exercise its discretion in denying a request by the jury to review portions of the transcript. *Barrow*, 350 N.C. at 647-48, 517 S.E.2d at 378-79. In denying the jury's request, the trial court stated as follows:

> Ladies and gentlemen of the jury, although the Court Reporter obviously was taking down and continues to take down everything that's in fact been said during the trial, what she's taking down has not yet been transcribed. And the Court doesn't have the ability to now present to you the transcription of what was said during the course of the trial.

Id. at 646-47, 517 S.E.2d at 378. The trial court further explained that it was "not in the position to be able to comply with that request as far as any transcription of anything said by a witness during the trial[.]" *Id.* at 647, 517 S.E.2d at 378. Reviewing these statements by the trial court, the Supreme Court concluded the trial court's declaration that it lacked the ability to present the transcription suggested a failure to exercise discretion. The *Barrow* Court noted that, although the defendant had no right to copies of the transcript even if available, the trial judge was nevertheless required to exercise his discretion as to whether to have the court reporter read to the jury the testimony of these witnesses. *Id.* at 648, 517 S.E.2d at 379; *see also Johnson*, 346 N.C. at 124, 484 S.E.2d at 375 (holding that the trial court's response to the jury's request—"I'll need to instruct you that we will not be able to replay or review the testimony for you"—indicated that the trial court believed it did not have discretion to consider the request); *State v. Ashe*, 314 N.C. 28, 34-35, 331 S.E.2d 652,

657-58 (1985) (holding that the trial court failed to exercise its discretion in merely stating that the request could not be granted because there was "no transcript at this point").

In comparison to *Barrow*, our Supreme Court has also consistently upheld decisions of the trial court where it exercised discretion. *See, e.g., State v. Lawrence*, 352 N.C. 1, 27-28, 530 S.E.2d 807, 824 (2000) (concluding that the trial court did not impermissibly deny the jury's request to review certain testimony based solely on the unavailability of the transcript where the trial court instructed the jury as follows: "members of the jury, it is your duty to recall the evidence as the evidence was presented. So you may retire and resume your deliberation."), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001); *State v. Fullwood*, 343 N.C. 725, 743, 472 S.E.2d 883, 892 (1996) (concluding that the trial court plainly exercised its discretion in denying the jury request to review testimony where it stated for the record that the testimony would not be sent into the jury room because the previous court reporter who had recorded the testimony had left, but added that the decision was in its discretion and reminded the jury to use its recollection of the evidence), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997); *State v. Burgin*, 313 N.C. 404, 416, 329 S.E.2d 653, 660-61 (1985) (concluding the trial court properly exercised its discretion by telling the jury that, in its discretion, it refused to order the stenographer to type the transcript).

The central issue and distinguishing factor between these two lines of cases is the exercise of discretion on the part of the trial court. Where the trial court clearly indicates it is exercising discretion, a decision to deny a jury request will be upheld. Where the trial court indicates that it lacks discretion to grant or deny a request, such decision is error.

In the instant case, the trial court repeatedly averred both (1) that it "could not" provide the jury with a written transcript and (2) that it was exercising its discretion by denying the jury's request. If, as Defendant urges, we interpret the first statement to mean the trial court believed it had no authority or ability to provide the requested testimony, then these statements directly contradict one another. We do not agree with Defendant's interpretation, however, on the very basis that such an interpretation renders the trial court's statements nonsensical and contradictory. If the trial court truly believed it lacked the ability to provide the requested transcript, there would have been no basis for its repeated statements that it was exercising its discretion. If an act is impossible, it is not a discretionary act.

While we would encourage the trial court to use more care when articulating its grounds for denial of a jury request, we do not conclude the trial court's statements constituted a disavowal of its authority to exercise discretion. "When the trial court states for the record that, in its discretion, it is allowing or denying a jury's request to review testimony, it is presumed that the trial court did so in accordance with N.C.G.S. § 15A-1233." *State v. Weddington*, 329 N.C. 202, 208, 404 S.E.2d 671, 675 (1991). We therefore uphold the judgment of the trial court.

No error.

Judges HUNTER and TYSON concur.

STATE OF NORTH CAROLINA v. RAY MITCHELL SMITH

No. COA03-489

(Filed 20 April 2004)

1. Prisons and Prisoners— malicious conduct by prisoner—no instruction on lesser offense

The trial court did not err in a trial for malicious conduct by a prisoner by not instructing the jury on the alleged lesser included offense of assault on a government official. The State presented evidence as to each essential element of malicious conduct by a prisoner and defendant did not negate the State's evidence. N.C.G.S. § 14-258.4(a).

2. Constitutional Law— effective assistance of counsel—conflict of interest—prior representation of State's witness

The trial court did not err by not removing a defendant's counsel for a conflict of interest where defense counsel had represented a State's witness in an unrelated civil case. Defendant did not point to any instance in which counsel was less than diligent in cross-examining the witness.

Appeal by defendant from judgment dated 29 October 2002 by Judge James L. Baker in Superior Court, Avery County. Heard in the Court of Appeals 3 February 2004.

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

Michael E. Casterline for defendant-appellant.

McGEE, Judge.

Ray Mitchell Smith (defendant) was convicted of malicious conduct by a prisoner. Defendant was sentenced to twenty-one to twenty-six months to be served at the expiration of the sentence for which defendant was incarcerated at the time of the offense. Defendant appeals.

The State's evidence at trial tended to show that defendant was in the custody of Mountain View Correctional Facility on 11 April 2002 when correctional officers Nikki Webb (Officer Webb) and Kevin McMahan (Officer McMahan) conducted a random cell search. As a result of this search, the officers found an extra mattress in defendant's cell, which they removed. Defendant's cell door was locked following the search. Defendant forced his remaining mattress from his cell by pushing it under the cell door. Officer Webb ordered defendant to stop pushing the mattress, but defendant continued to do so.

While forcing the mattress out of his cell, defendant said he wanted to exchange his remaining mattress for the one removed by the officers. Officer Webb told defendant that defendant had been given a choice of which mattress to keep at the time of the removal of the extra mattress and the officers had abided by his decision. When the officers told defendant that they would not return the mattress they had removed, defendant grew agitated, hitting his cell door and verbally abusing Officer Webb. The officers informed the correctional facility's Master Control of defendant's behavior. Defendant continued his disruptive behavior and demanded to see Captain Donny Watkins (Captain Watkins). Captain Watkins arrived and defendant was handcuffed. The officers entered defendant's cell and he began to scream for the return of the mattress. Captain Watkins ordered that defendant be removed from his cell and placed in a holding cell while another search of defendant's cell was completed.

As defendant was being transported to a holding cell, he attempted to kick the attending officers, but the officers forced him to the floor. Officer Webb was standing nearby at the time. Defendant jerked away as he was being assisted into the holding cell and the officers cautioned defendant to calm down. Defendant continued to

curse the officers and Officer Webb, in particular. While Officer Webb waited for the completion of the search of defendant's cell, defendant made a hawking noise and spat on Officer Webb, striking her on her right sleeve. Ella Markland (Markland), a nurse practitioner at the correctional facility, examined Officer Webb following the incident and found no physical injury.

Attorney Doug Hall (Hall) was appointed to represent defendant. At trial, Hall moved to withdraw as counsel for defendant on the ground of conflict of interest based on his past employment by Markland, a witness for the State. After hearing a forecast of Markland's testimony, the trial court denied Hall's motion to withdraw as counsel.

[1] Defendant first argues that the trial court should have instructed the jury, as defendant requested, on the offense of assault on a government official because, according to defendant, that offense is a lesser included offense of malicious conduct by a prisoner.

In general, a defendant is entitled to have the jury instructed as to a lesser included offense when there is sufficient evidence to support that lesser included offense. *State v. Smith*, 351 N.C. 251, 267, 524 S.E.2d 28, 40, *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000). However, "[i]f the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements other than defendant's denial that he committed the offense, defendant is not entitled to an instruction on the lesser offense." *Id.* at 267-68, 524 S.E.2d at 40.

The offense of malicious conduct by a prisoner is defined as:

> Any person in the custody of the Department of Correction . . . who knowingly and willfully throws, emits, or causes to be used as a projectile, bodily fluids or excrement at a person who is an employee of the State or a local government while the employee is in the performance of the employee's duties is guilty of a Class F felony. The provisions of this section apply to violations committed inside or outside of the prison, jail, detention center, or other confinement facility.

N.C. Gen. Stat. § 14-258.4(a) (2003). Accordingly, this Court has found that there are five essential elements that the State must prove in order to prove a defendant guilty of the offense of malicious conduct by a prisoner:

(1) the defendant threw, emitted, or caused to be used as a projectile a bodily fluid or excrement at the victim;

(2) the victim was a State or local government employee;

(3) the victim was in the performance of his or her State or local government duties at the time the fluid or excrement was released;

(4) the defendant acted knowingly and willfully; and

(5) the defendant was in the custody of the Department of Correction . . . at the time of the incident.

State v. Robertson, 161 N.C. App. 288, 292-93, 587 S.E.2d 902, 905 (2003).

The State offered evidence at trial establishing that defendant, a prisoner at a facility operated by the North Carolina Department of Correction, deliberately cleared his throat of phlegm and spat on Officer Webb, an employee of the State. At the time of the incident, Officer Webb was performing her duties as a correctional officer. Thus, the State presented evidence as to each essential element of the offense of malicious conduct by a prisoner and defendant presented no evidence to negate the State's evidence. Therefore, the trial court was under no obligation to instruct the jury on any alleged lesser included offense. Defendant's assignment of error number two is without merit.

[2] In defendant's final assignment of error, he argues that the trial court committed prejudicial error in failing to remove defendant's counsel due to a conflict of interest. Defendant's trial counsel, Hall, had represented Markland, a witness for the State, in a civil matter unrelated to defendant's case. Defendant contends that due to their business relationship, Hall would have been tempted to cross-examine Markland with less vigor than he would employ for other witnesses called by the State. Markland's testimony was offered by the State to corroborate Officer Webb's testimony.

This Court has acknowledged that a criminal defendant "has a constitutional right to effective assistance of counsel[,]" which "includes the 'right to representation that is free from conflicts of interest.' " *State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996) (citations omitted). Our Supreme Court has adopted the two-

part test announced by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), for determining whether a criminal defendant received effective assistance of counsel. *State v. Taylor*, 141 N.C. App. 321, 324, 541 S.E.2d 199, 201 (2000), *cert. denied*, 355 N.C. 499, 564 S.E.2d 231 (2002). That two-part test requires that

> [f]irst, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687, 80 L. Ed. 2d at 693. However, when deciding whether to grant or deny a motion for attorney disqualification, a trial court is afforded substantial latitude. *State v. Taylor*, 155 N.C. App. 251, 255, 574 S.E.2d 58, 62 (2002), *cert. denied*, 357 N.C. 65, 579 S.E.2d 572 (2003).

Defendant has failed to direct this Court to any instance where defendant's trial counsel was less than diligent during the cross-examination of Markland. Because he makes no such showing, there is no indication that defendant was deprived of his right to a fair trial. Thus, defendant's assignment of error number five is overruled.

N.C.R. App. P. 28(b)(6) provides that "[a]ny assignments of error not set out in the appellant's brief, or in support of which no reason or judgment is stated or authority cited, will be taken as abandoned." Therefore, defendant's assignments of error numbers one, three, and four are deemed abandoned.

No error.

Judges WYNN and TYSON concur.

DORIS FRIEND-NOVORSKA, PLAINTIFF v. JAMES C. NOVORSKA, DEFENDANT

No. COA03-668

(Filed 20 April 2004)

Costs— attorney fees—alimony

The trial court did not err in an alimony action by denying plaintiff dependent spouse's motion for attorney fees, because plaintiff was able to subsist and defray the necessary expenses related to prosecuting the action since: (1) plaintiff's income had increased from the date of separation until the date of this action; (2) plaintiff continued to live at the marital residence while defendant voluntarily paid at least half of the monthly mortgage payments; (3) defendant paid plaintiff monthly postseparation support; and (4) defendant had previously paid $2,000 toward plaintiff's attorney fees.

Appeal by plaintiff from order entered 21 February 2003 by Judge Joseph Buckner in Orange County District Court. Heard in the Court of Appeals 16 March 2004.

Hayes Hofler & Associates, P.A., by R. Hayes Hofler, for plaintiff-appellant.

Darsie, Sharpe, Mackritis & Dukelow P.L.L.C., by Lisa M. Dukelow, for defendant-appellee.

TYSON, Judge.

Doris Friend-Novorska ("plaintiff") appeals from an order denying her motion for attorney's fees. We affirm.

I. Background

This is the fourth appeal from the parties to this Court. The first was heard by this Court on 21 October 1998. *Novorska v. Novorska*, 131 N.C. App. 508, 507 S.E.2d 900 (1998) ("*Novorska I*"), *aff'd*, 354 N.C. 564, 556 S.E.2d 294 (2001). We affirmed the trial court's judgment for equitable distribution. *Id.* While that appeal was pending, plaintiff also appealed the order and judgment for alimony. We affirmed the award of alimony but vacated and remanded for the trial court to make appropriate findings of fact to support the amount and duration of the award. *Novorska v. Novorska*, 131 N.C. App. 867, 509 S.E.2d 460 (1998) ("*Novorska II*"), *aff'd*, 354 N.C. 564, 556 S.E.2d 294 (2001). On

remand, plaintiff moved for a new award of alimony and for an award of attorney's fees and costs. The trial court made new findings of fact and awarded plaintiff the same amount and duration of alimony. The trial court denied plaintiff's request for attorney's fees. The plaintiff appealed this denial. We affirmed the award of alimony, and reversed and remanded the trial court's denial of attorney's fees for appropriate findings of facts on whether plaintiff was entitled to attorney's fees. *Novorska v. Novorska*, 143 N.C. App. 387, 545 S.E.2d 788 ("*Novorska III*"), *aff'd*, 354 N.C. 564, 556 S.E.2d 294 (2001). We incorporate the facts from our previous opinions and set forth additional facts necessary to decide this appeal. *Novorska I*, 131 N.C. App. at 510, 507 S.E.2d at 902; *Novorska II*, 131 N.C. App. at 868, 509 S.E.2d at 460; *Novorska III*, 143 N.C. App. at 388, 545 S.E.2d at 790.

Following remand from this Court, the trial court held a hearing on Plaintiff's motion for attorney's fees on 18 March 2002. After hearing oral arguments from each attorney and reviewing the record before it, the trial court concluded that "[d]uring the course of this action, the plaintiff was able to subsist and defray the necessary expenses related to prosecuting this action." The trial court entered an order denying plaintiff's request for attorney's fees on 21 February 2003. Plaintiff appeals.

II. Issue

The sole issue is whether the trial court erred in failing to award plaintiff, the dependent spouse, attorney's fees.

III. Attorney's Fees

N.C. Gen. Stat. § 50-16.4 (2003) sets forth the requirements for awarding attorney's fees to a dependent spouse and states,

> [a]t any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A, or post-separation support pursuant to G.S. 50-16.2A, the court *may*, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony.

(emphasis supplied). We interpreted this statute to require that "[a] spouse is entitled to attorney's fees if that spouse is (1) the dependent spouse, (2) entitled to the underlying relief demanded (e.g., alimony and/or child support), and (3) without sufficient means to defray the costs of litigation." *Barrett v. Barrett*, 140 N.C. App. 369,

374, 536 S.E.2d 642, 646 (2000) (citing *Clark v. Clark*, 301 N.C. 123, 135-36, 271 S.E.2d 58, 67 (1980)). Whether the moving party meets these requirements is a question of law fully reviewable *de novo* on appeal. *Hudson v. Hudson*, 299 N.C. 465, 473, 263 S.E.2d 719, 724 (1980).

Here, the trial court found that plaintiff was the dependent spouse and entitled to alimony. We affirmed the trial court's holdings on these two issues in *Novorska I*, *Novorska II*, and *Novorska III*. The determinative issue at bar is whether the trial court made sufficient findings of fact to conclude that plaintiff was with "sufficient means to defray the costs of litigation." *Barrett*, 140 N.C. App. at 374, 536 S.E.2d at 646.

The trial court found that plaintiff presently is employed as a Personnel Technician II at the University of North Carolina Hospital with an annual salary of $29,900.00, compared to her salary of $17,280.00 per year at the time of separation, an increase of $12,620.00. Plaintiff's job also provides "health insurance at no cost, dental insurance, disability insurance and a retirement plan which requires a six percent (6%) deduction from her salary and the State of North Carolina matches her contribution at the same rate."

The trial court further found that plaintiff retained sole possession of the marital residence and that defendant voluntarily agreed to pay the $1,113.00 per month mortgage payment on the marital residence from the date of separation until this action was filed. These payments allowed plaintiff to secure full-time and permanent employment. After the filing of this action, the parties entered into a consent judgment in which defendant agreed to pay plaintiff $600.00 per month in post-separation funds plus one-half of the monthly mortgage payment in the amount of $578.48. The trial court further found that plaintiff had received an unequal distribution of the marital property and that defendant had already paid $2,000.00 towards plaintiff's attorney's fees.

The trial court's findings that (1) plaintiff's income had increased from the date of separation until the date of this action, (2) plaintiff continued to live at the marital residence while defendant voluntarily paid at least half of the monthly mortgage payments, (3) defendant paid plaintiff monthly post-separation support, and (4) defendant had previously paid $2,000.00 towards plaintiff's attorney's fees supports its conclusion of law that plaintiff "was able to subsist and defray the necessary expenses related to prosecuting the action" and

the denial of plaintiff's motion for attorney's fees. Plaintiff's assignment of error is overruled.

IV. Conclusion

The trial court's findings of fact are supported by substantial evidence and its conclusions of law support its denial of plaintiff's motion for attorney's fees. The order of the trial court is affirmed.

Affirmed.

Judges WYNN and HUNTER concur.

HARALD IBELE, PLAINTIFF v. EVERETTE TATE D/B/A THAT'S WRIGHT AVIATION AND CAROLINA AERO SERVICES, L.L.C., DEFENDANTS

No. COA03-789

(Filed 20 April 2004)

Contempt— enforcement of settlement agreement—inherent powers of court—invocation by parties

The trial court correctly denied a motion to find defendant in contempt under a settlement agreement which stated that it would be enforceable by the contempt powers of the court. The consent order merely recited the settlement agreement, contained no findings or conclusions, and does not represent an adjudication of the parties' respective rights. Contempt is an inherent power of the court which the parties cannot grant or accept; the proper avenues for enforcement include an action for breach of contract, a motion in the cause, and an independent action for a declaratory judgment.

Appeal by plaintiff from order filed 27 February 2003 by Judge Clarence E. Horton, Jr. in Union County Superior Court. Heard in the Court of Appeals 17 March 2004.

Harrington Law Firm, by James J. Harrington, for plaintiff-appellant.

James, McElroy & Diehl, P.A., by Richard S. Wright, for defendant-appellees.

BRYANT, Judge.

Harald Ibele (plaintiff)[1] appeals an order filed 27 February 2003 denying his motion to find Everette Tate d/b/a That's Wright Aviation and Carolina Aero Service, L.L.C. (collectively defendants) in contempt.

In a complaint dated 7 May 2001, plaintiff initiated a lawsuit against defendants for breach of contract and unfair and deceptive practices arising out of defendants' attempt to repair plaintiff's airplane. Following the parties' participation in a mediated settlement conference, a consent order, signed by the trial court and the parties, was entered. In reflecting the parties' agreement, the consent order stated:

> 1. . . . Defendant(s) shall pay . . . [p]laintiff the sum of $5,000.00, and . . . [p]laintiff shall file or cause to be filed a voluntary dismissal with prejudice.
>
> 2. The aforementioned $5,000.00 shall be paid within 120 days of May 1, 2002 unless sooner paid by . . . [d]efendant(s), and shall be paid in four equal monthly installments commencing May of 2002.
>
> 3. Upon 48 hours notice to . . . [d]efendant(s) or defense counsel by [p]laintiff or his attorney, employees of . . . [d]efendant(s) shall collect and assist [p]laintiff in loading the disputed 1958 Cessna 175 airplane, two fuselages, and related parts for removal from [d]efendant(s)' premises. Plaintiff shall be entitled to retain and dispose of the disputed 1958 Cessna 175 airplane, two fuselages, and related parts as he sees fit.
>
> . . . .
>
> 5. Plaintiff's voluntary dismissal with prejudice shall be filed within seven days of the entry of this Order.
>
> . . . .
>
> 7. This Order shall be enforceable by the contempt powers of this Court.

A stipulation of dismissal with prejudice dated 30 May 2002 was thereafter filed by the parties. In January 2003, plaintiff filed a motion for contempt alleging defendants had failed to meet all the require-

1. The judgment appealed from lists plaintiff as Harald Ibele. We note, however, that other orders contained in the record state plaintiff's name as Harold Ibele.

ments of the consent order. On 27 February 2003, the trial court entered an order denying plaintiff's motion for contempt on the basis that "the parties voluntarily dismissed all of their claims with prejudice pursuant to a stipulation of dismissal entered June 13, 2002."

The dispositive issue on appeal is whether the consent order was subject to the contempt powers of the court.

Plaintiff argues on appeal that the trial court erred in denying his motion for contempt based on the court's reasoning that the parties' voluntary dismissal ended all claims between the parties. Because we hold that the consent order was not enforceable by contempt, we need not address this issue.

With respect to non-domestic causes of actions, this Court has held:

> A consent judgment is the contract of the parties entered upon the record with the sanction of the court. Thus, it is both an order of the court and a contract between the parties. If a consent judgment is merely a recital of the parties' agreement and not an adjudication of rights, it is not enforceable through the contempt powers of the court, but only through a breach of contract action.

Potter v. Hilemn Labs., Inc., 150 N.C. App. 326, 334, 564 S.E.2d 259, 265 (2002) (citing *Nohejl v. First Homes of Craven County, Inc.*, 120 N.C. App. 188, 190, 461 S.E.2d 10, 12 (1995) and *Crane v. Green*, 114 N.C. App. 105, 106, 441 S.E.2d 144, 144-45 (1994)); *see also Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) ("[a] consent judgment is a court-approved contract"); *In re Will of Smith*, 249 N.C. 563, 568-69, 107 S.E.2d 89, 93-94 (1959) (a consent judgment is nothing more than a contract between the parties, and "[a] breach of contract is not punishable for contempt").

In this case, the consent order contains no findings of fact or conclusions of law by the trial court and does therefore not represent an adjudication of the parties' respective rights. Instead, the trial court merely recited the parties' settlement agreement. As a result, the consent order "is not enforceable through the contempt powers of the court."[2] *Potter*, 150 N.C. App. at 334, 564 S.E.2d at 265.

We next address whether, in an attempt to overcome the general law on consent orders, the parties could contract to be bound by the

2. We note that the outcome of this analysis would differ if the trial court had made findings of fact and conclusions of law, thereby adjudicating the parties' rights.

contempt powers of the court, as paragraph seven of the consent order specifically provided for enforcement by contempt. Our Supreme Court has stated that a court's authority to hold a party in contempt is part of the inherent powers of the court, *see In re Alamance County Court Facilities*, 329 N.C. 84, 94, 405 S.E.2d 125, 129 (1991) ("[t]his Court has upheld the application of the inherent powers doctrine to a wide range of circumstances, from dealing with its attorneys, to punishing a party for contempt") (citations omitted), and "the exercise of inherent power by courts of this state has been limited to matters discretely within the judicial branch," *id.* Moreover, "[t]he purpose of the contempt power . . . is to use the *court's* power to compel [a] defendant to comply with an *order of the court.*" *Ferree v. Ferree*, 71 N.C. App. 737, 741, 323 S.E.2d 52, 55 (1984) (emphasis added). As the consent order in this case essentially represents a contract between the parties, the court has no authority to exercise its inherent contempt power, and the parties have no right to grant or accept a power held only by the judiciary, which includes the potential for imprisonment. *See id.*; *see also*, *e.g.*, N.C.G.S. § 5A-11(a)(3), -21(b) (2003) (allowing for the possible application of criminal contempt or civil contempt coupled with imprisonment to the facts of this case).

Accordingly, the trial court did not err in denying plaintiff's motion for contempt. Proper avenues for enforcement of the consent order entered by the parties include: (1) an action for breach of contract, (2) a motion in the cause to seek specific performance of the consent order, and (3) an independent action for a declaratory judgment on the parties' contract embodied in the consent order. *See Hemric v. Groce*, 154 N.C. App. 393, 397-98, 572 S.E.2d 254, 257 (2002).

Affirmed.

Judges McCULLOUGH and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

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PARIKH v. ENTREPRENEUR, INC. No. 03-352	Wake (02CVD5893)	Affirmed
PRECISION WALLS, INC. v. UBC No. 03-394	Mecklenburg (02CVS1413)	Dismissed in part, reversed in part, affirmed in part
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