NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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1. Appointed and sworn in 1 August 2005 to replace Vance Bradford Long.

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CONSTITUTION OF UNITED STATES CITED

CONSTITUTION OF NORTH CAROLINA CITED

RULES OF EVIDENCE CITED

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RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

HARRY E. STETSER, DALE E. NELSON, AND MICHAEL DE MONTBRUN, INDIVIDUALLY AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS V. TAP PHARMACEUTICAL PRODUCTS, INC.; ABBOTT LABORATORIES; TAKEDA CHEMICAL INDUSTRIES, LTD.; JOHNSON & JOHNSON; ETHICON ENDO-SURGERY, INC.; INDIGO LASER CORPORATION; DAVID JETT; CHRISTOPHER COLEMAN; SCOTT HIDALGO; AND EDDY JAMES HACK, DEFENDANTS

No. COA03-901

(Filed 6 July 2004)

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

Although the trial court's 24 April 2003 order certifying a class action was interlocutory in nature and appellate review of this interlocutory order is usually inappropriate because the order does not affect a substantial right, the Court of Appeals exercised its discretion to grant defendants' petition for writ of certiorari under N.C. R. App. P. 21.

2. Conflict of Laws— common law fraud—civil conspiracy—tortious concert of action—unfair or deceptive trade practices

A de novo review revealed that the trial court erred by finding that the common issues of law pertaining to plaintiffs' class action including common law fraud, civil conspiracy, concert of action, and violation of consumer fraud protection statutes are questions of whether defendants violated North Carolina law without regard to the location of those plaintiffs or their state of

residence and the case is remanded for further findings on the state law to be applied to the claims involved, because: (1) according to North Carolina's choice of law rules, the law of North Carolina would control the procedural matters in this class action lawsuit such as determining the statute of limitations, but the substantive law of the state where the injury occurred would be applied to plaintiffs' claim for common law fraud, civil conspiracy, and tortious concert of action, as well as determining what damages were available to plaintiffs for any liability resulting from those claims; (2) the substantive law of the state with the most significant relationship or where the injury occurred would control plaintiffs' claims for unfair or deceptive trade practices and determine the damages available; (3) the trial court's application of North Carolina law to a nationwide plaintiff class will pass constitutional muster only if the substantive laws of each of these states does not materially differ from North Carolina's law on plaintiffs' claims, and the trial court failed to make any findings of fact regarding the differences between state laws which potentially would apply according to the conflict of law rules; and (4) the trial court violated due process when it failed to make findings to show that North Carolina's contacts with all of the claims involved in this class action were not so arbitrary as to render unfair application of our law.

3. Class Actions— factors—common issues of law

Although defendants contend the trial court erred by finding that plaintiffs met the burden of showing the existence of all the factors necessary to satisfy N.C.G.S. § 1A-1, Rule 23(a) for class certification, the Court of Appeals already reversed and remanded the certification order for other reasons and the trial court's further findings of fact on remand will determine whether common issues of law are present, whether a class action is the appropriate method for disposing of this litigation, and whether class certification is appropriate as to the claims against some or all of defendants.

4. Appeal and Error— appealability—interlocutory order—denial of motion to amend pleadings—writ of certiorari

Although defendant appeals from the trial court's 14 April 2003 order denying its motion to amend its answer, the order denying an amendment of the crossclaims for contribution and unfair trade practices is interlocutory and did not affect a substantial right, because: (1) although both crossclaims involve

some of the same parties and possibly some of the same transactions as the underlying lawsuit, the crossclaims deal with the much different issue of whether the individual defendants are liable to the corporate defendants; (2) defendant has not shown that it will be subject to two trials on the same issue or that inconsistent verdicts would result if it was involved in two trials as a result of the trial court's denial of its motion to amend; and (3) even though the Court of Appeals granted defendant's petition for certiorari in order to address the merits of this issue, it cannot be said that the trial court abused its discretion by concluding that amendment of defendant's answer to include crossclaims was untimely and prejudicial.

Appeal by defendants from orders entered 14 April 2003 and 24 April 2003 by Judge Paul L. Jones in New Hanover County Superior Court. Heard in the Court of Appeals 31 March 2004.

The Blount Law Firm, P.L.L.C., by Marvin K. Blount, Jr. and Marvin K. Blount, III, and Kline & Specter, P.C., by Donald E. Haviland, Jr., pro hac vice, and TerriAnne Benedetto, for plaintiff-appellees.

Smith Moore LLP, by J. Donald Cowan, Jr. and Shannon R. Joseph, and Jones Day, by Daniel E. Reidy, pro hac vice, for defendant-appellant TAP Pharmaceutical Products, Inc.

Womble, Carlyle, Sandridge, & Rice, PLLC, by Pressly M. Millen, for defendant-appellant Abbott Laboratories.

Alston & Bird, LLP, by George O. Winborne, John J. Barnhardt, III, and Lance A. Lawson, and Patterson, Belknap, Webb & Tyler, LLP, by William F. Cavanaugh, Jr., pro hac vice, for defendant-appellants Johnson & Johnson and Ethicon Endo-Surgery, Inc.

Stubbs & Perdue, P.A., by George Mason Oliver and Trawick H. Stubbs, Jr., for defendant-appellee Scott Hidalgo.

Gary S. Parsons, for the North Carolina Association of Defense Attorneys, amicus curiae.

Philip R. Isley, Daniel J. Popeo, pro hac vice, Richard A. Samp, pro hac vice, and George M. Teague, for Washington Legal Foundation and North Carolina Citizens for Business and Industry, amicus curiae.

MARTIN, Chief Judge.

Defendants TAP Pharmaceutical Products, Inc. (TAP), Abbott Laboratories (Abbott), Johnson & Johnson (Johnson) and Ethicon Endo-Surgery (Ethicon) appeal from the trial court's order certifying plaintiffs' class action lawsuit against defendants. Defendant TAP also appeals a separate order denying its motion to amend its answer to add a crossclaim.

I. Facts

Plaintiffs Harry E. Stetser, Dale E. Nelson and Michael de Montbrun filed this action in New Hanover County on 31 December 2001. Plaintiffs allege that defendants inflated the price of the prescription drug Lupron® from 1991 to 2001, thereby defrauding patients and insurance companies in North Carolina and throughout the United States in violation of the federal Prescription Drug Marketing Act (PDMA). Lupron® is used to treat patients with prostate cancer, endometriosis, female infertility, central precocious puberty in children and for preoperative treatment of patients with uterine fibroid-caused anemia. Lupron®, which is only available in liquid form, is administered by injection, usually in a doctor's office or hospital setting.

A. Parties

Defendants Abbott and Takeda are the joint owners of defendant TAP. TAP manufactures Lupron®. Takeda is a Japanese corporation, with headquarters in Osaka, Japan. Takeda's United States headquarters is located in Illinois. Abbott and TAP's principal offices are located in Illinois as well. On 3 October 2001, defendant TAP entered a plea of guilty to federal criminal charges stemming from an alleged conspiracy to violate the PDMA by inflating the price of Lupron®. Defendant TAP agreed to repay the federal government for the overcharges to Medicare and other federal programs as a result of the PDMA violations.

Defendant Johnson is headquartered in New Jersey, while its wholly-owned subsidiaries Ethicon and Indigo both have headquarters in Ohio. Indigo markets the "LASEROPTIC Treatment System," a procedure used to treat patients with enlarged prostate glands having a condition known as benign prostatic hyperplasia.

Individual defendants David Jett, Christopher Coleman, and Scott Hidalgo were employees of Indigo during the period at issue in this lawsuit. Defendant Eddy James Hack was the owner of Oncology

Solutions, also known as International Oncology Network, which was a community-based oncology network. Jett and Coleman are residents of North Carolina, while Hidalgo and Hack are residents of the state of Florida. Jett, Coleman, Hidalgo and Hack pled guilty to a criminal information charging them with conspiracy to violate the PDMA in connection with the diversion and marketing of Lupron®.

B. Members of Plaintiff Class

The named plaintiffs, Harry E. Stetser, Dale E. Nelson and Michael de Montbrun, are all residents of North Carolina. The remaining members of the class are:

> All persons and entities in North Carolina and throughout the United States who paid any portion of the cost of Lupron® based upon, in whole or in part, the published AWP for Lupron® (and/or Zoladex® in LCA states). Excluded from the Class are Defendants, any entity in which Defendants have a controlling interest, and their legal representatives, heirs, successors, and any governmental entities.

According to plaintiffs, three types of individual patients were disadvantaged by defendants' marketing scheme: (1) Government Assistance Patients (including individuals who relied on government assistance programs to pay, partially or in full, the cost of their medical care, including Medicare, Medicaid, and TRICARE [formerly known as CHAMPUS]); (2) Private Assistance Patients (including patients whose medical care was paid for in part or totally by private health insurance carriers); and (3) No Assistance Patients (individuals who had no insurance or government assistance to cover their medical costs). Although the federal government reached a settlement with several of the defendants, the settlement did not include reimbursement to individuals who were overcharged co-payments for Lupron® as a result of this conspiracy, nor did the settlement include reimbursement of private health insurance carriers for their alleged overpayments. Therefore, the plaintiff class includes individuals with no insurance nor government assistance, individuals who made co-payments for Lupron® while covered by government assistance programs, individuals who made co-payments while covered by private medical insurance, and private health insurance carriers.

C. Allegations

Plaintiffs allege defendants created an elaborate scheme in order to profit illegally from the sale of Lupron® throughout the United

States. Plaintiffs contend defendants used several methods to inflate the average wholesale price (AWP) of Lupron®. Government programs and private insurers usually set the amount of reimbursement to medical providers based upon the published AWP. The AWP also affects the amount of patients' co-payments made when they receive prescription drugs. The AWP is listed in a pharmaceutical industry publication called the *Red Book*. The plaintiffs allege defendants deliberately reported a higher AWP to the *Red Book*, which increased reimbursement and co-payment amounts for government insurers, private insurers and patients.

Plaintiffs further contend defendants encouraged medical providers to administer Lupron® by selling the drug to them at its actual cost. Therefore, the medical providers were charging patients, private insurance companies and the government the higher AWP while paying a lower actual cost of the drug. The difference between the amount medical providers charged for Lupron® and the cost they paid to acquire the drug accrued to the medical providers. Defendants referred to this difference in internal memos as "spread", "return to practice," "return on investment" or "profit".

Plaintiffs also allege defendants would provide free samples of Lupron® to medical providers and encourage them to seek reimbursement from the government programs, private insurers, or individual patients for those free samples. The misuse of these free samples by medical providers further inflated the AWP by increasing market demand for Lupron®. Also, defendants offered illegal incentives to medical providers to encourage them to use Lupron®, including promises of debt repayment, trips to resort areas, and free consulting services. Plaintiffs allege these actions encouraged physicians to use Lupron® and thereby increased the AWP of Lupron® even further.

The Lupron® price inflation scheme was a direct violation of the PDMA. Several of defendant TAP's employees, as well as several physicians, were indicted for conspiracy to violate the PDMA. As noted above, defendant TAP pled guilty to the federal criminal conspiracy charges, along with individual defendants Jett, Coleman, Hidalgo and Hack.

D. Procedural History

Plaintiffs filed this lawsuit on 31 December 2001, asserting claims for unjust enrichment, fraud, civil conspiracy, concert of action/

aiding and abetting and violation of various consumer fraud and antitrust laws. Motions by defendants TAP and Abbott to dismiss, as well as to stay or dismiss the lawsuit pursuant to N.C. Gen. Stat. § 75-12.1, were denied on 13 May 2002, as were motions to dismiss pursuant to Rule 12(b)(6) by defendants Johnson, Ethicon and Indigo.

Defendant TAP filed its answer to the complaint on 29 April 2002. Defendants Johnson, Ethicon and Indigo filed a separate answer on 29 April 2002. Defendant Abbott's answer was filed on 1 May 2002. All defendants asserted affirmative defenses in their answers, but did not include any crossclaims.

On 28 May 2002, plaintiffs asked the trial court to certify a plaintiff class consisting of

> [a]ll persons in North Carolina and throughout the United States who paid any portion of the cost of Lupron®, which cost was based upon, in whole or in part, the published AWP for Lupron®.

The trial court entered a scheduling order for discovery on the question of class certification on 22 August 2002, which it amended on 19 September 2002.

Defendants TAP, Abbott and Johnson filed a motion to compel on 8 November 2002, requesting that the trial court order plaintiffs to submit settlement agreements entered into with the individual defendants Jett, Coleman, Hidalgo and Hack. Plaintiffs' counsel asserted that plaintiffs settled their claims against the individual defendants approximately three months before the motion to compel was filed. Defendants argued that the settlement agreements were final and the case should be removed to federal court. Plaintiffs responded that they could not produce the settlement agreement with the individual defendants because the agreements were not complete. The trial court denied defendants' motion to compel by an order filed 26 November 2002.

Defendants removed the lawsuit to federal court on 26 November 2002, basing their motion on diversity of citizenship. Defendants also moved to sever the individual defendants from the lawsuit. Plaintiffs filed a motion to remand the case to North Carolina state court. The federal district court ruled that the settlement between plaintiffs and the individual defendants was not "final nor binding at the time of removal." Without a "final" settlement, the individual defendants could not be removed from the lawsuit. Unless individual defendant Coleman was removed from the lawsuit, no diversity of

citizenship existed to give the federal court jurisdiction. The district court remanded the lawsuit to North Carolina state court and denied plaintiffs' motion for punitive sanctions in an order filed 20 December 2002.

On 9 January 2003, plaintiffs requested the trial court's preliminary approval of the settlement reached with the individual defendants Jett, Coleman, Hidalgo and Hack. On 3 February 2003, defendant TAP moved for leave to amend its answer to assert a crossclaim against the individual defendants, seeking contribution as well as recovery for tortious interference with contract and unfair trade practices. The trial court denied the motion to amend in an order filed 14 April 2003, stating that no basis existed "for tolling of the time within which Defendant was required to assert its Crossclaim."

On 24 April 2003, the trial court granted plaintiffs' motion for certification of the class action. Defendants TAP, Abbott, Johnson, Ethicon and Indigo immediately appealed.

After the record on appeal was filed 10 July 2003, plaintiffs filed several motions with this Court requesting dismissal of defendants' briefs and sanctions. The trial court's 24 April 2003 order specifically exempted defendant Takeda from its order. Takeda had appealed the trial court's order entered 17 October 2002 denying Takeda's motion to dismiss for lack of jurisdiction, and this Court reversed that decision, holding that North Carolina had no personal jurisdiction over Takeda. *Stetser v. TAP Pharmaceutical Products*, 162 N.C. App. 518, 591 S.E.2d 572 (2004). Therefore, defendant Takeda is not properly considered part of this lawsuit or this appeal.

E. Similar Lawsuits

On 9 October 2001, in the State Superior Court of New Jersey, Cape May County, named plaintiff Bernard Walker filed an action against defendants TAP, Abbott and Takeda, alleging claims of unjust enrichment, fraud, civil conspiracy/concert of action and violations of consumer protection statutes. Walker alleged that defendants created a price-fixing scheme that inflated the price of Lupron®, affecting Medicare Part B patients. By an order on 29 August 2003, the class certified in New Jersey state court was defined as: "All persons and entities in New Jersey who paid any portion of the cost of Lupron® from 1991 to the present which cost was based, in whole or in part on the AWP for Lupron (and/or Zoladex)." Plaintiff Walker's request for certification of a nationwide plaintiff's class was denied.

On 28 June 2002, in the Superior Court of Arizona, Maricopa County, named plaintiff Robert J. Swanston filed an action against defendants TAP, Abbott, Takeda, Johnson, Ethicon, Indigo, Jett, Coleman, Hack, and Hidalgo, along with several other individual and corporate defendants. Swanston's complaint sought certification of a class that included "[a]ll persons and entities in Arizona and throughout the United States who paid any portion of the cost of Lupron®, Zoladex®, or other prostate cancer and prescription drugs manufactured, marketed, sold and distributed by Defendants, which cost was based, in whole or in part, upon the published AWPs for these drugs." The complaint set out claims for unjust enrichment, fraud, civil conspiracy, concert of action and violation of consumer protection statutes.

In the Federal District of Massachusetts United States District Court, an action was filed by several corporate plaintiffs, including named plaintiffs Empire Healthchoice, Inc., Blue Cross and Blue Shield of Florida, Inc., Health Options, Inc., and Trigon Insurance Company. This litigation was based upon an alleged illegal marketing and sales scheme for Lupron® by defendants TAP, Abbott and Takeda.

On 12 March 2002, the Circuit Court of the First Judicial Circuit of Williamson County, Illinois certified a national class action lawsuit. The named plaintiff, Acie C. Clark, sued defendants TAP, Abbott, and Takeda based upon improper marketing of Lupron®. The class included: "All individuals or non-ERISA third-party payor entities in the United States who paid any portion of the 20% co-payment or deductible amount for beneficiaries under the Medicare Part B for Lupron® during the period 1993 through the present (the class period)." This class certification has been affirmed by the Illinois Court of Appeals in *Clark v. TAP Pharmaceutical Products, Inc.*, 798 N.E.2d 123 (Ill. App. Ct. 2003).

II. Interlocutory Certification Order

Defendants argued thirty-five of their thirty-six assignments of error contained in the record on appeal. The remaining assignment of error is deemed abandoned. N.C. R. App. P. 28(a).

[1] Plaintiffs argue that the order certifying the class action is interlocutory and defendants' appeal should be dismissed. "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, 362, 57 S.E.2d 377, 381 (1950). "An appeal from a nonappealable interlocutory order is fragmentary and premature and will be dismissed." *Hoots v. Pryor*, 106 N.C. App. 397, 400, 417 S.E.2d 269, 272, *disc. rev. denied*, 332 N.C. 345, 421 S.E.2d 148 (1992) (citation omitted). However, if a trial court enters "a final judgment as to one or more but fewer than all of the claims or parties" and "there is no just reason for delay," the interlocutory appeal can be reviewed. N.C. Gen. Stat. § 1A-1, Rule 54(b). An interlocutory appeal also "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[.]" N.C. Gen. Stat. § 1-277(a) (2003); *see also* N.C. Gen. Stat. § 7A-27(d) (2003).

None of the parties here deny that the 24 April 2003 order certifying the class action was interlocutory in nature. However, defendants argue that appellate review of this interlocutory order is appropriate because the order affects a substantial right. In order to determine whether a substantial right has been affected "[e]ssentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury if not corrected before appeal from final judgment." *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 292, 420 S.E.2d 426, 428 (1992) (quoting *Goldston v. American Motors Corp.*, 326 N.C. 723, 392 S.E.2d 735 (1990)). "If the appellant's rights 'would be fully and adequately protected by an exception to the order that could then be assigned as error on appeal after final judgment,' there is no right to an immediate appeal." *Horne v. Nobility Homes, Inc.*, 88 N.C. App. 476, 477, 363 S.E.2d 642, 643 (1988) (quoting *Bailey v. Gooding*, 301 N.C. 205, 210, 270 S.E.2d 431, 434 (1980)). "Whether a substantial right will be prejudiced by delaying appeal must be determined on a case by case basis." *Stafford v. Stafford*, 133 N.C. App. 163, 165, 515 S.E.2d 43, 45 (citing *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982)); *aff'd per curiam*, 351 N.C. 94, 520 S.E.2d 785 (1999).

The denial of class certification has been found to be an interlocutory order that affects a substantial right, meaning that such orders are, in most cases, immediately appealable. *See Frost v. Mazda Motors of Am., Inc.*, 353 N.C. 188, 540 S.E.2d 324 (2000); *Dublin v. UCR, Inc.*, 115 N.C. App. 209, 444 S.E.2d 455, *disc. rev. denied*, 337 N.C. 800, 449 S.E.2d 569 (1994); *Crow v. Citicorp*

Acceptance Co., 79 N.C. App. 447, 339 S.E.2d 437 (1986), *rev'd on other grounds*, 319 N.C. 274, 354 S.E.2d 459 (1987); *Perry v. Cullipher*, 69 N.C. App. 761, 318 S.E.2d 354 (1984). Conversely, "no order allowing class certification has been held to similarly affect a substantial right such that interlocutory appeal would be permitted." *Frost*, 353 N.C. at 193, 540 S.E.2d at 328; *see also Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 374-75, 424 S.E.2d 420, 429, *aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993). However, these general rules are not dispositive of this case, because each interlocutory order must be analyzed to determine whether a substantial right is jeopardized by delaying the appeal. "It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

Defendants here argue their substantial rights are affected by the trial court's certification order and those rights can only be protected by an immediate appeal. Defendants contend the class certification order violates their due process rights because it applies North Carolina law to plaintiffs' claims throughout the nation. Defendants also argue the order creates the possibility they will face more than one trial on the same factual issues which may result in inconsistent verdicts. Plaintiffs contend defendants' appeal should be dismissed in its entirety because it is premature and no substantial right is affected.

Plaintiffs base their argument for dismissal upon the *Frost* and *Faulkenbury* cases. In both of those cases, our appellate courts found that an interlocutory order allowing class certification did not affect a substantial right. *See Frost*, 353 N.C. at 194, 540 S.E.2d at 328; *Faulkenbury*, 108 N.C. App. at 375, 424 S.E.2d at 429. In *Faulkenbury*, the defendants sought interlocutory review alleging the named plaintiff lacked standing to represent the class, individual issues predominated over common issues, and the class action was not an efficient method to resolve the case because it was "complex, expensive and time consuming." *Faulkenbury*, 108 N.C. App. at 375, 424 S.E.2d at 429. Similarly, the defendants in *Frost* challenged the trial court's interlocutory order granting class certification on grounds the plaintiffs lacked representative capacity and the class claims differed too much to be adjudicated as a class action. *Frost*, 353 N.C. at 194, 540 S.E.2d at 328. The arguments for interlocutory appeal in both cases

were based upon the trial court's application of the class action criteria listed in Rule 23(a) and discussed in *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 354 S.E.2d 459 (1987).

Defendants in this case raise essentially the same arguments about the trial court's application of the class action criteria. However, unlike *Frost* and *Faulkenbury*, here defendants argue the trial court's order violates their due process rights and exposes them to multiple trials with possibly conflicting verdicts. Although defendants' arguments differ from those presented in *Frost* and *Faulkenbury*, we do not find them persuasive. We hold the trial court's interlocutory class certification order did not affect a substantial right.

However, defendants have asked alternatively that this Court treat their appeal as a petition for certiorari according to Rule 21(a)(1). "[A] writ of certiorari will only be issued upon a showing of appropriate circumstances in a civil case where the right to appeal has been lost by failure to take timely action or where no right to appeal from an interlocutory order exists." *Graham v. Rogers*, 121 N.C. App. 460, 464, 466 S.E.2d 290, 293 (1996). We recognize the significance of the issues in dispute in this action; the order which defendants request that we review affects numerous individuals and corporations and involves a substantial amount of potential liability. As a result of the significant impact of this lawsuit, the importance of the issues involved and the need for efficient administration of justice, we exercise our discretion to reach the merits of defendants' appeal and grant the petition for writ of certiorari according to Rule 21.

III. Choice of Law

[2] Defendants assign error to the trial court's finding that the common issues of law pertaining to the class are questions of whether defendants violated North Carolina law. This finding has the effect of applying North Carolina law to class plaintiffs' claims, although the plaintiffs themselves are located throughout the United States. Defendants argue this order ignores North Carolina's conflict of law rules and violates defendants' and out-of-state class plaintiffs' substantive due process rights. Plaintiffs respond that it is appropriate to use North Carolina law because our substantive law does not differ substantially from the law in other states and defendants' purported behavior is unlawful throughout the country.

A. The Trial Court's Findings

As part of the 24 April 2003 certification order, the trial court made the following findings of fact:

22. There are questions of fact and law common to the Class, which common questions predominate over any questions affecting only individual members. Included among these common questions are the following:

    a. Whether the defendants engaged in the common, fraudulent scheme and conspiracy alleged;

    b. The scope and impact of TAP's guilty plea, and whether the same admits certain aspects of the fraudulent scheme and conspiracy alleged;

    c. Whether and to what extent the defendants' unlawful provision of free samples of Lupron® to doctors, to which TAP pled guilty, caused injury and damages to the Class;

    d. Whether the defendants unlawfully inflated and otherwise misrepresented the AWPs for Lupron® through the *Red Book* and other publications;

    e. Whether the defendants unlawfully promoted the spread between the *Red Book* AWP for Lupron® and the actual cost to doctors as part of a common, fraudulent scheme and conspiracy to promote the sale of Lupron®;

    f. Whether the defendants engaged in a pattern and practice of deceiving and defrauding the Class and concealing their unlawful scheme and conspiracy;

    g. Whether the defendants' fraudulent scheme as alleged constitutes a violation of the North Carolina Consumer Fraud Act, N.C.G.S. §§ 75-1, *et seq.*;

    h. Whether the defendants violated the North Carolina common law of fraud;

    i. Whether the defendants engaged in a conspiracy, concerted action, or aiding and abetting/facilitating in violation of North Carolina law; and

    j. Whether and to what extent the plaintiffs and the members of the Class are entitled to relief and, if so, the nature of such relief.

The trial court did not make any further findings within its order indicating that any state law other than North Carolina's would be applied to any of the plaintiffs' claims, and made no specific findings regarding the choice of law issue. However, it is implicit within the order that North Carolina law would be applied to all plaintiffs and all plaintiffs' claims, without regard to the location of those plaintiffs or their state of residence. This finding effectively works as a conclusion of law that North Carolina law would govern the dispute between the plaintiff class and defendants.

B. Standard of Review

A trial court's application of North Carolina's conflict of law rules is a legal conclusion which this Court reviews under a *de novo* standard. In addition, defendants argue their due process rights are violated by the trial court's order. "It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated." *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). In *de novo* review, "the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence." *Bledsole v. Johnson*, 357 N.C. 133, 138, 579 S.E.2d 379, 381 (2003) (quoting *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989)).

C. Conflicts of Law

The allegations contained in the complaint here raised several distinct bases for recovery. The trial court certified four of these issues as common issues of law for the plaintiff class: common law fraud, civil conspiracy, concert of action and violation of consumer fraud protection statutes. To determine the appropriateness of the trial court's application of North Carolina law to all plaintiffs' claims, we must first determine what law should be applied to those claims according to our conflict of law rules.

"Our traditional conflict of laws rule is that matters affecting the substantial rights of the parties are determined by lex loci, the law of the situs of the claim, and remedial or procedural rights are determined by lex fori, the law of the forum. For actions sounding in tort, the state where the injury occurred is considered the situs of the claim." *Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 853-54 (1988) (citation omitted). Therefore, for the causes of action

that are normally considered to be torts (common law fraud, civil conspiracy and tortious acting in concert), the law of the state where the plaintiff was injured controls the outcome of the claim.

In contrast, "[a]n action for unfair or deceptive acts or practices is 'the creation of statute. It is, therefore . . . neither wholly tortious nor wholly contractual in nature." *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 230, 314 S.E.2d 582, 584, *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984) (quoting *Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 768, 779 (Mass. 1975)). The conflict of law rule regarding the substantive law to be applied to unfair or deceptive trade practices, however, is subject to a split of authority within our courts. One panel of this Court held that "the law of the state having the most significant relationship to the occurrence giving rise to the action" should be applied to the claim. *Andrew Jackson Sales v. Bi-Lo Stores*, 68 N.C. App. 222, 225, 314 S.E.2d 797, 799 (1984) (citing *Michael v. Greene*, 63 N.C. App. 713, 306 S.E.2d 144 (1983)). However, a different panel of this Court criticized that holding, stating the better rule is that "the law of the state where the injuries are sustained should govern" claims under N.C. Gen. Stat. § 75-1.1. *United Virginia Bank v. Air-Lift Associates*, 79 N.C. App. 315, 321, 339 S.E.2d 90, 93 (1986) (quoting *ITCO Corp v. Michelin Tire Corp.*, 722 F.2d 42, 49-50, n.11 (4th Cir. 1983), *cert. denied*, 469 U.S. 1215, 84 L. Ed. 2d 337 (1985)). The *United Virginia* court stated that the "most significant relationship" test, normally applied to claims under the UCC, should not be applied in unfair trade practices claims. *See United Virginia*, 79 N.C. App. at 322, 339 S.E.2d at 94. As a result of this split of authority, which has not been resolved by our Supreme Court, we will analyze the trial court's order under both standards.

Ordinarily, statutes of limitation are considered to be procedural rules for conflicts of law purposes. *See Boudreau*, 322 N.C. at 340, 368 S.E.2d at 857; *Sun Oil Co. v. Wortman*, 486 U.S. 717, 100 L. Ed. 2d 743 (1988). "And the law of the place where rights were acquired or liabilities incurred also governs the award of damages, they being substantive in nature." *Transportation, Inc. v. Strick Corp.*, 16 N.C. App. 498, 500, 192 S.E.2d 702, 704 (1972), *rev'd on other grounds*, 283 N.C. 423, 196 S.E.2d 711 (1973); *see also Ivey v. Rollins*, 250 N.C. 89, 108 S.E.2d 63 (1959) (applying substantive law of state where plaintiff injured to determine damages), *rev'd on other grounds by Greene v. Nichols*, 274 N.C. 18, 161 S.E.2d 521 (1968); *Robinson v. Leach*, 133 N.C. App. 436, 514 S.E.2d 567, *disc. rev. denied*, 350 N.C. 835, 539 S.E.2d 293 (1999).

Therefore, according to North Carolina's choice of law rules, as traditionally applied, the law of North Carolina would control the procedural matters in this class action lawsuit, such as determining the statute of limitations. However, the substantive law of the state where the injury occurred would be applied to the plaintiffs' claims for common law fraud, civil conspiracy and tortious concert of action, as well as determining what damages were available to plaintiffs for any liability resulting from those claims. The substantive law of the state (1) with the most significant relationship or (2) where the injury occurred would control plaintiffs' claims for unfair or deceptive trade practices and determine the damages available.

D. North Carolina's Substantive Law

In its order, the trial court did not distinguish between the substantive and procedural law of North Carolina, nor did it make any finding or conclusion that North Carolina's substantive law should govern plaintiffs' claims. Instead, the trial court held that the common issues of law which must be found to certify the plaintiffs' class were common issues of North Carolina law. This analysis is an indirect way of stating that plaintiffs' claims would be determined according to North Carolina's substantive law.

Defendants argue the trial court's choice of North Carolina law violates due process rules established by the United States Supreme Court in the recent past. The case of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 86 L. Ed. 2d 628 (1985), appears to be directly on point in this matter. In *Shutts*, a group of plaintiffs sued an oil company, seeking recovery of interest payments owed to them by the company. *Id.* "The Kansas courts applied Kansas contract and Kansas equity law to every claim in this case, notwithstanding that over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit." *Shutts*, 472 U.S. at 814-15, 86 L. Ed. 2d at 643-44. However, despite this blanket application of one state's law, the Supreme Court held that "[t]here can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit." *Shutts*, 472 U.S. at 816, 86 L. Ed. 2d at 645.

Applying the holding in *Shutts* to the case at bar, the trial court's unsubstantiated choice to apply North Carolina law to the plaintiffs' claims does not violate defendants' due process rights unless a material difference exists between North Carolina law and the law of another jurisdiction connected with this lawsuit. Because the trial

court certified this class as a nationwide plaintiffs' class, we must therefore assume that plaintiffs are located in each state, meaning that all fifty states are jurisdictions connected with this lawsuit. The trial court's application of North Carolina law to a nationwide plaintiff class will pass constitutional muster only if the substantive laws of each of these states does not materially differ from North Carolina's law on plaintiffs' claims.

1. Civil Conspiracy

In North Carolina law, "[t]he elements of a civil conspiracy are: (1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme." *Privette v. University of North Carolina*, 96 N.C. App. 124, 139, 385 S.E.2d 185, 193 (1989) (citing *Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E.2d 562 (1981)). A majority of states require proof that the conspirators complete an overt act in furtherance of the conspiracy before they can be found liable.[1] *See AmSouth Bank, N.A. v. Spigener*, 505 So. 2d 1030 (Ala. 1986), *Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.*, 869 P.2d 454 (Cal. 1994); *Nelson v. Elway*, 908 P.2d 102 (Colo. 1995); *Harp v. King*, 835 A.2d 953 (Conn. 2003); *Weishapl v. Sowers*, 771 A.2d 1014 (D.C. 2001); *Fritz v. Johnston*, 807 N.E.2d 461 (Ill. 2004); *McClure v. Owens Corning Fiberglas Corp.*, 720 N.E.2d 242 (Ill. 1999); *Wright v. Brooke Group, Ltd.*, 652 N.W.2d 159 (Iowa 2002); *State ex rel. Mays v. Ridenhour*, 811 P.2d 1220 (Kan. 1991); *Louisiana v. McIlhenny*, 9 So. 2d 467 (La. 1942); *Alleco, Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 665 A.2d 1038 (Md. 1995); *Adm. Ins. Co. v. Columbia Casualty Ins. Co.*, 486 N.W.2d 351 (Mich. Ct. App. 1992); *Schumacker v. Meridian Oil Co.*, 956 P.2d 1370 (Mont. 1998); *Appeal of Armaganian*, 784 A.2d 1185 (N.H. 2001); *Gosden v. Louis*, 687 N.E.2d 481 (Ohio Ct. App. 1996); *GMH Assocs., Inc. v. Prudential Realty Group*, 752 A.2d 889 (Pa. Super. Ct. 2000); *Frankenbach v. Rose*, —

1. According to a chart presented by plaintiffs and labeled Exhibit 16 MMM, the following states require evidence of an overt act to find liability for civil conspiracy: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. This chart was submitted with the affidavit by attorney John Haviland, as part of plaintiffs' motion for class certification. On the chart, North Carolina was erroneously identified as a state that required an overt act to find liability for civil conspiracy.

S.W.3d — (Tenn. Ct. App. 2004); *Juhl v. Airington*, 936 S.W.2d 640 (Tex. 1996); *Waddoups v. Amalgamated Sugar Co.*, 54 P.3d 1054 (Utah 2002). In contrast, North Carolina law does not require proof that defendant committed an "overt act" in furtherance of the conspiracy; instead a defendant has engaged in a civil or criminal conspiracy upon the making of the agreement. *See State v. Gallimore*, 272 N.C. 528, 158 S.E.2d 505 (1968); *Privette v. University of North Carolina*, 96 N.C. App. 124, 385 S.E.2d 185 (1989). Several states require the additional element of an intent to injure.[2] *See Stillinger & Napier v. Central States Grain Co.*, 82 N.W.2d 637 (Neb. 1957); *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 862 P.2d 1207 (Nev. 1993); *Bonds v. Landers*, 566 P.2d 513 (Ore. 1977); *GMH Assocs. Inc. v. Prudential Realty Group*, 752 A.2d 889 (Pa. Super. Ct. 2000); *Hammond v. Butler, Means, Evins & Brown*, 388 S.E.2d 796 (S.C. 1990), *cert. denied*, 498 U.S. 952, 112 L. Ed. 2d 335 (1990). The trial court made no findings of fact or conclusions of law regarding whether these differences between state laws were material or the effect of North Carolina's conflict of law rules on the trial court's choice of law.

2. Common Law Fraud

To show a cause of action for common law fraud in North Carolina, a plaintiff must prove:

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

Freese v. Smith, 110 N.C. App. 28, 34, 428 S.E.2d 841, 846 (1993) (quoting *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988)). Other jurisdictions require plaintiffs to present evidence of different elements in order to establish a *prima facie* case of common law fraud. Several states do not share North Carolina's requirement that the statement concern a material

2. According to Exhibit 16 MMM, Nebraska, Nevada, New York, Oregon, Pennsylvania, Rhode Island, South Carolina and Wisconsin require the additional element of intent to injure.

fact.[3] *See Suffield Dev. Assocs. Ltd. P'shp v. Nat'l Loan Investors, L.P.*, 802 A.2d 44 (Conn. 2002); *Simpson Consulting, Inc. v. Barclays Bank PLC*, 490 S.E.2d 184 (Ga. Ct. App. 1997); *Hawaii's Thousand Friends v. Anderson*, 768 P.2d 1293 (Haw. 1989); *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588 (Nev. 1992); *Eoff v. Forrest*, 789 P.2d 1262 (N.M. 1990). Several states do not require scienter or knowledge that the statement is false.[4] Some states do not require reasonable reliance on the false statement.[5] *See Laborde v. Dastugue*, 868 So. 2d 228 (La. Ct. App. 2004); *Cortes v. Lynch*, 846 So.2d 945 (La.Ct. App. 2003). Others do not require injury to prove fraud.[6] *See Powell v. D.C. Hous. Auth.*, 818 A.2d 188 (D.C. 2003). The trial court made no findings of fact as to whether these differences in the various states' laws were material.

3. Tortious Action in Concert

Plaintiffs also claim liability on a theory of tortious acting in concert or aiding and abetting. The Restatement (Second) of Torts describes this action as follows:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

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3. According to plaintiffs' chart, included in the record as Exhibit 16 NNN, Connecticut, Delaware, Georgia, Hawaii, Maryland, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Pennsylvania, Rhode Island, South Dakota, Wisconsin and Wyoming do not require the representation to be made about a material fact.

4. According to plaintiffs' Exhibit 16 NNN, the following states do not require scienter or knowledge of falsity: Louisiana, Pennsylvania, Rhode Island, West Virginia, Wisconsin, and Wyoming.

5. According to plaintiffs' Exhibit 16 NNN, the following states do not require proof of justifiable reliance in order to show common law fraud: Illinois, Louisiana, New Hampshire, and South Carolina.

6. According to plaintiffs' Exhibit 16 NNN, the following jurisdictions do not require proof of injury to show common law fraud: District of Columbia, Georgia, Hawaii, Louisiana, New Hampshire, North Dakota, and Vermont.

Restatement (Second) of Torts, § 876 (1979). Our Supreme Court has adopted this section of the Restatement as it is applied to the negligence of joint tortfeasors. *See Boykin v. Bennett*, 253 N.C. 725, 118 S.E.2d 12 (1961)) (holding all defendants liable for death of passenger as a result of negligence in racing automobiles upon a public highway); *also see McMillan v. Mahoney*, 99 N.C. App. 448, 393 S.E.2d 298 (1990) (applying § 876 where child was injured by a negligent act of one defendant but it was impossible to determine which defendant inflicted the injury); *Blow v. Shaughnessy*, 88 N.C. App. 484, 364 S.E.2d 444 (1988). Several states have not adopted the Restatement's definition of action in concert as it is outlined in § 876.[7] The trial court made no findings with respect to the different states' laws or whether those laws were sufficiently similar to North Carolina's law so that application of North Carolina's law was not unfair or arbitrary.

4. Consumer Protection Statutes

The trial court held that one of the common issues of law facing the plaintiff class was whether defendants had violated North Carolina's consumer protection statute, N.C. Gen. Stat. § 75-1.1 *et seq.*

N.C. Gen. Stat. § 75-1.1 states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." G.S. § 75-1.1(a) (2003). "The elements of a claim for unfair and deceptive practices in violation of G.S. § 75-1.1 are: '(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business.' " *Furr v. Fonville Morisey Realty, Inc.*, 130 N.C. App. 541, 551, 503 S.E.2d 401, 408 (1998) (quoting *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991)), *appeal dismissed*, 351 N.C. 41, 519 S.E.2d 314 (1999); *see First Atl. Mgt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 507 S.E.2d 56 (1998). "To prevail on this claim, deliberate acts of deceit or bad faith do not have to be shown." *Boyd v. Drum*, 129 N.C. App. 586, 593, 501 S.E.2d 91, 97 (1998) (citation omitted), *aff'd per curiam*, 350 N.C. 90, 511 S.E.2d 304 (1999). This Court has held that "it is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception" but "plaintiff must . . . show that the acts complained of possessed the tendency or capacity

7. Exhibit 16 OOO, presented by plaintiffs, lists Colorado, Indiana, New Mexico, Utah, Vermont, West Virginia and Wyoming as jurisdictions that have not adopted Restatement (Second) Torts § 876 or its equivalent.

to mislead, or created the likelihood of deception." *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 452-53, 279 S.E.2d 1, 7 (1981); *see Ken-Mar Finance v. Harvey*, 90 N.C. App. 362, 368 S.E.2d 646, *disc. rev. denied*, 323 N.C. 365, 373 S.E.2d 545 (1988). If the trial court finds a violation of N.C. Gen. Stat. § 75-1.1 and "if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict." N.C. Gen. Stat. § 75-16 (2003).

The North Carolina consumer protection statute is based upon the Federal Trade Commission Act (FTCA), 15 U.S.C. § 45(a)(1). *See Henderson v. United States Fidelity & Guaranty Co.*, 346 N.C. 741, 488 S.E.2d 234 (1997). Many states have adopted a similar version of the FTCA.[8] *See* Ariz. Rev. Stat. Ann. § 44-1522 (2003); Ga. Code Ann. §§ 10-1-391, 10-1-393 (2000); Tex. Bus. & Com. Code Ann. § 17.46 (2002); Utah Code Ann. § 13-11-4 (2001); Vt. Stat. Ann. tit. 9, § 2453 (1993). Other states have based their laws upon a consumer protection statute created by the Uniform Commission on State Laws which lists specific types of unfair and deceptive practices or acts.[9] *See* Ark. Code Ann. § 4-88-107 (2004); Cal. Civ. Code § 1770 (1998); 815 Ill. Comp. Stat. Ann. 510/2 (1999). Although North Carolina law does not require scienter on the part of the defendant in a G.S. § 75-1.1 claim, other states do.[10] *See* Ark. Code Ann. § 4-88-107 (2004); 815 Ill. Comp. Stat. Ann. 510/2 (1999); Utah Code Ann. § 13-11-4 (2001). North Carolina's law does not require reliance by the plaintiff in order to successfully pursue a claim under G.S. § 75-1.1, while some states do require reliance.[11] *See* Ariz. Rev. Stat. Ann. § 44-1522 (2003); Ga. Code

8. According to a chart included in the Record on Appeal as Exhibit 16 LLL, Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wyoming all have consumer protection statutes based upon the FTCA.

9. Jurisdictions with "laundry list" statutes based on the Commission on Uniform State Laws' model are Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia,West Virginia, Wisconsin and Wyoming, according to Exhibit 16 LLL.

10. According to plaintiffs' chart in Exhibit 16 LLL, Arkansas, Colorado, Illinois, Iowa, Kansas, South Dakota, Utah, and Wisconsin require proof of scienter to pursue a claim under their respective state consumer fraud laws.

11. According to plaintiffs' Exhibit 16 LLL, Arizona, Georgia, Indiana, Texas, Wisconsin and Wyoming require the element of reliance by the plaintiff.

Ann. § 10-1-393 (2000). In North Carolina, the plaintiff is allowed to recover treble damages. *See* G.S. § 75-1.1. Other states also allow equitable relief.[12] *See* Ariz. Rev. Stat. Ann. § 44-1528 (2003); Ark. Code Ann. §§ 4-88-104, 4-88-113 (2004); Cal. Civ. Code § 1780 (1998); Ga. Code Ann. § 10-1-399 (2000); 815 Ill. Comp. Stat. Ann. 510/3 (1999); Utah Code Ann. § 13-11-19 (2001). Some states allow plaintiffs to recover punitive damages.[13] *See* Cal. Civ. Code § 1780 (1998); Ga. Code Ann. § 10-1-399 (2000), Vt. Stat. Ann. tit. 9, § 2461 (1993); *Conseco Finance Servicing Corp. v. Hill*, 556 S.E.2d 468 (Ga. Ct. App. 2001). Others states do not allow the recovery of treble damages.[14] *See* Ariz. Rev. Stat. Ann. § 44-1528 (2003); Ark. Code Ann. § 4-88-113 (2004); Cal. Civ. Code § 1780 (1998); 815 Ill. Comp. Stat. Ann. 510/3 (1999); Utah Code Ann. § 13-11-19 (2001). The trial court made no findings of fact relating to the differences between these state laws, which potentially would apply according to the conflicts of law rules, and whether those differences were insignificant.

E. Due Process

The final step in the process of determining which state law should apply to the individual claims of the class action plaintiffs is the question of whether the application of the chosen substantive state law will violate due process. "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co v. Hague*, 449 U.S. 302, 312-13, 66 L. Ed. 2d 521, 531 (1981); *see also Phillips Petroleum Co.*

12. According to Exhibit 16 LLL, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin and Wyoming allow the remedy of equitable relief.

13. Exhibit 16 LLL lists Arkansas, California, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Kentucky, Missouri, Nebraska, Oregon, Rhode Island and Vermont as jurisdictions that allow the recovery of punitive damages in consumer fraud protection claims.

14. According to plaintiffs' chart, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, West Virginia, Wisconsin and Wyoming do not allow for recovery of treble damages as North Carolina does.

v. Shutts, 472 U.S. 797, 86 L. Ed. 2d 628 (1985). "[I]f a State has only an insignificant contact with the parties and the occurrence or transac-tion, application of its law is unconstitutional." *Allstate*, 449 U.S. at 310-11, 66 L. Ed. 2d at 529.

The "contacts" required to meet the due process standard for purposes of choice of law are different from the "contacts" necessary to give a trial court personal jurisdiction over the case:

> The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum.

Shutts, 472 U.S. at 821, 86 L. Ed. 2d at 648. "Neither the Due Process Clause nor the Full Faith and Credit Clause requires [a state] 'to substitute for its own [laws], applicable to persons and events within it, the conflicting statute of another state,' but [a state] 'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.' " *Shutts*, 472 U.S. at 822, 86 L. Ed. 2d at 649 (internal citations omitted) (quoting *Pacific E. Ins. Co. v. Industrial Acci. Com.*, 306 U.S. 493, 502, 83 L. Ed. 940, 945 (1939) and *Home Ins. Co. v. Dick*, 281 U.S. 397, 410, 74 L. Ed. 926, 935 (1930)). As the Supreme Court has stated, "the States need not, and in fact do not, provide [consumer] protection in a uniform manner. . . . The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 states." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 569-70, 134 L. Ed. 2d 809, 822-23 (1996). "Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." *In re Bridgestone/Firestone*, 288 F.3d 1012, 1020 (7th Cir. 2002) (rejecting certification of a nationwide class action lawsuit).

Plaintiffs argue that *Clark v. TAP Pharmaceutical Products, Inc.*, 798 N.E.2d 123 (Ill. App. Ct. 2003) should persuade this Court to allow the class certification to stand. *Clark* involves issues similar to those in the present appeal and a nationwide plaintiff class. In the Illinois case, the trial court certified a plaintiff class composed of "[a]ll individuals or non-ERISA third-party payor entities in the United States who paid any portion of the 20% copayment or deductible amount for

beneficiaries under the Medicare Part B for Lupron® during the period 1993 through the present (the class period)." *Clark*, 798 N.E.2d at 127. The *Clark* court held that application of the Illinois Consumer Fraud Act to all of the plaintiffs' claims did not violate due process or Illinois choice of law principles. *Id.* at 129. However, *Clark* differs from this case in several significant aspects. The *Clark* court held that Illinois had significant contacts to the litigation, which prevented the application of its law from being arbitrary or unfair. The defendants named in *Clark* were all headquartered in Illinois; therefore, the court reasoned that any illicit pricing scheme originated in Illinois, providing Illinois with a legitimate interest in and significant contact with the litigation. *Clark*, 798 N.E.2d at 130. In addition, Illinois's choice of law rule, according to its consumer protection statute, is the "most significant relationship" test. *Clark*, 798 N.E.2d at 130. The North Carolina class certification involved claims that, according to our choice of law rules, would typically apply the law of the state where the injury occurred. These differences make *Clark* readily distinguishable from the present appeal.

We find the New Jersey superior court's reasoning and holdings more persuasive on this matter. *See Walker v. TAP Pharmaceuticals Products, Inc.*, No. 682-01, slip op. (Cape May County Ct. (2003)). Plaintiff Walker, on behalf of the class, argued that a nationwide plaintiffs class should be certified, and that the New Jersey court should apply New Jersey law to all of the claims involved. *Walker*, slip op. at 4. The *Red Book*, the pharmaceutical industry publication that defendants allegedly used to further their conspiracy, is published in New Jersey. *Id.* Walker argued that since the defendants used the *Red Book* to publish their accelerated AWP, which was the central part of the alleged conspiracy, New Jersey had a significant contact to the litigation so that application of its laws was not arbitrary or unfair. *Walker*, slip op. at 8-9. The New Jersey court disagreed that this factor amounted to a significant contact allowing for the application of New Jersey law. *Id.* In addition, the New Jersey court found:

> Alternatively, plaintiff submits that, notwithstanding a lack of significant contact or aggregating of contacts, New Jersey Law may be applied nationally. In response to Defendants' many challenges to the application of New Jersey Law on a national basis, Plaintiff argues that the applicable New Jersey laws do not present a material conflict with other jurisdictions. In support of this proposition Plaintiff sets forth numerous similarities. Defense points to numerous differences in the Consumer Fraud Laws and Common

> Law Fraud Laws. Plaintiff fails to persuade this Court that there is not a conflict based on the purported similarities set out in the argument. The record as developed is simply inadequate to make the required rigorous analysis to satisfy the predominance and superiority issues relative to a national class.

Walker, slip op. at 9. For these reasons, the New Jersey court refused to certify a nationwide class of plaintiffs. Instead, the New Jersey court limited application of New Jersey law to a class of plaintiffs who were New Jersey residents.

Here, the trial court made no findings of fact about the significance of North Carolina's contacts with the subject matter of the litigation. Although the trial court has personal jurisdiction over the defendants (with the exception of defendant Takeda), this does not mean necessarily that North Carolina law can be applied to all of plaintiffs' claims without a violation of defendants' rights to due process. Because this class is composed of plaintiffs nationwide, the remaining forty-nine states' laws, as well as the law of the District of Columbia, must be analyzed to determine whether it conflicts with the law of North Carolina.

According to the plaintiffs' own evidence, differences exist between North Carolina law and the law of the other jurisdictions on each substantive claim presented by plaintiffs. Our conflict of law rules would require the North Carolina court to apply other jurisdictions' substantive law unless North Carolina's law is sufficiently similar. However, the trial court made no findings of fact to show that North Carolina has similar law to all other jurisdictions on all claims, so that no actual conflict of law exists. The trial court also did not make a conclusion of law to show that despite a conflict of law, North Carolina law should apply to an injury claim that occurred in another jurisdiction because North Carolina had the most significant interest in that litigation or that all of the injuries forming the basis of these claims occurred in North Carolina. The trial court did not make findings to show that North Carolina's contacts with all of the claims involved in this class action were not so arbitrary as to render unfair application of our law. The evidence regarding the differences between the laws of the various jurisdictions nationwide, standing alone, does not support the trial court's conclusion that the issues of law common to the class were North Carolina laws. On its face, the trial court's class certification order appears to violate defendants' due process rights. Allowing the class to proceed with its action as certified would result in a judgment that would not be recognized by

other courts according to the Full Faith and Credit Clause, because our state court judgment may be void as to certain plaintiffs. "Generally, when a trial court fails to make required findings of fact, the case must be remanded to the trial court for entry of findings. However, when the evidence in the record as to a finding is not controverted, remand is not required." *Pitts v. American Sec. Ins. Co.*, 144 N.C. App. 1, 18, 550 S.E.2d 179, 192 (2001) (citation omitted), *aff'd by an equally divided court*, 356 N.C. 292, 569 S.E.2d 647 (2002). As a result, we must reverse the trial court's order certifying the class action and remand for further findings on the state law to be applied to the claims involved.

IV. Rule 23 Certification

[3] Defendants TAP and Abbott, joined by defendants Johnson and Ethicon, argue that the trial court improperly found that plaintiffs met the burden of showing the existence of all the factors necessary to satisfy Rule 23(a). The requirements for a class action under Rule 23(a) are:

1. The existence of a class
2. The class members within the jurisdiction of the court must adequately represent any class members outside the jurisdiction of the Court;
3. The class must be so numerous as to make it impracticable to bring each member before the court;
4. More than one issue of law or fact common to the class should be present;
5. The party representing the class must fairly insure the representation of all class members;
6. Adequate notice must be given to the class members.

Crow v. Citicorp Acceptance Co., 79 N.C. App. 447, 448-49, 339 S.E.2d 437, 438 (1986), *rev'd on other grounds*, 319 N.C. 274, 354 S.E.2d 459 (1987); *see Perry v. Union Camp Corp.*, 100 N.C. App. 168, 394 S.E.2d 681 (1990). "Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results. The usefulness of the class action device must be balanced, however, against inefficiency or other drawbacks." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 284, 354 S.E.2d 459, 466 (1987); *see Pitts v. American Sec. Ins. Co.*, 144 N.C. App. at 11, 550 S.E.2d at 188.

We reversed and remanded the trial court's order certifying the class action for the reasons stated in Part III of this opinion. That class certification order contained the trial court's findings of fact and conclusions of law pertaining to Rule 23(a). The trial court's further findings of fact will determine whether common issues of law are present, as well as whether a class action is the appropriate method for disposing of this litigation and, if so, the composition of the plaintiff class. "If the prerequisites to a class action are established on remand, the decision whether a class action is superior to other available methods for the adjudication of this controversy continues to be a matter left to the trial court's discretion." *Crow*, 319 N.C. at 284, 354 S.E.2d at 466. Therefore, we reverse this portion of the trial court's order and remand for reconsideration according to the findings of fact and conclusions of law reached upon remand.

V. Johnson's Additional Argument

Defendants Johnson and Indigo, in addition to joining defendant TAP and Abbott's arguments, present one additional argument. Defendants Johnson and Indigo argue that the class certification was clearly erroneous as applied to them. Johnson and Indigo contend that their only connection to the litigation is the alleged actions of their former employees, individual defendants Jett, Coleman and Hidalgo. Johnson and Indigo assert that no class plaintiff has been injured by their actions, no common issue of law exists as applied to them because they took no actions to harm plaintiffs, and that the class action mechanism is inappropriate as applied to them. Plaintiffs counter that they have presented sufficient evidence from which the trial court could have concluded that defendants Johnson and Indigo were involved in the price inflation scheme and furthered the conspiracy by corporate actions. Our previous holding that the trial court's findings of fact and conclusions of law were not sufficient renders discussion of this assignment of error moot. The trial court must first make findings of fact and conclusions of law to support its choice of law. After these findings and conclusions are completed, the trial court must re-weigh factors necessary to determine whether class certification is appropriate as to the claims against some or all of the defendants.

VI. Motion to Amend

[4] Defendant TAP also appeals from the trial court's 14 April 2003 order denying TAP's motion to amend its answer. An order denying a motion to amend the pleadings is interlocutory and not immediately

appealable. *See Buchanan v. Rose*, 59 N.C. App. 351, 296 S.E.2d 508 (1982). However, when a motion to amend a party's compulsory counterclaim is denied, the order is immediately appealable because it affects a substantial right. *See Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E.2d 119, *disc. rev. denied*, 294 N.C. 736, 244 S.E.2d 154 (1978). Defendant TAP sought to amend its answer to add several crossclaims against the individual defendants. TAP's amendment was in response to a settlement agreement between the individual defendants and plaintiffs, which caused the dismissal of the action against the individual defendants. Therefore, the order denying the amendment of the crossclaim is interlocutory.

A. Interlocutory Order

Defendant TAP argues that the amendment order is immediately appealable because it affects a substantial right. TAP contends the denial of its motion affects TAP's right to avoid two trials on the same issues, which may subject it to inconsistent verdicts.

In *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982), the North Carolina Supreme Court analyzed a similar argument. After observing that "avoidance of one trial is not ordinarily a substantial right", the Court held that " 'the right to avoid the possibility of two trials on the same issues can be . . . a substantial right.' " *Green*, 305 N.C. at 608, 290 S.E.2d at 596 (citation omitted); *see Allen v. Sea Gate Assn.*, 119 N.C. App. 761, 460 S.E.2d 197 (1995); *Hartman v. Walkertown Shopping Center*, 113 N.C. App. 632, 439 S.E.2d 787, *disc. rev. denied*, 336 N.C. 780, 447 S.E.2d 422 (1994); *Hoots v. Pryor*, 106 N.C. App. 397, 417 S.E.2d 269 (1992). The right to avoid two trials has been explained in greater detail by this Court:

> This general proposition is based on the following rationale: when common fact issues overlap the claim appealed and any remaining claims, delaying the appeal until all claims have been adjudicated creates the possibility the appellant will undergo a second trial of the same fact issues if the appeal is eventually successful. This possibility in turn "creates the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue."

Davidson v. Knauff Ins. Agency, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491 (citations omitted), *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989). The test for this substantial right essentially has two parts. First, this Court must decide whether the other claims

asserted are based upon the same facts and issues. If that question is answered affirmatively, then this Court must decide whether this appeal can wait until the full trial has taken place or whether such delay will prejudice defendants by exposing them to inconsistent verdicts.

Defendant TAP argues that its crossclaims for contribution and unfair trade practices against the individual defendants are based upon the same factual issues as plaintiffs' claims against all defendants.[15] We disagree with TAP's argument. TAP's crossclaim for contribution is dependant upon a finding that defendants, as a group, are liable to the plaintiff class. TAP's crossclaim based upon unfair trade practices is not dependant upon a finding that defendants are liable to plaintiffs. Although both crossclaims involve some of the same parties and possibly some of the same transactions as the underlying lawsuit, the crossclaims deal with the much different issue of whether the individual defendants are liable to the corporate defendants.

Defendants also argue that separate trials may produce inconsistent verdicts. An inconsistent verdict can only occur if the same issue is involved in two trials. Here, all defendants may be found liable in one trial, but individual defendants may be found not liable to the corporate defendants in a second trial. Those are not necessarily inconsistent verdicts, but may reflect instead that the jury found the corporate defendants liable for the damage to plaintiffs on a theory other than vicarious liability. If all defendants are found not liable in the first trial, no second trial for the crossclaim of contribution need take place as the issue of unfair trade practice will have been decided and further trial will be precluded by collateral estoppel. Therefore, defendant TAP has not shown that it would be subject to two trials on the same issue or that inconsistent verdicts would result if it was involved in two trials as a result of the trial court's denial of its motion to amend. Accordingly, TAP has not demonstrated that a substantial right is affected and this interlocutory order is not immediately appealable.

However, defendant TAP has requested that we view its appeal alternatively as a petition for writ of certiorari under Rule 21(a)(1) in the event we find no grounds to review the interlocutory order. *See* N.C. R. App. P. 21(a)(1). We recognize that defendant TAP has no

15. Defendant TAP acknowledged in its brief that the crossclaim for tortious interference with contractual relations was not based upon the same factual issues.

appeal of right, but in consideration of the complexity of this appeal, in the interest of the administration of justice and because we have granted certiorari as to the other interlocutory issues in this appeal, we grant defendant TAP's petition for writ of certiorari in order to address the merits of TAP's argument.

B. Amendment

Denial of a motion to amend pleadings is a matter soundly within the discretion of the trial court. *See North River Ins. Co. v. Young*, 117 N.C. App. 663, 453 S.E.2d 205 (1995). The trial court's decision regarding a party's motion to amend the pleadings will not be disturbed on appeal unless an abuse of discretion is shown. *Dept. of Transportation v. Bollinger*, 121 N.C. App. 606, 468 S.E.2d 796 (1996).

Defendant TAP sought to amend its answer to add a crossclaim against the individual defendants. Crossclaims are described as follows:

> A pleading may state as a crossclaim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such crossclaim may include a claim that the party against whom it is asserted is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

N.C. Gen. Stat. § 1A-1, Rule 13(g) (2003). The Rules of Civil Procedure outline defendant TAP's ability to amend its answer as follows:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise 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. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

N.C. Gen. Stat. § 1A-1, Rule 15(a) (2003). Because defendant TAP sought to amend its answer outside of the thirty day time period and without consent of plaintiffs or the individual defendants, TAP could

only amend its answer by leave of the trial court. Rule 15(a) contemplates liberal amendments to the pleadings, which should always be allowed unless some material prejudice is demonstrated. *See Mauney v. Morris*, 316 N.C. 67, 340 S.E.2d 397 (1986); *Saintsing v. Taylor*, 57 N.C. App. 467, 291 S.E.2d 880, *disc. rev. denied*, 306 N.C. 558, 294 S.E.2d 224 (1982). Some of the reasons for denying a motion to amend include undue delay by the moving party, unfair prejudice to the non-moving party, bad faith, futility of the amendment, and repeated failure to cure defects by previous amendments. *See Delta Env. Consultants of N.C. v. Wysong & Miles Co.*, 132 N.C. App. 160, 510 S.E.2d 690, *disc. rev. denied*, 350 N.C. 379, 536 S.E.2d 70 (1999). In its 14 April 2003 order, the trial court stated that defendant TAP's motion to amend was "untimely and prejudicial." The trial court did not make any further factual findings to support its order.

TAP correctly argues that there is no time limit for amendments according to Rule 15. However, the trial court, in its discretion, may consider the relative timing of the proposed amendment in relation to the progress of the lawsuit. Rule 15 indicates the legislature's attempt to set up amendment rules to ensure the fairness of litigation, e.g. allowing one amendment before a responsive pleading is served or before the matter is placed on the trial calendar. In this case, plaintiffs point out that the factual allegations giving rise to defendant TAP's crossclaim had been known by TAP for some time. The complaint in this case was filed 31 December 2001, while defendant TAP's answer was filed 29 April 2002. The motion to amend was not filed until 4 February 2003. The individual defendants reached a settlement agreement on 8 January 2003, meaning that individual defendants would be discharged from the case. Defendant TAP argues that, in light of the potential dismissal of individual defendants, the motion to amend was timely and necessary to protect defendants' contribution claims. We disagree. Although the upcoming dismissal of the individual defendants from the lawsuit provided defendant TAP with an incentive to assert its crossclaims against the individual defendants to protect itself, this does not render those assertions timely.

In addition to the issue of delay and timeliness, the trial court held that defendant TAP's motion to amend should be denied because it was prejudicial. Defendant TAP argues that no possible prejudice could flow to plaintiffs or the individual defendants because all of the issues involved in its crossclaim were identical to the issues in the underlying lawsuit. Therefore, defendant TAP argues, no further discovery would be necessary. However, as noted in our discussion of

whether this interlocutory appeal affected TAP's substantial right to avoid two trials on the same issues, we hold that the issues of liability in plaintiffs' claims against defendants are separate and distinct from the issues of liability between the corporate defendants and the individual defendants. Different evidence would be necessary to support these additional legal claims, which could involve more discovery for the parties, slow the litigation process, and present a more unwieldy litigation for the trial court to administrate. We cannot say that the trial court abused its discretion in concluding that amendment of defendant TAP's answer to include crossclaims was prejudicial.

For the reasons stated above, the trial court's 14 April 2003 order denying defendant TAP's motion to amend is affirmed. However, the 24 April 2003 order certifying the class action is reversed, and this action is remanded to the trial court for further findings consistent with this opinion.

Affirmed in part; reversed and remanded in part.

Judges BRYANT and ELMORE concur.

WENDY WHITT, PLAINTIFF v. HARRIS TEETER, INC., AND RANDY SHULTZ, DEFENDANTS

No. COA03-335

(Filed 6 July 2004)

Employer and Employee— wrongful discharge—sexual harassment—constructive discharge

The trial court erred by granting a directed verdict for defendant on a claim for constructive wrongful discharge in violation of public policy based upon sexual harassment. Such a claim exists in North Carolina even though the discharge is constructive, and plaintiff presented sufficient evidence to survive a motion for a directed verdict.

Judge MCCULLOUGH dissenting.

Appeal by plaintiff from judgment entered 2 April 2002 by Judge Sanford L. Steelman, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 13 January 2004.

Kennedy, Kennedy, Kennedy & Kennedy, L.L.P, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Lucretia D. Guia and J. Mark Sampson, for defendant appellee Harris Teeter, Inc.

WYNN, Judge.

Plaintiff Wendy Whitt appeals from final judgment of the trial court entered upon directed verdict in favor of Defendant Harris Teeter, Inc. Plaintiff argues she presented sufficient evidence that Defendant terminated her employment in violation of public policy, and that the trial court therefore erred in granting directed verdict to Defendant on her wrongful discharge claim. We conclude Plaintiff presented sufficient evidence to withstand Defendant's motion for directed verdict, and we therefore reverse the judgment of the trial court.

The pertinent facts of the instant appeal are as follows: On 20 November 2000, Plaintiff filed a complaint in Forsyth County Superior Court against Defendant and one of its employees, Randy Schultz. The complaint alleged that Schultz sexually harassed Plaintiff during her employment with Defendant, and that Defendant failed to take appropriate action to protect Plaintiff from such misconduct. Plaintiff further alleged that after she reported the sexual harassment, Defendant took retaliatory action against her, resulting in her eventual termination. Plaintiff set forth claims against Defendant for (1) intentional infliction of emotional distress; (2) negligent retention and supervision; (3) wrongful discharge in violation of public policy based on retaliation; and (4) wrongful discharge in violation of public policy based upon a hostile workplace environment.

Plaintiff's case came for trial on 11 February 2002. In support of her claim for wrongful discharge, Plaintiff presented the following evidence: Plaintiff worked as a cashier at Defendant's grocery store in Kernersville, North Carolina. Schultz, a fellow employee at the grocery store, began sexually harassing Plaintiff in July of 1999. Specifically, Schultz approached Plaintiff at her cash register several times per day on a daily basis and whispered in her ear such statements as:

1. "Let's go get naked and rub down in baby oil."

2. "That bright polish you're wearing is giving me a hard-on."

3. "I bet you could f—k like hell when you're that mad."

4. "If I catch you bent over like that again I might have to come and throw my rod."

5. "If I'm Santa Claus, I have a lifetime lollipop when you want to sit on my lap."

Plaintiff could feel Schultz's lips touching her ear as he made these comments. Plaintiff informed Schultz she was married, asked him to stop, and told him she thought he was "sick." Schultz persisted in his objectionable behavior toward Plaintiff.

Plaintiff testified that, whenever possible, she "would push [Schultz] off and try to move away from him." Plaintiff could not always avoid Schultz, however, as he sometimes approached her while she assisted customers. Another cashier, Nell Williamson, regularly observed Schultz "leaning over up on [Plaintiff] and talking in her ear." Williamson testified Plaintiff "would pull away or push the groceries down [the] side to get him away from her. If she didn't have any customers, she would turn around and walk off." According to Plaintiff, Schultz's actions humiliated and degraded her and made her feel "helpless [and] trashy."

In October of 1999, Schultz approached Plaintiff from behind while she was standing near the time clock and "took his hand down the back of [her] back down over [her] bra, down to the top of [her] pants, and threatened [her]," by stating "I'll get you sooner or later." Following this incident, Plaintiff became "frightened" and informed her family of Schultz's behavior. After discussing the situation with her family, Plaintiff decided to report Schultz's behavior to management.

On 26 October 1999, Plaintiff informed her front-end manager, Jenny Poff, that Schultz had been sexually harassing her. Poff informed her that two other female employees had filed sexual harassment charges against Schultz, and she advised Plaintiff to contact the store manager, Mike Turner. Plaintiff met with Turner in his office later that afternoon, who told her "he would have to contact the Field Specialist, Shirley Morgan." Turner told Plaintiff "he was sorry that [she] had to go through this and that this type of behavior would not be tolerated." Turner did not ask Plaintiff for the details of the sexual harassment. Later that day, Plaintiff met with the field specialist, Shirley Morgan, who requested Plaintiff "write down the statements that had been said, the remarks" and informed

her there would be an investigation, stating the store did "not tolerate this type of behavior."

Despite these meetings, Schultz continued making sexual comments to Plaintiff over the next several days. One week later, Schultz was promoted and entered a manager trainee program at a different store location in Charlotte, North Carolina. However, Schultz continued to regularly visit the Kernersville store and harass Plaintiff by whispering sexual remarks in her ear, winking at her, and licking his lips. Schultz told Plaintiff, "I'll get you sooner or later" and "The green polish you're wearing is making me horny." On several occasions, Schultz followed Plaintiff to her home. As a result, Plaintiff's father, Jack Hodge, began accompanying Plaintiff to and from work. Hodge testified he observed Schultz following his daughter home on three occasions. Plaintiff met again with Turner and informed him of the continued harassment. She also informed Turner that Schultz had followed her home and had threatened her. Turner told Plaintiff "Well, as far as I know he's not been banned from the store." Turner informed Plaintiff he would contact Morgan, the field specialist.

Later in November, Morgan met with Plaintiff and informed her that the investigation was over, that Schultz had denied everything, and that she could not corroborate Plaintiff's allegations. Morgan gave Plaintiff a copy of Defendant's sexual harassment policy. Morgan did not discuss the details of her investigation with Plaintiff, nor did she acknowledge or discuss the continued additional instances of harassment of which Plaintiff had informed Turner.

Following her meeting with Morgan, Plaintiff arranged to have a third meeting with Turner, which both Plaintiff's father and the store's assistant manager, Mike Streicher, attended. After informing Turner that Schultz was still making the sexual comments, stalking her, following her home, physically touching her and making threatening phone calls, Turner replied, "harsh[ly] and unconcerned, 'Wendy, what do you want me to do about it?' " Her father then asked Turner, "What are you going to do about it?" Turner "just raised up in his seat and stared out the front out of the glass window of his office."

Plaintiff testified Schultz again approached her in November as she stood at the store's time clock. He pressed his entire body tightly against Plaintiff, reached around her and attempted to touch her breasts. Before he could touch her breasts, Plaintiff "slung him off." Instead of going to Turner, Plaintiff contacted the field specialist directly. She told Morgan the sexual harassment was

continuing and described the threats and stalking. Morgan informed her that the matter had been "thoroughly investigated" and the investigation was complete. Morgan offered no further assistance. As a result, Plaintiff filed a complaint with the Equal Opportunity Employment Commission.

Between the third week of November 1999 and the end of December 1999, Defendant reduced Plaintiff's employment hours from thirty-seven hours to twenty-seven hours per week. Schultz continued to visit the store in December, making sexually offensive comments to Plaintiff several times per week. By this time, Plaintiff was experiencing panic attacks, crying spells, suicidal thoughts, depression, withdrawal, insomnia, nightmares, nervousness and felt "hopeless, helpless, and just totally degraded." She was "an emotional basketcase." Plaintiff sought medical treatment and was prescribed Prozac and Xanax. Her condition worsened, however, causing Plaintiff to resign from her position with Defendant in February of 2000. Upon giving her notice of resignation to the assistant manager, he stated "Well, we figured this is going to happen."

At the close of the evidence, the trial court granted Defendant's motion for a directed verdict on Plaintiff's wrongful discharge claim pursuant to Rule 50(a) of the North Carolina Rules of Civil Procedure. On 27 February 2002, the jury rendered a verdict finding that Defendant was not liable for intentional infliction of emotional distress and negligent retention, and the trial court entered judgment accordingly. Plaintiff appealed.

Plaintiff contends the trial court improperly granted Defendant's motion for directed verdict in that she presented more than a "scintilla" of evidence to support her claim. For the reasons stated herein, we agree that directed verdict was improperly granted, and we reverse the judgment of the trial court.

It is well established in North Carolina that in determining whether the evidence is sufficient to withstand a motion for a directed verdict, "the plaintiff's evidence must be taken as true and all the evidence must be viewed in the light most favorable to her, giving her the benefit of every reasonable inference which may be legitimately drawn therefrom, with conflicts, contradictions, and inconsistencies being resolved in the plaintiff's favor." *Bryant v. Thalhimer Brothers, Inc.*, 113 N.C. App. 1, 6, 437 S.E.2d 519, 522 (1993), *disc. review denied*, 336 N.C. 71, 445 S.E.2d 29 (1994). The trial court

should deny the motion for directed verdict if there is more than a scintilla of evidence to support all the elements of the plaintiff's *prima facie* case. *Id.* In reviewing the grant of a directed verdict pursuant to Rule 50(a) of the Rules of Civil Procedure, our task is to determine whether the evidence, taken in a light most favorable to the plaintiff, was sufficient for submission to the jury. *Stallings v. Food Lion, Inc.*, 141 N.C. App. 135, 136-37, 539 S.E.2d 331, 332 (2000). We must therefore determine whether Plaintiff presented sufficient evidence to support the elements of her claim for wrongful discharge in violation of public policy.

I. *Wrongful Discharge in Violation of Public Policy*

In *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989), our Supreme Court adopted a public policy exception to the employee-at-will doctrine. 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.' " *Id.* at 175, 381 S.E.2d at 447 (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)). 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 v. Compass Grp. USA, Inc.*, 145 N.C. App. 314, 317, 551 S.E.2d 179, 181, *affirmed per curiam*, 354 N.C. 568, 557 S.E.2d 528 (2001). "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).

There is no question that "the right to be free of sexual harassment in the workplace . . . is implicated in our State declaration of public policy." *Guthrie v. Conroy*, 152 N.C. App. 15, 19-20, 567 S.E.2d

403, 407 (2002); *see also* N.C. Gen. Stat. § 143-422.2 (2003) (declaring that "[i]t is the public policy of this State to protect . . . the right . . . of all persons to seek, obtain and hold employment without discrimination or abridgement on account of . . . sex"); *Russell v. Buchanan*, 129 N.C. App. 519, 500 S.E.2d 728 (employee suit alleging wrongful discharge in violation of Title VII and North Carolina public policy), *disc. review denied*, 348 N.C. 501, 510 S.E.2d 655 (1998). Our Supreme Court has ruled that the "ultimate purpose of . . . G.S. 143-422.2 and Title VII (42 U.S.C. 2000(e), *et seq.*) is the same," and thus the statute is co-extensive with the federal statute, evaluated under the same standards of evidence and principles of law. *Dept. of Correction v. Gibson*, 308 N.C. 131, 141, 301 S.E.2d 78, 85 (1983). Title VII prohibits sexual harassment in the workplace. *See* 42 U.S.C. § 2000(e)(2)(a)(1) (providing that "it shall be an unlawful employment practice for an employer to fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such person's gender"). Various state statutes provide protection against sexual harassment in the workplace and elsewhere. *See, e.g.*, N.C. Gen. Stat. § 143-422.2 (above); N.C. Gen. Stat. § 115C-335.5 (2003) (prohibiting retaliation by any local board of education member against an employee who reports sexual harassment); N.C. Gen. Stat. § 115C-325 (2003) (addressing sexual harassment by career education employees); N.C. Gen. Stat. § 14-395.1(a) (2003) (classifying sexual harassment as a Class 2 misdemeanor). A discharge based on sexual harassment therefore offends the public policy of this State and may properly support a wrongful discharge claim in violation of public policy. *Guthrie*, 152 N.C. App. at 19-20, 567 S.E.2d at 407; *Russell*, 129 N.C. App. at 521, 500 S.E.2d at 730; *see also Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530, 534 (4th Cir. 1991) (holding that North Carolina's public policy wrongful discharge doctrine was applicable to prohibit sexual harassment); *Phillips v. J.P. Stevens & Co., Inc.*, 827 F. Supp. 349, 352-53 (M.D.N.C. 1993) (recognizing wrongful discharge claim in violation of public policy on the basis of sexual harassment).

In the instant case, Plaintiff presented evidence tending to show that (1) she was sexually harassed in the workplace by a fellow employee; (2) she repeatedly reported such harassment to Defendant; (3) Defendant promoted the employee responsible for the sexual harassment; (4) the sexual harassment continued after Plaintiff reported the behavior to Defendant; (5) Defendant reduced Plaintiff's

employment hours by ten hours per week after she reported the harassment; (5) Plaintiff developed depression and other psychological conditions as a result of the sexual harassment, Defendant's failure to effectively address such harassment, and Defendant's actions following the report of sexual harassment; and (5) Plaintiff's condition ultimately forced her to resign from her employment with Defendant. We conclude Plaintiff presented sufficient evidence that her termination of employment was predicated upon sexual harassment in violation of public policy. We must now examine whether Plaintiff's evidence supports her claim that she was wrongfully discharged, where termination of employment was constructive rather than explicit.

II. *Constructive Discharge*

Whether an at-will employee may be constructively discharged in contravention of the public policy of our State remains unsettled. *See Graham v. Hardee's Food Systems*, 121 N.C. App. 382, 385-86, 465 S.E.2d 558, 560-61 (1995) (indicating that although "North Carolina courts have yet to adopt the employment tort of constructive discharge," assuming *arguendo* such a claim exists, the plaintiff's evidence failed to establish an element of constructive discharge). In *Coman*, however, our Supreme Court implicitly recognized the viability of a wrongful discharge claim in violation of public policy where termination was constructive. The plaintiff-employee in *Coman* who refused to violate federal trucking regulations was not fired by his employer; rather, the employer reduced his salary by fifty percent. The *Coman* Court determined that the reduction in pay was "tantamount to a discharge" of the plaintiff, and went on to recognize the plaintiff's termination as a wrongful discharge in violation of public policy. *Id.* at 173-74, 381 S.E.2d at 446. After *Coman*, our Supreme Court ostensibly confirmed this interpretation of *Coman* in *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 515 S.E.2d 438 (1999), by describing the plaintiff's termination in *Coman* as a "constructive discharge." *Id.* at 570, 515 S.E.2d at 440. Decisions by this Court have left open the possibility of a constructive discharge claim. *See, e.g., Doyle v. Asheville Orthopaedic Assocs., P.A.*, 148 N.C. App. 173, 177, 557 S.E.2d 577, 579 (2001) ("We recognize the viability of [the plaintiff's claim for constructive discharge] in the context of interpreting whether constructive termination by her employer triggered the termination payment provision of the employment contract."), *disc. review denied*, 355 N.C. 348, 562 S.E.2d 278 (2002); *Russell*, 129 N.C. App. at 524, 500 S.E.2d at 731-32 (affirming, although not directly

addressing, jury verdict for plaintiff who brought suit alleging wrongful constructive discharge in violation of Title VII and North Carolina public policy based on sexual harassment); *Graham*, 121 N.C. App. at 385-86, 465 S.E.2d at 560-61; *Wagoner v. Elkin City Schools' Bd. of Education*, 113 N.C. App. 579, 588, 440 S.E.2d 119, 125 (stating that, "[a]ssuming that plaintiff was wrongfully constructively discharged, she is nonetheless not entitled to assert the tort of wrongful discharge because the tort of wrongful discharge arises only in the context of employees at will."), *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994).

Further support for the proposition that North Carolina recognizes the validity of wrongful discharge claims in violation of public policy where termination is constructive is found in the principles announced by our Supreme Court in the seminal case of *Coman*. As explained in *Coman*, an at-will employee may not be terminated for a reason violating the public policy of our State because " '[a] different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.' " *Coman*, 325 N.C. at 175, 381 S.E.2d at 447 (quoting *Sides*, 74 N.C. App. at 342, 328 S.E.2d at 826). Moreover, our Supreme Court acknowledged in *Coman* that "[b]ad faith conduct should not be tolerated in employment relations, just as it is not accepted in other commercial relationships." *Id.* at 177, 381 S.E.2d at 448. Bad faith conduct by an employer, resulting in intolerable working conditions like those in *Coman*, should not be sanctioned merely because the termination of employment was constructive rather than explicit. As recognized elsewhere, "[a] coerced resignation is tantamount to a discharge." *Smith v. Brown-Forman Distillers Corp.*, 241 Cal. Rptr. 916, 920 (Cal. App. 1987).

"There is a growing willingness among courts to permit common law public-policy-based claims of constructive discharge." 1 Lex. K. Larson, *Unjust Dismissal* § 6.06[2] (2003). " 'Though not always employing precisely the same language, most courts seem to have adopted the rule that a constructive discharge occurs . . . when an employer deliberately causes or allows the employee's working conditions to become "so intolerable" that the employee is forced into an involuntary resignation.' " *Smith*, 241 Cal. Rptr. at 920 (quoting *Beye v. Bureau of National Affairs*, 59 Md. App. 642, 653, 477 A.2d 1197, 1203, *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984)). Indeed, ten of the eleven states to consider whether such a claim is cognizable have extended the public policy exception to prohibit con-

structive discharge. *See id.*; *see also, e.g.*, *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 250, 743 S.W.2d 380, 386 (1988); *Smith*, 241 Cal. Rptr. at 920; *Seery v. Yale-New Haven Hospital*, 17 Conn. App. 532, 540, 554 A.2d 757, 761 (1989); *Balmer v. Hawkeye Steel*, 604 N.W.2d 639, 643 (Iowa 2000); *Beye*, 59 Md. App. at 653, 477 A.2d at 1203; *Bell v. Dynamite Foods*, 969 S.W.2d 847, 853 (Mo. Ct. App. 1998); *Barker v. State Ins. Fund*, 40 P.3d 463, 468 (Okla. 2001); *Dalby v. Sisters of Providence*, 125 Or. App. 149, 154, 865 P.2d 391, 394-95 (1993); *Slack v. Kanawha County Housing*, 188 W. Va. 144, 155, 423 S.E.2d 547, 558 (1992); *Strozinsky v. School Dist. of Brown Deer*, 237 Wis. 2d 19, 62-63, 614 N.W.2d 443, 464 (2000); *but see Grey v. First National Bank*, 169 Ill. App. 3d 936, 942-43, 523 N.E.2d 1138, 1143 (rejecting a claim for constructive discharge), *appeal denied*, 122 Ill. 2d 574, 530 N.E.2d 245 (1988), *cert. denied*, 493 U.S. 1020, 107 L. Ed. 2d 739 (1990). As explained by the Maryland Court of Special Appeals in *Beye*:

> [n]ormally, an employee who resigns is not regarded as having been discharged, and thus would have no right of action for abusive discharge.
>
> The law is not entirely blind, however. It is able, in most instances, to discard form for substance, to reject sham for reality. It therefore recognizes the concept of "constructive discharge;" in a proper case, it will overlook the fact that a termination was formally effected by a resignation if the record shows that the resignation was indeed an involuntary one, coerced by the employer.

Beye, 59 Md. App. at 649, 477 A.2d at 1201.

For the foregoing reasons, we conclude that under a fair reading of *Coman* as confirmed by *Garner*, North Carolina recognizes the claim of wrongful discharge in violation of public policy where termination is constructive. We therefore reject Defendant's argument that Plaintiff's claim for wrongful discharge cannot stand because her termination was constructive. We must now determine whether Plaintiff presented sufficient evidence in support of her claim of constructive discharge. Specifically, we consider whether Plaintiff presented sufficient evidence that Defendant deliberately forced her resignation.

III. *Deliberateness*

As indicated by this Court in *Graham v. Hardee's Food Systems*, "a plaintiff alleging constructive discharge 'must demonstrate that the

employer deliberately made working conditions intolerable and thereby forced [the plaintiff] to quit. Deliberateness exists only if the actions complained of were intended by the employer as an effort to force the employee to quit.' " *Graham*, 121 N.C. App. at 385, 465 S.E.2d at 560 (quoting *E.E.O.C. v. Clay Printing Co.*, 955 F.2d 936, 944 (4th Cir. 1992)); *see also Doyle*, 148 N.C. App. at 177, 557 S.E.2d at 579 (same). "Thus, each claimant must demonstrate that [the employer's] actions were specifically *intended* to force each claimant to quit. Intolerability is 'assessed by the objective standard of whether a "reasonable person" in the employee's position would have felt compelled to resign.' " *E.E.O.C.*, 955 F.2d at 944 (quoting *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082, 89 L. Ed. 2d 718 (1986)). (citations omitted).

Here, Plaintiff presented more than a scintilla of evidence demonstrating Defendant's deliberateness. Although Defendant initially took some steps to address Plaintiff's complaints of sexual harassment by initiating an investigation, the evidence tended to show that these measures were completely ineffective at ending the harassment. Defendant in fact promoted Schultz after being informed of his offensive behavior. The store manager, Turner, never informed the field specialist, Morgan, of the new instances of sexual harassment by Schultz reported to him by Plaintiff in November. Although Schultz no longer worked at Plaintiff's particular store after early November, Defendant did not prevent Schultz from coming into the store despite Plaintiff's allegations of continued harassment and threats. During the November meeting, Plaintiff informed Turner and the assistant manager, Streicher, that Schultz was stalking her and following her from the store parking lot to her home. Plaintiff's father confirmed this report. In response, Turner told Plaintiff that Schultz was not banned from the store, and refused Plaintiff's requests for help.

Further, Plaintiff testified that, after reporting the sexual harassment, her working conditions deteriorated still further. In November and December, Defendant decreased Plaintiff's employment to twenty-seven hours per week, the amount of time worked by part-time employees, while all other employees' hours remained the same. Plaintiff also testified that one of the customer service managers began reporting her cash register "till [as] coming up short." The manager repeatedly embarrassed Plaintiff by loudly informing her of shortages in front of employees and customers, in violation of store policy. Plaintiff testified that this problem did not occur prior to making her complaint. Turner, the store manager, stopped speaking to

Plaintiff, as did other employees. Upon tendering her resignation, the assistant store manager stated, "We figured this would happen."

We conclude that Plaintiff's evidence presents more than a scintilla of evidence that Defendant specifically intended to deliberately make Plaintiff's working conditions intolerable. Defendant's refusal to take effective steps in addressing the sexual harassment, the reduction in hours and resulting reduction in pay, the implied allegations of incompetence or embezzlement, the silent treatment, the continued harassment, and the compelling statement from management that they expected she would resign, present a question for the jury as to whether Defendant is liable for wrongful termination. The trial court therefore erred in granting directed verdict on this issue.

In summation, we hold that a viable claim for wrongful discharge exists in North Carolina where the termination violates public policy, even though the discharge is constructive. Plaintiff presented sufficient evidence of her claim for wrongful discharge in violation of public policy to survive a motion for directed verdict. The trial court therefore erred in granting Defendant's motion for a directed verdict on this issue. The judgment of the trial court is therefore,

Reversed.

Judge TIMMONS-GOODSON concurs.

Judge McCULLOUGH dissents.

Judge McCULLOUGH dissenting.

Because I disagree with the majority's conclusion that the claim of constructive discharge based upon either a hostile work environment or in retaliation is authorized under the public policy exception to the employee-at-will doctrine set forth in *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989), I respectfully dissent. I also dissent in the case *sub judice* on the grounds that even if constructive discharge claims are authorized, plaintiff's case lacks sufficient evidence on the elements of the claim to withstand a motion for a directed verdict.

I. Claims for Wrongful Discharge

Plaintiff contends, and the majority agrees, that the North Carolina Supreme Court conclusively recognized the tort of con-

structive wrongful discharge in the case of *Coman*, 325 N.C. at 175, 381 S.E.2d at 447. I do not read *Coman* so broadly, but instead read its holding as more narrowly defined by the issue presented in that case: "Our present task is to determine whether we should adopt a public policy exception to the employee-at-will doctrine." *Id.* The Court went on to adopt the public policy exception as a claim for wrongful discharge. I believe this is an altogether different claim than that of constructive discharge and therefore would distinguish this opinion from *Graham v. Hardee's Food Systems*, 121 N.C. App. 382, 386-87, 465 S.E.2d 558, 561 (1996). In *Graham*, our Court seems to hold that a constructive discharge claim falls within the public policy exception of a wrongful discharge to an at-will-employee, and therefore requires proof that the discharge was in contravention of the public policy of North Carolina. *Id.*

A. The Public Policy Exception to an at-will-employee

Generally, an at-will-employee may be discharged without reason. *Still v. Lance*, 279 N.C. 254, 260, 182 S.E.2d 403, 407 (1971). However, in *Coman* the Court held that, should an employee be discharged for failing to follow an employer's demands, where such demands violate public policy, discharging that employee on the grounds of this failure is unlawful. The Court found authority for this exception in *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 13 (1985), where this Court stated:

> [W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.

The issue in *Sides* was the employer's demand that the employee perjure herself in a malpractice lawsuit; the issue in *Coman* was the employer's demand that the employee violate federal trucking regulations and falsify logs. The Court found both of these demands violated public policy. *Coman*, 325 N.C. at 175, 381 S.E.2d at 447. In *Coman*, the employee who refused to violate the federal trucking regulations had his pay reduced by fifty percent, which the Court determined was tantamount to discharge. *Id.* at 173-74, 381 S.E.2d at 446. It is clear from *Coman*, that a claim under this wrongful discharge

required some affirmative demand of an employee by the employer to violate public policy.

B. Elements of Hostile Work Environment Constructive Discharge

A separate and distinct wrongful discharge claim, one other than the public policy exception to the at-will-employee doctrine as defined in *Coman*, is a claim in tort for a hostile work environment constructive wrongful discharge. North Carolina state courts have yet to adopt this type of claim. *Graham*, 121 N.C. App. at 385, 465 S.E.2d at 560.

In the interest of judicial economy, however, our Court in *Graham* assumed *arguendo* what the elements of this constructive discharge claim would be. *Id.* In so doing, we sought guidance from the Federal Fourth Circuit Court of Appeals as to the elements of the claim. "A plaintiff alleging constructive discharge must therefore prove two elements: deliberateness of the employer's action, and intolerability of the working conditions." *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985). In *Bristow*, the Fourth Circuit required deliberateness be shown by the following:

> Our decisions require proof of the employer's specific intent to force an employee to leave[.] *Intent* may be inferred through circumstantial evidence, including a failure to act in the face of known intolerable conditions[.]

Id. (citations omitted) (emphasis added). The *Bristow* Court required that intolerability be assessed by the following: "[A]s the circuits uniformly recognize, [intolerability] is assessed by the objective standard of whether a 'reasonable person' in the employee's position would have felt *compelled* to resign." *Id.* (emphasis added).

II. Plaintiff's Claim of Constructive Discharge

Assuming *arguendo* that North Carolina courts have adopted the claim of constructive discharge, a claimant would be required to bring forth the elements of the claim as set out in *Bristow*. *See Graham*, 121 N.C. App. at 385, 465 S.E.2d at 560. Because I do not believe plaintiff supported her case with more than a scintilla of evidence as to the element of defendant's deliberateness or intent, I would hold the trial court was correct in granting the motion for directed verdict at the close of all evidence.

A. Standard of Review

A motion for a directed verdict under Rule 50(a) of the North Carolina Rules of Civil Procedure presents the same question for both trial and appellate courts: whether the evidence, taken in a light most favorable to plaintiff, was sufficient for submission to the jury. *Helvy v. Sweat*, 58 N.C. App. 197, 199, 292 S.E.2d 733, 734, *disc. review denied*, 306 N.C. 741, 295 S.E.2d 477 (1982). The question of the evidence's sufficiency is a matter of law, and the motion should be reversed if there is more than a scintilla of evidence to support all the elements of plaintiff's *prima facie* case. *Southern Railway Co. v. O'Boyle Tank Lines*, 70 N.C. App. 1, 4, 318 S.E.2d 872, 875 (1984). Therefore, this Court reviews the record and transcript *de novo*, reversing upon a finding of more than a scintilla of evidence supporting each element of plaintiff's *prima facie* case.

B. The Element of "Deliberateness" in Constructive Discharge

Plaintiff alleges the following evidence, put forth in their case in chief, is more than a scintilla of evidence to establish the element of defendant's "deliberateness." In making this claim, plaintiff argues that this element does not require specific intent, but can be met so long as an employer "tolerates discriminatory working conditions that would drive a reasonable person to resign." *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 364 (D.C. 1993). I would disagree, citing the stricter *Bristow* standard: "Our decisions require proof of the employer's *specific intent* to force an employee to leave." *Bristow*, 770 F.2d at 1255 (emphasis added). Under either of these standards, the evidence was no more than a scintilla as to the element of deliberateness.

Plaintiff alleges the following evidence meets the "more than a scintilla" standard to survive a directed verdict on the question of defendant's "deliberateness": Plaintiff first began employment with defendant in the spring of 1999 at their Kernersville store. At that time, she signed a copy of defendant's sexual harassment policy and was put on notice to take any concerns to management, or use the toll-free number in the back of the store for complaints.

Plaintiff began to be sexually harassed at her job in July of 1999 by co-employee Randy Schultz. Mr. Schultz worked in the meat department. The harassment consisted of daily sexual comments by Mr. Schultz when he would visit plaintiff at her register. This continued up until 26 October 1999, when plaintiff first reported the

harassment to defendant's management. She first told her immediate supervisor, who on the same day arranged to have her speak with Mike Turner, the store manager. Also on 26 October 1999, Mr. Turner contacted a special field specialist, Shirley Morgan, in Charlotte, North Carolina, to come and interview plaintiff. The field specialist told plaintiff she would get back with her in a week, but in fact got back in touch with her a "couple of weeks" later.

In the first week of November, four days after plaintiff's concerns were brought to the attention of management, Mr. Schultz was transferred to another of defendant's locations to start a management trainee program. In another meeting with Mr. Turner, plaintiff again discussed the continued sexual harassment and alleged threats by Mr. Schultz, despite his being transferred. Mr. Turner responded to these contentions, "Well, as far as I know he's not been banned from the store." He said he would again contact Ms. Morgan (the field specialist), but plaintiff did not hear from Ms. Morgan immediately.

Mr. Schultz occasionally came into the store throughout November to do paperwork, buy something, or just "hang out." In mid to late November, plaintiff met with Ms. Morgan at McDonald's where she was told the investigation had been completed, Mr. Schultz had denied everything, and they had found no evidence to corroborate her story. Plaintiff alleged that defendant was still making sexual statements to her after this meeting, and arranged a third meeting with Mr. Turner and a co-manager. Her father was also present. Plaintiff alleged defendant was stalking her, physically touching her, and making threatening phone calls. To this, Mr. Turner replied, "Wendy, what do you want me to do about it?"

Plaintiff alleged that incidents of both sexual comments and physical touching continued throughout November. Twice during November, Mr. Schultz followed plaintiff out of defendant's parking lot in his car after plaintiff had finished work. Plaintiff contacted Ms. Morgan one last time at the end of November by phone. In December, plaintiff alleged defendant continued to make sexual statements to her, approximately two to three times a week.

Randy Schultz was known by plaintiff, fellow employees, and management to be having an affair with a fellow coworker before his November transfer to the management program. Defendant has a policy that its employees can be immediately discharged for "immoral conduct on or off the job." Defendant never sought to discharge Mr. Schultz on these grounds.

From January 2000 to 22 February 2000, Mr. Schultz made no further attempts to contact plaintiff, by phone or otherwise. Plaintiff gave defendant notice of her resignation 22 February 2000.

Defendant's undisputed evidence, offered to show the lack of deliberateness as to plaintiff's resignation, was as follows: Defendant was not on notice of the alleged sexual harassment until 26 October 1999. That same day, the defendant took immediate action, having plaintiff interviewed by both Mr. Turner and Ms. Morgan (arriving from Charlotte). The following day Mr. Schultz was interviewed as to the alleged incidents. There was no evidence to corroborate plaintiff's allegations and therefore no basis upon which to credit plaintiff or discredit defendant.

As Mr. Schultz was set to transfer four days after the complaint, defendant considered this a remedy to the problem because the two would no longer be working in the same store. Mr. Turner had recommended Mr. Schultz be placed in the management program before he was on notice of the alleged sexual harassment allegations. The allegations by plaintiff were the first of their kind against Mr. Schultz. Because Mr. Schultz had been selected for the management program, Mr. Turner told Ms. Morgan that he "wanted to get this investigation started as soon as possible and get to the bottom of it."

The field specialist conducted the investigation, and recommended the following:

> We knew that Randy was no longer at the store because he went into the MDP store and he moved out of that store I think two or three days after that. Our recommendation was, because we could not corroborate the allegations, that we go back to Wendy and Randy with follow-up memos and let them read the harassment policy indicating that they understood that harassment is not tolerated in the future. If anything happened in the future, it should be reported.

Both plaintiff and Mr. Schultz were given a copy of defendant's harassment policy, and both were signed: plaintiff signed 22 November 1999, and Mr. Schultz signed 23 November 1999. In late November, Ms. Morgan was contacted one last time by plaintiff alleging that Mr. Schultz had come back into the store at one time, and that she had been receiving threatening phone calls from someone she believed to be him. At that time, Ms. Morgan offered that "if [plaintiff] felt uncomfortable, she could work in Winston-Salem or

Greensboro of her choice," to which plaintiff responded, "she said she would think about that and let [Ms. Shirley] know." After this offer of transfer and notification to plaintiff that the investigation was closed, plaintiff provided no clear evidence that she brought any further notice to defendant of harassment occurring in December, all alleged to have occurred by phone calls to plaintiff's parents' home. It should be noted that there are no allegations of any harassment by Mr. Schultz in either January or in the three weeks in February before plaintiff's resignation.

When reading all evidence in a light most favorable to the plaintiff, granting all reasonable inferences therefrom, I am not in a position to ignore defendant's undisputed evidence. For this reason I believe the trial court was correct in denying a directed verdict motion at the close of plaintiff's evidence, but was also correct in granting the motion at the close of all evidence.

I believe that the "deliberateness" element of constructive discharge as set out in *Bristow*, cannot as a matter of law be shown where defendant has undisputedly responded immediately to plaintiff's complaint, in accord with the harassment policies that plaintiff signed, and where part of this response was an offer to transfer plaintiff in order that her employment may be retained. Furthermore, the record is clear that defendant considered the fact that Mr. Schultz was set to be moved to a new store in a matter of three or four days after the harassment claims were first brought to their attention. Defendant was reasonable in considering this a convenient and proper means to resolve an uncorroborated he-said, she-said scenario. Finally, plaintiff worked for nearly two months before her voluntary resignation, during which time she raises no allegations of harassment or any attempt by defendant to have her resign.

I find support in *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62 (2d Cir. N.Y. 2000). In that case, the Second Circuit required something "beyond mere negligence or ineffectiveness" to show that an employer's handling of plaintiff's complaints amounted to a "deliberate" attempt to make her work place so intolerable that she would resign. *Id.* at 74.

The undercurrent of plaintiff's argument is that, short of terminating Mr. Schultz, no response by defendant would be adequate.[1]

1. It should be noted here that the jury found that no damages were proximately caused by defendant's alleged negligent retention of Mr. Schultz or intentional infliction of emotion distress.

While this may be true had there been some corroborative evidence supporting claims for harassment, here no such corroborative evidence has been offered, even when read in the most favorable light to plaintiff.

In sum, I do not believe constructive discharge falls under the public policy exception of the at-will-employee doctrine as set out in *Coman*, but is a separate and distinct claim. I would therefore distinguish this case from *Graham* on that point, because *Graham* seemed to require a constructive discharge claim meet both the elements of deliberateness and intolerability, and also required a showing of a violation of North Carolina public policy under *Coman*.

Finally, applying the facts of this case to *Graham* and *Bristow*, even if the constructive discharge claim was cognizable in North Carolina or should our Supreme Court hold it to be so, there was not sufficient evidence as to the element of deliberateness for the claim to survive a motion for directed verdict at the close of all evidence. I would therefore affirm the trial court.

STATE OF NORTH CAROLINA v. BILLY LEE BLACKSTOCK

No. COA03-732

(Filed 6 July 2004)

1. Search and Seizure— investigatory stop—motion to suppress

The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by denying defendant's motion to suppress evidence seized by law enforcement officers during the 17 April 2000 investigative stop of an automobile in which defendant was a passenger, because: (1) defendant's arguments point to nothing more than inconsistencies and discrepancies in the evidence, the resolution of which was for the trial court; and (2) while a single one of the factors relied upon by law enforcement officers and cited by the trial court might not in itself have been sufficient to sustain a reasonable suspicion that criminal conduct was underway, the composite of the factors as detailed in the trial court's findings of fact adequately sustained a reasonable and articulable suspicion that criminal activity was afoot.

2. Evidence— hearsay—nontestimonial statements—right of confrontation

Hearsay statements made by a murder victim to his wife and daughter concerning the shooting of the victim during a robbery were nontestimonial and not rendered inadmissible by *Crawford v. Washington*, 541 U.S. —— (2004) where they were made during personal conversations that took place over a period of several days after the shooting at a time when the victim's physical condition was improving and he could have expected to personally testify at the trial.

3. Evidence— hearsay—state of mind exception—residual hearsay exception

The trial court erred in a first-degree murder and robbery with a dangerous weapon case by admitting hearsay statements made by the victim to his wife and daughter concerning the robbery and shooting, because: (1) the statements were made several days after the robbery and therefore were not admissible under N.C.G.S. § 8C-1, Rule 803(3) to show the victim's then-existing state of mind during the robbery; (2) the statements made by the victim to his wife and daughter did not bear particular guarantees of trustworthiness required for admissibility under the residual hearsay exception for testimony by unavailable witnesses set forth in N.C.G.S. 8C-1, Rule 804(b)(5) since, although the victim may have had no motivation to speak untruthfully to either the police captain or his wife and daughter, his statement to the officer that he was shot during a struggle for the gun versus the statement to his relatives that he was shot while on his knees with his hands in the air pleading for his life cannot be reconciled without the benefit of cross-examination, which defendant was denied; and (3) the improperly admitted hearsay statements contained the only evidence of premeditation and deliberation, and thus, the jury's verdict of first-degree murder cannot stand on that basis but can still rest on the felony murder theory with vacation of the armed robbery conviction which serves as the basis for the felony murder.

Appeal by defendant from judgments entered 25 February 2002 by Judge Michael E. Helms in Superior Court, Rockingham County. Heard in the Court of Appeals 18 May 2004.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant appellant.

WYNN, Judge.

Defendant Billy Lee Blackstock appeals from judgments of the trial court entered upon jury verdicts finding him guilty of robbery with a dangerous weapon and first-degree murder on the basis of premeditation and deliberation and felony murder. Defendant argues such judgments must be reversed, in that the trial court erred by (I) denying his motion to suppress; (II) admitting hearsay statements; (III) overruling his objections to statements made by the prosecutor during closing argument; and (IV) allowing an expert witness to state that the bullet wound suffered by the victim was the proximate cause of death. We conclude the trial court erred in admitting the hearsay statements in violation of Defendant's right to confrontation. Because the hearsay statements pertained only to Defendant's conviction of first-degree murder under a theory of premeditation and deliberation, however, we find no error in Defendant's conviction of felony murder; and, following our case law, we vacate Defendant's conviction of robbery with a dangerous weapon. *State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770 (2002).

At the trial, the State presented evidence tending to show that on the evening of 15 April 2000, Cecil Weeks was working at the convenience store he owned and operated in Reidsville, North Carolina. Weeks was alone in the store. Two African-American men wearing masks and carrying handguns entered the store at approximately 9:30 p.m. and demanded money. Weeks was shot in the upper right chest during the course of the robbery.

Weeks was treated for the gunshot wound at a hospital, where his condition improved over the next four days. On the fifth day, he developed an infection in his blood stream and died on 22 April 2000. Before his death, Weeks made several statements to law enforcement officers and his wife and daughter describing the robbery and the shooting. The trial court allowed Weeks' wife and daughter to testify to these statements at trial over Defendant's objections.

Investigating officers recovered a spent .40 caliber bullet and shell casing from the floor of the convenience store. Testing revealed that the bullet recovered from the scene of the robbery was fired from

a Glock handgun belonging to Defendant and seized by officers during a 17 April 2000 investigative stop of an automobile in which Defendant was a passenger. During a subsequent search of Defendant's residence, officers discovered a pair of blood-stained jeans identified by Defendant as belonging to him. A forensic molecular geneticist performed a DNA analysis and concluded that the blood stain on the jeans matched Weeks' DNA profile. Finally, a witness for the State identified Defendant as one of two men she observed loitering behind the convenience store approximately thirty minutes before the robbery.

Before trial, counsel for Defendant moved to suppress evidence seized by law enforcement officers during the 17 April 2000 investigative stop. At the suppression hearing, Greensboro police officer J.D. Slone testified that, on 16 April 2000, he was working with fellow officer Jay Tunstall as part of a larger unit of officers known as the "Crime Abatement Team." The officers wore plain clothes and patrolled in an unmarked vehicle "the area between Summit Avenue and Bessemer and back to Cone Boulevard" in northeast Greensboro because "the statistical data indicated this area had a problem with robberies and break-in and enterings." At approximately 11:45 p.m., Officer Slone "observed two black males dressed in dark clothing . . . walking along the front of the closed businesses of [a] strip mall." None of the businesses in the strip mall was open, the lighting was dim, and there were no vehicles in the parking lot. The two men "were walking very slowly, and they were looking into the business windows and looking back throughout the parking lot and back into the businesses as they were going up along the sidewalk." Officer Slone relayed his observations to his sergeant, who arrived at the scene in a vehicle with visible police antennas and a mounted blue light on the rear window. One of the two men turned and appeared to spot the police vehicle, whereupon both men "immediately turned around and stopped their direction of travel that they were going and immediately began to walk hurriedly back toward . . . the western end of the building." The men entered a vehicle parked at the end of the building, in an area generally concealed from public view. The officers followed the two men, who drove slowly through the parking lots of a gas station and a fast-food restaurant, but did not stop. The man sitting in the passenger's seat turned his head and "looked over his left shoulder, and he kept his head turned back for a few seconds as if he was trying to identify the vehicle." At that point, Officers Slone and Tunstall decided they would stop the vehicle. Officer Slone testified the decision to stop the vehicle was

> [b]ased upon the statistical data we reviewed and the indication of robberies in that area, given the time of night it was, the dark clothing they were wearing, the position of their car out of sight, the way they moved along the front of the businesses, moving around. They were trying to be aware of their surroundings when they began to walk around the parking lot and when they observed the police vehicle, they turned and changed their pace. They got into their vehicle and left.
>
> They pulled directly into the [gas station parking] lot as if they were casing the business, what appeared to be—it was a slow pace. Never did stop. Pulled back onto the street; upon approaching the [fast food restaurant], immediately we were behind them because they failed to give a turn signal in an orderly fashion. The front seat passenger immediately looked over as if they were trying to identify the people within the vehicle.
>
> . . . .
>
> And the fact that they drove through the [fast food restaurant parking] lot and upon getting on Sullivan Street, we were behind them. Again, they started looking, again, as if they were trying to identify who it was.

The officers stopped the vehicle near the campus of A&T University. The driver identified himself as Tory Gerald Tucker, but told Officer Slone he did not have his driver's license with him. Officer Slone identified Defendant as the passenger. Officer Slone requested that Tucker step out of the vehicle. Tucker informed Officer Slone they were traveling to A&T University "to talk with a football player by the name of Marvin Blackstock." Officers with A&T University informed Officer Slone that no such person was listed in the university roster. Tucker further explained that the two men had been at the strip mall earlier to use a pay phone; however, Officer Slone stated there were no pay phones in the immediate area of the shopping center. Tucker gave Officer Slone permission to search his vehicle. Officers found a plastic bag containing two ounces of marijuana and a "loaded Glock 23 .40 caliber handgun" beneath the front passenger seat. Both Tucker and Defendant denied ownership of the weapon. The officers also found two black toboggans and "a female-styled hair wig" in the vehicle.

Defendant presented the testimony of Doris Hunter, the registrar at A&T University, who verified that a student named Marvin

Blackstock was enrolled and attended the university during April of 2000. Hunter further testified that Blackstock was a football player for the university.

The trial court denied Defendant's motion to suppress, and the case came to trial on 7 January 2002. Upon conclusion of the evidence, the jury found Defendant guilty of armed robbery and first-degree murder under the felony murder rule and on the basis of premeditation and deliberation. Upon the jury's recommendation that Defendant be spared the death penalty, the trial court sentenced Defendant to life imprisonment without parole for the first-degree murder conviction and a term of sixty-four to eighty-six months' imprisonment for the armed robbery conviction. Defendant appealed.

Defendant presents four assignments of error on appeal, arguing the trial court erred by (I) denying his motion to suppress evidence seized by law enforcement officers during the 17 April 2000 investigative stop; (II) admitting statements made by Weeks to his wife and daughter; (III) overruling his objections to statements made by the prosecutor during closing argument; and (IV) allowing an expert witness to state that the bullet wound suffered by Weeks was the proximate cause of death. For the reasons stated herein, we conclude the trial court erred in admitting the hearsay statements made by Weeks to his wife and daughter.

I. *Motion to Suppress*

[1] By his first assignment of error, Defendant contends the trial court erred in denying his motion to suppress evidence seized during the 17 April 2000 stop of the automobile in which Defendant was a passenger. Defendant contends that some of the findings by the trial court are not supported by the evidence, and that, in turn, the trial court's conclusion that the investigative detention was lawful is erroneous.

We review a trial court's ruling on a motion to suppress to determine whether the findings of fact are supported by competent evidence, and whether the findings support the conclusions of law. *State v. Braxton*, 344 N.C. 702, 709, 477 S.E.2d 172, 176 (1996) (noting that a trial court's resolution of a conflict in the evidence will not be disturbed on appeal). The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. *Id.* Once we conclude that the trial court's findings of fact are supported by the evidence, our next task "is to determine whether

the trial court's conclusion[s] of law [are] supported by the findings." *State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001). "Conclusions of law that are correct in light of the findings are also binding on appeal." *State v. Howell*, 343 N.C. 229, 239, 470 S.E.2d 38, 43 (1996). "This deference is afforded the trial judge because he is in the best position to weigh the evidence, given that he has heard all of the testimony and observed the demeanor of the witnesses." *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 631 (2000).

In the instant case, law enforcement officers seized evidence pursuant to an investigative stop of a vehicle in which Defendant was a passenger. Unreasonable searches and seizures are prohibited by the Fourth Amendment to the Constitution of the United States and Section 20 of Article I of the North Carolina Constitution. *State v. Garner*, 331 N.C. 491, 506-07, 417 S.E.2d 502, 510 (1992), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996). They apply to "seizures of the person, including brief investigatory detentions such as those involved in the stopping of a vehicle." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994). "An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *Id.* at 441, 446 S.E.2d at 70 (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). In ascertaining whether an officer had a reasonable suspicion to make an investigatory stop, the court must consider the totality of the circumstances. *Id.* "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." *Id.* Our Supreme Court has acknowledged that activity at an unusual hour is a factor that may be considered by a law enforcement officer in formulating a reasonable suspicion. *Id.* at 442, 446 S.E.2d at 70.

In reviewing the evidence submitted by the State, the trial court found, *inter alia*, that

> Among the facts composing the totality of the circumstances (the whole picture) supporting a reasonable and articulable suspicion by an experienced law enforcement officer that criminal activity was afoot at the Fairview Shopping Center just before 12 midnight are that (a) every one of the businesses was closed, (b) the shopping center is a block away from the lighted glare of Summit Avenue, (c) the back entrances to the shopping center open onto an asphalt lot and the lot is surrounded by a high fence which can

be accessed from near where the car in which the two were riding was parked, (d) the shopping center parking lot was essentially dark, (e) the light eliminating [sic] from the businesses was dim, (f) the two were wearing dark clothing, (g) it was just before midnight, (h) there were no visible vehicles in the parking lot and no other persons on the sidewalks or parking lot of the shopping center, (i) the strip shopping center was in an area where incidences of crime were on the significant increase, (j) the two slowly walked by the buildings near the windows, looking into the businesses as if casing them and as if looking to see what back door entrances there might be opening onto the asphalt back lot, which lot was essentially hidden from the view of the public, (k) one of the businesses was a type of bank, (l) the two walked into the parking lot and their walking came almost to a stop and they were "hanging out" as if they were looking to break into something, (m) the two seemed to be looking out for something or expecting somebody, (n) the two did not seem to be mere passersby, (o) the observing officers could not tell where the two came from, (p) the two parked their vehicle out of general view, (q) the shopping center would not be generally used for parking by residences in the area, (r) when a vehicle came into their sight, which they could have believed was a law enforcement vehicle, (alternatively that upon approach of a stranger in a Ford Taurus automobile they fled the parking lot) the two looked at each other and turned and hurriedly walked to the dark end of the strip and got in a hidden from view vehicle and left, (s) such flight from a law enforcement vehicle was unprovoked, (t) once on Summit Avenue they tried to lose any law enforcement officers who were following them by turning into the Citgo service station where they did not stop or conduct any business, and (u) turned into Wendys abruptly and looked around and took a sustained look at the vehicle following them, drove around Wendys without stopping or transacting any food business, and probably confirmed that law enforcement officers were following them. The suspicion that criminal activity was afoot at around 12 midnight on the night of April 16-17, 2000 was a reasonable and articulable suspicion. Such suspicion by Officer Slone was not a mere inchoate suspicion or mere hunch.

Defendant objects to several of the trial court's findings of fact, asserting they are unsupported by the greater weight of the evidence. For example, Defendant contends there was insufficient evidence to

support the trial court's findings that (1) the Fairview Shopping Center was in a "high crime area;" (2) the two men appeared to be "casing" the shopping center; and (3) the two men recognized and attempted to evade the officers following them. Defendant's arguments, however, point to nothing more than inconsistencies and discrepancies in the evidence, the resolution of which was for the trial court. *See State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994) (conflicting evidence must be resolved by the trial court's findings and such findings will not be disturbed on appeal where supported by competent evidence), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995). After careful consideration of the evidence presented to the trial court, we conclude the trial court's findings of fact are supported by competent evidence. We next consider whether the findings of fact support the trial court's conclusion that the investigative stop was lawful.

When determining whether an officer had reasonable suspicion to conduct an investigative stop, the trial court may properly consider such factors as: (1) activity at an unusual hour; (2) nervousness of an individual; (3) an area's disposition toward criminal activity; and (4) unprovoked flight. *State v. Roberts*, 142 N.C. App. 424, 429, 542 S.E.2d 703, 707 (2001); *State v. Parker*, 137 N.C. App. 590, 600-02, 530 S.E.2d 297, 304 (2000). "None of these factors, standing alone, [is] sufficient to justify a finding of reasonable suspicion, but must be considered in context." *Roberts*, 142 N.C. App. at 429, 542 S.E.2d at 707-08; *see also State v. Crenshaw*, 144 N.C. App. 574, 577, 551 S.E.2d 147, 150 (2001) (noting that, " 'individually, any of the factors cited in [articulating reasonable suspicion] might not justify a search, but one cannot piecemeal this analysis. One piece of sand may not make a beach, but courts will not be made to look at each grain in isolation and conclude there is no seashore.' ") (quoting Robert G. Lindauer, Jr., *State v. Pearson and State v. McClendon: Determining Reasonable, Articulable Suspicion from the Totality of the Circumstances in North Carolina*, 78 N.C. L. Rev. 831, 849 (2000)).

We conclude that, while a single one of the factors relied upon by the law enforcement officers and cited by the trial court might not in itself have been sufficient to sustain a reasonable suspicion that criminal conduct was underway, and may well have been consistent with innocent behavior, the composite of the factors as detailed in the trial court's findings of fact adequately sustained a reasonable and articulable suspicion that criminal activity was afoot, and thus supported the trial court's conclusion of law to that effect. *Parker*, 137 N.C. App.

at 600-01, 530 S.E.2d at 304-05 (holding the trial court properly denied the defendant's motion to suppress where the totality of the circumstances supported a reasonable suspicion that criminal activity was afoot); *State v. Fox*, 58 N.C. App. 692, 695, 294 S.E.2d 410, 412-13 (1982) (holding that reasonable suspicion existed for an investigatory stop of a vehicle the defendant was driving slowly in the early morning hours down a dead-end street where businesses had previously been robbed, where the defendant was dressed shabbily but the vehicle was "real nice," and where the defendant appeared to avoid the officer's gaze in passing) *affirmed per curiam*, 307 N.C. 460, 298 S.E.2d 388 (1983); *State v. Tillett and State v. Smith*, 50 N.C. App. 520, 524, 274 S.E.2d 361, 364 (1981) (holding reasonable and articulable suspicion existed to support the investigatory stop of a vehicle in view of the time of day and the officer's prior knowledge of reports of criminal activity in the area).

Here, Defendant and Tucker were observed loitering at a closed shopping center shortly before midnight wearing dark clothing in an area targeted by law enforcement officers as a high crime area. No other vehicles were in the shopping center parking lot. When a vehicle did appear, which Defendant and Tucker may have recognized as a law enforcement vehicle, the men abruptly and hurriedly returned to their vehicle, which was parked out of general public view, and departed. Once in the vehicle, the passenger turned and looked behind as if trying to determine the identity of the officers following them. These cumulative factors, together with the other detailed findings of fact articulated by the trial court, adequately support the officers' reasonable belief that Defendant and Tucker were involved in criminal activity. We hold the trial court properly denied Defendant's motion to suppress.

II. *Hearsay Statements*

[2] By further assignment of error, Defendant argues the trial court improperly admitted statements made by Weeks to his wife and daughter concerning the robbery and shooting. Prior to trial, the State filed written motions and notices of its intent to offer into evidence the hearsay statements. Following a hearing regarding the admissibility of the statements, the trial court ruled that the statements were admissible under Rules 803(3) and 804(b)(5) of the North Carolina Rules of Evidence. Defendant contends these statements were not properly admissible under any hearsay exception and that their admission violated his right to confrontation. According to Defendant, these statements were the only evidence to support the

jury's finding of first-degree murder under a theory of premeditation and deliberation. Thus, argues Defendant, admission of the statements irreparably prejudiced him, requiring a new trial.

Linda Billingsley, Weeks' daughter, testified to statements made to her by Weeks in the days following his admission to the hospital. Billingsley stated her father described the robbery as follows:

> He said that he was filling up the drink boxes. He said he heard something up front, and he said that he looked and saw someone come at him with a gun. He said the person was hollering "Don't be stupid or I'll blow your brains out."
>
> And he said that he fought with this person. He said he had the person down and he had the gun almost away from him, and he said that someone else had came in and stuck a gun to his head and told him not to do anything stupid or he would kill him. That's when he realized it was two and he gave up.
>
> He said that he was on his knees with his hands raised and he was begging for his life. He was talking about me and my mommy and sister and little girl. He told them not to hurt him, and he said the next thing he knew he was shot.

Weeks' widow, Teresa Weeks, gave similar testimony concerning her husband's statements regarding the robbery:

> He told me he was at the drink box. He was fixing to close up, and he was filling the drink box up. He said he heard the front door open, and he looked up and he saw a black man—well, a man dressed in black, dark clothing with a mask on and gloves; and he said he had a gun and said he came back to him and he told him, "Don't be crazy." He said, "I'll give you the money."
>
> And he said that—he tried to take the gun away from him. There was just one there. He tried to take the gun away. He said he almost had the gun away from him when another guy came storming through the door. He also was dressed in black with a mask, with dark clothes and he had a gun; and he came back to where he was at and said—he stuck the gun up to his head and he told him, he says, "Don't be crazy or I'll blow your brains out." And he said—he told him, he says, that he had a wife and two children and a grandchild; and he begged him not to kill him.
>
> He said that he had his hands up. He raised his hands and told them they could have anything they wanted, just don't kill him.

> And he said that he got up and—before he got up, he said he heard a gunshot and he didn't realize he was shot until he got up.

Thus, according to Billingsley and Teresa Weeks, Weeks was shot while on his knees with his hands in the air begging for his life. These statements differ significantly from the version of events Weeks gave to law enforcement officers. Captain Guilio Dattero of the Reidsville Police Department interviewed Weeks at the hospital immediately following the robbery and shooting. Weeks told Captain Dattero

> that he was in the process of closing up the store . . . when he went about the business of filling a drink machine in the store. He advised that he was doing that, that he heard the store front door open and two individuals entered. . . . He described the individuals. First of all, Suspect Number 1 as a black male, six feet in height, slender build, black or dark clothing, with a black mask and a black square gun. He then advised me Suspect Number 2 fit the same description, including possible identical ski mask and the weapon description was pretty much the same. . . . He advised that as the two entered the store they approached him, as they both had their weapons drawn. At some point he began to struggle with Suspect Number 1 after the suspects had demanded his cash. The suspect, that is, Suspect Number 1, then fired a single shot at Mr. Weeks, hitting him in the upper chest area.

According to this account of the robbery, Weeks was shot during a struggle for the gun. Thus, the officer's account did not provide evidence supporting the element of premeditation. We must now determine whether the trial court properly admitted the hearsay statements by Billingsley and Teresa Weeks.[1]

The United States Supreme Court's recent opinion in *Crawford v. Washington*, 541 U.S. —, 158 L. Ed. 2d 177 (2004) established new rules for determining whether the admission of hearsay statements violates a criminal defendant's constitutional right to be confronted with the witnesses against him. Prior to *Crawford*, the admission of an unavailable witness' statement against a criminal defendant was not violative of the Sixth Amendment confrontation right if the witness' statement bore adequate indicia of reliability. *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597 (1980). To meet that test, the out-of-

1. We note Defendant did not object at trial to admission of the hearsay statement offered by Captain Dattero, nor does Defendant argue on appeal that admission of the statement was improper. Accordingly, we give no consideration to this issue.

court statement had to fall within a firmly rooted hearsay exception or bear particularized guarantees of trustworthiness. *Crawford*, 541 U.S. at —, 158 L. Ed. 2d at 186.

Crawford replaced this test with a new focus upon the testimonial or nontestimonial nature of the out-of-court statement. *Crawford* held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at —, 158 L. Ed. 2d at 203. Where nontestimonial hearsay is at issue, however, "it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." *Id.* Thus, under *Crawford*, Sixth Amendment Confrontation Clause analysis will usually turn on the question of whether a particular statement is testimonial or nontestimonial in nature.

In determining whether admission of the hearsay statements in the instant case violated Defendant's Sixth Amendment right to confrontation, *Crawford* requires us to first determine whether the statements were testimonial or nontestimonial. *Crawford* did not explicitly define the term testimonial statements; nonetheless, the Court recognized the following as testimonial in nature: (1) grand jury testimony, (2) prior trial testimony, (3) *ex parte* testimony at a preliminary hearing, and (4) statements taken by police officers in the course of interrogations. *Crawford*, 541 U.S. at —, 158 L. Ed. 2d at 203. The Court also indicated that some statements covered by the hearsay exceptions are not testimonial in nature, such as business records or statements in furtherance of a conspiracy. *Id.* at —, 158 L. Ed. 2d at 195-96. Moreover, the Court left open the question of whether the Sixth Amendment incorporates an exception for testimonial dying declarations. *Id.* at — n.6, 158 L. Ed. 2d at 195 n.6.

We conclude the statements made by Weeks to his wife and daughter were essentially nontestimonial in nature. The evidence tended to show that these were personal conversations that took place over a series of several days, made at a time when Weeks' physical condition was improving. Thus, it is unlikely that Weeks made the statements under a reasonable belief that they would later be used prosecutorially. *See id.* at —, 158 L. Ed. 2d at 193 (reciting as one example of a definition of testimonial statement "pretrial statements that declarants would reasonably expect to be used prosecutorially"). At the time he made his statements, Weeks could have fully expected to testify at trial himself. Moreover, the fact that Weeks made the statements to his wife and daughter mitigates against the possibility

that he understood he was "bearing witness" against Defendant. *See id.* at —, 158 L. Ed. 2d at 192 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."). Because the statements were nontestimonial in nature, *Crawford* does not require their exclusion from trial. We must still determine, however, whether the out-of-court statements were properly admitted under exceptions to the general rule against hearsay.

In its order regarding the admissibility of the hearsay statements, the trial court concluded that the statements by Billingsley and Teresa Weeks were admissible under both Rule 803(3) and Rule 804(b)(5) of the North Carolina Rules of Evidence. We therefore examine the applicability of these two exceptions to the hearsay testimony admitted in this case.

A. *Rule 803(3)*

[3] Under Rule 803(3), the trial court may properly admit an out-of-court statement as an exception to the rule against hearsay where the statement concerns "the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . ." N.C. Gen. Stat. § 8C-1, Rule 803(3) (2003). Rule 803(3) allows the admission of hearsay testimony if it tends to demonstrate the victim's "then-existing state of mind." *State v. Gary*, 348 N.C. 510, 522, 501 S.E.2d 57, 65 (1998). Such evidence is only admissible if the victim's state of mind is relevant to the issues to be resolved at trial. *State v. Meekins*, 326 N.C. 689, 695, 392 S.E.2d 346, 349 (1990). On appeal, the ruling of the trial court regarding admissibility of evidence will be reversed if the findings are unsupported by competent evidence or if the law was applied erroneously. *State v. Carrigan*, 161 N.C. App. 256, 261, 589 S.E.2d 134, 138 (2003), *disc. review denied*, 358 N.C. 237, 593 S.E.2d 784 (2004).

The State contends the statements at issue were properly admitted under Rule 803(3) to demonstrate Weeks' "existing state of mind and emotional condition" during the robbery. However, the statements by Weeks were made several days *after* the robbery, and therefore do not reflect Weeks' "then-existing" state of mind during the robbery. Rather, the statements were simply a recital of Weeks' memory of the events that took place and his emotional condition at the time. As such, they were not admissible under Rule 803(3). *See* N.C.

Gen. Stat. § 803(3) (excluding statements of memory or belief to prove the fact remembered or believed); *In re Hayden*, 96 N.C. App. 77, 81-82, 384 S.E.2d 558, 561 (1989) (holding that, where the proffered hearsay statement of the victim pertained to a memory of the previous day's events and was offered solely for the purpose of proving such events, such statement was not admissible under Rule 803(3)). The trial court therefore erred in admitting the statements under Rule 803(3). We now determine whether the trial court properly admitted the statements under Rule 804(b)(5).

B. *Rule 804(b)(5)*

Under Rule 804(b)(5), an out-of-court statement not covered by any of the other exceptions to hearsay may nevertheless be admitted where a declarant is unavailable and the trial court

> determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (2003). After a trial court establishes that a declarant is unavailable pursuant to Rule 804(a) of the North Carolina Rules of Evidence, the trial court conducts a six-part inquiry to determine the admissibility of the hearsay evidence proffered under Rule 804(b)(5). *State v. Fowler*, 353 N.C. 599, 608-09, 548 S.E.2d 684, 696 (2001), *cert. denied*, 535 U.S. 939, 152 L. Ed. 2d 230 (2002); *State v. Triplett*, 316 N.C. 1, 8-9, 340 S.E.2d 736, 741 (1986). Specifically, 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. *Fowler*, 353 N.C. at 609, 548 S.E.2d at 696; *Triplett*, 316 N.C. at 8-10, 340 S.E.2d at 740-41. In addition, the court should consider the "nature and character of the statement and the relationship of the parties." *Triplett*, 316 N.C. at 11, 340 S.E.2d at 742.

Here, there is no question that proper notice was given and that the statements were material to the case against Defendant. We have determined that the statements were not admissible under Rule

803(3), nor do we perceive any other exception under which the statements could be admitted. There seems to be little question, moreover, that the statements were probative. We therefore examine whether the statements were trustworthy, and whether the interests of justice were served by their admission.

In examining the trustworthiness of the statements made by Weeks to his daughter, the trial court found the following facts:

i) That these statements were made while the deceased was still under the mental and physical stress of the robbery and shooting that occurred on April 15, 2000.

ii) That these statements were an attempt by the deceased to explain his then existing physical condition, and how he was wounded.

iii) That the statements were motivated by his concern for the safety of the witness, Linda Weeks Billingsley, and described his plan to increase the security of the store.

iv) That these statements were made to the deceased's daughter. That close, family relationship would have motivated the deceased to speak truthfully and candidly.

v) That the deceased did not recant his statements.

vi) The statements were consistent with other statements made by the deceased immediately after he was shot and during his stay in the hospital.

vii) That the statements did not implicate the Defendant or any other individual, but were merely an attempt to accurately inform Cecil Weeks' family members of the nature and sequence of events which led to his wounding.

The trial court made nearly identical findings regarding the statements made by Weeks to his wife.

Defendant contends, and we agree, that some of the critical findings regarding the trustworthiness of the statements are unsupported by the evidence. For example, we find no support in the record for the trial court's finding that the statements by Weeks "were motivated by his concern for the safety of the witness, Linda Weeks Billingsley, and described his plan to increase the security of the store." Although

some evidence was offered at an earlier *voir dire* hearing regarding Weeks' intent to improve security at the store, no such evidence was actually offered at trial.

Further, the trial court's finding that the hearsay statements offered by Billingsley and Teresa Weeks "were consistent with other statements made by the deceased immediately after he was shot and during his stay in the hospital" is not supported by the evidence at trial. While Weeks' description of the robbery and shooting as testified to by Captain Dattero generally resembled the version of events attested to by Billingsley and Teresa Weeks, the statements differed dramatically on the critical issue of the manner in which Weeks was wounded. According to Dattero, Weeks was shot during a struggle for the gun. Billingsley and Teresa Weeks testified, to the contrary, that Weeks was shot while on his knees with his hands in the air and pleading for his life. Thus, although Weeks may have had no motivation to speak untruthfully to either Captain Dattero or his wife and daughter, his statements cannot be reconciled without the benefit of cross-examination, which Defendant was denied.

" 'The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.' " *Lilly v. Virginia*, 527 U.S. 116, 123-24, 144 L. Ed. 2d 117, 126 (1999) (quoting *Maryland v. Craig*, 497 U.S. 836, 845, 111 L. Ed. 2d 666 (1990)). Where the government seeks to offer an unavailable declarant's out-of-court statements against the accused, courts must determine whether the Confrontation Clause permits the government to deny the accused the well-established right to force the declarant " 'to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth.' " *Id.* (quoting *California v. Green*, 399 U.S. 149, 158, 26 L. Ed. 2d 489, 497 (1970)). Under the general framework set forth by the United States Supreme Court in *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597 (1980),[2] "the veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) 'the evidence falls within a firmly rooted hearsay exception' or (2) it contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability." *Lilly*, 527

2. Although *Crawford* overrules the *Roberts* framework to the extent that it applies to testimonial statements, *Roberts* remains good law regarding nontestimonial statements. *See Crawford*, 541 U.S. at —, 158 L. Ed. 2d at 203.

U.S. at 124-25, 144 L. Ed. 2d at 127 (quoting *Roberts*, 448 U.S. at 66, 65 L. Ed. 2d at 608).

In the instant case, the first statement given by Weeks to Captain Dattero was admitted under the "firmly rooted" exception of excited utterance. The trial court also admitted the second set of statements made by Weeks to his wife and daughter because it found the statements contained "particularized guarantees of trustworthiness" notwithstanding the fact that the statements fundamentally contradicted the statement testified to by Captain Dattero. Thus, both set of statements were admitted as reliable, even though the statements gave contradicting accounts of the incident. As such, we cannot agree with the trial court that the statements made by Weeks to his wife and daughter bore "particular guarantees of trustworthiness." In contrast to the *Lilly* and *Roberts* standard of "particularized guarantees of trustworthiness" being met "where adversarial testing would be expected to add little, if anything, to the statements' reliability," adversarial testing of the statements in the instant case was critical to reconciliation of the contradictions contained therein and necessary for full discovery of the truth. We conclude the trial court erred in admitting the statements under the residual hearsay exception. We must now determine whether such error was prejudicial.

Defendant argues that the improper admission of the hearsay statements requires a new trial, in that the statements by Billingsley and Teresa Weeks contained the only evidence of premeditation and deliberation on Defendant's part. The jury also found Defendant guilty of first-degree murder on the basis of felony murder, however. Premeditation and deliberation and felony murder are theories under which a defendant may be convicted of first-degree murder. "However, a defendant is convicted of the crime, not of the theory." *Millsaps*, 356 N.C. at 560, 572 S.E.2d at 770. Where a defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the murder conviction. *Id.* Consequently, if a defendant is found guilty of first-degree felony murder and the underlying felony, the defendant cannot be sentenced separately for that felony. *Id.*; *State v. Wilson*, 345 N.C. 119, 122, 478 S.E.2d 507, 510 (1996).

Here, we agree with Defendant that the improperly admitted hearsay statements contained the only evidence of premeditation and deliberation. Thus, the jury's verdict of first-degree murder on that basis cannot stand. However, Defendant's conviction of first-degree murder on the theory of felony murder is without error, and is left

undisturbed. Because we are sustaining Defendant's conviction of first-degree murder only on a felony-murder theory, with armed robbery as the underlying felony, the armed robbery conviction merges with the murder conviction, and Defendant may not be separately sentenced for armed robbery. *Millsaps*, 356 N.C. at 560, 572 S.E.2d at 770. We must therefore vacate Defendant's conviction of armed robbery. We have reviewed Defendant's two remaining assignments of error and find them to be without merit.

We find no error in Defendant's felony murder conviction, but the armed robbery conviction, which serves as the basis for the felony murder, must be vacated. In the judgment of the trial court for first-degree murder, 00 CRS 005674, we find,

No error.

The judgment of the trial court for robbery with a dangerous weapon, 00 CRS 009485, is

Vacated.

Judges CALABRIA and STEELMAN concur.

JAMES MICHAEL GODFREY AND SHERRY JO LUSK, PLAINTIFFS v. RES-CARE, INC., DEFENDANT

No. COA03-790

No. COA03-791

(Filed 6 July 2004)

1. Fraud– common law—motion for directed verdict—concealment of material fact

The trial court did not err by denying defendant's motion for a directed verdict on plaintiffs' common law fraud claim even though defendant contends it had no duty to disclose to plaintiffs that it was negotiating to buy a company and employ a certain individual, because: (1) a duty to disclose arises in an arm's length negotiation where one party has taken affirmative steps to conceal material facts from the other; (2) plaintiffs presented suf-

ficient evidence that defendant was negotiating to buy the pertinent company and employ the pertinent individual while simultaneously concealing this fact from plaintiffs; and (3) the parol evidence rule did not prohibit plaintiffs from introducing evidence regarding the parties' negotiations prior to signing the agreement since in North Carolina parol evidence may be admitted to prove that a written contract was procured by fraud based on the fact that the allegations of fraud challenge the validity of the contract itself and not the accuracy of its terms.

2. Fraud— instructions—evidence of employment claim—damages

The trial court did not err by denying defendant's request to instruct the jury to disregard any evidence or inferences regarding plaintiffs' employment claim when considering damages for fraud, because: (1) the measure of damages for fraud in the inducement of a contract is the difference between the value of what was received and the value of what was promised, and is potentially trebled by N.C.G.S. § 75-16; and (2) the instruction allowed the jury to consider proper factors in determining plaintiffs' damages and the instructions did not direct the jury to determine or consider improper issues.

3. Jury— verdict sheet—fraud—unfair and deceptive trade practices

The trial court did not abuse its discretion in a common law fraud and unfair and deceptive trade practices case by submitting the verdict sheet to the jury even though defendant contends it was confusing and embodied several issues into one jury determination, because: (1) both the jury instructions and the verdict sheet utilized the North Carolina Pattern Jury Instructions on fraud, which allow a jury to find fraud in both affirmative representations and concealment of a material fact; (2) the parties agreed during the jury charge conference that the verdict sheet correctly questioned the jury regarding unfair and deceptive trade practices; and (3) by separating the fraud and unfair and deceptive trade practices issues and by allowing for separate answers, the verdict sheet offered three distinct alternatives to the jury.

4. Costs— attorney fees—unfair and deceptive trade practices—unwarranted refusal to resolve matter

The trial court did not err in a common law fraud and unfair and deceptive trade practices case by granting plaintiffs' motion

for attorney fees, because: (1) N.C.G.S. § 75-16.1 provides that the trial court may award attorney fees upon finding that defendant has willfully engaged in unfair and deceptive trade practices in violation of N.C.G.S. § 75-1.1 and has unwarrantedly refused to resolve the matter; (2) a finding of common law fraud necessarily establishes that unfair or deceptive acts have occurred in violation of N.C.G.S. § 75-1.1; and (3) the trial court's findings of fact in its 28 September 2002 order adequately support its conclusions of law as to both the willfulness of defendant's acts as well as defendant's unwarranted refusal to resolve the matter.

5. Trials— motion for new trial—procedural irregularity

The trial court did not abuse its discretion in a common law fraud and unfair and deceptive trade practices case by denying defendant's motion for a new trial, because: (1) contrary to defendant's assertion, there was no procedural irregularity regarding the trial court's decision not to instruct the jury regarding defendant's directed verdict as to the employment claims; and (2) the jury verdict was not contrary to law.

6. Trials— motion for judgment notwithstanding verdict—denial of motion for directed verdict

The trial court did not err in a common law fraud and unfair and deceptive trade practices case by denying defendant's motion for judgment notwithstanding the verdict, because: (1) where a trial court denies a motion for directed verdict made at the close of plaintiff's evidence, it is error for the trial court to then enter judgment in favor of defendant notwithstanding the verdict; and (2) plaintiffs presented sufficient evidence to withstand defendant's earlier motions for directed verdict.

7. Trials— motion for relief from final judgment—failure to demonstrate extraordinary circumstances

The trial court did not abuse its discretion in a common law fraud and unfair and deceptive trade practices case by denying defendant's motion for relief from final judgment under N.C.G.S. § 1A-1, Rule 60(b)(6), because: (1) the trial court properly instructed the jury regarding its determination of the amount of damages that would put plaintiffs in the same position as if the fraud had not been practiced on them; and (2) defendant failed to demonstrate that extraordinary circumstances exist that would require defendant to be relieved from judgment.

8. Fraud— employment claims—motion for directed verdict—false representation

The trial court did not err in a common law fraud and unfair and deceptive trade practices case by granting defendant's motion for directed verdict as to the employment claims based on the terms of the employment agreement allegedly being three years as opposed to at will, because plaintiffs failed to offer sufficient evidence that defendant made a false representation to plaintiff or that plaintiff was deceived by such representation.

Appeal by Res-Care, Inc., from judgment entered 29 July 2002 by Judge Timothy S. Kincaid in Catawba County Superior Court, and orders entered 19 August 2002 and 30 September 2002 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 29 March 2004.

Patrick, Harper, & Dixon, L.L.P., by Stephen M. Thomas and Kimberly Whitley, for plaintiffs-appellees.

Kilpatrick Stockton, L.L.P., by Fred M. Wood, Jr., and C. Marshall Lindsay, for defendant-appellant.

TIMMONS-GOODSON, Judge.

James Michael Godfrey ("Godfrey") and Sherry Jo Lusk ("Lusk") (collectively, "plantiffs") sued Res-Care, Inc. ("defendant"), alleging common law fraud and unfair and deceptive trade practices arising out of the sale of Access, Inc. ("Access") to Communications Network Consultants ("CNC"), a subsidiary of defendant. On 16 July 2002, the jury found in favor of plaintiffs. In separate notices of appeal, defendant assigns error to the final judgment and post-judgment orders. Plaintiffs cross-assign error to the trial court order partially granting directed verdict in favor of defendant. Pursuant to N.C.R. App. P. 40 (2004), defendant's separate appeals were consolidated at oral argument before this Court. After reviewing the merits of both appeals, we hold the trial court committed no error.

The facts presented at trial tend to show the following: In 1997, Access was in the business of providing employment, residential, habilitation, and vocational training services to the mentally handicapped, mentally ill, and developmentally disabled. James McKelvey ("McKelvey"), Louis Pugh ("Pugh"), and plaintiffs were the four shareholders of Access. In July 1997, representatives of CNC

expressed interest in acquiring Access. Negotiations commenced between the two parties, and in May 1998, McKelvey and plaintiff Godfrey visited defendant's corporate offices in Louisville, Kentucky. During the summer and fall of 1998, negotiations between Access and defendant became increasingly more serious, and on 10 February 1999, the shareholders of Access signed a Letter of Intent for the sale of Access to CNC. On 17 March 1999, CNC and the shareholders of Access signed a Stock Purchase Agreement ("Agreement"), whereby plaintiffs, McKelvey, and Pugh each sold their respective interests in Access to CNC.

Throughout negotiations between the parties, plaintiffs expressed concern in selling their interests to defendant, a large corporation. Each shareholder of Access was a former employee of VOCA of North Carolina ("VOCA"), a large business also engaged in providing employment, residential, habilitation, and vocational training services to the mentally handicapped, mentally ill, and developmentally disabled. Plaintiffs informed defendant that the shareholders of Access left VOCA and formed Access because of philosophical differences they had with VOCA and its management. Plaintiffs further stated that in order for the shareholders of Access to sell their respective interests, the shareholders must be assured that they would never be affiliated with a company that acted or operated like VOCA. In initial meetings between the parties, Paul Dunn ("Dunn"), defendant's Chief Development Officer, responded to plaintiffs' concerns by stating that defendant was not like VOCA, and that it would never be like VOCA. Plaintiff Godfrey reiterated the shareholders' concerns about selling to a large corporation when he and McKelvey traveled to Louisville in May 1998. At that time, Dunn reassured plaintiff Godfrey that defendant was not like VOCA, and that it was not interested in buying VOCA because VOCA did not make enough profit and was poorly managed. In the Fall of 1998, plaintiffs met with Todd Graybill ("Graybill"), defendant's Vice President of the Central Region. During these meetings, plaintiffs informed Graybill that if there was a possibility that an association with VOCA might arise, the shareholders of Access would not sell their interests to defendant. Plaintiffs further stated that the shareholders of Access also would not sell their interests if an association with Ron Curran ("Curran"), the shareholders' former supervisor at VOCA, might arise. Defendant's representatives again assured plaintiffs that defendant was not going to purchase VOCA, and that defendant could not afford such a purchase.

Plaintiffs' continued employment was also a critical factor in the sale of Access. Plaintiff Godfrey discussed his potential employment with defendant during initial meetings between the parties, and subsequent negotiations commenced under the assumption that plaintiff Godfrey would work for defendant for two or three years after the sale of Access. Plaintiff Lusk also planned to work for defendant for some time after the sale of Access. However, prior to the actual sale of Access, defendant informed plaintiffs that their employment contracts with defendant would be terminable at-will. When plaintiffs noted that the employment termination provisions were not what had been previously negotiated, Graybill assured plaintiffs that the employment term "wasn't an issue."

A week after plaintiffs signed the Agreement, defendant announced that it had signed a Letter of Intent to purchase VOCA. Defendant subsequently informed plaintiff Godfrey that he "had nothing to worry about [and that] things were not going to change." Defendant also informed plaintiff Godfrey that Curran would be leaving North Carolina for a position outside the state. However, defendant subsequently named Curran Statewide Director, a position that required plaintiff Godfrey to work together with Curran and plaintiff Lusk to work directly beneath Curran. Defendant soon terminated plaintiff Godfrey, "truly without cause" according to Graybill. Plaintiff Lusk subsequently resigned after defendant refused to release her from the non-compete provision in her employment agreement.

On 1 December 1999, plaintiffs filed suit against defendant, alleging common law fraud and unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1. On 21 May 2002, defendant filed a motion for summary judgment. On 19 June 2002, the trial court denied the motion. Trial began on 25 June 2002, and defendant moved for directed verdict at the close of plaintiffs' evidence. The trial court granted defendant's motion "as to the [employment] claims, based on the terms of the [employment] agreement as three years as opposed to at will," but denied defendant's motion "as to the purported misrepresentation as to whether or not VOCA would be or wouldn't be bought; in other words, the VOCA issue." On 16 July 2002, the jury rendered a verdict in favor of plaintiffs on the issue of fraud, awarding $300,000 in damages to plaintiff Godfrey and $30,000 in damages to plaintiff Lusk. On 22 July 2002, defendant filed a motion for a new trial, a motion for judgment notwithstanding the verdict, and a motion for relief from final judgment. On 19 August 2002, the trial court denied each of defendant's motions. On 30

September 2002, the trial court filed an order taxing attorneys' fees and costs against defendant. Defendant appeals the judgment entered 29 July 2002, the order entered 19 August 2002, and the order entered 30 September 2002.

As an initial matter, we note that defendant's briefs contain arguments supporting only ten of its original fifteen assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2004), the five omitted assignments of error are thus deemed abandoned. Therefore, we limit our present review to those assignments of error properly preserved by defendant for appeal.

The issues on appeal are whether the trial court erred in (I) denying defendant's motion for a directed verdict; (II) denying defendant's request to instruct the jury regarding the directed verdict; (III) submitting the verdict sheet to the jury; (IV) granting plaintiffs' motion for attorneys' fees; (V) denying defendant's motion for a new trial; (VI) denying defendant's motion for judgment notwithstanding the verdict; (VII) denying defendant's motion for relief from final judgment; and (VIII) granting defendant's motion for directed verdict.

I.

[1] Defendant first assigns error to the trial court order denying defendant's motion for directed verdict. Defendant argues that plaintiffs failed to present sufficient evidence of an essential element of fraud. We disagree.

"On a defendant's motion for directed verdict, the trial court must determine whether the evidence, when considered in the light most favorable to the plaintiff, is sufficient to take the case to the jury." *Ward v. Beaton*, 141 N.C. App. 44, 47, 539 S.E.2d 30, 33 (2000), *appeal dismissed and cert. denied*, 353 N.C. 398, 547 S.E.2d 431 (2001). Where there is more than a scintilla of evidence supporting each element of a plaintiff's claim, the trial court should deny the motion for directed verdict. *Norman Owen Trucking v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998).

> While fraud has no all-embracing definition and is better left undefined lest crafty men find a way of committing fraud which avoids the definition, the following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive,

(3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.

Ragsdale v. Kennedy, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974).

Defendant argues that plaintiffs failed to present sufficient evidence that defendant concealed a material fact. Defendant asserts that it had no duty to disclose to plaintiffs that it was negotiating to buy VOCA and employ Curran. In support of this assertion, defendant cites *Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C.*, 124 N.C. App. 383, 389, 477 S.E.2d 262, 265-66 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 163 (1997), where this Court held that in a real estate lease negotiation involving two commercial parties, the owner of the property does not have a duty to disclose to the lessor of the property that the owner is negotiating to sell the property to a third party. Defendant contends that the transaction in the instant case also involves two commercial parties, and that therefore defendant's non-disclosure of its plan to buy VOCA and employ Curran does not amount to the type of affirmative concealment necessary to establish fraud. We find this argument unconvincing.

"[E]ven if there is no duty to disclose information, if a seller does speak then he must make a full and fair disclosure of the matters he discloses." *Freese v. Smith*, 110 N.C. App. 28, 35, 428 S.E.2d 841, 846 (1993). The evidence presented at trial in the instant case demonstrates that plaintiffs made repeated inquiries into whether defendant was considering or would consider buying VOCA and employing Curran. Defendant's representatives responded to the inquiries by stating that VOCA was not a profitable company to purchase, that it was poorly managed by Curran, and that plaintiffs would not have to work for or with a company like VOCA or a supervisor like Curran. However, despite defendant's assurances to the contrary, throughout its negotiations between the parties, defendant was also actively negotiating to buy VOCA and employ Curran as supervisor of plaintiffs.

Although a duty to disclose generally arises out of a fiduciary relationship, *See, e.g., Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971), the Court has recognized that a duty to disclose arises in an arm's length negotiation where one party has taken affirmative steps to conceal material facts from the other. *See Ragsdale*, 286 N.C. at 139-40, 209 S.E.2d at 500-01. A fact is material "if the fact untruly asserted or wrongfully suppressed, if it had been known to the party, would have influenced [its] judgment or decision in making the con-

tract at all." *Machine Co. v. Bullock*, 161 N.C. 1, 7, 76 S.E. 634, 636 (1912). Both plaintiffs testified that throughout negotiations, plaintiffs made repeated comments that their willingness to sell Access to defendant was contingent on defendant's assurance that it would never associate with VOCA or Curran. Plaintiff Godfrey testified that after defendant purchased VOCA, Graybill contacted plaintiff Godfrey and apologized for not informing plaintiffs about the VOCA transaction. Plaintiff Godfrey also testified that Graybill stated that "I knew the VOCA deal was going down, but it was just like we were under a confidentiality agreement with you, we were under one with VOCA and we weren't at liberty to say anything." Although Graybill "would stop short of saying [defendant was] convinced that [Godfrey] wouldn't do the deal or anybody from Access wouldn't do the deal if they knew that [defendant] was going to purchase VOCA . . . ," Graybill testified that "folks knew what [Godfrey's] . . . feelings were towards VOCA, towards [Curran], and . . . chose not to test that." Graybill also testified that "there was uncertainty as to what [plaintiffs'] response would be" if plaintiffs knew about defendant's concurrent negotiations to buy VOCA. Furthermore, Graybill admitted that Dunn told him in January 1999 that defendant was negotiating with VOCA and that the negotiations should not be revealed. We conclude that the foregoing evidence, when viewed in the light most favorable to plaintiffs, sufficiently demonstrates that defendant took affirmative steps to conceal from plaintiffs the fact that defendant was negotiating to buy VOCA and employ Curran.

Defendant also argues that the evidence used by plaintiffs to prove the element of misrepresentation should not have been admitted as a matter of law. Defendant asserts that the parol evidence rule prohibited plaintiffs from introducing evidence regarding its oral discussions with defendant concerning VOCA and Curran. We find this argument unconvincing as well.

The parol evidence rule prohibits the admission of evidence of prior oral agreements "to vary, add to, or contradict [the terms of] a written instrument intended to be the final integration of the transaction." *Hall v. Hotel L'Europe, Inc.*, 69 N.C. App. 664, 666, 318 S.E.2d 99, 101 (1984); N.C. Gen. Stat. § 25-2-202 (2003). In the instant case, the Agreement contained the following merger clause:

> Entire Agreement. This Agreement, its Exhibits, Schedules and Annexes, and the documents executed on the Closing Date in connection herewith, constitute the entire agreement between

> the parties hereto with respect to the subject matter hereof and supercede all prior agreements and understandings, oral and written, between the parties hereto with respect to the subject matter hereof, including but not limited to the Letter of Intent.

("merger clause").

Defendant contends that because the merger clause states that the Agreement is the final expression of the parties' agreement, plaintiffs were prohibited as a matter of law from introducing evidence concerning negotiations made prior to the execution of the Agreement. In support of this contention, defendant cites *Ace, Inc. v. Maynard*, 108 N.C. App. 241, 423 S.E.2d 504 (1992), *disc. review denied*, 333 N.C. 574, 429 S.E.2d 567 (1993). In *Ace*, the plaintiff sued for breach of warranty, fraud, and unfair and deceptive trade practices arising out of the sale of an airplane. This Court concluded that it was improper for the jury to consider the defendant's statements to the plaintiff regarding the condition of the plane because the statements were made prior to the parties signing the contract for sale and were thus subject to the parol evidence rule. *Id.* at 247, 423 S.E.2d at 508.

In our analysis in *Ace*, we noted that "plaintiff failed to establish concealment of a material fact on the part of defendants because plaintiff presented no evidence that defendants knew of any defects in the plane." *Id.* at 250, 423 S.E.2d at 510 (citations omitted). However, in the instant case, we concluded *supra* that plaintiff presented sufficient evidence that defendant was negotiating to buy VOCA and employ Curran while simultaneously concealing this fact from plaintiffs. Thus, we also conclude our holding in *Ace* is not applicable to the facts of the instant case.[1]

1. Defendant also cites *One-O-One Enterprises, Inc. v. Caruso*, 848 F.2d 1283 (D.C. Cir. 1988) to support its contention. In *One-O-One*, the Court held that where an integration clause provides that "any and all prior understandings and agreements" are superceded, any reliance by the plaintiff on prior representations is unreasonable and any failure of defendant to disclose the existence of negotiations with another party is immaterial. *Id.* at 1286. We remind defendant that " 'with the exception of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State.' " *Soderlund v. Kuch*, 143 N.C. App. 361, 370, 546 S.E.2d 632, 638 (2001) (citation omitted). Moreover, in a subsequent case, the D.C. Circuit Court of Appeals limited the holding of *One-O-One* to its facts, noting that the conclusion "was plainly not intended to say that an integration clause bars fraud-in-the-inducement claims generally or confines them to claims of fraud in execution." *Whelan v. Abell*, 48 F.3d 1247, 1258 (1995) (citations omitted). According to the Court, "[s]uch a reading would leave swindlers free to extinguish their victims' remedies simply by sticking in a bit of boilerplate." *Id.*

In North Carolina, parol evidence may be admitted into evidence to prove that a written contract was procured by fraud because "the allegations of fraud challenge the validity of the contract itself, not the accuracy of its terms[.]" *Fox v. Southern Appliances*, 264 N.C. 267, 270, 141 S.E.2d 522, 525 (1965). Where a contract or transaction is induced by misrepresentations, the fraud and the contract are " 'distinct and separable—that is, the representations are usually not regarded as merged in the contract.' " *Id.* (quoting 23 Am. Jur., Fraud and Deceit, § 23, p. 775-76). We conclude that in the instant case, the parol evidence rule did not prohibit plaintiffs from introducing evidence regarding the parties' negotiations prior to signing the Agreement. Therefore, we hold that the trial court did not err in denying defendant's motion for directed verdict.

II.

[2] Defendant next assigns error to the trial court's jury instructions. Defendant argues that because the trial court granted defendant directed verdict "as to the [employment] claims, based on the terms of the [employment] agreement as three years as opposed to at will," the trial court was required to instruct the jury to disregard any evidence or inferences regarding plaintiff's employment claims. We disagree.

To prevail on this assignment of error, defendant must demonstrate that: (1) the requested jury instruction was a correct statement of law and was supported by the evidence; (2) that the jury instruction given, considered in its entirety, failed to encompass the substance of the law requested; and (3) that such failure likely misled the jury. *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002). We conclude that defendant has failed to meet this burden.

At the jury charge conference, the trial court concluded that plaintiffs' potential earnings at Res-Care were a proper measure for determining plaintiffs' fraud damages. The trial court stated that plaintiffs' damages in the case amounted to their potential earnings had they not sold Access. Thus, the trial court concluded, plaintiffs' employment evidence was relevant to their damage claims. The trial court then provided the following pertinent instructions:

> To determine the amount, if any, that you award to a respective plaintiff for actual damages, you will consider all the evidence that you have heard. Damages are compensation in money, in an

> amount so far as is possible, to restore a respective plaintiff to his or her original condition or position, which may include lost wages or lost benefits.
>
> . . . .
>
> There is not any fixed mathematical formula for placing value on damages. [Plaintiffs'] damages are to be reasonably determined from the evidence presented in the case. . . . Your award must be fair and just.
>
> . . . .
>
> You will determine the amount of damages by applying logic and common sense to the evidence; however, you may not reward any damages based upon speculation and conjecture.

The trial court did not instruct the jury to determine whether defendant's representations concerning plaintiffs' employment were fraudulent or whether defendant committed unfair and deceptive trade practices with regard to plaintiffs' employment contract. Instead, the trial court allowed the jury to consider plaintiffs' employment evidence to determine how to best restore plaintiffs to their original conditions and positions.

It is elementary that a plaintiff in a fraud suit has a right to recover an amount in damages "which will put him in the same position as if the fraud had not been practiced on him." *Sykes v. Insurance Co.*, 148 N.C. 13, 19, 61 S.E. 610, 612 (1908) (quoting *Hedden v. Griffen*, 136 Mass. 229, 232 (1884)). "The measure of damages for fraud in the inducement of a contract is the difference between the value of what was received and the value of what was promised, and is potentially trebled by N.C.G.S. § 75-16." *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 556 (1990) (internal citations omitted). It is the jury's responsibility to determine the exact amount of damages from the evidence presented at trial. *Rankin v. Helms*, 244 N.C. 532, 538, 94 S.E.2d 651, 656 (1956). However, the evidence presented to the jury cannot be so indefinite and uncertain that it does not furnish a basis for the jury to estimate damages. *Id.*

We conclude that the trial court's instruction, considered in its entirety, encompassed the substance of the law of fraud damages. The instruction allowed the jury to consider proper factors in determining plaintiffs' damages, and the instruction did not direct the jury

to determine or consider improper issues. Therefore, we hold that the trial court did not err in denying defendant's request to instruct the jury to disregard any evidence or inferences regarding plaintiffs' employment claims.

III.

[3] Defendant next assigns error to the trial court's decision to submit the verdict sheet to the jury. Defendant argues that the verdict sheet was impermissibly confusing. We disagree.

The form and the number of issues submitted to the jury is within the trial court's discretion. *Wilson v. Pearce*, 105 N.C. App. 107, 112, 412 S.E.2d 148, 150, *disc. review denied*, 331 N.C. 291, 417 S.E.2d 72 (1992). However, the issues "should be formulated so as to present separately the determinative issues of fact arising on the pleadings and evidence." *Stacy v. Construction, Inc.*, 119 N.C. App. 115, 122, 457 S.E.2d 875, 880, *disc. review denied*, 341 N.C. 421, 461 S.E.2d 761 (1995). "It is misleading to embody in one issue two propositions as to which the jury might give different responses." *Id.* (citation omitted).

Because an action for unfair and deceptive trade practices is a distinct action separate from fraud, *United Virginia Bank v. Air-Lift Associates*, 79 N.C. App. 315, 320, 339 S.E.2d 90, 93 (1986), at the close of all the evidence in the instant case, two issues were before the jury. First, the jury was to determine whether defendant committed fraud against plaintiffs. Second, the jury was to determine whether defendant committed unfair and deceptive trade practices by misrepresenting information to plaintiffs. The verdict sheet contained the following pertinent questions:

1. Was the plaintiff . . . damaged by fraud of the defendant . . . ?

Answer:_____

2. Did the defendant, Res-Care, Inc. falsely represent to the plaintiff . . . that plaintiffs would not have to work with VOCA or Ron Curran, or falsely represent that Res-Care, Inc., was not acquiring and would not acquire Voca?

Answer:_____

a. Was the conduct of the defendant . . . in commerce or did it affect commerce?

Answer:_____

b. Was the conduct of the defendant . . . a proximate cause of injury to the plaintiff . . . ?

*Answer:*_____

The verdict sheet instructed the jury to answer the second question regardless of the jury's answer to the first question. The verdict sheet also instructed the jury to answer subsection (a) of the second question only if the jury's answer to the second question was "yes." The verdict sheet further instructed the jury to answer subsection (b) only if the jury's answer to subsection (a) was "yes." Finally, the verdict sheet instructed the jury to answer the questions contained in the damage section only if the jury's answer to the first question was "yes" or if all of the jury's answers to the second question and its subsections were "yes."

Both the jury instructions and the verdict sheet utilized the North Carolina Pattern Jury Instructions on fraud, which allow a jury to find fraud in both affirmative misrepresentations and concealment of a material fact. N.C.P.I. 800.00. The parties agreed during the jury charge conference that the verdict sheet correctly questioned the jury regarding unfair and deceptive trade practices. By separating the fraud and unfair and deceptive trade practices issues and by allowing for separate answers, the verdict sheet offered three distinct alternatives to the jury. The jury could find (1) that defendant committed fraud, or (2) that defendant committed unfair and deceptive trade practices by making false representations, or (3) that defendant committed both fraud and unfair and deceptive trade practices. Thus, we conclude that the verdict sheet does not embody several issues into one jury determination, and is not impermissibly confusing or improper. Therefore, we hold that the trial court did not err in submitting the verdict sheet to the jury.

IV.

[4] Defendant next assigns error to the trial court order awarding attorneys' fees in favor of plaintiffs. Defendant argues that plaintiffs "lack any basis for recovering the fees and costs sought in their Petition for Attorneys' Fees." We disagree.

Plaintiffs' complaint clearly alleges that during negotiations between the parties, defendant committed fraud as well as unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 (2003). As discussed *supra*, defendant was not entitled to a directed verdict on plaintiffs' fraud claim, and the fraud claim was properly

submitted to the jury. After the jury found plaintiffs were damaged by fraud committed by defendant, plaintiffs moved the trial court to award attorneys' fees pursuant to N.C. Gen. Stat. § 75-16.1 (2003). N.C. Gen. Stat. § 75-16.1 provides that the trial court may award attorneys' fees upon finding that defendant has "willfully engaged" in unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 and has unwarrantedly refused to resolve the matter. As the trial court correctly noted in the order awarding attorneys' fees, a finding of common law fraud necessarily "establishes that unfair or deceptive acts have occurred in violation of [N.C. Gen. Stat. §] 75-1.1." *Davis v. Sellers*, 115 N.C. App. 1, 9, 443 S.E.2d 879, 884 (1994), *disc. review denied*, 339 N.C. 610, 454 S.E.2d 248 (1995). The trial court's findings of fact in its 30 September 2002 order adequately support its conclusions of law as to both the willfulness of defendant's acts as well as defendant's unwarranted refusal to resolve the matter. Therefore, we hold that the trial court did not err in awarding attorneys' fees in favor of plaintiffs.

V.

[5] Defendant next assigns error to the trial court order denying its motion for a new trial. Defendant argues that a procedural irregularity denied defendant the right to a fair trial, and that because plaintiffs failed to produce sufficient evidence of fraud, the jury verdict was contrary to law. We disagree.

N.C.R. Civ. P. 59(a) permits a trial court to grant a new trial where the trial court finds "[a]ny irregularity by which any party was prevented from having a fair trial . . . [or] [i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law." N.C. Gen. Stat. § 1A-1, Rule 59(a)(1), (7) (2003). Defendant asserts that a new trial is required in the instant case because defendant "was burdened by a procedural irregularity"—specifically, the trial court decision not to instruct the jury regarding defendant's directed verdict "as to the [employment] claims, based on the terms of the [employment] agreement as three years as opposed to at will." However, we concluded *supra* that the trial court's jury instructions were proper because the instructions (1) encompassed the substance of the law of fraud damages, and (2) did not instruct the jury to determine whether defendant committed fraud or unfair and deceptive trade practices with regard to the employment agreement. Therefore, we are unconvinced that the trial court's jury instructions amounted to a "procedural irregularity."

Defendant asserts in the alternative that a new trial is required because the jury verdict was contrary to law. In support of this assertion, defendant submits that plaintiffs failed to present sufficient evidence to establish fraud. Specifically, defendant reasserts its arguments that (1) plaintiffs failed to demonstrate defendant concealed a material fact, and (2) the parol evidence rule prohibited plaintiffs from introducing the evidence used to prove the misrepresentation and concealment. However, we concluded *supra* that plaintiffs produced sufficient evidence to demonstrate that defendant took affirmative steps to conceal its on-going negotiations to buy VOCA and employ Curran. Furthermore, because plaintiffs challenged the validity of the contract rather than its terms, we also concluded *supra* that the trial court did not err in allowing plaintiffs to introduce parol evidence regarding their negotiations with defendant prior to signing the Agreement. Therefore, we are unconvinced that the jury verdict was contrary to law.

Our review of a discretionary ruling denying a motion for a new trial is limited to determining whether the record demonstrates that the trial court manifestly abused its discretion. *Pittman v. Nationwide Mutual Fire Ins. Co.*, 79 N.C. App. 431, 434, 339 S.E.2d 441, 444, *disc. review denied*, 316 N.C. 733, 345 S.E.2d 391 (1986). Having concluded *supra* that plaintiffs presented sufficient evidence to justify the jury verdict and that the trial court did not engage in procedural irregularity when instructing the jury, we now conclude that the record does not demonstrate any manifest abuse of discretion by the trial court. Therefore, we hold that the trial court did not err in denying defendant's motion for new trial.

VI.

[6] Defendant next assigns error to the trial court's denial of defendant's motion for judgment notwithstanding the verdict. Defendant argues that "[t]his case should have never been submitted to the jury . . . [because defendant] was entitled to a directed verdict at the close of [p]laintiffs' evidence and at the close of all the evidence." We disagree.

"The test for determining the sufficiency of the evidence when ruling on a motion for judgment notwithstanding the verdict is the same as that applied when ruling on a motion for directed verdict." *DeHart v. R/S Financial Corp.*, 78 N.C. App. 93, 99, 337 S.E.2d 94, 98 (1985), *disc. review denied*, 316 N.C. 376, 342 S.E.2d 893 (1986).

Thus, where a trial court denies a motion for directed verdict made at the close of plaintiff's evidence, it is error for the trial court to then enter judgment in favor of defendant notwithstanding the verdict. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 378, 329 S.E.2d 333, 342 (1985); *Horton v. Insurance Co.*, 9 N.C. App. 140, 144, 175 S.E.2d 725, 727 (1970). In the instant case, we concluded *supra* that plaintiffs presented sufficient evidence to withstand defendant's earlier motions for directed verdict. Therefore, we now hold that the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict.

VII.

[7] Defendant next assigns error to the trial court's denial of defendant's motion for relief from the final judgment. Defendant argues that relief from judgment is proper in the instant case because the trial court erred in instructing the jury. We disagree.

N.C.R. Civ. P. 60(b)(6) (2003) allows a party to obtain relief from judgment for "[a]ny . . . reason justifying relief from the operation of the judgment." Although Rule 60(b)(6) has been described as a "grand reservoir of equitable power to do justice in a particular place," 7 Moore's Federal Practice, para. 60.27[2] at 375 (2d ed 1979), a court may only set aside a judgment pursuant to Rule 60(b)(6) upon a showing that (1) extraordinary circumstances exist, and (2) justice demands relief. *Thacker v. Thacker*, 107 N.C. App. 479, 481, 420 S.E.2d 479, 480, *disc. review denied*, 332 N.C. 672, 424 S.E.2d 407 (1992). Furthermore, absent a showing that the trial court abused its discretion in denying a motion for relief from judgment, this Court will not disturb the decision of the trial court below. *Kennedy v. Starr*, 62 N.C. App. 182, 187, 302 S.E.2d 497, 500, *disc. review denied*, 309 N.C. 321, 307 S.E.2d 164 (1983).

Defendant argues that the extraordinary relief provided by Rule 60(b)(6) is necessary in the instant case because the jury returned a verdict in favor of plaintiff Godfrey in the amount of $300,000, "or precisely Mr. Godfrey's compensation had he continued his employment for the three-year period he alleged he was promised." Defendant asserts that the jury awarded plaintiff Godfrey this amount only because the trial court refused to instruct the jury regarding the directed verdict previously granted in favor of defendant. However, we concluded *supra* that the trial court properly instructed the jury regarding its determination of the amount of damages that would put plaintiffs " 'in the same position as if the fraud had not been practiced

on [them].' " *Sykes*, 148 N.C. at 19, 61 S.E. at 612. Furthermore, the jury returned a verdict awarding plaintiff Lusk $30,000 in damages—$165,000 *less* than plaintiff Lusk would have earned "had [s]he continued h[er] employment for the three-year period [s]he alleged [s]he was promised." Thus, we conclude that defendant has failed to demonstrate that the extraordinary circumstances exist that require defendant be relieved from judgment in the instant case. Therefore, we hold that the trial court did not err in denying defendant's motion for relief from judgment.

VIII.

[8] Plaintiffs cross-assign error to the trial court order granting directed verdict in favor of defendant "as to the [employment] claims, based on the terms of the [employment] agreement as three years as opposed to at will." Plaintiffs argue that they presented sufficient evidence regarding the employment claims to withstand defendant's directed verdict motion. We disagree.

To survive a motion for directed verdict on a fraud claim, a plaintiff is required to provide sufficient evidence that the defendant concealed or made a false representation concerning a material fact. *Ragsdale*, 286 N.C. at 139, 209 S.E.2d at 500. The plaintiff must also provide sufficient evidence that the defendant's false representation or concealment deceived him. *Id.*

In the instant case, plaintiffs testified at trial that negotiations with defendant commenced under the assumption that the shareholders of Access would work for defendant for two or three years. However, plaintiffs also admitted into evidence the Letter of Intent delivered to plaintiffs on 10 February 1999 as well as a facsimile of the Agreement delivered to plaintiffs on 4 March 1999. Both documents clearly state that the terms of plaintiffs' continued employment would be mutually agreed on prior to the actual sale of Access on 29 March 1999. Furthermore, plaintiff Godfrey testified that two or three years of continued employment was only "the framework that [the parties] operated under," and that the discussions he had with defendant concerning his employment produced "draft agreements" that were "a launching pad for negotiations." Moreover, both plaintiffs admitted that prior to closing on 29 March 1999, they were aware that the Agreement contained at-will employment terms rather than the two or three-year employment terms they sought. When plaintiffs contacted Graybill about the at-will employment terms, Graybill informed plaintiffs that the terms were final and "pretty much it was

take it or leave it." Viewing this evidence in the light most favorable to plaintiffs, we nevertheless conclude that plaintiffs failed to offer sufficient evidence that defendant made a false representation to plaintiff or that plaintiff was deceived by such representation. Therefore, we hold that the trial court did not err in granting defendant directed verdict on plaintiffs' employment claims.

IX.

In conclusion, we hold that the trial court did not err in (I) denying defendant's motion for directed verdict; (II) denying defendant's requested jury instructions; (III) submitting the verdict sheet to the jury; (IV) awarding attorneys' fees in favor of plaintiffs; (V) denying defendant's motion for new trial; (VI) denying defendant's motion for judgment notwithstanding the verdict; (VII) denying defendant's motion for relief from judgment; and (VIII) granting defendant directed verdict on plaintiffs' employment claims.

No error.

Judges LEVINSON and THORNBURG concur.

RACHEL N. JENKINS, EMPLOYEE, PLAINTIFF v. EASCO ALUMINUM, EMPLOYER; HARTFORD SPECIALTY RISK SERVICES, CARRIER, DEFENDANTS

No. COA02-1446

(Filed 6 July 2004)

1. Workers' Compensation— reversal of prior award—authority to find facts and make conclusions

The Industrial Commission did not exceed its authority in a workers' compensation case by reversing its prior award, findings of fact, and conclusions of law, because the Court of Appeals' instruction on remand did not deprive the Commission of its authority to find the facts and make the conclusions of law it deemed proper.

2. Workers' Compensation— conclusion of law—make work

The Industrial Commission did not err in a workers' compensation case by its conclusion of law that plaintiff worker's position was "make work," because: (1) there was no indication that

plaintiff would be hired elsewhere in the area and although a witness testified that positions similar to plaintiff's quality inspector position existed at other manufacturing plants in the area, the witness did not conclude that plaintiff would be hired in any of these positions given her injury; (2) plaintiff produced evidence at trial tending to show that she could only perform some of the tasks of her position without assistance, that many of defendants' suggested jobs for plaintiff involved the use of both hands, that she was limited in her ability to use her injured hand, and that defendants' vocational consultant was unable to locate suitable employment for plaintiff; and (3) considering the evidence in the light most favorable to plaintiff, defendants failed to sufficiently establish that plaintiff was not prohibited from gaining competitive employment based on her continuing disability.

3. Workers' Compensation— conclusion of law—willful failure to comply with statutory safety requirement

The Industrial Commission did not err in a workers' compensation case by its conclusion of law that defendant company willfully failed to comply with statutory standards which entitled plaintiff to a ten percent increase in compensation under N.C.G.S. § 97-12, because: (1) testimony at the hearing from both plaintiff and plaintiff's coworkers firmly established that on the date of plaintiff's injury, there were no guards on the brake press machine plaintiff was operating; (2) a coworker testified that she was aware of three different occasions when a brake press machine had operated on its own and that she had reported the machines as malfunctioning, and the coworker also testified that it would have been impossible for finger injuries or amputations to have occurred had a guard been in place on plaintiff's machine; (3) the subsequent application of safety devices by defendant in the instant case established that it was possible to install guards on the press brake machines; and (4) plaintiff offered sufficient evidence to allow the Commission to conclude that the absence of the guard was the proximate cause of plaintiff's injury.

Appeal by defendants from opinion and award entered 15 July 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 May 2004.

George W. Lennon, Esq., and Hugh D. Cox, Jr., Esq., for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by J. Gregory Newton and Jaye E. Bingham, for defendants-appellants.

TIMMONS-GOODSON, Judge.

Easco Alumninum Corporation ("Easco") and Hartford Specialty Risk Services, Inc. ("Hartford") (collectively, "defendants") appeal an opinion and award of the North Carolina Industrial Commission ("the Commission") awarding Rachel N. Jenkins ("plaintiff") temporary disability payments and prosthetic fingers at defendants' expense. For the reasons stated herein, we affirm the Commission's opinion and award.

The pertinent facts and procedural history of the instant case are as follows: On 17 May 1993, plaintiff was injured in an industrial accident while employed as a brake press machine operator for Easco. Plaintiff remembers experiencing a period of dizziness prior to losing consciousness. During the accident, the fingers on plaintiff's left hand were crushed by the operational mechanisms of the brake press machine. Although metal guards designed to protect workers' hands were installed immediately after the date of plaintiff's accident, no such metal guards were in place at the time of plaintiff's injury.

As a result of plaintiff's injury, Dr. Robert Kahn ("Dr. Kahn") assigned a 75% permanent partial disability rating to four fingers of plaintiff's left hand. Plaintiff was compensated by Easco for eleven months after her accident. In April 1994, plaintiff returned to work at Easco as a quality control inspector of metal parts. However, because plaintiff was the junior employee in the quality control department, she was the first employee released when Easco experienced a work slowdown in November 1996.

After being released, plaintiff requested a hearing before the North Carolina Industrial Commission regarding her disability status. On 27 August 1998, the Deputy Commissioner awarded plaintiff temporary total disability from the date of the release and increased plaintiff's compensation by ten percent pursuant to N.C. Gen. Stat. § 97-12 (2003) for alleged safety violations committed by Easco. The Deputy Commissioner also determined that plaintiff was entitled to prosthetic fingers at defendants' expense. The parties appealed the Deputy Commissioner's award to the Commission. On 6 July 1999, the

Commission reversed the Deputy Commissioner's award, concluding that while plaintiff was entitled to have prosthetic fingers provided by defendants, plaintiff was not entitled to any temporary total disability payments from defendants.

Plaintiff appealed the Commission's decision to this Court. In *Jenkins v. Easco Aluminum Corp.*, 142 N.C. App. 71, 541 S.E.2d 510 (2001) ("*Jenkins I*"), we vacated the Commission's decision and remanded the case, instructing the Commission to consider all the evidence on disability and safety violations, to rule on plaintiff's pending motions and objections, and to enter awards where it deemed appropriate. On remand, the Commission reversed its prior decision and awarded plaintiff temporary disability payments from the date of release as well as prosthetic fingers should plaintiff desire them. Pursuant to N.C. Gen. Stat. § 97-12, the Commission also increased plaintiff's compensation for temporary total disability benefits because of alleged safety violations committed by Easco. It is from this opinion and award that defendants appeal.

The issues on appeal are (I) whether the Commission erred in reversing its prior award, findings of fact, and conclusions of law; (II) whether the Commission's conclusion of law that plaintiff's position was "make work" was supported by adequate findings of fact; and (III) whether the Commission's conclusion of law that Easco willfully failed to comply with statutory standards was supported by adequate findings of fact.

[1] Defendants first argue that the Commission erred in reversing its prior award, findings of fact, and conclusions of law. Defendants assert that the Commission exceeded its scope of authority on remand by wholly reversing its prior opinion and award. We disagree.

In *Jenkins I*, plaintiff argued that the Commission erred in failing to consider the testimony of Dr. Sheldon Downes ("Dr. Downes"), a Professor of Rehabilitation Counseling and Director of the Rehabilitation Counseling Program at East Carolina University. 142 N.C. App. at 77, 541 S.E.2d at 514. We recognized that " '[w]hile the Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony, . . . it nevertheless may not wholly disregard competent evidence[.]' " *Id.* at 78, 541 S.E.2d at 515 (quoting *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980)). Thus, because Dr. Downes' testimony "was certainly rel-

evant to the exact point in controversy," and because there was "no mention at all of Dr. Downes' testimony in the [6 July 1999] opinion and award," we held that "the Commission erred in failing to indicate that it considered the testimony of Dr. Downes." *Jenkins I*, 142 N.C. App. at 78-79, 541 S.E.2d at 515. We then stated the following:

> Consequently, the opinion and award of the Industrial Commission must be vacated, and the proceeding "remanded to the Commission to consider all the evidence, make definitive findings and proper conclusions therefrom, and enter the appropriate order."

Id. at 79, 541 S.E.2d at 515 (quoting *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 683, 486 S.E.2d 252, 255 (1997)).

In the instant appeal, defendants cite *Jackson v. Fayetteville Area System of Transp.*, 88 N.C. App. 123, 362 S.E.2d 569 (1987) ("*Jackson II*") in support of their argument. However, we conclude *Jackson* is inapposite to the instant case.

In *Jackson v. Fayetteville Area Sys. of Transp.*, 78 N.C. App. 412, 337 S.E.2d 110 (1985) ("*Jackson I*"), the defendant appealed the Commission's conclusion that the plaintiff sustained a compensable injury in an employment-related accident. "Because of the insufficiency of the findings as to plaintiff's injury by accident, we reverse[d] and remand[ed] the cause to the Industrial Commission for specific findings of fact regarding the injury, if any, sustained by plaintiff and the nature of that injury." *Id.* at 414, 337 S.E.2d at 112. On remand, the Commission reconsidered the entire record and reinstated the Deputy Commissioner's opinion and award, which concluded that the plaintiff's injury was not compensable. The plaintiff then appealed, and in *Jackson II*, we reversed the Commission's decision on remand, concluding that "[t]he Commission exceeded the scope of its instructions by revising its entire opinion and vacating its earlier findings." 88 N.C. App. at 127, 362 S.E.2d at 572.

The instructions to the Commission on remand were not so limited in the instant case. In *Jenkins I*, this Court determined that there was no "finding from which we [could] reasonably infer that the Commission gave proper consideration" to Dr. Downes' testimony, which we characterized as "certainly relevant to the exact point in controversy." 142 N.C. App. at 78, 541 S.E.2d at 515. However, we did not remand the case with instructions to "make

specific findings of fact" regarding Dr. Downes' testimony, as in *Jackson I*. Instead, we vacated the Commission's opinion and award, and we instructed the Commission to "*consider all the evidence*" on remand and to make "definitive findings and proper conclusions therefrom, and enter the *appropriate* order." *Id.* at 79, 541 S.E.2d at 515 (emphasis added).

Given the importance of Dr. Downes' testimony to the case, our decision and language in *Jenkins I* clearly indicated that the Commission was free to reverse its previous order on remand if, after considering Dr. Downes' testimony, it felt such a reversal was necessary. The "exact point in controversy" throughout the case has been "whether the quality inspector job performed by plaintiff was an adequate indicator of her ability to compete for similar jobs in the marketplace." *Id.* at 78, 541 S.E.2d at 515. Dr. Downes' conclusion that "because of plaintiff's physical limitations and her limited educational background and experience, there are no competitive jobs she can perform" is certainly important to whether plaintiff's inspector job was "make work" created by defendant to shield itself from further compensation payments. *Id.* at 77, 541 S.E.2d at 515. Furthermore, although she concluded that plaintiff's inspector job was not "make work," Annette Ruth ("Ruth"), defendants' vocational expert, testified at the hearing that she had not performed any tests on plaintiff like those administered by Dr. Downes but that she had examined Dr. Downes' report and had no reason to doubt either the results of the dexterity tests performed by Dr. Downes or his medical conclusions. *Id.* at 78, 541 S.E.2d at 515.

"The Commission is the sole judge of the credibility of witnesses and the weight to be given their testimony; it may accept or reject all of the testimony of a witness; it may accept a part and reject a part." *Blalock v. Roberts Co.*, 12 N.C. App. 499, 504, 183 S.E.2d 827, 830 (1971). We conclude that our instructions on remand did not deprive the Commission of its authority to find the facts and make the conclusions of law it deems proper. Thus, we hold that the Commission did not exceed its authority in reversing its prior award, findings of fact, and conclusions of law on remand. Therefore, defendants' first argument is overruled.

[2] Defendants next argue that the Commission erred in concluding as a matter of law that plaintiff's position was "make work." Defendants assert the Commission's conclusion was not supported by adequate findings of fact. We disagree.

In this argument, defendants assign error to eleven findings of fact made by the Commission in its 6 July 1999 order. However, the body of defendants' brief contains specific challenges to only one of these findings: finding of fact number eleven. Those errors assigned to other findings but not supported by argument in defendants' brief are deemed abandoned. *Hooker v. Stokes-Reynolds Hosp.*, 161 N.C. App. 111, 114-15, 587 S.E.2d 440, 443 (2003); *see* N.C.R. App. P. 28(b)(6) (2004).

Finding of fact number eleven states in pertinent part:

> 11. As to similar jobs in Hertford County, no evidence was submitted to show that plaintiff would be hired [as a quality inspector] in a competitive job market given her disability from the compensable injury.

Defendants contend that this portion of the finding is contradicted by Ruth's testimony. Ruth testified at the hearing concerning other jobs in the area as follows:

> COUNSEL: Did you—now, outside Easco have you done any, what do you call, surveys in the area?
>
> WITNESS: Job search activity.
>
> COUNSEL: Yes.
>
> WITNESS: [Plaintiff and I] met twice during this—during the time that we initiated a few months back, and we did find one particular job with the Ahoskie school system, but we secured an application and we—I followed up. They just—we're waiting. I don't know if they were hiring for assistantships or waiting 'til the fall.
>
> COUNSEL: Okay. Is that—is there anything else you're waiting on?
>
> WITNESS: No, that's—that's it.
>
> COUNSEL: Okay. Did you do any type of survey—other than finding just direct jobs, a survey of what's available in her area—you know, in the Winton-Ahoskie area?
>
> WITNESS: A labor market survey?
>
> COUNSEL: Yeah.
>
> WITNESS: That's generally directed through the insurance company, and I wasn't given any directions as to—to do a

job search activity except I did—I did do a research analysis in the area based on the inspector's job to see if that type of work was transitional within other industrial companies in the Ahoskie area.

[Ruth then examines a report by Downes]

WITNESS: I did a research analysis of the local area in Hertford County with different industries, and this job does exist within other companies. They don't always call it quality control technician. It has an interchangeable name such as grader, tester, and assurance inspector.

. . . .

COUNSEL: Okay. You mentioned earlier that you talked—you called and talked to some other job—manufacturing plants in the area.

WITNESS: Yes. Uh-huh (yes).

COUNSEL: Could you tell us what you did in that regard?

WITNESS: I—I telephoned several industrial companies manufacturing [sic] that would be comparable in production factory and spoke with human resource or personnel person in charge of the company and asked them specific questions as to the type of training—if they have inspectors or quality control type of position, and what type of training and educational background would be needed to hold that position.

COUNSEL: And do you happen to recall what companies you talked to?

WITNESS: Not right off hand, but I spoke with Perdue. I spoke with Billets, Carolina Billets.

COUNSEL: Is this something you did recently that's going to be a part of another report—a vocational report?

WITNESS: I thought my company—I thought I wrote this up and my company sent it to you, but evidently—I just wrote it up last week, so what I do is that I—I dictate my reports, and I send them in. I just—it just was—

COUNSEL: When you asked me this morning if I had received a fax, was this that report?

WITNESS: Could be.

COUNSEL: Well, your report should be submitted at a later date. I will send that in addition to her attorney as part of your report before I send it in. That's all I have.

We disagree with defendants' assertion that Ruth's testimony contradicts the Commission's determination in finding of fact number eleven. There was no indication from Ruth's direct job survey that plaintiff would be hired elsewhere in the area—the Ahoskie school system had not decided whether it had a position open for plaintiff. Although Ruth did testify that positions similar to plaintiff's quality inspector position existed at other manufacturing plants in the area, Ruth did not conclude that plaintiff would be hired in any of these positions given her injury. Similarly, the record contains no reports from Ruth reaching a conclusion as to whether plaintiff would be hired at the Ahoskie school system or by the other manufacturing plants in the area.

Defendants also assert that three of the Commission's conclusions of law are not supported by adequate findings of fact. Specifically, defendants argue that conclusions of law numbers two, three, and four are not supported by adequate findings of fact. We disagree.

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

> 2. As a result of her compensable injury, plaintiff was disabled and was unable to earn wages of any kind from May 17, 1993 to April 10, 1994. She was paid temporary total disability during this period. Plaintiff returned to work as a Quality Control Inspector on April 10, 1994. Plaintiff's position was modified and can be characterized as "make work." Since plaintiff's job was make-work, defendants have not established that plaintiff was capable of obtaining a position suitable to her age, education, experience, and with her physical limitations due to her disability. *Bridges v. Linn-Corriher Corp.*, 90 N.C. App. 397, 368 S.E.2d 388, *disc. rev. den.*[,] 323 N.C. 171, 373 S.E.2d 104 (1988); *Peoples v. Cone Mills Corp.*, 316 N.C. App. 426, 342 S.E.2d 798 (1986).
>
> 3. Plaintiff was laid off from her "make work" position on November 22, 1996 and no other work has been made available. Defendants produced no evidence that there are other jobs available in the job market which plaintiff could obtain given her

restrictions. Plaintiff has presented evidence that she is totally disabled at this time and will require extensive retraining and assistance with job searches and job placement to return to gainful employment. *Radica v. Carolina Mills*, 113 N.C. App. 440, 439 S.E.2d 185 (1994).

4. Plaintiff is entitled to temporary total disability benefits at her compensation rate of $216.54 per week for the period of temporary disability between [the] date of her "lay-off" on [] November 22, 1996 [and] the date of the filing of this Opinion and Award (with credit for the Unemployment compensation arranged by the employer) pursuant to N.C. Gen. Stat. § 97-29 and henceforth until plaintiff returns to work or until further Order of the Commission.

Plaintiff received her total disability benefits pursuant to a duly approved Form 21 agreement. In such an instance, a presumption of total disability attaches in favor of the employee. *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997). "After the presumption attaches, 'the burden shifts to [the employer] to show that plaintiff is employable." *Id.* (quoting *Dalton v. Anvil Knitwear*, 119 N.C. App. 275, 285, 458 S.E.2d 251, 257, *disc. review and cert. denied*, 341 N.C. 647, 462 S.E.2d 507 (1995)). "However, the fact that an employee is capable of performing employment tendered by the employer is not, as a matter of law, an indication of plaintiff's ability to earn wages." *Saums*, 346 N.C. at 764, 487 S.E.2d at 750. The tendered employment must accurately reflect the employee's ability to compete with others in the job market in order for the employment to be indicative of an employee's earning capacity. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 438, 342 S.E.2d 798, 806 (1986). Thus, "if other employers would not hire the employee with the employee's limitations at a comparable wage level. . . . [or] if the proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market," the job is "make work" and is not competitive. *Id.*

In the instant case, witnesses for defendants testified that plaintiff's position was no different from the other inspector positions in her shift, that plaintiff satisfactorily performed her job as a quality inspector, and that the inspector job was a competitive job in the local market. Defendants contend they thus rebutted the presumption of continuing disability in the instant case by establishing that plaintiff's job at Easco was not "make work" and that similar jobs suitable

for plaintiff were available in the local market. Defendants cite the "uncontested evidence" and testimony of their witnesses in support of this contention and request that this Court reverse the Commission's opinion and award. However, on appeal of a worker's compensation decision, this Court does not have the authority to weigh the evidence and decide an issue on the basis of its weight. *Walker v. Lake Rim Lawn & Garden*, 155 N.C. App. 709, 713, 575 S.E.2d 764, 767, *disc. review denied*, 357 N.C. 67, 579 S.E.2d 577 (2003). Instead, evidence tending to support the plaintiff's claim must be taken in the light most favorable to the plaintiff, and the plaintiff "is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *rehearing denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

Plaintiff produced evidence at trial tending to show that she could only perform some of the tasks of her position without assistance, that many of defendants' suggested jobs for plaintiff involved the use of both hands, that she was limited in her ability to use her injured hand, and that defendants' vocational consultant was unable to locate suitable employment for plaintiff. Dr. Downes testified that jobs involving finger dexterity or rapid movements were impossible for plaintiff to accomplish, and that, given her injuries, of the possible jobs for plaintiff proffered by defendants, only the Saw Helper job, a job Dr. Downes was unfamiliar with, appeared suitable for plaintiff. Considering this evidence in the light most favorable to the plaintiff, we conclude that defendants failed to sufficiently establish that plaintiff was not prohibited from gaining competitive employment because of her continuing disability. The Commission's findings of fact were supported by competent evidence, and its findings supported its conclusions of law. Thus, we hold the Commission did not err in making its conclusions of law. Therefore, defendants' second argument is overruled.

[3] Defendants next argue that the Commission erred in concluding that Easco willfully failed to comply with a statutory safety requirement. Defendants assert that the Commission's conclusion that plaintiff was entitled to a ten percent increase in compensation because of Easco's alleged violation of the safety requirement was unsupported by adequate findings of fact. We disagree.

N.C. Gen. Stat. § 97-12 (2003) states that "[w]hen the injury or death is caused by the willful failure of the employer to comply with

any statutory requirement or any lawful order of the Commission, compensation shall be increased ten percent[.] . . . The burden of proof shall be upon him who claims an exemption or forfeiture under this section." An act is considered willful "when there exists 'a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another,' a duty assumed by contract or imposed by law." *Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 383-84, 291 S.E.2d 897, 903 (1982) (quoting *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971)). The ten percent increase in compensation for willful OSHA violations is added to a successful plaintiff's total award.

In the instant case, the Commission concluded in pertinent part:

6. Plaintiff is entitled to a 10% penalty for unsafe conditions created by [Easco] pursuant to N.C. Gen. Stat. § 97-12 because of OSHA violations (29 C.F.R. §1910.212) for which [Easco] had prior knowledge and willfully chose not to comply with OSHA regulations. Plaintiff has met her burden of proof with regard to [Easco's] actions being willful.

In support of this conclusion, the Commission found:

15. If guards had been in place on the Press Brake machine upon which plaintiff operated, according to Ms. Ealey, it would have been impossible for finger injuries or amputations to occur. Following plaintiff's injury, guards were placed on the Press Brake machine.

16. [Easco's] Press Brake machines did not have guarding as defined by North Carolina's OSHA Manual. Moreover, the press brake machines did not prevent entry of hands and fingers into the point of operation. [Easco] willfully failed to come [into] compliance with OSHA standards, even though they had been informed by at least one employee of problems with the Press Brake machine.

17. According to Mr. Melvin Gurganus, also an employee of [Easco] many portions of the OSHA Manual were not being enforced or in place at the time of plaintiff's injury. Mr. Gurganus confirmed that a guard was put on the machine after plaintiff was injured. [Easco] no longer owns press brake machines of the sort upon which plaintiff was injured.

. . . .

> 29. [Easco] had knowledge through its employees such as Ms. Ealey that some Press Brake machines were inadequately guarded. Failure to bring the brake press machines back into compliance was an OSHA violation of [Easco] had knowledge of and willfully failed to come into compliance. CFR 1910.212 requires that guards should be applied *where possible*. It is the responsibility of management at [Easco] to maintain guards in a serviceable condition. The required standards were not met. [Easco] did install guards immediately after plaintiff's accident indicating that *it was possible* to install guards on the press brake machines, and therefore, should have been done. It was also the responsibility of [Easco's] supervisor to properly train plaintiff in using the machine with guards. Such training did not occur in violation of OSHA standards. See OSHA Publication 3067 (1992).

(emphasis in original).

Defendants contend that finding of fact number sixteen is not supported by competent evidence. However, testimony at the hearing from both plaintiff and plaintiff's co-workers firmly established that, on the date of plaintiff's injury, there were no guards on the brake press machine plaintiff was operating. Linda Ealey ("Ealey"), an employee of Easco who was working at the plant the day plaintiff was injured, testified that she was aware of three different occasions when a brake press machine had operated on its own, and that she had reported the machines as malfunctioning. She also testified that it would have been impossible for finger injuries or amputations to have occurred had a guard been in place on plaintiff's machine. We conclude this testimony was sufficient to support finding of fact sixteen.

Defendants also contend that the Commission erred in basing its conclusion on its finding that Easco applied guards to the brake press machines subsequent to plaintiff's injury. As defendant correctly notes, the sole fact that guards were applied to the machinery subsequent to plaintiff's injury is insufficient to support a conclusion that Easco willfully violated a safety statute. *See Ledford v. Lumber Co.*, 183 N.C. 614, 615, 112 S.E. 421, 422 (1922) ("In an action by an employee to recover for injuries alleged to have been received in consequence of defective machinery, used by his employer, the fact that after the injury the defendant substituted machinery of different material and adopted additional precautions in its use, is no evidence of negligence."). However, as reflected in finding of fact twenty-nine, the subsequent application of safety devices by Easco in the instant

case establishes that "*it was possible* to install guards on the press brake machines." (emphasis in original). Part 1910 of the Occupational Safety and Health Standards requires that "[o]ne or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation[.]" 29 C.F.R. § 1910.212(a)(1) (2003). The provision further requires that "[g]uards *shall be affixed* to the machine *where possible* and *secured elsewhere if* for any reason *attachment* to the machine *is not possible.*" 29 C.F.R. 1910.212(a)(2) (emphasis added).

In addition to the testimony concerning subsequent application of safety devices, the Commission considered the testimony from Ealey, who testified that she had informed Easco's management of several malfunctions in the brake press machines. Plaintiff testified that she received approximately ten minutes of training on how to safely operate the brake press machine. Melvin Gurganus ("Gurganus"), another employee of Easco, testified that many portions of the OSHA manual were not being enforced by Easco at the time of plaintiff's injury, including the requirements of Part 1910 of the Standards. Considering the evidence detailed above in the light most favorable to plaintiff, we conclude plaintiff offered competent evidence to support the Commission's conclusion that Easco willfully violated the safety statute.

Defendants further contend that plaintiff failed to offer sufficient evidence to establish that the absence of the guard was the cause of her injury. In support of this contention, defendants note that plaintiff testified at the hearing that she felt dizzy prior to her injury and could not recall exactly how she was injured, and that Billy Saulter ("Saulter"), plaintiff's vocational expert, testified that guards on a brake press machine could not prevent all injuries. However, as evidenced by the trial court's determination in finding of fact number fifteen, Ealey testified that "[i]f guards had been in place on the Press Brake machine upon which plaintiff operated . . . it would have been impossible for finger injuries or amputations to occur." Ealey had been employed as a brake press machine operator by Easco for over two years at the time of plaintiff's injury. She continued to work as a brake press machine operator at Easco after plaintiff's injury and after guards were placed on the brake press machines. Thus, we conclude plaintiff offered sufficient evidence to allow the Commission to conclude that the absence of the guard was the proximate cause of plaintiff's injury. Defendants' final argument is therefore overruled.

We have reviewed defendants' remaining assignments of error and find them to be without merit. Therefore, the decision of the Commission is affirmed.

Affirmed.

Judges HUNTER and GEER concur.

CAROLYN DAVIS, PLAINTIFF v. DURHAM MENTAL HEALTH/DEVELOPMENT DISABILITIES/SUBSTANCE ABUSE AREA AUTHORITY D/B/A THE DURHAM CENTER, *ET. AL.*, DEFENDANT

No. COA03-1035

(Filed 6 July 2004)

1. Pleadings— judgment on—outside evidence

There was no error where the trial court heard but did not consider matters outside the pleadings before entering a judgment on the pleadings. Plaintiff initiated the introduction of evidence and may not now complain of the action she began. Moreover, receiving but not relying on evidence does not convert a motion for a judgment on the pleadings into a motion for summary judgment.

2. Open Meetings— judgment on pleadings—no issue of fact

The trial court did not err by granting defendant's motion for judgment on the pleadings on an Open Meetings claim arising from an employment decision. Taking plaintiff's allegations as true, no genuine issues of fact exist. Defendant properly entered a closed session and plaintiff's request that she be appointed to the position was beyond the court's authority under the Open Meetings Law.

3. Pleadings— sanctions—improper purpose of action

The trial court's order imposing Rule 11 sanctions following a dismissal on the pleadings was affirmed. The evidence supports findings that plaintiff was present when the alleged violations of the Open Meetings Law occurred, that she had a duty to inform the Board if it was acting improperly, and that plaintiff intentionally remained silent. The evidence further supports the conclu-

sion that plaintiff filed this action not to vindicate her rights, but in retaliation for defendant's actions and to gain leverage in settlement negotiations.

4. Pleadings— sanctions—attorney fees—government attorney

The trial court did not abuse its discretion by awarding attorney fees and costs to defendant as a Rule 11 sanction following a judgment on the pleadings for defendant in an Open Meetings case. Plaintiff produced no case law or evidence to support the contention that the court should have based the fee on actual costs for the county attorney rather than the reasonable rate for a private attorney.

5. Pleadings— sanctions—attorney fees—reduction of award

The trial court did not abuse its discretion by reducing an award of attorney fees that had been imposed as a sanction.

Appeal by plaintiff from order and judgment entered 15 August 2002 and judgement and order entered 16 September 2002 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Cross-appeal by defendant from judgment and order entered 16 September 2002 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 19 May 2004.

Frasier & Alston, P.A., by Kären Frasier Alston, for plaintiff-appellant/cross-appellee.

Office of the Durham County Attorney, by Assistant County Attorney Curtis Massey, for defendant-appellee/cross-appellant.

TYSON, Judge.

Carolyn Davis ("plaintiff") appeals from the trial court's judgments and orders granting the Durham County Mental Health, Developmental Disabilities, Substance Abuse Services Area Authority's ("defendant") motions for judgment on the pleadings and sanctions. Defendant cross-appeals the trial court's judgment and order modifying its earlier award of sanctions. We affirm.

I. Background

Plaintiff was employed by defendant and had served as Deputy Area Director since 8 July 1985. In January 2002, Dr. Steven Ashby ("Dr. Ashby") announced his resignation as defendant's Area Director.

Plaintiff contacted members of the Personnel Committee of the defendant's Board of Directors ("the Board") and expressed her desire to serve as Interim Area Director. The Board is composed of volunteers, organized under N.C. Gen. Stat. § 122C-118, sets policy for defendant, and hires the Area Director. The Area Director and staff, including plaintiff, keep the Board informed of controlling law and policy. The Personnel Committee met with plaintiff on 12 February 2002. Plaintiff requested an annual salary of $90,183. The parties failed to reach a salary agreement.

The Board met again on 18 February 2002. Plaintiff was present at the meeting and spoke with the Board in closed session. The Board informed plaintiff it was not going to appoint her as Interim Area Director and that it would consider other candidates. Once the open session resumed, the Board announced it would open the search for an Interim Area Director.

The Board scheduled a budget retreat for 21 February 2002. Due to Dr. Ashby's absence, plaintiff attended as acting Area Director. During a break, Chairman Harold Babtiste ("Babtiste") announced that he wished to speak with other Board members to discuss three candidates for the Interim Area Director position. While the Board met in closed session, plaintiff told defendant's other staff personnel she thought the Board members were violating the Open Meetings Law. Plaintiff neither advised Babtiste nor any other Board members of her belief or how to properly move into closed session at that time.

Plaintiff also alleged defendant held other improper closed meetings concerning the selection of an Interim Area Director. In an open meeting on 4 March 2002, the Board moved to enter into a closed session to interview three candidates for the position. The Board remained in closed session until 11 March 2002 to continue its discussion of the selection and hiring of an Interim Area Director. On 11 March 2002, the Board remained in closed session until 18 March 2002 and continued discussions related to personnel issues. On 18 March 2002, the Board met in a closed session to re-interview two candidates and then returned to an open session. Plaintiff was present at all these meetings and never communicated her belief that the Board was acting in violation of the Open Meetings Law.

Defendant appointed Ellen Holliman ("Holliman") to the position of Interim Area Director in open session meetings held on 18 March 2002 and on 1 April 2002. On 2 May 2002, plaintiff filed a verified complaint and alleged defendant violated the Open Meetings Law, N.C.

Gen. Stat. § 143-318.9 *et. seq.*, in selecting the Interim Area Director. Plaintiff prayed the court to declare the selection and hiring of Holliman "null and void." On 2 August 2002, plaintiff filed another civil action (02 CVS 3232) against defendant and others regarding their failure to appoint her to the position of Interim Area Director. Plaintiff also initiated two contested case hearings with the Office of Administrative Hearings.

Defendant answered on 15 July 2002 and moved for a judgment on the pleadings and for sanctions on 2 August 2002. The trial court granted these motions in defendant's favor and ordered plaintiff to pay $10,563.40 in costs, including reasonable attorney's fees, as a sanction for initiating her lawsuit for an improper purpose. Plaintiff moved for relief from judgment. The trial court entered a judgment modifying its earlier award and ordered plaintiff to pay $5,000.00 for attorney's fees and $617.15 for costs incurred. Both plaintiff and defendant appeal.

II. Issues

The issues presented are whether the trial court erred in: (1) granting defendant's motion for judgment on the pleadings; (2) granting defendant's motion for sanctions; (3) awarding defendant attorney's fees and costs; and (4) granting plaintiff partial relief from judgment.

III. Judgment on the Pleadings

Plaintiff contends the trial court erred in granting defendant's motion for judgment on the pleadings because: (1) the court heard matters outside the pleadings, and plaintiff was not given any notice to prepare for a summary judgment hearing; and (2) defendant was not entitled to judgment on the pleadings as a matter of law when genuine issues of material fact exist.

A. Conversion to Motion for Summary Judgment

[1] Defendant moved for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure:

> [a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given rea-

> sonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. § 1A-1, Rule 12(c) (2003). The trial court may consider, "[o]nly the pleadings and exhibits which are attached and incorporated into the pleadings" in ruling on the motion. *Helms v. Holland*, 124 N.C. App. 629, 633, 478 S.E.2d 513, 516 (1996) (citing *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867, *disc. rev. denied*, 312 N.C. 495, 322 S.E.2d 558 (1984)). " 'No evidence is to be heard, and the trial judge is not to consider statements of fact in the briefs of the parties or the testimony of allegations by the parties in different proceedings.' " *Helms*, 124 N.C. App. at 633, 478 S.E.2d at 516 (quoting *Minor*, 70 N.C. App. at 78, 318 S.E.2d at 867). When the trial court considers matters outside the pleadings during the hearing on the judgment on the pleadings, the motion will be treated as a motion for summary judgment. *Helms*, 124 N.C. App. at 633, 478 S.E.2d at 516. " 'Memoranda of points and authorities as well as briefs and oral arguments . . . are not considered matters outside the pleading for purposes' of converting a Rule 12 motion into a Rule 56 motion [for summary judgment]." *Privette v. University of North Carolina*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989) (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure Sec. 1366 at 682 (1969)).

Here, the trial court heard, but did not consider, matters outside the pleadings. Defendant mentioned other actions between the parties and presented documents during its argument to the court regarding its motion for sanctions pursuant to Rule 11. In doing so, defendant only referred to other actions and did not seek to admit any evidence. Defendant did not offer any evidence or materials to the trial court for consideration of its motion for judgment on the pleadings. Plaintiff, however, requested the court to consider *several* matters outside the pleadings including plaintiff's job description, minutes from the Board's meeting, and the Board's policies and procedures. Defendant objected each time plaintiff delivered this information to the judge and argued the consideration of such material was improper on a motion for judgment on the pleadings.

Plaintiff requested the trial court to consider matters outside the pleadings by presenting at least three documents to the judge. By initiating the introduction of evidence, plaintiff "may not complain of action which [s]he induced." *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) (citations omitted). Her argument that she was not afforded a reasonable opportunity to prepare and present evidence for summary judgment has no merit.

Although the court received this evidence, the order clearly states, "Based upon the pleadings and the arguments of counsel, the Court finds that Defendant is entitled to entry of a judgment in its favor based on the pleadings." Merely receiving evidence, without considering or relying on it, does not convert a motion for judgment on the pleadings into a motion for summary judgment. *See Privette*, 96 N.C. App. at 132, 385 S.E.2d at 189 (Although matters outside the pleadings were introduced, "[t]he trial court specifically stated in its order that for the purposes of the Rule 12 motion, it considered only the amended complaint, memoranda submitted on behalf of the parties and arguments of counsel."). This assignment of error is overruled.

B. Genuine Issues of Material Fact

[2] Plaintiff contends the trial court erred in granting defendant's motion for judgment on the pleadings because genuine issues of material fact exist. We disagree.

> Pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure, a court may dispose of claims or defenses when the lack of merit of the claim or defense is apparent upon review of the pleadings. The granting of judgment on the pleadings is proper when there does not exist a genuine issue of material fact, and the only issues to be resolved are issues of law. In reviewing a motion for judgment on the pleadings, the court must consider the evidence in the light most favorable to the non-moving party, accepting as true the factual allegations as pled by the non-moving party.

Jackson v. Associated Scaffolders & Equip. Co., 152 N.C. App. 687, 689, 568 S.E.2d 666, 667 (2002) (citations omitted).

Meetings of governmental bodies must be conducted in accordance with Chapter 143 of our North Carolina General Statutes, including Article 33C regarding Meetings of Public Bodies ("Open Meetings Law"). N.C. Gen. Stat. § 115C-4 (2003). The Open Meetings Law provides, in part, "the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people's business, it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly." N.C. Gen. Stat. § 143-318.9 (2003). Closed sessions are permitted for specified purposes, including:

> (5) To establish, or to instruct the public body's staff or negotiating agents concerning the position to be taken by or on behalf of the public body in negotiating . . . (ii) the amount of compensation and other material terms of an employment contract or proposed employment contract.
>
> (6) To consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of an individual public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge, or grievance by or against an individual public officer or employee. General personnel policy issues may not be considered in a closed session. A public body may not consider the qualifications, competence, performance, character, fitness, appointment, or removal of a member of the public body or another body and may not consider or fill a vacancy among its own membership except in an open meeting. Final action making an appointment or discharge or removal by a public body having final authority for the appointment or discharge or removal shall be taken in an open meeting.

N.C. Gen. Stat. § 143-318.11(a) (2003). The statute further provides, "[a] public body may hold a closed session only upon a motion duly made and adopted at an open meeting. Every motion to close a meeting shall cite one or more of the permissible purposes listed in subsection (a) of this section." N.C. Gen. Stat. § 143-318.11(c) (2003).

Here, plaintiff's complaint alleges defendant violated the Open Meetings Law, specifically N.C. Gen. Stat. § 143-318.11, when the Board failed to properly move into closed session on 21 February 2002, 4 March 2002, 11 March 2002, and 18 March 2002. Her complaint indicates otherwise and states:

> 27. On March 4, 2002, the Area Authority Board made a motion in open session to enter into closed session pursuant to North Carolina General Statutes § 143-318.11(a)(6) reportedly to interview three candidates for the position of Interim Area Director. The Board was remaining [sic] in closed session until March 11, 2002, to continue discussion of the general personnel policy for the selection and hiring of an Interim Area Director.
>
> 28. On March 11, 2002[,] the Area Authority Board met in continued closed session to discuss personnel issues related to hiring an Interim Area Director. The Board stated that it was remaining

> in closed session until the March 18, 2002[,] regular Area Authority Board meeting.
>
> . . . .
>
> 31. [The March 18, 2002,] Board Meeting returned to Open Session. Printed ballots were distributed after a motion was made, but not carried, to select the Interim Area Director by a show of hands. The Board announced the selection of Ellen Holliman as Interim Area Director and that the contract for her employment would be negotiated in the future.

Despite plaintiff's assertion that the Board improperly entered closed session on 21 February 2002, her complaint alleges that the Board *properly* entered closed sessions on 4 March 2002, 11 March 2002, and 18 March 2002 and selected Holliman to serve as Interim Area Director during open meetings held on 18 March 2002 and 1 April 2002.

Plaintiff's complaint requested the trial court to issue a declaratory judgment and prayed the court: (1) determine that the selection of Holliman was made wrongfully during closed session; (2) declare the selection of Holliman "null and void;" (3) declare that defendant wrongfully failed to appoint plaintiff to the position of Interim Area Director; (4) declare the appointment of Holliman to the position of Interim Area Director "to be a nullity;" and (5) award plaintiff costs and attorney's fees.

Reviewing plaintiff's allegations and prayers for relief as stated in her complaint, we hold that the trial court did not err in granting defendant's motion for judgment on the pleadings. Taking plaintiff's allegations as true, no genuine issue of material fact exists. The only issue presented to the trial court was a question of law: whether defendant violated the Open Meetings Law. The Board properly entered a closed session on 4 March 2002 and continued this closed session on 11 March 2002 and 18 March 2002 to evaluate and consider a prospective employee's qualifications. *See* N.C. Gen. Stat. § 143-318.11(a)(6). Plaintiff's complaint alleges that the appointment of Holliman and the approval of her contract took place in open meetings on 18 March 2002 and 1 April 2002. Defendant did not violate the Open Meetings Law to warrant Holliman's appointment to be declared "null and void" or "a nullity."

Further, plaintiff's complaint does not state a claim upon which the requested relief can be granted. The trial court properly con-

cluded that it lacked the authority under the Open Meetings Law to order defendant to appoint her to the position as Interim Area Director. This assignment of error is overruled.

IV. Motion for Sanctions

[3] Plaintiff argues the trial court erred in concluding that she initiated her action for an improper purpose when N.C. Gen. Stat. § 143-318.16A(a) specifically allows any person to institute a suit for a declaratory judgment.

We review a trial court's decision to impose sanctions pursuant to Rule 11 *de novo* and must determine: "(1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence." *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). "If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a)." *Id.*

Under Rule 11 of our North Carolina Rules of Civil Procedure, when a complaint is filed, "the signer certifies that three distinct things are true: the pleading is (1) well grounded in fact; (2) warranted by existing law, 'or a good faith argument for the extension, modification, or reversal of existing law' (legal sufficiency); and (3) not interposed for any improper purpose." *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992). "Parties, as well as attorneys, may be subject to sanctions for violations of the improper purpose prong of Rule 11. Further, both are subject to an objective standard to determine the existence of such an improper purpose." *Id.* at 656, 412 S.E.2d at 332 (citing *Turner*, 325 N.C. at 164, 381 S.E.2d at 713).

"An improper purpose is 'any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.' " *Brown v. Hurley*, 124 N.C. App. 377, 382, 477 S.E.2d 234, 238 (1996) (quoting *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (quoting Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse § 13(C) (Supp. 1992))).

> In other words, a party "will be held responsible if his evident purpose is to harass, persecute, otherwise vex his opponents or cause them unnecessary cost or delay." An objective standard is

used to determine the existence of an improper purpose, with the burden on the movant to prove such improper purpose.

Brown, 124 N.C. App. at 382, 477 S.E.2d at 238 (quoting *Bryson*, 330 N.C. at 663, 412 S.E.2d at 337).

Plaintiff contends she filed her complaint for a proper purpose and denies that she instituted this action in retaliation for defendant's failure to appoint her as the Interim Area Director. Her complaint alleges defendant violated the Open Meetings Law. The trial court found that she was present at meetings where she believed violations of the Open Meetings Law occurred and had a duty to inform the Board if it was not acting properly. Instead of performing this duty, she discussed the alleged violations with other staff members and not Board Members while the Board continued to meet in closed sessions.

The evidence supports the trial court's findings. Plaintiff's deposition clearly shows that she intentionally remained silent, despite her duty to inform the Board of proper procedures. After Holliman was appointed, plaintiff filed this action seeking to have the selection of Holliman declared "a nullity" due to the violations of the Open Meetings Law. Her complaint shows Holliman was appointed as Interim Area Director in open sessions. The complaint requested the trial court rule that Holliman be removed and plaintiff be appointed to the position. Following the filing of the case at bar, plaintiff filed an additional action in Superior Court and two actions with the Office of Administrative Hearings.

Plaintiff's action is neither well-grounded in fact nor warranted by existing law. *See Bryson*, 330 N.C. at 655, 412 S.E.2d at 332. Further, the trial court did not err in concluding that she filed this action for an improper purpose. The trial court found plaintiff instituted this action in retaliation for defendant's failure to appoint her as Interim Area Director and for leverage in obtaining a settlement from defendant for her other personnel actions. The evidence shows that plaintiff filed this action after defendant appointed another individual as Interim Area Director. Plaintiff's complaint alleged violations that plaintiff could have prevented pursuant to her duties as Deputy Area Director. She willfully failed to inform the Board regarding its potential violations under the Open Meetings Law. Plaintiff filed suit alleging such violations and seeking to overturn decisions that plaintiff *admits* were made in *open* meetings. The evidence supports the trial court's conclusion that plaintiff filed her action not to "vindicate her

rights," but in retaliation for defendant's actions and in order to gain leverage in settlement negotiations. *Brown*, 124 N.C. App. at 382, 477 S.E.2d at 689.

Sufficient evidence supports the trial court's findings of fact, and the findings of fact support its conclusions of law. *See Turner*, 325 N.C. at 165, 381 S.E.2d at 714. Further, these conclusions support the trial court's decision to impose sanctions on plaintiff. *Id.* We affirm the trial court's order granting defendant's motion for sanctions. This assignment of error is overruled.

V. Attorney's Fees and Costs

[4] Plaintiff argues the trial court abused its discretion in awarding attorney's fees and costs to defendant. We disagree.

Rule 11 of the North Carolina Rules of Civil Procedure states:

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2003). "[I]n reviewing the appropriateness of the particular sanction imposed, an 'abuse of discretion' standard is proper because '[t]he rule's provision that the court 'shall impose' sanctions for motions abuses . . . concentrates [the court's] discretion on the *selection* of an appropriate sanction rather than on the *decision* to impose sanctions.' " Turner, 325 N.C. at 165, 381 S.E.2d at 714 (emphasis in original) (quoting *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir.)).

Here, the trial court ordered plaintiff to pay reasonable attorney's fees of $9,945.25 and $617.15 for costs of deposing plaintiff. Plaintiff argues the imposition of sanctions is unsupported by the evidence because the judgment on the pleadings should not have been granted. We have already held the trial court did not err in granting the judgment on the pleadings or in its decision to impose sanctions.

Plaintiff also argues that the trial court erred in calculating its award by using a reasonable rate for a private attorney and, instead, should have awarded fees based on actual costs for the County attorney. Plaintiff cites no case law and identifies no evidence

in the record to support this contention. We hold that plaintiff has failed to show the trial court abused its discretion by ordering her to pay attorney's fees and costs as sanctions. This assignment of error is overruled.

VI. Relief from Judgment

[5] Defendant cross-appeals and argues the trial court erred in modifying its order for sanctions and reducing its award of attorney's fees because no competent evidence exists in the record to support the findings of fact or conclusions of law.

Rule 60(b) of the North Carolina Rules of Civil Procedure provides, "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) Any other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2003). "Rule 60(b) has been described as a grand reservoir of equitable power to do justice in a particular case. Relief afforded under N.C. Gen. Stat. § 1A-1, Rule 60(b) is within the discretion of the trial court, and such a decision will be disturbed only for an abuse of discretion." *Branch Banking & Trust Co. v. Tucker*, 131 N.C. App. 132, 137, 505 S.E.2d 179, 182 (1998) (quotations and citations omitted).

"Courts have the power to vacate judgments when such action is appropriate, yet they should not do so under Rule 60(b)(6) except in extraordinary circumstances and after a showing that justice demands it." *Equipment Co. v. Albertson*, 35 N.C. App. 144, 147, 240 S.E.2d 499, 501 (1978). Defendant argues the trial court did not find "extraordinary circumstances" or a "showing that justice demands" the relief sought. *Id. Equipment Co.*, however, is distinguishable from the case at bar. Here, the trial court did not *vacate* a judgment or enter a dismissal or default. The trial court *modified* its award of attorney's fees, which it had ordered, in its discretion, as a sanction under Rule 11.

Defendant contends the trial court's findings of fact are unsupported by the evidence. "The record does not contain the oral testimony; therefore, the court's findings of fact are presumed to be supported by competent evidence." *Fellows v. Fellows*, 27 N.C. App. 407, 408, 219 S.E.2d 285, 286 (1975) (citing *Christie v. Powell*, 15 N.C. App. 508, 190 S.E.2d 367 (1972), *cert. denied*, 281 N.C. 756, 191 S.E.2d 361)); *see also Dolbow v. Holland Industrial*, 64 N.C. App. 695, 696,

308 S.E.2d 335, 336 (1984), *disc. rev. denied*, 310 N.C. 308, 312 S.E.2d 651 (1984) ("We are hampered in our review of defendants' first contention, however, because defendants have included no transcript or narration of the evidence upon which this Court can fully review this assignment of error. The burden is on an appealing party to show, by presenting a full and complete record, that the record is lacking in evidence to support the [trial court's] findings of fact."). As defendant failed to include a narration of the evidence or a transcript with the record, we presume the findings at bar are supported by competent evidence. *Fellows*, 27 N.C. App. at 408, 219 S.E.2d at 286.

Here, plaintiff moved for relief from the trial court's earlier order and judgment imposing sanctions because she was "unemployed as a result of this lawsuit," "the payment of sanctions would be an undue hardship," "to assess sanctions against plaintiff would 'chill' future plaintiffs from challenging the Open Meetings Laws," and "ordering sanctions against plaintiff for holding public bodies accountable is inconsistent with the public policy [of North Carolina] . . . ." In ruling on plaintiff's motion, the trial court considered "plaintiff's new terminated employment status, together with a news article concerning the reduced costs for the County to have matters litigated." Defendant argues the trial court erred in relying on a news article to find that the attorney's fees awarded to defendant were excessive. Defendant failed to include a copy of the news article in the record, which precludes our review of this argument. *See Fellows*, 27 N.C. App. at 408, 219 S.E.2d at 286.

The trial court's findings are sufficient to support its conclusion that "it is reasonable for the sanctions imposed against plaintiff be reduced to $5,000 for attorney's fees." Defendant has failed to show that the trial court abused its discretion in reducing the amount of attorney's fees from $10,562.40 to $5,617.15 following plaintiff's termination from her employment. This assignment of error is overruled.

VII. Conclusion

The trial court did not err in entering a judgment on the pleadings for defendant. Plaintiff failed to establish that defendant violated the Open Meetings Law when it appointed Holliman as Interim Area Director. The trial court did not err in sanctioning plaintiff pursuant to Rule 11 of the North Carolina Rules of Civil Procedure and did not abuse its discretion in ordering plaintiff to pay attorney's fees and costs. Defendant failed to show the trial court abused its discretion in modifying this judgment and order following plaintiff's termination

from employment. The judgments and orders entered by the trial court are affirmed.

Affirmed.

Judges McGEE and TIMMONS-GOODSON concur.

MICKEY S. COLLINS, EMPLOYEE, PLAINTIFF v. SPEEDWAY MOTOR SPORTS CORP., EMPLOYER, AND ROYAL AND SUNALLIANCE, CARRIER, DEFENDANTS

No. COA03-853

(Filed 6 July 2004)

Workers' Compensation— maximum medical improvement— healing period—maximum vocational recovery

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee reached maximum medical improvement (MMI) on 25 January 1999 and that plaintiff employee's entitlement to combined benefits under N.C.G.S. §§ 97-29 and 97-30 was greater than his entitlement to benefits under N.C.G.S. § 97-31, because: (1) MMI, which is equivalent to a finding that the healing period as defined under N.C.G.S. § 97-31 has ended, does not require the employee to have reached maximum vocational recovery; (2) the evidence is uncontroverted that plaintiff's fracture was completely healed as of 25 January 1999 and that it was the doctor's professional opinion that plaintiff's physical injury had reached MMI as of the date his fracture became healed; and (3) plaintiff's need for vocational rehabilitation services in this case further supports, rather than contradicts, the competent evidence establishing that plaintiff reached MMI as of 25 January 1999.

Appeal by plaintiff from order entered 28 March 2003 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 26 April 2004.

Cox, Gage & Sasser, by Charles McB. Sasser, for plaintiff-appellant.

McAngus, Goudelock & Courie, P.L.L.C., by Andrew R. Ussery and Robert B. Starnes, for defendants-appellees.

MARTIN, Chief Judge.

Plaintiff appeals from an order of the North Carolina Industrial Commission awarding him compensation, pursuant to N.C. Gen. Stat. §§ 97-29 and 97-30, for temporary total disability from 13 August 1997 until 6 February 2000, and temporary partial disability from 6 February 2000 until 1 April 2000.

The record discloses that on 12 August 1997, plaintiff received injuries to his right leg arising out of and in the course and scope of his employment as a ground maintenance worker with defendant-employer. On 3 September 1997, defendant-carrier admitted liability for plaintiff's injuries and executed a Form 21 agreement with plaintiff, agreeing to pay temporary total disability benefits.

As a result of the injury, plaintiff was admitted to University Hospital where x-rays revealed comminuted transverse fractures of the distal third of the tibia and fibula. Plaintiff immediately underwent closed reduction surgery and splinting of the tibia and fibula fractures. On 14 August 1997, an additional surgery was performed by Dr. Matthew David Ohl. At a follow-up examination on 17 October 1997, Dr. Ohl found a lack of mobility and dorsiflexion of plaintiff's foot. Plaintiff subsequently moved to Ohio, where he was examined by Dr. Kee P. Wong on 4 December 1997 for ongoing right leg pain. Dr. Wong diagnosed plaintiff with a peroneal nerve injury and a delayed union of the left tibia fracture.

Plaintiff underwent ongoing treatment with Dr. Wong and on 21 February 1998, Dr. Wong found that plaintiff's surgical wounds had healed. At a follow-up visit on 5 March 1998, plaintiff reported to Dr. Wong that he was no longer experiencing pain in his right leg. On 14 April 1998, further x-rays revealed proper healing of the right leg with a disappearing fracture line. However, plaintiff still continued to have very little ankle motion and minimal dorsiflexion. Dr. Wong recommended stretching exercises and plaintiff returned to see Dr. Wong for follow-up visits on 28 May and 28 July 1998. On 4 September 1998, Dr. Wong filled out documents sent by Concerta Managed Care concerning vocational rehabilitation and work restrictions. On 25 January 1999, Dr. Wong conducted another follow-up examination of plaintiff's right leg. Dr. Wong informed plaintiff that if the fracture in his leg was healed, then it was his opinion that plaintiff had reached maximum medical improvement. The following day, x-rays confirmed that the fracture in plaintiff's right leg was healed. Dr. Wong recommended that plaintiff undergo vocational rehabilitation in order to

learn to work with the limitations in his leg and released plaintiff to return to work with the restrictions that he not engage in repetitive lifting, lifting over 30 pounds, standing for more than 4 hours, or sitting for more than 8 hours. On 17 June 1999, Dr. Wong assigned a 24% disability rating to plaintiff's right foot.

With the assistance of vocational rehabilitation professionals, plaintiff attempted to find work within his restrictions in both Ohio and North Carolina, but was unsuccessful. On 15 October 1999, plaintiff returned to Dr. Ohl, who found that plaintiff had a healed fracture with continuing peroneal nerve palsy, a permanent peroneal nerve lesion to the foot and ankle, and a lack of motion and dorsiflexion. Dr. Ohl assigned a 35% disability rating to plaintiff's right foot.

On 6 February 2000, plaintiff found work at an Ohio plastics plant for wages significantly less than his pre-injury wages. On 1 April 2000, plaintiff returned to North Carolina to work for an auto detailing shop at wages comparable to his pre-injury wages.

Defendant-employer continued to pay temporary total disability benefits until plaintiff returned to work on 6 February 2000. On 17 April 2000 plaintiff filed a Form 33 hearing request with the Industrial Commission for defendant's refusal to pay additional disability benefits. Defendants responded that plaintiff was not entitled to benefits after his return to work. The matter was heard by a deputy commissioner, who entered an opinion and award on 18 September 2001 ordering, *inter alia*, that in addition to the payment of temporary total disability, pursuant to G.S. § 97-29, through 6 February 2000, plaintiff was eligible to receive benefits for permanent partial disability for an additional 50.4 weeks, pursuant to G.S. § 97-31, based on a 35% disability to his right foot.

Defendant appealed the deputy commissioner's order to the Full Commission. On 28 March 2003, the Full Commission entered its opinion and award in which it found facts as summarized above and concluded, *inter alia*, that while plaintiff was entitled to compensation, he had reached maximum medical improvement on 25 January 1999, not 6 February 2000, and thus, plaintiff's more munificent remedy was pursuant to G.S. §§ 97-29 and 97-30, not G.S. § 97-31. Plaintiff appeals from the opinion and award of the Full Commission.

Plaintiff first argues the Industrial Commission erred in law and in fact when it concluded that he reached maximum medical improvement on 25 January 1999. Such error, plaintiff argues further, caused

the Commission to also erroneously conclude that his entitlement to combined benefits under G.S. §§ 97-29 and 97-30 was greater than his entitlement to benefits under G.S. § 97-31. We have carefully considered his contentions and affirm the Commission's opinion and award.

"In reviewing an opinion and award from the Industrial Commission, the appellate courts are bound by the Commission's findings of fact when supported by any competent evidence; but the Commissions's legal conclusions are fully reviewable." *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000).

Plaintiff first argues the Commission erred in either law or fact when it determined that plaintiff reached maximum medical improvement (MMI) on 25 January 1999. Although the Commission erroneously labeled such determination as a conclusion of law, the question of whether an employee has reached "maximum medical improvement" or "MMI" is an issue of fact. *See, e.g., Aderholt v. A.M. Castle Co.*, 137 N.C. App. 718, 722, 529 S.E.2d 474, 477, *cert. denied*, 352 N.C. 356, 544 S.E.2d 546 (2000); *Davis v. Embree-Reed, Inc.*, 135 N.C. App. 80, 85, 519 S.E.2d 763, 766, *disc. review denied*, 351 N.C. 102, 541 S.E.2d 143 (1999); *Carpenter v. Industrial Piping Co.*, 73 N.C. App. 309, 312, 326 S.E.2d 328, 330 (1985). Thus, the applicable standard of review is whether there is competent evidence in the record to support the Commission's finding that plaintiff had reached MMI on 25 January 1999.

In this case, plaintiff argues that Dr. Wong's opinion was not competent to support the Commission's finding that plaintiff reached MMI on 25 January 1999. On 25 January 1999, Dr. Wong stated the following after evaluating plaintiff:

> I explained to the patient that basically he has reached maximal medical improvement if the fracture is healed. I explained to him I think he should undergo some type of vocational rehab since he is not working now. We will see the patient tomorrow for x-ray.

The next day, plaintiff underwent x-rays of his right leg, which showed that his tibial fracture was completely healed. Dr. Wong made the following entry in his notes:

> I explained to the patient that his tibia fracture is healed. I explained to him that he is maximally medically improved now. At this point he states he can stand for four hours, sit for eight hours, and carry 30 lbs. He cannot do any repetitive lifting. At this point I would recommend the patient undergo vocational rehabil-

itation. I explained to him that he could learn to work with these types of limitations. We will see the patient again only as needed.

On 2 February 1999, in response to a letter forwarded to him by Concentra Managed Care, Dr. Wong made an affirmative response to the following question:

> Has the [plaintiff] reached a level of Maximum Medical Improvement for his allowed condition of RIGHT CLOSED TIBIA/FIBULA FRACTURE as defined by the Bureau of Worker's [sic] Compensation:
>
> 'A treatment plateau (static or well-stabilized) in which no fundamental, functional or physiological change can be anticipated within reasonable probability despite further medical or rehabilitative procedures. A claimant may need supportive care to maintain this level of function.'

Based on this evidence, the Commission found that plaintiff had reached MMI on 25 January 1999.

Plaintiff argues that the fact that plaintiff's fracture had completely healed as of 25 January 1999 does not establish MMI, since Dr. Wong recommended that plaintiff undergo vocational rehabilitation. Plaintiff cites language used by this Court in *Walker v. Lake Rim Lawn & Garden*, 155 N.C. App. 709, 575 S.E.2d 764, *disc. review denied*, 357 N.C. 67, 579 S.E.2d 577 (2003), stating that an injured worker's healing period cannot be considered to have come to an end "until he has reached maximum vocational recovery." *Id.* at 718, 575 S.E.2d at 770.

In *Walker*, defendants argued that an award of continuing temporary total disability pursuant to G.S. § 97-29 should be reversed. *Id.* at 717, 575 S.E.2d at 769. To support this argument, defendants assigned error to a Commission finding which stated, "plaintiff has not reached maximum medical improvement or the end of the healing period . . . [since he] is in need of and would benefit from both chronic pain treatment and a vocational rehabilitation program." *Id.* at 717-18, 575 S.E.2d at 769-70. They contended that a finding of MMI would have barred the Commission from awarding to plaintiff continuing temporary total disability benefits pursuant to G.S. § 97-29. *Id.* This Court rejected the assignment of error, holding the Commission finding was immaterial to the determination of whether plaintiff was entitled to temporary total disability benefits pursuant to G.S. § 97-29. *Id.* at 717-18, 575 S.E.2d at 769. The Court went on to say:

> In addition, the evidence does support that part of the Commission's finding Number 34, that 'plaintiff has not reached maximum medical improvement or the end of the healing period . . . [since he] is in need of and would benefit from both chronic pain treatment and a vocational rehabilitation program.' Both pain treatment and vocational services are considered medical compensation as defined in N.C. Gen. Stat. § 97-2(19), and are designed to 'give relief and . . . to lessen the period of disability . . . .' N.C. Gen. Stat. § 97-2(19) (2001). Therefore, until he has reached maximum vocational recovery, this plaintiff's healing period is not yet at an end. Thus, this argument is without merit.

Id. at 718, 575 S.E.2d at 770.

We first note that "maximum medical improvement, by definition, means that the employee's healing period has ended." *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 14 n.4, 562 S.E.2d 434, 443 n.4 (2002), *aff'd*, 357 N.C. 44, 577 S.E.2d 620 (2003) (internal quotation omitted). Thus, the *Walker* court seems to equate an injured worker's attainment of MMI with the point he or she reaches "maximum vocational recovery." *Walker*, 155 N.C. App. at 718, 575 S.E.2d at 770. After careful review, we decline to follow this language as it was unnecessary to the resolution of its case and is contrary to the previous decisions of our courts.

"The underlying purpose of our Work[ers'] Compensation Act, G.S. Chap. 97, is to provide compensation for work[ers] who suffer disability by accident arising out of and in the course of their employment." *Henry v. A. C. Lawrence Leather Co.*, 234 N.C. 126, 127, 66 S.E.2d 693, 694 (1951). An award under the Act has two distinct components: (1) payment of "medical compensation" pursuant to G.S. § 97-25 for expenses incurred as a direct result of the work-related injury, and (2) payment of general "compensation" pursuant to G.S. §§ 97-29 through 97-31 for financial loss suffered as a direct result of the work-related injury. *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 267, 425 S.E.2d 698, 704 (1993). N.C. Gen. Stat. § 97-2(19) (2003) broadly defines the term "medical compensation" as follows:

> The term 'medical compensation' means medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the

Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

"[T]he relief obtainable as general 'compensation' is different and is separate and apart from the medical expenses recoverable under the Act's definition of 'medical compensation.' " *Hyler*, 333 N.C. at 265, 425 S.E.2d at 703. When pursuing a general "compensation" award, "[a]n employee . . . has, at the outset, two very general options." *Knight*, 149 N.C. App. at 10, 562 S.E.2d at 441. An employee may seek compensation by showing a disability pursuant to G.S. §§ 97-29 or 97-30. *Id.* "[D]isability is defined by a diminished capacity to earn wages, not by physical infirmity." *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 764, 487 S.E.2d 746, 750 (1997). Alternatively, an employee may seek compensation by showing a specific physical impairment pursuant to G.S. § 97-31. *Knight*, 149 N.C. App. at 10, 562 S.E.2d at 442. Where an employee can show *both* a disability pursuant to G.S. §§ 97-29 or 97-30 and a specific physical impairment pursuant to G.S. § 97-31, he may not collect benefits pursuant to both schemes, but rather is entitled to select the statutory compensation scheme which provides the more favorable remedy. *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 95-96, 348 S.E.2d 336, 340 (1986).

Under N.C. Gen. Stat. §§ 97-29 and 97-30, an injured employee who suffers a loss of wage-earning capacity is generally entitled to collect compensation for as long as he or she remains disabled. *See* N.C. Gen. Stat. §§ 97-29 and 97-30 (2003) (may only collect partial disability for a maximum of 300 weeks). "[D]isability [and hence, compensation] ends when the employee returns to work at the same wages he was receiving at the time of the injury." *Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 464, 470 S.E.2d 357, 358 (1996).

Under N.C. Gen. Stat. § 97-31, an injured employee who suffers some degree of permanent function loss to a part of the body as enumerated in the statute is entitled to collect (1) compensation under N.C. Gen. Stat. §§ 97-29 or 97-30 for temporary disability, if any, occurring during the period his physical injury is healing; and (2) permanent disability compensation "for an additional, statutorily prescribed period of time . . . which begins when the healing period ends . . . ."

Knight, 149 N.C. App. at 11, 562 S.E.2d at 442; *see also* N.C. Gen. Stat. § 97-31 (2003).

"[T]he healing period in N.C. Gen. Stat. § 97-31 ends at the point when the injury has stabilized, referred to as the point of 'maximum medical improvement'. . . ." *Knight*, 149 N.C. App. at 12, 562 S.E.2d at 442-43. In *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 229 S.E.2d 325 (1976), *cert. denied*, 292 N.C. 467, 234 S.E.2d 2 (1977), this Court stated:

> The healing period, within the meaning of G.S. 97-31, is the time when the claimant is unable to work because of his injury, is submitting to treatment, which may include an operation or operations, or is convalescing. This period of temporary total disability contemplates that eventually there will be either complete recovery, or an impaired bodily condition which is stabilized. When the claimant has an operation to correct or improve the impairment resulting from his injury, the healing period continues after recovery from the operation until he reaches maximum recovery. The healing period continues until, after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established.

Id. at 288-89, 229 S.E.2d at 328-29 (citations omitted).

"[A] finding of maximum medical improvement is not the equivalent of a finding that the employee is able to earn the same wage earned prior to injury." *Russos v. Wheaton Indus.*, 145 N.C. App. 164, 167, 551 S.E.2d 456, 459 (2001), *disc. review denied*, 355 N.C. 214, 560 S.E.2d 135 (2002) (internal quotation omitted). Rather "the primary significance of the concept of MMI is to delineate a crucial point in time *only within the context of a claim for scheduled benefits under N.C. Gen. Stat. § 97-31*, and . . . does not have any direct bearing upon an employee's right to continue to receive temporary disability benefits once the employee has established a loss of wage-earning capacity pursuant to N.C. Gen. Stat. § 97-29 or § 97-30." *Knight*, 149 N.C. App. at 13-14, 562 S.E.2d at 443 (emphasis original). Whereas MMI is "a purely medical determination" which "occurs when the employee's physical recovery has reached its peak," *Walker*, 155 N.C. App. at 717, 575 S.E.2d at 769, "the term 'disability' is not simply a medical question, but includes an assessment of other vocational factors, including age, education, and training," *Russos*, 145 N.C. App. at 168, 551 S.E.2d at 459.

It is within this statutory framework that we determine whether a finding of MMI, which is equivalent to a finding that the healing period as defined under G.S. § 97-31 has ended, requires the employee to have reached "maximum vocational recovery." *Walker*, 155 N.C. App. at 718, 575 S.E.2d at 770. Without defining the terms, the Act distinguishes between "medical rehabilitation services" and "vocational rehabilitation services," which are both compensable within an award for "medical compensation" pursuant to G.S. § 97-25. *See* N.C. Gen. Stat. §§ 97-25.4 and 97-25.5 (2003) (providing for the adoption, by the Commission, of utilization rules and guidelines for "medical care and medical rehabilitation services" and for "vocational rehabilitation services and other types of rehabilitation services").

Under its "Rules for Utilization of Rehabilitation Professionals in Workers' Compensation Claims," the Industrial Commission provides the following definitions:

> E. "Vocational Rehabilitation" refers to the delivery and coordination of services under an individualized plan, ***with the goal of assisting injured workers to return to suitable employment.***
>
> (1) Specific vocational rehabilitation services may include, but are not limited to: vocational assessment, vocational exploration, counseling, job analysis, job modification, job development and placement, labor market survey, vocational or psychometric testing, analysis of transferable skills, work adjustment counseling, job-seeking skills training, on-the-job training and retraining, and follow-up after re-employment.
>
> (2) The vocational assessment is based on the RP's evaluation of the worker's social, medical, and vocational standing, along with other information significant to employment potential and on a face-to-face interview between the worker and the RP, to determine whether the worker can benefit from vocational rehabilitation services, and, if so, to identify the specific type and sequence of appropriate services. It should include an evaluation of the worker's expectations in the rehabilitation process, an evaluation of any specific requests by the worker for medical treatment or vocational training, and a statement of the RP's conclusion regarding the worker's need for rehabilitation services, benefits expected from services, and a description of the proposed rehabilitation plan.

> (3) Job placement activities may be commenced after completion of a vocational assessment and formulation of an individualized plan for vocational services which specifies its goals and the priority for return-to-work options in each case. Placement shall only be directed toward prospective employers offering the opportunity for suitable employment, as defined herein.
>
> . . .
>
> G. "Suitable employment" means employment in the local labor market or self-employment which is reasonably attainable and ***which offers an opportunity to restore the worker as soon as possible and as nearly as practicable to pre-injury wage,*** while giving due consideration to the worker's qualifications (age, education, work experience, physical and mental capacities), impairment, vocational interests, and aptitudes. No one factor shall be considered solely in determining suitable employment.

N.C. Indus. Comm'n Rules for Rehabilitation Professionals III(E) & (G), 2004 Ann. R. (N.C.) 1017, 1018-19 (emphases added).

These rules make clear that "vocational rehabilitation" under the Act refers to services geared toward assisting injured workers to return "as soon as possible and as nearly as practicable" to employment offering pre-injury wages. *Id.* Thus, in order for an injured worker to achieve "maximum vocational recovery," *see Walker*, 155 N.C. App. at 718, 575 S.E.2d at 770, the injured worker must come to a point, after utilizing all vocational resources, where his or her maximum ability to earn pre-injury wages has been reached. Such a concept extends well beyond the scope of physical recovery and stabilization that is characterized as MMI. *See Russos*, 145 N.C. App. at 167-68, 551 S.E.2d at 459; *Knight*, 149 N.C. App. at 14, 562 S.E.2d at 443-44. We, accordingly, decline to adopt the *obitur dictum* contained in *Walker*, and hold that a finding of MMI, which is equivalent to a finding that the healing period as defined under G.S. § 97-31 has ended, does not require the injured worker to have reached "maximum vocational recovery." *See State v. Pearson*, 348 N.C. 272, 277, 498 S.E.2d 599, 601 (1998) (language which is not necessary to the resolution of a case is dictum and does not constitute binding precedent). Defendant's assignment of error to the contrary is overruled.

We next turn to the question of whether there is competent evidence in the record to support the Commission's finding that plaintiff reached MMI on 25 January 1999. The evidence is uncontro-

verted that plaintiff's fracture was completely healed as of 25 January 1999 and that it was Dr. Wong's professional opinion that plaintiff's physical injury had reached MMI as of the date his fracture became healed. Plaintiff points to evidence showing that at the time of the Commission's order, he was still experiencing problems with his injured leg and he was still in need of vocational rehabilitation services. A close examination of the entire record reveals that plaintiff's need for vocational rehabilitation services in this case further supports, not contradicts, the competent evidence establishing that plaintiff reached MMI as of 25 January 1999. Plaintiff's assignment of error to the contrary is overruled.

As there is competent evidence to support the Commission's finding that plaintiff reached MMI as of 25 January 1999, the Commission also did not err when it determined that plaintiff's entitlement to combined benefits under G.S. §§ 97-29 and 97-30 was greater than his entitlement to benefits under G.S. § 97-31 (60.6 weeks versus 50.4 weeks, respectively). We, therefore, overrule plaintiff's final two assignments of error.

Affirmed.

Judges BRYANT and THORNBURG concur.

STATE OF NORTH CAROLINA v. MAURICE LACATO PHIFER

No. COA03-972

(Filed 6 July 2004)

1. Constitutional Law— effective assistance of counsel—failure to request jury instructions

Defendant did not receive ineffective assistance of counsel in an assault with a deadly weapon with intent to kill inflicting serious injury case based on his counsel's failure to request jury instructions on self-defense, defense of a third party, and defense of habitation because given the great amount of evidence challenging the credibility of defendant's claim that he was acting in defense of himself, his estranged wife, and her home, the decision by defendant's trial counsel to decline the trial court's offer to instruct the jury on the pertinent defenses was reasonable.

2. Constitutional Law— effective assistance of counsel—failure to file notice of appeal

Defendant did not receive ineffective assistance of counsel in an assault with a deadly weapon with intent to kill inflicting serious injury case based on his counsel's failure to file a notice of appeal on behalf of defendant, because assuming arguendo that defendant requested his trial counsel to file notice of appeal and that trial counsel neglected to do so, defendant has failed to convince the Court of Appeals that he was prejudiced by the alleged negligent deficient performance.

3. Evidence— destruction—videotape

Defendant was not prejudiced in an assault with a deadly weapon with intent to kill inflicting serious injury case by the destruction of evidence as a result of his trial counsel's failure to file an appeal, because: (1) although an order was entered to destroy evidence, the day after defendant was sentenced defendant does not contend that the evidence was destroyed or removed prior to the thirty-day period required by Rule 14 of the General Rules of Practice for the Superior and District Courts of North Carolina; (2) assuming arguendo that defendant and/or his trial counsel failed to receive written notification of the destruction of the exhibits, any error was harmless; and (3) although defendant specifically contends review of his videotaped statement to police might strengthen his ineffective assistance of counsel claim, defendant's videotaped statement further contradicts a potential claim of self-defense, defense of others, or defense of habitation when considered in light of the testimony at trial regarding the videotape.

Appeal by defendant from judgment entered 24 August 1999 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General C. Norman Young, Jr., for the State.

Rudolf Maher Widenhouse & Fialko, by Andrew G. Schopler, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Maurice Lacato Phifer ("defendant") appeals his conviction of assault with a deadly weapon with intent to kill inflicting serious

injury. For the reasons stated herein, we hold defendant received a trial free of prejudicial error.

The State's evidence presented at trial tends to show the following: Sometime before June of 1996, defendant's wife, Cassandra Phifer ("Cassandra"), began a sexual relationship with a former high school friend, John Lewis Southerland ("Southerland"). Defendant was unaware of Cassandara's relationship with Southerland. In June of 1996, defendant and Cassandra separated, and defendant moved into a different apartment. In October of 1996, defendant and Cassandra reconciled. Defendant returned to the apartment he had previously shared with Cassandara. However, unbeknownst to defendant, Cassandra continued her sexual relationship with Southerland.

On 25 June 1997, Cassandra and Southerland were spending the afternoon together at the home Cassandra shared with defendant. Shortly after Cassandra and Southerland had sexual intercourse, defendant returned home with a friend, Chris Young ("Young"). Cassandra instructed Southerland to hide in the bedroom closet while she talked to defendant. She then went to the front of the house and laid down on a couch. When defendant expressed his surprise at Cassandra's presence at the home, Cassandra told defendant she felt sick and thought she might be pregnant. She then asked defendant to go to the grocery store to buy her a pregnancy test and some ginger ale. Defendant and Young walked out the front door, and Cassandra locked it behind them.

A moment later, defendant returned and knocked on the front door. Cassandra let defendant inside, and asked him if he had forgotten something. Defendant asked Cassandra where their daughter was, and Cassandra told defendant the child was in her sister's care. When defendant noticed Cassandra was nervous and was continually looking over her shoulder, defendant asked Cassandra, "you ain't got no other ****** up in here, do you?" Cassandra responded that she did not. Defendant then picked up a bag of chips and began walking through the other rooms of the house. Cassandra followed defendant to the bedroom where Southerland was hiding. Cassandra implored that defendant "just go to the store and get the stuff." Defendant stated that if no one else was in the home, he would look in the closet. Cassandra told defendant that he did not need to look in the closet. Defendant then told Cassandra he was going to get his gun.

Cassandra followed defendant to the bathroom, where defendant's gun was located. Cassandra tried to prevent defendant from entering the bathroom, telling him that he did not need a gun. A struggle ensued, and Cassandra's bracelet fell off and her shirt was torn. Defendant managed to locate and pick up his 9mm handgun. Defendant and Cassandra then returned to the bedroom. After Southerland heard defendant state "I'm about to shoot up the closet," Southerland decided to exit the closet. Just as Southerland emerged from the closet, defendant reached for the closet door. Southerland and defendant bumped into one another, and defendant's gun went off. Southerland was shot in the right side of his neck. As a result of his injuries, Southerland is now quadriplegic.

Immediately after the shooting, defendant walked past Cassandra and told her, "you're a whore, you're next." At trial, defendant testified that he then fled the scene in his vehicle and dropped Young off "because at that time I didn't know where I was going or what was going on." After dropping off Young, defendant drove his vehicle until it ran out of gas. The next day, defendant turned himself in to the Charlotte-Mecklenburg Police Department. Defendant does not remember what happened to the gun after the shooting.

Defendant was indicted and tried for assault with a deadly weapon with intent to kill inflicting serious injury. On 20 August 1999, the jury returned a guilty verdict, on 23 August 1999, the trial court sentenced defendant to 100 months to 129 months incarceration. On 24 August 1999, the trial court ordered the exhibits from the trial destroyed, pending notice of appeal within thirty days. Defendant did not thereafter file an appeal. However, on 28 June 2002, this Court granted defendant's "Petition for a Writ of Certiorari," thereby allowing the instant appeal to proceed.

As an initial matter, we note that defendant's brief contains arguments supporting only five of his original thirteen assignments of error. Pursuant to North Carolina Rule of Appellate Procedure 28(b)(6) (2004), the eight omitted assignments of error are deemed abandoned. Therefore, we limit our present review to those assignments of error properly preserved by defendant for appeal.

[1] Defendant first argues that he received ineffective assistance of counsel at trial because his counsel failed to request a jury instruction on self-defense, defense of a third party, and defense of habitation. Defendant asserts that his trial counsel's performance was deficient and resulted in prejudice to defendant. We disagree.

We note initially that although the preferred method for raising ineffective assistance of counsel is by motion for appropriate relief made in the trial court, a defendant may bring his ineffective assistance of counsel claim on direct appeal. On direct appeal, defendant's ineffective assistance of counsel claim "will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114 (2002).

A successful ineffective assistance of counsel claim requires satisfaction of the familiar two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984) and adopted by our Supreme Court in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). First, defendant must establish that his counsel's performance was deficient in that it fell below an "objective standard of reasonableness." *Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248. Second, defendant must establish that a reasonable probability exists that but for the error, the result of defendant's trial would have been different. *Id.* at 563, 324 S.E.2d at 248.

During the charge conference in the instant case, the following exchange occurred between the trial court and defendant's counsel:

THE COURT: Now at this point the Court also will be making inquiry of the State and the defendant in regard to the evidence and whether or not, particularly the defendant, whether he contends the Court based upon this evidence should instruct as to self-defense, there being some evidence from the defendant's wife that he pushed or attempted to push or whatever the evidence reflects or shows.

Does the defendant contend and request self-defense?

TRIAL COUNSEL: May I have a moment to confer?

(Pause in Proceedings)

TRIAL COUNSEL: We will not be asking for that charge.

THE COURT: You're saying then and telling the Court you're not requesting that, contending that is not a part

of his defense and the Court should not instruct, is that correct?

TRIAL COUNSEL: That is correct.

THE COURT: Now the same, the Court will be asking as to the defense of habitation of one's residence. Is there any request for that instruction?

TRIAL COUNSEL: Let me confer.

(Pause in Proceedings)

TRIAL COUNSEL: We will not be requesting that, Your Honor.

THE COURT: You're indicating that you do not desire that to be instructed to the jury as being a part of the evidence and a part of the defense in the case?

TRIAL COUNSEL: That is correct.

THE COURT: The Court will make further inquiry of the defendant whether or not he desires a defense of lawful defense of a third person?

TRIAL COUNSEL: If I might have just a moment.

(Pause in Proceedings)

TRIAL COUNSEL: We will not be. Thank you.

THE COURT: Are you asking the Court not to instruct based upon the possible evidence in the case and the strategy of the defense?

TRIAL COUNSEL: That is correct.

The trial court then instructed the jury only as to defendant's requested defense of accident.

The elements of self-defense are:

(1) it appeared to defendant and he believed it to be necessary to kill the [victim] 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 that 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. Larry, 345 N.C. 497, 518, 481 S.E.2d 907, 919 (1997).

The elements of self-defense are applicable to the defense of others. In general, one may use defensive force to protect another if that person "believes it to be necessary to prevent death or great bodily harm to the other 'and has a reasonable ground for such belief, the reasonableness of this belief or apprehension to be judged by the jury in light of the facts and circumstances as they appeared to the defender at the time of the [use of defensive force].' " *State v. Perry*, 338 N.C. 457, 466, 450 S.E.2d 471, 476 (1994) (quoting *State v. Terry*, 337 N.C. 615, 623, 447 S.E.2d 720, 724 (1994)). " 'The right to kill in defense of another cannot exceed such other's right to kill in his own defense as that other's right reasonably appeared to the defendant.' " *Id.*

The elements of defense of habitation are also similar to those governing self-defense. N.C. Gen. Stat. § 14-51.1(a) (2003) provides as follows:

A lawful occupant within a home or other place of residence is justified in using any degree of force that the occupant reasonably believes is necessary, including deadly force, against an intruder to prevent a forcible entry into the home or residence or to terminate the intruder's unlawful entry (i) if the occupant reasonably apprehends that the intruder may kill or inflict serious bodily harm to the occupant or others in the home or residence, or (ii) if the occupant reasonably believes that the intruder intends to commit a felony in the home or residence.

Defendant contends that his trial counsel's performance was deficient because each of the above-detailed defenses was supported by the evidence, and therefore no reasonable attorney would withhold consideration of a valid legal defense from the jury. However, given the great amount of evidence challenging the credibility of defendant's claim that he was acting in defense of himself, his estranged wife, and her home, we conclude that the decision by defendant's trial

counsel to decline the trial court's offer to instruct the jury on the pertinent defenses was reasonable.

Defendant testified that he searched the house "pretty much for [his] own personal security," and that his first thought when Southerland exited the closet was that Southerland "was in my house to do my family harm." However, defendant also testified that while searching the home, "me being hungry I reached in the kitchen [and] got me a bag of chips." He further testified that he "didn't suspect there was still someone in the bedroom area" when he returned to the home, and that the gun went off after he and Southerland "bumped into each other." Cassandra testified that she responded "no" after defendant asked her, "you ain't got no other ****** up in here, do you?" Cassandra also testified that while in the bedroom, she told defendant, "you don't have to look in the closet, just go to the store," to which defendant replied, "well, I'm going to get my gun." Cassandra further testified that on the way back to the bedroom after retrieving the gun, defendant looked "confused and upset," and pushed her out of the way after she struggled with defendant and said, "Maurice, you don't need no gun." Finally, Cassandra testified that after shooting Southerland, defendant walked past her and said, "you're a whore, you're next." Southerland testified that before he exited the closet, he heard defendant say, "I'm about to shoot up the closet."

As defendant correctly notes, strategic and tactical decisions such as whether to request an instruction or submit a defense are "within the 'exclusive province' of the attorney." *State v. Rhue*, 150 N.C. App. 280, 290, 563 S.E.2d 72, 79 (2002), *appeal dismissed and disc. review denied*, 356 N.C. 689, 578 S.E.2d 589 (2003). Trial counsel are thereby given wide latitude in their decisions to develop a defense, and "[s]uch decisions are generally not second-guessed by our courts." *State v. Lesane*, 137 N.C. App. 234, 246, 528 S.E.2d 37, 45, *appeal dismissed and disc. review denied*, 352 N.C. 154, 544 S.E.2d 236 (2000). In the instant case, defendant's trial counsel chose not to request that the trial court instruct the jury on defenses that were contradicted by the great weight of the evidence as well as the testimony of all witnesses but defendant. We conclude that the trial counsel's decision was not so objectively unreasonable that " 'the trial [became] a farce and mockery of justice.' " *State v. Montford*, 137 N.C. App. 495, 502, 529 S.E.2d 247, 252, *cert. denied*, 353 N.C. 275, 546 S.E.2d 386 (2000) (quoting *State v. Pennell*, 54 N.C. App. 252, 261, 283 S.E.2d 397, 403, *disc. review denied and appeal dismissed*, 304 N.C. 732, 288 S.E.2d 804 (1982)). Thus, we overrule defendant's argument

that he received ineffective assistance of counsel when his counsel failed to request jury instructions on self-defense, defense of habitation, and defense of others.

[2] Defendant next assigns error to his trial counsel's failure to file a notice of appeal on behalf of defendant. Defendant argues that his trial counsel's failure to file an appeal constituted deficient performance that resulted in prejudice to defendant.

We note initially that in a footnote contained within his brief, defendant requests this Court take judicial notice of the fact that trial counsel did not consult defendant regarding his right to an appeal. Defendant's trial counsel denied this allegation in an affidavit attached to the State's response to defendant's petition for writ of certiorari. This Court's review of matters before it is based "solely upon the record on appeal and the verbatim transcript[.]" N.C.R. App. P. 9 (2004). It is the appellant's responsibility to ensure that the record before this Court is complete and in proper form. *State v. Thigpen*, 10 N.C. App. 88, 92, 178 S.E.2d 6, 9 (1970). Beyond defendant's bald assertion that his trial counsel "neglected even to consult with [defendant] about his right to an appeal," the record before us contains no evidence pertaining to conversations between defendant and his trial counsel concerning defendant's decision to appeal. Therefore, we refuse to take judicial notice of this fact.

Assuming *arguendo* that defendant requested his trial counsel to file notice of appeal and that trial counsel neglected to do so, defendant has nevertheless failed to convince this Court that he was prejudiced by the alleged deficient performance. As defendant correctly states, "[t]he usual remedy for a failure to file notice of appeal is to reinstate the appeal." This Court reinstated defendant's appeal in the 28 June 2002 Order granting defendant's "Petition for a Writ of Certiorari." However, defendant contends that because the alleged deficient performance precipitated "further injury" to defendant, namely the destruction of exhibits, "the remedy should be a new trial or at least a hearing on a Motion for Appropriate Relief." We find no authority to support this contention, and for the reasons discussed below, we fail to see how defendant was injured by the destruction of the exhibits. Thus, we overrule defendant's argument that he received ineffective assistance of counsel because his counsel failed to file appeal on his behalf.

[3] Defendant argues alternatively that if his trial counsel's failure to appeal was not ineffective assistance of counsel, the destruction of

evidence as a result of the failure to file an appeal was prejudicial to him. Defendant argues that the trial court committed reversible error by issuing the order to destroy exhibits #1-47 because the destruction of the evidence "deprived defendant of his rights to, *inter alia*, due process and fair appellate review of his conviction and sentence."

Rule 14 of the General Rules of Practice For the Superior and District Courts of North Carolina (2003) provides:

> Once any item of evidence has been introduced, the clerk (not the court reporter) is the official custodian thereof and is responsible for its safekeeping and availability for use as needed at all adjourned sessions of the court and for appeal.
>
> . . . .
>
> Whenever any models, diagrams, exhibits, or materials have been offered into evidence and received by the clerk, they shall be removed by the party offering them, except as otherwise directed by the court, within 30 days after final judgment in the trial court if no appeal is taken; if the case is appealed, within 60 days after certification of a final decision from the appellate division. At the time of removal a detailed receipt shall be given to the clerk and filed in the case file.
>
> If the party offering an exhibit which has been placed in the custody of the clerk fails to remove such article as provided herein, the clerk shall write the attorney of record (or the party offering the evidence if he has no counsel) calling attention to the provisions of this rule. If the articles are not removed within 30 days after the mailing of such notice, they may be disposed of by the clerk.

In the instant case, the trial court issued an Order of Disposition of Physical Evidence requiring destruction of forty-seven of the "articles introduced into evidence," including the videotape defendant asserts is "crucial" to the instant appeal. Although the order was entered 24 August 1999, the day after defendant was sentenced, defendant does not contend nor do we conclude the evidence was destroyed or removed prior to the thirty-day period required by Rule 14. In fact, the bottom of the order reads:

> NOTE***THIS EVIDENCE TO BE HELD THIRTY DAYS PENDING NOTICE OF APPEAL

(emphasis in original). Nevertheless, assuming *arguendo* that defendant and/or his trial counsel failed to receive written notification of the destruction of the exhibits, for the reasons discussed below, we conclude any such error by the trial court was harmless.

Defendant contends that this Court should adopt the rule of *Adams v. Transportation Ins. Co.*, 845 S.W.2d 323 (1992). In *Adams*, the Texas Court of Appeals reversed and remanded a worker's compensation claim, holding that the loss of exhibits used during the trial made it impossible for the court to make a proper determination of whether the trial court's finding was against the weight and preponderance of the evidence. *Id.* at 327. However, we remind defendant that the decisions of the Texas Court of Appeals are not binding upon this Court or other courts in this state. Furthermore, in the instant case, defendant is not challenging a finding of fact made by the trial court or the trial court's decision to allow the introduction of the destroyed exhibits, nor is defendant challenging his trial counsel's decision not to object to the introduction of the destroyed exhibits. Instead, defendant asserts that the exhibits, specifically his videotaped statement, "could well have determined whether [defendant's] appellate arguments carried the day." Specifically, defendant contends that if this Court could review the videotape, his ineffective assistance of counsel argument might be strengthened.

The videotaped statement defendant refers to was taken by Charlotte-Mecklenburg Police Department Officer Robert Buening ("Officer Buening") on 26 June 1999, the day after the shooting. Officer Buening testified at trial that during his taped interview with defendant, defendant admitted being in the bedroom when Southerland was shot but did not admit or deny shooting Southerland. Officer Buening also testified that defendant stated that he had handled a BB or pellet gun sometime before Southerland was shot, but that he did not have the BB or pellet gun when Southerland was shot. Although the videotape was played for the jury, when questioned at trial about the statements he made on the videotape, defendant could not recall discussing a BB or pellet gun. However, he did recall being "still upset, nervous" when he made the statement to Buening. On cross-examination, defendant testified that:

> The statement I gave them was—I don't want to say true or false or accurate. I was telling them how I felt that things had went the day before.

On re-direct examination, defendant admitted that the videotaped statement was "incomplete," and that the story he related to the jury on direct examination was the "complete story."

When considered in light of the testimony at trial regarding the videotape, we conclude defendant's videotaped statement further contradicts a potential claim of self-defense, defense of others, or defense of habitation. As such, the videotape only supports our conclusion that defendant's trial counsel was not objectively unreasonable in withholding the undeveloped and potentially futile defenses from the jury. Thus, we conclude the videotaped statement is unnecessary to our present review of whether defendant received ineffective assistance of counsel. Therefore, defendant's final assignment of error is overruled.

No error.

Judges McGEE and TYSON concur.

STATE OF NORTH CAROLINA v. ANTHONY DYWONE BURRELL AND RODNEY MATTHEW BURRELL

No. COA03-989

(Filed 6 July 2004)

1. Kidnapping— separate offenses—sufficiency of evidence

The trial court correctly denied defendants' motion to dismiss first-degree kidnapping charges where defendants abducted the victim in his car, drove him to a deserted mall where they stole money, traveler's checks, bank cards, and credit cards, and then drove around with a gun at defendant's head trying to obtain more money from ATM machines. Although defendants argued that the kidnapping was an inherent part of the armed robbery, the robbery for which defendant was indicted was complete with the theft of the money, checks, and cards, and the victim's restraint was more than the technical asportation necessary to complete the armed robbery.

2. Kidnapping— release in unsafe place—sufficiency of evidence

There was sufficient evidence that a first-degree kidnapping defendant did not release his victim in a safe place where the victim was released on the side of an interstate at about 1:30 a.m., the victim was not given money for a telephone call, the area was wooded, and the victim had to walk for about two miles to find an exit ramp and an open business to obtain help.

3. Confessions and Incriminating Statements— nontestifying defendant—letters incriminating codefendant—not plain error

Even if the trial court committed *Bruton* error by allowing unredacted letters written by the nontestifying defendants incriminating each other to be read into evidence in a prosecution for armed robbery and kidnapping, the admission of this evidence was not plain error in light of the overwhelming evidence of defendants' guilt of the charged crimes.

4. Appeal and Error— plain error—jury poll—not applicable

A defendant did not object to a jury poll and did not preserve the issue for review. Plain error analysis applies only to jury instructions and evidentiary matters.

Appeal by defendants from judgment entered 7 June 2002 by Judge Lindsay R. Davis, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 28 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General Daniel D. Addison and Assistant Attorney General Jane Ammons Gilchrist, for the State.

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

Irving Joyner for defendant-appellant Rodney Matthew Burrell.

TIMMONS-GOODSON, Judge.

Anthony Dywone Burrell ("Anthony") and Rodney Matthew Burrell ("Rodney") (collectively, "defendants") appeal their convictions for first-degree kidnapping and robbery with a dangerous weapon. For the reasons discussed herein, we conclude that defendants received a trial free of prejudicial error.

The State's evidence presented at trial tends to show the following: On the night of 10 April 2001, Hiroharu Okamoto ("Okamoto") flew from New York to Greensboro, North Carolina, for a business meeting. Okamoto rented a vehicle and drove to the Park Lane Hotel, where he registered at approximately 11:30 p.m. The hotel receptionist instructed Okamoto to park his vehicle in the rear parking lot of the hotel.

While Okamoto was parking his vehicle, defendants were walking near the Park Lane Hotel with Rodney's girlfriend, Valri Baker ("Baker"). The three noticed Okamoto parking his vehicle and decided to rob him. Anthony confronted Okamoto with a gun as soon as Okamoto attempted to exit his vehicle, and Anthony demanded that Okamoto move to the passenger seat of the vehicle. When Okamoto resisted, Rodney stuck Okamoto in the face with his fists. Okamoto then moved to the passenger seat of the vehicle while Anthony entered the driver's seat and took Okamoto's cell phone from him. Rodney and Baker got into the back seat of the vehicle. As Anthony drove the vehicle away from the Park Lane Hotel, Rodney held the gun to Okamoto's head and hip and Baker held Okamoto's hands behind his back.

Okamoto was driven to a dark location he thought was a shopping mall. Defendants and Baker began to search Okamoto, and they took from him $600 in cash, $500 in travelers' checks, several credit cards, two bank cards, and an airline card. Okamoto was then driven to an Automated Teller Machine ("ATM") located somewhere between Greensboro and Burlington, North Carolina. Anthony demanded Okamoto disclose the Personal Identification Number ("PIN") for one of his bank cards. Defendants threatened to kill Okamoto if he lied about the PIN. Eventually Okamoto gave defendants his PIN. Anthony then put on one of Okamoto's hats and attempted to withdraw money from the ATM. After several unsuccessful attempts to withdraw money, Anthony pushed the gun at Okamoto and accused Okamoto of giving him the wrong PIN. Okamoto told Anthony he had provided the correct PIN, but that the card may not work at that particular bank. Defendants and Baker then argued amongst themselves for some time, and after several more unsuccessful attempts to withdraw money, Anthony drove the four to a wooded area.

When they reached the wooded area, Okamoto was searched again, and defendants took from him a telephone book containing three or four more bank cards. Anthony approached Okamoto and

"unlocked" the gun. He pushed the gun into Okamoto's abdomen and threatened to kill Okamoto if he lied again about his PIN. Okamoto was then taken to another ATM. After several unsuccessful attempts to withdraw money, Anthony drove the vehicle away from the bank. Both Anthony and Rodney threatened Okamoto with the gun while they searched Burlington for another drive-through ATM. When defendants became lost, Baker urged them to return to High Point, North Carolina, and she called someone in High Point for directions back to Interstates 40 and 85.

At approximately 1:30 a.m. on 11 April 2001, Anthony found Interstate 85. Defendants pushed Okamoto out of the vehicle and onto the side of the interstate. After defendants and Baker drove away in the vehicle, Okamoto unsuccessfully waved at passing vehicles for help. He walked approximately two miles on the interstate to the nearest exit, where he reached a hotel and recounted the night's events to the receptionist. Okamoto then called the police.

Police officers from Burlington and Greensboro responded to Okamoto's call. After he provided an account of the events, the police transported Okamoto to the Greensboro Police Department. Detective Leslie Lejune ("Detective Lejune") showed Okamoto a photographic line-up. Okamoto identified Anthony as the driver of the vehicle but was unable to identify Baker in the line-up.

On 19 April 2001, Anthony and Baker were arrested in Winston-Salem while driving the vehicle. The arresting officer searched the vehicle and found Okamoto's wallet, credit cards, travelers' checks, and address book, as well as several cell phones. A print matching Anthony's palm was also obtained from the window of the vehicle.

After her arrest, Baker initially confessed that she and defendants had robbed and kidnapped Okamoto. However, after talking to Anthony, Baker withdrew her confession. In her second statement, Baker claimed that she and Anthony had obtained the vehicle in a trade for drugs.

On 17 September 2001, Anthony was indicted for first-degree kidnapping, robbery with a dangerous weapon, and possession of a stolen vehicle. The same day, Rodney was indicted for first-degree kidnapping, robbery with a dangerous weapon, assault on a governmental official/employee, and assault inflicting serious injury. Defendants were tried jointly the week of 3 June 2002. On 6 June 2002, the jury found defendants guilty of first-degree kidnapping and

robbery with a dangerous weapon. On 7 June 2002, Anthony pled guilty to possession of a stolen vehicle, and Rodney pled no contest to assault on a government official/employee and assault inflicting serious injury. The trial court imposed consecutive sentences on both defendants. Anthony received 120 to 153 months and 108 to 139 months incarceration, while Rodney received sixty to eighty-one months and fifty-four to seventy-four months incarceration. Defendants appeal.

Defendants filed separate appellate briefs to this Court. As an initial matter, we note that neither defendant's brief contains arguments supporting each of the 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.

In their now consolidated appeal, both defendants argue that the trial court erred (I) by denying their motions to dismiss, and (II) by allowing the introduction of letters written by each co-defendant that implicated the other co-defendant. Rodney argues separately that the trial court erred in conducting the juror poll after the announcement of the verdict.

[1] Defendants first assign error to the trial court's denial of their motions to dismiss. Defendants argue that the trial court violated their constitutional rights by failing to dismiss the charges of first-degree kidnapping. According to defendants, the State presented insufficient evidence to establish that Okamoto's kidnapping was not an inherent part of the armed robbery. We disagree.

N.C. Gen. Stat. § 14-39 defines the law of kidnapping in North Carolina as follows:

> Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed[.]

N.C. Gen. Stat. § 14-39(a) (2003). Kidnapping is elevated to the first degree where the person kidnapped was not released in a safe place. N.C. Gen. Stat. § 14-39(b).

N.C. Gen. Stat. § 14-87 defines the law of armed robbery in North Carolina as follows:

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87(a) (2003).

It is well established that the same course of action or conduct may produce more than one criminal offense. *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). For example, a defendant may break into a home, intending to commit larceny, and then, after breaking into the home, actually commit the larceny. In such an instance, the defendant may properly be convicted of both the breaking and entering with intent to commit larceny and the larceny itself. *Id.* at 523-24, 243 S.E.2d at 352. Likewise, the Constitution does not forbid conviction for both kidnapping and another felony committed after such kidnapping, provided that the restraint that constitutes the kidnapping is "a separate, complete act, independent of and apart from the other felony." *Id.* at 524, 243 S.E.2d at 252. Thus, where a defendant is charged with armed robbery and kidnapping, our Supreme Court has noted that the restraint, confinement, or removal required to commit kidnapping must be something more than the inherent restraint necessary to commit armed robbery. *State v. Irwin*, 304 N.C. 93, 102, 282 S.E.2d 439, 446 (1981).

In *Irwin*, the Court found that the victim's removal to the back of a drug store to obtain drugs during an armed robbery was an inherent and integral part of the armed robbery. 304 N.C. at 103, 282 S.E.2d at 446. According to the Court, "[t]o permit separate and additional punishment where there has been only a technical asportation, inherent

in the other offense perpetrated, would violate a defendant's constitutional protection against double jeopardy." *Id.* Thus, where there is mere "technical asportation," the victim of the kidnapping "is not exposed to greater danger than that inherent in the armed robbery itself, nor is [the victim] subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *Id.*

In the instant case, we conclude that Okamoto's restraint was more than the mere "technical asportation" necessary to complete armed robbery. The evidence presented at trial tended to show that defendants forced their way into Okamoto's vehicle and took control of the vehicle at gunpoint. After driving Okamoto to a dark location he believed was a shopping mall, defendants searched Okamoto at gunpoint and took from him $600 in cash, $500 in travelers' checks, several credit cards, two bank cards, and an airline card. Defendants then proceeded to drive Okamoto to Burlington and then back towards Greensboro in search of an ATM where defendants could use Okamoto's PIN to withdraw more money.

Defendants contend that because their "last criminal act . . . was the attempt to access the ATM machine in Burlington[,] . . . defendants' drive to that destination with the victim was an essential and necessary step in committing the robbery." However, while defendants may now claim that their "ultimate objective" in their "robbery enterprise" was to obtain Okamoto's PIN and withdraw money from the ATM, defendants were indicted for the crime of taking "six hundred dollars ($600.00) in U.S. currency, five hundred dollars ($500.00) in Travelers checks, an ATM card, six (6) credit cards, and a 2001 Mazda 626, from the person and presence of [Okamoto] without his consent." Thus, the crimes for which defendants were indicted and convicted were complete when defendants took control of Okamoto's vehicle at gun point and his property at the shopping mall. Furthermore, the evidence tends to show that Okamoto was subjected to a greater amount of danger during the two hours than that amount of danger inherent in the armed robbery itself. Okamoto's arms were held behind him and a gun was continually pointed at his head *after* he had been dispossessed of his vehicle and had his cash, checks, and credit cards taken from him. Therefore, we overrule defendants' first argument.

[2] Defendants argue in the alternative that the State presented insufficient evidence to support the charge of first-degree kidnapping in that the State failed to show the victim was released in an unsafe place. We disagree.

In support of their argument, defendants cite *State v. White*, 127 N.C. App. 565, 492 S.E.2d 48 (1997). In *White*, this Court held that, for the purposes of N.C. Gen. Stat. § 14-39, a rape victim was released in a safe place where the victim was released at a motel near a major shopping center in the middle of the afternoon, was given change to make a phone call after her release, and was able to go directly to the motel office and seek assistance. *Id.* at 573, 492 S.E.2d at 53. However, other than the fact that Okamoto ultimately found assistance at a hotel, the facts of the instant case sharply contrast those of *White*.

In the instant case, defendants gave Okamoto no money to make a phone call after his release, and they did not release him in a major shopping area or in the middle of the afternoon. Instead, defendants pushed Okamoto out of his vehicle and onto the side of an interstate at approximately 1:30 a.m. The area near the interstate was isolated and wooded. Although he attempted to get the attention of passing motorists, Okamoto was forced to walk approximately two miles along the interstate before he reached the hotel. We conclude that these facts "do not indicate a conscious act on the part of [defendants] to assure that [Okamoto] was released in a safe place." *State v. Garner*, 330 N.C. 273, 294, 410 S.E.2d 861, 873 (1991). Instead, when " 'considered in the light most favorable to the State, giving the State every reasonable inference which may be drawn therefrom,' " *State v. Sutcliff*, 322 N.C. 85, 88-89, 366 S.E.2d 476, 478-79 (1988) (citations omitted), these facts provide sufficient evidence to allow a jury to conclude that defendants did not release Okamoto in a safe place. Therefore, we overrule defendants' alternative argument, and, accordingly, we overrule defendants' first assignment of error.

[3] Defendants next assign error to the trial court's decision to allow the introduction of evidence regarding letters written by each defendant and mailed separately to Baker. Defendants argue that it was plain error for the trial court to allow the State to read into evidence any statement that incriminated either co-defendant. We disagree.

As part of her plea agreement with the State, Baker agreed to testify truthfully at defendants' joint trial. In her testimony, Baker recanted her second statement to the Greensboro Police Department and testified instead that she and defendants robbed Okamoto and stole his vehicle on 10 April 2001. During Baker's testimony, the trial court allowed the State to introduce letters that Baker received while she was incarcerated. Anthony claimed in the letters he wrote to

Baker that "[Baker] wouldn't get no time," and that "if anybody got time, prison time, it would be [Anthony] and not [Baker] or [Rodney]" because "[Anthony] was going to write a statement on himself to clear our name." In one letter, Anthony wrote that "[w]hoever that Chinese dude, he can't just point us out like that 'cause it's a lot of people in the world that could be us." Anthony later wrote and instructed Baker to "[t]ell [me] if those detectives have come back to see [you] and what they are talking about."

A copy of a letter from Rodney to Baker was read into evidence. In that letter, Rodney stated:

> I was thinking how could they know I was in the car because I did not get caught doing anything, and I was not in the car when they stopped y'all that night. . . . About our case, I don't know nothing and won't never say ****. You know an eye for an eye. You stay real and I'll stay true. But about my brother making a statement on himself I would never ask my blood to do that, but I will mention it if **** did not go our way and [Anthony] does that. I know why he would. I know he don't want to see us two be locked up.

In another letter, Rodney instructs Baker to "tell [Anthony] to clear our name because I can't deal with this **** ****." The letter goes on to say that "if [Anthony] writes a statement on himself to clear me and your name [] we get out."

Baker testified that she also received a letter from Anthony after he realized that Baker had agreed to testify at his trial. In that letter, Anthony admonishes Baker for agreeing to testify, stating:

> This is real. You are very wrong for something you have done. For one, my little brother [Rodney] is not to be accused of nothing. We were in the street as a team. Me and you. That's all. No one else. So what we do is us. . . . This is a let you know I'm not playing letter. If you take it, I will go to prison. But I'm real. I can do time if I go and you don't hold me down.

In *Bruton v. United States*, 391 U.S. 123, 132 (1968), the United States Supreme Court held that the State may not use out-of-court statements by one defendant against another defendant during a joint trial if the declarant does not testify at the joint trial. In *State v. Fox*, 274 N.C. 277, 291, 163 S.E.2d 492, 502 (1968), our Supreme Court adopted *Bruton* and described the effect it has on criminal trials in North Carolina as follows:

> [I]n joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately.

Both defendants argue that it was plain error for the trial court to admit into evidence statements contained in letters written by their co-defendant because these statements implicated the other defendant and were not redacted prior to the letters being read. Under plain error review, defendants are entitled to a new trial only if they establish that the trial court committed a fundamental error, and that the error was so fundamental that absent the error, the jury likely would have reached a different result. *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002). In the instant case, assuming *arguendo* that the trial court's decision to allow the unredacted statements to be read into evidence was error, we nevertheless conclude that defendants have failed to meet the heavy burden placed upon them by plain error review.

Courts in this state have held that the admission of incriminating statements of a co-defendant may be harmless error where there is other admissible or overwhelming evidence establishing the defendant's guilt. *State v. Brewington*, 352 N.C. 489, 514, 532 S.E.2d 496, 511 (2000); *State v. Roope*, 130 N.C. App. 356, 367, 503 S.E.2d 118, 126, *disc. review denied*, 349 N.C. 374, 525 S.E.2d 189 (1998). Such evidence includes: admissible statements of the defendant as equally incriminating as the co-defendant's statement, *Brewington*, 352 N.C. at 514, 532 S.E.2d at 511; testimony of victims or other participants in the crime that tends to show defendant was involved in crime, *Roope*, 130 N.C. App. at 365, 503 S.E.2d at 125; and physical evidence establishing that the defendant was involved in the crime, *State v. Hayes*, 314 N.C. 460, 470, 334 S.E.2d 741, 747 (1985), *reversed on other grounds*, 323 N.C. 306, 372 S.E.2d 704 (1988).

In the instant case, both Okamoto and Baker testified to specific actions by each defendant in connection with the crime. Surveillance video from the Park Lane Hotel showed defendants and Baker approach Okamoto in the parking lot, enter his vehicle, and drive away. Anthony was arrested in the very vehicle he was accused of taking, and at the time of his arrest, the vehicle contained property the indictment alleged defendants stole as well as a palm print that

matched Anthony's palm print. Furthermore, statements contained in letters written by each defendant were as self-incriminating as the statements contained in their co-defendant's letters. Thus, we conclude there was overwhelming evidence of defendants' guilt in the instant case, and that any error committed by the trial court with regard to the admission of defendants' out-of-court statements was not prejudicial. Therefore, defendants' second joint assignment of error is overruled.

[4] Rodney assigns separate error to the trial court's decision to conduct a juror poll after the jury rendered its verdict. However, we note that Rodney failed to object to this alleged error at trial and thus failed to properly preserve this error for appellate review. N.C.R. App. P. 10(b)(1) (2004). Nevertheless, Rodney now contends that he is entitled to plain error review of this alleged error. However, our Supreme Court has held that "plain error analysis applies only to jury instructions and evidentiary matters." *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002). Thus, we conclude that Rodney has failed to preserve this issue for plain error review as well. Therefore, Rodney's separate assignment of error is overruled.

No error.

Judges McGEE and TYSON concur.

MARY BROWN MADISON, AS GUARDIAN OF LEONARD TODD MADISON, HER MINOR SON, AND AS WIDOW OF LEONARD E. MADISON, DECEASED EMPLOYEE, PLAINTIFFS V. INTERNATIONAL PAPER COMPANY, EMPLOYER, SELF-INSURED, (LIBERTY MUTUAL INSURANCE COMPANY, SERVICING AGENT) DEFENDANTS

No. COA03-815

(Filed 6 July 2004)

1. Workers' Compensation— causation—exposure to special hazard or excessive heat

The Industrial Commission did not err in a workers' compensation case by finding that exposure to special hazard or excessive heat was a contributing factor in a worker's death, because: (1) although there was some evidence in the case that the worker was potentially at risk for a heart attack regardless of the condi-

tions to which he was exposed, there was also evidence that his work responsibilities to which he was exposed put him at a greater risk of a heart attack than if he had not had such a position; (2) there was expert testimony that the exposure to this type of heat was a significant contributing factor to the worker's heart attack and resulting death; (3) there was expert testimony that this type of exposure was in violation of industrial safety regulations and was very unsafe; and (4) expert testimony from both medical doctors and an industry safety professional was based on their respective reviews of the circumstances surrounding the worker's death and their own experience in their fields of expertise and was not mere speculation or conjecture.

2. Workers' Compensation— injury by accident—heart attack

The Industrial Commission did not err in a workers' compensation case by concluding that a worker's heart attack was a compensable injury by accident, because: (1) even though the worker had pre-existing heart disease, there was abundant expert testimony that heat would make him more susceptible to a heart attack and that the excessive heat to which his employment exposed him was a significant contributing factor in his fatal heart attack; (2) the Commission's findings of fact support the conclusion that the worker's employment subjected him to a particular or special hazard from the elements, which caused, or significantly contributed to, his heart attack and resulting death, and further that this was a compensable injury by accident arising out of and in the course of his employment; and (3) there was evidence that exposure to these conditions in the manner in which the worker worked was in violation of safety regulations and would represent unsafe and extreme conditions for anyone.

Appeal by defendants from an opinion and award entered 28 March 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 March 2004.

Taft, Taft & Haigler, P.A., by Thomas F. Taft; Brannon Strickland, P.L.L.C., by Anthony M. Brannon, for plaintiff-appellees.

Hedrick & Morton, L.L.P., by G. Grady Richardson, Jr. and P. Scott Hedrick, for defendant-appellants.

HUNTER, Judge.

International Paper Company ("International Paper") and Liberty Mutual Insurance Company (collectively "defendants") appeal from an opinion and award of the Full Commission of the North Carolina Industrial Commission ("the Commission") filed 28 March 2003 awarding benefits to Mary Brown Madison, as Guardian of Leonard Todd Madison, and as widow of Leonard E. Madison ("plaintiffs"). Because the Commission correctly found that Leonard E. Madison ("Madison") was exposed to special heat conditions, which contributed to his fatal heart attack, and concluded that Madison's death was the result of an injury by accident arising out of his employment, we affirm.

The evidence before the Commission tends to show that on 15 August 1997, Madison was sixty years of age and had worked for International Paper and its predecessors since 1979. He was employed as a 5A or B utility worker or assistant whose job duties included vacuuming lint filters in the "Carolina King" pulp dryer, which would take in wet pulp and dry it, turning the pulp into a continuous sheet of paper. The Carolina King pulp dryer was estimated to be at least half a football field in length and consisted of four levels. Each level had thirty doors that opened into the dryer that were accessible via catwalks along the levels. Temperatures inside the dryer ranged from 220 to possibly up to 300 degrees Fahrenheit. With the doors closed the dryer radiated heat exceeding ninety degrees Fahrenheit. The dryer was located in a building with large fans, but that was not air conditioned except for a control room, which included a break area for employees.

Each utility worker was required to vacuum one level of the dryer at some point during their shift. The worker would open a door, reach up into the dryer, and vacuum the lint filters located about ten feet high. The process would be repeated for each door on a level and would take two or three minutes per door and last from an hour to an hour and a half.

Madison was observed vacuuming lint filters at around 9:00 p.m., during the last two hours of his shift on 15 August 1997, and eventually clocked out at 10:36 p.m. that evening. Madison drove to the main gate of the paper mill and told the security officer that he was having chest pain and needed medical assistance. Madison's supervisor came to the gate and found Madison sitting in his truck. Madison was sweaty and stated that he "thought he had gotten too hot." As

Madison was being transported to the hospital by ambulance, he suffered a major heart attack and died.

An autopsy by Dr. J. L. Almeida revealed Madison had an enlarged heart with a hypertrophic left ventricle, severe coronary artery atherosclerosis, an enlarged liver and spleen, and mild nephrosclerosis of the kidneys. These findings were consistent with significant coronary artery disease and hypertension. This included one primary coronary artery that was ninety-five percent (95%) blocked with plaque and Dr. Almeida testified that Madison was "a heart attack waiting to happen." Dr. Almeida concluded that Madison died from "ischemic heart disease with hypertrophic cardiomyopathy with a contributing factor being physical activity in a hot environment." There was no evidence Madison suffered the heart attack because of heat stroke or heat exhaustion.

Plaintiffs presented deposition testimony from Dr. Mark Friend, an industrial safety professional, as an expert in industrial safety. Dr. Friend based his expert testimony on his own inspection of the International Paper plant and his subsequent report, as well as his recollection of testimony presented before the deputy commissioner at the hearing. Dr. Friend stated that in his opinion the International Paper plant violated safety regulations by failing to have anyone directly monitoring employees vacuuming the lint filters in the dryer. Furthermore, by allowing unsupervised employees to even break the threshold of the doors to the dryer, which he described as a "permit-required confined space" meaning it was not fit for continuous human occupancy, International Paper, in Dr. Friend's opinion, was in violation of government safety regulations.

During his inspection, Dr. Friend took measurements of the heat radiating from the doors which averaged around ninety degrees Fahrenheit. Although he did not measure temperature inside the doors, Dr. Friend testified that in adjusting his equipment during the inspection, he had received a first-degree burn on his hand from the inside of the dryer door.[1] He testified that, based on his own research and experimentation, it would have required heat in excess of 200 hundred degrees Fahrenheit to cause such a burn from contact with

1. Dr. Friend testified that he did not measure the temperature inside the threshold of the dryer door during his inspection because he had been informed through International Paper that employees did not cross the threshold in cleaning the lint filters. He, however, learned during the testimony before the deputy commissioner through the testimony of an employee who actually performed this work, that the employees would have to lean through the doorway in order to reach the lint filter.

metal. Moreover, Dr. Friend observed that there was nowhere available where an employee would be likely to take a break in the middle of cleaning the lint filters. Thus, it would be more likely an employee would simply attempt to work straight through and finish the job.

In his opinion, the working conditions under which employees at International Paper were required to clean the lint filters of the dryer were "very unsafe. These people were subjected to high levels of . . . heat . . . and they were subjected for periods of time that would be in violation of all standards." Dr. Friend concluded in his report that Madison's death was a "heat stress death." Dr. Friend based his conclusion on the exposure to high levels of heat, which were measured at temperatures up to 120 degrees Fahrenheit outside the threshold of the dryer doors and that he described as like opening "a pizza oven," as well as his review of the circumstances surrounding Madison's death.

In addition, Dr. Franklin Tew, an expert in cardiology testified that, within a reasonable degree of medical certainty, heat was a significant contributing factor in Madison's heart attack. Dr. Tew based his opinion on his knowledge of Madison's health condition, and the temperatures to which Madison would have been exposed. In addition, Dr. Tew testified his belief that heat played a contributing role in Madison's heart attack was based on his own observations in clinical practice that heart disease patients "did worse in the summer than in the winter"; the use by heart surgeons of cardioplegia, the practice of stopping the heart and keeping it cool to prevent the expenditure of energy stored during surgery; the fact that as temperature increases, the body heats up and the heart is required to work harder; that heat may be linked to increased susceptibility to arrythmia; and that heat is a stressor to the body that can precipitate a heart attack in someone susceptible to coronary heart disease.

Dr. Almeida opined that, within a reasonable degree of medical certainty, that the circumstances around Madison's death, "of temperature and physical activity would be a stressful environment stressing the cardiovascular system of an individual. And that an individual with not much cardiovascular reserve would be extremely compromised." Dr. Almeida further opined that "the temperatures would be a contributing factor" to Madison's heart attack and "working in a hot environment would have stressed [Madison's] cardiovascular system and would have caused his heart attack."

The Commission in its ultimate finding of fact found:

> 17. [Madison] was never diagnosed with heat stroke. He died due to cardiac arrest associated in part with his preexisting medical conditions. In fact, [Madison's] coronary artery occlusion was a "widow maker"—a medical term which refers to the severity and the location of his coronary artery occlusion. The medical evidence, however, particularly from the second deposition of Dr. Almeida and from his autopsy report, establishes that a "contributing factor" to the heart attack was [Madison's] work "in a hot environment." Although the evidence does not establish that [Madison] suffered from heat exhaustion or heat stroke, the uncontroverted medical evidence is that decedent was exposed to a "special hazard," heat, in the course of his employment and that the "special hazard" was a contributing factor to his heart attack and death.

The Commission concluded as a matter of law:

> 1. On [15 August] 1997, [Madison] sustained an injury by accident arising out of and in the course of his employment with [International Paper]. . . . Plaintiff[s] ha[ve] established that [Madison's] employment subjected him to a particular or special hazard from the elements which caused his heart attack and resulting death.

The issues presented on appeal are whether (I) there was sufficient evidence to support the Commission's finding that exposure to special hazard heat was a contributing factor to Madison's heart attack and death, and (II) the Commission's findings supported its conclusion that Madison's heart attack was a compensable injury by accident caused by special hazard heat.

I.

[1] Defendants first contend that there was no evidence to support the Commission's finding that exposure to special hazard or excessive heat was a contributing factor in Madison's death.

Appellate courts reviewing decisions of the Commission are "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). " 'The evidence tending to support plaintiff's claim is to be viewed in the light most

favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.' " *Id.* at 115, 530 S.E.2d at 553 (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 680-81, 509 S.E.2d 411, 413-14 (1998)). In reviewing the Commission's findings of fact, an appellate court must not weigh the evidence presented to the Commission or decide the case on the basis of the weight of the evidence. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Rather, the Commission is the "sole judge of the weight and credibility of the evidence." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. An appellate court must determine only whether the record contains any evidence tending to support facts found by the Commission. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

"In a workers' compensation claim, the employee 'has the burden of proving that his claim is compensable.' " *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (quoting *Henry v. A.C. Lawrence Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950)). "An injury is compensable as employment-related if ' "any reasonable relationship to employment exists." ' " *Id.* (quoting *Kiger v. Bahnson Serv. Co.*, 260 N.C. 760, 762, 133 S.E.2d 702, 704 (1963)). "Although the employment-related accident 'need not be the sole causative force to render an injury compensable,' " *id.* (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981)), "the plaintiff must prove that the accident was a causal factor by a 'preponderance of the evidence,' " *id.* at 232, 581 S.E.2d at 752 (quoting *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158-59, 357 S.E.2d 683, 685 (1987)).

In *Holley*, the North Carolina Supreme Court discussed the requirements for an expert medical opinion to be competent evidence sufficient to support a finding of causation in workers' compensation cases involving complicated medical questions:

> In 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." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). "[T]he evidence must be such as to take the case out of the realm of con-

> jecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation." *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942) . . . .

Id. at 232, 581 S.E.2d at 753. In addition, the Court explained: "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 (citations omitted).

Although there is some evidence in this case that Madison was potentially at risk for a heart attack regardless of the conditions to which he was exposed, there is also evidence that his work responsibilities exposed him to heat measured at approximately ninety degrees Fahrenheit for a period of an hour to an hour and a half, in addition to periodic exposure to heat in excess of 200 degrees Fahrenheit while the dryer doors were open during vacuuming, and that this exposure put him at a greater risk of a heart attack than if he had not had such a position. There was also expert testimony that the exposure to this type of heat was, in fact, a significant contributing factor to his heart attack and resulting death. Furthermore, there was expert testimony that this type of exposure was in violation of industrial safety regulations and was very unsafe. The expert testimony from both medical doctors and an industrial safety professional was based on their respective reviews of the circumstances surrounding Madison's death and their own experience in their fields of expertise and was not mere speculation or conjecture. Thus, there is sufficient evidence to support the Commission's ultimate finding of fact that the heat to which Madison was exposed was a contributing factor to his heart attack.

II.

[2] Defendants also argue that the Commission erred in concluding that Madison's heart attack was a compensable injury by accident. This Court has summarized the law surrounding the compensability of a heart attack in the realm of workers' compensation as follows.

> To be compensable under the Workers' Compensation Act, an injury must result from an "accident arising out of and in the course of the employment . . . ." N.C. Gen. Stat. § 97-2(6) . . . . "The claimant has the burden of proving each of these elements."

> *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 366, 368 S.E.2d 582, 584 (1988). "When an employee is conducting his work in the usual way and suffers a heart attack, the injury does not arise by accident and is not compensable." *Cody v. Snider Lumber Co.*, 328 N.C. 67, 71, 399 S.E.2d 104, 106 (1991) (citing *Jackson v. Highway Commission*, 272 N.C. 697, 701, 158 S.E.2d 865, 868 (1968)). "However, an injury caused by a heart attack may be compensable if the heart attack is due to an accident, such as when the heart attack is due to unusual or extraordinary exertion, *Lewter v. Abercrombie Enterprises, Inc.*, 240 N.C. 399, 404, 82 S.E.2d 410, 415 (1954), or extreme conditions." *Id.* (citing *Dillingham v. Yeargin Construction Co.*, 320 N.C. 499, 503, 358 S.E.2d 380, 382, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 84 (1987)).

Wall v. North Hills Properties, Inc., 125 N.C. App. 357, 361, 481 S.E.2d 303, 306 (1997). In this case, the Commission based its ruling on the exception that Madison suffered his heart attack after being exposed to extreme conditions.

> "[W]here the employment subjects a workman to a special or particular hazard from the elements, such as excessive heat or cold, likely to produce sunstroke or freezing, death or disability resulting from such cause usually comes within the purview of the compensation acts. . . . The test is whether the employment subjects the workman to a greater hazard or risk than that to which he otherwise would be exposed."

Dillingham v. Yeargin Construction, Co., 320 N.C. at 503, 358 S.E.2d at 382 (quoting *Fields v. Plumbing Co.*, 224 N.C. 841, 842-43, 32 S.E.2d 623, 624 (1945)).

Defendants contend that Madison's heart attack was not compensable because there was no evidence that Madison suffered correlating heat stroke, heat exhaustion, or heat prostration. In so doing, defendants rely on language in *Dillingham*, which stated:

> *Fields* represents the majority rule in this country. Other jurisdictions hold, with virtual unanimity, that when the conditions of employment expose the claimant to extreme heat or cold, injuries such as heatstroke, heat exhaustion, heat prostration, sunstroke, freezing, and frostbite are considered accidental. 1B A. Larson, *The Law of Workmen's Compensation* § 38.40 (1987); 99 C.J.S. *Workmen's Compensation* § 187 (1958); 83 A.L.R. 234 (1933).

Id. Fields and *Dillingham*, however, do not limit compensable injuries arising from excessive heat only to heat stroke, exhaustion, and heat prostration. Rather the proper determination remains as stated in both *Fields* and *Dillingham*: " 'The test is whether the employment subjects the workman to a greater hazard [from the elements] or risk than that to which he otherwise would be exposed.' " *Id.*

Defendant further contends that the Commission erred in concluding that Madison's heart attack was compensable where the evidence and findings of fact revealed he was "a heart attack waiting to happen" and that the excessive heat exposure was at most a contributing factor in causing the fatal heart attack.

"In order for an injury to 'arise out of employment' there must exist some causal connection between the injury and the employment." *Rivera v. Trapp*, 135 N.C. App. 296, 300-01, 519 S.E.2d 777, 780 (1999). "In other words, the employment must be a contributing cause or bear a reasonable relationship to the employee's injuries." *Id.* at 301, 519 S.E.2d at 780. The employment, however, need not be the sole causative force if the physical aspects of the employment contribute in some reasonable degree to bring about or intensify the condition which renders the employee susceptible to such accident and consequent injury. *Kendrick v. City of Greensboro*, 80 N.C. App. 183, 186, 341 S.E.2d 122, 124 (1986).

Therefore, in this case, where even though Madison had pre-existing heart disease, there was abundant expert testimony that heat would make Madison more susceptible to a heart attack and that the excessive heat to which his employment exposed him was, in fact, a significant contributing factor in his fatal heart attack. Accordingly, the Commission's findings of fact support the conclusion that Madison's employment subjected him to a particular or special hazard from the elements, which caused, or significantly contributed to, his heart attack and resulting death, and further that this was a compensable injury by accident arising out of and in the course of his employment.

Defendants argue that the Commission's ruling results in an expansion of the limited exception contained in *Fields* and *Dillingham* and amounts to a ruling that if heat causes any problem for an employee, it is a compensable workers' compensation claim, without regard to proof of exposure to extreme or hazardous conditions, or whether the employment puts the employee at a greater risk

of such harm than members of the general public. We disagree. The evidence in this case clearly shows Madison was exposed to extreme heat, including radiant temperatures around ninety degrees Fahrenheit for a period of an hour to an hour and a half and heat in excess of 200 degrees Fahrenheit inside the dryer when the doors were open, which according to the medical expert testimony was a significant contributing factor in his fatal heart attack. *See Dillingham*, 320 N.C. at 504, 358 S.E.2d at 383 (province of medical experts, not appellate courts, to determine whether temperature was a factor in an employee's injury considering the circumstances). In addition, there was evidence that exposure to these conditions in the manner in which Madison worked, was in violation of safety regulations and would represent unsafe and extreme conditions for anyone. Therefore, there was proof of exposure to extreme or hazardous heat and, as such, defendant's concerns are overruled.

Affirmed.

Judges TYSON and BRYANT concur.

MELVA LEE, EMPLOYEE, PLAINTIFF v. WAKE COUNTY, EMPLOYER, AND SELF-INSURED (COMPENSATION CLAIMS SOLUTIONS, SERVICING AGENT), DEFENDANT

No. COA03-1164

(Filed 6 July 2004)

1. **Appeal and Error— appealability—interlocutory order—abandonment of issue during oral argument**

Although plaintiff argued that the Industrial Commission erred in a workers' compensation case by reviewing a deputy commissioner's order on the grounds that defendants appealed from an interlocutory order that did not affect a substantial right, plaintiff expressly abandoned this issue during oral argument of this case.

2. **Workers' Compensation— validity of memorandum of agreement—notice—submission of formalized compromise settlement agreement**

The Industrial Commission erred in a workers' compensation case by concluding that the parties' memorandum of a mediated

settlement agreement was invalid and by failing to order the parties to submit a formal compromise settlement agreement for approval by the Commission, because: (1) it could not reasonably be inferred that the settlement conference was attended by a representative of defendant county who lacked authority to negotiate the agreement reached by the parties, and the 2001 budget ordinance did not describe the scope or extent of the county manager's authority on 1 May 2001; (2) an act that is otherwise within the statutory powers of a governmental entity is not ultra vires simply because it is undertaken by a governmental or municipal employee who acts outside the terms of his employment, and the county in this case has authority to enter into settlement agreements with workers' compensation claimants; (3) plaintiff was not charged with notice of the limitations and restrictions on the authority of defendant's agent, and N.C.G.S. § 159-28 did not put plaintiff on constructive notice that an agreement would have to be approved by others; and (4) N.C.G.S. § 159-28 does not require that a memorandum of agreement be accompanied by a county finance manager's pre-audit certificate to enable the Commission to direct the submission of a formalized compromise settlement agreement.

Appeal by plaintiff from opinion and award entered 17 June 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 May 2004.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Ronald C. Dilthey and Katherine E. Downing, and Lucas, Bryant, Denning & Edwards, P.A., by Robert V. Lucas, for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Kathlyn C. Hobbs and Bambee N. Booher, for defendant-appellees.

LEVINSON, Judge.

Plaintiff (Melva Lee) appeals from an opinion and award of the Industrial Commission denying plaintiff's motion to enforce a memorandum of agreement. We reverse and remand.

The record establishes the following: Plaintiff was employed by defendant Wake County. On 10 November 1996 she suffered an injury by accident arising out of her employment when she was assaulted by an inmate of the Wake County Jail. The parties subsequently entered

into a Form 21 agreement for payment of disability benefits. On 1 May 2001, the parties reached a mediated settlement resolving the issues presented by plaintiff's claim, and a written memorandum of agreement was signed by representatives of all parties.

The memorandum of agreement provided in pertinent part that defendants would pay plaintiff a lump sum of $750,000 and would pay certain medical and disability benefits, and that defendants would prepare a formal clincher agreement incorporating the terms of the settlement agreement and releasing defendants from all workers' compensation liability. The memorandum of agreement contained no contingencies or provisional terms such as the approval of its terms by the Wake County Board of County Commissioners. Thereafter, defendants withdrew their consent to the memorandum of agreement and refused to prepare a formal settlement agreement for presentation to the Commission for approval.

On 9 August 2001 plaintiff moved to compel enforcement of the agreement. At a hearing before deputy Commissioner Stephen T. Gheen, defendants contended that the entire agreement was invalid because their representative at the settlement conference had not been given authority to negotiate a settlement agreement for more than $100,000. In support of this argument, defendants introduced a Wake County Budget Ordinance, adopted several weeks **after** the parties executed the memorandum of agreement, which authorized the county manager to make payments of up to $100,000 in "settlement of any liability claims against the County or against any of its officers or employees as provided by Resolution of May 20, 1995." This May 20, 1995 Resolution was not introduced into evidence and has not been made a part of the record on appeal.

On 3 June 2002 the deputy commissioner issued an "Interlocutory opinion and award." The Commissioner found that all parties had signed the memorandum of agreement; that the agreement resolved the substantive issues in the case; that the agreement contained no contingencies; and that defendants' representatives had not informed plaintiff of any limitations on their authority to enter into a memorandum of agreement. The deputy commissioner concluded the memorandum of agreement was valid and enforceable, notwithstanding defendant Wake County's assertion that its representative lacked authority to negotiate a settlement for more than $100,000.

In reaching this conclusion, the deputy commissioner construed several provisions of the North Carolina Industrial Commission Rules

for Mediated Settlement and Neutral Evaluation Conferences ("RMSC"). First, Rule 4(a)(1)(D) states that:

> Any party that is a governmental entity shall be represented at the conference by an employee or agent . . . who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law, proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

Secondly, Rule 4(d) states in part that when parties reach an agreement at a settlement conference, they "shall reduce the agreement to writing, specifying all the terms of their agreement bearing on the resolution of the dispute before the Industrial Commission, and sign it along with their counsel." The deputy commissioner construed Rule 4(a)(1)(D), requiring a governmental entity to be represented at a settlement conference by an agent with authority to reach a binding agreement, "in *pari materia* with Rule 4(d), the latter requiring that '*all of the terms of [the] agreement* bearing on the resolution of the dispute' be reduced to writing," and concluded that "Wake County's representative acted with apparent authority to fully negotiate and authorize the settlement reached."

Although the deputy commissioner ruled that the memorandum of agreement was a valid agreement, he did not rule on plaintiff's motion to enforce the agreement. Instead, the Commissioner noted that under both Rule 4(d) and N.C.G.S. § 97-17, if a settlement is reached pursuant to a mediation conference, reduced to writing, and signed by the parties, it must be submitted to the Commission for approval. Accordingly, he directed defendants to prepare and submit a formal Compromise Settlement Agreement for his consideration as to whether or not to approve the settlement.

Defendants appealed this "interlocutory order" to the Full Commission, seeking review on the grounds that a "substantial right" was implicated. Plaintiff moved to dismiss defendants' appeal to the Full Commission on the grounds that it was interlocutory and premature. The Full Commission concluded that the interlocutory order affected a substantial right and, in a 2-1 opinion and award filed 17 June 2003, reversed the deputy commissioner's order.

In its 17 June 2003 opinion and award, the Commission concluded that Wake County's representative at the mediated settlement

conference had no authority to bind Wake County to a settlement agreement for more than $100,000. This conclusion was based on a finding that, from the language in the June 2001 Wake County budget ordinance, it could "reasonably be inferred . . . that the $100,000 limitation of authority to settle has existed in Wake County since 1995." The Commission acknowledged that defendants never disclosed to plaintiff this lack of authority and pointedly noted that:

> [t]he conduct of defendant and its representatives in this case in failing to notify plaintiff of the limited settlement authority delegated by the Board of County Commissioners was reprehensible and clearly misleading and therefore the equities undoubtedly reside with plaintiff who relied on the promises of defendant's representatives.

The 2-1 majority of the Full Commission concluded, however, that plaintiff was "charged with notice of all limitations" on the authority of defendant's representatives to enter into a settlement. The Commission further concluded that, because the representative who attended the settlement conference lacked the authority to legally bind defendant to an enforceable contract with plaintiff, the agreement itself was "*ultra vires*" and was "void and of no legal effect" and therefore unenforceable.

The Commission also held that the memorandum of agreement was invalid because it lacked a pre-audit certificate required under N.C.G.S. § 159-28.

For all these reasons, the Commission denied plaintiff's motion to compel defendant to prepare a formal Compromise Settlement Agreement for presentation to the Commission for approval. Plaintiff appeals from this order.

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[1] Preliminarily, we note that plaintiff argues that the Commission erred by reviewing the deputy commissioner's order, on the grounds that defendants appealed from an interlocutory order that did not affect any substantial right. However, plaintiff expressly abandoned this issue during oral argument of this case. Accordingly, we do not address it.

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[2] Plaintiff argues that the Full Commission erred by concluding that the memorandum of agreement was invalid and by failing to order the parties to submit a formal Compromise Settlement Agreement for approval. We agree.

The Commission's opinion and award was based on its conclusions that: (1) record evidence established that Wake County's agent at the settlement conference had no authority to negotiate a binding settlement over $100,000; (2) the representative's lack of authority to negotiate above a certain dollar amount rendered the agreement itself *ultra vires*; (3) plaintiff was charged with notice of any limitations on the agent's negotiating authority; and (4) the memorandum of agreement signed at a mediated settlement conference is not a valid or enforceable agreement unless a county executes and simultaneously attaches a pre-audit certificate at the same time the memorandum of agreement is signed. We consider these in turn.

We first address the Commission's conclusion that record evidence established that Wake County's agent at the settlement conference had no authority to negotiate a binding settlement over $100,000. To reach this conclusion, the Commission necessarily had to rely upon the only evidence in the record to support such a conclusion, the Wake County Budget Ordinance enacted after the memorandum of agreement was executed on 1 May 2001. This ordinance authorized the county manager to make payments of up to $100,000 in "settlement of any liability claims against the County or against any of its officers or employees as provided by Resolution of May 20, 1995." It bears repeating that the 1995 resolution was not introduced into evidence. The 2001 Budget Ordinance, standing alone, neither affirmatively describes nor reasonably informs the scope or extent of the county manager's authority on 1 May 2001. Accordingly, the Commission erred when it held it could "reasonably be inferred" that the settlement conference was attended by a representative of defendant Wake County who lacked authority to negotiate the agreement reached by the parties.

The Commission also erred in its conclusion that, if the representative of Wake County acted beyond his authority in negotiating the settlement amount, the entire agreement was *ultra vires* and was "void and of no legal effect and therefore unenforceable." An act or contract is only *ultra vires* if it is "beyond the power of the city[.]" *Bowers v. City of High Point*, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (1994). "The term *ultra vires* is used to designate the acts of corporations beyond the scope of their powers as defined by their charters or acts of incorporation." *Lambeth v. Thomasville*, 179 N.C. 452, 454, 102 S.E. 775, 776 (1920). However, an act that is otherwise within the statutory powers of a governmental entity is not *ultra vires* simply because it is undertaken by a governmental or municipal employee

who acts outside the terms of his employment. For example, in *Rowe v. Franklin County*, 318 N.C. 344, 349 S.E.2d 65 (1986), hospital trustees entered into a long term employment contract after their authority to do so had been revoked by the county commissioners. The Court noted that "it is indisputable that the commissioners had statutory authority to enter into employment contracts on behalf of the hospital[,]" and therefore "[h]iring management employees is not an ultra vires act[.]" *Id.* at 349, 349 S.E.2d at 69. The Court held:

> If a corporation has authority under statute and charter to enter into a particular kind of contract, the fact that an agent of the corporation purports to bind the corporation without permission of the corporation does not make this act *ultra vires*. It merely makes this particular act one that the corporation has not authorized, even though other such acts by proper corporate agents would be binding on the corporation.

Id. at 349, 349 S.E.2d at 68-69 (citing *Moody v. Transylvania County*, 271 N.C. 384, 156 S.E.2d 716 (1967)). The Court analyzed the validity of the contract under principles of agency:

> [T]he issue remains whether, despite the trustees' lack of actual authority, the contract is enforceable on grounds that . . . the trustees held out to plaintiff apparent authority to act on behalf of the hospital. "When a corporate agent acts within the scope of his apparent authority, and the third party has no notice of the limitation on such authority, the corporation will be bound by the acts of the agent[.]"

Rowe, 318 N.C. at 350, 349 S.E.2d at 69 (quoting *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 30, 209 S.E.2d 795, 799 (1974)). *Rowe* governs the present situation. It is undisputed that Wake County has authority to enter into settlement agreements with workers' compensation claimants. As in *Rowe*, the issue is the scope of the actual or apparent authority of Wake County's representative at the settlement conference. Thus, the memorandum of agreement was not *ultra vires*, even if the county manager acted beyond his authority in negotiating a settlement for $750,000.

We also reject the Commission's conclusion that plaintiff was "charged with notice" of the limitations and restrictions on the agent's authority. If, as defendants contend, plaintiff had actual or constructive notice that the Wake County Board of Commissioners was required to approve the settlement, this would defeat their abil-

ity to enforce the agreement. In making this argument, defendants rely heavily upon the second half of Rule 4(a)(1)(D), which states that "if, *under law*, proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board." (emphasis added).

As a preliminary matter, we easily reject defendants' contention that the second half of Rule 4(a)(1)(D), standing alone, suffices to place a workers' compensation claimant "on notice" of the possibility that a county agent's authority to settle may be operating under settlement authority limitations.

Defendants concede plaintiff did not have "actual notice" that Wake County would not be obligated to perform in the absence of approval by the Wake County Board of County Commissioners. With respect to constructive notice of, *e.g.*, statutes or ordinances establishing that "under law" an agreement reached at the conference was subject to approval of others, defendants rely upon (1) the 2001 Budget Ordinance, discussed above, and (2) the preaudit certificate provisions in N.C.G.S. § 159-28 (2003). First, as already discussed, the 2001 Budget Ordinance does not describe the scope or extent of the county manager's authority on 1 May 2001. Second, as more fully discussed below, the provisions of G.S. § 159-28 did not place plaintiff on constructive notice that an agreement would have to be approved by others. Accordingly, we reject defendants' contention that the 2001 Budget Ordinance and G.S. § 159-28 operated to place plaintiff on constructive notice that the Wake County Board of Commissioners would have to approve the settlement.[1]

Lastly, we address the Commission's conclusion that the absence of a preaudit certificate pursuant to G.S. § 159-28 defeats the Commission's authority to direct defendants to prepare a formal Compromise Settlement Agreement for approval. We agree with plaintiff that, given the current posture of this matter, the Commission could properly enforce the memorandum of agreement and order defendants to do so.

G.S. § 159-28 requires a county government to ensure that, for each obligation incurred, "an unencumbered balance remains in the

1. Because the record is devoid of any actual or constructive notice that the Board would have to approve the settlement, we need not address that which would suffice to place claimants like plaintiff on notice that a Board would have to subsequently approve a settlement.

appropriation sufficient to pay in the current fiscal year the sums obligated by the transaction[.]" Accordingly, it is the duty of the county finance officer to attach to each contract executed by the county "a certificate stating that the instrument has been preaudited to assure compliance with this subsection[.]" Moreover, a contract for the payment of money may not be enforced against a county unless the sufficiency of available funds has been ascertained and documented by the required pre-audit certificate. *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 545 S.E.2d 243 (2001).

The development of a formalized workers' compensation compromise settlement agreement takes place within the structure imposed by the Industrial Commission Rules and the Industrial Commission Rules for Mediated Settlement Conferences. These rules provide for a three-stage process. First, the parties attend a mediated settlement conference: "If an agreement is reached in the mediation conference, the parties shall reduce the agreement to writing, specifying all the terms of their agreement bearing on the resolution of the dispute before the Industrial Commission, and sign it along with their counsel." RMSC Rule 4(d). Secondly, "agreements for payment of compensation shall be submitted in proper form for Industrial Commission approval, and shall be filed with the Commission within 20 days of the conclusion of the mediation conference." RMSC Rule 4(d). To be "in proper form," a compromise settlement agreement must be accompanied by, *e.g.*, copies of all pertinent medical and vocational rehabilitation records, a signed release of liability, and documents pertinent to the claimant's future earning capacity. Finally, upon submission to the Commission, "[o]nly those agreements deemed fair and just and in the best interest of all parties will be approved." Industrial Commission Rule 502(1). In this sequence of events the pre-audit certificate will naturally be executed, if at all, after the settlement conference, when the amount of the county's liability is known, and as part of the general formalizing of the documents for submission to the Industrial Commission.

We conclude that an otherwise valid memorandum of agreement is not rendered void by the fact it does not bear the requisite pre-audit certificate. In this case, the subject memorandum of agreement is an agreement to prepare a formalized settlement compromise agreement for the Commission's consideration. The current appeal therefore involves an action for specific performance, not for the payment of money. We conclude that G.S. § 159-28 does not require that a memorandum of agreement be accompanied by a county finance manager's

pre-audit certificate to enable the Commission to direct the submission of a formalized compromise settlement agreement.

But for its erroneous conclusions of law, addressed above, related to the fact defendant is a county government, the Full Commission held the instant case would be governed by the principles enunciated in *Lemly v. Colvard Oil Co.*, 157 N.C. App. 99, 577 S.E.2d 712 (2003). We agree.

We reverse the Opinion and Award of the Full Commission, and remand this case for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges McCULLOUGH and HUDSON concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, OCEAN CLUB VENTURES, L.L.C., COMPLAINANT V. CAROLINA WATER SERVICE, INC. OF NORTH CAROLINA, RESPONDENT V. MONTERAY SHORES, INC. AND ROBERT R. AND LAURIE T. DEGABRIELLE, INTERVENORS

No. COA03-896

(Filed 6 July 2004)

1. Utilities— standing—aggrieved party

Appellant-intervenor company has standing to bring this appeal because subjecting the company to the Utility Commission's jurisdiction impacts the company's legal rights, and therefore, the company is an aggrieved party.

2. Utilities— resignation of commissioner—no prejudicial error

Although the Utilities Commission erred by entering an order when one of the commissioners on the panel had resigned at the time it was reduced to writing and filed, this error was not prejudicial to appellant-intervenor company because appellant requested a hearing before the full Commission as relief, and a majority of the full Commission has already ruled on the case and would be counted to vote with their prior orders in accord with the final decision pursuant to the pertinent section of N.C.G.S. § 62-76(c).

3. Utilities— standing—burden of proof

The Utilities Commission did not err by determining that complainant company had standing to prosecute the case and met their burden of proof, because: (1) the company had a direct interest in the subject matter in that it was, at the time of the complaint, the owner of one phase of the land in question and under an option contract with respect to the remaining portion of the land; (2) the company complained as a result of the omission of the public utility to provide water and sewer services for the purpose of developing the land; and (3) appellant abandoned the issue of burden of proof by failing to argue it in the brief as required by N.C. R. App. P. 28(b)(6).

4. Utilities— public utility—collection of tap fees—offering special service to residents

The Utilities Commission did not err by determining that appellant-intervenor company was a public utility, because: (1) collection of tap fees constitutes compensation under N.C.G.S. § 62-3(23)a; and (2) offering service to all of its residents satisfies the definition of "public" within the statute and cases.

5. Utilities— franchise—contiguous extension

The Utilities Commission did not err by determining that water and sewer was provided in the pertinent planned unit development as a result of a contiguous extension of the pertinent franchise and that Corolla Shores was within the franchise area held by respondent public utility, because: (1) appellant-intervenor company constructed the facility as an agent of respondent public utility; and (2) taking the Commission's findings as prima facie just and reasonable, there was no evidentiary basis upon which to overturn its decision.

6. Utilities— contract not in public interest—modification

The Utilities Commission did not err by determining that the contract between appellant-intervenor and respondent public utility was not in the public interest and could be modified by the Commission under N.C.G.S. § 62-2(b).

Appeal by the intervenors from the final decision of the Utilities Commission dated 19 December 2002. Heard in the Court of Appeals 17 March 2004.

Public Staff Chief Counsel Antoinette R. Wike and Staff Attorney Elizabeth Denning Szafran for the complainant-appellee North Carolina Utilities Commission.

Hunton & Williams, by Edward S. Finley, Jr. for respondent-appellee Carolina Water Service, Inc.

John S. O'Connor, Attorney for intervenor-appellants Monteray Shores, Inc. and the DeGabrielles.

ELMORE, Judge.

For the full facts of the case we reference the opinion of this Court rendered in the related case, *State ex rel. Utilities Commission v. Buck Island*, COA03-198, filed 17 February 2004. In addition to the facts related therein, we note that between the decision and the written order here appealed being given by the panel of the Utilities Commission, Commissioner William Pittman, a member of the panel, resigned.

Carolina Water Service (CWS), is a public utility who provides sewer and water service. Monterey Shores, Inc. (MSI), is a real estate developer owned by the DeGabrielles. MSI is the developer of Monterey Shores, a planned unit development (PUD) in Currituck County, which was serviced by CWS because it was adjacent to Corolla Light, another PUD for which CWS held a utilities franchise. Ocean Club Ventures (OCV), the complainant, is the real estate developer of Corolla Shores, which was originally intended as the third phase of Monterey Shores. Corolla Shores is located directly north of Monterey Shores, and directly south of Corolla Light. Buck Island is a PUD located to the south of Monterey Shores, and developed by Ships Watch, Inc.

OCV filed a complaint with the North Carolina Utilities Commission (the Commission) for water and sewer service from CWS. CWS responded that MSI is the proper one to provide such approval for service, because of their former agreement. MSI intervened and was ordered by the Commission to allow expansion of service to OCV's land. MSI brings this appeal.

I.

Our review of final decisions of the Utilities Commission is guided by the standard mandated by section 62-94 of the General Statutes, which states in pertinent part:

(a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of appellate procedure, and any alleged irregularities in procedures before the Commission, not shown in the record, shall be considered under the rules of appellate procedure.

(b) . . . The court may affirm or reverse the decision of the Commission . . . if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or

(2) In excess of statutory authority or jurisdiction of the Commission, or

(3) Made upon unlawful proceedings, or

(4) Affected by other errors of law, or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or

(6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commission.

N.C. Gen. Stat. § 62-94 (2003).

On appeal, findings of fact made by the Utilities Commission are considered *prima facie* just and reasonable. N.C. Gen. Stat. § 62-94(e) (2003). This means that the Court "may not replace the Commission's judgment with its own when there are two reasonably conflicting views of the evidence." *State ex rel. Utilities Comm. v. Public Staff*, 123 N.C. App. 43, 46, 472 S.E.2d 193, 196 (1996); *State ex rel. Utilities Comm'n v. Buck Island*, 162 N.C. App. 568, 575, 592 S.E.2d 244, 249 (2004).

The appellant brings three main issues on appeal, and the appellees bring objections based on standing and preservation of the appellant's issues in response. We consider the issues in turn, reserving determination of the preservation issue.

II.

[1] The appellees first argue that the appellant Monterey Shores, Inc. (MSI) has no standing to bring this appeal in that they are not an aggrieved party. This issue was also raised in the related case referenced above against there appellant Buck Island, Inc. We conclude in concert with that opinion that MSI does have standing to bring this appeal because subjecting MSI to the Commission's jurisdiction impacts MSI's legal rights, and therefore MSI is an aggrieved party. *See State ex rel. Utils Comm'n v. Buck Island*, 162 N.C. App. 568, 573-74, 592 S.E.2d 244, 248 (2004).

III.

[2] The first substantive issue brought by the appellant MSI is whether the panel erred in entering an order when one of the commissioners on the panel, Commissioner Pittman, had resigned at the time it was reduced to writing and filed. Assuming this issue to be properly preserved, we conclude that the panel did err, but without prejudice to the appellant.

Section 62-77 of our General Statutes requires that final orders of the Commission be reduced to writing in order to take effect. Commissioner Pittman had resigned by the time the order in question was reduced to writing, and thus the appellant argues that it was ineffective. Appellant argues that because he was not a current member of the Commission, he had no authority to participate in or sign the order, citing the case of *In re Pittman*, 151 N.C. App. 112, 564 S.E.2d 899 (2002). In the *Pittman* case, this Court vacated and remanded the order of a district court judge who signed the order after her term had ended. We, however, do not reach consideration of this argument, because the appellant's argument is settled by the statute itself.

Section 62-76(c) of the General Statutes states:

> In all cases in which a pending proceeding shall be assigned to a hearing commissioner, such commissioner shall hear and determine the proceedings and submit his recommended order, but, in the event of a petition to the full Commission to review such recommended order, the hearing commissioner shall take no part in such review, either in hearing oral argument or in consideration of the Commission's decision, but his vote shall be counted in such decision to affirm his original order.

N.C. Gen. Stat. § 62-76(c) (2003).

The appellant has requested a hearing before the full Commission as relief. The record indicates that through the life of this case before the Commission, four of the seven current Commissioners heard evidence in this case, and that all ruled unanimously on their respective orders. Thus a majority of the full Commission has already ruled on the case and would be counted to vote with their prior orders according to the above quoted section of the statute. There is therefore no prejudice demonstrated by the appellant from Commissioner Pittman's signing of the order, since a majority of the current Commission is already bound by prior orders regardless of Commissioner Pittman's decision.

This decision of the Court should in no way be construed as a green light to the Commission to commit any future procedural irregularities. It is because a majority of the Commission has already heard evidence and voted in accord with the final decision that we are compelled not to send the case back to the full Commission. However, this decision will not be applicable in cases where the facts are not identical, and where an appellant has been prejudiced. Because there was no prejudice on this issue, we will not discuss the preservation issue raised by the appellees.

IV.

[3] The appellant next brings the issue of whether the panel erred in determining that the complainant (Ocean Club Ventures, or OCV) had standing to prosecute the case and met their burden of proof. We conclude that the panel did not err.

The only authority cited by the appellant in support of this assignment of error is section 62-73 of the General Statutes, which states in pertinent part:

> Complaints may be made by the Commission on its own motion or by any person having an interest, either direct or as a representative of any persons having a direct interest in the subject matter of such complaint by petition or complaint in writing setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation or rate heretofore established or fixed by or for any public utility in violation of any provision of law or of any order or rule of the Commission, or that any rate, service, classification, rule, regulation or practice is unjust and unreasonable. . . .

N.C. Gen. Stat. § 62-73 (2003).

OCV had a direct interest in the subject matter in that it was, at the time of the complaint, the owner of one phase of the land in question (referred to as Corolla Shores or Monterey Shores Phase III) and under an option contract with respect to the remaining portion of the land. OCV complained as a result of the omission of the public utility, Carolina Water Service, to provide water and sewer service for the purpose of developing the land. OCV attached a copy of its warranty deed to "section 1" of the land in question to the original complaint. Because of this direct interest, OCV had standing to bring the complaint.

As to burden of proof, that issue is not argued in the appellant's brief, and is therefore deemed abandoned under Rule of Appellate Procedure 28(b)(6) (2004).

V.

[4] The final issue raised on appeal is whether the panel erred in determining that MSI was a public utility, that water and sewer was provided in Monterey Shores as a result of a contiguous extension of the Corolla Light franchise, that Corolla Shores was within the franchise area of Carolina Water Service (CWS), and that the contract between MSI and CWS was not in the public interest and could be modified by the commission. For the same reasons that Buck Island was considered a pubic utility in the *Buck Island* case, we conclude that the panel did not err.

First, the issue of MSI being deemed a public utility parallels Buck Island's claim in the related appeal. A public utility is defined in N.C. Gen. Stat. § 62-3(23)a:

> a. "Public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:
>
> . . .
>
> 2. Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation, or operating a public sewerage system for compensation . . .

N.C. Gen. Stat. § 62-3(23)a (2003).

Appellant's argument focuses on the language in the statute saying a public utility provides water and sewer service for compensa-

tion, arguing that they do not receive compensation for the service they provide. The *Buck Island* decision stated:

> [T]he statute does not require the sale of utility service, only that utility service is furnished "to or for the public for compensation." N.C. Gen. Stat. § 62-3(23)a.2 (2003). Evidence of the tap fees received by Buck Island is substantial, competent, and material evidence supporting the Commission's conclusion that appellant receives compensation for the utility services.

State ex rel. Utilities Commission v. Buck Island, 162 N.C. App. 568, 577, 592 S.E.2d 244, 250 (2004).

Appellant admits on appeal that both Buck Island and Monterey Shores collect tap fees. This constitutes compensation under the statute.

Appellant also argues that they do not hold the service out to the general public. Our Court has previously stated with respect to public utilities that "[o]ne offers service to the 'public' within the meaning of the statute when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial, in the connection, that his service is limited to a specified area and his facilities are limited in capacity." *State ex rel. Utilities Comm. v. Mackie*, 79 N.C. App. 19, 25-26, 338 S.E.2d 888, 893-94 (1986). Appellant admits on appeal offering service to all of their residents. This satisfies the definition of "public" within the statute and cases.

[5] Next appellant argues that the panel erred in determining that water and sewer were provided in Monterey Shores as a result of a contiguous extension of the Corolla Light franchise, and that Corolla Shores was within the franchise area held by CWS.

Usually, a Certificate of Convenience and Necessity is required when a public utility begins construction or operation. *See* N.C. Gen. Stat. § 62-110(a). The only exception in the statute is for "construction into territory contiguous to that already occupied and not receiving similar service from another public utility, [or . . .] construction in the ordinary conduct of business." N.C. Gen. Stat. § 62-110(a) (2003). This construction is what is referred to as a contiguous extension.

Through no fault of MSI, no certificate was filed in this case, and thus MSI and Buck Island were within the franchise area of CWS because of a contiguous extension, which requires that the area be

immediately adjacent to the original franchise area, Corolla Light. Corolla Shores is located between MSI and Corolla Light, and the two connect only through Corolla Shores. Corolla Shores is within the contiguous extension, and is necessary to continue as such in order for MSI to remain in the franchise granted to CWS.

As noted above, findings of fact made by the Utilities Commission are considered *prima facie* just and reasonable on appeal. N.C. Gen. Stat. § 62-94(e) (2003). The role of the appellate court is to determine, after reviewing the entire record, "whether . . . the Commission's findings and conclusions are supported by substantial, competent, and material evidence." *State ex rel. Utilities Comm. v. Piedmont Nat. Gas Co.*, 346 N.C. 558, 569, 488 S.E.2d 591, 598 (1997). However, the Court "may not replace the Commission's judgment with its own when there are two reasonably conflicting views of the evidence." *State ex rel. Utilities Comm. v. Public Staff*, 123 N.C. App. 43, 46, 472 S.E.2d 193, 196 (1996); *Buck Island*, 162 N.C. App. at 575, 592 S.E.2d at 249.

MSI relies on language in the statute which emphasizes "construction," asserting that because CWS did not construct the facilities it did not extend a contiguous extension of Corolla Light. However, the Commission found as fact that MSI constructed the facility as an agent of CWS because in the agreement reached between CWS and MSI and Ships Watch, MSI and Ships Watch agreed to construct the facilities and not turn over ownership to CWS in order to avoid increasing CWS's federal tax burden. This technical distinction in who constructed the facility would not seem to defeat the fact that the facility was constructed for the express purpose of allowing CWS to provide utility service to MSI's entire area, which originally included what later came to be known as Corolla Shores, the subject of this assignment of error. The Commission's 20 March 2001 order noted that if this arrangement was not construed as a contiguous extension merely because MSI constructed the physical facility, then that would mean "that no contiguous extension could ever occur unless the utility directly installed all facilities in the newly franchised area, a result which is simply inconsistent with the manner in which water and sewer utilities operate in North Carolina."

This finding by the Commission is supported by the substantial, competent, and material evidence. The agreement between CWS and MSI is included in the record as an appendix to the complaint. This agreement vests ownership of the "main facilities" in CWS, while MSI

retains ownership of the land, which it leases to CWS, and of the "backbone facilities." CWS agreed to pay all expenses of operation and maintenance of the facilities, as well as to assist in future expansion. From the agreement, the facilities appear to have been constructed for the purpose of providing water and sewer service, which service was provided by CWS. Because construction was not complete at the time of the agreement, it seems that the facilities were completed in order to connect with the existing CWS franchise. Taking the Commissions findings as *prima facie* just and reasonable, we find no evidentiary basis upon which to overturn the Commission's decision.

[6] Lastly, the appellant argues that the Commission erred in determining that the contract between MSI and CWS was not in the public interest and could be modified by the Commission. Section 62-2(b) of the General Statutes gives the Commission authority to regulate the services and operations of public utilities, including the right to modify or abrogate private agreements between parties with respect to the operation of a public utility, "upon a showing that the contracts do not serve the public welfare." *State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc.*, 149 N.C. App. 656, 657, 562 S.E.2d 60, 62 (2002); *Buck Island, supra.*

Appellant argues that the contract modification was in error because there was no contiguous extension, since the modification was to allow CWS to extend service to the franchise area. Because we determined above that the Commission did not err in finding that there was a contiguous extension, this argument no longer applies.

Having reviewed the record and the arguments of the parties, we affirm the panel of the Commission.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

SATORRE v. NEW HANOVER CTY. BD. OF COMM'RS

[165 N.C. App. 173 (2004)]

TERESA H. SATORRE, SHARON O. LEE, THERESA K. PUGH-McQUEEN, KIM AMERI, PAMELA R. ALMEIDA, SANDRA RANDOLPH, GLORIA P. TODD, AND JACKIE G. WATSON, PLAINTIFFS v. NEW HANOVER COUNTY BOARD OF COMMISSIONERS, NEW HANOVER COUNTY, ALLEN O'NEAL, COUNTY MANAGER, IN HIS OFFICIAL CAPACITY, AND DAVID E. RICE, NEW HANOVER COUNTY HEALTH DIRECTOR, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA03-648

(Filed 6 July 2004)

1. **Appeal and Error— appealability—denial of summary judgment—sovereign immunity—substantial right**

Although appeal from denial of summary judgment is an appeal from an interlocutory order and thus ordinarily not immediately appealable, the issue of sovereign immunity affects a substantial right sufficient to warrant immediate appellate review.

2. **Immunity— sovereign—maintenance of courthouse—public officials liability exclusion**

A de novo review revealed that the trial court erred by denying defendants' and intervenors' motion for summary judgment arising out of the alleged improper maintenance of the pertinent courthouse and by failing to find that defendants were insulated from liability under the doctrine of sovereign immunity, because the public officials liability exclusion in the pertinent policy excludes the alleged negligence in this case from the general waiver of sovereign immunity in the general liability coverage.

3. **Public Officers and Employees— health director—county manager—writ of mandamus—discretionary duties**

Summary judgment should have been granted in favor of the Health Director and County Manager denying plaintiffs' writ of mandamus, because: (1) the health director and county manager are public officials whose primary duties under their statutory posts are discretionary and generally beyond the reach of the extraordinary writ of mandamus; and (2) the duties sought by the writ of mandamus in this case were discretionary.

Appeal by defendants and intervenor from a summary judgment order entered 30 December 2002 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 25 February 2004.

Shipman & Associates, L.L.P., by Gary K. Shipman and William G. Wright, for plaintiff appellees.

Helms Mulliss & Wicker, P.L.L.C., by L. D. Simmons, II, Robert A. Wicker, Henry L. Kitchin, Jr., and Jason D. Evans, for defendants appellants.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Mark A. Davis and Garth A. Gersten, for intervenor appellants.

McCULLOUGH, Judge.

On or about 8 March 2002, plaintiff-appellees ("plaintiffs") filed their lawsuit against New Hanover County and the individually named defendant appellants (collectively "defendants"). Plaintiffs are persons who were employed at the New Hanover County Courthouse in Wilmington. Defendants operate and maintain the courthouse as required by the laws of this state. Plaintiffs allege in their complaint that they have been injured due to the presence of mold, carbon monoxide, and other chemicals and irritants in the building. Plaintiffs allege that defendants "breached their duties owed to the plaintiffs, and were negligent, in that they: . . . failed to properly maintain the Courthouse[.]" They further maintain that David E. Rice (County Health Director) and Allen O'Neal (County Manager) should be ordered by writ of mandamus to investigate and abate noxious fumes and odors due to mold.

At all times relevant to plaintiffs' claims, defendant New Hanover County participated in a risk pool administered by the North Carolina Counties Liabilities and Property Insurance Fund (the "Fund"). The Fund issued a package insurance policy containing a number of separate coverages to the County, two of which are relevant to this case: the General Liability section (GL) and the Environmental Impairment Liability contract (EIL). The GL capped coverage at two million dollars per occurrence. The EIL capped coverage at fifty thousand dollars in the aggregate (meaning if one occurrence of an environmental impairment occurred where claims were more than fifty thousand dollars, then coverage under the EIL would be completely exhausted and the County is protected by sovereign immunity for any amount more, and any future occurrence).

On or about 23 August 2002, defendants filed a motion for summary judgment based on New Hanover County's sovereign immunity to the extent that the County had not waived such immunity by

obtaining insurance. Defendants argued that the fifty thousand dollar coverage provided for under the EIL contract has been exhausted, and therefore defendants are immune to claims beyond this value. On or about 19 November 2002, the Fund was permitted to intervene for the sole purpose of presenting the insurance coverage issue raised by the summary judgment motion. The Fund, supporting defendants' motion, acknowledged coverage under the EIL and that this coverage had been paid out and exhausted.

The trial court, in its order denying summary judgment on the issue of insurance coverage,[1] concluded that defendant was not protected by the doctrine of sovereign immunity for claims alleged by plaintiffs equal to or less than two million dollars per occurrence. The court did so on the basis of finding that plaintiff's bodily/personal injury and damages may be covered by the GL section of the Fund, and that these claims were not solely governed by the EIL contract.

In this appeal, defendants and intervenor collectively raise the issue that the trial court erred in not finding defendants insulated from liability under the doctrine of sovereign immunity. They allege the court ignored the plain wording of the "pollution exclusion" and "public officials liability" exclusion of the GL policy issued by the Fund. Defendants further raise the issue that the trial court erred in failing to grant summary judgment in their favor on plaintiffs' claims for a writ of mandamus. Based upon the analysis herein, we reverse the trial court's order denying summary judgment on the issue of sovereign immunity as to plaintiffs' claims; and on the issue of the writ of mandamus, we hold plaintiffs have alleged no violation or neglect of ministerial duties by the County Health Director that would be subject to this extraordinary writ.

[1] This is an appeal from the denial of summary judgment, and thus interlocutory. However, we take this appeal under N.C. Gen. Stat. § 7A-27(d)(1) as affecting a "substantial right." Where the appeal from an interlocutory order raises issues of sovereign immunity, such appeals affect a substantial right sufficient to warrant immediate appellate review. *See Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283, *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996).

1. The trial court did grant summary judgment in favor of the plaintiffs' claim for relief for a Temporary and Permanent Injunction based upon defendants' alleged violations of Article I, Section I of the Constitution of North Carolina.

Standard of Review

[2] "[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). "[T]he evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Id.* Furthermore, we review *de novo*, as a question of law, the lower court's interpretation of an insurance policy's language. *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 289, 444 S.E.2d 487, 491, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 528 (1994). With this standard in mind, we turn to the issues of this case.

Waiver of Sovereign Immunity By Liability Insurance

Sovereign immunity bars claims brought against the state or its counties, "where the entity sued is being sued for the performance of a governmental, rather than a proprietary, function." *Messick v. Catawba County*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). The obligation of a county in this state to provide and maintain courthouses for the conducting of judicial proceedings is a duty imposed by statute. N.C. Gen. Stat. § 7A-302 (2003). We have held that the operation of a courthouse is viewed as a governmental function of a county acting in its role as a political subdivision. *Doe v. Jenkins*, 144 N.C. App. 131, 134, 547 S.E.2d 124, 127 (2001), *disc. review dismissed as moot and disc. review denied*, 355 N.C. 284, 560 S.E.2d 798, 799 (2002).

"A county may, however, waive such immunity through the purchase of liability insurance." *Id.* "[I]mmunity is waived only to the extent that the [county] is indemnified by the insurance contract from liability for the acts alleged." *Combs v. Town of Belhaven*, 106 N.C. App. 71, 73, 415 S.E.2d 91, 92 (1992); *see also Dawes v. Nash Cty.*, 357 N.C. 442, 445-46, 584 S.E.2d 760, 762-63, *reh'g denied*, 357 N.C. 511, 587 S.E.2d 417 (2003) (Our Supreme Court found Nash County's purchase of the GL section of a policy issued by the same Fund was a waiver of sovereign immunity, unless some specific exclusion applied.).

In this case, it is uncontested that New Hanover County purchased a comprehensive insurance policy issued by the Fund covering the time period in which the alleged acts of negligence took place.

This policy includes separate sections covering general liability and environmental impairment liability.

The GL section of the policy provided two million dollars per occurrence for damages caused by the county resulting in personal/bodily injury. Subsection E of the GL contains exclusions to this coverage which, if applicable, specify non-waivers of immunity that might otherwise be waived under the GL. The two exclusions at issue in this case are the "pollution" exclusion and the "public officials liability" exclusion. Because we find the public officials exclusion saved defendants from waiver of their sovereign immunity in this case, we need not address the issue of whether toxic mold falls within the definition of pollution in the GL's pollution exclusion.

The Public Officials Liability Exclusion

Defendants and intervenor contend that the "public officials liability" exclusion, exclusion 13 of subsection E, excludes the alleged negligence in this case from the general waiver of sovereign immunity in the GL coverage. We agree.

In *Doe*, the defendant county was alleged to have breached its duty to use reasonable care to protect lawful visitors against the reasonably foreseeable criminal acts of third parties while on the courthouse premises. *Doe*, 144 N.C. App. at 131, 547 S.E.2d at 125. We held the following exclusion saved Orange County from liability to persons harmed by such acts, though the county had waived its sovereign immunity by purchasing general liability coverage:

> 15. Errors and Omissions
>
> to any liability for any actual or alleged error, misstatement, or misleading statement, act, or omission, or neglect or breach of duty by the Participant, or by any other person for whose acts the Participant is legally responsible arising out of the discharge of duties as a political subdivision or a duly elected or appointed member or official thereof.

Id. at 132, 547 S.E.2d at 125. Under this exclusion, we held:

> The language of the exclusion in the present case unambiguously limits the coverage provided by the coverages contract. Relevant to plaintiff's complaint, the exclusion states explicitly that "coverage does not apply to . . . any liability for . . . neglect or breach of duty . . . arising out of the discharge of duties as a political subdivision . . . ."

Id. at 135, 547 S.E.2d at 127. The Court found this exclusion applied, and that Orange County had not waived liability for the criminal acts of third parties in its courthouse.

In the case at bar, the language of the "public officials liability" exclusion is *exactly* that of the "Errors and Omissions" exclusion applied in *Doe*. The only differences in the language are the two exclusions' headings. In *Doe* we quoted a case from another jurisdiction stating, " '[a]n insured is not entitled to read only the heading and ignore the operative language of the provision itself.' " *Doe*, 144 N.C. App. at 135, 547 S.E.2d at 127 (quoting *Town of Wallingford v. Hartfort Acc. and Indem. Co.*, 649 A.2d 530, 533 (Conn. 1994). We find the operative language of the public officials exclusion in this case unambiguous.

Plaintiffs claim defendants breached "a duty to provide a safe public building" by failing to properly maintain the Courthouse. Though criminal acts of third parties and the growth of toxic mold are wholly different events in kind, we cannot distinguish them under the operative language of the exclusion. Both fit within the operative language of the exclusion: "to any liability for any actual or alleged . . . breach of duty by the Participant . . . arising out of the discharge of duties as a political subdivision[.]" Therefore, we hold the *operative language* of the public officials exclusion retains defendants' sovereign immunity from plaintiffs' claims of negligence.[2]

Writ of Mandamus

[3] In their final assignment of error, defendants and intervenor contend that there is no issue of material fact concerning plaintiffs' entitlement to a writ of mandamus. They argue that duties which plaintiffs seek to enforce upon the Health Director are discretionary and not otherwise enforceable by a writ of mandamus. *See Sutton v. Figgatt*, 280 N.C. 89, 185 S.E.2d 97 (1971); *Orange Co. v. Dept. of Transportation*, 46 N.C. App. 350, 386, 265 S.E.2d 890, 913, *disc.*

2. Plaintiffs distinguish *Doe*, stating:

> *Doe* is clearly distinguishable from the case *sub judice* in that [it] involved an assault on a courthouse visitor and the County's failure to provide security from an unknown assailant (government function). In the case, however, Plaintiffs' claims involve the County's failure to provide safe premises and a safe workplace (proprietary)[.]

Plaintiffs' Brief, pg. 27, fn. 5. We disagree, however. *Doe* clearly holds that *operation* of a courthouse pursuant to statute is a governmental function. *Doe*, 144 N.C. App. at 134, 547 S.E.2d at 126.

review denied, 301 N.C. 94 (1980) (writ of mandamus only contemplated for ministerial duties). Though this issue is most likely moot as there is uncontradicted evidence that the mold problem has been abated, for the interest of clarity and judicial economy we dispose of this assignment of error on the merits. We do so in holding that summary judgment should have been granted in favor of the Health Director and County Manager denying plaintiffs' writ of mandamus.

North Carolina courts have held that "public officers and public employees are generally afforded different protections under the law when sued in their individual capacities." *Schmidt v. Breeden*, 134 N.C. App. 248, 258, 517 S.E.2d 171, 177-78 (1999). "[A] public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto." *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952). The official may be held liable only if it is "alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties." *Id.* (citation omitted).

A public officer is a position created by the constitution or statutes, where the official exercises a portion of the sovereign power, and exercises discretion under that power; public employees perform *ministerial* duties. *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999). The director of a county health department is a public officer set forth by statute. *See* N.C. Gen. Stat. § 130A-41 (2003); *Block v. County of Person*, 141 N.C. App. 273, 281-82, 540 S.E.2d 415, 421-22 (2000). Our Supreme Court has held:

> "An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of sovereign power." Officers exercise a certain amount of discretion, while employees perform ministerial duties. Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts."

Hare v. Butler, 99 N.C. App. 693, 700, 394 S.E.2d 231, 236 (citations omitted), *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

The New Hanover County Health Director is a "public official" created by statute. The Director's duties for the most part are broad,

discretionary, and presumptively not ministerial or subject to the extraordinary writ of mandamus. The statutes cited by plaintiff alleging Director Rice's failure to act are exactly of this broad and discretionary nature. *See* N.C. Gen. Stat. § 130A-41 (2003) (Powers and duties of local health director). No issue of material fact has been raised that Director Rice failed to carry out a ministerial duty. Additionally, there is uncontradicted evidence that Director Rice used sufficient discretion in exercising his portion of sovereign power concerning the mold issue at the Courthouse. Director Rice has monitored the County's extensive work at the Courthouse and overseen the activities of the Health Department's efforts to abate the mold. The County retained a qualified industrial hygienist to investigate the indoor air quality at the Courthouse and to supervise remediation of any problem areas. The County has successfully abated all areas of concern, and there are no longer air quality problems at the Courthouse threatening the public health.

Applying this same analysis to County Manager O'Neal, we find no issue of material fact raised by plaintiffs that Mr. O'Neal has failed in carrying out a ministerial duty. *See* N.C. Gen. Stat. § 153A-82 (2003) (powers and duties of a county manager).

Conclusion

In this opinion, we hold that the trial court should have granted summary judgment in favor of defendants on the ground that defendants had retained sovereign immunity under the "public officials liability" exclusion of the GL policy for liability relating to breaching the duty to maintain a safe public building. Additionally, we hold that, because the Director of New Hanover County Health Department and the County Manager are "public officials," the primary duties under their statutory posts are discretionary and generally beyond the reach of the extraordinary writ of mandamus. The duties sought by the writ of mandamus in this case were discretionary.

Therefore, we reverse the lower court's denial of summary judgment, and grant summary judgment in favor of defendants and intervenors in accordance with this opinion on the issues of liability under the GL and the writ of mandamus.

Reversed.

Judges HUNTER and LEVINSON concur.

REVELS v. MISS AM. ORG.

[165 N.C. App. 181 (2004)]

REBEKAH CHANTAY REVELS, PLAINTIFF v. MISS AMERICA ORGANIZATION, MISS NORTH CAROLINA PAGEANT ORGANIZATION, INC., ALAN CLOUSE, BILLY DUNCAN, CHARLENE HAY, DOUG HUFF, TOM ROBERTS, DAVID CLEGG, BEVERLY ADAMS, AND CANDACE RUSSELL, DEFENDANTS

No. COA03-1194

(Filed 6 July 2004)

1. Arbitration and Mediation— choice of law in agreement— existence of agreement—threshold procedural question

The trial court properly chose to apply the law of North Carolina rather than that of New Jersey to an arbitration question even though the arbitration agreement specified application of New Jersey law. Only one party signed the agreement and the existence of the agreement is a procedural issue. Procedural rights are determined by the law of the forum.

2. Arbitration and Mediation— existence of agreement—document not signed by both parties

The trial court's findings supported its conclusion that defendant did not show the existence of a written agreement to arbitrate where defendant did not sign the agreement and denied acceptance of the contract for purposes of defending the merits of plaintiff's claim.

Appeal by defendant Miss America Organization from judgment entered 31 March 2003 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 26 May 2004.

Barber & Wilson, P.A., by Timothy C. Barber, Sean T. Partrick, Andrew H. D. Wilson, and Leslie Hickman-Loucks, for defendant-appellant Miss America Organization.

Barry Nakell for plaintiff-appellee.

ELMORE, Judge.

In this appeal, we must determine whether the trial court erred in denying defendant Miss America Organization's (MAO) amended motion to compel arbitration of the dispute between MAO and plaintiff Rebekah Chantay Revels. For the reasons stated herein, we conclude that the trial court did not err, and we affirm the trial court's order.

The factual and procedural background is as follows: On 22 June 2002, plaintiff was designated "Miss North Carolina 2002" by defendant Miss North Carolina Pageant Organization, Inc. (MNCPO) after winning a public contest sponsored by MNCPO. MNCPO is a franchisee of MAO pursuant to a document entitled "Miss America Organization Official Franchise Agreement," (the Franchise Agreement), the terms of which required MNCPO to conduct a public contest (the State Finals) to select Miss North Carolina and to prepare Miss North Carolina for participation in the Miss America pageant (the National Finals). In return, MAO agreed to "accept the winner of the State Finals conducted by [MNCPO] . . . as a contestant in the National Finals provided that [MNCPO] has complied with the terms hereof and with such other rules and regulations as may be promulgated from time to time by MAO." Plaintiff and MNCPO executed a document entitled "Miss North Carolina 2002 Contract" whereby plaintiff was recognized as Miss North Carolina 2002 and agreed to "represent the State of North Carolina and [MNCPO] in the [National Finals] . . . ."

On 24 June 2002, following her selection as Miss North Carolina, plaintiff signed a document entitled "The Miss America Organization Application and Contract for Participation in the National Finals of the Miss America Competition" (the Application and Contract), which set forth plaintiff's duties and obligations regarding her competition in the National Finals. By signing the Application and Contract, plaintiff represented, *inter alia*, that she was "of good moral character and [she had] not been involved at any time in any act of moral turpitude" and that she had "never . . . engaged in any activity . . . that is or could reasonably be characterized as dishonest, immoral, or indecent." The Application and Contract also contained the following provisions, which are at the heart of the present appeal:

> 2.8.4. *Attorney Review of Application and Contract.* I have been given a sufficient opportunity to review this Application and Contract. . . . I have also had the opportunity to consult with an attorney of my own choosing to give me legal advice with regard to this Application and Contract. . . . (x) I have decided that I do not need to do so (check applicable choice). . . .
>
> . . . .
>
> 6.10. *Applicability of New Jersey Law.* This Application and Contract and its attachments shall be construed and interpreted under the laws of the State of New Jersey.
>
> . . . .

> 6.12. *Arbitration of Disputes.* Any controversy or claim arising out of or relating to this Application and Contract or any breach thereof shall be submitted to arbitration in Atlantic City, New Jersey in accordance with the Rules of the American Arbitration Association. Judgment upon any award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. This section shall not in any way affect the rights of MAO to (1) seek injunctive relief as provided in Section 6.9 of this Application and Contract, or (2) take any action permitted by this Application and Contract to enforce the eligibility standards of the Program in the event that time does not permit the completion of an arbitration process before action must be taken.

Significantly, the Application and Contract was signed by plaintiff, but was never signed by any representative of MAO.

On 19 July 2002, MAO received an anonymous e-mail, later determined to have been sent by plaintiff's ex-boyfriend, implying that plaintiff had formerly cohabited with a "male non-relative" and that nude photographs of plaintiff existed. MAO forwarded the e-mail to MNCPO. Thereafter, in a meeting with MNCPO's Board of Directors, plaintiff confirmed the existence of the photographs. On 22 July 2002, MAO's Board of Directors voted to ask plaintiff to resign as Miss North Carolina, and if plaintiff refused to resign, to exclude her from competing in the National Finals. After MAO's decision was conveyed to MNCPO, the MNCPO Board of Directors likewise voted to ask plaintiff to resign, and to terminate her reign as Miss North Carolina 2002 if she did not. On 23 July 2002, plaintiff tendered her resignation as Miss North Carolina 2002.

On 1 September 2002, Plaintiff commenced the litigation underlying this appeal by filing a complaint, naming only MAO as a party defendant, in Robeson County Superior Court. Plaintiff's complaint asserted claims for breach of contract and specific performance, and also sought injunctive relief. On 4 September 2002, Chief Justice I. Beverly Lake of the North Carolina Supreme Court entered an order designating the matter as an exceptional case pursuant to Rule 2.1 of the General Rules of Practice for Superior and District Courts, and assigned the case to the Honorable Narley L. Cashwell of Wake County Superior Court.[1] On 5 September 2002, MAO filed a Notice of

1. The record indicates that on 3 September 2002, Chief Justice Lake had also designated a companion case, *Revels v. Miss North Carolina Pageant Organization*, File No. 02 CVS 11625, as an exceptional case and assigned it to Judge Cashwell.

Removal in the United States District Court for the Eastern District of North Carolina, Southern Division, removing the matter to federal court on the basis of diversity of citizenship.[2] On 6 September 2002, MAO filed (1) a Motion to Dismiss and Answer, and (2) a Motion to Compel Arbitration. Following an evidentiary hearing, the Honorable James C. Fox, Senior United States District Judge, denied plaintiff's motion for a preliminary injunction by order entered 19 September 2002. MAO's motion to compel arbitration was held in abeyance pending plaintiff's response.

On 21 October 2002, plaintiff filed a Motion For Leave to File First Amended Complaint, by which plaintiff sought to add as parties defendant MNCPO and the individual members of its Board of Directors and Executive Committee.[3] Plaintiff also sought to assert additional claims against MAO. On 5 December 2002, Judge Fox entered an order which allowed plaintiff's motion to amend, and, because addition of the new parties defendant destroyed diversity of citizenship, remanded the case to Robeson County Superior Court.[4]

In pleading her breach of contract claim against MAO in the amended complaint, plaintiff specifically alleged that "Plaintiff and Defendants MAO and MNCPO entered into the [Application and Contract]." Plaintiff's breach of contract claim against MAO is therefore grounded, at least in part, on the assertion that the Application and Contract—which contained an arbitration clause as set forth above and was signed by plaintiff, but not by MAO—represents a valid and binding agreement between plaintiff and MAO. In its amended answer to plaintiff's first amended complaint MAO

2. MAO is a non-profit corporation organized under the laws of the state of New Jersey, with its principal place of business in Atlantic City, New Jersey.

3. At the time of the events giving rise to the underlying litigation, Defendants Alan Clouse, Billy Duncan, Charlene Hay, Doug Huff, and Tom Roberts collectively comprised MNCPO's Board of Directors, and defendants David Clegg, Beverly Adams, and Candace Russell were members of MNCPO's Executive Committee. MNCPO is a North Carolina nonprofit corporation, and each of the individual defendants are citizens and residents of North Carolina. Neither MNCPO nor any of the individual defendants are parties to the instant appeal.

4. At the time Judge Fox entered his 5 December 2002 order, he had apparently received neither a copy of Chief Justice Lake's 4 September 2002 order designating the case as exceptional, nor a copy of Robeson County Senior Resident Superior Court Judge Robert F. Floyd, Jr.'s 4 September 2002 order transferring the matter from Robeson to Wake County. By entry on 8 January 2003 of an Administrative Order Re-Activating Case, the Honorable Donald W. Stephens ordered that "all papers shall be filed and proceedings conducted in Wake County unless Judge Cashwell notifies the parties otherwise."

acknowledged only that plaintiff signed the Application and Contract. For purposes of defending against the merits of plaintiff's breach of contract claim, MAO asserted therein, and continues to assert before this Court, that the Application and Contract does not represent a valid and binding agreement between MAO and plaintiff.

On 17 January 2003, MAO filed an Amended Motion to Compel Arbitration "pursuant to [the Application and Contract] signed by Plaintiff . . . on or about June 24, 2002[.]" In support of its motion, MAO alleged that "on or about June 24, 2002, Plaintiff . . . signed [the Application and Contract][,]" and "pursuant to Section 6.12 [of the Application and Contract], any controversy or claim arising out of or relating to the application and contract or any breach thereof shall be submitted to arbitration in Atlantic City, New Jersey . . . ."

MAO's amended motion to compel arbitration came on for hearing before Judge Cashwell on 3 February, 2003. By order entered 31 March 2003, Judge Cashwell denied MAO's motion to compel arbitration. Judge Cashwell's order contained the following pertinent findings of fact:

> 17. In her original and amended Complaints the Plaintiff has alleged and asserted the existence of a written contract between the Plaintiff and MAO. Specifically, the Plaintiff has alleged and asserted that Exhibit C (Court's Exhibit 1) to her First Amended Complaint [the Application and Contract] is a copy of that contract. While Court's Exhibit 1 does not bear the signature of an agent or representative of MAO showing acceptance of same, the Plaintiff has alleged in conclusory language without supporting factual allegations that MAO accepted this contract.
>
> 18. [The Application and Contract] provides in pertinent part[] . . . [that] [a]ny controversy or claim arising out of or relating to this Application and Contract or any breach thereof shall be submitted to arbitration in Atlantic City, New Jersey . . . .
>
> 19. The Plaintiff asserts two approaches in arguing her opposition to MAO's Amended Motion to Compel Arbitration. Under neither approach does the Plaintiff deny the existence of a contract, [the Application and Contract], between the Plaintiff and MAO.
>
> 20. Under her first approach the Plaintiff argues the Amended Motion to Compel Arbitration should be denied because MAO has denied in its Amended Answer that [the

Application and Contract] is a contract between MAO and Plaintiff and further that MAO has denied accepting same and acting in reliance on it as a valid contract binding on MAO and thusly MAO has not carried its burden of satisfying the requirement of N.C.G.S. [§] 1-567.3 of "showing an agreement described in G.S. 1-567.2."

. . . .

24. The [Application and Contract] does not show on its face that the document was accepted by MAO as a contract and MAO has denied acceptance of same. MAO has not shown the existence of a contract containing an arbitration agreement between MAO and the Plaintiff.

. . . .

Based on these findings, Judge Cashwell concluded that "MAO has not satisfied the requirements of N.C.G.S. 1-567.3(a)[]" to prove the existence of a written agreement between plaintiff and MAO to arbitrate, and denied MAO's amended motion to compel arbitration. From this order, MAO now appeals.

At the outset, we note that "an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991); *see also Park v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 N.C. App. 120, 582 S.E.2d 375, 377 (2003). "[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626, 87 L. Ed. 2d 444, 454 (1985); *see also Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271-72, 423 S.E.2d 791, 794 (1992).

MAO contends that the trial court erred by denying its amended motion to compel arbitration on the grounds that the arbitration clause in the Application and Contract, which was signed by plaintiff but not by any representative of MAO, evidenced an agreement by the parties to submit any dispute arising out of the Application and Contract to arbitration. We disagree.

[1] We must first address MAO's contention that the trial court erroneously applied North Carolina law in determining whether the parties had in fact agreed to arbitrate their dispute. MAO argues that

because the Application and Contract contains a provision stating that it "shall be construed and interpreted under the laws of the State of New Jersey[,]" the trial court was required to apply New Jersey law in determining whether an agreement to arbitrate existed. However, in order to determine whether the parties had agreed to arbitrate their dispute, the facts of the present case required the trial court *not* to *interpret*, *construe*, or otherwise *determine the validity* of the Application and Contract's arbitration clause, but rather to determine whether the parties had *mutually agreed to be bound* by the Application and Contract itself, specifically the arbitration clause contained therein. Because the existence of such an agreement is a threshold requirement to compel arbitration, *see Mitsubishi Motors*, 473 U.S. at 626, 87 L. Ed. 2d at 454, we discern this to be a procedural, rather than substantive, issue. "Our traditional conflict of laws rule is that matters affecting the substantial rights of the parties are determined by lex loci, the law of the situs of the claim, and remedial or procedural rights are determined by lex fori, the law of the forum." *Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 853-54 (1988). Thus, we conclude that the trial court's application of North Carolina law was proper. *Sears Roebuck and Co. v. Avery*, 163 N.C. App. 207, 211, 593 S.E.2d 424, 428 (2004) (applying Arizona law, pursuant to choice of law provision in undisputed contract between the parties, to interpret and determine validity of arbitration clause also contained therein); *Park v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 N.C. App. 120, 122-23, 582 S.E.2d 375, 378 (2003) (same, applying New York law).

[2] Pursuant to N.C. Gen. Stat. § 1-567.2(a) (2003) (Repealed by Session Laws 2003-345, s.1, effective January 1, 2004 and applicable to agreements to arbitrate made on or after that date), "Two or more parties . . . may include in a *written contract* a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof." (Emphasis added) In addition, N.C. Gen. Stat. § 1-567.3(a) (2003) (Repealed by Session Laws 2003-345, s.1, effective January 1, 2004 and applicable to agreements to arbitrate made on or after that date) provides in pertinent part as follows:

> On application of a party *showing an agreement described in G.S. 1-567.2*; and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the

issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.[5] (Emphasis added)

MAO argues that its burden under N.C. Gen. Stat. § 1-567.3 of showing a written agreement to arbitrate has been met by plaintiff's own pleadings, which uniformly allege the existence of a valid and binding contract between plaintiff and MAO in the form of the Application and Contract, which contains an arbitration clause. We are not persuaded by this argument.

In a recent opinion affirming the trial court's denial of a motion to compel arbitration, this Court stated as follows:

> "The question of whether a dispute is subject to arbitration is an issue for judicial determination." [*Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001) (citing *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 89 L. Ed. 2d 648 (1986))]. This determination involves a two-step analysis requiring the trial court to "ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether 'the specific dispute falls within the substantive scope of that agreement.' " *Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678 (quoting *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990)).
>
> A dispute can only be settled by arbitration if a valid arbitration agreement exists. N.C.G.S. § 1-567.2 (2001). "The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes." *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271-72, 423 S.E.2d 791, 794 (1992); *see Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 120, 535 S.E.2d 397, 400 (2000). "The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary." *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (citing *Routh*, 108 N.C. App. at 272, 423 S.E.2d at 794), *disc. review denied*, 356 N.C. 167, 568 S.E.2d 611 (2002). However, the trial court's determination of whether a dispute is subject to arbitration is a conclusion of law that is reviewable *de novo* on appeal.

5. Because it is undisputed that the purported agreement to arbitrate in this case was made, if at all, before 1 January 2004, N.C. Gen. Stat. § 1-567.2(a) and N.C. Gen. Stat. § 1-567.3(a) are applicable to the present case.

Raspet, 147 N.C. App. at 136, 554 S.E.2d at 678; *Brevorka v. Wolfe Constr., Inc.*, 155 N.C. App. 353, 356, 573 S.E.2d 656, 659 (2002), *disc. review denied*, 357 N.C. 61, 579 S.E.2d 385 (2003).

Slaughter v. Swicegood, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004).

In the present case, our review of the record indicates there is competent evidence to support the trial court's findings that the Application and Contract "does not bear the signature of an agent or representative of MAO showing acceptance of same" and "does not show on its face that the document was accepted by MAO as a contract and MAO has denied acceptance of same." It is undisputed that the Application and Contract was not signed by MAO. Moreover, it is clear from MAO's pleadings and the arguments of its counsel that, for purposes of defending against the merits of plaintiff's breach of contract claims, MAO has throughout this litigation denied acceptance of the Application and Contract as a contract between itself and plaintiff. Because the arbitration clause contained within the Application and Contract was the sole basis for MAO's amended motion to compel arbitration, we hold that the trial court's findings support its conclusion that MAO failed to carry its burden of proving the existence of a written agreement between plaintiff and MAO to arbitrate, as required by N.C. Gen. Stat. § 1-567.3(a). Accordingly, the trial court's order denying MAO's amended motion to compel arbitration is

Affirmed.

Judges McGEE and McCULLOUGH concur.

HOME SAVINGS BANK, SSB OF EDEN, PLAINTIFF v. COLONIAL AMERICAN CASUALTY AND SURETY COMPANY, AND COMMUNITY BANK SERVICES, INC., DEFENDANTS

No. COA03-1110

(Filed 6 July 2004)

1. Insurance— fidelity bond—ambiguous language—knowledge of dishonest act—interpreted for insured

Ambiguous language in a fidelity bond was correctly interpreted for the insured, and summary judgment was correctly granted for plaintiff, where a bank contended that a provision

ending coverage when it first learned of a dishonest act by an employee applied only to knowledge gained after the bond became effective, while defendant-insurer contended that the provision applied to knowledge gained at any time.

2. Appeal and Error— cross-appeal—mootness

A cross-appeal was moot where it was dependent on another issue correctly resolved for plaintiff by the trial court.

Appeal by defendant Colonial American Casualty and Surety Company, and cross-appeal by plaintiff, from memorandum and order entered 21 April 2003 and judgment entered 12 May 2003 by Judge Judson D. DeRamus, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 28 April 2004.

Forman Roassabi Black, P.A., by T. Keith Black, and Wright, Robinson, Osthimer & Tatum, by Thomas S. Schaufelberger, pro hac vice, for defendant-appellant Colonial American Casualty and Surety Company, and for defendant/cross-appellee Community Bank Services, Inc.

Pinto Coates Kyre & Brown, P.L.L.C., by David L. Brown and Deborah J. Bowers, for plaintiff-appellee/cross-appellant.

ELMORE, Judge.

Defendant Colonial American Casualty and Surety Company (Colonial) appeals from judgment entered following a memorandum and order denying its motion for summary judgment against plaintiff Home Savings Bank, SSB of Eden (Home Savings), and granting summary judgment in favor of Home Savings against Colonial. Home Savings cross-appeals from that portion of the memorandum and order granting summary judgment in favor of defendant Community Bank Services, Inc. (Community) against Home Savings. For the reasons stated below, we (1) affirm the memorandum and order granting summary judgment in favor of Home Savings against Colonial, and therefore affirm the subsequent judgment, and (2) dismiss Home Savings' cross-appeal as moot.

The relevant facts are as follows: Colonial sold to Home Savings, a North Carolina State Savings Bank, a fidelity bond effective for the period 1 January 2001 to 1 January 2002. The bond was sold to Home Savings by and through Colonial's agent, Community. The bond provided, among other things, for indemnification of Home

Savings in the event of a loss caused by dishonest or fraudulent acts committed by an employee, subject to certain limitations expressly contained therein.

Colonial required Home Savings to complete an application before agreeing to issue the bond. On 8 December 2000, Home Savings' President, W. Thomas Flynt, met with a representative of broker Community and completed the application for bond coverage. In its written discovery responses, Colonial stated that it drafted the application, which "basically follows" a standard form widely used in the bond industry. Flynt testified at his deposition that he responded truthfully to each question on the application. The application for bond coverage did not contain any questions asking if Home Savings was aware of any prior dishonest or fraudulent conduct on the part of its employees, and Home Savings did not divulge any such knowledge.

At the inception of the bond's coverage period on 1 January 2001, Marsha Rice Gibson was employed by Home Savings as an assistant vice president. Gibson had worked for Home Savings since October 1984, when she was hired as a teller. In 1985, Home Savings' management became aware that Gibson had been convicted in 1981 of embezzling funds from a previous employer, Northwestern Bank.[1] After obtaining assurances in August 1981 from its fidelity bond carrier at the time, CNA Insurance, that Gibson would continue to be covered as an insured employee under its then-current fidelity bond, Home Savings retained Gibson as an employee. Gibson remained in the employ of Home Savings until May 2001, when it was discovered that Gibson had, over several years, embezzled over one million dollars from certain customer accounts at Home Savings.[2] On 2 July 2001, Gibson entered a plea of guilty in federal court to one count of "theft, embezzlement, misapplication by a bank official."

Home Savings thereafter made a claim under the bond for the loss caused by Gibson's embezzlement and submitted supporting docu-

1. Gibson did not disclose her embezzlement conviction on her application for employment with Home Savings, instead stating that she left Northwestern's employ because she was getting married. After Gibson made restitution and served almost three years of probation, the United States District Court for the Middle District of North Carolina entered a "Certificate of Vacation of Conviction" with respect to Gibson's 1981 conviction on 2 May 1984, approximately five months prior to Gibson's employment by Home Savings.

2. The total amount embezzled by Gibson was later determined to be $1,745,562.21.

mentation as requested by Colonial. By letter to Home Savings dated 12 November 2001, Sandra M. Bourbon, claims counsel for Colonial's parent company, Zurich North America, rejected Home Savings' claim, noting that Home Savings was aware of Gibson's 1981 embezzlement conviction at the time Colonial issued the 2001-2002 bond. As the sole basis for rejecting Home Savings' claim, Bourbon's letter cited language contained in Section 12 of the bond, which provided in pertinent part as follows:

> This bond terminates as to any employee or any partner, officer, or employee of any processor (a) as soon as any director, titled officer or risk manager of any Insured not in collusion with such person learns of any dishonest or fraudulent act committed by such person at any time, whether in the employment of the Insured or otherwise, whether or not of the type covered under Insuring Agreement (A), against the Insured or any other person or entity . . . .
>
> . . . .
>
> Termination of the bond as to any Insured terminates liability for any loss sustained by such Insured which is discovered after the effective date of such termination.

In closing, Bourbon's letter stated "we conclude that [Home Savings'] claim would not be covered under the bond, as the coverage pertaining to Marsha Rice Gibson was terminated once the bank became aware of her prior dishonesty."

Home Savings responded by filing a complaint in Rockingham County Superior Court on 5 April 2002, seeking a declaratory judgment obligating Colonial to pay Home Savings the policy limits of liability under the bond and asserting a claim for breach of contract against Colonial, and also bringing claims against bond broker Community for breach of contract, breach of fiduciary duty, and negligence. On 8 August 2002, the trial court denied the respective motions to dismiss brought by defendants Colonial and Community pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). On 24 March 2003, defendants Colonial and Community each filed motions for summary judgment. On 2 April 2003, Home Savings filed a cross-motion for summary judgment against Colonial, asserting specifically that Home Savings "is entitled to recover for its loss under the terms of the applicable fidelity bond up to the limits of the bond."

On 14 April 2003, a hearing was held on the cross-motions for summary judgment of Home Savings and Colonial, and on Community's motion for summary judgment. By its memorandum and order entered 21 April 2003, the trial court: (1) denied Colonial's motion for summary judgment against Home Savings; (2) allowed Home Savings' motion for summary judgment against Colonial; (3) allowed Community's motion for summary judgment; and (4) denied Home Savings' motion for summary judgment against Community.[3] Regarding the cross-motions of Colonial and Home Savings, the trial court stated as follows:

> These parties disagree about the language in the policy's "TERMINATION OR CANCELLATION" section on pages 20 and 21 [of the bond] . . . which reads in pertinent part, "(t)his bond terminates as to any employee or . . . officer . . . as soon as any director, titled officer or risk manager of any Insured not in collusion with such person learns of any dishonest or fraudulent act committed by such person at any time . . . ." The disagreement centers on the words "as soon as . . . learns."
>
> [Home Savings] contends that this language pertains only to knowledge first obtained after the policy's effective date. Defendant Colonial contends that it also pertains to knowledge of dishonesty of the employee obtained for the first time by [Home Savings] in 1985.
>
> . . . .
>
> [Home Savings'] contention that the language "as soon as . . . learns" implies learning or discovery after the effective date of the policy is a reasonable one in the context here in which a new policy is being issued by a new insurer, and the new insurer has not been misled as of the effective date by the insured in the preceding application. If the language in question is not clear as contended by [Home Savings], then it is at least ambiguous and must be construed in [Home Savings'] favor.

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3. The record indicates that Home Savings did not actually move for summary judgment against Community, but rather opposed Community's motion for summary judgment, arguing that material issues of fact existed with respect to these claims. In allowing Community's motion and purporting to deny Home Savings' "motion" with respect to Community, the trial court noted in its memorandum and order that "the conclusion that summary judgment is appropriate against defendant Colonial negates any alternative liability of defendant Community dependent upon a lack of coverage by defendant Colonial."

Thereafter, on 12 May 2003, the trial court entered judgment in favor of Home Savings against Colonial in the amount of $1,000,000.00, representing the principal sum due under the bond, plus interest and costs.

Colonial now appeals from the 21 April 2003 memorandum and order allowing Home Savings' motion for summary judgment, and the subsequent judgment entered 12 May 2003. Home Savings cross-appeals from the 21 April 2003 memorandum and order granting summary judgment in favor of Community.

Standard of Review

Summary judgment is properly granted 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, 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, 21, 567 S.E.2d 403, 408 (2002) (citations omitted).

Colonial's Appeal

[1] In the present controversy between Colonial and Home Savings, neither party contends that any material facts are in dispute. Rather, the parties' dispute arises from their differing interpretations of the bond's terms, specifically the language concerning termination of coverage as to any employee upon Home Savings learning that the employee has committed a dishonest or fraudulent act. In its lone assignment of error, Colonial argues the trial court erred in ruling that because Home Savings first learned of Gibson's 1981 embezzlement *before* the bond's coverage period commenced, as a matter of law the termination clause did not disqualify Gibson from coverage, resulting in coverage under the bond for the loss caused by Gibson's subsequent embezzlement. Colonial contends that the termination clause must be interpreted to disqualify Gibson from coverage, essentially arguing that the bond terminated as to Gibson at its inception because Home Savings was aware *before the coverage period began* of her prior dishonest conduct. We disagree with Colonial's assertions.

Colonial urges this Court to resolve the controversy in its favor by adopting the construction of the bond's termination clause it advocated unsuccessfully before the trial court. Simply put, Colonial argues that the termination clause operates to disqualify from coverage any employee whom Home Savings knows to have committed a dishonest act, regardless of whether Home Savings first learned of the act *before* or *after* the bond's coverage period commenced. Home Savings maintains the trial court correctly construed the termination clause as requiring that it discover, for the first time only *after* commencement of the coverage period, an employee's dishonest conduct in order for the bond coverage to terminate as to that employee.

At the outset, we note that in North Carolina, fidelity bonds "are in the nature of contracts of insurance, and are subject to rules of construction applicable to insurance policies generally." *Thomas & Howard Co. of Shelby, Inc. v. American Mut. Liability Ins. Co.*, 241 N.C. 109, 113, 84 S.E.2d 337, 340 (1954). It is well-settled in North Carolina that:

> '[w]here the language used in the policy is ambiguous and reasonably susceptible to more than one interpretation, judicial construction is necessary.' *If there is uncertainty or ambiguity in the language of an insurance policy regarding whether certain provisions impose liability, the language should be resolved in the insured's favor.* Moreover, exclusions from liability are not favored, and are to be strictly construed against the insurer.

Eatman Leasing, Inc. v. Empire Fire & Marine Ins. Co., 145 N.C. App. 278, 281, 550 S.E.2d 271, 273 (2001), *rev. denied*, 356 N.C. 298, 570 S.E.2d 503, (2002) (emphasis added).

Our Supreme Court has stated as follows regarding judicial construction of fidelity bond language:

> [W]e must place such bonds in the general class of insurance policies, and construe them upon the same general principles; that is, most strongly against the company, and most favorably to their general intent and essential purpose. In [*American Surety Co. v. Pauly*, 170 U.S. 133, 42 L. Ed. 977 (1898)], Justice Harlan, speaking for a unanimous Court, says on page 144: "If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the

> reason that the instrument which the Court is invited to interpret was drawn by the attorneys, officers, or agents of the surety company. This is a well-established rule in the law of insurance."

Bank of Tarboro v. Fidelity and Deposit Co., 128 N.C. 271, 275-76, 38 S.E. 908, 910 (1901) (citations omitted). Moreover, our Supreme Court has further stated that in construing fidelity bond terms, "if the language of the instrument or instruments is ambiguous, they must be construed most strongly against the [insurer], who chose words to suit itself and sold them to the bank for compensation for the purpose of indemnifying against loss occasioned by unfaithful officers." *Hood v. Davidson*, 207 N.C. 329, 334, 177 S.E. 5, 9 (1934).

We have carefully examined the language of the fidelity bond at issue in the present case with the foregoing principles in mind. We agree with the trial court's conclusion that the construction of the termination clause advanced by Home Savings—i.e., that coverage as to any employee under the bond only terminates where Home Savings initially discovers, *after the coverage period's commencement*, the employee's dishonest conduct—is a reasonable one. Significantly, the termination clause provides that the bond "*terminates* . . . as soon as" Home Savings "learns" of any dishonest conduct by an employee. Use of the present, rather than past, tense here suggests an intent by the parties that coverage under the bond must first commence *before* discovery of an employee's dishonest conduct will operate to terminate it. This interpretation is supported by the deposition testimony of Colonial's claims counsel, Bourbon, that "you have to have the bond for the coverage to terminate . . . you have to have the bond issued before . . . the termination provision can apply to the bond claim."

We conclude that a reasonable reading of the termination clause "could produce either the reading offered by [Home Savings] or the reading offered by [Colonial]; 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); *see also Wachovia Bank & Trust Co. v. Westchester Fire Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970) ("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.") There was evidence before the trial court, in the form of Colonial's discovery responses, that "Colonial drafted the . . . bond[,]" the text of which "derives primarily from the Surety Association of America ("SAA") Standard Form 24"

and which "Colonial then enhanced . . . with those changes routinely being offered in the marketplace." With respect to the termination clause presently at issue, Colonial's discovery responses specifically acknowledge, and Sandra Bourbon, Colonial's 30(b)(6) designee, confirmed in her deposition, that Colonial modified that part of the Standard Form 24's language, albeit not in a way material to the portions of that clause giving rise to the parties' present dispute.

Based on the principles endorsed by our Supreme Court regarding construction of fidelity bond language in *Bank of Tarboro v. Fidelity and Deposit Co.*, *supra*, and *Hood v. Davidson*, *supra*, as well as on the well-settled principle that ambiguous terms in a policy of insurance are to be resolved in the insured's favor, *see Eatman Leasing, Inc. v. Empire Fire & Marine Ins. Co.*, *supra*, we conclude that the trial court did not err in determining that the termination clause did not operate to disqualify Gibson from coverage under the bond. We affirm the trial court's order for summary judgment in favor of Home Savings and the subsequent entry of judgment against Colonial.

Home Savings' Cross-Appeal

[2] In granting bond broker Community's cross-motion for summary judgment against Home Savings, the trial court stated as follows in its memorandum and order entered 21 April 2003:

> As to the summary judgment motions pertaining to defendant Community Bank Services, Inc., the conclusion that summary judgment is appropriate against defendant Colonial [in favor of Home Savings] negates any alternative liability of defendant Community dependent upon a lack of coverage by defendant Colonial, therefore . . . defendant Community's cross motion [is] allowed.

We conclude that by affirming the trial court's grant of summary judgment in favor of Home Savings, Home Savings' cross-appeal with respect to Community is rendered moot and is hereby dismissed. "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); *see also In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978) ("Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no

longer at issue, the case should be dismissed[.]"), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297.

Affirmed in part and dismissed in part.

Judges BRYANT and GEER concur.

IN THE MATTER OF: APPEAL OF WEAVER INVESTMENT COMPANY FROM THE DECISION OF THE ALAMANCE COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING REAL PROPERTY TAXATION FOR TAX YEAR 2001

No. COA03-1226

(Filed 6 July 2004)

Taxation— property—appraisal value—cost approach—income approach

A whole record test revealed that the Property Tax Commission did not err by relying on an independent appraiser's determination of property value to determine that the true value of taxpayer's hotel property was $2,880,000 instead of using the county appraiser's value of $4,813,953, because: (1) the county's appraiser used the cost approach, which is better suited for valuing specialty property or newly developed property, instead of the income approach which is the most reliable method of valuation; (2) the county appraiser admitted to using the income approach to value similar investment properties such as apartments and other commercial properties in the area, but failed to explain why he valued the pertinent property differently; (3) the taxpayer's appraiser employed three different methods and concluded that the income approach was the best indicator of value; (4) the county's appraiser failed to take into account the statutory factors listed in N.C.G.S. § 105-317(a) that affect the true value of the taxpayer's property such as location, zoning, quality of soil, waterpower, water privileges, past income, probable future income, and any other factors that may affect its value; (5) an appraisal must consider any disadvantages inherent in a property's location including the declining attractiveness of the property's use for a specific purpose; and (6) the county's appraiser failed to physically visit the property as required by N.C.G.S.

§ 105-317(b) and failed to compare the property to other hotel properties in the Burlington area.

Appeal by respondent Alamance County from final decision entered 1 May 2003 by Chairman Terry L. Wheeler for the North Carolina Property Tax Commission. Heard in the Court of Appeals 9 June 2004.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by S. Leigh Rodenbough IV and Charles F. Marshall III, for petitioner-appellee Weaver Investment Company.

Alamance County Attorney David I. Smith for respondent-appellant Alamance County.

TYSON, Judge.

Alamance County ("the County") appeals the decision of the North Carolina Property Tax Commission holding: (1) the appraised value of Weaver Investment Company's ("the taxpayer") improved property was error; (2) the County used an arbitrary and illegal method of appraisal resulting in a value substantially exceeding the true value of the taxpayer's property; and (3) reducing the value of the property from $4,813,953.00 to $2,880,000.00. We affirm.

I. Background

The taxpayer owns the Burlington Holiday Inn ("BHI") located off of Interstate 85 at Exit 145 in Burlington, North Carolina. The BHI was built in 1987 and has operated as a full-service hotel since 1989. In 1989, Exit 145 was an active commercial corridor as Burlington was considered "the outlet center of the South." In the 1990s, other outlet shopping centers began opening in competition with Burlington. Commercial activity in the Burlington area dramatically declined. The restaurants that surrounded BHI that attracted hotel patrons closed or were converted into other businesses, such as car dealerships or smaller restaurants.

The change and decline in the surrounding areas decreased the occupancy and revenues at BHI: occupancy dropped 6.6 percent between 1997 and 1998, dropped 3.7 percent in 1999, increased 6.4 percent in 2000, and again dropped 11.3 percent in 2001 to a 55 percent occupancy rate. Room revenues dropped $171,211.00 between 1997 and 1998, dropped $75,983.00 in 1999, increased $97,954.00 in

2000, and dropped $250,021.00 in 2001. Total revenues declined to $2.5 million in 1998 and $2.36 million in 1999, increased to $2.51 million in 2000, and dropped to $2.21 million in 2001.

In January 2001, the County was required by statute to conduct a county wide octennial reappraisal of real property. *See* N.C. Gen. Stat. § 105-286 (2003). Luther Ford ("Ford"), an employee of Cole Lloyd Tremble Company, was the project manager for the County's reappraisal. In valuing BHI, Ford used a "cost approach" method. Ford estimated the replacement cost of the building, deducted the accrued depreciation of the building, and added the estimated value of the land. Ford did not use any other approaches to arrive at a value for BHI. Using the cost approach, Ford appraised the land value of BHI at $5.67 per square foot. The County relied exclusively on Ford's data to appraise BHI at $4,813,953.00.

The taxpayer appealed the County's appraisal to the Alamance County Board of Commissioners ("the Board"), sitting as the Alamance County Board of Equalization and Review. The County's appraisal of value for BHI was sustained by the Board. The taxpayer appealed the decision to the Property Tax Commission ("the Commission").

The taxpayer subsequently retained C.D. Foster ("Foster") to perform an independent appraisal of BHI. Foster's report contained a detailed physical description of the property and considered the visibility of BHI from Interstate 85, the accessibility of BHI from the road, characteristics of the neighborhood, and BHI's standing among a competitive set of surrounding hotels, many of which Ford did not consider in his appraisal of BHI.

Foster employed three different valuation methods in his appraisal—a "cost approach," a "comparable sales approach," and an "income approach." Foster appraised BHI at $3,740,000.00 using the "cost approach," $3,630,000.00 under the "comparable sales approach," and $2,880,000.00 under the "income approach." Foster concluded the "income approach" was the best indicator of value for BHI because it is "an investment grade property" and "[t]he potential to produce income and show profit is the driving force to any investor . . . ."

On 13 March 2003, the Commission heard the taxpayer's appeal. The Commission heard testimony from numerous witnesses, including Ford and Foster concerning their valuation methods. On 1 May

2003, the Commission entered a final decision reducing the County's appraisal of BHI from $4,813,953.00 to $2,880,000.00. The Commission found that the County "did not properly appraise the Taxpayer's property in accordance with its schedule of values, standards, and rules effective as of January 1, 2001." The Commission also found that the taxpayer met his burden of proof by producing "competent, material and substantial evidence" to show: (1) the County used an "arbitrary or illegal method of appraisal;" and (2) the County's appraisal "substantially exceeded the true value in money of the subject property." The County appeals.

II. Issues

The issues are whether the Commission erred in: (1) relying on an independent appraiser's determination of property value to determine that the true value of BHI was $2,880,000.00; and (2) concluding that the County employed illegal and arbitrary methods of valuation that resulted in a valuation substantially in excess of the true value of the property, as these findings of fact and conclusions of law are not supported by competent evidence.

III. Standard of Review

This Court reviews the Commission's decision under the "whole record" test. *In re Appeal of the Greens of Pine Glen, Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). The "whole record" test "is not a tool of judicial intrusion" and this Court only considers whether the Commission's decision has a "rational basis in the evidence." *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979); *see also Greens of Pine Glen, Ltd.*, 356 N.C. at 647, 576 S.E.2d at 319. We may not substitute our judgment for that of the Commission even when reasonably conflicting views of the evidence exist. *See In re Appeal of Owens*, 144 N.C. App. 349, 352, 547 S.E.2d 827, 829, *disc. rev. denied*, 354 N.C. 361, 556 S.E.2d 575-76 (2001) ("It is the responsibility of the Commission to determine the weight and credibility of the evidence presented."); *In re Appeal of Westinghouse Electric Corp.*, 93 N.C. App. 710, 712, 379 S.E.2d 37, 38 (1989) ("The weight to be accorded relevant evidence is a matter for the factfinder, which is the Commission.")

IV. The Commission's Determination of the Value of BHI

The County contends that the Commission erred in relying on the taxpayer's independent appraiser and determining that the true value of BHI was $2,880.000.00. We disagree. As both assignments

of error are substantially similar, we address both in this section of the opinion.

A county's *ad valorem* tax assessments are presumed to be correct. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761-62 (1975). The burden is on the taxpayer to rebut that presumption by providing competent, material, and substantial evidence to show: (1) the county used an arbitrary or illegal method of valuation; and (2) the county's assessment substantially exceeds the true value of the property. *Id.* at 563, 215 S.E.2d at 762. "It is the function of the administrative agency to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. We cannot substitute our judgment for that of the agency when the evidence is conflicting." *In re Appeal of McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 126-27 (1981); *see also In re Appeal of Owens*, 144 N.C. App. at 352, 547 S.E.2d at 829; *In re Appeal of Westinghouse Electric Corp.*, 93 N.C. App. at 712, 379 S.E.2d at 38.

N.C. Gen. Stat. § 105-286 (2003) provides:

> (a) Octennial Plan—[E]ach county of the State, as of January 1 of the year prescribed in the schedule set out in division (a)(1), below, and every eighth year thereafter, shall reappraise all real property in accordance with the provisions of G.S. 105-283 and 105-317.

N.C. Gen. Stat. § 105-283 (2003), entitled "Uniform appraisal standards," provides:

> All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C. Gen. Stat. § 105-317 (2003) provides:

> (a) Whenever any real property is appraised it shall be the duty of the persons making appraisals:

> (1) In determining the true value of land, to consider as to each tract . . . at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; water privileges; . . . past income; probable future income; and any other factors that may affect its value . . . .
>
> (2) In determining the true value of a building or other improvement, to consider at least its location; type of construction; age; replacement cost; cost; adaptability for residence, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value.

This Court has held that the income approach is the "most reliable" method to determine the market value of investment or income producing property. *In re Appeal of Owens*, 132 N.C. App. 281, 287, 511 S.E.2d 319, 323 (1999). The cost approach is "better suited for valuing specialty property or newly developed property and is often used when no other method will yield a realistic result." *Greens of Pine Glen, Ltd.*, 356 N.C. at 648, 576 S.E.2d at 320. The reason is that the cost approach "may not effectively reflect market conditions." *In re Appeal of Belk-Broome*, 119 N.C. App. 470, 474, 458 S.E.2d 921, 924 (1995), *aff'd*, 342 N.C. 890, 467 S.E.2d 242 (1996).

The County relied exclusively on the cost approach in reappraising BHI. Ford, the County's appraiser, failed to use the income approach to provide alternative or supporting evidence for its valuation. By rejecting the income approach, the County failed to use the "most reliable" method of valuation in appraising BHI. *In re Appeal of Owens*, 132 N.C. App. at 287, 511 S.E.2d at 323. Further, Ford admitted using the income approach to value similar investment properties such as apartments and other commercial properties in the area, and failed to explain why he valued BHI differently using solely the cost approach.

Foster, the taxpayer's appraiser, employed three different valuation methods in his appraisal—a cost approach, a comparable sales approach, and an income approach. Foster valued BHI at $3,740,000.00 using the cost approach, $3,630,000.00 under the comparable sales approach, and $2,880,000.00 under the income approach. Foster concluded that the income approach was the best indicator of value for BHI because it is "an investment grade property" and "[t]he potential to produce income and show profit is the

driving force to any investor . . . ." Foster's cost approach valuation was over $1,000,000 less than Ford's valuation.

Further, Ford failed to take into account the statutory factors listed in N.C. Gen. Stat. § 105-317(a) that affect the true value of BHI, such as "location; zoning; quality of soil; waterpower; water privileges . . . past income; probable future income; and any other factors that may affect its value." The evidence shows that Foster relied on the occupancy and daily room rates for similar hotels in Burlington and included projections for other income and expenses typically associated with a hotel to calculate BHI's net income. Foster also included BHI's actual income and expenses in his analysis. After applying a capitalization rate of 0.1093 to BHI's projected net operating income of $314,853.00, Foster arrived at a total valuation of $2,880,000.00 for BHI.

Our Supreme Court held that an appraisal must consider any "disadvantages inherent" in a property's location including "the declining attractiveness" of the property's use for a specific purpose. *In re Ad Valorem Valuation of Property at 411-417 West Fourth Street*, 282 N.C. 71, 78, 191 S.E.2d 692, 697 (1972). In *In re Appeal of Stroh Brewery Co.*, this Court affirmed the Commission's determination that a county erred by failing to consider functional and economic obsolescence that affected the subject property. 116 N.C. App. 178, 183-84, 447 S.E.2d 803, 805 (1994).

The record also shows that Ford failed to physically visit BHI as required by N.C. Gen. Stat. § 105-317(b). Foster physically visited BHI and provided an adequate and detailed description of BHI's conditions. Our Supreme Court, interpreting a prior version of N.C. Gen. Stat. § 105-317(b), held "the legislative directive is crystal clear: all property being reappraised by a county must receive an on-site visit and observation by the appraiser." *McElwee*, 304 N.C. at 82, 283 S.E.2d at 124; *see also In re Appeal of Parsons*, 123 N.C. App. 32, 41-42, 472 S.E.2d 182, 188-89 (1996) (A county appraisal considered arbitrary where appraiser, among other things, failed to physically visit the property prior to valuation).

Ford testified that he "drove by" BHI but did not indicate that he actually visited the site. While the failure to perform a physical evaluation is not in and of itself grounds for setting aside the County's valuation, it is a factor to be considered when determining whether the County's valuation was arbitrary or illegal. *See In re Appeal of Land*

and Mineral Company, 49 N.C. App. 608, 614, 272 S.E.2d 878, 882 (1980), *cert. denied*, 302 N.C. 397, 279 S.E.2d 351 (1981).

Ford also failed to compare BHI to other hotel properties in the Burlington area. Rather, Ford compared BHI to two restaurants at Exit 141 and a new drug store located at Exit 145. These properties were not comparable to BHI in function, age, or location. Further, when valuing the land, Ford ascribed a per square foot value to BHI that was higher than the land value of a more accessible hotel directly across the street, a new drugstore on a corner lot, and the Ramada Inn that fronted Interstate 85 at Exit 143. Ford offered no credible explanation or supporting evidence to the Commission to account for the higher land value placed on BHI. *See In re Appeal of Parsons*, 123 N.C. App. at 41-42, 472 S.E.2d at 188-89 (A county appraisal deemed arbitrary where appraiser, among other things, used comparable sales that did not reflect characteristics of subject property).

The evidence discussed above shows that the County failed to: (1) use the proper method of valuation by relying exclusively on the cost approach in valuing BHI; (2) make proper adjustments to reflect the true value of BHI; and (3) consider the relevant statutory indicia of value listed in N.C. Gen. Stat. § 105-317 (a).

The County's failure to consider the location and income-producing potential of BHI, combined with the credible evidence of Foster's appraisal using all three methods, is competent, material, and substantial evidence to support the Commission's findings of fact and conclusions of law that the County's appraisal was arbitrary and illegal and substantially exceeded the true value of the property. *In re Appeal of Amp*, 287 N.C. at 563, 215 S.E.2d at 762; *see In re Ad Valorem Valuation of Property*, 282 N.C. at 78, 191 S.E.2d at 697. The Commission's decision has a "rational basis in the evidence." *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979). The County's assignments of error are overruled.

V. Conclusion

The County failed to show that the Commission erred in finding that the taxpayer presented competent, material, and substantial evidence to show that the County used an arbitrary and illegal method in appraising BHI and that the assigned value substantially exceeded BHI's true value. The County also failed to show that the Commission's valuation of BHI at $2,880,000.00 was error. The

Commission's decision has a "rational basis in the evidence" and is affirmed. *Id.*

Affirmed.

Judges BRYANT and STEELMAN concur.

DEEP RIVER CITIZENS' COALITION, PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, RESPONDENT, CITY OF GREENSBORO AND PIEDMONT TRIAD REGIONAL WATER AUTHORITY, RESPONDENT-INTERVENORS, DEEP RIVER COALITION, INC., ET AL. PETITIONERS v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, RESPONDENT, CITY OF GREENSBORO AND PIEDMONT TRIAD REGIONAL WATER AUTHORITY, RESPONDENT-INTERVENORS

No. COA02-1657

(Filed 6 July 2004)

1. **Administrative Law— whole record test—dam proposal—water quality standards not violated**

The trial court properly chose the whole record test where the question was whether there was substantial evidence that DENR had provided reasonable assurance that the proposed Randleman Dam and Reservoir would not violate water quality standards. This matter was filed before N.C.G.S. § 150B-51(c) became applicable.

2. **Environmental Law— water quality—substantial evidence—discrepancies for agency**

The trial court properly concluded that there was substantial competent evidence to support the Environmental Management Commission's determination that DENR had provided reasonable assurance that water quality standards would not be violated by the proposed dam and reservoir. Petitioner's argument merely raises discrepancies in the evidence; under the whole record test, the reviewing court must not substitute its evaluation of the evidence for that of the agency. Moreover, the court had substantial evidence that the State can impose additional restrictions if water quality standards are actually threatened.

DEEP RIVER CITIZENS' COALITION v. N.C. DEP'T OF ENV'T & NATURAL RES.

[165 N.C. App. 206 (2004)]

Appeal by petitioners from judgment and order entered 10 September 2002 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 20 August 2003.

Cunningham, Dedmond, Petersen & Smith, LLP, by Marsh Smith, and Terris, Pravlik & Millian, LLP, by Bruce J. Terris and Demian A. Schane, for petitioners-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Kathryn Jones Cooper and Special Deputy Attorney General Francis W. Crawley, for respondent-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by George W. House, and Linda A. Miles, for respondent-intervenor City of Greensboro, and Hunton & Williams, by Charles D. Case and Julie Beddingfield, for respondent-intervenor Piedmont Triad Regional Water Authority.

TIMMONS-GOODSON, Judge.

American Canoe Association, Inc. and Deep River Citizens' Coalition, Inc. ("petitioners") appeal the judgment and order of the trial court granting summary judgment in favor of the North Carolina Department of Environment and Natural Resources ("DENR"), City of Greensboro ("Greensboro") and Piedmont Triad Regional Water Authority ("Water Authority") (collectively hereinafter "respondents"). For the reasons stated herein, we affirm the decision of the trial court.

Since May of 1999, petitioners have contested the Randleman Dam and Reservoir construction project through various legal petitions and court hearings. In September 2000, the instant case was brought before the Environmental Management Commission (the "EMC"). Petitioners moved the EMC for summary judgment, and respondents filed a cross-motion for summary judgment. The EMC granted summary judgment for defendants. Petitioners appealed to the Superior Court. In September 2002, the Superior Court also granted summary judgment for respondents, finding that DENR (1) properly issued a 401 Water Quality Certification ("401 Certification") for the project; (2) substantially proved that the Randleman Dam project would not violate the State's water quality standards; and (3) did not violate the North Carolina Environmental Policy Act ("NCEPA") by issuing the 401 Certification before a final environmental impact statement ("FEIS") was complete. It is from this sum-

mary judgment that petitioners now appeal. Further facts are set out in the opinion as necessary.

Petitioners argue that the trial court erred by (1) applying the whole record test rather than the *de novo* standard in reviewing the EMC's decision; (2) denying petitioners' motion for summary judgment because respondents failed to reasonably assure the EMC that the project would not violate the State's water standards; and (3) upholding the 401 Certification although it was issued before a FEIS was complete. For the reasons stated herein, we affirm the trial court's order.

[1] By their first assignment of error, petitioners argue the trial court erred by applying the whole record test to one of the sub-issues presented on appeal. We examine the trial court's affirmance of the EMC's decision to determine "(1) whether the trial court exercised the appropriate standard of review; and (2) whether the trial court properly applied the standard of review." *Clark Stone Co. v. N.C. Dep't of Env't & Natural Res.*, 164 N.C. App. 24, 31, 594 S.E.2d 832, 837 (2004); *Town of Wallace v. N.C. Dep't of Env't & Natural Res.*, 160 N.C. App. 49, 52, 584 S.E.2d 809, 812-13 (2003). This Court's scope of review is the same as that utilized by the trial court. *Clark Stone Co.*, 164 N.C. App. at 31, 594 S.E.2d at 837. The trial court may reverse or modify an agency's final decision if

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

N.C. Gen. Stat. § 150B-51(b) (2001). The trial court reviews *de novo* any alleged errors of law. *County of Wake v. N.C. Dep't of Env't*, 155

N.C. App. 225, 233, 573 S.E.2d 572, 579 (2002), *disc. review denied*, 357 N.C. 62, 579 S.E.2d 387 (2003). However, "if the petitioner contends the agency decision was not supported by the evidence, N.C.G.S. § 150B-51(5), or was arbitrary, capricious, or an abuse of discretion, N.C.G.S. § 150B-51(6), the whole record test is utilized." *Id.* Under the whole record test, the trial court examines all of the evidence before the agency in order to determine whether the decision has a rational basis in the evidence. *Town of Wallace*, 160 N.C. App. at 54, 584 S.E.2d at 813. Where there is substantial competent evidence in the record to support the findings, the agency decision must stand, as the trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency. *See Clark Stone Co.*, 164 N.C. App. at 31-32, 594 S.E.2d at 837.[1]

Petitioners contend the trial court should have applied *de novo* review to the issue of whether there was substantial evidence that DENR provided reasonable assurance that the proposed Randleman Dam and Reservoir would not violate applicable water quality standards. We disagree. Section 150B-51 of the General Statutes clearly mandates that the trial court must review a petitioner's allegation of insufficient evidence to support an agency decision "in view of the entire record as submitted." N.C. Gen. Stat. § 150B-51(b)(5). We conclude that the trial court properly applied the whole record test to this issue.

[2] Petitioners further argue the trial court erred by finding and concluding there was substantial competent evidence to support the EMC's determination that the Randleman Dam and Reservoir would not violate certain water quality standards. Specifically, petitioners argue there was insufficient evidence that the proposed project would not violate the State's water quality standards for chlorophyll *a*. The governing standard applicable to all fresh surface waters in North Carolina provides that the amount of chlorophyll *a* should not exceed

> 40 μg/l for lakes, reservoirs, and other waters subject to growths of macroscopic or microscopic vegetation not designated as trout waters, and not greater than 15 μg/l for lakes, reservoirs, and

1. Subsection (c) of N.C. Gen. Stat. § 150B-51, which requires the reviewing court to engage in a *de novo* review of a final agency decision where the agency did not adopt the ALJ recommendation, was enacted in 2000 and is applicable to contested cases commenced on or after 1 January 2001. Because the contested case petition in the instant case was filed 3 May 1999, the standard of review articulated in subsection (c) does not apply.

> other waters subject to growths of macroscopic or microscopic vegetation designated as trout waters (not applicable to lakes and reservoirs less than 10 acres in surface area); the Commission or its designee may prohibit or limit any discharge of waste into surface waters if, in the opinion of the Director, the surface waters experience or the discharge would result in growths of microscopic or macroscopic vegetation such that the standards established pursuant to this Rule would be violated or the intended best usage of the waters would be impaired . . . .

15A N.C. Admin. Code tit. 15A, r. 2B.0211(3)(a). Petitioners contend the trial court erred in finding and concluding there were adequate assurances that chlorophyll *a* levels would not be violated by the proposed Randleman Reservoir.

In the recommended decision ultimately adopted by the EMC, the administrative law judge found, *inter alia*, that

> 21. Based upon earlier eutrophication modeling done for the [Piedmont Triad Regional Water] Authority by Tetra Tech, [the Division of Water Quality] requested additional eutrophication modeling by Research Triangle Institute. Research Triangle Institute's final report entitled Eutrophication Modeling for the Randleman Lake Project delivered to the DENR Division of Water Quality on September 30, 1998 generally supported the findings in Tetra Tech's analysis. The Research Triangle Institute report includes nutrient response modeling output that predicted future concentrations of chlorophyll *a* in the upper two segments (1 and 2) of the proposed Randleman Lake in excess of 40 μg/l during the summer growing season under certain sets of assumptions.
>
> 22. To address the modeling predictions and to add further protection against eutrophication in Randleman Lake, the EMC, at the request of the Director of [the Division of Water Quality], promulgated nutrient controls in excess of the controls usually applied to WS-IV waters. . . . The Randleman Rules include aggressive steps to affect both point source and nonpoint source nutrient loads and would consequently limit chlorophyll *a* concentrations. After a September 1, 1998 Public Hearing, the Hearing Officers' Report to the EMC . . . concluded that the combination of the Randleman Rules with other control measures available to the [Division of Water Quality] will prevent average chlorophyll *a* concentrations in

> excess [of] 40 μg/l in all segments of Randleman Lake under the various modeling scenarios considered, including the most conservative scenario of the summer growing season.
>
> . . . .
>
> 25. Historically, the chlorophyll *a* standard has not been used to prevent the creation of water supply lakes . . . but has been used as a trigger or indicator of the need for management strategies to protect nutrient-impaired waters.
>
> 26. At the time the Director made the decision to issue the 401 Water Quality Certification to the Authority, he was aware of nutrient response models that predicted instantaneous chlorophyll *a* [excesses] of 40 μg/l under certain scenarios in Water Quality Segments 1 and 2 of the proposed reservoir at certain times. . . .
>
> 27. On March 11, 1999, the Director of the Division of Water Quality signed Water Quality Certification No. 970722 for the Proposed Randleman Reservoir. At the time the Director made this 401 Water Quality Certification determination, he specifically considered the existing Randleman Lake Water Supply Watershed Nutrient Management Strategy and the opportunity that the State would have to impose additional restrictions on nutrient sources in the event of actual or threatened water quality standard violations after the reservoir is constructed.
>
> 28. The Water Quality Certification's conditions include the following specific reference to maintain at a minimum the high level of protection currently provided by the Randleman Lake Water Supply Watershed Nutrient Management Strategy:
>
> > If any changes are made to 15A NCAC 2B.0248, .0249, .0250, .0251 adopted by the Environmental Management [Commission] on November 12, 1998, that are not equal or more protective than these rules, then this Certification is voided and new 401 Certification with public notice is required.

In its review of the final agency decision, the trial court found that the record contained

> more than adequate and substantial evidence to uphold the EMC's Decision's conclusion that there were adequate assurances that

> the chlorophyll *a* standard will be met. For example, as discussed there, the most recent computer models predicted that chlorophyll *a* average for all water quality segments of the Randleman Reservoir will be below the number specified in the rule. As discussed there, the eutrophication modeling, Second DEIS, Second FEIS, Third DEIS, the Review Document, the 1998 hearing Officers' Report, the Randleman Lake Water Supply Watershed Nutrient Management Strategy rules, and the condition designed to maintain the level of protection from nutrients established by the management strategy rules all constitute substantial evidence which support the conclusion by the EMC that there were reasonable assurances that the chlorophyll *a* water quality standard would not be violated when the 401 Certification was issued.

In support of their argument, petitioners direct this Court to computer models used by the EMC in predicting the effects the Randleman project will have on resulting chlorophyll *a* levels. Two of the three models predict levels of chlorophyll *a* in excess of the water quality standard of 40 μg/l, while the third model predicts an average value of chlorophyll *a* below 40 μg/l. Petitioners also contend the computer models were flawed and unreliable. Petitioners argue there was therefore insufficient evidence that future violations of chlorophyll *a* levels will not occur, contrary to the trial court's findings. Respondents argue that the first two models were preliminary, and that the third model most accurately predicts future chlorophyll *a* levels. Inasmuch as petitioners' argument raises mere discrepancies in the evidence, the resolution of which was for the agency, the trial court properly concluded there was substantial competent evidence to support the EMC's determination that DENR provided reasonable assurance that the State's water quality standards would not be violated by the proposed project. *See King v. N.C. Envtl. Management Comm'n*, 112 N.C. App. 813, 817-18, 346 S.E.2d 865, 869 (1993) (stating that, "[u]nder the whole record test, the probative value of testimony is for the agency to determine, and the reviewing court must not substitute its evaluation of the evidence for that of the agency.").

Petitioners argue, however, that the 40 μg/l standard represents a daily maximum rather than an average value, and that the third model, which predicts average levels below 40 μg/l, will nevertheless result in actual violations of the standard. Petitioners contend, therefore, that the trial court lacked substantial evidence that violations of the water quality standards would not occur. Petitioners concede,

however, that "DENR is [not] prohibited from issuing a 401 Certification whenever a computer model predicts levels above 40 μg/l." Further, the evidence tended to show, and the EMC found that "[h]istorically, the chlorophyll *a* standard has not been used to prevent the creation of water supply lakes . . . but has been used as a trigger or indicator of the need for management strategies to protect nutrient-impaired waters." As further found by the EMC, at the time the Director of the Division of Water Quality issued the 401 Certification, he was aware of the potential for water quality standard violations and "specifically considered the existing Randleman Lake Water Supply Watershed Nutrient Management Strategy and the opportunity that the State would have to impose additional restrictions on nutrient sources in the event of actual or threatened water quality standard violations after the reservoir is constructed." We agree with respondents that "no one will know precisely whether or to what extent exceedances [sic] of the Standard will occur until construction of the dam and impoundment of the lake have been completed" but that mere "[k]nowledge of the potential for exceedances [sic] of the chlorophyll *a* standard was not sufficient to preclude [DENR] from issuing the 401 Certification." The trial court therefore had before it substantial and competent evidence that, in the event water quality standards were actually threatened, the State could impose additional restrictions to avoid chlorophyll *a* violations. We conclude the trial court did not err in concluding that DENR provided reasonable assurance that the State's water quality standards would not be violated by the proposed project.

By their final assignment of error, petitioners argue DENR was required to wait until the FEIS was complete before it issued the 401 Certification. Assuming *arguendo* that petitioners are correct, this issue has nevertheless been rendered moot by the subsequent issuance of the FEIS. *See Richmond Co. v. N.C. Low-Level Radioactive Waste Mgmt. Auth.*, 108 N.C. App. 700, 708-09, 425 S.E.2d 468, 473, *affirmed*, 335 N.C. 77, 436 S.E.2d 113 (1993); *accord, Warren County v. North Carolina*, 528 F. Supp. 276, 286 (E.D.N.C. 1981) (noting that the failure to prepare and publish an EIS as required by North Carolina law was rendered moot as a cause of action by the subsequent filing of such a statement). We therefore do not address this assignment of error.

For the reasons stated herein, the judgment and order of the trial court is

Affirmed.

Judges HUNTER and ELMORE concur.

STATE OF NORTH CAROLINA v. WALLACE ANTIJUAN BOSTON

No. COA02-1717

(Filed 6 July 2004)

1. **Firearms and Other Weapons— possession of firearm by felon—penalty for underlying offense—substantial right not affected**

The trial court did not err by denying defendant's motion to dismiss an indictment for possession of a firearm by a felon where the indictment did not state the penalty for the underlying conviction. The provision of N.C.G.S. § 14-415.1(c) that requires the indictment to state the penalty is not material and does not affect a substantial right. Defendant is no less apprised of the conduct which is the subject of the accusation than he would have been if the penalty had been included.

2. **Evidence— possession of firearm by felon—probation for underlying offense revoked—relevant**

Evidence that defendant's probation had been revoked was admissible in a prosecution for possession of a firearm by a felon. The evidence was relevant to proving defendant's status as a felon and the court's limiting instructions were sufficient to cure any prejudice.

3. **Firearms and Other Weapons— possession by felon—no instruction on justification**

The trial court did not err by refusing to give an instruction on justification in a prosecution for possession of a firearm by a felon. Defendant was involved in an ongoing dispute, but there was no evidence that he was under an imminent threat of death or injury when he decided to carry a gun.

Judge WYNN concurs in the result.

Appeal by defendant from judgment entered 23 April 2002 by Judge Zoro J. Guice, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 14 October 2003.

Attorney General Roy Cooper, by Assistant Attorney General June S. Ferrell, for the State.

Reita P. Pendry for defendant-appellant.

TIMMONS-GOODSON, Judge.

Wallace Antijuan Boston ("defendant") appeals his convictions of second-degree trespass and possession of firearms by a felon. For the reasons stated herein, we conclude that defendant received a trial free of prejudicial error.

The factual and procedural history of this case is as follows: In June 1997 Michael Godwin ("Godwin"), deputy director for the Housing Authority of the City of Asheville ("Housing Authority"), sent a letter to defendant banning him from all Housing Authority properties, specifically the Deaverview Apartment complex ("Deaverview"). The ban was based on a prior, dismissed illegal gambling charge against defendant, and an April 1996 conviction of possession with intent to sell and distribute cocaine.

Deaverview resident Derrick Smith ("Smith") testified at trial that on 25 October 2000, he observed defendant walking through the parking lot of the apartment complex carrying a pistol. Defendant walked toward Jonathan Daniels ("Daniels") who, upon observing defendant, ran behind a parked car. Defendant chased Daniels around the car several times. Smith heard defendant repeat the following statement to Daniels two or three times: "Let's put the guns down, put the guns down, let's fight like men." Defendant placed his gun on the ground. Daniels reached over the car, aimed a gun at defendant who was in a crouched position behind the car, and shot defendant four times. Soon thereafter, police officers from the Asheville Police Department and paramedics arrived on the scene.

Defendant was taken to Mission Hospital, where he was treated for four gunshot wounds. On 9 November 2000, two arrest warrants were issued, charging defendant with second-degree trespassing and possession of firearms by a felon. Defendant was subsequently arrested and indicted on these two charges.

At the beginning of trial, defendant made an oral motion to dismiss the charge of possession of firearms by a felon. Defendant argued that the bill of indictment did not provide the penalty for the felony of which defendant was previously convicted, and therefore

the indictment was fatally defective. The trial court denied defendant's motion, and proceeded with the trial. The jury subsequently found defendant guilty of second-degree trespassing and possession of firearms by a felon. Defendant was sentenced to a term of fifteen to eighteen months imprisonment. It is from these convictions that defendant appeals.

As an initial matter, we note that defendant's brief contains arguments supporting only three of the original five assignments of error on appeal. The two omitted assignments of error are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6) (2004). We therefore limit our review to those assignments of error addressed in defendant's brief.

The issues presented for appeal are whether the trial court erred by (I) denying defendant's motion to dismiss the indictment for possession of firearms by a felon; (II) allowing the State to introduce evidence that defendant's probationary sentence was revoked; and (III) failing to instruct the jury that justification is an affirmative defense to the charge of possession of firearms by a felon.

[1] Defendant first argues that the trial court erred by denying defendant's motion to dismiss the indictment for possession of firearms by a felon. Defendant argues that the indictment is fatally defective because it fails to state the statutory penalty for the underlying felony conviction. We disagree.

Defendant was charged pursuant to § 14-415.1 with possession of firearms by a felon. Section 14-415.1(a) prohibits "any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any handgun or other firearm . . . ." Specific information is required for a proper indictment of possession of firearms by a felon. The indictment

> *must* set forth the date that the prior offense was committed, the type of offense and the penalty therefor, and the date that the defendant was convicted or plead guilty to such offense, the identity of the court in which the conviction or plea of guilty took place and the verdict and judgment rendered therein.

N.C. Gen. Stat. § 14-415.1(c) (2003) (emphasis added).

In the case *sub judice*, the indictment in question reads as follows:

> [T]he defendant named above unlawfully, willfully and feloniously did did [sic] have in his custody, care and control a handgun, on October 25, 2000. The defendant is a convicted felon in that on or about December 1, 1995, the defendant did commit the felony of Possess [sic] with Intent to Sell or Deliver Cocaine, in violation of G.S. 90-95(a)(1), and that on or about April 9, 1996, the defendant was convicted of that felony in Buncombe County Superior Court, Asheville, North Carolina, and was sentenced to 8-10 months in the North Carolina Department of Corrections.

Thus, the indictment expressly contains all of the elements required by § 14-415.1(c), except for the penalty for Possession with Intent to Sell or Deliver Cocaine. Cocaine is classified as a Schedule II controlled substance. *See* N.C. Gen. Stat. § 90-90(1)(d) (2003). Section 90-95, referenced in the statute, provides as follows: "[A]ny person who violates G.S. 90-95(a)(1) with respect to a controlled substance classified in Schedule I or II shall be punished as a Class H felon. . . ." N.C. Gen. Stat. § 90-95(b)(1) (2003).

The facts of this case are analogous to *State v. House*, 295 N.C. 189, 244 S.E.2d 654 (1978). In *House*, the defendant challenged a bill of indictment, arguing that it did not comply with N.C. Gen. Stat. § 15A-644(a), which provided as follows:

> (a) An indictment *must* contain:
>
> (1) The name of the Superior Court in which it is filed;
>
> (2) The title of the action;
>
> (3) Criminal charges pleaded as provided in Article 49 of this Chapter, Pleadings and Joinder;
>
> (4) The signature of the solicitor, but its omission is not a fatal defect; and
>
> (5) The signature of the foreman or acting foreman of the grand jury attesting the concurrence of twelve or more grand jurors in the finding of a true bill of indictment.

295 N.C. at 200, 244 S.E.2d at 660, *citing* N.C. Gen. Stat. § 15A-644 (emphasis added). The indictment in question contained the foreman's signature beneath the statement that the bill was found a "true bill," but contained no express attestation that twelve or more grand jurors concurred in finding it a true bill. *Id.*, 295 N.C. at 200-01.

Upon reviewing *House*, the Supreme Court stated the following:

> "In determining the mandatory or directory nature of a statute, the importance of the provision involved may be taken into consideration. Generally speaking, those provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance, are considered to be directory."
>
> While, ordinarily, the word "must" and the word "shall," in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action, it is not necessarily so and the legislative intent is to be derived from a consideration of the entire statute. To interpret G.S. 15A-644 as requiring the quashing of a bill of indictment under the circumstances of this case would be to attribute to the Legislature an intent to paramount mere form over substance. This we decline to do.

295 N.C. at 203, 244 S.E.2d at 661-62, *quoting 73 Am. Jur. 2d, Statutes*, § 19.

In the case *sub judice*, we hold that the provision of § 14-415.1(c) that requires the indictment to state the penalty for the prior offense is not material and does not affect a substantial right. Defendant is no less apprised of the conduct which is the subject of the accusation than he would have been if the penalty for the prior conviction had been included in the indictment. To hold otherwise would permit form to prevail over substance. Thus, the trial court did not err by denying defendant's motion to dismiss the indictment.

[2] Defendant next asserts that the trial court erred by allowing the State to introduce evidence that defendant's probationary sentence for the possession with intent to sell and distribute cocaine conviction was revoked, and that an active sentence was imposed. We disagree.

The standard of review for this Court assessing evidentiary rulings is abuse of discretion. *State v. Meekins*, 326 N.C. 689, 696, 392 S.E.2d 346, 350 (1990). North Carolina Evidence Rule 404(b) provides as follows:

> 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, Rule 404(b) (2003). The rule has been interpreted by North Carolina courts as "a clear general rule of *inclusion.*" *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Relevant evidence of other crimes, wrongs or acts by a defendant are admissible subject to but one exception: "if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Id.*

In the case *sub judice*, Elizabeth Whittenberger ("Whittenberger"), a deputy clerk of superior court, testified on direct examination by the State as follows:

> Q: I'm going to show you two documents that we will mark collectively as State's Exhibit No. 2 and ask you if you will identify those.
>
> A: Okay. The first document that you're showing me is a judgment suspending sentence.
>
> Q: Who does that document pertain to?
>
> A: Wallace Boston.
>
> . . . .
>
> Q: And if you will look at—And for what conviction is that suspended judgment for?
>
> A: That is for Possession with Intent to Sell Schedule II Cocaine, a felony.
>
> Q: And if you will take a look at the second document that's in there.
>
> A: Okay. That's a revocation of the judgment. It's a judgment and commitment where Wallace Boston's suspended sentence was revoked.
>
> Q: And that's for the same charge, for Possession with Intent to Sell and Deliver Cocaine?
>
> A: Correct.

MR. BROWN: Objection. Motion to strike that statement, Your Honor.

THE COURT: I didn't hear all of the statement. I'm sorry.

Q: I just said, and that is for the same charge of Possession with Intent to Sell Schedule II Cocaine.

THE COURT: And your objection as to that question?

MR. BROWN: I'm not objecting to that question. I'm objecting to her answer. She didn't answer the question. I think her answer would be either it was or it wasn't.

A: Well, I'm sorry you didn't hear me. I said yes, it is the same conviction.

Q: And are both of these documents certified and true copies?

A: Correct.

Q: And is that stamped "Certified" by you?

A: Yes, it is.

MR. MARTIN: Your Honor, the State would move to enter State Exhibit No. 2 into evidence.

MR. BROWN: I'm going to object to part of the exhibit.

THE COURT: Let me see State's Exhibit No. 2.

(PAUSE)

THE COURT: Come up here a minute.

(DISCUSSION OFF THE RECORD)

THE COURT: All right, ladies and gentlemen of the jury, State's Exhibit No. 2 is offered and received into evidence for the limited purpose of showing the Defendant Wallace Boston's status on the day in question and for no other purpose.

It is unclear from this testimony whether defendant actually made a Rule 404 objection to Whittenberger's testimony, and thus whether defendant properly preserved this issue for review on appeal. We see in the above exchange that defendant objected twice during Whittenberger's testimony. His first objection came

after the State's question tying the Revocation of Judgment to defendant's conviction of Possession with Intent to Sell and Distribute Cocaine. Defendant objected to the form of Whittenberger's answer. The second objection was to one of the two documents entered into evidence as State's Exhibit No. 2. However, because that objection was discussed off the record, we do not know the substance of defendant's objection.

Assuming *arguendo* that defendant's second objection was based on Rule 404, we conclude that the evidence was relevant for the purpose of proving defendant's status as a convicted felon, and was therefore admissible. To the extent that the evidence tended to show that defendant committed inadmissible prior bad acts, i.e., that he violated the terms of his probation, we hold that the trial court's limiting instructions to the jury were sufficient to cure any prejudice against defendant. This assignment of error is overruled.

[3] Defendant last argues that the trial court erred by failing to instruct the jury that justification is an affirmative defense to the charge of possession of firearms by a felon. We disagree.

Recently, the federal courts have recognized justification as an affirmative defense to possession of firearms by a felon. *See U.S. v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000). However, the North Carolina Court of Appeals has specifically noted "that the *Deleveaux* court limited the application of the justification defense to 18 U.S.C. § 922(g)(1) cases (federal statute for possession of a firearm by a felon) in 'only extraordinary circumstances.' " *State v. Napier*, 149 N.C. App. 462, 465, 560 S.E.2d 867, 869, *quoting Deleveaux*, 205 F.3d at 1297.

In *Napier*, the defendant was a convicted felon who was involved in an on-going dispute with his neighbor and the neighbor's son. On or about 30 June 1999, the neighbor's son discharged a shotgun directed over the defendant's property. The neighbor's son continued this action for the next several days. On 3 July 1999, the defendant walked over to the neighbor's property armed with a nine millimeter handgun in a holster on his hip to confront the neighbor and the neighbor's son. The confrontation escalated into a physical altercation and the defendant shot the neighbor's son in the arm.

This Court declined to apply the *Deleveaux* rationale in *Napier* because the evidence did not support a conclusion that the defendant was under an imminent threat of death or injury. 149 N.C. App. at 465,

560 S.E.2d at 869. This Court reached this conclusion despite evidence that the neighbor had been firing bullets over the defendant's property and that the two parties engaged in prior altercations. *Id.*

In the case *sub judice*, the evidence tended to show that defendant and Daniels were engaged in an on-going conflict whereby in the week prior to the shooting, Daniels threatened to kill defendant, and on at least one prior occasion Daniels fired a gun at defendant. However, the evidence also tends to show that on the day of the shooting, defendant was observed walking through the apartment complex carrying a pistol. The State's evidence also tended to show that defendant chased Daniels around a parked car with the gun in hand. Therefore, we hold that, as in *Napier*, there is no evidence to support the conclusion that defendant was under an imminent threat of death or injury when he made the decision to carry the gun. Accordingly, the trial court did not err in failing to instruct the jury on justification as an affirmative defense.

No error.

Judge ELMORE concurs.

Judge WYNN concurs in the result.

STATE OF NORTH CAROLINA v. JOSHUA MICHAEL McADOO

No. COA03-1061

(Filed 6 July 2004)

1. Homicide— first-degree murder—instruction—cool state of mind

The trial court did not err in a first-degree murder case by its instruction to the jury on cool state of mind regarding the additional instructions on deliberation, because: (1) defendant waived review of a portion of the instruction by moving to change the original wording, which the trial court granted, thus inviting any error; and (2) the trial court's instructions were supported by controlling law as interpreted by our Supreme Court.

2. Homicide— first-degree murder—motion to dismiss—sufficiency of evidence—premeditation and deliberation

The trial court did not err by failing to dismiss the charge of first-degree murder based on alleged insufficient evidence of premeditation and deliberation, because: (1) there was ample opportunity for defendant to formulate an intent to kill when defendant did not shoot the victim immediately, but observed the victim for a short time before firing multiple shots; and (2) following the shooting, defendant continued to threaten his estranged wife and his daughter by telling them that he was going to kill them.

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

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

Appeal by defendant from judgment entered 13 December 2002 by Judge Melzer A. Morgan, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 19 May 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Ronald M. Marquette, for the State.

Nora Henry Hargrove, for defendant-appellant.

TYSON, Judge.

Joshua Michael McAdoo ("defendant") appeals from a judgment entered after a jury found him to be guilty of first-degree murder. We conclude there was no error at trial.

I. Background

In 1998, defendant's wife, Dana McAdoo ("Dana"), removed defendant's belongings from their residence because he was seeing another woman. Defendant and Dana had been married about two months and were the parents of a young daughter. Dana took the child to visit defendant without court-ordered visitation. Following two altercations, including an incident where defendant broke into Dana's residence and went through her belongings, Dana obtained a protective order.

In 1999, Dana began seeing Tyrone Griggs ("Griggs"). On 24 December 1999, Dana and her child were visiting at Griggs's house in Guilford County. Defendant was visiting with his sister, Janel Harris

("Harris"), in Orange County. Around 10:00 a.m., defendant dialed a phone number, handed the telephone to Harris, and told her to ask to speak with Dana. Griggs answered the telephone. Dana signaled to Griggs to deny that she was at his house. Dana was unaware anyone knew that she and her daughter were at Griggs's house or knew Griggs's telephone number. Harris testified that the man who answered the phone "chuckled" when he said she had the wrong number, but she did not know his name. After Harris told defendant the response to her telephone call, he departed and drove from Orange County to Griggs's house in Guilford County.

Approximately one hour after the telephone call, Dana heard the doorbell ring and a knock at the front door. Griggs went to a bedroom, looked out a window, and told Dana that defendant was at the front door. Dana went to the bedroom and saw defendant walk away from the front door, get into his car, back out of the driveway, and park directly across the street.

Dana called 911 because defendant was violating the protective order. While Dana was on the phone, defendant returned to the house. Dana saw him at the back door and yelled, "He's here, he's here." Defendant kicked in the back door, fired one shot near Dana, and fired four additional shots towards Griggs. He grabbed Dana, dragged her across the floor by her hair, and put her in front of Griggs's body. Dana noticed that defendant had wrapped latex gloves around his hands. The child ran to Dana as defendant reloaded his gun. Defendant stated he planned to kill them both.

Law enforcement personnel were dispatched and responded to Griggs's house. Defendant tried to leave with Dana and the child. After Deputy Sheriff James Cuddeback ordered defendant to get on the ground, defendant grabbed Dana and told her, "Tell them to go away or I'll kill you." Defendant also threatened to kill himself. Defendant, Dana, and the child remained inside Griggs's house.

Between 11:30 a.m. and noon that day, defendant called his sister, Harris, and told her that he had "just killed Dana's boyfriend." Harris could hear Dana crying in the background. Dana noticed that defendant was not paying attention to her, grabbed her daughter, escaped from the house, and ran into the street. Defendant came outside, waived the gun, and talked while pacing back and forth. He told the officers that he would not hurt anyone in law enforcement. Tear gas was eventually used to remove defendant from inside the house.

At trial, defendant presented the testimony of two psychologists, who testified that he suffered from diminished mental capacity. Dr. John Warren, an expert in clinical psychology, testified that defendant did not have the mental capacity to form the specific intent to kill. Dr. James Hilkey ("Dr. Hilkey"), an expert in forensic psychology, testified that defendant had difficulty with interpersonal relationships and an impaired interpretation of reality. Dr. Hilkey stated that defendant's experience in the Marine Corps was traumatic and impaired his ability to interpret reality.

The jury found defendant to be guilty of first-degree murder. He was sentenced to life imprisonment without parole. Defendant appeals.

II. Issues

The issues presented are whether the trial court erred in: (1) instructing the jury on "cool state of mind" because the instructions expressed an opinion and deprived defendant of his rights to a defense, due process, and fundamental fairness; (2) denying defendant's motion to dismiss the charge of first-degree murder; and (3) denying defendant's motion to dismiss the short-form indictment.

III. Jury Instructions

[1] Defendant contends the trial court erred in adding to the pattern jury instructions on "cool state of mind." We disagree.

The trial court instructed the jury on the deliberation element of first-degree murder in accordance with the North Carolina Pattern Jury Instructions, N.C.P.I.—Crim. 206.13 (2003):

> And fifth, that the defendant [Joshua McAdoo] acted with deliberation, which means that he acted while he was in a cool state of mind. [Cool state of mind] does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion, it is immaterial that the defendant [Joshua McAdoo] was in a state of passion or excited when the intent was carried into effect.

The trial court added in the following statements immediately following this portion of its instruction:

> Cool state of mind means that a killing was committed with a fixed design to kill, regardless of whether the person was angry

> or gripped with passion at the time of the act. A person may be capable of forming murderous intent, premeditating and deliberating, yet be prompted and to a large extent controlled by passion at the time of the offense. Cool state of mind also means that the defendant's anger or emotion was not so strong as to overcome the defendant's ability to weigh and consider the consequences of his actions—of his action [sic].

Defendant objected to this later portion as misleading and a misstatement of the law. Defendant requested the trial court to instruct the jury, "Deliberation refers to a steadfast resolve and deep rooted purpose, or a design formed after carefully considering the consequences." He also requested an instruction that stated, "The intent to kill must arise from a fixed determination previously formed after weighing the matter." The trial court denied defendant's requests. Defendant asserts the trial court erred in instructing the jury using the additional statements given in addition to the pattern jury instructions on deliberation.

Our Supreme Court addressed a similar issue in *State v. Montgomery*, 331 N.C. 559, 570, 417 S.E.2d 742, 748 (1992). In *Montgomery*, the Supreme Court granted the defendant a new trial because the trial court's instruction on reasonable doubt was an incorrect statement of law and violated the requirements of the Due Process Clause as interpreted by the United States Supreme Court in *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990). 331 N.C. at 573, 417 S.E.2d at 749-50. The Court noted, "[t]he trial court has the duty to define the term 'reasonable doubt' when requested to give such an instruction to the jury." *Id.* at 570, 417 S.E.2d at 748 (citing *State v. Shaw*, 284 N.C. 366, 200 S.E.2d 585 (1973)). When instructing the jury, the trial court is not required to use "an exact formula," however, "its instruction must be a correct statement of the law." *Montgomery*, 331 N.C. at 570, 417 S.E.2d at 748 (citations omitted). The issue before us is whether the trial court's additional instructions on deliberation are correct statements of law.

The trial court instructed the jury, "Cool state of mind means that a killing was committed with a fixed design to kill, regardless of whether the person was angry or gripped with passion at the time of the act." In *State v. Saunders*, our Supreme Court set forth the elements of first-degree murder, and ruled, " '[c]ool state of blood' as used in connection with premeditation and deliberation does not mean absence of passion and emotion but means that an unlawful killing is deliberate and premeditated if executed *with a fixed design*

to kill notwithstanding defendant was angry or in an emotional state at the time." 317 N.C. 308, 312, 345 S.E.2d 212, 215 (1986) (quoting *State v. Ruof*, 296 N.C. 623, 636, 252 S.E.2d 720, 728 (1979)) (emphasis supplied).

The trial court also instructed, "A person may be capable of forming murderous intent, premeditating and deliberating, yet be prompted and to a large extent controlled by passion at the time of the offense." This instruction was essentially identical to the analysis and discussion in *State v. Johnston*, 331 N.C. 680, 685, 417 S.E.2d 228, 231 (1992) (citing *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)) ("A perpetrator may premeditate, deliberate, and intend to kill although prompted and to a large extent controlled by passion at the time.").

The trial court's final instruction regarding deliberation stated, "Cool state of mind also means that the defendant's anger or emotion was not so strong as to overcome the defendant's ability to weigh and consider the consequences of his actions . . . ." Defendant moved to change the original wording, which the court granted, resulting in the instruction given and now assigned as error. By requesting this portion of the instruction, defendant invited any error that resulted and waives review. *State v. King*, 352 N.C. 457, 546 S.E.2d 575 (2001), *cert. denied*, 534 U.S. 1147, 151 L. Ed. 2d 1002 (2002). Further, the trial court originally proposed to end the sentence, "so strong as to overcome the defendant's reason." This statement is supported by *State v. Hunt*, where the Supreme Court ruled, "[t]he phrase 'cool state of blood' means that the defendant's anger or emotion must not have been such as to overcome the defendant's reason." 330 N.C. 425, 427, 410 S.E.2d 478, 480 (1991) (citing *State v. Brown*, 315 N.C. 40, 58, 337 S.E.2d 808, 822 (1985)).

The trial court's instructions were supported by controlling law as interpreted by our Supreme Court. *See Montgomery*, 331 N.C. at 570, 417 S.E.2d at 748. This assignment of error is overruled.

IV. Motion to Dismiss

[2] Defendant contends the trial court erred in failing to dismiss the charge of first-degree murder due to insufficient evidence of premeditation and deliberation. We disagree.

A motion to dismiss for insufficiency of the evidence is properly denied if substantial evidence exists to show: (1) each essential element of the offense charged; and (2) that defendant is the perpetrator

of such offense. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "The trial court's function is to test whether a *reasonable inference* of the defendant's guilt of the crime charged may be drawn from the evidence." *Id.* at 99, 261 S.E.2d at 117 (citations omitted). The evidence is to be considered in the light most favorable to the State. *Id.*

First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. *Hunt*, 330 N.C. at 427, 410 S.E.2d at 480 (citing *State v. Fleming*, 296 N.C. 559, 251 S.E.2d 430 (1979); N.C. Gen. Stat. § 14-17 (1989)). "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation; it is sufficient if the process of premeditation occurred at any point prior to the killing." *Hunt*, 330 N.C. at 427, 410 S.E.2d at 480 (citing *State v. Brown*, 315 N.C. 40, 58, 337 S.E.2d 808, 822 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986)). "Deliberation means an intent to kill carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Hunt*, 330 N.C. at 427, 410 S.E.2d at 480 (citing *Brown*, 315 N.C. at 58, 337 S.E.2d at 822). "[T]he nature and number of the victim's wounds is a circumstance from which an inference of premeditation and deliberation can be drawn." *Hunt*, 330 N.C. at 428, 410 S.E.2d at 481 (citing *State v. Bullard*, 312 N.C. 129, 161, 322 S.E.2d 370, 388 (1984)). "Evidence of the defendant's conduct and statements before and after the killing may be considered in determining whether a killing was with premeditation and deliberation." *Hunt*, 330 N.C. at 428, 410 S.E.2d at 481 (citing *Brown*, 315 N.C. at 59, 337 S.E.2d at 823)).

Here, the State presented evidence of premeditation and deliberation, including testimony that after discovering Dana was present at Griggs's house, defendant drove from Orange County to Guilford County. After arriving at Griggs's house, defendant approached the door, walked back to his car, and put on latex gloves. He entered Griggs's house and fired a total of five shots towards Dana and Griggs. In *State v. Fields*, our Supreme Court held there was "ample time and opportunity for defendant to formulate an intent to kill" when the defendant did not shoot the victim immediately, but observed the victim for a short time and then shot the victim five times. 315 N.C. 191, 200, 337 S.E.2d 518, 524 (1985).

Following the shooting, defendant continued to threaten Dana and his daughter that he was going to kill them.

The State presented substantial evidence to allow a juror to reasonably infer defendant's guilt and to survive defendant's motion to dismiss. This assignment of error is overruled.

V. Short-Form Indictment

[3] Defendant contends the short-form indictment was constitutionally defective. "We have reviewed over fifty additional decisions in which this issue has been raised and rejected by our Supreme Court and this Court in the last three years. These decisions consistently hold that the short form murder indictment is constitutional." *State v. Messick*, 159 N.C. App. 232, 238, 585 S.E.2d 392, 396 (2003), *per curiam aff'd*, 358 N.C. 145, 593 S.E.2d 583 (2004). This assignment of error is without merit.

VI. Conclusion

The trial court properly instructed the jury regarding the element of deliberation and used correct statements of law. The trial court did not err in denying defendant's motion to dismiss as the State presented sufficient evidence of premeditation and deliberation. Defendant's assignment of error regarding the short-form indictment is without merit. Defendant's trial was free of errors he assigned and argued.

No Error.

Judges McGEE and TIMMONS-GOODSON concur.

GLOBAL FURNITURE, INC., PLAINTIFF v. EDDIE PROCTOR, DEFENDANT

No. COA03-1043

(Filed 6 July 2004)

1. Discovery— noncompliance—sanctions

The trial court did not abuse its discretion by entering sanctions against defendant for not complying with a discovery order.

2. Discovery— discovery sanctions—not precluded by default

Sanctions against defendant for failure to comply with a discovery order were not precluded by an entry of default against plaintiff on defendant's counterclaims.

3. Discovery— sanctions—dismissal—failure to consider lesser measure

A trial court's dismissal of a counterclaim as a sanction for failure to comply with a discovery order was set aside for failure to consider lesser sanctions.

4. Judges— default entry of one stricken by another—no good cause of change of circumstances finding

The trial court erred by striking an entry of default by another superior court judge ex mero motu without finding good cause or a substantial change in circumstances.

5. Civil Procedure— motion—calendar request or notice of hearing

A calendar request or notice of hearing need not accompany a valid motion, although the issue in this case was moot.

Appeal by defendant from orders entered 19 March 2003 and 2 May 2003 by Judge Larry G. Ford in Iredell County Superior Court. Heard in the Court of Appeals 28 April 2004.

Patrick, Harper & Dixon, LLP, by Stephen M. Thomas and Evans W. Fisher, for plaintiff-appellee.

Brawley & Harwell, P.A., by Brian R. Harwell, for defendant-appellant.

TYSON, Judge.

Eddie Proctor ("defendant") appeals from the trial court's 19 March 2003 order dismissing his counterclaim with prejudice as a sanction for failure to comply with a discovery order. Defendant also appeals a 2 May 2003 order finding entry of default had been improperly entered against Global Furniture, Inc., ("plaintiff") and striking the entry of default. We vacate both orders and remand the 19 March 2003 sanction order for further consideration.

I. Background

Defendant is a former employee of plaintiff. Plaintiff instituted this action on 29 August 2002 and alleged defendant obtained confidential information following termination from employment and disclosed it to third parties to promote his own business interests. Defendant answered and counterclaimed for a unhonored severance package, withheld wages, extortion, blackmail, blacklisting, unjust enrichment, and racketeering. Plaintiff moved for and was granted an extension of time until 7 January 2003 to answer defendant's counterclaim.

On 6 December 2002, plaintiff served defendant with "Plaintiff's Second Set of Interrogatories and Requests for Production of Documents." On 9 December 2002, defendant objected to plaintiff's discovery requests, asserted attorney-client privilege to the requested information that was in his attorney's possession, and failed to answer the interrogatories or produce the requested documents. Plaintiff moved to compel discovery. After hearing, defendant was ordered to answer each interrogatory and produce all documents requested by 5 January 2003.

On 30 December 2002, plaintiff filed a motion to dismiss defendant's counterclaim pursuant to N.C.R. Civ. P. 12(b)(1) and 12(b)(6). This motion was served on defendant by first-class mail.

Defendant filed his responses to plaintiff's second set of interrogatories and requests for production of documents on 2 January 2003. On 11 March 2003, plaintiff moved for sanctions and alleged that defendant's answer violated the trial court's earlier order to compel discovery. On the same day, defendant moved for an entry of default on defendant's counterclaim, which Superior Court Judge Christopher M. Collier granted on 13 March 2003. Defendant filed a response to plaintiff's motion for sanctions, and, on 14 March 2003, filed a motion for default judgment.

Judge Larry Ford heard and granted plaintiff's motion for sanctions on 17 March 2003. By order entered 19 March 2003, defendant's counterclaim was stricken and dismissed with prejudice. Defendant's motion for default judgment was heard on 14 April 2003. On 2 May 2003, Judge Ford entered an order concluding that no hearing had been held on the motion to dismiss and no ruling had been obtained at the time of entry of default. Plaintiff's reply was not due at the time the entry of default was entered against plaintiff pursuant to N.C.R.

Civ. P. 12(a)(1). Judge Ford's order ruled that entry of default was improperly entered, ordered the entry stricken, and denied defendant's motion for default judgment. Defendant appeals.

II. Issues

The issues are whether the trial court erred in: (1) dismissing defendant's counterclaim as a sanction for non-compliance with an order compelling discovery; (2) striking the entry of default entered by another superior court judge; and (3) striking the entry of default because plaintiff's motion failed to comply with the North Carolina Rules of Civil Procedure.

III. Sanctions

[1] Defendant argues the trial court erred in striking his counterclaim as a sanction for non-compliance with the trial court's earlier order compelling discovery.

Rule 37(b)(2) of the North Carolina Rules of Civil Procedure authorizes a trial court to sanction a party for failure to comply with a court order compelling discovery. The trial court is given broad discretion to "make such orders in regard to the failure as are just" and authorized to, among other things, prohibit the introduction of certain evidence, strike pleadings, dismiss the action, or render judgment against the disobedient party. N.C. Gen. Stat. § 1A-1, Rule 37(b) (2003).

"The administration of [discovery] rules, in particular the imposition of sanctions, is within the broad discretion of the trial court. The trial court's decision regarding sanctions will only be overturned on appeal upon showing an abuse of that discretion." *Joyner v. Mabrey Smith Motor Co.*, 161 N.C. App. 125, 129, 587 S.E.2d 451, 454 (2003) (quoting *Williams v. N.C. Dep't of Correction*, 120 N.C. App. 356, 359, 462 S.E.2d 545, 547 (1995)); *see also Hursey v. Homes by Design*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995). "A trial court may be reversed for 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." *Hursey*, 121 N.C. App. at 177, 464 S.E.2d at 505 (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

A. Abuse of Discretion

Defendant asserts the trial court abused its discretion and argues he made good faith efforts to comply with the order compelling discovery. We disagree. The trial court considered the evidence and

arguments. Defendant asserted no knowledge of the requested information and inability to comply because another of his attorney's clients was in possession of the information requested. Defendant concedes this was the same evidence and argument presented during the hearing on plaintiff's motion to compel. Defendant presents no new argument not considered by the trial court.

Defendant has failed to show that the trial court's order was not a result of a reasoned decision. The trial court did not abuse its discretion in imposing sanctions on defendant for his failure to comply with the order compelling discovery. This portion of his assignment of error is overruled.

B. Effect of Entry of Default

[2] Defendant contends the entry of default against plaintiff established that his counterclaim was admitted and prohibited the trial court from imposing sanctions. We disagree.

Even if defendant's counterclaim was deemed admitted, Rule 37(b) of the North Carolina Rules of Civil Procedure allows a trial court to refuse "to allow the disobedient party to support or oppose designated claims or defenses" or dismiss "the action or proceeding or any part thereof . . . ." N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(b)-(c) (2003). Rule 37 does not require the disobedient party's claims to be denied. The entry of default did not prevent the trial court from sanctioning defendant for failure to comply with the order to compel discovery.

C. Lesser Sanctions

[3] Defendant also argues the trial court failed to consider lesser sanctions. We agree.

"[B]efore dismissing a party's claim with prejudice pursuant to Rule 37, the trial court must consider less severe sanctions." *Hursey*, 121 N.C. App. at 179, 464 S.E.2d at 507 (citing *Goss v. Battle*, 111 N.C. App. 173, 177, 432 S.E.2d 156, 159 (1993)). The trial court is not required to *impose* lesser sanctions, but only to *consider* lesser sanctions. *Goss*, 111 N.C. App. at 177, 432 S.E.2d at 159 ("It is important to note that our holding today does not affect the trial court's discretionary authority, on remand, to impose the sanction of dismissal with prejudice after properly considering less severe sanctions.").

In *Hursey*, we examined the transcript and held the trial court did not err in imposing sanctions pursuant to Rule 37(b). 121 N.C. App. at

179, 464 S.E.2d at 507. The trial court considered two options in *Hursey*: striking both the answer and counterclaim, or only striking the counterclaim. *Id.* Here, the transcript shows the trial court only considered striking defendant's counterclaim. Additionally, the trial court issued an order in response to the parties' request for judicial settlement of the record on appeal. Judge Ford's order imposing sanctions, stated, "the Court did not consider . . . the imposition of lesser sanctions as a part of the March 19, 2003 Order . . . ."

We vacate the order dismissing defendant's counterclaim as a sanction and remand for a hearing on lesser sanctions. As in *Goss*, the trial court has the discretionary authority, on remand, to dismiss defendant's counterclaim with prejudice, but must first consider less severe sanctions. 111 N.C. App. at 177, 432 S.E.2d at 159.

IV. Entry of Default

[4] Defendant asserts the trial court erred in striking the entry of default entered by another judge. We agree.

Rule 55 of the North Carolina Rules of Civil Procedure allows the trial court to enter default "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute . . . ." N.C. Gen. Stat. § 1A-1, Rule 55(a) (2003). Rule 55 also grants the trial court the authority to set aside an entry of default "[f]or good cause shown." N.C. Gen. Stat. § 1A-1, Rule 55(d) (2003).

Judge Collier entered default on 13 March 2003 pursuant to defendant's motion. Defendant moved for default judgment on 14 April 2003. After hearing this motion, Judge Ford ordered the entry of default entered by Judge Collier to be stricken. Although Rule 55(d) allows the trial court to set aside an entry of default and, in effect overrule a trial court's earlier order, plaintiff never moved to set aside entry of default pursuant to this rule. Further, Judge Ford made no findings that it was striking Judge Collier's entry of default pursuant to Rule 55 for "good cause shown." Instead, Judge Ford made specific findings of fact regarding the pleadings and concluded, contrary to Judge Collier's entry of default, that "plaintiff is not in default on defendant's counterclaim."

Our Supreme Court has long recognized:

> "The power of one judge of the superior court is equal to and coordinate with that of another." *Michigan Nat'l Bank v.*

> *Hanner*, 268 N.C. 668, 670, 151 S.E.2d 579, 580 (1966). Accordingly, it is well established in our jurisprudence that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.

State v. Woolridge, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003) (quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)). One judge may reconsider another judge's ruling "only in the limited situation where the party seeking to alter that prior ruling makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter." *Woolridge*, 357 N.C. at 549-50, 592 S.E.2d at 194 (quoting *State v. Duvall*, 304 N.C. 557, 562, 284 S.E.2d 495, 499 (1981)).

Judge Ford's order made findings of fact regarding the pleadings in this action. At the time Judge Ford entered his order, plaintiff had filed a Rule 12(b) motion to dismiss, on which the trial court had not yet ruled when it entered default. The order concludes, based on these pleadings, "entry of default was improperly entered" under Rule 12(a)(1) of the North Carolina Rules of Civil Procedure. By striking the entry of default, Judge Ford's order improperly implies that Judge Collier erred as a matter of law and misapplied the Rules of Civil Procedure. *See Woolridge*, 357 N.C. at 549, 592 S.E.2d at 194.

We hold the trial court erred in striking the entry of default *ex mero motu* without finding that plaintiff had shown "good cause" or that a substantial change in circumstances had occurred to warrant a different disposition. N.C. Gen. Stat. § 1A-1, Rule 55; *Woolridge*, 357 N.C. at 549, 592 S.E.2d at 194. The trial court also erred in reversing Judge Collier's entry of default. Judge Ford was without jurisdiction to reconsider another judge's ruling on the same matter without finding "good cause" or a substantial change in circumstances. N.C. Gen. Stat. § 1A-1, Rule 55; *Woolridge*, 357 N.C. at 549, 592 S.E.2d at 194. As plaintiff neither moved nor presented evidence of "good cause" to set aside the entry of default, Judge Ford's jurisdiction and authority extended only to grant or deny defendant's motion for default judgment. Defendant neither assigns error to nor argues that portion of the trial court's order denying his motion for default judgment.

We vacate that portion of Judge Ford's order striking Judge Collier's entry of default and reinstate the entry of default.

V. Notice of Hearing

[5] Defendant contends the trial court erred in striking the entry of default because plaintiff did not include written notice of hearing with its motion to dismiss. As we hold the trial court erred in striking the entry of default, this assignment of error is moot. *See Highway Comm. v. School*, 276 N.C. 556, 564, 173 S.E.2d 909, 915 (1970).

Further, Rule 7 of the North Carolina Rules of Civil Procedure states:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (2003). Based on a plain reading of this rule, a calendar request or notice of hearing need not accompany a valid motion.

VI. Conclusion

The trial court erred by not considering lesser sanctions. The trial court's order of 19 March 2003 granting plaintiff's motion for sanctions is vacated, and this case is remanded for consideration of lesser sanctions.

The trial court also erred in striking Judge Collier's entry of default and overruling another superior court judge's order without making required findings. The portion of the trial court's 2 May 2003 order striking the entry of default is vacated.

Vacated and Remanded.

Judges McGEE and TIMMONS-GOODSON concur.

STATE v. McDONALD

[165 N.C. App. 237 (2004)]

STATE OF NORTH CAROLINA v. GARY WOMACK McDONALD

No. COA03-534

(Filed 6 July 2004)

1. Sentencing— punishment enhancement—habitual misdemeanor assault

The trial court did not err by using the charge of habitual misdemeanor assault (HMA) to enhance defendant's punishment even though defendant contends he never entered a guilty plea to nor was convicted of this charge, because: (1) habitual misdemeanor assault can be considered as either a substantive offense or a sentence enhancement offense; (2) defendant admitted the prior convictions element of the HMA offense, the jury found defendant guilty of assault on a female which was the last element of the HMA charge, and thus the trial court correctly used this conviction as one of the underlying felonies to enhance defendant's sentence under the Habitual Felon Act; and (3) defendant was not prejudiced by the trial court's failure to formally arraign him under N.C.G.S. § 15A-928(c), since defense counsel and defendant's statements to the trial court show that defendant understood the charges against him and knowingly waived his right for the jury to determine those issues.

2. Sentencing— habitual felon—habitual misdemeanor assault

The trial court did not violate defendant's Eighth and Fourteenth Amendment constitutional rights by imposing a sentence of 120 to 153 months for habitual misdemeanor assault as an habitual felon, because in light of the repetitive nature of defendant's offense and his lengthy criminal history, the sentence imposed was not grossly disproportionate to his crime.

3. Sentencing— habitual felon—underlying felony—possession of cocaine

The trial court did not err by using defendant's conviction for possession of cocaine as one of the underlying felonies to support his status and conviction of being an habitual felon, because N.C.G.S. § 90-95(d)(2) classifies possession of cocaine as a felony.

Appeal by defendant from judgments entered 14 August 2002 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 3 February 2004.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Bruce T. Cunningham, Jr., for defendant-appellant.

TYSON, Judge.

Gary Womack McDonald ("defendant") appeals from judgments entered after a jury found him to be guilty of: (1) assault on a female, after defendant had stipulated to the other elements of the charge of habitual misdemeanor assault ("HMA"); (2) injury to real property; and (3) resisting a public officer. Defendant also entered a guilty plea to having attained habitual felon status.

I. Background

On 8 November 2001, defendant went to Cheryl Rowland's ("Rowland") house to see his children. Rowland testified that she and defendant fought and defendant punched her in the nose, kicked her, and dragged her around the apartment. Defendant left, and Rowland called the police. Rowland filed charges against defendant for assault on a female and injury to real property. Defendant returned to Rowland's apartment in December, and she again called the police. Defendant was arrested after he attempted to flee from the police and giving them a false name.

A jury found defendant guilty of assault on a female, resisting a public officer, and injury to real property. Defendant stipulated to prior convictions that established his HMA offense and pled guilty to being an habitual felon. Defendant was sentenced to 120 to 153 months and gave notice of appeal.

II. Issues

The issues are whether the trial court erred in: (1) using the HMA offense to enhance defendant's punishment pursuant to the Habitual Felon Act; (2) imposing a sentence of 120 to 153 months for habitual misdemeanor assault as an habitual felon, arguing he was subjected to cruel and unusual punishment under the Eighth Amendment as applied to the State through the Fourteenth Amendment; and (3) using a misdemeanor conviction of possession of cocaine as one of the underlying felonies to support his status and conviction of being an habitual felon thereby causing the indictment to be invalid as a matter of law.

III. Habitual Misdemeanor Assault

[1] Defendant contends that the trial court erred in using HMA to enhance his punishment. Defendant argues that he never entered a guilty plea to nor was convicted of HMA. He asserts that he merely stipulated to attaining the status of being an habitual misdemeanor assailant.

This Court has held that habitual misdemeanor assault and habitual driving while impaired can be considered as either a substantive offense or a sentence enhancement offense. *State v. Vardiman*, 146 N.C. App. 381, 385, 552 S.E.2d 697, 700 (2001), *appeal dismissed*, 355 N.C. 222, 559 S.E.2d 794 (2002), *cert. denied*, 537 U.S. 833, 154 L. Ed. 2d 51 (2002) ("Habitual impaired driving . . . is a substantive offense *and* a punishment enhancement (or recidivist, or repeat-offender) offense."). Applying the reasoning in *Vardiman*, this Court held that "habitual misdemeanor assault 'is a substantive offense *and* a punishment enhancement . . . offense.' " *State v. Carpenter*, 155 N.C. App. 35, 49, 573 S.E.2d 668, 677 (2002), *disc. rev. denied*, 356 N.C. 681, 577 S.E.2d 896 (2003) (quoting *Vardiman*, 146 N.C. App. at 385, 552 S.E.2d at 700).

N.C. Gen. Stat. § 15A-928(c) (2003) states:

> (c) After commencement of the trial and before the close of the State's case, the judge in the absence of the jury must arraign the defendant upon the special indictment or information, and must advise him that he may admit the previous conviction alleged, deny it, or remain silent. Depending upon the defendant's response, the trial of the case must then proceed as follows:
>
> (1) If the defendant admits the previous conviction, that element of the offense charged in the indictment . . . is established, no evidence in support thereof may be adduced by the State, and the judge must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense.

Here, defendant was separately indicted for assault on a female and HMA as required by N.C. Gen. Stat. § 15A-928(b) (2003). When defendant's case was called for trial, the trial court inquired of defendant whether there were any "stipulations or agreements about the habitual misdemeanor assault status" or whether the court was going to go "forward with the burden on the State to prove everything."

Defense counsel confirmed an agreement and stated that defendant would stipulate to prior convictions that supplied certain elements of the HMA offense. Defense counsel further stated the sole issue for the jury was whether defendant was guilty of assault on a female. After defendant was found guilty of assault on a female, the court found defendant to be guilty of HMA.

Defendant admitted the prior convictions element of the HMA offense. The jury found defendant to be guilty of assault on a female, the last element of the HMA charge. Defendant was properly convicted of the felony offense of HMA. The trial court correctly used this conviction as one of the underlying felonies to enhance defendant's sentence under the Habitual Felon Act.

Defendant argues that N.C. Gen. Stat. § 15A-928(c) requires the trial court to arraign defendant on the special indictment and to advise defendant that he may admit, deny, or remain silent on his previous convictions. The trial court failed to specifically arraign defendant on the HMA charge and to inform him of his right to remain silent. However, this failure is not reversible error.

In *State v. Jernigan*, the defendant was charged with habitual impaired driving and other unrelated charges. 118 N.C. App. 240, 242, 455 S.E.2d 163, 165 (1995). When defendant's case was called for trial, defendant stipulated to his prior convictions, as defendant did here. *Id.* The trial court failed to arraign defendant under N.C. Gen. Stat. § 15A-928, and Jernigan assigned error. *Id.* This Court held:

> [t]he failure to arraign the defendant . . . is not always reversible error. Where there is no doubt that a defendant is fully aware of the charge against him, or is no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding.

Id. at 244, 455 S.E.2d at 166 (internal citations omitted). In *Jernigan*, defense counsel stated that he: (1) fully discussed the case with his client; (2) informed him of the consequences; and (3) reaffirmed defendant's stipulation before the close of the State's evidence. *Id.* We held the trial court's failure to arraign defendant was not reversible error. *Id.* at 245, 455 S.E.2d at 167.

Here, defense counsel and defendant informed the court that he admitted the prior convictions element of the HMA offense. Defense counsel stated:

> Your Honor, the defendant would stipulate that he has previously been convicted of five misdemeanor assaults, two of which were assault [sic] that would constitute the elements of habitual misdemeanor assault. So, the jury would be entitled to determine the case based solely on whether or not he's guilty of assault on a female.

The court conducted a full inquiry to determine whether the defendant understood he was entitled to a jury trial and told defendant that if he stipulated to the prior convictions, his right to a jury trial on those issues would be waived. The court asked defendant if he knowingly and voluntarily made this decision to admit the prior convictions. Defendant responded affirmatively. The court ensured that defendant understood his admissions would enhance the crime to a felony and that it would be punished as a felony. Defendant also reaffirmed his stipulations after the close of all the evidence. On appeal, defendant does not argue that he did not understand the charges or the effect of his stipulation.

Defense counsel and defendant's statements to the trial court show that defendant understood the charges against him and knowingly waived his right for the jury to determine those issues. Defendant was not prejudiced by the trial court's failure to formally arraign him pursuant to N.C. Gen. Stat. § 15A-928. *Jernigan*, 118 N.C. App. at 244, 455 S.E.2d at 166. The trial court's failure to formally arraign defendant is not reversible error. *Id.* at 244, 455 S.E.2d at 167.

IV. Cruel and Unusual Punishment

[2] Defendant contends that the trial court violated his Eighth and Fourteenth Amendment constitutional rights by sentencing him to 120 to 153 months for the HMA offense as an habitual felon. We disagree.

Whether the Habitual Felon Act violates a defendant's Eighth and Fourteenth Amendment rights has been recently reviewed by this Court. *State v. Hensley*, 156 N.C. App. 634, 577 S.E.2d 417, *disc. rev. denied*, 357 N.C. 167, 581 S.E.2d 64 (2003). The trial court sentenced Hensley under the Habitual Felon Act to a term of imprisonment of a minimum of 90 months to a maximum of 117 months. *Id.* at 636, 577 S.E.2d at 419. Hensley raised an identical argument to the argument defendant presents on appeal. *Id.* This Court stated,

> defendant argues that the sentence imposed is so disproportionate to the charge that it results in an unconstitutional infliction of cruel and unusual punishment. . . . Defendant is mistaken. Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment. Further, our Supreme Court rejected outright the suggestion that our legislature is constitutionally prohibited from enhancing punishment for habitual offenders as violations of constitutional strictures dealing with . . . cruel and unusual punishment . . . . The sentence imposed . . . under the habitual felon laws is not so grossly disproportionate so as to result in constitutional infirmity.

Id. at 638-39, 577 S.E.2d at 421 (internal citations omitted).

This Court reaffirmed the holding in *Hensley* in *State v. Clifton*, 158 N.C. App. 88, 580 S.E.2d 40, *cert. denied*, 357 N.C. 463, 586 S.E.2d 266 (2003). Clifton received two consecutive sentences under the Habitual Felon Act of 168 to 211 months. *Id.* at 91, 580 S.E.2d at 42. We stated, "our Court must continue to apply the grossly disproportionate principle, remembering that only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *Id.* at 94, 580 S.E.2d at 45 (citations omitted). In *Clifton*, we held defendant's sentence was not grossly disproportionate to violate the Eighth Amendment. *Id.*

Here, defendant received a sentence of 120 to 153 months under the Habitual Felon Act for the HMA offense. In light of the repetitive nature of defendant's offense and his lengthy criminal history, the sentence imposed was not grossly disproportionate to his crime. *Id.* We stated in *Hensley*, "[d]efendant was not sentenced for 90 to 117 months in prison because he pawned a caliper obtained by false pretenses for approximately twenty dollars. Defendant was sentenced to that term because he committed multiple felonies over a span of almost twenty years and is a[n] habitual felon." 156 N.C. App. at 639, 577 S.E.2d at 421. Here, defendant was not sentenced to 120 to 153 months in prison solely because of his one assault on Rowland. Defendant was sentenced based on his history of repeated assaults, misdemeanor convictions, and his prior felony convictions, all of which occurred within a fifteen year time span. Defendant's assignment of error is overruled.

V. Possession of Cocaine to Support Habitual Felon Status

[3] Defendant contends that the trial court erred in using his conviction of possession of cocaine as one of the underlying felonies to establish his status as an habitual felon and argues that punishing a misdemeanor as a felony does not make that crime a felony for purposes of the Habitual Felon Act. Pursuant to our Supreme Court's rulings in *State v. Jones*, 358 N.C. 473, 598 S.E.2d 125 (2004) and *State v. Sneed*, 358 N.C. 538, 599 S.E.2d 365 (2004), defendant's assignment of error is without merit.

In *Jones*, our Supreme Court, reversing the Court of Appeals decision, concluded:

> Under N.C.G.S. § 90-95(d)(2), the phrase "punishable as a Class I felony" does not simply denote a sentencing classification, but rather, dictates that a conviction for possession of the substances listed therein, including cocaine, is elevated to a felony classification for all purposes. Concerning the controlled substances listed therein, the specific exceptions contained in section 90-95(d)(2) control over the general rule that possession of any Schedule II, III, or IV controlled substance is a misdemeanor.

358 N.C. at 478-79, 598 S.E.2d at 128; *see also Sneed*, 358 N.C. at 538-39, 599 S.E.2d at 365. The Court also held, "because N.C.G.S. § 90-95(d)(2) classifies possession of cocaine as a felony, defendant's 1991 conviction for possession of cocaine was sufficient to serve as an underlying felony for his habitual felon indictment, and thus, defendant's habitual felon indictment was valid." *Jones*, 358 N.C. at 487, 598 S.E.2d at 134. Defendant's assignment of error is overruled.

VI. Conclusion

Defendant failed to show the trial court erred in using the HMA offense to enhance defendant's punishment pursuant to the Habitual Felon Act or that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. Based on our Supreme Court's recent rulings in *State v. Jones* and *State v. Sneed*, the trial court properly sentenced defendant as an habitual felon.

No Error.

Judges WYNN and McGEE concur.

LEGRAND A. VAN KEUREN, PLAINTIFF v. YVONNE LITTLE, DEFENDANT

No. COA03-1389

(Filed 6 July 2004)

1. Release— mutual mistake—allegations insufficient

The trial court correctly granted summary judgment for defendant where plaintiff was struck by defendant's car in a parking lot while he was walking toward his company car, plaintiff signed a release with defendant in return for a payment from defendant's insurer, and plaintiff later contended that he had not intended to waive pursuit of underinsured motorist coverage. Plaintiff's affidavit does not establish a prima facie case of mutual mistake in that it did not state with particularity the circumstances constituting mistake as to all parties.

2. Release— motion to reform—implicitly denied

The trial court did not err by not considering plaintiff's affidavit about a release as a motion to reform the release. The court implicitly denied any motion to reform when it granted summary judgment for defendant. Moreover, the affidavit did not request a hearing or set forth relief sought, and did not contain the allegations required to reform a written document.

Appeal by plaintiff from order entered 10 July 2003 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 26 May 2004.

Pinto, Coates, Kyre & Brown, PLLC, by Paul D. Coates and Richard L. Pinto, for plaintiff-appellant.

Bennett & Guthrie, P.L.L.C., by Roberta B. King and Rodney A. Guthrie, for defendant-appellee Yvonne Little.

Ellis & Winters LLP, by Thomas D. Blue, Jr., for unnamed defendants-appellees Safeguard Insurance Company and Royal & SunAlliance.

TYSON, Judge

LeGrand A. Van Keuren ("plaintiff") appeals after the trial court entered summary judgment against him. We affirm.

I. Background

On 22 May 1999, plaintiff was walking across a parking lot towards his company car when he was struck by a car driven by Yvonne Little ("Little"). Following this incident, plaintiff consulted with an attorney. Plaintiff's attorney sent a claim letter to Little's liability insurance carrier, Integon Insurance Company ("Integon"). Integon had a liability limit of $25,000.00 for plaintiff's claim. On 18 October 1999, plaintiff, represented by counsel, signed a "Release of All Claims" ("release") in favor of Little in return for $25,000.00 from Integon.

On 26 April 2001, plaintiff contacted Royal & SunAlliance ("Royal"), his employer's automobile insurance carrier. His letter provided written notice of Integon's tender and stated:

> Please be advised that we are providing you notice, pursuant to G.S. § 20-279.21(b)(4), that Integon, the liability carrier in this matter has tendered its limit of $25,000.00.
>
> We are hereby providing you this notice pursuant to the statute, so that you can preserve your rights of subrogation, if you deem so, by advancing pursuant to the statute.

Royal did not respond. On 31 August 2001, plaintiff executed a release entitled, "Settlement Agreement and Covenant Not to Enforce" ("settlement agreement"). On 19 November 2001, plaintiff sent Royal a copy of this settlement agreement

Plaintiff initiated this action against Little on 21 May 2002 for injuries resulting from the accident. The complaint was served on Little and Royal, an unnamed defendant. All defendants answered and asserted the release as an affirmative defense.

On 27 January 2003, Little moved for summary judgment and argued the release barred plaintiff's claim. On 23 May 2003, Royal moved for judgment on the pleadings based on the release. The trial court conducted a hearing on 7 July 2003, considered the pleadings and plaintiff's affidavit that had been filed on 3 July 2003, and converted Royal's motion into a motion for summary judgment. The trial court granted summary judgment in favor of all defendants. Plaintiff appeals.

II. Issues

The issues presented are whether: (1) the trial court erred in granting summary judgment when plaintiff asserted a mutual mistake

of fact existed among the parties to the release; (2) plaintiff's affidavit should have been considered as a motion to reform; and (3) Royal waived its rights of subrogation and to approve the settlement with Integon.

III. Summary Judgment

[1] Plaintiff argues the release was executed under mutual mistake because he did not intend to release his right to pursue underinsured motorist coverage. We disagree.

A trial court properly grants summary judgment 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).

> "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." An issue is genuine if it is supported by substantial evidence.

Best v. Ford Motor Co., 148 N.C. App. 42, 44, 557 S.E.2d 163, 165 (2001), *per curiam aff'd*, 355 N.C. 486, 562 S.E.2d 419 (2002) (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972)). Once the moving party shows that no genuine issue of material fact exists, the nonmoving party has the burden "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." *Best*, 148 N.C. App. at 44, 557 S.E.2d at 165 (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000), *cert. denied*, [534 U.S. 950], 151 L. Ed. 2d 261 (2001)).

> A release is a formal written statement reciting that the obligor's duty is immediately discharged. A release given for valuable consideration is a complete defense to a claim for damages due to injuries. Releases and covenants not to sue are treated the same under the Uniform Contribution Among Tort-feasors Act (Act). Under the Act, a release or covenant not to sue that is given in good faith to one or more persons liable for the same injury does not discharge other tortfeasors, unless otherwise provided. However, absent other evidence, a release that releases all other persons or entities is valid.

Best, 148 N.C. App. at 44, 557 S.E.2d at 165 (internal citations omitted).

"A release may be avoided upon evidence that it was executed as a result of fraud or mutual mistake." *Best*, 148 N.C. App. at 44, 557 S.E.2d at 165. "Mutual mistake is 'a mistake common to all the parties to a written instrument . . . which usually relates to a mistake concerning its contents or its legal effect.'" *Id.* at 46-47, 557 S.E.2d at 166 (quoting *Sykes v. Keiltex Indus., Inc.*, 123 N.C. App. 482, 486, 473 S.E.2d 341, 344 (1996)).

In *Best*, the plaintiff-automobile passenger made claims against her driver, the automobile dealer, the automobile manufacturer, the air bag manufacturer, and the driver of the other vehicle and his employer for injuries she sustained in a crash. 148 N.C. App. at 43-44, 557 S.E.2d at 164. In conjunction with her settlement with the other driver and his employer, the plaintiff executed a general release. *Id.* The trial court granted summary judgment in favor of the dealer and manufacturers in a subsequent action based on the release. *Id.* at 44, 557 S.E.2d at 164. Plaintiff argued the release was executed under a mutual mistake of fact and asserted her affidavit, along with a former adjuster's affidavit, stating that she had not intended to release any other party. *Id.* at 46, 557 S.E.2d at 166. The plaintiff's affidavit merely stated she never intended to release the other parties and failed to set forth *specific facts* to establish mutual mistake. *Id.* at 47, 557 S.E.2d at 166.

We affirmed the trial court's award of summary judgment against the plaintiff due to her failure "to submit any evidence that . . . the other parties to the Release . . . were mistaken as to the effect of the Release." *Id.* We held, "because mutual mistake is one that is common to *all the parties to a written instrument*, the party raising the defense must state with particularity the circumstances constituting mistake as to all of the parties to the written instrument." *Id.* at 47, 557 S.E.2d at 166 (citation omitted).

Here, plaintiff's affidavit fails to establish a *prima facie* case of mutual mistake. The release signed by plaintiff states:

> the Undersigned, being of lawful age, for the sole consideration of Twenty Five Thousand and 00/100—Dollars . . . does hereby . . . release, acquit and forever discharge Yvonne Little . . . and all other persons, firms, corporations, associations or partnerships of and from any and all claims of action . . . resulting from the

> accident, casualty, or event which occurred on or about the 22nd day of May 1999, at or near Adams Farm, Greensboro, N.C. . . .

Plaintiff's affidavit states, "It is my belief that the carrier for the defendant forgot, as did my attorneys, of the potential underinsured claim in preparing and reviewing the settlement documents that were executed." Plaintiff also stated, "When I accepted the $25,000 . . . I intended to pursue an underinsured claim . . . ." These conclusory statements fail to show specific facts of mutual mistake, "lack[s] particularity" and is "insufficient to withstand a motion for summary judgment." *Id.* at 47, 557 S.E.2d at 166.

Further, plaintiff's affidavit fails to "state with particularity the circumstances constituting mistake as to all parties to the written instrument." *Id.* Plaintiff presented *no* evidence and made *no* allegation that Little, who was a named party to the release, was mistaken concerning any legal effect of the release.

Plaintiff failed to forecast evidence sufficient to make a *prima facie* case and show that a genuine issue of material fact existed regarding mutual mistake in executing the release. The trial court did not err in granting summary judgment against plaintiff. This assignment of error is overruled.

IV. Motion to Reform

[2] Plaintiff contends the trial court failed to consider his affidavit as a motion to reform. We disagree.

When the issue of reformation has been raised,

> [t]he party asking for relief by reformation of a deed or written instrument, must allege and prove, first, that a material stipulation, as alleged, was agreed upon by the parties, to be incorporated in the deed or instrument as written, and second, that such stipulation was omitted from the deed or instrument as written, by mistake, either of both parties, or of one party, induced by the fraud of the other, or by the mistake of the draughtsman. Equity will give relief by reformation only when a mistake has been made, and the deed or written instrument because of the mistake does not express the true intent of both parties. The mistake of one party to the deed, or instrument, alone, not induced by the fraud of the other, affords no ground for relief by reformation.

Matthews v. Shamrock Van Lines, Inc., 264 N.C. 722, 725, 142 S.E.2d 665, 668 (1965) (quoting *Crawford v. Willoughby*, 192 N.C. 269, 271,

134 S.E. 494, 495 (1926)). "[M]istake as a ground for relief should be alleged with certainty, by stating the facts showing the mistake . . . ." *Matthews*, 264 N.C. at 725, 142 S.E.2d at 668 (quoting 1 McIntosh, North Carolina Practice and Procedure § 990 (2d Ed. 1956)). In order to satisfy this requirement and sufficiently set forth the grounds to reform the writing, our North Carolina Supreme Court adopted the Massachusetts Supreme Court's reasoning that the party must allege "(1) that the parties intended to include the omitted provision; (2) stating the substance of the omitted provision; (3) stating the provision of the executed lease; and (4) that the omission was by mistake (that is, human failure of performance) of the parties and 'without intention or design' . . . ." *Matthews*, 264 N.C. at 726, 142 S.E.2d at 669 (quoting *De Vincent Ford Sales v. First Mass. Corp.*, 336 Mass. 448, 451, 146 N.E.2d 492, 494 [1957])).

Here, plaintiff filed an affidavit with the trial court on 3 July 2003 that stated, "justice and equity require the first Release document be reformed so as to allow my pursuit of an underinsured claim . . . ." The parties stipulated that during the summary judgment hearing plaintiff orally moved the trial court to consider his affidavit as a motion to reform the release. After "review[ing] the submissions of the parties including the plaintiff's affidavit," the trial court entered an order granting summary judgment for both Little and Royal.

By granting summary judgment, the trial court implicitly denied plaintiff's motion to reform the release. Were we to presume the trial court granted plaintiff's oral motion to consider his affidavit as a motion to reform the release, the affidavit did not request a hearing or "set forth the relief or order sought" as required by the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (2003). Further, plaintiff's affidavit fails to set forth any of the allegations to reform a written document as required under our Supreme Court's reasoning in *Matthews*. 264 N.C. at 726, 142 S.E.2d at 669. This assignment of error is overruled.

V. Rights of Subrogation

Plaintiff argues Royal waived its right of subrogation and right to approve plaintiff's settlement with Integon. In his brief, plaintiff cites to his assignments of error and asserts genuine issues of material fact exist regarding the validity of the release and mutual mistake among the parties. We have already ruled on these assignments of error and held that the trial court did not err in granting summary judgment against plaintiff. This assignment of error is overruled.

VI. Conclusion

The trial court properly granted summary judgment in favor of Little and Royal. The trial court properly refused to treat plaintiff's affidavit as a motion to reform the release. The judgment of the trial court is affirmed.

Affirmed

Judges BRYANT and STEELMAN concur.

LAUREN McGLYNN, PLAINTIFF v. DUKE UNIVERSITY, DEFENDANT

No. COA03-1262

(Filed 6 July 2004)

Compromise and Settlement— employment termination agreement—wages, not personal injuries—intent of payor

Summary judgment was correctly granted for defendant on a breach of contract action arising from the settlement of claims concerning the termination of her employment. Although plaintiff claimed that FICA taxes should not be deducted because the settlement was for personal injuries and not for wages, the settlement agreement is silent about the purpose for which the payment was made and the intent of the payor is therefore the most important factor. Defendant's intent from the beginning was that any payment was purely in settlement of the employment relationship, plaintiff made no demand for medical expenses or mention of personal injury and sought only back pay, and the settlement was calculated based on plaintiff's salary.

Appeal by plaintiff from order entered 25 April 2003 by Judge Kenneth Titus in Orange County Superior Court. Heard in the Court of Appeals 9 June 2004.

Barry Nakell, for plaintiff-appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Robert A. Sar and C. Matthew Keen, for defendant-appellee.

TYSON, Judge.

Lauren McGlynn ("plaintiff") appeals from an order granting Duke University's ("defendant") motion for summary judgment. We affirm.

I. Background

On 17 January 2002, defendant requested plaintiff to resign from her employment and to sign a severance agreement or, in the alternative, be discharged. Defendant's request arose from plaintiff's alleged work performance. Plaintiff rejected the severance offer, and defendant terminated plaintiff's employment.

On 27 February 2002, plaintiff submitted a Dispute Resolution Form pursuant to defendant's private dispute resolution process. Plaintiff alleged various reasons for her performance, including unfair work demands and unfair harassment from her supervisor. Plaintiff sought reinstatement to her previous position, "back pay," a transfer, and removal of derogatory remarks from her file. Plaintiff made no demand for medical expenses or personal injury.

On 3 April 2002, the grievance officer rejected plaintiff's grievance. Plaintiff appealed to another grievance officer. Plaintiff again demanded reinstatement with "back pay" and removal of derogatory remarks, but additionally requested to be placed on medical leave. On 8 June 2002, a grievance officer again rejected plaintiff's grievance and held her termination was "for cause." Throughout this process, defendant continually offered to settle plaintiff's claims and submitted various proposals to her. Plaintiff rejected all offers.

On 3 July 2002, plaintiff and defendant executed a "Full, Final and Complete Release and Discharge of All Claims, Convenient [sic] Not to Sue and Indemnity Agreement" ("settlement agreement"). Defendant agreed to reinstate plaintiff and place her on unpaid personal leave for a period not to exceed one year. Defendant also agreed to provide plaintiff with a lump sum payment, which amount was equivalent to six (6) months of her current salary as full settlement for any and all claims. Plaintiff agreed that she would not sue or bring any cause of action against defendant and that she had been paid all monies owed to her, including, but not limited to, wages and bonuses. Defendant agreed to delete a clause following the agreement to pay plaintiff a six month salary equivalent lump sum that stated, "less applicable federal taxes, deductions, and withholdings." Defendant claims this clause was deleted because "taxability of a pay-

ment did not depend on whether the parties state that taxes would be withheld." Plaintiff claims this clause was deleted to ensure that she did not have to reimburse unemployment benefits and that a fair sum would remain for her continuing recovery. Throughout all negotiations, plaintiff never requested compensation for medical bills or personal injury.

On 10 July 2002, defendant informed plaintiff that she could pick up her check where all other payroll checks were located. Plaintiff contended the lump sum payment was not a payroll check and not taxable according to the settlement agreement. Defendant informed her that she never asserted a claim for personal injury or medical expenses and, under federal law, the payment was not a personal injury settlement and was taxable. Plaintiff continued to assert the check was for settlement of claims and not a payroll check. Defendant tendered payment of the settlement amount, less a deduction for Federal Insurance Contributions Act ("FICA") and state and federal income taxes.

On 25 October 2002, plaintiff sued defendant for breach of contract. Both parties moved for summary judgment. The trial court granted defendant's motion for summary judgment and denied plaintiff's motion. Plaintiff appeals.

II. Issue

The sole issue on appeal is whether the trial court erred in granting summary judgment in favor of defendant on plaintiff's breach of contract claim.

III. Standard of Review

Our standard to review 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), *aff'd*, 358 N.C. 137, 591 S.E.2d 520, *reh'g denied*, 358 N.C. 381, 597 S.E.2d 129 (2004) 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)); *see also* 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 can-

not 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. Breach of Contract

Plaintiff contends that the trial court erred in granting defendant's motion for summary judgment as the evidence showed that the settlement agreement was for personal injuries and not for wages, making deductions for FICA taxes inapplicable. We disagree.

FICA is codified at 26 U.S.C. § 3101 and sets out the regulations for the United States' social security system. Sections 3101(a) and (b) impose a 7.65 percent tax on wages received from employment that is to be matched by the employer. 26 U.S.C. § 3101(a)-(b) (2004). Section 3102 requires employers to collect the tax from the employee by deducting the amount from wages when paid. 26 U.S.C. § 3102 (2004). The term "wage" means all remuneration for employment unless specifically excepted by FICA. 26 C.F.R. 31.3121(a)-1(b) (2004). The designation of remuneration for employment, such as salary, fees, and bonuses, is immaterial. 26 C.F.R. 31.3121(a)-1(c) (2004). Remuneration continues to be considered wages even though the employer/employee relationship ended prior to the time of payment. 26 C.F.R. 31.3121(a)-1(i) (2004).

The Supreme Court of the United States emphasized the inclusive nature of the term "wages":

The very words "any service . . . performed . . . for his employer," . . . import breadth of coverage. They admonish us against holding that "service" can be only productive activity. We think that "service" as used by Congress in this definitive phrase means not only work actually done but the entire employer-

employee relationship for which compensation is paid to the employee by the employer.

Social Sec. Bd. v. Nierotko, 327 U.S. 358, 365-66, 90 L. Ed. 718, 725 (1946).

"When a settlement agreement lacks express language stating what the settlement amount was paid to settle, *the most important factor for courts to consider is the intent of the payor.*" *Pipitone v. United States*, 180 F.3d 859, 864 (7th Cir. 1999) (emphasis supplied); *see also Haile v. Combined Ins. Co. of Am.*, 2000 U.S. Dist. LEXIS 19565 (W.D.N.C. 2000). "The withholding of taxes [by the payor] is a significant factor suggesting the employer intended a payment to constitute [wages]." *Pipitone*, 180 F.3d at 864. In *Haile*, the parties disputed the withholding of taxes from the monies paid pursuant to the settlement agreement. 2000 U.S. Dist. LEXIS 19565, 1-2. The Court, relying on *Pipitone*, held the payment was subject to taxes and that taxes were properly withheld. *Id.* The evidence showed the employer intended the settlement agreement to end plaintiff's employment claims against them and classified the payment as taxable wages. *Id.*

Here, plaintiff argues that the amounts paid under the settlement agreement were for personal injuries and medical expenses suffered on account of her supervisor's harassment. The settlement agreement is silent regarding the purpose for which the payment was made. Therefore, "the most important factor for courts to consider is the intent of the payor." *Pipitone*, 180 F.3d at 864.

Defendant's intent from the beginning of negotiations was that any payment was purely in settlement of the employment relationship between the parties and plaintiff's challenge to her termination. After being terminated, plaintiff initially sought reinstatement to her previous position, "back pay," a transfer, and removal of derogatory remarks from her file. Plaintiff made no demand for medical expenses or mention of personal injury.

After plaintiff's initial grievance was rejected, plaintiff appealed. Plaintiff again demanded reinstatement with "back pay" and removal of derogatory remarks. She additionally requested to be placed on medical leave. Again, plaintiff made no complaint of personal injuries or demand for medical expenses. The only monetary remedy ever sought by plaintiff was "back pay," not compensation for personal injuries or reimbursement of medical expenses. Plaintiff's claim of

harassment by her supervisor was merely an assertion that her termination of employment was wrongful and did not set forth an independent claim for personal injury and medical expenses.

The settlement agreement itself also provides insight on defendant's intent in entering into the settlement agreement with plaintiff. The settlement agreement calculated the payment to plaintiff based on her monthly base salary. The evidence shows that plaintiff last worked for defendant in January 2002 and entered into the settlement agreement in July 2002, a time span of six months. The amount paid to plaintiff for back pay under the settlement agreement was a lump sum payment "equivalent to six (6) months of her current monthly base salary in full settlement of any perceived claims."

Further, under the settlement agreement, plaintiff was reinstated and placed on unpaid personal leave for the purpose of providing plaintiff "with an opportunity to be considered for other positions at Duke and to remain eligible for Duke benefits." Defendant also agreed to remove any "negative information leading to or relating to her work with DCRI." Plaintiff agreed to release defendant from "any and all legal claims, causes of action, agreements, obligations, liabilities, damages and/or demands whatsoever at law or in equity . . . ." The settlement agreement makes no mention of medical expenses or personal injuries. Under the terms of the settlement agreement, plaintiff received all remedies requested in the previous dispute resolutions. She was reinstated and paid a lump sum of money equivalent to six months of back pay. All negative comments were removed from her file.

Plaintiff neither complained of personal injuries nor requested medical expenses as a remedy in any of her dispute resolution demands. All the evidence, including the settlement agreement, shows defendant intended to pay the settlement sum only to resolve plaintiff's termination of employment and were properly treated as wages subject to defendant's withholding of FICA taxes. *Pipitone*, 180 F.3d at 864. The trial court properly granted defendant's motion for summary judgment. Plaintiff's assignment of error is overruled.

V. Conclusion

Plaintiff failed to show that the trial court erred in granting defendant's motion for summary judgment on plaintiff's breach of contract claim. The order and judgment of the trial court is affirmed.

Affirmed.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA v. PRESTON SMITH

No. COA03-758

(Filed 6 July 2004)

1. **Appeal and Error— appealability—interlocutory order—N.C.G.S. § 15A-1432(d) exception**

Although an appeal from the superior court's reversal and remand of a district court order dismissing defendant's probation violation is an appeal from an interlocutory order and ordinarily not appealable, N.C.G.S. § 15A-1432(d) provides an exception because: (1) the superior court determined that the district court's order dismissing the probation violation was erroneous and remanded the matter back to the district court for further proceedings; (2) defendant's attorney certified to the superior court judge that the appeal was not taken for the purpose of delay, and the superior court judge found that the cause was appropriately justiciable in the appellate division as an interlocutory matter; and (3) a probation revocation hearing is sufficiently analogous to the dismissal of criminal charges for the purposes of this statute.

2. **Probation and Parole— probation violation report—timeliness**

The superior court erred in a probation violation case by concluding that the State's violation report was timely, because: (1) the State's probation revocation complaint was not filed prior to the expiration of defendant's probation term as required by N.C.G.S. § 15A-1344(f)(1); and (2) defendant's probation was not stayed while defendant appealed his conviction from district court to superior court.

Appeal by defendant from order entered 13 March 2003 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 3 March 2004.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

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

McCULLOUGH, Judge.

On 6 December 2000, defendant Preston Smith was found guilty of assault on a female in Buncombe County District Court. Defendant's sentence of ninety days in prison was suspended, and defendant was placed on supervised probation for twelve months. Defendant appealed to superior court and was later allowed to withdraw the appeal. The case was remanded to district court for immediate execution of the judgment.

On 24 January 2002, defendant's probation officer, Liz McCurry, filed a probation violation report. McCurry asserted that defendant violated the terms of his probation by failing to pay his probation supervision fee and by committing the offense of felony larceny.

The Honorable Gary S. Cash considered the issue of defendant's probation violation on 29 January 2003. Judge Cash dismissed the probation violation because the State failed to file a violation report before the expiration of the probation period. The State appealed this order on 31 January 2003, but voluntarily dismissed the appeal.

On 6 March 2003, the State filed a petition for writ of certiorari in Buncombe County Superior Court seeking review of Judge Cash's order. The State amended its petition on 7 March 2003 and filed a memorandum in support of the petition.

On 10 March 2003, defendant filed a motion to dismiss the petition for writ of certiorari and a response to the petition. The Honorable James U. Downs granted the State's petition and remanded the matter to district court for further proceedings. Judge Downs also determined that when a defendant appeals his case from district court to superior court and later remands his case back to the district court, the date of remand starts the judgment.

Defendant appeals. On appeal, defendant argues that the trial court erred in determining that the State's petition was timely filed. We agree and reverse the decision of the superior court.

I. State's Motion to Dismiss

[1] As a preliminary matter, we must consider whether the appeal is properly before this Court. 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). The right to appeal in a criminal proceeding is purely statutory. *State v. Nichols*, 140 N.C. App. 597, 598-99, 537 S.E.2d 825, 826 (2000). Generally, "[t]here is no provision for appeal to the Court of Appeals as a matter of right from an interlocutory order entered in a criminal case[.]" *State v. Henry*, 318 N.C. 408, 409, 348 S.E.2d 593, 593 (1986).

In this case, the superior court reversed and remanded the district court's order dismissing defendant's probation violation. This order is not a final judgment because it does not dispose of the matter as to all the parties, leaving nothing to be judicially determined between them in the trial court. Instead, the order is interlocutory because the lower court must take further action to settle the dispute. As we have stated, interlocutory orders entered in criminal cases are generally not appealable in this Court. *Id.* Therefore, this appeal should be dismissed unless an exception applies.

N.C. Gen. Stat. § 15A-1432(d) (2003) provides such an exception:

> If the superior court finds that a judgment, ruling, or order *dismissing criminal charges* in the district court was in error, it must reinstate the charges and remand the matter to district court for further proceedings. The defendant may appeal this order to the appellate division as in the case of other orders of the superior court, including by an interlocutory appeal if the defendant, or his attorney, certifies to the superior court judge who entered the order that the appeal is not taken for the purpose of delay and if the judge finds the cause is appropriately justiciable in the appellate division as an interlocutory matter.

(Emphasis added.)

We believe that this statute applies to the present case. Here, the superior court determined that the district court's order dismissing the probation violation was erroneous and remanded the matter back to the district court for further proceedings. Defendant also met the other requirements of the statute. His attorney certified to the superior court judge that the appeal was not taken for the purpose of delay, and the superior court judge found that the cause was appropriately justiciable in the appellate division as an interlocutory matter.

We also wish to clarify that a probation revocation hearing is sufficiently analogous to the dismissal of criminal charges for the purposes of this statute. In its brief, the State (the party which would be aggrieved by such an interpretation) acknowledges that:

> While a probation revocation hearing is not technically a full criminal prosecution, it is undeniably a part of the criminal process. Probationers receive a variety of due process protections. Final revocation of probation must be preceded by a hearing. . . .
>
> Violation of probation can result in arrest for such violation [under] N.C.G.S. § 15A-1345(a) (2001), and a preliminary hearing is generally required, just as in conventional criminal prosecutions. N.C.G.S. § 15A-1345(c). . . .
>
> *For these reasons, the State argues that the dismissal of the instrument bringing a probationer back to the court for possible revocation of probation and activation of a sentence of imprisonment is sufficiently akin to the dismissal of criminal charges* . . . .

(Emphasis added.) Because we have the authority to hear this case under N.C. Gen. Stat. § 15A-1432(d), the State's motion to dismiss is denied.[1] We turn to consider the merits of the case.

II. Failure to Timely File the Probation Violation Report

[2] Defendant argues that the superior court erred in making its determination on the timeliness of the probation violation report. We agree.

1. Alternatively, we note that this Court has the authority to hear this case even if N.C. Gen. Stat. § 15A-1432(d) does not apply. Under N.C.R. App. P. 21(a)(1) (2004), writs of certiorari "permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost [because] no right of appeal from an interlocutory order exists[.]" This provision allows us to hear interlocutory criminal appeals like the one in the case at bar.

" 'When a sentence has been suspended and defendant placed on probation on certain named conditions, the court may, *at any time during the period of probation*, require defendant to appear before it, inquire into alleged violations of the conditions, and if found to be true, place the suspended sentence into effect.' " *State v. Hicks*, 148 N.C. App. 203, 204, 557 S.E.2d 594, 595 (2001) (citation omitted). However, *after the period of probation has ended*, a court may revoke probation only if a probation revocation complaint is filed prior to the expiration of the probation term. N.C. Gen. Stat. § 15A-1344(f)(1) (2003).

In this case, defendant was placed on twelve months' probation on 6 December 2000. The revocation complaint was filed on 29 January 2002. Thus, the complaint was filed more than twelve months from the date of sentencing.

The State argues that the complaint was timely filed because defendant's probation was stayed while defendant appealed his conviction from district court to superior court. We disagree with this contention. Under N.C. Gen. Stat. § 15A-1431(f) (2003):

> Appeal pursuant to this section stays the execution of portions of the judgment relating to fine and costs. Appeal stays portions of the judgment relating to confinement when the defendant has complied with conditions of pretrial release. If the defendant cannot comply with conditions of pretrial release, the judge may order confinement in a local confinement facility pending the trial de novo in superior court.

This statute provides that the only portions of a district court sentence stayed by an appeal are fines, costs, and terms of imprisonment if the defendant has complied with pretrial conditions of release. "If ordinary probation is involved, the defendant begins serving the probation despite the appeal[.]" *See* Stevens H. Clarke, *Law of Sentencing, Probation, and Parole in North Carolina*, p. 124 (Institute of Gov't 2d ed. 1997).

This provision should not be confused with N.C. Gen. Stat. § 15A-1451 (2003), the section that deals with appeals from superior court to the appellate courts. When a defendant appeals from superior court to the appellate courts, probation is stayed. N.C. Gen. Stat. § 15A-1451(a)(4). Since the legislature specifically delineated that probation is stayed in this section and did not do so in N.C. Gen. Stat.

§ 15A-1431(f), this reveals a deliberate decision not to stay probation when a defendant appeals district court decisions to the superior court. Plaintiff's suggestion that defendant's probation was stayed is without merit.

Because the State's probation revocation complaint was not filed prior to the expiration of defendant's probation term, the State failed to comply with N.C. Gen. Stat. § 15A-1344(f)(1). Furthermore, since defendant's probation was not stayed while defendant appealed his conviction from district court to superior court, the State has not shown that its complaint was timely filed. Therefore, the district court was correct in dismissing the probation violation, and the superior court erred in reinstating the charges. The order of the superior court is

Reversed.

Judges BRYANT and ELMORE concur.

BEVERLY A. KUMMER, PLAINTIFF v. ANTHONY LOWRY, JR., AND ANTHONY LOWRY, DEFENDANTS

No. COA03-1079

(Filed 6 July 2004)

Motor Vehicles— intersection accident—green light—duty to look—contributory negligence

The trial court did not abuse its discretion by denying plaintiff's motion for a new trial after a jury found her to be contributorily negligent in an automobile accident at an intersection. Plaintiff had the green light and did not see defendant until the last minute, but admitted not looking to see if traffic was coming. A driver must maintain a reasonable and proper lookout even when she has a green light.

Appeal by plaintiff from order entered 16 May 2003 by Judge Nancy Black Norelli in Mecklenburg County District Court. Heard in the Court of Appeals 19 May 2004.

Harris Ragan Patterson & Rodgers, by J. Neal Rodgers, for plaintiff-appellant.

Lovejoy & Bolster, P.A., by Jeffrey S. Bolster, for defendants-appellees.

TYSON, Judge.

Beverly A. Kummer ("plaintiff") appeals from a judgment entered after a jury's verdict found Anthony Lowry, Jr., ("Lowry") and Anthony Lowry (collectively, "defendants") negligent, plaintiff contributorily negligent, and failed to award damages for injuries she sustained in a car accident with defendants. We affirm.

I. Background

On 20 June 2000, plaintiff was driving her automobile west on Carowinds Boulevard in Charlotte, North Carolina. As plaintiff's automobile entered the intersection of Carowinds Boulevard and Catawba Trace Drive, the traffic light at the intersection emitted green for plaintiff's lane of traffic. Lowry entered the intersection proceeding south on Catawba Trace Drive in violation of the red light in his lane of travel. Plaintiff's automobile "t-boned" Lowry's automobile. The front of plaintiff's automobile struck the left rear quarter panel of Lowry's automobile.

Plaintiff brought suit against defendants and alleged that Lowry was negligent in causing the accident as he: (1) failed to maintain and keep a reasonable and careful lookout; (2) failed to keep his vehicle under reasonable and proper control; (3) operated his vehicle upon a public road heedlessly and carelessly; and (4) entered an intersection at a time when the traffic light emitted red for traffic in the direction in which he was traveling.

Defendants answered, denied negligence, and alleged that plaintiff was contributorily negligent by: (1) failing to keep a proper lookout; (2) failing to reduce the speed of her vehicle to avoid a collision; and (3) acting carelessly and negligently.

Weather conditions on the day of the collision were clear and dry with no obstructions or impediments to plaintiff's view. Plaintiff presented evidence that showed the speed limit on Carowinds Boulevard was 55 miles-per-hour and that at the time of the accident she was traveling between 45 and 55 miles-per-hour. Plaintiff testified she did not see or notice Lowry's vehicle or any other vehicle coming from the direction of Catawba Trace Drive. Plaintiff observed a car to

her right traveling in the same direction. As plaintiff entered the intersection, she focused on the road directly in front of her and did not look to her left or right. Plaintiff stated she did not see Lowry's vehicle until it was directly in front of her and did not have time to brake or take any other action to prevent the collision. Defendants did not put on any evidence.

Plaintiff moved for a directed verdict on the issue of contributory negligence, which the trial court denied. The jury found: (1) defendants to be negligent; (2) plaintiff's negligence contributed to her injuries; and (3) denied plaintiff recovery. Plaintiff's motion for judgment notwithstanding the verdict and new trial was denied. Plaintiff appeals solely from the order denying her motion for a new trial and does not appeal from the judgment filed 17 March 2003.

II. Issues

The sole issue is whether the trial court erred in denying plaintiff's motion for a new trial because there was insufficient evidence to submit the issue of contributory negligence to the jury.

III. Contributory Negligence

This Court applies an abuse of discretion standard of review when reviewing the denial of a motion for new trial. *Garrison v. Garrison*, 87 N.C. App. 591, 594, 361 S.E.2d 921, 923 (1987). A trial court's discretionary decision to deny or grant a new trial may be reversed on appeal "only when the record affirmatively demonstrates a manifest abuse of discretion." *Id.* This Court must determine whether the verdict represents an injustice and is against the greater weight of the evidence. *See In re Will of Buck*, 350 N.C. 621, 516 S.E.2d 858 (1999). Because "the trial court has directly observed the evidence as it was presented and the attendant circumstances, as well as the demeanor and characteristics of the witnesses," a trial court's ruling on a motion for new trial is given great deference. *Id.* at 628, 516 S.E.2d at 863.

In determining the sufficiency of the evidence to justify the submission of an issue of contributory negligence to the jury, the court "must consider the evidence in the light most favorable to the defendant and disregard that which is favorable to the plaintiff." *See Prevette v. Wilkes Gen. Hosp., Inc.*, 37 N.C. App. 425, 427, 246 S.E.2d 91, 92 (1978). " 'If different inferences may be drawn from the evidence on the issue of contributory negligence, some favorable to the plaintiff and others to the defendant, it is a case for the jury to deter-

mine.' " *Id.* (quoting *Bell v. Maxwell*, 246 N.C. 257, 261-62, 98 S.E.2d 33, 36 (1957)).

Plaintiff argues that because a green light was emitting for her direction of traffic, she had the right to assume that any motorist approaching an intersection would abide by all traffic signals and was not contributorily negligent. Our Supreme Court, however, has held that even though a driver possesses a green light, "the duty rests upon [the driver] to maintain a reasonable and proper lookout for other vehicles in or approaching the intersection." *Beatty v. Bowden*, 257 N.C. 736, 739, 127 S.E.2d 504, 506 (1962) (citing *Cox v. Freight Lines*, 236 N.C. 72, 72 S.E.2d 25 (1952)).

In *Bass v. Lee*, our Supreme Court elaborated on a motorist's duties:

> The duty of a driver at a street intersection to maintain a lookout and to exercise reasonable care under the circumstances is not relieved by the presence of electrically controlled traffic signals, which are intended to facilitate traffic and to render crossing less dangerous. He cannot go forward blindly even in reliance on traffic signals . . . . A green traffic light permits travel to proceed and one who has a favorable light is relieved of some of the care which otherwise is placed on drivers at intersections, since the danger under such circumstances is less than if there were no signals. However, a green or "go" light or signal is not an absolute guarantee of a right to cross the intersection solely in reliance thereon without the necessity of making any observation and without any regard to traffic conditions at, or other persons or vehicles within, the intersection. A green or "go" signal is not a command to go, but a qualified permission to proceed lawfully and carefully in the direction indicated. In other words, not withstanding a favorable light, the fundamental obligation of using due and reasonable care applies.

255 N.C. 73, 78-79, 120 S.E.2d 570, 573 (1961) (internal citations omitted).

In *Currin v. Williams*, a case with facts similar to those at bar, the plaintiff approached an intersection while her signal light was green. 248 N.C. 32, 35, 102 S.E.2d 455, 457 (1958). It was a fair and sunny day, with no impediments to plaintiff's line of sight while entering the intersection. *Id.* Plaintiff's car struck the side of defendant's car. *Id.* Plaintiff testified that she did not see defendant's car until

impact and that she did not look left or right while entering the intersection. *Id.* at 35, 102 S.E.2d at 457. Our Supreme Court held that the issue of contributory negligence was properly submitted to the jury based on this evidence.

This Court has also held that a motorist facing a green light while approaching an intersection has a duty to maintain a proper lookout. *See Love v. Singleton*, 145 N.C. App. 488, 492, 550 S.E.2d 549, 551 (2001); *Seaman v. McQueen*, 51 N.C. App. 500, 503-04, 277 S.E.2d 118, 120 (1981). "It is the duty of the driver of a motor vehicle not merely to look, but to keep an outlook in the direction of travel; and [the driver] is held to the duty to see what she ought to have seen." *Seaman*, 51 N.C. App. at 503-04, 277 S.E.2d at 120.

Here, the evidence shows that plaintiff admitted not looking left or right to see if any traffic was coming and stated, "it's not [her] responsibility." Further, the evidence shows that it was a clear and sunny day, the roads were dry, and there was good visibility to the left, right, and front of plaintiff's vehicle. There were no obstructions to plaintiff's view as she approached the intersection, and she testified she was familiar with the intersection.

Officer B.M. Hawk ("Officer Hawk"), the investigating officer of the accident, confirmed that the roadway was straight, with no hills or visual obstructions, and that there was good visibility in all directions. Officer Hawk also testified that the impact occurred in the second inside lane of Carowinds Boulevard and defendants' car had almost completely crossed this intersection when it was hit by plaintiff's car. Plaintiff agreed with Officer Hawk's description and location of the accident. Plaintiff was unable to provide a reason why she did not notice defendants' car until it was directly in front of her.

The evidence also showed that plaintiff did not apply her brakes or slow her vehicle's speed. Plaintiff testified that she did not recall hitting her brakes before impact or seeing any skid marks. Officer Hawk testified that his investigation revealed no evidence that plaintiff took any action to avoid the collision.

Sufficient evidence was presented regarding plaintiff's contributory negligence, which allowed the trial court to submit the issue of contributory negligence to the jury. The trial court did not abuse its discretion in denying plaintiff's motion for a new trial after the jury found her to be contributorily negligent and failed to award her damages. Plaintiff's assignment of error is overruled.

IV. Conclusion

Plaintiff failed to show that the trial court abused its discretion in denying her motion for a new trial after a jury found her to be contributorily negligent. The order of the trial court is affirmed.

Affirmed.

Judges McGEE and TIMMONS-GOODSON concur.

ANTHONY MARANO COMPANY, PLAINTIFF v. PHILLIP C. JONES AND MICHELLE M. JONES, DEFENDANTS, AND PAUL L. BITTER AND SANDRA L. BITTER, INTERVENING-DEFENDANTS

No. COA03-367

(Filed 6 July 2004)

1. **Mortgages and Deeds of Trust— novation—modification of obligation**

A de novo review revealed that the trial court did not err by finding that a second note from defendant to plaintiff did not extinguish the original debt secured by the mortgage, because the execution of the second note was not a novation as to the earlier debt, although it is undisputed that the parties agreed to modify the obligation, when there was no evidence of a clear intent among the parties that the second note be substituted for the original obligation such that the original obligation was extinguished.

2. **Creditors and Debtors— application of payment—discretion of creditor**

A de novo review revealed that the trial court did not err by entering judgment for plaintiff company in an action to foreclose a mortgage even though defendants contend plaintiff improperly applied payments by defendant and his companies to reduce other debts owed by defendant and his companies, because there was no evidence in the record that defendant ever specified the debts to which payments were to be credited, and thus, the application of payments was in the discretion of plaintiff company.

Appeal by intervenors from judgment entered 28 October 2002 by Judge James W. Morgan in Cleveland County Superior Court. Heard in the Court of Appeals 3 December 2003.

R. Keith Johnson, P.A., by R. Keith Johnson, for the plaintiff-appellee.

Hamilton, Gaskins, Fay, & Moon, P.L.L.C., by Jackson N. Steele and Mark R. Kutny, for the intervenor-appellants.

ELMORE, Judge.

To secure a debt, Phillip Jones (defendant) executed a mortgage in favor of Anthony Marano Company (appellee) on certain real property in Cleveland County, North Carolina (the property) on 16 June 1992. The mortgage was recorded in the Cleveland County Registry on 25 June 1992. On 21 October 1993, defendant and appellee executed a demand note (second note), changing the terms of the original debt obligation by reducing the interest rate. As of our hearing of this case, the mortgage remained unpaid.

On 16 August 1996, Paul and Sandra Bitter (appellants) obtained a judgment against defendant in the Court of Common Pleas of Ottawa County, Ohio. On 10 January 1997, appellants docketed the Ohio judgment against defendant in Cleveland County, North Carolina, thereby placing a lien on the property to satisfy the judgment.

On 28 April 2000, appellee filed suit against defendant to foreclose the mortgage on the property in Cleveland County Superior Court to satisfy the debt. Appellants, claiming to have a superior interest in the property, filed a motion to intervene in the case, their motion was granted. After a non-jury trial, the Honorable James W. Morgan entered judgment in favor of appellees and ordered that the property be sold to satisfy the defendant's unpaid debt to the appellees. From this order, appellants appeal. For the reasons stated herein, we affirm.

[1] Appellants' first assignment of error is that the trial court erred in finding the second note from defendant to appellee did not extinguish the original debt secured by the mortgage. In essence, appellant argues that a novation occurred when appellee and defendant executed the second note.

It is well settled that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evi-

dence to support the trial court's findings of fact and whether the conclusions of law were proper in light of such facts. *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 84 N.C. App. 27, 351 S.E.2d 786 (1987). A trial court's conclusions of law, however, are reviewable *de novo*. *Wright v. Auto Sales, Inc.*, 72 N.C. App. 449, 325 S.E.2d 493 (1985). In the case *sub judice*, the trial court made the following findings of fact relative to the absence of a novation:

> 10. The note dated 15 June 92 was not paid on its due date, and subsequent thereto, on 21 October 93 [defendant] executed a note for $450,000 payable to Marano, on demand, to acknowledge and renew the obligation that was unpaid, that was secured by the mortgage identified above.
>
> 11. No new funds were advanced to [defendant] as a result of the note dated 21 October 93, as said note simply acknowledged the existing obligation owed to [appellee] by [defendant].
>
> 12. The debt owed by [defendant] to [appellee] secured by the property in Cleveland County was not intended to be extinguished by [defendant] and [appellee].

Our review of the record in this case reveals that there is competent evidence to support these findings of fact. In fact, there is no evidence in the record to support appellant's contention that the second note was intended by the parties to extinguish the original obligation secured by the mortgage. We are therefore bound by these findings. The following conclusions of law were therefore proper in light of the findings of fact:

> 1. The execution of the note on 21 October 93 by [defendant] was not a novation as to the earlier debt created on 16 June 92, but instead was a restatement and acknowledgment of that debt which, in effect, extended the maturity date of the obligation. It was not intended by [defendant] and [appellee] to extinguish the previous debt, nor was the mortgage securing said obligation canceled. Consequently, there was no novation upon execution of the note on 21 October 93, and the obligation which arose on 16 June 92 continued through that date and continues to the date of this order.
>
> . . .
>
> 3. The obligation of [defendant] to [appellee] secured by the mortgage was not extinguished by payments from [defendant] to

> [appellee] on other debts and obligations, and the note dated 16 June 92, as restated in the note dated 21 October 93 was not extinguished or paid, and is a continuing obligation.

De novo review of this issue requires us to consider the question anew, as if not previously considered or decided. *Raleigh Rescue Mission, Inc. v. Board of Adjust. of City of Raleigh (In re Appeal of Soc'y for Pres. of Historic Oakwood)*, 153 N.C. App. 737, 740, 571 S.E.2d 588, 590 (2002). " 'The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract.' . . . 'Ordinarily . . . in order to constitute a novation the transaction must have been so intended by the parties.' " *Tomberlin v. Long*, 250 N.C. 640, 644, 109 S.E.2d 365, 368 (1959) (citations omitted). Although it is undisputed that the parties agreed to modify the obligation, there is no evidence of a clear intent among the parties that the second note be substituted for the original obligation such that the original obligation was extinguished. The record does not support appellants' argument.

[2] Appellants' second assignment of error is that the trial court erred by entering judgment for the appellee because the appellee improperly applied payments by defendant and his companies to reduce other debts owed by defendant and his companies. The trial court made the following conclusion of law:

> 4. [Appellee] was not obligated to apply credits or payments to the oldest debt owed to it by [defendant], nor was it otherwise legally obligated to apply credits and payments so that the debt secured by the mortgage identified herein would be extinguished and paid.

We review this conclusion *de novo*. Our Supreme Court has stated:

> [i]t is a well-settled principal of both common and civil law, which seems to be universally applied, that where a debtor, who owes a number of debts to a creditor, makes a payment to the creditor, he has the right at the time of the payment to specify the debt or debts to which the payment will be applied, and if he fails to do so, the creditor may make the application.

Heating Co. v. Realty Co., 263 N.C. 641, 654, 140 S.E.2d 330, 339 (1965). There is no evidence in the record that defendant ever specified the debts to which payments were to be credited. Therefore, the right to make such an assignment fell to the appellee, as creditor. The

trial court's conclusion of law is proper and this assignment of error is without merit.

We conclude that the trial court did not err in holding there was not a novation and that the application of payments was in the discretion of the appellee. As a result, the judgment of the trial court is affirmed.

Affirmed.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA v. CALVIN LAMONTE BROWN

No. COA03-1332

(Filed 6 July 2004)

Appeal and Error— *Anders* brief—two appeals frivolous—record inadequate on remainder—pro se appeal on *Alford* plea—not cognizable

In an appeal from five judgments and sentences for burglary and assault submitted on an *Anders* brief, appeal from two of the judgments was frivolous and the record on appeal did not permit review of the remaining three. The case was remanded for appointment of new counsel to bring forward defendant's appeal on those judgments. Defendant's pro se arguments were not cognizable on direct appeal from an *Alford* plea.

Appeal by defendant from judgments dated 21 May 2003 by Judge John O. Craig, III, in Stokes County Superior Court. Heard in the Court of Appeals 15 June 2004.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Samuel L. Bridges for defendant-appellant.

BRYANT, Judge.

Calvin Lamonte Brown (defendant) appeals from judgments dated 21 May 2003 entered consistent with his *Alford* plea to first-

degree burglary, assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), assault inflicting serious bodily injury, assault with a deadly weapon inflicting serious injury ("AWDWISI"), and conspiracy to commit assault with a deadly weapon inflicting serious injury. Defendant stipulated to facts resulting in a Prior Record Level II. The trial court imposed five aggravated prison sentences, to wit:

(1) 109 to 140 months for AWDWIKISI on 03 CRS 50233;

(2) 77 to 102 months for first-degree burglary in 03 CRS 50234, consecutive to the sentence in 03 CRS 50233;

(3) 24 to 29 months for conspiracy in 03 CRS 50284, consecutive to the sentence in 03 CRS 50234;

(4) a concurrent term of 19 to 36 months for assault inflicting serious bodily injury in 03 CRS 1379; and

(5) a concurrent term of 29 to 44 months for AWDWISI in 03 CRS 50276.

Testimony at the plea hearing tended to show that defendant had enlisted his co-defendants Jerry Hairston and Delante Kelly to retaliate against Bennie Hopper for stealing cocaine from defendant's residence. On 8 February 2003, defendant, Hairston and Kelly went looking for Hopper at 1875 Delta Church Road in Sandy Ridge, North Carolina, Hopper's previous address. After disabling the telephone lines, the three men entered the residence armed with guns and a golf club and assaulted three of the occupants. Defendant and Hairston brutally beat Jerry Lee Ashburn with a golf club, fracturing his skull and leaving him permanently paralyzed on his right side. In addition to losing his house, business, and ability to work, Ashburn incurred medical costs of approximately $170,000, and the additional costs of his ongoing rehabilitation. Michael J. Dalton was knocked unconscious by co-defendants, and was treated and released from the hospital later that night. Michael Shane Dalton was hit in the head with "something" and was kicked several times while on the ground.

After judgment, defendant gave notice of appeal in open court.

Counsel appointed to represent defendant has been unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal and therefore requests this Court to conduct its own review of the record for possible prejudicial error pursuant to

Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). Counsel advised defendant of his right under *Anders* and *Kinch* to file written arguments with this Court, and defendant has filed *pro se* arguments.

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom and whether the appeal is wholly frivolous. We conclude the appeal is frivolous as to the judgments entered in 03 CRS 50233 and 50284. Furthermore, we have examined the record for possible prejudicial errors in these judgments and have found none.

Defendant's appellate counsel, however, has failed to include in the record on appeal three of the five judgments entered by the trial court. *See* N.C.R. App. P. 9(a)(3)(g). They are instead attached as an "Appendix" to defendant's appellate brief and therefore are not properly before this Court for review. *State v. Dayberry*, 131 N.C. App. 406, 407, 507 S.E.2d 587, 588 (1998) (where counsel merely appends a copy of a judgment to his brief without a motion to amend the record, such judgment is not a proper part of the record on appeal). Although this Court may amend the record on its own motion to include these judgments, *see id.* (citing N.C.R. App. P. 2), such action would not remedy the insufficiency of the record on appeal. At a minimum, the indictments corresponding to these judgments are needed to assess potential errors in either (1) the use of Ashburn's injuries and expenses as aggravating factors for the assaults upon the Daltons, *see State v. Yelverton*, 334 N.C. 532, 549-50, 434 S.E.2d 183, 193 (1993), or (2) the entry of judgment upon numerous assault convictions for the single assault upon Ashburn, *see State v. Ezell*, 159 N.C. App. 103, 111, 582 S.E.2d 679, 685 (2003). Moreover, the State notes the judgment in 03 CRS 1379 contains an error under the Structured Sentencing grid, N.C. Gen. Stat. § 15A-1340.17(c), (e) (2003), imposing a term of nineteen to thirty-six months for the Class F felony of assault inflicting serious bodily injury.

Because the record on appeal does not permit review of the judgments in 03 CRS 1379, 50234, and 50276, we remand the cause for appointment of new appellate counsel to bring forward the defendant's appeal of right from those judgments. *See Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498.

As the issues raised by defendant in his *pro se* arguments to the Court are not cognizable on direct appeal from his *Alford* plea, *see*

N.C.G.S. § 15A-1444(a1), (a2) (2003), we accordingly note that our ruling in the instant appeal is without prejudice to defendant's right to file a motion for appropriate relief in superior court. *See State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

No error in 03 CRS 50233 and 50284.

Remanded for appointment of new appellate counsel in 03 CRS 1379, 50234, and 50276.

Chief Judge MARTIN and Judge McGEE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

ADESUYI v. SOLOMON BROS. REALTY CORP. No. 03-872	Wake (03CVS4844)	Appeal dismissed
ALAN STONE EXCAVATING, INC. v. JONES BROS., INC. No. 03-960	Chatham (02CVS381)	Affirmed
BILLINGSLEY v. KEYSTONE FOODS, LLC No. 03-745	Rockingham (02CVS2194)	Reversed and remanded
BRANSON v. DUKE UNIV. No. 03-1081	Ind. Comm. (I.C. 044467) (I.C. 046239) (I.C. 046241)	Affirmed
BREWER v. BREWER No. 03-782	Alamance (02SP356)	Appeal dismissed
IN RE A.L.K. No. 03-487	Guilford (98J1047)	Affirmed
IN RE C.B. No. 03-644	Wayne (02J191)	Affirmed
IN RE C.N.S. & B.N.S. No. 03-843	New Hanover (02J305) (02J306)	Affirmed
IN RE K.P.P. No. 03-1285	Mecklenburg (01J693)	Affirmed
IN RE M.C. & C.H. No. 03-1656	Cabarrus (01J198) (01J199)	Affirmed
IN RE M.L.J. No. 03-754	Alamnace (02J38)	Affirmed
IN RE R.T.W. No. 03-728	Orange (01J86)	Vacated
IN RE S.H. & A.K. No. 03-1161	Guilford (03J197) (03J198)	Remanded
JG WINSTON-SALEM, LLC v. CENTRAL CAROLINA SURGICAL EYE ASSOCS., P.A. No. 03-1515	Guilford (03CVS720)	Appeal dismissed

KENNEDY v. BRANCH BANKING & TR. CO. No. 03-1401	Guilford (03CVS6034)	Affirmed
KOHNEN v. EATON CORP. No. 03-798	Ind. Comm. (I.C. 985679)	Affirmed
LITTLE RIVER SOIL FARM v. HILL No. 03-607	Wake (00CVS13543)	Appeal dismissed
LOWE v. BALDWIN No. 03-1440	Durham (02CVS3834)	Affirmed
OLDHAM v. HSL AUTO., INC. No. 03-949	Moore (01CVS1498)	Dismissed
POMEROY v. TANNER MASONRY No. 03-1170	Ind. Comm. (I.C. 451069)	Affirmed
SHOCKLEY v. CAIRN STUDIOS LTD. No. 03-1210	Ind. Comm. (I.C. 601213)	Affirmed
SMITHFIELD FIN. SERVS., INC. v. CONWAY No. 03-1368	Pitt (02CVS2120)	Dismissed
STATE v. BETHEA No. 03-826	New Hanover (01CRS24730)	No prejudicial error
STATE v. CARTER No. 03-318	Randolph (00CRS22) (00CRS23) (00CRS690)	No error
STATE v. CASE No. 03-1127	Guilford (01CRS4043) (01CRS4044) (01CRS4086) (01CRS4087) (01CRS4088) (01CRS4089)	Affirmed
STATE v. CHAPPELL No. 03-1190	Guilford (02CRS91930) (02CRS91931) (02CRS91932)	No error
STATE v. COLLIE No. 03-1299	Cleveland (01CRS57429)	Appeal dismissed
STATE v. CRISP No. 03-1404	Clay (02CRS50103)	Affirmed

STATE v. DENDY No. 03-928	Mecklenburg (02CRS229813) (02CRS229814)	No error
STATE v. DIETRIECH No. 03-748	Onslow (02CRS54674) (02CRS54675) (02CRS54676)	No error
STATE v. DUBAR No. 03-506	New Hanover (01CRS8471)	No error
STATE v. FOYE No. 03-549	Guilford (00CRS106379)	No error
STATE v. GARLINS No. 03-1294	Union (02CRS50277)	No error
STATE v. GOODSON No. 03-834	Cleveland (01CRS3054)	No error
STATE v. GOODWIN No. 03-1336	Guilford (02CRS87385)	Affirmed
STATE v. GRAY No. 03-1430	Forsyth (02CRS51072)	No error
STATE v. HAWKINS No. 03-942	Durham (00CRS57915) (00CRS57917)	No error
STATE v. HOOKER No. 03-940	Lenoir (02CRS53017) (02CRS53018) (02CRS53019)	No error
STATE v. HUNTER No. 03-1173	Durham (00CRS57076)	No error
STATE v. JACKSON No. 03-1086	Davidson (02CRS52154)	No error
STATE v. JACKSON No. 03-996	Robeson (02CRS18335) (02CRS18336) (02CRS18337) (02CRS18338) (02CRS18339) (02CRS18340)	Affirmed
STATE v. JONES No. 03-590	Harnett (01CRS1029) (01CRS50743)	No error
STATE v. KENNEDY No. 03-1448	New Hanover (02CRS56903)	No error

STATE v. KNELLER No. 03-1301	Haywood (02CRS3833)	Affirmed; remanded for correction of clerical error in the judgment
STATE v. LOGAN No. 03-1541	Caldwell (02CRS5336) (02CRS5933)	No error
STATE v. MERRITT No. 03-1503	Carteret (02CRS55609) (02CRS55610)	No error
STATE v. NELSON No. 03-244	Guilford (01CRS98935) (01CRS98939) (01CRS98942) (01CRS98936) (01CRS98940) (01CRS98941)	No error
STATE v. NEWSOM No. 03-1403	Rowan (02CRS1052) (02CRS1053) (02CRS50640) (03CRS926) (03CRS927) (03CRS928)	No error
STATE v. NIXON No. 03-1514	Beaufort (02CRS003947) (02CRS003948) (02CRS053645) (02CRS053646)	No error in part-Docket numbers 02CRS053645, 02CRS053646. Reversed and remanded in part-Docket numbers 02CRS003947; 02CRS003948
STATE v. PRATT No. 03-1397	Guilford (02CRS82777)	No error
STATE v. RAGLAND No. 03-1163	Cumberland (02CRS52465)	No error
STATE v. REED No. 03-692	Durham (00CRS57792) (00CRS57793) (00CRS57794) (00CRS57795) (00CRS57777) (00CRS13322) (00CRS13323)	No error

STATE v. TAYLOR No. 03-349	Durham (01CRS53766)	No error
STATE v. WARDLAW No. 03-39	Guilford (00CRS96099)	New trial
STATE v. WELDON No. 04-3	Wake (02CRS790) (02CRS791) (02CRS69525)	No error
STATE v. WILLIAMS No. 03-536	Edgecombe (00CRS52206)	No error
VITTITOE v. VITTITOE No. 03-999	Guilford (96CVD1249)	Affirmed
WILHELM v. BOARD OF CTY. COMM'RS FOR ROWAN CTY. No. 03-1283	Rowan (03CVS637)	Reversed and remanded

STATE v. CLARK

[165 N.C. App. 279 (2004)]

STATE OF NORTH CAROLINA v. ORLANDO RAPHAEL CLARK

No. COA03-652

(Filed 6 July 2004)

1. Constitutional Law— right to confrontation—nontestifying witness—*Crawford*—testimonial evidence

A nontestifying witness's statement to an officer during the initial investigation and her later affidavit during questioning constituted testimonial evidence under *Crawford v. Washington*, 541 U.S. 36 (2004). The affidavit contained statements which implicated defendant and which were made under oath during police questioning. The fact that the initial statement was not under oath is not dispositive.

2. Constitutional Law— right to confrontation—nontestifying witness—unavailable

The trial court did not err by declaring a witness unavailable where the prosecutor informed the court that he had personally visited the scene, that the State had attempted to contact the witness through her friends, and that an officer had made several attempts to locate her. The State subsequently offered additional evidence regarding the witness's unavailability, including the officer's testimony.

3. Constitutional Law— right to confrontation—nontestifying witness—prior testimony

Defendant's Sixth Amendment right to confrontation was not violated by the admission of a nontestifying witness's prior testimony where defendant was present at the earlier trial, was represented by counsel, and had the opportunity to cross-examine the witness. The jury in the second trial heard the entire transcript, including the cross-examination about defendant's convictions, addictions, and any special treatment she received for her testimony.

4. Constitutional Law— right to confrontation—nontestifying witness—statements to officer—admission harmless error

There was harmless error in the admission of a nontestifying witness's statements to an officer and subsequent affidavit which identified defendant. Defendant did not have the opportunity to cross-examine the witness and the trial court failed to give an

instruction limiting the evidence to corroboration, but the error was harmless in light of the other evidence.

5. Criminal Law— instructions on witness's criminal charges—granted in substance

The trial court did not err by refusing to read to the jury a list of a nontestifying witness's prior and pending criminal charges. Defendant submitted the list before jury selection as support for a request to exclude the witness's testimony from a prior trial, but did not introduce the evidence at trial. General evidence of the witness's prior convictions was admitted through the prior testimony, and the court granted the request in substance by instructing the jury on consideration of prior convictions in determining credibility.

Judge WYNN concurring in the result.

Appeal by defendant from judgments entered 18 December 2002 by Judge James Floyd Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 16 March 2004.

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

Joseph E. Zeszotarski, Jr., for defendant-appellant.

TYSON, Judge.

Defendant appeals from judgments entered after a jury found him to be guilty of robbery with a dangerous weapon and second-degree kidnapping. Following a second proceeding, the jury adjudicated defendant as having the status of being an habitual felon and a violent habitual felon. We affirm defendant's conviction and the trial court's judgments and hold that any error at trial was harmless beyond a reasonable doubt.

I. Background

On 23 May 2001, Sarah DeBone ("DeBone") flew from her home in Michigan to Raleigh, North Carolina, and traveled by bus from Raleigh to Fayetteville. DeBone had not visited Fayetteville previously and was traveling to meet her fiancée, who was serving on active duty in the military and stationed near Fayetteville. Upon arrival at the Fayetteville bus station in mid-afternoon, DeBone walked outside the terminal to hail a taxi and was approached by defendant, who struck up a conversation with her.

DeBone told defendant she was visiting from Michigan and was waiting for a taxi to take her to the Fairfield Inn. Defendant falsely informed DeBone the Fairfield Inn was located within walking distance and offered to show her the way. DeBone consented, and defendant led her away from the bus station on foot. Several blocks away, defendant and DeBone encountered a woman, with whom defendant had a brief conversation.

As DeBone and defendant continued walking, she became apprehensive. DeBone told defendant she appreciated his help, but was returning to the bus station to get a taxi. Defendant promised the hotel was nearby, and DeBone relented. After they walked a short distance, defendant moved behind DeBone, grabbed her around the neck, and forced her to the ground. Defendant told DeBone not to move or talk because he had a gun. Defendant went through DeBone's belongings, stole her money, debit card, and compact disc player, and ran.

After lying on the ground until she was satisfied that defendant had fled, DeBone ran to the closest restaurant and called the police. Fayetteville Police Officer A.L. Black ("Officer Black") responded and drove DeBone through the area where she had walked. DeBone saw the woman whom defendant had spoken with earlier that day. Officer Black recognized the woman as Michelle Moore ("Moore"), a transient he had known for several years. Moore recognized DeBone as the woman she had seen walking with a male earlier that afternoon. Moore also stated she had known the man with DeBone for a couple of years, but informed Officer Black that she only knew him by his "street name" "C."

Fayetteville Police officers conducted an independent investigation to determine the identity of "C." Through this investigation, defendant was identified as a suspect. Moore later identified defendant as "C" in a photographic lineup. DeBone also identified defendant in a photographic lineup, and again at trial, as the man who led her away from the bus station and assaulted and robbed her.

Moore did not testify at trial. The trial court allowed the State to introduce her sworn testimony given in a prior trial against defendant, her identification of defendant, and her notarized statement to Officer Black. Defendant did not present any evidence. The jury convicted defendant of all charges, as well as having attained the status of an habitual felon and being a violent habitual felon. The trial court

sentenced defendant as a violent habitual felon to life imprisonment without possibility of parole. Defendant appeals.

II. Issues

Defendant contends the trial court erred in: (1) allowing into evidence Moore's prior testimony, affidavit, and statements to Officer Black identifying defendant as DeBone's robber; and (2) refusing to instruct the jury regarding Moore's prior criminal history.

All of defendant's assignments of error directly challenge the admission of evidence from, and jury instructions regarding, a witness who was not physically present to testify at trial. After the briefs were filed, the United States Supreme Court addressed the issue of "whether [the admission of recorded statements to police] complied with the Sixth Amendment's guarantee that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' " *Crawford v. Washington*, 541 U.S. 36, 38, 158 L. Ed. 2d 177, 184 (2004). As defendant's assignments of error directly relate to his Sixth Amendment right of confrontation, the United States Supreme Court's analysis in *Crawford* is controlling.

III. Confrontation Clause

Defendant argues the trial court violated his Sixth Amendment right to confrontation by admitting Moore's: (1) testimony from a prior trial; (2) affidavit taken by Officer Black; and (3) statements identifying defendant during police questioning, without making proper findings of unavailability.

The Sixth Amendment right of confrontation applies to the States through the Fourteenth Amendment of the United States Constitution. *Barber v. Page*, 390 U.S. 719, 721, 20 L. Ed. 2d 255, 258 (1968). Our United States Supreme Court has held, " '[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' " *Id.* (quoting *Pointer v. Texas*, 380 U.S. 400, 405, 13 L. Ed. 2d 923, 927 (1965)). "[T]here has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant." *Barber*, 390 U.S. at 722, 20 L. Ed. 2d at 258.

The United States Supreme Court recently revisited the Sixth Amendment Confrontation Clause in *Crawford*. After thoroughly discussing historical interpretations of the Confrontation Clause, the Supreme Court set forth the proper analysis to be applied and held, "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68, 158 L. Ed. 2d at 203.

Our review of whether defendant's Sixth Amendment right of confrontation was violated is three-fold: (1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant. *Id.*

A. Testimonial Evidence

[1] The Sixth Amendment to the United States Constitution guarantees that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Defendant contends the admission at trial of Moore's prior testimony, her affidavit taken during police questioning, and statements made to Officer Black identifying defendant violated his right of confrontation.

Defendant did not assign error to the trial court's admission of Moore's identification of defendant during a photographic lineup, nor does he assign error to the procedures used to obtain this evidence. Although defendant objected at trial, his failure to assign error precludes our review pursuant to N.C.R. App. P. 10 (2004). Defendant argues the admission of Moore's statements through *other witnesses'* testimony at trial violated his Sixth Amendment right to confrontation.

In *Crawford*, Justice Scalia wrote, " '[t]estimony,'. . . is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " 541 U.S. at 51, 158 L. Ed. 2d at 192 (quoting 1 N. Webster, An American Dictionary of the English Language (1828)). Although the Court in *Crawford* expressly declined to issue a comprehensive definition of "testimonial evidence," it clearly held that prior testimony in a former trial and statements made during "police interrogations" constitute testimonial evidence. *Id.* at 52, 158 L. Ed. 2d at 193. Under *Crawford*, Moore's testimony in an earlier trial is "testimonial evidence." *Id.*

The Supreme Court declined to define "police interrogation," and stated in footnote four, "[j]ust as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case." *Id.* at 53, 158 L. Ed. 2d at 194 n. 4. Further, a witness's "recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition." *Id.* Moore's affidavit, which contains recorded statements implicating "C," who was later identified as defendant, and made under oath during police questioning, constitutes "testimonial evidence."

Moore's statements to Officer Black made during his initial investigation are also testimonial evidence. The fact that this statement was not made "under oath" is not dispositive. *See id.* at 52, 158 L. Ed. 2d at 193 ("Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive."). Here, as in *Crawford*, "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51, 158 L. Ed. 2d at 192; *see also Moody v. State*, 594 S.E.2d 350, 354 n. 6 (Ga. 2004) (Although the *Crawford* Court declined to define the term "testimonial," "it appears that the term ['testimonial'] encompasses the type of field investigation of witnesses at issue here."). Moore's prior testimony, affidavit, and statements to police are testimonial in nature and require further analysis under *Crawford* to determine their admissibility.

B. Unavailability

[2] Under *Crawford*, the State is required to present evidence of and the trial court must find Moore is unavailable at trial for her statements to be admitted. *See Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203. Rule 804 of the North Carolina Rules of Evidence creates a hearsay exception and allows admission of prior testimony into evidence if the declarant is unavailable. N.C. Gen. Stat. § 8C-1, Rule 804(b)(1) (2003). Rule 804 lists several definitions for "unavailability as a witness," including situations where the declarant "[i]s absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means." N.C. Gen. Stat. § 8C-1, Rule 804(a)(5) (2003).

In *State v. Triplett*, our Supreme Court held, "[t]he trial judge's determination of unavailability in such cases must be supported by a

finding that the declarant is [unavailable], which finding in turn must be supported by evidence of [unavailability]." 316 N.C. 1, 8, 340 S.E.2d 736, 740 (1986). "The degree of detail required in the finding of unavailability will depend on the circumstances of the particular case." *Id.*

In *State v. Nobles*, our Supreme Court ruled that the prosecution's statements about its attempts to find the witness were insufficient to conclude that a good-faith effort was made and held the trial court erred in admitting the evidence. 357 N.C. 433, 584 S.E.2d 765 (2003). The Court stated that, as an appellate court, it had to determine whether the prosecution met its burden of establishing that the witness was constitutionally unavailable to testify. *Id.* at 437, 584 S.E.2d at 769. The Court also said, "[t]urning to the facts . . ., the transcript provides little insight as to whether the state undertook any effort whatsoever to produce [the witness]." *Id.* at 438, 584 S.E.2d at 770. The State asserted the witness was not located within the state and had been unwilling to come back four years ago for previous proceedings. *Id.*

> Second, the state did not present a witness to testify, offer other evidence, or otherwise demonstrate good-faith efforts to locate and present [the witness]. Accordingly, the state did not adequately demonstrate, on this record, that [the witness] was constitutionally unavailable to testify in person before the jury.

Id. at 439, 584 S.E.2d at 770. Our North Carolina Supreme Court concluded, "[t]he state's failure to undertake good-faith efforts to locate and produce [the witness] constitutes reversible error," however, the Court limited its holding to "the facts and circumstances of the present case." *Id.* at 441, 584 S.E.2d at 771.

During a hearing on motions *in limine*, the State moved to have Moore declared to be unavailable as a witness. The prosecuting attorney informed the trial court that he had personally visited the areas Moore frequented and that the State had attempted to contact Moore through her friends. He also asserted Officer Black made several attempts to locate Moore. The State informed the trial court and defendant that it planned to offer into evidence Moore's prior testimony, affidavit, and statements identifying defendant.

Defense counsel objected to the State's motion to declare Moore unavailable and requested the trial court to exclude her testimony and statements. Defendant does not assign error to the admission of

Moore's identification of defendant in a photographic lineup. Defense counsel also submitted proposed jury instructions on Moore's prior convictions if the trial court declared her unavailable and admitted her prior testimony. Without hearing evidence or conducting *voir dire*, the trial court granted the State's motion to declare Moore unavailable and denied defendant's motion for proposed jury instructions.

The trial court must receive substantial supporting evidence before making a finding of unavailability. *See id.* at 439, 584 S.E.2d at 770; *see also Tripplett*, 316 N.C. at 8, 340 S.E.2d at 740. Although the State informed the court of its efforts to locate Moore, it did not "present a witness to testify" or "offer other evidence" at the motion hearing. *See Nobles*, 357 N.C. at 439, 584 S.E.2d at 770.

We note that during defendant's objection to the State's motion to declare Moore unavailable, defense counsel conceded, "I can't find her." Defense counsel's statement during his *objection* to the State's motion that *he* could not locate Moore does not relieve the State of *its* burden to produce evidence showing it has been "unable to procure [Moore's] attendance . . . by process or other reasonable means." N.C. Gen. Stat. § 8C-1, Rule 804(a)(5); *see also Nobles*, 357 N.C. at 440, 584 S.E.2d at 771.

A review of the transcript reveals that prior to the admission of Moore's prior testimony *at trial*, the State offered additional evidence regarding Moore's unavailability, including Officer Black's testimony that he had "repeatedly" tried to locate Moore. The prosecutor's statements regarding its efforts to locate Moore corroborate Officer Black's testimony and sufficiently demonstrate the State's good-faith efforts to procure Moore in order for the trial court to declare her unavailable. We hold the trial court did not err in declaring Moore to be unavailable to testify during defendant's trial at bar.

C. Cross-Examination

To determine whether the trial court properly admitted Moore's prior testimony, prior statements to police, and her affidavit, our analysis turns to whether defendant had an opportunity to cross-examine Moore regarding the evidence presented against him. *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203. In *Crawford*, the Supreme Court ruled it was error for the trial court to admit the unavailable witness's tape recorded statement taken during police investigation and describing defendant's commission of the crime

because the defendant had no opportunity to cross-examine during the witness's prior statement to the police. *Id.* We next consider whether defendant was afforded an opportunity to cross-examine Moore during her prior testimony or regarding her affidavit and statements to Officer Black.

1. Prior Testimony

[3] The trial court admitted Moore's prior testimony, given under oath in an earlier trial, regarding the incident at bar. At the earlier trial, defendant was present, represented by counsel, had an opportunity to cross-examine Moore, and, through his counsel, did cross-examine her. Moore's entire testimony from the earlier trial was admitted and read into evidence in the jury's presence. The jury also heard defense counsel's prior cross-examination regarding Moore's convictions for "numerous drug offenses" and "prostitution," addictions to drug and alcohol that required her to be institutionalized, and any potential bias or special treatment she received from the State for testifying against defendant.

We hold that Moore's prior testimony, which was given at an earlier trial where defendant was present and cross-examined the witness, satisfies the cross-examination requirement under *Crawford*. *See id.*

Moore's prior testimony was properly admitted under Rule 804. Since the State satisfied the requirements set forth in *Crawford*, we hold defendant's Sixth Amendment right of confrontation was not violated by the admission of Moore's prior trial testimony at bar. *See Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203.

2. Statements to Police

[4] Defendant argues the trial court erroneously admitted Moore's affidavit and her statements identifying defendant to Officer Black during his investigation.

Immediately following the incident, DeBone and Officer Black returned to the area where she and her assailant had walked. While riding with Officer Black, DeBone identified the woman whom she and her assailant had met earlier on the street. Officer Black recognized the woman as Moore and engaged in a brief conversation with her. During this initial investigation, Moore made statements to Officer Black identifying the man walking with DeBone earlier as "C," but stated she did not know his legal name.

Later that day, Moore signed an affidavit, under oath, which was witnessed by and given in the presence of Officer Black and signed before a notary. Her affidavit indicated that she had known "C" for a couple of years and identified him as the man walking with DeBone on 23 May 2001.

As in *Crawford*, defendant here did not have the opportunity to cross-examine Moore during her statements to Officer Black or the taking of her affidavit. The State argues Moore's affidavit and statements to Officer Black were not admitted to prove the truth of the matter asserted but as corroborating evidence of Moore's prior testimony. In *Crawford*, the Supreme Court noted, "[t]he [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 59, 158 L. Ed. 2d at 197-98 n. 9 (citing *Tennessee v. Street*, 471 U.S. 409, 414, 85 L. Ed. 2d 425, 105 S. Ct. 2078 (1985)). In *Tennessee v. Street*, the Supreme Court ruled that the admission of an accomplice's out of court confession was not error because the accomplice's statement was admitted for the nonhearsay purpose of rebutting defendant's testimony. 471 U.S. at 414, 85 L. Ed. 2d at 431. The Court reasoned, "[t]he Clause's fundamental role in protecting the right of cross-examination, *see Douglas v. Alabama*, 380 U.S. 415, 418, [13 L. Ed. 2d 934, 937] (1965), was satisfied by Sheriff Papantoniou's presence on the stand. If [the defendant's] counsel doubted that [the accomplice's] confession was accurately recounted, he was free to cross-examine the Sheriff." *Tennessee*, 471 U.S. at 414, 85 L. Ed. 2d at 431. In *Tennessee v. Street*, however, the jury "was pointedly instructed by the trial court 'not to consider the truthfulness of [the accomplice's] statement in any way whatsoever.' " 471 U.S. at 414-15, 85 L. Ed. 2d at 431.

Here, the trial court failed to give the jury a limiting instruction. Because the jury could have considered this evidence for the truth of the matter asserted, we cannot presume it was offered and received as corroborating evidence. The admission of this evidence must be analyzed under *Crawford* as if it was offered and received to prove the truth of the matter asserted.

Although Moore's affidavit and statements may have corroborated her prior testimony, without a limiting instruction to the jury not to consider the evidence for the truth of the matter asserted, *i.e.*, whether defendant was DeBone's assailant, the admission of this evidence without affording defendant an opportunity to cross-examine Moore is error.

D. Harmless Error

Because defendant's constitutional right was violated through the admission of Moore's prior statements to Officer Black and her affidavit, the State has the burden of proving the error was harmless beyond a reasonable doubt to sustain defendant's conviction. N.C. Gen. Stat. § 15A-1443(b) (2003); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 684, 89 L. Ed. 2d 674, 686 (1986) ("The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt."); *State v. Sisk*, 123 N.C. App. 361, 370, 473 S.E.2d 348, 354 (1996), *aff'd in part and disc. rev. improvidently allowed in part*, 345 N.C. 749, 483 S.E.2d 440 (1997) (citing N.C. Gen. Stat. § 15A-1443).

"In order for this Court to find that the error affecting defendant's constitutional rights was harmless beyond a reasonable doubt, we must determine that the error had no bearing on the jury deliberations." *Sisk*, 123 N.C. App. at 370, 473 S.E.2d at 354. "Overwhelming evidence of a defendant's guilt [without regard to the erroneously admitted evidence] may render a constitutional error harmless beyond a reasonable doubt." *State v. Roope*, 130 N.C. App. 356, 367, 503 S.E.2d 118, 126, *disc. rev. denied*, 349 N.C. 374, 525 S.E.2d 189 (1998) (citing *Harrington v. California*, 395 U.S. 250, 23 L. Ed. 2d 284 (1969); *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988)).

DeBone, the victim, testified at trial regarding the events that occurred on 23 May 2001. A man approached her after she arrived at the Fayetteville bus station between 3:30 p.m. to 4:30 p.m. on a clear, spring day. He offered to walk with her to her hotel, which he falsely informed her was within walking distance. DeBone walked and talked with defendant for approximately twenty-five to thirty-five minutes in clear daylight. As DeBone reported the incident to police immediately after she was assaulted and robbed, she recalled several identifying characteristics of her assailant, including his sex, race, weight, and "crooked teeth." Prior to defendant assaulting and robbing her, they stopped and talked to a woman on the street. Following the robbery, DeBone and Officer Black retraced the path she had taken with her robber. While riding with Officer Black, DeBone quickly identified the woman whom she and her assailant had met earlier on the street. DeBone asked Officer Black to stop his vehicle, and he engaged in a brief conversation with the woman. That afternoon, Officer Black showed several photographs to DeBone.

Defendant's photograph was not included in the lineup. DeBone did not identify her assailant and robber from the photographs she was shown.

After DeBone returned to Michigan, the Fayetteville Police Department conducted an independent investigation to determine the robber's identification. After determining that defendant was a suspect, the Fayetteville Police Department contacted Ottawa County Sheriff's Detective Timothy Raha ("Detective Raha") in Michigan to request his assistance in a photograph identification procedure. Detective Raha testified at defendant's trial that he met with DeBone at her place of work two weeks after the incident, around 4:25 p.m. on 7 June 2001. He showed DeBone a photographic lineup of six men and read to her the accompanying "Photo Identification Procedure" document.

DeBone testified she was instructed to take her time and not to rush. She stared at the photographs for less than ten minutes before identifying defendant as her robber. DeBone also testified she felt a "sick feeling in my stomach when I kept going back to [defendant's] picture," and that she "remembered his face at the Greyhound bus station." In identifying the robber in the photo array, DeBone signed below defendant's photograph. DeBone also identified defendant as her assailant and robber at trial.

In addition to the victim's identification of defendant, Moore also identified defendant in a photographic lineup as the man she saw walking with DeBone on 23 May 2001. While Moore's statements to Officer Black and her affidavit are inadmissible, her identification of defendant in a photographic lineup was not assigned as error and serves as additional evidence implicating defendant as the robber.

Defendant did not object to or move to strike any of the identification procedures for either DeBone or Moore. Excluding Moore's prior statements to Officer Black and her affidavit, the State presented overwhelming evidence of defendant's guilt.

This evidence taken together with the testimony and identification made *twice* by the victim, who had walked and talked with defendant for around thirty minutes on a clear afternoon, renders the admission of Moore's statements and affidavit in violation of defendant's Sixth Amendment right to confront the witnesses against him harmless. We hold the admission into evidence of Moore's affidavit and her prior statements to Officer Black implicating defendant were harmless beyond a reasonable doubt.

IV. Jury Instruction

[5] Defendant contends the trial court erred in denying his request to read to the jury, during jury instructions, a list that specifically set forth all of Moore's prior and pending criminal charges. We disagree.

"It is well established that a request for a specific instruction which is correct in law and supported by the evidence must be granted at least in substance." *State v. Williams*, 98 N.C. App. 68, 71, 389 S.E.2d 830, 832 (1990). "[T]he trial judge is not required to give the requested instruction verbatim." *Id.* "Where specific instructions requested are not supported by the evidence, the trial judge does not err in failing to give such instructions verbatim or in substance." *State v. Hall*, 57 N.C. App. 544, 546, 291 S.E.2d 873, 875, *disc. rev. denied*, 305 N.C. 761, 293 S.E.2d 593 (1982).

Prior to selecting the jury, defense counsel submitted to the court a copy of Moore's Cumberland County criminal record check, a document that showed she had been arrested twenty times, and certified copies from the Cumberland County Clerk of Court showing Moore's pending charges. He presented these documents as "supporting data" for his request to "exclude [Moore's] testimony" and moved that these documents be "made part of the record." Defense counsel never moved to have the trial court read or publish these documents to the jury during trial. Following the close of the State's case-in-chief, defense counsel moved to dismiss the charges and informed the trial court, "We've chosen not to present evidence in this case." Defendant did not seek to introduce Moore's prior record into evidence for impeachment or other purposes.

Some general evidence of Moore's prior convictions and bad acts was admitted into evidence and presented to the jury through the admission of Moore's prior testimony and cross-examination. We previously held that the admission of this prior testimony was not error. Moore's prior testimony referenced generally her "numerous drug offenses" and her abuse of and addictions to drug and alcohol. In this testimony, Moore admitted these drug offenses and addictions, specifically stating that she had been convicted of "possession of narcotics, drug paraphernalia, prostitution, you name it."

During the charge conference, defense counsel requested the trial court "instruct" the jury by reading each of Moore's fourteen prior convictions and charges in Cumberland County, along with the corresponding conviction date. Although the details of Moore's prior

charges were made part of the record during pretrial motions, defendant did not move to admit these documents into evidence. The trial court was not required to submit verbatim this requested instruction to the jury in the absence of their admission into evidence. *Hall*, 57 N.C. App. at 546, 291 S.E.2d at 875.

Even if Moore's prior testimony supported defendant's requested instruction, the trial court granted his request in substance. *See Williams*, 98 N.C. App. at 71, 389 S.E.2d at 832. The trial court instructed the jury:

> [W]hen evidence has been received tending to show that a witness has been convicted of criminal charges, you may consider this evidence for one purpose only. . . . in deciding whether you believe or disbelieve his or her testimony at this trial. . . .

Although the trial court denied defendant's specific request, it instructed the jury on its ability to consider a witness's prior convictions in determining her credibility as a witness. The trial court's instruction, in substance, addressed defendant's concern over Moore's criminal history, credibility, and the jury's ability to determine what weight to give her testimony. Portions of Moore's criminal past and her history of drug and alcohol abuse were presented to the jury through the admission of her prior testimony and cross-examination. The trial court did not err in denying defendant's request for jury instructions. This assignment of error is overruled.

V. Conclusion

Defendant's Sixth Amendment right of confrontation was not violated when the trial court admitted Moore's prior testimony into evidence, as this prior testimony was subject to cross-examination and satisfied the United States Supreme Court's ruling in *Crawford*. The trial court erred in admitting Moore's testimonial affidavit and statements given during police questioning as corroborating evidence without giving the jury a limiting instruction. This evidence violated defendant's right to confrontation. We hold the evidence and record shows this error was harmless beyond a reasonable doubt. The trial court did not err in failing to give defendant's requested jury instruction where the evidence did not support such instruction and the trial court did instruct the jury that it could use Moore's prior criminal record and bad acts in determining her credibility. Defendant's convictions and the trial court's judgments and sentence are affirmed.

Harmless error. Judgments and sentence affirmed.

Judge HUNTER concurs.

Judge WYNN concurs in the result only by separate opinion.

WYNN, Judge concurring in the result.

I agree with the majority that, even if the trial court erroneously admitted the testimonial statements in violation of *Crawford*, such error was harmless in light of the overwhelming evidence of Defendant's guilt. I do not agree with the majority's discussion of *Crawford*, however, and I therefore concur in the result only.

In this case, the majority opinion analyzes multiple issues in light of *Crawford*, but ultimately concludes that all such errors were harmless. Inasmuch as the United States Supreme Court deliberately left its holding in *Crawford* with unsettled issues, and the errors in this case were harmless, I believe the majority's lengthy *Crawford* analysis is unnecessary to resolution of the case. Indeed, it is fundamental that our appellate courts should refine opinions to address only the issues necessary for resolution of each case. The Court thereby avoids the multiple evils of advisory opinions, questionable dicta, and other unnecessary expressions of views that may tie the Court's hands in future cases or cause confusion among the state bar. *See, e.g.*, *Smith v. Norfolk & S. R.R. Co.*, 114 N.C. 728, 749-50, 19 S.E. 863, 869 (1894) (warning that, "it may be safely remarked that no science is more dependent upon the accuracy of its terms and definitions than that of the law. Looseness of language and dicta in judicial opinions, either silently acquiesced in or perpetuated by inadvertent repetition, often insidiously exert their influence until they result in confusing the application of the law, or themselves become crystallized into a kind of authority which the courts, without reference to true principle, are constrained to follow."); *Currie v. Worthy*, 48 N.C. (1 Jones Eq.) 315, 319-20 (1856) ("dicta do not fix the law; and I will take occasion to say, that the habit in which Judges, particularly on this side of the Atlantic, indulge, of writing *dissertations* instead of confining themselves to the point presented by the case, which is done either to display their learning or to save others from the trouble of thinking, so far from tending to fix the law, tends to unsettle it, and create confusion."); Thomas Fowler, *Are Unnecessary "Holdings" Dicta?*, North Carolina State Bar Journal, Summer 2003 (noting that, "In light of the widespread use of electronic legal

research, it may be more important than ever for appellate judges to clearly state in their opinions what their holding is, and to avoid discussions of matters that are not necessary to that holding); Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997, 2004 (1994) (discussing the difficulties arising from the lack of consistency among courts as to the proper scope of judicial holdings).

Since, for the sake of argument, we could assume there was error and dispose of this matter under a harmless error analysis, I believe it imprudent to, for instance, set forth a *Crawford* "three-fold" test with attending "prongs." *Crawford* is a momentous case handed down by the United States Supreme Court only four months ago. This Court, like federal and state courts across the country, will be addressing the impact of *Crawford* on countless individual cases to come. The significance of *Crawford* should be allowed time to develop and mature on a case-by-case basis with the benefit of briefs and arguments by litigants. It is premature to attempt to fashion a definitive *Crawford* "test" to be applied in all cases. For these reasons, I respectfully concur in the result only.

IN THE MATTER OF N.R.M., T.F.M., MINOR JUVENILES

No. COA03-592

(Filed 6 July 2004)

Termination of Parental Rights; Child Support, Custody, and Visitation— Arkansas custody order—N.C. termination petition—subject matter jurisdiction

A petition to terminate a mother's parental rights in North Carolina, filed by the father, should have been dismissed for lack of subject matter jurisdiction where respondent was in Arkansas, which had issued an earlier custody order, the children were in North Carolina, and the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) did not apply. Custody issues have already been addressed by the Arkansas court, the UCCJEA emergency jurisdiction provision is not relevant, there was no order from Arkansas stating that Arkansas no longer has jurisdiction or that North Carolina would be a more convenient forum, and one of the parties continued to live in Arkansas.

Appeal by respondent from order entered 31 October 2002 by Judge J.H. Corpening, II in District Court, New Hanover County. Heard in the Court of Appeals 3 February 2004.

Lea, Rhine & Associates, by Lori W. Rosbrugh, for petitioner-appellee.

Jeffrey Evan Noecker for respondent-appellant.

McGEE, Judge.

N.R.M. and T.F.M. (the children) were born to B.M. (petitioner) and S.P. (respondent) on 5 December 1996 in Arkansas. From the time of the birth of the children until 31 July 2000, the children lived in Arkansas with different persons. From birth until 20 November 1997, they lived with petitioner; from 20 November 1997 until 16 December 1999, the children lived with respondent; and from 20 December 1999 until 31 July 2000, the children lived with their paternal grandparents. Since 1 August 2000, they have lived in North Carolina with petitioner.

The Chancery Court of Garland County, Arkansas, entered a custody order pertaining to the children on 16 August 2000. The Arkansas court found it was in the best interest of the children to place them in the custody of petitioner. The order provided for reasonable, but restricted and supervised, visitation for respondent until respondent fulfilled conditions set forth in the order. The order stated that for respondent to be granted additional visitation, she had to provide proof that she had met the conditions set forth in the order. The order further provided that respondent had a duty to support the children.

Petitioner filed a petition on 21 March 2002 to terminate the parental rights of respondent to the children. Respondent received the petition by certified mail on 27 July 2002. Respondent filed a *pro se* response on 9 August 2002 and an amended response on 23 August 2002. The amended response included lack of personal jurisdiction and lack of subject matter jurisdiction as defenses. Respondent also filed a separate motion to dismiss for lack of personal jurisdiction on 23 August 2002. The trial court orally denied the motion on 5 September 2002 and then entered a written order denying the motion on 31 October 2002. In this order, the trial court specifically concluded that "North Carolina has jurisdiction over the subject matter and parties to this action." Respondent appeals the order denying her motion to dismiss for lack of personal jurisdiction.

The petition to terminate respondent's parental rights was filed in New Hanover County, North Carolina, nearly two years after the Arkansas order was entered. In his petition, petitioner asserted the following as grounds for termination:

a. The Petitioner was awarded custody of the minor children by judicial decree and the Respondent has for a period of one year or more preceding the filing of this Petition willfully failed without justification to pay for the care, support, and education of the minor children as required by the judicial decree.

b. The Respondent has wil[l]fully abandoned the minor children for at least six consecutive months immediately preceding the filing of this Petition.

In the 9 August 2002 response to the petition, respondent claimed that petitioner had kept the location of the children secret "for the past year and a half." However, petitioner disputes this allegation. In the response, respondent also denied that petitioner was a fit and proper parent to have custody of the children and denied that her rights should be terminated.

On 26 August 2002, subsequent to the filing in North Carolina of the petition to terminate respondent's parental rights, the Circuit Court of Garland County, Arkansas, entered an order whereby petitioner was ordered to return the children to Arkansas "for a three day period within the next thirty (30) days." The purpose of this order was to allow the Arkansas court to hold a hearing on visitation for respondent. However, this order resulted from a hearing that was held on 4 December 2000, approximately twenty months before the 26 August 2002 order was entered. There is no evidence in the record indicating that petitioner complied with the 26 August 2002 order of the Arkansas court.

Respondent argues that the trial court erred by ignoring precedent in denying respondent's motion to dismiss for lack of personal jurisdiction. However, before addressing the merits of respondent's argument, we review the issue of subject matter jurisdiction although not briefed by the parties. Our Court's authority to conduct such a review is summarized by *In re McKinney*, 158 N.C. App. 441, 581 S.E.2d 793 (2003), which provides that

> [w]e recognize that a party's failure to brief a question on appeal ordinarily constitutes a waiver of the issue. *See In re Faircloth*,

153 N.C. App. 565, 581, 571 S.E.2d 65, 75 (2002) (where respondent-father fails to argue certain issues on appeal from order terminating his parental rights, this Court holds "respondent has abandoned these issues on appeal" citing N.C.R. App. P. 10(a) and 28(a)). However, regardless of whether subject matter jurisdiction is raised by the parties, this Court "may review the record to determine if subject matter jurisdiction exists in this case." *Foley v. Foley*, 156 N.C. App. 409, 412, 576 S.E.2d 383, 385 (2003). "[A] court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882, *disc. review denied*, 352 N.C. 676, 545 S.E.2d 428 (2000).

McKinney, 158 N.C. App. at 448, 581 S.E.2d at 797. *See also Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986) ("When the record clearly shows that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu*.").

The significance of subject matter jurisdiction has been recently addressed by this Court:

> "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (citing 1 Restatement (Second) of Judgments § 11, at 108 (1982)), *disc. review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001). "Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act. Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question[, and] . . . is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citing W. Shuford, *N.C. Civil Practice and Procedure* § 12-6 (1981)). Moreover, a court's inherent authority does not allow it to act where it would otherwise lack jurisdiction. "Courts have the inherent power to do only those things which are reasonably necessary for the administration of justice *within the scope of their jurisdiction. In re Transportation of Juveniles*, 102 N.C. App. 806, 808, 403 S.E.2d 557, 559 (1991) (citing 20 Am. Jur. 2d Courts § 78 (1965)). "[T]he inherent powers of a court do not increase its jurisdic-

> tion but are limited to such powers as are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction." *Hopkins v. Barnhardt*, 223 N.C. 617, 619-20, 27 S.E.2d 644, 646 (1943).

McKinney, 158 N.C. App. at 443, 581 S.E.2d at 795.

> N.C. Gen. Stat. § 7B-1101 (2003) provides that a
>
> court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion.

The statute further states that "before exercising jurisdiction under this Article, the court shall find that it would have jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204." *Id.*

In this case, the children were located in New Hanover County when the petition for termination was filed. Thus, the general requirement that the children reside in or be found in the district where the petition is filed is fulfilled. However, the inquiry does not end at this stage. Rather, as N.C. Gen. Stat. § 7B-1101 indicates, jurisdictional provisions under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) (N.C. Gen. Stat. § 50A-101 *et seq.*) (2003)) must be satisfied. We note that the definition of a "[c]hild-custody proceeding" under the UCCJEA specifically includes a proceeding for termination of parental rights. N.C. Gen. Stat. § 50A-102(4).

The UCCJEA provisions referenced above include N.C. Gen. Stat. §§ 50A-201, 50A-203, and 50A-204. The first provision, N.C. Gen. Stat. § 50A-201, addresses jurisdiction for initial child-custody determinations. The phrase "[i]nitial determination" is defined as "the first child-custody determination concerning a particular child." N.C. Gen. Stat. § 50A-102(8). In the present case before our Court, the custody issues have already been addressed by an Arkansas court. The initial determination provision is therefore not relevant. Similarly, N.C. Gen. Stat. § 50A-204 is not applicable because it provides North Carolina with temporary emergency jurisdiction "if the child is present in [North Carolina] and the child has been abandoned or it is necessary in an emergency to protect the child[.]" N.C. Gen. Stat. § 50A-204(a). In the present case, the children have not been abandoned within the

meaning of the UCCJEA and there is no indication that the children are in need of protection. Accordingly, this emergency jurisdiction provision is not relevant.

Thus, the remaining provision, N.C. Gen. Stat. § 50A-203, is the provision which must be satisfied for a North Carolina court to have jurisdiction to terminate respondent's parental rights. This statute outlines the requirements for a North Carolina court to have jurisdiction to modify a child-custody determination. Under the UCCJEA, "[m]odification" is defined as "a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination." N.C. Gen. Stat. § 50A-102(11).

In this case, a custody order was entered by the Arkansas court on 16 August 2000 granting custody to petitioner and visitation to respondent. Thus, at the time of the petition to terminate respondent's parental rights, there was an existing order from another state pertaining to the children at issue. Accordingly, any change to that Arkansas order qualifies as a modification under the UCCJEA.

Under the applicable modification provision, N.C. Gen. Stat. § 50A-203, a North Carolina court cannot modify a child-custody determination made by another state unless two requirements are met. The first requirement is that the North Carolina court must have jurisdiction to make an initial determination under N.C. Gen. Stat. § 50A-201(a)(1) or (a)(2). Subsection (a)(1) provides for jurisdiction if North Carolina is the "home state of the child on the date of the commencement of the proceeding[.]" N.C. Gen. Stat. § 50A-201(a)(1). "Home state" is defined as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7). In this case, the children had been living in New Hanover County since 1 August 2000, and the petition was filed 21 March 2002. Thus, the home state requirement was satisfied.

However, in order for a North Carolina court to modify a custody determination of another state, a second requirement must also be met. This requirement is that either

> (1) [t]he court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that

a court of this State would be a more convenient forum under G.S. 50A-207; or

(2) [a] court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

N.C. Gen. Stat. § 50A-203. Under subsection (1), there are two means whereby North Carolina would obtain jurisdiction. The first manner is if the Arkansas court determined it no longer had jurisdiction under N.C.G.S. § 50A-202. This statute provides that a court

which has made a child-custody determination consistent with [the UCCJEA] has exclusive, continuing jurisdiction over the determination until:

(1) [it] determines that . . . the child, the child's parents, and any person acting as a parent [no longer have] a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationship; or

(2) [it] or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.

N.C. Gen. Stat. § 50A-202. The official comment to this statute clarifies that "the original decree State is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction." Official Comment to N.C.G.S. § 50A-202.

In the case before our Court, there is no Arkansas order in the record stating that Arkansas no longer has jurisdiction. In fact, as recently as 26 August 2002, after the termination petition and both responses to the petition had been filed, an Arkansas court entered an order directing petitioner to return the children to Arkansas so that a hearing could be held regarding visitation for respondent. Although this order concerned a hearing which had been held on 4 December 2000, it clearly indicated that Arkansas was not declining to exercise jurisdiction. Further, we note that at the time of the petition, respondent resided in Arkansas so Arkansas did not lose continuing jurisdiction based on N.C. Gen. Stat. § 50A-202(a)(2).

A second option under N.C. Gen. Stat. § 50A-203(1) that would relinquish jurisdiction from Arkansas to North Carolina is if the Arkansas court determined that a North Carolina court would be a more convenient forum under N.C. Gen. Stat. § 50A-207. Again, there is nothing in the record showing that Arkansas made such a determination. Accordingly, neither method of obtaining jurisdiction under N.C. Gen. Stat. § 50A-203(1) is satisfied.

The final option for North Carolina to obtain jurisdiction is contained in N.C. Gen. Stat. § 50A-203(2). This section allows jurisdiction if either the issuing state or the state attempting to modify the order determines that the child, the child's parents, and any person acting as a parent have left the issuing state. In the case before this Court, at the time of the petition, the record shows respondent was residing in Arkansas. Because respondent continued to live in Arkansas, subsection (2) was not satisfied even though petitioner and the children had left Arkansas and moved to North Carolina. Accordingly, pursuant to the UCCJEA, the trial court lacked subject matter jurisdiction to hear a petition for termination of respondent's parental rights. Although North Carolina qualifies as the home state of the children, the second requirement for modification jurisdiction is not met. Thus, the trial court lacked subject matter jurisdiction to enter the order.

For the reasons stated, the order of the trial court must be vacated and this case remanded to the New Hanover County District Court for entry of an order dismissing petitioner's action.

Because we resolve this appeal on the basis of lack of subject matter jurisdiction, we do not address the merits of respondent's argument.

Vacated and remanded.

Judges WYNN and TYSON concur.

ROBIN CANNON AND CLARK D. WHITLOW, SR. AND WIFE, JO ANN C. WHITLOW, PLAINTIFFS V. GILBERT DAY AND WIFE, CONNIE DAY, GARY WOOD AND WIFE, CHERYL WOOD, AND RONALD JAMES EDWARDS AND WIFE, JANET MOORE EDWARDS, DEFENDANTS

No. COA03-704

(Filed 6 July 2004)

1. **Appeal and Error— appealability—denial of summary judgment**

   The denial of summary judgment based on the sufficiency of the evidence is not reviewable following a trial.

2. **Easements— prescriptive—sufficiency of evidence**

   The trial court did not err by denying defendants' motion for a directed verdict on a prescriptive easement claim where there was evidence that permission to use a farm lane was neither sought nor given, that plaintiffs had performed maintenance to keep the road passable, and that plaintiffs had used the lane for 20 years as if they had a right to it.

3. **Appeal and Error— preservation of issues—denial of request for jury instruction—failure to object—agreement with court**

   Defendants did not preserve for appeal the denial of their request for a jury instruction on permissive use where they not only did not object, but said, "That's fine" when the court read its intended instruction.

Chief Judge MARTIN concurring in the result.

Appeal by defendants Gilbert and Connie Day and Gary and Cheryl Wood from judgment entered 4 October 2002 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 3 March 2004.

Taylor & Taylor, by Nelson W. Taylor, III, for plaintiffs-appellees.

Harris Law Firm, P.L.L.C., by R. Andrew Harris, for Gilbert and Connie Day and Gary and Cheryl Wood, defendants-appellants.

No brief filed by Ronald James Edwards and Janet Moore Edwards.

GEER, Judge.

This appeal arises out of a dispute over whether plaintiffs acquired a prescriptive easement across defendants' lots permitting use of a private lane to access the public road from plaintiffs' lot. We hold that plaintiffs' evidence—that plaintiffs' predecessors-in-interest used the lane without permission for more than 20 years, maintained the lane, named the lane, and treated the lane as if they owned it—was sufficient to support a verdict in plaintiffs' favor. The trial court therefore properly submitted the issue to the jury, which ultimately found that a prescriptive easement existed.

Facts

In November 1965, Carlyle and Julia Garner, plaintiffs' predecessors-in-interest, were deeded a parcel of land in Carteret County ("the Garner tract") without access to a public road. Between the Garner tract and Nine Mile Road lay a tract of land ("the Cannon tract") owned by the Garners' nephew, Clayton Cannon. A lane ("the farm lane") ran along the eastern edge of the Cannon tract, connecting the Garner tract to Nine Mile Road. Carlyle Garner, Clayton Cannon, and others had used the farm lane to move farm equipment and materials. In 1966, after Carlyle Garner made improvements to the farm lane and moved a house onto the Garner tract, the Garners began using the lane as their driveway. Plaintiffs offered evidence that the Garners never asked for nor received anyone's permission to use the farm lane.

Mr. Garner maintained the farm lane from 1966 until 1977. In 1977, Clayton Cannon subdivided the Cannon tract into four lots. One of the four lots fronted Nine Mile Road. Each of the three remaining lots was flag-shaped with the "flagpole" being a 10-foot-wide strip running parallel to the farm lane and connecting each lot to Nine Mile Road. When the Cannon tract was subdivided, the farm lane was graveled and otherwise improved, although testimony was conflicting as to whether Clayton Cannon or his sons Robin and Joel Cannon paid for the improvements. To reach their homes, the Garners and the owners of the flag-shaped lots drove on the farm lane. Although the road needed little maintenance after the improvements, Mr. Garner continued to help perform periodic maintenance as needed on the farm lane until his death in 1984.

Carlyle Garner named the farm lane "Possum Lane," carved a wooden sign with that name engraved on it, and installed the sign on

the public road near his mailbox. When Carteret County put in a 911 system, it renamed the farm lane "Carlyle Lane" in honor of Mr. Garner.

After Mr. Garner's death, his wife Julia Garner deeded the Garner tract to Robin Cannon in 1985, but continued to live on the property and use the farm lane until she moved into a nursing home in 1996. After Mrs. Garner moved, Robin Cannon allowed some friends to live in the Garner home; they continued to use the lane until Gilbert Day (now owner of the flag-shaped lot adjacent to the Garner tract) blockaded the lane in 1997 or 1998.

On 9 March 2000, Robin Cannon filed a complaint against the Days asserting the existence of an easement benefitting the Garner tract and seeking a permanent injunction preventing the Days from obstructing or otherwise interfering with his or his tenants' use of the farm lane. The Whitlows, who bought the Garner tract on 8 December 2000, were later added as plaintiffs, while Gary and Cheryl Wood and James and Janet Edwards, owners of the other flag-shaped lots, were later joined as defendants.

Defendants filed a motion for summary judgment on 5 September 2002 that was denied. After a jury trial at the 23 September 2002 session of Carteret County Superior Court, the jury found the existence of a prescriptive easement, and on 4 October 2002, the trial court entered judgment for plaintiffs. On 1 November 2002, defendants filed notice of appeal to this Court from the denial of their motion for summary judgment and from the final judgment.

I

As an initial matter, we address plaintiffs' motion to strike defendants' brief and dismiss the appeal. In support of their motion, plaintiffs point out several violations of the Rules of Appellate Procedure, including the following: (1) the brief's Table of Cases and Authorities contains no references to the pages on which the citations appear, in violation of N.C.R. App. P. 26(g)(2) and 28(b)(1); (2) the brief contains no statement of the grounds for appellate review, in violation of N.C.R. App. P. 28(b)(4); (3) the brief's Statement of Facts contains almost no page references to the transcript, the record, or exhibits, in violation of N.C.R. App. P. 28(b)(5); and (4) in the brief's argument section, the questions presented are not followed by specification of the pertinent assignments of error, in violation of N.C.R. App. P. 28(b)(6). In addition to those rule violations pointed out by

plaintiffs, we also note that defendants' brief is printed in 11-point non-proportionally-spaced type, with more than 27 lines per page, in violation of N.C.R. App. P. 26(g)(1) and 28(j).

"The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal." *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984). Here, although we are very concerned about the extent of the violations of the Appellate Rules, we elect to suspend the Rules pursuant to N.C.R. App. P. 2 in order to review defendants' assignments of error.

II

[1] Defendants first assign as error the trial court's denial of their motion for summary judgment. Our Supreme Court has held, however, that denial of a motion for summary judgment based on the sufficiency of the evidence is not reviewable following a trial:

> 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). We therefore decline to address the question whether the trial court properly denied defendants' motion for summary judgment.

Defendants also assign as error the trial court's consideration of the affidavit of Clayton Cannon submitted with plaintiffs' brief opposing defendants' motion for summary judgment. We have reviewed the affidavit and hold that the trial court could properly consider it under N.C.R. Civ. P. 56(e).

III

[2] Defendants' primary contention on appeal is that the trial court's denial of their motion for a directed verdict was error. At the close of plaintiffs' evidence, defendants moved for a directed verdict on the ground that plaintiffs had failed to present sufficient evidence of adverse and hostile use of the disputed easement by Carlyle Garner. After the trial court denied their motion, defendants presented evidence. By offering their own evidence, defendants waived their

motion for a directed verdict made at the close of plaintiffs' evidence and, in order to preserve the question of the sufficiency of the evidence for appellate review, they were required to renew this motion at the close of all the evidence. *Gibbs v. Duke*, 32 N.C. App. 439, 442, 232 S.E.2d 484, 486, *disc. review denied*, 292 N.C. 640, 235 S.E.2d 61 (1977). Defendants did not, however, renew their motion for directed verdict at the close of the evidence. Because of this failure, defendants are not entitled to argue this issue on appeal.

Even if the question of the sufficiency of the evidence had been properly preserved, our review of the record reveals that the trial court properly denied the motion for a directed verdict.[1] A motion for a directed verdict tests the sufficiency of the evidence to take the case to the jury. *Horack v. Southern Real Estate Co. of Charlotte, Inc.*, 150 N.C. App. 305, 309, 563 S.E.2d 47, 50 (2002). A trial court should grant such a motion only when, viewing the evidence in the light most favorable to the non-moving party and giving that party the benefit of every reasonable inference arising from the evidence, the evidence is insufficient for submission to the jury. *Id.* If there is more than a scintilla of evidence supporting each element of the non-moving party's claim, the motion for directed verdict should be denied. *Clark v. Moore*, 65 N.C. App. 609, 610, 309 S.E.2d 579, 580-81 (1983). Conflicts and inconsistencies in the evidence are to be resolved in favor of the non-moving party. *Davis & Davis Realty Co. v. Rodgers*, 96 N.C. App. 306, 308-09, 385 S.E.2d 539, 541 (1989), *disc. review denied*, 326 N.C. 263, 389 S.E.2d 112 (1990). This Court applies *de novo* review to a trial court's denial of a motion for directed verdict. *Denson v. Richmond County*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003) (questions concerning the sufficiency of the evidence to withstand a Rule 50 motion for directed verdict present an issue of law).

In order to establish the existence of a prescriptive easement, the party claiming the easement must prove four elements: " '(1) that the use is adverse, hostile or under claim of right; (2) that the use has

1. Defendants also argue that the jury verdict finding the existence of a prescriptive easement was not supported by sufficient evidence. This argument appears to be based on the trial court's failure to set aside the jury's verdict upon defendants' motion for judgment notwithstanding the verdict ("JNOV"). A motion for JNOV is not proper unless the moving party previously moved for a directed verdict at the close of all the evidence. N.C.R. Civ. P. 50(b)(1); *Gibbs*, 32 N.C. App. at 443, 232 S.E.2d at 486. Nevertheless, the test for determining the sufficiency of the evidence when ruling on a motion for JNOV is identical to that applied when ruling on a motion for directed verdict. *Cook v. Wake County Hosp. Sys., Inc.*, 125 N.C. App. 618, 620, 482 S.E.2d 546, 549 (1997).

been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period.' " *Perry v. Williams*, 84 N.C. App. 527, 528-29, 353 S.E.2d 226, 227 (1987) (quoting *Potts v. Burnette*, 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981)). Defendants have argued only that plaintiffs presented insufficient evidence to show that the Garners' use of the farm lane was hostile, adverse, or under a claim of right.[2]

There is a presumption that a party's use is permissive and not adverse. *Orange Grocery Co. v. CPHC Investors*, 63 N.C. App. 136, 138, 304 S.E.2d 259, 260 (1983). In order to rebut the presumption of permissive use, "[t]here must be some evidence accompanying the user which tends to show that the use is hostile in character and tends to repel the inference that it is permissive and with the owner's consent. A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription." *Dickinson v. Pake*, 284 N.C. 576, 581, 201 S.E.2d 897, 900 (1974) (internal citation omitted). Nevertheless, as our Supreme Court has explained:

> To establish that the use is "hostile" rather than permissive, "it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate." A "hostile" use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right.

Dulin v. Faires, 266 N.C. 257, 260-61, 145 S.E.2d 873, 875 (1966) (quoting 17A Am. Jur. *Easements* § 76, p. 691).

In this case, plaintiffs presented evidence at trial that the Garners neither sought nor received permission to use the farm lane. Clayton

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2. Defendants do not challenge the duration of the easement. We note, parenthetically, that "possession, not title, is the relevant consideration" in determining the period of adverse use. *Dickinson*, 284 N.C. at 586, 201 S.E.2d at 903. Thus, although Mrs. Garner conveyed the tract to Robin Cannon in 1985, because she remained in possession and continued to use the lane until 1996, her adverse use of the lane totaled 30 years. Since " 'one who succeeds to the possession of a dominant tenement thereby succeeds to the privileges of use of the servient tenement authorized by the easement[,]' " any prescriptive easement passed to Robin Cannon, and later, the Whitlows when they took possession of the Garner tract. *Id.* at 585, 201 S.E.2d at 903 (quoting 5 Restatement of Property § 487 (1944)).

Cannon testified that he never gave Mr. Garner permission to use the lane, but that Mr. Garner was still claiming it as his own. In addition, Mr. Garner continuously participated in the maintenance of the road; the Garners used the lane as if it were their own; they referred to it as "my road" or "our road;" they gave it a name; and Mr. Garner posted a sign with that name at the intersection with the public road.

Where, as here, the evidence shows that permission to use the lane had been neither given nor sought, that the plaintiffs performed maintenance required to keep the road passable, and that the plaintiffs used the road for over 20 years as if they had a right to it, the evidence is sufficient to rebut the presumption of permissive use and establish that the use was hostile and under a claim of right. *See Dickinson*, 284 N.C. at 583-84, 201 S.E.2d at 901-02 (evidence sufficient when family used disputed road as only means of access to their property, plaintiffs neither sought nor obtained permission to use the road, and plaintiffs performed maintenance on the road by raking leaves and scattering oyster shells). *See also Potts*, 301 N.C. at 668, 273 S.E.2d at 289 (where plaintiffs' evidence showed that disputed roadway had been openly and continuously used by plaintiffs and predecessors-in-title for a period of at least 50 years, no permission had ever been asked or given, plaintiffs performed some maintenance on road, and plaintiffs considered their use of the road to be a right and not a privilege, evidence was sufficient to rebut the presumption of permissive use); *Perry*, 84 N.C. App. at 529, 353 S.E.2d at 228 (plaintiff did not ask or receive permission to use road, plaintiff made statements regarding right to use road, and plaintiff maintained road for plaintiff's use).

Defendants rely on *Boger v. Gatton*, 123 N.C. App. 635, 638, 473 S.E.2d 672, 676, *disc. review denied*, 344 N.C. 733, 478 S.E.2d 3 (1996), in which this Court held that the plaintiffs offered insufficient evidence to rebut the presumption of permissive use. In *Boger*, however, the testimony at trial was undisputed that the defendant's predecessor-in-title gave the plaintiffs' predecessor-in-title express permission to build a road over his land. *Id.* ("the evidence shows that Ed Johnson created and then maintained the road incident to express permission given by Sollie Stroud and not as a means of giving notice to Mr. Stroud or others that he was claiming by adverse right"). Here, the evidence was in dispute whether the Garners were granted permission to use the farm lane, thus creating an issue for the jury.

Viewing the evidence in the light most favorable to plaintiffs, plaintiffs presented sufficient evidence of the existence of a prescrip-

tive easement to withstand defendants' motion for directed verdict and to support the jury's verdict. Accordingly, these assignments of error are overruled.

IV

[3] Finally, defendants contend that the trial court's denial of their request for a jury instruction on permissive use was prejudicial error entitling them to a new trial. Defendants submitted a written request for the following instruction:

> In this case, evidence has been presented which could be interpreted by you as indicating that the use of Carlyle and Julia Garner commenced as a result of express permission granted to them by Clayton Cannon and later by the Defendants themselves. If you determine by the greater weight of the evidence that this evidence is true, then I instruct you that the use by Carlyle and Julia Garner cannot become adverse unless and until they disclaimed the arrangement and made the Defendants or their predecessors in title aware either by words or conduct that they did disclaim the arrangement and were thereafter claiming the use as a matter of right.

Although defendants contend that this instruction was supported by the evidence, they have failed to preserve this issue for appellate review.

"Rule 10(b)(2) of our Rules of Appellate Procedure requires counsel to lodge an objection to jury instructions before the jury retires, or otherwise waive the right to assign error thereto on appeal." *Hanna v. Brady*, 73 N.C. App. 521, 528, 327 S.E.2d 22, 26, *disc. review denied*, 313 N.C. 600, 332 S.E.2d 179 (1985). In this case, counsel for defendant not only failed to object when the trial judge indicated that he would not deviate from the pattern instruction and gave counsel an opportunity to object, but, in addition, counsel told the judge, after the judge read the instruction he intended to give, "That's fine, Your Honor." Therefore, defendants may not raise this issue on appeal. Accordingly, this assignment of error is overruled.

No error.

Judge HUDSON concurs.

Chief Judge MARTIN concurs in the result in a separate opinion.

MARTIN, Chief Judge, concurring in the result.

Although I agree with the majority's analysis of the issues raised by appellants in this case, in my view the appellants have, by their disregard of the requirements of the Rules of Appellate Procedure, abandoned their assignments of error. The Rules of Appellate Procedure are designed to facilitate appellate review; a party's failure to observe them frustrates the appellate process and requires the appellate court to expend additional time and resources performing tasks which should have been completed by the party. Thus, our courts have repeatedly held the Rules of Appellate Procedure to be mandatory, not directory, and have warned that such rules must not be disregarded and should be enforced uniformly. *State v. Fennell*, 307 N.C. 258, 297 S.E.2d 393 (1982) (citing *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126 (1930)). It is as true today as when Chief Justice Stacy wrote:

> The work of the Court is constantly increasing, and, if it is to keep up with its docket, which it is earnestly striving to do, an orderly procedure, marked by a due observance of the rules, must be maintained. When litigants resort to the judiciary for the settlement of their disputes, they are invoking a public agency, and they should not forget that rules of procedure are necessary, and must be observed, in order to enable the courts properly to discharge their duties.

Pruitt, 199 N.C. at 790, 156 S.E. at 127.

In my view, the discretionary power to suspend the rules, granted by Appellate Rule 2, is to be used in limited instances where error is so fundamental as to amount to the denial of a fair trial, *see Fennell*, 307 N.C. at 263, 297 S.E.2d at 394, or where the nature of the rule violation is so technical or minor as to not inconvenience the reviewing court or render appellate review appreciably more difficult. If we were to exercise our discretion and suspend the rules as a matter of course, there would be little purpose in having them and no incentive on appellate litigants to observe them.

For the foregoing reasons, I vote to strike the brief of the defendants-appellants for their failure to observe the requirements of Appellate Rules 26 and 28, to treat their assignments of error as abandoned, and dismiss their appeal.

IN RE J.L.K.

[165 N.C. App. 311 (2004)]

IN RE: J.L.K., A MINOR JUVENILE

No. COA03-421

(Filed 6 July 2004)

1. **Termination of Parental Rights— not reduced to writing within 30 days—no prejudice**

A termination of parental rights order was not vacated where the written order was filed 89 days after the hearing. While that delay violated the 30-day requirement of N.C.G.S. § 7B-1109(e), there is no authority compelling vacation, and vacating the order is not the proper remedy in this case because respondent did not show prejudice from the delay.

2. **Termination of Parental Rights— neglect and abandonment—sufficiency of evidence**

The evidence was sufficient to support termination of the parental rights of an incarcerated parent where respondent had limited contact with his daughter during the six months before the petition; he had limited communication between incarcerations; his alcohol problems prevented a showing of proper parental concern well before he was incarcerated; and he did not provide financial support.

3. **Termination of Parental Rights— jurisdiction—venue**

The trial court in Johnston County properly exercised jurisdiction in a termination of parental rights case where the child was a lifelong resident of Wake County but was in Johnston County when the petition was filed, and respondent was incarcerated in Johnston County when the petition was filed. Respondent confuses jurisdiction and venue; if he felt that Johnston County was an improper setting for the proceeding, it was incumbent upon him to move for a change of venue or to object to venue.

Appeal by respondent from order entered 19 November 2002 by Judge Jacquelyn L. Lee in Johnston County District Court. Heard in the Court of Appeals 14 January 2004.

Richard E. Jester for respondent-appellant, G.K.

Spence, Spence & Tetreault, P.A., by Martin A. Tetreault, for petitioner-appellee, S.B.

James D. Johnson as Guardian ad Litem.

ELMORE, Judge.

G.K. (respondent) appeals from an adjudication, announced orally in open court following a hearing on 21 August 2002 and subsequently reduced to a written order, signed, and filed on 19 November 2002, terminating his parental rights to his daughter, J.L.K. For the reasons stated herein, we affirm.

The record establishes the following: respondent and the petitioner herein, S.B., are the parents of J.L.K., who was born on 15 June 1997. By agreement between petitioner and respondent, J.L.K. has been in petitioner's custody since shortly after her birth. At the time of J.L.K.'s birth, respondent was in the midst of what he admits has been a "long ongoing problem with alcohol." Respondent's alcohol problem has had a negative impact on his ability to parent J.L.K. Petitioner testified at the TPR hearing that on one occasion when J.L.K. was approximately two months old, respondent got drunk and "was throwing [J.L.K.] up in the air, and [petitioner] had to stop him." Petitioner testified that a few months later, on 7 November 1997, respondent came to her home drunk and fired a gun into the residence, while J.L.K. was present therein. Respondent was arrested that night and incarcerated until June 1998. Respondent had very limited contact with J.L.K. from the time of his release until October 1998, when petitioner told respondent she never wanted to see or hear from him again due to his drunken, violent, and erratic behavior, and because she "couldn't depend on [respondent] to take care of [J.L.K.] because he was drunk all the time." Petitioner testified that respondent has not seen J.L.K. since October 1998.

Respondent was again jailed in April 1999 and has remained incarcerated at all times since. He is currently serving a 115-144 month sentence pursuant to a plea agreement on charges of being a habitual felon, possession of a firearm by a felon, discharging a firearm into occupied property, embezzlement, and multiple counts of possession of stolen goods, forgery, uttering, and larceny. Respondent's projected release date is March 2009, at which time J.L.K. will be almost 12 years old. Respondent has never called J.L.K. since his incarceration in 1999, although he has regularly called and written other family members and his attorney during that time, and his only communications with J.L.K. since then appear to have been a Christmas card sent in December 2001, a Valentine's Day card sent in February 2002, and a birthday card containing five dollars sent in June 2002. Petitioner testified that during J.L.K.'s life she has never received any child support from respondent.

Respondent was present at the TPR hearing and testified that prior to his incarceration in November 1997, he often cared for J.L.K. while petitioner was at work. Respondent admitted that he had "done some pretty bad things" and "a lot of things [petitioner] says are right, and [petitioner]'s right in what she's saying" with respect to his behavior towards petitioner and J.L.K. Respondent explained his lack of contact with J.L.K. after October 1998 by testifying that petitioner told him "she would have [him] locked up for the rest of [his] life if [he] called back, and [he] didn't." Respondent testified that he has attended Alcoholics Anonymous and Narcotics Abusers Anonymous meetings while incarcerated and that he thinks he could be a better example to J.L.K. when he is released from prison, but "[he's] not going to say that [he's] a changed person."

Petitioner, who at all times relevant to this matter has resided with J.L.K. in Wake County, initiated the underlying proceedings by filing her petition to terminate respondent's parental rights in neighboring Johnston County on 11 March 2002. Respondent, who was at that time incarcerated in Johnston County, was properly served on 15 March 2002 and thereafter filed a *pro se* written response to the TPR petition on 2 April 2002, in which he expressed his intent to contest the TPR petition and requested court-appointed counsel. On 29 April 2002, respondent's appointed counsel filed an answer denying the allegations of the TPR petition. Immediately following the arguments of counsel and presentation of evidence by both petitioner and respondent at the TPR hearing on 21 August 2002, the trial court orally granted the TPR petition. Respondent gave notice of appeal from this adjudication on 4 September 2002. Thereafter, the trial court's adjudication was reduced to a written order, signed, and entered on 19 November 2002. The TPR order contained the following relevant findings of fact:

> 1. The child, [J.L.K.], was born on June 15, 1997 in Raleigh, North Carolina. The child resides in Wake County, North Carolina, near the Johnston County line and spends considerable time in Johnston County.
>
> . . . .
>
> 3. The minor child was present in Johnston County at the time the Petition in this matter was filed.
>
> . . . .

5. The Respondent[] . . . currently resides at Piedmont Correctional Institution, although at the time that he was served, he resided at Johnston Correctional Institution, located in Johnston County, North Carolina. . . .

. . . .

9. Respondent has not seen his child since October 1998.

10. Respondent will remain in the custody of the North Carolina Department of [C]orrections until 2009.

. . . .

12. In the six months immediately preceding the filing of this action, Respondent did not call the minor child and his contact with the child was limited to two cards.

13. In the six months immediately prior to the hearing in this matter, Respondent's contact with the minor child was limited to one card.

14. During the same period, Respondent regularly corresponded with his attorney and called his mother twice per month.

15. Respondent has willfully failed without justification to pay for the care, support and education of the child for a period of one year or more prior to his incarceration on August 24, 1999.

16. Respondent has willfully failed without justification to pay for the care, support and education of the child for a period of one year or more next preceding the filing of this action.

17. [Respondent] has neglected the juvenile within the meaning of N.C.G.S. § 7B-101.

18. [Respondent] has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition.

19. The juvenile has no relationship with [respondent] as a result of Respondent's repeated incarcerations.

20. The juvenile is doing well at the private school she attends in Raleigh, North Carolina.

21. The best interests of the child require that parental rights of the respondent be terminated in this preceding.

From these findings, the trial court concluded, in relevant part, as follows:

2. The minor child was found in Johnston County, which is part of this District, at the time of the filing of the Petition in this matter, as required by N.C.G.S. § 7B-1101, and this Court has exclusive jurisdiction over this matter.

3. Grounds exist for terminating the parental rights of the Respondent with respect to the child as set fort above in the Findings of Fact.

4. The best interests of the child require that the parental rights of the Respondent be terminated.

From this order terminating his parental rights to J.L.K., respondent appeals.

[1] By his first assignment of error, respondent contends that because the TPR order was not reduced to writing, signed, and filed within 30 days following the completion of the TPR hearing, the TPR order must be vacated. We disagree.

Section 7B-1109(e) of our General Statutes provides that, following the trial court's adjudication of a TPR petition, "[t]he adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing." N.C. Gen. Stat. § 7B-1109(e) (2003). In the present case, the TPR hearing was held on 21 August 2002 and the trial court did not enter the written order until 89 days later, on 19 November 2002. While the trial court's delay clearly violated the 30-day provision of N.C. Gen. Stat. § 7B-1109(e), we find no authority compelling that the TPR order be vacated as a result. Further, we reject respondent's assertion that because section 7B-1109(e) provides that a TPR order "shall" be reduced to writing, signed, and entered within 30 days, this Court's decision in *In re Alexander*, 158 N.C. App. 522, 581 S.E.2d 466 (2003), requires that we vacate the TPR order.

In *Alexander*, this Court held that in a proceeding to terminate parental rights, the petitioner's failure to comply with the mandatory notice requirements set forth in N.C. Gen. Stat. § 7B-1106.1, which provides that the petitioner "shall" prepare notice directed to the juvenile's parents and that the notice "shall" contain certain elements, was prejudicial error. *Alexander*, 158 N.C. App. at 523, 581 S.E.2d at 467. In reaching this conclusion, the *Alexander* Court stated that

"[t]he mandatory nature of the language employed in N.C. Gen. Stat. § 7B-1106.1 is underscored by N.C. Gen. Stat. § 7B-1102[(b)], which states, in relevant part, that the service of the motion for termination of parental rights 'and the notice required by G.S. 7B-1106.1 shall be . . . in accordance with G.S. 1A-1, Rule 5(b)' . . . ." *Alexander*, 158 N.C. App. at 524, 581 S.E.2d at 468 (emphasis omitted). In rejecting the petitioner's argument that this error was not prejudicial because the respondents received actual notice, the *Alexander* Court stated that "[t]he notice requirements at issue are part of a statutory framework intended to safeguard a parent's fundamental rights 'to make decisions concerning the care, custody, and control of their children.' " *Alexander*, 158 N.C. App. at 525, 581 S.E.2d at 468 (quoting *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000)).

In the present case, unlike *Alexander*, the statute at issue is not "underscored" by the "interlocking provisions" of two additional statutes in directing the trial court to reduce its adjudication to writing and enter the resulting TPR order within a prescribed time period. *Alexander*, 158 N.C. App at 524, 581 S.E.2d at 468. Nor does section 7B-1109(e)'s 30-day provision implicate a fundamental right, unlike the notice requirement of section 7B-1106.1, the statute at issue in *Alexander*. Finally, section 7B-1109(e) directs the *trial court* to enter an order within 30 days after the *completion* of a TPR hearing, while section 7B-1106.1 directs the *petitioner* to notify the respondent that proceedings to terminate his or her parental rights have been commenced and that a TPR hearing *will be held* at a future date. Because the differences in section 7B-1109(e) and section 7B-1106.1 are manifest, we conclude that our decision in *In re Alexander* does not require us to vacate the TPR order in the present case.

Moreover, we conclude that, on these facts, vacating the TPR order is not an appropriate remedy for the trial court's failure to enter the order within 30 days of the hearing. Our review of the transcript reveals that in her oral adjudication, the trial judge stated that neglect and abandonment had been proven by clear, cogent and convincing evidence as the grounds upon which respondent's parental rights were being terminated. Respondent filed his written notice of appeal from the trial court's adjudication on 4 September 2002, shortly after the TPR hearing and almost two and a half months before the TPR order was reduced to writing, signed, and entered. Respondent has failed to demonstrate that he suffered any prejudice by the trial court's delay. Accordingly, respondent's first assignment of error is overruled.

[2] By his second assignment of error, respondent contends that the evidence presented at the TPR hearing was not sufficient to support the termination of respondent's parental rights. We disagree.

Section 7B-1111 of our General Statutes sets forth the statutory grounds for terminating parental rights. A finding of any one of the grounds enumerated therein, if supported by competent evidence, is sufficient to support a termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). "[T]he party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997); *see also* N.C. Gen. Stat. § 7B-1111(b) (2003). "If the petitioner meets its burden of proving that there are grounds to terminate parental rights, the trial court then will consider whether termination is in the best interests of the child. . . . [T]he trial court has discretion, if it finds that at least one of the statutory grounds exists, to terminate parental rights upon a finding that it would be in the child's best interests." *In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 174 (2001) (citation omitted).

On appeal, the trial court's decision to terminate parental rights is reviewed on an abuse of discretion standard, *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001), and we must affirm "where the court's findings of fact are based upon clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996).

In the present case, the trial court found as grounds for terminating respondent's parental rights that respondent had neglected J.L.K. pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), and that respondent had willfully abandoned J.L.K. pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). After a careful review of the record, we conclude that both grounds are supported by clear, cogent, and convincing evidence.

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), the trial court may order termination of parental rights where "[t]he parent has abused or neglected the juvenile. The juvenile shall be deemed to be . . . neglected if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101." N.C. Gen. Stat. § 7B-1111(a)(1) (2003). Section 7B-101(15) of our General Statutes defines a "neglected juvenile" as:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent[] . . .; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2003). This Court has stated that "[a]n individual's 'lack of parental concern for his child' is simply an alternate way of stating that the individual has failed to exercise proper care, supervision, and discipline as to that child." *In re Williamson*, 91 N.C. App. 668, 675, 373 S.E.2d 317, 320 (1988). Moreover, a parent's "failure to provide the personal contact, love, and affection that inheres in the parental relationship" is a proper consideration in determining whether neglect has occurred. *Whittington v. Hendren (In re Hendren)*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 375-76 (2003).

Section 7B-1111(a)(7) of our General Statutes also permits the trial court to terminate parental rights where "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" N.C. Gen. Stat. § 7B-1111(a)(7) (2003).

In the present case, the trial court found that when the TPR petition was filed in March 2002, respondent had not seen his daughter since October 1998, a period of almost three and a half years. The trial court found that respondent's only communication with J.L.K. in the six months preceding filing of the TPR petition was sending her two cards, and that respondent's only communication with J.L.K. in the six months prior to the TPR hearing was sending her one card. The trial court found that respondent communicated with his mother and his attorney, by telephone and in writing, on a regular basis during this period. While respondent contends his opportunities to show filial affection for J.L.K. have been limited by his current incarceration, we note that respondent did not visit or communicate with J.L.K. during the approximately six-month period *before* his current incarceration began, and that his contact with J.L.K. following his release from jail in June 1998 until his last visit with her in October 1998 was extremely limited. Moreover, this Court has stated that "[i]ncarceration alone . . . does not negate a father's neglect of his child. . . . Although his options for showing affection are greatly limited, the respondent will not be excused from showing interest in his

child's welfare by whatever means available." *Hendren*, 156 N.C. App. at 368, 576 S.E.2d at 376.

The record also reveals that respondent's problems with alcohol prevented him from showing proper parental concern for J.L.K. well before his current incarceration, culminating in the trial court's finding that respondent fired a gun into petitioner's residence while J.L.K., then approximately five months old, was inside. The trial court also found that respondent had failed to support J.L.K. financially "for a period of one year or more" prior to his current incarceration.

We conclude that petitioner carried her burden of showing by clear, cogent, and convincing evidence that respondent neglected and abandoned J.L.K., and that the trial court's findings support its conclusions of law. Moreover, we conclude that the trial court did not abuse its discretion by finding it was in J.L.K.'s best interest to terminate respondent's parental rights. *Hendren*, 156 N.C. App. at 370, 576 S.E.2d at 377 (trial court did not abuse its discretion by finding it was in the juvenile's best interest to terminate the respondent's parental rights, "[c]onsidering the ideal situation which the child currently enjoys with petitioner and her husband, and considering respondent's long incarceration[.]") Here, the guardian ad litem testified that J.L.K. currently lives in a "very appropriate" setting with petitioner and her sixteen-year-old half-brother, and that J.L.K. enjoys "a very good relationship" with each of them. The trial court found that J.L.K. currently has no relationship with respondent and that respondent will remain in prison until 2009, when J.L.K. will be twelve years old. We conclude that the trial court did not abuse its discretion. Respondent's second assignment of error is overruled.

[3] By his final assignment of error, respondent contends that because petitioner filed the TPR petition in Johnston County rather than J.L.K.'s home county of Wake, the trial court did not have subject matter jurisdiction to terminate respondent's parental rights. We disagree.

Section 7B-1101 of our General Statutes provides that a trial court

> shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, *is found in*, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district *at the time of filing of the petition* or motion.

N.C. Gen. Stat. § 7B-1101 (2003) (emphasis added). It is undisputed that J.L.K. has been a resident of Wake County since birth, and that respondent was incarcerated in Johnston County when the TPR petition was filed. It is also undisputed that at the moment the TPR petition was filed on 11 March 2002, J.L.K. was physically present in Johnston County.

We agree with petitioner's assertion that respondent's argument here confuses the issues of subject matter jurisdiction and venue. As our Supreme Court has stated, "[W]e must keep in mind the clear distinction between jurisdiction and venue. Jurisdiction implies or imports the power of the court; venue the place of action." *Shaffer v. Bank*, 201 N.C. 415, 418, 160 S.E. 481, 482 (1931). Moreover, "[i]t is a generally accepted principle that the courts of the state in which a minor child is physically present have jurisdiction consistent with due process to adjudicate a custody dispute involving that child." *Lynch v. Lynch*, 302 N.C. 189, 193, 274 S.E.2d 212, 217, *modified and affirmed*, 303 N.C. 367, 279 S.E.2d 840 (1981).

We conclude that the trial court properly exercised subject matter jurisdiction in the case at bar. If respondent felt Johnston County was an improper setting for the termination proceedings, it was incumbent upon him to either move for a change of venue prior to answering the TPR petition or object to venue in his answer, or his right to seek a change of venue would be waived. N.C. Gen. Stat. § 1A-1, Rule 12(b) (2003). The record indicates that respondent did neither. Accordingly, and because J.L.K. was "found" in Johnston County when the TPR petition was filed, the trial court properly exercised its jurisdiction pursuant to N.C. Gen. Stat. § 7B-1101 in terminating respondent's parental rights.

Affirmed.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA v. JOE HEDGEPETH

No. COA03-787

(Filed 6 July 2004)

Rape— first-degree—assault on a female as lesser offense—instruction denied—short form indictment not applicable

The trial court correctly denied an instruction on assault on a female to a first-degree rape defendant indicted under N.C.G.S. § 14-27.2. Where the indictment specifically alleges all of the elements of first-degree rape under N.C.G.S. § 14-27.2(a)(2)(a) & (b) and does not contain the specific averments or allegations of N.C.G.S. § 15-144.1 (the short form indictment, which can include assault on a female as a lesser offense), the court has jurisdiction only to issue instructions on first-degree rape and any lesser included offenses that meet the definitional test. Assault on a female does not meet that test because it contains elements not present in the greater offense of rape.

Appeal by defendant from judgment entered 18 April 2002 by Judge W. Osmond Smith in Wake County Superior Court. Heard in the Court of Appeals 17 March 2004.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for defendant appellant.

McCULLOUGH, Judge.

Defendant was tried before a jury at the 16 April 2002 Criminal Session of Wake County Superior Court on the charge of first degree rape. The State's evidence tended to show the following: On 3 July 2001, Nicole Bouleris was dropped off by a friend at the Char-Grill Restaurant on Hillsborough Street in Raleigh, North Carolina. It was after 5:30 p.m., and she was planning on walking to a friend's house on Dorothea Drive to drink alcohol. On her way there, Nicole decided to follow a path that went through a wooded area. She did so around 6:00 p.m. while it was still light outside.

Nicole was then approached by defendant, who asked her something like, "Hey baby, what are you doing?" Nicole smiled at defend-

ant and said hello. Defendant asked Nicole if she wanted to hang out with him, to which Nicole replied in the negative and stated that she was going to her friend's house. Defendant then stepped in front of Nicole, about an arm's length away. Defendant again asked Nicole if she wanted to come hang out with him. Nicole again replied in the negative and stated she was going to her friend's house. Defendant then punched her in the nose, grabbed her around the neck, and said, "Shut the f*ck up," and dragged her into an area of bushes behind an abandoned building.

Behind the building, defendant grabbed her around the neck, threw her to the ground on something like a rug, and straddled her. He then slammed her head against the ground, punched her a few times, and choked her. He said repeatedly, "Shut the f*ck up, bitch. Shut the f*ck up." Defendant then took off Nicole's pants, leaving her shirt on, and when doing so found and removed a knife that Nicole had kept in a sheath clipped to her pants. Defendant held the knife to Nicole's neck and kept repeating, "Shut the f*ck up." He then said that if she did not keep quiet he would kill her, and "Do you think you are the first bitch I've killed?" He then cut her slightly on the neck.

A struggle ensued and Nicole knocked the knife out of defendant's hand. Defendant got mad and slammed Nicole's head against the ground, choking and punching her.

Defendant, having lost the knife, undid his pants. He than proceeded to have vaginal intercourse with Nicole, stating, "I'm going to f*ck that pussy and then I am going to kill you." When she continued to try to push him off with her legs, he hit her. She successfully pushed defendant off once, to which he came back at Nicole with both hands and began choking her. She never lost consciousness.

A nearby resident, Ms. Vanessa Crockett, witnessed two partially dressed adults in broad daylight amidst a sexual act. Ms. Crocket did not believe the female was struggling. Though she heard "don't hit me," she thought it might be something kinky and did not call the police until she conferred with a friend.

Officer S.R. Davis of the Raleigh Police Department was the first to arrive at the scene. As he approached, Officer Davis saw defendant having intercourse with a female. The female did not appear to be struggling, but the officer challenged defendant with his sidearm. Nicole heard somebody yell, scaring defendant. Defendant immediately jumped off Nicole, and she saw a police officer standing in the

woods. Officer Davis noticed defendant was totally naked and that Nicole had on only a shirt. In a matter of seconds, defendant had his pants on, which were either still around his ankles when the officer first approached or very close to him.

Before fleeing the scene, Nicole hit defendant in the face as hard as she could. She fled to a nearby store that she frequented. The owner of the store, a testifying witness for the State, noticed that Nicole was cut on the neck. Nicole next went to a friend's house, where she called her friend and housemate Ellie London to come get her. Ellie testified that when she picked Nicole up, she noticed blood on Nicole's neck and shirt. Ellie also noticed cuts, bruises, and scrapes on Nicole. Nicole did not want to go to the hospital, so Ellie took her home. They first stopped at the scene of the alleged rape, where Nicole sought to retrieve her shoes, knife, and her day planner. The day planner was not there.

Nicole contacted a rape counselor about three days after the incident. The counselor suggested Nicole go to the hospital and report the crime to the police. Nicole wrote a letter and e-mailed the Raleigh Police Department telling them what happened on 3 July 2001. Nicole herself was wanted for setting fire to a building, which she had done to escape involuntary commitment at Dorothea Dix Mental Hospital in Raleigh. Nicole decided to talk to the police in person on 26 July 2001. Nicole spoke consistently about the incident to the police and this was testified to by two members of the department. She confessed to the arson charges and was arrested after making a statement.

Defendant was found guilty of first degree rape and sentenced to a term from the presumptive range of a minimum of 480 months and a corresponding maximum of 585 months. He appealed. For the reasons stated below, we conclude defendant received a trial free from prejudicial error.

FIRST DEGREE RAPE/SHORT FORM INDICTMENT FOR RAPE

At the outset, we note that while defendant sets forth five assignments of error in the record on appeal, those assignments not addressed in his brief are deemed abandoned, pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure.

The single issue properly preserved for our review in this case is whether the trial court committed prejudicial error by denying

defendant's request that the jury be given the option of the lesser, alternative instruction of assault on a female. The jury was given only guilty of first degree rape and not guilty. Defendant argues that N.C. Gen. Stat. § 15-144.1 (2003), the short form indictment statute for rape, expressly authorizes the lesser alternative charge of assault on a female, and that the facts of this case support such an instruction. We do not find the short form indictment for rape applicable in this case.

Pursuant to N.C. Gen. Stat. § 14-27.2(a)(2) (2003), "In order to prove first degree rape, it is sufficient that the State demonstrate that the defendant engaged in vaginal intercourse with another person by force and against the will of the other person and either (1) employed or displayed a dangerous weapon, or (2) inflicted serious personal injury upon the victim or another person." *State v. Worsley*, 336 N.C. 268, 275, 443 S.E.2d 68, 71 (1994). An indictment under N.C. Gen. Stat. § 14-27.2(a)(2) will support a verdict of rape; it will also support a verdict of any lesser included offense of first degree rape, as an alternative verdict, where the evidence on an essential element of the first degree rape indictment is in conflict. *State v. Drumgold*, 297 N.C. 267, 271, 254 S.E.2d 531, 533 (1979). In determining whether one offense is a lesser included offense of another, we apply a definitional test as opposed to a case-by-case factual test. *State v. Weaver*, 306 N.C. 629, 636-37, 295 S.E.2d 375, 378-79 (1982), *overruled on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993); *see also State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). "If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense." *Weaver*, 306 N.C. at 635, 295 S.E.2d at 379.

Under North Carolina law, assault on a female does not meet this definitional test because assault on a female contains elements not present in the greater offense of rape: (1) the element that the defendant be a male person; and (2) the element that he be at least eighteen years old. *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988) (assault on a female not a lesser included offense of first degree rape); *see also State v. Wortham*, 318 N.C. 669, 351 S.E.2d 294 (1987) (assault on a female not lesser included offense of attempted second degree rape).

In his indictment, defendant was charged with violating N.C. Gen. Stat. § 14-27.2. The indictment stated the following:

> [T]he defendant named above unlawfully, willfully, and feloniously did engage in vaginal intercourse with Nicole [], by force and against the victim's will. The defendant used or displayed a dangerous or deadly weapon, to wit: a knife, or the defendant inflicted serious personal injury on Nicole [] by beating her on the head and face and cutting her on the neck with the knife.

The indictment tracks the language of N.C. Gen. Stat. § 14-27.2(a)(2)(a) & (b). Defendant argues that the language of his indictment is sufficient to meet the short form rape indictment, N.C. Gen. Stat. § 15-144.1. That statute states:

> In indictments for rape it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the offense of rape was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will and concluding as is now required by law. *Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for rape in the first degree and will support a verdict of guilty of rape in the first degree, rape in the second degree, attempted rape or assault on a female.*

Id. (emphasis added). Defendant argues that his indictment in substance states all of the required averments and allegations in the short form rape statute, and therefore defendant should be allowed an instruction on the alternative offense of assault on a female.

Defendant cites *State v. Hatcher*, 117 N.C. App. 78, 450 S.E.2d 19 (1994), *appeal dismissed, disc. review denied*, 339 N.C. 618, 454 S.E.2d 261 (1995) as governing this issue. In *Hatcher*, the defendant was indicted on second degree rape. After a hung jury and mistrial, he was then indicted for attempted second degree rape and assault on a female. *Id.* at 83-84, 454 S.E.2d at 23. The trial court dismissed these indictments finding that double jeopardy had attached to these charges when the State initially chose to pursue a case on the single indictment of second degree rape. We reversed, holding that double jeopardy only attaches to charged crimes in specific instances, and that in the double jeopardy context, there is no *de facto* acquittal of a lesser and/or alternative theory of criminal liability when the State

chooses initially to pursue a greater theory but gets a hung jury. The *Hatcher* opinion stated:

> We note that in the instant case, the indictment for second degree rape would support a verdict for attempted second degree rape or assault on a female. Although defendant was not indicted for attempted second degree rape and assault on a female, defendant could still have been convicted of any of those charges under North Carolina General Statutes § 15-144.1[.]

Id. at 82, 454 S.E.2d at 23. Defendant would have us read *Hatcher* for the proposition that when a defendant is indicted specifically under N.C. Gen. Stat. § 14-27.3 (2003) for second degree rape, he automatically is subject to the charges of N.C. Gen. Stat. § 15-144.1, and the same would hold true for an indictment under first degree rape. We do not agree.

We cannot discern from the *Hatcher* opinion the language of the initial second degree rape indictment. If the initial indictment in *Hatcher* contained the "averments and allegations" as set out in N.C. Gen. Stat. § 15-144.1, we agree defendant could be charged with assault on a female even if the indictment cited N.C. Gen. Stat. § 14-27.3, but used the language of N.C. Gen. Stat. § 15-144.1. The language of N.C. Gen. Stat. § 15-144.1 states that "[a]ny bill of indictment containing the averments and allegations herein" is sufficient. But if the defendant was indicted under the exact language of N.C. Gen. Stat. § 14-27.3, then *Hatcher* is an anomaly and not controlling. *See Wortham*, 318 N.C. 669, 351 S.E.2d 294. Additionally, the Court's notation in *Hatcher* is dicta and not controlling.

In *Wortham*, our Supreme Court determined:

> Assault on a female not being a lesser included offense of attempted second degree rape for which defendant was indicted and defendant not having been otherwise charged with such an assault, the trial court had no *jurisdiction* to try, convict or sentence defendant for that offense.

Id. at 673, 351 S.E.2d 297 (emphasis added). *Herring* followed this rationale in holding that assault on a female was not a lesser included offense of first degree rape. *Herring*, 322 N.C. at 743, 370 S.E.2d at 370. Neither of these opinions mention N.C. Gen. Stat. § 15-144.1, though that statute was effective at the time of these decisions. The instant case is consistent with *Herring* and *Wortham*. Where the lan-

guage of the indictment alleges each element of first degree rape, then the trial court has jurisdiction to instruct the jury *only* on first degree rape and its lesser included theories. To hold otherwise would be to make an indictment under N.C. Gen. Stat. § 14-27.2 superfluous, as it would always be the equivalent to an indictment under N.C. Gen. Stat. § 15-144.1.

By using the express averment and allegations of N.C. Gen. Stat. § 15-144.1, the State gives the defendant notice of the potential theories of liability it may pursue based on the evidence it has acquired at that point and also protects the defendant from double jeopardy on any of that statute's listed offenses. *State v. Sills*, 311 N.C. 370, 375-76, 317 S.E.2d 379, 382 (1984). By using the exact language of N.C. Gen. Stat. § 14-27.2 in its indictment and citing it, the State gives defendant notice it will pursue the theory of first degree rape and foreclose pursuing a charge of assault on a female under that indictment. The court is without jurisdiction to instruct on that theory though the evidence may support it. It is the State's choice as to how to scale the benefits and risks of pursuing a greater degree of criminal liability under the more specific indictment.

Therefore, we hold that where the indictment specifically alleges all of the elements of first degree rape under N.C. Gen. Stat. § 14-27.2(a)(2)(a) & (b) and does not contain the specific averments or allegations of N.C. Gen. Stat. § 15-144.1, the court has jurisdiction only to issue instructions on that offense, and any lesser included offenses that meet the definitional test. The short form rape indictment is not at issue.

Therefore, we find the trial court properly denied defendant the jury instruction of assault on a female.

No error.

Judges BRYANT and ELMORE concur.

ROBERT A. LEVERETTE, ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS v. BATTS TEMPORARY SERVICES, INC. D/B/A LABOR WORKS OR LABOR WORLD, BILL C. SCHLEUNING, LORRAINE SCHLEUNING, AND SEAN A. FORE, DEFENDANTS

No. COA03-818

(Filed 6 July 2004)

1. Costs— refiled action—prior action involuntarily dismissed—inherent authority not appropriate

The trial court abused its discretion by dismissing a second action for failure to pay deposition costs in the first action. Although the court indicated that it was using its authority under N.C.G.S. § 1A-1, Rule 41 and its inherent power to enforce its own orders, the first case was involuntarily dismissed and the taxation of costs was not an order, and there was no occasion for the use of the court's inherent authority because other methods existed for the enforcement of a civil judgment.

2. Pleadings— Rule 11 sanctions—properly denied

Rule 11 sanctions were properly denied where the court concluded that defendant's motion to dismiss and an earlier motion to stay were well-grounded in law and fact.

Appeal by plaintiffs from order entered 10 April 2003 by Judge Evelyn W. Hill, Superior Court, Wake County. Heard in the Court of Appeals 30 March 2003.

Law Offices of Robert J. Willis, by Robert J. Willis, for plaintiff-appellant.

Bailey & Dixon, L.L.P., by Gary S. Parsons, Kenyann Brown Stanford, and Jennifer D. Maldonado, for defendant-appellees.

WYNN, Judge.

This appeal concerns the dismissal of a second action based on Plaintiff's failure to pay costs awarded to Defendants in an earlier action that was dismissed on jurisdictional grounds. Plaintiff contends in this appeal that the dismissal of his second action was improper because although it arose under the same facts as the earlier dismissed action, it involved different claims. We hold that the trial court lacked authority to dismiss *Leverette II* because of

Plaintiff's failure to pay costs under *Leverette I*. Accordingly, we remand this matter to the trial court.

The facts tend to show that in *Leverette I*, Plaintiff brought an action against Defendants Batts Temporary Services, Inc., and its owners, Bill Schleuning, Lorraine Schleuning, and Sean Fore on behalf of himself and other similarly situated former employees of Defendants. Plaintiff contended Defendants had violated the North Carolina Wage and Hour Act by making wage deductions for transportation charges that were incident of and necessary to the temporary employment provided by Defendants.

By order entered 21 February 2002, the trial court dismissed *Leverette I* for insufficient process, insufficient service of process, and lack of personal jurisdiction over Defendants. Thereafter, the trial court granted Defendants' motion for costs under N.C. Gen. Stat. § 6-20 stating in pertinent part: "It is, therefore, ORDERED, in the Court's discretion, that Defendants' deposition costs, in the amount of $514.40, are hereby taxed against Plaintiffs." Shortly thereafter, Plaintiff filed a notice of appeal for *Leverette I*.

In the meantime, upon the dismissal of *Leverette I* on 21 February 2002, Plaintiff filed a second action against Defendants—*Leverette II*—alleging two claims under Chapter 95 of our General Statutes. However, the trial court stayed that action pending the appeal of *Leverette I*. Plaintiff responded by dismissing his appeal of *Leverette I* thus prompting the dissolution of the stay of *Leverette II*.

In January 2003, Defendants moved to stay *Leverette II* on the grounds that Plaintiff had not paid the costs awarded in *Leverette I*; in turn, Plaintiff moved for Rule 11 sanctions. At the hearing on these motions, Defendants orally moved to amend their motion to include a request for dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b). On 10 April 2003, the trial court granted Defendants' motion and dismissed *Leverette II* based upon Plaintiff's failure to pay costs awarded in *Leverette I*. Plaintiff appeals.

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[1] On appeal, Plaintiff first contends the costs order in *Leverette I* taxing the deposition costs upon him could not be enforced pursuant to N.C. Gen. Stat. § 1A-1, Rule 41 or the trial court's contempt powers or inherent authority; rather, he contends the order should be treated as a civil judgment and enforced as such. We agree.

In explaining the distinction between taxing costs against a party and ordering the payment of costs, this Court in *In re Estate of Tucci* stated,

> "There is a clear difference between including attorney's fees in the costs taxed against a party to a lawsuit and in ordering the payment of attorney's fees. When costs are taxed, they establish a liability for payment thereof, and if a fund exists which is the subject matter of the litigation, costs may be ordered paid out of the fund prior to distribution of the balance thereof to the persons entitled. If no such fund exists, the satisfaction of the judgment for costs may be obtained by methods as for the enforcement of any other civil judgment."

Id., 104 N.C. App. 142, 149, 408 S.E.2d 859, 864 (1991) (quoting *Smith v. Price*, 315 N.C. 523, 538, 340 S.E.2d 408, 417 (1986)). In *Leverette I*, the trial court's order stated "It is, therefore, ORDERED, in the Court's discretion, that Defendants' deposition costs, in the amount of $514.40, are hereby taxed against Plaintiffs." Thus, the trial court's order in *Leverette I* should not be characterized as an order; rather, it was a civil judgment.

In dismissing *Leverette II* for failure to pay the deposition costs, the trial court indicated it was utilizing its authority under N.C. Gen. Stat. § 1A-1, Rule 41 and its "inherent power to take those actions necessary to the proper administration of justice, including those actions necessary to enforce its own appropriately entered orders and to sanction their disobedience." However, Rule 41 does not authorize the trial court's dismissal in this case. Indeed, under Rule 41(d), dismissal of an action is required when a plaintiff fails to pay the costs taxed upon him *as a result of a voluntary dismissal.* Under subsection (b), a defendant may move for dismissal "for failure of the plaintiff to prosecute or to comply with these rules or any order of court." Neither situation is present in this case as *Leverette I* was involuntarily dismissed and the taxation of costs in *Leverette I* was not an order.

Moreover, the trial court did not have the inherent authority to dismiss *Leverette II.*

> The very conception of inherent power carries with it the implication that its use is for occasions not provided for by established methods . . . . [Only w]hen [established] methods fail and the court shall determine that by observing them the assistance nec-

> essary for the due and effective exercise of its own functions cannot be had, or when an emergency arises which the established methods cannot or do not instantly meet, then and not till then does occasion arise for the exercise of the inherent power.

In re Alamance County Court Facilities, 329 N.C. 84, 100, 405 S.E.2d 125, 133 (1991). The trial court in *Leverette I*, taxed costs upon Plaintiff pursuant to N.C. Gen. Stat. § 6-20. Under N.C. Gen. Stat. § 6-4, "when costs are not paid by the party from whom they are due, the clerk of superior court shall issue an execution for the costs and attach a bill of costs to each execution. The sheriff shall levy the execution as in other cases." Furthermore, as indicated by our Supreme Court in *Smith v. Price*, the costs judgment may be satisfied by methods used to enforce other civil judgments. *Smith*, 315 N.C. at 538, 340 S.E.2d at 417. Therefore, as other methods exist for the enforcement of the costs judgment, the occasion does not arise for the use of the trial court's inherent authority. Accordingly, we vacate the order dismissing *Leverette II* and remand for further proceedings.

[2] Plaintiff also contends the trial court erroneously denied his motion for Rule 11 sanctions under which he contended Defendants' motion to dismiss *Leverette II* for failure to pay costs in the earlier action was neither well-grounded in fact nor warranted by existing law or a good faith argument for the extension, modification, or reversal of case authority interpreting and applying Rule 41(d). "In reviewing a trial court's determination to award Rule 11 sanctions, the appellate court conducts a *de novo* review. Pursuant to this review, the appellate court must determine: (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence." *Johnson v. Harris*, 149 N.C. App. 928, 933, 563 S.E.2d 224, 227 (2002).

In this case, the trial court concluded:

> Defendants' motion to dismiss this action pursuant to G.S. § 1A-1, Rule 41(b), as well as Defendants' earlier motion to abate or stay this action, pursuant to G.S. § 6-20, are well-grounded in both fact and law and are not subject to sanctions pursuant to G.S. § 1A-1, Rule 11.

We agree with the trial court's conclusion and therefore affirm its denial of Rule 11 sanctions in this case.

Finally, Plaintiff contends the trial court erroneously stayed *Leverette II* pending the appeal of *Leverette I*. However, instead of appealing from that order, Plaintiff dismissed his appeal of *Leverette I* and proceeded with discovery in *Leverette II*. As such, this issue is moot. *See Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (stating "a case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy").

In sum, in light of our Supreme Court's holding in *Smith v. Price*, the trial court in *Leverette II* misconstrued the taxation of costs in *Leverette I* as a costs order rather than a civil judgment. As the taxation of costs may be enforced as a civil judgment, the trial court abused its discretion in dismissing *Leverette II* for failure to pay costs in *Leverette I*. However, we affirm the trial court's denial of Rule 11 sanctions and dismiss Plaintiff's appeal of the order staying the proceedings in *Leverette II* pending the appeal of *Leverette I* as moot. Finally, we find no merit in Leverette's remaining issues on appeal.

Vacated in part, affirmed in part, dismissed in part.

Judges HUNTER and TYSON concur.

STATE OF NORTH CAROLINA v. CARL HARRISON

No. COA03-1362

(Filed 6 July 2004)

1. **Constitutional Law— double jeopardy—failure to register as sex offender—prior record—inclusion of underlying rape**

Defendant was not subjected to double jeopardy by the inclusion of the underlying second-degree rape conviction in his prior record level during his sentencing for failing to register as a sex offender.

2. **Sexual Offenses— failing to register as a sex offender—indictment—elements of offense**

An indictment against a homeless defendant for failing to register as a sex offender was sufficient where it clearly stated

the elements of the offense. The argument that the indictment failed by not identifying the specific dates defendant moved and his new addresses is without merit.

Appeal by defendant from judgment entered 20 May 2003 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 June 2004.

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

Michelle FormyDuval-Lynch, for defendant-appellant.

TYSON, Judge.

Carl Harrison ("defendant") appeals from a judgment entered after he entered a guilty plea of failing to register as a sex offender. We affirm.

I. Background

On 13 March 1992, defendant entered a guilty plea to the charge of second-degree rape and was sentenced to fifteen years active imprisonment. Upon release from prison on 25 April 1997, defendant was required to register as a sex offender. On 28 April 1997, defendant appeared at the Mecklenburg County Sheriff's Office, registered his address at his mother's house on Markland Drive, Apartment B, in Charlotte, North Carolina, and signed a document, in which he acknowledged a duty to inform the Sheriff of any change of address within ten days. Defendant's mother suffered a stroke and became very ill. After several hospitalizations, she lost her home. Defendant became homeless and began staying in shelters.

On 20 March 2002, a Mecklenburg County Sheriff's Deputy visited the address at Markland Drive to verify defendant's residence. The current occupant informed the deputy that she had been residing in the house since May 2001 and did not know defendant. Defendant was arrested on 10 September 2002 and entered a guilty plea for his failure to register as a sex offender on 20 May 2003, reserving his right to appeal the issues below.

II. Issues

The issues presented are whether: (1) the trial court erred in calculating defendant's prior record level by including his conviction of

second-degree rape; and (2) the indictment was insufficient to support the offense of which defendant was convicted.

III. Prior Record Level

[1] Defendant argues the trial court violated the Structured Sentencing Act and his right to be protected against double jeopardy by including his conviction for second-degree rape in calculating his prior record level for sentencing. We disagree.

N.C. Gen. Stat. § 14-208.11 (2003) states:

> (a) A person required by this Article to register who does any of the following is guilty of a Class F felony:
>
> . . . .
>
> (2) Fails to notify the last registering sheriff of a change of address.

Defendant does not challenge his conviction of violating this statute. Defendant argues his conviction for second-degree rape is an element of the offense at bar, which precludes the trial court from using this conviction in determining his record level during sentencing.

"To meet its burden under § 14-208.11(a)(2), the State must prove that: 1) the defendant is a sex offender who is required to register; and 2) that defendant failed to notify the last registering sheriff of a change of address." *State v. Holmes*, 149 N.C. App. 572, 577, 562 S.E.2d 26, 30 (2002). To establish the first element, the State must prove that defendant is a State resident and that he has a "reportable conviction." N.C. Gen. Stat. § 14-208.7(a) (2003). N.C. Gen. Stat. § 14.208.6 (2003) classifies second-degree rape as a "reportable conviction."

Defendant contends being a sexual offender is similar to being an habitual felon and the trial court is precluded from using the sexual offense in calculating his prior convictions. We disagree. "Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence." *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977). Failing to register as a sexual offender, however, is not a status but constitutes a separate crime. *See* N.C. Gen. Stat. § 14-208.11 ("A person required by this Article to register who does any of the following is guilty of a Class F felony . . . .").

The State argues that defendant's conviction of second-degree rape is not an element of the offense charged, but is analogous to a conviction for the offense of possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1. Under this statute, it is unlawful for "any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches . . . ." N.C. Gen. Stat. § 14-415.1(a) (2003). In *State v. Glasco*, we explicitly rejected defendant's argument that "the indictment violates his constitutional rights by utilizing the same felony charge as the basis for his underlying conviction for possession of a firearm by a convicted felon and as one of the three underlying felonies used to elevate him to habitual felon status." 160 N.C. App. 150, 160, 585 S.E.2d 257, 264, *disc. rev. denied*, 357 N.C. 580, 589 S.E.2d 356 (2003). We held, "[o]ur courts have determined that elements used to establish an underlying conviction may also be used to establish a defendant's status as a[n] habitual felon." *Id.* (citing *State v. Misenheimer*, 123 N.C. App. 156, 158, 472 S.E.2d 191, 192-93 (1996), *cert. denied*, 344 N.C. 441, 476 S.E.2d 128 (1996)).

Following this reasoning, we hold defendant was not subjected to double jeopardy by including his conviction of second-degree rape in calculating his prior record level. This assignment of error is overruled.

IV. Indictment

[2] Defendant argues the indictment fails to indicate defendant's new address, does not provide adequate notice to enable him to prepare his defense, is fatally defective, and requires his conviction be vacated. We disagree.

N.C. Gen. Stat. § 15-153 (2003) provides:

> Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express 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 or proceeding, sufficient matter appears to enable the court to proceed to judgment.

"It is generally held that the language in a statutorily prescribed form of criminal pleading is sufficient if the act or omission is clearly set forth so that a person of common understanding may know what is

intended." *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984) (citing 41 Am. Jur. 2d, *Indictments and Informations* § 68 (1968)). "A defect in an indictment is considered fatal if it 'wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty.' " *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (quoting *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943)).

Defendant's indictment clearly charges him with "Failing to Register As A Sexual Offender G.S. 14-208.11." The indictment states:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 20th day of March, 2002, in Mecklenburg County, Carl Rayfette Harrison did unlawfully, willfully and feloniously as a person required by Article 27A of Chapter 14 of the General Statutes of North Carolina to register as a sexual offender, knowingly and with the intent to violate the provisions of said Article, fail to register as a sexual offender in that said defendant, a Mecklenburg County, North Carolina resident, changed his address and failed to provide written notice of his new address no later than ten (10) days after the change to the Sheriff's Office in the county with whom he had last registered.

The indictment sufficiently states with particularity the violation of which defendant was charged. The indictment clearly states the elements "of the offense of which the defendant is found guilty." *Wilson*, 128 N.C. App. at 691, 497 S.E.2d at 419. Defendant's argument that the indictment's failure to identify specific dates he moved and the identification of his new address is without merit. This assignment of error is overruled.

V. Conclusion

The trial court did not err by including defendant's conviction of second-degree rape in calculating his prior record level during sentencing. The indictment at bar provided defendant with ample notice of the charge to allow him to adequately prepare a defense for trial. The trial court's judgment is affirmed.

Affirmed.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA v. PAMELA SANDERS LANIER

No. COA03-476

(Filed 20 July 2004)

1. Evidence— prior crimes or bad acts—death of former husband—absence of accident—doctrine of chances—remoteness—motive

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion in limine to prevent the State from offering evidence concerning the death of defendant's former husband by drowning six years prior to the death of her second husband by arsenic poisoning, because: (1) although defendant contends that both men died as the result of an accident, both men suddenly and inexplicably became seriously ill while sharing a home with defendant after experiencing no major medical problems; (2) both men experienced a change in personality, described by their respective friends and family members as being in a stupor or acting like a zombie; (3) when both men became ill, defendant diagnosed their medical problems and treated the men herself; (4) defendant attempted to isolate both men and generally refused to get them professional medical assistance on a regular basis; (5) defendant reaped a substantial financial benefit from the untimely deaths of both her husbands; (6) although the two men died from different causes, the circumstances surrounding the first husband's death are relevant to the argument that the death of the second husband was not accidental according to the doctrine of chances; (7) remoteness in time does not affect the probative value of the death of the first husband regarding absence of accident, and the similarities between the two deaths are not less probative due to the passage of time; (8) evidence of defendant's financial gain following the deaths of both of her husbands provided a motive for her involvement in their deaths; and (9) the evidence pertaining to the husbands' financial status, coupled with the mysterious illnesses of both men and the similarities between the two deaths, rendered the evidence of the first husband relevant to prove something other than defendant's propensity to commit murder.

2. Evidence— exclusion—cause of death of first husband—invited error

The trial court did not abuse its discretion in a first-degree murder case by excluding evidence about the cause of the death of defendant's first husband in order to differentiate the death of her second husband, because: (1) a defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct; and (2) even if the exclusion of this evidence during a doctor's cross-examination had been error, defendant had the opportunity to present the arsenic evidence during her case-in-chief but chose to request its exclusion instead.

3. Evidence— fire—beneficial financial impact

The trial court did not abuse its discretion in a first-degree murder case by admitting evidence regarding a fire at a home defendant shared with the victim husband, because: (1) although defendant objected to the presentation of this evidence during the testimony of one witness, two other witnesses had already testified concerning the fire without objection by defendant, and the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character; (2) the evidence discussing the beneficial impact of the fire on the couple's finances, along with the evidence of the death of defendant's first husband, strengthens the application of the doctrine of chances and lessens the probability that the second husband's death occurred as an accident; (3) the chain of events before the victim's death forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury; and (4) even if the evidence was admitted in error, defendant failed to show how it prejudiced her given the voluminous amount of evidence and testimony presented during the trial.

4. Evidence— witness—impeachment—waiver

The trial court did not err in a first-degree murder case by allowing the State to impeach its own witness, because: (1) there was no indication that the State's impeachment was used as a mere subterfuge to present improper evidence to the jury; (2) the State impeached the witness's credibility by comparing his testimony to representations he made on the pertinent insurance application; and (3) defendant waived any error since the appli-

cation for insurance had been admitted into evidence and the witness had given most of his testimony before defendant objected to the State's impeachment of him.

5. Homicide— first-degree-murder—requested instruction—accidental death

The trial court did not err in a first-degree murder case by failing to give defendant's requested jury instruction on the theory of accidental death, because: (1) the trial court's instruction on accident was a correct statement of the law and contained the substance of the instruction defendant requested; and (2) defendant failed to show that had the jury been instructed as she suggested, there is a reasonable probability that the outcome of her trial would have been different.

6. Homicide— short-form indictment—murder by poison

The short-form indictment used to charge defendant with first-degree murder was sufficient to support a conviction of defendant for murder by poison under N.C.G.S. § 14-17.

Appeal by defendant from judgment entered 29 November 2001 by Judge Carl L. Tilghman in Wayne County Superior Court. Heard in the Court of Appeals 19 April 2004.

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

Rudolf, Maher, Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

MARTIN, Chief Judge.

Defendant Pamela Sanders Lanier appeals from a judgment imposing a sentence of life imprisonment without parole entered upon her conviction by a jury for the first-degree murder of her husband, Ivy Dorian Lanier (Dorian). The jury found that she was guilty of first degree murder both on the basis of premeditation and deliberation and murder by poison.

Summarized only to the extent required to discuss the assignments of error brought forward on appeal, the evidence presented at defendant's trial tended to show that she and Dorian Lanier were married in 1993 and lived near Chinquapin. Dorian and defendant had a contract to grow turkeys for Nash Johnson and Son Farms. Dorian

used a turkey medication called Nitro-3 on his turkeys, which was administered through the turkeys' water supply. Dorian had a proportional medication system between his house and his turkey houses, where Nitro-3 was mixed with water in a bucket called a proportioner; the mixture then ran through a water hose to the turkey house. The hose had a bypass valve that allowed one to draw fresh water, without Nitro-3, out of the hose. Nitro-3 contains arsenic and stains yellow any object with which it comes in contact.

The evidence showed that Dorian hurt his leg while operating his bulldozer the first week in September 1997, after which his health began to decline, and his behavior changed as well. Alli Bradshaw ("Bradshaw"), a family friend, testified that she lived with defendant and Dorian from September until 4 November 1997. Bradshaw testified that during that period, Dorian was frequently bedridden and delirious, lying in his bed naked. On other occasions, Dorian sat in his recliner and was too weak to cross his legs. Bradshaw described one incident when Dorian was bedridden for three days, unable to move or talk and had soiled the bed. Dorian ate only melted ice cream during this period, which defendant fed him from her fingers. On another occasion in late September, Dorian returned home and fell out of his truck onto the driveway where he lay, "acting like a zombie." Dorian had diarrhea and "messed up his pants" before defendant could get him inside the house.

Several witnesses testified that defendant tried to prevent family and friends from seeing Dorian while he was ill. Defendant became furious when anyone asked her to take Dorian to the doctor, even though he was ill and was not eating. Numerous witnesses documented that Dorian did not like doctors and did not want to go to the doctor, relying instead on defendant to "doctor" him. Defendant often opened up capsules which she said were antibiotics and poured them into Dorian's soft drinks; she also administered injections of Phenergan and Nubain. Phenergan is used to reduce nausea and vomiting; Nubain is a painkiller, sufficient quantities of which will put a person into a stupor. Despite his illness, Dorian received professional medical care only sporadically between September and his death in November.

The evidence also showed that defendant suffered from numerous medical problems in 1997, including migraine headaches. She had sores on her buttocks, which she thought were shingles, and frequently showed the sores to other people. As a result of her illnesses, defendant used a lot of medication, including Nubain and Phenergan.

Over a four-year period ending in 1998, defendant purchased over $10,000 worth of prescription medication from the Kenansville Drug Store. She also went to an urgent care clinic as often as three days each week to get shots of Phenergan and Nubain until January 1997. Defendant had no insurance to cover her medical expenses.

Dr. Richard Jordan first treated Dorian on 14 September 1997, when Dorian complained of a bitter taste in his mouth. When Dorian came in for an office visit on 27 September 1997 he was delirious and sick. Despite his declining health, Dorian Lanier did not see a doctor until 13 November 1997. During this doctor's appointment on 13 November 1997, Dorian was in terrible pain and his cognitive function was impaired. Defendant stated that she had been giving Dorian injections of Phenergan, which the nurse instructed defendant to stop doing so that an upcoming diagnostic test would give accurate results. Despite this advice, defendant continued giving Dorian injections of Phenergan.

Dorian saw Dr. Jordan on 17 November 1997 with symptoms of nausea, diarrhea and vomiting. He had lost 21 pounds since his office visit on 27 September. Dorian was disoriented and could hardly walk or talk. Dr. Jordan instructed defendant to take Dorian to the emergency room immediately because he thought Dorian was on the verge of death. Defendant took Dorian to the emergency room, but did not stay for treatment.

Because Dorian's condition was worsening, he was unable to complete the diagnostic test scheduled for 18 November 1997. Defendant called the doctor's office on 19 November and stated that Dorian was nauseated, moaning in pain and vomiting. Defendant did not follow instructions to take Dorian Lanier to the emergency room immediately and continued to care for him at home.

Jackie Hatcher, a family friend, visited Dorian on the afternoon of 19 November 1997, to find him "wobbling" with orange skin. Hatcher insisted on taking him to the hospital and went to find help to carry Dorian to his truck. Defendant was preparing Pedialyte for Dorian to drink and checking his blood pressure. When Hatcher returned to the house, Dorian had a seizure and Hatcher told defendant to call 911.

Dorian arrived at the emergency room by ambulance at 6:25 p.m. He was vomiting, weak, and his skin looked orange. After a short time, Dorian began vomiting undigested food and a red liquid that

smelled like alcohol. Efforts to resuscitate Dorian were unsuccessful and he died at 10:57 p.m.

Dr. Charles Garrett performed an autopsy on Dorian Lanier. Dorian's body was completely yellow, his liver had failed, his heart was enlarged and there was excessive fluid in his lungs. Dr. Garrett found no measurable amount of alcohol in Dorian Lanier's body, but there were traces of over the counter medicine and Phenergan. In Dr. Garrett's opinion, Dorian died of chronic and acute arsenic poisoning. According to the medical expert witnesses, the most common symptoms of arsenic poisoning are abdominal pain, weight loss, nausea, vomiting, diarrhea, a metallic taste in the mouth, jaundice, low blood pressure, stupor, disorientation and weakness in the limbs.

After Dorian died, defendant sold his bulldozer and several tractors for a total of approximately $21,000. Defendant also sold an option to purchase Dorian's land in Duplin County for $225,000.

Witnesses for the defense, including defendant's son Dustin Williams and her nephew Mitchell Sanders, who both lived in the home, testified that Dorian frequently took unidentified pills and had eaten fly bait and rat poison before his death. Although Dorian knew the turkey medication contained arsenic, several defense witnesses, including defendant's son, nephew, mother, father and a family friend, testified that they had seen Dorian drink from the hose attached to the turkey medication. Defendants's son, defendant's father and an EMT testified that Dorian told them at the hospital on 19 November "he had done [this] to himself."

Defendant brings forward on appeal six of the twenty-three assignments of error contained in the record on appeal. The remaining assignments of error are deemed abandoned. N.C. R. App. P. 28(a).

I.

[1] Defendant contends the trial court erred by denying her motion in limine to prevent the State from offering evidence concerning the death of Johnny Ray Williams, defendant's former husband. Such evidence tended to show that defendant married Johnny Ray Williams (Williams) in 1989. He became ill during the summer of 1991. On 18 August 1991, Williams called his mother Marie Williams and told her that he would visit her the following day. Williams told his mother they needed to discuss the farm that they owned together, which was

being foreclosed upon by the bank. Williams did not keep his appointment with Marie Williams on 19 August 1991; defendant called her the following day to inform her Williams was in the hospital. When Williams was hospitalized, he was confused and had trouble speaking. When Marie Williams visited her son, he was initially non-responsive and unable to communicate, but eventually sat up and talked during her visit. His doctors were unable to determine the cause of his illness.

The evidence also tended to show that on another occasion during the summer of 1991, Williams was observed to be sick and almost unconscious at his home. Defendant stated that he had "the DTs" but instead of seeking medical attention for him, she tried to pour liquor in his mouth.

On 4 September 1991, Williams went to the doctor, arriving in the office at 2:20 p.m. According to defendant, after Williams returned home from the doctor's appointment, he took 5 Lorazepam (Valium) pills, his blood pressure medicine (Tenormin), Benedryl and drank one-third of a 1.75 liter (fifth) of Seagram's. Williams walked outside to check his crab pots around midnight with a glass of liquor in his hand. Johnny Williams fell into the water beside his dock, where he drowned. The investigating police officer testified he arrived and found that Williams was below the surface of the water, which was not higher than 3 to 4 feet where Williams fell in. Johnny Williams was known to be an excellent swimmer. Williams' neurologist opined that even if Williams had taken all the medication and had drunk as much alcohol as defendant claimed, he should still have been able to avoid drowning.

The official cause of Johnny Ray Williams's death was listed as drowning. A toxicology screen indicated no measurable trace of alcohol in his system at the time of death, nor was there any prescription medication. The State's expert witness, Dr. Garrett, opined that some alcohol would have appeared on the blood test if Williams had consumed as much alcohol as defendant claimed.

After Williams' death, defendant collected $25,000 as payment on a life insurance policy she purchased in spring of 1991. Defendant received the farm and $5,190.12 from the credit life insurance policy securing the deed of trust on the farm. Defendant eventually sold the farm for $30,000.

Defendant argues that none of this evidence should have been admitted because the circumstances of Williams' death were not sim-

ilar to Dorian Lanier's death; almost seven years had passed between the two deaths; and Williams' death was not relevant to any fact at issue in the case. She contends the introduction of this testimony served only to inflame and confuse the jury, and its erroneous admission entitles her to a new trial.

Rule of Evidence 404(b) states, in pertinent part:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b). Even if evidence is admissible according to Rule 404(b), it must also be scrutinized under Rule 403, which provides for the exclusion of otherwise admissible evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403.

Here, the trial court found the following similarities between the deaths of Johnny Ray Williams and Ivy Dorian Lanier:

1. Both men were married to the Defendant at the time of their death.
2. Prior to their death, both men became incapacitated to an unconscious state or stupor at various times preceding their death.
3. The Defendant was the only person able to care for each man and to seek medical attention when they were unable to help themselves.
4. The Defendant was present and had the ability to assist both men in getting medical help and did in fact seek medical help for each on some occasions before their death but only after being urged by others.
5. The Defendant benefitted financially from the death of Johnny Ray Williams and was in position to benefit financially from the death of Ivy Dorian Lanier.
6. In both cases when witnesses were present to see her husbands when they obviously appeared critically ill, the

> Defendant appeared to minimize the seriousness of her husbands' illnesses and attempted to treat them on her own.

As a result of these findings, the trial court found that the evidence regarding defendant's marriage to Williams, their financial matters, and the circumstances of Williams' death was admissible evidence, "probative of the issues of motive, intent, plan, opportunity, and absence of accident[.]" The trial court found that the probative value of the Williams evidence was not outweighed by the danger of unfair prejudice and that the time interval between the two deaths was not so remote as to affect the probative value of the Williams evidence. Defendant contends the trial court's findings were not supported by the evidence, because Johnny Williams and Dorian Lanier did not die under similar circumstances.

Rule 404(b) is "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original); *cert. denied*, 421 S.E.2d 360 (1992). "When prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991). "In each case, the burden is on the defendant to show that there was no proper purpose for which the evidence could be admitted." *State v. Williams*, 156 N.C. App. 661, 664, 577 S.E.2d 143, 145 (2003) (quoting *State v. Willis*, 136 N.C. App. 820, 823, 526 S.E.2d 191, 193 (2000)). "The determination of whether relevant evidence should be excluded under Rule 403 is a matter that is left in the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion." *State v. Hipps*, 348 N.C. 377, 405-06, 501 S.E.2d 625, 642 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999).

Here, the trial court allowed admission of the Williams evidence as probative for several purposes: to show defendant's motive, intent, plan, opportunity and absence of accident. "[W]here . . . an accident is alleged, evidence of similar acts is more probative than in cases in which an accident is not alleged." *State v. Lloyd*, 354 N.C. 76, 89, 552 S.E.2d 596, 608 (2001) (citation omitted). "Where a defendant claims accident, a prior bad act with a 'concurrence of common features' to

the crime charged, tends to negate a defendant's contention that he 'had no plan to shoot the victim.' " *Lloyd*, 354 N.C. at 90, 552 S.E.2d at 609 (citations omitted) (applying the doctrine of chances to admit evidence of two "accidental" shootings). One of defendant's main theories at trial was that Dorian Lanier's death was an accident, due to his voluntary consumption of turkey medication, rat poison and other toxic substances found around the farm.

Defendant argues the evidence regarding Johnny Ray Williams' death was not relevant because the circumstances of his death were completely dissimilar to those of Dorian Lanier's death. Dorian Lanier died after ingesting arsenic; Johnny Williams died by drowning. However, as the trial court found, both men were married to defendant at the time of their deaths; Johnny married defendant in 1989 and died 4 September 1991, while Dorian married defendant in 1993 and died 17 November 1997. Defendant contends both men died as the result of an accident; however, both men, after experiencing no major medical problems, suddenly and inexplicably became seriously ill while sharing a home with defendant. Both men experienced a change in personality, described by their respective friends and family members as being in a stupor or acting like a "zombie." When both men became ill, defendant diagnosed their medical problems and treated the men herself. Defendant attempted to isolate both men and generally refused to get them professional medical assistance on a regular basis. Finally, defendant reaped a substantial financial benefit from the untimely deaths of both her husbands.

Although the two men died from different causes, the circumstances surrounding Johnny Ray Williams' death are relevant to the argument that Dorian Lanier's death was not accidental, according to the "doctrine of chances." Our Supreme Court adopted the following explanation of the doctrine of chances:

> The recurrence or repetition of the act increases the likelihood of a mens rea or mind at fault. In isolation, it might be plausible that the defendant acted accidentally or innocently; a single act could easily be explained on that basis. However, in the context of other misdeeds, the defendant's act takes on an entirely different light. The fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual, or objectively improbable to be believed. The coincidence becomes telling evidence of mens rea.

State v. Stager, 329 N.C. 278, 305, 406 S.E.2d 876, 891 (1991) (quoting Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 5:05

(1984)). The doctrine of chances is especially probative when the two crimes are similar in nature. *See Stager*, 329 N.C. 278, 406 S.E.2d 876; *State v. Boczkowski*, 130 N.C. App. 702, 504 S.E.2d 796 (1998) (applying the doctrine of chances to justify admission of evidence regarding two drowning deaths). However, the doctrine of chances has been applied even when the prior misdeed is not factually similar in all respects. *See State v. Murillo*, 349 N.C. 573, 509 S.E.2d 752 (1998) (evidence of husband's increasingly violent assaults on his wife relevant to show lack of accident in trial for her murder), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999); *State v. White*, 340 N.C. 264, 457 S.E.2d 841 (defendant's involvement in conspiracy to murder her husband was probative of lack of accident in trial for murder of stepson), *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995) *State v. Taylor*, 154 N.C. App. 366, 572 S.E.2d 237 (2002) (defendant's threats to make the shooting of his first wife look like an accident relevant to show lack of accident in defendant's trial for shooting of second wife). Although Williams and Dorian Lanier died from different physical causes, their deaths shared sufficiently similar characteristics to provide some evidence that Dorian's death was not accidental.

Defendant also argues that the Williams evidence was too remote in time to be probative for any purpose. Our Supreme Court held:

> Remoteness in time between an uncharged crime and a charged crime is more significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan. In contrast, remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility.

Stager, 329 N.C. at 307, 406 S.E.2d at 893 (citations omitted). Here, Williams' death was separated from Dorian Lanier's death by approximately six years. After four years of marriage to defendant, Dorian died suddenly. The remoteness in time does not affect the probative value of the Williams evidence on absence of accident. The similarities between Dorian Lanier and Williams' deaths, as outlined by the trial court, are not less probative due to the passage of time. When considered in light of the doctrine of chances, we cannot hold that the Williams evidence is rendered inadmissible by its remoteness in time from Dorian's death.

The trial court also allowed admission of the Williams evidence as being probative of defendant's motive. "[T]he State may also intro-

duce [evidence of prior crimes] if it is relevant to establish a pattern of behavior on the part of the defendant tending to show that the defendant acted pursuant to a particular motive." *Stager*, 329 N.C. at 306-07, 406 S.E.2d at 892. Evidence of other crimes is admissible under Rule 404(b) if it "pertain[s] to the chain of events explaining the context, motive and set-up of the crime and form[s] an integral and natural part of an account of the crime . . . necessary to complete the story of the crime for the jury." *State v. Lloyd*, 354 N.C. 76, 90, 552 S.E.2d 596, 609 (2001) (quoting *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174-75 (1990)). *See also State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999); *State v. Williams*, 156 N.C. App. 661, 577 S.E.2d 143 (2003); *State v. Willis*, 136 N.C. App. 820, 526 S.E.2d 191 (2000). Evidence of defendant's financial gain following the deaths of Johnny Williams and Dorian Lanier, standing alone, would provide a powerful motive for her involvement in their deaths. The evidence pertaining to Johnny Williams and Dorian Lanier's financial status, coupled with the mysterious illnesses of both men and the similarities between the two deaths, rendered the Williams evidence relevant to prove something other than defendant's propensity to commit murder.

For these reasons, we cannot say that the trial court abused its discretion in admitting the evidence regarding Johnny Ray Williams' death, his marriage to defendant, and their financial transactions before and after his death to show absence of accident in Dorian Lanier's death or a motive for defendant to commit his murder. The trial court also found, within its discretion, that the Williams evidence was not substantially more prejudicial than it was probative, rendering it admissible pursuant to Rule 403. Because the trial court did not abuse its discretion in admitting this evidence for proper purposes under Rule 404(b), we need not address defendant's arguments regarding the remaining purposes for which the trial court introduced this evidence.

II.

[2] Defendant also assigned error to the exclusion of evidence about the cause of Johnny Ray Williams' death. Defendant proffered evidence to show that Williams neither died from arsenic poisoning nor had high levels of arsenic in his body at the time of his death, in order to differentiate his death from that of Dorian Lanier. Defendant argues the exclusion of this evidence amounted to a denial of her constitutional rights to present a defense and confront the witnesses against her.

Persons accused of crimes are entitled by the North Carolina and United States constitutions to confront the witnesses against them and to present a defense. U.S. Const. Amend. VI, XIV; N.C. Const. Art. 1, §§ 19, 23. However, the trial court has control over the presentation of evidence and the scope of the testimony allowed during cross-examination. *See* N.C. Gen. Stat. § 8C-1, Rule 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence. . . ."). "[A]lthough cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court." *State v. Coffey*, 326 N.C. 268, 290, 389 S.E.2d 48, 61 (1990) (citing *State v. Hosey*, 318 N.C. 330, 348 S.E.2d 805 (1986)), *cert. denied*, 421 S.E.2d 360 (1992). "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b). "The range of facts that may be inquired into is virtually unlimited except by the general requirement of relevancy and the trial judge's discretionary power to keep the examination within reasonable bounds." *State v. Freeman*, 319 N.C. 609, 617, 356 S.E.2d 765, 769 (1987).

Following Dorian Lanier's death in November 1997, Johnny Williams' body was exhumed for an autopsy in January 1998. Defendant proffered this autopsy report evidence while cross-examining Dr. Garrett. Dr. Garrett did not refer to the 1998 autopsy during his direct examination by the State, nor did he perform the autopsy on Williams. The trial court did not allow the defense to offer the evidence during Dr. Garrett's cross-examination, but indicated that it would reconsider the ruling if defendant attempted to introduce the autopsy evidence during her case in chief. Such decisions regarding the subject matter allowed during cross-examination are within the sound discretion of the trial court, whose decisions will not be reversed upon appeal except upon a showing of an abuse of discretion. *See State v. Chavis*, 134 N.C. App. 546, 558, 518 S.E.2d 241, 250 (1999); *disc. rev. denied*, 351 N.C. 362, 542 S.E.2d 220 (2000).

Even if the exclusion of this evidence during Dr. Garrett's cross-examination had been error, the error would be harmless. Expert witness Dr. Page Hudson testified about the 1991 autopsy of Williams and defendant moved in limine to prevent Dr. Hudson from testifying about the 1998 autopsy or being examined concerning the presence of arsenic in Williams' body. "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2003). Defendant had

the opportunity to present the arsenic evidence during her case-in-chief, but chose to request its exclusion instead. Therefore, this assignment of error is overruled.

III.

[3] Defendant next contends the trial court erred in admitting evidence regarding a fire at the home defendant shared with Dorian Lanier on Ludie Brown Road (Ludie Brown house). Defendant argues this evidence was not relevant and was more prejudicial than probative, and therefore she should receive a new trial.

The evidence about which defendant complains tended to show that Jackie Hatcher and Dorian Lanier were working outdoors on Hatcher's property on 10 December 1996. Defendant called Hatcher's wife and told her the Ludie Brown house was on fire. Hatcher and Dorian arrived at the Ludie Brown house to find defendant alone in the house and the laundry room on fire. Hatcher and Dorian put the fire out, turned off the electrical circuit for the room, tore out the paneling and insulation, removed the washer and dryer from the house and wet down the cement floor of the laundry area. They returned to Hatcher's property and had lunch, only to learn the house was on fire again; when they returned, the house was burning badly.

After the fire, Dorian Lanier sold the Ludie Brown property for $55,000. Dorian and defendant received an insurance payment of $142,317.05 as a result of the destruction of their home, part of which they used to buy a new modular home for $88,733. Dorian told Hatcher the money from the land sale and insurance payment had gotten him out of a bind. Dorian said his feet would "be in salt water" as a result of the money, and he intended to enjoy life from that point on.

Initially, we note that although defendant objected to the presentation of this evidence during Jackie Hatcher's testimony, two witnesses had already testified concerning the fire without objection by defendant. These witnesses discussed the impact of the fire on the couple's finances, showing the benefits they received as a result of the fire. "[T]he admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Doisey*, 138 N.C. App. 620, 625, 532 S.E.2d 240, 244 (quoting *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979)), *disc. rev. denied*, 352 N.C. 678, 545 S.E.2d 434 (2000).

Therefore, defendant waived her objection to the admission of evidence concerning the financial impact of the fire.

The trial court admitted the Ludie Brown fire evidence to show motive, intent and plan. The evidence, in combination with other testimony that defendant was Dorian's sole beneficiary; that defendant had substantial prescription drug expenses and no insurance; that defendant wanted to move into a new home; that Dorian sold the Ludie Brown property for $55,000; that defendant sold Dorian's bulldozer for $15,000; and that defendant sold an option to purchase Dorian's real property for $225,000, creates a strong profit motive for defendant to kill her husband. The Ludie Brown fire evidence, along with the evidence of Johnny Ray Williams' death, strengthens the application of the doctrine of chances and lessens the probability that Dorian Lanier's death occurred as an accident. This evidence regarding the chain of events before Dorian Lanier's death "forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.' " *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (citation omitted). Therefore this evidence was relevant to the issue of whether defendant committed the murder of her husband Dorian Lanier. The trial court determined that the relevance of the evidence outweighed its prejudicial effect; defendant has not shown that the trial court abused its discretion in making such a determination.

Finally, even if we determined this evidence was admitted in error, defendant has failed to show how its admission prejudiced her, given the voluminous amount of evidence and testimony presented during the trial. The erroneous admission of evidence requires a new trial only when the error is prejudicial. *See State v. Locklear*, 349 N.C. 118, 149, 505 S.E.2d 277, 295 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). Therefore, this assignment of error is overruled.

IV.

[4] Defendant also contends the trial court erred by allowing the State to impeach its witness, insurance agent Lester Wayne Anderson. The State conducted a voir dire examination of Anderson, then called him as a witness. His testimony tended to show that in spring 1991, defendant and Johnny Williams purchased life insurance on each other and for their children from Anderson. Anderson testified he did not witness Williams' signature on the policy application and barely knew him before selling him insurance. The State then presented evi-

dence that Anderson had indicated on the policy application in 1991 that he had witnessed Williams' signature and that he had known Williams for twenty years.

"The credibility of a witness may be attacked by any party, including the party calling him." N.C. Gen. Stat. § 8C-1, Rule 607. Impeachment of a party's own witness may allow a party to use impermissible hearsay as impeachment material in order to get the substance of the hearsay statement before the jury. *See State v. Hunt*, 324 N.C. 343, 349, 378 S.E.2d 754, 758 (1989); *State v. Bell*, 87 N.C. App. 626, 633, 362 S.E.2d 288, 292 (1987). In order to prevent abuse of Rule 607, impeachment should only be allowed when "[c]ircumstances indicating good faith and the absence of subterfuge" are present. *Hunt*, 324 N.C. at 350, 378 S.E.2d at 758. Several of these circumstances have been identified as when "the witness's testimony was extensive and vital to the government's case, that the party calling the witness was genuinely surprised by his reversal, or that the trial court followed the introduction of the statement with an effective limiting instruction." *Hunt*, 324 N.C. at 350, 378 S.E.2d at 758 (citation omitted). It is the better practice for a trial court to make findings of fact to indicate the presence of these circumstances before allowing impeachment of a witness by the party that called the witness. *See Bell*, 87 N.C. App. at 633, 362 S.E.2d at 292. However, the State may impeach a hostile witness by asking about prior inconsistent statements, if those questions are not a mere subterfuge for introducing improper and otherwise inadmissible evidence. *See State v. Price*, 118 N.C. App. 212, 216, 454 S.E.2d 820, 822-23, *disc. rev. denied*, 341 N.C. 423, 461 S.E.2d 766 (1995); *State v. Spinks*, 136 N.C. App. 153, 523 S.E.2d 129 (1999).

There is no indication that the State's impeachment of Anderson in this case was used as a mere subterfuge to present improper evidence to the jury. The State impeached Anderson's credibility by comparing his testimony to representations he made on the 1991 insurance application. The application for insurance had been admitted into evidence and Anderson had given most of his testimony before defendant objected to the State's impeachment of him. Thus, defendant waived any error. *See Doisey*, 138 N.C. App. at 625, 532 S.E.2d at 244 (citation omitted). This assignment of error is overruled.

V.

[5] Defendant argues the trial court committed reversible error when it failed to give defendant's requested jury instruction on

the theory of accidental death. Defendant requested that the trial court instruct the jury:

> Ladies and gentlemen of the jury, if Ivy Dorian Lanier died by accident or misadventure, that is, without wrongful purpose on the part of the defendant, the defendant would be not guilty. The burden of proving accident is not on the defendant. The assertion of accident is merely a denial that she has committed any crime. The burden remains at all times on the State to prove the defendant's guilt beyond a reasonable doubt.
>
> Ladies and gentlemen of the jury, I instruct you that the State of North Carolina has the burden of proving to you beyond a reasonable doubt that the death of Ivy Dorian Lanier was a homicide, that is, that the death of Ivy Dorian Lanier was not an accident. I instruct you that the mere fact that Ivy Dorian Lanier died on November 19, 1997, does not mean that a crime was committed.
>
> The defendant in this case has entered a plea of not guilty. She is not required to prove her innocence or to explain anything. The defendant does not have to prove that the death of Ivy Dorian Lanier was caused by an accidental exposure to or ingestion of arsenic. Rather, the State of North Carolina must prove to you beyond a reasonable doubt that the death of Ivy Dorian Lanier was not an accident.
>
> When a defendant asserts that the victim's death was a result of an accident, she is in effect denying the existence of those facts which the State must prove beyond a reasonable doubt to convict her of the crime of murder. Therefore, the burden remains at all times on the State to prove to the jury beyond a reasonable doubt those essential facts necessary to establish that a crime was committed, and in so doing, disprove beyond a reasonable doubt the defendant's contention of accidental death.
>
> I charge you, ladies and gentlemen of the jury, that the State of North Carolina must satisfy you beyond a reasonable doubt that the death of Ivy Dorian Lanier was not accidental.

The trial court instructed the jury as follows, in pertinent part:

> If the victim died by accident or misadventure, that is, without wrongful purpose or criminal negligence on the part of the defendant, the defendant would be not guilty. The burden of proving accident is not on the defendant. Her assertion of accident is

> merely a denial she has committed any crime. In effect, she is denying the existence of those facts which the State must prove beyond a reasonable doubt to convict her of the crime of murder or any lesser included offenses about which you are instructed. The burden remains at all times on the State to prove the defendant's guilt beyond a reasonable doubt and that the victim's death was not accidental.

Defendant argues that instruction did not clearly inform the jury that the State was required to disprove accident beyond a reasonable doubt, and that such error, in turn, created constitutional and prejudicial error because the instruction lowered the State's burden of proof on an essential element of crime. Defendant also contends the trial court committed reversible error by failing to include accident in its final mandate to the jury.

Failure to instruct on each element of crime is prejudicial error requiring a new trial. *See State v. Bogle*, 324 N.C. 190, 376 S.E.2d 745 (1989). Prejudicial error is defined as a question of whether "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2003).

In *State v. White*, the trial court instructed the jury that "[t]he burden remains on the State to prove the defendant's guilt beyond a reasonable doubt, thus that the death was not a result of accident or misadventure." *State v. White*, 340 N.C. 264, 300, 457 S.E.2d 841, 862 (1995). This instruction was held to be free from error. Defendant argues that *White* does not control the present case because *White* involved a review for plain error, whereas here we review for prejudicial error. The standard of review for plain error is higher than that for prejudicial error. *See State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (Plain error is error "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him.").

Despite the different standards of review, the instruction given here and in *White* are almost identical. The *White* court held "[t]he substance of this instruction was accurate and free from error" and "instruct[ed] the jury on accident as a theory of acquittal." *White*, 340 N.C. at 300, 457 S.E.2d at 862. Here, the trial court's instruction on accident was also a correct statement of the law and contained the substance of the instruction defendant requested. Defendant has failed to show that, had the jury been instructed as

she suggested, there is a reasonable probability that the outcome of her trial would have been different. Accordingly, we overrule this assignment of error.

VI.

[6] Finally, defendant argues the indictment used here, the short-form murder indictment, failed to allege all of the elements of first degree murder, specifically murder by poison. Defendant argues that use of the short-form indictment violates her constitutional rights to due process.

The short form indictment is valid to charge first degree murder on any of the theories listed under N.C. Gen. Stat. § 14-17. *See State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed 2d 797 (2001). The Supreme Court has upheld use of the short form indictment for first degree murder by premeditation and deliberation in light of the holding in *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999); *see State v. Wallace*, 351 N.C. 481, 508, 528 S.E.2d 326, 343, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), *reh'g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2001), and also for murder by lying in wait in *State v. Locklear*, 145 N.C. App. 447, 449, 551 S.E.2d 196, 197 (2001). We hold that the short form indictment is also sufficient to support a conviction for murder by poison under G.S. § 14-17. This assignment of error is overruled.

For the reasons stated above, we hold defendant received a fair trial, free from prejudicial error.

No error.

Judges HUNTER and THORNBURG concur.

STATE OF NORTH CAROLINA v. RANDY WAYNE BINGHAM

No. COA03-1137

(Filed 20 July 2004)

1. Sexual Offenses— statutory—evidence sufficient

On a motion to dismiss, the court is concerned only with the sufficiency of the evidence and not its weight. Defendant's motion to dismiss a statutory sex offense charge was

properly denied where most of the evidence was that the alleged sexual acts were merely poses for photographs, but there was some testimony that defendant, age 51, performed cunnilingus on the 13-year-old victim.

2. Rape; Sexual Offenses— statutory—specificity of evidence—sufficient

The testimony of a 13-year-old statutory rape and sexual offense victim that certain sexual acts occurred with defendant 25-40 times at intervals during an 8 month period was sufficient to deny defendant's motion to dismiss, although the victim could not remember the details because it was ". . . basically the same thing over and over again."

3. Sexual Offenses— statutory—sufficiency of evidence—activity with another with defendant watching

A charge of statutory sex offense should have been dismissed where there was evidence that defendant forced the victim to perform cunnilingus on her mother, but there was no activity between the victim and defendant. The State did not proceed on an aiding and abetting theory.

4. Sexual Offenses— statutory—evidence of rape—no other activity—evidence not sufficient

The trial court should have dismissed a charge of statutory sex offense where there was sufficient evidence of statutory rape, but no evidence of a separate sexual offense.

5. Criminal Law— jury deliberations—written statements in jury room—not prejudicial

Allowing the jury to take written statements from a statutory rape and sex offense victim and her mother into the jury room during deliberations was not prejudicial where the evidence was identical to that presented on direct examination.

6. Sentencing— aggravating factors—position of trust or confidence—dating victim's mother

There was no error in finding in aggravation that a statutory rape and sex offense defendant took advantage of a position of trust or confidence where defendant was dating the victim's mother and they all lived in defendant's house for a time before the abuse began.

7. Sentencing— aggravating factors—joining with more than one other person—evidence not sufficient

The trial court should not have found in aggravation that a statutory rape and sex offense defendant joined with more than one other person in committing the offenses. The evidence at trial was that defendant and the victim's mother were the only ones abusing her.

8. Rape; Sexual Offenses— short form indictment—statutory rape and statutory sexual offense

There was no error in using the short form indictment for statutory rape and statutory sexual offense.

Appeal by defendant from judgment entered 9 December 2002 by Judge Henry E. Frye, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 7 June 2004.

Attorney General Roy Cooper by Assistant Attorney General Anne M. Middleton for the State.

Paul Pooley for the defendant.

TIMMONS-GOODSON, Judge.

Randy Wayne Bingham ("defendant") appeals his convictions of six of the seven counts of statutory rape, six of the seven counts of statutory sexual offense and seven counts of indecent liberties with a child. For the reasons stated herein we conclude that the trial court erred by denying defendant's motion to dismiss two of the counts of statutory sex offense. We also conclude that one of the trial court's aggravating factors for sentencing was not supported by the evidence, and we remand this case for resentencing.

The evidence presented at trial tends to show the following: In November 2000, defendant was dating Diana Lewis[1] ("Diana"). Defendant was fifty-one years old. Defendant and Diana lived in separate houses on Central Avenue in High Point, North Carolina. Diana lived with her daughter, Haley Brooks ("Haley"), and her son, David Brooks ("David"). On 13 November 2000, Haley turned thirteen years old. Diana and Haley were at defendant's house when defend-

1. To protect the identities of the witnesses in this case, the mother will be referred to by the pseudonym "Diana Lewis." The minor children will be referred to by the pseudonyms "Haley Brooks" and "David Brooks."

ant presented Haley with a vibrating sex instrument as a birthday gift. Haley declined the gift. Defendant told Haley that it was Diana's fantasy for Diana and defendant to teach Haley about sex. Haley responded negatively. Defendant and Diana told Haley that she could either "be in their circle" or pack her bags and go live with her grandmother.

Haley left defendant's house, went to the house that she shared with Diana and David, and began to pack her belongings in a bag. Diana went to the house, spoke with Haley, and brought her back to defendant's house. Either on that night or a few days later, defendant told Haley that he wanted to have sex with her. Haley refused. Defendant aggressively pursued Haley until, out of fear, she undressed and laid on defendant's bed. Defendant engaged in vaginal intercourse with Haley.

A few days later, Haley was at defendant's house when he led her into his bedroom. Defendant and Diana performed cunnilingus on Haley, and defendant engaged in vaginal intercourse with Haley. Defendant asked Haley to perform fellatio on him, but she refused.

In December 2000, Diana, Haley and David moved into defendant's two-bedroom house. Defendant and Diana shared one bedroom. Haley and David shared the other bedroom. On or around 25 December 2000, defendant gave Diana and Haley matching lingerie, which included sheer negligees, stockings, and thong underwear. Defendant had Diana and Haley wear the lingerie as he took photographs of the three of them engaged in sexual poses.

After Haley's birthday in November, defendant would engage in sex with her as many as three times per week. On some occasions, Diana would participate in sex with defendant and Haley. Defendant also forced Haley to watch pornographic videos with him and to drink alcoholic beverages. Defendant and Diana eventually moved Haley's bed into their bedroom. Haley slept in the bedroom with defendant and Diana, and David slept in the other bedroom.

On 14 February 2001, defendant and Diana engaged in sexual intercourse with Haley. On 12 July 2001, defendant suggested that Haley perform cunnilingus on Diana. Diana had complained to defendant that Haley "never did anything for her" and that Haley "never pleased her." Haley first refused to perform cunnilingus on Diana, but relented out of fear of defendant.

One evening in August 2001, defendant and Haley were cooking dinner outside on a grill when defendant asked Haley to have sex with him. Haley refused because the next-door neighbor was in his yard. Defendant told Haley that if she did not let him have sex with her, he would push her on the ground and rape her. Haley relented and allowed defendant to have vaginal intercourse with her. Diana came home from work later that evening and Haley told Diana that defendant forced her to have sex with him. Diana became angry with defendant and argued with him.

On the weekend of 15 and 16 September 2001, defendant's daughter, Sara,[2] was visiting defendant's house pursuant to the custody arrangement between defendant and his former wife, Lisa Miller ("Lisa"). At approximately 1:00 a.m. on 16 September 2001 defendant telephoned Lisa, told her that he and Diana had been fighting, and indicated that she should come to pick Sara up immediately. When Lisa arrived, Diana and Haley told them about defendant's abusive behavior toward Haley. Lisa took Sara home and subsequently called the Guilford County Department of Social Services ("DSS").

DSS Child Protective Services investigator Clayton Coward ("Coward") visited defendant's house on 18 September 2001 to investigate Lisa's claims. Coward interviewed Haley and Diana separately about defendant's abusive behavior toward Haley. Haley and Diana provided Coward with handwritten statements describing defendant's abusive behavior. Coward then took Haley and David into protective custody and placed them in a foster home. Pursuant to the DSS investigation, defendant was arrested on 18 October 2001 in Pensacola, Florida, and indicted on seven counts of statutory rape, seven counts of statutory sex offense, and seven counts of indecent liberties with a child. Following a jury trial, at which defendant presented no evidence, defendant was convicted of six counts of statutory rape, six counts of statutory sex offense, and seven counts of indecent liberties with a child. It is from these convictions that defendant appeals.

As an initial matter, we note that defendant's brief contains arguments supporting only eight of the original forty-six assignments of error on appeal. The thirty-eight omitted assignments of error are

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2. To protect the identities of the witnesses in this case, defendant's daughter will be referred to by the pseudonym "Sara," and his former wife will be referred to by the pseudonym "Lisa Miller."

deemed abandoned pursuant to N.C.R. App. P. 28(b)(6) (2004). We therefore limit our review to those assignments of error properly preserved by defendant for appeal.

The issues presented on appeal are whether the trial court erred by (I) denying defendant's motion to dismiss all charges at the close of the State's evidence; (II) allowing jurors to view the handwritten statements by Diana and Haley during deliberations; (III) finding improper aggravating factors during sentencing; and (IV) accepting short-form indictments for the charges against defendant.

[1] Defendant first assigns error to the failure by the trial court to dismiss four of the counts of statutory rape and four of the counts of sex offense charges at the close of the State's evidence.

In ruling on a motion to dismiss, "the trial court must determine whether there is substantial evidence of each essential 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).

The criminal statute for statutory rape or sexual offense of a person who is thirteen, fourteen, or fifteen years old provides that "[a] defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person . . . ." N.C. Gen. Stat. § 14-27.7A(a) (2003). The term "rape" is defined by statute as vaginal intercourse. *See* N.C. Gen. Stat. §§ 14-27.2(a) and 14-27.3(a) (2003). The slightest penetration of the female sex organ by the male sex organ constitutes vaginal intercourse. *State v. Summers*, 92 N.C. App. 453, 456, 374 S.E.2d 631, 633 (1988), *cert. denied*, 324 N.C. 341, 378 S.E.2d 806 (1989). *See also* N.C. Gen. Stat. § 14-27.10 (2003). The term "sexual act" is defined in pertinent part as "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse." N.C. Gen. Stat. § 14-27.1(4) (2003).

In the present case, defendant argues that the trial court should have granted his motion to dismiss with respect to the charge of

statutory sex offense on or between 1 December 2000 and 31 January 2001. We disagree.

At trial, Haley testified that defendant gave her lingerie on "Christmas Night." Haley further testified that she and her mother put on the lingerie, and that "[h]e took pictures of my mother and I, and I took pictures of him and my mother, and . . . my mom took pictures of me and him." These pictures were taken with a Polaroid camera. Haley testified that some of the pictures taken that evening, which were destroyed before trial, depicted defendant performing cunnilingus on Haley, engaging in vaginal intercourse with Haley, and Haley performing fellatio on defendant. Haley testified that these were "just poses. None of that actually happened, not that I remember. They were, that was just the way that they had us, that they told me to pose for the pictures." The district attorney asked Haley if there was "any other time in December when anything happened of a sexual nature." Haley replied, "Not that I can remember at this time."

Diana testified that defendant gave Haley the lingerie "[t]wo days after Christmas." The district attorney also questioned Diana about the pictures as follows:

Q: Now, in the pictures you described it as posing?

A: Yes, sir.

Q: Were you performing any sexual acts in the pictures?

A: No, sir.

Q: Just pretending?

A: Yes, sir.

The district attorney later asked Diana if any sexual activity occurred that night. Diana said that "Mr. Bingham had oral sex with [Haley]."

We conclude that Diana's testimony that defendant performed cunnilingus on Haley is sufficient to overcome defendant's motion to dismiss the charge of statutory sex offense. We recognize the discrepancy between Haley's testimony and Diana's testimony about whether any sexual activity occurred between defendant and Haley that evening. However, "[i]n considering a motion to dismiss, the trial court is concerned only with the sufficiency of the evidence, not with the weight of the evidence." *State v. Lowery*, 318 N.C. 54, 71, 347 S.E.2d 729, 741 (1986), *citing State v. Gonzalez*, 311 N.C. 80, 316

S.E.2d 229 (1984). Accordingly, we hold that the trial court did not err by denying defendant's motion to dismiss the charge of statutory sex offense on or between 1 December 2000 and 31 January 2001.

[2] Defendant next argues that the trial court should have granted his motion to dismiss with respect to the charges of statutory rape on or between 1 December 2000 and 31 January 2001, statutory rape on or between 1 March 2001 and 30 April 2001, statutory sex offense on or between 1 March 2001 and 30 April 2001, statutory rape on or between 1 May 2001 and 30 June 2001, and statutory sex offense on or between 1 May 2001 and 30 June 2001. Defendant argues that the State did not present evidence of specific sexual acts that occurred during those time periods. Defendant contends that because "no evidence tied to the dates referenced in these indictments was offered," the evidence raises only suspicion or conjecture regarding the commission of the offenses and the identity of the perpetrator.

Defendant's argument is similar to the argument presented in *State v. Burton*, 114 N.C. App. 610, 442 S.E.2d 384 (1994). In *Burton*, the accusing witnesses alleged that the defendant sexually abused them "two or three times a week" between 1975 and 1976. 114 N.C. App. at 613-14, 442 S.E.2d at 386. The defendant argued that "the State failed to produce sufficient evidence establishing that the incidents alleged therein occurred during the time periods stated in the indictments." 114 N.C. App. at 612, 442 S.E.2d at 385. This Court held that

> In cases involving allegations of child sex abuse, temporal specificity requirements are further diminished. Children frequently cannot recall exact times and dates; accordingly, a child's uncertainty as to the time of the offense goes only to the weight to be given that child's testimony. Judicial tolerance of variance between the dates alleged and the dates proved has particular applicability where, as in the case *sub judice*, the allegations concern instances of child sex abuse occurring *years before*. Unless a defendant demonstrates that he was deprived of the opportunity to present an adequate defense due to the temporal variance, the policy of leniency governs.

114 N.C. App. at 613, 442 S.E.2d at 386 (citations omitted). Based on these principles, this Court concluded that defendant's motion to dismiss was properly denied. 114 N.C. App. at 614, 442 S.E.2d at 386.

In the case *sub judice*, Haley testified that between 13 November 2000 and August 2001, defendant engaged in sexual activity with her

twenty-five to forty times. When the district attorney asked Haley if she could remember details of the abuse, Haley testified that she could not "because it happened so many times, but it was basically the same thing over and over again." The district attorney later engaged in the following dialogue with Haley:

Q: Once things started on November the 13th, at your birthday, how often would things occur of a sexual nature between you and Randy Bingham?

A: Sometimes they were like once a week and then sometimes it was twice a week or three times a week, or, you know, like as much as possible for him.

. . . .

Q: And was that, when you say it happened sometimes those many times per week, was that every week, [Haley]?

A: It could be like every other week.

. . . .

Q: Would it be fair and accurate to say, [Haley], that something occurred of a sexual nature on some repeated interval over the period from November the 13th [of 2000] until August of 2001?

. . . .

A: Yes.

. . . .

Q: And on each occasion when something would happen, what would be the sexual activity?

In response to the last question, Haley testified that defendant would digitally penetrate her vagina, and engage in fellatio, cunnilingus and vaginal intercourse with her.

Based on this testimony, and in accordance with *Burton*, we conclude that the trial court properly denied defendant's motion to dismiss the aforementioned charges.

[3] Defendant next argues that the trial court should have granted his motion to dismiss with respect to the charge of statutory sex offense on or about 12 July 2001. We agree.

Haley testified on direct examination about the events of 12 July 2001 as follows:

Q: Do you remember the date that [defendant] had had [sic] you perform oral sex on your mom for the first time?

A: July 12th, I believe.

Q: Of 2001?

A: Yes.

Q: Tell the jury about that date, what occurred then?

A: My mom had just gotten home from work and they had an argument about, well, my mom brought up the fact that I never did anything for her and she said that there was no point because I never pleased her or anything. And Randy got all mad and everything and he came in there and he started yelling at me saying, you need to start doing stuff for your mom and all of this. And I said, well, I'm not about to go down on my mom, because for one thing I think it's disgusting and for another thing, it's my mom and I would never do anything like that. And he got really mad and then my mom came in there and he said, I'd better go down on her now. So of course him being like ten times stronger than me, and of course, me being scared of him, I did it. And I mean, you know, if you were scared you'd probably do it, too.

Q: Well, what happened sexually on July the 12th other than performing oral sex on your mom?

A: Nothing that I remember.

Q: Nothing happened between you and Randy Bingham?

A: Not that I remember.

We conclude that defendant's actions on 12 July 2001 do not fall within the definition of statutory sexual offense as provided in § 14-27.7A. There was no sexual act between Haley and defendant on that date. Assuming *arguendo* that there was sufficient evidence to support defendant's conviction of statutory sexual offense on an aider and abettor theory, the record is clear that the State did not proceed on this theory. At no time did the State seek to prove that defendant aided or abetted another or seek a jury instruction regarding his role as a non-principal participant in the crime.

Accordingly, we conclude that the trial court erred by denying defendant's motion to dismiss this charge.

[4] Defendant also argues that the trial court should have granted his motion to dismiss with respect to the charge of statutory sex offense on or about 20 August 2001. We agree.

Haley testified on direct examination that on or about 20 August 2001 defendant coerced her into engaging in vaginal intercourse outside of their home. Defendant concedes that this evidence is sufficient to uphold his conviction of statutory rape on this date. However, he contends that there was no evidence of a separate sexual offense as defined by statute. We agree. Defendant's actions with Haley on or about 20 August 2001 do not come within the definition of statutory sexual offense discussed *supra*. We conclude that the trial court erred by denying defendant's motion to dismiss the charge of statutory sex offense on 20 August 2001.

[5] Defendant next argues that the trial court committed prejudicial error by allowing jurors to take the handwritten statements by Diana and Haley into the jury room during deliberations. We disagree.

"Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received into evidence." N.C. Gen. Stat. § 15A-1233(b) (2003). Where the trial court allows the jury to take such evidence into the jury room over a party's objection, this Court may correct the error if it is prejudicial to the defendant. N.C. Gen. Stat. § 15A-1442(6) (2003); *see State v. Taylor*, 56 N.C. App. 113, 115, 287 S.E.2d 129, 130-31 (1982). On appeal, the defendant must demonstrate that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *Taylor*, 56 N.C. App. at 115, 287 S.E.2d at 130-31.

In the case *sub judice*, defendant did not consent to the two handwritten statements being permitted in the jury room during deliberations. Thus, we conclude that the trial court erred in permitting the statements to be taken into the jury room. The question we must next consider is whether this error was prejudicial in that there was a reasonable possibility that, but for the error, a different trial outcome would have resulted. The evidence provided in the written statements is identical to the evidence presented by Diana and Haley

on direct examination. Thus, the written statements did not provide the jury with any evidence that was not already presented at trial. Accordingly, we conclude that there is no reasonable possibility that the jury would have reached a different verdict if they had not been allowed to take the written statements into the jury room during deliberations. This assignment of error is overruled.

Defendant next argues that the trial court erred by improperly finding two aggravating factors. The trial court found as aggravating factors in each of the judgments that (1) "The defendant induced others to participate in the commission of the offense;" (2) "The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy;" and (3) "The defendant took advantage of a position of trust or confidence to commit the offense." N.C. Gen. Stat. § 15A-1340.16(d)(1), (d)(2) and (d)(15) (2003). The trial court then sentenced defendant in the aggravated range.

[6] Defendant argues that the trial court erred by finding that defendant took advantage of a position of trust or confidence to commit the offense. We disagree.

A finding that a defendant took advantage of a position of trust or confidence depends on "the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other." *State v. Daniel*, 319 N.C. 308, 311, 354 S.E.2d 216, 218 (1987). In *State v. McGriff*, 151 N.C. App. 631, 566 S.E.2d 776 (2002), this Court held that where prior to the incidents leading to the defendant's convictions, the victim knew the defendant because defendant was dating and living with her friend's sister, the victim and her friend visited defendant's house every day after school, and the victim had known defendant for approximately two months, there was sufficient evidence that defendant took advantage of a position of trust. 151 N.C. App. at 640, 566 S.E.2d at 781-82.

In the present case, the evidence tends to show that Haley met defendant when defendant and Diana began dating in November 1999. Diana, Haley and David moved into defendant's house in December 1999 and lived there until July 2000 when they moved into a house down the street. Diana, Haley and David lived apart from defendant until December 2000 when they moved back into his home. Therefore, defendant had known Haley for one year, and lived in the same house as Haley for seven months of that year, before he began to abuse her. We conclude, in accordance with *McGriff*, that this is sufficient evi-

dence that defendant took advantage of a position of trust or confidence to commit the offenses of which he was convicted.

[7] Defendant also argues that the evidence does not support the finding that defendant joined with more than one person in committing the offenses. We agree.

The evidence presented at trial tends to show that defendant and Diana were the only persons sexually abusing Haley. There is no evidence to implicate the involvement of a third person. Thus, we conclude that the trial court erred by finding that defendant joined with more than one other person in committing the offenses. *See State v. Moses*, 154 N.C. App. 332, 340, 572 S.E.2d 223, 229 (2002).

" 'When the trial judge errs in finding an aggravating factor and imposes a sentence in excess of the presumptive term, the case must be remanded for a new sentencing hearing.' " *Moses*, 154 N.C. App. at 340, 572 S.E.2d at 229, *quoting State v. Wilson*, 338 N.C. 244, 259, 449 S.E.2d 391, 400 (1994). Accordingly, we remand this case for resentencing.

[8] Defendant's final argument is that the trial court erred by accepting short-form indictments for the statutory rape and statutory sexual offense charges against defendant. We disagree.

Defendant acknowledges that the North Carolina Supreme Court has held that the use of short-form indictments is constitutional. *See State v. Wallace*, 351 N.C. 481, 508, 528 S.E.2d 326, 343, *cert. denied*, 531 U.S. 1018 (2000), *reh'g denied*, 531 U.S. 1120 (2001) (noting the "overwhelming case law approving the use of short-form indictments and the lack of a federal mandate to change that determination"); *State v. Lowe*, 295 N.C. 596, 603-04, 247 S.E.2d 878, 883-84 (1978); N.C. Gen. Stat. §§ 15-144.1 and 15-144.2 (2003). Yet defendant raises these arguments to preserve them for later review. As this Court is bound by the Supreme Court's holding in *Wallace*, we overrule this assignment of error.

For the aforementioned reasons, we conclude that the trial court committed no prejudicial error with regard to defendant's convictions of statutory sex offense on or between 1 December 2000 and 31 January 2001, statutory rape on or between 1 December 2000 and 31 January 2001, statutory sex offense on or between 1 March 2001 and 30 April 2001, statutory rape on or between 1 March 2001 and 30 April 2001, statutory sex offense on or between 1 May 2001 and 30 June 2001, and statutory rape on or between 1 May 2001 and 30

June 2001. We reverse defendant's convictions of statutory sex offense on or about 12 July 2001 and statutory sex offense on or about 20 August 2001. We also conclude that the trial court erred in sentencing defendant.

NO ERROR in part, REVERSED in part, and REMAND for resentencing.

Chief Judge MARTIN and Judge HUNTER concur.

STATE OF NORTH CAROLINA v. JAMES RUSSELL COGDELL

No. COA03-605

(Filed 20 July 2004)

1. **Sentencing— superseding habitual felon indictment—different underlying felonies—notice**

The trial court did not err by failing to dismiss the superseding habitual felon indictment that contained substantive changes to all three of the previous underlying felonies after defendant entered his pleas at the arraignment, because: (1) a plea entered at an arraignment is, in essence, a preliminary plea since it is not entered in every instance; (2) the critical event that forecloses substantive changes in an habitual felon indictment is the plea entered before the actual trial; and (3) defendant received sufficient notice that he was being prosecuted as an habitual felon when the three months' notice he received far exceeded the prohibition against trying a defendant as an habitual felon within the twenty day time period provided under N.C.G.S. §14-7.3.

2. **Burglary and Unlawful Breaking or Entering— felony breaking or entering—intent—motion to dismiss—sufficiency of evidence**

The trial court did not err by failing to dismiss the charge of felony breaking or entering based on alleged insufficient evidence that defendant intended to commit a felony, i.e. larceny, in the pertinent office building because: (1) the evidence viewed in the light most favorable to the State revealed that the security system keypad to the office was destroyed, the contents of an employee's desk had been removed and strewn around, the

keypad to the motion detector system from the office was destroyed, and a computer monitor and processor were missing; (2) the fact of the entry alone in the nighttime accompanied by flight when discovered is some evidence of guilt, and in the absence of any other proof or evidence of other intent, may warrant a reasonable inference of guilty intent to commit a larceny after a break-in; and (3) although a statement regarding defendant's attempt to locate a friend's house was offered as an explanatory fact, that fact does not explain defendant's need to damage the office and its security systems.

3. Prisons and Prisoners— malicious conduct by a prisoner— misdemeanor assault on a government official

The trial court did not err by failing to instruct on misdemeanor assault on a government official as a lesser-included offense of malicious conduct by a prisoner, because: (1) assuming arguendo that misdemeanor assault on a governmental official is a lesser-included offense of malicious conduct by a prisoner, defendant failed to make the factual showing required to support a jury instruction on that offense; and (2) defendant concedes the only essential element of malicious conduct by a prisoner not also an element of misdemeanor assault on a government official is the element that defendant was in custody at the time he acted, and the State's evidence at trial established that defendant was in police custody when he spat at an officer.

Judge LEVINSON concurring in a separate opinion.

Appeal by defendant from judgment entered 16 December 2002 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 25 February 2004.

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

Winifred H. Dillon for defendant-appellant.

HUNTER, Judge.

James Russell Cogdell ("defendant") appeals a judgment sentencing him to 120 to 153 months imprisonment for felonious breaking and entering, damage to real property, malicious conduct by a prisoner, as well as attaining the status of an habitual felon. Specifically, defendant takes issue with the trial court's failure to (I) dismiss a

superseding habitual felon indictment filed after he pled to the substantive felonies, (II) dismiss the charge of felony breaking and entering due to insufficient evidence, and (III) instruct on a lesser included offense of malicious conduct by a prisoner. For the reasons stated herein, we conclude the trial court did not err.

At the outset, we note that this opinion was originally filed by this Court on 4 May 2004. However, the Court was unaware of a pending motion for appropriate relief that had been properly filed by defendant on 24 November 2003 while the matter was pending in this Court. Once that motion was brought to this Court's attention, the opinion was withdrawn by order dated 12 May 2004. As a result of the North Carolina Supreme Court's holding in *State v. Jones*, 358 N.C. 473, 598 S.E.2d 125 (2004), defendant's motion for appropriate relief is denied and we now re-file this opinion without further modification.

On 14 January 2002, defendant was indicted for breaking and entering, felony larceny, possession of stolen goods, injury to real property, and malicious conduct by a prisoner. On 22 January 2002, defendant was also indicted as an habitual felon. Defendant was arraigned on these indictments on 29 May 2002. The State subsequently obtained a superseding habitual felon indictment on 3 September 2002, changing all three underlying felony convictions on which it had previously relied to support defendant's habitual felon status. Defendant was arraigned on that indictment on 6 September 2002. Defendant's trial began on 9 December 2002, at which the following evidence was offered.

The State's evidence tended to show that Officer Thomas Witkowski ("Officer Witkowski") and Officer Matt Fox ("Officer Fox") of the Wilmington Police Department responded to a call in the early morning hours of 7 December 2001 about a break-in at the office of the Wilmington Housing Authority ("WHA office"), located in the basement of the James Walker Apartments building ("Walker Building"). During his search of the outside of the Walker Building for signs of a break-in, Officer Fox heard a banging noise coming from the basement and informed Officer Witkowski. While Officer Fox remained at the front of the Walker Building, Officer Witkowski located a door to the WHA office in the basement area of the building. Although the door was locked, Officer Witkowski was able to discern a person inside the office through a small window in the door. Officer Witkowski saw a black man wearing a plaid shirt hitting a

door inside the office with what appeared to be a fire extinguisher. He radioed Officer Fox with that information.

As Officer Fox went around the side of the Walker Building, he thought he heard the exit door on the back side of the building slam. Officer Fox then saw a black male wearing a plaid shirt, later identified as defendant, approximately six feet from the door walking away from the building. Officer Fox called to defendant to stop, but when it appeared that defendant was about to run, Officer Fox grabbed defendant and handcuffed him. Officer Witkowski rejoined Officer Fox and identified defendant as the man he saw inside the WHA office. Both officers smelled alcohol on defendant and testified that he appeared intoxicated. Further, while defendant was in Officer Fox's custody, he was unruly and verbally abusive, and defendant spat at the officer.

Thereafter, an inspection of the WHA office revealed a broken window on the basement level, which Officer Witkowski believed was the means of entry into the office. Also, the WHA office was in disarray, the keypads to the security system and motion detector system were destroyed, the contents of an employee's desk had been removed and strewn around, a computer monitor and processor were missing, the fire extinguisher was on the floor, and one of the doors in the office had red marks on it as if from the fire extinguisher. The technician that processed the crime scene was unable to obtain any usable or identifiable fingerprints.

Defendant's evidence tended to show that, on 6 December 2001, he had been drinking and had taken several Xanax tablets. That night, he had continued drinking at a friend's house located across the street from the Walker Building. Defendant did not recall breaking into the WHA office or his subsequent arrest. Nevertheless, on rebuttal, Officer Dean Allen testified that while in the back of his patrol car, defendant "said that he was inside of the [Walker] building . . . trying to find a friend's house."

I.

[1] Defendant first assigns error to the trial court's failure to dismiss the superseding habitual felon indictment. The original indictment listed the following three previous felonies: (1) defendant committed the felony of common law robbery on 21 July 1988 and was convicted of the felony of larceny from the person on 29 November 1988; (2) defendant committed the felony of breaking and/or entering and lar-

ceny on 9 October 1993 and was convicted of the felony of breaking and/or entering on 9 February 1994; and (3) defendant committed the felony of breaking and/or entering and larceny on 4 April 1995 and was convicted of the felony of possession of stolen goods on 29 June 1995. However, after defendant entered his pleas during the arraignment on the substantive felony indictments, a superseding habitual felon indictment was filed listing the following three previous felonies: (1) defendant committed the felony of larceny from the person on 21 July 1998 and was convicted on that felony on 29 November 1998; (2) defendant committed the felony of possession of stolen goods on 4 April 1995 and was convicted of that felony on 29 June 1995; and (3) defendant committed the felony of possession of cocaine on 30 December 1999 and was convicted of that felony on 3 October 2000. Defendant contends that the trial court erred in allowing the State to file a superseding indictment that contained substantive changes to all three of the previous underlying felonies after he had entered his pleas at the arraignment.

In support of this assigned error, defendant analogizes his case to *State v. Little*, 126 N.C. App. 262, 484 S.E.2d 835 (1997). In *Little*, the State filed several habitual felon indictments before the defendant ("Little") pled to the substantive felonies. However, after obtaining convictions on those substantive felonies at trial, the State filed a superseding habitual felon indictment, deleting one of the felonies listed in a prior habitual felon indictment and replacing it with another. Thereafter, Little pled guilty to one habitual felon charge, but reserved the right to appeal that issue. On appeal, the Court concluded that substituting one of the underlying felony convictions for another in the superseding indictment resulted in

> a substantive change in the indictment as it alters the allegations supporting an element of the offense. . . . Furthermore the defendant is entitled to rely, at the time he enters his plea on the substantive felony, on the allegations contained in the habitual felon indictment in place at that time in evaluating the State's likelihood of success on the habitual felon indictment. Therefore because the defendant did not have notice, prior to his plea on the substantive felonies, that the State was seeking to have him declared an habitual felon on the basis of the three felonies listed in the [superseding] indictment, the trial court erred in adjudicating and sentencing the defendant as an habitual felon . . . based on that indictment.

Id. at 269-70, 484 S.E.2d at 840. The habitual felon plea was vacated and the case remanded for a new sentencing.

In the instant case, defendant argues that as held in *Little*, the State should not be allowed to obtain a superseding habitual felon indictment containing different underlying felonies on which it was previously relying because defendant had already entered pleas to the substantive felony indictments at his arraignment. While we certainly recognize the obvious similarity between the two cases being that both involve superseding indictments that contain substantive changes, we conclude that *Little* and the present case are nonetheless distinguishable.

First, unlike the present case, the superseding indictment in *Little* was filed *after* that defendant was convicted of the substantive felonies. Second, there was absolutely no indication that the pleas on the substantive felonies discussed in *Little* actually occurred at an arraignment. Defendant would have us believe that a defendant's plea entered at an arraignment is the critical event that forecloses substantive changes in an habitual felon indictment. However, we have found no statutory authority or case law specifically supporting that contention.

The purpose of an arraignment is to advise the defendant of the charges pending against him and direct him to plead. N.C. Gen. Stat. § 15A-941(a) (2003). "If the defendant fails to plead, the court must record that fact, and the defendant must be tried as if he had pleaded not guilty." *Id.* Although defendant here entered a plea at the arraignment on the substantive felonies, that plea was not necessary. In fact, "[w]here there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding." *State v. Smith*, 300 N.C. 71, 73, 265 S.E.2d 164, 166 (1980).

It is therefore our conclusion that a plea entered at an arraignment is, in essence, a preliminary plea because it is not entered in every instance. Thus, the critical event that forecloses substantive changes in an habitual felon indictment is the plea entered before the actual trial. Our Supreme Court tends to support this conclusion by holding that an habitual felon adjudication in North Carolina is the functional equivalent of the following:

> "Before the trial and in the absence of the jury, both parts of the indictment are read to the defendant, at which time he

> must plead to the charge of the present crime. If he pleads not guilty to the present offense and proceeds to trial, at the trial there can be no mention to the jury of the prior convictions. If and when the jury returns a verdict of guilty, the second part of the indictment is again read to the defendant, at which time he must plead to the recidivist allegation. If he admits the prior convictions, he is sentenced in accordance with the recidivist statute. If he denies them, he is entitled to a jury trial on the issue of prior convictions."

State v. Allen, 292 N.C. 431, 434, 233 S.E.2d 585, 587-88 (1977) (citation omitted).

Finally, assuming *arguendo* that a plea entered at an arraignment is intended to foreclose substantive changes to an habitual felon indictment, the most important distinction between this case and *Little* involves notice. In *Little*, this Court determined that the trial court erred because "the defendant did not have *notice*, prior to his plea on the substantive felonies, that the State was seeking to have him declared an habitual felon on the basis of the three felonies listed in the [superseding] indictment . . . ." *Little*, 126 N.C. App. at 270, 484 S.E.2d at 840 (emphasis added).

> One basic purpose behind our Habitual Felons Act is to provide notice to defendant that he is being prosecuted for some substantive felony *as a recidivist*. Failure to provide such notice where the state accepts a guilty plea on the substantive felony charge may well vitiate the plea itself as not being knowingly entered with full understanding of the consequences.

Allen, 292 N.C. at 436, 233 S.E.2d at 588. Although the superseding habitual felon indictment was filed after defendant's first arraignment, it was filed approximately three months before defendant's trial. N.C. Gen. Stat. § 14-7.3 (2003) provides that "[n]o defendant charged with being an habitual felon in a bill of indictment shall be required to go to trial on said charge within 20 days of the finding of a true bill by the grand jury . . . ." Three months far exceeds the prohibition against trying a defendant as an habitual felon within this twenty day time period. Thus, defendant received sufficient notice that he was being prosecuted as an habitual felon.

II.

[2] Next, defendant argues the trial court erred in declining to dismiss the charge of felony breaking and entering. We disagree.

In order to survive a motion to dismiss in a criminal action, the trial court must view the evidence in the light most favorable to the State, drawing every reasonable inference in favor of the State. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). If a reasonable inference of the defendant's guilt may be deduced from the evidence, then the court must deny the motion to dismiss and submit the case to the jury even though the evidence may also support inferences of innocence. *State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994). The evidence considered by the court must be "substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982).

Here, defendant argues the felony breaking and entering charge should have been dismissed because there was insufficient evidence that he intended to commit a felony (i.e. larceny) in the Walker Building, which is one of the essential elements of felonious breaking and entering. *See* N.C. Gen. Stat. § 14-54(a) (2003). However, when the evidence is viewed the light most favorable to the State, it tends to show that (1) the security system keypad to the WHA office was destroyed, (2) the contents of an employee's desk had been removed and strewn around, (3) the keypad to the motion detector system for the office was destroyed, and (4) a computer monitor and processor were missing. Moreover, this Court has held that " '[t]he fact of the entry alone, in the night time, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent[]' " to commit a larceny after a break-in. *State v. Humphries*, 82 N.C. App. 749, 751, 348 S.E.2d 167, 169 (1986) (citation omitted). Although a statement regarding defendant's attempt to locate a friend's house was offered as an explanatory fact, that "fact" does not explain defendant's need to damage the office and its security systems. Therefore, defendant's assignment of error is without merit.

III.

[3] Defendant also argues the trial court erred in declining to instruct on a lesser included offense of malicious conduct by a prisoner, i.e. misdemeanor assault on a government official. Assuming *arguendo* that misdemeanor assault on a government official is a lesser included offense of malicious conduct by a prisoner, defendant has

failed to make the factual showing required to support a jury instruction on that offense.

Our Supreme Court has held:

> The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and *whether there is any conflicting evidence relating to any of these elements.*

State v. Leroux, 326 N.C. 368, 378, 390 S.E.2d 314, 322 (1990) (emphasis added). In the case *sub judice*, defendant concedes "[t]he only essential element of malicious conduct by a prisoner not also an element of misdemeanor assault on a government official is the element that the Defendant was in custody at the time he acted." The State's evidence at trial clearly established that defendant was in police custody when he spat at Officer Fox, and defendant neither argued nor offered evidence to the contrary. Since there was no conflicting evidence, the trial court did not err in declining to instruct the jury on misdemeanor assault on a government official.

Accordingly, the trial court did not err in failing to dismiss the superseding habitual felon indictment, dismiss the charge of felony breaking and entering, or instruct on a lesser included offense of malicious conduct by a prisoner.

No error.

Judge McCULLOUGH concurs.

Judge LEVINSON concurs in a separate opinion.

LEVINSON, Judge, concurring with separate opinion.

I concur in the majority opinion but write separately to express the reasons misdemeanor assault on a government official is not a lesser included offense of malicious conduct by a prisoner.

A defendant "is entitled to an instruction on a lesser included offense if 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) (citation and internal quotation marks omitted). "North Carolina has adopted a

definitional test for determining whether a crime is in fact a lesser offense that merges with the greater offense." *State v. Kemmerlin*, 356 N.C. 446, 475, 573 S.E.2d 870, 890 (2002) (citation omitted). "All of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense." *Id.* (citation and quotation marks omitted).

Assault on a government official is defined by N.C.G.S. § 14-33(c)(4) (2003) as follows:

> [A]ny person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she . . . [a]ssaults an officer or employee of the State or any political subdivision of the State, when the officer or employee is discharging or attempting to discharge his official duties[.]

Thus, the essential elements of the crime are: (1) an assault (2) on a government official in the actual or attempted discharge of his duties. "There is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules." *State v. Mitchell*, 358 N.C. 63, 69, 592 S.E.2d 543, 547 (2004) (citation and quotation marks omitted). Our Supreme Court has defined assault as "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *Id.* at 69-70; 592 S.E.2d at 547 (citation and quotation marks omitted).

Malicious conduct by a prisoner is defined in N.C.G.S. § 14-258.4 (2003) as follows:

> Any person in the custody of the Department of Correction, the Department of Juvenile Justice and Delinquency Prevention, any law enforcement officer, or any local confinement facility . . . , including persons pending trial, appellate review, or presentence diagnostic evaluation, 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.

Thus, the essential elements of this offense are: (1) a person in "custody", (2) who knowingly and willfully, (3) throws, emits, or causes to be used as a projectile, (4) bodily fluids or excrement, (5) at a government employee in the performance of his duties.

Careful analysis of these different offenses reveals that they contain different elements. Malicious conduct by a prisoner includes numerous elements that are not part of assault on a government employee, to wit: custody of a person, a "knowing and willful" *mens rea* standard, and the use of bodily fluid or excrement directed "at" a government employee. Misdemeanor assault on a government official includes at least one element that malicious conduct by a prisoner does not: the actions of the perpetrator must be such as to place a person of reasonable firmness in imminent fear of bodily injury. *Compare State v. Johnson*, 264 N.C. 598, 599-600, 142 S.E.2d 151, 153 (1965) (discussing reasonable fear element of assault), *with* G.S. § 14-258.4 (including no such element).[1] As these crimes each contain different elements, one cannot be a lesser included offense of the other. *Kemmerlin*, 356 N.C. at 475, 573 S.E.2d at 890.

The divergence between these two offenses is underscored by the fact that a defendant can be guilty of malicious conduct by a prisoner without committing misdemeanor assault on a government official. For example, a prisoner could throw bodily fluids or excrement "at" a prison guard under circumstances where no reasonable person in the guard's position would fear that the contaminant would actually touch him, either because the prisoner is restrained and clearly unable to throw the substance with sufficient force to reach the guard, or because the guard was not in a position to observe the conduct. In this situation, the inmate may be guilty of malicious conduct by a prisoner **without** being guilty of misdemeanor assault on a government official. This is so because G.S. § 14-258.4 requires only that a bodily fluid or excrement be thrown "at" a government official, whereas G.S. § 14-33(c)(4) requires that the official either be touched by the instrument of assault or reasonably fear such a touching. Thus, a conviction for malicious conduct by a prisoner might be sustained without regard to whether the government employee had fear of a touching, while a conviction for assault on a government official would require such fear or an actual touching.

1. Moreover, assault on a government official may be committed when the officer is "attempting" to discharge his official duties, G.S. § 14-33(c)(4), while malicious conduct by prisoner can be sustained only when the employee is "in the performance" of his duties, G.S. § 14-258.4. This suggests another essential element in G.S. § 14-33(c)(4) that is not completely covered by G.S. § 14-258.4.

Such an outcome is entirely logical, as the legislature apparently intended to address separate evils with these different offenses. Assault on a government official criminalizes attacks against police officers and/or other government officials who are in the actual or attempted performance of their duties. Quite differently, malicious conduct by a prisoner proscribes a specific type of conduct that may or may not constitute an "assault": throwing or emitting bodily fluids or excrement "at" a law enforcement officer and/or other government employee.

Accordingly, defendant was not entitled to have assault on a government official submitted to the jury because neither the evidence nor the law would support such an alternative verdict.

IN THE MATTER: THE APPEAL OF APPALACHIAN STUDENT HOUSING CORPORATION FROM THE DECISIONS OF THE WATAUGA COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING EXEMPTION OF CERTAIN REAL AND PERSONAL PROPERTY FOR TAX YEARS 2001 AND 2002

No. COA03-908

(Filed 20 July 2004)

1. **Taxation— ad valorem—educational exemption—student housing**

The whole record test revealed that the Property Tax Commission erred by holding that real property held in trust by Appalachian Student Housing Corporation for Appalachian State University for student housing was not exempt from ad valorem taxation by the pertinent county for 2001 and 2002, because: (1) equitable property held in trust qualifies as property belonging to the State of North Carolina, and neither the North Carolina Constitution nor N.C.G.S. § 105-278.1(b) requires the State to have legal title in order to exempt the property from taxation; and (2) student housing should be considered incidental to the educational institution.

2. **Real Property— proper governmental use—limited student housing**

The county's cross-assignment of error that if the pertinent property belongs to the State through Appalachian Student Housing Corporation's (ASHC) holding title for the benefit of

Appalachian State University then ASHC's use of the property is in violation of N.C.G.S. §66-58 has no merit, because: (1) ASHC is not providing a service that is ordinarily and customarily rendered by private enterprise even though many private individuals and businesses house students in condominiums, apartments, and other housing since few limit their lessees to the student population of a certain university, as the universities themselves do; and (2) the government may participate in providing that service since limited student housing is not a service normally provided by private enterprise.

Appeal by taxpayer from decision entered 25 March 2003 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 26 April 2004.

Maupin Taylor, P.A., by Charles B. Neely, Jr., Nancy S. Rendleman and Kevin W. Benedict, and Di Santi, Watson & Capua, by Anthony S. di Santi, for taxpayer Appalachian Student Housing Corporation.

Hedrick & Eggers, by Jeffery M. Hedrick, and Eggers, Eggers & Eggers, by Rebecca Eggers-Gryder and Stacy C. Eggers, IV, for Watauga County.

MARTIN, Chief Judge.

Appalachian Student Housing Corporation (ASHC) appeals from a decision by the North Carolina Property Tax Commission holding that real property held in trust by ASHC for Appalachian State University (ASU) was not exempt from *ad valorem* taxation by Watauga County (County).

The subject property is known as the University Highlands apartment complex, which is situated on a 37.269 acre lot in Watauga County, located approximately two and one-half miles from the ASU campus. ASU Students began moving into the complex as tenants in August 2000. The property contains ten buildings that have 768 bedrooms in two and four-bedroom apartments. Each apartment at University Highlands is connected to the ASU computer network. A management and maintenance office, study carrels, group study and meeting space, a computer lab, and a clubhouse are located on the property, in addition to weightlifting equipment, aerobic exercise space, tennis courts, basketball goals, a walking trail and a swimming pool.

ASHC manages the daily operations of University Highlands apartments. ASHC limits rental availability to ASU students, though some students at community colleges that participated in the Appalachian Learning Alliance program were initially allowed to live in University Highlands. Each potential lessee must prove his or her current enrollment status at ASU before being granted a lease. The lease terms for the apartments mirror ASU's academic calendar. If a student has a complaint concerning the operation of University Highlands he or she must appeal that matter to the ASU Office of Student Development, which is the same process that is followed when a student has a complaint while living in a traditional ASU residence hall.

Plans to build University Highlands took shape in 1998, when ASU faced a student housing shortage due to aging residence halls and an increase in student enrollment. The Board of Governors of the University of North Carolina endorsed the use of privately funded student housing in order to meet this need. At least four other UNC-system member schools have developed plans to construct student housing managed by non-profit corporations for those institutions, including North Carolina Agricultural and Technical University, the University of North Carolina at Pembroke, Fayetteville State University and Winston-Salem State University.

ASHC was originally incorporated as ASU Housing Foundation, Inc. (Housing Foundation) on 19 August 1999 by ASU as a non-profit corporation to fund construction of the project and manage University Highlands once construction was complete. The Articles of Incorporation stated "the purpose of ASU Housing Foundation shall be to develop, finance, prepare, provide and supervise residential housing facilities for the students and faculty of [ASU]." In the event of dissolution of the corporation, all its corporate assets are to be transferred to ASU. The ASU Chancellor and two Vice Chancellors served as officers and directors of Housing Foundation. The ASU Board of Trustees approved the construction project and formation of the corporation.

After construction of the University Highlands complex was completed in September 2000, ASHC bought the real property and improvements from the developer for approximately $24 million. On 7 June 2001, ASHC and ASU executed a document entitled "Trust Agreement", which contained the following clause:

> All funds and property received by ASHC shall be held in trust and used or expended for the benefit of ASU to the extent such expenditure is not inconsistent with lawful restrictions . . . ASHC may, from time to time, transfer any net revenue from its operations to ASU for support of student housing acquisition, development and operation. ASHC shall not transfer any funds or other assets to any person or entity other than ASU except in exchange for capital assets, goods or services at fair market value.

ASHC qualified for tax exempt status under the Internal Revenue Code as a section 501 (c)(3) non-profit corporation and is not subject to State or Federal income taxes. On 27 June 2000, ASHC and the Town of Boone executed an agreement which prohibits ASHC from transferring legal title to the property to ASU until 2025.

On 9 February 2001, ASHC requested a property tax exemption from Watauga County for the 2001 tax year, which was denied by the Watauga County Board of Commissioners on 21 August 2001. ASHC timely filed an appeal to the North Carolina Property Tax Commission (Commission) on 13 September 2001. On 11 January 2002, ASHC filed an application for a property tax exemption for the 2002 tax year, which was denied on 10 October 2002. The Commission, sitting as a board of equalization and review, consolidated ASHC's appeals from the 2001 and 2002 tax exemption applications.

The Commission affirmed the County's denial of exemption after the presentation of ASHC's evidence. The Commission found: "The operation of a student housing facility is not a use that qualifies under the statutes of North Carolina as an educational purpose" and that "the subject student housing facility is not owned by Appalachian State University[.]" As a result, the Commission concluded, in pertinent part:

4. The Taxpayer, Appalachian Student Housing Corporation, did not show that the subject property is wholly and exclusively used for an educational purpose since student housing is not an activity that is naturally and properly incident to the operation of an educational institution. Thus, the subject property is not used for an educational purpose and is not entitled to exemption pursuant to N.C. Gen. Stat. § 105-278.4.

5. The Taxpayer has failed to prove that the use of the subject property in question was wholly and exclusively for charitable

or educational, scientific or literary purposes. The Taxpayer neither meets the ownership or use requirements for an exemption from ad valorem taxation pursuant to N.C. Gen. Stat. §§ 105-278.6 or 105-278.7.

6. The Taxpayer's exemption requests for the subject property must be denied because the subject property is not entitled to exemption from ad valorem taxation pursuant to N.C. Gen. Stat. § 105-278.1.

I.

The standard of review for decisions of the Property Tax Commission is contained within N.C. Gen. Stat. § 105-345.2(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:
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> (1) In violation of constitutional provisions; or
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> (2) In excess of statutory authority or jurisdiction of the Commission; or
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> (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. § 105-345.2(b) (2003). "In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party . . . ." N.C. Gen. Stat. § 105-345.2(c) (2003). In its review, "[t]he court may not consider the evidence which in and of itself justifies the [Commission's] decision without [also] taking into account the contradictory evidence or other evidence from which conflicting inferences could be drawn." *In re Moses H. Cone Memorial Hospital*, 113 N.C. App. 562, 571, 439

S.E.2d 778, 783 (1994) (citation omitted). "[T]he legal effect of evidence and the ultimate conclusions drawn by an administrative tribunal from the facts . . . are questions of law" that are decided under *de novo* review. *Employment Security Com. v. Kermon*, 232 N.C. 342, 345, 60 S.E.2d 580, 583 (1950); *see In re Appeal of The Greens of Pine Glen Ltd. Part.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). However, "the 'whole record' test is not a tool of judicial intrusion; 'instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.' " *In re Appeal of Owens*, 132 N.C. App. 281, 286, 511 S.E.2d 319, 323 (1999) (citation omitted).

The taxpayer, ASHC, bears the burden of proving that its property meets the requirements of an *ad valorem* taxation exemption. *See In re Appeal of Atlantic Coast Conference*, 112 N.C. App. 1, 4, 434 S.E.2d 865, 867 (1993), *aff'd per curiam*, 336 N.C. 69, 441 S.E.2d 550 (1994). "The general rule established by the Constitution is that all property in this State is liable to taxation, and shall be taxed in accordance with a uniform rule. Exemption of specific property, because of its ownership by the State or by municipal corporations, or because of the purposes for which it is held and used, is exceptional." *Hospital v. Rowan County*, 205 N.C. 8, 10, 169 S.E. 805, 806 (1933) (quoting *Latta v. Jenkins*, 200 N.C. 255, 156 S.E. 857 (1931)). The taxation laws "should be construed strictly, when there is room for construction, against exemption and in favor of taxation." *Hospital*, 205 N.C. at 11, 169 S.E. at 806.

[1] Here, ASHC argues that the property in question should be exempted from *ad valorem* taxation for several reasons: (1) the property belongs to the State, exempting the property under N.C. Const. art. V, § 2 and N.C. Gen. Stat. §§ 116-16 and 105-278.1(b); (2) the property is owned by a non-profit educational organization and is used exclusively for educational purposes, exempting the property under N.C. Gen. Stat. § 105-278.4; and (3) the property is owned by a non-profit charitable organization and is used exclusively for charitable purposes, exempting the property under N.C. Gen. Stat. § 105-278.7. The Property Tax Commission rejected each basis for ASHC's request for exemption.

The North Carolina Constitution states: "Property belonging to the State, counties, and municipal corporations shall be exempt from taxation." N.C. Const. art. V, § 2(3). This exemption for State-owned property is reiterated in N.C. Gen. Stat. § 105-278.1(b)

(2003): "Real and personal property belonging to the State, counties, and municipalities is exempt from taxation." Specifically, the General Assembly has stated that "[t]he lands and other property belonging to the University of North Carolina shall be exempt from all kinds of public taxation." N.C. Gen. Stat. § 116-16 (2003). Appalachian State University is part of the University of North Carolina. *See* N.C. Gen. Stat. § 116-4 (2003). Therefore, all real and personal property owned by ASU is owned by the State of North Carolina and exempt from taxation.

ASHC contends that the University Highlands apartment complex was owned by ASU and therefore is tax-exempt. ASHC argues that while it holds legal title to the property, ASU holds equitable title to the property according to the terms of the 7 June 2001 Trust Agreement. This beneficial ownership, according to ASHC, is sufficient to trigger the exemption from taxation contained within the North Carolina Constitution and the General Statutes.

The question of whether equitable title to property held in trust qualifies as property "belonging to" the State of North Carolina is one of first impression. Therefore, we must determine the meaning of the phrase "belonging to" as it was used in the North Carolina Constitution, art. V, § 2(3) and N.C. Gen. Stat. § 105-278.1(b).

The North Carolina Attorney General has published an advisory opinion that attempted to define "belonging to" as it was used in G.S. § 105-278.1(b). 2000 N.C. AG LEXIS 1. The Town of Ocean Isle Beach, which leased real property from a private owner to provide public beach access and parking, requested the Attorney General's opinion as to whether, by reason of the Town's leasehold interest, such property qualified as property "belonging to" the State under G.S. § 105-278.1(b) so as to be exempt from taxation. The Attorney General opined that the language "belonging to" meant having title to a parcel of land or owning the parcel of land.

In *In re Forestry Foundation*, 296 N.C. 330, 250 S.E.2d 236 (1979), the North Carolina Supreme Court affirmed a Property Tax Commission decision denying an *ad valorem* taxation exemption request, for property owned by the North Carolina Forestry Foundation, Inc., a nonprofit corporation. The Foundation was created to develop new forestry methods and improve timber growing, while also giving financial assistance to the Division of Forestry at North Carolina State University. *Forestry*, 296 N.C. at 331, 250 S.E.2d at 237-38. The Foundation acquired approximately 80,000

acres of land known as the Hoffman Forest, located in Onslow and Jones County. *Forestry*, 296 N.C. at 332, 250 S.E.2d at 238. In 1945, the Foundation granted a 99-year lease to a paper company, which began logging operations on the property. *Id.* Students from North Carolina State University's forestry program were still permitted to conduct research in the Forest. *Forestry*, 296 N.C. at 333, 250 S.E.2d at 238-39. The Supreme Court held that the Forest was not used exclusively for educational or charitable purposes because the paper company was using the property commercially as well, so the property did not qualify for a tax exemption under G.S. §§ 105-275, 105-278.4, and 105-278.6. *Forestry*, 296 N.C. at 339-40, 250 S.E.2d at 241-42. With regard to the State ownership exemption, the Court held as follows:

> We note that the Foundation is the sole owner of the Forest. Examination of this record discloses that the University of North Carolina has no *legal or equitable title* to the land in question. Thus, the land simply does not "belong" to the University of North Carolina.

Forestry, 296 N.C. at 340, 250 S.E.2d at 242 (emphasis added). By implication, the Court indicated that either legal or equitable title held by the Foundation would have qualified the property for the state ownership exemption.

Conversely, in *Latta v. Jenkins*, 200 N.C. 255, 156 S.E. 857 (1931), a trustee held title to real property according to the terms of a will, which directed the trustee to sell the property and dedicate 55% of the proceeds from the land sale to various religious and charitable institutions. *Latta*, 200 N.C. at 257, 156 S.E. at 858. The trustee applied for a tax exemption under the use statutes, claiming that the proceeds from the land would be used for charitable, educational and religious purposes in accordance with the statutes. *Id.* However, the Supreme Court refused to exempt the property from taxation since none of the beneficiary organizations owned or occupied any part of the property during the tax year in question. *Latta*, 200 N.C. at 259, 156 S.E. at 859. The Court reasoned:

> In the instant case, the title to all the property on which taxes were levied by Buncombe County for the year 1928, was in the plaintiff, as trustee. The beneficiaries of the trusts had no right, title or interest in the property. They had the right only to certain percentages of the proceeds of the sale of the property, to be paid to them by the plaintiff after the sale of the property at any time

within five years from the date of the judgment and decree of the Superior Court of Mecklenburg County, at December Term, 1927.

Latta, 200 N.C. at 259, 156 S.E. at 859. The denial of the tax exemption in *Latta* was based upon the use exemption. Since the terms of the trust instructed that the beneficiaries only had an interest in the profits from the sale of the land and not an interest in the rents from the land or a possessory interest in the land itself, the Court held that the land was not presently being used for charitable, religious or educational purposes.

Watauga County contends that our decision in this matter is controlled by *Atlantic R.R. v. Commissioners*, 75 N.C. 474 (1876). In *Atlantic*, the State owned two-thirds of the capital stock in the Atlantic and North Carolina Railroad (Railroad). *Atlantic*, 75 N.C. at 474. The State's controlling interest in the stock of the corporation was held not to exempt the Railroad's land from taxation. *Atlantic*, 75 N.C. at 474. The *Atlantic* Court based its holding upon a requirement that State-owned property be used for a public purpose before the tax exemption would apply, and the Supreme Court has since expressly overruled the public purpose requirement of *Atlantic*. *See In re University of North Carolina*, 300 N.C. 563, 268 S.E.2d 472 (1980). The Supreme Court clarified that its decision in *Atlantic* was correct because the Railroad, rather than the State itself was the owner of the property in question. *University*, 300 N.C. at 567, 268 S.E.2d at 475 ("Even though the State held a controlling interest in the Railroad Company's common stock, the property, both real and personal, belonged to Atlantic and N.C.R.R. Co. and was therefore properly subjected to ad valorem taxation.") However, the Court rejected the proposition that State-owned property was not exempted from taxation unless it was used for a public purpose. *University*, 300 N.C. at 572, 268 S.E.2d at 478. "[The State ownership] exemption follows by virtue of the property's ownership and occurs irrespective of the purposes for which the property is held." *Id.*

The County argues that the equitable interest held by ASU is equivalent to the interest held by the Railroad in *Atlantic*. We disagree. In an active trust, legal title vests in the trustee of the property. *See Fisher v. Fisher*, 218 N.C. 42, 9 S.E.2d 493 (1940). "[W]hen any control is to be exercised or any duty performed by the trustee [in relation to the trust property or in regard to the beneficiaries], however slight it may be . . . the trust is active." *Finch v. Honeycutt*, 246 N.C. 91, 99, 97 S.E.2d 478, 485 (1957) (quoting *Chinnis v. Cobb*, 210 N.C. 104, 185 S.E. 638 (1936)). In an active trust, the legal and equi-

table titles to the trust property do not merge. *See Finch*, 246 N.C. at 91, 97 S.E.2d at 478; *Poindexter v. Trust Co.*, 258 N.C. 371, 128 S.E.2d 867 (1963). Property held in an active trust is therefore "owned" in some sense by both the trustee and the beneficiary.

Here, the trust agreement specifically outlines the relationship between ASHC and ASU. ASHC is required to manage the daily operations of University Highlands apartments. When ASHC receives rents, it must expend that income only in exchange for capital assets or goods and services necessary for the maintenance of the apartment complex. Alternatively, ASHC's income may be directed to ASU, to support ASU student housing. Therefore, the trust agreement between ASHC and ASU is an active trust and ASU's equitable interest in the property remains separate from ASHC's legal interest.

We hold that the equitable title held by ASU as beneficiary of this trust is sufficient to show that the property belongs to the State of North Carolina. Neither the North Carolina Constitution nor G.S. § 105-278.1(b) require the State to have legal title in order to exempt the property from taxation. Nor do we find persuasive Watauga County's argument that the *ad valorem* tax exemption law of North Carolina applies only to exempt property to which the taxpayer holds legal title. Although we recognize that the doctrine of *expressio unius est exclusio* ("expression of one thing is the exclusion of the other") is still the rule in North Carolina, the mention of equitable title in two parts of the Machinery Act (N.C. Gen. Stat. §§ 105-277.1(b) and 105-277.2(4)(a)) does not imply that real property does not belong to the State when it holds only equitable title. Because the real property parcel in question here belongs to the State, it is exempted from *ad valorem* taxation according to both the constitutional exemption in Art. V, § 2 and the statutory exemptions in G.S. §§ 116-16 and 105-278.1(b). As a result, there is insufficient evidence to support the Commission's finding of fact #7, which states that the property is not owned by the State, and we reverse the Commission's decision regarding the requested exemptions for 2001 and 2002.

ASHC argues several other grounds for exemption of the property from taxation, including G.S. §§ 105-278.4 and 105-278.7. Because we have already determined that the property in question is owned by the State of North Carolina so as to exempt it from taxation, we need not reach ASHC's arguments on these points. However, we do write briefly to express our strong disagreement with the Commission's conclusion of law #4 that states "student housing is not an activity

that is naturally and properly incident to the operation of an educational institution." In previous cases, this Court has held that a building where athletic conference television contracts are negotiated, *see In re Appeal of Atlantic Coast Conference*, 112 N.C. App. 1, 434 S.E.2d 865 (1993), and a stadium parking lot, *see In re Wake Forest University*, 51 N.C. App. 516, 277 S.E.2d 91, *disc. rev. denied*, 303 N.C. 544, 281 S.E.2d 391 (1981), are considered "incidental" to the operation of educational institutions so as to qualify for an exemption under N.C. Gen. Stat. § 105-278.4. Certainly student housing, which is one of the more traditional accoutrements of an educational facility, should be considered incidental to the educational institution.

II.

Watauga County made seven cross-assignments of error; only one of which has been brought forward in its brief. The remainder of its cross assignments of error are deemed abandoned. N.C.R. App. P. 28(a).

[2] The County argues that if University Highlands belongs to the State, through ASHC's holding title for the benefit of ASU, then ASHC's use of the property is in violation of N.C. Gen. Stat. § 66-58, which provides in pertinent part:

> [I]t shall be unlawful for any unit, department or agency of the State government, or any division or subdivision of the unit, department or agency, or any individual employee or employees of the unit, department, or agency in his, or her, or their capacity as employee or employees thereof, to engage directly or indirectly in the sale of goods, wares or merchandise in competition with citizens of the State, or to engage in the operation of restaurants, cafeterias or other eating places in any building owned by or leased in the name of the State, or to maintain service establishments for the rendering of services to the public ordinarily and customarily rendered by private enterprises, or to provide transportation services, or to contract with any person, firm or corporation for the operation or rendering of the businesses or services on behalf of the unit, department or agency, or to purchase for or sell to any person, firm or corporation any article of merchandise in competition with private enterprise.

N.C. Gen. Stat. § 66-58(a) (2003). Watauga County argues that ASHC's actions as a State entity leasing property to ASU students is

an example of the government engaging in competition with private enterprise. We do not find this argument persuasive. Without deciding whether ASHC is or is not a State entity, ASHC is not providing a service that is ordinarily and customarily rendered by private enterprise. Although many private individuals and businesses house students in condominiums, apartments and other housing, few limit their lessees to the student population of a certain university, as the universities themselves do. This type of limited student housing is not a service normally provided by private enterprise, so the government may participate in providing that service. We see no violation of G.S. § 66-58 in the apartment rentals at issue in this case, primarily because the lease allows only ASU students to reside in University Highlands. Watauga County's cross-assignment of error is overruled.

For the reasons stated, the Commission's decision is reversed and this cause remanded for entry of a decision exempting the subject property from *ad valorem* taxation.

Reversed and remanded.

Judges HUNTER and THORNBURG concur.

ERNEST W. LARKIN, III, PLAINTIFF v. MARY JO TATUM LARKIN, DEFENDANT

No. COA03-1091

(Filed 20 July 2004)

1. Divorce— equitable distribution—joint account—spent to zero during separation—distributional factor

An equitable distribution order was remanded where the trial court found that a bank account was marital but that it would be inequitable to distribute it because the parties had spent the account down to zero during the separation. The court was required to distribute the account equitably once it was classified as marital and valued as of the date of separation; however, the court can consider post-separation withdrawals as a distributional factor.

2. Divorce— equitable distribution—amounts withdrawn from joint account—children's education

The trial court did not abuse its discretion in an equitable distribution action by not imputing to plaintiff amounts withdrawn from a capital account. The money was used to realize the parties' joint intent in funding their children's college educations.

3. Divorce— attorney fees—partial award—alimony and equitable distribution

The award of only partial attorney fees in an equitable distribution action was not an abuse of discretion where the court based its decision on the distribution of assets and the amount of alimony awarded.

Judge TIMMONS-GOODSON concurring in part and dissenting in part.

Appeal by defendant from an order entered 3 January 2003 by Judge P. Gwynett Hilburn in Pitt County District Court. Heard in the Court of Appeals 24 May 2004.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Terri W. Sharp; Dallas Clark, Jr., for plaintiff-appellee.

Ward and Smith, P.A., by Cindi M. Quay, John M. Martin and Benton L. Toups, for defendant-appellant.

HUNTER, Judge.

Mary Jo Tatum Larkin ("defendant") appeals from an "Equitable Distribution Judgment and Alimony Order" filed 3 January 2003. Because we conclude the trial court failed to equitably distribute all of the marital property at issue, we remand this case in part.

Defendant and Ernest W. Larkin, III ("plaintiff") were married on 28 December 1968, separated on 12 March 2000, and divorced on 6 June 2001. As of the date of separation, there were two living children born of the marriage who were both over the age of eighteen and emancipated. During their marriage, the parties established a Wachovia joint checking account, which on the date of separation had a value of $44,739.52. Following the parties separation, plaintiff continued to deposit his entire monthly income totaling $15,715.18 per month into the Wachovia account. Both parties used the funds in

this account to pay for various expenses for themselves and their children, without any accounting to each other.

In January 2001, plaintiff ceased depositing his monthly income into the Wachovia account, and the parties subsequently entered into an agreement whereby plaintiff paid defendant post-separation support. Both parties continued to use the Wachovia account until the balance was zero, which occurred on or about 18 June 2001.

During their marriage, the parties also established an Aintree Capital Account, which on the date of separation was valued at $424,950.23. Plaintiff testified at trial that the funds in this account were intended to be used to ensure that the parties could pay for their children's college education. Following the parties separation, plaintiff, without informing defendant, withdrew funds totaling $198,004.00 from this account to pay for federal income tax liability on the parties' 2000 joint income tax return, college tuition for the parties' children, and a car for their son.

In her counterclaim, defendant made a claim for attorneys' fees pursuant to N.C. Gen. Stat. § 50-16.4, and plaintiff, in his reply, admitted that "[d]efendant is an interested party and is acting in good faith. Defendant has insufficient means with which to subsist during the pendency of and to pursue this action. Defendant is in need of an award of counsel fees . . . ."

In its 3 January 2003 order, the trial court made the following pertinent findings of fact.

> 20. . . . Plaintiff and [d]efendant stipulated to the identification and date of separation net value of all property acquired during the marriage and in existence as of the date of separation as follows:
>
> . . . .
>
> l. Joint Wachovia Interest Checking Account . . .—Forty-Four Thousand Seven Hundred Thirty-Nine and 52/100 Dollars ($44,739.52) . . . .
>
> m. Aintree Capital Account . . .—Four Hundred Twenty-Four Thousand Nine Hundred Fifty and 23/100 Dollars ($424,950.23).
>
> . . . .
>
> 23. After the date of separation, [plaintiff] continued to deposit his entire income into the Wachovia joint account.

Plaintiff and [d]efendant continued to use the joint account as they had during the marriage. Plaintiff and [d]efendant used this joint account to pay for their personal monthly living expenses, without accounting to the other, for one year after the date of separation. Plaintiff stopped depositing his monthly income in the joint account in the early part of 2001. . . . As of [18 June] 2001, the balance of the Wachovia joint account was zero (0). Since the date of separation account balance was used by the parties for their support and expenses after the date of separation, and since [p]laintiff deposited his post-date of separation separate earnings into this account for the use, without accounting, by each party, the [trial court] finds it is not equitable to distribute the date of separation balance to either [p]laintiff or [d]efendant.

24. As of the date of separation, the Aintree Capital Account . . . had a balance of Four Hundred Twenty-Four Thousand Nine Hundred Fifty and 23/100 Dollars ($424,950.23). Subsequent to the date of separation, neither party made any further contributions to this account. This account did experience passive appreciation and depreciation after date of separation, and the passive appreciation and depreciation constitutes divisible property. However, subsequent to the date of separation, [p]laintiff made the following withdrawals from this account:

a. A withdrawal of Fifteen Thousand Nine Hundred Three and No/100 Dollars ($15,903.00) to pay federal income taxes due for the tax returns filed jointly by the parties for 2000.

b. Withdrawals totaling One Hundred Sixty-Six Thousand Six Hundred Thirty-Four and No/100 Dollars ($166,634.00) to pay for the college tuitions and related expenses for both children.

c. A withdrawal of Fifteen Thousand Four Hundred Sixty-Seven and No/100 Dollars ($15,467.00) to purchase a car for their son . . . .

At the hearing, [d]efendant contended that the post-separation withdrawals made by [plaintiff] should be treated as distributions to him. However, because [p]laintiff and [d]efendant acknowledged that the education of their children was a top priority and [p]laintiff had planned to use the assets in this account and other assets acquired during the marriage for the education of the children, and because one of the post-date of separation withdrawals was used to pay the 2000 income tax liability for

their joint federal tax return, and one was for a car for the son's use at college, the date of separation balance of the Aintree account should be reduced by the post-separation withdrawals made by [plaintiff] for education payments, for payment of tax joint liability, and for purchase of a car for their son, and the distribution value is, therefore, One Hundred Eighty Thousand Seven Hundred Twenty-Four and 84/100 Dollars ($180,724.84).

. . . .

30. The following distributional factors have been considered:

. . . .

g. The use of the marital funds in the Aintree Capital Account for payment of college expenses for the children and the 2000 joint income tax liability.

. . . .

48. . . . In her Counterclaim, [defendant] included a claim for counsel fees . . . . In his Reply, [plaintiff] admitted that [defendant] was an interested party acting in good faith, had insufficient means with which to subsist during the pendency of and to pursue her claims, and that she was in need of an award of counsel fees.

49. . . . However, based on the amount of permanent alimony hereinafter awarded and based upon the division of marital and divisible property as hereinafter awarded, [d]efendant will have the ability to pay her counsel fees and expenses associated with her alimony claim, and, in the [trial court's] discretion, no award of counsel fees should be made. However, [d]efendant's counsel was instructed to prepare the final order pertaining to the award of permanent alimony. . . . Based upon the complexity of this Judgment and Order, and the substantial revisions which were necessary, the amount of time spent by [d]efendant's counsel in the preparation and revisions of the Judgment and Order is reasonable and the amount of fees are reasonable. [Plaintiff] has the ability to pay [d]efendant's counsel fees incurred for the preparation of the Order.

The trial court concluded that an equal distribution was equitable and ordered a corresponding distribution of the parties' marital and divisible assets. In addition, plaintiff was ordered to pay permanent alimony of $6,669.00 per month, made retroactively effective to 1

March 2001 resulting in a retroactive alimony payment of $43,236.00. Plaintiff was also ordered to pay part of defendant's attorneys' fees in the amount of $4,375.00.

The issues are whether the trial court erred: (I) in equitably distributing the marital property by (A) improperly valuing the Wachovia account, (B) failing to distribute the Wachovia account, and (C) failing to distribute the entire date of separation value of the Aintree Capital Account by subtracting the amount of plaintiff's withdrawals; and (II) by failing to award full attorneys' fees to defendant.

I.

In an equitable distribution proceeding, a trial court is required to conduct a three-step analysis: "(1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner." *Beightol v. Beightol*, 90 N.C. App. 58, 63, 367 S.E.2d 347, 350 (1988). "The distribution of marital property is vested in the discretion of the trial courts and the exercise of that discretion will not be upset absent clear abuse." *Id.* at 60, 367 S.E.2d at 348. "In order to reverse the trial court's decision for abuse of discretion, we must find that the decision was unsupported by reason and could not have been the result of a competent inquiry." *Id.* "Accordingly, the findings of fact are conclusive if they are supported by any competent evidence from the record." *Id.*

A.

Defendant argues that the trial court erred in its valuation of the Wachovia account by not making a valuation of the account on the date of separation, but instead using the zero balance of the account on the date of distribution. The trial court's findings, however, based upon the stipulation of the parties, reveal that the trial court did indeed value the Wachovia account on the date of separation at the amount of $44,739.52. Thus, the trial court did not err in its valuation of the Wachovia account.

B.

[1] The trial court, despite its valuation of the Wachovia account, nevertheless found that it would not be equitable to distribute the date of separation balance to either plaintiff or defendant because the account balance was zero at the time of distribution. Defendant contends the failure to distribute the Wachovia account was error.

In this case, with regard to the Wachovia account, the trial court found that after the date of separation, the parties continued to use the account as they had during their marriage. Plaintiff would deposit his monthly income into the account and both parties would use the account to pay for various expenses for themselves and their children without any accounting to each other. Both parties continued to use funds from the account after plaintiff ceased making deposits until the account balance was zero. The trial court's evidentiary findings regarding the post-separation use of the account by the parties are supported by the undisputed evidence in the record. Thus, it is apparent that both parties contributed to the depletion of the Wachovia account after the date of separation, ultimately using the marital funds that were in the account prior to the parties separation. Furthermore, the evidence of record is insufficient to trace out which party was responsible for what portion of the depletion of the funds in the account and neither party made any accounting to the other for their expenditures.[1]

The trial court found that it would not be equitable to distribute the date of separation balance in the Wachovia account to either party and failed to include the Wachovia account in its distribution of marital assets. Once, however, the trial court classified the Wachovia account as a marital asset and valued the account as of the date of separation, the trial court was required to distribute that account equitably. *See Khajanchi v. Khajanchi*, 140 N.C. App. 552, 557, 537 S.E.2d 845, 849 (2000) ("court must distribute the marital property and debts in an 'equitable' manner"); *see also* N.C. Gen. Stat. § 50-20(a) (2003) (court shall provide for an equitable distribution of marital and divisible property between the parties).

Thus, because the Wachovia account was a marital asset, which the trial court was required to equitably distribute, the trial court erred by failing to distribute that account. Accordingly, we must remand this case to the trial court for further findings of fact in order for the Wachovia account to be included in the equitable distribution of the parties' marital and divisible assets.[2] *See* N.C. Gen. Stat. § 50-20(a).

1. The only evidence presented on this issue consisted of testimony about several bank statements covering only a portion of the time during which both parties used the account and further testimony about various individual expenditures.

2. Furthermore, the parties' active post-separation diminution of the Wachovia account could not be considered as divisible property. *See* N.C. Gen. Stat. § 50-20(b)(4)(a). Thus, the trial court could not consider the parties' withdrawals from the Wachovia account in either classifying or valuing the marital

We note that although the trial court, in revisiting its findings of fact, is required to distribute the marital and divisible assets, it retains the discretion to determine *how* to equitably distribute those assets. *See Beightol*, 90 N.C. App. at 60, 367 S.E.2d at 348. This determination may be made by considering the various distributional factors contained in N.C. Gen. Stat. § 50-20(c). *See* N.C. Gen. Stat. § 50-20(c). Under N.C. Gen. Stat. § 50-20(c)(11a), a trial court is permitted to consider as a distributional factor "[a]cts of either party to . . . devalue . . . the marital property . . . during the period after separation of the parties and before the time of distribution." N.C. Gen. Stat. § 50-20(c)(11a). As such, the trial court could properly consider the post-separation withdrawals from the Wachovia account by both parties as a distributional factor in determining what amount, if any, the parties should equitably receive from the account.[3]

C.

[2] Defendant additionally assigns error to the trial court's distribution of the Aintree Capital Account. The trial court valued this account as of the date of separation at $424,950.23, but in distributing this asset, subtracted the amounts withdrawn by plaintiff from the distributable amount. Defendant contends that notwithstanding the trial court's conclusion in this matter that an equal distribution was equitable, the trial court's failure to impute plaintiff's withdrawals from the Aintree Capital Account resulted in an unequal and inequitable distribution because plaintiff received the benefit of an additional $198,004.00, the total amount of his withdrawals. We disagree.

One of plaintiff's withdrawals from the Aintree Capital account was used to pay the parties' joint 2000 tax liability. Furthermore, with regard to the withdrawals made for tuition payments, the trial court found that prior to separation the parties intended the Aintree Capital Account to be utilized to ensure payment of their children's college expenses. These findings are supported by the evidence.

Plaintiff's remaining withdrawals were used expressly for this purpose by paying for both children's college tuition and a car to be used by their son while he was at college. Thus, the withdrawals were

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property. However, the active post-separation diminution of the Wachovia account could be considered as a distributional factor under N.C. Gen. Stat. § 50-20(c).

3. The trial court did not consider the depletion of the Wachovia account by the parties as a distributional factor, presumably because it elected not to distribute the account at all.

used for the parties joint benefit in paying their joint tax liability and in realizing their joint intent for the Aintree Capital Account to be used for funding their children's college educations. Moreover, we note that, unlike the Wachovia account, the trial court expressly considered these withdrawals as a distributional factor in determining the proper distribution of the marital property.[4] Therefore, we conclude the trial court did not abuse its discretion by distributing the date of separation value of the Aintree Capital Account minus the withdrawals used to pay the parties joint tax liability and college education expenses for their children.

II.

[3] Defendant also argues that it was error for the trial court to not award her full attorneys' fees in her alimony action under N.C. Gen. Stat. § 20-16.4.

"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). Before granting an award of attorneys' fees, the trial court is required, as a matter of law, to determine whether the spouse seeking the award is the dependent spouse without sufficient means to subsist during the prosecution of the suit and to defray the necessary expenses. *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 396-97, 545 S.E.2d 788, 795, *per curiam aff'd*, 354 N.C. 564, 556 S.E.2d 294 (2001). This means the dependent spouse must "be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit." *Hudson v. Hudson*, 299 N.C. 465, 474, 263 S.E.2d 719, 725 (1980). "When an award of attorney's fees is properly awarded, the amount of the award is within the discretion of the trial court." *Friend-Novorska*, 143 N.C. App. at 397, 545 S.E.2d at 795.

4. The dissent "would hold that the trial court erred in valuing the Aintree Capital Account at the date of distribution rather than the date of separation." However, the trial court expressly valued that account, based on the parties stipulation, as of the date of separation in Finding of Fact 20(m). The trial court, in Finding of Fact 24, then made a separate finding to specifically reject defendant's argument that the withdrawals be treated as an advance on the marital estate to plaintiff and to explain in detail its rationale for the distribution of the Aintree Capital Account. Ultimately, though, the trial court, in its discretion, properly distributed the Aintree Capital Account by treating the withdrawals as a distributional factor as evidenced in Finding of Fact 30(g).

In this case, defendant was the dependent spouse and entitled to alimony. Plaintiff furthermore admitted that defendant would have insufficient means to defray the costs of the suit. Defendant contends that despite her meeting these requirements, the trial court failed to award her attorneys' fees. We disagree.

An affidavit contained in the record and submitted to the trial court lists defendant's attorneys' fees in the amount of $14,498.48. The trial court, in fact, did make a partial award of defendant's attorneys' fees in the amount of $4,375.00 for the time it took defendant's attorney to draft the final order. The trial court based its decision to award only a portion of defendant's attorneys' fees on the amount of alimony awarded and the equitable distribution of assets to defendant. This included the equal distribution of the marital assets, as well as a permanent alimony award to defendant of $6,699.00 per month, for a total of $80,025.00 per year, plus an additional $43,236.00 in retroactive alimony. From this, the trial court, in its discretion, found that although defendant met the requirements to receive attorneys' fees under the statute, she did not require a full award of attorneys' fees to defray the costs of litigation. We therefore conclude the trial court did not abuse its discretion in setting the partial amount of attorneys' fees to be awarded to defendant.

Affirmed in part. Remanded in part.

Chief Judge MARTIN concurs.

Judge TIMMONS-GOODSON concurs in part and dissents in part in a separate opinion.

TIMMONS-GOODSON, Judge, concurring in part and dissenting in part.

While I agree with the majority's conclusion that the trial court did not err in valuing the Wachovia joint account or in awarding attorneys' fees but did err by failing to distribute the Wachovia joint account, I disagree with the majority's conclusion that the trial court did not err in its distribution of the Aintree Capital Account. Therefore, I respectfully concur in part and dissent in part.

On the date of separation between the parties in the instant case, the Aintree Capital Account had a balance of $424,950.23. Subsequent to the date of separation, the account experienced passive appreciа-

tion and depreciation. Neither party made any further contributions to the account subsequent to the date of separation. However, plaintiff withdrew from the account: (a) $15,903.00 to pay federal income taxes; (b) $167,634.00 to pay for the college tuition and expenses of the parties' children; and (c) $15,467.00 to purchase a car for the parties' son. Thus, on the date of distribution, the account had a balance of $180,724.84.

In its equitable distribution order, the trial court concluded that

> because Plaintiff and Defendant acknowledged that the education of their children was a top priority and Plaintiff had planned to use the assets in [the Aintree Capital Account] and other assets acquired during the marriage for the education of the children, and because one of the post-date separation withdrawals was used to pay the 2000 income tax liability for their joint federal tax return, and one was for a car for the son's use at college, the date of separation balance of the Aintree account should be reduced by the post-separation withdrawals made by the Plaintiff . . . and the distribution value is, therefore, One Hundred Eighty Thousand Seven Hundred Twenty-Four and 84/100 Dollars ($180,724.84).

N.C. Gen. Stat. § 50-21(b) (2003) requires that marital property be valued "as of the date of separation of the parties." After the marital property is valued, N.C. Gen. Stat. § 50-20(c) (2003) requires that the trial court distribute the marital property equally unless the trial court determines that equal division is inequitable.

Unlike the majority, I believe the trial court in the instant case ignored the mandates of N.C. Gen. Stat. §§ 50-21(b) and 50-20(c) by distributing the Aintree Capital Account at its value on the date of distribution rather than the date of separation. Although the parties agreed prior to their separation that the Aintree Capital Account would be utilized to ensure payment of their children's college expenses, defendant did not expressly consent to or ratify plaintiff's withdrawals for this purpose subsequent to the date of separation, and plaintiff could not recall any specific conversations with defendant regarding the withdrawals prior to making them. As the majority correctly notes with respect to the Wachovia joint account, "[o]nce . . . the trial court classified the [Aintree Capital Account] as a marital asset and valued the account as of the date of separation, the trial court was required to distribute that account equitably." However, by valuing the Aintree Capital Account at the date of sepa-

ration but then dividing the property of the account based upon its value at the date of distribution, the trial court effectively decreased the statutorily proscribed value of the marital estate.

For the foregoing reasons, I would hold that the trial court erred in distributing the Aintree Capital Account at its value on the date of distribution rather than the date of separation.

POMPANO MASONRY CORPORATION, PLAINTIFF v. HDR ARCHITECTURE, INC., DEFENDANT

No. COA03-43

(Filed 20 July 2004)

1. Construction Claims— breach of duty—negligent performance as project expediter—economic loss

The trial court erred in a negligence action by granting summary judgment in favor of defendant, a separate prime contractor also serving as project expediter, based on N.C.G.S. § 143-128 or lack of privity of contract with plaintiff subcontractor, because: (1) although a subcontractor is allowed to submit to its own prime contractor its claims against a separate prime contractor, the subcontractor is not required to follow such a procedure; (2) defendant may be held liable for the foreseeable economic injury resulting from its alleged negligent performance of its duties as project expediter; and (3) while no privity of contract exists between defendant and plaintiff, a working relationship and community of interests exists allowing plaintiff to sue defendant for the economic loss resulting from defendant's alleged breach of its common law duty of care.

2. Statutes of Limitation and Repose— statute of limitation—negligence

The trial court erred in a negligence action by granting summary judgment in favor of defendant, a separate prime contractor also serving as project expediter, on the grounds that plaintiff subcontractor's claim was barred by the statute of limitations, because: (1) N.C.G.S. § 1-52 imposes a three-year statute of limitations for negligence actions and the action accrues at the time plaintiff discovers or reasonably should have discovered the

injury or damage as long as it is within ten years of defendant's negligence; (2) plaintiff filed its negligence action within three years of its discovery of defendant's alleged negligence during the June 1998 coordination meetings; and (3) it cannot be concluded as a matter of law that plaintiff reasonably should have discovered the damages or negligence prior to the coordination meetings.

3. Negligence— contributory negligence—participation in planning and approval of project schedule—proximate cause

The trial court erred in a negligence action by granting summary judgment in favor of defendant, a separate prime contractor also serving as project expediter, on the ground that plaintiff subcontractor's claim was barred by plaintiff's own contributory negligence, because: (1) whether plaintiff had a duty as a subcontractor to participate in the project planning and scheduling as early as February 1998 is a question for the jury; and (2) assuming arguendo that plaintiff was negligent in not participating in the planning and approval of the project schedule, there was no clear indication in the record that such negligence was the proximate cause of plaintiff's injury and damages.

4. Contracts— assumption of risk—lack of privity of contract

The trial court erred in a negligence action by granting summary judgment in favor of defendant, a separate prime contractor also serving as project expediter, on the ground that plaintiff subcontractor assumed the risk of injury by entering into its subcontract with another prime contractor, because: (1) defendant failed to allege any contractual relationship between itself and plaintiff, and defendant also challenged plaintiff's right to sue defendant based on lack of contractual privity; and (2) assumption of risk is not available as a defense to one not in a contractual relationship to plaintiff.

5. Damages and Remedies— failure to mitigate damages— summary judgment

The trial court erred in a negligence action by granting summary judgment in favor of defendant, a separate prime contractor also serving as project expediter, on the ground that plaintiff subcontractor failed to mitigate damages, because failure to mitigate damages is not an absolute bar to all recovery even though a plaintiff is barred from recovering for those

losses which could have been prevented through plaintiff's reasonable efforts.

6. Damages and Remedies— home office expenses—summary judgment

The trial court erred in a negligence action by granting summary judgment in favor of defendant, a separate prime contractor also serving as project expediter, on the ground that plaintiff subcontractor is prevented from recovering home office expenses, because: (1) although a plaintiff is not entitled to recover any home office expenses not contemplated in their contract with a defendant, no such contract or privity exists between plaintiff and defendant in the instant case; and (2) assuming arguendo that plaintiff is in fact prevented from recovering home office expenses, the trial court is authorized only to dismiss plaintiff's claims to those particular damages and not plaintiff's entire claim.

Appeal by plaintiff from judgment entered 30 August 2002 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 November 2003.

Smith, Currie & Hancock LLP, by Harry R. Bivens and David Hill Bashford, for plaintiff-appellant.

Moore & Van Allen, PLLC, by George V. Hanna, III, and Robert C. Bowers, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Pompano Masonry Corporation ("plaintiff") appeals the trial court order granting summary judgment in favor of HDR Architecture, Inc. ("defendant"). For the reasons discussed herein, we reverse the trial court's order.

The evidence presented upon the motion for summary judgment tends to show the following: In 1995, the University of North Carolina ("UNC") entered into a public construction project contract with defendant, whereby defendant was to oversee the project design work related to the construction of the Biological Science Research Center at the University of North Carolina at Chapel Hill ("the project"). In 1997, UNC and defendant entered into a contract that named defendant "project expediter." As project expediter, defendant was responsible for preparing the project schedule and overseeing and

coordinating the work between various prime contractors and subcontractors. Metric Constructors, Inc. ("Metric") served as the prime contractor for the general construction work of the project. In early 1998, Metric entered into a subcontract with plaintiff, whereby plaintiff agreed to perform the masonry work for the project.

On 10 February 1998, defendant prepared the first Project Schedule ("10 February Project Schedule") for the project. The 10 February Project Schedule provided that concrete masonry work would begin on 22 June 1998, after the initiation of the mechanical, electrical, and plumbing ("MEP") work. The 10 February Project Schedule also provided that plaintiff's masonry work would be completed on 25 March 1999.

On 16 June 1998, plaintiff's representatives attended a coordination meeting at the project site. At the coordination meeting, plaintiff criticized the scheduling and sequencing of the MEP work in the 10 February Project Schedule. Plaintiff provided defendant with input as to the scheduling and sequencing of the MEP work and requested that plaintiff's masonry work be rescheduled ahead of the MEP work for efficiency reasons. The prime contractors, plaintiff, and defendant each agreed to reschedule plaintiff's work prior to the MEP work but after completion of Metric's concrete work. The subcontract between Metric and plaintiff remained unsigned.

In July 1998, plaintiff was notified that Metric's concrete work had progressed to the point where masonry work could begin. However, plaintiff refused to sign the subcontract with Metric, and in plaintiff's absence, the MEP work began. On 13 July 1998, plaintiff notified Metric that plaintiff would incur $127,924 in additional costs in order to perform masonry work after the MEP work. On the same day, plaintiff began its masonry work on the project, and on 15 July 1998, plaintiff signed the subcontract with Metric.

Plaintiff completed its masonry work on the project on 10 November 1999, eight months after the original completion date indicated by the 10 February Project Schedule, and fifteen months after the actual start date of the masonry work. On 31 May 2001, plaintiff filed a Complaint alleging that defendant "fail[ed] . . . to properly schedule and coordinate the work on the [p]roject," and that as a result, "[plaintiff] was forced to perform out-of-sequence work and incurred significant disruptions to its work, substantially impairing [plaintiff's] ability to efficiently perform its work. . . . thereby increasing [plaintiff's] costs to perform its work." Defendant filed an Answer

asserting that plaintiff was "responsible, through its own action or omissions, for some or all of the acts and omissions alleged to have been committed by [defendant]," and that plaintiff "knowingly and voluntarily assumed the risk of any delays or other problems that were in existence or were reasonably foreseeable at the time [p]laintiff undertook its [work on the project]."

On 10 July 2002, defendant moved the trial court for summary judgment, stating, *inter alia*, the following:

> Plaintiff's claim is barred by the applicable statute of limitations, the economic loss doctrine, the lack of any contractual or statutory relationship between [p]laintiff and [defendant], and [p]laintiff's failure to pursue its alleged damages through the claims of its prime contractor. . . . Additionally, [p]laintiff's claim is barred by its own contributory negligence, by its assumption of risk, and by its failure to mitigate its alleged damages.

On 30 August 2002, the trial court granted summary judgment in favor of defendant. Plaintiff appeals.

The dispositive issue on appeal is whether the trial court erred in granting summary judgment in favor of defendant. Because we conclude defendant was not entitled to judgment as a matter of law, we hold that the trial court erred in granting summary judgment in favor of defendant.

"[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). Summary judgment is appropriate when, "viewed in the light most favorable to the non-movant[,]" *Id.*, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). The party moving for summary judgment must establish that no triable issue of material fact exists " '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.' " *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (quoting

Collingwood v. General Elec. Real Estate Equities, Inc., 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

Statutory and Contractual Bars to Recovery of Economic Loss

[1] Defendant contends that plaintiff's negligence action was barred by the lack of any contractual or statutory relationship between defendant and plaintiff. According to defendant, N.C. Gen. Stat. § 143-128 (2003) and the cases interpreting it require that plaintiff first submit its claims against defendant to Metric, its prime contractor. We disagree.

N.C. Gen. Stat. § 143-128(a1) (2003) provides as follows:

> Construction methods.—The State, a county, municipality, or other public body shall award contracts to erect, construct, alter, or repair buildings pursuant to any of the following methods:
>
> (1) Separate-prime bidding.
>
> (2) Single-prime bidding.
>
> (3) Dual prime bidding pursuant to subsection (d1) of this section.
>
> (4) Construction management at risk contracts pursuant to G.S. 143-128.1.
>
> (5) Alternative contracting methods authorized pursuant to G.S. 143-135.26(9).

N.C. Gen. Stat. § 143-128(b) (2003) provides further that where the State chooses to award contracts to multiple contractors:

> Each separate contractor shall be directly liable to the State of North Carolina, or to the county, municipality, or other public body and to the other separate contractors for the full performance of the separate contracts and in accordance with the plans and specifications, which shall specifically set forth the duties and obligations of each separate contractor.

The statute defines a "separate contractor" as "any person, firm or corporation who shall enter into a contract with the State, or with any county, municipality, or other public entity to erect, construct, alter or repair any building or buildings, or parts of any building or buildings." *Id.* Thus, under N.C. Gen. Stat. § 143-128, "a prime contractor may be sued by another prime contractor working on a construction

project for economic loss foreseeably resulting from the first prime contractor's failure to fully perform 'all duties and obligations due respectively under the terms of the separate contracts.' " *Bolton Corp. v. T.A. Loving Co.*, 94 N.C. App. 392, 396, 380 S.E.2d 796, 800, *disc. review denied*, 325 N.C. 545, 385 S.E.2d 496 (1989). However, the statute does not provide an express remedy for the circumstances of the instant case, where a subcontractor has sued a separate prime contractor that also served as project expediter.

In *Bolton*, a heating and ventilating prime contractor sued a project expediter for the project expediter's breach of its contract with the State. The prime contractor claimed that the project expediter's breach caused the prime contractor and its subcontractor "undue delay" and damages. This Court recognized initially that the suit was based not in tort, but upon the provisions of N.C. Gen. Stat. § 143-128. *Id.* at 396, 380 S.E.2d at 799. We concluded that the subcontractor's claims against the project expediter were properly brought by the prime contractor because "[a] contractor may recover from an owner its subcontractor's 'extra costs and services wrongfully demanded' when the subcontractor is not in privity with the owner and could not recover directly." *Id.* at 407, 380 S.E.2d at 806 (quoting *United States v. Blair*, 321 U.S. 730, 737 (1944)). Interpreting the terms of the contract between the project expediter and the State, we concluded the following:

> There is no privity of contract between the subcontractor and the [State], nor the subcontractor and the other primes. The subcontractor is viewed under the contract as a mere employee or agent of the prime contractor.

Id. at 408, 380 S.E.2d at 806.

In the instant case, defendant contends that because no privity exists between it and plaintiff, *Bolton* requires plaintiff to first submit its claims "up the chain" to Metric rather than directly against defendant. However, we note that *Bolton* merely *allows* a subcontractor to submit to its own prime contractor its claims against a separate prime contractor—the decision does not *require* the subcontractor to follow such a procedure. Furthermore, we also note that this Court's decision in *Bolton* does not overrule our previous decision in *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 255 S.E.2d 580, *disc. review denied*, 298 N.C. 295, 259 S.E.2d 911 (1979).

In *Davidson*, a general contractor and its subcontractors sued an architect for the architect's failure to reasonably conduct its examinations and inspections of the soil conditions and foundations adjoining a county building site. The trial court dismissed the subcontractor's complaints for failure to state a claim upon which relief may have been granted. On appeal, this Court reversed the trial court and held that "in the absence of privity of contract[,] an architect may be held liable to a general contractor and his subcontractors for economic loss resulting from breach of a common law duty of care." *Id.* at 666, 255 S.E.2d at 583-84. We noted that "a complete binding contract between the parties is not a prerequisite to a duty to use due care in one's actions in connection with an economic relationship, nor is it a prerequisite to suit by a contractor against an architect." *Id.* at 666, 255 S.E.2d at 584. We further concluded that

> [a]n architect, in the performance of his contract with his employer, is required to exercise the ability, skill, and care customarily used by architects upon such projects. 5 Am. Jur. 2d, Architects, § 8, pp. 669-70. Where breach of such contract results in foreseeable injury, economic or otherwise, to persons so situated by their economic relations, and community of interests as to impose a duty of due care, we know of no reason why an architect cannot be held liable for such injury.

Id. at 667, 255 S.E.2d at 584.

In the instant case, we conclude defendant may be held liable for the foreseeable economic injury resulting from its alleged negligent performance of its duties as project expediter. As we recognized in *Davidson*, "[l]iability arises from the negligent breach of a common law duty of care flowing from the parties' working relationships." *Id.* In the instant case, while no privity of contract exists between defendant and plaintiff, a "working relationship" and "community of interests" clearly exists. Thus, while plaintiff could not maintain a cause of action against defendant grounded upon defendant's negligent performance of its contract with the State, *Davidson* authorizes plaintiff to sue defendant for the economic loss resulting from defendant's alleged breach of its common law duty of care, despite the fact that no privity exists between plaintiff and defendant. *Id.*

"The project expediter is charged with using proper procedures to obtain information to evaluate the progress of the project." *Bolton*, 94 N.C. App. at 398, 380 S.E.2d at 801 (citing Goldberg, *The Owner's Duty to Coordinate Multi-Prime Construction Contractors, A*

Condition of Cooperation, 28 Emory L.J. 377, 385-87 (1979)). Plaintiff's Complaint recognizes this duty and claims that defendant breached its duty as project expediter by failing to properly schedule the work, failing to maintain a reasonable and workable project schedule, failing to give adequate and reasonable notice to the subcontractors regarding the sequencing of work to ensure efficient coordination of all phases of the work, and failing to properly incorporate into the schedule the subcontractors' input regarding the sequencing of work. Based upon our holding in *Davidson*, we conclude plaintiff stated a proper cause of action for negligence in the instant case. Therefore, we hold that summary judgment was improper on the grounds that plaintiff's claim was barred by N.C. Gen. Stat. § 143-128 or the absence of privity of contract.

Statute of Limitations

[2] Defendant also contends that plaintiff's claim is barred by the applicable statute of limitations. We disagree.

N.C. Gen. Stat. § 1-52 (2003) imposes a three-year statute of limitations for negligence actions. The negligence action accrues at the time the plaintiff discovers, or reasonably should have discovered, the injury or damage, as long as it is within ten years of the defendant's negligence. N.C. Gen. Stat. § 1-52(16) (2003).

In the instant case, plaintiff filed its negligence action within three years of its discovery of defendant's alleged negligence during the June 1998 coordination meetings. Furthermore, we cannot conclude as a matter of law that plaintiff reasonably should have discovered the damages or negligence prior to the coordination meetings. Therefore, we hold that summary judgment was improper on the grounds that plaintiff's claim was barred by the statute of limitations.

Contributory Negligence

A trial court may grant summary judgment in a negligence case where the "uncontroverted" evidence establishes that the defendant "failed to use ordinary care and that want of ordinary care was at least one of the proximate causes of injury." *DiOrio v. Penny*, 331 N.C. 726, 728, 417 S.E.2d 457, 459 (1992). A trial court may also grant summary judgment in a negligence action where the evidence fails to show negligence on the part of defendant, or where contributory negligence on the part of plaintiff is established. *Hale v. Power Co.*, 40 N.C. App. 202, 203, 252 S.E.2d 265, 267, *disc. review denied*, 297 N.C. 452, 256 S.E.2d 805 (1979). However, "[t]he existence of contrib-

utory negligence is ordinarily a question for the jury; such an issue is rarely appropriate for summary judgment, and only where the evidence establishes a plaintiff's negligence so clearly that no other reasonable conclusion may be reached." *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 479, 562 S.E.2d 887, 896 (2002).

Our Supreme Court has held that "[a] plaintiff is contributorily negligent when he fails to exercise such care as an ordinarily prudent person would exercise under the circumstances in order to avoid injury." *Newton v. New Hanover County Bd. of Education*, 342 N.C. 554, 564, 467 S.E.2d 58, 65 (1996). This Court has previously held that

> contributory negligence . . . may arise where a plaintiff knowingly exposes himself to a known danger when he had a *reasonable* choice or option to avoid that danger, or when a plaintiff heedlessly or carelessly exposes himself to a danger or risk of which he knew or should have known.

Lashlee v. White Consol. Indus., Inc., 144 N.C. App. 684, 690-91, 548 S.E.2d 821, 825-26, *disc. review denied*, 354 N.C. 574, 559 S.E.2d 179 (2001) (citations omitted).

[3] In the instant case, defendant contends that plaintiff chose to ignore a clear invitation contained in its subcontract with Metric to participate in the project planning and scheduling. According to defendant, plaintiff thus aggravated and contributed to its own injury despite a reasonable opportunity to avoid the injury. We disagree.

Angelo Antenucci ("Antenucci"), one of plaintiff's officers in 1998, stated in his deposition that there had been no conversations between plaintiff and defendant regarding the scheduling or sequencing of the project prior to the June 1998 coordination meeting. Antenucci also stated that plaintiff would ordinarily participate in those meetings in other projects. However, Antenucci further stated that plaintiff would not participate in coordination meetings "too far early into the project . . . if masonry wouldn't start, you know, for three months down the road."

We conclude a genuine issue as to a material fact remained regarding plaintiff's contributory negligence. Whether plaintiff had a duty as a subcontractor to participate in the project planning and scheduling as early as February 1998 is a question for the jury. Furthermore, assuming *arguendo* that plaintiff was negligent in not

participating in the planning and approval of the project schedule, there is no clear indication in the record that such negligence was the proximate cause of plaintiff's injury and damages. Thus, a genuine issue of fact exists in the instant case regarding not only whether plaintiff was negligent but also whether plaintiff's failure was the proximate cause of plaintiff's injury. Therefore, we hold that summary judgment was improper on the grounds that plaintiff's claim was barred by plaintiff's own contributory negligence.

Assumption of Risk

[4] Defendant also contends that summary judgment was proper in the instant case because plaintiff assumed the risk of its alleged injury by entering into its subcontract with Metric. We disagree.

In the instant case, defendant failed to allege any contractual relationship between it and plaintiff in its pleadings, and on appeal to this Court defendant challenges plaintiff's right to sue defendant because of the lack of contractual privity between the parties. "It is well established in this jurisdiction that assumption of risk is not available as a defense to one not in a contractual relationship to the plaintiff." *McWilliams v. Parham*, 269 N.C. 162, 166, 152 S.E.2d 117, 120 (1967) (citations omitted). Therefore, we hold that summary judgment was improper on the grounds that plaintiff assumed the risk of its injury.

Damages

[5] Defendant also contends that summary judgment was proper in the instant case because plaintiff failed to mitigate its damages and is barred from recovering its extended home office overhead damages. We disagree.

"In a negligence action, it is well settled the party wronged must use due care to minimize the loss occasioned by defendant's negligence." *Smith v. Childs*, 112 N.C. App. 672, 682-83, 437 S.E.2d 500, 507 (1993). However, "the failure to mitigate damages is *not* an absolute bar to all recovery; rather, a plaintiff is barred from recovering for those losses which could have been prevented through the plaintiff's reasonable efforts." *Id.* at 683, 437 S.E.2d at 507. Thus, in the instant case, plaintiff's alleged failure to mitigate damages does not serve as an absolute bar to its claim. Therefore, we hold that summary judgment was improper on the grounds that plaintiff failed to mitigate its damages.

[6] Defendant maintains that plaintiff is prevented from recovering home office expenses in its negligence claim, and that therefore summary judgment is proper in the instant case. We disagree.

Home office expenses are those expenses incurred by the plaintiff indirect of the damages proximately caused by the defendant. In *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123-26, 123 S.E.2d 590, 600-01 (1962), our Supreme Court concluded that the plaintiffs were not entitled to recover any home office expenses not contemplated in their contract with defendant. However, as discussed above, no such contract or privity exists between plaintiff and defendant in the instant case. Furthermore, assuming *arguendo* that plaintiff is in fact prevented from recovering its home office expenses, the trial court is authorized only to dismiss plaintiff's claims to those particular damages, not plaintiff's entire claim. Therefore, we hold that summary judgment was improper on the grounds that plaintiff's action contained improper claims for damages.

Conclusion

Summary judgment is a "drastic measure, and it should be used with caution." *Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979). "[I]t is seldom appropriate to grant summary judgment in a negligence action, [and] it is [only] proper if there are no genuine issues of material fact, and the plaintiff fails to demonstrate one of the essential elements of the claim." *Parish v. Hill*, 350 N.C. 231, 236, 513 S.E.2d 547, 550 (1999). As detailed above, we conclude that plaintiff is not barred from bringing the action in the instant case, and we also conclude that genuine issues of material fact remain in the action. Therefore, we hold that the trial court erred in granting summary judgment in favor of defendant.

Reversed.

Judges WYNN and ELMORE concur.

IN RE: THE ADOPTION OF BABY GIRL ANDERSON

No. COA03-651

(Filed 20 July 2004)

1. Appeal and Error— appealability—ability to withhold consent to adoption—substantial right

A court's determination as to whether a putative father has sufficiently protected his ability to withhold consent for the adoption of his child is a substantial right pursuant to N.C.G.S. § 1-277(a) and therefore is subject to immediate appellate review when the right is affected by an order or judgment.

2. Adoption— father's right to withhold consent—support requirement

The trial court erred in holding that a child could be adopted without the consent of his father where the father admitted paternity but the court held that he had not met the support requirement of N.C.G.S. § 48-3-601(2)(b)(4)(II). Respondent made available actual and tangible support which would clearly meet the spirit and intent of the consent statute; the mother's choice to rebuff those offers should not affect their legal implications.

Judge LEVINSON concurring.

Appeal by respondent from order entered 7 March 2003 by Judge Alice C. Stubbs in Wake County District Court. Heard in the Court of Appeals 1 March 2004.

Herring, McBennett, Mills & Finkelstein, P.L.L.C., by Bobby D. Mills, E. Parker Herring, and Stephen W. Petersen, for petitioner appellee.

Manning, Fulton, Skinner, P.A., by Michael S. Harrell, for respondent appellant.

McCULLOUGH, Judge.

Respondent appellant Michael Avery received notice dated 10 January 2003 from Kristine Anderson, that Ms. Anderson had filed an adoption petition seeking to have her and Mr. Avery's daughter, N.A., adopted. N.A. was born 6 January 2003. The adoptive applicants, petitioner appellees, on 10 January 2003 moved to have the Wake County Clerk of Court issue an order determining whether the consent of Mr.

Avery to the proposed adoptive placement was required. On 16 January 2003, Mr. Avery filed an opposition to the proposed adoption. The Wake County Clerk of Court found that his consent was not required. Mr. Avery appealed as a matter of right for a trial *de novo* in the district court on the issue of whether his consent is required. In an order dated 7 March 2003, the trial judge found that Mr. Avery's consent for adoption was not required. This order is now on appeal.

At the time of the district court March 2003 order, Mr. Avery worked at the International House of Pancakes (IHOP). He had dropped out of Northside High School in Onslow County on or around 18 September 2002. Before working at IHOP, he had worked at a number of jobs: Food Lion, Little Caesar's, for a home repairman, and at a Citgo gas station. At the time of this same order, Ms. Anderson was a senior at Northside High School, academically strong, and had been admitted to three colleges.

The order was borne out of the following evidence and facts: Mr. Avery and Ms. Anderson began a monogamous relationship in the fall of 2001. They had unprotected sexual intercourse resulting in Ms. Anderson's pregnancy in the spring of 2002. Mr. Avery learned of the pregnancy in June or July of 2002, and paternity has never been disputed. In early September of 2002, Ms. Anderson informed Mr. Avery that she wanted to put the child up for adoption. Initially, Mr. Avery consented to the adoption. He then withdrew his consent after discussing the issue with his parents.

During Ms. Anderson's pregnancy, Mr. Avery resided with his parents who paid for his food, clothing, shelter, and utilities. Mr. Avery acknowledges that he never transferred any tangible or actual financial support to Ms. Anderson during her pregnancy. He further acknowledged he purchased a car in the amount of $1,000.00 for himself during her last full month of pregnancy.

There was evidence at trial that sometime during the late summer of 2002, Mr. Avery's mother told Ms. Anderson that she would be welcome to come stay in their home. This offer was not accepted. Mr. Avery testified, as did four witnesses, that he offered Ms. Anderson money at school in the range of three to eight times during the months of September, October, and November of 2002. Ms. Anderson testified that he never offered her money at school. In December of 2002, Mr. Avery and his sister drove to Ms. Anderson's residence, where he attempted to deliver an envelope containing a letter and a check in the amount of $100.00. Ms. Anderson's father answered

the door and refused to accept the envelope. On 22 December 2002, Mr. Avery's attorney sent a letter to Ms. Anderson in which Mr. Avery acknowledged paternity, offered financial assistance to Ms. Anderson and the baby, and gave notice that he was not willing to consent to adoption.

N.A. was born on 6 January 2003. Mr. Avery attempted to see the mother and baby in the hospital, but was unable to do so because he was not an approved visitor. The adoptive applicants have had physical custody of the baby since on or about 14 January 2003.

In his appeal from the district court order holding that his consent was not required for the adoption of his child, Mr. Avery raises three issues: first, the trial court erred as a matter of law in finding that Mr. Avery did not satisfy the "payment" prong of N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) (2003), the putative father consent statute; second, the trial court's construction of the applicable statutory and case law violated Mr. Avery's rights to due process and equal protection; and lastly, the trial court erred as a matter of law in failing to consider whether or not adoption was in the child's best interest as required by law.

[1] Before addressing the merits of these issues, we note our jurisdiction to take this appeal. Though there are still legal proceedings left in the adoption of N.A., this Court and our Supreme Court have addressed the merits of trial court orders concerning a putative father's consent. *See In Re Baby Girl Dockery*, 128 N.C. App. 631, 495 S.E.2d 417 (1988); *In re Adoption of Byrd*, 137 N.C. App. 623, 529 S.E.2d 465 (2000), *aff'd sub nom. In re Adoption of Byrd*, 354 N.C. 188, 552 S.E.2d 142 (2001). We read *Dockery* and *Byrd* as assuming, *sub silencio*, that a court's determination as to whether a putative father has sufficiently protected his ability to withhold consent for the adoption of his child is a substantial right pursuant to N.C. Gen. Stat. § 1-277(a) (2003) and therefore capable of appellate review when the right is affected by order or judgment. We have recently held as such in *In re Adoption of Shuler*, —— N.C. App. ——, 590 S.E.2d 458, 460 (2004).

Providing Support Payments

[2] Mr. Avery's first assignment of error relates to the trial court's application of N.C. Gen. Stat. § 48-3-601 (2003), the consent statute, and our Supreme Court's holding in *Byrd*. Mr. Avery contends that he has met the statutory trigger for his consent to be required before his

child can be adopted, and that the facts of this case meet *Byrd's* interpretation of the statutory trigger and are distinguishable from the facts in *Byrd*.

The consent statute states in relevant part,

> Unless consent is not required under G.S. 48-3-603, a petition to adopt a minor may be granted only if consent to the adoption has been executed by:
>
> ****
>
> (4) Before the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206, has acknowledged his paternity of the minor and
>
> ****
>
> II. Has provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both[.]

N.C. Gen. Stat. § 48-3-601 (2003). In *Byrd*, our Supreme Court construed this statute to require three courses of action by the putative father before his consent would be necessary for any adoption of his child: (1) he must acknowledge paternity, (2) he must regularly communicate with mother and/or child, and (3) he must make reasonable and consistent support payments for mother or child in accordance with his financial means. *Byrd*, 354 N.C. at 193, 552 S.E.2d at 146. The trial court concluded as a matter of law that Mr. Avery "has met the requirements that he acknowledge paternity and communicate with Ms. Anderson." This was not cross-assigned as error by the adoptive applicants, and it is therefore not before us on review.

The single question then becomes whether Mr. Avery met the support payment requirement as contemplated in N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) and as interpreted in *Byrd*. In *Byrd*, the Supreme Court stated:

> The "support" required under N.C.G.S. § 48-3-601(2)(b)(4)(II) is not specifically defined. We believe, however, that "support" is best understood within the context of the statute as actual, real and tangible support, and that attempts or offers of support do not suffice. Statutory language supports this conclusion. While "attempted" communication satisfies the statute, there is no such language used to describe the support requirement. N.C.G.S. § 48-3-601(2)(b)(4)(II). Presumably, the General Assembly intended a different meaning for the support prong of the test because of the differing language—one that excludes attempt to provide support. The statute also states that support may include "the *payment* of medical expenses, living expenses, or other *tangible means of support*," thus reflecting actual support provided.

Byrd, 354 N.C. at 196, 552 S.E.2d at 148 (emphasis in original). In *Byrd*, the putative father was found to have the financial means to make support payments. The Court also found he never used these means to provide *tangible support* to the mother or unborn child at any time during the relevant period before the filing of the adoption petition. *Id.* The Court made this finding despite the following evidence: the putative father allegedly saved money for the child; the biological mother stayed at his grandparents' home on at least one occasion; his mother offered the biological mother housing throughout the pregnancy; and on the day of the child's birth, he purchased a $100 money order and gave it, along with baby clothing, to his mother to forward to the biological mother. However, the money order was not mailed to the biological mother until after the adoption petition and thus too late under the statute. *Id.* at 197, 552 S.E.2d 148-49.

We believe the facts and evidence of the instant case could meet *Byrd's* requirement of tangible support. The trial court order made the following selected findings of fact:

> 15. The Respondent acknowledges that he never provided any actual financial support to Ms. Anderson; however, he and four high school students testified that he offered her money at school during [] September, October, and November of 2002 but that she rejected his offers. The witnesses at trial were sequestered and their testimony ranged from offers of support having been made between "three or four times" up to "six to eight times." The Respondent testified that he offered her money six to seven times at school. Ms. Anderson testified that he never offered her money at

school. All the testimony regarding offers made at school is not consistent with the Respondent having dropped out on September 18, 2002.

16. Considering the school calender, the attendance records of the student witnesses and the Respondent, and the Respondent's withdrawal from school on September 18, 2002, it is unlikely that the Respondent made as many as six to eight offers at school. The Respondent may have offered Ms. Anderson cash at school on more than one occasion; however, this is not significant because he failed to ever provide Ms. Anderson with any tangible or actual support.

17. Some time during the late summer of 2002, prior to September 22, 2002, the Respondent's mother told Ms. Anderson that she would be welcome to come stay with the Respondent's family if she needed a place to stay; however, Ms. Anderson did not accept that offer. Once again, no tangible support was provided.

****

19. During the term of the pregnancy, the Respondent had the ability to provide financial support or other tangible support to Ms. Anderson; however, he failed to do so. The Respondent did manage to purchase a car in the amount of $1,000 for himself during the fall of 2002.

20. The Respondent did make some effort to provide support to Ms. Anderson. In December of 2002, the Respondent and his sister drove to the Andersons' residence. The Respondent went to the front door and attempted to hand deliver an envelope containing a letter and a check in the amount of $100.00. Ms. Anderson's father answered the door and refused to accept the envelope. The Respondent offered no documentary evidence of the check or letter at trial.

21. On December 22, 2002, the Respondent's attorney sent a letter to Ms. Anderson in which the Respondent acknowledged paternity, offered financial assistance to Ms. Anderson and the baby, and gave notice that he was not willing to consent to the adoption. This letter was admitted into evidence without objection.

Of these findings relating to attempts of support made by Mr. Avery, it is clear under *Byrd* that the mother's offer to house Ms. Anderson during the pregnancy does not suffice as tangible or actual support unless there was evidence that the putative father was providing financial aid to induce the mother's offer of assistance. However, without making a specific finding as to whether or not Mr. Avery did tender[1] money to Ms. Anderson at school, the trial court found that even if such tenders had been made, one or all of them would not meet *Byrd's* requirement of actual or tangible support. In sum, the court found the alleged tenders of money at school, the money brought to Ms. Anderson's door, and offers of support by Mr. Avery's attorney were all insufficient as a matter of law to meet the support payment prong of N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II). We do not agree.

Unlike *Byrd*, all of these attempts to impart support were made before N.A. was born. While we have no conclusive finding to review as to whether Mr. Avery tendered actual payments at school, there is his own testimony and that of four students that he did make such tenders at least three times during the early part of the school year, in the second and early part of the third trimester of the pregnancy, and Ms. Anderson rebuffed these tenders. Furthermore, there is evidence Mr. Avery went to Ms. Anderson's home and tendered an envelope containing $100. And finally, it is of record that Mr. Avery retained an attorney. This attorney, as the agent of Mr. Avery, sent the following in a letter:

> Mr. Avery will be more than willing to provide reasonable financial assistance regarding your medical expenses, living expenses or any other needs that you or the baby may require. Please let us know of any financial needs you may have by contacting myself or Mr. Avery directly.

In short, and assuming at least some money was tendered at school, Mr. Avery provided tangible money and a tangible document expressing a willingness to provide assistance. These provisions were made

1. As defined by Black's Law Dictionary, "tender" means: "An unconditional offer of money or performance to satisfy a debt or obligation. . . . The tender may save the tendering party from a penalty for nonpayment or nonperformance or may, if the other party unjustifiably refuses the tender, place the other party in default." Black's Law Dictionary 1479-80 (7th Ed. 1999). We use the word "tender" in regard to the evidence of Mr. Avery's unconditional offers of money at school, and on Ms. Anderson's doorstep, with great deliberateness. These tenders are distinguishable from *Byrd* and the alleged "offers" made in that case.

directly to Ms. Anderson. We hold this falls within the contemplation of *Byrd* and the statute as requiring the putative father to "provide[]" payments of support. N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II). We believe that "provide[]" in this context means to "to make available." *See* American Heritage Dictionary 997 (2d ed. 1985). Mr. Avery has made available actual and tangible support, with actual money and actual documentation via legal representation. He sufficiently tendered support in tangible form such that it had to be *directly* rebuffed—allegedly at school and at her home. Here, the tangible provisions of support were made by Mr. Avery, not his mother, and were directly rebuffed.

Evidence shows Mr. Avery has taken steps beyond manifestations or offers of support. He has taken actual, tangible steps: offering Ms. Anderson money at school, going to her home with money, and retaining counsel to provide documentation of his tender of support.

We find support in our holding from the majority in *Byrd*. The Court, in determining the intent behind the consent statute, stated:

> We believe the General Assembly crafted these subsections of this statute primarily to *protect* the interests and rights of men who have demonstrated paternal responsibility and to facilitate the adoption process in situations where a putative father for all intents and purposes has walked away from his responsibilities to mother and child, but later wishes to intervene to hold up the adoption process.

Id. at 194, 552 S.E.2d at 148. A putative father's "demonstra[tion] of paternal responsibility" cannot be rebuffed by a mother such that it renders his demonstration inconsequential. Mr. Avery cites a number of cases from different jurisdictions which also support our application of N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II). *In re K.D.O.*, 20 Kan. App. 2d 559, 889 P.2d 1158 (1995); *Abernathy v. Baby Boy*, 313 S.C. 27, 437 S.E.2d 25 (1993); and *In re Chandini*, 166 A.2d 599, 560 N.Y.S.2d 886 (1990). However, the facts of this case are distinguishable on their face from those of *Byrd*, and fit within the law of *Byrd* to which we are bound. The evidence of Mr. Avery's tenders of payment, if found as fact, would clearly meet the spirit and intent of the consent statute; Ms. Anderson's choice to rebuff these alleged tenders was one that should not affect the legal implications of such tenders. Otherwise, "consent" would act as something more akin to consideration for Mr. Avery's reasonable and consistent payments (assuming

they are), thus making his rights purely an issue of freedom of contract by Ms. Anderson and governed by the traditional "offer and acceptance" framework. This is clearly not what the legislature contemplated in recognizing the need to *protect* a putative father's right to demonstrate his ability to be a father.

Therefore, the trial court erred as a matter of law when applying N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) and the precedent of *Byrd* to the evidence and facts of this case. Because the trial court misapplied the statute and the guidance of *Byrd*, we remand for entry of an order not inconsistent with this opinion.

Best Interest Determination

Because we remand this case for further findings of fact and conclusions of law pursuant to the instruction of this opinion, it is premature to discuss the issue of the child's best interest under the adoption procedure as the issue may become moot by the district court's order modified pursuant to this opinion.

Conclusion

In sum, we remand this case back to the district court to make findings of fact as to if and how many times Mr. Avery tendered payment to Ms. Anderson, and whether such payments were consistent and otherwise in accord with Mr. Avery's financial means. Upon such findings, and pursuant to this opinion and that of *Byrd*, the court shall determine whether Mr. Avery's consent is required.

Reversed and remanded.

Judge WYNN concurs.

Judge LEVINSON concurs with separate opinion.

I agree with the majority opinion insofar as it concludes that "providing" payments of support under the consent statute, N.C.G.S. § 48-3-601 (2003), can include offers of support that are made available, yet rebuffed by the mother. However, I disagree with the standard the majority employs to address *indirect* payments of support as opposed to *direct* payments of support.

The majority reasons that the offer by the mother of the putative father "to house [the expectant mother] during the pregnancy does not suffice as tangible or actual support unless there was evidence

that the putative father was providing financial aid *to induce the mother's offer of assistance.*" (emphasis added). In my view, requiring a nexus between a putative father's contribution towards his mother's household expenses with the *reason* his mother offers housing to the expectant mother is neither supported by the relevant consent statute nor well-grounded in reason.

Where supported by the evidence and documented through findings of fact, a putative father's payments of, *e.g.*, rent to his mother and/or payments of household utilities, could be considered "payments" under the consent statute. Indeed, such means of indirect support can be as tangible and essential as any direct payments of cash to the expectant mother.

However, it does not follow that a trial court must determine the motivating reason for the putative father's mother's offer of housing when objectively evaluating whether the putative father has provided support to the expectant mother. Maybe the putative father's mother did so only after requiring her son to contribute to the household needs. Perhaps she would offer housing to the expectant mother no matter what. Whatever the reason, it is irrelevant in an analysis of the support prong codified in G.S. § 48-3-601, which makes the relevant inquiry whether the putative father, during the relevant time period, provided support consistent with his means.

As was the case in the appeal presented in *In re Adoption of Byrd*, 354 N.C. 188, 552 S.E.2d 142 (2001), *aff'g* 137 N.C. App. 623, 529 S.E.2d 465 (2000), the trial court in the instant case made no findings related to whether Mr. Avery provided financial support to the household of his mother. Moreover, the parties have neither assigned error nor briefed this issue, and the majority's suggestion that "inducement" be examined when a putative father's mother offers housing to the expectant mother is not essential to its opinion. Thus, as this appeal does not implicate a connection between a putative father's support of his mother's household and his mother's offer to house the expectant mother, the "inducement" standard suggested by the majority to evaluate indirect payments of support is *dicta* and is not binding on our trial courts.

RHUE v. PACE

[165 N.C. App. 423 (2004)]

LUTHER MASON RHUE, PERSONAL REPRESENTATIVE OF THE ESTATE OF BARBARA RHUE, DECEASED, PLAINTIFF v. EVERETT ODELL PACE, DEFENDANT

No. COA03-1031

(Filed 20 July 2004)

Divorce— equitable distribution—preservation of rights

The trial court did not err by granting summary judgment in favor of defendant based on its conclusion that plaintiff failed to properly preserve her equitable distribution claim under N.C.G.S. § 50-11(e), because: (1) res judicata did not forbid the trial court from granting summary judgment in favor of plaintiff since denial of a previous motion to dismiss made under N.C.G.S. § 1A-1, Rule 12(b)(6) does not prevent the trial court from granting a subsequent motion for summary judgment, and further, a motion for judgment on the pleadings does not present the same question as that raised by a later motion for summary judgment; (2) the trial court had the proper documents to consider the summary judgment motion based on attached copies of the divorce judgment, the notice of voluntary dismissal, the motion to dismiss all issues except absolute divorce, and the voluntary dismissal without prejudice to support the motion for summary judgment; (3) where, as here, a defendant does not take exception to the three voluntary dismissals filed by a plaintiff, defendant has consented to the voluntary dismissal and the claims are thereby voluntarily dismissed under N.C.G.S. § 1A-1, Rule 41(a)(1)(ii); and (4) plaintiff's claims were voluntarily dismissed pursuant to Rule 41(a)(1) prior to the judgment of absolute divorce, and thus, the equitable distribution claim brought by plaintiff under 00 CVD 311 was not the same claim as that originally brought under 99 CVD 1851 and was instead a new claim forbidden by N.C.G.S. § 50-11(e).

Appeal by plaintiff from order entered 21 November 2002 by Judge Ann McKown in Durham County District Court. Heard in the Court of Appeals 28 April 2004.

Hollowell, Mitchell, Peacock & Van Hagen, P.A., by Donald R. Van Hagen, for plaintiff-appellant.

Browne, Flebotte, Wilson & Horn, P.L.L.C., by Daniel R. Flebotte, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Luther Mason Rhue, Personal Representative of the Estate of Barbara Rhue ("plaintiff"), appeals the trial court order granting summary judgment in favor of Everett Odell Pace ("defendant"). For the reasons discussed herein, we affirm the trial court order.

The facts and procedural history relevant to the instant appeal are as follows: Plaintiff and defendant were married on 5 September 1966 and permanently separated on 1 April 1998. On 7 May 1998, plaintiff filed a Complaint under Durham County District Court file 98 CVD 1851 ("98 CVD 1851"), seeking, *inter alia*, equitable distribution of marital property. On 4 June 1998, defendant filed an Answer requesting absolute divorce and joining plaintiff's equitable distribution claim.

On 10 May 1999, defendant filed a separate action under Durham County District Court file 99 CVD 2111 ("99 CVD 2111"), asserting a claim for absolute divorce and requesting that the issue of equitable distribution be preserved for later resolution. Plaintiff filed a pro se Answer on 12 July 1999, requesting that the absolute divorce not be granted until the pending motions of 98 CVD 1851 were heard. However, on 9 August 1999, plaintiff filed a pro se Notice of Voluntary Dismissal, thereby dismissing all pending claims under 98 CVD 1851, including specifically "spousal support, alimony issues, equitable distribution and all other issues before the court." On 24 August 1999, plaintiff filed a pro se motion requesting "[t]hat my case under [98 CVD 1851] be reinstated and put on hold," and "[t]hat my case under [99 CVD 2111] be put on hold as well until I receive help from a higher court." However, on 27 August 1999, plaintiff filed a pro se Motion to Dismiss All Issues Before Court Except Absolute Divorce, whereby plaintiff requested that "all issues under [98 CVD 1851] . . . [and] all issues under [99 CVD 2111] with [the] exception of absolute divorce" be dismissed. The motion also asserted "[t]hat I dismiss all issues of equitable distribution under File No. 99 CVD 03439," a file that did not involve either plaintiff or defendant.

On 30 August 1999, the trial court entered an order granting an absolute divorce to the parties and ordering that "the issues concerning [e]quitable [d]istribution are hereby reserved for later resolution in Durham County File Number 98 CVD 01851." On 9 November 1999, plaintiff filed a motion entitled Motion to Judge Orlando Hudson to Request Investigation of Conduct of Court and Attorneys Involved in My Case, whereby she requested, *inter alia*, "[t]hat my spousal sup-

port be reinstated and I receive my half of equitable distribution." A short time later on 9 November 1999, defendant voluntarily dismissed his counterclaims and causes of action under 98 CVD 1851.

On 1 February 2000, plaintiff filed a Complaint under Durham County District Court file 00 CVD 310 ("00 CVD 310"), asserting claims for post-separation support, alimony, equitable distribution, and attorney's fees. On 14 February 2000, defendant filed an Answer and Counterclaim, wherein he moved the trial court to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) or enter judgment on the pleadings pursuant to Rule 12(c). On 25 June 2001, plaintiff died, and a consent order was entered to substitute Luther Mason Rhue, executor of plaintiff's estate, as personal representative.

On 25 July 2002, defendant filed a Motion for Summary Judgment, asserting that plaintiff did not have a pending claim for equitable distribution when the parties' absolute divorce was granted, and that therefore plaintiff's claim was barred by N.C. Gen. Stat. § 50-11(e). On 21 November 2002, the trial court dismissed plaintiff's complaint and granted summary judgment in favor of defendant, "on the basis that plaintiff's action was barred by [N.C. Gen. Stat.] § 50-11(e)." The trial court also consolidated 98 CVD 1851 and 00 CVD 311 for appeal on 21 November 2002. On 28 July 2003, the trial court issued an order denying defendant's Motion to Dismiss and Motion for Judgment on the Pleadings, *nunc pro tunc* 6 November 2001. Plaintiff appeals the trial court's 21 November 2002 order.

The only issue on appeal is whether the trial court erred in granting summary judgment in favor of defendant. We hold that the trial court did not err.

Plaintiff argues that *res judicata* forbids the trial court from granting summary judgment in favor of defendant, and that plaintiff's complaint should not have been dismissed pursuant to N.C. Gen. Stat. § 50-11(e) because the complaint asserted a valid claim for equitable distribution. We disagree.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that any party is entitled to a judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (2003). Plaintiff first argues that the trial court was forbidden from granting summary judgment in

favor of defendant by the doctrine of *res judicata*. According to plaintiff, the trial court's denial of defendant's Motion to Dismiss and Motion for Judgment on the Pleadings estopped defendant from bringing the later Motion for Summary Judgment. However, denial of a previous motion to dismiss made under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2003) does not prevent the trial court from granting a subsequent motion for summary judgment. *Barbour v. Little*, 37 N.C. App. 686, 692, 247 S.E.2d 252, 255, *disc. review denied*, 295 N.C. 733, 248 S.E.2d 862 (1978). Furthermore, because "[a] motion for judgment on the pleadings [does] not present the same question as that raised by [a] later motion for summary judgment[,]" denial of a previous motion for judgment on the pleadings made under N.C. Gen. Stat. § 1A-1, Rule 12(c) (2003) does not preclude the trial court from granting a subsequent motion for summary judgment. *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987).

Nevertheless, plaintiff maintains that the summary judgment standard employed by the trial court was essentially that used in ruling on defendant's 12(b)(6) motion, because both motions referred to and attached the pleadings and rulings from prior actions between the parties, and the summary judgment motion provided no new evidence in support of dismissal. Thus, plaintiff contends, the trial court was without the depositions, interrogatories, and admissions of the parties to consider. However, plaintiff fails to provide any support for her contention that the trial court was required to review depositions, interrogatories, and admissions of the parties in order to grant summary judgment. Furthermore, in the instant case, defendant attached copies of the Divorce Judgment, the Notice of Voluntary Dismissal, the Motion to Dismiss All Issues Except Absolute Divorce, and the Voluntary Dismissal Without Prejudice to support his Motion for Summary Judgment. We conclude these documents were sufficient to support the trial court's order. Therefore, plaintiff's first argument is overruled.

Plaintiff argues in the alternative that summary judgment was improper because her claim for equitable distribution was valid under N.C. Gen. Stat. § 50-11(e) (2003). In support of this argument, plaintiff contends that her previous voluntary dismissals of equitable distribution were invalid, and that her prior assertion of the equitable distribution claim was adequate to preserve the claim after absolute divorce. We disagree.

Defendant asserted two grounds for dismissal of plaintiff's claim in his Motion for Summary Judgment. Defendant first argued

that plaintiff "did not have a claim pending for equitable distribution at the time the divorce was granted to [defendant] and therefore [plaintiff's] equitable distribution action against [defendant] is barred by law pursuant to [N.C. Gen. Stat.] § 50-11(e)." Defendant also argued plaintiff's cause of action was barred by the "two dismissal rule." The trial court agreed with defendant's first argument, dismissing plaintiff's claim and granting summary judgment in favor of defendant "on the basis that Plaintiff's action was barred by [N.C. Gen. Stat.] § 50-11(e)."

N.C. Gen. Stat. § 50-11(e) (2003) provides that a spouse's right to equitable distribution is destroyed upon a judgment of absolute divorce, unless the right was asserted prior to the judgment of absolute divorce. Defendant contends that plaintiff's previous voluntary dismissals of her equitable distribution claim made her instant equitable distribution claim invalid. Plaintiff argues that her previous voluntary dismissals of equitable distribution were invalid, and that therefore the trial court erred in concluding that she had not asserted an equitable distribution claim prior to absolute divorce.

Our Supreme Court has held that where a defendant files a counterclaim arising out of the same transaction as that alleged in a plaintiff's complaint, the plaintiff thereby loses his or her right to take a voluntary dismissal without the defendant's consent. *McCarley v. McCarley*, 289 N.C. 109, 113, 221 S.E.2d 490, 493 (1976). The rationale for this rule was explained as follows:

> [I]t would be manifestly unjust to allow a plaintiff, who comes into court upon solemn allegations which, if true, entitle defendant to some affirmative relief against the plaintiff, to withdraw, *ex parte*, the allegations after defendant has demanded the relief to which they entitle him. Upon demand for such relief defendant's right to have his claim adjudicated in the case "has supervened," and plaintiff thereby loses the right to withdraw allegations upon which defendant's claim is based without defendant's consent. Nowhere, it seems to us, does this rationale apply with more force than where plaintiff seeks divorce upon the ground of one year's separation and defendant in his answer likewise prays for a divorce upon the same ground.

Id. (citations omitted). Thus, a defendant's assertion of a counterclaim arising out of the same transaction alleged in plaintiff's complaint deprives plaintiff not only of his or her ability to escape defendant's claim, but also the right to dismiss the underlying claim without

defendant's consent. *Layell v. Baker*, 46 N.C. App. 1, 6-7, 264 S.E.2d 406, 410 (1980).

In the instant case, plaintiff's complaint alleged facts entitling either or both of the parties to an absolute divorce and requested post-separation support, alimony, and equitable distribution. Defendant's Answer admitted some allegations, requested absolute divorce, and prayed for equitable distribution and "such further and other relief as [the trial court] may deem just and proper." This Answer was, in effect, a counterclaim seeking affirmative relief and arising out of the same transactions alleged in the complaint. *See McCarley*, 289 N.C. at 113, 221 S.E.2d at 493 ("Since the complaint alleged facts entitling either or both of the parties to the marriage to an absolute divorce, we hold that defendant's answer admitting these allegations together with his prayer 'that the bonds of matrimony heretofore existing between the plaintiff and defendant be dissolved, and that the parties hereto be granted a divorce from each other' was, in effect, a counterclaim seeking affirmative relief and arising out of the same transactions alleged in the complaint."). Therefore, plaintiff was deprived of her statutory right to take a voluntary dismissal of her equitable distribution claims without defendant's consent. *Gardner v. Gardner*, 48 N.C. App. 38, 44, 269 S.E.2d 630, 633-34 (1980).

Consent to dismissal is generally evidenced "by filing a stipulation of dismissal signed by all parties who have appeared in the action[.]" N.C. Gen. Stat. § 1A-1, Rule 41(a)(1)(ii) (2003). However, our Supreme Court has disfavored strict statutory construction of Rule 41, allowing oral notice of a voluntary dismissal in court to substitute for the written requirements of Rule 41. *See Danielson v. Cummings*, 300 N.C. 175, 179, 265 S.E.2d 161, 163 (1980) (North Carolina tradition equates oral notice in open court with a filed written notice of voluntary dismissal). This Court has stated that "[i]n construing Rule 41 . . . we must give effect to the legislative intent, and avoid constructions which operate to defeat or impair that intent." *Ward v. Taylor*, 68 N.C. App. 74, 79, 314 S.E.2d 814, 819 (1984). According to its Comment, Rule 41 was enacted to protect defendants from abusive use of the voluntary dismissal procedure after "there has been a heavy expenditure of time and effort by the court and other parties." N.C. Gen. Stat. § 1A-1, Rule 41, Comment (2003).

In the instant case, defendant's own voluntary dismissal of "all [d]efendant's counterclaims and causes of action" after judgment

of absolute divorce evidences his true intention with respect to the suit—to obtain an absolute divorce from plaintiff. Defendant specifically requested absolute divorce in a separate complaint under 99 CVD 2111, and dismissed his equitable distribution claims under 99 CVD 1851 shortly after the trial court granted absolute divorce under 99 CVD 2111. At no point prior to the judgment granting absolute divorce did defendant object to or challenge any of plaintiff's voluntary dismissals of the equitable distribution claims. Instead, defendant continued to participate in hearings until his clear purpose of gaining an absolute divorce was met. Thus, defendant's lack of concern with the expenditures of time or money undertaken to effectuate this purpose is evident from the record, as is his acquiescence to plaintiff's voluntary dismissal of the equitable distribution claims. We conclude that "such [in]action speaks 'consent' as clearly as oral notice or written stipulation." *Gilliken v. Pierce*, 98 N.C. App. 484, 488, 391 S.E.2d 198, 200 (1990) (defendant's dismissal of his counterclaim showed "willingness to abandon the time and effort he had expended on his claim, and to forego his right to have his claim adjudicated."). Therefore, we hold that where, as here, a defendant does not take exception to three voluntary dismissals filed by a plaintiff, the defendant has consented to the voluntary dismissal and the claims are thereby voluntarily dismissed pursuant to Rule 41(a)(1)(ii).

Plaintiff also contends that the trial court erred in concluding that she had not preserved her equitable distribution claim prior to entry of absolute divorce. According to plaintiff, even if her claims were voluntarily dismissed, her previous assertions of equitable distribution prior to the divorce were sufficient to preserve her instant claim for equitable distribution after the absolute divorce. We disagree.

Plaintiff clearly asserted her equitable distribution claim prior to the absolute divorce. However, as discussed above, plaintiff then twice voluntarily dismissed her equitable distribution claim before entry of the absolute divorce. This Court has previously held that an alimony claim asserted prior to absolute divorce and then voluntarily dismissed before the entry of absolute divorce is not preserved after the divorce. *Banner v. Banner*, 86 N.C. App. 397, 404, 358 S.E.2d 110, 113, *disc. review denied*, 320 N.C. 790, 361 S.E.2d 70 (1987), *overruled on other grounds by Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991). In *Banner*, we stated:

> A voluntary dismissal under the current Rules of Civil Procedure is substantially the same as a voluntary nonsuit under the former procedure. "Under the former practice a judgment of voluntary nonsuit terminated the action and no suit was pending thereafter on which the court could make a valid order. . . . We think the same rule applies to an action in which a plaintiff takes a voluntary dismissal under G.S. 1A-1, Rule 41(a)(1)."

Id. (citations omitted). Thus, where a party is granted a voluntary dismissal in an original claim, "it [is] as if the suit had never been filed." *Tompkins v. Log Systems, Inc.*, 96 N.C. App. 333, 335, 385 S.E.2d 545, 547 (1989), *disc. review denied*, 326 N.C. 366, 389 S.E.2d 819 (1990). Any refiling of the same claim thereafter begins the case "anew for all purposes." *Id.*; *See* N.C. Gen. Stat. § 1A-1, Rule 41(a) (2003) ("If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a *new* action based on the same claim may be commenced within one year after such dismissal[.]" (emphasis added)).

Chapter 50 of the North Carolina General Statutes provides that an action for equitable distribution must have been brought before entry of absolute divorce, because after the divorce is entered, all rights arising out of the marriage "cease." N.C. Gen. Stat. § 50-11(a) (2003). In *Stegall v. Stegall*, 336 N.C. 473, 479, 444 S.E.2d 177, 181 (1994), our Supreme Court held that "if . . . equitable distribution claims are properly asserted . . . and are not voluntarily dismissed pursuant to Rule 41(a)(1) until after judgment of absolute divorce is entered, a new action based on those claims may be filed within the one-year period provided by the rule." However, in the instant case, plaintiff's claims were voluntarily dismissed pursuant to Rule 41(a)(1) *prior* to judgment of absolute divorce. Thus, the equitable distribution claim brought by plaintiff under 00 CVD 311 was not the same claim as that originally brought under 99 CVD 1851. Instead, plaintiff's equitable distribution claim was a new claim forbidden by N.C. Gen. Stat. § 50-11(e). Therefore, we conclude that the trial court did not err in concluding that plaintiff failed to properly preserve her equitable distribution claim. Accordingly, plaintiff's alternative argument is overruled.

Affirmed.

Judges McGEE and TYSON concur.

STATE OF NORTH CAROLINA v. JUAN VILLEDA

No. COA03-772

(Filed 20 July 2004)

1. **Appeal and Error— disclosure of interview—discovery order not appealed**

The issue of whether the trial court erred by ordering disclosure of an Internal Affairs interview in a criminal prosecution was not before the Court of Appeals because the State did not appeal the order granting defendant's request for discovery.

2. **Evidence— hearsay—admissions by party-opponent—government agents**

The exception to the hearsay rule for admissions by an agent of a party-opponent applies to statements by government agents for the purpose of a criminal proceeding. Here, statements by a Highway Patrol trooper to attorneys and to an internal affairs officer about why he stopped Hispanics were admissible in a DWI trial because the trooper was an agent of the government and the statements concerned matters within the scope of his agency. N.C.G.S. § 8C-1, Rule 801(d)(D).

3. **Search and Seizure— DWI stop—trooper's reason not credible**

The trial court's finding that the DWI stop of a Hispanic male was unjustified and constituted an unreasonable search and seizure was supported by findings and evidence from an Internal Affairs investigation that the trooper's stated reason for the stop was not credible.

Appeal by the State from order dated 31 December 2002 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 17 March 2004.

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

Mercedes O. Chut for defendant-appellee.

Seth H. Jaffe for American Civil Liberties Union of North Carolina Legal Foundation, Inc., amicus curiae.

BRYANT, Judge.

Pursuant to N.C. Gen. Stat. § 15A-1445, the State appeals an order dated 31 December 2002 granting defendant Juan Villeda's motion to suppress and dismissing with prejudice the charge against him of driving while impaired (DWI).

At 2:40 a.m. on 11 August 2001, Trooper C.J. Carroll stopped defendant, a Hispanic male, for a seatbelt violation on Highway 70 near the Highway 15-501 intersection in Durham, North Carolina. Defendant was subsequently arrested for driving while impaired (DWI). Defendant was found guilty in district court and appealed to the superior court on 11 January 2002. On 18 April 2002, defendant filed a motion to suppress the evidence obtained during the traffic stop. The motion alleged violations of defendant's rights under the "4th, 5th, and 14th Amendments" to the United States Constitution and Article I, Section 19 of the North Carolina Constitution, stating defendant's detention had been motivated "in part by [his] race or national origin." Based on these grounds, defendant also filed a motion to dismiss the DWI charge on 17 September 2002.

At the hearing on defendant's motions, defendant presented the testimony of three attorneys who had come into contact with Trooper Carroll in the past while defending clients arrested for various driving violations. Attorney Kenneth Duke (Duke) testified that in 1998 he had represented a client charged with DWI. At the first court appearance in that case, Duke ran into Trooper Carroll in the hallway of the courthouse. Duke asked Trooper Carroll the reason for stopping his client, to which the officer replied: "[I]f they're Hispanic and they're driving, they're probably drunk." At the hearing in traffic court, Duke requested and was allowed to question Trooper Carroll about his statement in the hallway. Trooper Carroll denied having made such a statement; but when questioned by the trial court, Trooper Carroll admitted that after having seen Duke's client, a Hispanic, walk into a gas station, he parked his vehicle, turned off his lights, and just watched the gas station. Upon seeing Duke's client walk out of the gas station with beer in his arms, get into his vehicle, and start to drive away, Trooper Carroll stopped him as he was leaving the parking lot. The trial court reacted in outrage to this account of the events and dismissed the DWI charge against Duke's client.

Attorney Frances Miranda Watkins testified at the suppression hearing that she had been present at the hearing for Duke's client and

confirmed Trooper Carroll's account of the stop and the trial court's reaction thereto.

Attorney Leonor Childers (Childers) testified she had represented a client, Elvin Javier Ayala, in 2001 charged with DWI and driving with a revoked license. Prior to trial, Childers contacted Trooper Carroll by telephone to question him about his stop of her client. Trooper Carroll explained he had been driving on Miami Boulevard when he observed her client exit the Circle K store with a carton of beer in his hands. Trooper Carroll followed Childers' client, observed a broken tail-light, and ran the vehicle's tags through the computer. The computer search indicated the vehicle was uninsured. Trooper Carroll then stopped Childers' client, issued a ticket for the insurance violation and subsequently arrested him for driving while impaired. When asked by Childers if he had been staking out the Circle K, Trooper Carroll replied that on that particular occasion he had not done so, "but on other occasions he does stake out that Circle K on Miami Boulevard as well as another location on US 70" near LaMaraca, a Hispanic nightclub. Trooper Carroll told Childers he patrols those two areas of Durham "for the purpose of looking for Hispanic males." Childers further inquired, if all her client had done was exit the store with a carton of beer, why did Trooper Carroll stop him. Trooper Carroll responded: "Everyone knows that a Hispanic male buying liquor on a Friday or a Saturday night is probably already drunk"; "Mexicans drink a lot because they grew up where the water isn't good"; and that he did not care what happened in court "as long as I get them [(i.e. Hispanic males)] off the road and in jail for one night." Finally, when asked if he targets Hispanics, Trooper Carroll stated: "I'm not targeting Hispanics. Most of my tickets go to blacks." At the hearing on the charges against Childers' client, although Trooper Carroll denied having made the above statements, the trial court dismissed the charges.

Childers further testified that, following her discussion with Trooper Carroll, she began looking into his citation history. She pulled up all of Trooper Carroll's citations from 1 January 2001 to 24 March 2002, a total of 716 citations, and found that 71% of DWI citations issued by Trooper Carroll involved Hispanic individuals. Only 16% of DWI stops were of Caucasians, 9% of African-Americans, and 2% of other racial backgrounds. After Trooper Carroll came under investigation by Internal Affairs in the spring of 2002 for racial profiling, no Hispanics were cited by him for DWI violations.

In plotting the DWI stops on a map, Childers noted "two fairly concentrated areas": Area 1—the US 70-Hillsborough Road-Main Street area in Durham (within a two-to-three-mile radius of LaMaraca), and Area 2—encompassing Miami Boulevard, East Durham, Geer Street, and Holloway Street (including Circle K). According to the 2000 census data Childers reviewed, the Hispanic population in Durham County amounts to approximately 7% of the general population. However, the census data for LaSalle Street in the city of Durham, which is located in Area 1 and a quarter mile from LaMaraca, reveals a population of 32% Hispanics and 36% African-Americans.

Childers also testified that she was involved in the case *sub judice* as defendant's attorney during the district court proceeding. At the hearing before the district court, Trooper Carroll testified he had been driving behind defendant on Hillsborough Road in Durham when he noticed defendant was not wearing a seatbelt. Trooper Carroll stated the area was well lit and "he could see the seatbelt from the back."

Lieutenant Edward Vuncannon with the Highway Patrol's Internal Affairs Section testified regarding his investigation of Trooper Carroll following allegations of racial discrimination. His interviews of Trooper Carroll were recorded on tape and later transcribed. Defendant questioned Lieutenant Vuncannon about the accuracy of the questions and answers contained in the investigative interview. Lieutenant Vuncannon testified Trooper Carroll told him that in his personal opinion "Hispanics are more prone than other races to get in a car after they have been drinking" and that "[i]t's the lifestyle they live. They work Monday through Friday and . . . ." Lieutenant Vuncannon also testified that Trooper Carroll told him he was not assigned to any specific area for patrol. During the interview with Lieutenant Vuncannon, Trooper Carroll denied having made any of the statements testified to by Childers. Trooper Carroll did tell Lieutenant Vuncannon that at night, when it is dark, he cannot see into vehicles in front of him. Trooper Carroll explained: "The streetlights, . . . all this stuff going on inside the city limits of Durham, the street[]lights glare off the windows, it's almost like a mirror on the window."

In its order dated 31 December 2002, the trial court found as fact: (1) Trooper Carroll's statements testified to by the witnesses at the suppression hearing, (2) the dismissal of the 1998 and 2001 DWI charges resulting from stops made by Trooper Carroll, (3) the statis-

tics on Trooper Carroll's citation patterns as presented by Childers, and (4) the 2000 census data. With respect to Trooper Carroll's stop of defendant, the trial court further found:

> 28. Trooper Carroll stated that he cannot see inside of vehicles at night on the 2-3 mile stretch of Hillsborough Road because the light glares off the windows like a mirror.
>
> . . . .
>
> 35. In the present case, Trooper Carroll began following [defendant] on Hillsborough Road, at night on the weekend within a mile of LaMaraca. [Defendant] was arrested on Saturday, August 11, 2001 around 2:40 am on Hillsborough Road.[1]
>
> 36. Trooper Carroll asserted that he saw that [defendant's] seat[]belt was not fastened, and that he viewed him from the back in the dark.
>
> . . . .
>
> 38. [Defendant] is of Hispanic ethnicity, race, and national origin.
>
> 39. The Court finds based on Trooper Carroll's own statements, that the allegation that [defendant] failed to wear his seat[]belt is incredible in that Trooper Carroll was unable to see inside the vehicle before stopping the vehicle.

The trial court concluded "[t]here was no credible evidence of a particularized, reasonable, articulable suspicion to justify the traffic stop" and "the investigatory detention of [defendant therefore] violated the Fourth and Fourteenth Amendments to the United States Constitution." The trial court further concluded that defendant offered sufficient evidence to support a *prima facie* showing that Trooper Carroll engaged in racial profiling and that defendant "was stopped pursuant to intentional racially discriminatory law enforcement conduct." Accordingly, the trial court suppressed all evidence seized as a result of the stop and dismissed the DWI charge against defendant with prejudice.

The issues are whether: (I) the State preserved for appeal the question of whether the trial court erred in allowing defendant's discovery request; (II) the trial court's findings were based on impermissible hearsay; and (III) there was sufficient evidence to support

1. Hillsborough Road is part of US 70.

the trial court's finding that Trooper Carroll's contention of having seen defendant without his seatbelt was not credible.

I

[1] The State first argues that the trial court erred in ordering the disclosure of the transcript of the Internal Affairs interview, contained in Trooper Carroll's personnel file, on which defendant relied in questioning Lieutenant Vuncannon. The State, however, did not appeal the trial court order granting defendant's request for discovery. Accordingly, the issue is not properly before this Court. *See State v. Drdak*, 330 N.C. 587, 591, 411 S.E.2d 604, 607 (1992) (holding that the evidence of the defendant's blood alcohol level was properly in the possession of the State where the district attorney filed a motion to compel disclosure of the defendant's medical records and the defendant, although he initially objected to the disclosure, did not appeal the disclosure order); *In re Foreclosure of Allan & Warmbold Constr. Co.*, 88 N.C. App. 693, 696, 364 S.E.2d 723, 725 (1988) (only if an intermediate order "involv[es] the merits and necessarily affect[s] the judgment" will a party be relieved of the burden to separately appeal from that order) (quoting N.C.G.S. § 1-278 (1987)); *see also Fenz v. Davis*, 128 N.C. App. 621, 623, 495 S.E.2d 748, 750 (1998) (absent proper notice of appeal, this Court does not acquire jurisdiction).

II

[2] The State next contends that a majority of the defense evidence was based on impermissible hearsay, i.e. testimony regarding statements allegedly made by Trooper Carroll, and that the trial court erred in relying on this evidence in reaching its decision. Defendant counters that the evidence was admissible under the exception to the hearsay rule for admissions by agents of a party-opponent. *See* N.C.G.S. § 8C-1, Rule 801(d)(D) (2003).

Rule 801(d) provides:

> Exception for Admissions by a Party-Opponent.—A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) *a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship* or

(E) a statement by a coconspirator of such party during the course and in furtherance of the conspiracy.

N.C.G.S. § 8C-1, Rule 801(d) (2003) (emphasis added). The question whether Rule 801(d), identical to the Federal Rules of Evidence, *see* Fed. R. Evid. 801(d)(2) (2004), applies to statements by government agents for the purpose of a criminal proceeding has yet to be decided in North Carolina; however, the Fourth Circuit Court of Appeals has clearly resolved the issue in defendant's favor. *See United States v. Barile*, 286 F.3d 749, 758 (4th Cir. 2002) (holding that statements by an FDA employee were made "in her capacity as a government official on matters within the scope of her employment, and as such, the statements are of a party-opponent and therefore not hearsay"); *see also Rodela v. State of Texas*, 829 S.W.2d 845, 849 (Tex. App. 1992) (applying party-opponent admission exception to statements by a sergeant who was an employee of the police department and spoke concerning actions taken in his official capacity). As there is nothing in the plain language of Rule 801(d) to suggest that it does not apply to the prosecution in a criminal case, we adopt the position taken in *Barile*.

In the case *sub judice*, Trooper Carroll was a law enforcement officer and therefore an "agent or servant" of the government. *See generally* Anne Bowen Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?*, 87 Minn. L. Rev. 401, 467-71 (Dec. 2002) (for the proposition that the government, for purposes of a criminal prosecution, encompasses only members of the executive branch, including law enforcement, and not members of the judicial and legislative branches). In addition, Trooper Carroll's statements to Duke, Childers, and Lieutenant Vuncannon concerned matters "within the scope of his agency or employment," i.e. the motivations and circumstances surrounding his traffic stops, and were "made during the existence of the relationship." N.C.G.S. § 8C-1, Rule 801(d)(D). Accordingly, Trooper Carroll's statements were admissible as an admission by a party-opponent.

III

[3] The State also assigns error to the trial court's conclusion that "[t]here was no credible evidence of a particularized, reasonable, articulable suspicion to justify the traffic stop." We disagree.

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). Because the trial court, as the finder of fact, has the duty to pass upon the credibility of the evidence and to decide what weight to assign to it and which reasonable inferences to draw therefrom, " '[t]he appellate court cannot substitute itself for the trial court in this task.' " *Nationsbank of North Carolina v. Baines*, 116 N.C. App. 263, 269, 447 S.E.2d 812, 815 (1994) (quoting *General Specialties Co. v. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979)).

With respect to the validity of traffic stops, this Court has held:

> While there are instances in which a traffic stop is also an investigatory stop, warranting the use of the lower standard of reasonable suspicion, the two are not always synonymous. A traffic stop made on the basis of a readily observed traffic violation such as speeding or running a red light is governed by probable cause. Probable cause is 'a suspicion produced by such facts as indicate a fair probability that the person seized has engaged in or is engaged in criminal activity.' On the other hand, a traffic stop based on an officer's mere *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, 97-98 (2002) (quoting *State v. Young*, 148 N.C. App. 462, 470-71, 559 S.E.2d 814, 820-21 (2002) (Greene, J., concurring) (citing *State v. Hamilton*, 125 N.C. App. 396, 399, 481 S.E.2d 98, 100 (1997) (officer had probable cause to stop the vehicle for the purpose of issuing seatbelt citations because he had observed both the driver and the defendant without seatbelts)) (citations omitted), *appeal dismissed and disc. review denied*, 356 N.C. 693, 579 S.E.2d 98 (2003).

Thus, if Trooper Carroll did in fact observe a seatbelt violation, he had probable cause to stop defendant. In this case, however, there was evidence stemming from the Internal Affairs interview that, due to the city lights reflecting off the car windows, Trooper Carroll could not see inside vehicles driving in front of him at night on the stretch of road on which defendant was stopped. Accordingly, there was

competent evidence to support the trial court's finding that "the allegation that [defendant] failed to wear his seat[]belt [wa]s incredible." This finding, coupled with the fact that the seatbelt violation was Trooper Carroll's sole reason for the stop in turn suffices to support the trial court's conclusion that Trooper Carroll's stop of defendant was unjustified and constituted an unreasonable search and seizure in violation of defendant's constitutional rights. Since dismissal by the trial court on this basis was proper, we need not address the State's final argument in its brief to this Court that defendant's evidence was insufficient to establish racial profiling in violation of the Equal Protection Clause.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

BURLINGTON INSURANCE CO., PLAINTIFF v. THE FISHERMANS BASS CIRCUIT, INC. A/K/A THE FISHERMAN'S BASS CIRCUIT, INC. AND JERRY RHYNE, DEFENDANTS

No. COA03-1231

(Filed 20 July 2004)

1. Civil Procedure— summary judgment—supplemental affidavit

The trial court did not abuse its discretion by allowing the submission of a supplemental affidavit during a summary judgment hearing where the supplemental affidavit was in response to allegations made for the first time in an affidavit received the afternoon before the hearing and the supplement contained only six additional sentences, which specifically rebutted the affidavit received the day before the hearing.

2. Insurance— existence of exclusion—question of fact

The trial court erred by granting summary judgment for plaintiff insurer in a declaratory judgment action to determine insurance coverage where plaintiff had submitted affidavits averring that a policy endorsement excluded coverage and defendants submitted an affidavit in opposition.

Appeal by defendants from judgment entered 30 April 2003 by Judge Marcus L. Johnson in Lincoln County Superior Court. Heard in the Court of Appeals 26 May 2004.

Pendleton & Pendleton, P.A., by Wesley L. Deaton, for defendants-appellants.

Whiteside & Walker, L.L.P., by Nancy E. Walker and Michael Kemper, for plaintiff-appellee.

ELMORE, Judge.

In this appeal, we must determine whether the trial court erred by granting summary judgment in favor of Burlington Insurance Co. (plaintiff) in its declaratory judgment action against The Fishermans Bass Circuit, Inc., a/k/a the Fisherman's Bass Circuit, Inc., and Jerry Rhyne (collectively, defendants). For the reasons stated herein, we reverse the judgment and remand this matter to the trial court.

The facts giving rise to the present appeal are as follows: defendant Fishermans Bass Circuit, Inc. (FBC) is a North Carolina corporation which operates and conducts fishing tournaments throughout the Southeast. Defendant Jerry Rhyne (Rhyne) is FBC's president. On 6 June 1999, while FBC was conducting a tournament in Alabama, a bass boat operated by a participant in the tournament struck a houseboat occupied by Eldridge and Bobbie Loudermilk, two non-participants in the tournament, killing Eldridge Loudermilk and injuring Bobbie Loudermilk. On 8 June 2000, Bobbie Loudermilk filed a civil action in the Marshall County Circuit Court, Marshall County, Alabama, seeking damages against, *inter alia*, defendants. Larry J. Baker, a passenger in the bass boat which struck the Loudermilks and also a participant in the tournament, subsequently filed a separate action in Alabama against, *inter alia*, defendants.[1]

Plaintiff initially provided a defense, under a reservation of rights, for defendants in the Alabama lawsuits, pursuant to the terms of a commercial general liability insurance policy issued by plaintiff in favor of defendants. However, on 20 July 2002 plaintiff filed the declaratory judgment action underlying this appeal, alleging that it had no obligation under the policy to provide coverage for defendants. In support of its allegations, plaintiff averred that defendants

1. We shall hereinafter refer to the Loudermilk and Jackson lawsuits collectively as the "Alabama lawsuits."

"are not entitled to either a defense or coverage under the Policy for the reason that the occurrence giving rise to the claims in question is specifically excluded from coverage by Policy Endorsement BG-G-074 492." A copy of this endorsement was attached to plaintiff's complaint and read in pertinent part as follows:

1. This insurance does not apply to:

   a. "bodily injury," "personal injury," or "advertising injury"

      (1) arising out of any mechanical amusement rides, batting cages, dunk tanks, moonwalks, trampolines, animal rides, aircraft, *watercraft*, . . .;

      . . .

      (4) To any person while practicing, instructing, demonstrating, or participating in . . . any type of sport or athletic activity or *contest*.

      . . .

   b. "property damage"

      (1) To any vehicle while practicing for *or participating in any contest*;

      . . . . (emphasis added).

In their answer, defendants admitted that plaintiff issued to them a commercial general liability insurance policy, and denied that they were not entitled to a defense under this policy. Defendants specifically "aver[red] that plaintiff is barred by latches and estoppel from proceeding with this declaratory judgment action because plaintiff, through its agents, bound the plaintiff and agreed with the defendants to provide coverage" for the incident which gave rise to the Alabama lawsuits. Defendants pled in their answer that "the terms of the Policy and provisions of the Policy speak for themselves[,]" but did not specifically plead that Policy Endorsement BG-G-074 492 was not part of the policy, that defendants had no notice of the endorsement, or that any terms of the policy were ambiguous.

Plaintiff took no further action in this matter until 16 April 2003, when it filed a motion for summary judgment and three affidavits in support thereof. Plaintiff's first supporting affidavit was executed by

Jerry Dellinger (Dellinger), an insurance agent employed by East Lincoln Insurance Agency. Dellinger stated in his affidavit that in 1995, at Rhyne's request and while acting as a retail agent for defendants, he "contacted Jackson Sumner & Associates, the agent for [plaintiff], and was able to obtain coverage for [defendants]." Dellinger's affidavit stated as follows regarding the policy he procured for defendants:

5. The 1995 policy was written as spectator liability only and covered property damage and/or personal injuries sustained in the exercise of [defendants'] administrative functions during the tournament events and did not cover acts by tournament participants and others on the water.

6. [Defendants] renewed the policy each year since 1995.

7. Rhyne made no request to change his coverage for the 1999 policy and never asked to add coverage for participants or other persons arising out of the use of watercraft.

Plaintiff's second supporting affidavit was executed by Frank Dent, III, plaintiff's vice president. Dent stated in his affidavit that "the occurrence giving rise to the [Alabama lawsuits] is specifically excluded from coverage by Policy Endorsement BG-G-074 492." Dent's affidavit also stated that no one in his office communicated with any representative of defendants regarding purchase of the policy in question, and that plaintiff "has no relationship whatsoever with East Lincoln Insurance Agency or with Jerry Dellinger and they have no authority whatsoever to make representations on behalf of [plaintiff]."

Plaintiff's third supporting affidavit was executed by Wayne L. Sumner (Sumner), owner of Jackson Sumner & Associates, an authorized wholesale agent for plaintiff. Sumner's affidavit stated that his office was "contacted in 1995 by [Dellinger] . . . the retail agent for [defendants]," and that the resulting "1995 policy was written as requested by Dellinger, and was renewed on a yearly basis." Regarding the policy written by plaintiff, Sumner's affidavit stated as follows:

4. The 1995 policy provided by [plaintiff] covered property damage and/or bodily injuries sustained in the exercise of [defendants'] administrative functions during the tournament events

and expressly excluded acts by tournament participants and others on the water.

. . .

6. The 1999 policy in effect at the time of the accident in this case provided the same coverage for property damage and/or bodily injuries as Burlington's 1995 through 1998 policies.

On 23 April 2003, in opposition to plaintiff's summary judgment motion, defendants filed an affidavit executed by Rhyne. Plaintiff's counsel received Rhyne's affidavit by mail on Friday, 25 April 2003, one business day prior to the hearing on plaintiff's motion, which had been noticed for Monday, 28 April 2003. Rhyne's affidavit alleged that Dellinger represented himself to be an agent of *plaintiff*, rather than defendants; that when Rhyne spoke with Dellinger in 1995 about procuring an insurance policy for defendants, Rhyne emphasized to Dellinger that defendants needed coverage for boating accidents; and that Dellinger told Rhyne he would provide such a policy. Regarding Policy Endorsement BG-G-074 492, Rhyne's affidavit stated as follows:

10. I have never before been given, told of or heard of the endorsements described in the Plaintiff's complaint, to which Plaintiff makes reference in its Motion for Summary Judgment. I further contend that I would not ever have agreed to this modification of my liability policy.

11. . . . I would never have agreed to a policy change, and did not agree to a policy change, that would have effectively nullified the protection of which I had requested from Jerry Dellinger.

On 28 April 2003, plaintiff's motion for summary judgment came on for hearing. At the hearing, defendants argued that Rhyne's affidavit created "a genuine issue of material fact as to whether . . . Dellinger, who sold the policy to [defendants], . . . is an agent under the terms of the law for [plaintiff]," such that Dellinger, by making representations to Rhyne as alleged therein, "has bound the plaintiff to coverage." Defendants also argued that Rhyne's affidavit created a second genuine issue of material fact, that being whether Policy Endorsement BG-G-074 492 was ever agreed to by defendants or ever delivered to defendants. Plaintiff's counsel responded by noting that she received Rhyne's affidavit in the mail one business day before the

hearing, and that Rhyne therein averred, for the first time, that Policy Endorsement BG-G-074 492 was not part of the insurance policy at issue and that he had no notice of its existence. In response to these averments, plaintiff's counsel procured a supplemental affidavit from Sumner late on the afternoon of the last business day before the hearing, which she tendered to the trial court during the hearing. The trial court received Sumner's supplemental affidavit over defendants' objection. Sumner's supplemental affidavit stated in pertinent part as follows:

> 3. The 1995 policy issued by [plaintiff] to [defendants] included Endorsement BG-G-074 492.
>
> 4. [Plaintiff's] 1995 policy was renewed by [defendants] each year through their agent, Jerry Dellinger, and always included Endorsement BG-G-074 492.
>
> 6. [sic] For each renewal of coverage, Jackson Sumner & Associates physically mailed to Jerry Dellinger, the agent for [defendants], two complete copies of the insurance policy . . . . Endorsement BG-G-074 492 was included in each of the policies sent to Jerry Dellinger's office each year.
>
> 7. The 1999 policy in effect at the time of the accident in this case contained Endorsement BG-G-074 492 as did all of policies issued to [defendants] since 1995.

Thereafter, by order entered 30 April 2003, the trial court concluded "that there are no genuine issues of any material fact[] and . . . that the policy does not provide coverage for claims arising out of the Alabama boating accident[,]" and granted plaintiff's motion for summary judgment. From this order, defendants appeal.

[1] By their first assignment of error, defendants contend the trial court abused its discretion by allowing plaintiff to submit Sumner's supplemental affidavit during the hearing on plaintiff's summary judgment motion, despite the fact that the affidavit was not served upon defendants prior to the hearing. Defendants argue plaintiff's failure to serve the affidavit prior to the day of the hearing constitutes reversible error. We disagree.

This Court has stated that "[a]lthough affidavits in support of a motion for summary judgment are required by G.S. 1A-1, Rules 6(d)

and 56(c) to be filed and served with the motion, Rule 56(e) grants to the trial judge wide discretion to permit further affidavits to supplement those which have already been served." *Rolling Fashion Mart, Inc. v. Mainor*, 80 N.C. App. 213, 216, 341 S.E.2d 61, 63 (1986) (citing *Nationwide Mut. Ins. Co. v. Chantos*, 21 N.C. App. 129, 203 S.E.2d 421 (1974)); *see also Chaplain v. Chaplain*, 101 N.C. App. 557, 560, 400 S.E.2d 121, 122 (1991) ("The provision requiring service of materials before a hearing for summary judgment is not inviolable. Unserved materials are receivable within the court's discretion.")

In the present case, plaintiff submitted Sumner's supplemental affidavit to rebut assertions made, for the first time, in Rhyne's affidavit that Policy Endorsement BG-G-074 492 was not part of the insurance policy at issue and that Rhyne had no notice of its existence. Plaintiff's counsel received Rhyne's affidavit on the afternoon of the last business day prior to the summary judgment hearing. When plaintiff tendered Sumner's supplemental affidavit during the hearing, the trial court received it "as a rebuttal to an allegation that was not previously made." Sumner's supplemental affidavit contained only six sentences which were not present in his original affidavit, and these six sentences specifically rebutted Rhyne's affidavit by stating that the 1995 policy contained Policy Endorsement BG-G-074 492, as did all subsequent renewals thereof, each of which was mailed to Dellinger as defendants' agent. On these facts, we discern no abuse of discretion in the trial court's admission or consideration of Sumner's supplemental affidavit.

[2] By their second assignment of error, defendants contend the trial court erred in granting plaintiff's motion for summary judgment because a genuine issue of material fact existed as to whether Policy Endorsement BG-G-074 492 was part of the contract of insurance upon which plaintiff and defendants agreed.[2] We find defendants' argument on this point persuasive.

2. We note that defendants have set forth two assignments of error in the record on appeal: assignment of error number one, by which defendants except to admission of Sumner's supplemental affidavit, and assignment of error number two, which by which defendants except to the trial court's grant of summary judgment "on the basis that the Defendants' pleadings, affidavits and other testimony show there to be a genuine issue of fact as to whether the Defendants agreed to, consented to or even knew of a modification in their insurance contract excluding the insurance coverage at issue." We are not persuaded by plaintiff's assertion that defendants, by either the wording of their second assignment of error or the arguments advanced in their brief, have failed to preserve this issue for appeal pursuant to N.C.R. App. P. 10(a).

In a declaratory judgment action, summary judgment is properly granted "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.' " *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 178, 581 S.E.2d 415, 422 (2003) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003)). Our Supreme Court has stated that " 'an issue is genuine if it is supported by substantial evidence,' which is that amount of relevant evidence necessary to persuade a reasonable mind to accept a conclusion," *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citations and internal quotation marks omitted). Further, "an issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). In order to defeat a motion for summary judgment, the nonmoving party "must by affidavit, or other means provided in the Rules, set forth specific facts showing a genuine issue of fact for the jury; otherwise, 'summary judgment, if appropriate, shall be entered against [the nonmoving party].' " *In re Will of McCauley*, 356 N.C. 91, 101, 565 S.E.2d 88, 95 (2002) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(e)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001).

In the present case, plaintiffs moved for summary judgment on the grounds that Policy Endorsement BG-G-074 492 excluded plaintiff from liability for acts committed by participants and others arising from the use of watercraft during fishing tournaments conducted by defendants. In support of its motion, plaintiff submitted affidavits averring that defendants' insurance policy included Policy Endorsement BG-G-074 492 and therefore covered only losses arising from defendants' "administrative functions during the tournament events and expressly excluded acts by tournament participants and others on the water[,]" and that Dellinger had no authority to make any contrary representations to plaintiff.

Defendants submitted the affidavit of Rhyne in opposition to plaintiff's motion for summary judgment. Rhyne avers therein that (1) Dellinger represented himself to be an agent of plaintiff; (2) Rhyne related to Dellinger the nature of defendants' business and told

Dellinger that he "wanted a liability policy . . . for protection from boating liability[;]" (3) Dellinger assured Rhyne that he could provide such a policy; (4) Rhyne read the original 1995 policy, and it did not contain Policy Endorsement BG-G-074 492; and (5) Rhyne never received notice of any subsequent addition of Policy Endorsement BG-G-074 492 to the policy.

On these facts, we conclude that defendants have carried their burden of setting forth specific facts showing a genuine issue of material fact for the jury as to whether the contract for insurance agreed upon by the parties included Policy Endorsement BG-G-074 492. Consequently, we reverse the trial court's grant of summary judgment in plaintiff's favor and remand to this case to the trial court for further proceedings.

Reversed and remanded.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. TANNA BARNARD SAKOBIE

No. COA03-1406

(Filed 20 July 2004)

Kidnapping— first-degree—minor—sex offender registration

The trial court did not err in a first-degree kidnapping of a minor case by entering an amended judgment mandating that defendant be required upon release from the Department of Correction to register pursuant to the Sex Offender and Public Protection Registration Program under Article 27A, because: (1) registration pursuant to Article 27A is not a form of punishment unauthorized by Article XI, Section 1 of the North Carolina Constitution when Article 27A is a civil rather than a criminal remedy; (2) even though defendant contends the kidnapping was in furtherance of larceny of a vehicle, N.C.G.S. § 14-208.6(li) provides that an offense against a minor includes kidnapping pursuant to N.C.G.S. § 14-39; (3) defendant's separate asportation or movement of the child was unnecessary to complete the offense of larceny of the vehicle as defendant already had pos-

session of the vehicle; and (4) based on the language of the indictment and the fact that defendant was found guilty of the crime for which she was indicted, it is unnecessary to remand the case for a specific finding concerning whether the kidnapping involved a minor.

Appeal by defendant from an amended judgment dated 10 July 2003 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 9 June 2004.

Attorney General Roy Cooper, by Assistant Attorney General Ashby T. Ray, for the State.

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

BRYANT, Judge.

Tanna Barnard Sakobie (defendant) appeals an amended judgment dated 10 July 2003 mandating defendant be required upon release from the Department of Correction to register pursuant to the Sex Offender and Public Protection Registration Programs (Article 27A).

The evidence presented by the State at the underlying trial tended to show the following: On 4 October 2000 at approximately 9:00 p.m., Joi Rivers drove to a convenience store in her Chevrolet Cavalier to purchase soft drinks. Rivers' five-year-old son was a passenger in the vehicle. When Rivers stopped at the convenience store, she left her child in the front seat with the vehicle's engine running. While Rivers was inside the convenience store, defendant jumped into Rivers' vehicle and drove away with the child still sitting in the front seat. When Rivers reached the store counter to pay for her soft drinks, she did not see her parked vehicle and ran outside to discover both her vehicle and child were gone. Rivers began to scream and cry, and she went back into the convenience store. The store clerk telephoned the police.

Defendant drove approximately six and a half miles to another convenience store where she exited the vehicle, pulled the child out of the vehicle, and forced him into the convenience store with her. Defendant told the child to stand at the counter and remain quiet. The child stayed at the counter, although crying, while defendant purchased a forty-ounce bottle of malt liquor. Defendant then grabbed the child's arm, pulling him out of the convenience store.

Defendant then drove to a mobile home, leaving the child in the vehicle while she obtained a bag from the occupants. Defendant then drove more than 12 miles into the countryside to the home of her friend Robert Johnson (Johnson). Several other individuals were also present on the premises on her arrival. Defendant went inside the mobile home to drink wine, again leaving the child outside in the vehicle for at least five to ten minutes.

The child was crying and told Johnson he wanted to go where his mother was located. When defendant came out of the mobile home, Johnson said he would go with defendant to return the child to the child's mother. Defendant, however, refused Johnson's offer and drove off with the child.

Around midnight, defendant drove approximately 4 miles to a mobile home where Vicky Ray (Ray) and Jerome Leak lived. The mobile home was in a rural area with only one trailer behind it and a house across the street. Ray's mobile home was approximately 12 miles from the convenience store where the vehicle was initially taken and the child abducted.

The lights were on inside the Ray's mobile home. Defendant parked twenty feet from the backdoor of the mobile home and told the child his mother was inside; however, the child responded that his mother did not visit trailers. Defendant thereafter unlocked the child's door and pushed him out of the vehicle. Able to hear a barking dog and feeling scared, the child nevertheless went to the backdoor of the mobile home and knocked. Defendant drove away while the child was knocking at the door.

Upon opening her door, Ray found the child standing before her who repeatedly asked for his mother. Ray also observed a car turning out onto the main road. Because of cold weather conditions, Ray told the child to come inside her home. As Ray did not own a telephone or a vehicle and there were no other telephones within miles of the mobile home, she put the child to bed on her couch. Also, Ray told the child she would try to return him to his mother the following morning. Defendant meanwhile returned to Johnson's residence where she continued to drink.

At 2:45 a.m., Officer Garrett Gwin of the Hope Mills Police Department spotted defendant driving Rivers' vehicle. Officer Gwin stopped the vehicle and took the defendant into custody. On discovering the child was not in the vehicle, an extensive search for the

child was initiated. Defendant initially lead the officers to many different locations in the search for the child but after an hour, lead the officers to Ray's trailer. The child was located inside the trailer and later returned to his mother.

Defendant was charged with and convicted of first-degree kidnapping, felony larceny of a motor vehicle, and possession of a stolen vehicle. The trial court arrested judgment as to the charge of possession of a stolen vehicle. Defendant was sentenced to 95-125 months imprisonment for first-degree kidnapping and 10-12 months imprisonment suspended with 24 months of supervised probation for felony larceny of a motor vehicle to run consecutively with the sentence of first-degree kidnapping. Defendant appealed her convictions, and this Court found no error as to the trial. *State v. Sakobie*, 157 N.C. App. 275, 579 S.E.2d 125 (2003).

On remand, the Department of Correction (DOC) referred this case to Cumberland County Superior Court for an amendment to the judgment, specifically for defendant to be designated and required upon release to register pursuant to Article 27A. Defendant appeared in open court on 10 July 2003. Over defendant's objection, the trial court found the offense to be a reportable conviction involving a minor pursuant to N.C. Gen. Stat. § 14-208.6 and amended the judgment in accordance therewith. Defendant filed notice of appeal on 18 July 2003.

The issues on appeal are whether: (I) requiring a defendant to register pursuant to Article 27A is a form of punishment authorized by Article XI, Section 1 of the North Carolina Constitution; and (II) is unconstitutional as applied to the facts in this case.

Purpose of Registry

North Carolina enacted Article 27A (N.C. Gen. Stat. § 14-208.5 to .32) in 1995, which requires persons convicted of certain sex-related offenses and offenses against minors to register with law enforcement agencies. *See* 1995 N.C. Sess. Laws ch. 545, § 3 (Article 27A applies to all offenders convicted on or after 1 January 1996 and to all prior offenders released from prison on or after that date). The purpose of the Article is to prevent recidivism because "sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and . . . protection of the public from sex offenders is of paramount governmental interest." N.C.G.S. § 14-208.5 (2003). In addition, the "General Assembly also

recognizes that persons who commit certain other types of offenses against minors, such as kidnapping, pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest." *Id.*

Pursuant to N.C. Gen. Stat. § 14-208.7(a), "[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." N.C.G.S. § 14-208.7(a) (2003). Residents who are released from a correctional institution must register with the sheriff of the county in which the offender resides "[w]ithin 10 days of release," N.C. Gen. Stat. § 14-208.7(a)(1) (2003), and registration must be maintained for ten years thereafter, N.C. Gen. Stat. § 14-208.7(a). A person who violates this requirement is guilty of a Class F felony. N.C.G.S. § 14-208.11 (2003).

I

Defendant contends the trial court erred in designating her as a person required to register pursuant to N.C. Gen. Stat. § 14-208.5 *et seq*, because this form of punishment is not authorized by Article XI, Section 1 of the North Carolina Constitution.[1]

In *State v. White*, 162 N.C. App. 183, 590 S.E.2d 448 (2004), this Court addressed a defendant's contention that the registration requirements provided in Article 27A constituted an *ex post facto* law because the requirements retroactively increased the punishment imposed as a result of his 1996 conviction for indecent liberties with a minor. In *White*, the defendant conceded that the U.S. Supreme Court had considered and rejected most of his arguments in *Smith v. Doe*, 538 U.S. 84, 155 L. Ed. 2d 164 (2003),[2] but argued that North Carolina's registry law could be distinguished from the Alaska statutes analyzed in *Smith*. In reaching the conclusion that North Carolina's statute is not an unconstitutional *ex post facto* law, our Court noted:

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1. The following punishments only shall be known to the laws of this State: death, imprisonment, fines, suspension of a jail or prison term with or without conditions, restitution, community service, restraints on liberty, work programs, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State.

N.C. Const. art. XI, § 1.

2. *Smith* held that Alaska's sex-offender registration law did not violate the *ex post facto* prohibition of the federal constitution because the law established a civil, non-punitive regulatory regime intended to protect the public.

> We must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and non-punitive, we must further examine whether the statutory scheme is " 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' "

White, 162 N.C. App. at 192, 590 S.E.2d at 454 (alteration in original) (citations omitted). Our Court stated that we must first determine the intended purpose of the law. *White*, 162 N.C. App. at 192, 590 S.E.2d at 454.

> If the declared purpose was to enact a civil regulatory scheme, then the court determines whether either the purpose or effect is so punitive as to negate any intent to deem the scheme civil. In making this determination, " 'only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.' "

White, 162 N.C. App. at 192, 590 S.E.2d at 454 (citations omitted). The *White* Court ultimately concluded that "the legislature did not intend that the provisions of Article 27A be punitive [and] . . . the effects of North Carolina's registration law do not negate the General Assembly's expressed civil intent and that retroactive application of Article 27A does not violate the prohibitions against *ex post facto* laws." *White*, 162 N.C. App. at 194-98, 590 S.E.2d at 455-58.

Having previously determined that Article 27A is a civil and not a criminal remedy, this panel is not at liberty to revisit the issue. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (stating "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"). Accordingly, defendant's argument that registration pursuant to Article 27A is a form of punishment not authorized by Article XI, Section 1 of the North Carolina Constitution must fail. This assignment of error is overruled.

II

Next, defendant argues, as applied to the facts in this case, Article 27A is unconstitutional, and the facts of this case do not support the trial court's designation of defendant's first-degree kidnapping conviction as a reportable conviction.

N.C. Gen. Stat. § 14-208.6(1i) states: " 'Offense against a minor' means any of the following offenses if the offense is committed against a minor, and the person committing the offense is not the minor's parent: G.S. 14-39 (kidnapping), G.S. 14-41 (abduction of children), and G.S. 14-43.3 (felonious restraint)." N.C.G.S. § 14-208.6(1i) (2003). Here, defendant was convicted of first-degree kidnapping pursuant to N.C. Gen. Stat. § 14-39, but urges us to consider her argument that the purpose of the restraint and confinement was for the goal of facilitating the commission of larceny of a vehicle and possession of a stolen vehicle. Defendant further argues that because she committed a "crime of opportunity" in taking the vehicle and did not have an intent to kidnap the child, Article 27A as applied to the facts of her case will not further the goal of requiring registration.

The language of section 14-208.6(1i) is clear and unambiguous: an offense against a minor includes kidnapping pursuant to N.C. Gen. Stat. § 14-39. "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *State v. Cheek*, 339 N.C. 725, 728, 453 S.E.2d 862, 864 (1995).

Although defendant argues that the kidnapping was in furtherance of the larceny of the vehicle, N.C. Gen. Stat. § 14-39 clearly states that a kidnapping occurring during the facilitation of a felony is encompassed in the statute.[3]

Moreover, the facts reveal that after defendant took the vehicle, she drove approximately six and one-half miles to another convenience store, exited the vehicle, pulled the child out of the vehicle, and forced him into the convenience store with her. Defendant told the child to stand at the counter and remain quiet. The child stayed at the counter, although crying, while defendant purchased a forty-ounce bottle of malt liquor. Defendant then grabbed the child by the arm and pulled him back out of the convenience store. This separate asportation or movement of the child was therefore unnecessary to

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3. Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or 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: . . . Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony.

N.C.G.S. § 14-39(a)(2) (2003). In the instant case, defendant was convicted of felony larceny of a motor vehicle.

complete the offense of larceny of the vehicle as defendant already had possession of the vehicle.

Defendant argues this Court should remand the case to the trial court for a specific finding that the kidnapping involved a minor, because defendant was convicted of first-degree kidnapping on the theory she failed to release the child in a safe place. Whether a victim is released in a safe place goes to whether a defendant will be found guilty of first or second-degree kidnapping, and not to the underlying elements of kidnapping. N.C.G.S. § 14-39(b) (2003). A defendant will be found guilty of kidnapping if the victim was either over the age of sixteen and did not give consent, or under the age of sixteen and the defendant did not have the consent of the victim's parent. N.C.G.S. § 14-39(a). Here, defendant was indicted for kidnapping the child, who was "a person under the age of sixteen (16) years." Based on the language of the indictment and the fact that defendant was found guilty of the crime for which she was indicted, we find it unnecessary to remand for a specific finding concerning whether the kidnapping involved a minor. The judgment of the trial court is

Affirmed.

Judges TYSON and STEELMAN concur.

STATE OF NORTH CAROLINA v. DAVID MICHAEL McQUEEN

No. COA03-1251

(Filed 20 July 2004)

1. Criminal Law— motion for mistrial—objection sustained—curative instruction

The trial court did not abuse its discretion in a felonious possession of stolen goods case by denying defendant's motion for a mistrial after a witness testified that he learned that defendant was in prison, because: (1) the trial court immediately sustained defendant's objection to the inadmissible evidence and granted his motion to strike; and (2) the trial court gave the jury a curative instruction to disregard the statement.

2. Possession of Stolen Property— felonious possession of stolen goods—motion to dismiss—sufficiency of evidence—doctrine of recent possession

The trial court did not err by denying defendant's motion to dismiss the charge of felonious possession of stolen goods even though defendant contends there was insufficient evidence to show that he knew or had reasonable grounds to believe that the generator he possessed had been stolen pursuant to a breaking and entering, because: (1) defendant's possession of the generator shortly after its theft supported the instruction of the doctrine of recent possession; (2) defendant offered no explanation at trial for his possession of the stolen generator or his representation to another person that the generator belonged to him; and (3) from the evidence presented, the jury could have believed that defendant did not actually break into or enter the victim's storage shed, but was present and assisted in transporting the generator away from the victim's property or otherwise aided and abetted in the taking of the property.

3. Sentencing— habitual felon—no contest plea

Although defendant contends the trial court erred in a felonious possession of stolen goods case by accepting defendant's plea of no contest to the habitual felon charge, this assignment of error is dismissed because defendant's argument is based entirely upon his contention that the trial court erred by sentencing him for felonious possession of stolen goods, and the Court of Appeals already rejected that contention.

Appeal by defendant from judgment entered 29 January 2003 by Judge Kenneth Crow in Superior Court, Pender County. Heard in the Court of Appeals 8 June 2004.

Attorney General Roy Cooper, by Assistant Attorney General J. Douglas Hill, for the State.

William D. Spence for defendant appellant.

WYNN, Judge.

Defendant David Michael McQueen appeals from judgment of the trial court entered upon a jury verdict finding him guilty of felonious possession of stolen goods, and upon his plea of no contest to habitual felon status. Defendant argues the trial court erred in denying his

motions for a mistrial and to dismiss the charges against him. Defendant further contends the trial court improperly sentenced him for felonious possession of stolen goods and habitual felon status. For the reasons hereafter stated, we find no error by the trial court.

The State presented evidence at trial tending to show the following: Alfred Mott testified he owned a storage shed located on Mott Town Road in Atkinson, North Carolina, in which he stored an electric generator. Mott described his machine as a 5200-watt "blue generator" with a distinguishing scratch under the carburetor. Mott stated he had paid $900.00 for the generator, and that it was two years old. In the late afternoon of 29 September 2001, Mott observed Defendant walking by as he worked with the generator. At approximately 6:00 p.m., Mott finished his work, placed the machine inside his storage shed, and locked the front door. The storage shed, however, also contained double doors which did not lock, but were secured only by a board. Mott testified that "anybody [who] went in my shed . . . would [have known] that's the way I lock[] it."

When Mott returned to his storage shed the following morning, the electric generator was gone. The front door to the storage shed remained locked, but the double doors were not fully closed. He noticed automobile tracks approximately 120 feet away from the storage shed, but observed no markings on the ground to indicate the generator had been dragged. Mott testified that "it seemed like to me that [whoever broke into the storage shed] had to know what they [were] doing, because they didn't tear my door down." Mott further explained he was "puzzled in my mind how in the world one man can pick that big generator up and tote it that far, and all I could do was to move it."

Defense counsel cross-examined Mott extensively regarding his cousin, Jerome Mott, who lived approximately two miles away from where the storage shed was located. Mott confirmed that Jerome was familiar with his storage shed and the method by which Mott secured the double doors. Mott denied having suspected Jerome of being involved in the disappearance of the generator, but testified that Jerome was acquainted with "people who receive stolen goods."

After he discovered the generator missing, Mott summoned the sheriff's department, which located the generator several days later with the assistance of Noel Brooks. Brooks testified that Defendant came to his residence in the early morning hours of 30 September 2001 with an electric generator. Defendant asked Brooks to loan him

one hundred dollars for one week and offered the generator as collateral for the loan. Defendant told Brooks the generator belonged to him, and that he needed the money in order to have his automobile repaired. Brooks loaned Defendant the money and took the generator in exchange. Brooks suspected, however, that the generator was possibly stolen and contacted a friend at the sheriff's department a few days later. Mott identified the generator given to Brooks by Defendant as the same generator taken from his storage shed.

Doris Jacobs Herring testified on behalf of Defendant. Herring stated she and Defendant were installing carpet at their residence the evening of 29 September 2001, and that Defendant did not leave the house during that time. At 8:00 a.m. the following morning, Herring observed Jerome Mott approach Defendant while he was standing outside the residence and state, "I want to see you." Herring agreed that it was "unusual for [Jerome] to be there that early in the morning." Herring shut the door of the residence and did not observe any further interaction between Defendant and Jerome. Defendant told Herring he was going to work and left the residence soon afterwards. Herring never saw Defendant with a generator.

Defendant was indicted on charges of felonious breaking or entering, felonious larceny, felonious possession of stolen property, and habitual felon status. Upon conclusion of the evidence, the jury found Defendant not guilty of felonious breaking or entering, but guilty of felonious larceny and felonious possession of stolen goods. Defendant then entered a plea of no contest to habitual felon status. The trial court arrested judgment on the felonious larceny conviction and sentenced Defendant to an active minimum term of imprisonment of eighty months, with a maximum term of 105 months. Defendant appealed.

Defendant presents four assignments of error on appeal, arguing the trial court erred by (1) denying Defendant's motion for a mistrial; (2) denying Defendant's motion to dismiss the charges against him; (3) sentencing Defendant for felonious possession of stolen goods; and (4) sentencing Defendant for habitual felon status. We find no error by the trial court.

[1] By his first assignment of error, Defendant argues the trial court erred in denying his motion for a mistrial after Mott testified that he "learned that [Defendant] was in prison." Defendant correctly notes that such evidence was inadmissible, and he contends Mott's state-

ment substantially and irreparably prejudiced his case in the minds of the jurors. In light of such prejudice, Defendant argues the trial court erred in failing to declare a mistrial, thereby entitling him to a new trial. We do not agree.

The trial court must declare a mistrial upon the defendant's motion "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2003). The decision to grant or deny the defendant's motion for a mistrial is discretionary, and such a decision "is to be given great deference because the trial court is in the best position to determine whether the degree of influence on the jury was irreparable." *State v. Hill*, 347 N.C. 275, 297, 493 S.E.2d 264, 276 (1997), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998). A mistrial should be declared only if there are serious improprieties making it impossible to reach a fair and impartial verdict. *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 35-36 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). "When a court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Walker*, 319 N.C. 651, 655, 356 S.E.2d 344, 346 (1987). Absent circumstances indicating otherwise, jurors are presumed to follow a trial court's instructions. *McCarver*, 341 N.C. at 384, 462 S.E.2d at 36.

In the instant case, the trial court immediately sustained Defendant's objection to the inadmissible evidence and granted his motion to strike. The trial court then instructed the jury that Mott's statement was "inappropriate [and] inadmissible," and stated that "you are not to consider in any way his statement when you adjudicate the facts in the case." In light of the trial court's curative instruction, we conclude the trial court did not abuse its discretion in denying Defendant's motion for a mistrial. *State v. Morgan*, 164 N.C. App. 298, 302, 595 S.E.2d 804, 808 (2004).

[2] Defendant next argues the trial court erred in denying his motion to dismiss the charge of felonious possession of stolen goods at the close of the State's evidence and again at the close of all the evidence. Defendant contends the State presented insufficient evidence that he knew or had reasonable grounds to believe that the generator he possessed had been stolen pursuant to a breaking and entering.

The standard for ruling on a motion to dismiss is "whether there is substantial evidence (1) of each essential element of the

offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). Substantial evidence is "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). The trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). The test for sufficiency of the evidence is the same regardless of whether the evidence is circumstantial or direct. *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982). We must therefore determine whether there was substantial evidence to support the essential elements of felonious possession of stolen property.

The essential elements of felonious possession of stolen property are: (1) possession of personal property, (2) which was stolen pursuant to a breaking or entering, (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen pursuant to a breaking or entering, and (4) the possessor acting with a dishonest purpose. *See* N.C. Gen. Stat. §§ 14-71.1, 14-72(c) (2003); *State v. Hargett*, 148 N.C. App. 688, 691, 559 S.E.2d 282, 285 (2002). Defendant takes issue with the third element, contending there was insufficient evidence to demonstrate that he knew or should have known the property had been stolen pursuant to a breaking or entering.

In order to show that Defendant knew or had reasonable grounds to believe the generator was stolen pursuant to a breaking or entering, the State relied on the doctrine of recent possession. The doctrine of recent possession is a rule of law creating the presumption that a person in possession of recently stolen property is guilty of its wrongful taking and of the unlawful entry associated with that taking. *State v. Hamlet*, 316 N.C. 41, 44-45, 340 S.E.2d 418, 420 (1986); *State v. Walker*, 86 N.C. App. 336, 338, 357 S.E.2d 384, 386 (1987), *affirmed per curiam*, 321 N.C. 593, 364 S.E.2d 141 (1988). " 'The presumption is strong or weak depending upon the circumstances of the case and the length of time intervening between the larceny of the goods and the discovery of them in the defendant's possession.' " *Hamlet*, 316 N.C. at 44, 340 S.E.2d at 420 (quoting *State v. Maines*, 301 N.C. 669, 673-74, 273 S.E.2d 289, 293 (1981)). "The presumption or inference arising from recent possession of stolen property 'is to be considered by the jury merely as an evidential fact, along with the other evidence

in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt.' " *Maines*, 301 N.C. at 674, 273 S.E.2d at 293 (quoting *State v. Baker*, 213 N.C. 524, 526, 196 S.E. 829, 830 (1938)).

For the doctrine of recent possession to apply, the State must show: (1) the property was stolen, (2) defendant had possession of the property, subject to his control and disposition to the exclusion of others, and (3) the possession was sufficiently recent after the property was stolen, as mere possession of stolen property is insufficient to raise a presumption of guilt. *State v. Barnes*, 345 N.C. 184, 240, 481 S.E.2d 44, 75 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998); *Hargett*, 148 N.C. App. at 692, 559 S.E.2d at 285. As to recency, our Supreme Court has stated that

> [a]lthough the passage of time between the theft and the discovery of the property in a person's possession is a prime consideration in establishing whether property has recently been stolen, our North Carolina Courts have also recognized that the nature of the property is a factor in determining whether the recency is sufficient to raise a presumption of guilt. Thus, if the stolen property is of a type normally and frequently traded in lawful channels, a relatively brief time interval between the theft and the finding of an accused in possession is sufficient to preclude an inference of guilt from arising. Conversely, when the article is of a type not normally or frequently traded in lawful channels, then the inference of guilt may arise after the passage of a longer period of time between the larceny of the goods and the finding of the goods in the accused's possession.

Hamlet, 316 N.C. at 43-44, 340 S.E.2d at 420.

Here, the State presented substantial evidence from which the jury could find that (1) the generator belonging to Mott was stolen from his storage shed pursuant to a breaking or entering; (2) Defendant offered and Brooks accepted the stolen generator as collateral for a $100.00 loan; and (3) Defendant was in exclusive possession of the stolen generator the morning following its theft. We conclude that Defendant's possession of the generator shortly after its theft supported the instruction of the doctrine of recent possession and the denial of Defendant's motion to dismiss. *See Hargett*, 148 N.C. App. at 691-92, 559 S.E.2d at 285 (upholding the use of the doctrine of recent possession to show there was sufficient evidence that the defendant knew or should have known the property was stolen

pursuant to a breaking or entering in support of charge of felonious possession of stolen property).

Defendant argues the doctrine of recent possession is inapplicable to the crime of felonious possession of stolen property and cannot support his conviction. In a related argument, Defendant contends that, as the jury found him not guilty of breaking or entering, he could not be convicted of felonious possession of stolen property, because there was no evidence that he knew the property had been taken pursuant to a breaking or entering. We do not agree.

Although the jury found Defendant not guilty of breaking or entering, it found him guilty of felonious larceny, a conviction later arrested by the trial court. Mott testified he believed only a person familiar with the storage shed would have known his method of securing the double doors, and he doubted a single man could have transported the generator without assistance. Defendant was in possession of the generator the morning following its theft, and he represented to Brooks that the generator belonged to him. Herring testified that Jerome Mott, a person familiar with Mott's storage shed, appeared at Defendant's residence earlier that same morning in order to talk to him, a circumstance Herring confirmed as unusual. Defendant offered no explanation at trial for his possession of the stolen generator or his representation to Brooks that the generator belonged to him.

From the evidence presented, the jury could have believed that Defendant did not actually break into or enter Mott's storage shed, but was present and assisted in transporting the generator away from Mott's property, or otherwise aided and abetted in the taking of the property. *See State v. Curry*, 288 N.C. 312, 319, 218 S.E.2d 374, 378 (1975) (upholding the defendant's conviction of felonious larceny where the jury acquitted the defendant of breaking or entering and holding that the jury's not guilty verdict on the breaking or entering count was not necessarily a finding by the jury that the larceny was not committed by the defendant pursuant to a breaking or entering, where there was evidence that the defendant aided and abetted two other men in a larceny they committed pursuant to a breaking or entering by them, but did not aid or abet them in the breaking or entering). Notably, the jury sent an inquiry to the trial court during deliberations requesting further instruction on whether the "defendant [had] to perpetrate the [breaking or entering] or just know the property was obtained through a [breaking or entering] . . . to be found guilty of felonious larceny[?]" From this inquiry and the ulti-

mate verdict, it is clear the jury believed Defendant did not perpetrate the breaking or entering, but that he nevertheless knew the generator had been stolen by means of a breaking or entering, and had participated in its larceny. We conclude there was substantial evidence to support the jury's finding that Defendant was guilty of felonious possession of stolen property.

[3] By his final assignment of error, Defendant contends the trial court erred in accepting a plea of no contest to the habitual felon charges. As Defendant's argument is based entirely upon his earlier contention that the trial court erred in sentencing him for felonious possession of stolen goods, we necessarily reject this assignment of error.

In the judgment of the trial court we find,

No error.

Judges CALABRIA and LEVINSON concur.

IN THE MATTER OF MATTHEW ZOLLICOFFER

No. COA03-1387

(Filed 20 July 2004)

1. Mental Illness— involuntary commitment—hearsay information

The trial court did not err by failing to dismiss the petition for involuntary commitment even though information contained in the affidavit and petition for involuntary commitment presented to the magistrate contained hearsay, because: (1) the Court of Appeals has previously held that a magistrate may consider hearsay evidence as a basis for issuing an involuntary commitment custody order despite the pertinent statute's silence on the issue; (2) though any deprivation of a person's liberty through an involuntary commitment custody order is an intrusion on that person's liberties, our laws provide for a rapid and thorough review of this action; (3) the two psychological examinations and the hearing within 10 days of the initial detainment provides respondent with adequate assurance that he is not being improp-

erly detained; and (4) a hearing before a magistrate under N.C.G.S. § 122C-261 upon a petition for the involuntary commitment of a person is a miscellaneous proceeding under Rule 1101, and the rules of evidence do not apply.

2. Mental Illness— involuntary commitment—dangerous to self

The trial court did not err in a mental illness hearing by finding as a matter of law that respondent was dangerous to himself and did not fail to specifically state findings of fact in support of this conclusion, because the failure of a person to properly care for his medical needs, diet, grooming, and general affairs meets the test of dangerousness to self.

Appeal by respondent from order entered 5 June 2003 by Judge J. Larry Senter in the District Court of Granville County. Heard in the Court of Appeals 26 May 2004.

Willa G. Mills, for respondent-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Angel E. Gray, for the State.

STEELMAN, Judge.

Lori Lowder, mother of respondent, petitioned for the involuntary commitment of respondent pursuant to N.C. Gen. Stat. § 122C-261 (2003) on 27 May 2003. The affidavit and petition requesting respondent's commitment alleged that "the respondent had a history of mental illness;" that he was a diagnosed paranoid schizophrenic; that he "is not on medication at this time and when prescribed refused to take it;" that he "made threats to other residents [of his apartment complex] that he was going to kill them, and put his vehicle in reverse to try to back over some children;" that respondent "seemed very agitated" when he spoke with his grandfather; and that he refused to allow anyone in his apartment. Based on this petition, a magistrate signed an order involuntarily committing respondent for mental health examination. Respondent was examined by Dr. Nawab Alnaquib of Centerpoint Human Services on 27 May 2003. Dr. Alnaquib determined that respondent had been non-compliant with his required medications; that he had made "homicidal threats that he would attack residents and kill them;" and that he "would want to reverse his vehicle back on children and kill them." Dr. Alnaquib expressed the opinion that respondent was mentally ill, dangerous to himself and others, and should be admitted to John Umstead Hospital

for treatment. Respondent was sent to Umstead Hospital, and examined by Dr. Rosario Hidalgo. Dr. Hildalgo diagnosed respondent as having chronic paranoid schizophrenia and as being non-compliant with treatments. She further determined that respondent was "having dangerous behavior towards self and others." Dr. Hidalgo admitted respondent for treatment at Umstead Hospital.

A hearing was held on 5 June 2003 in the District Court of Granville County, before Judge Senter, pursuant to the provisions of N.C. Gen. Stat. § 122C-267(a) (2003). Respondent moved to dismiss the proceedings based on insufficiency of the affidavit and petition for involuntary commitment. Judge Senter denied this motion. The State offered into evidence an affidavit from Dr. Catherine Soriano, respondent's attending physician at Umstead Hospital. The affidavit contained Dr. Soriano's opinion that respondent was not complying with his medication requirements; was not participating fully in his treatment; appeared paranoid; that she suspected he was withholding information about himself in an attempt to "expedite his release;" that he does not accept he is mentally ill; he requires inpatient treatment; and based on the behavior indicated in the petition, that he "may present a risk for danger to others" as well as himself. Dr. Soriano recommended ninety days of inpatient treatment. Respondent's mother testified that respondent "continued to get worse since his last admission." She further testified that respondent's apartment was in disarray, there were holes in the walls, his furniture was "destroyed," and his refrigerator was unplugged and empty. She further testified that she had repaired respondent's apartment two or three times in the past; that he had been evicted and had nowhere to live; that he had threatened her on one occasion; that respondent had been involuntarily committed on three previous occasions; and that his family had attempted to get respondent to attend outpatient treatment five different times. Respondent testified, and denied his mental illness, denied the threats at his apartment complex, and denied having caused the damage in his apartment. Judge Senter found that respondent was mentally ill and dangerous to himself, and committed him to Umstead Hospital for a period not to exceed ninety days. Respondent appeals.

[1] In respondent's first assignment of error he argues that the trial court erred by failing to dismiss the petition for involuntary commitment because some of the information contained in the affidavit and petition for involuntary commitment presented to the magistrate was hearsay. We disagree.

N.C.R. Evid. Rule 802 states that "hearsay is not admissible except as provided by statute or by these rules." N.C.R. Evid. Rule 1101 exempts certain proceedings from the Rules of Evidence, including Rule 1101(b)(3), which exempts "Miscellaneous Proceedings." These miscellaneous proceedings include "Proceedings for extradition or rendition; first appearance before district court judge or probable cause hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise." N.C. Gen. Stat. § 122C-261 (2004) provides the authority for involuntary commitment for mentally ill persons not requiring immediate hospitalization. N.C. Gen. Stat. § 122C-261 states in pertinent part:

> (a) Anyone who has knowledge of an individual who is mentally ill and either (i) dangerous to self, as defined in G.S. 122C-3(11)a., or dangerous to others, as defined in G.S. 122C-3(11)b., or (ii) in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness, may appear before a clerk or assistant or deputy clerk of superior court or a magistrate and execute an affidavit to this effect, and petition the clerk or magistrate for issuance of an order to take the respondent into custody for examination by a physician or eligible psychologist. The affidavit shall include the facts on which the affiant's opinion is based.
>
> (b) If the clerk or magistrate finds *reasonable grounds* to believe that the facts alleged in the affidavit are true and that the respondent is probably mentally ill and either (i) dangerous to self, as defined in G.S. 122C-3(11)a., or dangerous to others, as defined in G.S. 122C-3(11)b., or (ii) in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness, the clerk or magistrate shall issue an order to a law enforcement officer or any other person authorized under G.S. 122C-251 to take the respondent into custody for examination by a physician or eligible psychologist.

(emphasis added). N.C. Gen. Stat. § 122C-261 does not expressly state whether the affiant's knowledge must be based on personal knowledge or whether it can be in whole or in part based upon hearsay. This Court has determined that a person facing involuntary commitment "is entitled to the safeguard of a determination by a neutral officer of the court that reasonable grounds exist for his original detention just

as he would be if he were to be deprived of liberty in a criminal context." *In re Reed*, 39 N.C. App. 227, 229, 249 S.E.2d 864, 866 (1978) (This opinion was written under the former involuntary commitment statute N.C. Gen. Stat. § 122-58.3). " 'Reasonable grounds' has been found to be synonymous with 'probable cause[.]' " *Id.* citing *State v. Shore*, 285 N.C. 328, 204 S.E.2d 682 (1974). We find that the requirements for a custody order under N.C. Gen. Stat. § 122C-261 are analogous to those where a criminal suspect is subject to loss of liberty through the issuance of a warrant for arrest. In both instances a magistrate or other approved official must find probable cause (though under N.C. Gen. Stat. § 122C-261 the synonymous term reasonable grounds is used) supporting the issuance of the order or warrant. In both cases the magistrate has the power to deprive a person of his liberty pending a more thorough and demanding determination of the evidence against him. As our Supreme Court has stated in the criminal context:

> Probable cause "does not mean actual and positive cause, nor does it import absolute certainty. The determination of the existence of probable cause is not concerned with the question of whether the offense charged has been committed in fact, or whether the accused is guilty or innocent, but only with whether the affiant has reasonable grounds for [his] belief.

State v. Campbell, 282 N.C. 125, 129, 191 S.E.2d 752, 756 (1972) (citation omitted). "The affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant[.]" *Id.* (This discussion was in the context of a challenge to a search warrant. However, the probable cause requirements for the issuance of a search warrant and an arrest warrant are the same. *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972)).

Hearsay evidence is sufficient to support an affidavit supporting an arrest warrant, even though not admissible to prove guilt at trial because: "There is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes of proof required to establish them." *Jones v. United States*, 362 U.S. 257, 270, 4 L. Ed. 2d 697, HR14 (1960) *Overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 65 L. Ed. 2d 619 (1980) (citing *Brinegar v. United States*, 338 U.S. 160, 172, 93 L. Ed. 1879 (1949); N.C. Gen. Stat. § 1101(b)(3).

In *In re Hernandez*, 46 N.C. App. 265, 270, 264 S.E.2d 780, 783 (1980) this Court held that a magistrate could rely on hearsay evidence presented by a police officer to issue a custody order for involuntary commitment. *Hernandez* was decided under former N.C. Gen. Stat. § 122-58.18 pertaining to law enforcement officers who take mentally ill persons into custody. Former N.C. Gen. Stat. § 122-58-18 required the law enforcement officer to execute an affidavit under former N.C. Gen. Stat. § 122-58.3. Former N.C. Gen. Stat. § 122-58.3(a) provided:

> Any person who has knowledge of a mentally ill or inebriate person who is imminently dangerous to himself or others . . . may appear before a clerk or assistant or deputy clerk of superior court or a magistrate of district court and execute an affidavit to this effect and petition the clerk or magistrate for issuance of an order to take the respondent into custody for examination by a qualified physician. The affidavit shall include the facts on which the affiant's opinion is based.

This Court in *Hernandez* reasoned in support of its ruling, "the legislature has provided further protection for the respondent in circumstances such as the one before us by requiring that a hearing shall be held in district court within ten days of the day the respondent is taken into custody, at which time the legislature has made adequate provision for protection of the respondent's rights." *Hernandez*, 46 N.C. App. at 269, 264 S.E.2d at 782. This Court has thus previously held that a magistrate may consider hearsay evidence as a basis for issuing an involuntary commitment custody order, despite the statute's silence on the issue.

Our current law is quite similar to that under which Hernandez was decided. Within a reasonable time after a respondent subject to an involuntary commitment order of a magistrate is taken in custody, he must be transported to an approved facility. N.C. Gen. Stat. § 122C-263 (2003). Within 24 hours of arrival at the facility, he must be examined by a physician or eligible psychologist. *Id.* If the physician or eligible psychologist makes a determination that the respondent is a danger to self or others, he shall recommend inpatient treatment. *Id.* At a time no later than the next business day following the finding of dangerousness to self or others under N.C. Gen. Stat. § 122C-263, the respondent must be examined a second time by a physician, and if the respondent is again determined to be a danger to self or others, he will be detained pending a full hearing before the district court. N.C. Gen. Stat. § 122C-266 (2003). The hearing shall

be held within 10 days of respondent's being taken into custody. N.C. Gen. Stat. § 122C-268 (2003).

Though any deprivation of a person's liberty through an involuntary commitment custody order is an intrusion on that person's liberties, our laws provide for a rapid and thorough review of this action. We must strike a balance between the intrusion on personal liberty and the need for an efficient method of protecting the public from those who may be dangerous to either themselves or others due to mental illness. It is reasonable in both the criminal and involuntary commitment contexts to allow magistrates and other approved officials to order a brief detention based on hearsay evidence, provided there is a mechanism in place to review the detainment within a reasonable period of time. The two psychological examinations and the hearing within 10 days of the initial detainment in this context provides respondent with adequate assurance that he is not being improperly detained.

We hold that a hearing before a magistrate under N.C. Gen. Stat. § 122C-261 upon a petition for the involuntary commitment of a person is a "miscellaneous proceeding" under Rule 1101, and the rules of evidence do not apply. This assignment of error is without merit.

[2] In respondent's second and third assignments of error he argues the trial court erred by finding as a matter of law that respondent was dangerous to himself, because the evidence was insufficient to support that finding, and the trial court failed to specifically state findings of fact in support of this conclusion. We disagree.

N.C. Gen. Stat. § 122C-271(b)(2) (2003) states: "If the court finds by clear, cogent, and convincing evidence that the respondent is mentally ill and is dangerous to self, as defined in G.S. 122C-3(11)a., or others, as defined in G.S. 122C-3(11)b., it may order inpatient commitment at a 24-hour facility described in G.S. 122C-252 for a period not in excess of 90 days." "The trier of fact alone must determine whether the evidence presented is clear, cogent and convincing. Our only function on appeal is to determine whether there was any competent evidence to support the factual findings made." *In re Medlin*, 59 N.C. App. 33, 36, 295 S.E.2d 604, 606 (1982) (This opinion was decided under the now repealed N.C. Gen. Stat. § 122-58.7(i)).

Respondent does not contest the conclusion that he is mentally ill, he only contests the conclusion that he presents a danger to himself. Judge Senter's involuntary commitment order incorporates Dr.

Soriano's examination and recommendation of 3 June 2003 in his findings of fact. In Dr. Soriano's recommendation she states that respondent has a history of chronic paranoid schizophrenia, that respondent admits to medicinal non-compliance which puts him "at high risk for mental deterioration," that respondent does not cooperate with his treatment team, and that he "requires inpatient rehabilitation to educate him about his illness and prevent mental decline." These findings of fact were not objected to in respondent's assignments of error, thus they are binding on appeal.

"We have held specifically that the failure of a person to properly care for his/her medical needs, diet, grooming and general affairs meets the test of dangerousness to self." *In re Lowery*, 110 N.C. App. 67, 72, 428 S.E.2d 861, 864 (1993) (citation omitted). Judge Senter's findings of fact support his conclusion of law that respondent is dangerous to himself. These assignments of error are without merit.

AFFIRMED.

Judges TYSON and BRYANT concur.

HARRY EUGENE VAUGHN, EMPLOYEE, PLAINTIFF v. INSULATING SERVICES, EMPLOYER, TRAVELERS INSURANCE, USF&G (HARTFORD), KEMPER, ROYAL INSURANCE, MASSACHUSETTS BAY, AETNA LIFE & CASUALTY, AND HARLEYSVILLE MUTUAL INSURANCE, CARRIERS, DEFENDANTS

No. COA03-781

(Filed 20 July 2004)

Workers' Compensation— asbestosis—last injurious exposure—failure to meet burden of proof

The Industrial Commission did not err by denying plaintiff's claim for compensation for asbestosis on the ground that plaintiff did not meet his burden of proof that he was last injuriously exposed to the hazards of asbestos during his employment with defendant-employer where (1) the Commission did not improperly require plaintiff to produce scientific or medical evidence of exposure to asbestos for the relevant time period while employed by defendant but merely noted that there was no such evidence; (2) the Commission did not improperly require plaintiff to prove

that his asbestosis was contracted while he was employed by defendant but merely noted that plaintiff's asbestosis was not proof of exposure while in the employ of defendant since he was exposed to asbestos prior to that employment; and (3) the evidence supported the Commission's determination that plaintiff's testimony that he was exposed to asbestos on at least 30 days in a consecutive seven-month period while working for defendant was not credible because such testimony was inconsistent with plaintiff's behavior and reports to his doctors, and plaintiff's other testimony showed that he did not know when or if he was exposed to asbestos while working for defendant.

Appeal by plaintiff from Opinion and Award entered 27 March 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 March 2004.

Wallace and Graham, P.A., by Richard L. Huffman, for plaintiff-appellant.

Cranfill, Sumner, & Hartzog, L.L.P., by Amanda L. Kims for defendant-appellees Insulating Services, Inc. and USF&G (the Hartford); Hedrick, Eatman, Garner & Kincheloe, L.L.P, by Jeffrey A. Kadis for defendant-appellees Insulating Services, Inc. and the Kemper Group; John F. Morris and Roberta S. Sperry for defendant-appellees Insulating Services, Inc. and Hanover Insurance Company (Massachusetts Bay Insurance); Stiles, Byrum, & Horne, by Henry C. Byrum, Jr., for defendant-appellees Insulating Services, Inc. and Harleysville Insurance Company; Alala, Mullen, Holland, & Cooper, P.A., by J. Reid McGraw, Jr. for defendant-appellees Insulating Services, Inc. and The Travelers Insurance; and McAngus, Goudelock, & Courie, P.L.L.C., by Andrew R. Ussery and Daniel B. Eller for defendant-appellees Insulating Services, Inc. and Royal Insurance.

STEELMAN, Judge.

Harry Eugene Vaughn ("plaintiff") appeals an opinion and award of the North Carolina Industrial Commission ("the Commission") denying his claim for compensation for an alleged occupational disease. For the reasons discussed herein, we affirm.

At the time of the hearing before the deputy commissioner, plaintiff was sixty-four years old. He completed his education through the

eighth grade, and he received a GED during his military service. Plaintiff began working in the insulation industry in 1952. He continued working in the insulation business until 1959, at which time he joined the Army. The majority of the work plaintiff performed between 1952 and 1959 involved insulation containing asbestos. Plaintiff left the Army in 1980 and subsequently worked for various insulation companies.

Plaintiff began his employment with Insulating Services, Inc. ("defendant-employer") in 1983. He worked for defendant-employer until his retirement in February 2000. Plaintiff spent much of his time working at a facility in Charlotte that is now owned by B.F. Goodrich ("the Goodrich plant"). Plaintiff's duties for defendant-employer included installation of insulation for repair work and new construction at the Goodrich plant and other locations. Surveys conducted at the Goodrich plant in 1991, 1995 and 1998 indicated that there were areas within the plant where asbestos existed.

Plaintiff was examined on 12 April 1996 by Dr. Douglas G. Kelling, the examining physician for the Industrial Commission's Advisory Medical Committee. Plaintiff provided Dr. Kelling with a written employment history, which indicated that he worked as an insulator from 1954 until 1982, during which time he was exposed to asbestos without benefit of a respirator.

Plaintiff did not mention any specific exposure to asbestos during his employment with defendant-employer. Dr. Kelling diagnosed plaintiff with asbestosis.

Plaintiff was also examined by Dr. Patrick Kelly, a Board certified pulmonologist, on 19 November 1999. Dr. Kelly noted that "[plaintiff] reports exposure to asbestos [during his employment with defendant-employer] although it is somewhat unclear exactly in what form." Plaintiff did not advise Dr. Kelly of any specific incidents of exposure to asbestos dust while working for defendant-employer. Dr. Kelly diagnosed plaintiff with asbestosis.

On 16 May 1997, plaintiff filed a Form 18B alleging asbestosis and seeking workers' compensation benefits from defendant-employer. The carriers are the insurance companies that provided worker's compensation insurance for employer during the course of plaintiff's employment. Defendants denied liability.

In an opinion and award filed 27 March 2003, the Commission denied plaintiff's claim for compensation. Plaintiff gave notice of appeal to this Court on 4 April 2003.

On appeal of an opinion and award by the Industrial Commission, this Court is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). Evidence tending to support the plaintiff's claim is to be viewed in the light most favorable to the plaintiff. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). However, if there is any evidence in the record to support a finding of fact by the Commission, it is conclusive on appeal, even if there is substantial evidence to the contrary. *Id.* Moreover, the Commission is the sole judge of the credibility of witnesses and the weight to be given the evidence. *Russell v. Lowes Prod. Distr.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

In his first assignment of error, plaintiff argues the Commission used the incorrect legal standard to determine if plaintiff was injuriously exposed to asbestos while employed by Insulating Services. We disagree.

N.C. Gen. Stat. § 97-57 (2003) states:

> In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any which was on the risk when the employee was so last exposed under such employer, shall be liable.

The statute goes on to explain the phrase "last injuriously exposed" in the context of asbestosis claims:

> For the purpose of this section when an employee has been exposed to the hazards of asbestosis or silicosis for as much as 30 working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious . . . .

Id. To recover under this statute, the plaintiff must show: (1) that he has a compensable occupational disease and (2) that he was "last injuriously exposed to the hazards of such disease" in defendant-

employer's employment. *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 88, 301 S.E.2d 359, 362 (1983).

The plaintiff contends that the Commission made four errors of law in coming to its conclusions. First, plaintiff argues the Commission improperly required him to produce scientific or medical evidence of exposure to asbestos for the relevant time period while in defendant's employ. Plaintiff is correct that there is no need for such expert testimony. *Austin v. Continental General Tire*, 141 N.C. App. 397, 404, 540 S.E.2d 824, 829 (2000), *rev'd on other grounds*, 354 N.C. 344, 553 S.E.2d 680 (2001). In addressing the issue of producing scientific evidence of exposure to toxic substances, this Court stated:

> It is unreasonable to assume that the legislature intended an employee to bear the burden of making [toxicity] measurements during his employment in order to lay the groundwork for a worker's compensation claim. Such an interpretation of the statute would make it virtually impossible for an employee to successfully bring suit for compensation . . . due to the difficulty he would encounter in attempting to make measurements of [toxic airborne substances] on his employer's premises. A construction of the statute which defeats its purpose . . . would be irrational and will not be adopted by this Court.

Id., citing *Gay v. J.P. Stevens & Co.*, 79 N.C. App. 324, 333-34, 339 S.E.2d 490, 496 (quoting *McCuiston v. Addressograph-Multigraph Corp.*, 308 N.C. 665, 668, 303 S.E.2d 795, 797 (1983)). This does not mean, however, that the Commission cannot consider expert testimony, or the lack thereof, along with lay testimony, in weighing the evidence and determining whether claimant has met his burden of proof.

Plaintiff has the burden of proving his claim by the "greater weight of the evidence" or by a "preponderance of the evidence." *Phillips v. U.S. Air*, 120 N.C. App. 538, 541, 463 S.E.2d 259, 261 (1995). Thus, the plaintiff must present credible evidence of exposure sufficient to prove that he was last injuriously exposed while working for the defendant-employer.

Second, plaintiff argues that the Commission improperly determined that his asbestosis was caused by exposure prior to his employment with defendant. With regard to the issues of the extent of exposure, prior exposure and causation, this Court has said that

"last injurious exposure" did not have to cause or even significantly contribute to a claimant's disease, rather it is sufficient for it to be "an exposure which proximately augmented the disease to any extent, however slight." *Cain v. Guyton*, 79 N.C. App. 696, 701, 340 S.E.2d 501, 505, *aff'd* 318 N.C. 410, 348 S.E.2d 595 (1986), quoting *Rutledge*, 308 N.C. at 89, 301 S.E.2d at 362-63. Therefore it is not necessary for plaintiff to prove what caused his asbestosis, or where he contracted it. He must simply prove that he has asbestosis, and that the last place of employment where he was exposed to asbestos on at least 30 separate days within a consecutive seven month period was with the defendant-employer. Prior exposure may be relevant when actual exposure to asbestos in a defendant's employ is in question. If a plaintiff has not been exposed in prior employment, and has asbestosis, then that could give rise to an inference that he was exposed (and last injuriously exposed) while working for defendant-employer.

Third, plaintiff argues that the Commission erred in refusing to rely on inferences that can be drawn from the evidence. As stated above, the Commission is the sole determiner of the credibility of the witnesses, and the weight to be given to the evidence. The Commission must then make a determination considering the evidence in the light most favorable to the plaintiff. This does not mean, however, that the Commission must accept as true all evidence favoring plaintiff and make all inferences that support plaintiff's claim. It is up to the Commission to make the final determination in weighing the evidence. "Indeed the Commission is required to evaluate the credibility of the evidence and reject any evidence it finds as not convincing." *Phillips*, 120 N.C. App. at 542, 463 S.E.2d at 262. The plaintiff must present credible evidence of exposure sufficient to prove that he was last injuriously exposed while working for the defendant-employer.

Finally, plaintiff argues that the Commission placed an impossible burden on him to prove his case. As previously stated, "The degree of proof required of a party plaintiff under the Act is the 'greater weight' of the evidence or 'preponderance' of the evidence." *Id* at 541, 463 S.E.2d at 261.

The Commission found the plaintiff's testimony that he was regularly exposed to asbestos in defendant's employ over the relevant period not to be credible, and thus afforded it little weight. It based its finding on inconsistencies between plaintiff's testimony and "his behavior and reports to his doctors." The Commission found that

even if it afforded the plaintiff's own testimony greater weight, this testimony was not sufficient to meet plaintiff's burden of proof:

> The only testimony on this issue came from plaintiff when he described working at the tank farm at the Goodrich plant in 1996. Plaintiff testified that he worked in that area for a month and a half or two months, and that asbestos abatement crews were later called in 1999 to work in those areas. Plaintiff believed that he was exposed to asbestos when he worked on the tanks because the asbestos abatement crews, with their plastic tents, were called to work there later. On further clarification of this potential exposure, plaintiff explained that he worked nearly 40 tanks in the tank farm for "almost a month and a half" and that he later saw the asbestos abatement tents on two of the tanks. During this time period plaintiff was working four days per week, and thus a month and a half would have consisted of 24 to 28 days. Two months at four days a week would amount to about 32 days. Even assuming that plaintiff's testimony is true, and that two of the tanks had asbestos as indicated by subsequent work by an abatement crew, at the average rate of completing one to two tanks per day, plaintiff's testimony does not establish 30 days of exposure within a seven consecutive month period. Furthermore, exposure to asbestos during employment with defendant-employer cannot be assumed from plaintiff's diagnosis of asbestosis, because plaintiff's exposure to asbestos before his employment with defendant-employer was sufficient to cause the disease. The greater weight of the credible evidence is that plaintiff was not exposed to the hazards of asbestos for 30 or more working days during a seven consecutive month period while working for defendant-employer.

There is competent evidence in the record to support the Commission's findings. Although plaintiff was employed by defendant-employer when he was examined by Dr. Kelling, plaintiff never mentioned any potential exposure to asbestos during his examination. Moreover, plaintiff's own testimony shows that he did not know when or if he was exposed to asbestos while working for defendant-employer. Consequently, the Commission, as the sole judge of credibility, determined that plaintiff's testimony that he was exposed on at least 30 days in a consecutive seven month period in 1996 while working for defendant-employer was entitled to little weight.

Based on the Commission's findings of fact, we conclude that the Commission applied the correct standard under N.C. Gen. Stat.

§ 97-57 in determining plaintiff did not meet his burden of proving last injurious exposure under N.C. Gen. Stat. § 97-57.

The Commission did not require plaintiff to submit scientific or medical testimony, it merely noted that there was none. The Commission did not improperly require that plaintiff prove his asbestosis was contracted while employed by defendant-employer, it merely noted that plaintiff's asbestosis was not proof of exposure while in the employ of defendant-employer since he was exposed prior to that employment. The Commission was not required to make inferences supporting plaintiff's position if it determined the evidence was not credible. Finally, there is nothing in the record to support plaintiff's contention that he was held to an "impossible burden." The record supports the Commission's conclusion that plaintiff failed to prove his claim by a preponderance of the evidence.

In the instant case, the Commission found that plaintiff did not meet his burden of proof that he was last injuriously exposed to the hazards of asbestosis during his employment with defendant-employer. There is credible evidence to support the Commission's findings, thus, its denial of compensation under N.C. Gen. Stat. § 97-57 must be affirmed.

Having determined that there is competent evidence in the record to support the Commission's findings of fact, and that those findings of fact support it's conclusions of law that plaintiff was not last injuriously exposed to the hazards of asbestosis while employed by defendant-employer, we need not reach plaintiffs remaining assignments of error.

AFFIRMED.

Judges McGEE and CALABRIA concur.

HENDERSON v. HENDERSON

[165 N.C. App. 477 (2004)]

ANGELA MARIA HENDERSON (NOW ANGELA MARIA WHITE), PLAINTIFF v. JAMES BRYANT HENDERSON, DEFENDANT

No. COA03-980

(Filed 20 July 2004)

1. **Appeal and Error— preservation of issues—failure to make argument**

Plaintiff's two assignments of error that she failed to argue in her brief are deemed abandoned pursuant to N.C. R. App. P. 28(b)(5).

2. **Child Support, Custody, and Visitation— child support—modification**

The trial court erred by modifying plaintiff mother's child support obligation where such a modification was not requested by the parties, because: (1) the only issue before the trial court was whether primary custody of the minor child would remain with defendant or be awarded to plaintiff; and (2) there was no motion before the court seeking to modify child support.

Judge TYSON dissenting.

Appeal by plaintiff from judgment entered 27 February 2003 by Judge Daniel F. Finch in Granville County District Court. Heard in the Court of Appeals 21 April 2004.

John M. Dunlow, attorney for plaintiff.

Currin & Dutra, LLP, by Thomas L. Currin and Amy R. Edge for defendant.

TIMMONS-GOODSON, Judge.

Angela Maria Henderson ("plaintiff") appeals the trial court's judgment ordering her to pay $488 per month in child support to James Bryant Henderson ("defendant"). For the reasons stated herein, we vacate the judgment in part and remand the case to the trial court.

The factual and procedural history of this case is as follows: Plaintiff and defendant were married from 1 September 1984 to 7 March 1995. Their daughter, Michelle Wade Henderson ("Michelle"), was born on 30 November 1990. When the parties divorced, the trial

court ordered that the parties share joint custody of Michelle, and that her primary residence be with defendant. Plaintiff was ordered to pay $100 per month in child support to defendant. In December 2001, defendant became engaged to a woman living in California. Defendant and his fiancée agreed that defendant would move to California. In January 2002, defendant informed plaintiff that he intended to move to California at the end of the school year, and he planned to take Michelle with him.

On 26 February 2002, plaintiff filed a Motion in the Cause seeking modification of the "custodial arrangements" and containing the following prayers for relief:

1. That the Court enter an Order granting the Plaintiff and Defendant joint custody of the minor child, Michelle Wade Henderson, and award primary residence to the Plaintiff and visitation with the Defendant.

2. That the Court enter a preliminary injunction enjoining the Defendant from relocating the minor child's residence pending a full hearing on the merits of this Motion.

3. That the Court accept this verified motion as an affidavit on which to base further orders of the Court.

4. For such other and further relief as the Court deems proper and just.

The trial court conducted an evidentiary hearing on 12 July 2002. At the conclusion of the hearing, the trial judge ordered that if defendant moves to California, then it would be in the best interests of the child that primary custody be with defendant, subject to reasonable visitation with plaintiff. The trial judge also directed from the bench that "if the visitation occurs, and if the modified visitation schedule is arranged, that the child support obligation be calculated according to the North Carolina Child Support Guidelines as required by law." On 27 February 2003, the trial court issued its judgment, ordering plaintiff to pay defendant $488 per month in child support. It is from this judgment that plaintiff appeals.

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[1] As an initial matter, we note that plaintiff's brief contains arguments supporting only three of the original five assignments of error on appeal. The two omitted assignments of error are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6) (2004).

We therefore limit our review to those assignments of error addressed in plaintiff's brief.

[2] The dispositive issue on appeal is whether the trial court erred by modifying plaintiff's child support obligation where such a modification was not requested by the parties. We hold that the trial court erred by ordering the modification.

"An order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances . . . ." N.C. Gen. Stat. § 50-13.7 (2003). The trial court may not, on its own, modify an existing child support order. Instead, "[t]he trial court's jurisdiction is limited to the specific issues properly raised by a party or interested person." *Bogan v. Bogan*, 134 N.C. App. 176, 179, 516 S.E.2d 641, 643 (1999) (*citing Smith v. Smith*, 15 N.C. App. 180, 182-83, 189 S.E.2d 525, 526 (1972)).

The case *sub judice* is analogous to *Royall v. Sawyer*, 120 N.C. App. 880, 463 S.E.2d 578 (1995). In *Royall*, the divorced parents entered into a consent order for child support. Later, the trial court convened to resolve a custody dispute between the parents. Included in the trial court's judgment on the custody issue was an order that the child attend a private boarding school, and that the father pay for the child's tuition and fees. This Court held that "[t]he only issue before the trial court was the custody of plaintiff's and defendant's son. There was no motion before the trial court to modify the child support. Accordingly, the trial court was without authority to issue an order modifying an earlier Consent Order setting child support." 120 N.C. App. at 882, 463 S.E.2d at 580.

We conclude that, as in *Royall*, the only issue before the trial court in this case was whether primary custody of Michelle would remain with defendant or be awarded to plaintiff. There was no motion before the court seeking to modify child support. In fact, the Court's statement regarding child support was a conditional statement. The modification of child support was contemplated to take place only in the event that defendant and Michelle moved to California. Thus, the trial court was without authority to modify the existing child support arrangement. For these reasons, we hereby vacate the portion of the trial court's judgment that modifies the existing child support arrangement. Accordingly, it is not necessary to address defendant's remaining assignments of error.

VACATED IN PART AND REMANDED.

Judge McGEE concurs.

Judge TYSON dissents.

TYSON, Judge dissenting.

The majority's opinion vacates the trial court's order and remands this case to the trial court, holding "the trial court was without authority to modify the existing child support arrangement," when the only issue before the trial court was whether primary custody of the minor child would remain with defendant or be awarded to plaintiff. I respectfully dissent.

I. Modification of Child Support

The general rule is that a trial court may not, *sua sponte*, modify an existing child support order. *Bogan v. Bogan*, 134 N.C. App. 176, 179, 516 S.E.2d 641, 643 (1999). "The trial court's jurisdiction is limited to the specific issues properly raised by a party or interested person." *Id.* at 179, 516 S.E.2d at 643 (citing *Smith v. Smith*, 15 N.C. App. 180, 182-83, 189 S.E.2d 525, 526 (1972)). However, Rule 15(b) of the North Carolina Rules of Civil Procedure provides an exception to the general rule. "When issues not raised by the pleadings are tried by the express or *implied consent* of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C. Gen. Stat. § 1A-1, Rule 15(b) (2003) (emphasis supplied). "A formal amendment to the pleadings 'is needed only when evidence is objected to at trial as not within the scope of the pleadings.' " *Taylor v. Gillespie*, 66 N.C. App. 302, 305, 311 S.E.2d 362, 364, *disc. rev. denied*, 310 N.C. 748, 315 S.E.2d 710 (1984) (quoting *Securities & Exchange Commission v. Rapp*, 304 F.2d 786 (2d Cir. 1962)).

In *Browne v. Browne*, the trial court entered an order of child support against the defendant. 101 N.C. App. 617, 620, 400 S.E.2d 736, 738 (1991). In reviewing whether the amount of child support was correct, this Court acknowledged that the issue of child support was not raised within the scope of the original pleadings. *Id.* at 624, 400 S.E.2d at 740-41. However, we held:

> [O]ur review of the record does not reveal any motion by either party requesting the trial court to conduct a hearing to determine the reasonable needs of the children or the relative ability of each

> parent to pay support for the children. However, when the case was called for trial, *both parties introduced evidence on these relevant issues without objection and the trial court heard the evidence.* Therefore, any failure by this defendant to give proper notice of his request that a hearing be conducted was waived.

Id. (emphasis supplied) (citing *J.D. Dawson Co. v. Robertson Marketing, Inc.*, 93 N.C. App. 62, 66, 376 S.E.2d 254, 256 (1989); *Brandon v. Brandon*, 10 N.C. App. 457, 460, 179 S.E.2d 177, 179 (1971)).

Here, the record shows that the only matter formally before the trial court in plaintiff's original pleading was whether the minor child would remain in the custody of defendant or whether custody would be awarded to plaintiff. At trial, *both* parties presented evidence regarding the annual earnings of each and the amount of child support plaintiff was currently paying. Without objection, defendant's attorney cross-examined plaintiff's present husband regarding the amount of money plaintiff currently earned and the amount of child support she presently paid to defendant. On redirect, plaintiff's attorney questioned plaintiff's present husband regarding the same information.

Defendant testified on direct examination, without objection from plaintiff's attorney, regarding the amount of money he currently earned, the amount of money plaintiff currently earned, the amount of child support plaintiff currently paid, and the previous agreement between plaintiff and defendant regarding child support. Plaintiff's attorney also failed to object when the trial court ordered in open court that plaintiff's child support obligation for the minor child be modified and calculated according to the North Carolina Child Support Guidelines. At the conclusion of the trial court's ruling, plaintiff's attorney was asked by the court, "Anything further for the moving party?" Plaintiff's attorney responded, "No."

Both parties presented evidence regarding the amount of child support paid and the amount both parties currently earned annually. Plaintiff failed to object to the presentation of any of this evidence as being outside the scope of the pleadings. A formal amendment to the pleadings was not needed. *Gillespie*, 66 N.C. App. at 305, 311 S.E.2d at 364. The issue of child support was tried without objection and by the implied consent of both parties. Therefore, the issue of child support "shall be treated in all respects as if [it] had been raised in the pleadings." N.C. Gen. Stat. § 1A-1, Rule 15(b).

II. Failure to Object

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure states:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.

N.C.R. App. P. 10(b)(1) (2004). Plaintiff waived her right to appellate review of this issue by: (1) failing to object at trial to the presentation of evidence regarding child support and the trial court's order modifying child support; and (2) presenting evidence regarding child support. *Id.* Plaintiff's assignments of error and appeal should be dismissed.

III. Conclusion

Plaintiff failed to object to either the presentation of evidence regarding the modification of child support or the trial court's order modifying child support. Plaintiff also presented evidence regarding the issue of child support. Under Rule 15(b), this issue was "tried by the . . . *implied consent* of the parties . . . ." N.C. Gen. Stat. § 1A-1, Rule 15(b) (emphasis supplied). Plaintiff waived her right to appellate review of this issue. I vote to dismiss plaintiff's assignments of error and appeal. I respectfully dissent.

JOHN D. SULLIVAN AND CYNTHIA K. SULLIVAN, PARENTS OF JOHN KEEVER SULLIVAN, PETITIONERS v. WAKE COUNTY BOARD OF EDUCATION, BILL FLETCHER, SHEILA TIDWELL AND PATTI HEAD, RESPONDENTS

No. COA03-673

(Filed 20 July 2004)

Schools and Education— school assignment—new year—new factors—moot appeal

An appeal of a school assignment was moot because the school year has come and gone, the "red flag" practice (denying further departures from a school) has been abolished, and different factors are now being addressed.

Appeal by petitioners from order entered 3 February 2003 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 1 March 2004.

Meyer & Meuser, P.A., by Linda K. Wood, Deborah N. Meyer, and John B. Meuser, for petitioner appellants.

Tharrington Smith, L.L.P., by Ann L. Majestic and Lisa Lukasik, for defendant appellee.

McCULLOUGH, Judge.

The case now before us stands in the following posture: Wake County residents John D. and Cynthia K. Sullivan ("petitioners") challenged the decision of the Wake County Board of Education ("Board") to assign petitioners' son, John Keever Sullivan ("John"), to his base school, Dillard Elementary School ("Dillard") and denied their request that John be transferred to Oak Grove Elementary School ("Oak Grove"). Petitioners brought claims under N.C. Gen. Stat. § 115C-116 (2003), the state special education statutes; the Individuals with Disability in Education Act ("IDEA"); the regulations implementing the state special education statutes and IDEA ("regulations"); and the Americans with Disabilities Act ("ADA"). Petitioners named as respondents the Board; an employee of the school system, Sheila Tidwell; and individual members of the Board, Bill Fletcher and Patti Head. The superior court order from which petitioners now appeal contains conclusions of law dismissing the three individually named respondents and dismissing claims under the special education statutes, the IDEA, the regulations, and the ADA. The court concluded as a matter of law that petitioners had not exhausted their administrative remedies under these statutes and regulations. The petitioners did not assign error to the dismissal of these respondents or claims, and thus they are not before us on appellate review. The superior court, in dismissing the above claims and the named respondents, then reviewed the administrative appeal from the Board's final decision denying transfer of John, in accordance with Article 4 of N.C. Gen. Stat. § 150B (2003) as referred to by N.C. Gen. Stat. § 115C-370 (2003). Applying the whole record test, the superior court found substantial evidence to support the Board's decision. Petitioners appealed to this Court.

The underlying facts of the case are these: Shortly before he was to begin kindergarten in the academic year of 2002-2003, John was diagnosed with Sensory Integration Disorder ("SID") and identified as

developmentally delayed. Petitioners received four recommendations from educational and psychological professionals that John would benefit from year-round schooling. Additionally, petitioners sought advice from the Wake County School System's Project Enlightenment, who then wrote on behalf of petitioners recommending John's assignment to Oak Grove.

Dillard runs a traditional nine-month school year, with a long summer; Oak Grove is a year-round magnet school, with shorter, periodic breaks. Oak Grove was the only year-round school to which John was eligible to apply, and is within walking distance of the petitioners' home. Petitioners applied for assignment of John to Oak Grove through the initial lottery process but did not receive placement. The lottery is the traditional means of obtaining assignment in a magnet and year-round school outside a student's attendance zone. Petitioners then sought to have John transferred for the 2002-2003 year, citing John's SID, the four professional recommendations, and the recommendation of Project Enlightenment. These recommendations stated that John would benefit from a year-round school that was close to home for a number of reasons: the year-round school provides a more structured and consistent approach to education and is better able to deal with the symptoms of SID; John's cycle of social integration, activities, sleep, and performance in school would be broken by the long summers of a traditional school year allowing for regression in his development; John would not be able to tolerate a long bus ride or maintain his self-control as there is little structure on a bus; and a walk to school would provide John and his parents a predictable, reliable schedule that would begin his day in a positive manner.

The school administrator reviewed and considered petitioners' transfer request along with the recommendations and denied the request on 21 May 2002. This notice of denial also informed petitioners of their right and the process to appeal.

At the time the school administrator denied the transfer request, Dillard was one of five schools that had a "red flag" designation. The designation of these schools was to limit transfers from them for the 2002-2003 school year. "Red flag" designation arose from concerns of the significant under enrollment in these five schools, and that transfers into magnet and year-round schools would only add to the depletion of their students. Such depletion was feared to seriously jeopardize the ability of each of these schools to satisfy capacity requirements, and would likely have a negative impact on their

socioeconomic diversity. Thus, the Office of Growth Management (OGM) decided to create the "red flag" designations. The administrative staff of the OGM designated Dillard among the five schools. The designations were used by student assignment staff as a means of assisting the administration in effectively and appropriately addressing the thousands of transfer applications it considered for the 2002-2003 school year. The "red flag" practice was not taken to the Board for review or approval. When the "red flag" designation of certain schools came to the Board's attention during review of over 797 student assignment appeals heard prior to the 2002-2003 school year, the Board expressed disapproval of the practice and directed the student assignment administration to abolish it.

On 12 June 2002, the petitioners' appeal was heard by a two-member panel of the Board. The hearing proceeded as prescribed by N.C. Gen. Stat. § 115C-369. At the hearing, petitioners informed the panel that their request for year-round placement was based upon John's special needs, and presented the recommendations that were attached to the transfer request. The minutes from the hearing reflect John's special needs were considered, as the comments by his name state, "priority," "check with special programs," and "where they can be served?" The petitioners were given approximately 15 minutes to make their argument. Two minutes is generally the time provided. After the petitioners left the hearing, all the hearing panels convened to present each case to the full Board. The panel recommended to the full board that transfer be denied. The full Board vote affirmed this recommendation, but due to the concerns raised, asked the senior administrator of the Office of Student Assignments to send the documentation submitted by petitioners at the hearing to the senior administrator in the Office of Special Programs to review John's Individualized Education Program ("IEP") to determine whether John's need could be met at Dillard. Petitioners' appeal to the Board for John's transfer was officially denied by letter dated 14 June 2004.

Petitioners, pursuant to N.C. Gen. Stat. § 115C-370, petitioned for judicial review of the Board's final decision. In its findings of fact and conclusions of law, the trial court applied the "whole record test" to the facts of this case, and concluded in its 4 February 2003 order that there was substantial evidence to support the Board's decision.[1]

1. The trial court's final decree states, "Petitioners' Petition for judicial review is hereby DENIED." However, the court made adequate findings of fact and conclusions of law on the merits of this case, and these are before us on review.

Petitioners then appealed to this Court. Petitioners filed their appellants' brief on 7 July 2003. Respondents then filed a brief in support of their motion to dismiss this appeal as moot on 6 August 2003, and petitioners filed a brief in opposition to that motion on 28 August 2003 (after an extension of time was granted). Respondents then filed their appellees' brief on 5 September 2003 (after an extension of time was granted) which incorporated by reference the mootness argument.

As a threshold matter, we address the mootness issue.

Mootness

The underlying issue before the Court is whether the Board's denial of John's transfer request for the academic year of 2002-2003 was without a rational basis and arbitrary and capricious, and whether the trial court's findings of fact and conclusions of law affirming the Board are supported by competent evidence. The crux of petitioners' argument is that John's transfer request was denied by the Board based on Dillard's "red flag" designation, and that his special needs were overlooked. Because the 2002-2003 school year has now come and gone, and the school assignment administration's practice of the "red flag" designation of some schools has been abolished by the Board, we agree with respondents that this case is moot and therefore dismiss on those grounds pursuant to the analysis hereunder.

Our Supreme Court has held:

> Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

In re Peoples, 296 N.C. 109, 147, 250 S.E.2d 890, *cert. denied, Peoples v. Judicial Standards Comm.*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979) (citations omitted). Generally, a court will not decide a moot case and this mootness doctrine "represents a form of judicial restraint." *Id.*

The thrust of petitioners' argument on the merits as to John's assignment to Dillard, is that it was based on Dillard's "red flag" designation. There is, however, undisputed evidence of record that the Board did not approve of this means of assignment and did not apply it in reviewing transfer requests. Furthermore, this

practice, used only for the 2002-2003 assignment year now on appeal, has been abolished. In the affidavit of the Senior Director of OGM for the Wake County Public School System, Dr. Ramey Beavers (Dr. Beavers) attests:

> Even in 2002-2003, the "red flag" school designation procedure was not applied by the Board of Education. The Board approved transfer requests that the school administration had denied under its "red flag" practice—including transfer requests out of Dillard Elementary School. The Board learned of the administration's "red flag" school designations in April 2002. Before the 2003-2004 magnet / year-round school selection process began and before transfer requests for the 2003-2004 school year were considered, the Board directed my office to abolish the "red flag schools" designation. The Board of Education's directive was clear: administration was not to consider or apply any "red flag" designation in its school assignment processes going forward and was not to single out particular schools as having transfer limitations. As such, the "red flag" school analysis that applied in 2002-2003 did not apply to the magnet / year-round process or the transfer request process this year (2003-2004), and it will not apply to either process in subsequent years.

As John may apply for a transfer to Oak Grove each year, the issue of the 2002-2003 assignment and the basis of that assignment are moot.

Petitioners argue that the Supreme Court has decided assignment cases on the merits, despite the school year at issue having substantially or almost completely run. *See In Re Hayes*, 261 N.C. 616, 135 S.E.2d 645 (1964); *In re Varner*, 266 N.C. 409, 146 S.E.2d 401 (1966). However, each of these appeals reached the Supreme Court within the relevant school year and presumably when the same factors by the Board were being used to decide transfer requests. In the present appeal, the 2002-2003 school year has come and gone, the "red flag" practice has been abolished, and different factors are being addressed for the 2003-2004 school year's student assignments. In his affidavit, Dr. Beavers states:

> Now that the 2002-2003 school year is over, student assignment decisions applicable to the 2002-2003 school year are over. All parents were entitled to request transfers in the 2002-2003 school year, regardless if whether their request had been made in a previous year. Each individual request for a transfer was considered based upon the new information and data pertaining to the stu-

> dent assignment factors outlined in Board policy and procedure and in State statute. The information and data considered for the 2003-2004 school year is different from last year, and decisions about individual student assignments and transfers were made in the context of this new information and data.[2]

Therefore, we hold the issue moot by the fact that the school year has come and gone, and the red flag designations have been abandoned.

Petitioners argue that, if we hold the issue to be moot, we should reach the merits of this case as one "capable of repetition yet evading review," an exception to the mootness doctrine. *In Re Jackson*, 84 N.C. App. 167, 170-71, 352 S.E.2d 449, 452 (1987) (where the Court decided the merits of the conflict between a school system's right to suspend a student for misconduct and the juvenile court's authority to fashion sensitive and appropriate dispositions, even though the school suspension would always end with the school year). To apply this exception, petitioners must show:

> "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again."

Crumpler v. Thornburg, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (citation omitted), *disc. review denied*, 324 N.C. 543, 380 S.E.2d 770 (1989).

There is no reasonable expectation that the same complaining party would be subject to the same factors used by the school board in making its assignment/transfer determinations for any school year beyond 2002-2003.

School assignments are more than a repetition of legal issues arising under the same law; a school must consider an abundance of synergistic factors that change annually when determining student assignments for a particular year. For example, assignment plans contribute annual data on a school's performance, diversity, enrollment, capacity, school programs, and transportation. To hold this case as anything but moot would require decisions on innumerable

2. We note that the undisputed evidence shows petitioners reapplied to have John in the lottery to attend Oak Grove for the 2003-2004 school year, but John was not chosen. Petitioners' request for transfer was then denied again, as was his appeal before the Board. Petitioners did not seek judicial review of this final Board decision. At no time during the 2003-2004 process was the red flag practice in place.

stale claims which would require our review of factors no longer relevant to the evolving annual assignment considerations of the school board.

For the reasons set forth above, this appeal is

Dismissed.

Judges WYNN and LEVINSON concur.

FRANK E. EMORY, DORIS JONES, CATHERINE TAYLOR, HAZEL LEWIS, LOUVENIA ELLIOTT, A.P. COLEMAN, WILLIE L. ELLIOTT, GEORGE LEACH, CLEVELAND LEWIS, SR., ATHALENE D. EMORY, WILLIAM JAMES, AND THELMA JOHNSON, PLAINTIFFS V. JACKSON CHAPEL FIRST MISSIONARY BAPTIST CHURCH AND DARRYL T. CANADY, DEFENDANTS

No. COA03-1293

(Filed 20 July 2004)

1. **Churches and Religion— subject matter jurisdiction— interpretation of church bylaws—ecclesiastical matters**

The trial court did not have subject matter jurisdiction to interpret the notice provisions of church bylaws and correctly dismissed the action where continuing would have required the court to delve into ecclesiastical matters regarding the church's customs and its interpretation of its bylaws.

2. **Churches and Religion— subject matter jurisdiction— church bylaws—property rights tangentially affected**

The trial court properly dismissed an action involving the incorporation of a church for lack of subject matter jurisdiction where plaintiffs' property rights were affected only tangentially.

Appeal by plaintiffs from order entered 2 July 2003 by Judge Frank Brown in Wilson County Superior Court. Heard in the Court of Appeals 9 June 2004.

Hunton & Williams LLP, by Matthew P. McGuire and Ray A. Starling, for plaintiffs-appellants.

Law Office of Earl T. Brown, P.C., by Earl T. Brown, for defendants-appellees.

TYSON, Judge.

Frank E. Emory, Doris Jones, Catherine Taylor, Hazel Lewis, Louvenia Elliott, A.P. Coleman, Willie L. Elliott, George Leach, Cleveland Lewis, Sr., Athalene D. Emory, William James, and Thelma Johnson (collectively, "plaintiffs") appeal from an order granting Jackson Chapel First Missionary Baptist Church's ("Jackson Chapel") and Darryl T. Canady's (collectively, "defendants") motion to dismiss for lack of subject matter jurisdiction. We affirm.

I. Background

Jackson Chapel is a Missionary Baptist church located in Wilson, North Carolina. Darryl T. Canady has served as Jackson Chapel's pastor since 1994. Jackson Chapel was established in 1872, and operated for more than 130 years as an unincorporated association, not subject to any outside religious or denominational body or organization. All decision making authority was vested within the Church's congregation.

In 1991, the congregation adopted comprehensive bylaws ("1991 Bylaws") to establish and govern the organization, structure, administration, discipline, and doctrine of the church and its members. The 1991 Bylaws contained procedures which governed Jackson Chapel's membership, officers, finances, committees, and meetings. Article VI, Section 5, of the 1991 Bylaws, dealt specifically with meetings of the congregation:

> Section 5. THE CALL FOR REGULAR OR SPECIAL MEETINGS.
>
> The pastor may, with the concurrence of the Boards of Deacons and Trustees make a call from the pulpit for a special business meeting, provided notice is given at least one week in advance. The object of the meeting must be clearly stated in the notice.

Article VIII, entitled "AMENDMENTS" states, "These by-laws may be amended by two-thirds (2/3) affirmative vote of the members present at a meeting, provided the purpose has been announced at least one week in advance."

On 18 May 2003, a business meeting was held at Jackson Chapel. Plaintiffs contend this meeting was a "special" meeting which required advance notice pursuant to Article VI, Section 5, of the 1991 Bylaws. Defendants claim this was a regularly scheduled quarterly meeting preceded by announcement in the church bulletin and from

the pulpit during four Sundays preceding its occurrence. At this meeting, a substantial majority of the members present voted to authorize Jackson Chapel to submit Articles of Incorporation to the North Carolina Secretary of State for filing. On 30 May 2003, the Articles of Incorporation were accepted by the North Carolina Secretary of State. The filing and acceptance incorporated Jackson Chapel as a non-profit religious corporation pursuant to N.C. Gen. Stat. § 55A.

Three weeks after the Articles of Incorporation were filed, plaintiffs commenced a lawsuit alleging that the decision to incorporate Jackson Chapel was made at a meeting held in violation of the notice requirements of the 1991 Bylaws. Defendants answered and moved to dismiss for lack of subject matter jurisdiction. The trial court found that the suit involved the interpretation of the 1991 Bylaws of Jackson Chapel and granted defendants' motion to dismiss for lack of subject matter jurisdiction. Plaintiffs appeal.

II. Issue

The sole issue on appeal is whether the trial court erred in granting defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure.

III. Motion to Dismiss for Lack of Subject Matter Jurisdiction

This Court reviews *de novo* whether a trial court's grant of a motion to dismiss for lack of subject matter jurisdiction was proper. *State ex rel. Pilard v. Berninger*, 154 N.C. App. 45, 52, 571 S.E.2d 836, 841 (2002), *disc. rev. denied*, 356 N.C. 694, 579 S.E.2d 100 (2003) (citing *Country Club of Johnston County, Inc. v. United States Fidelity & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002)). To determine whether jurisdiction over the subject matter exists, the court may consider and weigh matters outside the pleadings. *Tart v. Walker*, 38 N.C. App. 500, 502, 248 S.E.2d 736, 737 (1978).

A. Ecclesiastical Matters

[1] Plaintiffs argue none of the issues raised would require the trial court to resolve ecclesiastical questions or to interpret church doctrine, and assert the trial court should exercise subject matter jurisdiction. We disagree.

Courts have expressed an increasing reluctance to become involved in church disputes:

> The prohibition on judicial cognizance of ecclesiastical disputes is founded upon both establishment and free exercise clause concerns. By adjudicating religious disputes, civil courts risk affecting associational conduct and thereby chilling the free exercise of religious beliefs. Moreover, by entering into a religious controversy and putting the enforcement power of the state behind a particular religious faction, a civil court risks 'establishing' a religion.

Crowder v. Southern Baptist Convention, 828 F.2d 718, 721 (11th Cir. 1987). Our Supreme Court has held that a trial court's exercise of jurisdiction is improper only where "purely ecclesiastical questions and controversies" are involved. *Conference v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 627 (1962).

> An ecclesiastical matter is one which concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church; and all such matters are within the province of church courts and their decisions will be respected by civil tribunals.

Conference v. Piner, 267 N.C. 74, 77, 147 S.E.2d 581, 583 (1966), *overruled in part by Atkins v. Walker*, 284 N.C. 306, 200 S.E.2d 641 (1973) (quoting *Conference v. Miles*, 259 N.C. 1, 10-11, 129 S.E.2d 600, 606 (1963)). "Freedom of religion means not only that civil authorities may not intervene in the affairs of the church; it also prevents the church from exercising its authority through the State." *Id.* at 78, 147 S.E.2d at 583.

After a complete review of the record, we disagree with plaintiffs' contention that the trial court can exercise subject matter jurisdiction to decide whether defendants provided sufficient notice to plaintiffs of a church meeting as required by the 1991 Bylaws without delving into matters of ecclesiastical governance.

Numerous ambiguities exist in the 1991 Bylaws, conflicts remain between both parties' interpretations of the 1991 Bylaws, and long-established church customs exist that may alter the interpretation of the notice requirements listed in the 1991 Bylaws. Both parties disagree regarding what type of meeting was actually held. Plaintiffs argue that a special meeting was called, which required a

two-thirds vote of all trustees and one week notice. Defendants contend that the action was taken at a regular quarterly meeting, which was noticed from the pulpit on the Sunday before the meeting was to be held, and published in the church bulletin for four Sundays prior to the meeting.

Evidence from the record shows that all actions by the church were taken prior to the filing or issuance of a non-profit corporate charter by the North Carolina Secretary of State. Further, church customs and practices exist on how and when church meetings are called, which deviate from the 1991 Bylaws' requirements. These customs and practices have been used by the church since the adoption of the 1991 Bylaws. The trial court would be required to look beyond merely the words of the 1991 Bylaws to determine whether proper notice was given to plaintiffs. There is also a dispute regarding the type of meeting held. The trial court would be required to initially determine what type of meeting was held and look beyond the plain language of the 1991 Bylaws.

As the trial court would be required to delve into "ecclesiastical matters" regarding how the church interprets the 1991 Bylaws' notice requirements and types of meetings, the trial court properly dismissed plaintiffs' action for lack of subject matter jurisdiction. *Piner*, 267 N.C. at 77, 147 S.E.2d at 583. Jackson Chapel determined, through a super-majority vote of its members present at the meeting, that it complied with all notice requirements. Its interpretation of the notice requirements based on long-standing customs and practices of the church must be given judicial deference. *See Braswell v. Purser*, 282 N.C. 388, 393, 193 S.E.2d 90, 93 (1972); *see also Jones v. Wolf*, 443 U.S. 595, 602, 61 L. Ed. 2d 775, 784 (1979), *cert. denied*, 444 U.S. 1080, 62 L. Ed. 2d 763 (1980); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709-15, 49 L. Ed. 2d 151, 162-64 (1976), *cert. denied*, 443 U.S. 904, 61 L. Ed. 2d 872 (1979); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16-17, 74 L. Ed. 131, 137 (1929); *Watson v. Jones*, 80 U.S. 679, 727-29, 20 L. Ed. 666, 676-77 (1871).

B. Violation of Plaintiffs' Contractual and Property Rights

[2] Plaintiffs also assert their contractual and property rights were violated by the failure of the church to follow the procedures set forth in the 1991 Bylaws. We disagree.

North Carolina civil courts may determine church controversies concerning property. In the seminal case of *Atkins v. Walker*, Justice

Lake wrote, "[i]t nevertheless remains the duty of the civil courts to determine controversies concerning property rights over which such courts have jurisdiction and which are properly brought before them, notwithstanding the fact that the property is church property." 284 N.C. at 318, 200 S.E.2d at 649. "Where civil, contracts, or property rights are involved, the courts will inquire as to whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules." *Creech*, 256 N.C. at 140-41, 123 S.E.2d at 627.

Here, plaintiffs argue that their contractual and property rights were violated by the alleged failure of the church to follow its own procedures and bylaws and the court should intervene in the affairs of the church. At the heart of this matter is a change in the structure of the church from an unincorporated association to a non-profit corporation. Plaintiffs do not assert that their membership or use of property rights will be affected by this change in organizational structure. Their complaint only alleges that under the corporate structure the corporation's bylaws would be adopted by a simple majority vote and not by the two-thirds vote required by the 1991 Bylaws of the unincorporated association.

We have previously ruled on church controversies concerning property, however, none involve the type of property rights plaintiffs assert in this matter. *See Looney v. Community Bible Holiness Church*, 103 N.C. App. 469, 473, 405 S.E.2d 811, 813 (1991) (deciding which faction retained control of the physical property of the church and land); *Church v. Church*, 27 N.C. App. 127, 218 S.E.2d 223, *cert. denied*, 288 N.C. 730 (1975) (examining church operations to determine if trustees properly conveyed the church property); *Trotter v. Debnam*, 24 N.C. App. 356, 210 S.E.2d 551 (1975) (reviewing superior court's contempt order for violation of restrictions on use of church building and land).

The reasoning of the Eleventh Circuit Court of Appeals in *Crowder* is persuasive, even though that case was decided under Georgia law. 828 F.2d 718. In *Crowder*, delegates to the Southern Baptist Convention challenged the validity of the procedure by which members of the Convention's Committee on Boards were selected. In affirming the dismissal of the plaintiff's action, the Eleventh Circuit stated:

> [T]he controversy bears only a tangential relationship to property rights. Although appellants contend that the SBC bylaws create

enforceable contract rights under Georgia law, the denial of these alleged rights is unrelated to any question of ownership of property that would give rise to a state interest in assuming a prompt resolution of the controversy by a civil court forum.

Crowder, 828 F.2d at 726-27.

Similarly, the claims of plaintiffs in this case only tangentially affect property rights. The courts of this State should not intervene in a question of whether defendants are organized as an unincorporated association or a non-profit corporation. Plaintiffs have failed to assert a substantial property right which has been affected by the incorporation of the church. The trial court properly dismissed the complaint based upon lack of subject matter jurisdiction.

IV. Conclusion

Plaintiffs failed to show the trial court erred in dismissing their action for lack of subject matter jurisdiction. The trial court would be required to delve into "purely ecclesiastical matters" in violation of the First Amendment as applicable to the States through the Fourteenth Amendment. U.S. Const. amend. I, XIV; *see Creech*, 256 N.C. at 140, 123 S.E.2d at 627. Plaintiffs also failed to show a substantial property right which has been affected by the incorporation of the church. The trial court's order is affirmed.

Affirmed.

Judges BRYANT and STEELMAN concur.

SHIRLEY EVANS HARRIS, PLAINTIFF v. TRI-ARC FOOD SYSTEMS, INC. (D/B/A BOJANGLES) AND PROSTRUCTION, INC., DEFENDANTS

No. COA03-1106

(Filed 20 July 2004)

1. Premises Liability— defective restaurant ceiling—latent defect—no knowledge or reason to discover

There was no genuine issue of material fact as to whether a restaurant owner was negligent in failing to discover a defective ceiling or in creating the dangerous condition. Summary judgment was properly granted for defendant.

2. Negligence— res ipsa loquiter—defective ceiling—exclusive control not shown

Res ipsa loquiter did not apply to a negligence action in which a ceiling fell on a restaurant patron where plaintiff did not show that the restaurant owner had exclusive control of the instrumentality that caused the injury (a defect in the ceiling construction). Summary judgment for defendant was affirmed.

Appeal by plaintiff from an order entered 6 February 2003 by Judge David Q. LaBarre in Granville County Superior Court. Heard in the Court of Appeals 24 May 2004.

Currin & Dutra, L.L.P., by Lori A. Dutra and Amy R. Edge, for plaintiff-appellant.

Ragsdale Liggett, P.L.L.C., by John M. Nunnally, Andrew C. Buckner and George R. Ragsdale, for defendant-appellee Tri-Arc Food Systems, Inc.

HUNTER, Judge.

Shirley Evans Harris ("plaintiff") appeals from an order filed 6 February 2003 granting summary judgment in favor of Tri-Arc Food Systems, Inc. ("defendant").[1] We conclude (1) there was no genuine issue of material fact raised by the evidence as to whether defendant was negligent, and (2) the doctrine of *res ipsa loquitur* does not apply to the case *sub judice*. Accordingly, summary judgment was properly granted and we affirm the order of the trial court.

The evidence contained in the record on appeal shows that on 12 April 1999, plaintiff was a customer in a Bojangles restaurant owned by defendant in Creedmoor, North Carolina. As plaintiff sat down inside the restaurant to eat her lunch, a portion of the restaurant's ceiling collapsed, falling on to plaintiff and causing serious injury to her head, neck, and shoulders. As a result of these injuries plaintiff incurred medical expenses of over $8,000.00 and lost wages in excess of $9,000.00. In addition, plaintiff continues to have chronic neck and shoulder pain, as well as limited use of her left arm, and anticipates

1. An order filed 28 May 2003 granted summary judgment in favor of Prostruction, Inc. ("Prostruction"), which resolved all of plaintiff's remaining claims and thus the appeal of the 6 February 2003 order is now properly before us. Plaintiff, however, has not appealed the 28 May 2003 order granting summary judgment in favor of Prostruction and that order is therefore not before us on appeal.

needing future medical treatment and incurring future loss of earnings and decreased earning capacity.

According to defendant's responses to interrogatories, the last time the restaurant's ceiling would have been inspected was by the building inspector who inspected and approved the building for occupancy and it was not a part of defendant's procedures to regularly inspect the ceiling. In addition, defendant was not aware of any defect or condition existent in the construction of the ceiling. An investigation conducted by defendant's insurance carrier concluded that:

> The dining room has a tray ceiling and the facade is on the front left and right walls of the ceiling area. . . . The facade was fastened to a 2 x 4 plate with trim nails approximately 2' - 2 ½' feet apart, and with a small amount of construction adhesive. These fasteners held up two 1 x 9 oak boards, oak shoe molds, and fluorescent lights which ran inside the facade. Also the weight of the acoustic ceiling and light fixtures were placed on the horizontal oak board as described. The ceiling tiles/grid and light fixtures were supported on the left and right wall areas by metal straps fastened to the roof joists. This appeared to have effectively relieved the weight of these items from the horizontal board. The grid tiles, 5 chandeliers, and duct work on the front elevation of the tray ceiling did not have any metal supports. Essentially, the horizontal oak board was supporting all this weight, which was fastened only with trim nails and very little construction adhesive. Consequently, the entire facade collapsed when the front portion let loose. The front portion of the facade is tied into the right and left portions by the oak shoe mold, wiring for the fluorescent fixtures, and the L-channel for the ceiling tile.

Kurt Hendrickson ("Hendrickson") was the president of Prostruction, the general contractor for the construction of the Bojangles restaurant. Hendrickson testified in a deposition that the trim work on the ceiling was performed by Scott Brothers, a subcontractor. After the incident, Hendrickson contacted Scott Brothers and was told that the only way the trim would have fallen was if someone had pulled away, or ripped down, the molding. Gary Thiede, who performed the repairs for defendant, told Hendrickson that he did not know what caused the collapse. Hendrickson also testified that based on his knowledge and experience in the construction industry, the construction on the ceiling conformed to industry standard practices.

The issues presented on appeal are whether (I) there is a genuine issue of material fact as to whether defendant failed to maintain ordinary care in protecting its customers from the unsafe condition, and (II) the doctrine of *res ipsa loquitur* is applicable to this case.

I.

[1] Plaintiff first contends that summary judgment was improperly granted for defendant in this case because there was a genuine issue of material fact as to whether defendant breached its duty of care to plaintiff either by creating the dangerous condition with the ceiling or by failing to properly inspect the ceiling.

"Summary judgment is appropriate when all the evidentiary materials before the court '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.' " *Bolick v. Bon Worth, Inc.*, 150 N.C. App. 428, 429, 562 S.E.2d 602, 603 (2002) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). "The burden is on the party moving for summary judgment to show the absence of any genuine issue of fact and his entitlement to judgment as a matter of law." *Id.*

> "The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim."

Roumillat v. Simplistic Enterprises, Inc., 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

> In a negligence action, to survive a motion for summary judgment, plaintiff must establish a *prima facie* case by showing: "(1) that defendant failed to exercise proper care in the performance of a duty owed 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."

Bolick, 150 N.C. App. at 430, 562 S.E.2d at 603 (quoting *Lavelle v. Schultz*, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995)).

Under the Restatement (Second) of Torts, a possessor of land who carefully selects an independent contractor to construct a building on his land is subject to liability for harm caused to invitees by the

negligent acts of the contractor. Restatement (Second) of Torts, § 422 (1965). This liability exists when the possessor is in possession of the land during the construction project or when the possessor resumes control after the project's completion. *Id.* In North Carolina, however, an employer is generally not liable for the negligent acts of an independent contractor unless the work is "(1) ultrahazardous or (2) inherently dangerous, and the employer either knows or should have known that the work is of that type." *Kinsey v. Spann*, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000). In North Carolina only blasting operations are considered to be "ultrahazardous," *id.*, and it has long been recognized that ordinary building construction is generally not an inherently dangerous activity. *See Vogh v. Geer*, 171 N.C. 672, 676, 88 S.E. 874, 876 (1916).

Our Supreme Court in *Nelson v. Freeland*, in abolishing the distinction between invitees and licensees in premises liability actions emphasized that owners and occupiers are not insurers of their premises, and that North Carolina premises liability law was aligned "with all other aspects of tort law by basing liability upon the pillar of modern tort theory: negligence." *Nelson v. Freeland*, 349 N.C. 615, 632-33, 507 S.E.2d 882, 892-93 (1998). Thus, under the negligence standard imposed by *Roumillat* and *Nelson*, in premises liability cases in North Carolina:

> Owners and occupiers of land have a duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. "Reasonable care" requires that the landowner not unnecessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge.

Bolick, 150 N.C. App. at 430, 562 S.E.2d at 604 (citations omitted); *see also Nelson*, 349 N.C. at 631-32, 507 S.E.2d at 892. Our Supreme Court has stated the duty of a landowner in such a case as follows:

> [T]he owner of the premises has a duty to exercise "ordinary care to keep in a reasonably safe condition those portions of its premises which it may expect will be used by its customers during business hours, and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision." In order to prove that the defendant-proprietor is negligent, plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or con-

> structive notice of its existence. When the unsafe condition is attributable to third parties or an independent agency, *plaintiff* must show that the condition "existed for such a length of time that defendant knew or by the exercise of reasonable care should have known of its existence, in time to have removed the danger or [to have] given proper warning of its presence." In short, a proprietor is not the insurer of the safety of its customers.

Roumillat, 331 N.C. at 64, 414 S.E.2d at 342-43 (citations omitted). Consequently, under *Roumillat*, despite the clear and undisputed fact that plaintiff suffered severe injury directly caused by the collapse of defendant's ceiling, she nevertheless still has the burden of showing that defendant failed to use ordinary care in either providing a safe premises or in failing to warn of the hazard to which she was subjected.

In the case *sub judice*, defendant's evidence tends to show that the accident causing injury to plaintiff was the result of a latent construction defect in the restaurant's ceiling of which defendant had no knowledge, nor any reason to discover the defect. Plaintiff first contends there is evidence that defendant failed to conduct a reasonable inspection of the premises. However, the evidence of record shows the building was inspected and approved for occupancy by the building inspector and plaintiff has failed to produce any evidence to support her allegation that regular inspections of the ceiling would have been necessary or reasonable under the circumstances. *See Lowe v. Bradford*, 305 N.C. 366, 370, 289 S.E.2d 363, 366 (1982) (nonmoving party may not rest on mere allegations).

Plaintiff also contends that there is evidence the hazardous condition was actually caused by defendant. In support of this allegation, plaintiff points to the deposition testimony of Hendrickson in which he stated that the subcontractor told him the only way the accident could have occurred was by someone ripping down or pulling away the molding, and that in Hendrickson's opinion this was the only way such an incident could have occurred. Despite being complete speculation unsupported by the evidence and, with regard to the subcontractor's statement, hearsay, these statements standing by themselves are insufficient to establish a genuine issue of fact as to whether it was defendant who created the unsafe condition. *See Williamson v. Food Lion, Inc.*, 131 N.C. App. 365, 366, 507 S.E.2d 313, 315 (1998), *per curiam aff'd*, 350 N.C. 305, 513 S.E.2d 561 (1999) (negligence not presumed from mere fact of injury, there must be evidence to estab-

lish negligence beyond speculation or conjecture). Thus, there was no genuine issue of material fact to be decided as to whether defendant was negligent in failing to either discover or in creating the dangerous condition which resulted in plaintiff's injuries. *See Lowe*, 305 N.C. at 369, 289 S.E.2d at 366 ("issue is 'genuine' if it can be proven by substantial evidence").

II.

[2] Plaintiff also argues summary judgment was improperly granted for defendant because the doctrine of *res ipsa loquitur* should be held to apply to the facts of the case at bar. We disagree.

"The doctrine of ' "*[r]es ipsa loquitur*, in its distinctive sense, permits negligence to be inferred from the physical cause of an accident, without the aid of circumstances pointing to the responsible human cause." ' " *Williams v. 100 Block Assoc. Ltd.*, 132 N.C. App. 655, 663, 513 S.E.2d 582, 587 (1999) (quoting *Kekelis v. Machine Works*, 273 N.C. 439, 443, 160 S.E.2d 320, 323 (1968)). Thus, *res ipsa loquitur* applies where there is no available proof of the cause of the injury. *Bowlin v. Duke University*, 108 N.C. App. 145, 149, 423 S.E.2d 320, 322 (1992).

> "In order to invoke the doctrine of *res ipsa loquitur* plaintiff must show, '(1) that there was an injury, (2) that the occurrence causing the injury is one which ordinarily doesn't happen without negligence on someone's part, (3) that the instrumentality which caused the injury was under the exclusive control and management of the defendant.' "

Williams, 132 N.C. App. at 663-64, 513 S.E.2d at 587 (quoting *Johnson v. City of Winston-Salem*, 75 N.C. App. 181, 182, 330 S.E.2d 222, 223 (1985)). With respect to the third element of *res ipsa loquitur*:

> " 'The rule of *res ipsa loquitur* never applies when the facts of the occurrence, although indicating negligence on the part of some person, do not point to the defendant as the *only* probable tortfeasor. In such a case, unless *additional evidence*, which eliminates negligence on the part of all others who have had control of the instrument causing the plaintiff's injury is introduced, the court must nonsuit the case.' "

Id. at 664, 513 S.E.2d at 587 (quoting *Bryan v. Elevator Co.*, 2 N.C. App. 593, 596, 163 S.E.2d 534, 536 (1968)).

The doctrine of *res ipsa loquitur* is not applicable in this case, because there is evidence of what caused plaintiff's injury: a latent construction defect in the ceiling of the restaurant. Furthermore, plaintiff has also failed to introduce any evidence eliminating all possible tortfeasors other than defendant as there is evidence that the defect occurred during the construction of the building by Prostruction, and specifically during the work of the subcontractor. Thus, plaintiff has failed to show that defendant had exclusive control of the instrumentality that caused plaintiff's injury, namely the defect in the ceiling construction and as such, the doctrine of *res ipsa loquitur* does not apply. Accordingly, the trial court properly granted summary judgment in favor of defendant.

Affirmed.

Chief Judge MARTIN and Judge TIMMONS-GOODSON concur.

ELMER MEDINA, PETITIONER v. DIVISION OF SOCIAL SERVICES AND DIVISION OF MEDICAL ASSISTANCE OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENTS

No. COA03-875

(Filed 20 July 2004)

1. **Administrative Law— standard of review—agency affirmation of denial of Medicaid**

The correct standard of review for appeal of an agency affirmation of the denial of Medicaid reimbursement for an illegal alien's leukemia treatment was that used in the appeal of civil cases in which the superior court sits without a jury. Findings supported by evidence are conclusive, and conclusions of law are reviewable de novo.

2. **Public Assistance— denial of Medicaid—illegal alien—leukemia treatments—findings insufficient**

An appeal of the denial of Medicaid benefits for treatment of an illegal alien's leukemia was remanded where the findings were not adequate to support the conclusion that the care and services for which respondent denied reimbursement were not for an emergency (illegal aliens receive coverage for emergencies only).

Appeal by petitioner from order entered 11 April 2003 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 March 2004.

Ott Cone & Redpath, P.A., by Thomas E. Cone and Melanie M. Hamilton, for petitioner appellant.

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

McCULLOUGH, Judge.

Petitioner Elmer Medina appeals the trial court's order affirming an agency's decision to deny Medicaid coverage. Petitioner is an alien who was not lawfully admitted to the United States. In December of 2000, petitioner suffered a one-day fever, and over the next two weeks, he became increasingly fatigued. On the morning of 29 December 2000, petitioner had a fainting spell and passed out. Petitioner went to an urgent care facility and was later admitted to the pediatric floor at Carolinas Medical Center in Charlotte, North Carolina. (CMC)

At that time, petitioner denied any symptoms of upper respiratory infection, nausea, vomiting, or diarrhea. However, doctors believed that petitioner was likely suffering from acute lymphoblastic leukemia. The results of a bone marrow biopsy confirmed this diagnosis, and petitioner began to receive chemotherapy.

On 5 January 2001, petitioner had a fever of 103.7 degrees. He was also suffering abdominal pain that was associated with acute pancreatitis resulting from the chemotherapy. After being treated in the intensive care unit, petitioner went back to the pediatric floor on 7 January 2001. On 10 January 2001, petitioner had an operative procedure to insert an infusion port because petitioner required chronic venous access for chemotherapy. He was discharged to go home on 13 January 2001, given prophylactic medications, and directed to follow up with his treating physician.

On 6 January 2001, petitioner submitted an application for Medicaid benefits to the Mecklenburg County Department of Social Services. Respondent Division of Medical Assistance approved Medicaid coverage for the care and services petitioner received on 29 December 2000 through 30 December 2000 and 5 January 2001 through 6 January 2001.

On 31 January 2001, petitioner received diagnostic tests. He was readmitted to CMC on 5 February 2001 for scheduled chemotherapy. He was instructed to contact his treating physician if he suffered any problems.

Petitioner underwent additional chemotherapy and diagnostic testing on 13 February 2001 on an outpatient basis. He was discharged to go home the following day and had no restrictions. Petitioner had other visits on 27 February 2001 and on 12 March 2001.

On 6 April 2001, petitioner submitted another application for Medicaid services after 13 January 2001. Respondent Division of Medical Assistance denied coverage based on its determination that the care petitioner received was no longer for the treatment of an emergency medical condition. Petitioner appealed this decision to respondent Division of Social Services, but the final agency affirmed the denial of benefits. Petitioner then sought judicial review of the final agency decision. A hearing took place on 20 March 2003, and the Honorable Jesse B. Caldwell, III, affirmed the agency's denial of Medicaid coverage after 13 January 2003.

Petitioner appeals. On appeal, petitioner argues that the trial court erred by determining that he was not eligible for Medicaid benefits after 13 January 2003. Because the trial court failed to make adequate findings of fact to support its conclusions of law, we reverse and remand the decision of the trial court.

I. Standard of Review

[1] Codified at Chapter 150B of the North Carolina General Statutes, the North Carolina Administrative Procedure Act (APA), governs judicial review of administrative agency decisions. *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988). Under N.C. Gen. Stat. § 150B-52 (2003), "[a] party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in G.S. 7A-27." The amended statute now provides two possibilities for the standard of review. *Id.* "In cases reviewed under G.S. 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence." *Id.* Otherwise, "[t]he scope of review to be applied by the appellate court under this section is the same as it is for other civil cases." *Id.*

The present case is not governed by N.C. Gen. Stat. § 150B-51(c) because that section addresses the situation in which an administra-

tive law judge makes a decision, but the agency declines to adopt that decision. In this case, the Division of Medical Assistance denied coverage for services after 13 January 2001, and the agency *affirmed* the denial of benefits. Therefore, the correct standard of review is the one used in other civil cases in which the superior court sits without a jury:

> [T]he 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. Findings of fact by the trial court in a non-jury trial . . . are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Shear v. Stevens Building Co., 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citations omitted). Petitioner has not assigned error to any of the trial court's findings which are therefore binding on appeal. However, we review the disputed conclusions of law *de novo*.[1]

II. Legal Background

[2] Medicaid is a federal program designed to provide health care funding for the needy. *Luna v. Div. of Soc. Servs.*, 162 N.C. App. 1, 4, 589 S.E.2d 917, 919 (2004). Under federal and state regulations, undocumented aliens or aliens who are not permanent residents under color of law are not entitled to full Medicaid coverage. *Id.* "The only exception to this exclusion in both the North Carolina rule and the federal regulations is that payment is authorized for medical 'care and services' that are necessary for the treatment of an emergency medical condition." *Id.* at 4, 589 S.E.2d at 919-20. In this case, petitioner is an undocumented alien who is not permanently living in the United States under color of law. Therefore, he is entitled to benefits only if his care was necessary for the treatment of an emergency medical condition.

In *Luna*, this Court outlined the definition of "emergency medical condition" under federal law:

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1. This standard of review was also applied in a case that considered the same issue on appeal. *Luna v. Div. of Soc. Servs.*, 162 N.C. App. 1, 589 S.E.2d 917 (2004). In *Luna*, we considered "whether the Department correctly applied the law in determining that certain care and services did not constitute treatment for Petitioner's emergency medical condition." *Id.* at —, 589 S.E.2d at 918.

> The implementing federal regulation provides, however, that undocumented aliens are entitled to Medicaid coverage for emergency services required after the sudden onset of a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in: (i) placing the patient's health in serious jeopardy; (ii) serious impairment to bodily functions; or (iii) serious dysfunction of any bodily organ or part. A state Medicaid plan must conform to these requirements.

Id. at 4-5, 589 S.E.2d at 920 (citations omitted). Under the North Carolina rule, medical care is necessary for the treatment of an emergency condition if "[t]he alien requires the care and services after the sudden onset of a medical condition (including labor and delivery) that manifests itself by acute symptoms of sufficient severity (including severe pain)[.]" N.C. Admin. Code tit. 10A, r. 21B.0302 (Nov. 2003) (formerly N.C. Admin. Code tit. 10, r. 50B.0302 (June 2002)). These symptoms must be so severe that the absence of immediate medical attention could result in: (1) placing the patient's health in serious jeopardy, (2) serious impairment to bodily functions, or (3) serious dysfunction of any bodily organ or part. *Id.* With these principles in mind, we turn to consider the issue on appeal.

III. Issue on Appeal

Petitioner submitted two applications for Medicaid. The first application was approved, and coverage was provided for services rendered 29 December 2000 through 30 December 2000 and 5 January 2001 through 6 January 2001. Therefore, the first application is not the subject of this appeal. Instead, the parties are disputing petitioner's second application. The issue is whether the services rendered after 13 January 2001 were for the treatment of an emergency medical condition.

We recognize that this is an evolving issue in North Carolina. Our appellate courts simply have not had the opportunity to consider cases like this one with great frequency. However, this Court has established that the trial court must make adequate findings of fact to support its conclusions of law. Luna, 162 N.C. App. at 4, 589 S.E.2d at 924. The rationale is that without sufficient findings, it is impossible to determine "whether coverage was proper or not." *Id.* at 9, 589 S.E.2d at 922. In *Luna*, we remanded the case and instructed the trial

court to make factual findings on the following issues before deciding the issue of coverage:

> (1) whether his condition was manifesting itself by acute symptoms, and (2) whether the absence of immediate medical treatment could reasonabl[y] be expected to place his health in serious jeopardy, or result in serious impairment to bodily functions or serious dysfunction of any bodily organ or part.

Id. at 13, 589 S.E.2d at 924-25.

In this case, the trial court made the following relevant findings of fact:

3. Petitioner was originally admitted to Carolinas Medical Center on December 29, 2000, and subsequently diagnosed as having acute lymphoblastic leukemia. Following the insertion of a central line for the administration of chemotherapy, a bone marrow aspirate and lumbar puncture, he was discharged home on January 13, 2001.

4. Subsequent admissions were for planned courses of chemotherapy.

5. An application for Medicaid was submitted on the Petitioner's behalf on April 6, 2001 to the Mecklenburg County Department of Social Services.

6. The Respondent determined that admissions covering December 29-30, 2000, and January 5-6, 2001, were for the treatment of an emergency medical condition and approved Medicaid coverage to reimburse Carolinas Medical Center for these periods.

7. The Respondent denied coverage for the admissions subsequent to January 13, 2001, upon its determination that these admissions were not for the treatment of an emergency medical condition.

The trial court also made the following pertinent conclusions of law:

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

4. The care and services for which the Respondent denied Medicaid reimbursement were not for the treatment of an emergency medical condition.

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

6. The Respondent's final agency decision was made upon lawful procedure and is not affected by other error of law.

After carefully reviewing the decision in *Luna* and the findings of fact and conclusions of law in the present case, we are struck by the similarities between the two cases. Like the trial court in *Luna*, the trial court in the present case failed to show whether petitioner's condition was manifesting itself by acute symptoms. The trial court also failed to address whether the absence of immediate medical attention after 13 January 2001 could result in any of the consequences listed in the North Carolina rule (health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part). These are the key issues required by the regulation, and even if its conclusions of law were accurate, the trial court failed to make sufficient findings to support those conclusions.

Without adequate findings, we are unable to decide whether coverage was proper or not. Therefore, we vacate the conclusions of law, leave standing the findings of fact, and remand for further proceedings. On remand, the trial court should resolve the important factual issues mentioned above and then decide the legal issue of coverage.

Reversed and remanded.

Judges BRYANT and ELMORE concur.

IN RE J.S.

[165 N.C. App. 509 (2004)]

IN RE: J.S.

No. COA03-1047

(Filed 20 July 2004)

1. **Termination of Parental Rights— permanency planning order—findings insufficient**

A permanency planning order relieving social services of reunification and visitation efforts was remanded for further findings where the trial court entered a cursory two page order which was insufficient to allow meaningful appellate review.

2. **Termination of Parental Rights— cessation of reunification efforts—notice—jurisdiction**

The trial court had jurisdiction to order that reunification efforts cease despite petitioner not filing a motion requesting relief from those efforts. The court obtained jurisdiction when petitioner filed a petition alleging that the minors were neglected, and that jurisdiction continues until terminated by the court or the juveniles become emancipated.

3. **Appeal and Error— failure to object—lack of notice**

Respondents waived any objection to improper notice of a permanency planning order for neglected juveniles when they and their attorneys appeared and participated without objection.

Appeal by respondents from judgment filed 17 January 2003 and entered *nunc pro tunc* on 22 August 2002 by Judge John W. Dickson in Cumberland County District Court. Heard in the Court of Appeals 18 May 2004.

Hunton & Williams, by Jason S. Thomas, for petitioner-appellee Guardian Ad Litem.

John. F. Campbell, for petitioner-appellee Cumberland County Department of Social Services.

Katharine Chester for respondents-appellants.

STEELMAN, Judge.

Respondents appeal the district court's Permanency Planning Order relieving Cumberland County Department of Social Services (DSS) of reunification and visitation efforts with the parents.

Respondents are the parents of three boys, now ages fifteen, eleven, and four. Respondent-father receives Social Security Disability due to several strokes he had in 1999 and is unable to work. Respondent-mother is also unemployed. On 15 March 2001, DSS filed a juvenile petition regarding the children, alleging they were neglected, in that they: (1) lived in unsanitary and unsafe conditions; (2) had poor attendance at school; (3) had very poor personal hygiene; (4) received inadequate medical care; and (5) the parents were unable to manage their finances in a responsible way. On 17 April 2001, the trial judge issued orders for non-secure custody of the three children, placing their custody with DSS. Additional orders for non-secure custody were issued on 4 May 2001 and 14 June 2001, finding that grounds existed to continue the non-secure custody order. On 12 June 2001, the trial court conducted the adjudication and dispositional hearings, where DSS moved to amend the petition to include allegations of dependency. Since respondents stipulated to dependency, DSS took a voluntary dismissal on the neglect allegations. The court continued the matter for review. On 15 November 2001, the trial court conducted a review hearing pursuant to N.C. Gen. Stat. § 7B-906. The trial court found that reasonable efforts were being made to reunite the children with their family, or to provide a permanent plan for the children, but that the return of the children to the parent's custody would be contrary to the welfare of the minors. While legal custody remained with DSS, physical custody of the two youngest boys was placed with relatives of respondents and the oldest boy was placed in foster care. The parents were allowed visitation with the children. The court conducted periodic permanency planning hearings on 20 February 2002, 20 March 2002, 12 June 2002, and 22 August 2002.

At the 22 August 2002 permanency planing review, the court relieved DSS from its reunification and visitation efforts as to the minor children. Respondents appeal.

[1] In respondents' first assignment of error, they contend the trial court's findings of fact are not supported by competent evidence and, in turn, the findings of fact do not support the conclusions of law. Our analysis of this issue also includes respondents' second assignment of error, in which they assert it was error for the trial court to make a finding of fact which merely incorporated reports of others.

"In all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law thereon . . . ." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2003). Thus,

the trial court must, through "processes of logical reasoning," based on the evidentiary facts before it, "find the ultimate facts essential to support the conclusions of law." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003). The resulting findings of fact must be "sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982). Where the trial court's findings are supported by competent evidence, they are binding on appeal, even if there is evidence which would support a finding to the contrary. *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003).

Here, the trial court's findings are not "specific ultimate facts," which are sufficient for this Court to determine that it was proper for the lower court to allow DSS to cease reunification efforts. *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (noting that "ultimate facts" are the resulting effect reached by the court's application of logical reasoning to the evidentiary facts). In this case, the trial court entered a cursory two page order. It did not incorporate any prior orders or findings of fact from those orders. Instead, the trial court incorporated a court report from DSS and a mental health report on the oldest boy as a finding of fact. In juvenile proceedings, it is permissible for trial courts to consider all written reports and materials submitted in connection with those proceedings. *In re Ivey*, 156 N.C. App. 398, 402, 576 S.E.2d 386, 390 (2003); N.C. Gen. Stat. § 7B-907(b) (2003). Despite this authority, the trial court may not delegate its fact finding duty. *Harton*, 156 N.C. App. at 660, 577 S.E.2d at 337. Consequently, the trial court should not broadly incorporate these written reports from outside sources as its findings of fact.

Furthermore, the trial court's findings of fact are insufficient to allow meaningful appellate review, in that they lack the findings required by N.C. Gen. Stat. § 7B-907(b) and N.C. Gen. Stat. § 7B-507(b) (2003). N.C. Gen. Stat. § 7B-907(b) states that at the conclusion of the hearing, if the juvenile is not to be returned home, the court must consider the factors listed and make relevant findings of fact. These factors include:

> (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) (emphasis added).

Here, the trial court found that "it is not possible for the minor to return home at this time." While it is true that the court is not expressly required to make every finding listed, it must still make those findings that are relevant to the permanency plans being developed for the children. Arguably the trial court met the criteria of numbers (2) and (5), however, it failed to meet the statutory requirements of section (1) as it neglected to state *why* it was not possible for the minors to be returned home. *See In re Ledbetter*, 158 N.C. App. 281, 286, 580 S.E.2d 392, 395 (2003) (reversing the trial court's order since it failed to explain why it was not in the child's best interest to be returned to his mother and because it did not make the findings required by section 7B-907(b)). In this case, the findings of fact do not sufficiently comply with the requirements of this statute. Furthermore, N.C. Gen. Stat. § 7B-907(c) requires that at the conclusion of a permanency planning hearing, "the judge shall make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile . . . ." N.C. Gen. Stat. § 7B-907(c) (2003). The court made no findings addressing this requirement.

The only finding which gives any indication as to why DSS should cease reunification efforts is Finding of Fact No. 6, which states "[t]he respondent parents have had no substantial change in their judgment making and concepts to adequately take care of the children." This finding alone will not support the trial court's order, as the remaining findings were either more properly classified as conclu-

sions of law or were a mere recitation of the status of the case, *i.e.* the minors were adjudicated dependant and the children's current placement was with relatives or foster care. Since the trial court's findings are not sufficiently specific to allow this Court to review its decision and determine whether the judgment was correct, and since the findings also fail to comply with the statutory requirements, we remand this matter to the district court to make appropriate findings of fact.

[2] In light of our holding on respondents' first two assignments of error, it is unnecessary to address respondents' third assignment of error. However, we do address respondents' final assignment of error since it raises an issue as to the trial court's jurisdiction. Respondents contend that since petitioner did not file a motion requesting relief from reunification efforts, the trial court was without jurisdiction to cease reunification efforts.

The order which is the subject of this appeal was entered after a permanency planning hearing conducted pursuant to N.C. Gen. Stat. § 7B-907. N.C. Gen. Stat. § 7B-907(a) provides that a permanency planning hearing shall be held within twelve months after the initial order removing custody, with subsequent planning hearings to be held at least every six months. N.C. Gen. Stat. § 7B-907(a) (2003). The purpose of the hearings is to "review the progress made in finalizing the permanent plan for the juvenile, or if necessary, *to make a new permanent plan for the juvenile.*" *Id.* (emphasis added). This vests the trial court with the authority to modify its permanency plan for the children with respect to any aspect of that plan, including reunification or visitation. By its nature, the subsequent planning hearings do not require petitioner to file a new petition for each subsequent hearing, as the statute mandates that the lower court hold such a hearing at least every six months. Furthermore, our Supreme Court has held that nothing in the juvenile code, N.C. Gen. Stat. Ch. 7B, "precluded the trial court from specifying in its order in this case that DSS 'may' cease reconciliation efforts." *In re Brake*, 347 N.C. 339, 340-41, 493 S.E.2d 418, 419-20 (1997).

N.C. Gen. Stat. § 7B-200(a) provides that "[t]he court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a) (2003). Once the court obtains jurisdiction over a juvenile, that "jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated . . . ." N.C. Gen. Stat. § 7B-201 (2003). When petitioner

filed its petition alleging the minors to be neglected, the district court obtained jurisdiction over the matter.

[3] By this same assignment of error, respondents contend they did not receive notice of the permanency planning hearing as required by N.C. Gen. Stat. § 7B-907(a) (requiring the clerk to give fifteen days notice of the hearing to the parents). A party who is entitled to notice of a hearing waives such notice where they attend the hearing and participate in it without objecting to improper notice. *Anderson v. Anderson*, 145 N.C. App. 453, 456, 550 S.E.2d 266, 269 (2001); *Brandon v. Brandon*, 10 N.C. App. 457, 460-61, 179 S.E.2d 177, 179-80 (1971). Here, respondents and their attorneys were present at the hearing, they participated in the proceedings, and no one objected to improper notice. Thus, respondents waived any objection they might have had to improper notice. This assignment of error is without merit.

For the reasons discussed herein, we reverse the trial court's Permanency Planning Order and remand for proceedings consistent with this opinion. It is within the trial court's discretion to allow additional evidence prior to making findings of fact and conclusions of law. *See In re Anderson*, 151 N.C. App. 94, 100, 564 S.E.2d 599, 603 (2002).

REVERSED AND REMANDED.

Judges WYNN and CALABRIA concur.

ESTATE OF WORTH APPLE, ON BEHALF OF WORTH APPLE, DECEASED EMPLOYEE, AND BESSIE HUTCHINS APPLE, WIDOW OF WORTH APPLE, DECEASED EMPLOYEE, PLAINTIFF v. COMMERCIAL COURIER EXPRESS, INC., EMPLOYER; MICHIGAN MUTUAL INSURANCE COMPANY, CARRIER DEFENDANTS

No. COA03-829

(Filed 20 July 2004)

1. Workers' Compensation— death benefits—statute of limitations—determination of disability

A workers' compensation claim for death benefits was not time barred under N.C.G.S. § 97-38 where the decedent was attacked in 1994 while working as a courier, he was left in a per-

manent vegetative state, a Form 21 agreement for disability compensation was approved in 1994, and he died in 2001, more than six years after his injury and more than two years from the Form 21 filing. While a Form 21 is a method for establishing disability, it does not always constitute a final award; in this case, the decedent's condition was uncertain and the Form 21 was a preliminary agreement for disability payments rather than a final determination of disability. That occurred in a separate claim on 19 April 2001, and death occurred within two years of that date.

2. Workers' Compensation— attorney fees—determination of issue required

The Industrial Commission errs by failing to rule on attorney fees when the issue has been raised. In this case, the motion was for attorney fees under N.C.G.S. § 97-88; while the Commission ruled on attorney fees under N.C.G.S. § 97-88.1, the statutes provide separate grounds and the case was remanded for a determination of the issue under N.C.G.S. § 97-88.

Appeal by plaintiff and defendants from an opinion and award entered 13 February 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 March 2004.

R. James Lore for plaintiff-appellant.

Carruthers & Roth, P.A., by Norman F. Klick, Jr. and J. Patrick Haywood, for defendant-appellants.

HUNTER, Judge.

Commercial Courier Express, Inc. ("CCE") and Michigan Mutual Insurance Company (collectively "defendants") appeal from an opinion and award of the Full Commission of the North Carolina Industrial Commission ("the Commission") filed 13 February 2003 awarding death benefits to Bessie Hutchins Apple ("plaintiff") as widow of Worth Apple ("Apple"). Plaintiff also appeals. Because Apple's death occurred within two years of the final determination of disability, plaintiff was eligible to receive death benefits, and we therefore affirm that portion of the opinion and award of the Commission. We, however, remand this case to the Commission for a determination of whether plaintiff is entitled to attorneys' fees under N.C. Gen. Stat. § 97-88.

The undisputed facts of this case establish that on 4 August 1994, Apple, who was 77 years old, was working as a courier for CCE. Apple was brutally attacked and robbed while making a delivery. During the attack, he was struck in the head with a hammer and, as a result, suffered severe head injuries leaving him in a persistent vegetative state.

On 6 September 1994, defendants filed a Form 19 Employer's Report of Injury to Employee. This report noted that the probable length of Apple's disability was "unknown." On 20 October 1994, the Commission approved a Form 21 Agreement for Compensation for Disability. This Form 21 Agreement stated that disability compensation would be paid continuing for "[n]ecessary weeks" and the parts of the form regarding Apple's return to work were left blank.

Apple reached the point of maximum medical improvement between 10 March 1995 and 13 March 1995, but remained permanently and totally disabled. On 15 March 2000, defendants filed a Form 33 Request for Hearing in Apple's separate disability benefits claim alleging that plaintiff had refused to enter into a Form 26 agreement regarding the date of the onset of Apple's disability.[1] Apple died from complications stemming from his injuries on 14 January 2001. Plaintiff filed the present claim for death benefits on 22 March 2001.

Defendants requested that the Commission deny the claim for death benefits because Apple's death had occurred more than six years after his injuries and more than two years from the entry of the Form 21 agreement. Although the parties stipulated before the Commission that Apple was totally disabled on 4 August 1994, the date of the attack, the Commission concluded that no final disability determination under N.C. Gen. Stat. § 97-38 had been made in the case until 19 April 2001, when as a result of defendant's Form 33 request for a hearing in the disability benefits claim regarding plaintiff's reluctance to enter into a Form 26, the deputy commissioner determined that Apple was totally and permanently disabled on 13 March 1995, following his maximum medical improvement. The Full Commission agreed with the deputy commissioner that total and permanent disability occurred on 13 March 1995.[2]

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1. The appeal from this related but separate disability benefits claim arising out of the same attack upon Apple is contained at *Apple v. Commercial Courier Express*, 165 N.C. App. 530, 598 S.E.2d 623 (2004).

2. We note that neither party appealed the deputy commissioner's 19 April 2001 determination that plaintiff was totally and permanently disabled as of 13 March 1995.

Because the Commission in the present case concluded that no final disability determination had been made until 19 April 2001, the Commission determined that Apple's death on 14 January 2001 occurred within two years of the final determination of disability. The Commission further concluded that plaintiff's claim was proper and awarded her benefits. The Commission also ruled that plaintiff was not entitled to attorneys' fees under N.C. Gen. Stat. § 97-88.1, but made no ruling as to plaintiff's motion for attorneys' fees under N.C. Gen. Stat. § 97-88.

The two issues on appeal are whether (I) the Form 21 agreement entered into by the parties in this case constituted a "final determination of disability," such that plaintiff was time-barred from filing a death benefits claim under the Workers' Compensation Act; and (II) the Commission erred by failing to rule on plaintiff's motion for attorneys' fees under N.C. Gen. Stat. § 97-88.

I.

[1] Defendants contend that plaintiff's claim for death benefits is time barred under N.C. Gen. Stat. § 97-38. Specifically, defendants argue that the 20 October 1994 Form 21 agreement entered into by the parties constituted a final determination of disability, and thus plaintiff's claim for death benefits filed 22 March 2001 was filed more than two years after the final disability determination. We disagree.

N.C. Gen. Stat. § 97-38 provides that:

> If death results proximately from a compensable injury or occupational disease and within six years thereafter, or within two years of the final determination of disability, whichever is later, the employer shall pay or cause to be paid [death benefits].

N.C. Gen. Stat. § 97-38 (2003). In this case, it is undisputed that Apple died more than six years following his injury, therefore we must determine whether his death occurred within two years of the final determination of disability. Defendants contend that a Form 21 agreement is a final determination of disability.

It is true that a Form 21 is "[o]ne method for establishing disability . . . ; written agreements between employers and employees using Form 21 and approved by the Commission qualify as awards of the Commission and entitle employees to a presumption of disability." *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 158-59, 542

S.E.2d 277, 281 (2001). The general rule is that a Form 21 agreement, approved by the Commission, is as " ' "binding on the parties as an order, decision or award of the Commission unappealed from." ' " *Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 77, 476 S.E.2d 434, 436 (1996) (quoting *Dalton v. Anvil Knitwear*, 119 N.C. App. 275, 282, 458 S.E.2d 251, 257 (1995)). Our Courts have, however, also recognized that under certain circumstances, a Form 21 agreement does not constitute a final award or final determination, but rather acts as a preliminary and interlocutory award. *See Pratt v. Upholstery Co.*, 252 N.C. 716, 115 S.E.2d 27 (1960); *Beard v. Blumenthal Jewish Home*, 87 N.C. App. 58, 359 S.E.2d 261 (1987). This case is analogous to both *Pratt* and *Beard*.

In *Pratt*, the North Carolina Supreme Court held that the Form 21 agreement in that case was not a final determination of the compensation to be awarded and was instead "a preliminary and interlocutory award." *Pratt*, 252 N.C. at 722, 115 S.E.2d at 33. There the Form 21 agreement stated compensation would be paid continuing " 'for legal weeks.' " *Id.* at 720, 115 S.E.2d at 32. Further, the portions of the Form 21 relating to the employee's return to work had been left blank. *Id.* In addition, the uncertainty of the nature of the employee's injuries was evidenced by the Form 25 doctor's report, which in response to an inquiry regarding the employee's permanent disability, simply had three question marks. *Id.* at 721, 115 S.E.2d at 33. The Supreme Court concluded that under these facts the Form 21 did not constitute a final determination. *Id.* at 722, 115 S.E.2d at 33.

In *Beard*, the Form 21 agreement, as in this case, stated payment would " 'continu[e] for necessary weeks.' " *Beard*, 87 N.C. App. at 60, 359 S.E.2d at 262. This Court stated that because the Form 21 answered only the preliminary questions of jurisdiction and temporary disability, it left the extent of the employee's permanent disability unresolved and thus the Form 21 was not a final determination of disability. *Id.* We concluded, therefore, that the Form 21 agreement in that case was the equivalent of an interlocutory order and not a final determination. *Id.*

In this case, in addition to the Form 21, which stated the length of payments would be for "[n]ecessary weeks," the uncertainty of Apple's condition was evidenced by the employer's report stating the probable length of disability was "unknown." Furthermore, Apple did not reach maximum medical improvement until March 1995, and there was no determination that he was "permanently and totally" disabled until the Commission's resolution of the issue in the separate

disability compensation claim, on 19 April 2001, following the filing of a Form 33 request for hearing on the issue by defendants. Perhaps the most telling indication that the parties did not consider the Form 21 to be a final determination of disability is the fact defendants later attempted to enter into a Form 26 agreement to finally establish the date of disability and subsequently sought out the Commission to determine the issue.

Therefore, under the facts of this case, we conclude the Form 21 agreement entered into by the parties in the case *sub judice* was not a final determination of disability but rather a preliminary agreement for disability payments as in *Pratt* and *Beard*. We note that our holding in no way abrogates the general rule that a Form 21 creates a presumption of disability and is to be given the same effect as an order of the Commission. Thus, the final determination of disability was made by the deputy commissioner in the separate disability benefits claim on 19 April 2001, finding total and permanent disability occurred in March 1995, from which neither party appealed. Since Apple's death occurred on 14 January 2001, it occurred within two years of the final determination of disability in this case. Accordingly, plaintiff's claim for death benefits was not time barred under N.C. Gen. Stat. § 97-38. Thus, we affirm that portion of the Commission's opinion and award.

II.

[2] Plaintiff assigns error to the Commission's failure to rule on her motion for attorneys' fees under N.C. Gen. Stat. § 97-88. Where the issue has been raised before the Commission, it is error for the Commission to fail to rule on whether attorneys' fees should be awarded. *See Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 358, 581 S.E.2d 778, 789 (2003). In this case, the Commission did rule under N.C. Gen. Stat. § 97-88.1, whether plaintiff was entitled to attorneys' fees. N.C. Gen. Stat. § 97-88, however, provides a separate legal ground for an award of attorneys' fees, *see id.*, and the Commission made no findings or conclusions with regard to this ground. Accordingly, we remand this case to the Commission for a determination as to whether plaintiff is entitled to attorneys' fees under N.C. Gen. Stat. § 97-88.

Affirmed in part and remanded in part.

Judges WYNN and TYSON concur.

MICHAEL T. WINBUSH, PETITIONER v. WINSTON-SALEM STATE UNIVERSITY, RESPONDENT

No. COA03-891

(Filed 20 July 2004)

1. **Public Officers and Employees— university coach—jurisdiction to hear petition to reinstate duties**

The superior court did not err by concluding that the Office of Administrative Hearings (OAH) and State Personnel Commission (SPC) had jurisdiction to hear the petition seeking to reinstate petitioner's duties as Assistant Football Coach and Head Women's Softball Coach at Winston-Salem State University, because: (1) an employee petition filed with the OAH that alleges the employee has been dismissed, demoted, or suspended without just cause is sufficient to invoke the jurisdiction of the OAH and SPC; and (2) in this case petitioner alleged he had been discharged without just cause or reassigned without just cause when he was relieved of his athletic duties and privileges by respondent's Athletics Director, thus alleging a discharge or demotion.

2. **Public Officers and Employees— university coach—demotion or discharge**

The superior court erred by concluding petitioner had been demoted or discharged from his coaching duties in violation of N.C.G.S. § 126-34.1(a)(1), because: (1) at most, the evidence shows a reassignment as petitioner claims to have lost his more significant coaching responsibilities; (2) a demotion is defined as a lowering in rank, position, or pay, and in the instant case petitioner's paygrade remained the same; and (3) as the promised raise in salary had not yet come into effect at the time of his reassignment, petitioner has also failed to show a demotion through a decrease in pay.

Appeal by respondent from order filed 17 March 2003 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 17 March 2004.

Elliot Pishko Morgan, P.A., by Robert M. Elliot, for petitioner-appellee.

Attorney General Roy Cooper, by Assistant Attorneys General Joyce S. Rutledge, for respondent-appellant.

BRYANT, Judge.

Winston-Salem State University (respondent) appeals a superior court order filed 17 March 2003 reversing an order by the State Personnel Commission (SPC) and ordering the reinstatement of Michael T. Winbush (petitioner) to his duties as Assistant Football Coach and Head Women's Softball Coach.

On 2 October 2000, petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings (OAH). The petition alleged petitioner had been discharged or reassigned from his coaching duties without just cause. Attached to the petition was a statement by petitioner that he had been "relieved of [his] athletic duties and privileges effective June 30, 2000" by respondent's Athletics Director. In a recommended decision, the administrative law judge (ALJ) who initially heard the case concluded: (1) the OAH had "jurisdiction over this contested matter" and (2) petitioner was demoted without just cause. The SPC, however, rejected the ALJ's findings of fact and conclusions of law as "erroneous as a matter of law." In rejecting the ALJ's recommended decision in its entirety, the SPC stated: "The Commission finds that neither the ALJ nor the Commission have jurisdiction under Chapter 126 over [p]etitioner's complaint, as an employee subject to the State Personnel Act, that he was not assigned the job duties of his choice, i.e. specifically certain coaching duties and responsibilities." Petitioner appealed the SPC ruling to the superior court.

In an order filed 17 March 2003, the superior court in turn reversed the SPC decision, finding jurisdiction and making the following pertinent findings of fact:

> 33. As a result of the disciplinary action . . . , [petitioner] did not receive the 10% raise in salary in July[] 2000, which he had been told that he would receive for his coaching accomplishments.
>
> . . . .
>
> 35. [Petitioner] is still employed at WSSU as a recreation worker, and his pay[]grade has not changed. [Petitioner] was hired as a coach, has excelled as a coach and has developed a reputation as an excellent coach; however, he has not been allowed to coach at WSSU since June 30, 2000.

The superior court concluded petitioner had been demoted or discharged for disciplinary reasons without just cause from his position

as coach. The superior court also concluded that petitioner had been denied a 10% pay raise for his coaching responsibilities.

The issues are whether: (I) the allegations in the petition invoked the jurisdiction of the OAH and SPC and (II) the superior court erred in concluding petitioner had been demoted or discharged from his coaching duties in violation of N.C. Gen. Stat. § 126-34.1(a)(1).

I

[1] The rights of university employees to challenge any employment action in the OAH arise solely from the State Personnel Act (SPA). *University of North Carolina v. Feinstein*, 161 N.C. App. 700, 703, 590 S.E.2d 401, 402 (2003). Thus, the OAH's jurisdiction over appeals of university employee grievances is confined to the limits established by the SPA. *Id.* at 703, 590 S.E.2d at 403. In 1995, N.C. Gen. Stat. § 126-34.1 was enacted to specifically define the types of employee appeals that constitute contested case issues of which the OAH may hear. *Id.*; N.C.G.S. § 126-34.1(a) (2003) (explicitly stating that State employees may file in the OAH "only as to the following personnel actions or issues").

N.C. Gen. Stat. § 126-34.1 provides in pertinent part that a State employee or former State employee has the right to challenge his "[d]ismissal, demotion, or suspension without pay based upon an alleged violation of G.S. 126-35, if the employee is a career State employee."[1] N.C.G.S. § 126-34.1(a)(1) (2003). Pursuant to N.C. Gen. Stat. § 126-35, "[n]o career State employee subject to the [SPA] shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C.G.S. § 126-35(a) (2003). Therefore, an employee petition filed with the OAH that alleges the employee has been dismissed, demoted, or suspended without just cause is sufficient to invoke the jurisdiction of the OAH and SPC. *See Campbell v. N.C. Dep't of Transp.*, 155 N.C. App. 652, 660, 575 S.E.2d 54, 60 (for claim under N.C. Gen. Stat. § 126-34.1, "[j]urisdiction rests on the allegations of the petitioner"), *disc. review denied*, 357 N.C. 62, 579 S.E.2d 386 (2003); *see also Batten v. N.C. Dep't of Correction*, 326 N.C. 338, 346-47, 389 S.E.2d 35, 41 (1990) (holding that the mere "allegation that an employee has been 'demoted in rank without sufficient cause' invokes . . . the jurisdiction of the State Personnel Commission [and] that of the OAH"), *disapproved of on other grounds by Empire Power Co. v. N.C. Dep't of E.H.N.R.*, 337 N.C. 569, 447 S.E.2d 768

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1. The parties do not dispute that petitioner qualifies as a career State employee.

(1994); *Fearrington v. University of North Carolina*, 126 N.C. App. 774, 781, 487 S.E.2d 169, 174 (1997) ("[t]he Commission has jurisdiction to review[, *inter alia*,] appeals involving government employees subject to the Personnel Act where an employee was . . . discharged, suspended or demoted for disciplinary reasons without just cause").

In this case, the petition filed by petitioner alleged he had been discharged without just cause or reassigned without just cause when he was "relieved of [his] athletic duties and privileges effective June 30, 2000" by respondent's Athletics Director. Under our liberal rules of construction for allegations raised in a party's pleading, the petition thus *alleges* either a discharge or demotion. *See* N.C.G.S. § 1A-1, Rule 8(f) (2003) (the allegations in a pleading must be liberally construed so "as to do substantial justice"); *Black's Law Dictionary* 444 (7th ed. 1999) (to "demote" is defined as "[t]o lower in rank, position, or pay"). Accordingly, the superior court properly concluded that the OAH and SPC had jurisdiction to hear the petition.

II

[2] We next consider whether the superior court erred in concluding that petitioner had been demoted or discharged from his coaching duties in violation of N.C. Gen. Stat. § 126-34.1(a)(1).

The evidence establishes that petitioner was neither dismissed nor demoted from his respondent employment. In 1994, respondent's Student Affairs Department hired petitioner to fill the position of "Recreation Worker II." Petitioner's annual salary was $22,557.00, which was equivalent to a "paygrade 64" on the N.C. State Salary Schedule. As a respondent employee, petitioner's primary responsibility was to coach football and women's softball. In April 2000, petitioner was commended for his coaching accomplishments and told he would receive an additional 10% raise in salary effective 1 July 2000.

In June 2000, a dispute arose over petitioner's coaching performance: Petitioner had organized a youth football camp to occur on 18 and 19 June 2000. After having scheduled the football camp, petitioner learned he was required to attend a respondent staff retreat on 17 and 18 June 2000. Petitioner made arrangements for his staff to operate the football camp while he attended the required respondent staff retreat. However, against the instructions of his supervisor, petitioner failed to obtain prior, written approval to conduct the football camp. Consequently, effective 1 July 2000 petitioner was removed

from his coaching duties and began serving as intramural coordinator, without change to his paygrade or Recreation Worker II status. In addition, he failed to receive the promised raise in salary for his coaching accomplishments.

This evidence shows petitioner was neither dismissed nor demoted in his Recreation Worker II position at respondent. At most, the evidence speaks to a reassignment, as petitioner claims to have lost his more significant coaching responsibilities. "Because petitioner [is] a permanent State employee, it is well-settled that he [has] a 'property interest of continued employment created by state law and protected by the Due Process Clause.' " *Nix v. Dep't of Administration*, 106 N.C. App. 664, 666, 417 S.E.2d 823, 825 (1992) (citation omitted). That interest "does not extend to the right to possess or retain a particular job or to perform particular services." *Fields v. Durham*, 909 F.2d 94, 98 (4th Cir. 1990), *cert. denied*, 498 U.S. 1068, 112 L. E. 2d 849 (1991); *Babb v. Harnett County Bd. of Education*, 118 N.C. App. 291, 454 S.E.2d 833 S.E.2d 184 (rejecting plaintiff's argument that under contract and the State Constitution he had a protected property interest in being assigned coaching duties), *disc. rev. denied*, 340 N.C. 358, 458 S.E.2d 184 (1995).

As previously stated, a demotion is defined as a "lower[ing] in rank, position, or pay," *Black's Law Dictionary* 444. Rank is defined as "relative standing or position" within a group. *Webster's Third New International Dictionary* 1881 (3d ed. 1966). A reduction in position under the SPA has been construed by this Court to mean the placement of an employee "in a lower paygrade." *Gibbs v. Dept. of Human Resources*, 77 N.C. App. 606, 611, 335 S.E.2d 924, 927 (1985) (rejecting a petitioner's contention that she had been demoted under the SPA when she was reassigned to a position with fewer responsibilities but which was subject to the same paygrade). In the instant case, petitioner's paygrade remained the same. Furthermore, as the promised raise in salary had not yet come into effect at the time of his reassignment, petitioner has also failed to show a demotion through a decrease in pay. As such, petitioner was neither discharged nor demoted and is not entitled to relief under the SPA. Accordingly, the superior court erred in concluding that petitioner had been discharged without just cause.

Affirmed in part, reversed in part.

Judges McCULLOUGH and ELMORE concur.

JOSEPH WAYNE LEE, PLAINTIFF v. R & K MARINE, INC., DEFENDANT

No. COA03-1145

(Filed 20 July 2004)

1. Statutes of Limitation and Repose— breach of contract— sale of boat—dispute over date of delivery

The trial court erred by granting defendant's motion for summary judgment on a breach of contract claim arising from the sale of a boat where there was a dispute as to the date of delivery (when the breach occurred and the claim accrued).

2. Warranties— disclaimer—effective

Defendant effectively disclaimed any and all warranties of merchantability and fitness for a particular purpose, and the trial court did not err by granting summary judgment for defendant on plaintiff's breach of warranty claim for a defective boat.

Appeal by plaintiff from order entered 16 July 2003 by Judge Ripley E. Rand in Wake County Superior Court. Heard in the Court of Appeals 19 May 2004.

Browne, Flebotte, Wilson & Horn, PLLC, by Aaron C. Hemmings and Rachel Lea Hunter, for plaintiff-appellant.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Reid Russell, for defendant-appellee.

TYSON, Judge.

Joseph Wayne Lee ("plaintiff") appeals from the trial court's order granting R & K Marine, Inc.'s ("defendant") motion for summary judgment. We affirm in part, reverse in part, and remand.

I. Background

In December 1998, plaintiff purchased a 1999 Sea Ox boat ("the boat") from defendant. Plaintiff and a representative of defendant signed the Standard Marine Purchase Agreement ("purchase agreement") on 18 December 1998. Paragraph 9 of the Additional Terms and Conditions on the back of the purchase agreement stated in all capital letters, "EXCEPT TO THE EXTENT REQUIRED BY STATE LAW, SELLER EXPRESSLY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE."

Delivery of the boat to plaintiff took place some time after the execution of the purchase agreement. The parties dispute the date the boat was delivered to plaintiff.

In January 2002, plaintiff took the boat in for repairs. Cracks and massive deterioration were discovered in the hull. Plaintiff contracted with an appraiser, who determined the cracks and deterioration were due to manufacturing defects and the hull could not be repaired. Plaintiff was informed the manufacturer of the boat had ceased doing business, filed for bankruptcy, and was in prison for fraud. Plaintiff brought suit against defendant claiming breach of contract and breach of the warranties of merchantability and fitness for a particular purpose. Defendant moved for summary judgment on 9 May 2003. After hearing oral arguments and reviewing affidavits submitted by each party, the trial court granted defendant's motion. Plaintiff appeals.

II. Issues

The issues are whether the trial court erred in granting: (1) defendant's motion for summary judgment on plaintiff's breach of contract claim and holding plaintiff was barred by the statute of limitations set forth in the North Carolina Uniform Commercial Code, N.C. Gen. Stat. § 25-2-725; and (2) defendant's motion for summary judgment on plaintiff's claim for breach of warranty holding that defendant effectively disclaimed the warranties of merchantability and fitness for a particular purpose.

III. Statute of Limitations for Breach of Contract

[1] Plaintiff contends the trial court erred in granting defendant's motion for summary judgment regarding plaintiff's breach of contract claim and asserts issues of material fact existed regarding the date of the delivery of the boat. We agree.

> The standard of review on appeal from the granting of a motion for summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. The moving party has the burden of establishing the lack of any triable issue of fact. A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, 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. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist. 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 v. Harnett Cty. Bd. of Educ., 158 N.C. App. 705, 707-08, 582 S.E.2d 343, 345 (2003), *aff'd*, 358 N.C. 137, 591 S.E.2d 520, *reh'g denied*, 358 N.C. 381, 597 S.E.2d 129 (2004) (internal citations omitted); *see Herring v. Liner*, 163 N.C. App. 534, 594 S.E.2d 117 (2004); *Kampschroeder v. Bruce*, 162 N.C. App. 180, 590 S.E.2d 333 (2004); *Trivette v. State Farm Mut. Auto. Ins. Co.*, 164 N.C. App. 680, 596 S.E.2d 448 (2004); *McGlynn v. Duke University*, 165 N.C. App. 250, 598 S.E.2d 424 (2004); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003).

The Uniform Commercial Code ("UCC"), codified in N.C. Gen. Stat. § 25-2-102 (2003), applies to all transactions in goods. N.C. Gen. Stat. § 25-2-725 (2003) states:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, *regardless of the aggrieved party's lack of knowledge of the breach.* A breach of warranty occurs when tender of delivery is made . . . .

(emphasis supplied).

Here, plaintiff contracted to buy the boat from defendant in 1998. On 18 December 1998, both parties signed a standard purchase agreement. The boat was actually delivered to plaintiff at some period of time after the purchase agreement was signed. At the summary judgment hearing, both parties presented evidence regarding the date of the boat's delivery. Defendant claims the boat was delivered on 18 December 1998. Plaintiff claims the boat was delivered sometime after 25 December 1998. Plaintiff also presented an affidavit stating that defendant was not in possession of the boat until 21 December 1998.

In January 2002, plaintiff took the boat in for repairs. After interior components of the boat were removed, massive cracks and deterioration of the hull of the boat were discovered. The appraiser determined these defects occurred in the manufacturing process where the fiberglass had not bonded correctly. Plaintiff was not aware of these defects until January 2002.

A breach of contract action does not accrue until the breach occurs. N.C. Gen. Stat. § 25-2-725(2). Although both parties signed the purchase agreement setting out their rights and obligations on 18 December 1998, the breach could not and did not occur until defendant actually delivered the boat that was different from what plaintiff and defendant agreed upon in the purchase agreement. Once plaintiff received the defective boat under the purchase agreement, his right to sue for breach of contract accrued. Plaintiff had four years from this date to file his claim. N.C. Gen. Stat. § 25-2-725(1). The trial court found that plaintiff failed to meet the statute of limitations for his breach of contract action by two days. However, genuine issues of fact exist regarding the date the boat was actually delivered to plaintiff. Plaintiff claims it was delivered after 25 December 1998, and that defendant was not in possession of the boat until 21 December 1998. Defendant claims the boat was delivered on 18 December 1998, the same day the purchase agreement was signed.

As the date of delivery is disputed and is pertinent in determining when plaintiff's claim for breach of contract accrues, the trial court erred in granting summary judgment. The merits of this issue should be fully tried.

IV. Disclaimer of Warranties of Merchantability and Fitness for a Particular Purpose

[2] Plaintiff also contends that the trial court erred in granting defendant's motion for summary judgment regarding plaintiff's breach of warranty claim. We disagree.

N.C. Gen. Stat. § 25-2-316(2) (2003) provides, "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous." N.C. Gen. Stat. § 25-1-201(10) (2003) defines the term "conspicuous" as:

> A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to

> have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger *or* other contrasting type or color.

(emphasis supplied).

Here, the reverse side of the purchase agreement contained a disclaimer that read, "EXCEPT TO THE EXTENT REQUIRED BY STATE LAW, SELLER EXPRESSLY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE." This disclaimer was printed in all capital letters with the surrounding print in lower-case letters. The language specifically mentioned both the warranties of merchantability and fitness for a particular purpose. N.C. Gen. Stat. § 25-2-316(2). Further, there were at least five different references on the front of the purchase agreement notifying plaintiff of the terms and conditions listed on the back of the purchase agreement.

The disclaimer met all the requirements of N.C. Gen. Stat. § 25-1-316(2), and was conspicuous as defined by N.C. Gen. Stat. § 25-1-201(1). Defendant effectively disclaimed any and all warranties of merchantability and fitness for a particular purpose. The trial court did not err in granting defendant's motion for summary judgment on plaintiff's breach of warranty claim.

V. Conclusion

Plaintiff failed to show the trial court erred by granting defendant's motion for summary judgment regarding the breach of warranty claim. That portion of the trial court's order is affirmed. Genuine issues of material fact exist regarding the date the boat was delivered to plaintiff. As this date determines when plaintiff's breach of contract claim accrued, the trial court erred in granting summary judgment. This issue should be tried on its merits. That portion of the trial court's order granting summary judgment regarding plaintiff's breach of contract claim is reversed and remanded.

Affirmed in part, reversed in part, and remanded.

Judges McGEE and TIMMONS-GOODSON concur.

ESTATE OF WORTH APPLE, ON BEHALF OF WORTH APPLE, DECEASED EMPLOYEE, AND BESSIE HUTCHINS APPLE, WIDOW OF WORTH APPLE, DECEASED EMPLOYEE, PLAINTIFF V. COMMERCIAL COURIER EXPRESS, INC., EMPLOYER; MICHIGAN MUTUAL INSURANCE COMPANY, CARRIER DEFENDANTS

No. COA03-850

(Filed 20 July 2004)

Workers' Compensation— past due medical expenses owed to third-party medical provider—standing

An employee's estate has no standing to bring a claim for past due medical expenses owed to a third-party medical provider by defendant employer in a compensable workers' compensation claim because: (1) the medical provider has made no claim for relief before the Commission; and (2) plaintiff has made no showing that the failure to make payment results in injury in fact.

Appeal by plaintiff from an opinion and award entered 13 February 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 March 2004.

R. James Lore for plaintiff-appellant.

Carruthers & Roth, P.A., by Norman F. Klick, Jr. and J. Patrick Haywood, for defendant-appellees.

HUNTER, Judge.

The Estate of Worth Apple ("plaintiff") appeals an Opinion and Award of the Full Commission of the North Carolina Industrial Commission filed 13 February 2003 ruling that Commercial Courier Express, Inc. ("CCE") and Michigan Mutual Insurance Company (collectively "defendants") were not responsible for additional payments for rehabilitation care of Worth Apple ("Apple"). Because we conclude plaintiff lacks standing to bring this claim, we must vacate that portion of the Commission's Opinion and Award.

This case stems from the same facts as *Apple v. Commercial Courier Express, Inc.*, 165 N.C. App. 514, 598 S.E.2d 625 (2004). Apple was working as a courier for CCE when he was attacked and hit in the head with a hammer in August 1994. He remained in a persistent vegetative state until his death in January 2001. This appeal solely involves a claim by plaintiff that defendants failed to pay

$160,000.00 in accrued medical expenses to Winston-Salem Rehabilitation and Healthcare Center ("W-S Rehab") pursuant to a Form 21 agreement entered into by the parties.

W-S Rehab did not intervene in the action and the record in this case reveals W-S Rehab accepted a reduced payment of $50,000.00 as payment in full for services rendered to Apple and the account was settled to the satisfaction of W-S Rehab. On this issue, the Commission concluded, *inter alia*:

> 3. As a result of decedent's compensable injury, decedent was entitled to have defendants provide all necessary medical treatment arising from his compensable injury to the extent it tended to effect a cure, give relief or lessen decedent's disability. . . . Plaintiff failed to establish . . . that defendants have failed to pay the agreed reimbursement for the reasonable services provided by W-S Rehab.
>
> 4. [W-S Rehab] is estopped to request further compensation after accepting the $50,0000 payment as a full accord and satisfaction of the claim or potential claim for unpaid medical services. . . .

Thus, in the award portion of the opinion and award, the Commission stated: "Defendants are not responsible for payment of any additional monies to W-S Rehab for the care of decedent . . . ."

Although the Commission ruled in favor of defendants on the merits of the case primarily on the ground of accord and satisfaction between defendants and W-S Rehab, the dispositive issue before us on appeal is whether plaintiff even has standing to assert the non-payment of medical expenses by his employer to a third-party provider.

If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim. *See Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002). Standing consists of three main elements:

> "(1) 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Id. at 114, 574 S.E.2d at 52 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 364 (1992)). The issue of standing generally turns on whether a party has suffered injury in fact. *See id.*

In this case, plaintiff has made no showing that injury in fact has resulted or will result if defendants are not required to pay W-S Rehab the full $160,000.00. First of all, there is no outstanding debt to W-S Rehab to be collected as evidenced by W-S Rehab's own correspondence. Further, even if there was an outstanding debt, W-S Rehab is barred by law from attempting to collect any such debt from plaintiff. *See* N.C. Gen. Stat. § 97-88.3(c) (2003) (class 1 misdemeanor for a healthcare provider to knowingly hold an employee responsible for medical expenses incurred as a result of a compensable injury); *see also* N.C. Gen. Stat. § 97-90(e) (2003) (a health care provider shall not pursue a private claim against an employee for costs of treatment unless claim is adjudicated not compensable). In addition, the sole and exclusive remedy for a healthcare provider seeking payment from an employer in a compensable claim is to apply for relief from the Commission. *See Palmer v. Jackson*, 157 N.C. App. 625, 634-35, 579 S.E.2d 901, 908 (2003), *disc. review improvidently allowed*, 358 N.C. 373, 595 S.E.2d 145 (2004). No such application was made in this case.

As such, we conclude plaintiff has no standing to bring a claim for past due medical expenses owed to a third-party medical provider by an employer in a compensable workers' compensation claim where (1) the medical provider has made no claim for relief before the Commission, and (2) plaintiff has made no showing that the failure to make payment results in injury in fact.[1] Accordingly, the portion of the opinion and award of the Commission addressing this issue, as

1. To the extent that plaintiff impliedly asserts in this appeal that defendants' failure to make full payment led to a reduction in the standard of care provided by W-S Rehab to Apple, plaintiff's recourse was not to force payment by defendants, but was instead under N.C. Gen. Stat. § 97-25, which provides that the "Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer . . . ." N.C. Gen. Stat. § 97-25 (2003). Furthermore, if plaintiff believed the care given to Apple by W-S Rehab was legally substandard, the proper remedy would have been to pursue a potential tort action against W-S Rehab outside of the workers' compensation regime.

contained in paragraphs 3 and 4 of the Commission's conclusions of law and paragraph 3 of the award, must be vacated.[2]

Vacated in part.

Judges WYNN and TYSON concur.

IN THE MATTER OF: S.S.T.

No. COA03-990

(Filed 20 July 2004)

Evidence; Juveniles— prior juvenile delinquency adjudications—admissible in subsequent adjudications

Evidence of prior juvenile delinquency adjudications was properly admitted to impeach the juvenile's credibility in a subsequent adjudication proceeding. The clear intent of the legislature in adopting N.C.G.S. § 8C-1, Rule 609(d) and N.C.G.S. § 7B-3201(b) was to provide that a prior juvenile adjudication is admissible in a juvenile proceeding where the juvenile takes the stand in his own defense, even though that evidence is not admissible in a criminal case.

Appeal by juvenile from an order entered 19 March 2003 by Judge Avril U. Sisk in Mecklenburg County District Court. Heard in the Court of Appeals 24 May 2004.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Margaret P. Eagles, for petitioner-appellee.

Russell J. Hollers III, for respondent-appellant.

HUNTER, Judge.

S.S.T. ("juvenile") appeals from an order dated 19 March 2003 adjudicating him as a delinquent juvenile based on a finding that he committed the offenses of disorderly conduct, resisting, obstructing and/or delaying an officer, and assault on a govern-

2. We note the remaining issues dealt with by the Commission regarding indemnity compensation to plaintiff are not before us on appeal and thus, this decision does not address the remaining portion of the Commission's opinion and award.

ment officer/employee. As a consequence, a dispositional order was filed on 14 March 2003, requiring juvenile to serve 12 months of supervised probation and perform 100 hours of community service. We conclude that evidence of juvenile's prior juvenile adjudications was properly admitted to impeach juvenile's credibility under N.C. Gen. Stat. § 7B-3201(b) and affirm the adjudication order.

Juvenile denied the allegations of the petition and, accordingly, a juvenile hearing was conducted. During cross-examination of the juvenile by the State during the adjudication phase of the proceeding, the prosecutor inquired if juvenile had been adjudicated delinquent on three prior occasions. These prior adjudications included one for assault, a second consisting of one assault on school personnel and a simple assault, and a third for communicating threats. Juvenile, through counsel, did not object to this questioning. Juvenile admitted these prior offenses.

The dispositive issue in this case is whether it was error to admit evidence of the prior juvenile adjudications as impeachment evidence.[1]

In a juvenile delinquency proceeding, "[i]f the juvenile denies the allegations of the petition, the court shall proceed in accordance with the rules of evidence applicable to criminal cases." N.C. Gen. Stat. § 7B-2408 (2003). Rule 609 of the North Carolina Rules of Evidence provides for the admissibility of prior criminal convictions to attack the credibility of a witness. *See* N.C. Gen. Stat. § 8C-1, Rule 609 (2003). Under this rule, "[e]vidence of juvenile adjudications is generally not admissible . . . ." N.C. Gen. Stat. § 8C-1, Rule 609(d). The juvenile code, however, expressly and specifically provides that "in any delinquency case if the juvenile is the defendant and chooses to testify . . . , the juvenile may be ordered to testify with respect to whether the juvenile was adjudicated delinquent." N.C. Gen. Stat. § 7B-3201(b) (2003).

Even though N.C. Gen. Stat. § 7B-3201 deals with the effect of expunction of juvenile records, the plain language of subsection (b) of that statute by its clear and unambiguous language applies to *any* juvenile delinquency case, not just those in which a juvenile is questioned about an adjudication which has been expunged. Therefore, a juvenile in a delinquency proceeding who takes the stand in his own defense, as in this case, is subject to being cross-examined about

1. Because we conclude admission of these prior adjudications was not error, we do not need to address whether their admission was plain error.

prior delinquency adjudications under N.C. Gen. Stat. § 7B-3201, notwithstanding Rule 609(d) of the Rules of Evidence. This is supported by a brief review of the statutory history behind both N.C. Gen. Stat. § 7B-3201 and Rule 609(d) of the Rules of Evidence.

N.C. Gen. Stat. § 7B-3201 was originally enacted as N.C. Gen. Stat. § 7A-601, *see* 1979 N.C. Sess. Laws ch. 815, § 1, and later codified at N.C. Gen. Stat. § 7A-677. Under the original statute, evidence of a prior juvenile delinquency adjudication was admissible against a juvenile who took the stand as a defendant in both criminal and delinquency proceedings. *See State v. Baker*, 312 N.C. 34, 46, 320 S.E.2d 670, 678 (1984). When the current rules of evidence were adopted by our legislature in 1983, *see* 1983 Sess. Laws ch. 701 § 1, they included Rule 609(d) providing that in general juvenile adjudications were not admissible, *see* N.C. Gen. Stat. 8C-1, Rule 609(d). The exception to this rule provided, as it still does, that a trial court may

> in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

N.C. Gen. Stat. § 8C-1, Rule 609(d). Commentary to Rule 609 urged the legislature to amend then N.C. Gen. Stat. § 7A-677 to conform to this rule. *See* N.C. Gen. Stat. § 8C-1, Rule 609, official commentary, (2003). The legislature subsequently amended former Section 7A-677 to omit the reference to criminal cases, but left prior juvenile adjudications admissible in juvenile delinquency proceedings against a juvenile taking the stand. *See* 1984 N.C. Sess. Laws ch. 1037, § 7. Section 7A-677 was then re-codified in our current juvenile code at N.C. Gen. Stat. § 7B-3201. *See* 1998 Sess. Laws ch. 202, § 6.

Thus, the clear intent of our legislature in adopting Rule 609 and Section 7B-3201(b) was to provide that although evidence of a prior juvenile adjudication is not admissible in a criminal case, evidence of a prior juvenile adjudication is admissible in a juvenile proceeding where the juvenile takes the stand in his own defense. In the case *sub judice*, juvenile took the stand in his own defense. Therefore, in this case it was not error to admit evidence of juvenile's prior adjudications.[2]

2. We note that the Arizona Court of Appeals reached a different conclusion, holding that admission of prior juvenile adjudications to impeach a juvenile was error, that decision, however, was made solely under Rule 609(d). *See In re Anthony H.*, 994 P.2d 407, 409 (Ariz. App. 1999).

As a practical matter, allowing the admission of a juvenile's prior delinquency adjudications as impeachment evidence under N.C Gen. Stat. § 7B-3201(b) is logical for two reasons. First, it is only reasonable, in the limited setting of a juvenile delinquency proceeding, that the State be allowed to impeach the credibility of a juvenile who takes the stand in his own defense with the juvenile's prior adjudications for committing criminal offenses, in the same way that the credibility of a defendant in a criminal proceeding may be impeached with prior convictions for those same criminal offenses. Second, as juvenile delinquency proceedings are conducted by bench trial, it is presumed that the trial court will only consider competent evidence, *see In re Morales*, 159 N.C. App. 429, 433, 583 S.E.2d 692, 694 (2003), thus mitigating any possibility that the prior adjudications would be considered for an improper purpose.

Juvenile also argues that it was error for the prosecutor to recite details of the prior adjudications in cross-examining him. A review of the transcript, however, shows that the prosecutor simply refreshed juvenile's memory by naming the victim of one of the simple assaults and the victim of the communicating threats adjudication as well as the fact that it involved a death threat. *See State v. White*, 349 N.C. 535, 554-55, 508 S.E.2d 253, 265-66 (1998) (not error under Rule 609 to recite certain factual elements of prior convictions in order to jog a defendant's memory). Accordingly, we conclude there was no error and affirm the adjudication of delinquency.

Affirmed.

Chief Judge MARTIN and Judge TIMMONS-GOODSON concur.

IN THE MATTER OF: J.N.S., A MINOR CHILD

No. COA03-1097

(Filed 20 July 2004)

1. Termination of Parental Rights— prior dependency adjudication—allegations of neglect—not binding

In a termination of parental rights proceeding, a prior adjudication that the child was dependent was an adjudication only of dependency, despite allegations of neglect, and was binding only for the time frame of that order.

2. Termination of Parental Rights— summary judgment—not allowed

The General Statutes contain no provision allowing use of summary judgment in a juvenile proceeding. Moreover, the requirement in N.C.G.S. § 7B-1109(e) that the court take evidence and make findings in a termination of parental rights proceeding is incompatible with summary judgment.

Appeal by respondent from order filed 4 June 2003[1] by Judge Robert M. Brady in Catawba County District Court. Heard in the Court of Appeals 28 April 2004.

J. David Abernethy for petitioner-appellee Catawba County Department of Social Services.

Wesley E. Starnes for respondent-appellant.

BRYANT, Judge.

C.T.J.B. (respondent) appeals an order filed 4 June 2003 denying her motion for partial summary judgment. On 26 November 2002, the Catawba County Department of Social Services (petitioner) filed a petition to terminate respondent's parental rights over her minor son (the child). The petition alleged respondent had: (1) neglected the child and (2) willfully left him in foster care for more than twelve months without showing to the satisfaction of the trial court that reasonable progress under the circumstances had been made in correcting the conditions that led to the child's removal. The petition further stated that "a [c]ourt [o]rder [had previously been] entered on or about the 5th day of April 2000, upon which the minor child was found to be [a] dependent child." The 5 April 2000 order, which indicated that respondent had consented to an adjudication of the child as dependent, was attached to the petition.

On 12 March 2003, respondent filed a motion for partial summary judgment, contending:

1. That a consent order for Consolidated Order of Adjudication and Disposition was entered on April 5, 2000.

2. That the order was a "settlement and consent" which was "based upon the verified [p]etition" filed in the action.

1. The caption has been altered to show only the juvenile's initials. Similarly, respondent's name has been reduced to initials to protect the juvenile's identity.

3. That the [p]etition contained certain allegations of neglect that also serve as a portion of the petition filed to terminate parental rights which is pending.

4. That the prior adjudication resolved the issues raised in the prior petition and [p]etitioner is bound by res judicata or collateral estoppel on these issues which were necessarily resolved in the April 5, 2000[] Consolidation Order of Adjudication and Disposition.

In its 4 June 2003 order, the trial court denied respondent's motion for partial summary judgment on the basis that "the cases are sufficiently different so that collateral estoppel and res judicata do not apply."

The dispositive issue is whether summary judgment is proper in a termination of parental rights proceeding.

We first note that respondent's appeal from the denial of a motion for partial summary judgment is interlocutory. *See N.C. Dept. of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995) (an appeal is interlocutory "if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy"). Assuming no substantial right was implicated, we nevertheless grant certiorari in order to address the merits of respondent's appeal. N.C.R. App. P. 21(a)(1).

[1] In her brief to this Court, respondent contends the trial court erred in denying her motion because the doctrines of collateral estoppel and res judicata operate to bar relitigation of the issue of neglect. We disagree. Apart from the fact that the 5 April 2000 consent order served only as an adjudication on the issue of dependency, not neglect, and with respect to dependency was only binding as to the time frame of that order,[2] respondent's motion for summary

2. A prior adjudication of neglect, abuse, or dependency is only "binding in [a] later proceeding on the facts regarding abuse[, dependency, or] neglect which were found to exist *at the time it was entered*." *In re Wheeler*, 87 N.C. App. 189, 194-95, 360 S.E.2d 458, 461 (1987) (emphasis added); *In re Wilkerson*, 57 N.C. App. 63, 69, 291 S.E.2d 182, 186 (1982) (affirming trial court's ruling, "that all previous orders in the case were binding . . . as to what those orders found to exist when they were entered"). In determining whether grounds exist to terminate parental rights, this Court has held: "Although prior adjudications of neglect may be admitted and considered by the trial court, they will rarely be sufficient, standing alone, to support a termination of parental rights, since the petition must establish that neglect exists at the time of hearing." *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003).

judgment incorporates a greater fundamental error that demands this Court's attention.

[2] Chapter 7B of the North Carolina General Statutes contains absolutely no provision allowing for the use of a summary judgment motion in a juvenile proceeding. In fact, the provisions of Chapter 7B implicitly prohibit such use by imposing on the trial court the duty to hear the evidence and make findings of fact on the allegations contained in the juvenile petition. N.C.G.S. § 7B-1109(e) (2003) ("[t]he court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent"). This duty is incompatible with the law on summary judgment, which rests on the non-existence of genuine issues of fact *prior to a hearing on the merits. See* N.C.G.S. § 1A-1, Rule 56(c) (2003) (a motion for summary judgment will be 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"); *McArdle Corp. v. Patterson*, 115 N.C. App. 528, 531, 445 S.E.2d 604, 606 (1994) ("it is not the function of the trial court to make findings of fact and conclusions of law on a motion for summary judgment"), *aff'd*, 340 N.C. 356, 457 S.E.2d 596 (1995). Summary judgment on the existence of grounds for termination of parental rights listed in N.C. Gen. Stat. § 7B-1111 is therefore contrary to the procedural mandate set forth in our juvenile code. As the trial court lacked authority to grant summary judgment in this case, respondent's motion was properly denied.

Affirmed.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER NATHANIEL JONES, DEFENDANT

No. COA02-1633

(Filed 20 July 2004)

Homicide— attempted common law murder—not recognized

Attempted common law murder is not recognized by the General Statutes. Defendant's conviction, based on an indictment for that offense, was vacated.

Appeal by defendant from judgment entered 8 August 2001 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 November 2003.

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

Paul Pooley for the defendant.

ELMORE, Judge.

Defendant and victim were both employees at Buffalo Tire Shop. After an argument, defendant retrieved a gun from his car, reentered the shop, and shot at the victim, hitting him in the shoulder and left hip. Defendant was charged with attempted common law murder, assault with a deadly weapon with intent to kill inflicting serious injury (ADWWIKISI), and assault by pointing a weapon. Defendant was found guilty of all charges by a jury, and sentenced to active time.

Defendant first argues on appeal that N.C. Gen. Stat. § 15-144, authorizing the short-form murder indictment, does not support an indictment for attempted murder. We agree and vacate the conviction.

We first note that the assignment of error indicated in defendant's brief is the incorrect assignment for this issue; he cites to assignment #1, and the argument in the footnote and in the reply brief are based on assignment #2. Assignment #1 concerns the short form indictment, and has no merit. Assignment #2 attacks the common law offense, which is a valid argument. The error in numeration is not fatal to defendant's argument.

Our Supreme Court has passed on the issue of short form indictments several times and has consistently held that short-form

indictments are "in compliance with both the North Carolina and United States Constitutions." *State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *see also State v. Lytch*, 142 N.C. App. 576, 579-80, 544 S.E.2d 570, 572 (2001), *affirmed*, 355 N.C. 270, 559 S.E.2d 547 (2002).

As for the sufficiency of the indictment for a second degree common law murder conviction, N.C. Gen. Stat. § 15-170 states, "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." N.C. Gen. Stat. § 15-170 (2003).

Because the indictment is constitutional and sufficient for murder, it will support a conviction for attempted murder. However, although the short form indictment is constitutional, this indictment is not correct because the crime of attempted common law murder is not recognized by our General Statutes.

Our Supreme Court, in the case of *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000) reasoned:

> First degree murder, which has as an essential element the intention to kill, has been called a specific intent crime. Second degree murder, which does not have this element, has been called a general intent crime.
>
> "In connection with [second-degree murder and voluntary manslaughter], the phrase 'intentional killing' refers not to the presence of a specific intent to kill, but rather to the fact that the act which resulted in death is intentionally committed . . . ." . . . Moreover, we have explained that specific intent to kill is " 'a necessary constituent of the elements of premeditation and deliberation in first degree murder [] [and] is not an element of second degree murder or manslaughter.' " . . . Therefore, it logically follows that the crime of attempted murder, as recognized in this state, can be committed only when a person acts with the specific intent to commit first-degree murder.
>
> . . .
>
> Because specific intent to kill is not an element of second-degree murder, the crime of attempted second-degree murder is a logical impossibility under North Carolina law. The crime of

> attempt requires that the actor specifically intend to commit the underlying offense. It is logically impossible, therefore, for a person to specifically intend to commit a form of murder which does not have, as an element, specific intent to kill. As the United States Supreme Court stated, "Although a murder may be committed without an intent to kill, attempt to commit murder requires a specific intent to kill." *Braxton*, 500 U.S. at 351, 114 L. Ed. 2d at 393. Accordingly, the crime of attempted murder is logically possible only where specific intent to kill is a necessary element of the underlying offense.

State v. Coble, 351 N.C. 448, 449-51, 527 S.E.2d 45, 47-48 (2000) (most citations omitted).

In light of the foregoing reasoning, we vacate defendant's conviction for the defect in the indictment.

Vacated.

Judges WYNN and TIMMONS-GOODSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

ADDISON v. KYE No. 03-1111	Durham (01CVS4973)	No error
CITY OF CONCORD v. STAFFORD No. 03-1223	Cabarrus (01CVS2632)	Appeal dismissed; Petition denied
D.A. WESLEY GRP., INC. v. WINDBRELLA PRODS. CORP. No. 03-906	Durham (02CVS4653)	Affirmed
GIBSON CONTRS., INC. v. CHURCH OF GOD IN CHRIST JESUS OF ANGIER No. 03-1255	Harnett (02CVS93)	No error
GILLISPIE v. GILLISPIE No. 02-1407	Iredell (00CVD1046)	Affirmed
HARLEYSVILLE MUT. INS. CO. v. NATIONWIDE MUT. INS. CO. No. 03-1220	Wake (02CVS12906)	Affirmed
HOUCK v. PEELE No. 03-1282	Union (03CVD622)	Affirmed
IN RE CALDWELL CTY. ELECTION PROTESTS No. 03-1177	Wake (03CVS841) (03CVS984)	Dismissed
IN RE C.C.M. No. 03-1198	Wake (03J241)	Affirmed
IN RE M.L. & A.G. No. 03-1567	Cabarrus (02J43) (02J44)	Affirmed
IN RE R.L.F. No. 03-1052	Forsyth (02J285)	Affirmed
IN RE T.S.B. No. 03-1143	Robeson (98J123)	Affirmed
JOYCE v. BRUCE No. 03-1385	Stokes (03CVS5)	Appeal dismissed
LYONS v. KIM No. 03-1579	Durham (98CVS1729)	Dismissed
MIYARES v. FORSYTH CTY. No. 03-1278	Forsyth (02CVS4895)	Reversed
STATE v. ABDULLAH No. 03-840	Alamance (02CRS9336) (02CRS53446)	No error

STATE v. ALEGRIA-SANCHEZ No. 03-1545	Cumberland (02CRS58206) (02CRS58207)	No error
STATE v. ARMSTRONG No. 03-1195	Durham (00CRS56046) (00CRS56048)	No error
STATE v. AYALA No. 03-1449	Davidson (03CRS50395) (03CRS50396)	No error
STATE v. BEY No. 04-24	Wake (98CRS90134)	No error
STATE v. BLANKENSHIP No. 03-337	Buncombe (01CRS58391) (02CRS1870)	No error
STATE v. BOSTICK No. 03-538	Richmond (02CRS2675) (02CRS50461)	No error in part, vacated in part, and remanded for a new sentencing hearing
STATE v. BRUMLEY No. 03-1675	Harnett (02CRS56243)	No error
STATE v. CAMPBELL No. 03-545	Lenoir (99CRS9782)	Vacated and remanded
STATE v. CANUPP No. 03-1428	Rowan (02CRS58067) (02CRS58068) (02CRS58069) (02CRS58070) (02CRS58071) (02CRS58072) (02CRS58073) (02CRS58074)	No error
STATE v. CARTER No. 03-109	Wayne (00CRS53583)	No error
STATE v. CHRISTMAS No. 04-362	Wake (03CRS36229) (03CRS36597)	Vacated and remanded
STATE v. DANCY No. 03-1553	Rowan (01CRS2635) (01CRS2636) (01CRS2637) (01CRS50085)	No error
STATE v. DANIELS No. 03-1253	Rutherford (01CRS52099)	No error

STATE v. DAVIS No. 03-647	Cabarrus (99CRS8182) (01CRS18167)	No error
STATE v. FULTON No. 03-1559	Guilford (03CRS24218)	Affirmed
STATE v. GEDDIE No. 03-1441	Johnston (02CRS11122) (02CRS59676)	No error
STATE v. GRAVES No. 03-1521	Randolph (02CRS56055) (03CRS6)	No error
STATE v. GULLEY No. 03-1540	Wake (00CRS101694) (00CRS101695) (00CRS101700) (00CRS101714) (00CRS101715) (00CRS101716) (03CRS14076) (03CRS14077) (03CRS14078) (03CRS14079)	Dismissed
STATE v. HATFIELD No. 03-1384	Alamance (02CRS57846)	No error
STATE v. HAWES No. 03-1417	Durham (02CRS54694) (02CRS54696) (02CRS54697)	No error
STATE v. HAY No. 03-1131	Gaston (02CRS62197) (02CRS62198)	No error
STATE v. HEGE No. 03-1646	Forsyth (02CRS39969) (02CRS63181)	No error
STATE v. HEMBY No. 03-1180	Wake (02CRS69437) (02CRS69438)	No error
STATE v. HICKSON No. 03-1392	Rowan (97CRS17756)	No error at trial; remanded for resentencing
STATE v. HILDEBRAN No. 03-403	Catawba (01CRS55743)	No error

STATE v. HILLMAN No. 03-1529	Cleveland (01CRS56980) (01CRS56981) (01CRS56982)	No error
STATE v. HILTON No. 03-305	Cabarrus (01CRS17471) (01CRS17473) (01CRS22539)	No error
STATE v. HUTCHINSON No. 03-1266	Wake (01CRS100830) (01CRS100831) (01CRS100832) (01CRS100833) (01CRS100834) (01CRS100835) (01CRS100836) (01CRS100837) (01CRS100838) (01CRS111431)	No error
STATE v. JACKSON No. 03-357	Cumberland (01CRS63276)	No error, remanded for correction of clerical error
STATE v. LOCKLEAR No. 03-1480	Robeson (00CRS8553) (00CRS8554)	No error
STATE v. MANNING No. 03-1631	Lenoir (02CRS50434) (02CRS51266)	Reversed and remanded
STATE v. McAFEE No. 03-1497	Buncombe (02CRS60760) (02CRS60761)	No error
STATE v. MEDLIN No. 03-1200	Gaston (00CRS65887) (00CRS65890) (00CRS65904) (00CRS65905) (00CRS65910) (00CRS65977)	Affirmed
STATE v. MINCEY No. 03-1072	Gaston (02CRS66888) (02CRS66889)	No error

STATE v. MORGAN No. 03-1506	Onslow (02CRS62222)	Affirmed
STATE v. PIMENTAL No. 03-979	Alamance (03CRS50157) (03CRS50158) (03CRS50159) (03CRS50160) (03CRS50161)	Appeal dismissed
STATE v. PRATT No. 03-1263	Gaston (01CRS58420)	No error
STATE v. REHM No. 03-370	Guilford (01CRS23649) (01CRS76797)	No error
STATE v. SCARLETT No. 03-1122	Ashe (01CRS559)	No prejudicial error
STATE v. SEELEY No. 03-1648	Harnett (02CRS55524)	No error
STATE v. SIMMONS No. 03-1027	Craven (02CRS53102)	No error
STATE v. SMITH No. 03-1356	Pitt (02CRS56387) (02CRS56388)	No error
STATE v. SMITH No. 03-1572	Caswell (02CRS1151)	No error
STATE v. VICK No. 03-1670	Edgecombe (01CRS50845)	No error
STATE v. WHITFIELD No. 03-1088	Guilford (01CRS103879)	No error
STATE v. WILLIAMS No. 03-1335	Sampson (03CRS50863) (03CRS50870)	No error
VAUGHAN v. NASH HEALTH CARE SYS., INC. No. 03-1259	Ind. Comm. (I.C. 036222)	Affirmed
WALKER v. WALKER No. 03-998	New Hanover (00CVD3315)	Reversed and remanded in part, affirmed in part
WORSHAM-FAIR v. LOWE'S FOOD STORES, INC. No. 03-1284	Rockingham (02CVS801)	Affirmed

STATE OF NORTH CAROLINA v. GARY LEE LAWRENCE, JR.

No. COA03-614

(Filed 3 August 2004)

1. Evidence— exclusion—timeliness of sexual abuse reports

The trial court did not err in a multiple second-degree rape, multiple second-degree sex offense, and double indecent liberties case involving three of defendant's children by excluding evidence pertaining to certain incidents occurring between the children and persons other than defendant, because: (1) the record shows the trial court admitted evidence of all the earlier incidents or accusations offered by either defendant or the State, provided the events or accusations at issue had occurred either during the same general time period as the charged offenses or at least before the complainants reported defendant to law enforcement authorities; (2) the only accusations that the trial court excluded were those allegedly occurring between 1999 and 2001, long after the 1991-1994 time period of the charged offenses and when the complainants were young adults; (3) although defendant contends one child's prompt reporting of some incidents tends to discredit the State's argument that the complainants delayed reporting defendant out of fear, shame, or embarrassment, defendant does not articulate a connection between the failure of a scared thirteen-year-old child to report her father's abuse and the fact that as a young woman of twenty, she reported a crime committed by a non-family member to law enforcement authorities; and (4) the trial court's rulings did not prevent or impede defendant's ability to present a defense of the charges since defendant was able to introduce ample evidence of reports and accusations made during the time period of the alleged offenses.

2. Rape; Sexual Offenses— second-degree rape—second-degree sexual offense—motion to dismiss—sufficiency of evidence

The trial court did not err by failing to dismiss the charges of second-degree rape and second-degree sexual offense even though defendant contends there was insufficient evidence to prove lack of consent by the victims to sexual activity with their father, because: (1) force may be established by evidence of constructive force, and constructive force does not necessarily require proof of actual physical threats where defendant was the

victim's parent; and (2) the State presented ample evidence of constructive force including that all three victims testified that they were afraid of defendant, were subjected to physical abuse at home, and that defendant performed sexual acts on each one.

3. Constitutional Law— right to unanimous jury—sexual assaults

The trial court in a multiple second-degree rape, multiple second-degree sex offense, and double indecent liberties case deprived defendant of his right to a unanimous verdict, because comparison of the evidence adduced at trial with the charges brought against defendant reveals that with regard to the charges of second-degree sex offense: (1) there was evidence of a greater number of separate criminal offenses than the number of charges for two of the victims; (2) there was general testimony with no accompanying instructions on limiting its consideration to one criminal offense in regard to one of the victims; (3) the jury was permitted to consider evidence of numerous criminal sexual acts with no guidance separating them into separate criminal offenses for all three victims; and (4) none of the verdict sheets associated the offense number with a given incident or separate criminal offense, nor did the trial court's instructions make any attempt to separate the individual criminal offenses or guide the jury to identify a given verdict sheet with a corresponding instance of alleged sexual abuse.

Appeal by defendant from judgments entered 9 July 2002 by Judge Jerry R. Tillett in Camden County Superior Court. Heard in the Court of Appeals 4 February 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Ellen B. Scouten, for the State.

Rudolf Maher Widenhouse & Fialko, by Andrew G. Schopler, for defendant-appellant.

LEVINSON, Judge.

On 9 July 2002 Gary Lawrence, Jr., (defendant) was convicted of four counts of second degree rape, ten counts of second degree sex offense, and two counts of indecent liberties. The alleged offenses were committed against three of defendant's four children: C.L., S.L., and G.L. Defendant was tried upon indictments returned by Camden, Currituck, and Pasquotank Counties, where the offenses

were alleged to have occurred on various dates ranging from seven to ten years prior to trial.

Evidence presented by the State is summarized, in pertinent part, as follows: C.L. testified that she and her twin sister, S.L., were born in 1978 and were the oldest of defendant's four children. The Lawrence family lived in Currituck County, North Carolina, from the time C.L. was about two years old until she was fifteen. When she was about ten or eleven years old, the defendant started having explicit discussions with her about sex, and would touch her breasts and pubic area to see if she had started to develop. When she was eleven or twelve years old, defendant conducted a group session with his four children in which he taught them how to masturbate, rubbing each child's genitals and demonstrating on himself. In addition, defendant often masturbated in the living room, in front of his children.

C.L. lost her virginity to defendant when she was 12½ years old. Defendant, who was a long distance truck driver, took C.L. with him on a truck trip of several weeks. While they were on the road, defendant gave C.L. wine coolers, told her he wanted to "take her innocence," then had oral sex and vaginal intercourse with her. After this, C.L. and her father had sex on many occasions over the next two years. She described several specific instances of sexual activity, including oral sex, digital penetration, penetration with objects, vaginal intercourse, and watching pornographic videos together. In time, C.L. fell in love with defendant, and felt that she, rather than her mother, "was his wife."

In 1993, when C.L. was in the ninth grade, her parents separated and the four children moved to Camden County with defendant. C.L., who was then 15 years old, decided to end the sexual relationship with her father. Although there were several more incidents that fall, C.L. was able to end the sexual activity between them before she was sixteen. During this period, defendant was drinking heavily and was aggressive and abusive towards his children. Following a family brawl resulting in the police and DSS being called, C.L. and S.L. moved out of their father's house. C.L. testified that she never lived with defendant after that, and had seen him only a few times since 1995.

C.L.'s twin sister, S.L., offered testimony that tended to corroborate that of C.L. S.L. also testified concerning the explicit sexual discussions with her father starting when she was 11 years old, his

genital "inspections" to determine if the twins were still virgins, the group masturbation "lesson," and several occasions when defendant showered with S.L. and C.L. and washed their genitals. S.L. testified that she too had lost her virginity to her father while on a long distance truck trip. She described several incidents in which the defendant performed oral, anal, or vaginal sexual acts with her. Like C.L., S.L. succeeded in ending the sexual activity with defendant shortly before turning 16.

S. McKoy, the fourth of defendant's children, testified that she had been present at the group masturbation session, and had experienced inappropriate touching by defendant, ostensibly to check her "development." However, she testified that defendant had not engaged in any other sexual activity with her, and defendant was not charged with any sexual offenses against S. McKoy.

G.L., defendant's only son, corroborated his siblings' testimony regarding defendant's masturbation in the living room in view of other family members, the group masturbation session, and defendant's inappropriate touching of his daughters' genitals. G.L. heard defendant say on several occasions that if anyone was going to "take" C.L.'s and S.L.'s virginity, it would be him. G.L. also testified that when he and his sisters lived with defendant in Camden County, defendant was often drunk and abusive, and that on at least one occasion he heard S.L. crying in defendant's bedroom.

In 1995, at a time when C.L., S.L, and S. McKoy were living with their mother, G.L. and defendant lived on a sailboat which was docked in Pasquotank County. G.L. was 14 years old at this time. He testified that during the months they lived on the sailboat together defendant repeatedly engaged him in acts of oral and anal sex. He described several incidents in detail, in each of which defendant had provided him with alcohol, played a pornographic video, and then secured G.L.'s acquiescence in particular acts of anal or oral sex.

Defendant testified on his own behalf. He acknowledged having explicit sexual conversations with his children, and having sex toys and pornographic videos at home. He also admitted taking C.L. and S.L. on overnight truck trips, and conducting a group masturbation "lesson" with his children, although he denied touching them or stimulating himself during this session. Defendant further admitted that, while living in Camden County, he was depressed and drank to excess, and that during the fight that led to C.L. and S.L. moving out he had "backhanded" S.L., and had "popped" C.L. Defendant testified

that he had evicted S.L. and C.L. from the house after this incident because they were beyond his control.

However, defendant denied ever having sex with any of his children, showering with them, touching their genitals, showing them pornographic videos, giving them alcohol, masturbating in front of them, stating that he would "be the one" to take the twins' virginity, or engaging in any sexual activity with C.L., S.L., or G.L. He testified that he believed S.L. had organized the State's witnesses to offer false testimony as part of a conspiracy to "get even" with him for evicting her and C.L. from the house in 1995, seven years earlier.

Following trial, defendant was convicted of all charges and was sentenced to consecutive prison terms totaling 308 to 324 years. From these convictions and judgments, defendant appeals.

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[1] Defendant argues first that the trial court erred by excluding evidence pertaining to certain incidents occurring between C.L., S.L., or G.L. and persons other than the defendant. He argues that, because he was charged with offenses alleged to have occurred between seven and eleven years before trial, "the crux of [his] defense was that his children's years of silence as to these charges indicated that the allegations were the result of fantasy or fabrication." On this basis, defendant contends the court erred by excluding evidence that the complaining witnesses "had made timely accusations or reports against a host of alleged offenders." He further asserts that the trial court's error was compounded by the prosecutor's closing argument that the complainants had delayed reporting the alleged incidents for years out of shame and embarrassment. Defendant argues that the trial court's exclusion of this evidence effectively prevented him from exercising his constitutional right to present a defense, and constitutes reversible error. We disagree.

Defendant is correct that a criminal defendant's right "to present to the jury his version of the facts is a fundamental element of due process of law, guaranteed by the Sixth and Fourteenth Amendments to the federal Constitution and by Article I, Sections 19 and 23 of the North Carolina Constitution." *State v. Miller*, 344 N.C. 658, 673, 477 S.E.2d 915, 924 (1996) (citation omitted). However, "[l]ike all evidence offered at trial, . . . evidence offered to support a defense must be relevant to be admissible. N.C.G.S. § 8C-1, Rule 402 [(2003)]." *State v. Fair*, 354 N.C. 131, 150, 557 S.E.2d 500, 515 (2001).

N.C.G.S. § 8C-1, Rule 401 (2003) defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Although '[the] trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard . . . such rulings are given great deference on appeal.' " *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (quoting *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991)). Further, even if relevant, evidence may be excluded if the trial court determines that "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (2003). "Whether to exclude relevant evidence pursuant to Rule 403 is a decision within the trial court's discretion and will remain undisturbed on appeal absent a showing that an abuse of discretion occurred." *State v. Ward*, 354 N.C. 231, 264, 555 S.E.2d 251, 272 (2001) (citation omitted).

In the instant case, the record shows that both the State and defendant offered evidence of earlier investigations, allegations, and accusations by the complainants. Evidence was offered regarding numerous reports to DSS between 1982 and 1997, alleging abuse and neglect, and of the subsequent DSS investigations. In addition, the State and defendant stipulated that between 1982 and 1997 DSS conducted fifteen separate investigations of the Lawrence household, pursuant to allegations of abuse and neglect, and that during these investigations none of the children had reported sexual abuse by their father. Other evidence was offered regarding criminal charges brought against a Jacob Banks in 1987 for sexual offenses against C.L. and S.L., and about the resultant trial. The State's witnesses, particularly C.L. and S.L., were also cross-examined extensively about 1994 criminal charges that were brought against the twins' uncle, Gene Smith, for sexual offenses against both girls. Dean Cartwright testified that in 1994 he was a deputy sheriff with the Currituck County Sheriff's Department. When he interviewed C.L. and S.L. in 1994 regarding sexual abuse committed by Smith, neither girl reported that the defendant had also abused them. Other testimony was presented from S.L.'s and C.L.'s high school boyfriends pertaining to accusations each girl had made about defendant after they left home, and from relatives of C.L. and S.L. in whom they had later confided information about the defendant's sexual abuse.

The record shows that the trial court admitted evidence of all the earlier incidents or accusations offered by either defendant or the State, provided that the events or accusations at issue had occurred either during the same general time period as the charged offenses, or at least before the complainants reported defendant to law enforcement authorities. The **only** accusations that the trial court excluded were those allegedly occurring between 1999 and 2001, long after the 1991-1994 time period of the charged offenses, and when the complainants were young adults. Defendant asserts only one basis for the relevance of these incidents—that the prompt reporting of these incidents tends to discredit the State's argument that the complainants delayed reporting defendant out of fear, shame, or embarrassment. However, defendant does not articulate a connection between the failure of a scared thirteen year old child to report her father's abuse and the fact that, as a young woman of twenty, she reported a crime committed by a non-family member to law enforcement authorities. The trial court ruled that this evidence was not relevant to any issue in the case. Giving due deference to the trial court's determination in this regard, we conclude that the trial court did not err by excluding certain evidence of allegations made by the complainants many years after the subject offenses. We further conclude that the trial court's rulings did not prevent or impede the defendant's ability to present a defense to the charges, as defendant was able to introduce ample evidence of reports and accusations made during the time period of the alleged offenses. This assignment of error is overruled.

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[2] Defendant argues next that the charges of second-degree rape and second-degree sexual offense should have been dismissed for failure of the State to prove lack of consent by the complainants to sexual activity with their father. We disagree.

"The elements of second-degree sexual offense are: (1) a person engages in a sexual act; (2) with another person; and (3) the act is by force and against the person's will. *See* N.C.G.S. § 14-27.5(a) [(2003)]." *State v. Tucker*, 154 N.C. App. 653, 655, 573 S.E.2d 197, 199 (2002), *disc. review denied*, 356 N.C. 691, 578 S.E.2d 597 (2003). "The elements of second-degree rape are that the defendant (1) engage in vaginal intercourse with the victim; (2) by force; and (3) against the victim's will. N.C. Gen. Stat. § 14-27.3 [(2003)]." *State v. Scercy*, 159 N.C. App. 344, 352, 583 S.E.2d 339, 344, *disc. review denied*, 357 N.C. 581, 589 S.E.2d 363 (2003). Defendant argues that the State failed to offer evidence of force. He contends that the complainants' testimony was that each of them had voluntarily consented to have sex with

their father. On this basis he asserts that the State failed to establish that the sexual activity between defendant the complainants was other than consensual. This argument is without merit.

The element of force may be established by evidence of constructive force:

> Constructive force, applied through fear, fright, or coercion, suffices to establish the element of force in second-degree rape. It may be demonstrated by proof that the defendant acted so as, in the totality of the circumstances, to create the reasonable inference that the purpose of such acts was to compel the victim to submit to sexual intercourse.

Scercy, 159 N.C. App. At 352, 583 S.E.2d at 344 (citing *State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987)). In *Etheridge*, the North Carolina Supreme Court held that evidence of constructive force did not necessarily require proof of actual physical threats where the defendant was the victim's parent:

> Sexual activity between a parent and a minor child is not comparable to sexual activity between two adults[.] . . . The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose. . . . The child's knowledge of his father's power may alone induce fear sufficient to overcome his will to resist[.] . . . [T]he parent wields authority as another assailant might wield a weapon.

Id. at 47-48, 352 S.E.2d at 681-82. We also note that the line of cases relied upon by defendant was expressly overruled in *Etheridge*.

In the instant case, C.L. testified that she and her siblings were subjected to "physical and verbal abuse," slapped by their parents, and deprived of food. She submitted to defendant's advances because it raised her "rank" in the family, so that she "wasn't getting beat as often." She was frightened of defendant, who was often angry and aggressive, and who threatened to "hunt her down and kill her" if she ever revealed their sexual activity. S.L.'s testimony was that she was hit "a lot more" than C.L., and that when several investigations by DSS did not lead to improvements at home, she despaired of getting outside help to stop her father's sexual abuse. She also testified that she delayed reporting defendant out of fear. In addition, both girls testified that they were given alcohol before their first act of intercourse

with defendant. G.L. testified that defendant had punched him in the mouth, and that he was fearful of being hit or punched if he resisted or told anyone about defendant's abuse. Defendant also provided G.L. with alcohol, beginning at age six, and got him drunk before their sexual activities.

In the instant case, all three of the complainants testified that they were frightened of defendant, were subjected to physical abuse at home, and that defendant performed sexual acts on each one, notwithstanding the victim's pain or tears. We conclude that the State presented ample evidence of constructive force. This assignment of error is overruled.

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[3] Defendant argues next that his convictions must be reversed on the grounds that he was deprived of the right to a unanimous verdict. We conclude this argument has some merit.

A criminal defendant's right to a unanimous jury verdict is guaranteed by the North Carolina Constitution. *See* N.C. Const. art I, § 24, and N.C.G.S. § 15A-1237(b) (2003). "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). Further, the failure to object to alleged errors by the trial court that violate a defendant's right to a unanimous verdict does not waive his right to raise the question on appeal. *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985)).

Our determination of whether the trial court's instructions to the jury violate the right to a unanimous verdict requires us to "examine the verdict, the charge, the jury instructions, and the evidence to determine whether any ambiguity as to unanimity has been removed." *State v. Petty*, 132 N.C. App. 453, 461-62, 512 S.E.2d 428, 434 (1999). A defendant's right to a unanimous verdict may be compromised by jury instructions that allow the jury to convict a defendant without requiring unanimity on the issue of which criminal offense the defendant committed. *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986).

We find it useful to review several scenarios, each with some relevance to the instant case, in which the issue of jury unanimity commonly arises in child sex offense cases. The first of these occurs when a young child is abused by "an abuser residing with the child . . . [who] perpetuate[s] the abuse so frequently . . . that the young child loses any frame of reference in which to compart-

mentalize the abuse into distinct and separate transactions. Such evidence of abuse has been termed generic evidence." *R.L.G. v. State*, 712 So. 2d 348, 356 (1997) (internal quotation marks omitted). The victim's "generic testimony" may describe a *pattern* of abuse ("every time mama went to the store") rather than specific incidents ("after the July 4th parade"). Thus, a concern arises because the jury is not presented with a specific act upon which they unanimously may agree.

In response to this recurring problem, several jurisdictions have enacted criminal statutes that do not require evidence of particular incidents for prosecution. *See, e.g., State v. Fortier*, 146 N.H. 784, 789-90, 780 A.2d 1243, 1249-50 (2001) ("A continuous course of conduct crime, however, does not require jury unanimity on any specific, discrete act . . . [l]ike other jurisdictions that have adopted pattern statutes . . . our legislature created [this statute] to respond to the legitimate concern that many young victims, who have been subject to repeated, numerous incidents of sexual assault over a period of time by the same assailant, are unable to identify discrete acts of molestation."). The North Carolina legislature has not adopted a statute criminalizing an ongoing pattern of sexual abuse when the victim is unable to reconstruct the specific circumstances of any one incident. In at least one case, *State v. Wiggins*, 161 N.C. App. 583, 589 S.E.2d 402 (2003), this Court upheld a conviction for second degree rape that was apparently based upon such "generic testimony." However, there is no apparent statutory or common law authority that would permit the return of more than one indictment based on the same generic testimony. That is, there are no cases upholding two or more convictions, all based on generic testimony that, *e.g.*, "he sexually assaulted me at least once a week for several months." Another source of concern stems from jury instructions that are delivered disjunctively and authorize conviction upon a finding that the defendant engaged in **either** "X" or "Y" behavior. In this regard, our jurisprudence has drawn a distinction between disjunctive instructions on alternative *means* of committing an offense, and alternative *separate criminal offenses*:

> [A] disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. . . . [I]f the trial court merely instructs the jury disjunc-

> tively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied.

State v. Lyons, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991). Thus, "in [*State v.*] *Diaz*, [317 N.C. 545, 346 S.E.2d 488 (1986)], the Court held that a disjunctive instruction resulted in an ambiguous verdict since the Court would not determine whether the jury unanimously convicted the defendant of a particular crime where each activity instructed on constituted a separate, discrete offense[.]" *State v. Alford*, 339 N.C. 562 576-77, 453 S.E.2d 512, 520 (1995).

In the context of cases wherein a defendant is charged with a single sexual offense, but the evidence supports more than one type of sexual act, our appellate courts have held that "a jury need not be unanimous as to which of several sex acts it finds to support a conviction for indecent liberties[,]" as the particular sex acts are considered alternative means of committing the offense, rather than separate offenses. *State v. McCarroll*, 336 N.C. 559, 566, 445 S.E.2d 18, 22 (1994) (citing *State v. McCarty*, 326 N.C. 782, 392 S.E.2d 359 (1990)). The same reasoning has been applied to charges of first degree sexual offense. This Court has noted that "our Supreme Court's determination that first-degree sexual offense is a single wrong for unanimity purposes requires us to conclude that charging a defendant with a separate count of first-degree sexual offense for each alternative sexual act performed in a single transaction would result in a multiplicious indictment." *Petty, id.* Thus, where a defendant is charged with first or second degree sexual offense, based upon evidence that he engaged in several sexual acts during a single incident, these acts should be considered by the jury as being alternative means by which the State may prove the "sexual act" element of **a single criminal offense**.

Jury unanimity is also at issue when evidence is presented of a greater number of separate criminal offenses than the defendant is charged with. *See State v. Holden*, 160 N.C. App. 503, 586 S.E.2d 513 (2003). In *Holden*, the jury convicted defendant of two counts of rape, following presentation of evidence of at least five separate incidents. This Court noted that the trial court's instructions "made no attempt to distinguish" among the offenses and held that:

> [T]he effect of the instruction in the case *sub judice* is to permit the jury to return guilty verdicts without agreeing . . . on which two particular incidents of statutory rape defendant was guilty [of.] . . . Thus, without any instruction differentiating between the

> multiple counts, it was possible for a jury to return a verdict of guilty of two counts of statutory rape with some jurors believing defendant guilty of the incidents in the van, and others believing defendant guilty of two incidents at the victim's grandmother's house, or any number of other combinations.

Id. at 508, 586 S.E.2d at 517.

There are several ways to protect a defendant's right to a unanimous verdict when the evidence might support more separate offenses than the number of verdict sheets submitted to the jury. Unanimity is assured if before the jury begins its deliberations the State elects which particular criminal offense it will proceed on for a given indictment or verdict sheet. Or, where there is evidence of several incidents, any one of which might support conviction of a separate criminal offense, the trial court may protect the defendant's right to a unanimous verdict by instructing the jury that they must be unanimous as to the particular criminal offense that the defendant committed. Accordingly, the North Carolina Supreme Court has found no violation of the defendant's right to a unanimous verdict where "the trial judge submitted a specific instruction with respect to unanimity of verdict as to each indictment and also assigned correlating specific alleged acts of sexual offense to each indictment." *State v. Kennedy*, 320 N.C. 20, 25, 357 S.E.2d 359, 362 (1987).

In the vast majority of jurisdictions that have analyzed this issue, these two mechanisms for protecting the right to a unanimous verdict are characterized as the "either-or" rule. That is, when there is evidence of a greater number of separate criminal offenses than the number of counts submitted to the jury, **either** the State must elect one offense per charge, **or** the trial court must instruct the jury that they are required to agree unanimously on the offense committed. A leading case on the either/or rule is *State v. Petrich*, 101 Wash.2d 566, 572, 683 P.2d 173, 178 (1984):

> When the evidence indicates that several distinct criminal acts have been committed, . . . jury unanimity must be protected. . . . The State may, in its discretion, elect the act upon which it will rely for conviction. Alternatively, if the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal act will be assured. When the State chooses not to elect, this jury instruction must be given to ensure the jury's understanding of the unanimity requirement.

See also, e.g., State v. Arceo, 84 Haw. 1, 32-33, 928 P.2d 843, 874-75 (Haw. 1996):

> [W]hen separate and distinct culpable acts are subsumed within a single count charging a sexual assault . . . the defendant's constitutional right to a unanimous verdict is violated unless . . . (1) at or before the close of its case-in-chief, the prosecution is required to elect the specific act upon which it is relying to establish the "conduct" element of the charged offense; or (2) the trial court . . . advises the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt.

Although North Carolina has never adopted the "either/or" rule *per se*, our appellate cases have employed similar reasoning, and found no violation of a defendant's right to a unanimous verdict unless the evidence reveals a greater number of separate criminal offenses than the number of charges submitted to the jury. For example, in *State v. Wiggins*, 161 N.C. App. 583, 589 S.E.2d 402 (2003), the defendant was convicted of two counts of sexual offense, and five counts of statutory rape. As in the instant case, neither the indictments, verdict sheets, nor the trial court's instructions, associated a given verdict sheet or indictment with any particular incident. The victim testified at trial to two specific incidents of sexual offense and four distinct instances of statutory rape. Significantly, the victim testified to only one sexual act in each incident. In this factual context, the Court noted that as regards the charges of sexual offense, "since [the victim] testified to only two incidents qualifying as statutory sexual offenses under section 14-27.7A(a), there was no possibility the jury could not have been unanimous in its vote on these two offenses." The Court also held that as the victim "testified to four specific occasions she could describe in detail during which defendant had sexual intercourse with her[,]" defendant's conviction of four counts of rape did not violate defendant's right to a unanimous verdict.[1] *Id.* at 593, 589 S.E.2d at 409.

Defendant herein was indicted for sixteen offenses in three counties, as follows:

> 1. Currituck County, victim C.L.: two charges of second-degree rape, one charge second-degree sex offense.

1. The fifth count of statutory rape was supported by the victim's "generic testimony" that "defendant had sexual intercourse with her five or more times a week" without specifying any particular incident.

2. Currituck County, victim S.L.: two charges of second-degree sex offense, one charge second-degree rape, one charge indecent liberties.

3. Camden County, victim C.L.: one charge of second-degree rape, one charge second-degree sex offense, one charge indecent liberties.

4. Camden County, victim S.L.: one charge second-degree sex offense.

5. Pasquotank County, victim G.L.: five charges of second-degree sex offense.

Under N.C.G.S. § § 14-27.5 (a)(1) (2003), a person commits a second degree sex offense if he "engages in a sexual act with another person by force and against the will of the other person[.]" A "sexual act" includes "cunnilingus, fellatio, analingus, or anal intercourse, . . . [and] also means the penetration, however slight, by any object into the genital or anal opening of another person's body[.]" N.C.G.S. § 14-27.1(4) (2003).

Comparison of the evidence adduced at trial with the charges brought against defendant reveals that, with regards to the charges of second-degree sex offense, the defendant's right to a unanimous verdict was compromised. In making this determination, we have not considered evidence that was admitted under North Carolina Rules of Evidence 404(b) for the limited purpose of shedding light on the defendant's motive and intent. As regards two categories of charges, there was evidence of a greater number of offenses than the number of charges: (1) the five charges of second-degree sex offense committed against G.L., arising in Pasquotank County; and (2) the single charge of second-degree sex offense committed against C.L. in Currituck County. Additionally, with regard to the charges of second-degree sex offense committed against each of the three victims, the jury was permitted to consider evidence of various sexual acts without any instruction from the court on which acts should be grouped together and evaluated as alternative means to establish the "sexual act" element of a given individual criminal offense.

C.L. testified that on one occasion in Currituck County, defendant woke her up in the middle of the night, took her downstairs to watch a pornographic movie, and performed oral sex on her. She testified that on another occasion, defendant asked her to stay home from school. During the course of that day, defendant "pour[ed] wine in

[her] vagina" and then performed oral sex. Later, he penetrated her digitally, and applied mineral oil to her vagina, before massaging her with an electric vibrator. Defendant was charged with only one second degree sex offense against C.L. in Currituck County. However, even if we consider certain of the defendant's actions to comprise a continuous single offense (e.g., pouring wine into C.L.'s vagina, and then performing oral sex) the evidence clearly showed more than one separate incident, each of which was a separate criminal offense. Further, each incident involved multiple sexual acts. Thus, one juror might consider the "sexual act" element to be satisfied by evidence pertaining to one incident, while another juror based his verdict on evidence from a different transaction.

Defendant was also charged with committing five second-degree sex offenses against G.L., all in Pasquotank County. G.L. testified about no fewer than six individual incidents involving acts of anal or oral sex performed on or by the defendant. In most of these incidents, there was evidence of several types of sexual activity occurring in one incident, such as oral sex, anal sex, and attempted anal penetration. G.L. **also** offered "generic testimony" that the defendant committed many other second-degree sex offenses against him, both oral and anal sex, but that it had happened so many times he could not single out any other particular instances. Again, the jury was not instructed as to: (1) not returning more than one verdict based on G.L.'s "generic" testimony that there were numerous other incidents; (2) the need to consider various sexual acts occurring in one incident, not as separate criminal offenses, but as alternative means of establishing the "sexual act" element of a single offense; or (3) the need for unanimity on a specific sexual incident.

S.L. testified regarding an incident of sexual abuse occurring after a truck trip with the defendant. Evidence was presented that during this incident the defendant engaged in digital penetration, oral sex, and the application of a lubricant on S.L.'s external genitalia and in her vagina. On the basis of this testimony, the defendant was convicted of **two** counts of second-degree sexual offense. However, each of the alleged sexual acts occurred during the same incident, and were alternative means of establishing the element of commission of a sexual act. North Carolina case law suggests that, for a given second-degree sexual offense, the jury need not be unanimous as to which sexual act the defendant committed, provided they are unanimously agreed that the defendant committed one or another of the alleged sexual acts. However, as the jury was **not** instructed that they

must be unanimous on the particular act committed, evidence of several different sexual acts must be considered as alternative means to establish an element of a single criminal offense. Accordingly, while we may safely conclude that the jury unanimously agreed on defendant's commission of one second degree sexual offense, the second conviction must be reversed.

We conclude that as regards the charges of second degree sexual offense against C.L. in Currituck County, and against G.L. in Pasquotank County, there was evidence of a greater number of separate criminal offenses than were submitted to the jury. Regarding charges of sexual offense against G.L., there was also generic testimony, with no accompanying instructions on limiting its consideration to one criminal offense. Regarding charges of second-degree sex offense committed against all three victims, the jury was allowed to consider evidence of numerous criminal sexual acts with no guidance on separating them into separate criminal offexnses. Further, although the indictments and verdict sheets were validly drawn, they did not remove the ambiguity in the jury's verdict. None of the verdict sheets associated the offense number with a given incident or separate criminal offense. Nor did the trial court's instructions make any attempt to separate the individual criminal offenses, or guide the jury to identify a given verdict sheet with a corresponding instance of alleged sexual abuse. We conclude, upon review of the charges, the evidence, and the jury instructions, that the jury's verdicts of guilty are ambiguous as regards the charge of second-degree sex offense against C.L. in Currituck County, the five charges of second-degree sex offense against G.L. in Pasquotank County, and one of the charges of second-degree sex offense against S.L. in Currituck County.

We have reviewed defendant's remaining arguments and find them to be without merit. For the reasons discussed above, we conclude that defendant's convictions in cases Currituck County 01-CRS-212, and 219, and Pasquotank County 02-CRS-1331 through 1335, must be reversed. We find no error in defendant's nine other convictions.

Reversed in part; No error in part.

Judges HUNTER and McCULLOUGH concur.

PEGGY E. McMANUS, PLAINTIFF v. G. LEE KLUTTZ, GRAYSON M. KLUTTZ AND L. STEVE KLUTTZ, DEFENDANTS

No. COA03-608

(Filed 3 August 2004)

1. Appeal and Error— sanctions—failure to include documents in record on appeal

Defense counsel is sanctioned $500.00 under N.C. R. App. P. 34(a)(3) and 34(b)(2) based on its failure to include plaintiff's voluntary dismissal in the record on appeal, thus causing defendants to file a motion to withdraw the Court of Appeals' prior opinion dismissing the appeal as interlocutory and to amend the record to include plaintiff's voluntary dismissal, because the Court of Appeals incurred unnecessary expenses and the parties experienced further delay in the resolution of their claim.

2. Adverse Possession— color of title—known and visible lines and boundaries—lappage

The trial court did not err by granting partial summary judgment in favor of plaintiff based on a finding that plaintiff acquired fee simple ownership of the pertinent strip of land by virtue of seven years adverse possession under color of title pursuant to N.C.G.S. § 1-38(a), because: (1) plaintiff's deed contains a thorough metes and bounds description of the property, and three maps and the testimony of two surveyors show the disputed land as falling within the boundaries of the deed; (2) N.C.G.S. § 1-38(b)(1)-(2) is not the only method by which property may be held under known and visible lines and boundaries, and claimants may still prove known and visible lines and boundaries under common law methods pursuant to N.C.G.S. § 1-38(a); (3) the manmade difference in growth and maintenance between plaintiff's maintained property and defendants' waist-high overgrown property provides visual notification of the extent of plaintiff's possession; (4) there is evidence that the visible line was long standing for roughly thirty years prior to the initiation of this lawsuit; and (5) although the deeds of each party encompassed the disputed property, plaintiff as junior grantee claiming title by seven years adverse possession under color of title did not have to show that the boundaries of the lappage were visible on the ground since she established the required adverse possession within those lines in an actual, open, hostile, exclusive, and continuous manner for the required seven year period.

Appeal by defendants from an order entered 17 March 2003 by Judge Russell J. Lanier, Jr. in Carteret County Superior Court. Heard in the Court of Appeals 25 February 2004.

Ward & Smith, P.A., by Ryal W. Tayloe and Eric J. Remington, for plaintiff-appellee.

Clark, Newton, Evans & Craige, L.L.P., by John Richard Newton, for defendant-appellant.

HUNTER, Judge.

G. Lee Kluttz and Grayson M. Kluttz ("defendants")[1] appeal from a grant of partial summary judgment in favor of Peggy E. McManus ("plaintiff"). For the reasons stated herein, we affirm.

[1] As an initial matter, we note that this Court previously filed an opinion dismissing this appeal as interlocutory due to the failure of defendants' counsel to include plaintiff's Voluntary Dismissal of her Claim for Damages in the Record on Appeal. *McManus v. Kluttz*, — N.C. App. —, 595 S.E.2d 238 (2004) (unpublished). Without the Voluntary Dismissal, the documents in the Record on Appeal showed that other claims were still pending in the trial of this case. Accordingly, we dismissed the appeal as interlocutory because the trial court had not certified the case for appeal under Rule 54(b) of the North Carolina Rules of Civil Procedure nor had defendant argued that the order affected a substantial right. *See Embler v. Embler*, 143 N.C. App. 162, 164-65, 545 S.E.2d 259, 261 (2001). Defendants then filed a motion to withdraw the opinion and amend the record to include plaintiff's Voluntary Dismissal, thus changing the status of defendants' appeal from interlocutory to final.

Although this Court granted defendants' motion, we note that our previous opinion had to be withdrawn and that a considerable amount of time and resources were wasted as a result of defendants' counsel's error. It is the appellant's duty and responsibility to ensure the completeness and proper form of the Record on Appeal. *See* N.C.R. App. P. 9(a) *et. seq.*; *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983). Due to defendants' counsel's error, the Court incurred unnecessary expenses and the parties experienced further delay in the resolution of their claim. Therefore, this Court elects in its discretion pursuant to Rules 34(a)(3) and 34(b)(2) of the North

1. Defendant L. Steve Kluttz was removed as a party during the course of this appeal.

Carolina Rules of Appellate Procedure to sanction defendants' counsel in the amount of $500.00. *See* N.C.R. App. P. 34(a)(3), 34(b)(2). We now proceed to consider the merits of this appeal.

On 16 November 1979, the Clayton Fulcher Seafood Company transferred a tract of land on Harkers Island in Carteret County to a woman named Bessie Scott. The deed for the land transfer and a survey map of the property are recorded in the Carteret County Registry at Book 16, Page 95. Registered land surveyor John W. Collier ("Collier") performed the survey according to the deed's metes and bounds description, and placed metal stakes in the ground to mark the boundaries of the property. Collier also marked the locations of these stakes on the survey map. Following Bessie Scott's death, ownership of the land passed to her son, Elliot Anderson Scott ("Scott").

On 21 September 1990, plaintiff and her husband (now deceased) purchased the tract of land from Scott. The purchase is recorded in the Carteret County Registry at Book 643, Page 412. Soon thereafter, registered land surveyor W. D. Daniels ("Daniels") performed a second survey of the property. Although they were not sticking up from the ground, Daniels physically identified all but two boundary stakes from the previous survey. Notably, however, Daniels identified every stake along the western boundary of plaintiff's property. Daniels then remarked the property boundaries by setting flags and wooden "witness" stakes beside the original metal stakes. According to plaintiff, these stakes and flags remained in the ground "for the first five or so years" after the property was purchased.

On plaintiff's property there is also a small home, to which she and her husband added a second story sometime after its purchase. Just west of the home is a strip of land that is the subject of this dispute. Until plaintiff's purchase, Scott maintained and cleared the yard and the disputed strip of land. In addition, the Collier and Daniels surveys each identified the disputed strip as falling within the boundaries of plaintiff's property. As such, plaintiff and her husband believed they owned the strip and actively maintained it since 1990 by seeding, mowing the grass, planting three pampas bushes, and paying the related property taxes.

Directly next to this strip, however, is a plot of land owned by defendants since 1964. Defendants' purchase is recorded in the Carteret County Registry at Book 254, Page 204. Although there is a house trailer on the property, it is only used occasionally and the

property is primarily used for storage of automobiles and other items of business. Defendants' yard is unkempt and overgrown with waist-high scrub brush, weeds, and smilax. Photographs and testimony in the record show that the overgrown nature of the property creates a visible distinction between the land maintained by plaintiff and the land maintained by defendants.

Based on the deed to their property, defendants allege they own the strip of land just west of plaintiff's home. In March 2001, registered land surveyor Sherwin D. Cribb ("Cribb") created a map of defendants' property based on the metes and bounds description in their deed. Cribb's map identifies the disputed strip as falling within the property owned by defendants. The map also shows that the eastern boundary line of defendants' land runs through a portion of plaintiff's home. Cribb states that during the course of his work, he did not find any survey markers delineating the disputed tract of land that were readily open or visible.

Around December of 2000, defendants noticed plaintiff's grass and other plantings on the disputed strip of land. Defendants' son then bulldozed the strip, tearing out the grass and pampas bushes and destroying a drainpipe running from plaintiff's home. Upon this incursion, plaintiff hired registered land surveyor Robert H. Davis ("Davis") to perform another survey of the property. Like Collier and Daniels, Davis identified the disputed strip as falling within the property owned by plaintiff. Davis also states that while performing the survey he physically located and identified every stake on the western line of plaintiff's land that was referenced in the previous survey.

Plaintiff then filed a complaint alleging, among others, that defendants' assertion of ownership was a cloud upon her title, which she acquired by seven years adverse possession under color of title. Defendants denied plaintiff had met the requirements for adverse possession and alleged superior title and fee simple ownership of the strip of land. The trial court granted partial summary judgment in favor of plaintiff, finding that she acquired fee simple ownership of the strip by virtue of seven years adverse possession under color of title.

[2] The sole issue on appeal is whether the trial court properly granted partial summary judgment in favor of plaintiff. This Court reviews grants of summary judgment *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999).

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. Gen. Stat. § 1A-1, Rule 56(c) (2003). A genuine issue of material fact exists if the fact alleged constitutes a legal defense or is of such a nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). However, a question of fact which is immaterial does not preclude summary judgment. *Id.*

Defendants assign as error the trial court's grant of partial summary judgment on grounds that genuine issues of material fact exist concerning plaintiff's character of possession and plaintiff's holding the property under known and visible lines and boundaries. We conclude that any questions of fact are immaterial and that summary judgment was appropriate.

Section 1-38(a) of the North Carolina General Statutes provides that one acquires title to real property after possessing it for seven years under color of title and under known and visible lines and boundaries. N.C. Gen. Stat. § 1-38(a) (2003).[2] In addition, such possession must be actual, open, hostile, exclusive, and continuous for the required time period. *Merrick v. Peterson*, 143 N.C. App. 656, 663, 548 S.E.2d 171, 176, *disc. review denied*, 354 N.C. 364, 556 S.E.2d 572 (2001).

Defendants do not dispute plaintiff's possession under color of title.

> Adverse possession under color of title is occupancy under a writing that purports to pass title to the occupant but which does not actually do so either because the person executing the writing fails to have title or capacity to transfer the title or because of the defective mode of the conveyance used.

Cobb v. Spurlin, 73 N.C. App. 560, 564, 327 S.E.2d 244, 247 (1985). In North Carolina, a deed may constitute color of title so long as it contains an adequate description of the land. *Marlowe v. Clark*, 112 N.C. App. 181, 186, 435 S.E.2d 354, 357 (1993). In addition, the claimant must prove that the boundaries described in the deed cover

2. If adverse possession is not under color of title, the required statutory period of possession is twenty years. *See* N.C. Gen. Stat. § 1-40 (2003).

the land in dispute. *McDaris v. "T" Corporation*, 265 N.C. 298, 300-01, 144 S.E.2d 59, 61 (1965). Since plaintiff's deed contains a thorough metes and bounds description of the property, and because three maps and the testimony of two surveyors show the disputed land as falling within the boundaries of the deed, the requirement of color of title is satisfied. *See e.g. Willis v. Johns*, 55 N.C. App. 621, 624-25, 286 S.E.2d 646, 648-49 (1982).

However, defendants assert that summary judgment was improper because genuine issues of material fact exist concerning plaintiff's possession of the land under known and visible lines and boundaries. Defendants argue that, under North Carolina General Statutes § 1-38(b)(1)-(2), plaintiff is required to demonstrate the marking of boundaries by stakes or other monuments that are at least eighteen inches above ground level for the entire seven year period. Although surveyors Daniels and Davis physically identified markers on the property, defendants point out that the markers were only in place for the first five years of plaintiff's possession. In addition, the markers were not eighteen inches above the ground, and surveyor Cribb did not locate markers at all. Accordingly, defendants argue that plaintiff did not possess the land under known and visible lines and boundaries.

This argument, however, is based on the incorrect premise that § 1-38(b)(1)-(2) provides the only method by which property may be held under known and visible lines and boundaries. In 1973, the General Assembly amended § 1-38 to include subsection (b), which provides that if property boundaries are identified by distinctive markings on trees or by stakes raising eighteen inches above the ground, and if a survey map is recorded in the county registry, "then the listing and paying of taxes on the real property . . . shall constitute prima facie evidence of possession of real property under known and visible lines and boundaries." N.C. Gen. Stat. § 1-38(b).[3] The addition of § 1-38(b) did not abrogate the provisions of § 1-38(a), but was merely "designed to *facilitate* proof of possession under known and visible lines and boundaries, which is often difficult with respect to farmland and woodland not actually occupied." James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 14-12, at 660 (1998) (emphasis added). Thus, § 1-38(b) simply provides one undisputable method by which a claimant may establish possession under known and visible lines and boundaries in difficult cases. However,

3. The 1973 amendment also added subsection (c) to § 1-38. However, since subsection (c) is not relevant to the resolution of this matter, it is not discussed here.

since § 1-38(a) remains valid, claimants may still prove known and visible lines and boundaries under common law methods.

Under our common law interpretations, known and visible lines and boundaries must apprise the true owner and the world of the extent of the possession claimed. *McDaris*, 265 N.C. at 303, 144 S.E.2d at 63. Accordingly, this Court has held that a line of trees marked by old chops and blazes can sufficiently indicate the extent of possession to satisfy the requirement of known and visible lines and boundaries. *Wiggins v. Taylor*, 31 N.C. App. 79, 82, 228 S.E.2d 476, 478 (1976), *disc. review denied*, 291 N.C. 717, 232 S.E.2d 208 (1977). In *Wiggins*, plaintiffs claimed adverse possession over a tract of land, the eastern boundary of which defendant claimed was not marked by visible lines and boundaries. However, evidence showed that the eastern boundary began at a concrete marker and then followed a line of trees that had been marked by chops and blazes. Several witnesses, including a surveyor and a former adjoining land owner, testified that they saw or knew of the eastern boundary created by the chops and blazes. In addition, the chops and blazes were between thirty-five and fifty years old. Based on these facts, this Court concluded there was sufficient evidence to support a finding of possession under known and visible lines and boundaries. *Id. See also Beam v. Kerlee*, 120 N.C. App. 203, 213, 461 S.E.2d 911, 919 (1995), *cert. denied*, 342 N.C. 651, 467 S.E.2d 703 (1996) (holding that one's ability to cut a path marking the boundaries of his property constitutes sufficient evidence of known and visible lines boundaries to withstand a motion for directed verdict).[4]

Similar to the manmade chops and blazes in *Wiggins*, the manmade difference in growth and maintenance between plaintiff's and defendants' property provides visual notification of the extent of plaintiff's possession. Photographs, affidavits, and depositions in the record demonstrate that plaintiff consistently maintains her yard, including the disputed tract of land, by seeding, mowing, and planting bushes. In contrast, defendants' property opposite the disputed tract is overgrown with waist-high scrub brush, weeds, and smilax. Thus, just as the marked trees in *Wiggins* created a visible line marking the extent of possession, the dramatic difference in yard main-

4. We acknowledge that both *Wiggins* and *Beam* address the issue of known and visible lines and boundaries under N.C. Gen. Stat. § 1-40 rather than § 1-38, which applies to this case. However, the requirement of known and visible lines and boundaries in § 1-40 is identical to the requirement found in § 1-38(a). Therefore, in determining whether known and visible lines and boundaries exist under § 1-38(a), analogy can be made to precedent establishing such boundaries under § 1-40.

tenance in this case creates a visible line marking the extent of plaintiff's possession.

Further, just as a surveyor and former land owner in *Wiggins* testified to their familiarity with the tree markings, registered surveyor Daniels and former Clayton Fulcher Seafood Company employee Kenny Willis ("Willis"), both state they have seen and are familiar with the dramatic contrast in growth and maintenance between the two yards. Also like the thirty-five to fifty year old markings on the trees in *Wiggins*, there is evidence that the visible line in this case is long standing. In their affidavits, Willis and plaintiff both state that prior to plaintiff's purchase, former owner Scott and his mother maintained the yard, including the disputed strip of land. Willis's affidavit also states that defendants' yard has been overgrown since at least 1970. In addition, aerial photographs in the record, dating back to Clayton Fulcher Seafood Company's transfer of the land to Bessie Scott, show a clearly visible line between the two properties caused by overgrowth in defendants' yard. Thus, a visible line between the properties has existed for roughly thirty years prior to the initiation of this lawsuit. Based on all of these facts, we conclude that the waist-high overgrowth in defendants' yard, and the contrasting maintenance of plaintiff's yard, creates a sufficiently visible line to apprise defendants of the extent of possession claimed by plaintiff. Therefore, the requirement of possession under known and visible lines and boundaries is satisfied. As such, defendants' asserted questions of fact regarding the placement of markers are immaterial because they do not affect the outcome of the case. *See Kessing*, 278 N.C. at 534, 180 S.E.2d at 830.

Yet even if the dramatic difference in growth and maintenance does not create sufficiently known and visible lines and boundaries, the matter can be resolved by the applicability of lappage rules to this case. Lappage cases are a specific type of adverse possession case in which the deeds of each party encompass the disputed property. As such, the deeds are said to "lap" upon each other. *See* James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 14-13, at 660-61 (1998). Since the metes and bounds descriptions in both plaintiff's and defendants' deeds include the strip of land west of plaintiff's home, the disputed property is lappage.

In order to make out a superior title to land that is lappage, it is necessary to ascribe exclusive possession to one of the claimants. Accordingly, our courts have formulated certain rules to establish possession of the lappage. *See Price v. Tomrich Corp.*, 275 N.C. 385,

392-94, 167 S.E.2d 766, 771-72 (1969). *See also* Webster, *Webster's Real Estate Law in North Carolina* § 14-13, at 660-61. One rule is that a junior grantee claiming title by seven years adverse possession under color of title does not have to show that the boundaries of the lappage were visible on the ground, so long as he establishes the required adverse possession within those lines. *See Allen v. Morgan*, 48 N.C. App. 706, 709, 269 S.E.2d 753, 754 (1980); *Price*, 275 N.C. at 394, 167 S.E.2d at 772. Therefore, any questions about the visible lines and boundaries created by differences in growth and maintenance are resolved by the applicability of lappage rules. Accordingly, plaintiff can gain title to the disputed property even without known and visible boundaries on the ground so long as she can establish the elements of adverse possession within the boundaries identified by her deed.

We therefore turn to the common law requirements of adverse possession. As stated earlier, adverse possession under color of title must be actual, open, hostile, exclusive, and continuous for the required seven year period. *Merrick*, 143 N.C. App. at 663, 548 S.E.2d at 176. Regarding actual possession, there is evidence that plaintiff has been in actual physical possession of the disputed property for over seven years. Since 1990, plaintiff and her husband planted grass and pampas bushes on the disputed track and maintained the strip by mowing the lawn and keeping weeds down. In addition, it is the general rule that where one enters upon a portion of land, but asserts ownership of the whole land based on color of title, the law extends his possession to the outer bounds of his deed so long as the land is not held adversely by another. *Willis*, 55 N.C. App. at 625, 286 S.E.2d at 649; *Vance v. Guy*, 223 N.C. 409, 413, 27 S.E.2d 117, 121 (1943). Thus, plaintiff is also deemed in possession of the tract because she has lived in her home within the boundaries of her deed for over seven years, her deed encompasses the disputed tract of land, and because there is no evidence of competing possession by any other person.

However, defendants argue that material issues of fact exist concerning the open character of plaintiff's possession. Although plaintiff claims she and her husband actively maintained the disputed strip of land throughout the required seven year period, defendants submit the deposition of plaintiff's yard maintenance worker, who states that he only cut plaintiff's grass once a month for about seven months each year and that he only saw plaintiff and her husband at their home and surrounding property "now and then." In addition,

defendants provide the affidavit of a local fisherman who states that he parked his car on plaintiff's property and never saw any person there throughout the entire summer season of 1997. Finally, defendants' son claims he never saw plaintiff or her husband on the property. Since this testimony conflicts with plaintiff's evidence, defendants argue that issues of fact exist that made summary judgment improper.

Even if plaintiff was rarely seen in person, her alterations to the land satisfied the requirement of open and notorious possession. Possession is open and notorious if it places the true owner on notice of an adverse claim. *Cothran v. Motor Lines*, 257 N.C. 782, 784, 127 S.E.2d 578, 580 (1962). Further, working activities such as cutting timber or pulpwood creates sufficiently open and notorious possession if they are kept up with such frequency and regularity as to give notice to the public that the party performing the work is claiming ownership of the land. *Price*, 275 N.C. at 398, 167 S.E.2d at 775. Although mowing a lawn once a month for seven months a year is not a large amount of time, it is a regular and consistent schedule for mowing grass that may not require attention twelve months out of the year. In addition, the fact that defendants' son and a local fisherman never saw plaintiff or her husband on the property are not sufficient to refute plaintiff's other acts of ownership. Even if plaintiff was never seen on her property, the second story addition to her home, her yard maintenance, and her planted bushes are all clearly visible to anyone passing by. These activities should have apprised defendants that someone was on their land, making use of it, and asserting an ownership interest, regardless of who they did or did not see. Therefore, despite the conflicting testimony offered by defendants, summary judgment was appropriate because the undisputed evidence was sufficient to place defendants on notice of an adverse claim.

Defendants next argue that plaintiff's possession was not hostile because her use of the land was permissive. Before plaintiff and her husband purchased the property from Scott, defendant G. Lee Kluttz alleges he had a conversation with plaintiff's husband. Recalling that conversation in his deposition, Mr. Kluttz states that:

> [Mr. McManus] was telling me that he was figuring on buying Bessie Scott's house. I said, well now, I want to tell you something before you do. I said you'd better check into it because it's on part of my land—just like that, that's what I told him. And I said, now I'm telling you about it because—uh, I said I'd straighten it out or

> move the house back. . . . I said, now if you want to buy it, it's your business to do what you want to.

Based on these statements, defendants assert that plaintiff's use of the disputed land was permissive and cannot constitute adverse possession.

Defendants' argument fails, however, because nothing in Mr. Kluttz's conversation with plaintiff's husband constituted permission to use the disputed land. At most, Mr. Kluttz's statement that "you'd better check into it because it's on part of my land" provided plaintiff and her husband with notice that a potential boundary issue existed concerning the property. However, notice is not equivalent to permission. Moreover, Mr. Kluttz's statement that "it's your business to do what you want to" removes him from the situation altogether, rather than assert his role as an owner of the land giving permission. Certainly, choosing not to involve oneself in another person's affairs cannot be construed as permission. Finally, Mr. Kluttz's statement that "I'd straighten it out or move the house back" appears to be a denial of permission. Viewed in this light, Mr. Kluttz's conversation actually heightens the hostile nature of plaintiff's possession because she and her husband continually resided in the home, and remodeled the home, without ever moving it away from defendants' alleged property line. Accordingly, any factual issues presented by the alleged conversation are immaterial because at most it provided notice but not permission, and at worst it increased the hostile nature of plaintiff's possession.

Finally, we note that the requirements of exclusive and continuous possession are also satisfied. For possession to be exclusive, other people must not make similar use of the land during the required statutory period. *See State v. Brooks*, 275 N.C. 175, 183, 166 S.E.2d 70, 75 (1969). Here, defendants offer no evidence that they made use of the disputed property or shared it with plaintiff in any way. In fact, defendants admit that their property is only used occasionally and is primarily used for storage of automobiles and other items of business. Defendants' son also states in his deposition that the family has used their property "very little" since the time his mother became sick in 1991. Further, there is no evidence of anyone else making use of the property or of plaintiff sharing the property in any manner during the time of her possession. Therefore, plaintiff's possession was exclusive.

Similarly, plaintiff's possession was continuous for the required seven year period. To be continuous, adverse possession does not

have to be unceasing, but the evidence must warrant the inference that actual use and occupation has extended over the required period and that during it, the claimant has, from time to time, continuously subjected the land to its susceptible use. *See Helton v. Cook*, 27 N.C. App. 565, 568, 219 S.E.2d 505, 507 (1975), *disc. review denied*, 289 N.C. 297, 222 S.E.2d 697 (1976); *Locklear v. Savage*, 159 N.C. 236, 239, 74 S.E. 347, 348 (1912). Here, plaintiff has continuously lived in her home since 1990. In addition, plaintiff has regularly subjected the land to use during the course of her possession by adding a second story to her home, planting grass and bushes along the disputed property, and hiring a maintenance worker to mow the lawn. No other evidence, other than the defendants' allegations that plaintiff was rarely seen at her house and surrounding property, indicates that plaintiff ceased occupying the property for any amount of time during the required period. Therefore, the acts of residence and yard maintenance support the inference that plaintiff's occupation of the land extended over the required seven year period.

For the above stated reasons, we conclude that plaintiff has held the disputed land under color of title and known and visible boundaries in an actual, open, hostile, exclusive, and continuous manner for the required seven year period. Any factual issues presented by defendants are immaterial in that they do not affect the outcome of the case. Therefore, the trial court did not err in granting partial summary judgment in favor of the plaintiff.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

HENRY WOODROW BARNES, JR., PETITIONER v. JAMES DONALD WELLS, RESPONDENT, FOR THE ADOPTION OF DAWN MARIE BARNES

No. COA03-997

(Filed 3 August 2004)

1. Jurisdiction— personal—not waived by motion to reopen adoption file—no general appearance

Respondent did not waive his personal jurisdiction objection to his daughter's adoption by moving that the trial court reopen the adoption file and transfer the matter from the Clerk of

Superior Court. Respondent did nothing that could be considered a general appearance before entry of the order now challenged; if the court lacked personal jurisdiction when it entered the order, subsequent actions could not retroactively supply jurisdiction.

2. **Adoption; Process and Service— motion to reopen adoption—prior abandonment proceeding—service by publication**

There was no abuse of discretion in the denial of a natural father's Rule 60 motions for relief from the adoption of his daughter by the mother's new husband. The abandonment proceeding which preceded the adoption (so that respondent was not a necessary party to the adoption) was based on service by publication. The publication requirements were satisfied because petitioner first attempted service by certified mail at the respondent's admitted address in Virginia, with the letter addressed both to respondent and in care of the person with whom he lived.

3. **Jurisdiction— minimum contacts—divorce and child custody proceedings**

There were sufficient minimum contacts for the court to obtain personal jurisdiction over respondent in an abandonment proceeding, which preceded an adoption, where respondent lived in North Carolina for only one month but had other contacts with the state through his divorce proceeding and his daughter's custody matters.

Judge GEER concurring.

Appeals by petitioner and respondent from order filed 26 March 2003 by Judge John R. Jolly, Jr. in Chatham County Superior Court. Heard in the Court of Appeals 21 April 2004.

Jones, Martin, Parris & Tessener Law Offices, P.L.L.C., by Sean A.B. Cole, for petitioner-appellant.

Glenn, Mills & Fisher, P.A., by Carlos E. Mahoney, for respondent-appellant.

BRYANT, Judge.

Henry Woodrow Barnes, Jr. (petitioner) and James Ronald Wells (respondent) both appeal an order filed 26 March 2003 denying respondent's motion for relief from an order entered 25 October 1979

that allowed petitioner to adopt respondent's natural daughter. Respondent and Donna Jarrett (Jarrett) were married in Blair, Virginia on 26 March 1970. On 11 October 1970, Dawn Marie was born to the marriage. Following Dawn Marie's birth, the family moved to Fort Bragg, North Carolina while respondent was engaged in military service. Sometime in 1971, the family moved back to Virginia.

In either late 1974 or early 1975, respondent and Jarrett separated. Following their separation, Jarrett moved back to North Carolina and began living with petitioner.

On 13 October 1975, Jarrett obtained a divorce from respondent in Mecklenburg County, North Carolina. Custody of Dawn Marie was placed with Jarrett. Respondent did not appear at the divorce proceeding. On 24 January 1976, Jarrett married petitioner in York, South Carolina, and the family moved to Chapel Hill, North Carolina.

Sometime in late 1977, respondent came to North Carolina, picked-up Dawn Marie, and returned with the child to Danville, Virginia. On 7 December 1977, respondent filed a petition for custody of Dawn Marie in Danville, Virginia. On 8 December 1977, Jarrett contested the petition by filing a similar petition for custody in Danville, Virginia. A custody hearing was held on 8 December 1977, and respondent was awarded temporary custody. A permanent custody hearing was scheduled for 31 January 1978. Shortly after the 8 December 1977 hearing, respondent returned Dawn Marie to the physical custody of Jarrett and petitioner in North Carolina. On 16 December 1977, respondent dismissed his petition for custody.

On 26 September 1978, petitioner filed a petition for the adoption of Dawn Marie in Chatham County, North Carolina. Jarrett signed a consent for adoption, and also filed a petition alleging respondent's abandonment of Dawn Marie. During this time, respondent was living with his grandmother in Danville, Virginia.

The clerk of superior court of Chatham County attempted to serve notice on respondent, via certified mail with return receipt requested, advising that a court date had been set to determine whether abandonment had occurred. Petitioner also attempted to serve notice of the adoption proceeding on respondent via certified mail with return receipt requested. The certified mail was not successfully delivered; thereafter, petitioner provided service by publication in the Danville newspaper. Notice was published for four days in April 1979. On 14 May 1979, Jarrett and petitioner's attorney filed an

affidavit attesting that respondent's "whereabouts, dwelling house is unknown and there has been diligent but unsuccessful attempt to serve the party under paragraph c of Rule 4(j)(9)."

On 14 May 1979, a hearing was held before the clerk of superior court, at which Jarrett, petitioner, and their attorney were present. Respondent was not present and did not have an attorney present on his behalf. On the same date, the clerk issued an order of abandonment decreeing that respondent had abandoned Dawn Marie and that a guardian ad litem should be appointed to represent her interests.

On 25 October 1979, the trial court entered an order allowing petitioner to adopt Dawn Marie. Respondent neither was a party to the adoption proceeding nor did he enter an appearance before the court.

On 28 May 2002, Dawn Marie died in an automobile accident. Following her death, respondent claims he discovered she had been adopted by petitioner in North Carolina. On 19 September 2002, respondent filed a motion for relief from the final order of adoption pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) and (b)(6). Respondent's motion alleged that the final order for adoption was void because petitioner failed to properly serve respondent with notice of the proceedings, and the clerk of superior court lacked personal jurisdiction over respondent. On 28 October 2002, upon motion of respondent, these matters were transferred to the superior court division for hearing.

These matters came for hearing on 2 December 2002. On 26 March 2003, the trial court issued an order denying respondent's Rule 60(b)(4) and (b)(6) motion. Both petitioner and respondent assigned as error portions of the 26 March 2003 order.

The issues on appeal are whether the trial court erred in (I) concluding respondent did not waive his personal jurisdiction objection; and (II) denying respondent's Rule 60(b)(4) and (b)(6) motion for relief.

I

Petitioner's Appeal

[1] The trial court entered as conclusion of law 12:

> Petitioner asserts that this matter is controlled by In re Blalock, 233 N.C. 493, 64 S.E.2d 848 (1951), and argues that Respondent

> submitted to the [c]ourt's jurisdiction by moving the [c]ourt to open the adoption file, and by filing a Motion to Transfer from the Clerk to Superior Court. Accordingly, Petitioner moves the court to conclude that by these specific actions Respondent should be deemed to have waived all defects to personal jurisdiction. The court rejects Petitioner's argument that Blalock is controlling, and the motion is DENIED.

Petitioner argues the trial court erred in failing to conclude that respondent submitted to the trial court's jurisdiction by moving the trial court to open the adoption file and transfer the matter from the clerk of superior court. We disagree.

In *In re Blalock*, 233 N.C. 493, 64 S.E.2d 848 (1951), our Supreme Court examined whether a party waived his objection to improper service of process by filing a motion to dismiss based on personal and subject matter jurisdiction. The *Blalock* Court determined that by seeking dismissal based on lack of subject matter jurisdiction, the respondent made a general appearance, thereby waiving all objections to personal jurisdiction. *Blalock*, 233 N.C. at 504, 64 S.E.2d at 856. We agree with the trial court's conclusion that *Blalock* is inapplicable to the instant case. The actions deemed to be a general appearance in *Blalock* occurred prior to the entry of a final judgment. Here, respondent did nothing that could be considered a general appearance prior to the entry of the order now challenged.

Petitioner cites several cases in support of his argument that respondent waived his objections to personal jurisdiction. However, we find these cases are also inapplicable because respondent never made a general appearance before entry of the final order. *Bullard v. Bader*, 117 N.C. App. 299, 301-02, 450 S.E.2d 757, 759 (1994) (defendant made a general appearance before entry of judgment by submitting financial documents for consideration at his child support hearing); *Bumgardner v. Bumgardner*, 113 N.C. App. 314, 319, 438 S.E.2d 471, 474 (1994) (defendant made a general appearance before entry of judgment by appearing in court with counsel and participating in the hearing for absolute divorce); *Humphrey v. Sinnot*, 84 N.C. App. 263, 265-66, 352 S.E.2d 443, 445 (1987) (defendant made a general appearance by moving for change of venue before asserting lack of jurisdiction defenses); *Williams v. Williams*, 46 N.C. App. 787, 788-89, 266 S.E.2d 25, 27-28 (1980) (defendant made a general appearance before entry of judgment by his legal counsel's participation in an in-chambers conference with judge and opposing attorney on cus-

tody issue); *Swenson v. Thibaut*, 39 N.C. App. 77, 89-92, 250 S.E.2d 279, 287-89 (1978) (defendants made a general appearance by moving to disqualify plaintiff's counsel before filing lack of jurisdiction defenses). If the trial court lacked personal jurisdiction over respondent when it entered the order, actions subsequent to that order could not retroactively supply jurisdiction. Based on applicable case law, the trial court did not err in concluding that respondent did not waive his objection to personal jurisdiction. Accordingly, petitioner's assignment of error is overruled.

II

Respondent's Appeal

[2] Respondent argues that the trial court erred in denying his Rule 60(b)(4) & (b)(6) motion for relief from the adoption judgment. We disagree.

> Pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b),
>
> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:
>
> . . . .
>
> (4) The judgment is void;
>
> . . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C.G.S. § 1A-1, Rule 60(b)(4), (b)(6) (2003). The standard of review for a trial court's ruling on a Rule 60(b) motion is abuse of discretion. *Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616 (1998). Abuse of discretion exists when "the challenged actions are manifestly unsupported by reason." *Blankenship v. Town and Country Ford, Inc.*, 155 N.C. App. 161, 165, 574 S.E.2d 132, 134 (2002). The trial court's findings regarding a Rule 60(b) motion are conclusive on appeal if supported by competent evidence. *Blankenship*, 155 N.C. App. at 165, 574 S.E.2d at 134-35.

In the instant case, an order was entered on 14 May 1979 adjudicating respondent had abandoned Dawn. The abandonment order was entered several months before the adoption order. The dispositive issue, therefore, is whether the abandonment proceeding of 14

May 1979 was proper. Since the adoption occurred in 1979, we analyze this case under the adoption statutes of Chapter 48 in effect at that time.

N.C. Gen. Stat. § 48-5 provides:

> (a) The court shall be authorized to determine whether the parent or parents of a child shall be necessary parties to any proceeding under this Chapter, and whether the consent of such parent or parents shall be required in accordance with G.S. 48-6 and 48-7.
>
> . . . .
>
> (e) If the parent, parents, or guardian of the person deny that an abandonment has taken place, this issue of fact shall be determined as provided in G.S. 1-273, and if abandonment is determined, then the consent of the parent, parents, or guardian of the person shall not be required.

N.C.G.S. § 48-5 (Supp. 1977) (repealed 1 July 1996).

According to the clear language of N.C. Gen. Stat. § 48-5, respondent would not be a necessary party to the adoption proceeding if the prior abandonment determination was properly entered. Respondent argues that service by publication, as was used in this case, was improper, and the court lacked jurisdiction over respondent to enter the abandonment order.

Before a party can resort to service by means of publication, other forms of service must first be attempted. N.C. Gen. Stat. § 1A-1, Rule 4(j)(9)(c) (1979). In 1979, this State's rules concerning service were as follows:

a. Personal service may be made on any party outside this State by anyone authorized in section (a) of this rule and in the manner prescribed in this section (j) for service on such party within this State. Before judgment by default may be had on such service, there shall be filed with the court an affidavit of service showing the circumstances warranting the use of personal service outside this State and proof of such service in accordance with the requirements of G.S. 1-75.10(1).

b. Any party subject to service of process under this subsection (9) may be served by mailing a copy of the summons and complaint, registered or certified mail, return receipt requested,

addressed to the party to be served. Service shall be complete on the day the summons and complaint are delivered to the address, but the court in which the action is pending shall upon motion of the party served, allow such additional time as may be necessary to afford the defendant reasonable opportunity to defend the action. Before judgment by default may be had on such service, the serving party shall file an affidavit with the court showing the circumstances warranting the use of service by registered or certified mail and averring (i) that a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested, (ii) that it was in fact received as evidenced by the attached registered or certified receipt or other evidence satisfactory to the court of delivery to the addressee and (iii) that the genuine receipt or other evidence of delivery is attached.

c. A party subject to service of process under this subsection (9) may be served by publication whenever the party's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to serve the party under either Paragraph A or under Paragraph B or under Paragraphs A and B of this subsection (9).

N.C.G.S. § 1A-1, Rule 4(j)(9)(a), (b), (c) (Supp. 1979).

The trial court in the instant case stated in its judgment:

While the appellate courts of our state have consistently rejected using a checklist to determine whether due diligence was accomplished by a party before that party resorts to service of process by publication, in the instant case, due diligence was accomplished. Petitioner presented photocopies of the returned certified mail envelope originally used to attempt service on Respondent in Danville, Virginia. In spite of his admitted residence at the address in Danville where Petitioner sought to serve him, Respondent did not claim the certified letter.

As the trial court noted, this Court has refused to "make a restrictive mandatory checklist for what constitutes due diligence for purposes of permitting Rule 4(j)(9)(c) publication. Rather, a case by case analysis is more appropriate." *Emanuel v. Fellows*, 47 N.C. App. 340, 347, 267 S.E.2d 368, 372 (1980). In *Emanuel*, the plaintiff took several

steps to determine the defendant's location but could not find him. The defendant on appeal argued that the plaintiff should have interviewed the defendant's old neighbors, checked with government agencies, relatives, and the county clerk's office before proceeding with service by publication. *Emanuel*, 47 N.C. App. 340 at 347, 267 S.E.2d at 372. The Court, however, held the plaintiff had acted with due diligence when he contacted directory assistance and the defendant's insurer in an unsuccessful attempt to determine the defendant's address. *Id.*

In the instant case, petitioner attempted service by certified mail at respondent's admitted address, which letter was addressed not only to respondent but also in care of his grandmother.

Respondent relies on *Sink v. Easter*, 284 N.C. 555, 202 S.E.2d 138 (1974), as support for his assertion that service by publication was improper. However, there are critical distinctions between *Sink* and the instant case. In *Sink*, the plaintiff had notice that the defendant was living outside the United States, and was told by a person at the defendant's High Point residence that he was unsure when the defendant would be returning to the United States. The Court noted that "it thus appears that Plaintiff could have and therefore should have affected personal service of process by leaving copies of the Summons and Court Order at Defendant's High Point residence with a person of suitable age and discretion living there." *Sink*, 284 N.C. 555 at 558, 202 S.E.2d at 141. Unlike the defendant in *Sink*, however, respondent admitted living at the same address where petitioner attempted service. Moreover, petitioner attempted to serve either respondent or the person with whom he lived. The trial court found:

> 12. Attorney Levi attempted to serve Respondent by certified mail at the address where he was living in Danville, Virginia, in March, 1979. Respondent did not claim the certified mail sent to him, although it remained at the post office for several weeks.
>
> . . . .
>
> 15. Petitioner and Donna Petty were each aware that Respondent was a resident of the Danville, Virginia address in question where they were attempting service; and that Respondent was not claiming his mail. Donna Petty had contacted Respondent and gave him actual notice of the proceedings, both before and after they occurred. Petitioner knew that Respondent was in the area where the notice of publication would run.

We conclude that the trial court correctly determined that due diligence was shown such that the service by publication requirements of Rule 4(j)(9)(a) to (c) were satisfied.

[3] In the instant case, we find the trial court was also presented with competent evidence to support a finding that the clerk of superior court had personal jurisdiction over respondent at the time of the entry of the abandonment order. The existence of personal jurisdiction is a question of fact for the trial court. *Hiwassee Stables v. Cunningham*, 135 N.C. App. 24, 27, 519 S.E.2d 317, 320 (1999). Our standard of review of an order "determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Wyatt v. Walt Disney World Co.*, 151 N.C. App. 158, 163, 565 S.E.2d 705, 708 (2002).

When personal jurisdiction exists pursuant to our long arm statute, the question collapses into the inquiry of whether the respondent "has the minimum contacts necessary to meet the requirements of due process." *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 671, 541 S.E.2d 733, 736 (2001). The requirements of due process are met when a respondent's contacts with the forum State are such that the maintenance of the suit would not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 2d 95, 102 (1945). Factors to consider include the: "(1) quantity of contacts, (2) nature and quality of the contacts, (3) . . . source and connection of the cause of action to the contacts, (4) . . . interest of the forum state and (5) convenience to the parties." *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 114, 516 S.E.2d 647, 650 (1999). "The test for minimum contacts is not mechanical, but instead requires individual consideration of the facts in each case." *Id.* All factors "must be weighed in light of fundamental fairness and the circumstances of each case." *Corbin Russwin, Inc. v. Alexander's Hardware, Inc.*, 147 N.C. App. 722, 725, 556 S.E.2d 592, 595 (2001).

In the instant case, although respondent lived in the State for only one month, he had other contacts with the State. Specifically, respondent and Jarrett's divorce proceeding was held in Mecklenburg County, North Carolina. As part of the divorce proceeding, Jarrett was awarded custody of Dawn Marie. Dawn Marie resided in North Carolina. In addition, respondent removed Dawn Marie from the custody of Jarrett, took Dawn Marie to Virginia, where he petitioned the

State of Virginia for custody, dropped his petition for custody, and later returned Dawn Marie to Jarrett in North Carolina.

Respondent's contacts with North Carolina are sufficient to support the trial court's finding of personal jurisdiction. Therefore, the clerk of superior court had personal jurisdiction over respondent at the time the abandonment order was entered, thereby rendering the order valid. Once the valid abandonment order was entered, respondent was no longer a necessary party to the adoption proceeding. The adoption of Dawn Marie by petitioner remains valid. Respondent's assignment of error is overruled.

Conclusion

Petitioner's assignment of error that the trial court erred in concluding respondent did not waive his personal jurisdiction objection is therefore overruled.

Respondent's assignment of error that the trial court erred in denying his Rule 60(b)(4) and (b)(6) motion for relief from the adoption judgment is therefore overruled.

The judgment of the trial court is affirmed.

Affirmed.

Judge ELMORE concurs.

Judge GEER concurs with a separate opinion.

GEER, Judge concurring.

I concur fully with the majority opinion, but write separately because I also believe that respondent is barred from challenging the 25 October 1979 adoption order. Respondent contends, the trial court assumed, and petitioner does not dispute that the statute in existence in 1979 controls: "No adoption may be questioned by reason of any procedural or other defect by anyone not injured by such defect, nor may any adoption proceeding be attacked either directly or collaterally by any person other than a biological parent or guardian of the person of the child." N.C. Gen. Stat. § 48-28(a) (repealed effective 1 July 1996).

In 1996, the General Assembly amended North Carolina's adoption laws, including N.C. Gen. Stat. § 48-28(a). The session law pro-

vided that "[t]his act becomes effective July 1, 1996. Any petition for adoption filed prior to *and still pending* on the effective date of this act shall be completed in accordance with the law in effect immediately prior to the effective date of this act." 1995 N.C. Sess. Laws 457 § 12 (emphasis added). While the petition for adoption at issue in this case was filed prior to the effective date of the amendments, it was not still pending as of the effective date. As a result, I believe the controlling law is the statute that went into effect on 1 July 1996: N.C. Gen. Stat. § 48-2-607 (2003).

Under N.C. Gen. Stat. § 48-2-607, a party to the adoption proceedings who does not appeal the order "shall be fully bound by the order." N.C. Gen. Stat. § 48-2-607(a). With respect to people who were not parties to the adoption proceedings, the statute provides: "No adoption may be attacked either directly or collaterally because of any procedural or other defect by anyone who was not a party to the adoption." *Id.* Parents or guardians are, however, given a limited additional right to challenge an adoption decree. N.C. Gen. Stat. § 48-2-607(c) provides in pertinent part:

> (c) A parent or guardian whose consent or relinquishment was obtained by fraud or duress may, within six months of the time the fraud or duress is or ought reasonably to have been discovered, move to have the decree of adoption set aside and the consent declared void. A parent or guardian whose consent was necessary under this Chapter but was not obtained may, within six months of the time the omission is or ought reasonably to have been discovered, move to have the decree of adoption set aside.

N.C. Gen. Stat. § 48-2-607(c).

In short, because the adoption order was entered in 1979, respondent could no longer move to set aside that order. This case demonstrates why there is a need for finality in adoptions. An order of adoption should not be subject to unraveling a quarter of a century after it was entered.

TODD WILLIAMS, PLAINTIFF v. CITY OF JACKSONVILLE POLICE DEPARTMENT, BILLY J. HOUSTON AND EARL K. BURKHART, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY, DEFENDANTS

No. COA03-1450

(Filed 3 August 2004)

1. **Appeal and Error— appealability—denial of summary judgment—res judicata and collateral estoppel**

   The denial of summary judgment based on the defenses of res judicata and collateral estoppel may affect a substantial right and make the order immediately appealable.

2. **Collateral Estoppel and Res Judicata— state claims in federal court—not ruled upon—not barred by res judicata**

   Res judicata did not bar state claims which a federal judge had expressly declined to review and dismissed without prejudice even though he also ruled on federal claims arising from the same traffic stop.

3. **Collateral Estoppel and Res Judicata— prior ruling on federal issues—underlying issues and identical elements—collateral estoppel**

   Summary judgment should have been granted for defendants on civil claims against police officers and their department based on collateral estoppel where a federal court had ruled on underlying issues and identical elements when granting summary judgment for defendants on federal claims.

Appeal by defendants from order entered 1 May 2003 by Judge Paul L. Jones in Onslow County Superior Court. Heard in the Court of Appeals 16 June 2004.

Ernest J. Wright, for plaintiff-appellee.

Crossley, McIntosh, Prior & Collier, by Brian E. Edes and Clay A. Collier, for defendants-appellants.

TYSON, Judge.

The City of Jacksonville Police Department ("Jacksonville Police Department"), Officer Billy J. Houston ("Officer Houston"), and Officer Earl K. Burkhart ("Officer Burkhart") (collectively, "defendants") appeal from an order denying their Motion for Summary Judgment. We reverse.

I. Background

Plaintiff originally filed this action on 2 March 2000 in Onslow County Superior Court from incidents that arose during a traffic stop of plaintiff by defendants. Plaintiff asserted claims for: (1) "personal injuries, pain and suffering, humiliation, loss of liberty and emotional distress" that he suffered as a result of defendants' "negligence, malicious and wanton conduct;" (2) "the action of Defendants violated the 4th and/or the 14th Amendments to the U.S. Constitution, protecting against unlawful seizures;" (3) "the acts and conduct of the Defendants . . . constitutes [sic] false arrest and negligence under the laws of the State of North Carolina;" and (4) "The City of Jacksonville intentionally or negligently failed to properly train its officers . . . ."

Defendants removed the action to the United States District Court for the Eastern District of North Carolina ("the U.S. District Court") pursuant to plaintiff's assertion of a violation of the Civil Rights Act, Title 42 U.S.C. § 1983 and moved for summary judgment. By Order entered 29 May 2001, the Honorable James C. Fox, Senior U.S. District Court Judge, granted defendants' motion. Judge Fox found, as a matter of law: (1) defendants had probable cause to stop and detain plaintiff; (2) defendants acted reasonably in conducting a pat-down search and in using "threat of force;" and (3) defendants did not use excessive force. Judge Fox also concluded, "Because the officers [Houston and Burkhart] did not commit any constitutional violation, summary judgment is also appropriate as to the plaintiff's claims against the City of Jacksonville." Judge Fox's Order stated, "To the extent that the plaintiff's complaint alleges state law causes of action, the court, pursuant to 28 U.S.C. § 1367(c)(3), declines to exercise supplemental jurisdiction over such pendent claims, and ORDERS these claims DISMISSED without prejudice."

Plaintiff timely filed a new complaint on 16 November 2001 asserting the causes of action stated in his earlier complaint, except for deleting his claim for violations of the Fourth and Fourteenth Amendments of the United States Constitution. Defendants filed an answer and asserted thirty defenses, including governmental immunity, public duty doctrine, and *res judicata*/collateral estoppel. Defendants moved for summary judgment and asserted, "Plaintiff's pendant state tort claims are premised on either the lack of probable cause or the unreasonableness of Defendants' conduct . . . [and] are barred under the doctrines of *res judicata* and collateral estoppel in that the necessary elements of Plaintiff's claims have been previously

adjudicated in favor of Defendants." The trial court denied defendants' motion. Defendants appeal.

II. Issues

The issues presented are whether: (1) this appeal is interlocutory; and (2) the trial court erred in denying defendants' Motion for Summary Judgment because the doctrines of *res judicata* and collateral estoppel bar plaintiff's claims.

III. Interlocutory Appeal

[1] "The denial of summary judgment is not a final judgment, but rather is interlocutory in nature. We do not review interlocutory orders as a matter of course." *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 50, 542 S.E.2d 227, 230, *appeal dismissed and disc. rev. denied*, 353 N.C. 452, 548 S.E.2d 527 (2001) (citing *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)). "If, however, 'the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review,' we may review the appeal under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1)." *McCallum*, 142 N.C. App. at 50, 542 S.E.2d at 230-31 (quoting *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995)).

Although interlocutory, "the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) (citations omitted). "Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them." *Id.* (citing *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)).

> Denial of a summary judgment motion based on *res judicata* raises the possibility that a successful defendant will twice have to defend against the same claim by the same plaintiff, in frustration of the underlying principles of claim preclusion. Thus, the denial of summary judgment based on the defense of *res judicata* can affect a substantial right and may be immediately appealed.

McCallum, 142 N.C. App. at 51, 542 S.E.2d at 231 (citing *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161). "The denial of summary judgment based on collateral estoppel, like *res judicata*, may expose a suc-

cessful defendant to repetitious and unnecessary lawsuits. Accordingly, . . . the denial of a motion for summary judgment based on the defense of collateral estoppel may affect a substantial right . . . . [such that the appeal] is properly before us." *McCallum*, 142 N.C. App. at 51, 542 S.E.2d at 231. Defendants' appeal is properly before this Court.

IV. Summary Judgment

Defendants argue the trial court erred in denying their motion for summary judgment based on *res judicata* and collateral estoppel.

Rule 56(c) of the North Carolina Rules of Civil Procedure provides that summary judgment will be 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 judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003).

> An issue is "genuine" if it can be proven by substantial evidence and a fact is "material" if it would constitute or irrevocably establish any material element of a claim or a defense. A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Generally this means that on "undisputed aspects of the opposing evidential forecast," where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. If the moving party meets this burden, the nonmoving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.

Lowe v. Bradford, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (internal citations omitted).

Here, defendants moved for summary judgment and asserted plaintiff's claims were barred under the doctrines of *res judicata* and collateral estoppel. The parties did not brief, move for, or present further arguments or other grounds to the trial court to support or contest the Motion for Summary Judgment. Our review is limited to whether defendants were entitled to summary judgment as a matter of law based on *res judicata* and collateral estoppel. *See McDonald v. Skeen*, 152 N.C. App. 228, 567 S.E.2d 209, *disc. rev. denied*, 356 N.C.

437, 571 S.E.2d 221 (2002) (addressing only the issue of collateral estoppel and declining to consider arguments that were not presented in motion or argued at the hearing); *see also* N.C.R. App. P. 10(b)(1).

V. *Res Judicata* and Collateral Estoppel

The trial court concluded neither *res judicata* nor collateral estoppel precluded plaintiff's claims and denied defendants' Motion for Summary Judgment.

"The companion doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) have been developed by the courts for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161.

> Where the second action between two parties is upon the same claim, the prior judgment serves as a bar to the relitigation of all matters that were or should have been adjudicated in the prior action. Where the second action between the same parties is upon a different claim, the prior judgment serves as a bar only as to issues actually litigated and determined in the original action.

Id. at 492, 428 S.E.2d at 161 (citations omitted). Our Supreme Court has distinguished between these two doctrines:

> Under the doctrine of res judicata or "claim preclusion," a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies. The doctrine prevents the relitigation of all matters . . . that were or should have been adjudicated in the prior action. Under the companion doctrine of collateral estoppel, also known as "estoppel by judgment" or "issue preclusion," the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (internal citations and quotations omitted). *Res judicata* precludes a party from "bringing a subsequent action based on the 'same claim' . . . litigated in an earlier action . . . ." *Id.* Collateral

estoppel bars "the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim." *Id.*

VI. *Res Judicata*

[2] In *City-Wide Asphalt Paving, Inc. v. Alamance County*, we held the doctrines of *res judicata* and collateral estoppel did not bar the plaintiff's claims under the North Carolina Constitution, although the federal court had already ruled on the same issues under the United States Constitution. 132 N.C. App. 533, 536, 513 S.E.2d 335, 338, *appeal dismissed and disc. rev. denied*, 350 N.C. 826, 537 S.E.2d 815 (1999).

> After careful review of the record, briefs and contentions of both parties, we hold that plaintiff's claims are not barred by *res judicata* or collateral estoppel. The federal court expressly stated that it "declined to exercise supplemental jurisdiction over Plaintiff's state law claims," and dismissed them without prejudice. While the federal court did review federal due process and equal protection claims, this Court has stated that "our courts . . . when construing provisions of the North Carolina Constitution, are not bound by the opinions of the federal courts 'construing even identical provisions in the Constitution of the United States . . .' " and that "an independent determination of plaintiff's constitutional rights under the state constitution is required."

Id. at 536, 513 S.E.2d at 338 (quoting *Evans v. Cowan*, 122 N.C. App. 181, 183-84, 468 S.E.2d 575, 577, *aff'd per curiam*, 345 N.C. 177, 477 S.E.2d 926 (1996)).

Here, Judge Fox expressly declined to review plaintiff's state claims, and stated in his Order, "To the extent that the plaintiff's complaint alleges state law causes of action, the court, pursuant to 28 U.S.C. § 1367(c)(3), declines to exercise supplemental jurisdiction over such pendent claims, and ORDERS these claims DISMISSED without prejudice." Plaintiff's complaint, filed after the U.S. District Court's ruling, alleged causes of action under state law for negligence, false arrest, and assault. By dismissing these claims without prejudice, plaintiff's "subsequent action" is not "based on the 'same claim' as that litigated in an earlier action." *Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880.

We hold that plaintiff's claims are not barred by *res judicata* as Judge Fox's Order addressed only plaintiff's claims under federal law

and the United States Constitution. Judge Fox expressly declined to rule on plaintiff's causes of action controlled by state law.

VII. Collateral Estoppel

[3] Defendants assert that the doctrine of collateral estoppel precludes plaintiff's suit in state court. "Under the doctrine of collateral estoppel, when an issue has been fully litigated and decided, it cannot be contested again between the same parties, even if the first adjudication is conducted in federal court and the second in state court." *McCallum*, 142 N.C. App. at 52, 542 S.E.2d at 231 (citation omitted). This Court has held:

> Although plaintiff's present state court claims are different from those brought in federal court, his state court claims may contain issues previously litigated and determined in the federal court. Thus, plaintiff may be collaterally estopped from re-litigating these issues. To hold otherwise, . . . would mean that state courts are *never* barred from hearing state constitutional claims or issues pertinent to such claims, even when such issues have been previously litigated in the federal courts. Such a finding would directly violate the underlying principle of judicial economy that precipitated the creation of the collateral estoppel and *res judicata* doctrines . . . . We reaffirm, therefore, that collateral estoppel may prevent the re-litigation of issues that are necessary to the decision of a North Carolina constitutional claim and that have been previously decided in federal court.

Id. at 53-54, 542 S.E.2d at 232-33. For collateral estoppel to bar a party's subsequent claim:

> (1) the issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Id. at 54, 542 S.E.2d at 233 (quoting *King v. Grindstaff*, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973)).

Here, the federal court's Order addressed the issue of whether "Defendant Billy Houston and Defendant Earl K. Burkhart violated [plaintiff's] Fourth and Fourteenth Amendment rights during a traffic

stop . . . ." In granting summary judgment for defendants on the issues of unlawful seizure and excessive force under the United States Constitution, Judge Fox ruled, among other things, Officer Houston and Officer Burkhart: (1) did not "expand[] the permissible scope of the stop;" (2) did not use excessive force because "the threat of force displayed by Houston in order to persuade the driver not to leave the scene was not unreasonable;" (3) "did not violate the plaintiff's Fourth Amendment rights" by asking the plaintiff to step out of his vehicle; and (4) "a pat-down search was not unreasonable under the circumstances . . . ." The U.S. District Court held, "Because the officers did not commit any constitutional violation, summary judgment is also appropriate as to the plaintiff's claims against the City of Jacksonville [Police]."

Following entry of the U.S. District Court's Order, plaintiff filed a new complaint in state court and asserted claims for negligence, false arrest, and assault. Plaintiff also asserted the Jacksonville Police Department negligently trained its officers. While the U.S. District Court's Order did not rule on defendants' ultimate liability for these claims, the Order ruled on several underlying issues and identical elements of these claims. To the extent the U.S. District Court ruled on these issues, plaintiff is barred from relitigating the issues in state court. *See McCallum*, 142 N.C. App. at 53, 542 S.E.2d at 232.

A. Negligence

Plaintiff's complaint alleges Officer Houston and Officer Burkhart acted negligently in their official and individual capacity. " 'In a negligence action, a law enforcement officer is held to the standard of care that a reasonably prudent person would exercise in the discharge of official duties of like nature under like circumstances.' " *Prior v. Pruett*, 143 N.C. App. 612, 620, 550 S.E.2d 166, 172 (2001), *disc. rev. denied*, 355 N.C. 493, 563 S.E.2d 572 (2002) (quoting *Best v. Duke University*, 337 N.C. 742, 752, 448 S.E.2d 506, 511-12 (1994) (quoting *Bullins v. Schmidt*, 322 N.C. 580, 582, 369 S.E.2d 601, 603 (1988))). A law enforcement officer may be held liable for use of "unreasonable or excessive force" upon another person. N.C. Gen. Stat. § 15A-401(d)(2) (2003).

In the U.S. District Court's Order, Judge Fox held, "Viewed from the perspective of an objectively reasonable police officer, the court concludes that the threat of force displayed by Houston . . . was not unreasonable." Additionally, the officers' actions did "not amount to an unreasonable seizure," and the "pat-down search was

not unreasonable under the circumstances . . . ." The issues regarding the reasonableness of Officer Houston and Officer Burkhart's actions were litigated in federal court. Plaintiff is precluded from relitigating the issue of whether the officers acted reasonably in performing their official duties. The trial court erred in failing to grant summary judgment for defendants in their official capacity on the issue of negligence.

"To withstand a law enforcement officer's motion for summary judgment on the issue of individual capacity, plaintiff must allege and forecast evidence demonstrating the officers acted maliciously, corruptly, or beyond the scope of duty." *Prior*, 143 N.C. App. at 623, 550 S.E.2d at 173-74. "[S]tate governmental officials can be sued in their individual capacities for damages under section 1983." *Corum v. University of North Carolina*, 330 N.C. 761, 772, 413 S.E.2d 276, 283, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992) (citing *Kentucky v. Graham*, 473 U.S. 159, 87 L. Ed. 2d 114 (1985)).

> [U]nlike a suit against a state official in his official capacity, which is basically a suit against the official office and therefore against the State itself, a suit against an individual who happens to be a governmental official but is not acting in his official capacity is not imputed to the State. Such individuals are sued as individuals, not as governmental employees.

Corum, 330 N.C. at 772, 413 S.E.2d at 283.

In support of his claim that defendants acted negligently in their individual capacity, plaintiff asserts that Officer Houston "intentionally," "negligently[,] and maliciously pointed a loaded weapon" at plaintiff. Other than this broad assertion, plaintiff presents no other allegation or forecast of evidence to show that defendants acted "maliciously, corruptly, or beyond the scope of duty." *Prior*, 143 N.C. App. at 623, 550 S.E.2d at 174. The U.S. District Court ruled that Officer Houston acted reasonably in pointing his service weapon at plaintiff. Plaintiff is collaterally estopped from relitigating this issue.

Plaintiff's complaint also alleges that defendants "intentionally destroyed dispatch tapes" and "conspired to unnecessarily call the plaintiff's supervisor to the scene . . . ." Judge Fox's Order recites these allegations and indicates that he considered these actions in ruling on plaintiff's claim under 42 U.S.C. § 1983. The U.S. District

Court's Order does not rule on the ultimate issue of defendants' *negligence* in their individual capacity. However, Judge Fox's award of summary judgment to defendants essentially ruled both officers' actions were reasonable; neither officer violated plaintiff's constitutional rights; and their actions did not extend "beyond the scope of duty." *Id.* Collateral estoppel precludes plaintiff's suit on the issue of negligence for Officer Houston and Officer Burkhart in their individual capacity. The trial court erred in denying defendants' Motion for Summary Judgment on the issue of negligence.

B. False Arrest

"[U]nder state law, a cause of action in tort will lie for false imprisonment, based upon the 'illegal restraint of one's person against his will.' A false arrest, *i.e.*, one without proper legal authority, is one means of committing a false imprisonment." *Myrick v. Cooley*, 91 N.C. App. 209, 212, 371 S.E.2d 492, 494, *disc. rev. denied*, 323 N.C. 477, 373 S.E.2d 865 (1988) (quoting *Mobley v. Broome*, 248 N.C. 54, 56, 102 S.E.2d 407, 409 (1958)). Probable cause is an absolute bar to a claim for false arrest. *Burton v. City of Durham*, 118 N.C. App. 676, 682, 457 S.E.2d 329, 333, *disc. rev. denied and cert. denied*, 341 N.C. 419, 461 S.E.2d 756 (1995) (citing *Friedman v. Village of Skokie*, 763 F.2d 236, 239 (7th Cir. 1985)).

In the prior federal court action, Judge Fox ruled that Officer Burkhart had probable cause to detain plaintiff because "plaintiff admittedly drove his vehicle in excess of the speed limit." Further, Judge Fox ruled that defendants did not unreasonably expand the permissible scope of the stop. As probable cause is an absolute bar to plaintiff's claim, he is collaterally estopped from relitigating this issue. Plaintiff's claim for false arrest fails. *Burton*, 118 N.C. App. at 682, 457 S.E.2d at 333. The trial court erred in failing to grant summary judgment on plaintiff's claim of false arrest.

C. Assault

" '[A] civil action for damages for assault . . . is available at common law against one who, for the accomplishment of a legitimate purpose, such as justifiable arrest, uses force which is excessive under the given circumstances.' " *Thomas v. Sellers*, 142 N.C. App. 310, 315, 542 S.E.2d 283, 287 (2001) (quoting *Myrick*, 91 N.C. App. at 215, 371 S.E.2d at 496).

> An officer of the law has the right to use such force as he may reasonably believe necessary in the proper discharge of his duties to

> effect an arrest. Within reasonable limits, the officer is properly left with the discretion to determine the amount of force required under the circumstances as they appeared to him at the time of the arrest.

State v. Anderson, 40 N.C. App. 318, 321, 253 S.E.2d 48, 50 (1979) (citations omitted).

In the prior federal court action, Judge Fox held that defendants' display of force and the subsequent pat-down search of plaintiff were reasonable under the circumstances. Collateral estoppel bars plaintiff from relitigating these issues and bars plaintiff's assault claim in state court. The trial court erred in failing to grant summary judgment in favor of defendants on plaintiff's assault claim.

D. Jacksonville Police Department

"Without an underlying negligence charge against the [law enforcement officers], a claim of negligence against the [department] can not [sic] be supported." *Prior*, 143 N.C. App. at 622, 550 S.E.2d at 172-73 (citing *Johnson v. Lamb*, 273 N.C. 701, 707, 161 S.E.2d 131, 137 (1968); *Wrenn v. Maria Parham Hosp., Inc.*, 135 N.C. App. 672, 681, 522 S.E.2d 789, 794 (1999)). To the extent collateral estoppel bars plaintiff's claims against defendants' in their official governmental capacity, plaintiff is precluded from asserting a negligence action against the Jacksonville Police Department.

VII. Conclusion

Plaintiff's claims are not barred by *res judicata*. However, the trial court erred in failing to grant summary judgment in favor of defendants based on collateral estoppel. Essential elements of plaintiff's claims for false arrest and assault were raised, litigated, and ruled upon in the U.S. District Court's Order. *See McCallum*, 142 N.C. App. at 55, 542 S.E.2d at 233.

Judge Fox also ruled that Officer Houston and Officer Burkhart acted reasonably and within the scope of their duties in stopping and detaining plaintiff and also in their show of force and pat-down search of plaintiff. Collateral estoppel bars plaintiff's action against defendants for negligence in their official and individual capacities. Without liability shown for defendants' conduct in their official capacity, plaintiff's claim against the Jacksonville Police Department for negligent training fails. The judgment of the trial court is reversed

and this cause is remanded to the trial court for entry of summary judgment for defendants.

Reversed and remanded.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA v. ANAEL SALINAS VALLADARES

No. COA03-879

(Filed 3 August 2004)

1. **Evidence— prior bad acts—sale and use of cocaine—intent, knowledge, motive**

The admission of testimony mentioning defendant's prior bad acts, including the sale and use of cocaine, was admissible in a prosecution for conspiracy to traffic in cocaine and for trafficking in cocaine by possession. Defendant testified that he never used cocaine and his defense was that he had accompanied a friend without knowledge that the friend was involved in a drug deal; under these circumstances, the testimony was proper to show defendant's intent, knowledge, and motive.

2. **Evidence— character for truthfulness—not pertinent to cocaine trafficking**

Evidence of a defendant's character for truthfulness was correctly excluded as not pertinent to cocaine trafficking.

3. **Evidence— law abiding person—pertinent—exclusion not prejudicial**

Evidence of a cocaine trafficking defendant's character as a law-abiding person tended to establish that defendant did not commit the crime and was incorrectly excluded, but there was no prejudice because the State presented overwhelming evidence of defendant's guilt.

4. **Evidence— identity of confidential informant—factors favoring nondisclosure**

The trial court's refusal to disclose the identity of a confidential informant to a cocaine trafficking defendant was not error

where the factors favoring nondisclosure outweighed the factors favoring disclosure.

5. Drugs— cocaine trafficking—weight as element—instruction required

A conviction for trafficking in cocaine by possession was remanded for resentencing for simple possession where the court did not tell the jury that the weight of the cocaine was an element that had to be proven beyond a reasonable doubt.

Appeal by defendant from judgment entered 31 October 2002 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 22 April 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Karen E. Long, for the State.

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

McCULLOUGH, Judge.

Defendant Anael Salinas Valladares was arrested and charged with conspiracy to traffic in cocaine and trafficking in cocaine by possession. The State's evidence tended to show that defendant and Joshua Lee Gerrehgy (Gerrehgy) had worked in construction for various employers since 1996. Over time, the two became friends.

Gerrehgy, defendant, defendant's brother, and another friend took a three-day vacation to Ocean City, Maryland, over the Memorial Day weekend in 1998. Defendant arranged for the purchase of a couple of grams of cocaine, and the four men contributed funds to cover the cost. It was the first time Gerrehgy had used cocaine.

After that vacation, Gerrehgy began using cocaine while visiting defendant on the weekend. After getting an alcohol buzz, defendant would call a friend who would sell him a gram or two of cocaine. Then Gerrehgy, defendant, and other friends would pay for the drugs. The group would take the cocaine to a club and use it in the bathroom.

Gerrehgy quit using drugs in August of 1999 after an incident in which he got high, totaled his car, and lost his job. However, Gerrehgy began to use again in 2000 after going to defendant's house. The group drank and sent one of defendant's roommates out to buy

half an ounce of cocaine. The cocaine was fronted which means that the group got the drugs immediately and paid later.

Gerrehgy testified that defendant had a few sources, but he got most of his drugs from Miguel Colon. Gerrehgy began using every Friday night, and he started selling cocaine to help pay for his habit.

Two weeks before the arrest, defendant told Gerrehgy that he wanted to sell cocaine to make money. Gerrehgy agreed to give defendant some customers, and on the day before the arrest, Gerrehgy met a man who wanted to buy some cocaine. Gerrehgy arranged for defendant to meet the man, and defendant delivered a half gram to him later that day. The next day, the same man asked for more cocaine.

Billy Wade also called Gerrehgy looking for an ounce. Gerrehgy and defendant put their money together and made arrangements to pick up an ounce and deliver it to Wade's apartment. Originally, Gerrehgy gave defendant $600 to make the purchase; defendant contributed $200.

On 7 June 2002, Gerrehgy and defendant went to Colon's trailer, and Gerrehgy waited in the living room while defendant went in the back room with Colon to make this first deal. While Gerrehgy was waiting, he received a call from Wade requesting another ounce. Gerrehgy did not have enough money to purchase another ounce, so defendant loaned him another $200, and Colon fronted the rest of the money for two hours while the men made the deal. Defendant and Gerrehgy paid a total of $1,700 for two and one-quarter (2¼) ounces. Two ounces were for Wade, and one-quarter of an ounce was for defendant's deal with the man to whom he had sold drugs the day before. Gerrehgy paid $600, and defendant contributed $400. The men also agreed to pay the remaining $700 to Colon later.

Gerrehgy got a message from Bear telling Gerrehgy to deliver Wade's two ounces to Bear at the Burger King. Gerrehgy had dealt with Bear in the past and trusted him. In fact, Bear was a confidential informant who was working undercover.

Gerrehgy and defendant parked near the dumpster at Burger King to avoid being seen by too many people. Bear got into the vehicle, looked at the cocaine, and said that he would return with the money. When Bear walked away, three or four police cars pulled up and blocked Gerrehgy's car. The police arrested Gerrehgy and defendant.

Wake County ABC agent, Brad Pearson, testified that his informant, Bear, contacted Gerrehgy to make the deal on 7 June 2002. Bear told Pearson that he thought he could purchase two ounces from Gerrehgy, so he called Gerrehgy back and made arrangements to buy the second ounce. Pearson heard Gerrehgy tell Bear that the cocaine would be fronted and that the deal would have to be done quickly.

Pearson contacted agents, Wesley Nipper and Louis Knuckles, and made preparations for the takedown. The plan involved having Bear confirm that Gerrehgy had the cocaine. Then Bear would leave the car, remove his hat, and rub his head as a signal to arrest the suspects.

Nipper was parked about 50 yards from the Burger King and observed Gerrehgy pull into the parking lot. The agents watched as Bear approached Gerrehgy's vehicle. A few minutes later, Knuckles saw Bear give the takedown signal, and he radioed for the others to move in. As defendant and Gerrehgy were taken into custody, Knuckles and Nipper recalled seeing a clear plastic bag containing a white, rocky substance in the backseat of Gerrehgy's car. The bag was located near defendant's leg. Later, it was taken into evidence and determined to be cocaine.

Pearson took defendant into custody and read him his rights. Defendant told him that he spoke English and agreed to talk. Defendant admitted that he had loaned Gerrehgy $400 for the cocaine and expected to get some money back. Defendant also agreed to think about participating in the substantial assistance program.

After being arrested, Gerrehgy told Nipper that defendant loaned him $400 for the purchase and that defendant owed another $700. Gerrehgy also volunteered to participate in the substantial assistance program, but he did not know until a week before trial that he would have to testify against defendant as part of that program.

Defendant testified that he left El Salvador and came to the United States in 1996. He said that he learned English by reading and watching television, but he did not understand all English words. Defendant indicated that he and Gerrehgy worked together in 1996. Initially, the two were not close friends, but they became closer around June of 1997.

Defendant stated that everything Gerrehgy said in his testimony was a lie. Defendant testified that he never used cocaine and never saw Gerrehgy use cocaine.

On June 7, defendant admitted to loaning Gerrehgy $400, but never asked why Gerrehgy needed the money. Defendant thought that the men were going to Gerrehgy's house to drink a few beers. Instead, Gerrehgy took defendant to a trailer on Poole Road. Defendant sat on the sofa while Gerrehgy spoke with some Hispanic men in the back room. Defendant thought Gerrehgy was buying some pot for his own personal use.

The men left and went to Gerrehgy's house. Defendant stated that he did not know that Gerrehgy had any drugs. On the way, Gerrehgy received two phone calls on his cell phone. Gerrehgy said that the first caller was his girlfriend; defendant did not know who the second caller was because Gerrehgy talked too fast, and defendant could not understand what he said.

At Gerrehgy's house, defendant drank a soda while Gerrehgy went into a back room. Gerrehgy told defendant that they were going to Burger King. After arriving at Burger King, Gerrehgy instructed defendant to get in the backseat, but did not explain why. Another guy entered the car and sat in the front seat. Defendant saw Gerrehgy take something out of his pocket before showing it to the man. As the police moved in, Gerrehgy threw the bag in the backseat. After defendant was arrested, he told the officer that he loaned Gerrehgy the money, but never said that it was to purchase drugs.

Rodney Smith and Miguel Cerpas testified that they had known defendant for one to three years and had never seen illegal drugs at defendant's residence.

During the State's rebuttal, Jorge Galeana (Galeana) testified that he had known defendant for about two years. Galeana had been to defendant's house and remembered seeing Gerrehgy there. He had seen cocaine at defendant's house, but not when Gerrehgy was there.

Earlier on the day of the arrest, Galeana recalled that Gerrehgy and defendant had a thirty-five to forty-minute conversation about cocaine. Both men spoke in English. Galeana also testified that defendant asked him if he wanted to sell cocaine, but Galeana turned him down.

Defendant was found guilty of conspiracy to traffic in cocaine and trafficking in cocaine by possession. He was sentenced to 35-42 months in prison.

Defendant appeals. On appeal, defendant argues that the trial court erred by (1) allowing the State to introduce evidence of prior bad acts under Rule 404(b), (2) preventing defendant from presenting evidence of his character for truthfulness and his character as being law-abiding, (3) denying his motion to discover the identity of the confidential informant, and (4) failing to instruct the jury as to each element of the offense of trafficking in cocaine by possession. With regard to the first three assignments of error, we conclude that there was no prejudicial error. Accordingly, the conviction of conspiracy to traffic in cocaine is upheld. However, since the trial court made an instructional error, the charge of trafficking in cocaine by possession is vacated and remanded for resentencing.

I. 404(b) Evidence

[1] Defendant argues that the trial court erred by admitting portions of Gerrehgy's testimony which mentioned defendant's other bad acts, including using cocaine in the past and selling cocaine on the day before the arrest. We disagree.

Under N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003):

> 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.

"This rule is a general rule of *inclusion* of such evidence, subject to an exception if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991) (emphasis added). We believe that this evidence was not offered for the sole purpose of showing that defendant had the propensity to commit the crimes charged. Instead, it was admitted to demonstrate that defendant had the motive and intent to possess cocaine to sell.

We are also guided by this Court's decision in *State v. Johnson*, 13 N.C. App. 323, 185 S.E.2d 423 (1971), *appeal dismissed*, 281 N.C. 761, 191 S.E.2d 364 (1972). In that case, defendant was charged with possession of marijuana, but denied knowledge of the marijuana or that he had anything to do with it. *Id.* at 324-25, 185 S.E.2d at 424-25.

We allowed evidence which revealed that defendant sold marijuana two weeks earlier and noted that "[i]t was competent for the State to show by the challenged evidence the defendant's intent and guilty knowledge as well as his motives." *Id.* at 325, 185 S.E.2d at 425.

In the case at bar, defendant testified that he never used cocaine and never saw Gerrehgy use cocaine. Additionally, his defense was that he was not involved in buying or selling cocaine and that he accompanied Gerrehgy without knowledge that Gerrehgy was making a drug deal. Under these circumstances, it was proper to allow evidence of the prior drug use and the cocaine sale on the previous day to show defendant's intent, knowledge, and motive. Therefore, this assignment of error is rejected.

II. Evidence of Defendant's Character

[2] Defendant argues that the trial court erred by preventing defendant from introducing evidence of his character for truthfulness and his character as a law-abiding person.

"Rule 404(a) is a general rule of exclusion, prohibiting the introduction of character evidence to prove that a person acted in conformity with that evidence of character." *State v. Bogle*, 324 N.C. 190, 201, 376 S.E.2d 745, 751 (1989). "One of the exceptions to Rule 404(a) permits the accused to offer evidence of a 'pertinent trait of his character' as circumstantial proof of his innocence." *Id.* "In criminal cases, in order to be admissible as a 'pertinent' trait of character, the trait must *bear a special relationship to* or *be involved in* the crime charged." *Id.* With these general principles in mind, we turn to consider whether defendant's character for truthfulness and his character as a law-abiding person were pertinent traits.

Our courts have examined whether the traits of honesty and truthfulness are pertinent in drug cases. In *Bogle*, our Supreme Court explained:

> Truthfulness and honesty are closely related concepts. Webster's Ninth New Collegiate Dictionary defines 'truthful' as 'telling or disposed to tell the truth.' It defines 'honest' as 'free from fraud or deception.' In common usage, a person is 'truthful' if he *speaks* the truth. He is 'honest' if his *conduct*, including his speech, is free from fraud or deception. Neither trafficking by possession nor by transporting marijuana necessarily involves being untruthful or engaging in fraud or deception. Consequently, we hold that the traits of truthfulness and honesty are not 'perti-

> nent' character traits to the crime of trafficking in marijuana by possession or transportation.

Id. at 202, 376 S.E.2d at 752 (citations omitted). In this case, evidence of defendant's character for truthfulness is not pertinent to the crimes of conspiring to traffic in cocaine and trafficking cocaine by possession. Therefore, the trial court did not err in excluding this evidence.

[3] Our courts have also addressed whether a criminal defendant may introduce evidence of his character as a law-abiding person. In deciding whether a trait is pertinent or relevant, it is well established that "the trait may be general in nature[.]" *State v. Squire*, 321 N.C. 541, 548, 364 S.E.2d 354, 358 (1988). "An example of a character trait of a general nature which is nearly always relevant in a criminal case is the trait of being law-abiding." *Id.* "Evidence of law-abidingness tends to establish circumstantially that defendant did not commit the crime charged." *Bogle*, 324 N.C. at 198, 376 S.E.2d at 749. We conclude that the trait of being law-abiding is pertinent because such evidence would make it less likely that defendant is guilty of conspiracy to traffic in cocaine and trafficking in cocaine by possession.

However, this does not end the analysis. We must consider whether this error prejudiced defendant. Pursuant to N.C. Gen. Stat. § 15A-1443(a) (2003):

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]

Furthermore, our Supreme Court has indicated that such errors are harmless when there is "overwhelming evidence of defendant's guilt, including his confession." *State v. Collins*, 345 N.C. 170, 174, 478 S.E.2d 191, 194 (1996). In this case, there was not a reasonable possibility that a different result would have been reached, even if the trial court had admitted the evidence. The State presented overwhelming evidence of defendant's guilt, including defendant's own admission of his participation in the crimes charged. This assignment of error is overruled.

III. Identity of the Confidential Informant

[4] Defendant contends that the trial court erred by denying his motion to learn the identity of the confidential informant. "It is well

established that the [S]tate is privileged to withhold from a defendant the identity of a confidential informant, with certain exceptions." *State v. Newkirk*, 73 N.C. App. 83, 85, 325 S.E.2d 518, 520, *disc. reviews denied*, 313 N.C. 608, 332 S.E.2d 81 (1985). However, if revealing the informant is relevant and helpful to the defense or is necessary to make a fair determination of the case, the trial court may require disclosure. *Id.* at 86, 325 S.E.2d at 520. "Once defendant has made a 'plausible' showing of the materiality of the informer's testimony, the trial court must balance the public's interest with defendant's right to present his case[.]" *Id.* (citations omitted). "Two factors weighing in favor of disclosure are (1) the informer was an actual participant in the crime compared to a mere informant, and (2) the [S]tate's evidence and defendant's evidence contradict on material facts that the informant could clarify[.]" *Id.* (citations omitted). "Several factors vitiating against disclosure are whether the defendant admits culpability, offers no defense on the merits, or the evidence independent of the informer's testimony establishes the accused's guilt. *Id.* at 86, 325 S.E.2d at 520-21.

In this case, the factors favoring nondisclosure outweigh the factors favoring disclosure. Although defendant offered some defense (that he had no knowledge of or involvement with the cocaine), there was plenty of evidence, independent of the informant's testimony, to establish guilt. Gerrehgy testified that he and defendant hatched a plan to buy cocaine to resell. Similarly, Galeana described a conversation in which defendant asked him if he wanted to sell cocaine, too. Finally, and perhaps most importantly, defendant was arrested with drugs in his possession and admitted culpability by telling the arresting officer that he contributed $400 towards the purchase of cocaine with the expectation that he would get money back.

Even if we assume that the confidential informant participated in the commission of the crime, that single factor would not warrant disclosure of the informant. This was not a close case in which the informant's testimony would clarify key differences in the evidence. The State presented substantial evidence, including defendant's own admissions, which tended to show that defendant was guilty of the crimes charged. Because the factors favoring nondisclosure outweighed the factors favoring disclosure, the trial court did not err in denying defendant's motion to learn the informant's identity. This assignment of error is overruled.

IV. Instructional Error

[5] Defendant argues that the trial court erred by failing to instruct the jury on each element of the offense of trafficking in cocaine by possession. The parties agree that the trial court appropriately instructed the jury on the charge of conspiracy to traffic in cocaine. The trial court mentioned all of the elements, including the amount of cocaine at issue (at least 28 grams and less than 200 grams of cocaine). Therefore, this assignment of error is limited to the charge of trafficking in cocaine by possession.

At the outset, we note that defendant failed to preserve this issue by raising an objection at trial. N.C.R. App. P. 10(b)(2) (2004). However, N.C.R. App. P. 10(c)(4) allows plain error review of certain questions that were not properly preserved at trial and are not otherwise deemed preserved by rule of law. Our courts have applied plain error analysis to errors in jury instructions. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). In his assignments of error, defendant properly contends that the trial court committed plain error. Therefore, we will apply plain error analysis to the trial court's jury instruction on this charge.

"A trial judge is required . . . to instruct the jury on the law[.]" *Bogle*, 324 N.C. at 195, 376 S.E.2d at 748. "This includes instruction on elements of the crime." *Id.* "The trial judge has great discretion in the manner in which he charges the jury, but he must explain every essential element of the offense charged." *State v. Young*, 16 N.C. App. 101, 106, 191 S.E.2d 369, 373 (1972). In its brief, the State concedes that the trial court did not charge on the amount of the drugs. Our courts have established that such an omission is erroneous.

In *State v. Gooch*, 307 N.C. 253, 255, 297 S.E.2d 599, 601 (1982), the trial court failed to instruct the jury that it had to find that defendant possessed more than one ounce of marijuana to return a guilty verdict on the charge of possession of over one ounce of marijuana. In *Gooch*:

> The trial judge properly referred to the offense as "possessing a quantity of marijuana more than one ounce"; however, the court told the jury in the final mandate that it needed to find only that defendant possessed marijuana to find him guilty of the stated offense.

Id. at 256, 297 S.E.2d at 601. Our Supreme Court explained that "[p]ossession of *more than one ounce* is an essential element

of the offense and the trial judge's failure to so charge was error." *Id.*

The case at bar is very similar to *Gooch.* Here, the trial court correctly described the charge as "trafficking in cocaine by possession, which is the unlawful possession of at least 28 grams of cocaine but less than 200 grams of cocaine." However, the trial court never mentioned that the weight of the drugs was one of the elements which had to be proven beyond a reasonable doubt. Therefore, as it did in *Gooch*, the trial court erred in failing to instruct on the amount of drugs.

Defendant contends that this instructional error entitles him to a new trial. We cannot agree. In *Gooch*, our Supreme Court rejected this argument and explained:

> Defendant is not, however, entitled to a new trial. In failing to submit the amount requirement . . . the trial court essentially submitted to the jury the offense of simple possession of marijuana and the jury convicted defendant of that offense.

Id. at 257, 297 S.E.2d at 602 (citation omitted). Ultimately, the Court recognized the decision as a guilty verdict of simple possession of marijuana and remanded the case for resentencing. *Id.* at 258, 297 S.E.2d at 602.

We believe that a similar result is warranted in the case at bar. The sole distinction between trafficking in cocaine by possession, N.C. Gen. Stat. § 90-95(h)(3)(a) (2003), and simple possession of cocaine, N.C. Gen. Stat. § 90-95(a)(3), is the amount of drugs. To convict defendant of trafficking in cocaine by possession, the jury would have to find that defendant (1) knowingly possessed cocaine, and (2) in an amount that was 28 grams or more, but less than 200 grams. N.C. Gen. Stat. § 90-95(h)(3)(a). In contrast, defendant could be found guilty of simple possession if he possessed *any* amount of cocaine. N.C. Gen. Stat. § 90-95(a)(3). Thus, by failing to mention the amount requirement, the trial court submitted and the jury found defendant guilty of simple possession of cocaine. As the Supreme Court did in *Gooch*, we remand this portion of the case to the Wake County Superior Court for resentencing as upon a verdict of guilty of simple possession of cocaine.

In summary, we conclude that the trial court did not commit prejudicial error on issues related to defendant's first three assignments of error. Accordingly, the charge of conspiracy to traffic in

cocaine is upheld. However, because of the instructional error, we vacate the trial court's judgment on the trafficking in cocaine by possession charge. This portion of the case is remanded to the trial court for resentencing as upon a verdict of guilty of simple possession of cocaine.

No error in part, vacated in part, and remanded in part for resentencing.

Judges HUDSON and LEVINSON concur.

STATE OF NORTH CAROLINA, ON RELATION OF R. STUART ALBRIGHT, DISTRICT ATTORNEY OF THE 18TH PROSECUTORIAL DISTRICT, PLAINTIFF V. ROBERT C. ARELLANO, CHA U. ARELLANO, ROCHA ENTERPRISES, INC. D/B/A ROSE SPA, AND OTHER UNKNOWN PERSONS, DEFENDANTS

No. COA03-258

(Filed 3 August 2004)

1. **Constitutional Law— Double Jeopardy—public nuisance action following prostitution conviction**

The Double Jeopardy Clause was not violated by an action by a district attorney seeking the illegal profits from a public nuisance owned by defendants, who had been convicted of maintaining a place for prostitution. The North Carolina statutes on abatement of nuisances, examined under *Hudson v. United States*, 522 U.S. 93 (1997), do not reveal clear proof of legislative intent to impose a criminal penalty.

2. **Nuisance; Constitutional Law— prostitution—summary judgment—right to jury trial**

Summary judgment for plaintiff was appropriate on an action for injunctive relief, abatement, and forfeiture following defendants' conviction for maintaining a place for prostitution. The State's evidence was sufficient to prove that defendants engaged in a nuisance and that proceeds from the activity should be forfeited, while defendants provided no evidence to refute plaintiff's account of their activity. This does not deprive defendants of their right to a jury trial, which accrues only when there is a genuine issue of fact.

3. Nuisance— prostitution—damages—summary judgment

Summary judgment should not have been awarded to plaintiff on damages in a nuisance action by a district attorney following defendants' conviction for maintaining a place for prostitution. While the gross income from Rose Spa could be calculated from tax records, the amount derived from unlawful activity is disputed. N.C.G.S. § 19-6.

Appeal by defendants from judgments entered 12 August 2002 by Judge Lindsay R. Davis, Jr., and 12 November 2002 by Judge Richard L. Doughton in Guilford County Superior Court. Heard in the Court of Appeals 2 December 2003.

R. Stuart Albright, District Attorney, 18th Prosecutorial District, and Forman Rossabi Black P.A., by Amiel J. Rossabi and William F. Patterson, for the State.

A. Wayne Harrison for defendants.

TIMMONS-GOODSON, Judge.

This case involves a complaint by Guilford County District Attorney R. Stuart Albright ("plaintiff") to claim the illegal profits from a public nuisance owned and operated by Robert C. Arellano and Cha U. Arellano ("defendants"). Defendants appeal two orders of summary judgment entered against them pursuant to N.C. Gen. Stat. § 19. For the reasons stated herein, we affirm in part and reverse in part the trial court's judgment.

The pertinent factual and procedural history of the case is as follows: Defendants owned and operated Rose Spa, a massage business in Greensboro, North Carolina from 1991 to 2001. The Greensboro Police Department Vice/Narcotics Division suspected Rose Spa of housing a prostitution ring. Following an undercover investigation, the Greensboro Police Department obtained evidence of prostitution.

Defendants were arrested and charged with the misdemeanor criminal offenses of maintaining a place for purposes of prostitution, permitting the use of a place for prostitution, and aiding and abetting prostitution pursuant to N.C. Gen. Stat. § 14-204(1), (2) and (7). Defendants were convicted in district court on 14 February 2002 of all charges. The trial court sentenced defendants to forty-five days in jail with a suspended sentence of five years, and placed defendants on

unsupervised probation on the conditions that they not be convicted of a similar offense, and that they pay a $500 fine.

Concurrent with the criminal prosecution, plaintiff filed the underlying civil action in 2001 pursuant to N.C. Gen. Stat. § 19 to permanently enjoin defendants from operating a public nuisance, and to seek "an order of forfeiture of all personal property, monies, contents and other considerations received or used in conducting and maintaining said nuisance." Defendants filed a motion for summary judgment on 15 February 2002, one day after their criminal convictions, asserting that "this proceeding is barred by the protection against double jeopardy." Defendants presented no evidence in support of their motion. Plaintiff filed a cross motion for summary judgment on 22 April 2002 accompanied by affidavits from three witnesses. The trial court heard oral arguments on 22 July 2002 and granted plaintiff's motion for summary judgment on 12 August 2002, granting plaintiff injunctive relief, an order of abatement, and an order of forfeiture of personal property. The trial court decreed in its order, *inter alia*, that the matter would "proceed to trial solely on the issue of damages."

After an accounting of the income earned from Rose Spa from 1991 through 2001, plaintiff filed a motion for summary judgment on damages on 1 November 2002 claiming that all of defendants' income should be forfeited. Defendants filed affidavits on 29 October 2002 stating that they did not have the documentation necessary to perform an accounting. Defendants filed a response to the motion for summary judgment on 31 October 2002, asserting that "the amount of damages, if any, is a subject for resolution of contested factual and legal issues." The trial court granted plaintiff's motion for summary judgment in November 2002, and ordered defendants to pay $1,633,137.13 in damages plus court costs and attorneys fees. It is from these two orders of summary judgment that defendants appeal.

The issues presented on appeal are whether (I) the civil action against defendants invokes the Double Jeopardy Clause; (II) the trial court erred by granting summary judgment on the issue of forfeiture; (III) the trial court erred by awarding damages in the amount of $1,633,137.13; and (IV) the damages award violates the excessive fines clauses of the North Carolina and United States constitutions.

[1] Defendants first argue that the civil action against defendants invokes the Double Jeopardy Clause because defendants were convicted of criminal charges arising from the same conduct. We disagree.

The Double Jeopardy Clause prohibits "a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *Montana Dept. of Rev. v. Kurth Ranch*, 511 U.S. 767, 769, n.1 (1994). "The Law of the Land Clause incorporates similar protections under the North Carolina Constitution." *State v. Oliver*, 343 N.C. 202, 205, 470 S.E.2d 16, 18 (1996), citing N.C. CONST. art. I, § 19.

In *Hudson v. United States*, 522 U.S. 93 (1997), the United States Supreme Court modified the standard for Double Jeopardy analysis. The *Hudson* Court noted that "the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could, in common parlance, be described as punishment." 522 U.S. at 98-99 (citations omitted). Instead, "[t]he [Double Jeopardy] Clause protects only against the imposition of multiple *criminal* punishments for the same offense." 522 U.S. at 99 (citations omitted). The *Hudson* Court then advanced a two-part inquiry for determining whether a statutory scheme imposes punishment for double jeopardy purposes:

> Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." Even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect," as to "transform what was clearly intended as a civil remedy into a criminal penalty."

522 U.S. at 99 (citations omitted). The *Hudson* Court further established the following seven factors to be considered in assessing whether the punitive nature of the statute transforms the civil remedy into a criminal penalty:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the

> behavior to which it applies is already a crime; (6) whether any alternative purpose to which it may rationally be connected is assignable to it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

522 U.S. at 99-100 (emphasis omitted). The *Hudson* Court emphasized that no one factor is controlling, 522 U.S. at 101, and cautioned that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." 552 U.S. at 100 (citations omitted).

Pursuant to the two-part inquiry articulated in *Hudson*, we analyze the case *sub judice* by first examining the purpose behind North Carolina statutes on abatement of nuisances, which provide in pertinent part the following:

> Wherever a nuisance is kept, maintained, or exists, as defined in this Article, the . . . district attorney . . . may maintain a civil action in the name of the State of North Carolina to abate a nuisance under this Chapter, perpetually to enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a nuisance under this Chapter . . . .

N.C. Gen. Stat. § 19-2.1 (2003).

> If the existence of a nuisance is admitted or established in an action as provided for in this Chapter an order of abatement shall be entered as a part of the judgment in the case, which judgment and order shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of . . . . Such order may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance.

N.C. Gen. Stat. § 19-5 (2003).

> All personal property, including money and other considerations, declared to be a nuisance under . . . other sections of this Article, are subject to forfeiture to the local government and are recoverable as damages in the county wherein such matter is sold, exhibited or otherwise used. . . . An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and county governments wherein such activity took place . . . as a forfeiture of the fruits of an

> unlawful enterprise, and as partial restitution for damages done to the public welfare.

N.C. Gen. Stat. § 19-6 (2003).

The fact that § 19-2.1 expressly labels a lawsuit brought in this manner as a civil action indicates a legislative intent to establish a civil remedy for nuisance issues. Having made this determination, we next apply the seven-factor test discussed *supra* to determine whether the effect of the statute is to impose a criminal punishment.

The first factor requires a review of whether the statute imposes an "affirmative disability or restraint," i.e., whether it imposes a sanction "approaching the infamous punishment of imprisonment." *State v. Beckham*, 148 N.C. App. 282, 285, 558 S.E.2d 255, 257 (2002), *citing Hudson*, 522 U.S. at 104 (citations omitted). Defendants argue that this question must be answered in the affirmative because the statute allows for permanent injunctive relief, which can result in imprisonment for contempt if such an injunction is violated. We disagree.

The realm of this statute does not provide for a punishment of imprisonment. It is only the ancillary possibility of a contempt violation which may impose such a punishment. This connection is too tenuous to invoke the Double Jeopardy Clause. As the Court reasoned in *Hudson*, if double jeopardy implications prevented contempt rulings, then all civil remedies would give rise to double jeopardy. *See Hudson*, 522 U.S. at 102. Our civil courts could not use contempt rulings to reinforce injunctive relief because of double jeopardy implications.

The second factor asks whether the civil remedy in question has historically been regarded as a punishment. Defendants argue that the answer to this question is "yes" because "prostitution has been subjected to criminal punishment since the dawn of civilization."

Defendants' response indicates that they misinterpret the nature of the question asked. The appropriate inquiry is not whether the nuisance activity has been historically punished, but rather if the civil remedy imposed by the statute has been historically viewed by the courts as punishment. We hold that the civil remedy imposed by General Statute § 19.6 has not been historically viewed by the courts as punishment.

Historically, criminal "punishment has taken the forms of incarceration and incapacitation." *State v. Evans*, 145 N.C. App. 324, 333,

550 S.E.2d 853, 859 (2001). The statute in question does not offer a remedy of incarceration or incapacitation. It only allows for injunctive relief and monetary damages which "have historically not been viewed as criminal punishment." *Beckham*, 148 N.C. App. at 285, 558 S.E.2d at 257, *citing Helvering v. Mitchell*, 303 U.S. 391 (1938).

The third factor asks whether the civil remedy comes into play only on a finding of scienter. Defendants argue that this question must be answered affirmatively because General Statutes § 19-6 provides that money damages are "recoverable from such persons who, under G.S. 19-2.4, have knowledge of the nuisance at the time such moneys are received by them." We disagree.

The sanction does not come into play upon a finding of scienter. The paragraph that allows for forfeiture permits such a penalty "upon judgment against the defendant or defendants in legal proceedings" without regard to defendants' state of mind. Thus, defendants' intent is not at issue in this analysis. *See Hudson*, 522 U.S. at 105.

The fourth factor asks whether the sanction promotes the "traditional aims of punishment—retribution and deterrence." *Beckham*, 148 N.C. App. at 286, 558 S.E.2d at 258. Defendant argues that "surely a statute that can result in the complete loss [of] all assets of ones [sic] business, real and personal, carries a deterrent impact, and voices societal retribution." We find this argument unpersuasive.

We "recognize that the imposition of both money penalties and [other] sanctions will deter others from emulating [defendants'] conduct," *Hudson*, 522 U.S. at 105; however, "the mere presence of a [deterrent quality] is insufficient to render a sanction criminal [because] deterrence may serve civil as well as criminal goals." *Beckham*, 148 N.C. App. at 286, 558 S.E.2d at 258, *citing Hudson*, 522 U.S. at 105 (citations omitted).

We also recognize that civil forfeiture has a retributive effect. In fact, § 19-6 plainly states that "[a]n amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be [treated] . . . as a forfeiture of the fruits of an unlawful enterprise, and as partial restitution for damages done to the public welfare." N.C. Gen. Stat. § 19-6 (2003). However, as we have previously noted,

> [c]ivil forfeitures in contrast to civil penalties, are designed to do more than simply compensate the Government [for the cost of investigating and prosecuting this case]. Forfeitures serve a vari-

> ety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct. They are not, however, intended as punishment, and therefore do not constitute penal measures in violation of double jeopardy prohibitions.

Belk v. Cheshire, 159 N.C. App. 325, 329, 583 S.E.2d 700, 704 (2003), *citing U.S. v. Ursery*, 518 U.S. 267, 284-88 (1996). Therefore, we conclude that there is not a sufficient criminal effect under this statute to invoke double jeopardy.

The fifth factor asks whether the behavior to which the statute applies is already a crime. Section 19-1 provides a civil remedy for public nuisance. The statute defines public nuisance as follows:

> [t]he erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place for the purpose of assignation, prostitution, gambling, illegal possession or sale of alcoholic beverages, illegal possession or sale of controlled substances as defined in the North Carolina Controlled Substances Act, or illegal possession or sale of obscene or lewd matter.

N.C. Gen. Stat. § 19-1 (2003). There is a correlating criminal statute regarding prostitution. *See* N.C. Gen. Stat. § 14-203 *et seq.* However, " 'this fact is insufficient to render' " the civil remedy " 'criminally punitive, particularly in the double jeopardy context.' " *Beckham*, 148 N.C. App. at 286, 558 S.E.2d at 258, *citing Hudson*, 522 U.S. at 105 (citations omitted).

The sixth and seventh factors ask whether any purpose, other than criminal punishment, to which the statute may rationally be connected is assignable to it, and whether the statute appears excessive in relation to the alternative purpose assigned. We hold that there is an alternative purpose that is assignable to this statute. As discussed *supra*, there is a remedial purpose behind this civil remedy since it allows the government to recover the cost of investigating and prosecuting violators, and it disables the illegal activity which allows the general public to recover its sense of safety and well-being. The effect that the statute has on criminal activity is not excessive in relation to these benefits.

Having examined N.C. Gen. Stat. § 19 in light of the two-part analysis established by *Hudson*, we find no clear proof that the true legislative intent of the statute is to impose a criminal penalty. Accordingly, we reject defendants' assignment of error that

N.C. Gen. Stat. § 19 constitutes punishment under a double jeopardy analysis.

[2] Defendants also argue that the trial court erred by granting plaintiff's motion for summary judgment awarding plaintiff injunctive relief, an order of abatement, and an order of forfeiture of personal property. Defendants argue that the trial court violated their constitutional right to a jury trial. We disagree.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). "When a motion for summary judgment is made and properly supported . . . the adverse party may not rest upon the mere allegations or denials of his pleading, but must, by affidavit or otherwise, set forth *specific facts* showing that there is a genuine issue for trial." *Five Star Enters., Inc. v. Russell*, 34 N.C. App. 275, 278, 237 S.E.2d 859, 861 (1977).

A public nuisance is defined to include, *inter alia*, "[e]very place which, as a regular course of business, is used for the purposes of . . . prostitution, and every such place in or upon which acts of . . . prostitution[] are held or occur." N.C. Gen. Stat. § 19-1.2(6) (2003). Additionally, all "money or other valuable consideration . . . received or used in . . . prostitution" is deemed a nuisance. N.C. Gen. Stat. § 19-1.3(3) (2003).

Section 19-6 provides for forfeiture of all moneys that are declared to be a nuisance:

> An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and county governments wherein such activity took place, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise, and as partial restitution for damages done to the public welfare.

N.C. Gen. Stat. § 19-6 (2003).

With regard to the proof required to show knowledge of nuisances involving prostitution, the statute provides that "evidence that the defendant knew or by the exercise of due diligence should have known of the acts or conduct constitutes proof of knowledge." N.C. Gen. Stat. § 19-1.1(1a) (2003).

In the case *sub judice*, the trial court notes in its order of summary judgment that

> The plaintiff has offered evidence in support of its motion in the form of affidavits and portions of the transcript of the defendants' prior criminal trial and depositions. The defendants have offered no evidence in response . . . except the "verified" answer. The defendants' responses to the specific allegations are simple, mostly one-word, responses: "Admitted" or "Denied." When questioned during depositions about the nature of operations at their property and the activities being undertaken there, the defendants invoked their privileges against self-incrimination.

The State's evidence is sufficient to prove that defendants engaged in nuisance activity, and that the proceeds of the activity should be forfeited. Defendants provided no evidence to refute plaintiff's account of defendants' activity, and therefore failed to raise a genuine issue of material fact. Accordingly, we conclude that summary judgment was appropriate. We further note that summary judgment does not deprive defendants of their right to a jury trial. The right to a jury trial accrues only when there is a genuine issue of fact to be decided at trial. *See Kidd v. Early*, 289 N.C. 343, 368-69, 222 S.E.2d 392, 409 (1976). For these reasons, we overrule this assignment of error.

[3] Defendants next argue that the trial court erred by granting plaintiff summary judgment on the issue of damages. We agree.

Section 19-6 states in pertinent part the following:

> Upon judgment against the defendant or defendants in legal proceedings brought pursuant to this Article, *an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a nuisance under this Article.* An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and county governments wherein such activity took place, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise, and as partial restitution for damages done to the public welfare.

(emphasis added).

In the case *sub judice*, both defendants filed affidavits on 29 October 2002 stating the following:

1. I am aware of the order of Judge Lindsay R. Davis, Jr. dated August 12, 2002, which states that I should provide an accounting for all gross income earned from Rose Spa from 1991 to the present date including the dates and amounts of each item of income, with a detailed description of goods or services provided therefore.

2. It is impossible for me to comply with the letter of that order since all the records relative to the income of Rose Spa and any description of goods or services provided are presently there, in the possession of the Internal Revenue Service and the United States Attorney's Office for the Middle District of North Carolina. My lawyer advises me that he has asked that the records be copied and the copies returned to me, but that the Federal Authorities have refused to return the items. In addition, it may be practically impossible for anyone to determine a separate accounting for each item of income; and, unless the description of services provided appear on the document held by the Federal Authorities, I have no knowledge as to the specific nature of them.

3. I have earlier provided all information concerning gross income from Rose Spa to Mrs. Erma T. Reynolds. I have instructed my counsel to release all that information to this Court, however, it is my belief that the plaintiff in this action has already filed copies of my business tax returns from the past several years. A [sic] this time, I can do no more by way of an accounting.

Defendants later filed a response to the motion for summary judgment on damages stating that "the amount of damages, if any, is a subject for resolution of contested factual and legal issues." The only evidence presented on the issue of damages was the State's affidavit by Erma Reynolds ("Reynolds") stating that she was defendants' accountant from 1991 or 1992 until 2001, that she prepared defendants' income tax returns during those years, that her records show defendants' income over that period of time to be $1,633,137.13, and providing defendants' tax records for those years. Based on this information alone, the trial court awarded plaintiff damages in the amount of $1,633,137.13.

We conclude that while the total amount of gross income from Rose Spa may be calculated based on the accountant's copies of defendants' tax records, the amount of gross income derived from

defendants' unlawful activity is disputed. Thus, summary judgment on the issue of damages was premature. Thus, we reverse the trial court's summary judgment on the issue of damages.

Defendants also argue that the damages award was excessive pursuant to the Eighth Amendment of the United States Constitution and Article I, Section 27 of the North Carolina Constitution. Because we reverse the trial court's summary judgment on damages, it is unnecessary to address this assignment of error.

For the aforementioned reasons, we hereby affirm in part, and reverse in part the judgment of the trial court, and remand the case for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Judges WYNN and McCULLOUGH concur.

NELSON KONRADY, EMPLOYEE, PLAINTIFF v. U.S. AIRWAYS, INC., EMPLOYER, RELIANCE NATIONAL INSURANCE COMPANY, CARRIER, AND SEDGWICK CLAIMS MANAGEMENT, ADMINISTRATOR, DEFENDANTS

No. COA02-1504

(Filed 3 August 2004)

1. Workers' Compensation— injury—accident

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee flight attendant suffered an injury by accident on 18 November 1999 when she misstepped while exiting from a hotel van with an unexpectedly short final step where the steps also overlapped with the curb, because: (1) the issue is not whether exiting vans is routine for plaintiff, but whether something happened as she was exiting that particular van on that specific occasion that caused her to exit the van in a way that was not normal; and (2) the unusual condition of half steps or the unusual circumstance of engaging in missteps was not part of plaintiff's normal work routine even if plaintiff's normal routine included frequent van trips.

2. Workers' Compensation— injury—causation

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee flight attendant

proved that her injury was causally related to a short step on a hotel van because even though the question of the sufficiency of the evidence as to causation is not properly before the Court of Appeals, there was ample evidence from a doctor's testimony to support the Commission's finding and conclusion that the accident on 18 November 1999 caused plaintiff's disability.

3. Workers' Compensation— medical expenses—apportionment

The Industrial Commission did not err in a workers' compensation case by failing to apportion plaintiff's medical expenses and disability between the November 1999 incident and plaintiff employee's previous ACL tear, because: (1) defendants have pointed to no evidence in the record that allocates the medical expenses or the degree of temporary disability between the two conditions; and (2) the lack of evidence of how the expenses or disability should be allocated meant the Commission was not required to apportion.

Appeal by defendants from the Opinion and Award of the North Carolina Industrial Commission entered 17 July 2002 by Commissioner Dianne C. Sellers. Heard in the Court of Appeals 28 August 2003.

Mark T. Sumwalt, P.A., by Mark T. Sumwalt and Vernon Sumwalt, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Daniel C. Pope, Jr. and Kimberley A. D'Arruda, for defendants-appellants.

GEER, Judge.

Defendants appeal from an Opinion and Award of the Industrial Commission concluding that plaintiff Nelson Konrady suffered a knee injury as a result of an accident when she misstepped while exiting from a van with an unexpectedly short final step. Because the Commission's decision is supported by competent evidence and its findings support its conclusions of law, we affirm.

Facts

At the time of the hearing before the deputy commissioner, Konrady had been a flight attendant for 28 years. On the evening of 18 November 1999, defendant U.S. Airways had arranged for the flight crew, including Konrady, to stay at the Hilton for their layover in

Raleigh. A Hilton courtesy van arrived at the Raleigh-Durham Airport to transport Konrady and her coworkers to the hotel. As plaintiff descended the steps from the van at the hotel, she "misstepped" on the last step because the last step was shorter than the other steps and because the van had parked so that the steps overlapped the curb. As a result, Konrady unexpectedly stepped onto the elevated curb, rather than down onto the road. Konrady could not recall ever before encountering a shortened step while exiting a van.

Because of Konrady's "misstep," her right leg hit the ground harder than she expected and she immediately felt a sharp pain in her right knee. Konrady testified that the "last step was a short step. It wasn't the same length as the other steps. . . . so when I took that step, I felt some pain in my right knee." She started walking to the back of the van to get her luggage, but felt severe pain again and had to walk with her leg bent for the pain to subside. After retrieving her luggage and going to her hotel room, Konrady went to sleep. She awoke in the middle of the night; when she started to walk to the bathroom, she felt the pain again.

The next morning, Konrady returned to Charlotte on a "no-serve" flight that allowed her to sit in her jump seat for the entire flight. She completed an incident report upon arriving in Charlotte and promptly took a non-working flight to her home in Wilmington and sought medical treatment. Konrady initially saw Dr. William Sutton of the Wilmington Orthopaedic group on 19 November 1999. She had right knee pain upon standing, pain with flexion of the knee, and some tenderness over the medial joint line.

U.S. Airways directed Konrady to see its company physician, Dr. Roger Hershline. Dr. Hershline diagnosed a bilateral knee strain and excused Konrady from work through 22 November 1999. Dr. Hershline referred Konrady to Dr. Thomas Parent (also of the Wilmington Orthopaedic group), who had treated her for a prior injury. On 1 December 1999, an MRI revealed a possible meniscal tear and condylar lesion or injury to plaintiff's cartilage. The MRI also revealed an absent cruciate ligament as a result of a previous injury.

In 1998, Konrady had suffered an injury to her right knee playing volleyball. She had the anterior cruciate ligament removed from her knee approximately a year or more before the 18 November 1999 injury. After Dr. Parent performed the ligament removal surgery, Konrady returned to work full-time, participated in triathlons, and had no further problems with her knee until 18 November 1999.

On 12 May 2000, Konrady underwent arthroscopic surgery on her right knee. The surgery revealed a cartilaginous defect that appeared fresh with jagged edges and no surrounding thinning—findings that Dr. Parent testified are consistent with trauma. Dr. Parent repaired the cartilage injury and reconstructed the anterior cruciate ligament from her non-work-related injury. Following surgery, Konrady had a normal recovery. She was unable to work from 18 November 1999 through 1 September 2000.

Defendants denied Konrady's workers' compensation claim on the grounds that her condition was not the result of an accident and, even if an accident occurred, was not caused by the accident. The deputy commissioner filed an Opinion and Award on 15 February 2001 granting Konrady temporary total disability benefits for the period she was out of work and requiring defendants to provide medical treatment. Defendants appealed to the Full Commission. Like the deputy commissioner, the Full Commission concluded, in an Opinion and Award filed 17 July 2002, that Konrady had sustained an injury by accident arising out of and in the course of her employment, that she was entitled to temporary total disability benefits and medical treatment, and that the issue of permanent partial impairment should be reserved.

Standard of Review

This Court's review of a decision by the Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). If supported by competent evidence, the Commission's findings are conclusive on appeal even though there may be evidence to support contrary findings. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000). The Commission's conclusions of law are reviewable *de novo*. *Smith v. Housing Auth. of Asheville*, 159 N.C. App. 198, 201, 582 S.E.2d 692, 695 (2003).

I

[1] Defendants first argue that the Commission erred in concluding that Konrady suffered an injury by accident on 18 November 1999. A plaintiff is entitled to compensation for an injury under the Workers' Compensation Act "only if (1) it is *caused by an 'accident,'* and (2) the accident arises out of and in the course of employment." *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 645,

566 S.E.2d 807, 811 (2002) (emphasis added). Defendants question only whether the manner in which Konrady's injury occurred constituted an "accident" within the meaning of the Workers' Compensation Act. They do not address whether the injury arose out of and in the course of employment.

Our Supreme Court has held that an injury does not arise by accident "[i]f an employee is injured while carrying on his usual tasks in the usual way[.]" *Gunter v. Dayco Corp.*, 317 N.C. 670, 673, 346 S.E.2d 395, 397 (1986). On the other hand, "[a]n accidental cause will be inferred . . . when an interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences occurs." *Id.* To be an accident, the incident must have been for the employee an "unlooked for and untoward event." *Cody v. Snider Lumber Co.*, 328 N.C. 67, 70, 399 S.E.2d 104, 106 (1991).

In arguing that the Commission erred in concluding that Konrady was injured as a result of an "accident," defendants have assigned error to two of the Commission's findings of fact:

> 4. As plaintiff exited the van at the hotel, the space between the last step and the ground was shorter than the space between the other steps. The van had also parked such that the steps overlapped the curb. As a result, plaintiff "misstepped" and her right leg hit the ground harder than she expected. In addition to the shortened space between the steps, plaintiff expected a greater distance to the road, but instead stepped onto the elevated curb. Plaintiff immediately felt a sharp pain in her right knee.
>
> . . . .
>
> 14. The greater weight of the medical evidence is that plaintiff sustained a compensable injury to her right knee arising out of and in the course of her employment with defendant-employer. Plaintiff's misstep exiting the van was an unexpected and unforeseen occurrence, constituting an unusual condition. During plaintiff's twenty-eight year career as a flight attendant, plaintiff averaged approximately twelve layovers per month where her job required her to stay overnight at defendant-employer's designated hotels. Plaintiff could not recall ever encountering a half-step, or shortened step as on 18 November 1999 before while existing [sic] a van. Plaintiff routinely traveled in courtesy vans while going to and from a hotel.

Defendants have also assigned error to the Commission's conclusions of law based on these findings:

> 1. The van pulling closer to the curb and the shorter distance between the bottom step caused plaintiff to misstep. This was an unforeseen circumstance, unusual condition and an interruption of plaintiff's normal work routine. Plaintiff had never encountered this situation during twenty-eight years of employment with defendant-employer.
>
> 2. On 18 November 1999, plaintiff sustained an injury by accident arising out of and in the course of her employment with defendant-employer. G.S. § 97-2(6).

In asking this Court to set aside the Commission's decision, defendants argue that "[e]xiting the van was not an 'unlooked for or untoward event' and there was no interruption in plaintiff's work routine." Defendants point to Konrady's testimony that vans were of varying sizes and types so that each time Konrady stepped off from a van, it was potentially different. They argue that this testimony requires reversal under *Landry v. U.S. Airways, Inc.*, 356 N.C. 419, 571 S.E.2d 586, *rev'g per curiam for the reasons in* 150 N.C. App. 121, 125, 563 S.E.2d 23, 26 (2002) (Hunter, J., dissenting).

Defendants have, however, overlooked the importance of the standard of review in *Landry*. In *Landry*, in contrast to this case, the Commission had concluded that no accident occurred. Judge Hunter's dissent, as adopted by the Supreme Court, was founded on that standard of review: "I would hold that the Commission's findings of fact, which are supported by competent evidence, are sufficient to support its conclusion of law that plaintiff did not sustain a compensable injury because there were no 'unusual conditions likely to result in unexpected consequences.' I therefore respectfully dissent." 150 N.C. App. at 125, 563 S.E.2d at 26.

The plaintiff in *Landry* had been injured when grabbing a mailbag that was heavier than expected. *Id.* at 122, 563 S.E.2d at 24. The Commission based its conclusion that the plaintiff's injury did not result from an accident on its findings that the plaintiff's job required him to lift weights of up to 400 pounds; that plaintiff never knew prior to lifting mailbags how much they weighed; that it was not unusual for mailbags to be extremely heavy; and that plaintiff was engaged in his normal duties and using his normal motions when injured. *Id.* at 126, 563 S.E.2d at 27. Judge Hunter concluded that those findings

were supported by competent evidence and "in and of themselves support the Commission's conclusion that plaintiff was not injured as a result of any unusual condition." *Id.*

While the Commission in *Landry* found that it was not unusual for the plaintiff to lift unexpectedly heavy bags, the Commission in this case found that the van pulling closer to the curb and the shorter distance between the bottom step and the ground were an unforeseen circumstance and unusual condition and that Konrady could not recall ever before having encountered that situation. These findings are, as were those in *Landry*, supported by competent evidence.

In deciding whether the Commission's findings are sufficient to support its conclusion that an accident occurred, the issue is not whether exiting vans is routine for Konrady, as defendants contend, but whether something happened as she was exiting that particular van on that specific occasion that caused her to exit the van in a way that was not normal. Were there any unexpected conditions resulting in unforeseen circumstances? Here, the unexpected conditions found by the Commission included a step that was shorter than other steps and the overlapping of the step with the curb. The unforeseen circumstances found by the Commission were that the step down from the van was much shorter than Konrady anticipated, causing her to "misstep" and hit the ground harder than she expected.

This Court has previously held that similar findings of fact were sufficient to support a conclusion that an accident occurred. In *Dolbow v. Holland Industrial, Inc.*, 64 N.C. App. 695, 308 S.E.2d 335 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984), the Commission found that the plaintiff was engaging in his job of unloading rods from a truck at a job site "when he stepped into a depression, injuring his knee." *Id.* at 697, 308 S.E.2d at 336. The Court held that this finding of fact, together with findings relating to the nature of the injury, were sufficient to support an award of compensation. We cannot distinguish Konrady's "misstep" in exiting a van from *Dolbow's* stepping into a depression.

This Court has also concluded that an "accident" occurred in other cases involving an employee entering or exiting a vehicle, so long as the conditions were different from the routine. In *Coffey v. Automatic Lathe Cutterhead*, 57 N.C. App. 331, 291 S.E.2d 357, *disc. review denied*, 306 N.C. 555, 294 S.E.2d 222 (1982), the Commission found that a salesman injured his back while exiting his car when he reached for a clipboard that had fallen off the car seat. This Court

reversed the Commission's conclusion that no accident had occurred because the Commission's "own findings show the unusual circumstance of the clipboard being off the seat . . . [and the employee's] normal manner or routine of exiting his car was interrupted by the unusual location of the clipboard." *Id.* at 334, 291 S.E.2d at 359. Because the clipboard had fallen, the plaintiff "experienced an accidental injury upon the interruption of his usual routine of work and the introduction of unusual conditions likely to result in unexpected consequences." *Id.* at 335, 291 S.E.2d at 360.

In *Ross v. Young Supply Co.*, 71 N.C. App. 532, 536, 322 S.E.2d 648, 651-52 (1984), this Court found an interruption of the work routine and the introduction of unusual conditions when a salesman slipped as he put most of his weight on his left leg while trying to wedge himself behind the steering wheel of his car. This Court held, "The facts here tend to show that plaintiff was not entering his automobile in the manner in which he normally entered his automobile." *Id.*, 322 S.E.2d at 652.

Likewise, Konrady did not exit the van in the manner in which she normally exited. The unusual conditions of a clipboard sliding off a car seat or a steering wheel being too close to the seat are not materially different from the condition of a step being unexpectedly short and too close to the ground.

Defendants point to *Bowles v. CTS of Asheville, Inc.*, 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985), arguing that an otherwise "unusual" activity can become part of the normal work routine so as not to result in an interruption of the work routine or an injury by accident. There is no indication in this record that the unusual condition of "half steps" or the unusual circumstance of engaging in "missteps" had become part of Konrady's normal work routine, even if plaintiff's "normal" routine included frequent van trips. *See Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 116, 519 S.E.2d 61, 64 (1999) (reversing Commission's denial of compensation because fact that plaintiff's job responsibilities included task that resulted in injury was not dispositive when task on this occasion involved non-routine circumstances), *disc. review denied*, 351 N.C. 351, 543 S.E.2d 124 (2000).

Under the standard of review applicable to appeals from the Industrial Commission, we hold that the Commission's conclusion that plaintiff's injury resulted from an accident is supported by its findings of fact, which are in turn supported by competent evidence.

II

[2] Defendants contend that even if plaintiff suffered an accident, she has not proven that her injury was causally related to the "short step." In a workers' compensation case, "[t]he injury by accident must be the proximate cause, that is, an operating and efficient cause, without which [the disability] would not have occurred." *Gilmore v. Hoke County Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942).

Defendants did not, however, assign error to the Commission's following findings of fact relating to causation:

> 10. As a result of plaintiff's 18 November 1999 work-related incident, plaintiff underwent arthroscopic surgery on 12 May 2000. . . .
>
> 11. Following surgery, plaintiff had a normal recovery. As a result of plaintiff's work-related incident on 18 November 1999, plaintiff was unable to work from 18 November 1999 through 1 September 2000. . . .

Because of the lack of any assignment of error, these findings of fact are binding on appeal. *Fennell v. N.C. Dep't of Crime Control & Pub. Safety*, 145 N.C. App. 584, 596, 551 S.E.2d 486, 494 (2001) ("As plaintiffs did not assign error to the above findings of fact, they are binding on appeal."), *cert. denied*, 355 N.C. 285, 560 S.E.2d 800 (2002). These findings establish that the 18 November 1999 accident caused her need for surgery and caused her temporary total disability.

Even though the question of the sufficiency of the evidence as to causation is not properly before this Court, our review of the record reveals ample evidence from Dr. Parent to support the Commission's finding and conclusion that the accident on 18 November 1999 caused Konrady's disability. When asked if the changes he observed in her knee after November 1999 are more often associated with trauma or with general degeneration, Dr. Parent stated, "Oh, I think they're—her trauma." He also directly addressed the causation question:

> Q. Okay. Do you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty as to whether the—the symptoms that you observed in November of 1999 and thereafter were more likely than not caused by an accident that she described to you on November 18, 1999?
>
> A. Yes. I think that's the cause.

Q. Okay. And what's the basis for that opinion?

A. The arthroscopy.

. . . .

Q. Okay. And specifically, if you would, just tell us briefly what those findings were that lead to your opinion that it was caused by trauma as opposed to—as opposed to anything else.

A. Well, she had a very focal cartilaginous injury and those occur from trauma.

Dr. Parent's testimony thus provides competent medical evidence based on his physical examination sufficient to support the Commission's findings of fact regarding causation.

III

[3] Finally, defendants argue that the Commission erred in not apportioning plaintiff's medical expenses and disability between the November 1999 incident and Konrady's previous ACL tear. This argument was not the subject of any assignment of error and, therefore, is not properly before us.

In any event, although apportionment may be appropriate when a work-related and a non-compensable condition combine to cause disability, an employee may receive "full compensation for total disability without apportionment when the nature of the employee's total disability makes any attempt at apportionment between work-related and non-work-related causes speculative." *Errante v. Cumberland County Solid Waste Mgmt.*, 106 N.C. App. 114, 119, 415 S.E.2d 583, 586 (1992).[1] The Commission may also decline to apportion when the record lacks evidence attributing a percentage of the employee's total incapacity to her compensable injury. *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 390-91, 465 S.E.2d 343, 346, *disc. review denied*, 343 N.C. 305, 471 S.E.2d 68 (1996).

Defendants have pointed to no evidence in the record that allocates the medical expenses or the degree of temporary disability between the two conditions. Dr. Parent's testimony indicates that the surgery was performed to diagnose and repair the knee injury attrib-

1. Plaintiff correctly contends that apportionment is not appropriate when a work-related condition aggravates or accelerates a non-work-related condition. *Id.* Our review of the record does not, however, reveal any evidence that Konrady's temporary disability was the result of an aggravation of a prior condition rather than a new condition.

utable to the 18 November 1999 accident and that the ACL reconstruction was simply done at the same time. Plaintiff testified, "I decided that since I was going to have the cartilage damage repaired, that I might as well go on and have a ligament replacement while he was in there." With respect to the disability, Dr. Parent testified that he would expect the recovery time for surgery to repair cartilage damage and surgery for ACL reconstruction to be "about the same, depending on the person" and there was "[p]robably not" any increase in the recovery time. Because of the lack of evidence of how the expenses or disability should be allocated, the Commission was not required to apportion.

Affirmed.

Judges McGEE and BRYANT concur.

STATE OF NORTH CAROLINA v. DANIEL DELANE COOK, DEFENDANT

No. COA02-1582

(Filed 3 August 2004)

1. Embezzlement— sufficiency of evidence—age

Evidence that the restaurant from which defendant allegedly embezzled money did not hire anyone under 16 years of age was sufficient for the jury to infer that defendant was 16 on the date of the offense. The trial court correctly denied defendant's motion to dismiss for insufficient evidence and his request for a jury instruction on age.

2. Evidence— prior crimes or bad acts—introduced by State to attack credibility

The trial court erred in an embezzlement prosecution by allowing the State to introduce evidence of a prior incident of embezzlement for which a charge was dismissed under a deferred prosecution agreement where the sole purpose was to attack defendant's credibility. The distinctions between N.C.G.S. § 8C-1, Rule 404(b) and Rule 609 may not be blurred.

3. Evidence— prior bad act erroneously admitted— prejudicial

There was prejudice in the erroneous introduction of a prior embezzlement in an embezzlement prosecution because the evidence against defendant was not overwhelming and the result hinged on the jury's assessment of defendant's credibility.

Appeal by defendant from judgment entered 27 June 2002 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 September 2003.

Attorney General Roy Cooper, by J. Douglas Hill, Assistant Attorney General, for the State.

Leslie C. Rawls for defendant-appellant.

GEER, Judge.

Defendant Daniel Delane Cook appeals from his conviction for embezzlement. He argues on appeal (1) that the trial court erred in denying his motion to dismiss for insufficient evidence that he was at least 16 years old; and (2) that the trial court erred by admitting evidence of a prior incident of embezzlement by defendant. We hold that the trial court properly denied defendant's motion to dismiss, but that the admission of evidence of a prior incident of embezzlement was prejudicial error. Defendant is, therefore, entitled to a new trial.

Facts

The State's evidence tended to show the following. In the summer of 2001, defendant was employed at a Wendy's restaurant in Charlotte. On 10 June 2001, defendant reported that someone had robbed the restaurant at gunpoint while he was working at the drive-through window. Ten days later, defendant reported that the same person had again robbed the drive-through window while he was working there, this time cutting defendant's forearm with a knife when he reached through the window to hand the robber the money.

On the evening of 21 July 2001, defendant was operating the dining room cash register off and on from 6:00 p.m. until 10:00 p.m. At about 10:00 p.m., the manager of the Wendy's, Thomas Smith, asked defendant to stay a little later to close the restaurant. Smith locked the restaurant door and returned to his office. Approximately ten minutes later, when he came out of his office, Smith noticed that there was a line of people at the counter, but defendant was not at the

register. The shift supervisor told Smith that he did not know where defendant was. Smith waited on the customers in line, then went to look for defendant. One of the employees informed him that defendant had "booked out the back door," but when Smith looked out the back door he did not see defendant. He checked the time clock and verified that defendant had not clocked out. Smith then checked the register and lock box and found that $578.00 was missing.

Smith called defendant's home and asked his mother to have him call the restaurant. Smith then called his general manager, who instructed him to call the police. A short time later, defendant called the general manager and reported that he had seen the perpetrator of the two recent robberies in the dining room of the restaurant, causing him to panic and flee the store.

Defendant testified on his own behalf. He suggested that other employees could have taken the money, pointing out that when he began working on the register, it was not changed out and that the manager had taken over his cash drawer at least once. According to defendant, the restaurant had cameras trained on the register and he believed they worked. Defendant testified that after the manager locked the restaurant's doors (although there were 10 to 20 people still inside), he recognized one of the people as being the man who had cut him on 20 June 2001. He grabbed his clothes, ran out the back door, and left with a co-worker. When he called his mother a short time later, she told him about Smith's call. Defendant first called the manager to report what had happened and then called the police. He waited by the pay phone for the police to pick him up.

Defendant was charged with three counts of embezzlement based on the 10 June, 20 June, and 21 July 2001 robberies of the Wendy's. The charges were consolidated for trial at the 25 June 2002 session of Mecklenburg County Superior Court. On 27 June 2002, defendant was convicted of embezzlement arising from the 21 July 2001 incident, but was acquitted of the two charges arising from the 10 June and 20 June 2001 incidents. The trial judge sentenced defendant to six to eight months imprisonment, suspended the active sentence, placed defendant on 48 months supervised probation, and ordered him to pay restitution.

I

[1] Defendant first contends that the trial court erred in denying his motion to dismiss for insufficient evidence, arguing only that the

State failed to present substantial evidence that defendant was 16 years old or older. In ruling on a motion to dismiss for insufficient evidence, a trial court must determine whether the State has presented substantial evidence of each element of the offense. *State v. Rupe*, 109 N.C. App. 601, 607, 428 S.E.2d 480, 485 (1993). Substantial evidence is such evidence that, when viewed in the light most favorable to the State, a reasonable mind would accept as sufficient to support a conclusion. *Id.* If the State has offered substantial evidence of each essential element of the crime charged, the defendant's motion must be denied. *Id.* at 608, 428 S.E.2d at 485.

The crime of embezzlement is set out in N.C. Gen. Stat. § 14-90 (2003) (emphasis added):

> If any . . . agent, consignee, clerk, bailee or servant, *except persons under the age of 16 years* . . . shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, . . . belonging to any other person or corporation, unincorporated association or organization which shall have come into his possession or under his care, he shall be guilty of a felony.

Defendant claims that this statute makes age an essential element of the offense of embezzlement that must be proven by the State. The State, however, contends that age is an affirmative defense.

Nearly a century ago, our Supreme Court held that age is an affirmative defense rather than an element of the offense:

> While the indictment must charge that the defendant was not an apprentice, nor under the age of 16 years, yet it is not an act constituting a part of the transaction which the State is called on to prove. It is a status, peculiarly within the knowledge of the defendant (like non-marriage in indictments for fornication and adultery), which though charged in the bill, if denied, is a defense to be shown by defendant. When the status of defendant, as being under a given age or married, by the terms of the statute would withdraw the defendant from responsibility, while the indictment must negative such status, the status is a defense in the nature of a confession and avoidance which must be shown by the defendant. The State is not called upon to prove negative averments of this nature.

State v. Blackley, 138 N.C. 620, 622, 50 S.E. 310, 311 (1905) (internal citations omitted), *overruled on other grounds by State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977). Nevertheless, in more recent cases, this Court has included the age restriction when listing the elements of embezzlement that must be proven by the State. *See, e.g., State v. Britt*, 87 N.C. App. 152, 153, 360 S.E.2d 291, 292 (1987), *disc. review denied*, 321 N.C. 475, 364 S.E.2d 924 (1988); *State v. Melvin*, 86 N.C. App. 291, 298, 357 S.E.2d 379, 384 (1987); *State v. Pate*, 40 N.C. App. 580, 583, 253 S.E.2d 266, 269, *cert. denied*, 297 N.C. 616, 257 S.E.2d 222 (1979).

We need not, however, resolve this apparent conflict in the law because the State in fact presented uncontroverted evidence that defendant was at least 16 years old. John Donaldson, the general manager of the Wendy's restaurant at which defendant worked, was asked about age requirements for employees. He stated: "They have to be minimum 16 years old. We don't hire below 16 years of age." Since this testimony was sufficient to allow the jury to infer that defendant was over the age of 16 on the date of the offense, the trial court did not err in denying defendant's motion to dismiss. For the same reason, we hold that the trial court did not err in denying defendant's motion to set aside the jury verdict.

Defendant further argues that the trial court erred in denying his request for a jury instruction on age. A defendant is entitled to a requested jury instruction only when the instruction is "correct in itself and supported by evidence[.]" *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993). Here, the record contains no evidence suggesting defendant was under the age of 16, and, therefore, the trial court was not required to give the requested instruction.

II

[2] Defendant has also assigned as error the trial court's admission into evidence of a prior incident of embezzlement by defendant as violating N.C.R. Evid. 404(b). Rule 404(b) of the North Carolina Rules of Evidence provides:

> 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.

Rule 404(b) is "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Lloyd*, 354 N.C. 76, 88, 552 S.E.2d 596, 608 (2001) (internal quotation marks omitted; emphasis original).

The trial court below allowed the State to present evidence during its case in chief that defendant previously embezzled money in January 2000 while employed as a bagger/cashier at a Bi-Lo grocery store in Charlotte. The Bi-Lo Regional Loss Prevention Specialist, Scott Goodwin, testified that he spoke to defendant while investigating an incident regarding a bag containing $1,100.00 that was missing from the Eastway Drive Bi-Lo where defendant worked. Goodwin testified that defendant admitted both verbally and in writing to taking the money for his personal use. Defendant's handwritten statement was admitted into evidence and read aloud by Goodwin. The State also called the investigating police officer, Paul B. Conner, who authenticated and read defendant's statement to him regarding the Bi-Lo embezzlement.

According to the statements, defendant was bagging groceries at the Bi-Lo store. A cashier counted out the money in her register and separated it into two bags. She asked defendant to take both bags to the cash room. Defendant took one bag of money to the cash room, but put the other bag (containing $1,100.00) in a locker in the break room. He retrieved the bag when he finished work and took it home. Defendant was charged with embezzlement, but qualified for deferred prosecution. After he successfully completed the requirements of the deferred prosecution, the charges were dismissed.

During voir dire, the trial court found that the evidence "would go to the credibility of the Defendant's explanation for the missing money, would tend to negate his contention made to his employer that the money was missing due to two robberies, and also due to his having to run from the restaurant out of fear." The court further found that the evidence was "more probative than prejudicial," as required by N.C.R. Evid. 403. The court admitted the evidence "for the limited purpose of contradicting the Defendant's explanations given on the three occasions for which he is being tried" and gave the following limiting instruction to the jury:

> Members of the jury, this evidence would be admitted for the limited purpose, and you may consider it for this limited purpose only.
>
> That is, to the extent that you find that this evidence relates to the credibility of the explanations given by the Defendant to his employer on three occasions when money was found to be missing.
>
> You may not consider this evidence for any other purpose other than this limited purpose. That is, the extent you find it bears on the credibility of the Defendant's explanation which he gave to his employer in these cases.

The State then argued in closing arguments:

> Now, we went over some evidence relating to an incident that occurred at Bi-Lo, the Bi-Lo located on Eastway back in 2000. And the Judge will tell you that he's not charged with that case today. The mere fact that that incident occurred does not in and of itself mean that the Defendant committed the embezzlement at Wendy's on June 10th, June 20th, and July 21st. But you can look at what happened at Bi-Lo in 2000, and determine for yourself whether or not you want to believe the Defendant's story. . . . Now, like I said, we're not using that to try to say that he did this or that in and of itself proves he commited [sic] the acts at Wendy's, but you can consider that based on the fact that the Defendant did this at Bi-Los [sic] you can consider. . . . You can consider whether or not you want to believe the Defendant's story today.

While the State argues that the trial court admitted the disputed evidence for a purpose other than showing defendant's propensity to commit embezzlement, we disagree. The sole purpose for admission of the evidence at trial was to attack defendant's credibility. If we were to allow evidence of prior bad acts to be admissible under Rule 404(b) for purposes of challenging credibility, we would undermine the General Assembly's careful design regarding admission of character evidence.

Rule 608(b) (emphasis added) provides that "[s]pecific instances of the conduct of a witness, *for the purpose of attacking or supporting his credibility*, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." Instead, if probative of truthfulness or untruthfulness, they may "be inquired

into on cross-examination of the witness[.]" *Id.* Rule 609(a) in turn permits admission of evidence of certain, specified convictions "[f]or the purpose of attacking the credibility of a witness," only "if elicited from the witness or established by public record during cross-examination or thereafter." Under Rule 609, the State may not offer evidence of the details underlying the convictions apart from the name of the crime, the time and place of the conviction, and the punishment imposed. *State v. Lynch*, 334 N.C. 402, 409, 432 S.E.2d 349, 352 (1993).

By allowing the State to introduce extrinsic evidence during its case in chief of the details of a prior embezzlement in which the charges have been dismissed pursuant to a deferred prosecution agreement, the trial court allowed the State to circumvent the strict limitations of Rules 608 and 609. Our Supreme Court has already held that the distinctions between Rule 404(b) and Rule 609 may not be blurred. *State v. Wilkerson*, 356 N.C. 418, 418, 571 S.E.2d 583, 583, *adopting per curiam*, 148 N.C. App. 310, 318, 559 S.E.2d 5, 10 (2002) (Wynn, J., dissenting). Since Rules 608 and 609 specifically address the admissibility of prior bad acts to challenge a witness' credibility, Rule 404(b) should not be construed in a manner inconsistent with those rules. As our Supreme Court has stated, in construing the Rules of Civil Procedure:

> "Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling[.]"

Thigpen v. Ngo, 355 N.C. 198, 203, 558 S.E.2d 162, 165-66 (2002) (quoting *Nat'l Food Stores v. N.C. Bd. of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966)).

Nor is a reading that would find impeachment to be a proper purpose for admission of evidence under Rule 404(b) consistent with our Supreme Court's past explanations of the rule. Although Rule 404(b) is a rule of inclusion, our Supreme Court has held that evidence of other offenses is admissible only "so long as it is relevant to any fact

or issue other than the character of the accused." *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986). Phrased differently, Rule 404(b) provides that proof of a person's character by evidence of prior bad acts "may properly be used as circumstantial proof of a controverted fact at trial (for instance, to prove motive, opportunity, intent, preparation, plan, knowledge, identity, etc.)." *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986). Credibility relates only to "the character of the accused" and challenges to credibility do not amount to "circumstantial proof of a controverted fact." *See* 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 97, at 299 & n.237 (6th ed. 2004) ("a person's character is only collaterally in issue, . . . *[i].e.*, where it is offered on the question of a witness's credibility").

Indeed, as offered here, in order for the jury to find that the prior embezzlement undercut the credibility of defendant's version of the facts, the jury would have to reason—as the State urged in closing argument—that if defendant embezzled money from a prior employer, then his claim that he did not embezzle money from Wendy's was unlikely to be true. This reasoning is precisely what Rule 404(b) prohibits. To allow otherwise inadmissible Rule 404(b) evidence to be admitted under the guise of challenging credibility would effectively erase the exclusionary portion of the rule.

The State has not pointed to any other basis for admission of the evidence apart from credibility. We therefore hold that the trial court erred in admitting the disputed evidence pursuant to Rule 404(b).

[3] Having concluded that the trial court erred in admitting the disputed evidence, we must determine whether the error was harmless. Defendant bears the burden of demonstrating that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" N.C. Gen. Stat. § 15A-1443(a) (2003). Here, we cannot say with certainty that the admission of the evidence of the prior embezzlement was harmless. The evidence against defendant, in the absence of the Bi-Lo incident, was not overwhelming and the result hinged on the jury's assessment of his credibility. It is significant to this analysis that the jury acquitted defendant of the two counts of embezzlement arising from the 10 June 2001 and 20 June 2001 incidents. *State v. McMillan*, 55 N.C. App. 25, 33, 284 S.E.2d 526, 531 (1981) (fact that jury acquitted defendant of one of the charges "takes on added significance" when determining whether error as to second charge was

harmless). We conclude that the error was not harmless, and, as a result, the admission of the disputed evidence constituted prejudicial error requiring a new trial.

New trial.

Chief Judge MARTIN and Judge BRYANT concur.

EASTWAY WRECKER SERVICE, INC., PLAINTIFF-APPELLANT v. CITY OF CHARLOTTE, DEFENDANT-APPELLEE

No. COA03-399

(Filed 3 August 2004)

1. **Civil Procedure— failure to state a claim—consideration of complaint's exhibits—not transformed into summary judgment**

A Rule 12(b)(6) motion was not transformed into a summary judgment motion by consideration of exhibits to the complaint which were expressly incorporated by reference.

2. **Quantum Meruit— government contract—sovereign immunity**

The trial court did not err by dismissing a quantum meruit claim against the City of Charlotte for failure to state a claim arising from the provision of towing services. Although the trial court erred by dismissing the claim on the ground that it was precluded by express contract where plaintiff had alleged that the contract was invalid (plaintiff's claims are taken as true when ruling on a Rule 12(b)(6) motion), the dismissal was still appropriate because sovereign immunity bars quantum meruit claims against the State. Any suggestion in prior cases that sovereign immunity only bars quantum meruit claims arising from ultra vires contracts has been overruled.

3. **Fraud— negligent misrepresentation—failure to state a claim**

A claim for negligent misrepresentation against the City of Charlotte for a towing contract was properly dismissed for failure to state a claim where plaintiff did not allege that it was denied

the opportunity to investigate or that it could not have learned the facts by reasonable diligence. Moreover, the complaint establishes that any reliance by plaintiff on representations by employees of the City other than the City Manager was unjustified.

Judge McGEE dissenting.

Appeal by plaintiff from order entered 6 January 2003 by Judge Albert Diaz in Superior Court, Mecklenburg County. Heard in the Court of Appeals 14 January 2004.

The Odom Firm, P.L.L.C., by T. LaFontine Odom, Sr. and Thomas L. Odom, Jr., for plaintiff-appellant.

City Attorney's Office, by Senior Assistant City Attorney Cynthia White, for defendant-appellee.

GEER, Judge.

Plaintiff Eastway Wrecker Service, Inc. ("Eastway") appeals from an order dismissing its claims against defendant City of Charlotte based on *quantum meruit* and negligent misrepresentation. We hold that the *quantum meruit* cause of action is barred by sovereign immunity while the negligent misrepresentation cause of action failed to include all the allegations necessary to state a claim for relief. We, therefore, affirm.

Factual Background

Plaintiff entered into an agreement with defendant providing that plaintiff would tow, store, and dispose of motor vehicles, as directed by the police, for a specified geographical area known as Zone C. Plaintiff was to pay defendant $2,000.00 annually for the right to service Zone C and agreed to various specifications and conditions regarding documentation, service hours, and storage facilities, as well as a fee schedule for services rendered and the sale of unclaimed motor vehicles.

In a complaint filed 28 March 2002 and amended in August 2002, plaintiff alleged that defendant breached the agreement by failing to pay plaintiff for services provided under the agreement. In its amended complaint, plaintiff added alternative claims for (1) damages in *quantum meruit* for labor and materials supplied; (2) for negligent misrepresentation by defendant in connection with the agreement; and (3) breach of the covenant of good faith and fair

dealing. Defendant filed a motion to dismiss the alternative claims pursuant to Rule 12(b)(6). Following a hearing, the trial court entered an order on 6 January 2003 granting defendant's motion to dismiss as to plaintiff's *quantum meruit* and negligent misrepresentation claims, but denying it as to the claim for breach of the implied covenant of good faith and fair dealing. As a result, plaintiff's claims for breach of contract and breach of the implied covenant of good faith and fair dealing remain pending. Plaintiff appeals from the 6 January 2003 order.

Discussion

Because the trial court's order granting defendant's motion to dismiss did not dispose of all of plaintiff's claims against defendant, the order is interlocutory. *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 584, 500 S.E.2d 666, 667 (1998). The trial court, however, included a certification that the dismissal of plaintiff's claims for *quantum meruit* and negligent misrepresentation was a "final judgment[] and dispositive as to these claims and there is no reason to delay an appeal." In an action with multiple parties or multiple claims, Rule 54(b) provides that "if the trial court enters a final judgment as to a party or a claim and certifies there is no just reason for delay, the judgment is immediately appealable." *Id.* at 585, 500 S.E.2d at 668. We agree with the trial court that the dismissal order was properly certified under Rule 54(b) and, therefore, address the merits of plaintiff's appeal.

[1] To determine if a complaint is sufficient to withstand a Rule 12(b)(6) motion to dismiss, the trial court must "ascertain '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.' " *Plummer v. Community Gen. Hosp. of Thomasville, Inc.*, 155 N.C. App. 574, 576, 573 S.E.2d 596, 598 (2002) (quoting *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999)), *disc. review denied*, 357 N.C. 63, 579 S.E.2d 392 (2003). As an initial matter, we address the dissent's conclusion that the trial court considered matters outside the pleadings, thereby converting the motion to dismiss into a motion for summary judgment under Rule 12(b): "If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and

disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

After carefully reviewing the record, it appears that the only documents other than the pleadings that were before the trial court in connection with the motion to dismiss were the plaintiff's exhibits to the complaint. Since the exhibits to the complaint were expressly incorporated by reference in the complaint, they were properly considered in connection with the motion to dismiss as part of the pleadings. *See Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60-61, 554 S.E.2d 840, 847 (2001) ("Here, the loan agreement is the subject of [plaintiff's] complaint and is specifically referred to in the complaint. Therefore, the trial court did not err in reviewing the loan agreement when ruling on the Rule 12(b)(6) motions.").

Quantum Meruit

[2] Plaintiff first contends that the trial court erred in dismissing its alternative claim for recovery in *quantum meruit* on the grounds that such recovery was precluded by the existence of an express contract between the parties. While it is true that an express contract precludes recovery in *quantum meruit*, *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998), it was improper for the trial court to assume the presence of an express contract in this case. Under Rule 8(a)(2) of the North Carolina Rules of Civil Procedure, plaintiff is entitled to seek alternative forms of relief. N.C. Gen. Stat. § 1A-1, Rule 8(a)(2) (2003) ("Relief in the alternative or of several different types may be demanded."). Here, plaintiff's alternative claim for relief in *quantum meruit* does not allege that a contract exists, but rather that the parties' contract is invalid because of defects in its formation and performance. When ruling on a Rule 12(b)(6) motion to dismiss, the trial court must only determine whether the plaintiff's allegations, if taken as true, support a claim upon which relief may be granted. *Sutton v. Duke*, 277 N.C. 94, 98-99, 176 S.E.2d 161, 163 (1970); N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2003). If plaintiff's allegations in its alternative claim are accepted as true, no contract exists and *quantum meruit* is not precluded as a remedy *per se*. Accordingly, it was error for the trial court to dismiss plaintiff's alternative claim for recovery in *quantum meruit* on the ground that it was precluded by an express contract between the parties.

Nonetheless, dismissal of the *quantum meruit* claim was still appropriate because such a claim when brought against an arm of the State is barred by sovereign immunity. In North Carolina, the State waives sovereign immunity when it expressly enters into a valid contract. *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). Sovereign immunity bars *quantum meruit* actions against the State, however, because the remedy of *quantum meruit* is based on an implied contract and an implied contract cannot support the inference of an express waiver. *Whitfield*, 348 N.C. at 42, 497 S.E.2d at 415. Our Supreme Court held in *Whitfield* that "[a] contract implied in law—as opposed to an express valid contract—simply will not form a sufficient basis for a court to make a reasonable inference that the State has intended to waive its sovereign immunity." *Id.* at 45, 497 S.E.2d at 416.

This Court has since applied *Whitfield* and held: "[O]ur Supreme Court declined to imply a contract in law in derogation of sovereign immunity to allow a party to recover under a theory of *quantum meruit*, and we decline to do so here." *Data Gen. Corp. v. County of Durham*, 143 N.C. App. 97, 103, 545 S.E.2d 243, 248 (2001). *See also Moore v. N.C. Coop. Extension Serv.*, 146 N.C. App. 89, 93, 552 S.E.2d 662, 665 (citation omitted) ("In *Whitfield*, the Supreme Court held that the State's waiver of sovereign immunity only applies to express contracts and that contracts implied in law, such as a claim in *quantum meruit*, are insufficient to constitute a waiver of the State's sovereign immunity."), *disc. review denied*, 354 N.C. 574, 559 S.E.2d 180 (2001). *Archer v. Rockingham County*, 144 N.C. App. 550, 557, 548 S.E.2d 788, 792 (2001), *disc. review denied*, 355 N.C. 210, 559 S.E.2d 796 (2002), relied upon by plaintiff, did not address a claim based on *quantum meruit*, but rather a claim arising out of a valid employment contract. It, therefore, did not—indeed could not—overrule *Whitfield*.

Plaintiff argues, however, that *Whitfield's* sovereign immunity bar only applies in cases where a contract fails because it is *ultra vires*. Plaintiff urges that if a contract fails for some other reason, such as a defect in formation, then sovereign immunity does not protect the State from *quantum meruit* claims. Indeed, certain cases decided prior to *Whitfield* support plaintiff's argument. *See, e.g., Hawkins v. Town of Dallas*, 229 N.C. 561, 564, 50 S.E.2d 561, 563 (1948); *Rockingham Square Shopping Center, Inc. v. Town of Madison*, 45 N.C. App. 249, 254, 262 S.E.2d 705, 708 (1980). Further, *Whitfield* itself involved a contract that was invalid because it was *ulta vires*. *Whitfield*, 348 N.C. at 43-44, 497 S.E.2d at 415-16.

The language and reasoning of *Whitfield* does not, however, support the continuing validity of such a distinction. The Supreme Court specifically held:

> [W]e will not first imply a contract in law where none exists in fact, then use that implication to support the further implication that the State has intentionally waived its sovereign immunity and consented to be sued for damages for breach of the contract it never entered in fact. Only when the State has implicitly waived sovereign immunity by *expressly* entering into a *valid* contract through an agent of the State expressly authorized by law to enter into such contract may a plaintiff proceed with a claim against the State upon the State's breach.

Id. at 42-43, 497 S.E.2d at 415 (emphasis original). Without both an express contract and a valid contract, the State has not waived its sovereign immunity. This dual requirement necessarily precludes any recovery in *quantum meruit* against the State regardless of the reason why the alleged contract fails. To the extent prior cases suggested that sovereign immunity only bars *quantum meruit* claims where the alleged contract is *ulta vires*, they were overruled by *Whitfield*.

Plaintiff's complaint also alleges that the City was engaged in a proprietary or ministerial act when entering into the contract at issue, arguably a basis for avoiding the sovereign immunity defense. The plaintiff has not, however, argued this theory on appeal and, therefore, we do not reach that question. Plaintiff's claim based on *quantum meruit* is barred by sovereign immunity and dismissal was, for that reason, proper.

Negligent Misrepresentation

[3] Plaintiff has also appealed from the dismissal of its claim for negligent misrepresentation. Plaintiff based its claim on (1) misrepresentations "in Item 4 of the Contract and Amendments that Eastway Wrecker shall be compensated per the attached fee schedule upon completion of the Contract[,]" (2) the City's payment of some towing and storage charges, (3) statements by employees within the course and scope of their employment regarding payment, and (4) the failure of the City to "respond with any denial that charges had not accrued or there were no amounts owing."

The Supreme Court has held that "[t]he tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on

information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988). Plaintiff's claim could properly be dismissed by the trial court pursuant to Rule 12(b)(6) if no law exists to support the claim, if the complaint fails to allege sufficient facts to assert a viable claim, or if the complaint alleges facts that will necessarily defeat the claim. *Oberlin Capital*, 147 N.C. App. at 61, 554 S.E.2d at 847. Here, the trial court properly dismissed the negligent misrepresentation claim for failure to allege all the required facts and because the complaint includes facts that necessarily defeat the claim.

Plaintiff alleged in its complaint that "[d]efendant owed a duty of care to Eastway Wrecker to provide accurate information in the Contract and Amendments and other actions and omissions set forth above." Plaintiff further alleged that it "reasonably and justifiably relied upon the above misrepresentations to its detriment by entering into the Contract and Amendments to tow, store and dispose of vehicles for the Defendant from July 5, 1994 until October 31, 2001 and by actually towing, storing and disposing of the vehicles."

It appears that plaintiff is at least in part alleging that the City failed to disclose the legal import of the contract or to properly memorialize the parties' agreement. While it is questionable that such a contention, standing alone, could form a basis for a negligent misrepresentation claim, *see International Harvester Credit Corp. v. Bowman*, 69 N.C. App. 217, 220, 316 S.E.2d 619, 621 (internal citations omitted) ("[a] person who executes a written instrument is ordinarily charged with knowledge of its contents, and may not base an action for fraud on ignorance of the legal effect of its provisions"), *disc. review denied*, 312 N.C. 493, 322 S.E.2d 556 (1984), the Court need not reach that question. This Court has held that if "the complaint fails to allege that [the plaintiff] was denied the opportunity to investigate or that [the plaintiff] could not have learned the true facts by exercise of reasonable diligence, the complaint fails to state causes of action for fraudulent concealment and negligent misrepresentation." *Oberlin Capital*, 147 N.C. App. at 60, 554 S.E.2d at 847. *See also Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 346, 511 S.E.2d 309, 313 (1999) ("[W]hen the party relying on the false or misleading representation could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence."). Because plaintiff's complaint fails

to include this required allegation, it fails to state a claim for negligent misrepresentation.

Further, to the extent the complaint based its cause of action on representations by employees of the City regarding the contract and the amendments, the complaint establishes that any reliance by plaintiff was unjustified. The original contract states:

> This contract together with the Invitation to Bid and, Instructions to Bidder, and the Bid Continuation Sheet-Specifications and Special Conditions constitutes the entire agreement between the City and the Contractor on this subject and its acceptance by the City Manager of the City, *and no one is authorized to vary same unless the proposed substitution or variations are brought before the City Manager.*

(Emphasis added.) Each of the amendments to the contract, extending the term of the agreement, specifically provided that the terms of the original contract "shall remain in force and effect." As a result of these provisions, plaintiff was not entitled to rely upon statements of City personnel, other than the City Manager, regarding a variation of the terms of the contract. Since the contract and the amendments were incorporated by reference in the complaint, the complaint discloses facts that necessarily defeat plaintiff's claim. *See Oberlin Capital*, 147 N.C. App. at 61, 554 S.E.2d at 847 (language of loan agreement established that any reliance was not reasonable and, therefore, "the trial court did not err in dismissing the claim for negligence"). The trial court thus properly granted the motion to dismiss the negligent misrepresentation claim.

Affirmed.

Judge HUNTER concurs.

Judge McGEE dissents in a separate opinion.

McGEE, Judge, dissenting.

I respectfully dissent from the majority opinion for the following reasons. To determine if a complaint is sufficient to withstand a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2003), the trial court must "ascertain '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.' " *Plummer v. Community Gen. Hosp. of Thomasville, Inc.*, 155 N.C. App. 574, 576, 573 S.E.2d 596, 598 (2002) (citation omitted), *disc. review denied*, 357 N.C. 63, 579 S.E.2d 392 (2003). "When considering a 12(b)(6) motion to dismiss, the trial court need only look to *the face of the complaint* to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Locus v. Fayetteville State University*, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991).

The sole purpose of a motion pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) is "to test the legal sufficiency of *the* pleading against which [the motion] is directed." *Azzolino v. Dingfelder*, 71 N.C. App. 289, 295, 322 S.E.2d 567, 573 (1984), *rev'd. in part and aff'd. in part*, 315 N.C. 103, 377 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835, 93 L. Ed. 2d 75 (1986). Where a defendant asserts, pursuant to Rule 12(b)(6), that a plaintiff's complaint has failed to state a claim for which relief is available and where the trial court considers

> matters outside the pleading . . . [which were] not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C.G.S. § 1A-1, Rule 12(b).

In the case before this Court, the trial court stated in its order dismissing plaintiff's claims under Rule 12(b)(6), that it "considered the pleadings, the Motion to Dismiss, the Motion to Reconsider And/Or Amend, Plaintiff's Request to Certify, the arguments of the parties and the applicable law." Defendant's motion was directed solely at plaintiff's complaint and for the trial court to consider other pleadings is contrary to the function of Rule 12(b)(6). Based on the trial court's order, I conclude the trial court considered matters in addition to the allegations in the complaint and defendant's motion to dismiss was thereby converted into one for summary judgment. N.C.G.S. § 1A-1, Rule 12(b).

Plaintiff was not provided, upon conversion of the motion from a 12(b)(6) motion to a summary judgment motion, a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." N.C.G.S. § 1A-1, Rule 12(b). Because plaintiff was not afforded a reasonable opportunity to oppose the summary judgment motion, as in Locus, I would remand the case to the trial

court in order that plaintiff be permitted to present evidence in opposition to the motion for summary judgment. Locus, 102 N.C. App. at 528, 402 S.E.2d at 866.

STATE OF NORTH CAROLINA v. JOSEPH ALOYSIUS DYSON, II

No. COA03-1046

(Filed 3 August 2004)

1. **Evidence— testimony—child protective services worker—sexual assault—corroboration**

The trial court did not commit plain error in a first-degree sexual offense case by admitting testimony of a child protective services worker regarding statements made to her by the child victim, because: (1) while the witness's testimony went beyond the single act of oral sex to which the child victim testified, the witness's testimony did not depart from the child's testimony that oral sex occurred between defendant and the victim thus corroborating the testimony although there was some variation; and (2) defendant is unable to show error such that the jury probably would have reached a different result absent the alleged error.

2. **Evidence— hearsay—opinion testimony—plain error analysis**

The trial court did not commit plain error in a first-degree sexual offense case by admitting hearsay and opinion testimony of a witness who had not been qualified as an expert, because: (1) when admitted without objection, otherwise inadmissible hearsay may be considered with all the other evidence and given such evidentiary value as it may possess; (2) the pertinent testimony was too vague to amount to opinion testimony; and (3) neither of the witness's pertinent statements would have prejudiced the jury and tilted the scales in favor of conviction.

3. **Sexual Offenses— first-degree sexual offense—failure to instruct on indecent liberties with a minor**

The trial court did not err in a first-degree sexual offense case by failing to instruct the jury as to indecent liberties with a minor, because: (1) indecent liberties with a minor is not a lesser-

included offense of a first-degree sex offense; and (2) the State's evidence supported each element of first-degree sex offense.

4. Evidence— prior crimes or bad acts—sexual act with minor—motive—intent—common plan

The trial court did not abuse its discretion in a first-degree sexual offense case by admitting testimony concerning a prior sexual act committed by defendant with another minor, because: (1) the lapse of time of eleven years between the prior acts and the acts in this case does not sufficiently diminish the similarities between the acts; (2) remoteness is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident, and the State introduced evidence of defendant performing oral sex on a nine-year-old boy to show defendant's intent, motive, and common plan since both acts involved oral sex with young children eight and nine years old; and (4) the trial court applied the appropriate balancing test of N.C.G.S. § 8C-1, Rule 403, and the probative value outweighed any prejudicial effect.

5. Constitutional Law— effective assistance of counsel—failure to object—failure to request instruction

Defendant did not receive ineffective assistance of counsel in a first-degree sex offense case based on his attorney's failure to object to certain testimony and failure to request a jury instruction on a lesser-included offense, because: (1) defendant could not have been prejudiced by failure to object to the pertinent testimony when the Court of Appeals already determined based on plain error review that the trial court did not err by admitting the challenged testimony; and (2) indecent liberties with a minor is not a lesser-included offense of a first-degree sexual offense, and contrary to defendant's contentions, defense counsel did request this jury instruction.

Appeal by defendant from judgment dated 29 April 2003 by Judge A. Moses Massey in Moore County Superior Court. Heard in the Court of Appeals 28 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General Sue Y. Little, for the State.

Bruce T. Cunningham, Jr. for defendant-appellant.

BRYANT, Judge.

Joseph Aloysius Dyson, II (defendant) appeals a judgment dated 29 April 2003 entered consistent with a jury verdict finding him guilty of first-degree sexual offense.

The State's evidence at trial tended to show that eight-year-old A.H.[1] resided with her mother and siblings in South Carolina. During the summer of 2002, A.H. went to stay with her aunt in Pinebluff, North Carolina. Defendant occasionally spent the night at the home of A.H.'s aunt and usually slept in the living room. One night while A.H. slept in her aunt's room, defendant entered, awakened A.H., and "made [her] suck his thing." A.H.'s sisters, infant cousin and aunt remained asleep during the incident. The next day, A.H. telephoned her mother and said that "Joseph had been messing with her." When A.H.'s mother asked what she meant, A.H. replied that "he made [her] suck his thing." Several days later A.H. was interviewed by Tanyetta Felder (Felder), a Child Protective Services worker with Moore County Department of Social Services (DSS). A.H. told Felder defendant had "touched her private parts with his hand and then made her suck his thing," that it was defendant's "private part that he made her suck."

The State also presented "other crimes" evidence which tended to show that more than 10 years previously, in October 1991, Kevin B. Motter (Detective Motter), with the Spring Lake Police Department, investigated an incident involving defendant. He took a statement from defendant who said that on 23 October 1991 he was in a park with friends when it began to rain and that he and a boy, who was nine or ten years old at the time, "ran to one of the dugouts from the baseball diamond." While sitting in the dugout, defendant "pulled [the boy's] pants down and began sucking his penis."

Defendant presented no evidence at trial.

On appeal, defendant raises four issues of whether the trial court erred by: (I) admitting testimony of a child protective services worker regarding statements made to her by the child victim; (II) admitting opinion testimony of a witness who had not been qualified as an expert; (III) not instructing the jury as to indecent liberties with a minor; and (IV) admitting testimony concerning a prior sexual act committed by defendant. Interspersed in some of defendant's argu-

1. The victim's name has been reduced to initials for protection purposes.

ments are claims of ineffective assistance of counsel, which are addressed in the last section of this opinion.

I

[1] Defendant first argues it was plain error for the trial court to admit testimony from Felder regarding statements made to her by the child victim, A.H. We note that because defendant failed to object to the admission of this testimony, we must apply plain error review.

"Plain error analysis is applied when our review of the entire record reveals . . . a fundamental error so prejudicial that justice cannot have been done." *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602-03 (2003). "To prevail, the 'defendant must convince this Court not only that there was error, but that absent the error the jury probably would have reached a different result.' " *Id.* (citation omitted). Plain error review is to be applied only to exceptional cases. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

In the instant case, A.H. testified at trial that defendant had her perform oral sex on him on one occasion. Felder testified that A.H. told her that defendant "touched her private parts with his hand and then he made her suck his thing." Felder further stated A.H. told her "it was more than one time." Defendant contends Felder's statements did not corroborate A.H.'s testimony at trial, and it was plain error for the trial court to have allowed such testimony.

Corroboration is "[t]he process of persuading the trier of the facts that a witness is credible." 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 49 (3d ed. 1988). Our Supreme Court has defined "corroborate" as "to strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence." *State v. Higginbottom*, 312 N.C. 760, 769, 324 S.E.2d 834, 840 (1985); *see State v. Aguallo*, 322 N.C. 818, 825, 370 S.E.2d 676, 679 (1988) (concluding testimony was corroborative if it tended to add weight or credibility to earlier testimony of witness); *State v. Riddle*, 316 N.C. 152, 160, 340 S.E.2d 75, 79 (1986) (holding the trial court did not err in admitting testimony of protective services worker as corroborating evidence of testimony of victim).

In *State v. Lloyd*, our Supreme Court further reiterated the principle that testimony which is offered to corroborate the testimony of another witness and which substantially does corroborate

the testimony is not rendered incompetent because there is some variation. 354 N.C. 76, 104, 552 S.E.2d 596, 617 (2001); *see also State v. Beane*, 146 N.C. App. 220, 232, 552 S.E.2d 193, 201 (2001) (corroborative evidence need not mirror the testimony it seeks to corroborate, and may include new or additional information as long as the new information tends to strengthen or add credibility to the testimony it corroborates).

While Felder's testimony went beyond the single act of oral sex to which A.H. testified, Felder's testimony did not depart from A.H.'s testimony that oral sex occurred between defendant and A.H. Therefore, while there was some variation, Felder's testimony was nonetheless corroborative of A.H.'s testimony and properly admitted for that purpose.

Finally, defendant is unable to show error such that the jury probably would have reached a different result absent the alleged error. Defendant was indicted, tried, and convicted of one count of first-degree sexual offense. A.H. testified defendant "made [her] suck his thing," and A.H.'s mother testified A.H. told her defendant "made [A.H.] suck his thing." Based on this evidence, defendant is unable to show plain error in the admission of Felder's testimony. This assignment of error is overruled.

II

[2] Defendant next argues the trial court erred in admitting hearsay and opinion testimony by a witness not qualified as an expert. Again, we note defendant did not object at trial to the testimony he now challenges, and we therefore apply plain error analysis.

"Hearsay is defined as a statement, other than the one made by the declarant while testifying at trial or hearing offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2003). "[W]hen admitted without objection, otherwise inadmissible hearsay may be considered with all the other evidence and given such evidentiary value as it may possess." 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 139 (3d ed. 1988).

The following statement is the first of two made by Felder that defendant challenges as inadmissible opinion hearsay:

> When I received the report and information from—[w]hat [c]ounty is this? North Carolina. Let me make sure I give you the

> right information that—of sexual abuse allegations against [A.H.] by Mr. Joseph Dyson. He was the perpetrator.

When Felder stated, "[h]e was the perpetrator," she was referring to defendant as the alleged perpetrator identified in the DSS report in order to differentiate this case from her other Moore County DSS cases. Felder was not testifying as an expert witness, nor did she state an opinion that defendant was in fact the perpetrator.

Defendant also contends Felder was allowed to offer opinion testimony as to recommended treatment for A.H., without being qualified as an expert witness. Felder stated:

> They said that that was normal, you know, for [A.H.] to have, you know, some anger. And what they did with their recommendations, they recommend that, you know, she undergo some type of therapy with mental health to deal with the sexual abuse.

This testimony is too vague to amount to opinion testimony. The transcript reveals "they" refers to the facility that performed A.H.'s forensic evaluation. Defendant did not object to this testimony at trial, and on appeal, fails to demonstrate plain error in the admission of Felder's statement as to A.H.'s forensic evaluation. Moreover, we find neither of Felder's statements now challenged by defendant would have prejudiced the jury and "tilted the scales" in favor of conviction. *State v. Short*, 322 N.C. 783, 790, 370 S.E.2d 351, 355 (1988). This assignment of error is overruled.

III

[3] Defendant next argues the trial court erred by not instructing the jury as to indecent liberties with a minor.

When defendant requested the trial court to instruct the jury on indecent liberties with a minor, the trial court refused to do so stating,

> COURT: Crime against nature and indecent liberties are not lesser-included offenses of first- or second-degree sexual offenses, 303 North Carolina 507 and 309 North Carolina 224. . . . It would seem . . . in this case there's no conflicting evidence about the . . . second element, the age of the child. There's no conflicting evidence about the third element, the age of the victim. And it would seem that there's no—it's an issue of credibility as to whether fellatio occurred or didn't occur . . . the

request to instruct on a lesser-included offense of taking indecent liberties is denied. Any other requests?

DEFENSE: No, Your Honor.

Our courts have clearly held that indecent liberties with a minor is not a lesser-included offense of a first-degree sex offense. *State v. Williams*, 303 N.C. 507, 513, 279 S.E.2d 592, 596 (1981); *State v. Ludlum*, 303 N.C. 666, 674, 281 S.E.2d 159, 164 (1981); *State v. Ramseur*, 112 N.C. App. 429, 436, 435 S.E.2d 837, 841 (1993).

In determining when a lesser-included offense instruction is required, our Supreme Court held in *State v. Millsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002) that:

> Under North Carolina and federal law a lesser included offense instruction is required if the evidence "would permit a jury rationally to find [defendant] guilty of the lesser offense and acquit him of the greater." *State v. Strickland*, 307 N.C. 274, 286, 298 S.E.2d 645, 654, quoting *Beck v. Alabama*, 447 U.S. 625, 635, 65 L. Ed. 2d 392, 401, 100 S. Ct. 2382 (1980). The test is whether there "is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required. *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985).

Id. at 562, 572 S.E.2d at 772.

The trial court in the instant case examined the lack of conflict in the evidence as to all but one element (fellatio) in determining whether or not to instruct the jury on indecent liberties with a minor. Defendant argues that some of the State's evidence supported a lesser charge of indecent liberties; however the State's evidence supported each and every element of a first-degree sex offense without contradiction. Because neither the victim's nor defendant's age were in dispute, the only question for the jury to decide was whether defendant engaged in fellatio, a first-degree sexual offense, with the victim. Because indecent liberties with a minor is not a lesser-included offense of first-degree sexual offense and the State's evidence supported each element of first-degree sex offense, the trial court did not

err by failing to instruct the jury on indecent liberties with a minor. This assignment of error is overruled.

IV

[4] Defendant next argues the trial court erred in admitting the testimony of Detective Motter concerning a prior sexual act committed by defendant.

The State called Detective Motter as a witness on voir dire concerning a 1991 signed statement defendant made to the police where defendant, then seventeen years old, admitted performing oral sex on a nine-year-old boy. The State introduced evidence of the prior sexual act to show defendant's intent, motive, and common plan, since both acts involved oral sex with young children, eight and nine years old. Defendant objected to the admission of Detective Motter's statement and asserted the prejudicial effect of the evidence outweighed its probative value. The trial court overruled defendant's objection citing North Carolina Rules of Evidence 404(b) and 403, and summarized for the record:

> I just wish to make it clear that the court applied . . . the balancing test of Rule 403 and determines, based on the fact that the offense that occurred previously involved a child of the age of eight or nine, that the offense involved fellatio, that the offense involved the defendant seeking out—being alone with the child, conscious of his presence, and other similarities, and applying the balancing test required by 403 has determined that the evidence is more probative than prejudicial, that the evidence is not unfairly prejudicial, and therefore ruled as the [c]ourt has ruled.

While the period of elapsed time since the prior sexual acts is an important part of the Rule 403 balancing process, and the passage of time may "slowly erode commonalities" between the prior acts and the acts currently charged, the lapse of time in this case does not sufficiently diminish the similarities between the acts. *State v. Frazier*, 121 N.C. App. 1, 11, 464 S.E.2d 490, 495 (1995); *State v. Blackwell*, 133 N.C. App. 31, 36, 514 S.E.2d 116, 120 (evidence of prior similar sex offenses which occurred ten and seven years earlier were not too remote in time), *cert. denied*, 350 N.C. 595, 537 S.E.2d 483 (1999); *see also State v. Roberson*, 93 N.C. App. 83, 85, 376 S.E.2d 486, 487-88 (1989) (involving nearly a five-year lapse of time between sexual acts). Furthermore, "remoteness is less sig-

nificant when the prior conduct is used to show intent, motive, knowledge, or lack of accident." *State v. Hipps*, 348 N.C. 377, 405, 501 S.E.2d 625, 642 (1998).

In the instant case, eight-year-old A.H. testified defendant made her perform oral sex on him in a bedroom where others were asleep. Detective Motter testified defendant admitted to engaging in oral sex with a nine-year-old child victim in 1991 when they were alone. While these events occurred eleven years apart, Detective Motter's testimony was introduced to show defendant's motive and opportunity in engaging in oral sex with A.H. Because the record clearly indicates the trial court applied the appropriate balancing test of N.C. Gen. Stat. § 8C-1, Rule 403 in deciding whether to admit Officer Motter's testimony, and because the probative value outweighed the prejudicial effect, we conclude the trial court did not abuse its discretion by admitting the evidence of defendant's prior sexual act. *See State v. Beckham*, 145 N.C. App. 119, 124, 550 S.E.2d 231, 235 (2001) (acts of masturbation in front of a male and female child admissible in case alleging rape of a female child). This assignment of error is overruled.

Ineffective Assistance of Counsel

[5] Finally we note that in several of defendant's forgoing arguments he contends ineffective assistance of counsel prejudiced his right to a fair trial. Defendant alleges his counsel's failure to object to certain testimony and request a jury instruction on a lesser-included offense was erroneous and amounted to ineffective assistance of counsel.

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the United States Constitution.

Strickland v. Washington, 466 U.S. 668, 691, 80 L. Ed. 2d 674, 696 (1984).

A defendant claiming a denial of the right to effective assistance of counsel is held to a familiar two-part standard:

> 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.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). Mere allegations surrounding matters of trial tactics, without more, are not sufficient to meet the test set forth in *Strickland*. *State v. Piche*, 102 N.C. App. 630, 638, 403 S.E.2d 559, 564 (1991). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Quick*, 152 N.C. App. 220, 566 S.E.2d 735 (2002).

We have already determined based on plain error review that the trial court did not err in admitting the challenged testimony of child protective services worker Felder. Therefore, defendant's right to a fair trial could not have been prejudiced by his counsel's failure to object to Felder's testimony.

Further, as previously discussed, the law is clear that indecent liberties with a minor is not a lesser-included offense of a first-degree sexual offense. *Williams*, 303 N.C. 507, 279 S.E.2d 592. However, contrary to defendant's contentions, the record reveals that defense counsel *did* request a jury instruction as to indecent liberties with a minor, which the trial court denied.

Defendant has failed to meet his burden under *Strickland* with respect to his claim of ineffective assistance of counsel. Accordingly, we find no error.

No error.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA v. WILLIAM CONRAD HALL

No. COA03-1235

(Filed 3 August 2004)

1. Kidnapping; Robbery— second-degree kidnapping—robbery with dangerous weapon—motion to dismiss—sufficiency of evidence—perpetrator of crime

The trial court did not err by denying defendant's motion to dismiss the charges of robbery with a dangerous weapon and second-degree kidnapping even though defendant contends that there was insufficient evidence to show that defendant was the perpetrator of the crimes charged, because the evidence was sufficient taken as a whole to reveal that: (1) the robber wore a ski mask identical to the one seized from the residence of defendant's girlfriend; (2) one of the witnesses described the robber as having reddish-brown facial hair, and a detective described defendant as having a goatee and moustache; (3) a witness testified the robber took over two thousand dollars mostly in twenty dollar bills during the 16 June robbery, that same night defendant gave his girlfriend one thousand dollars in twenty dollar bills, and defendant offered different explanations for the source of the cash; (4) defendant was observed at a bowling alley located directly across from the convenience store where the robbery occurred several hours after the 2 June robbery; (5) detectives seized a BB gun and dark blue jumpsuit belonging to defendant, both of which were consistent with descriptions by witnesses of the gun and clothing used by the robber; and (6) defendant offered no evidence or innocent explanation for his actions at trial.

2. Robbery— dangerous weapon—BB gun

The trial court did not err by denying defendant's motion to dismiss the charges of robbery with a dangerous weapon even though defendant contends that the BB gun used in the robberies could not be considered a dangerous weapon, because: (1) where the instrument according to the manner of its use or the part of the body at which the blow is aimed may be likely to endanger the lives of the victims, its alleged deadly character is one of fact to be determined by the jury; and (2) the evidence showed that defendant committed the robberies by placing a BB gun directly into the backs of the store clerks, defendant pointed the BB gun

directly at another person's face at a distance of only six to eight inches, and a detective testified that based on his testing that the gun was capable of denting a quarter-inch piece of cedar plywood at distances up to two feet.

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

The trial court did not err by denying defendant's motion to dismiss the charges of second-degree kidnapping even though defendant alleges there was insufficient evidence of restraint separate and apart from that inherent in the robberies, because: (1) defendant restrained two store employees at gunpoint in order to coerce fellow employees to hand defendant the money, and such restraint was unnecessary to the armed robberies when defendant could have accomplished the robberies by directly approaching the other employees; (2) one of the restrained employees was actually outside the store when defendant approached him and forced him to move inside the store; and (3) the other restrained employee was occupied at the rear of the store, while another employee was in the store office at the computer register.

Appeal by defendant from judgments entered 28 February 2002 by Judge J. Richard Parker in Superior Court, Dare County. Heard in the Court of Appeals 8 June 2004.

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

Sue Genrich Berry for defendant appellant.

WYNN, Judge.

Defendant William Conrad Hall appeals from judgments of the trial court entered upon jury verdicts finding him guilty of two counts of robbery with a dangerous weapon and two counts of second-degree kidnapping. Defendant contends the State presented insufficient evidence to convict him of these crimes, and the trial court therefore erred in denying his motions to dismiss the charges. For the reasons hereafter stated, we find no error by the trial court.

The evidence before the trial court tended to show that on the evening of 2 June 2002, Marvin McNeal Shultz and Kimberly Joan Voltz were working at "The Brew Thru," a "drive-through convenience store" located in Nags Head, North Carolina. Shultz was stocking sup-

plies in the refrigerated units at the rear of the store when he felt an object touch his back and he heard a voice say, "[G]ive me all your money or I will kill you." Shultz turned and saw a man wearing dark clothing and a dark ski mask. Shultz described the man as being Caucasian and approximately five feet, eleven inches in height, carrying a dark-colored pistol with a clip. Shultz raised his hands, and the man guided him with one hand on his shoulder and the gun at his back toward the store office approximately thirty feet away, where Voltz was inside counting money at the computer register. As they approached her, Shultz called her name, and Voltz turned to face them. The intruder told Voltz, "Give me all the money or I will shoot him." Voltz asked whether the man was serious, whereupon he pointed the gun at her face and said, "[D]on't get hurt over somebody else's money." Voltz testified the gun was approximately six to eight inches from her face. Voltz immediately turned back to the register and removed approximately $637.00 from the drawer, which the man instructed her to place directly in his hand. The robber departed, and Voltz and Shultz summoned law enforcement.

Voltz confirmed the robber was Caucasian, and that he spoke with a southern American accent. The gun was "a thin blackish gray" and appeared to be semi-automatic. Both Voltz and Shultz identified State's Exhibit 9, a handgun, and State's Exhibit 10, a ski mask, as being consistent with the gun and the ski mask used by the robber.

Rex Meads testified he spoke with Defendant shortly before midnight on the evening of 2 June 2002 at a bowling alley located directly across from "The Brew-Thru." Meads testified the convenience store was between four to six hundred yards from the bowling alley.

Robert Ferguson gave further testimony for the State. Ferguson testified he was working at "The Brew Thru" on the evening of 16 June 2002, when a man approached him from behind and placed against his back an object Ferguson assumed was a gun. Ferguson was loading supplies onto a cart from a shed located behind the store at the time. The man, who wore a dark ski mask and dark clothing, told Ferguson, "[J]ust take me to the money and you're not going to get hurt." The man then marched Ferguson approximately 128 feet to the convenience store entrance and inside to the store cash register, where store employee Alexandra Brindle was counting out the money contained in the cash drawer. Upon the demand of the robber, Brindle gave him approximately $2000.00 in mostly twenty dollar bills. After

ordering Ferguson and Brindle to lie on the floor, the man departed. Brindle described the robber as having reddish-brown facial hair, from what she could observe from the mouth opening in the ski mask. According to Brindle, the gun was "all black with like a semi-automatic pistol." Brindle identified State's Exhibit 9, the handgun, and State's Exhibit 10, the ski mask, as being very similar to the ones used in the robbery.

Heather Scott testified she was a friend of Defendant's during the summer of 2002. Scott observed Defendant with a black BB gun during June of 2002, and identified State's Exhibit 9 as being consistent with the BB gun used by Defendant. On 17 June 2002, Defendant visited Scott at her residence with "a wad of money." Defendant told Scott he had given some money to Kimberly Stallings, his girlfriend. When Scott asked Defendant where he had gotten the money, he replied that he had "robbed a businessman."

Kimberly Stallings testified she dated Defendant during the summer of 2002, and that he occasionally stayed at her residence and drove her vehicle while he was looking for another place to live. Stallings identified State's Exhibit 9 as the BB gun Defendant kept at her house. On the evening of 2 June 2002, Stallings left her five-year-old son in Defendant's care while she went to work. Defendant, however, telephoned Elaine Hill, a close friend to Stallings who regularly cared for her son, and asked whether Stalling's son could stay with her for an hour. Defendant explained that "he had to go out and contact some people about getting some side jobs . . . . because he needed to get some money." Defendant did not return, however, after dropping Stalling's son off with Hill. Defendant called Hill between 10:45 and 11:30 p.m. and told her that "things had gone a little longer than he thought" and asked Hill to keep the boy overnight. Hill expressed concern to Stallings the next day over the fact that her son had been "kind of excited" because Defendant had his BB gun in the car.

On the evening of 16 June 2002, Stallings and her son dined at a restaurant with a friend and returned home at approximately 10:00 p.m. Stallings left her vehicle at home during this time. Defendant was at the residence when they arrived. After putting her son to bed, Stallings asked Defendant to drive to a store to purchase beer. When he returned from the store, Defendant gave Stallings one thousand dollars in twenty dollar bills. Stallings noticed that Defendant's fingernails were extremely dirty. Defendant explained that he had "dug the money up out of a drug dealer's yard."

Stallings deposited the money Defendant gave her into her bank account the following day. When Stallings learned of the "Brew Thru" robbery through a pamphlet posted at the restaurant where she worked, Defendant immediately "popped in [her] mind." Stallings attempted to call the telephone number listed on the pamphlet, but gave up because she "never got through." On 18 June 2002, Defendant moved out of Stalling's residence at her request. Stallings stated she "had been trying for a while to get [Defendant] to find somewhere else to go." After he left, Stallings bought new locks for her doors. As she was having the locks installed, two detectives arrived and told her they were looking for Defendant. Stallings asked them whether their presence "had anything to do with the Brew Thru thing" and gave them permission to search her residence and her vehicle. The detectives found Defendant's BB gun and a ski mask which Stallings testified did not belong to her or her son. The detectives also found a dark blue jumpsuit belonging to Defendant in Stalling's vehicle. After he was arrested, Defendant called Stallings from jail and told her he was a drug dealer and had buried the money himself.

Detective Christopher Montgomery of the Nags Head Police Department testified that the weapon seized from Stalling's residence was a 177 caliber BB gun, and that it was functional based on tests he performed. Detective Montgomery explained that he had fired the gun into a piece of cedar plywood from distances of six, twelve and twenty-four inches, and that the BB pellet made a dent in the wood each time. The muzzle of the gun contained scratches consistent with a description of the weapon given to Detective Montgomery by Brindle. Detective Montgomery arrested Defendant on 18 June 2002. He stated that Defendant's appearance during trial was substantially the same as it was at the time of his arrest, and noted that Defendant wore a goatee and moustache.

Defendant presented evidence by Stallings, who testified that when she saw Defendant at her residence on 18 June 2002, his eye was bruised and red in one corner, he had a cut above one eye, and it appeared to her that he had been hit with something.

At the close of the evidence, the trial court denied Defendant's motion to dismiss the charges, and the jury returned verdicts finding Defendant guilty of two counts of robbery with a dangerous weapon and two counts of second-degree kidnapping. The trial court consolidated for judgment one count of robbery with a dangerous weapon and one count of second-degree kidnapping and sentenced Defendant to a minimum of 103 months' imprisonment and a maximum of 133

months, followed by an identical consolidated sentence for the remaining two charges. Defendant appealed.

Defendant contends on appeal the trial court erred in denying his motion to dismiss, arguing the State presented insufficient evidence to show (1) he was the perpetrator of the offenses; (2) a dangerous weapon was used during the commission of the robberies; and (3) restraint separate from that inherent in the robberies such as to support the kidnapping charges. We find no error in the judgments of the trial court.

Motion to Dismiss

In determining whether to grant or deny a defendant's motion to dismiss on the ground of sufficiency of the evidence, the trial court must decide "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Barden*, 356 N.C. 316, 351, 572 S.E.2d 108, 131 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). As to whether substantial evidence exists, the question for the trial court is not one of weight, but of the sufficiency of the evidence. *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). In resolving this question, the trial court examines the evidence in the light most advantageous to the State, drawing all reasonable inferences from the evidence in favor of the State's case. *State v. Hyatt*, 355 N.C. 642, 665, 566 S.E.2d 61, 76 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. *Id.*

[1] Defendant contends the State presented insufficient evidence to show he committed the crimes charged in the instant case. Defendant directs this Court to conflicting testimony by victims of the armed robberies, one of whom described the robber as having brown eyes, while the second stated the robber had green eyes, but later gave a written statement listing the robber's eye color as blue. Defendant has green eyes. Defendant argues that eye color was "the only defining description of the perpetrator" and that the remaining circumstantial evidence was "subject to innocent explanation" and could not support Defendant's convictions. We do not agree.

The witnesses to both armed robberies consistently described the robber as being Caucasian, slightly under six feet tall, wearing dark clothing and carrying a handgun matching the one belonging to Defendant. The robber wore a ski mask identical to the one seized at Stalling's residence. One of the witnesses described the robber as having "reddish-brown facial hair." Detective Montgomery described Defendant as having a goatee and moustache. The two robberies were strikingly similar to one another, both of which were committed at the same location on a Sunday night during the store's closing shift within two weeks of each other. The robber wore dark clothing and a ski mask each time, carried the same type of weapon, and utilized the same robbery method during each robbery. Brindle testified the robber took over two thousand dollars during the 16 June robbery, mostly in twenty dollar bills. That same night, Defendant gave Stallings one thousand dollars in twenty dollar bills. Defendant offered different explanations for the source of the cash. He first told Stallings he dug the money up out of a drug dealer's yard. He later told her he was a drug dealer and had buried the money himself. Defendant told Scott he had obtained the money by "robbing a businessman." On the evening of 2 June 2002, the night of the first robbery, Defendant never returned to Hill's residence to pick up Stalling's son, although he told Hill he would only be gone for an hour. On the evening of 16 June 2002, the night of the second robbery, Defendant had access to Stalling's vehicle and gave her one thousand dollars upon his return from the store. Defendant was observed at a bowling alley located directly across from the convenience store several hours after the 2 June robbery. Detectives seized a BB gun and dark blue jumpsuit belonging to Defendant, both of which were consistent with descriptions by witnesses of the gun and clothing used by the robber. Defendant offered no evidence or "innocent explanation" for his actions at trial. When viewed in the light most favorable to the State, the evidence, taken as a whole, was sufficient to support the jury's finding that Defendant was the perpetrator of the crimes charged against him. We therefore overrule Defendant's assignment of error in this regard.

Dangerous Weapon

[2] By his second assignment of error, Defendant contends the BB gun used in the robberies cannot be considered a dangerous weapon. Section 14-87(a) of the North Carolina General Statutes provides that

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87(a) (2003). The determinative question in reviewing whether a weapon may be considered dangerous under this statute, "is whether the evidence was sufficient to support a jury finding that a person's *life* was in fact endangered or threatened." *State v. Alston*, 305 N.C. 647, 650, 290 S.E.2d 614, 616 (1982). Where "all the evidence shows the instrument could not have been a firearm or other dangerous weapon capable of threatening or endangering the life of the victim, the armed robbery charge should not be submitted to the jury." *State v. Allen*, 317 N.C. 119, 124-25, 343 S.E.2d 893, 897 (1986); *see also State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978). In *Joyner*, our Supreme Court found a soda bottle to be a sufficiently deadly weapon for a jury to consider a charge of assault with a deadly weapon and noted that "where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce such results, its allegedly deadly character is one of fact to be determined by the jury." *Id.* at 64-65, 243 S.E.2d at 373.

In *State v. Westall*, 116 N.C. App. 534, 449 S.E.2d 24, *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994), the defendant committed armed robbery by placing a pellet gun into the convenience store clerk's back, pointed directly at her kidney. The State presented evidence showing "the projectile from such a pistol was capable of totally penetrating a quarter-inch of plywood." This Court concluded that, "[f]rom the manner in which the pellet gun was used, there was clearly sufficient evidence to permit the jury to decide whether defendant committed robbery with a dangerous weapon or the lesser included offense of common law robbery." *Id.* at 540-41, 449 S.E.2d at 28.

Here, the evidence tended to show that Defendant committed the robberies by placing a BB gun directly into the backs of the store clerks, Shultz and Ferguson. Further, Voltz testified Defendant

pointed the BB gun directly at her face at a distance of only six to eight inches. Detective Montgomery stated that, based on the testing he performed on the gun, it was capable of denting a quarter-inch piece of cedar plywood at distances up to two feet. From this evidence, the jury could conclude that Defendant's weapon was capable of endangering the lives of the victims had it been discharged. This assignment of error is overruled.

Kidnapping

[3] Finally, Defendant argues his convictions for second-degree kidnapping must be vacated because the State presented insufficient evidence of restraint separate from that inherent in the robberies. We reject this assignment of error.

Under section 14-39(a) of the North Carolina General Statutes, a person is guilty of kidnapping if he or she

> unlawfully confine[s], restrain[s], or remove[s] from one place to another, any other person 16 years of age or over without the consent of such person . . . if such confinement, restraint or removal is for the purpose of . . . [f]acilitating the commission of any felony or facilitating flight of any person following the commission of a felony . . . .

N.C. Gen. Stat. § 14-39(a) (2003). It is well established that any restraint which is an inherent, inevitable feature of another felony, such as armed robbery, cannot form the basis of a kidnapping conviction. *State v. Beatty*, 347 N.C. 555, 558, 495 S.E.2d 367, 369 (1998). "The key question . . . is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping 'exposed [the victim] to greater danger than that inherent in the armed robbery itself . . . .' " *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (quoting *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981)).

Defendant contends there was insufficient evidence to show restraint separate and apart from that restraint necessary to accomplish the armed robbery. This argument has no merit. The evidence tended to show Defendant restrained the store employees Shultz and Ferguson at gunpoint in order to coerce fellow employees Voltz and Brindle to hand him the money. Such restraint was unnecessary to the armed robberies, however. Defendant could have accomplished the robberies by directly approaching Voltz and Brindle. Indeed, the

evidence showed that Ferguson was actually outside the store when Defendant approached him and forced him to move inside the store. Similarly, Shultz was occupied at the rear of the store, while Voltz was in the store office at the computer register. Because these actions were separate and apart from the actual armed robberies, the trial court properly submitted the kidnapping charges to the jury.

In the judgments of the trial court, we find,

No error.

Judges CALABRIA and LEVINSON concur.

STATE OF NORTH CAROLINA v. DALTON OSBORN BRUNSON

No. COA03-240

(Filed 3 August 2004)

1. Drugs— trafficking in cocaine—federal conviction of unlawful distribution—state prosecution barred

N.C.G.S. § 90-97 barred the prosecution of defendant in state court for trafficking in cocaine after defendant was convicted in federal court of unlawful distribution of cocaine under federal law for the same transactions that formed the basis for the trafficking charges. The "same act" as used in N.C.G.S. § 90-97 focuses the relevant analysis on the underlying actions for which defendant is prosecuted at the state and federal levels rather than on the elements of the offenses.

2. Drugs— conspiracy to traffic in cocaine—federal conviction of unlawful distribution—state prosecution not barred

N.C.G.S. § 90-97 does not bar the prosecution of defendant in state court for conspiracy to traffic in cocaine by sale after defendant was convicted in federal court of unlawful distribution of cocaine because the federal statute under which defendant was convicted only criminalizes the acts of manufacturing, distributing, dispensing or possession with the intent to engage in one of those acts; conspiracy is separately prohibited by another

federal statute; and defendant was not charged in federal court under the conspiracy statute.

3. Conspiracy— number of conspiracies—trafficking in cocaine—sufficiency of evidence

The trial court erred by concluding that there was sufficient evidence to show three separate conspiracies to traffic in cocaine, because: (1) the undercover officer's objective was at all times to identify and apprehend a drug dealer's source; (2) each transaction was temporally separated from the preceding transaction by no more than fourteen days and all transactions transpired over a short period of time within a one month period; (3) the undercover officer's statement to the drug dealer indicated the transaction was not a separate or discreet transaction but was to be part of an ongoing agreement for the continued purchase and supply of cocaine; and (4) the transactions were sufficiently similar based on the surrounding circumstances to hold that the transactions were part of a single conspiracy entered into by the same parties for the same purpose.

4. Drugs— motion for appropriate relief—habitual felon conviction—possession of cocaine

Defendant's motion for appropriate relief seeking to overturn his habitual felon conviction is denied because our Supreme Court has held that the offense of possession of cocaine is classified as a felony for all purposes.

Appeal by defendant from judgments entered 28 June 2002 by Judge A. Leon Stanback, Jr. in Durham County Superior Court. Heard in the Court of Appeals 19 November 2003.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

CALABRIA, Judge.

In March 2001, a detective from the Durham County Sheriff's Department initiated an undercover drug operation. After numerous purchases of prescription controlled substances from Nancy Ashley ("Ashley"), the undercover officer negotiated to purchase one and one-half ounces of cocaine from her. On 5 April 2001, the

undercover officer met Ashley and went to her sister's house to arrange a deal.

Thereafter, Dalton Osborn Brunson ("defendant") arrived and greetings were exchanged. Defendant sold the undercover officer a bag of white powder between the size of a golf ball and a tennis ball. Later, the State Bureau of Investigation ("SBI") confirmed the bag of white powder contained 41.5 grams of cocaine hydrochloride ("cocaine"). On 17 April and again on 1 May 2001, two additional purchases for approximately one and one-half ounces of cocaine occurred. Immediately following defendant's 1 May 2001 sale to the undercover officer, law enforcement officials apprehended and arrested defendant after he attempted to flee.

On 6 August 2001, defendant was indicted by the Durham County Grand Jury of, *inter alia*, three counts of conspiracy to traffic in cocaine, nine counts of trafficking in cocaine, and four counts of possession of cocaine with intent to sell or deliver. On 27 August 2001, after state prosecutors supplied the pertinent information to federal prosecutors, defendant was also charged, *inter alia*, with three counts of unlawful distribution of cocaine under federal law for the same three drug transactions. Defendant pled guilty in the United States District Court for the Middle District of North Carolina on one count of unlawful distribution of cocaine and was sentenced to 166 months' imprisonment for that charge.[1] The State subsequently proceeded on the charges upon which defendant had been indicted by the Durham County Grand Jury. Defendant moved to dismiss the drug-related charges, contending "that the North Carolina Constitution, the law of the land provision, does not permit the State to [exact] double punishment for the same conduct." The trial court denied defendant's motion. The jury found defendant guilty of all drug-related offenses and of being a habitual felon. The trial court arrested judgment on the four counts of possession with intent to sell and deliver cocaine and sentenced defendant on the remaining charges relating to the transactions between the undercover officer and defendant. Defendant appeals.

On appeal, we consider defendant's assertions that (I) the trial court erred in failing to dismiss the State charges relating to the transactions between defendant and the undercover officer and (II) the evidence was insufficient to show three separate conspiracies.

1. The State stipulated the federal sentence was based on all three drug sales, even though there was a plea to only one count.

I. North Carolina General Statutes § 90-97

[1] Many of defendant's assignments of error turn on the issue of whether the federal charges and the state charges constitute the same offense. At trial, defendant argued only constitutional double jeopardy grounds as a bar to his prosecution by the State. Defendant, for the first time on appeal, argues N.C. Gen. Stat. § 90-97 (2001) barred prosecution by the State for the drug-related offenses. Because the transcript reveals defendant failed to raise this argument in the trial court, the question is not properly before us. *See* N.C.R. App. P. 9(a) (appellate "review is solely upon the record on appeal [and] the verbatim transcript of proceedings . . ."); *State v. Hall*, 134 N.C. App. 417, 424, 517 S.E.2d 907, 912 (1999) ("where theory argued on appeal not raised in trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]' ") (citations omitted). Nonetheless, we choose to address this argument in our discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure.

North Carolina General Statutes § 90-97 provides, in pertinent part, as follows: "[i]f a violation of [the North Carolina Controlled Substances Act] is a violation of a federal law . . . , a conviction or acquittal under federal law . . . *for the same act* is a bar to prosecution in this State." (Emphasis added). Defendant was prosecuted for violation of 21 U.S.C. § 841 (2003), which criminalizes the acts of manufacturing, distributing, or dispensing controlled substances or possession with intent to engage in one of those acts. He was also prosecuted by the State for, *inter alia*, trafficking offenses in violation of N.C. Gen. Stat. § 90-95(h)(3) (2003). This Court has previously remarked upon the effect of N.C. Gen. Stat. § 90-97 in this context. *State v. Woods*, 146 N.C. App. 686, 544 S.E.2d 383 (2001). In *Woods*, we examined the relevant language of the two substantive offenses defined in N.C. Gen. Stat. § 90-95 and 21 U.S.C. § 841 and observed "the elements of the state violation and the federal violation are nearly identical." *Id.* at 691, 544 S.E.2d at 386. Accordingly, we noted that felonious trafficking in drugs, as proscribed by the state statute, also violated 21 U.S.C. § 841 and "but for N.C. Gen. Stat. § 90-97, [defendant] could have been prosecuted for both." *Id.* at 692, 544 S.E.2d at 387.

The State argues *State v. Overton*, 60 N.C. App. 1, 298 S.E.2d 695 (1982), defines "the same act" as it is used in N.C. Gen. Stat. § 90-97 to require an elemental analysis of the state and federal statutory

offenses charged and, based on that reading, urges this Court to uphold the judgment below. This argument fails for two reasons. First, and most directly, *Woods* makes clear that, even if we did read *Overton* to require an elemental approach, the elements of the offenses charged in this case were deemed "nearly identical." Moreover, we do not read *Overton*, in the first instance, as requiring the elemental approach advocated by the State. *Overton* merely recognized that the two conspiracy charges in that case (conspiracy to *import* a controlled substance on the federal level as opposed to conspiracy to *manufacture, possess with intent to sell or deliver, or to sell or deliver* a controlled substance on the state level) were different acts. Nothing in *Overton* suggests the State's proposed elemental approach was used or adopted by this Court.

Applied to the case *sub judice*, we hold that "the same act" as used in N.C. Gen. Stat. § 90-97 focuses the relevant analysis on the underlying actions for which defendant is prosecuted at the state and federal levels and operates as a bar to the State's prosecution of defendant's trafficking offenses under N.C. Gen. Stat. § 90-95. We need not reach defendant's constitutional argument.

[2] Defendant also asserts, on the basis of N.C. Gen. Stat. § 90-97, that the three counts of conspiracy to traffic in cocaine by sale were barred. We disagree. Under 21 U.S.C. § 841, only the acts of manufacturing, distributing, dispensing, or possession with intent to engage in one of those acts are criminalized. Conspiracy is separately prohibited in 21 U.S.C. § 846 (2001), with which defendant was not charged.[2] Accordingly, the prohibition against subsequent prosecution by the State found in N.C. Gen. Stat. § 90-97 is not applicable under these facts to the offense of conspiracy to traffic in cocaine by sale, and defendant's argument is without merit.

II. Number of Conspiracies

[3] Defendant asserts the evidence at trial showed defendant was guilty of only one conspiracy to traffic in cocaine rather than three separate conspiracies. Specifically, defendant contends that, although there was a series of agreements and acts, they constituted a single conspiracy.

2. *See also Overton*, 60 N.C. App. at 35, 298 S.E.2d at 715, n.7 (noting "the [United States] Supreme Court held that convictions and separate consecutive sentences received for conspiracy to import marijuana (21 U.S.C. § 963) and conspiracy to distribute marijuana reflected Congressional intent . . . and [the two statutes] specify different ends as the proscribed object of the conspiracy. . .").

"A criminal conspiracy is an agreement, express or implied, between two or more persons to do an unlawful act or to do a lawful act by unlawful means." *State v. Burmeister*, 131 N.C. App. 190, 199, 506 S.E.2d 278, 283 (1998). A "conspiracy is complete upon formation of the unlawful agreement [but] continues until the conspiracy comes to fruition or is abandoned." *State v. Griffin*, 112 N.C. App. 838, 841, 437 S.E.2d 390, 392 (1993). However, "[a] single conspiracy is not transformed into multiple conspiracies simply because its members vary occasionally and the same acts in furtherance of it occur over a period of time." *Id.* In determining the propriety of multiple conspiracy charges, we look to "the nature of the agreement or agreements" in light of the following factors: "time intervals, participants, objectives, and number of meetings . . . ." *State v. Tabron*, 147 N.C. App. 303, 306, 556 S.E.2d 584, 586 (2001).

In the instant case, these factors support the existence of a single conspiracy. Initially, the three drug transactions involved the same principal participants engaging in virtually identical conduct for each transaction. In each transaction, the undercover officer contacted Ashley by phone and asked her to arrange a meeting in which he would purchase one and one-half ounces of cocaine. Each time, Ashley then contacted defendant and arranged for herself, the undercover officer, and defendant to meet and make the exchange.[3] After each transaction between defendant and the undercover officer, the undercover officer paid Ashley a "commission" for arranging the transfer.

Regarding the objective sought to be accomplished, the undercover officer testified his private motivation was to identify Ashley's source in the first transaction, confirm the source in the second, and close down the source in the third; however, it could easily be stated that the undercover officer's objective was, at all times, to identify and apprehend Ashley's source. Certainly with respect to Ashley and defendant, the objective remained the same. Ashley's objective was to arrange a drug transaction and receive a "commission" for doing so, and defendant's objective was the sale of drugs to a purchaser.

3. Ashley's roommate, the State argues, was present during one transaction; however, the undercover officer testified "she just happened to be in the residence" and that she was not "part of [the] transaction at any point with Mr. Brunson." Additionally, the State argues Ashley's sister was present during another transaction; however, the undercover officer testified she "came . . . and bought a bag of cocaine from the defendant" after the transaction between defendant and the undercover officer occurred. Neither individual, from the facts presented on the record, had an impact on the transactions considered in the case *sub judice*.

Additionally, the indictments all aver the same objective: trafficking by sale in a controlled substance.

Looking at the time interval, we note that each transaction was temporally separated from the preceding transaction by no more than fourteen days and "all transactions transpired over a short period of time, a one month period." *See Griffin*, 112 N.C. App. at 841, 437 S.E.2d at 392 (rejecting the argument that multiple conspiracies existed "because the offenses occurred one to two weeks apart").

Additionally, we note the undercover officer testified that he continued to contact Ashley throughout the time the transactions were being planned and "told her . . . that [he] did want to make another purchase of cocaine, buy another one-and-a-half ounces." This statement indicates the transaction was not a separate or discreet transaction but was to be part of an ongoing agreement for the continued purchase and supply of cocaine. The State's arguments, that there were some discrepancies in how Ashley was paid her commission or that one of the transactions took place at a different location, are unavailing. Admittedly, each transaction was not a mirror image of the other transactions; however, we have never required, and do not herein adopt, absolute precision in examining the similarities of the surrounding circumstances in order to determine the number of conspiracies. In short, we find the transactions sufficiently similar in consideration of the factors set forth in *Tabron* and the surrounding circumstances to hold that the transactions were part of a single conspiracy entered into by the same parties for the same purpose.

III. Motion for Appropriate Relief

[4] Defendant has submitted a motion for appropriate relief, seeking to overturn his habitual felon conviction. The motion for appropriate relief is properly before this Court because "appellate courts may rule on such a motion under N.C. Gen. Stat. § 15A-1418 . . . when the defendant has . . . an appeal of right." *State v. Jamerson*, 161 N.C. App. 527, 530, 588 S.E.2d 545, 547 (2003). Defendant's arguments are premised upon this Court's holdings in *State v. Jones*, 161 N.C. App. 60, 588 S.E.2d 5, *stay granted*, 357 N.C. 660, 589 S.E.2d 882 (2003) and *State v. Sneed*, 161 N.C. App. 331, 588 S.E.2d 74, *stay granted*, 357 N.C. 661, 589 S.E.2d 883 (2003) (holding a habitual felon indictment cannot be predicated upon misdemeanor cocaine possession convictions). In reviewing *Jones* and *Sneed*, our Supreme Court held "the offense of possession of cocaine is classified as a felony for all purposes." *State v. Jones*, 358 N.C. 473, 486, —— S.E.2d

—, — (2004). We hold accordingly and deny defendant's motion for appropriate relief.

In summary, defendant's prosecution by the State for cocaine trafficking convictions, but not for conspiracy to traffic in cocaine convictions, were barred by operation of N.C. Gen. Stat. § 90-97. Furthermore, the trial court erred in denying defendant's motion to dismiss two counts of conspiracy to traffic cocaine. We remand for further proceedings consistent with this opinion.

Affirmed in part, reversed and vacated in part.

Judges BRYANT and ELMORE concur.

ESTATE OF CHRISTIAN E. CARLSEN, PLAINTIFF v. ROBERTA C. CARLSEN, TRUSTEE, ROBERTA C. CARLSEN, INDIVIDUALLY, SHIRLEY C. HART, ROBERTA JANE CARLSEN, AND CHRISTIAN EDWARD CARLSEN, DEFENDANTS

IN THE MATTER OF THE WILL OF CHRISTIAN ELMER CARLSEN, DECEASED

No. COA02-1735

(Filed 3 August 2004)

Declaratory Judgments; Estates— caveat proceeding—Rule 60 motion—validity of stipulation

The trial court did not abuse its discretion in a declaratory judgment action and caveat proceeding by denying appellants' Rule 60 motion to set aside judgment based on their attorney's alleged gross negligence in urging them to sign a stipulation which invalidated a 1999 will, the revocation of a trust, and a promissory note, because: (1) the language of the stipulation was sufficiently definite and certain as to its impact and the parties were present and aware of their actions; (2) evidence that one of the parties was distraught when she signed the stipulation is insufficient to establish that either she or her sister did not assent to the stipulation; (3) while the trial court found that appellants established mere negligence on the part of their counsel, the trial court also found that appellants' counsel was not grossly negligent and did not engage in any intentional misconduct or any conduct that would merit relief under Rule 60(b); and (4) appellants did not show a meritorious position since the stipulation decided the case against them, ratification was not necessary for the stip-

ulation to be found valid, and appellants admitted that stipulations are judicial admissions.

Appeal by defendants Roberta Jane Carlsen and Shirley C. Hart from order entered 27 June 2002 by Judge J. B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 14 October 2003.

Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., by Gary L. Beaver for defendant-appellants Roberta Jane Carlsen and Shirley C. Hart.

Vernon, Vernon, Wooten, Brown, Andrews & Garrett, P.A., by Benjamin D. Overby and Thomas R. Peake, II for defendant-appellee.

ELMORE, Judge.

The facts of the case were previously recorded in the unpublished opinion *Estate of Carlsen v. Carlsen*, COA02-463 (filed 6 May 2003).

Christian Elmer Carlsen (decedent) married Roberta C. Carlsen (Mrs. Carlsen) on 3 December 1932. The couple lived together in Fort Lauderdale, Florida until 1997. Decedent and Mrs. Carlsen had three children during their marriage, including Christian Edward Carlsen (Christian), Shirley Hart (Shirley) and Roberta Jane Carlsen (Roberta Jane). Decedent moved in with his daughter, Roberta Jane, in 1997. Decedent lived with Roberta Jane until his death.

Decedent executed a will in 1994. This will appointed Mrs. Carlsen as the personal representative and referred to a simultaneously created trust for the benefit of Mrs. Carlsen, Christian, Shirley and Roberta Jane. On 18 November 1999, eleven days before his death, decedent executed a document titled "Revocation of Trust" that terminated this trust. Decedent executed a promissory note to Roberta Jane in the amount of $200,000.00 on 18 November 1999. Decedent also executed a will on 18 November 1999. The division of decedent's property according to the 1999 will differed significantly from the terms of the 1994 will. The 1999 will divided the estate equally among the children with a gift to Mrs. Carlsen. The 1999 will also appointed Roberta Jane as personal representative of decedent's estate. Decedent passed away on 29 November 1999.

Decedent's estate requested a declaratory judgment on 28 February 2000. The purpose of this action was "to determine and

declare the legal rights of the parties to the personal property held" in the trust created in 1994. Mrs. Carlsen and Christian counterclaimed for declaratory judgment against the estate. Mrs. Carlsen also filed a caveat to the 1999 will on 22 December 2000. The caveat alleged that the 1999 will was invalid because decedent lacked testamentary capacity to execute it, that Roberta Jane exerted undue influence over decedent, that decedent executed the will as a result of duress from Roberta Jane and that the will was a product of fraud on the part of Roberta Jane. The declaratory judgment action and the caveat proceeding were consolidated by a consent order dated 8 February 2001.

After depositions were taken from two doctors who both agreed that decedent lacked capacity to execute the 1999 documents, Roberta Jane and Shirley, upon the advice of their then counsel Robert Johnston (Johnston), signed a stipulation admitting that decedent "lacked the testamentary capacity" to execute the 1999 will and the trust revocation and promissory note, and that each of the purported documents was invalid and null and void. The trial court entered a judgment based on the stipulation which invalidated the 1999 will and the revocation of trust and promissory note. Johnston apparently committed suicide in October of 2001. Appellants filed a motion praying the court to vacate the judgment under Rule of Civil Procedure 60, arguing that attorney Johnston had committed gross negligence in urging them to sign the stipulation. From the denial of that motion appellants bring this appeal.

I.

In determining whether to grant relief under Rule 60(b), "the trial court has sound discretion which will be disturbed only upon a showing that the trial court abused its discretion." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 655 (1998).

Rule 60(b) provides relief from a judgment for:

> (b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2003).

II.

Appellants argue that the trial court erred by denying the Rule 60(b) motion. In support of this, appellants have asserted in their brief one assignment of error with multiple sub-parts, ten of these sub-parts appearing in their brief on appeal. Four of the arguments are not supported by any authority in their brief, and are therefore deemed abandoned under Rule of Appellate Procedure 28(b)(6). The matter of attorney's fees was resolved by the companion appeal captioned COA02-463, cited above, which was decided by this Court in an opinion filed 6 May 2003. The remaining arguments are as follows: that the trial court erred in finding that attorney Johnston's acts were not grossly negligent; that the trial court erred in finding that the appellants did not show a meritorious position on the merits; that the trial court erred in treating Mrs. Carlsen's evidence as a sworn statement; that the ratification of the judgment by appellants' attorney was not effective; and that the trial court erred in finding that the stipulation was binding as a judicial admission. All of these arguments are brought to support the assignment of error to the denial of the Rule 60 Motion.

The dispositive basis for the appeal is essentially the effect of the stipulation, which was signed by the appellants. If the stipulation is valid, then the other errors assigned by the appellants threaten no prejudice, the appeal in its entirety has no merit, and the denial of the Rule 60 Motion by the trial court was appropriate. After considering the arguments on appeal, the record, and the transcripts, we hold that the stipulation was indeed valid and we affirm the trial court's denial of the Rule 60 Motion.

Any material fact that has been in controversy between the parties may be established by stipulation. *Thomas v. Poole*, 54 N.C. App. 239, 241, 282 S.E.2d 515, 517 (1981), *disc. review denied*, 304 N.C. 733, 287 S.E.2d 902 (1982). A stipulation need not follow any particular form, but its terms must be sufficiently definite and certain as to form a basis for judicial decision, and it is essential that the parties or those representing them assent to the stipulation. 83 C.J.S. Stipulations § 13 (2000). A factor to consider in determining whether a stipulation was entered into properly is whether the party had competent representation of counsel. *Id.*

The effect of a stipulation by the parties withdraws a particular fact from the realm of dispute. *Despathy v. Despathy*, 149 N.C. App. 660, 662, 562 S.E.2d 289, 291 (2002). In order to set aside a stipulation, one of the parties to the stipulation may make a motion to set aside the stipulation in the court where the action is pending. *See R. R. Co. v. Horton and R. R. Co. v. Oakley*, 3 N.C. App. 383, 389, 165 S.E.2d 6, 10 (1969). *See also Sharp v. Sharp*, 116 N.C. App. 513, 521, 449 S.E.2d 39, 43 (1994).

It is within the discretion of the court to set aside a stipulation of the parties relating to the conduct of a pending cause, where enforcement would result in injury to one of the parties and the other party would not be materially prejudiced by its being set aside. *See Lowery v. Locklear Constr.*, 132 N.C. App. 510, 514, 512 S.E.2d 477, 479 (1999) (citing 73 Am. Jur. 2d Stipulations § 13 (1974)). "A stipulation entered into under a mistake as to a material fact concerning the ascertainment of which there has been reasonable diligence exercised is the proper subject for relief." *Id.* (citing 73 Am. Jur. 2d Stipulations § 14 (1974)). Other proper justifications for setting aside a stipulation include: misrepresentations as to material facts, undue influence, collusion, duress, fraud, and inadvertence. *Lowery*, 132 N.C. App. at 514, 512 S.E.2d at 479; *see also Thomas*, 54 N.C. App. at 242, 282 S.E.2d at 517 (just cause for setting aside a stipulation includes mistake, inadvertence, and stipulations made by counsel without authority).

In the present case, the trial court made thorough findings of fact in the order denying the Rule 60(b) motion. The trial court found that a deposition was taken of Dr. Kenneth Fath in which he testified that the decedent lacked testamentary capacity to execute the 1999 will and documents. The trial court also found that the deposition of Dr. Bruce B. Hughes was taken at appellant Roberta Jane's request, in which Dr. Hughes also testified that he believed

that the decedent lacked testamentary capacity. The trial court included in the order the exact language of the stipulation in its entirety, which ended with the statement that the 1999 will and documents are "invalid and null and void." We conclude that the language of the stipulation was sufficiently definite and certain to form a basis for a judicial decision.

Appellants' claim that Roberta Jane was "distraught" when she signed the stipulation is insufficient to establish that either Roberta Jane or Shirley did not assent to the stipulation. Furthermore, while the trial court found that appellants established "mere negligence" on the part of their counsel, the trial court also found that appellants' counsel was not grossly negligent and did not engage in any intentional misconduct or any conduct that would merit relief under Rule 60(b). This finding and the trial court's resulting conclusion are consistent with case law, which holds that although attorney error may qualify as a reason for granting relief from judgment under certain conditions, neither ignorance nor carelessness on the part of an attorney will provide grounds for such relief. *Briley v. Farabow*, 348 N.C. 537, 546-47, 501 S.E.2d 649, 655 (1998).

In such a case where the testimony is in agreement, the stipulation is clear as to its impact, and the parties were present and aware of their actions, the stipulation is valid, and the trial court does not abuse its discretion to decline to set aside such a stipulation. Moreover, for the same reason, the trial court here did not abuse its discretion in denying the Rule 60 Motion.

The trial court also did not err in finding that appellants did not show a meritorious position, since the stipulation decided the case against them. The trial court's consideration of Mrs. Carlsen's amended response was not prejudicial in light of the stipulation. The trial court did not err in finding that appellants had ratified the stipulation since no ratification was necessary for the stipulation to be found valid. Finally, the trial court did not err in finding that the stipulation was binding as a judicial admission, and the appellants admit in their brief that stipulations are judicial admissions.

We therefore hold that the trial court did not err in denying the Rule 60 Motion. The order of the trial court is

Affirmed.

Judges WYNN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. MICHAEL RAY TEETER, SR.

No. COA03-1013

(Filed 3 August 2004)

Arson— burning a garage—erroneous grant of motion to dismiss—double jeopardy

The trial court violated defendant's double jeopardy rights in a burning a garage in violation of N.C.G.S. § 14-62 case and the conviction must be vacated based on the trial court's erroneous grant of defendant's motion for dismissal of an arson charge at the first trial, because: (1) the original indictment charging defendant with first-degree arson was sufficient to support a conviction for burning the garage within the curtilage of the house; (2) dismissal of the original arson charge precludes further prosecution for burning the same outbuilding; and (3) whether correct or erroneous, the judgment of nonsuit had the force and effect of a verdict of not guilty.

Appeal by defendant from judgment entered 15 February 2003 by Judge Clarence E. Horton, Jr., in Cabarrus County Superior Court. Heard in the Court of Appeals 29 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Granberry Corbett, for the State.

Moser, Schmidly & Roose, by Richard G. Roose, for defendant-appellant.

LEVINSON, Judge.

Defendant (Michael Teeter) appeals from judgment entered upon his conviction of burning a garage in violation of N.C.G.S. § 14-62 "Burning of Certain Buildings." For the reasons that follow, we conclude his conviction must be vacated.

The relevant facts are not in dispute, and are summarized as follows: On 14 January 2002 defendant was charged with first degree arson in an indictment alleging in pertinent part that the defendant

> willfully and feloniously did maliciously burn the dwelling house inhabited by Rita Ilene Mullis and Allie Teeter located at 405 Oakdale Avenue, Kannapolis, North Carolina. At the time of

> the burning, Rita Ilene Mullis and Allie Teeter [were] in the dwelling house.

The case was originally tried on 22 July 2002 before Judge W. Erwin Spainhour. Trial evidence tended to show that in June 2001 the defendant's mother, Allie Teeter, was staying with her sister defendant's aunt, Rita Mullis, at 405 Oakdale Avenue, Kannapolis. Approximately ten to fifteen yards from the Mullis house was a garage, in which were stored household items, including a freezer filled with food, chests of drawers containing clothing, a lawnmower, and unused furniture. Both women were home on the evening of 29 June 2001. At around 2:00 a.m Teeter and Mullis discovered that the garage adjacent to the house was on fire. The fire department was summoned and contained the fire before it spread beyond the garage. At trial, Teeter testified that several days later the defendant told her he had set the fire. Defendant's sister and brother-in-law also testified that defendant had confessed that he was responsible for burning the garage. In addition, the Kannapolis fire investigator offered an expert opinion that the fire did not start accidentally, but was set intentionally.

At the close of the State's evidence, defendant moved for dismissal, on the grounds that there was a fatal variance between the indictment and the proof offered at trial. He argued that, although there was evidence that defendant burned the **garage** at 405 Oakdale, no evidence had been offered to support the allegation in the indictment that the **dwelling** at 405 Oakdale had been burned. The prosecutor argued that an indictment for arson of the dwelling house at 405 Oakdale was sufficient to charge burning of an adjacent building within the curtilage of the house, such as the garage. The trial court granted defendant's nonsuit motion and dismissed the arson charge against defendant.

On 5 August 2002 defendant was re-indicted for burning the same garage on Oakdale Avenue. He was charged in two separate indictments. One charged defendant with second degree arson, and the other indictment charged defendant with burning an uninhabited building, in violation of G.S. § 14-62. Defendant was retried before Judge Clarence E. Horton on 13 January 2003. The evidence presented at the second trial was virtually identical to the trial evidence from the first trial, and at the close of the State's evidence, defendant again moved for dismissal. The trial judge dismissed the charge of second degree arson, but denied defendant's motion with respect to the charge of burning an uninhabited building.

Defendant was convicted of the charge and received an active prison sentence of twenty-five to thirty months. From this conviction and judgment, defendant appeals.

Defendant argues that his second trial was conducted in violation of his constitutional double jeopardy rights. We agree.

Defendant's first trial was upon an indictment charging him with first degree arson. "The common law definition of arson is still in force in North Carolina, and arson has been defined as the willful and malicious burning of the dwelling house of another person." *State v. Jones*, 110 N.C. App. 289, 291, 429 S.E.2d 410, 412 (1993) (citations omitted). "At common law, arson was the malicious and voluntary or willful burning of another's house, or dwelling house, **or outhouse appurtenant to or a parcel of the dwelling house or within the curtilage.**" 5 AM. JUR. 2D *Arson and Related Offenses* § 1 (2004) (emphasis added). North Carolina has long followed this common law rule that arson includes the burning of a dwelling or of an outbuilding in the curtilage of the house. *See, e.g., State v. Cuthrell*, 235 N.C. 173, 176, 69 S.E.2d 233, 235 (1952):

> [I]t must be borne in mind that the common law crime of arson embraces only a dwelling house and such structures as are within the curtilage. The extension of the crime, in modified forms, to the burning of other buildings and structures rests entirely upon statutory grounds.

"In North Carolina, 'curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings.' " *State v. Rhodes*, 151 N.C. App. 208, 214, 565 S.E.2d 266, 270 (2002) (quoting *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955)). Thus, under our common law definition of arson, a defendant may properly be charged with arson when he burns an outbuilding within the curtilage of an inhabited house.

"The General Assembly adopted N.C.G.S. § 14-58 . . . [i]n order to give more protection when a dwelling house is occupied by a person at the time of the burning." *State v. Barnes*, 333 N.C. 666, 677, 430 S.E.2d 223, 229 (1993). The "Punishment for arson" statute provides:

> There shall be two degrees of arson as defined at the common law. If the dwelling burned was occupied at the time of the burning, the offense is arson in the first degree and is punishable as a

> Class D felony. If the dwelling burned was unoccupied at the time of the burning, the offense is arson in the second degree and is punishable as a Class G felony.

N.C.G.S. § 14-58 (2003). Likewise, the inclusion, within the common law definition of arson, of outbuildings within the immediate curtilage of a dwelling is consistent with " 'the main purpose of common law arson [which] is to protect against danger to those persons who might be in the dwelling house which is burned[.]' " *State v. Pigott*, 331 N.C. 199, 207, 415 S.E.2d 555, 560 (1992) (quoting *State v. Jones*, 296 N.C. 75, 77, 248 S.E.2d 858, 860 (1978)). We conclude that the original indictment charging defendant with arson was sufficient to support a conviction for burning the garage within the curtilage of the house.

We further conclude that the original indictment was not invalid on account of its failure to specify the particular outbuilding within the curtilage that defendant burned.

> In examining the sufficiency of a bill of indictment, the trial judge must determine that: "(1) The offense is charged in a plain, intelligible, and explicit manner; (2) The offense is charged properly so as to avoid the possibility of double jeopardy; and (3) There is such certainty in the statement of the accusation as to enable the accused to prepare for trial and to enable the court, on conviction . . . to pronounce sentence according to the rights of the case."

Jones, 110 N.C. App. at 291, 429 S.E.2d at 411-12 (upholding conviction for second degree arson upon indictment that did not state that building was unoccupied at time of fire) (quoting *State v. Reavis*, 19 N.C. App. 497, 498, 199 S.E.2d 139, 140 (1973)). On the facts of this case, the absence in the indictment of a specific reference to the **garage** neither impaired defendant's ability to present a defense, nor exposed him to the possibility of successive prosecutions.

Because the original indictment charging defendant with arson would have supported a conviction for burning the garage next to the house, we conclude that the trial court erred by dismissing the charge against defendant at the first trial. We further conclude that dismissal of the original arson charge precludes further prosecution for burning the same outbuilding. For example, in *State v. Ballard*, 280 N.C. 479, 186 S.E.2d 372 (1972), defendant was tried for robbery with a dangerous weapon. His motion for nonsuit was granted, on the grounds that

there was a fatal variance between the victim alleged in the indictment and the evidence at trial. Defendant was subsequently reindicted for the same robbery under an indictment that alleged a different victim. On appeal, the North Carolina Supreme Court held that the original indictment would have been sufficient to support a conviction, and that the trial judge erred by granting defendant's nonsuit motion at the first trial. That being so, the Court held that principles of double jeopardy barred defendant's retrial:

> Whether correct or erroneous, the judgment of nonsuit had the force and effect of a verdict of "not guilty" as to the [charge] for which Ballard was then being tried, [and] . . . barred further prosecution for that crime. . . . Decision on this appeal is that the judgment of nonsuit for variance was improvidently entered[, and]. . . protects Ballard from the second prosecution[.]

Id. at 483-84, 490, 186 S.E.2d at 373-74, 377-78.

Similarly, in *State v. Vestal*, 131 N.C. App. 756, 509 S.E.2d 249 (1998), the trial court *sua sponte* dismissed the charges against defendant at the close of the State's evidence. The State attempted to appeal, and argued that principles of double jeopardy would not bar the appeal or a retrial. This Court disagreed, holding that

> due to the trial court's *sua sponte* dismissal of this case, defendant was involuntarily deprived of his constitutional right to have his trial completed by the jury which had been duly empaneled and sworn. . . . [T]he rule against double jeopardy bars further prosecution of defendant on the charge set forth in the indictment.

Id. at 760, 509 S.E.2d at 252 (citations omitted).

We note that the issue of whether the State might originally have charged defendant with violating G.S. § 14-62 by burning an outbuilding **outside** the curtilage of an **inhabited** dwelling is not before this Court. In the instant case, the State elected to indict defendant for first degree arson. We conclude that an indictment for first degree arson of an inhabited dwelling house is sufficient to support a conviction for burning a building within the curtilage of the dwelling house. Accordingly, the trial judge erred by granting defendant's motion for dismissal at the first trial. "Whether correct or erroneous, the judgment of nonsuit had the force and effect of a verdict of 'not guilty.' " *Ballard*, 280 N.C. at 484, 186 S.E.2d at 374. Therefore,

defendant could not be retried for burning the same garage. We recognize that the absence of a statutory definition of arson has rendered this area of law somewhat murky; we further acknowledge that, although defendant served a two-year prison term for this offense, it will not result in a conviction on his record. However, for the reasons discussed above, we conclude that defendant's conviction must be

Vacated.

Judges McCULLOUGH and HUDSON concur.

STATE OF NORTH CAROLINA v. JAMES DANIEL SIMMONS

No. COA03-1048

(Filed 3 August 2004)

1. Appeal and Error— record—verdict sheet lost—transcript of verdict return included—sufficient for appellate review

The transcript of the return of the verdict provided sufficient information on appeal to determine the crime of which defendant was convicted, even though the jury verdict sheet was absent from the trial court file.

2. Criminal Law— judgment and commitment—not supported by verdict

A judgment and commitment for possession of cocaine with intent to sell and deliver was not supported by a verdict of guilty of possession of cocaine, and the case was remanded for entry of a judgment and commitment for possession of cocaine.

3. Sentencing— habitual felon—possession of cocaine

A conviction for possessing cocaine may be used to prove habitual felon status.

Appeal by defendant from judgment and commitment entered 29 January 2003 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 19 May 2004.

Attorney General Roy Cooper, by Assistant Attorney General Rudy Renfer, for the State.

Brian Michael Aus, attorney for the defendant.

TIMMONS-GOODSON, Judge.

James Daniel Simmons ("defendant") appeals his convictions of possessing cocaine and attaining habitual felon status. For the reasons stated herein, we affirm in part and vacate in part the judgment of the trial court.

The evidence presented at trial tends to show the following: At approximately 8:30 a.m. on 31 December 2001, police officer Bret Moyer ("Officer Moyer") was parked in a patrol vehicle monitoring traffic at the intersection of Liberty Street and 14th Street in Winston-Salem, North Carolina. Officer Moyer observed a vehicle drive through a red light into the intersection. He began to follow the vehicle, and observed the vehicle passenger throw a paper bag containing a beer bottle into the street. Officer Moyer activated his blue lights and effected a vehicle stop.

Officer Moyer walked up to the driver's side of the vehicle and spoke to the driver. He observed defendant in the passenger seat pulling tobacco out of a cigar, a practice Officer Moyer considered to be consistent with marijuana consumption. Officer Moyer asked the driver for his driver's license and gave it to Officer Horatious Bowen ("Officer Bowen") to run a check on the license. Officer Bowen informed Officer Moyer that the driver's license was revoked. Officer Moyer arrested the driver for driving with a revoked driver's license, and arrested defendant for littering. A search of the vehicle incident to the arrests revealed marijuana, a "large bag of unknown white powder," a loaded .25 caliber semi-automatic handgun, a sandwich bag full of coffee grounds, a pager and money.

Defendant and the driver of the car were taken to the Forsyth County Jail for booking. Defendant was taken into a search room by Officer Moyer and Officer Jeff Azar ("Officer Azar") where he was searched for contraband prior to being placed in jail. When defendant untucked his shirt as ordered by the police officers, a bag of crack cocaine fell out of his waistband onto the floor. Defendant dove on top of the bag. The police officers tried to take the bag from defendant but he grabbed it, put it into his mouth and swallowed it.

The police officers immediately took defendant to the hospital where he was placed under medical supervision at 10:00 a.m. while Officer Moyer obtained a search warrant for defendant's bodily fluids and excrement. At approximately 8:30 p.m. defendant began to vomit onto the sheet of the hospital bed. A nurse removed the soiled sheet and, at the direction of police officer Ronald Beasley ("Officer Beasley"), spread the sheet onto the floor. Officer Beasley searched the sheet and located one white rock and several crumbs. These materials were later tested by the State Bureau of Investigation and determined to be cocaine.

Defendant was indicted on charges of possession with intent to sell and deliver cocaine and attaining habitual felon status. Defendant's case was tried before a jury which found defendant guilty of the lesser-included offense of possession of cocaine. Defendant subsequently pled guilty to the habitual felon charge. It is from these convictions that defendant appeals.

As an initial matter, we note that defendant's brief contains arguments supporting only three of the original five assignments of error on appeal. The omitted assignments of error are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6) (2004). We therefore limit our review to those assignments of error addressed in defendant's brief.

The remaining issues on appeal are whether (I) the conviction is invalidated by the absence of the jury verdict sheet from the trial court file; (II) the trial court erred by indicating on the judgment and commitment worksheet that defendant was convicted of possession with intent to sell and deliver cocaine; (III) the trial court erred by including defendant's two prior convictions for possession with intent to sell and distribute cocaine in its determination of defendant's habitual felon status.

[1] Defendant first argues that his conviction is invalid because the jury verdict sheet is absent from the trial court file. We disagree.

Generally, the jury's "verdict must be in writing, signed by the foreman, and made a part of the record of the case." N.C. Gen. Stat. § 15A-1237(a) (2003). The failure to include the verdict sheet has previously been grounds for dismissal of an appeal. *See State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981); *State v. Hunter*, 245 N.C. 607, 609, 96 S.E.2d 840, 841 (1957) (per curiam); *State v. Currie*, 206 N.C. 598, 599, 174 S.E. 447, 447 (1934) (per curiam).

However, in *State v. Gray*, our Supreme Court held that although the verdict sheet was lost in the office of the clerk of superior court the record was sufficient for appellate review. 347 N.C. 143, 491 S.E.2d 538 (1997), *cert. denied*, 523 U.S. 1031 (1998), *overruled on other grounds by State v. Long*, 354 N.C. 534, 557 S.E.2d 89 (2001). In *Gray*, the defendant contended that because the verdict sheet was lost, no valid verdict existed in the case and no judgment may be imposed. He argued that in the absence of a written verdict sheet, there is no way for the Supreme Court to determine whether the verdict was properly returned. The Supreme Court noted that the judge and the clerk of court examined the verdict sheet when the jury submitted it to the court, and that the judge polled the jurors, and each juror stated that he or she agreed with the verdict. The Supreme Court stated that "[i]f there was an irregularity in the verdict, [the judge and the clerk of court] would have found it." *Gray*, 347 N.C. at 177-78, 491 S.E.2d at 553. Thus, the Supreme Court held that "[t]he record is sufficient for us to determine the appeal." *Gray*, 347 N.C. at 178, 491 S.E.2d at 553.

The case *sub judice* is analogous to *Gray*. The verdict sheet is absent from the record because it was lost in the office of the clerk of the superior court. However, the trial transcript provides as follows:

> THE COURT: Mr. Duncan, as foreperson of the Jury, you and the Members of the Jury have reviewed the evidence and have reached a unanimous verdict in this case?
>
> FOREPERSON: Yes, sir.
>
> THE COURT: And you've reflected that and signed and dated the verdict sheet?
>
> FOREPERSON: Yes, sir.
>
> THE COURT: All right, if you will present that to the Sheriff and we appreciate that.
>
> (Verdict sheet handed to the Court.)
>
> THE COURT: All right, Madam Clerk, if you will publish the verdict of the Jurors?
>
> CLERK: Members of the Jury, your foreman has returned the following verdict in open court in the matter of State of

North Carolina versus James Daniel Simmons. In case number 02 CRS 0026—excuse me, it's 02 CRS 50026, we, the Jury, unanimously find the Defendant, James Daniel Simmons, guilty of possession of cocaine. Members of the jury, was this your verdict, so say you all?

(Jurors respond in an affirmative manner.)

Thus, as in *Gray*, we conclude that there is sufficient information in the record to determine the crime of which defendant was convicted. Accordingly, we hold that defendant's conviction is valid despite the absence of a verdict sheet in the record.

[2] Defendant next assigns error and the State concedes that the judgment and commitment worksheet erroneously indicate that defendant was convicted of possession with intent to sell and deliver cocaine and sentencing defendant as a Class H felon.

Defendant was indicted for the crime of possession with intent to sell and deliver cocaine. However, after the evidence was presented at trial, the trial court found it appropriate to instruct the jury only on the lesser-included crime of possession of cocaine. The jury found defendant guilty of possession of cocaine. Nevertheless, the trial court subsequently entered a judgment and commitment which provided that defendant was guilty of possession with intent to sell and deliver cocaine, and sentenced defendant as a Class H felon. The trial court erred.

When a defendant is convicted of a crime, the trial court must issue an appropriate written commitment order which must include "the identification and class of the offense or offenses for which the defendant was convicted." N.C. Gen. Stat. § 15A-1301 (2003). The commitment order must be supported by the verdict rendered at trial, and the verdict must be supported by the evidence presented at trial. *See generally State v. Riddle*, 300 N.C. 744, 746, 268 S.E.2d 80, 82 (1980) *and State v. Carr*, 61 N.C. App. 402, 412, 301 S.E.2d 430, 437 (1983).

Possession of cocaine is punishable as a Class I felony. N.C. Gen. Stat. § 90-90(1)(d) and § 90-95(a)(3) and (d)(2) (2003). Possession with intent to sell and deliver cocaine is punishable as a Class H felony. N.C. Gen. Stat. § 90-90(1)(d) and § 90-95(a)(1) and (b)(1) (2003).

In the case *sub judice*, the jury found defendant guilty of possession of cocaine, a verdict which was supported by the evidence presented at trial. However, the judgment and commitment incorrectly states that defendant was convicted of the greater offense of possession with intent to sell and deliver cocaine. Thus, the judgment and commitment are not supported by the verdict. Incidental to the trial court's misidentification of the offense, the judgment and commitment also sentences defendant for a Class H felony instead of the Class I felony for which he was convicted. Accordingly, we vacate the judgment and commitment as it pertains to possession with intent to sell and deliver cocaine, and remand the case to the trial court for entry of a judgment and commitment consistent with the verdict rendered at trial with respect to the identification of the offense and the sentence imposed on defendant.

[3] Defendant also argues that the trial court erred by sentencing him as a habitual felon following his conviction of possessing cocaine. We disagree.

North Carolina General Statute § 14-7.1 (2003) defines a habitual felon as "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof." Our Supreme Court has recently held that "possession of cocaine is a felony and therefore can serve as an underlying felony to an habitual felon indictment." *State v. Jones*, 358 N.C. 473, 476, 598 S.E.2d 125, 127 (2004).

In accordance with *Jones*, we hold that defendant's conviction of possessing cocaine may be used to prove defendant's habitual felon status.

NO ERROR in part, VACATED in part, and REMANDED.

Judges McGEE and TYSON concur.

GUY F. WING D/B/A FRANKLIN HOMES CONSTRUCTION, PLAINTIFF V. TOWN OF LANDIS, DEFENDANT

No. COA03-1021

(Filed 3 August 2004)

Quantum Meruit— cost of unused engineering plans—no benefit received

Summary judgment was properly granted for defendant town on a developer's quantum meruit claim for the cost of plans for a water line extension which was never built. There was no showing that the plans for the extension were prepared by plaintiff in expectation of repayment by defendant or that defendant received any benefit from the plans.

Appeal by plaintiff from order entered 20 May 2003 by Judge Kim S. Taylor in Rowan County Superior Court. Heard in the Court of Appeals 21 April 2004.

Ferguson, Scarbrough & Hayes, P.A., by James E. Scarbrough, for plaintiff-appellant.

Woodson, Sayers, Lawther, Short, Parrott & Walker, L.L.P., by Donald D. Sayers, for defendant-appellee.

GEER, Judge.

Plaintiff Guy F. Wing, d/b/a Franklin Homes Construction, appeals from the trial court's order granting summary judgment to defendant Town of Landis on plaintiff's *quantum meruit* claim for reimbursement of the cost of engineering plans for a water line extension. Because there was no showing that the plans were prepared in expectation of payment by the Town or that the Town received any benefit from the plans, plaintiff has failed to produce a forecast of evidence sufficient to establish each of the elements of his claim. The trial court, therefore, properly granted defendant's motion for summary judgment.

Facts

Early in 2001, plaintiff, a developer, sought to have municipal water service extended to serve an expansion of his Highland Woods development in the town of Landis. The Town informed plaintiff that the State's approval of any extension of service was contingent

upon the Town's obtaining an additional water source from the City of Salisbury. The Town, however, agreed to apply to the N.C. Department of Environmental and Natural Resources ("DENR") for approval of an extension of its water service to Highland Woods. Plaintiff hired an engineer, at a cost of $22,469.00, to draft plans for the extension of service and to prepare an application for approval of the plans to be submitted to DENR. On 14 May 2001, the engineer submitted to DENR the completed application, signed by the Town's Mayor as required by DENR.

On 21 June 2001, DENR responded to the application by letter, requesting additional information prior to processing the application. The evidence is conflicting as to whether the Town's engineer or plaintiff's engineer was supposed to respond to DENR's request for additional information. In any event, neither responded.

Nevertheless, on 3 January 2002, DENR notified the Town that DENR would be able to approve expansion of the Town's water system since an "authorization to construct" letter had been issued to the City of Salisbury permitting it to supply additional water to the Town. When the Town's administrator called plaintiff's agent with the news, however, plaintiff's agent informed him that plaintiff no longer needed the water line extension. Plaintiff planned instead to construct community wells to serve the new homes. As a result, the water line extension has never been built.

On 5 August 2002, plaintiff filed a complaint alleging that by failing to respond to the State's requests for information, the Town breached its agreement to apply for approval of the application and, therefore, owed plaintiff $22,469.00 in reimbursement of plaintiff's cost in obtaining engineering plans for the water line extension. On 22 January 2003, the Town filed a motion for summary judgment, which the trial court granted in an order entered 20 May 2003. Plaintiff filed notice of appeal to this Court on 18 June 2003.

Standard of Review

Summary judgment shall be 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.R. Civ. P. 56(c). The party moving for summary judgment has the burden of establishing the lack of a triable issue.

Collingwood v. Gen. Elec. Real Estate Equities, Inc., 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). The movant may meet this burden by showing that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense that would bar the claim. *Id.* Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that [he] will be able to make out at least a prima facie case at trial." *Id.* 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).

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). A trial court's ruling on a motion for summary judgment is reviewed *de novo* because the trial court rules only on questions of law. *Virginia Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 384-85, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

Discussion

Plaintiff concedes that his agreement with the Town regarding the DENR application is unenforceable under N.C. Gen. Stat. § 160A-16 (2003), which provides that a contract made by or on behalf of a city is void and unenforceable unless it is in writing. *See also Concrete Machinery Co. v. City of Hickory*, 134 N.C. App. 91, 95, 517 S.E.2d 155, 157 (1999) (oral agreement to relocate sewer line unenforceable). Plaintiff contends on appeal, however, that he is entitled to recover his engineering costs under a theory of *quantum meruit*.

To recover in *quantum meruit*, a plaintiff must show that (1) services were rendered to the defendant; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously. *Scott v. United Carolina Bank*, 130 N.C. App. 426, 429, 503 S.E.2d 149, 152 (1998), *disc. review denied*, 350 N.C. 99, 528 S.E.2d 584 (1999). In addition, "[*q*]*uantum meruit* claims require a showing that both parties understood that services were rendered with the expectation of payment." *Id.* A party may recover from a municipality under a *quantum meruit* theory upon a proper show-

ing.[1] *See, e.g., Charlotte Lumber & Mfg. Co. v. City of Charlotte*, 242 N.C. 189, 87 S.E.2d 204 (1955) (plaintiff could recover against city in *quantum meruit*); *Hawkins v. Town of Dallas*, 229 N.C. 561, 50 S.E.2d 561 (1948) (plaintiff could recover against town in *quantum meruit*); *Orange Water & Sewer Auth. v. Town of Carrboro*, 58 N.C. App. 676, 294 S.E.2d 757 (plaintiff could recover under an implied agreement in order to prevent the unjust enrichment of the town), *disc. review denied*, 307 N.C. 127, 297 S.E.2d 400 (1982).

In this case, plaintiff failed to present any evidence that the engineering plans were prepared with an expectation of payment by the Town. *See also Twiford v. Waterfield*, 240 N.C. 582, 585, 83 S.E.2d 548, 551 (1954) ("The plaintiff must show by the greater weight of the evidence that both parties, at the time the labor was done or the services were rendered, contemplated and intended that pecuniary recompense should be made for the same."). Plaintiff's evidence showed only that plaintiff, as the developer, hired and paid its own engineer to complete the engineering plans. There was no evidence that either party, at the time, expected the Town to reimburse plaintiff for the cost of the plans.

In addition, "[*q*]*uantum meruit* does not apply where no benefit accrues to the party from whom compensation is sought." *Scott*, 130 N.C. App. at 430-31, 503 S.E.2d at 152. *See also Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988) (internal citations omitted) ("[i]n order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously . . . . The benefit must not be gratuitous and it must be measurable . . . [and] the defendant must have consciously accepted the benefit."). Plaintiff argues that there was evidence that the Town "would have benefited" and "stood to benefit and intended to benefit from extension of water to plaintiff's subdivision." Plaintiff does not, however, cite any cases, which support its argument that it may recover where the benefit was intended, but not received. In each of the cases cited by plaintiff, the municipality actually received a tangible benefit in the form of some type of infrastructure whereas, here, the water line was never built. *See Charlotte Lumber*, 242 N.C. at 195, 87 S.E.2d at 208 (city appropriated plaintiff's sewer system and assumed maintenance and operation of it); *Hawkins*, 229 N.C. at 564, 50 S.E.2d at 563 (plaintiff constructed sewer line and paved streets and town accepted the work); *Orange*

1. The Town has not asserted sovereign immunity and, therefore, we do not address that affirmative defense.

Water & Sewer Auth., 58 N.C. App. at 683, 294 S.E.2d at 761 (plaintiff had installed fire hydrants). As the Court held in *Hawkins*, "where the construction work *has been actually done and accepted* . . . the county, city or town 'is bound on a *quantum meruit* for the reasonable and just value of the work and labor done and material furnished.' " 229 N.C. at 564, 50 S.E.2d at 563 (emphasis added; quoting *McPhail v. Board of Comm'r of Cumberland County*, 119 N.C. 330, 335, 25 S.E. 958, 959 (1896)).

Here, although plaintiff had engineering plans prepared for a water line extension, the Town never received any benefit from those plans because the water lines were never built. Thus, as this Court observed in *Greeson v. Byrd*, 54 N.C. App. 681, 683, 284 S.E.2d 195, 196 (1981), *disc. review denied*, 305 N.C. 299, 291 S.E.2d 149 (1982), "one of the necessary elements for recovery on a contract implied in law is missing here—there is no evidence in the record to indicate that any benefit inured to the defendant as a result of plaintiff's partial performance. Without enrichment, there can be no 'unjust enrichment' and therefore no recovery on an implied contract." Because of the lack of any benefit to the Town, plaintiff may not recover in *quantum meruit*. *See id.* ("[I]t was the crop to be cultivated and harvested by the plaintiff, not the plaintiff's labor, for which the defendant bargained. Thus, there could be no recovery for the value of partial performance of the contract since no part of the crop was produced.")

Plaintiff nonetheless argues that the Town may still be able to use the engineering plans in the future. As the Town points out, however, it has no use for plans extending water service to Highland Woods because plaintiff now has constructed wells to serve the new phase of his development. Indeed, the planned extension was stricken from the Town's water system expansion plans when plaintiff informed the Town that he no longer needed the water. Plaintiff offered no contrary evidence and has provided no explanation of how the Town could use the plans in the future.

Viewing the evidence in the light most favorable to plaintiff, there was no showing that the engineering plans were prepared with an expectation of payment by the Town or that the Town received a benefit from completion of the plans for the water line extension. Therefore, the court properly granted summary judgment to the Town.

Affirmed.

Judges BRYANT and ELMORE concur.

IN RE: J.W.J., T.L.J., D.M.J.

No. COA03-1188

(Filed 3 August 2004)

1. Jurisdiction— defense—not raised in answer—waived

The respondent in a termination of parental rights action waived the defense of no personal jurisdiction by not raising it in her response and answers.

2. Termination of Parental Rights— diligent efforts requirement—deleted

The trial court did not err by determining that respondent's parental rights should be terminated without finding that petitioner DSS made diligent efforts to reunite the family. N.C.G.S. § 7A-289.32(3), on which respondent relies, has been replaced by N.C.G.S. § 7B-1111(a)(2), which deleted the diligent efforts requirement.

Appeal by respondent Christine Joy Palma from orders entered 2 January 2003 by Judge Joseph J. Williams in District Court, Richmond County. Heard in the Court of Appeals 26 May 2004.

Deane, Williams and Deane, by Jason T. Deane, for petitioner-appellee.

M. Victoria Jayne for respondent-appellant.

McGEE, Judge.

The Richmond County Department of Social Services (petitioner) filed petitions on 24 August 2000 alleging that J.W.J., T.L.J., and D.M.J. (collectively, the children) were abused and neglected by their paternal grandparents, who were the children's caretakers. Petitioner assumed immediate physical custody of the children on 24 August 2000. The trial court stated in an order entered 8 January 2001 that the paternal "grandparents/caretakers/[r]espondents and the Department

of Social Services [had] reached a settlement and compromise of the issues involving neglect and abuse between them," which the trial court found to be "fair and adequate to protect the interests of the minor children." The grandparents/caretakers/respondents relinquished their custodial rights to the children that had been previously granted to them by the trial court on 13 May 1996, and the allegations of abuse and neglect as to the respondents were dismissed with prejudice. The children's natural father stipulated the children were presently dependent juveniles as defined in N.C. Gen. Stat. § 7B-101(9), in that the minor children were in need of assistance and placement because they had no parent, guardian or custodian able to provide for their proper care and supervision because of their special needs at that time. The trial court held it was "contrary to the welfare of the minor children" that their legal custody be returned to their parents or grandparents and the trial court awarded temporary legal custody of the children to petitioner.

The legal custody of the children was ordered to remain with petitioner "with full placement and medical authority" in an order dated 19 September 2001. In orders dated 11 January 2002 and 22 February 2002, legal and physical custody of the children was ordered to remain with petitioner.

Petitioner filed petitions on 12 March 2002 for the termination of the parental rights of C.J.P. (respondent) with respect to the children. Subsequent to these petitions, in an order filed 21 May 2002, the trial court noted that the petitions to terminate respondent's parental rights had been filed and ordered that legal and physical custody of the children remain with petitioner. In an order dated 25 July 2002, the trial court again ordered that legal custody of the children remain with petitioner. Respondent filed answers to the petitions for termination of parental rights on 29 August 2002. In an order filed 5 September 2002, the trial court again ordered that legal custody of the children remain with petitioner. A hearing was held on 26 November 2002 and the trial court terminated respondent's parental rights to the children. Respondent appeals.

The evidence presented to the trial court tended to show that J.W.J. was born on 30 July 1986, T.L.J. was born on 14 February 1989, and D.M.J. was born on 9 September 1992 to respondent and E.J. D.M.J. was placed with his paternal grandparents at birth and has never lived with respondent. Respondent testified that she took J.W.J. and T.L.J. to California when they were about ages four and two, respectively. Respondent further testified that she, J.W.J., and T.L.J.

returned to North Carolina after being in California for about eight years. Respondent also testified that she subsequently returned to California without the children because she was told by the Sheriff's Department and a social worker that she could not take the children with her.

[1] Respondent first argues that her constitutional and due process rights were violated by lack of notice and lack of jurisdiction over her in this case. Respondent asserts that prior to the November 2002 hearing for the termination of her parental rights, she had last been in North Carolina in 1997. Prior to coming to North Carolina in 1997, respondent testified that she lived in California with her two older children. As stated above, respondent testified that at some point around 1997, she came to North Carolina but that she returned to California because she was told by the Sheriff's Department and a social worker that she had to leave North Carolina. Respondent testified she was told she could not take her children with her to California. She testified that although she wanted to take the children with her, she returned to California alone.

Respondent stresses in her argument that she suffers from schizophrenia and that petitioner made no effort to contact her and made no effort to assess if she was capable of caring for her children. Respondent further asserts that petitioner failed to provide her with notice of any of the review hearings prior to the termination hearing. Upon receipt of the petition to terminate her parental rights, respondent wrote to the Richmond County Clerk of Court in an attempt to explain her situation. She provided her contact information and expressed her desire to see her children again and to not "lose all contact" with them.

Respondent cites several cases where this Court has found contacts to be insufficient to support the exercise of personal jurisdiction in a termination of parental rights case. *See In re Finnican*, 104 N.C. App. 157, 408 S.E.2d 742 (1991), *disc. review denied and cert. denied*, 330 N.C. 612, 413 S.E.2d 800, *overruled in part on other grounds by Bryson v. Sullivan*, 330 N.C. 644, 663, 412 S.E.2d 327, 337 (1992); *In re Trueman*, 99 N.C. App. 579, 393 S.E.2d 569 (1990). While respondent is correct in her assertion that minimum contacts must exist in order for a trial court to exercise jurisdiction, respondent's argument fails nonetheless.

Under Rule 12(h)(1) of the North Carolina Rules of Civil Procedure, the "defense of lack of jurisdiction over the person . . . is

waived . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." N.C. Gen. Stat. § 1A-1, Rule 12(h)(1) (2003). In this case, respondent mailed a handwritten response to the petitions to terminate her parental rights to the Richmond County Clerk of Court. Further, she filed formal answers to the petitions on 29 August 2002. In her response and answers, respondent failed to raise the defense that the trial court lacked personal jurisdiction over her. Accordingly, respondent has waived this defense pursuant to Rule 12(h)(1). *See Jackson Co. v. Swayney*, 75 N.C. App. 629, 630, 331 S.E.2d 145, 146 (1985) ("Defendant waived his right to contest lack of personal jurisdiction when he filed his answer without raising this defense."), *aff'd in part and rev'd in part on other grounds*, 319 N.C. 52, 352 S.E.2d 413, *cert. denied*, 484 U.S. 826, 98 L. Ed. 2d 54 (1987). *See also Stern v. Stern*, 89 N.C. App. 689, 693, 367 S.E.2d 7, 9 (1988) (holding that because the defendant filed his answer without contesting personal jurisdiction, he waived his right to challenge the trial court's exercise of personal jurisdiction over him); *Shores v. Shores*, 91 N.C. App. 435, 437, 371 S.E.2d 747, 749 (1988) (holding that the defendant waived his right to raise lack of personal jurisdiction as a defense "because he failed to raise it in his answer or motions but presents it for the first time on appeal"). Accordingly, we find respondent's first argument to be without merit.

[2] Respondent next argues that the trial court erred in determining that the best interests of the children would be served by terminating her parental rights. Respondent asserts that the trial court erred in finding that termination was in the best interests of the children without making any findings or conclusions of law that petitioner made any diligent efforts to work with respondent or to reunite the family before recommending termination. For the reasons stated below, we find this argument unpersuasive.

"There is a two-step process in a termination of parental rights proceeding." *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). "At the adjudicatory stage, the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111 exists." *In re Faircloth*, 153 N.C. App. 565, 575, 571 S.E.2d 65, 72 (2002). If a ground for termination is established, the trial court must then hold a dispositional hearing to consider the best interests of the child. *Id.* "Unless the trial court determines that the best interests of the child require otherwise, the termination order shall be issued." *Id.*

In the case before our Court, respondent admits that the trial court found grounds for termination under N.C. Gen. Stat. § 7B-1111 (2003). However, respondent disputes the trial court's decision that it was in the best interests of the children to terminate her parental rights. Respondent relies on *In re Harris*, 87 N.C. App. 179, 360 S.E.2d 485 (1987) for her argument concerning the trial court's failure to make findings or conclusions that petitioner made diligent efforts to work with respondent or to reunite the family. We note that "G.S. 7A-289.32(3) [1995], the applicable termination statute when *Harris* was decided, included a requirement that DSS undertake 'diligent efforts' to 'encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.' " *In re Frasher*, 147 N.C. App. 513, 516-17, 555 S.E.2d 379, 382 (2001) (quoting N.C. Gen. Stat. § 7A-289.32(3)). However, this statute was replaced by N.C. Gen. Stat. § 7B-1111(a)(2), effective 1 July 1999, which "deleted the 'diligent efforts' requirement, indicating an intent by the legislature to eliminate the requirement that DSS provide services to a parent before a termination of parental rights can occur." *Frasher*, 147 N.C. App. at 517, 555 S.E.2d at 382. *See also In re Pierce*, 146 N.C. App. 641, 643-44, 554 S.E.2d 25, 27 (2001) (rejecting the respondent's argument that DSS was required "to prove that it made diligent efforts to encourage respondent to strengthen her parental relationship[.]" Our Court rejected this argument because it was based on the statutory provision, N.C. Gen. Stat. § 7A-289.32(3), which was no longer applicable.), *aff'd*, 356 N.C. 68, 565 S.E.2d 81 (2002). Similarly, we overrule respondent's argument based on the holding in *Frasher* that "a determination that DSS made diligent efforts to provide services to a parent is no longer a condition precedent to terminating parental rights." *Frasher*, 147 N.C. App. at 517, 555 S.E.2d at 382.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

BALD HEAD ISLAND UTILITIES, INC., PLAINTIFF v. VILLAGE OF BALD HEAD ISLAND, DEFENDANT

No. COA03-1338

(Filed 3 August 2004)

Contracts; Utilities— first priority option—right of first refusal—res judicata

The trial court did not err by granting summary judgment in favor of defendant village and by dismissing plaintiff utility company's summary judgment claim based on a contract entered into by the parties to build a water line from Caswell Beach to Bald Head Island where the contract contained a first priority option and a right of first refusal for defendant to purchase the water and sewer utility assets of plaintiff, because: (1) a valid contract was created between plaintiff and defendant after months of negotiation between two experienced utility lawyers; (2) plaintiff is barred by res judicata from claiming the pertinent option is void since plaintiff failed to appeal the 19 February 2001 order of the Utilities Commission, thus meaning the issue had been decided; (3) plaintiff's motion to declare the option void while upholding the rest of the contract would violate established North Carolina contract law when the evidence tends to show that both parties intended to be bound by both the contract and the option; (4) defendant did not exceed its governmental authority by agreeing to this contract since it is sanctioned by the Utilities Commission and serves the public welfare; (5) defendant has neither relinquished its authority nor abandoned its responsibility to its citizens by selecting by agreement a method of resolving disputes over terms; and (6) when parties have dealt at arms length and contracted, the Court of Appeals cannot relieve one of them even though the contract has proven to be a hard one.

Appeal by plaintiff from order entered 19 May 2003 by Judge B. Craig Ellis in Superior Court of Brunswick County. Heard in the Court of Appeals 27 May 2004.

Fletcher, Ray & Satterfield, L.L.P., by George L. Fletcher and Kimberly L. Moore, for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Christopher T. Graebe, for defendant-appellee.

HUDSON, Judge.

Plaintiff appeals the trial court's decision granting summary judgment to the defendant and dismissing its own summary judgment claim. Plaintiff and defendant entered into a contract to build a water line from Caswell Beach to Bald Head Island. The contract contained a first priority Option and a Right of First Refusal for the defendant, and was approved by an order of the North Carolina Utilities Commission (NCUC) on 19 February 2001. The evidence tends to show that both parties intended to be bound by the contract and that the option was essential for the defendant's participation. Both parties acted in accordance with the contract and defendant timely gave notice of its intent to exercise its option to purchase the tangible and intangible assets used or useful in providing the water and sewer service as written in the contract. Plaintiff now contends that the option is void. For the reasons stated below, we affirm the trial court's decision.

"For the purpose of conducting hearings, making decisions, and *issuing orders*, . . . the [Utility] Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law." N.C. Gen. Stat. § 62-60 (2003) (emphasis added). If an appeal from a North Carolina Utilities Commission Order is not made within 30 days, then the right of appeal is waived and this Court has no jurisdiction. *See State ex rel. Utils. Comm'n. v. Services Unlimited, Inc.*, 9 N.C. App. 590, 591, 176 S.E.2d 870, 871 (1970), N.C. Gen. Stat. § 62-90 (2003). "Only specific questions actually heard and finally determined by the Commission in its judicial character are res judicata, and then only as to the parties to the hearing." *State ex rel. Utilities Comm'n v. Carolinas Comm. for Indus. Power Rates, etc.*, 257 N.C. 560, 570, 126 S.E.2d 325, 333 (1962).

Here, the NCUC's Order held that a valid contract was created between the plaintiff utility company and defendant village after months of negotiation between two experienced utility lawyers. The Order states that "[i]n addition to the other provisions of the Use Agreement, the Village is granted an option and right of first refusal to purchase the water and sewer utility assets of Utilities for a two-year period beginning on July 1, 2001." Plaintiff did not appeal this Order, and carried out the provisions of the contract until plaintiff filed a complaint on 4 April 2002 claiming, *inter alia*, that the option was void. However, we conclude that plaintiff's failure to appeal the

19 February 2001 order of the NCUC means the issue has been decided. Plaintiff is barred by res judicata from arguing it here.

Additionally, plaintiff's motion to declare the option void while upholding the rest of the contract would violate established North Carolina contract law:

> The controlling purpose of the court in construing a contract is to ascertain the intention of the parties as of the time the contract was made, and to do this consideration must be given to the purpose to be accomplished, the subject-matter of the contract, and the situation of the parties. The intention of the parties is to be gathered from the entire instrument and not from detached portions. An excerpt from a contract must be interpreted in context with the rest of the agreement. When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit. It is the province of the courts to construe and not to make contracts for the parties.

Weyerhaeuser Co. v. Carolina Power & Light Co., 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962) (internal citations omitted).

Here, the evidence tends to show that both parties intended to be bound by both the contract and the option. The contract language is clear, providing specific actions and guidelines to govern future negotiations. Thus, this Court will not reject the option term that was mutually agreed upon by the parties.

Further, Plaintiff contends that defendant has exceeded its governmental authority by agreeing to this contract. However, defendant, by providing water and sewer service for the public welfare, acted within its authority using powers "necessarily or fairly implied in or incident to the powers expressly granted . . . and essential to the accomplishment of the declared object of the corporation." *Rockingham Square Shopping Ctr. v. Town of Madison*, 45 N.C. App. 249, 251-52, 262 S.E.2d 705, 707 (1980). Limitations on these governmental body contractual powers exist to prevent too much authority being delegated away to parties that may not represent the people's best interests. *Id.* at 252, 262 S.E.2d at 707-08. We do not find that this contract violates this principle as this contract is clear, sanctioned by the NCUC, and serves the public welfare.

Plaintiff also argues that the delegation of authority to a mutually-agreed arbitrator to resolve certain disputes divests the defendant village of its decision-making powers. Here, the contract was initially approved by the NCUC and specifies that the courts will appoint an arbitrator if the parties cannot agree. Thus, the defendant village has neither relinquished its authority nor abandoned its responsibility to its citizens. Rather, it has selected by agreement a method of resolving disputes over terms. Furthermore, "when parties have dealt at arms length and contracted, the Court cannot relieve one of them because the contract has proven to be a hard one." *Weyerhaeuser Co.* at 722, 127 S.E.2d at 543.

Affirmed.

Judges GEER and THORNBURG concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

BUNDY v. BOYLIN No. 03-1187	Anson (02CVS319)	Affirmed
BUTLER v. E.I. DuPONT DE NEMOURS & CO. No. 03-1078	Ind. Comm. (I.C. 746977)	Affirmed
DEMAS v. TERMINIX CO. No. 03-1160	New Hanover (03CVS284)	Affirmed
GASTER v. STANLY CTY. BD. OF EDUC. No. 03-885	Stanly (00CVS1678)	Affirmed
HANSON AGGREGATES SOUTHEAST, INC. v. CITY OF RALEIGH No 03-1270	Wake (02CVS12536)	Affirmed
IN RE A.L. & N.W. No. 03-1326	Mecklenburg (00J967) (00J968)	Affirmed
IN RE A.N.B. No. 03-501	Mecklenburg (02J228)	Reversed
IN RE APPEAL OF FRANKLIN SMITH ENTERS., INC. No. 03-1000	Prop. Tax Comm. (02PTC496)	Affirmed
IN RE ASHLEY W. & ANTHONY J. No. 03-488	Forsyth (00J428) (00J430)	Affirmed
IN RE ESTATE OF BEST No. 02-1449	Orange (77E229)	Affirmed
IN RE J.E.P. No. 03-1322	Guilford (01J69)	Affirmed
O&M INDUS. v. SMITH ENG'G CO. No. 03-432	Davidson (02CVS62)	Reversed
OWENS v. WAL-MART STORES, INC. No. 03-975	Ind. Comm. (I.C. 002275) (I.C. 003420)	Affirmed
REYNOLDS v. REYNOLDS No. 03-1034	Mecklenburg (92CVD9547) (93CVD13114)	Affirmed
SHIERTS v. ATLANTIC CAS. INS. CO. No. 03-1268	Mecklenburg (02CVS14633)	Affirmed

STATE v. AGAN No. 03-420	Burke (01CRS2611)	No error
STATE v. ANDERSON No. 03-1084	Wake (02CRS50491) (02CRS63104)	No error
STATE v. BAILEY No. 03-338	Johnston (02CRS6237) (02CRS54026)	No error
STATE v. BROWN No. 03-1310	Caswell (01CRS1153)	No error
STATE v. BROWN No. 03-1407	Catawba (02CRS13288) (02CRS56242)	Affirmed
STATE v. BUCKMAN No. 03-859	Wake (01CRS27435) (01CRS27437) (01CRS27438) (01CRS27439) (01CRS33262) (01CRS33263)	No error
STATE v. BYERS No. 03-1247	Gaston (02CRS19671)	No error
STATE v. CAIN No. 03-1227	Gaston (02CRS64228)	No error
STATE v. COOK No. 03-50	Forsyth (01CRS62657) (02CRS3718)	No error; remanded for resentencing
STATE v. DAVIS No. 03-463	Cumberland (01CRS9095)	No error
STATE v. ELLIS No. 03-1204	Halifax (02CRS56384)	No error
STATE v. FEENEY No. 02-1716	Cumberland (01CRS54561)	No error
STATE v. HOLDER No. 03-586	Durham (01CRS21561) (01CRS48734) (01CRS48735)	Remanded for resentencing
STATE v. HOLDER No. 03-524	Johnston (02CRS6247) (02CRS54284)	Affirmed and remanded in part

STATE v. HOWARD No. 02-1728	Wake (01CRS77562) (01CRS86867)	No error
STATE v. HOWARD No. 03-780	Durham (02CRS10308) (02CRS45869)	Affirmed; remanded for correction of clerical errors
STATE v. MORGAN No. 02-1466	Onslow (01CRS50599)	No error
STATE v. OSTEEN No. 03-1073	Buncombe (01CRS61239)	No error
THREATT v. SOUTHERN PIPE, INC. No. 03-1186	Ind. Comm (I.C. 083426)	Reversed in part and remanded
TUCKER v. STEGALL MILLING CO. No. 03-913	Ind. Comm. (I.C. 108073)	Affirmed

GLORIA BARHAM, ADMINISTRATRIX OF THE ESTATE OF BILLY MELVIN BARHAM, PLAINTIFF v. RODNEY J. HAWK, M.D. AND HENDERSONVILLE EAR NOSE & THROAT, P.A., DEFENDANTS

No. COA02-1393

(Filed 17 August 2004)

1. Medical Malpractice— expert testimony—standard of care—opinion

The trial court abused its discretion in a medical malpractice case by admitting the testimony of one of decedent's treating doctors that amounted to an opinion as to defendant doctor's compliance with the relevant standard of care, and the case is remanded for a new trial, because: (1) defendants failed to establish that the testifying doctor was familiar with the standard of care in Hendersonville, North Carolina or similar communities and failed to show the doctor had any knowledge of the resources available in Hendersonville sufficient to be able to testify about the standard of care in similar communities; (2) the doctor's only foundation was oral representations by counsel unsupported by evidence and made in the middle of the trial; and (3) there was no indication in the record that the doctor would have personal knowledge of the standard of care in any similar community.

2. Discovery— medical malpractice—failure to comply with discovery order—sanctions

The trial court erred in a medical malpractice case by barring the expert testimony of a doctor who examined decedent's ear following surgery by defendant doctor based on plaintiff's failure to designate the doctor earlier as an expert witness, and the case is remanded for a new trial with instructions to weigh whether any unfair prejudice outweighs the probative value of the pertinent testimony, even though plaintiff's designation limiting treating physician testimony to diagnosis, care, and treatment of decedent was insufficient to advise defendants that plaintiff might call the pertinent doctor to give standard of care testimony, because: (1) the trial court could not have excluded the testimony under N.C.G.S. § 1A-1, Rule 26(f1) or Rule 37(b)(2) as a sanction since plaintiff's voluntary dismissal of the case nullified a 1998 consent discovery order meaning there was no discovery order in effect to violate; and (2) plaintiff did not fail to comply with any obligation under N.C.G.S. § 1A-1, Rule 26(e) when defendants

failed to serve a general expert interrogatory that would have required identification of the pertinent doctor in a timely manner.

Appeal by plaintiff from judgment entered 21 March 2002 by Judge Marlene Hyatt in Polk County Superior Court. Heard in the Court of Appeals 21 August 2003.

Blanchard, Jenkins, Miller & Lewis, P.A., by Robert O. Jenkins and E. Hardy Lewis; Feagan and Foster, by Phillip R. Feagan, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Scott M. Stevenson and Meg Sohmer Wood, for defendants-appellees.

GEER, Judge.

This appeal addresses the admissibility of expert testimony in a medical malpractice case. Plaintiff Gloria Barham appeals two rulings by the trial court, arguing that (1) the trial court erroneously admitted standard of care testimony by Dr. Danko Cerenko; and (2) the court improperly barred the expert testimony of Dr. Eric Kraus, who examined her husband's ear following surgery by defendant Dr. Rodney J. Hawk. We hold that the trial court erroneously allowed Dr. Cerenko to give testimony amounting to an opinion as to defendant Dr. Hawk's compliance with the relevant standard of care when defendants had failed to establish that Dr. Cerenko was familiar with the standard of care in Hendersonville, North Carolina or similar communities. With respect to Dr. Kraus, we hold that the trial court could not have properly excluded his testimony as a sanction, but we do not reach the question whether the court abused its discretion under Rule 403 of the Rules of Evidence since this case must be remanded for a new trial.

Factual Background

In 1994, Billy Melvin Barham was diagnosed with a cholesteatoma, a cyst-like growth, in his left ear. In June 1994, defendant Dr. Hawk of defendant Hendersonville Ear, Nose and Throat, P.A. performed a modified radical mastoidectomy designed to remove the cholesteatoma. Following the surgery, Mr. Barham stayed under the care of Dr. Hawk through October 1995.

On 4 December 1995, Mr. Barham met with Dr. Eric Kraus, an otolaryngologist who practices in Greensboro. After examining Mr. Barham, Dr. Kraus concluded that Dr. Hawk had performed an

"incomplete" removal of the cholesteatoma and otherwise improperly conducted the surgery. Dr. Kraus recommended that Mr. Barham undergo a second operation on his ear, but Mr. Barham declined, opting instead for antibiotic eardrops.

Mr. Barham did not return to see Dr. Kraus, but rather, in February 1996, went to Emory University Medical Center for treatment. Mr. Barham was admitted to that hospital in March 1996 for chronic meningitis and mastoiditis. Dr. Danko Cerenko, an Emory University ear, nose and throat specialist, operated on Mr. Barham's ear, but in May 1996, Mr. Barham died. Plaintiff Gloria Barham, Mr. Barham's wife and the administratrix of his estate, filed suit against Dr. Hawk and his clinic in June 1998, alleging that improper treatment by Dr. Hawk had resulted in chronic infection of her husband's left ear, which had in turn led to meningitis and his death.

On 14 September 1998, the parties entered into a Consent Discovery Order that set a deadline of 15 February 1999 for plaintiffs to "identify any and all expert witnesses whom they may call to testify at trial." On 15 February 1999, plaintiff identified by name three expert witnesses as potentially being called to testify at trial. On 5 December 2000, after plaintiff obtained additional counsel, the trial court granted plaintiff leave to designate two more medical experts. Defendant in turn identified three expert witnesses. None of the experts identified by name by the parties included Dr. Kraus.

Three weeks before trial, in February 2001, Dr. Hawk's daughter died unexpectedly. After the trial judge indicated he would not allow a continuance, the parties informally agreed to "continue" the case by having plaintiff voluntarily dismiss and refile the lawsuit. Plaintiff filed a Notice of Voluntary Dismissal Without Prejudice on 19 February 2001, but refiled her claims on 2 March 2001. Counsel for both parties apparently verbally agreed to use all discovery materials obtained in the original suit and to abide by the 1998 Consent Discovery Order. No order, however, was ever entered incorporating or effectively refiling the Consent Discovery Order in the new case.

Trial was scheduled in the refiled case for the 19 February 2002 session in Polk County Superior Court. A few weeks prior to trial, plaintiff's new attorney telephoned Dr. Kraus for the first time and learned of Dr. Kraus' opinion that Dr. Hawk's surgery and treatment of Mr. Barham fell short of the applicable standard of care. Plaintiff's counsel notified defendants' attorney of Kraus' potential testimony, and, on 8 February 2002, defense counsel deposed Dr.

Kraus. On 13 February 2002, plaintiff took a *de bene esse* deposition of Dr. Kraus.

On the first day of trial, before Judge Marlene Hyatt, defendants moved *in limine* to exclude Dr. Kraus' testimony as a sanction under Rules 26(f1) and 37(b)(2)(b) and on the grounds that allowing plaintiff to designate a new expert witness 10 days before trial unfairly prejudiced defendants. The trial court stated, without further explanation, "I will allow the motion to exclude Dr. Krause's [sic] testimony." Although the trial court requested that a written order be prepared, one was never filed. Following the trial, the jury returned a verdict in favor of defendants. The trial court entered judgment in defendants' favor on 21 March 2002. Plaintiff has appealed from that judgment.

Dr. Danko Cerenko's Testimony

[1] Dr. Danko Cerenko, one of Mr. Barham's treating physicians, was called to testify by defendants. Plaintiff objected to his rendering an opinion on Dr. Hawk's care on the grounds that defendants could not establish that Dr. Cerenko had knowledge of the applicable standard of care in Hendersonville, North Carolina or similar communities. After allowing voir dire by both parties, the trial court sustained plaintiff's objection; it allowed Dr. Cerenko to testify regarding his treatment of Mr. Barham, but not as an expert regarding the standard of care. During the course of Dr. Cerenko's testimony, however, the trial court allowed, over plaintiff's objection, certain testimony that plaintiff contends constituted standard of care testimony.

Plaintiff contends on appeal that the trial court erred in admitting the disputed testimony. Defendants, on the other hand, have cross-assigned error to the trial court's ruling that limited the scope of Dr. Cerenko's testimony. The issue underlying both plaintiff's and defendants' assignments of error is whether a proper foundation was laid for qualification of Dr. Cerenko as a standard of care expert. We find no error in the trial court's decision to preclude Dr. Cerenko from giving standard of care testimony, but hold that the testimony admitted by the trial court constituted improper standard of care testimony that should have been excluded.

We first turn to the question whether the trial court erred in refusing to allow Dr. Cerenko to testify as an expert on the standard of care in Hendersonville or similar communities. The competency of a witness to testify as an expert is addressed to the sound discretion of

the trial court and the trial court's determination will not be disturbed by the reviewing court in the absence of an abuse of discretion. *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 653, 535 S.E.2d 55, 65 (2000), *disc. review denied*, 353 N.C. 370, 547 S.E.2d 2 (2001).

N.C. Gen. Stat. § 90-21.12 (2003) sets out the standard of care applicable in a medical malpractice action:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical . . . care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience *situated in the same or similar communities* at the time of the alleged act giving rise to the cause of action.

N.C. Gen. Stat. § 90-21.12 (emphasis added). As Judge Greene explained in his concurring opinion in *Henry v. Southeastern OB-GYN Assoc., P.A.*, 145 N.C. App. 208, 213-14, 550 S.E.2d 245, 248-49 (Greene, J., concurring), *aff'd per curiam*, 354 N.C. 570, 557 S.E.2d 530 (2001), this statute permits a physician, otherwise qualified under Rule 702 of the North Carolina Rules of Evidence, to testify regarding the applicable standard of care in a medical malpractice case "when that physician is familiar with the experience and training of the defendant and either (1) the physician is familiar with the standard of care in the defendant's community, or (2) the physician is familiar with the medical resources available in the defendant's community and is familiar with the standard of care in other communities having access to similar resources."

The issue with respect to Dr. Cerenko is whether he demonstrated sufficient familiarity with (a) the standard of care in Hendersonville; or (b) the resources available in Hendersonville and the standard of care in communities having access to similar resources. In seeking on voir dire to lay a foundation for Dr. Cerenko's testimony, counsel for defendants posed a hypothetical question to Dr. Cerenko in which he asked the doctor to assume the truth of various facts relating to Dr. Hawk's experience and to Hendersonville, including the city's population, the size of its hospital, the number of physicians, and the number of specialists. He then asked:

> Assuming the community I asked you to assume and the physician I asked you to assume, do you believe that you are familiar with the standards of practice for members of the same health care profession with similar training and experience situated in similar communities in that time frame?

Dr. Cerenko responded with a single sentence: "I am familiar with those standards."

On cross-examination, however, Dr. Cerenko stated that he knew nothing about Hendersonville, had no idea of the size of the community, knew nothing about the hospital in Hendersonville or its resources, and had no knowledge about the physicians practicing in the area. Plaintiff's counsel confirmed that Dr. Cerenko had received no information from any source regarding Hendersonville and its resources prior to hearing the hypothetical question:

> Q: The sum total of what you know now about Hendersonville is what you just heard from [defense counsel].
>
> A: That is correct.
>
> Q: Correct? You were deposed by [defendants'] law firm, oh, it's been a long time ago now, two or three years ago?
>
> A: I think in '99.
>
> Q: At that time they asked you whatever questions they wanted to ask you, correct?
>
> A: (Nods his head)
>
> Q: They at that time did not ask you any questions about Hendersonville or find out any information about Hendersonville from you, did they?
>
> A: I think that's correct, yes.

Plaintiff's counsel then asked Dr. Cerenko, "[Y]ou don't know if what [defense counsel] was asking you to assume [about Hendersonville] is correct or not, based upon your answers?" Dr. Cerenko answered, "Correct, right." This testimony establishes that Dr. Cerenko neither had any knowledge about the standard of care in Hendersonville nor had any knowledge of the resources available in Hendersonville sufficient to be able to testify about the standard of care in similar communities.

Defendants contend that Dr. Cerenko could still obtain the necessary information to have a basis for testifying from counsel's hypo-

thetical question. *Smith v. Whitmer*, 159 N.C. App. 192, 582 S.E.2d 669 (2003) forecloses that argument. In *Whitmer*, the doctor testified during a deposition that he was familiar with the standard of care in the community where defendants practiced although he had never practiced there himself. When asked to describe what he had done to familiarize himself with the relevant standard of care, he stated that he based his understanding of the nature of the community on statements of counsel that he could not specifically recall. He acknowledged that counsel did not supply him any written materials. In concluding that the doctor had failed to demonstrate that he was sufficiently familiar with the pertinent standard of care, the Court pointed out:

> [The doctor] offered no testimony regarding defendants' training, experience, or the resources available in the defendants' medical community. Although [the doctor] asserted that he was familiar with the applicable standard of care, his testimony is devoid of support for this assertion. In preparation for his deposition, [the doctor] stated that the sole information he received or reviewed concerning the relevant standard of care in [the community at issue] was verbal information from plaintiff's attorney regarding "the approximate size of the community and what goes on there." [The doctor] could offer no further details, however, concerning the medical community, nor could he actually remember what plaintiff's counsel had purportedly told him.

Id. at 196-97, 582 S.E.2d at 672.

If the foundation was inadequate in *Whitmer*, when the doctor had at least received some oral information from counsel prior to trial regarding the community at issue, then it cannot be sufficient if the doctor's only information is oral representations by counsel, unsupported by evidence, made in the middle of a trial. *See also Cox v. Steffes*, 161 N.C. App. 237, 244, 587 S.E.2d 908, 913 (2003) (the expert witness had reviewed written information concerning the relevant community prior to trial and had reviewed it again prior to testifying before the jury), *disc. review denied*, 358 N.C. 233, 595 S.E.2d 148 (2004); *Coffman v. W. Earl Roberson, M.D., P.A.*, 153 N.C. App. 618, 624, 571 S.E.2d 255, 259 (2002) (expert witness had obtained basis for testimony from Internet research about the size of the hospital and the programs at issue), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 111 (2003). At the point when the trial court was required to determine whether Dr. Cerenko was competent to testify, Dr.

Cerenko had no factual basis for stating that he was familiar with the relevant standard of care.

Defendants also contend that the trial court improperly "precluded" them from further inquiry into Dr. Cerenko's knowledge of communities similar to Hendersonville. Defendants overlook the fact that since Dr. Cerenko had no knowledge of the resources available in Hendersonville, he had no basis for stating that any other community was similar to it.

In addition, there is no indication in the record that Dr. Cerenko would have personal knowledge of the standard of care in any similar community. While counsel for defendants represented that Hendersonville has a population of 70,000, Dr. Cerenko has never worked in a community with a population lower than 1,000,000. Dr. Cerenko did testify that he saw patients in Atlanta from outlying communities, but counsel never attempted to identify those communities or their size. The record contains no basis for determining whether those communities were smaller than Hendersonville, larger than Hendersonville, or about the same. *Compare Cox*, 161 N.C. App. at 244, 587 S.E.2d at 913 (doctor believed hospital at issue was a level 2 hospital and he had previously practiced at a level 2 hospital; doctor also testified that the hospitals in the two communities were similar with respect to physicians, services, and equipment); *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 22, 564 S.E.2d 883, 888 (2002) (doctor had practiced in Asheville as well as in communities similar in size to Asheville; he testified that Asheville and other communities that size have the same standard of practice), *disc. review denied*, 357 N.C. 164, 580 S.E.2d 368 (2003).

Although after the voir dire hearing, counsel sought permission to ask additional questions regarding other communities when the jury returned, the trial court refused, stating: "We've plowed this ground. . . . [T]hat's what we had this hearing for." The trial judge was entitled to conclude that she had given counsel ample opportunity to lay his foundation, especially since further effort would likely be futile given Dr. Cerenko's acknowledged lack of knowledge of the resources available in Hendersonville.

As Judge McCullough concluded in *Henry*, if the doctor is "unfamiliar with the relevant standard of care, his opinion as to whether defendants met that standard is unfounded and irrelevant[.]" *Henry*, 145 N.C. App. at 213, 550 S.E.2d at 248. The trial court, therefore, properly barred Dr. Cerenko from giving standard of care testimony.

Plaintiff argues that the trial court nonetheless allowed Dr. Cerenko to testify as to the standard of care. The trial court allowed the following testimony over plaintiff's objection:

> Defense Counsel: Based upon your observations of Mr. Barham, preoperatively, as far as studies, perhaps CT scans, radiographic findings, things of that nature; as well as your intra-operative findings, were you in any fashion critical of the operation performed by Dr. Hawk?
>
> Plaintiff's Counsel: Objection, your honor.
>
> The Court: Overruled.
>
> Dr. Cerenko: *I was not critical of previously performed surgery.*
>
> Defense Counsel: And at some point did you tell them that? By "them" I mean [plaintiff's counsel].
>
> Dr. Cerenko: Yeah, we discussed the details and I was asked if I would consider those descriptions in my operative report as critical, and I said well, those were just the findings. *And we discussed how would somebody else do the surgery? How would I do the surgery? But this was not a criticism.* This was just an observation. *I was further asked if that was something that I would consider seeing performed by other surgeons, and I said, yes.*
>
> Plaintiff's Counsel: Objection. Motion to strike.
>
> The Court: Objection, overruled. Motion to strike denied.
>
> Defense Counsel: I'm sorry I missed that with the objection. *Did you say that was something you had seen done by other surgeons?*
>
> Dr. Cerenko: *The findings that I identified during the surgery are very common findings in doing revision surgery.*

(Emphasis added.)

We agree with plaintiff that this testimony constituted standard of care testimony that Dr. Cerenko was not qualified to give. Standard of care testimony is testimony regarding whether a particular doctor's actions conformed "to the standard of professional competence and care customary in similar communities among physicians engaged in his field of practice." *Whitehurst v. Boehm*, 41 N.C. App. 670, 674, 255 S.E.2d 761, 765 (1979). In this case, Dr. Cerenko did not merely testify

to what he observed when he performed the revision surgery on Mr. Barham's ear. He went further and testified that the results of Dr. Hawk's surgery were what he "would consider seeing performed by other surgeons," that they were "very common findings in doing revision surgery[,]" and that he "was not critical" of Dr. Hawk's surgery. In this testimony, Dr. Cerenko was expressing an opinion that Dr. Hawk's performance was in conformance with that of other surgeons from other unspecified communities. This testimony vouched for Dr. Hawk's professional competence in performing the surgery; it told the jury that Dr. Hawk had performed comparably to other surgeons. It was standard of care testimony and should have been excluded.

Even though the trial court erred in admitting this testimony, we must consider whether the error was harmless. "The burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred." *Suarez v. Wotring*, 155 N.C. App. 20, 30, 573 S.E.2d 746, 752 (2002), *disc. review denied*, 357 N.C. 66, 579 S.E.2d 107 (2003). In light of the emphasis on Dr. Cerenko's opinions in defense counsel's closing argument, we cannot find the error harmless. The importance of the testimony is demonstrated by the fact that defense counsel had the court reporter transcribe that testimony—and only that testimony—prior to closing arguments. He then read the above-quoted portion of Dr. Cerenko's testimony to the jury and argued:

> If you want to take Holliday, Holmes, Howell, and Bogdasarian [all of the other expert witnesses] and just toss them all out the window, go back to Cerenko and ask, what did you see? Cerenko is the one doctor who saw Dr. Hawk's work, the one. . . . There was one doctor who saw the previously performed meatalplasty. There was one doctor who saw the mastoid air cells and how much cholesteatoma was taken out, and what did he say? "The findings that I have identified during the surgery are very common findings in doing revision surgery."
>
> And then he went on to say, "I was not critical of the previously performed surgery." This is the one doctor who was in a position to see and appreciate what Dr. Hawk did, and he was not critical.
>
> . . . .
>
> . . . And did he provide health care in accordance with the standards of practice? Absolutely, he absolutely did.

Dr. Cerenko had no criticisms of the previously performed surgery. And he was the one man who was in a position to see it.

Apart from Dr. Cerenko, the parties presented a battle of retained experts. As defense counsel stressed repeatedly in his closing argument, only Dr. Cerenko had actually been a treating physician and seen the result of Dr. Hawk's work firsthand. Because defendants relied so heavily on the portion of Dr. Cerenko's testimony that should have been excluded and used it for precisely the reason it should have been excluded—to establish that Dr. Hawk had complied with accepted standards of practice—we do not believe admission of this testimony was harmless error. We must, therefore, remand for a new trial.

Dr. Kraus' Excluded Testimony

[2] Plaintiff sought to introduce the testimony of a treating physician, Dr. Eric Kraus, who also had the opportunity to examine the results of Dr. Hawk's surgery prior to Dr. Cerenko's operation. The trial court, however, excluded the testimony based on plaintiff's failure to designate him earlier as an expert witness. The trial court did not explain the basis for her ruling, simply stating: "I will allow the motion to exclude Dr. Krause's [sic] testimony."

Plaintiff first contends that the trial court erred in not finding that she sufficiently designated Dr. Kraus. Plaintiff points to her catch-all designation: "Plaintiff reserves the right to identify and/or call as expert witnesses any and all treating physicians of the Decedent, Billy Melvin Barham, to testify relative to their diagnosis, care and treatment of Billy Melvin Barham." In interrogatory answers, plaintiff had previously identified Dr. Eric Kraus as one of Mr. Barham's treating physicians. Because this designation limited treating physician testimony to "diagnosis, care and treatment of Billy Melvin Barham," the trial court could properly conclude that this designation was not sufficient to advise defendants that plaintiff might call Dr. Kraus to give standard of care testimony. We note that the trial court did not preclude Dr. Kraus from testifying as to his diagnosis, care, and treatment of Mr. Barham.

Plaintiff next contends that even if her designation was not sufficient, the trial court should not have excluded Dr. Kraus' testimony. Defendants, however, maintain that the trial court properly excluded Dr. Kraus' testimony as a sanction under Rule 26(f1) and Rule 37(b)(2)(b) of the North Carolina Rules of Civil Procedure. In medical

malpractice actions, Rule 26(f1) requires the entry of an order setting out a discovery schedule. It further provides: "If a party fails to identify an expert witness as ordered, the court shall, upon motion by the moving party, impose an appropriate sanction, which may include dismissal of the action, entry of default against the defendant, or exclusion of the testimony of the expert witness at trial." N.C.R. Civ. P. 26(f1). Rule 37(b)(2) permits the trial court to exclude evidence if "a party fails to obey an order to provide or permit discovery[.]" Both rules by their terms require violation of an order prior to imposition of sanctions.

Here, defendants contend that plaintiff violated the discovery order filed 14 September 1998 in the 1998 action. This order was not refiled in the case on appeal; nor was any order filed in the case providing that the 1998 Consent Discovery Order would apply in this case. Exclusion of Dr. Kraus' testimony under Rule 26(f1) as a sanction would be proper only if the 1998 Consent Discovery Order survived the dismissal and refiling of plaintiff's claims.

It is well established that once a plaintiff files a voluntary dismissal under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, "it [is] as if the suit had never been filed." *Tompkins v. Log Systems, Inc.*, 96 N.C. App. 333, 335, 385 S.E.2d 545, 547 (1989), *disc. review denied*, 326 N.C. 366, 389 S.E.2d 819 (1990). The refiling of the case within the one-year time limit of the rule "be[gins] [the] case anew for all purposes." *Id.* (prior order denying summary judgment was not binding in refiled case and did not preclude the trial court's granting summary judgment). As a result, the dismissal "carries down with it previous rulings and orders in the case." *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 464, 144 S.E.2d 393, 398 (1965) (*quoting* 11 A.L.R. 2d 1407, 1411). This Court has specifically held that an order under Rule 26 does not survive a voluntary dismissal without prejudice. *Doe v. Duke Univ.*, 118 N.C. App. 406, 408, 455 S.E.2d 470, 471 (1995) (a Rule 26 protective order "was nullified by plaintiff's dismissal").

Plaintiff's voluntary dismissal accordingly nullified the 1998 Consent Discovery Order. The parties could have entered into a consent order making the discovery order applicable in the refiled action, but did not do so. As a result, there was no order in effect and plaintiff did not "fail[] to identify an expert witness as ordered[.]" N.C.R. Civ. P. 26(f1). Nor did plaintiff fail "to obey an order to provide or permit discovery[.]" N.C.R. Civ. P. 37(b)(2). *See also Stilley v. Automobile Enter. of High Point, Inc.*, 55 N.C. App. 33, 38, 284 S.E.2d

684, 687 (1981) (A Rule 37(b)(2)(b) sanction "may only be imposed for failure of a party to comply with a court order compelling discovery."), *disc. review denied*, 305 N.C. 307, 290 S.E.2d 708 (1982). The trial court could not, therefore, have excluded Dr. Kraus' testimony under Rule 26(f1) or Rule 37(b)(2).

Defendants also contend that plaintiff "in making her designation of Dr. Kraus within two weeks of the trial date, failed to timely supplement her designation" and violated Rule 26(e) of the Rules of Civil Procedure. Rule 26(e)(1) (emphasis added), relating to supplementation of responses to requests for discovery, provides that "[a] party is under a duty seasonably to supplement his response *with respect to any question directly addressed to* . . . (ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony." Prior to concluding that plaintiff violated Rule 26(e), the trial court should first have determined whether defendants submitted a discovery request, such as an interrogatory, "requesting the identity of each person expected to be called as an expert witness at trial[.]" Defendants' interrogatories did not, however, include such an interrogatory. Instead, defendants asked plaintiff only to:

> State the name of each expert witness whom you have identified in accordance with Rule 9(j) of the Rules of Civil Procedure and/or in your Complaint as a person who is reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence and who is willing to testify that the medical care provided to the decedent by the Defendants did not comply with the applicable standard of care.

This interrogatory was not a general expert interrogatory, but rather by its terms was limited to experts identified "in accordance with Rule 9(j)" or in the Complaint. Identification of Dr. Kraus was not required by this interrogatory. Because of defendants' failure to serve a general expert interrogatory, plaintiff did not fail to comply with any obligation under Rule 26(e).

Since there was no binding Rule 26(f1) order in effect and plaintiff did not violate Rule 26(e), there was no basis for excluding Dr. Kraus' testimony as a sanction. As defendants argued to the trial court, however, the testimony could still be excluded to avoid unfair prejudice to the defendants. The parties informally agreed that the 1998 Consent Order would govern the refiled action and defendants could appropriately argue that they were unfairly preju-

diced by plaintiff's attempt to designate an additional expert witness days before trial. Rule 403 of the North Carolina Rules of Evidence offers grounds upon which a court may exclude relevant testimony based on unfair prejudice:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.R. Evid. 403.

A trial court's decision to exclude evidence under Rule 403 is reviewed for an abuse of discretion. *State v. Grooms*, 353 N.C. 50, 72, 540 S.E.2d 713, 727 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54, 122 S. Ct. 93 (2001). We need not, however, in this appeal decide whether the trial court properly excluded Dr. Kraus' testimony under Rule 403. Any unfair prejudice arose out of the late identification of Dr. Kraus. Because we have remanded for a new trial, the trial court will need to weigh whether any unfair prejudice existing at the time of the new trial outweighs the probative value of Dr. Kraus' testimony.

New trial.

Judges BRYANT and CALABRIA concur.

PAUL E. SPRINKLE AND CARLA JONES (NOW SPRINKLE), PLAINTIFFS V. N.C. WILDLIFE RESOURCES COMMISSION, DEFENDANT

No. COA03-797

(Filed 17 August 2004)

1. Damages and Other Remedies— wrecked boat—cost of repair—loss of value before repair

The Industrial Commission incorrectly calculated damages in a Tort Claims action involving a wrecked boat by adding the loss of resale value before repairs to the cost of repair. There was no evidence that this reflected the before and after value of the boat.

2. Damages and Other Remedies— wrecked boat—loss of use—finance payment

The Industrial Commission's Tort Claims award for loss of use of a boat was modified to reflect the minimum finance payments required while the boat was being repaired. Although there was no specific evidence of a similar boat's rental value, the Commission is not precluded from inferring that the boat payment is essentially equivalent to the rental value and thus is a fair measure of loss of use. However, there is no justification for reimbursing plaintiffs for payments in excess of the monthly payment; beyond the minimum finance payment, assessing loss of use is too speculative.

3. Costs— attorney fees—Tort Claims action—damages in excess of $10,000—counterclaim by State

The Industrial Commission could not award attorney fees under N.C.G.S. § 6-21.1 in a Tort Claims case where the damages to which plaintiffs were entitled were in excess of $10,000 (even after deducting amounts awarded in error). However, the Commission could award attorney fees under N.C.G.S. § 6-19.1 because the State's counterclaim was equivalent to a civil action and the State did not show substantial justification and that an award of attorney fees would be unjust. The case was remanded for an award for fees arising from the counterclaim.

Appeal by the State from decision and order on 7 January 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 March 2004.

Parker, Poe, Adams & Bernstein L.L.P., by R. Bruce Thompson II, for plaintiff appellees.

Attorney General Roy Cooper, by Special Deputy Attorney General William H. Borden, for the State appellant.

McCULLOUGH, Judge.

The issues addressed herein are before this Court in the following posture: The claims at issue in this case were brought by Paul Sprinkle and his wife Carla Jones ("plaintiffs" when referred to collectively) under the North Carolina Tort Claims Act, N.C. Gen. Stat. §§ 143-291, *et seq.* (2003). The case was heard before Deputy Commissioner Lorrie L. Dollar of the Industrial Commission on 6 September 2001. Commissioner Dollar filed a decision and order

on 10 May 2002 finding the State liable and awarding plaintiffs $31,007.08 in damages. On 7 January 2003, the Full Commission filed a decision and award affirming the decision of the Deputy Commissioner and additionally awarding attorney's fees. The State filed a notice of appeal on 10 February 2003. The Full Commission filed an amended decision and order on 12 June 2003 denying plaintiffs' motion for attorney's fees. On 7 July 2003, plaintiffs filed a notice of appeal on the amended decision denying plaintiffs' attorney's fees. The decision on that issue in plaintiffs' appeal was also filed on this date, with our decision vacating the amended decision and award. *See Sprinkle v. N.C. Wildlife Resources Comm.*, 165 N.C. App. 902, 600 S.E.2d 483 (2004) (No. COA03-1409) filed the same day as this case.

The following is a summary of relevant facts, as found by the Commission, and not assigned as error by the State: On 9 May 1999, Officer Guedalia of the North Carolina Wildlife Resources Commission (NCWRC) was operating a sixteen-foot boat on High Rock Lake in Rowan County and acting in the course and scope of her employment for the State. There is no speed limit on the lake other than restrictive "No Wake Zones." Fellow Officer Keith Voris was sitting stationary in his own boat facing the opposite direction of Officer Guedalia's boat. The two were in the main channel of the lake, and were discussing stopping two white boats for an inspection. Plaintiffs' boat was one of the white boats being discussed by the stationary officers.

As the two white boats approached the officers, Officer Voris started his patrol boat to pursue the first boat which was operated by a sibling of one of plaintiffs. Plaintiffs' boat was moving at a constant rate of fifty to sixty miles per hour when Officer Guedalia started her boat to pursue plaintiffs at full throttle. Plaintiffs were at a distance of seventy-five feet. Officer Guedalia's boat ran at a top speed of forty-five miles per hour. As Mr. Sprinkle rounded a small island in the channel, he saw a patrol boat and blue lights flashing. He then heard the siren and decreased his speed coming to a quick stop and idling in neutral. Officer Guedalia observed plaintiffs' decreased speed as she approached from the port side of plaintiffs' boat. She claimed plaintiffs' boat moved to the left when she was at a distance of twenty yards and kept moving into her path. Despite seeing the direction plaintiffs' boat was moving, Officer Guedalia turned her boat starboard and slammed her throttle in reverse. The patrol boat then collided with plaintiffs' boat. Plaintiffs' boat sustained extensive

damages. At the time of the collision, claimants' boat had approximately five hours on its engine.

Sergeant Anthony Sharum investigated the accident, preparing a report on 18 May 1999. The report noted that plaintiffs' boat may have moved to the left as the patrol boat collided. The Sergeant testified in his deposition that he found there was no evidence to support plaintiffs' boat turned left in front of the patrol boat. The Sergeant concluded that Officer Guedalia had followed plaintiffs' boat too closely, and that her inattention was the proximate cause of the accident. No citation was issued to Mr. Sprinkle. The Sergeant's report was confirmed by his superiors.

The Commission's findings of fact go on to state that pursuant to the Coast Guard Inland Steering and Sailing Rules, which govern the lake, Officer Guedalia's decision to cut starboard and reverse the throttle was unreasonable. Those rules provide that, when there is sufficient room, alteration of course alone may be the most effective action to avoid close quarters situations. Such would have been the better response in this case as there is no evidence boats were on either side of her. Furthermore, as this was a law enforcement stop, it was Officer Guedalia's duty to maintain a safe distance and speed in case the boat she is stopping suddenly goes right or left. She breached this duty.

Officer Guedalia wrote a memo and testified as to her version of the incident. She alleged Mr. Sprinkle never put his boat in neutral, but was moving forward at all times. She alleged she was never behind Mr. Sprinkle until he cut left over into her path. Commissioner Dollar and the Full Commission did not accept her testimony as credible. They found her version to be illogical because a boat traveling at a maximum of forty-five miles per hour cannot go from a stationary position and catch a speedboat operating at fifty to sixty miles per hour. Furthermore, as the pursuing boat was at a distance of at least seventy-five yards, Officer Guedalia was in the best position to observe any movement to the left by Mr. Sprinkle and stop at an appropriate distance.

Concerning the issue of damages, the Commission found as a fact that plaintiffs owned the boat jointly, having purchased the boat and the trailer for $47,252.00 on 11 February 1999. The monthly payment on the fifteen-year loan used to finance the purchase, including principal and interest, was $444.50. Plaintiffs generally paid more per month, a total ranging from $500.00 to $700.00.

On 14 May 1999, plaintiffs took the boat to the dealer who had sold it to them to see if they could trade it in for a new boat. David Natkin, an employee of the dealer, examined the boat. He reported to plaintiffs that the boat was not an acceptable trade-in and was worth $13,500.00 to $15,000.00 less for trade or resale. Plaintiffs took the boat to Campbell's Boat Repair and were quoted a repair cost of $9,507.08. This was the actual price that was charged after the boat was repaired at Campbell's. Until they took the boat in for these repairs, plaintiffs were in possession of the boat and, having taped it up, used it for a couple of trips. The boat was taken into Campbell's in September of 1999, and repairs were not completed until March of 2000.

Based on these undisputed facts, and other evidence before it, the Deputy Commissioner, and the Full Commission on appeal concluded as a matter of law that the State, on the part of individual NCWRC Officer Guedalia, acting in the scope of her employment, was negligent and the proximate cause of the damages to plaintiffs' boat. Both the Deputy Commissioner and the Full Commission concluded plaintiffs were not contributorily negligent, and that even assuming they had been, the State had the last clear chance to avoid the collision. Pursuant to these conclusions, the Full Commission awarded plaintiffs compensatory damages in the amount of $31,007.08 and costs which include plaintiffs' reasonable attorney's fees.

At the outset, we note that while the State sets forth six assignments of error in the record on appeal, those assignments not addressed in its brief are deemed abandoned, pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure. Specifically, the State does not object in its brief to the Commission's finding of the State's negligence, or the finding that plaintiffs were not contributorily negligent. Therefore, the two issues properly before us are: (I) whether the Commission's compensatory award of $31,007.08 was in error; and (II) whether the Commission's award of attorney's fees was in error.

I. Compensatory Damages

The Full Commission's compensatory award of $31,007.08 was based on the following: cost of repair ($9,507.08), loss of value ($15,000.00), and loss of use for the ten-month period the boat was of limited use or unusable ($6,500.00).

In our standard of review upon an appeal from an Industrial Commission's decision under the Tort Claims Act, our inquiry is limited to two questions: (1) does competent evidence on the record support the Commission's findings; and (2) do the Commission's findings justify its conclusions, decision, and award (if any). *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405, 496 S.E.2d 790, 793 (1998). Findings of fact by the Commission are read with deference, and if supported by competent evidence on the record, are conclusive on appeal even though evidence exists which would support a contrary finding. *Bullman v. Highway Comm.*, 18 N.C. App. 94, 98, 195 S.E.2d 803, 806 (1973). On appeal, the Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965).

A. COST OF REPAIR and LOSS OF VALUE ON THE UNREPAIRED BOAT

[1] The State put on little to no evidence contesting the cost of repair or loss of value evidence offered by plaintiff. The record indicates, by way of plaintiffs' exhibits, clear and competent documentation to support the Commission's findings as to both of these values. The gravamen of the State's argument is whether the Commission should have awarded both the cost of repair and the loss of value of the unrepaired boat. We agree with the State that the Commission erred in doing so, as this awarded plaintiffs double recovery.

It is well settled that

> North Carolina is committed to the general rule that the measure of damages for injury to personal property is the difference between the market value of the damaged property *immediately before and immediately after the injury*. The purpose of the rule is to pay the owner for his loss. If the damaged article has market value, the application of the before and after rule is relatively simple. Even in that case, however, the cost of repairs is some evidence of the extent of the damage.

Light Co. v. Paul, 261 N.C. 710, 710-11, 136 S.E.2d 103, 104 (1964) (emphasis added). Therefore, when measuring compensable damages of personal property, a court or the Commission must be given competent evidence of the difference between the "market value of

the damaged property immediately before and immediately after the injury." *Id.*

As to this value, the Court can consider cost of repair. While the recovery would by no means be limited to the amount of the cost of repairing the damaged property, "we are of the opinion that such cost would be some *evidence* to guide the jury in determining the difference in the market value of the automobile before and after the injury thereto." *Guaranty Co. v. Motor Express*, 220 N.C. 721, 723, 18 S.E.2d 116, 117 (1942) (emphasis added). " 'Evidence of the reasonable value of repairs to a damaged automobile, to show the difference in its value before and after it was injured is admissible.' " *Id.* (quoting *Baldwin v. Mittry*, 102 P.2d 643, 646 (Idaho 1940)). " 'Evidence of the cost of repairs of the automobile was admissible as proof of the difference between the value of the automobile before the accident and after it occurred. This difference was the measure of damages that the plaintiff was entitled to recover.' " *Id.* (quoting *Kiely v. Ragali*, 106 A. 502, 504 (Conn. 1919)). In North Carolina, it is clear the cost of repair can be evidenced by the difference of the before and after value of injured property, but it is not itself the exclusive measure.

The evidence before the Deputy Commissioner and the Full Commission was competent to show the following: the value lost of the boat due to the accident was $15,000.00. Mr. Nankin of Carolina Marina who sold plaintiffs their boat and examined it five days after the injury, stated: "We examined the boat and informed Mr. Sprinkle that we would not accept it as a trade-in because of the damage. . . . I further informed Mr. Sprinkle that, as a result of the accident, the boat was worth $13,500.00 to $15,000.00 less than book value." This was estimated in an invoice and was in the record before the Deputy Commissioner and Full Commission. There was also competent evidence that plaintiff repaired the boat at a cost of $9,507.08 after Carolina Marina's estimate. The Deputy Commissioner and the Full Commission had before it an estimate invoice and a paid invoice of the repairs, each itemized.

Applying the law set out above to this competent evidence for the purpose of determining the loss of value, the measure of damages for injury to the boat should be the difference between the market value of the damaged property *immediately before and immediately after the injury. Light Co.*, 261 N.C. at 711, 136 S.E.2d at 104. The competent evidence of this difference shows that the value of the boat fell below its book value, a boat with only five hours

on its engine, somewhere between $13,500.00 and $15,000.00 due to the injury caused by the State. While it is clear the Deputy Commissioner and the Full Commission could have used the cost of repair as *evidence* of this difference between the before and after injury value, it alone is not the difference, nor is it an additional element of damages.[1]

There is no competent evidence that the loss of resale value of the boat before repair, plus the cost of repair, reflects the difference between the before and after injury value of the boat. Plaintiffs state in their brief that: "the Claimants had to expend almost $10,000.00 in repairs to return the boat to a condition that would be worth $15,000.00 less than book value." If that were the case, we would have no problem affirming the Commission's award. We can find no such evidence in the record. The only evidence on this issue shows that the estimated loss of value as determined by Carolina Marina was based on assessing the lost value of the *damaged* boat, and not the loss of value after the boat was repaired. Thus plaintiff was awarded double recovery: the difference in value before repair, plus the cost of repair.

Therefore, we find no competent evidence on the record that the $9,507.08 cost of repairs represents a part of the difference between the market value of the damaged property immediately before and immediately after the injury and should therefore be removed from the award.

B. LOSS OF USE

[2] The State next argues that the Commission had no competent evidence before it to support the loss of use award of $6,500.00. The Commission based this award on the following: that although the minimum monthly loan payment was $444.00, over the ten-month period they were without a boat the claimants generally paid $600.00 to $700.00 a month. The Commission therefore awarded $6,500.00 for loss of use by apparently averaging these payments, and multiplying the average by the ten months the boat was being repaired. We find no competent evidence to support an award of payments beyond those to meet the minimum finance obligation for loss of use.

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1. There is no factual basis in the record that the value of the repaired boat was any less than the value of the boat before repair. Presumably it was. But we think that by awarding the $5,500.00 difference between the loss of resale value and cost of repair, the $15,000.00 award adequately compensates the loss of the boat's goodwill value (its depreciation after having been in an accident).

A loss of use recovery is generally allowed as to pleasure vehicles. *Martin v. Hare*, 78 N.C. App. 358, 364-65, 337 S.E.2d 632, 636 (1985). Both parties agree that North Carolina's case law governing the special damage award of loss of use of a vehicle is commanded by *Roberts v. Freight Carriers*, 273 N.C. 600, 160 S.E.2d 712 (1968). In *Roberts*, our Supreme Court held:

> In general, the right to recover for loss of use is limited to situations in which the damage to the vehicle can be repaired at a reasonable cost and within a reasonable time. If the vehicle is totally destroyed as an instrument of conveyance or if, because parts are unavailable or for some other special reason, repairs would be so long delayed as to be improvident, the plaintiff must purchase another vehicle.

Id. at 606, 160 S.E.2d 712, 717. Following *Roberts*, our Court has held:

> In order to recover for loss of use, it must be possible to repair the damaged vehicle at a reasonable cost and within a reasonable time. The measure of damages to be recovered is the cost *of renting a similar vehicle* during a reasonable time for repairs.

Gillespie v. Draughn, 54 N.C. App. 413, 417, 283 S.E.2d 548, 552 (1981), *disc. review denied*, 304 N.C. 726, 288 S.E.2d 805 (1982). As loss of use is a special damage, N.C. Gen. Stat. § 1A-1, Rule 9(g) (2003), the damages must be specifically pled and proved, and the facts giving rise to the special damages must be sufficient to inform the defendant of the scope of plaintiff's demand. *Id.*

In plaintiffs' affidavit of claim to the North Carolina Industrial Commission, they allege:

> Because Mr. Sprinkle and I were not financially able to purchase another boat to replace the one damaged by Officer Guedalia, we were unable to take several trips we had planned this summer, including a boating trip to Charleston, SC on June 4-6, 1999. Our damages for loss of use of the boat since the date of the accident are $14,000.00.

The evidence going towards the loss of use damages was the following: Plaintiffs had planned to take five trips in their new boat during the summer of 1999, and one to Charleston had been scheduled. Plaintiffs attempted to trade their damaged boat for a new boat. They then took the boat in for repairs. The itemized invoice of the repairs showed approximately 150 hours of labor went into repairing the

boat. There is no evidence as to what the cost would have been to rent or finance another boat for the planned trips and the Deputy Commissioner and the Full Commission stated as much in their findings of fact.

We agree with plaintiffs that the facts of this case, as pled in their affidavit of complaint, are sufficient to warrant an award for loss of use. We find the evidence sufficient to show that it was possible to repair the damaged vehicle at a reasonable cost and within a reasonable time. *Roberts*, 273 N.C. at 606, 160 S.E.2d at 717. The evidence shows that plaintiffs did so. While a long time to repair, ten months to do 150 hours of structural work on a boat is competent evidence of "reasonable time" of repair. This is true in light of the fact that much of the work was completed during off-season months. Furthermore, in light of the severe damage caused by the State, the invoice showing the itemized cost of repair is competent to show "reasonable costs."

However, plaintiffs offered no evidence of the measure of damages to be recovered, specifically as to the cost of renting a similar boat for the trips they had planned to take. *Gillespie*, 54 N.C. App. at 417, 283 S.E.2d at 552; *see also Martin*, 78 N.C. App. at 364-65, 337 S.E.2d at 636. The Deputy Commissioner took the evidence of finance payments and drew from these the loss of use for the time the boat was in repair. Plaintiffs cite one case suggesting this as an appropriate measure of loss of use damages. In *Champs Convenience Stores v. United Chemical Co.*, 329 N.C. 446, 406 S.E.2d 856 (1991), our Supreme Court awarded costs of overhead relating to rent and mortgage payments pending the repair of a building. That Court found "plaintiff was unable to operate the business to bring in the money necessary to pay these items yet these expenses accrued despite plaintiff's inability to operate the business." *Id.* at 463, 406 S.E.2d at 866.

We believe there to be no material distinction between allowing mortgage payments on a building and the amount of the boat payments in this case as representative of the value of loss of use. While there is no specific evidence of the costs of a similar boat's rental value as referenced in *Martin* and *Gillespie* as a reasonable measure of loss of use, we do not believe that the Commission is precluded from inferring from the record that a monthly rental value is essentially equivalent to the boat payment and thus fair measure of loss of use.

The State argues that loss of use should be limited to the cost of a boat rental for only those planned trips. This argument is too limited in its scope and does not adequately measure loss of use value. Ownership includes the ability to use the boat whenever desired, whether planned by the date of the accident or not. Plaintiffs were legally obligated to make monthly payments on the boat while it was under repairs caused by the State's negligence. Thus, the boat was unavailable for use on any given day during the repair period and plaintiffs are entitled to reasonable compensation for their inability to use the boat as desired.

Assuming, however, that loss of use and a monthly rental value can be inferred from the amount of the monthly payments, such evidence does not provide any justification for reimbursing plaintiffs for the payments made in excess of the monthly payment. To do otherwise would allow plaintiffs to build equity in an asset at no cost to themselves without any relative measure of the value of that asset as related to its monthly use. It is reasonable to assume that an owner of a pleasure vehicle hopes to get, on average, at least a use value sufficient to justify their minimum monthly finance payments. This is especially true with an asset that depreciates quickly. Beyond that value, however, assessing loss of use value is too speculative.

Accordingly, the Commission's $6,500.00 award for loss of use is modified to award the minimum finance payments of $444.00 per month plaintiffs were required by law to pay while the boat was being repaired. Thus, the loss of use damages should be modified to $4,440.00 to cover those ten months.

II. Reasonable Attorney's Fees

[3] Though not awarded by the Deputy Commissioner, the Full Commission's final award to plaintiffs was for costs, including plaintiffs' reasonable attorney's fees. The Full Commission's order did not specify under which statute it possessed authority to make such an award. The State assigned this award as error, arguing there was no statutory or other authority for the award of attorney's fees as the Commission's award was over $10,000.00. *See* N.C. Gen. Stat. § 6-21.1 (2003). Plaintiffs argue in their brief that the authority for such an award lies in N.C. Gen. Stat. § 6-19.1 (2003), and there was clear justification for it. We agree with plaintiffs.

A. N.C. Gen. Stat. § 6-21.1

The Tort Claims Act provides that "[t]he Industrial Commission is authorized . . . to tax the costs against the loser in the same manner

as costs are taxed by the superior court in civil actions." N.C. Gen. Stat. § 143-291.1 (2003). We have held that pursuant thereto, the Commission may award attorney's fees against the State under N.C. Gen. Stat. § 6-21.1. *Karp v. University of North Carolina*, 88 N.C. App. 282, 283, 362 S.E.2d 825, 826 (1987), *aff'd per curiam*, 323 N.C. 473, 373 S.E.2d 430 (1988); *see also Jane Doe 1 v. Swannanoa Valley Youth Dev. Ctr.*, 163 N.C. App. 136, 592 S.E.2d 715 (2004). The facts of *Karp*, though not laid out in any depth in the opinion, related to personal injury of plaintiff.

N.C. Gen. Stat. § 6-21.1 states in relevant part:

> 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.

Under this statute, both determining whether to award attorney's fees and the amount of the attorney's fees is in the considerable discretion of the presiding judge. *Hill v. Jones*, 26 N.C. App. 168, 169, 215 S.E.2d 168, 169, *cert. denied*, 288 N.C. 240, 217 S.E.2d 664 (1975). In the case of a state tort claim, this same discretion lies in the Industrial Commission. *Karp*, 88 N.C. App. at 284, 362 S.E.2d at 826. Pursuant to *Karp*, this statute is clearly applicable to plaintiffs' state tort claims action for personal injury or property damage. However, when the damages being awarded to the prevailing plaintiff exceeds $10,000.00, neither the presiding judge nor the Commission has authority to award attorney's fees. Such is the case at bar.

Even considering those portions of plaintiffs' award we have found in error, plaintiffs are still entitled to $15,000.00 for the loss in value of the boat and $4,440.00 for loss of use. Therefore, pursuant to *Karp* and N.C. Gen. Stat. § 6-21.1, the Commission would be in error to award plaintiffs' attorney's fees pursuant to that statute. However, we do not believe, as the State contends, that this foreclosed plaintiffs from being awarded attorney's fees under N.C. Gen. Stat. § 6-19.1.

B. N.C. Gen. Stat. § 6-19.1

Plaintiffs contend that attorney's fees were proper in this case pursuant to N.C. Gen. Stat. § 6-19.1. We agree. This statute states in part:

> **§ 6-19.1. Attorney's fees to parties appealing or defending against agency decision**
>
> In any civil action . . . *brought by the State* or brought by a party who is contesting State action pursuant to G.S. 150B-43 or any other appropriate provisions of law . . . the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees . . . if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust. The party shall petition for the attorney's fees within 30 days following final disposition of the case. The petition shall be supported by an affidavit setting forth the basis for the request.

N.C. Gen. Stat. § 6-19.1 (emphasis added). This statute applies to civil actions brought by the State on behalf of an agency, in this case, the NCWRC. The State argues that this statute cannot be the basis for awarding plaintiffs' attorney's fees as plaintiffs initiated this case by filing a claim under the State Tort Claims Act and thereby consented to the jurisdiction of the Industrial Commission to hear and determine any counterclaim. N.C. Gen. Stat. § 143-291.3 (2003). Thus, the State argues, the Commission is without jurisdiction to award attorney's fees in an action outside N.C. Gen. Stat. § 150B and the State Administrative Procedure Act as referenced in N.C. Gen. Stat. § 6-19.1.

Initially, we recognized that the Tort Claims Act must be strictly construed as it stands in derogation of the common law rule of sovereign immunity, *Etheridge v. Graham, Comr. of Agriculture*, 14 N.C. App. 551, 553, 188 S.E.2d 551, 553 (1972), and that the Commission is a court of limited jurisdiction having only those powers conferred upon it by statute. *Bryant v. Dougherty*, 267 N.C. 545, 549, 148 S.E.2d 548, 552 (1966).

The question before this Court is whether a counterclaim by the State in the context of a tort claim is equivalent to "any civil

action . . . brought by the State . . . pursuant to . . . any other appropriate provisions of law" as intended under N.C. Gen. Stat. § 6-19.1. For the reasons set forth herein, we conclude that the counterclaim in this case was the equivalent of a civil action brought by the State. Therefore, the Commission was justified to award attorney's fees under N.C. Gen. Stat. § 6-19.1, as the record does not indicate the State made a showing of substantial justification in bringing their counterclaim, nor did they make a showing of "special circumstances" that awarding attorney's fees in this instance would be "unjust." N.C. Gen. Stat. § 6-19.1; *see Crowell Constructors, Inc. v. State ex rel. Cobey*, 114 N.C. App. 75, 80-81, 440 S.E.2d 848, 851 (1994), *rev'd on other grounds*, 342 N.C. 838, 467 S.E.2d 675 (1996).

In the instant case, the State's counterclaim alleged the following:

> **FOURTH DEFENSE AND FIRST COUNTERCLAIM**
>
> If plaintiff Jones is allowed to recover, defendant is entitled to indemnity from plaintiff Sprinkle. His negligence as detailed in the third defense above was active and primary. In the alternative, the defendant is entitled to contribution from plaintiff Sprinkle because his negligence was a proximate cause of this accident.
>
> **SECOND COUNTERCLAIM**
>
> Plaintiff Sprinkle was negligent for the reasons stated in the third defense above. His negligence was the sole proximate cause of the accident which is the subject of this claim. Due to plaintiff's actions, defendant's boat suffered approximately $500.00 in damage and its employee was injured. It paid Officer Guedalia approximately $430.00 in statutory salary continuation while she was out on injury leave due to the accident and paid her medical expenses of approximately $1148.35 as self-insured employer under the Workers' Compensation Act. As a result of plaintiff's negligence, defendant suffered damages of at least $2,078.35.
>
> Defendant respectfully requests that plaintiffs' claim be denied, and that plaintiffs be ordered to pay damages and the costs of this action.

As a threshold matter, we here show this counterclaim brought by the State in the Industrial Commission is a "civil action" under N.C. Gen. Stat. § 6-19.1.

Rule 1 of the North Carolina Rules of Civil Procedure states in relevant part: "[The Rules of Civil Procedure] shall also govern the

procedure in tort actions brought before the Industrial Commission except when differing procedure is prescribed by statute." N.C. Gen. Stat. § 1A-1, Rule 1. Rule 2 goes on to state, "[t]here shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action." N.C. Gen. Stat. § 1A-1, Rule 2. Under Rule 7, counterclaims require a responsive pleading as if they themselves were the impetus of the civil action. N.C. Gen. Stat. § 1A-1, Rule 7(a). However, if the counterclaim is in actuality nothing more than an affirmative defense, such as contributory negligence, no reply is required. *Eubanks v. First Protection Life Ins. Co.*, 44 N.C. App. 224, 229, 261 S.E.2d 28, 31 (1979), *disc. reviews denied*, 299 N.C. 735, 267 S.E.2d 661 (1980); *see* N.C. Gen. Stat. § 1A-1, Rule 8(c) (Here, the State counterclaimed for damages in the same manner as did plaintiff, requiring a responsive pleading.).

Finally, Rule 13 provides:

> (a) *Compulsory counterclaims.*—A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

N.C. Gen. Stat. § 1A-1, Rule 13(a). Thus, if the State wished to assert its counterclaim, it was compulsory that it do so in the present proceedings as its claim arises out of the same transaction or occurrence. A counterclaim is in the nature of an independent proceeding and is not automatically determined by a ruling in the principle claim. *Brooks, Com'r of Labor v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984). Thus, the filing of a counterclaim is to initiate a "civil action" as denominated in Rule 2.

While the State's counterclaim was compulsory, it was within its discretion to assert it. And, unless the State's assertion was substantially justified or there is some showing of special circumstances that make awarding attorney's fees unjust, any civil action it brings is subject to such fees pursuant to N.C. Gen. Stat. § 6-19.1. As the purpose of this statute is to curb unwarranted, ill-supported suits asserted by the State, it was within the Commission's discretion to award attorney's fees. *Crowell Constructors*, 114 N.C. App. at

80-81, 440 S.E.2d at 851. We review an award for attorney's fees under the abuse of discretion standard. *Tay v. Flaherty*, 100 N.C. App. 51, 57, 394 S.E.2d 217, 220, *disc. review denied*, 327 N.C. 643, 399 S.E.2d 132 (1990). We cannot say, under the facts of this case, that the approach taken by the Commission was a clear abuse of its discretion. There is no showing in the findings of fact made by the Full Commission as to any substantial justification for the State's counterclaim in this case. The record shows after the investigation of the incident, the NCWRC all but acknowledged their officer's negligence. The investigation finding the officer was at fault was confirmed by the investigating Sergeant's superiors, and plaintiffs were not cited for the incident.

Therefore, we remand this case to the Industrial Commission for clear findings as to the amount of attorney's fees owed by the State. *Thornburg v. Consolidated Jud'l Ret. Sys. of N.C.*, 137 N.C. App. 150, 154, 527 S.E.2d 351, 354 (2000). The award should be tailored to compensate only for those fees which arose specifically from the State's counterclaim. This should not include fees encompassing the entire tort claim brought by plaintiffs.

III. Conclusion

Pursuant to the analysis set forth above, we affirm the Industrial Commission's conclusions of law that the State was negligent and that plaintiffs in no way contributed to the State's negligence. However, we modify the Commission's award to exclude the $9,507.08 for the cost of repair, as it would be double recovery when awarding $15,000.00 for loss of value. Furthermore, we modify the Commission's award for loss of use, reducing it from $6,500.00 to $4,440.00. And finally, we remand the case to the Commission to make clear calculations of attorney's fees incurred by plaintiffs in response to the State's counterclaim.

Affirmed in part, modified in part, and remanded in part.

Judges WYNN and ELMORE concur.

RD&J PROPERTIES, PLAINTIFF v. LAURALEA-DILTON ENTERPRISES, LLC AND DAVID T. NEWTON, DEFENDANTS, THIRD-PARTY PLAINTIFFS v. ROBERT E. LEGGETT, III AND JAMES C. PITTMAN, THIRD-PARTY DEFENDANTS

No. COA02-1660

(Filed 17 August 2004)

1. Appeal and Error— appealability—interlocutory order—Rule 54(b) certification

Although plaintiff's appeal from the trial court's grant of summary judgment in favor of defendants on plaintiff's claims for breach of contract, fraud, and unfair and deceptive trade practices is an appeal from an interlocutory order since defendants' counterclaims and third-party claims remain pending, the appeal is properly before the Court of Appeals based on the trial court's Rule 54(b) certification.

2. Contracts— breach of contract—summary judgment

The trial court did not err by granting summary judgment in favor of defendants on plaintiff's claim for breach of contract arising out of the purchase of two mobile home parks with problematic septic systems even though defendants failed to disclose the existence of a diverter pipe for which there was no permit, because: (1) plaintiff failed to establish that a contract existed between plaintiff and defendant individual; and (2) defendant company's representations and warranties were expressly qualified in that it represented "to the best of its knowledge" and that "it had no knowledge of any noncompliance," and plaintiff failed to offer evidence that the Health Department or anyone else ever informed defendant that the diverter pipe required a permit or violated any regulation or law in any other way.

3. Fraud— concealment—material misrepresentation—summary judgment—scienter—reasonable reliance

The trial court did not err by granting summary judgment in favor of defendants on plaintiff's claim for fraud based on concealment and material misrepresentation arising out of the purchase of two mobile home parks with problematic septic systems, because plaintiff forecast insufficient evidence of both defendants' scienter and of its own reasonable reliance when plaintiff failed to inspect the property.

4. Unfair Trade Practices— capacity to deceive reasonable businessperson—summary judgment

The trial court did not err by granting summary judgment in favor of defendants on plaintiff's claim for unfair and deceptive trade practices arising out of the purchase of two mobile home parks with problematic septic systems based on defendants' failure to disclose the existence of a diverter pipe because viewed in the light most favorable to plaintiff, defendants' acts did not have the capacity to deceive a reasonable businessperson when: (1) the partners of plaintiff company were sophisticated businessmen who elected to purchase property and a sewage system "as is" even though they had never had the property or system inspected; (2) the phrase "as is" placed plaintiff on notice that it needed to determine the existing condition of the parks; (3) there was a lack of evidence that an inspection would have failed to reveal the existence of the diverter pipe; and (4) defendants disclosed the diverter pipe to the Health Department whose records were available to plaintiff.

Appeal by plaintiff from order and judgment entered 30 September 2002 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 17 September 2003.

Colombo, Kitchin, Dunn & Ball, L.L.P., by W. Walton Kitchin, for plaintiff-appellant.

McCoy, Weaver, Wiggins, Cleveland & Raper, P.L.L.C., by Richard M. Wiggins and Jim Wade Goodman, for defendants/third-party plaintiffs-appellees.

GEER, Judge.

Plaintiff RD&J Properties ("RD&J") purchased two mobile home parks from defendant Lauralea-Dilton Enterprises, LLC ("Lauralea"). After experiencing problems with the septic system, RD&J sued for breach of contract, fraud, and unfair and deceptive trade practices. RD&J appeals from the trial court's grant of summary judgment to defendants on all of plaintiff's claims. Because RD&J failed to forecast sufficient evidence that it could prove a prima facie case for each of its claims, we hold that the trial court correctly granted summary judgment to defendants and affirm.

Facts

The materials before the superior court on defendants' motion for summary judgment tended to show the following. The Lauralea and Dilton mobile home parks are located in Cumberland County. At some point in the late 1960s or early 1970s, Sam Byrd, then owner of the parks, installed a pipe leading from the septic system in the Lauralea park to the wastewater treatment facility in the Dilton park. This mechanism, known as the "diverter pipe," was installed without the necessary permits from the North Carolina and Cumberland County regulatory agencies. The purpose of the diverter pipe was to divert the flow of sewage from the septic system to the waste water treatment plant when the existing system could not handle the amount of effluent.

In 1979, defendant David Newton, the sole owner of defendant Lauralea, purchased the parks. In January 1993, Mr. Newton notified the Cumberland County Health Department that all but 30 units in the Lauralea mobile home park were tied onto the treatment plant for the Dilton park. Jane Stevens of the Health Department made a notation of this fact on the Health Department's waste water system plat for the Lauralea park.

Subsequently, Lauralea experienced some problems with the drain field for its septic system. After a recommendation from a Health Department employee that it place more fill dirt in the drain field, the problems were apparently solved. For the period 13 March 1997 through 12 November 1998, a month before the sale to RD&J, the Health Department gave no demerits for the septic system in its regular checks of the parks. In the 29 September 1997 "Inspection of Engineered Subsurface Wastewater System"—the last full inspection of the septic system during Lauralea's ownership—the Health Department indicated the parks' septic system was "properly functional."

Plaintiff RD&J is a North Carolina general partnership in the business of owning and operating mobile home parks. During the events leading to this litigation, RD&J had three general partners: Robert E. Leggett, III, G. David Wood, and James C. Pittman. Mr. Leggett had been a managing partner of several mobile home parks in eastern North Carolina. Mr. Wood had worked as an industrial engineer, owned an equipment rental company, and had invested in two other mobile home parks. Mr. Pittman had worked as a civil engineer and also invested in real estate.

On 4 December 1998, RD&J and defendant Lauralea entered into a Sale and Purchase Agreement (the "Purchase Agreement") in which RD&J agreed to buy the Lauralea and Dilton mobile home parks and various tangible and intangible personal property from defendant Lauralea. The tangible personal property specifically included "all sewer and underground water systems[.]" Paragraph 14 of the Purchase Agreement provided:

> 14. "As Is" Condition. Buyer represents that it has inspected the two mobile home parks, Lauralea and [Dilton], the Tangible Personal Property and Intangible Property to be sold, and subject to the specific conditions, representations and warranties contained herein, is purchasing all of the Property being purchased "as is", "where is".

The "representations and warranties" at issue in this case include:

> 17. Building Codes, Zoning, etc. Buyer[1] represents and warrants, to the best of its knowledge, that the use and operation of the Property now is . . . in full compliance with applicable building codes, zoning and land use laws, and other local, state or federal laws and regulations and that all licenses and permits required by any governmental authority having jurisdiction over the Property have been validly issued and are in full force and effect. . . .
>
> . . . .
>
> 19. Environmental Matters. Lauralea represents and warrants that it has no knowledge of any noncompliance with any environmental protection, pollution or land use laws, rule, regulations, order or requirements, including but not limited to those pertaining to the handling, generating, treating, sorting or disposing of any hazardous waste or substance, oil or petroleum as related to the subject Property, except as set out in Paragraph 18. Lauralea agrees to indemnify and hold the Buyer harmless against claims, demands and liability, including attorney fees, for any violation of this representation and warranty.

Shortly after the closing, defendant Newton informed Mr. Leggett of the existence of the diverter pipe. RD&J continued to operate the mobile home parks for 18 months after learning about the pipe.

1. It appears that the parties intended this paragraph to refer to "Lauralea" rather than "Buyer." Since all the parties to the appeal have treated this provision as being binding on Lauralea, we do also.

In late 1999, with the arrival of wet weather, RD&J began to experience problems with the septic system at the Lauralea park. Several months later, RD&J had the Lauralea septic system inspected by Hydrostructures, P.A. The Hydrostructures report, dated 6 June 2000, concluded that "our inspection of the treatment system indicates that the various components are structurally sound and capable of performing the tasks for which they were intended. . . . [I]t is my recommendation that the system be allowed to continue operating with a few minor repairs."

In the spring of 2000, officials from state and local agencies informed Mr. Wood that the diverter pipe could not be used and that RD&J risked possible civil and criminal penalties if it was used. The agencies directed RD&J to dismantle and cap the illegal diverter pipe and bring the sewage system at the mobile home parks into compliance with local and state law.

RD&J became delinquent in its payments to defendant Lauralea, which then commenced foreclosure proceedings. On 16 August 2000, RD&J filed a complaint asserting claims for breach of contract, fraud, and unfair and deceptive trade practices. Defendants answered, denying the material allegations, and asserted counterclaims based on RD&J's default on payments. Defendant Lauralea also brought a third-party claim against Wood, Leggett, and Pittman. Lauralea subsequently took a voluntary dismissal as to Mr. Wood. Following completion of discovery, defendants moved for summary judgment on 28 August 2002. The trial court granted summary judgment to defendants on all of plaintiff's claims. Plaintiff has appealed from that order and judgment.

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[1] We first note that this appeal is interlocutory because defendants' counterclaims and third-party claims remain pending. *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001) (an interlocutory order is one made during the pendency of an action that does not dispose of the entire case). This appeal is, however, properly before us based on the trial court's Rule 54(b) certification. The court entered final judgment as to plaintiff's claims and found that "there is no just reason for delaying the appeal[.]"

Standard of Review

A trial court's ruling on a motion for summary judgment is reviewed *de novo*, "[s]ince the trial court in entering summary judgment 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 movant 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).

In ruling on a motion for summary judgment, a trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972). 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. *Id.* 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 Moore's Federal Practice § 56.15[3], at 2337 (2d ed. 1971)). A plaintiff may not, however, rest upon mere allegations in the pleadings, but instead must come forward with evidence demonstrating that there is a genuine issue for trial. *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 630, 538 S.E.2d 601, 618 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 372, 547 S.E.2d 811 (2001).

Breach of Contract Claim

[2] RD&J's breach of contract claim rests on its contention that by failing to disclose the diverter pipe, for which there was no permit, defendants breached paragraphs 17 and 19 of the Purchase Agreement. "The elements of breach of contract are (1) the existence of a valid contract and (2) breach of the terms of the contract." *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003). RD&J's complaint asserts the claim against both defendant Lauralea and defendant Newton and its brief on appeal does not distinguish between the two defendants. We, however, address each defendant separately.

With respect to defendant Newton, RD&J has failed to establish that a contract existed between RD&J and Newton. The Purchase Agreement that forms the basis for RD&J's breach of contract claim was entered into between Lauralea as seller and RD&J as buyer. Newton signed the agreement once on behalf of Lauralea and not individually. *See Keels v. Turner*, 45 N.C. App. 213, 218, 262 S.E.2d 845, 847 (quoting 19 Am. Jur. 2d, Corporations § 1343 (1965)) (" '[W]here individual responsibility is demanded, the nearly universal practice in the commercial world is that the corporate officer

signs twice, once as an officer and again as an individual.' "), *disc. review denied*, 300 N.C. 197, 269 S.E.2d 624 (1980). Since RD&J has failed to offer evidence of a contract between RD&J and Newton individually, the trial court properly granted summary judgment for Newton on the breach of contract claim.

As for Lauralea, in paragraph 17, Lauralea's representations and warranties were expressly qualified: it represented and warranted only "to the best of its knowledge[.]" Likewise, in paragraph 19, "Lauralea represent[ed] and warrant[ed] that it has no knowledge of any noncompliance . . . ." Since Lauralea's representations were limited in this fashion, in order to prove a breach of contract, RD&J was required to establish that Lauralea knew or should have known that the diverter pipe was not in compliance with applicable regulations and that it required a permit. *See American Transtech Inc. v. U.S. Trust Corp.*, 933 F. Supp. 1193, 1200 (S.D.N.Y. 1996) (defendant could be liable under "best knowledge" warranty if, at the time of representation, it had actual knowledge or, based on documents to which it had access, should have known); *Hirsch v. Feuer*, 299 Ill. App. 3d 1076, 1082, 702 N.E.2d 265, 270 (1998) (complaint met minimum requirements for breach of contract claim when contract contained "best of their knowledge" representation and complaint alleged defendants had actual knowledge of defects).

Here, defendants have presented evidence that defendant Newton had no knowledge that the diverter pipe required a permit or violated any other law or regulation. Defendant Newton's affidavit states:

> At the time the contract . . . was signed, and at the closing of the transaction . . . , I had no reason to believe that the existence or use of the diverter pipe was in violation of any building codes, zoning or land use laws, or any other local, state or federal laws and regulations. . . . In fact, in early 1993, I informed the Cumberland County Health Department of the existence of the diverter pipe . . . . No one from the Cumberland County Health Department, nor any other person, ever informed me prior to the closing of the sale of the [property] that the existence or use of the diverter pipe was in anyway [sic] illegal.

Defendant Newton's assertions are corroborated by the affidavit of Jane Stevens, a longtime employee of the Cumberland County Health Department. Ms. Stevens stated that in January 1993, defendant Newton informed her that "all but 30 units in the Lauralea mobile

home park were tied onto the treatment plant for the adjoining Dilton mobile home park." Ms. Stevens further stated that she made a note of this on the Health Department's waste water system plat for the Lauralea mobile home park, indicating: "30 mh's served by onsite septic . . . . Others are tied onto Dilton treatment plant." Further, despite repeated inspections of the sewage system through November 1998, a month before the sale, the Health Department's documentation never reflected any concern about the diverter pipe.

In the face of this showing by defendants, the burden shifted to plaintiff to demonstrate that defendant Newton knew or should have known of the problems with the diverter pipe. Yet, plaintiff offered no evidence that the Health Department or anyone else ever informed defendant Newton that the diverter pipe required a permit or violated any regulation or law in any other way. Since plaintiff has offered no evidence that the representations were untrue when made, they do not give rise to a breach of contract claim and the trial court properly granted defendants' motion for summary judgment as to that claim. *See Crofton Ventures Ltd. P'ship v. G & H P'ship*, 116 F. Supp. 2d 633, 645 (D. Md. 2000) (granting summary judgment on breach of contract claim when defendant had warranted that, to the best of its knowledge, property had not been used for hazardous waste disposal and plaintiff failed to produce evidence that defendant knew or should have known of the hazardous waste on the site), *aff'd in pertinent part and vacated in part*, 258 F.3d 292, 300 (4th Cir. 2001); *Hoffer v. Callister*, 137 Idaho 291, 295, 47 P.3d 1261, 1265 (2002) (summary judgment as to breach of contract claim proper when seller of mobile home parks warranted, to the best of her knowledge, no violation of law or ordinance existed and there was "no dispute that [defendant] did not have any actual knowledge of the alleged zoning violations").

Fraud Claim

[3] With respect to its fraud cause of action, RD&J alleged claims both for concealment and material misrepresentation. "The essential elements of actionable fraud are: '(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.' " *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 794, 561 S.E.2d 905, 910 (2002) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)). Additionally, plaintiff's reliance on any misrepresentations must be reasonable. *State Properties, LLC v. Ray*, 155 N.C. App. 65, 72, 574

S.E.2d 180, 186 (2002), *disc. review denied*, 356 N.C. 694, 577 S.E.2d 889 (2003).

In order for defendants to prevail on their motion for summary judgment, they did not need to negate every element of fraud. "If defendant effectively refutes even one element, summary judgment is proper." *Ramsey v. Keever's Used Cars*, 92 N.C. App. 187, 191, 374 S.E.2d 135, 137 (1988). Here, RD&J forecast insufficient evidence of both defendants' scienter and of its own reasonable reliance.

The required scienter for fraud is not present without both knowledge and an intent to deceive, manipulate, or defraud. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988).[2] This Court has repeatedly held that a "defendant could not, of course, be liable for concealing a fact of which it was unaware." *Ramsey*, 92 N.C. App. at 190, 374 S.E.2d at 137 (summary judgment proper where there was no issue of fact as to defendant auto dealer's lack of knowledge of vehicle's collision history). *See also Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 594, 394 S.E.2d 643, 647 (1990) ("Before defendants have any duty to disclose information, they must possess the information."), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (1991). Likewise, a defendant cannot be liable for misrepresenting a fact that it has no knowledge is false. *Taylor v. Gore*, 161 N.C. App. 300, 303, 588 S.E.2d 51, 54 (2003) (affirming grant of summary judgment), *disc. review denied*, 358 N.C. 380, 597 S.E.2d 775 (2004).

Once defendants presented affidavits evidencing a lack of knowledge that the diverter pipe needed a permit or was otherwise in violation of the law, the burden shifted to plaintiff to come forward with evidence placing defendants' knowledge in dispute. *Taylor*, 161 N.C. App. at 303, 588 S.E.2d at 54. Because RD&J has pointed to no evidence suggesting knowledge on the part of defendants, the trial court properly granted summary judgment as to the fraud claim. *Id.* (although defendants incorrectly represented that property was not in a flood zone, summary judgment on a fraud claim was correct when plaintiffs failed to refute defendants' showing that they did not know the property was in a flood zone); *Brown v. Roth*, 133 N.C. App. 52, 56, 514 S.E.2d 294, 297 (1999) (where there was no evidence in the record that defendant knew it had communicated false square

2. While a reckless disregard as to the truth of a statement may be sufficient to satisfy the element of "false representation," *Myers & Chapman* held that it is insufficient to meet the "intent to deceive" requirement. *Id.*

footage information to plaintiff, summary judgment proper on fraud claim); *Forbes*, 99 N.C. App. at 594-95, 394 S.E.2d at 647 (affirming summary judgment when plaintiffs' evidence did not refute defendants' showing of a lack of knowledge).

Even had RD&J demonstrated knowledge on the part of defendants, it has failed to forecast sufficient evidence that its own reliance was reasonable. With respect to the purchase of property, "[r]eliance is not reasonable if a plaintiff fails to make any independent investigation" unless the plaintiff can demonstrate: (1) "it was denied the opportunity to investigate the property," (2) it "could not discover the truth about the property's condition by exercise of reasonable diligence," or (3) "it was induced to forego additional investigation by the defendant's misrepresentations." *State Properties*, 155 N.C. App. at 73, 574 S.E.2d at 186. In an arm's-length transaction, when a purchaser of property has the opportunity to exercise reasonable diligence and fails to do so, the element of reasonable reliance is lacking and the purchaser has no action for fraud. *Calloway v. Wyatt*, 246 N.C. 129, 134, 97 S.E.2d 881, 885-86 (1957). While the reasonableness of a party's reliance is usually a question for the jury, a court may grant summary judgment when the facts are so clear that they support only one conclusion. *State Properties*, 155 N.C. App. at 73, 574 S.E.2d at 186.

In this case, the parties were dealing at arm's length and all of them were sophisticated businessmen, with two of RD&J's partners having experience in operating mobile home parks. These sophisticated businessmen chose to purchase the mobile home parks, specifically including the septic system, "as is." The phrase "as is" is defined as "[i]n the existing condition without modification[,]" *Black's Law Dictionary* 121 (8th ed. 2004), or "in its present condition[,]" *Webster's International Dictionary* 125 (3d ed. 1968). "Generally, a sale of property 'as is' means that the property is sold in its existing condition, and use of the phrase *as is* relieves the seller from liability for defects in that condition." *Black's*, *supra*, at 122 (emphasis original). *See also* N.C. Gen. Stat. § 25-2-316 (1986), comment 7 (in the context of the sale of goods, terms such as "as is" and the like "in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved"). To the extent that the sewage system was inadequate, RD&J assumed that risk by buying it "as is."

In the same paragraph as the "as is" clause, RD&J expressly represented that they had "inspected the two mobile home parks, . . .,

the Tangible Personal Property and Intangible Property to be sold"—a representation required presumably in an effort to avoid litigation such as the present lawsuit.[3] As this provision establishes and no evidence refutes, defendants did not in any way deny RD&J an opportunity to inspect the property nor did they engage in any artifice designed to induce RD&J to forego an investigation. Defendants in fact, through the Purchase Agreement, mandated the inspection. Nor has RD&J made any showing that an inspection of the septic system, such as occurred in 2000, would have failed to uncover the diverter pipe.

Under very similar circumstances, this Court has previously held that the trial court properly granted summary judgment as to a fraud claim because of a lack of evidence of reasonable reliance. In *Hearne v. Statesville Lodge No. 687*, 143 N.C. App. 560, 561-63, 546 S.E.2d 414, 415-16 (2001), plaintiffs had purchased property for the purpose of opening a restaurant. The defendant seller had informed them that the septic system on site was adequate for that purpose. Subsequently, plaintiffs learned that they could not obtain the necessary license for the restaurant because the septic system was insufficient. In affirming the grant of summary judgment, the Court pointed to the purchase contract, which specifically granted plaintiffs the right to inspect the septic system:

> The water and sewer systems shall be adequate and not in need of immediate repair. The purchaser shall have the option to have the above-listed systems, items and conditions inspected by a reputable inspector or contractor at purchasers[']' expense prior to the time this Contract is executed. Execution of this Contract by the seller and purchasers signifies acceptance of premises in its current condition.

Id. at 563, 546 S.E.2d at 416. This provision—essentially specifying that signature on the contract resulted in a purchase of the premises "as is"—is materially indistinguishable from paragraph 14 of the Purchase Agreement in this case.

In *Hearne*, based on this provision, the fact that the negotiation of the sale was at arm's length, and the opportunity of plaintiffs to inspect the property and determine its suitability, the Court ruled that "there is no evidence that defendant . . . prevented plaintiffs from making such reasonable inspections of the property as was their

3. The Agreement expressly defined "Tangible Personal Property" as including "all sewer and underground water systems[.]"

responsibility" and held summary judgment was, therefore, proper. *Id. See also Goff v. Frank A. Ward Realty & Ins. Co.*, 21 N.C. App. 25, 29-30, 203 S.E.2d 65, 68 (no action for fraud based on septic tank problems where parties dealt at arms' length, plaintiffs had full opportunity to inspect lot and inquire of neighbors as to septic tank problems, and defendants resorted to no artifice calculated to induce plaintiffs to forego investigation), *cert. denied*, 285 N.C. 373, 205 S.E.2d 97 (1974). RD&J has offered no persuasive reason why we should reach a different conclusion with respect to its failure to inspect.

Because of RD&J's lack of evidence of scienter and reasonable reliance, we hold that the trial court properly granted defendants' motion for summary judgment as to RD&J's fraud claim.

Unfair and Deceptive Trade Practices Claim

[4] The elements of a claim for unfair or deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 (2003) are: (1) an unfair or deceptive act or practice or an unfair method of competition; (2) in or affecting commerce; (3) that proximately causes actual injury to the plaintiff or to his business. *Furr v. Fonville Morisey Realty, Inc.*, 130 N.C. App. 541, 551, 503 S.E.2d 401, 408 (1998), *disc. review improvidently allowed*, 351 N.C. 41, 519 S.E.2d 314 (1999). To prevail on a Chapter 75 claim, a plaintiff need not show fraud, bad faith, or actual deception. Instead, it is sufficient if a plaintiff shows that a defendant's acts possessed the tendency or capacity to mislead or created the likelihood of deception. *Chastain v. Wall*, 78 N.C. App. 350, 356, 337 S.E.2d 150, 153 (1985), *disc. review denied*, 316 N.C. 375, 342 S.E.2d 891 (1986). Although it is a question of fact whether the defendant performed the alleged acts, it is a question of law whether those facts constitute an unfair or deceptive trade practice. *First Atl. Mgmt., Corp. v. Dunlea Realty, Co.*, 131 N.C. App. 242, 252-53, 507 S.E.2d 56, 63 (1998).

Even though we have determined that RD&J has presented insufficient evidence of fraud, we must still consider whether defendants' acts had the tendency or capacity to mislead. In a business context, this question is determined based on the likely effect on "the average businessperson." *Bolton Corp. v. T. A. Loving Co.*, 94 N.C. App. 392, 412, 380 S.E.2d 796, 808, *disc. review denied*, 325 N.C. 545, 385 S.E.2d 496 (1989).

Plaintiff does not explain the factual basis for its unfair and deceptive trade practices claim in its appellate brief and, in the

complaint, plaintiff merely incorporates by reference the factual allegations offered in support of its fraud claim. The essence of those allegations is that defendants represented that the property was in compliance with applicable regulations, but failed to disclose the existence of the diverter pipe, thereby deceiving plaintiff. Viewing the evidence in the light most favorable to plaintiff, defendants' acts did not have the capacity to deceive a reasonable businessperson.

The RD&J partners were sophisticated businessmen, electing to purchase property and a sewage system "as is" even though they had never had the property or system inspected. The phrase "as is" placed plaintiff, as a business, on notice that it needed to determine the "existing condition" of the parks, especially in light of defendants' qualification that the representations in paragraphs 17 and 19 of the Purchase Agreement were only "to the best of its knowledge." Even taken in the light most favorable to plaintiff, the circumstances of this case—including the "as is" and inspection provision in the Purchase Agreement, the lack of any evidence that an inspection would have failed to reveal the existence of the diverter pipe, and the fact that defendants disclosed the diverter pipe to the Health Department, whose records were available to RD&J—did not constitute an unfair or deceptive trade practice. *See Spartan Leasing Inc. of N.C. v. Pollard*, 101 N.C. App. 450, 461, 400 S.E.2d 476, 482 (1991) (summary judgment was proper on unfair and deceptive trade practices claim for the same reasons that the court had previously found any reliance on representations to be unreasonable).

For the foregoing reasons, we hold the trial court did not err in granting summary judgment to defendants on each of plaintiff's claims.

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

STATE OF NORTH CAROLINA v. DARRYL ROBIN TAYLOR

No. COA03-334

(Filed 17 August 2004)

1. Evidence— expert testimony—blood alcohol extrapolation

The admission of expert testimony about an impaired driving defendant's alcohol concentration at the time of an automobile accident was not an abuse of discretion even though the witness used an average alcohol elimination rate when doing a retrograde extrapolation. Moreover, there was other evidence sufficient for a DWI conviction in the observations of the officer who arrested defendant; driving while impaired can be established by either blood alcohol level or the opinion of a highway patrolman.

2. Appeal and Error— plain error review—instructions and evidence only

Plain error review did not apply to an argument concerning information revealed to the jury by the judge just before the jury was polled. Plain error doctrine is limited to jury instructions and evidentiary matters.

Judge TYSON concurring in result.

Appeal by defendant from judgment dated 12 September 2002 by Judge L. Todd Burke in Superior Court, Forsyth County. Heard in the Court of Appeals 27 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.

Jarvis John Edgerton, IV for defendant-appellant.

McGEE, Judge.

Darryl Robin Taylor (defendant) was indicted on 24 September 2001 by the Forsyth County grand jury for habitual impaired driving in violation of N.C. Gen. Stat. § 20-138.5. Defendant stipulated pre-trial to his three prior convictions of driving while impaired. Defendant was convicted of driving while impaired on 11 September 2002. The trial court found defendant to have a prior record level IV and sentenced defendant to a minimum term of twenty-two months and a maximum term of twenty-seven months in prison. Defendant appeals.

The State's evidence at trial tended to show that Preston Browder (Browder) was traveling north on Highway 66 in Rural Hall, North Carolina, in his 1984 GMC truck on 15 March 2001 at approximately 1:00 p.m. As Browder was driving, he saw a van driven by defendant coming towards him. The van was traveling south but was entirely in Browder's northbound lane. Browder testified that defendant "was slumped over like he was asleep." In an effort to avoid being hit by defendant's van, Browder "made a quick right." However, defendant's van hit Browder's truck on the driver's side and "turned [Browder] around in a private driveway." Browder testified that after the collision, defendant walked over to Browder's truck and apologized to Browder. Defendant came "within five feet" of Browder but not close enough for Browder to determine whether defendant had been drinking.

Trooper M.W. Davis (Trooper Davis) of the N.C. State Highway Patrol testified that he responded to the accident around 1:10 p.m. and observed defendant's van facing south but located in the northbound lane. Browder's vehicle was facing west in a driveway on the shoulder of the northbound lane. Trooper Davis approached defendant's van and asked defendant for his driver's license and registration. Trooper Davis testified that defendant responded by "look[ing] at [him] with a blank face and then [defendant] started fumbling through some papers." Trooper Davis noticed a "strong odor of alcohol" and "had to assist [defendant]" in getting to the patrol car. Defendant filled out a voluntary statement and Trooper Davis "barely [could] make [the statement] out" due to defendant's failure to write on the appropriate lines. When asked the reason for the collision, defendant stated that he had fallen asleep.

After defendant's statement was completed, Trooper Davis administered two Alcosensor tests and had defendant perform a "walk-and-turn" test and a "sway test." Defendant was "swaying off the line" with the walking test and was "swaying side to side" with the sway test. Trooper Davis arrested defendant for driving while impaired and took him to the "Forsyth County Breathalyzer room" in the county jail. Upon arrival, Trooper Davis searched defendant and found ten empty packages of Guaifenesin tablets, which defendant stated helped him with his breathing problems. Before administering a breathalyzer test, Trooper Davis administered two additional performance tests. At 3:18 p.m., defendant submitted to the first breathalyzer test, which showed an alcohol concentration of 0.05.

Paul Glover (Glover), a research scientist and training specialist with the forensic tests for alcohol branch of the North Carolina Department of Health and Human Services, testified as an expert in breath and blood alcohol testing, blood alcohol physiology and pharmacology, and the effect of drugs on human performance and behavior. Glover testified that he performed a retrograde extrapolation and determined that defendant's alcohol concentration at the time of the collision was 0.08. Glover further testified about the combined effect of alcohol and Guaifenesin. Defendant presented no evidence.

We first note that defendant has failed to present an argument in support of assignments of error numbers one, two, four, five, six, seven, eight, nine, and eleven and they are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

[1] Defendant argues in assignment of error number three that the trial court erred in allowing Glover's testimony that defendant's blood alcohol content at the time of the crash was 0.08, based on an average alcohol elimination rate of 0.0165. Glover utilized a retrograde extrapolation method to determine defendant's alcohol concentration at the time of the accident. The alcohol elimination rate used by Glover in this calculation was an average rate of 0.0165. Defendant argues that because the elimination rate was based on an average, rather than defendant's specific rate, the conclusion of defendant's alcohol content level at the time of the collision was "without foundation, speculative, and mislead[ing] [to] the jury[.]" For the reasons stated below, we find this argument to be without merit.

Defendant contends that the average rate used by Glover "applied a rate of elimination derived from the average rate found in a sample of 'drinking drivers' during roadside tests." Defendant argues that the rate of elimination used for defendant was actually derived by presuming that defendant "falls in [a] class of people labeled 'drinking drivers[.]' " However, we note that defendant's assertion is incorrect. Rather, Glover testified that he used a "conservative rate" that is "less than what has been reported in drinking drivers." Further, Glover specifically agreed that the average rate he used is lower than the rates from published studies concerning alcohol abusers and persons who drink and drive.

We note at the outset that "[i]t is well-established that trial courts must decide preliminary questions concerning . . . the admissibility of expert testimony." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citing N.C. Gen. Stat. § 8C-1, Rule

104(a) (2003)). "[T]rial courts are afforded 'wide latitude of discretion when making a determination about the admissibility of expert testimony.' " *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686 (quoting *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984)). Thus, "a trial court's ruling on . . . the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686.

Howerton sets forth the applicable three-step inquiry from *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995) concerning the admissibility of expert testimony: "(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686 (internal citations omitted).

Regarding the first step, "when specific precedent justifies recognition of an established scientific theory or technique advanced by an expert, the trial court should favor its admissibility, provided the other requirements of admissibility are likewise satisfied." *Id.* at 459, 597 S.E.2d at 687. Our Court has "accepted the reliability of extrapolation evidence since 1985." *State v. Davis*, 142 N.C. App. 81, 90, 542 S.E.2d 236, 241, *disc. review denied*, 353 N.C. 386, 547 S.E.2d 818 (2001). However, defendant indicates that he "is not challenging the reliability of blood extrapolation science or the general admissibility of such evidence." Rather, defendant challenges Glover's testimony on the ground that it lacked sufficient foundation since the alcohol elimination rate used by Glover when extrapolating was an average rate rather than defendant's actual elimination rate.

Defendant cites a 19 November 2002 unpublished opinion by this Court, *State v. Swain* (COA02-6), in acknowledging that "the science of blood alcohol extrapolation can yield specific conclusions about a defendant if two tests are done to measure that person's particular rate of elimination." In *Swain*, the defendant's blood alcohol level was tested at two separate points after a car accident. Based on these values, an expert used the extrapolation method to determine the defendant's blood alcohol level at the time of the accident. The implication in *Swain* is that the expert determined the defendant's actual rate of elimination by testing him at two separate intervals. In contrast, defendant in the case before us was only tested once after the accident. Based on this level and an *average* elimination rate, Glover testified to defendant's blood alcohol level at the time of the accident.

Our Court addressed the very issue of whether an average elimination rate can be used for an extrapolation calculation in *State v. Catoe*, 78 N.C. App. 167, 336 S.E.2d 691 (1985), *disc. review denied*, 316 N.C. 380, 344 S.E.2d 1 (1986). In *Catoe*, the defendant argued that the trial court erred in allowing the expert witness to testify that the average person displays a certain rate of decline in blood alcohol content in the hours after the last consumption of alcohol, and that based on that average rate of decline (*i.e.*, elimination rate), the expert witness determined what the defendant's blood alcohol content would have been at the time of the accident. *Catoe*, 78 N.C. App. at 168, 336 S.E.2d at 692. The specific average elimination rate which was used is not indicated in *Catoe*. However, this Court found that the trial court did not err in admitting the expert's testimony despite the use of an average elimination rate. *Id.* at 168-69, 336 S.E.2d at 692-93.

Our Court reasoned in *Catoe* that the expert testified that he had done experiments to determine the average rate of blood alcohol elimination and had arrived at an average rate "which matched that observed by many other nationally and internationally known scientists in [the expert's] field." *Id.* at 169, 336 S.E.2d at 692. Although the expert admitted that a deviation from the average was possible in individual cases, he testified that "his data were very consistent across the various subcategories of the population." *Id.* Based on this information, our Court concluded in *Catoe* that the expert's testimony was sufficiently reliable and the trial court did not abuse its discretion in admitting it. This Court further held that the possibility of minor variations "went to the weight, not the admissibility of [the expert's] testimony." *Id.* at 169, 336 S.E.2d at 693. We view *Catoe* as the type of "specific precedent" indicated in *Howerton* which is meant to encourage a trial court to favor the admissibility of extrapolation evidence based on an average elimination rate.

Our case is similar to *Catoe* because Glover used an average elimination rate of 0.0165 in his extrapolation calculation to determine defendant's blood alcohol level at the time of the accident. Glover thoroughly explained the steps of an extrapolation calculation: (1) determine the amount of time that has elapsed between the collision and the actual breathalyzer test; (2) multiply the amount of elapsed time by the rate of alcohol elimination from the body, which represents the amount of alcohol that has been eliminated since the time of the collision; and (3) add the amount of eliminated alcohol to the breathalyzer test result. This figure represents what the person's blood alcohol content would have been at the time of the collision.

Glover stated that extrapolation is possible "because we know that humans eliminate alcohol at a fairly predictable rate." Glover admitted that elimination rates vary "depending on a person's experience with alcohol" but stated that "there are elimination rates that have been published for over 65 years that have gained acceptance in the scientific community" which make extrapolation possible. Glover elaborated on how rates can vary and then stated that a "very conservative rate" is used for calculations in North Carolina. Glover described the 0.0165 rate as a conservative rate which tends to "favor the final result because it's going to give you a smaller number." When asked why he used this conservative rate, Glover responded, "because we don't know absolutely . . . a person's alcohol history necessarily[.]" This testimony established that the elimination rate used by Glover was not defendant's actual rate but rather an average rate.

In addition, we note that during Glover's testimony, he performed the actual calculation using the relevant figures in this case. Before multiplying 2.1 (the elapsed time) by 0.0165 (the elimination rate), he was asked, "[a]nd that would be the rate of elimination of alcohol from this defendant's body; is that correct?" Glover responded by saying "[c]orrect." However, in light of the detailed explanation about the process and the origin of the average elimination rate, the jury heard that 0.0165 was not defendant's actual elimination rate.

Further, when questioned about the origin of the rate he used, Glover said it originated with an individual named Professor Whitmark. Glover elaborated by stating that since 1935, a tremendous number of studies have been conducted to measure elimination rates. Those studies have agreed with the rate Professor Whitmark determined, with the exception that people with greater experience with alcohol have a faster elimination rate. Thus, as in *Catoe*, we conclude that the trial court did not err in admitting Glover's extrapolation testimony even though an average elimination rate was used for the calculation.

We note that the concurring opinion attempts to distinguish *Catoe* on the ground that unlike defendant in the case before our Court, the defendant in *Catoe* did not specifically object to the admission of the expert's testimony. However, we note that this failure to object in *Catoe* has no bearing on our analysis. Despite the lack of proper objection, this Court assumed the question was properly before it and concluded that the expert evidence was nonetheless properly admitted. *Catoe*, 78 N.C. App. at 168, 336 S.E.2d at 692.

We again note that defendant does not challenge the general admissibility of extrapolation evidence if the calculation is based on a defendant's specific elimination rate. However, defendant asserts that an extrapolation based on an average elimination rate is not the type of extrapolation that is generally admissible. Although we do not find this argument persuasive in light of *Catoe*, even if we assume that defendant is correct in his assertion that the type of extrapolation calculation done in this case is not generally admissible, we nonetheless hold that under *Howerton*, the trial court did not err in allowing the testimony.

As expressed in *Howerton*, under the first step of *Goode*, if "the trial court is without precedential guidance or faced with novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques," the trial court must look to other " 'indices of reliability' to determine whether the expert's proffered scientific or technical method of proof is sufficiently reliable[.]" *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687 (quoting *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 853 (1990)).

> This assessment does not, however, go so far as to require the expert's testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence. . . . Therefore, once the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility.

Howerton, 358 N.C. at 460-61, 597 S.E.2d at 687-88.

In light of the fact that defendant does not challenge Glover's qualification as an expert or the general relevance of extrapolation evidence, we need not address the second and third steps delineated above regarding the admissibility of expert testimony. Based on our discussion above, we hold that the trial court did not abuse its discretion in allowing Glover's testimony.

We also feel compelled to address *Hughes v. Vestal*, 264 N.C. 500, 142 S.E.2d 361 (1965), the case which the concurrence relies upon for the broad proposition that "[o]ur Supreme Court has rejected average data as evidence to show how a specific action may have occurred or how an individual may have reacted or responded in an 'actual set of circumstances.' " However, the *Hughes* Court merely concluded that

"charts and tables of stopping distances are incompetent and inadmissible" because such charts constitute hearsay, lack proper foundation, and because they "furnish[] no specific standards by which the facts of a particular case may be evaluated." *Hughes*, 264 N.C. at 505, 142 S.E.2d at 365. Further, in contrast to the case before our Court, *Hughes* did not involve the admission of expert testimony. Notably, however, the *Hughes* Court noted another case where "expert testimony as to the distance within which a certain truck could be stopped when going at a certain rate of speed was . . . admissible." *Id.* at 504, 142 S.E.2d at 364. For these reasons, we find that *Hughes* is not applicable to the case before us.

In addition, we note that N.C. Gen. Stat. § 20-138.1 governs the offense of impaired driving and provides that a person is guilty of the offense if he drives "(1) [w]hile under the influence of an impairing substance; or (2) [a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more." N.C. Gen. Stat. § 20-138.1(a) (2003). Thus, "the acts of driving while under the influence of an impairing substance and driving with an alcohol concentration of [.08] are two separate, independent and distinct ways by which one can commit the single *offense* of driving while impaired." *State v. Coker*, 312 N.C. 432, 440, 323 S.E.2d 343, 349 (1984). According to the pattern jury instructions, if "the evidence supports submission of the case under both alternatives . . . instructions on both alternatives should be given." N.C.P.I.—Crim. 270.20. The trial court specifically stated it would "adhere to the pattern instructions" and neither party objected. Subsequently, the instruction on impaired driving in this case tracked the language of the pattern instruction.

Although the primary value of Glover's testimony was to establish that defendant's blood alcohol content was above the statutory limit at the time of the collision, the State was not required to establish that level to prove that defendant was driving while impaired (DWI). *See State v. Sigmon*, 74 N.C. App. 479, 482, 328 S.E.2d 843, 846 (1985) (the defendant's blood alcohol content of 0.06 did not establish presumption that the defendant was not impaired; other evidence, principally the opinion of a highway patrolman, sufficed to convict). In fact, "the State may prove DWI where the [blood alcohol content] is entirely unknown or less than [0.08]." *State v. Harrington*, 78 N.C. App. 39, 46, 336 S.E.2d 852, 856 (1985). "The opinion of a law enforcement officer . . . has consistently been held sufficient evidence of impairment, provided that it is not solely based on the odor of alco-

hol." *State v. Mark*, 154 N.C. App. 341, 346, 571 S.E.2d 867, 871 (2002), *aff'd*, 357 N.C. 242, 580 S.E.2d 693 (2003).

In this case, there was evidence that Trooper Davis smelled an odor of alcohol on defendant's person at the accident scene, that defendant needed assistance with walking to the patrol car, that defendant had difficulty writing his statement on the appropriate lines, that defendant had a "blank face," and that defendant did not perform satisfactorily on field sobriety tests administered by Trooper Davis. Further, Trooper Davis gave his opinion that defendant "had consumed a sufficient amount of alcohol to impair both his mental and physical faculties to such an extent that appreciable impairment of either or both [of] his faculties was evident." This evidence was sufficient for a DWI conviction regardless of Glover's testimony. Thus, even if the admission of Glover's testimony was error, the error was not prejudicial.

[2] Defendant argues in assignment of error number ten that the trial court erred by publishing defendant's prior record level to the jury immediately before polling the jurors for their verdicts. Defendant argues that this error violated Rules 402 and 403 of the North Carolina Rules of Evidence because defendant's prior record had no relevance to the issue before the jury and was highly prejudicial information to be revealed to the jury. N.C. Gen. Stat. § 8C-1, Rules 402, 403 (2003). Defendant acknowledges that he failed to object at trial and accordingly asserts that plain error review is applicable. However, the North Carolina Supreme Court "has previously limited application of the plain error doctrine to jury instructions and evidentiary matters." *State v. Anderson*, 355 N.C. 136, 142, 558 S.E.2d 87, 92 (2002). Defendant's argument fits within neither of these limited situations. Defendant's plain error argument therefore fails and assignment of error number ten is overruled.

No error.

Judge WYNN concurs.

Judge TYSON concurs in the result with a separate opinion.

TYSON, Judge concurring in result only.

I concur in the result reached in the majority opinion to uphold defendant's driving while impaired conviction. I disagree with its con-

clusion that the trial court did not err in allowing Glover to testify that "defendant's" blood alcohol concentration at the time of the accident was 0.08 using a retrograde average extrapolation rate.

I. Average Data

The State tendered evidence of an average alcohol elimination rate data to prove *defendant's* actual alcohol elimination rate and establish his blood alcohol concentration at the time of the accident. Unlike the defendant in *State v. Catoe*, defendant here specifically objected to Glover's qualifications and argued that his testimony lacked foundation. 78 N.C. App. 167, 168, 336 S.E.2d 691, 692, *disc. rev. denied*, 315 N.C. 186, 338 S.E.2d 107 (1985) (expert's qualifications were "not contested" and "[d]efendant's objections to the contested testimony were only general."); *see also State v. Davis*, 142 N.C. App. 81, 90, 542 S.E.2d 236, 241, *disc. rev. denied*, 353 N.C. 386, 547 S.E.2d 818 (2001) ("Defendant did not object to [the expert's] qualifications."). Since we held in *Catoe*, "[t]he assignment [of error] is not properly before this Court," the remaining discussion in the opinion is *obiter dicta* and is not binding as precedent at bar. 78 N.C. App. at 168, 336 S.E.2d at 692.

The trial court admitted, over defendant's specific objection, Glover's testimony that "defendant's" elimination rate was 0.0165 and also that "defendant" had a 0.08 at the time of the accident. Glover relied on "an average extrapolation rate," pure hearsay, instead of defendant's *actual* elimination rate to reach his conclusions. Glover failed to establish any connection or common attributes to correlate the average extrapolation rate to defendant's actual rate to establish relevancy.

Recently, our Supreme Court clarified the test for admissibility of expert testimony:

> The most recent North Carolina case from this Court to comprehensively address the admissibility of expert testimony under Rule 702 is *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), which set forth a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? *Id.* at 527-29, 461 S.E.2d at 639-40. (2) Is the witness testifying at trial qualified as an expert in that area of testimony? *Id.* at 529, 461 S.E.2d at 640. (3) *Is the expert's testimony relevant*? *Id.* at 529, 461 S.E.2d at 641.

Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (emphasis supplied). Defendant argues Glover laid no foundation for his testimony because he failed to show any relevance in using the average rate data as it applied to defendant. I agree. The use of average elimination data, instead of defendant's actual elimination rate, is hearsay, irrelevant, and inadmissible under our Supreme Court's holdings in *Goode* and *Howerton*.

Our Supreme Court has rejected average data as evidence to show how a specific action may have occurred or how an individual may have reacted or responded in an "actual set of circumstances." *Hughes v. Vestal*, 264 N.C. 500, 505, 142 S.E.2d 361, 365 (1965). In *Hughes*, our Supreme Court addressed the admission into evidence of a chart showing average stopping distances. The Court rejected the use of these charts at trial and held:

> A formula, in which so many components are variables and in which there is only one constant (rate of speed), cannot by projection of a positive result (distance), based on speculative averages, be of sufficient accuracy and relevancy to rise of its own force to the dignity of evidence in an actual set of circumstances. This and its hearsay character have led to its rejection as evidence in a large majority of the jurisdictions where the question has been directly raised.

Id. The Court stated, "The factors involved in stopping automobiles are so many and varied that a fixed formula is of slight, if any, value in a given case." *Id.* The Court reiterated that numerous variables affect the outcome in specific situations, including the vehicle's weight, condition of tire tread, force of brakes, and types of roadways. *Id.*

Similarly, Glover admitted that numerous variables exist to determine an individual's alcohol elimination rate, including, among other things, a person's: (1) gender; (2) height; (3) weight; (4) age; (5) elapsed time since eating; (6) "recent consumption" of alcohol; (7) type of alcohol consumed; and (8) "a person's experience with alcohol." Glover testified that an individual's elimination rate "could be different within a given individual on different days." Glover further testified that "the ideal way [to know defendant's elimination rate] would be to get multiple samples at the time of the event, the arrest or the crash . . . [or] do a controlled experiment where you . . . measured it." Glover neither identified nor correlated any similarities between defendant and those out of court persons

tested during the experiments that collectively led to the "average" elimination rate.

In *Catoe*, we recognized, "usual constraints of relevance continue to apply." 78 N.C. App. at 170, 336 S.E.2d at 693. Average data is hearsay, purely circumstantial, and irrelevant to defendant's alcohol elimination rate and blood alcohol concentration at the time of the accident. The State failed to prove the relevance of Glover's average data testimony. Glover had neither personal knowledge nor any foundation to testify that *defendant's* rate of eliminating alcohol from his body is 0.0165 per hour. *See Howerton*, 358 N.C. at 458, 597 S.E.2d at 686. Glover's opinion that *defendant's* blood alcohol concentration was 0.08 at the time of the accident was also without foundation. Defendant's breathalyzer test showed 0.05, well below the "0.08 or more" alcohol concentration required for conviction under the statute. N.C. Gen. Stat. § 20-138.1(a)(2) (2003).

Glover failed to show how another out of court individual's or the average of a group of other individuals' alcohol elimination rates were relevant to defendant's rate on the date of the accident. The trial court erred in admitting this testimony. *See Howerton*, 358 N.C. at 458, 597 S.E.2d at 686. Glover's use of a "conservative rate" does not cure the hearsay defect or establish relevancy. Glover also failed to lay a foundation by correlating the average rates to defendant's age, sex, height, weight, or any other physical characteristic to establish relevancy to be admitted into evidence. If Glover's testimony on average rates was the sole basis for the jury to return a guilty verdict on defendant's having a blood alcohol concentration of 0.08 or more, his conviction must be reversed.

II. Presentation of Issues to the Jury

The trial court instructed the jury pursuant to N.C. Gen. Stat. § 20-138.1(a) (2003) that it should convict defendant if it found beyond a reasonable doubt that he operated a vehicle either: "under the influence of an impairing substance or had consumed sufficient alcohol that . . . defendant had an alcohol concentration of 0.08 or more . . . ." The issues, however, were not submitted to the jury separately. Further, the jury's verdict does not reflect which prong of the statute they found defendant violated. As defendant failed to request separate instructions, object to the trial court's instructions, assign error to the instructions, or argue plain error, this issue is not reviewable. Despite a clear indication in the record that the jury returned an unanimous verdict of either, or both, a 0.08 blood alcohol concentra-

tion or an appreciable impairment, defendant failed to preserve this error and waived his right to appellate review of the jury instructions. *See* N.C.R. App. P. 10(b)(2) (2004). Where the evidence shows defendant may have consumed a combination of alcohol and another impairing substance, the better practice is for the trial court to submit the issues separately to the jury to determine whether defendant operated a vehicle: (1) "[w]hile under the influence of an impairing substance;" or (2) "[a]fter having consumed sufficient alcohol that [defendant] has . . . an alcohol concentration of 0.08 or more." N.C. Gen. Stat. § 20-138.1(a)(1)-(2) (2003).

III. Conclusion

The trial court erred in admitting Glover's testimony of defendant's extrapolation rate and blood alcohol concentration based on irrelevant average data. Average data alone is hearsay, not relevant, and insufficient to prove defendant's alcohol extrapolation rate and blood alcohol concentration level at the time of the accident. Without proving the relevance of this average data as it relates to defendant's actual elimination rate, Glover lacked a foundation to offer this portion of his testimony. Defendant was denied his right to confront and cross-examine these hearsay declarations, which formed the basis for Glover's average data and were introduced to prove the truth of the matters asserted. In light of the other substantial evidence presented at trial and defendant's failure to object to the presentation of issues to the jury, this error was harmless.

Other testimony sufficiently supports the jury's conviction of defendant under N.C. Gen. Stat. § 20-138.1(a)(1) of driving "[w]hile under the influence of an impairing substance." *See State v. Coker*, 312 N.C. 432, 440, 323 S.E.2d 343, 349 (1984) (N.C. Gen. Stat. § 20-138.1 creates one offense that "may be proved by either or both theories."); *see also State v. Mark*, 154 N.C. App. 341, 346, 571 S.E.2d 867, 871 (2002), *aff'd*, 357 N.C. 242, 580 S.E.2d 693 (2003) ("The opinion of a law enforcement officer . . . has consistently been held sufficient evidence of impairment . . . ."). Trooper Davis testified that defendant smelled of alcohol, stared at him with a "blank face," fumbled through his papers, and needed assistance in getting to the patrol car. Trooper Davis also testified defendant was "swaying" during the "walk-and-turn" test, as well as during the "sway test." Trooper Davis found ten empty packages of Guaifenesin tablets on defendant. Glover testified as an expert on the combined effect of these tablets and alcohol. This evidence is sufficient to support

defendant's driving while impaired conviction under N.C. Gen. Stat. § 20-138.1(a)(1).

I concur in the result reached by the majority opinion and vote to sustain defendant's conviction.

STATE OF NORTH CAROLINA v. WILLIE MELVIN JACKSON

No. COA03-733

(Filed 17 August 2004)

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

The trial court did not err in a first-degree murder, attempted robbery with a firearm, and conspiracy to commit robbery with a firearm case by denying defendant's motion to suppress his 7 June 2001 statement made to an officer while defendant sat with two officers while waiting for juvenile authorities to transport defendant elsewhere, because: (1) the officer did not initiate any questioning with defendant, defendant spontaneously stated to the officer that he knew where the cap in the room came from and the officer simply responded "so do I" which is not the type of statement that necessarily invites a response, and defendant thereafter volunteered information about another robbery unrelated to defendant's pending charges; (2) the circumstances did not warrant a conclusion that the officer should have known that he would elicit an incriminating response from defendant by saying "so do I;" (3) the officer may have simply asked for clarification for such things as who defendant meant by "we," and defendant failed to cite any cases to support the assertion that the officer's requests for clarification amounted to interrogation; and (4) although defendant's Sixth Amendments rights attached, defendant was not interrogated and thus his Sixth Amendment rights were not violated.

2. Constitutional Law— presumption of innocence—instruction not to form an opinion—plain error analysis

The trial court did not deprive defendant of his constitutional right to the presumption of innocence and did not commit plain error by instructing the jury before the trial began not to form an

opinion regarding defendant's guilt or innocence because: (1) the presumption of innocence is not evidence, but instead is a way of describing the prosecution's duty to produce evidence of guilt and to convince the jury beyond a reasonable doubt; and (2) defendant failed to cite any cases showing that such an instruction constituted an error.

3. Juveniles— conspiracy to commit armed robbery—jurisdiction—absence of juvenile petition—transaction related to transferred felony charge

The superior court had jurisdiction over an offense of conspiracy to commit armed robbery that occurred when defendant was fifteen years old, even though no juvenile petition had been filed in district court regarding the conspiracy charge, where juvenile petitions alleging murder and attempted armed robbery were filed in district court; the district court ordered that those offenses be transferred to superior court; defendant was subsequently indicted for first-degree murder, attempted armed robbery and conspiracy to commit armed robbery; the offense of conspiracy to commit armed robbery fell within the transaction related to the felony charge of attempted armed robbery that was transferred from district to superior court; and the superior court thus had jurisdiction over the conspiracy offense under N.C.G.S. § 7B-2203(c).

4. Homicide— felony murder—attempted armed robbery

The trial court erred by failing to arrest judgment on an attempted armed robbery offense where that offense served as the underlying felony for defendant's felony murder conviction because where defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the murder conviction.

5. Homicide— felony murder—short-form indictment—constitutionality

The trial court did not err by entering judgment convicting defendant of first-degree murder based on an alleged insufficient indictment to allege the elements of felony murder, because our Supreme Court has consistently held that the short-form indictment is sufficient to charge a defendant with first-degree murder.

6. Constitutional Law— effective assistance of counsel—dismissal without prejudice—motion for appropriate relief

Defendant's claim of ineffective assistance of counsel is dismissed without prejudice so that defendant may file a motion for appropriate relief before the trial court because there is inadequate evidence of ineffective assistance of counsel in the record.

Appeal by defendant from judgments dated 24 October 2002 by Judge Cy A. Grant in Superior Court, Northampton County. Heard in the Court of Appeals 4 March 2003.

Attorney General Roy Cooper, by Assistant Attorney General Steven F. Bryant, for the State.

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

McGEE, Judge.

Willie Melvin Jackson (defendant) was convicted on 24 October 2002 of first degree murder, attempted robbery with a firearm, and conspiracy to commit robbery with a firearm. The trial court entered judgment and sentenced defendant to life imprisonment without parole for the murder conviction. The trial court further sentenced defendant to a minimum of 64 months and a maximum of 86 months in prison for the attempted robbery conviction and a minimum of 25 months and a maximum of 39 months in prison for the conspiracy conviction to run consecutively. Defendant appeals.

The State's evidence at trial tended to show that James Troutman (Troutman), manager of First Citizen's Bank (the bank) in Conway, and two women working as bank tellers, Vickie Howell (Howell) and Carolyn Watson (Watson), were working on the afternoon of 24 May 2001. Howell testified that at approximately 3:25 p.m. that afternoon, she was waiting on a customer, Marjorie Joyner (Joyner). Howell heard someone yell and she saw a "young guy" who had come into the bank with a "black mesh type thing on his face." Howell testified that the young male said, "don't push the f—— button" and then she heard a shot. Howell discovered Watson lying on the floor and told Troutman that Watson had been shot.

Joyner testified that while she was standing at Howell's teller window, she observed two young males enter the bank. One announced that he meant "business" and walked toward Watson's

teller window, while the second male crouched down. Joyner heard gunfire and then saw that Watson had fallen.

Troutman testified that at about 3:20 or 3:25 p.m. that afternoon, he was working at his desk when he heard someone yell, "nobody touch that f—— button." Troutman looked up and saw a male with a pistol in his hand in the bank lobby. Troutman also saw a second male crouched down at the corner of the teller window. The male with the pistol passed by Troutman's office and walked toward Watson's teller window. After the male passed by his office, Troutman heard a gunshot. The two males fled the bank immediately after the gunshot. Watson died on the way to the hospital as the result of a single gunshot wound just below her chin.

Mae Woodard (Woodard) testified that she saw defendant and another male named Cody Hill (Hill) standing on the street corner outside the bank at around 3:20 p.m. that afternoon. Woodard, who had previously taught defendant and Hill in school, stopped to speak with them. Woodard then went into the bank to make a deposit, and when she left the bank, she observed defendant and Hill walking away from the bank. Shortly after arriving back at work, Woodard saw rescue squad vehicles and police cars outside the bank. She returned to the bank and heard that Watson had been shot. Woodard informed an officer at the scene that she had just been at the bank and had seen two of her former students, defendant and Hill, on the corner outside the bank. She gave a written statement at the Conway Police Department. Afterwards, Woodard was taken back to the bank and was asked to view a videotape from the bank's surveillance camera. Woodard identified the male with the gun as defendant and the other male as Hill.

Conway Chief of Police Billy Duke (Chief Duke) testified that at around 7:00 p.m. that evening, FBI Agent Fernando Fernandez (Agent Fernandez), who was assisting with the investigation, spoke with Hill's father. Agent Fernandez then asked Chief Duke to check out a car at the Arrowhead Trailer Park belonging to Toby Gary (Gary), a twenty-four-year-old man from New York. Chief Duke and Deputy Kevin Bird (Deputy Bird) searched the unlocked car, which was parked at Lot 107 of the Arrowhead Trailer Park. The officers found two caps in the car that matched the description of the caps worn by the two males at the bank. On the way back to the police station, the officers heard over the police radio that three suspects, Gary, Hill, and defendant, had been detained.

Chief Ted Sumner (Chief Sumner) of the Gaston Police Department testified that he took Gary and defendant into custody that evening and transported them to the Conway Police Department with defendant in the front passenger's seat and Gary in the rear passenger area. Later that evening, the Conway Police Department asked Chief Sumner to check his car for a gun. Chief Sumner did so and found a handgun beneath the passenger's seat. Expert testimony at trial established that Watson was shot by the handgun found under the passenger's seat of Chief Sumner's patrol car.

The State also offered evidence of three statements defendant made to police. In defendant's first statement, made on the evening of 24 May 2001, defendant stated that Gary and Hill went into the bank on the afternoon of 24 May 2001 while defendant waited for them. While Gary and Hill were in the bank, defendant went to a thrift store and then waited for them in the car. In his second statement that evening, defendant admitted that he shot Watson, but defendant claimed that the shooting was an accident. Defendant also made a third statement on 7 June 2001 to Detective Charles Barfield (Officer Barfield) of the Northampton Sheriff's Department. In his third statement, defendant stated that he was with Gary and Shawn Garris (Garris) on the evening of 23 May 2001 when a man was robbed by Gary and Garris. Defendant further stated that they had attempted to get a gun "to do a job." Defendant presented no evidence.

We note at the outset that defendant has failed to present an argument in support of assignments of error numbers two, four through seven, ten, fourteen, fifteen, twenty, twenty-one, twenty-three through twenty-six, twenty-nine, and thirty-two through thirty-five. Therefore, those assignments of error are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

[1] Defendant first argues in assignments of error numbers sixteen through eighteen that the trial court erred in denying his motion to suppress his 7 June 2001 statement because it was obtained as a result of custodial interrogation after defendant had been formally charged. Accordingly, defendant asserts that he is entitled to a new trial because his constitutional rights under the Fifth and Sixth Amendments of the United States Constitution were violated. For the reasons stated below, we disagree.

In a written motion dated 22 October 2002, defendant moved to suppress "all evidence of written or oral statements made by him" to

law enforcement. However, on appeal, the only statement at issue is the statement defendant made to Officer Barfield on 7 June 2001. We note that

> [o]ur review of a denial of a motion to suppress by the trial court is "limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law."

State v. Barden, 356 N.C. 316, 340, 572 S.E.2d 108, 125 (2002) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). "However, the trial court's conclusions of law 'must be legally correct, reflecting a correct application of applicable legal principles to the facts found.' " *State v. Strobel*, 164 N.C. App. 310, 313, 596 S.E.2d 249, 253 (2004) (quoting *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997)).

In the case before our Court, *voir dire* was held during trial to determine the admissibility of defendant's 7 June 2001 statement to Officer Barfield, as well as statements defendant made to other officers. Evidence at *voir dire* tended to show that Officer Barfield testified that after defendant's 7 June 2001 court appearance, Officer Barfield and Officer Shelton Skinner (Officer Skinner) sat with defendant as they waited for juvenile authorities to transport defendant elsewhere. Officer Barfield did not make any statements to defendant, but he described defendant as being "very talkative." Officer Barfield testified that when defendant saw the cap which had been presented into evidence, defendant "spontaneously stated, 'I know where that cap came from.' " Officer Barfield simply responded, "so do I." Officer Barfield further testified that defendant then "went on to say, 'well I can tell you some stuff that you don't know about.' " Officer Barfield responded, "yeah[,]" and defendant "proceeded at that time talking and disclosing to me of a robbery committed in Roanoke Rapids by him and some others." When asked whether he initiated any conversation with defendant at any point, Officer Barfield responded negatively. On cross-examination during *voir dire*, Officer Barfield stated that the only thing he would have asked defendant was for defendant to "be more specific about something." Officer Barfield also specifically testified that he did not tell defendant he had a right not to say anything.

Officer Skinner testified at *voir dire* that he was present when defendant made the 7 June 2001 statement to Officer Barfield. Officer Skinner testified that defendant "just decided to talk" while they were waiting for defendant to be transferred. Officer Skinner stated that he did not ask defendant anything during this time and that Officer Barfield "may have asked [defendant] to specify what he was talking about[.]" Officer Skinner further testified that neither he nor Officer Barfield gave defendant any *Miranda* warnings. Defendant did not testify during *voir dire* concerning the motion to suppress.

At the conclusion of *voir dire*, the trial court immediately found and concluded, among other things, that "the statement made by the defendant on June 7, 2001, was made freely, voluntarily and understandingly." Accordingly, the trial court orally denied the motion to suppress and overruled defendant's objection to admission of the statement into evidence.

I. Fifth Amendment

Defendant first challenges admission of his statement to Officer Barfield as a violation of his rights under the Fifth Amendment of the U.S. Constitution. Under the interpretation of the Fifth Amendment under *Miranda v. Arizona*, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 726 (1966), "no evidence obtained from a defendant through *custodial interrogation* may be used against that defendant at trial, unless the interrogation was preceded by (1) the appropriate warnings of the rights to remain silent and to have an attorney present and (2) a voluntary and intelligent waiver of those rights." *State v. Locklear*, 138 N.C. App. 549, 551, n.2, 531 S.E.2d 853, 855, n.2, *disc. review denied*, 352 N.C. 359, 544 S.E.2d 553 (2000). However, " '[t]he *Miranda* warnings and waiver of counsel are required only when an individual is being subjected to custodial interrogation.' " *State v. Kincaid*, 147 N.C. App. 94, 101, 555 S.E.2d 294, 300 (2001) (quoting *State v. Clay*, 297 N.C. 555, 559, 256 S.E.2d 176, 180 (1979), *overruled on other grounds by State v. McAvoy*, 331 N.C. 583, 601, 417 S.E.2d 489, 500 (1992), *and by State v. Davis*, 305 N.C. 400, 414-15, 290 S.E.2d 574, 583 (1982)).

Defendant argues that his Fifth Amendment right applies in the present case because his statement to Officer Barfield was the result of custodial interrogation. The State does not dispute that defendant was in custody at the time of the 7 June 2001 statement, or that defendant was not advised of his *Miranda* rights. However, the State argues that Officer Barfield did not interrogate defendant;

rather, defendant's statement was spontaneous and therefore admissible. Thus, the issue is whether the statement was the result of an interrogation.

We begin our analysis by noting that "not every statement obtained by police from a person in custody is considered the product of interrogation." *State v. Fisher*, 158 N.C. App. 133, 142, 580 S.E.2d 405, 413, *disc. review denied*, 357 N.C. 464, 586 S.E.2d 273-74 (2003), *aff'd*, 358 N.C. 215, 593 S.E.2d 583 (2004).

> The term "interrogation" is not limited to express questioning by law enforcement officers, but also includes "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."

State v. Golphin, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). We emphasize that the definition of interrogation extends only to words or actions that police officers should reasonably have known would elicit an incriminating response "because 'the police surely cannot be held accountable for the unforeseeable results of their words or actions[.]' " *Golphin*, 352 N.C. at 406, 533 S.E.2d at 199 (quoting *Innis*, 446 U.S. at 301-02, 64 L. Ed. 2d at 308)). Further,

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

Fisher, 158 N.C. App. at 142-43, 580 S.E.2d at 413 (quoting *Innis*, 446 U.S. at 301-02, n.7,8, 64 L. Ed. 2d at 308, n.7,8).

In this case, as already stated, Officer Barfield did not initiate any questioning with defendant. Rather, defendant spontaneously stated to Officer Barfield that he knew where the cap in the room came from. Officer Barfield responded simply, "so do I." This is not the type of statement that necessarily invites a response. According to testimony by both Officers Barfield and Skinner, defendant then volunteered the information about another robbery unrelated to defendant's pending charges. Both officers also testified that Officer Barfield

may have asked for clarification on a couple of occasions as defendant talked about the unrelated robbery.

Defendant emphasizes that when he made this statement to Officer Barfield, he was only fifteen years old, he was facing first degree murder and attempted robbery charges, and he had just left a probable cause hearing in district court. Defendant argues that he was "undoubtedly nervous and scared" and "particularly susceptible to any persuasion tactics." In addition, defendant alleges that he was "confronted with a baseball cap" while he was waiting to be transferred. However, we do not find that these circumstances warrant a conclusion that Officer Barfield should have known that he would elicit an incriminating response from defendant by saying, "so do I."

Furthermore, we note that defendant argues that Officer Barfield "expressly questioned Defendant about the details, asking him to be more specific." However, this assertion is not supported by the evidence in the transcript. Rather, the evidence shows that Officer Barfield may have simply asked for clarification for such things as who defendant meant by "we." Defendant has also cited no cases to support the assertion that Officer Barfield's requests for clarification amounted to interrogation, and we hold that Officer Barfield's conduct did not constitute interrogation under the Fifth Amendment.

II. Sixth Amendment

The Sixth Amendment to the U.S. Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." U.S. Const. amend. VI. "The Sixth Amendment right to counsel attaches only 'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " *State v. Lippard*, 152 N.C. App. 564, 569-70, 568 S.E.2d 657, 661 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 32 L. Ed. 2d 411, 417 (1972)), *disc. review denied and cert. denied*, 356 N.C. 441, 573 S.E.2d 159 (2002). "[T]he police may not interrogate a defendant whose Sixth Amendment right has attached unless counsel is present or the defendant expressly waives his right to assistance of counsel." *State v. Warren*, 348 N.C. 80, 95, 499 S.E.2d 431, 439, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998).

As just stated, the Sixth Amendment protects a defendant from *interrogation* after the right has attached. In the analysis regarding defendant's Fifth Amendment challenge, we concluded that defend-

ant was not interrogated by Officer Barfield. Thus, although defendant's Sixth Amendment rights had attached, because he was not interrogated, the conclusion follows that defendant's Sixth Amendment rights were not violated. Accordingly, the assignments of error challenging the trial court's denial of defendant's motion to suppress the 7 June 2001 statement are overruled.[1]

[2] Defendant next argues in assignment of error number thirteen that the trial court deprived him of his constitutional right to a presumption of innocence by instructing the jury not to form an opinion regarding defendant's guilt or innocence. We note that defendant failed to object or make a constitutional claim for this alleged error at trial. "Constitutional questions not raised and passed upon at trial will not be considered on appeal." *State v. Call*, 353 N.C. 400, 421, 545 S.E.2d 190, 204, *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001).

> "In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4). In order to establish plain error, a defendant must establish that the trial court committed error and that absent this error, the jury would have probably reached a different result.

State v. Gainey, 355 N.C. 73, 93, 558 S.E.2d 463, 477, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002).

Defendant cites language from *Coffin v. United States*, 156 U.S. 432, 459, 39 L. Ed. 481, 493 (1895) for the proposition that the presumption of innocence is an "instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof

1. However, we note that even if defendant's constitutional rights had been violated, such error would have been harmless beyond a reasonable doubt. Under N.C. Gen. Stat. § 15A-1443(b) (2003), "[a] violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." In this case, there was overwhelming evidence of defendant's guilt. He was identified on the surveillance video by a former teacher and the gun which resulted in the death of Watson was discovered after defendant had been riding in Officer Sumner's patrol car. Further, defendant's statement to Officer Barfield dealt with a robbery totally unrelated to the charges he faced at the time of the statement.

which the law has created." Defendant argues that the trial court's instruction about not forming an opinion regarding defendant's guilt or innocence effectively "operated to remove from the jury's consideration a portion of the 'proof created by the law,' which the jury was bound to consider."

Subsequent cases have commented on the *Coffin* Court's view of the presumption of innocence being an "instrument of proof." For example, in *Taylor v. Kentucky*, the United States Supreme Court noted in a footnote that "the so-called 'presumption' is not evidence—not even an inference drawn from a fact in evidence—but instead is a way of describing the prosecution's duty both to produce evidence of guilt and to convince the jury beyond a reasonable doubt." *Taylor v. Kentucky*, 436 U.S. 478, 483-84, n.12, 56 L. Ed. 2d 468, 474, n.12 (1978). The Court further stated that the presumption is "better characterized as an 'assumption' that is indulged in the absence of contrary evidence." *Id.*

In the case before our Court, the trial court instructed the jury before the trial began not to "form any opinion about the guilt or innocence of the defendant." Defendant cited no cases showing that such an instruction constitutes an error. Thus, we hold that this instruction by the trial court did not amount to plain error. Accordingly, defendant's argument is overruled.

[3] Defendant next agues in assignment of error number eight that the trial court lacked jurisdiction to enter judgment convicting defendant of conspiracy to commit robbery. Defendant asserts that because he was fifteen years old at the time the alleged conspiracy was committed, he was subject to prosecution only pursuant to the North Carolina Juvenile Code as codified in N.C. Gen. Stat. § 7B-100 et seq. (2003). Defendant argues that the trial court did not properly obtain jurisdiction pursuant to the Juvenile Code.

The Juvenile Code provides that the district court "has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent. For purposes of determining jurisdiction, the age of the juvenile at the time of the alleged offense governs." N.C. Gen. Stat. § 7B-1601(a) (2003). *See also* N.C. Gen. Stat. § 7B-1501(4) (2003) (defining court as "[t]he district court division of the General Court of Justice."). Further, N.C. Gen. Stat. § 7B-2200 (2003) provides the following as the procedure regarding transfer from district to superior court:

> After notice, hearing, and a finding of probable cause the court may, upon motion of the prosecutor or the juvenile's attorney or upon its own motion, transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult. If the alleged felony constitutes a Class A felony and the court finds probable cause, the court shall transfer the case to the superior court for trial as in the case of adults.

"The superior court may obtain subject matter jurisdiction over a juvenile case only if it is transferred from the district court according to the procedure [N.C. Gen. Stat. § 7B-2200] prescribes." *State v. Dellinger*, 343 N.C. 93, 96, 468 S.E.2d 218, 220 (1996).

In the case before this Court, two juvenile petitions, one alleging murder and the other alleging attempted armed robbery, were filed in district court. The trial court found probable cause that defendant committed these offenses and ordered that these offenses be transferred to superior court. Subsequently, defendant was indicted and found guilty of first degree murder, attempted armed robbery, and conspiracy to commit armed robbery. Prior to the indictments in superior court, no petition had been filed in district court regarding the conspiracy charge. Defendant argues that the district court never exercised jurisdiction over defendant for this charge, and consequently, the superior court did not obtain jurisdiction over this charge by transfer pursuant to N.C. Gen. Stat. § 7B-2200. However, N.C. Gen. Stat. § 7B-2203(c) (2003) states that when a juvenile case is transferred to superior court, "the superior court has jurisdiction over that felony, any offense based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan of that felony[.]" The offense of conspiracy to commit armed robbery fell within the transaction related to the felony charge of armed robbery that was transferred from district court to superior court. Therefore, the superior court also had jurisdiction over the offense of conspiracy to commit armed robbery under N.C.G.S. 7B-2203(c). Accordingly, we affirm defendant's conviction for conspiracy to commit armed robbery.

[4] Defendant next argues in assignment of error number thirty that the trial court erred in failing to arrest judgment on the attempted armed robbery offense where that offense served as the underlying felony for defendant's felony murder conviction. We note that the State concedes the trial court erred.

"When a defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the murder conviction." *State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770 (2002). "In accordance with the state and federal prohibitions against double jeopardy, our Supreme Court firmly established that 'a defendant may not be punished both for felony murder and for the underlying, "predicate" felony, even in a single prosecution.' " *State v. Coleman*, 161 N.C. App. 224, 234, 587 S.E.2d 889, 896 (2003) (quoting *State v. Gardner*, 315 N.C. 444, 460, 340 S.E.2d 701, 712 (1986)). Because the underlying felony merges into the murder conviction, "any judgment on the underlying felony must be arrested." *Coleman*, 161 N.C. App. at 234, 587 S.E.2d at 896.

In the case before us, defendant was convicted of first degree murder based on the fact that the killing occurred during an attempted armed robbery. Defendant was also convicted of attempted armed robbery. The trial court erroneously imposed sentences for both the murder conviction and the attempted armed robbery conviction. Accordingly, judgment is arrested on defendant's conviction of attempted armed robbery. *See State v. Gillis*, 158 N.C. App. 48, 58-59, 580 S.E.2d 32, 39, *disc. review denied*, 357 N.C. 508, 587 S.E.2d 887 (2003); *State v. Ocasio*, 344 N.C. 568, 581, 476 S.E.2d 281, 288 (1996).

[5] Defendant next argues in assignment of error number one that the trial court erred in entering judgment convicting him of first degree murder because the indictment was insufficient to allege the elements of felony murder. Defendant maintains the trial court violated his federal and state constitutional rights under U.S. Const. amends. V, VI, VIII, and XIV and N.C. Const. art. I, §§ 18, 19, 22, 23, 24 and 27.

Defendant cites two cases in recognition that our Supreme Court has upheld the use of short-form indictments. However, defendant contends that the "cases do not address the specific issue presented here—whether an indictment alleging an unlawful, willful and felonious killing with malice aforethought provides sufficient notice . . . to charge a defendant with felony murder." Our Supreme Court "has consistently held that the 'short-form indictment is sufficient to charge a defendant with first-degree murder.' " *Coleman*, 161 N.C. App. at 236, 587 S.E.2d at 897 (quoting *Barden*, 356 N.C. at 384, 572 S.E.2d at 150). Contrary to defendant's assertion, our Supreme Court has addressed the very same issue. *See State v. Avery*, 315 N.C. 1, 12-14, 337 S.E.2d 786, 792-93 (1985) (holding that an in-

dictment alleging that the defendant "unlawfully, willfully and feloniously and of malice aforethought did kill and murder" the victim was "sufficient to charge first degree murder without specifically alleging premeditation and deliberation or felony murder."). Accordingly, defendant's argument is overruled.

[6] Finally, defendant argues in multiple assignments of error that he received ineffective assistance of counsel. "To establish ineffective assistance of counsel, defendant must satisfy a two-prong test which was promulgated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)." *State v. Thomas*, 350 N.C. 315, 328, 514 S.E.2d 486, 495, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). "[A] defendant must show that his counsel's assistance was so deficient that counsel was not 'functioning as the "counsel" guaranteed the defendant by the Sixth Amendment,' and that counsel's deficient performance deprived him of a fair trial." *State v. Lawson*, 159 N.C. App. 534, 543, 583 S.E.2d 354, 360 (2003) (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693).

Defendant argues that there are multiple errors that his trial counsel made at trial that either singularly or collectively amounted to ineffective assistance of counsel. He argues that trial counsel (1) failed to object to the first degree murder and conspiracy indictments; (2) failed to take appropriate action to preserve any record of the juvenile court proceedings and failed to preserve defendant's right to appeal the district court proceedings; (3) failed to adequately prepare for trial or to adequately present a defense; and (4) failed to present a defense that was supported by the law.

N.C. Gen. Stat. § 15A-1419(a)(3) (2003) "requires a defendant to raise on direct appeal 'those [ineffective assistance of counsel] claims on direct review that are apparent from the record.' " *Lawson*, 159 N.C. App. at 544, 583 S.E.2d at 361 (quoting *State v. Hyatt*, 355 N.C. 642, 668, 566 S.E.2d 61, 78 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003)). Pursuant to this statute, "it is likely that counsel will err on the side of bringing claims for ineffective assistance of counsel on direct review even when they cannot be accurately determined at such a stage." *Lawson*, 159 N.C. App. at 544, 583 S.E.2d at 361.

" '[Ineffective assistance of counsel] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be devel-

oped and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.' " *State v. Daniels*, 164 N.C. App. 558, 564, 596 S.E.2d 256, 259-60 (2004) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002)).

On this record, we conclude that there is inadequate evidence of ineffective assistance of counsel for our Court to review the issue on appeal. Accordingly, we dismiss defendant's ineffective assistance claim, without prejudice, so that defendant may file a motion for appropriate relief before the trial court. *See Daniels*, 164 N.C. App. at 564, 596 S.E.2d at 260.

Judgment arrested in 01 CRS 001020, the attempted armed robbery conviction.

Judgment affirmed in 01 CRS 001019, the conspiracy to commit armed robbery conviction.

Affirmed in part; dismissed in part; arrested in part.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA v. FRANKLIN McNEIL

No. COA03-460

(Filed 17 August 2004)

1. Drugs— possession of cocaine with intent to sell and deliver—sufficiency of evidence

There was sufficient evidence of defendant's possession of cocaine with intent to sell or deliver where an officer stopped two men while investigating a report of cocaine sales; the men appeared nervous and defendant put his hand in his pocket; when told to remove his hand from his pocket, defendant fled the scene; he was eventually captured and rocks of crack cocaine were found behind a chair where defendant had put his arm; an officer testified that defendant had admitted possession of the crack, although defendant denied the statement; and the crack was in twenty-two pieces with a total weight of 5.5 grams, individually wrapped, and placed in the corner of a paper bag.

2. Search and Seizure— guest—insufficient privacy interest

The trial court did not err by denying a motion to suppress cocaine seized from a house into which defendant had fled. Although defendant described himself as a frequent guest at the residence, he did not assert a possessory or property interest and there was no evidence that he was legitimately on the premises at the time of the search.

3. Sentencing— habitual felon—certified copies of judgment sheets

There was no plain error during a habitual felon proceeding in the introduction of certified copies of defendant's previous judgment sheets. Defendant's counsel was given the opportunity to inspect the authenticity of the documents but offered no evidence challenging their authenticity or the veracity of the convictions. N.C.G.S. § 8C-1, Rules 901(b)(7), 902; N.C.G.S. § 14-7.4.

Judge ELMORE dissenting.

Appeal by defendant from judgment entered 26 November 2002 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 26 February 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Pitman, for the State.

Hosford & Hosford, P.L.L.C., by Sofie W. Hosford, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Franklin McNeil ("defendant") appeals his convictions for possession with intent to sell or deliver cocaine and attaining habitual felon status. For the reasons discussed herein, we hold that defendant received a trial free of prejudicial error.

The State's evidence presented at trial tends to show the following: On 31 August 2001, Durham County Police Department Officer J.R. Broadwell ("Officer Broadwell") was investigating a complaint that drug sales were occurring in front of a residence located on 1108 Fargo Street. As Officer Broadwell approached the 1100 block of Fargo Street, he noticed defendant and another individual ("Keech") standing in front of 1108 Fargo Street. When they saw Officer Broadwell's police vehicle approaching, defendant and Keech quickly

walked away from 1108 Fargo Street. After stopping defendant and Keech to ask them where they lived, Officer Broadwell noticed that the two men were "nervous," and he decided to conduct a pat-down search of Keech. While performing the search of Keech, Officer Broadwell saw defendant put his hand into his right front pocket. When Officer Broadwell ordered defendant to take his hand out of his pocket, defendant "took off running down Fargo Street towards Umstead [Street]."

Officer Broadwell pursued defendant down Fargo Street and inside a residence located at the corner of Fargo Street and Umstead Street. Officer Broadwell continued to pursue defendant inside the residence and into a room in the rear of the residence. Upon reaching the rear room of the residence, defendant jumped and "went over the top of [a] chair with his arm." Officer Broadwell approached defendant and unsuccessfully attempted to pull defendant from behind the chair. Officer Broadwell eventually pulled defendant away from the chair, and he and defendant continued to struggle through "several rooms of the house." Officer Broadwell ultimately pulled defendant to the floor of the kitchen of the residence, at which time he placed defendant in custody.

A short period of time later, several assisting officers arrived at the residence. After securing defendant, Officer Broadwell searched the room where he and defendant had first struggled. Behind the chair that defendant had previously lunged over, Officer Broadwell found twenty-two individually wrapped white rock substances Officer Broadwell believed were pieces of crack cocaine.

Officer Broadwell then escorted defendant to his police vehicle, which was parked where Officer Broadwell had first encountered defendant and Keech. As he searched the area around the vehicle, Officer Broadwell found three small bags containing an off-white powdered substance Officer Broadwell believed was cocaine. According to Officer Broadwell, defendant stated "[t]hat the crack was his but that the bags . . . on the ground were not." Subsequent laboratory tests revealed the off-white rock substances to be crack cocaine and the off-white powdered substance to be baking soda.

On 4 March 2002, defendant was indicted for possession with intent to sell and deliver cocaine and attaining habitual felon status.[1]

1. Although we note that the indictment sheet charges defendant with "possession with intent to sell *and* deliver cocaine," defendant was convicted and sentenced for "possession with intent to sell *or* deliver cocaine." In order to remain consistent

Prior to trial, defendant moved the trial court "to suppress the tangible evidence seized by law enforcement officers in violation of his rights under the Fourth Amendment to the Constitution and Constitution of the State of North Carolina." The trial court subsequently denied the motion, and defendant was tried 21 November 2002.

At trial, defendant denied having made any statement to Officer Broadwell regarding the controlled substances Officer Broadwell seized during defendant's arrest. Defendant testified that he and Keech were walking down Fargo Street because Keech wanted to "retrieve something that he had left there." Defendant further testified that he ran after Officer Broadwell asked him to remove his hands from his pockets because "me and my wife had had a little fabrication [sic] and I didn't know if she had taken a warrant out on me or not." Defendant also testified that the residence he ran inside of was where "everybody goes to smoke this stuff that they have and drink."

At the close of all the evidence, the jury found defendant guilty of possession with intent to sell or deliver cocaine and guilty of attaining habitual felon status. The trial court determined that defendant had a prior record level IV, and on 26 November 2002, the trial court sentenced defendant to 133 to 169 months incarceration. Defendant appeals.

As an initial matter, we note that defendant's brief contains arguments supporting only four of his original five assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2004), the omitted assignment of error is deemed abandoned. Therefore, we limit our present review to those assignments of error properly preserved by defendant for appeal.

The issues on appeal are: (I) whether the trial court erred by denying defendnt's motion to dismiss the charge of possession with intent to sell or deliver cocaine; (II) whether the trial court erred by denying defendant's motion to suppress the evidence seized during defendant's arrest; and (III) whether the trial court erred by allowing the State to introduce into evidence copies of defendant's previous judgments.

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with both the verdict sheet and the judgment and commitment sheet, we will hereinafter refer to the charge as "possession with intent to sell or deliver cocaine."

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the charge of possession with intent to sell or deliver cocaine. Defendant asserts that the State failed to offer sufficient evidence to support each element of the charge. We disagree.

When ruling on a motion to dismiss, "[t]he trial court's inquiry is limited to a determination of 'whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.' " *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139 (2002) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). "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). "[A]ll of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

"The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance must be a controlled substance; (3) there must be intent to sell or distribute the controlled substance." *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001); N.C. Gen. Stat. § 90-95(a)(1) (2003). However, " '[i]n a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials.' " *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986)). Instead, "[p]ossession of a controlled substance may be either actual or constructive." *State v. Hamilton*, 145 N.C. App. 152, 155, 549 S.E.2d 233, 235 (2001). As long as the defendant "has the intent and capability to maintain control and dominion over" the controlled substance, he can be found to have constructive possession of the substance. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986). Incriminating circumstances, such as evidence placing the accused within close proximity to the controlled substance, may support a conclusion that the substance was in the constructive possession of the accused. *See State v. Harvey*, 281 N.C. 1, 12-13, 187 S.E.2d 706, 714 (1972). Thus, where sufficient incriminating circumstances exist, constructive possession of a controlled substance may be inferred even where possession of a premises is nonexclusive. *See State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 588-89 (1984).

In the instant case, Officer Broadwell testified that his patrol of Fargo Street was based upon a report that drugs were being sold in the area in front of 1108 Fargo Street. Officer Broadwell testified that, upon his arrival in the area, he noticed defendant and Keech standing in front of 1108 Fargo Street. Officer Broadwell further testified that, as his police vehicle approached the 1100 block of Fargo Street, the two men began to walk quickly away from the vehicle and towards Umstead Street. When Officer Broadwell questioned defendant and Keech, both men acted nervous and each looked at the other before answering. Officer Broadwell testified that defendant was shaking and put his right hand in his pocket while Officer Broadwell was conducting a pat-down search of Keech. Officer Broadwell testified that after he instructed defendant to remove his hands from his pockets, defendant fled the area and ran towards Umstead Street.

Officer Broadwell testified that while he was chasing defendant, defendant was never out of his eyesight. Officer Broadwell further testified that while in the back room of the residence located at the corner of Fargo Street and Umstead Street, he noticed defendant put his right hand behind a chair. Officer Broadwell testified that "immediately" after securing defendant, he returned to the room where the chair was located and found twenty-two rocks that he believed to be crack cocaine. Officer Broadwell further testified that when he and defendant returned to Officer Broadwell's police vehicle, defendant admitted to possessing the crack cocaine the officer had found behind the chair.

We conclude that the State presented sufficient evidence to establish that defendant possessed the cocaine. As discussed above, upon a motion to dismiss, the trial court need only "decide whether there is substantial evidence of each element of the offense charged." *Id.* at 566, 313 S.E.2d at 587. Contradictions or discrepancies in the evidence are matters left to the jury. *Id.* Therefore, although at trial defendant denied making any statement to Officer Broadwell regarding the cocaine, the credibility of Officer Broadwell's testimony was a question left to the jury to decide; neither defendant's denial of the statement nor defendant's alternative explanation for his behavior warranted dismissal of the charge. *State v. Locklear*, 322 N.C. 349, 357-58, 368 S.E.2d 377, 383 (1988).

A defendant's intent to sell or deliver a controlled substance may be shown by the "ordinary circumstantial evidence such as the amount of the controlled substance possessed and the nature of its packaging and labeling[.]" *State v. Casey*, 59 N.C. App. 99, 118, 296

S.E.2d 473, 484 (1982). In the instant case, the crack cocaine had a total weight of 5.5 grams, was individually wrapped in twenty-two pieces, and was placed in the corner of a paper bag. Thus, we conclude that the State also presented sufficient evidence to establish that defendant intended to sell or deliver the cocaine. Therefore, we hold that the trial court did not err in denying defendant's motion to dismiss the charge of possession with intent to sell or deliver cocaine.

[2] Defendant next argues that the trial court erred by denying his motion to suppress the evidence seized during his arrest. Defendant asserts that Officer Broadwell violated his Fourth Amendment rights by following him into the residence located at the corner of Fargo Street and Umstead Street. We disagree.

"The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *State v. Wiley*, 355 N.C. 592, 602, 565 S.E.2d 22, 32 (2002) (citing U.S. Const. amend. IV *and* N.C. Const. art. I, §§ 18, 19, 23), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). However, it is well established that protection under the Fourth Amendment only extends to those areas where an individual has a "legitimate expectation of privacy, which has two components: (1) the person must have an actual expectation of privacy, and (2) the person's subjective expectation must be one that society deems to be reasonable." *Id.* Thus, our courts have extended Fourth Amendment protection only to those persons who have a reasonable expectation of privacy in the premises searched. *Rakas v. Illinois*, 439 U.S. 128, 143, 58 L. Ed. 2d 387, 401 (1978), *reh'g denied*, 439 U.S. 1122, 59 L. Ed. 2d 83 (1979); *State v. Jones*, 299 N.C. 298, 306, 261 S.E.2d 860, 865 (1980); *Casey*, 59 N.C. App. at 113, 296 S.E.2d at 482.

In the instant case, we are not convinced that defendant possesses a reasonable expectation of privacy in the residence located at the corner of Fargo Street and Umstead Street. Although defendant describes himself as a "frequent guest" of the residence, there is no indication that defendant was legitimately on the premises at the time of the search. In fact, Officer Broadwell testifed at trial that he pursued defendant through a door of the residence that defendant "threw" open. Furthermore, defendant does not assert either a property or possessory interest in the premises. Thus, even when considered in the light most favorable to defendant, "[t]he evidence reveals only an earlier presence and accessibility and neither is sufficient to

establish the requisite 'privacy interest' in the absence of additional information." *State v. Ford*, 71 N.C. App. 748, 751, 323 S.E.2d 358, 361 (1984) (citing *State v. Taylor*, 298 N.C. 405, 416, 259 S.E.2d 502, 508-09 (1979)), *disc. review denied and appeal dismissed*, 313 N.C. 511, 329 S.E.2d 397 (1985). Therefore, we hold that the trial court did not err in denying defendant's motion to suppress the evidence seized as a result of defendant's arrest.

[3] Defendant's final argument is that the trial court committed plain error by allowing the State to introduce into evidence copies of defendant's previous judgments during the habitual felon proceedings. We note that defendant neither objected to nor challenged the admission of the judgment sheets at trial. However, on appeal defendant asserts that the admission of the judgment sheets without proper authentication was plain error. Under plain error review, defendant has the burden of convincing this Court: "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). We conclude that defendant has not met this burden.

N.C. Gen. Stat. § 8C-1, Rule 901(b)(7) (2003) provides that "[e]vidence that a writing authorized by law to be recorded or filed . . . is from the public office where items of this nature are kept" is generally sufficient to satisfy the requirements necessary to introduce the document into evidence. However, N.C. Gen. Stat. § 8C-1, Rule 902 (2003) provides that

> Extrinsic evidence of authenticity as a condition precedent to admissibility is *not required* with respect to . . . [a] copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification[.]

N.C. Gen. Stat. § 8C-1, Rule 902(4) (emphasis added). Similarly, N.C. Gen. Stat. § 14-7.4 (2003) provides that

> In all cases where a person is charged under the provisions of this Article with being an habitual felon, the record or records of prior convictions of felony offenses shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of former felony offenses. *A prior conviction may be*

proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein.

(emphasis added).

In the instant case, during the habitual felon stage of defendant's trial, the State introduced into evidence three certified copies of judgment sheets from three of defendant's previous felony convictions. Defendant's trial counsel was given an opportunity to inspect the authenticity of the documents prior to their introduction into evidence. Defendant offered no evidence at trial nor on appeal to this Court that challenges the authenticity of the certified judgment sheets or the veracity of the convictions. Instead, defendant contends that the trial court should not have allowed the documents to be introduced until a witness testified to their authenticity and was cross-examined by defendant. However, in light of the statutes detailed above, we are unable to conclude that the trial court's decision in the case was a "fundamental error" that resulted in a "miscarriage of justice" or denied defendant a fair trial. Therefore, we hold that the trial court did not commit plain error by allowing the State to introduce into evidence the certified copies of defendant's prior felony conviction judgment sheets.

No error.

Judge BRYANT concurs.

Judge ELMORE dissents.

ELMORE, Judge, dissenting.

I agree with the majority's decision except on the issue of the motion to dismiss. On that issue, I respectfully dissent.

Defendant was forty-five years old at the time judgment was entered against him in this case. He worked as a handyman in his neighborhood, cutting grass, raking leaves, and doing odd jobs. On 31 August 2001 defendant was cutting grass and Mr. Keech, a friend, was assisting him. When they finished, at around 2:30 or 3:00 in the after-

noon, the two men walked down the street. Defendant testified at trial that they went down the street because Mr. Keech wanted to "retrieve something that he had left there." Defendant testified that they were walking to 1201 Fargo Street.

That same afternoon, Officer Broadwell was dispatched to 1108 Fargo Street following receipt of a complaint of drug sales taking place in the street in front of that address. When Officer Broadwell arrived, he found defendant and Keech standing in the road in front of 1108 Fargo Street. Officer Broadwell testified that he saw no other people in the area. He asked the men to stop for a second, and they complied. He testified that both men appeared nervous. Officer Broadwell conducted a pat down search of Mr. Keech, at which time defendant shoved his hand into his right front pant pocket. Defendant denied on the witness stand having put his hand into his pocket. Officer Broadwell testified that he asked defendant to take his hand out of his pocket, at which point defendant ran down the street and into the house at 1201 Fargo Street. Defendant testified that he was afraid because he assumed his wife had called the police concerning a domestic incident. He also testified that he knew the residence at 1201 Fargo Street because it was where "everybody goes to smoke this stuff that they have and drink. . . ."

Officer Broadwell pursued defendant into the house and chased him through four rooms. In a room in the back of the house, defendant jumped over the top of a large chair. Officer Broadwell tackled defendant and attempted to pull him from his position on and partially behind the chair to the floor. Defendant struggled with Officer Broadwell, trying to get away. Officer Broadwell finally pinned defendant to the kitchen floor and handcuffed him. Officer Broadwell returned to the room with the large chair and looked behind the chair. He found more than twenty individually wrapped packages of crack cocaine totaling 5.5 grams on the floor behind the chair.

Officer Broadwell then escorted defendant back to his patrol car. In the area where Officer Broadwell had searched Mr. Keech, he found three more small bags of an off-white substance. Officer Broadwell testified that defendant then spontaneously stated that the substance on the ground wasn't his, but that the crack cocaine was his. Defendant denied on the witness stand having made any statement to the officer.

Defendant assigns error to the trial court's denial of his motion to dismiss the charge of possession with intent to sell and deliver

cocaine because, he argues, the state did not prove he constructively possessed the cocaine.

The standard by which we review the trial court's ruling on a motion to dismiss 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. *State v. Scott*, 356 N.C. 591, 594-97, 573 S.E.2d 866, 868-69 (2002). If so, the motion is properly denied. If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed. *Id.* In analyzing a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State. *State v. Davis*, 325 N.C. 693, 696, 386 S.E.2d 187, 189 (1989). The State is given every reasonable inference to be drawn from the evidence. *Id.* If substantial evidence exists, whether direct, circumstantial, or both, supporting a finding that the offense charged was committed by the defendant, the case must be left for the jury. *Id.* at 696-97, 386 S.E.2d at 189. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

Our Supreme Court has explained the doctrine of constructive possession:

> Constructive possession exists when the defendant, "while not having actual possession, . . . has the intent and capability to maintain control and dominion over" the narcotics. "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." "However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred."

State v. Butler, 356 N.C. 141, 146, 567 S.E.2d 137, 140 (2002) (citations omitted).

Our Courts recognize constructive possession when a defendant, although not present in the location, has exclusive control of the location where the substance is found. However, "where possession of the premises [by defendant] is nonexclusive, constructive

possession of the contraband materials may not be inferred without other incriminating circumstances." *Brown*, 310 N.C. at 569, 313 S.E.2d at 589.

In the *Butler* case, quoted above, the Supreme Court held that sufficient "other incriminating circumstances" existed where the defendant walked briskly away from officers, repeatedly looked back at the officers who followed him, entered a cab, bent over as if to place something under the driver's seat, was asked to exit the cab by officers, and walked away from the cab to talk with the officers. The defendant in *Butler* was in the cab for less than two minutes, and another passenger occupied the cab before drugs were found under the driver's seat in the cab several minutes later. That passenger was known to the cab driver.

In cases where other incriminating circumstances do not exist our Courts have required further proof of a proprietary interest in the location where the substance is found. *See State v. Hamilton*, 145 N.C. App. 152, 157, 549 S.E.2d 233, 236 (2001) ("When the evidence presented lacks incriminating circumstances showing defendant's exclusive use of the premises, maintenance of the premises as a residence, or some apparent proprietary interest in the premises or the controlled substance, our Supreme Court has held that the trial court should dismiss the charge of possession of the controlled substance").

Control of the location sufficient for constructive possession may be found in an instance where a defendant shows some proprietary interest in the premises, for example if he possesses a key to the premises, receives mail there, or there is evidence that he resides there. *See Brown*, 310 N.C. at 569-70, 313 S.E.2d at 589 (sufficient control shown where defendant had on his person a key to the residence being searched and on every occasion the police observed defendant prior to the date of the search defendant was at the residence in question); *State v. Allen*, 279 N.C. 406, 412, 183 S.E.2d 680, 684-85 (1971) (sufficient control shown where utilities at the residence were in defendant's name, personal papers including an Army identification card bearing defendant's name were found on the premises and evidence that drugs belonged to defendant and were being sold at defendant's direction); *State v. Rich*, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987) (sufficient control shown where defendant was seen on the premises the evening before the search, seen cooking dinner on the premises on the night of the search, mail

was found on the premises addressed to the defendant and an insurance policy listing the premises in question as defendant's residence was also found on the premises).

In the case at bar, the evidence, taken in the light most favorable to the State, did not show that defendant had a proprietary interest in or exclusive control over the location where the drugs were found. The record is silent as to who possessed the house and whether any other persons were present in the house at the time of the arrest. There was no evidence that defendant possessed a key, paid for any utilities there, was welcome to enter at will, spent much time there, or received any mail there. There was also no evidence that the house was free of drugs before defendant entered.

While there was some evidence of other incriminating circumstances, that evidence was not substantial. Defendant attributed his nervousness to a fear that there was a warrant out for his arrest concerning an unrelated matter. He ran to the house which was familiar to him, 1201 Fargo Street, and not to 1108 Fargo Street, the house which was the location of drug activity according to the tip received by police that morning. Defendant and Mr. Keech were in transit to 1201 Fargo Street when the Officer arrived. He perceived them to be stopped in front of 1108 while they were en route. The Officer testified that defendant made an incriminating statement, which defendant denied.[2] While we recognize the inherent credibility of an officer's testimony, that testimony standing alone, in opposition to the defendant's evidence, with no other indication that defendant possessed the drugs or had any control over the premises, does not constitute substantial evidence of constructive possession.

I would therefore reverse the trial court's denial of the motion to dismiss.

2. The issue of whether the testimony of the Officer concerning defendant's alleged statement to him was proper under the Rules of Evidence is not before us in this appeal.

MICHAEL BRUGGEMAN, PLAINTIFF v. MEDITRUST COMPANY, LLC AND MEDITRUST GOLF GROUP II, INC., DEFENDANTS

No. COA03-944

(Filed 17 August 2004)

1. Appeal and Error— preservation of issues—failure to follow appellate rules

Although intervenors in their brief move the Court of Appeals to dismiss defendants' appeal, motions to an appellate court may not be made in a brief but must be made in accordance with N.C. R. App. P. 37.

2. Parties— motion to intervene—lack of jurisdiction

The trial court erred by granting intervenors' motion to intervene and the 8 April 2003 order is vacated with the case remanded for further proceedings, because the trial court was divested of its jurisdiction to consider any motion regarding intervenors' intervention in the case while Bruggeman II was pending before the Court of Appeals even though intervenors' motion to intervene sufficiently asserted that their claim involved questions of fact or law common to plaintiff's claim and their motion met the requirements for permissive intervention pursuant to Rule 24(b).

Judge TYSON concurring in part and dissenting in part.

Appeal by defendants from order entered 8 April 2003 by Judge Kenneth Crow in New Hanover County Superior Court. Heard in the Court of Appeals 21 April 2004.

Johnson, Lambeth & Brown, by Robert White Johnson, Esquire, and Anna Johnson Averitt, Esquire, for intervenors-appellees Newton and McGonigal.

Ward & Smith, P.A., by George K. Freeman, Jr., Esquire, for defendants-appellants.

TIMMONS-GOODSON, Judge.

Meditrust Company, LLC ("MCLLC") and Meditrust Golf Group II, Inc., ("MGG") (collectively, "defendants") appeal the trial court's order granting the motion to intervene filed by Jackson Newton ("Newton") and Mark McGonigal ("McGonigal"). For the reasons

discussed herein, we vacate the trial court's order and remand the case.

This case is before this Court for the third time. The case involves efforts on the part of three real estate brokers, including one from North Carolina, to recover over $1,000,000 in sales commissions allegedly owed to them by a Delaware-headquartered property acquisition group. The facts and procedural history pertinent to the instant appeal are as follows: Michael Bruggeman ("Bruggeman"), Newton, and McGonigal (collectively, "plaintiffs") originally filed this action alleging a contract with Media Acquisition Company ("MAC") and MCLLC and asserting entitlement to a commission for locating certain properties purchased by defendants. According to plaintiffs' complaint, in late 1997 or early 1998, McGonigal, a licensed real estate broker in New Jersey, was contacted by MAC to assist defendants in the acquisition of golf course properties. McGonigal subsequently engaged Bruggeman, a licensed real estate broker in Maryland and Virginia, to assist him in representing defendants.

In January 1998, Bruggeman met with Abe Grossman ("Grossman"), President of MAC. At that time, MAC was a Florida corporation with offices in Florida. Grossman informed Bruggeman that MAC was interested in acquiring golf course properties in North Carolina. MAC subsequently merged with MCLLC, a Delaware corporation with offices in Florida, and Bruggeman subsequently contacted Newton, a resident of and licensed real estate broker in North Carolina. Bruggeman, McGonigal, and Newton then "formed a joint venture to provide services to [defendants] in any state where any one of [plaintiffs] was allowed to act as a real estate broker."

Soon after forming the joint venture, plaintiffs "brought several prospects to [defendants], including Carolina Golf Services and its executive officer, Stuart Frantz." Carolina Golf Services ("Carolina Golf") was a North Carolina business that, according to plaintiffs' complaint, owned Devils Ridge Golf Club, Kiskiack Golf Club, Lochmere Golf Club, Nags Head Golf Links, The Currituck Club, The Neuse Golf Club, and the Oak Valley Golf Club (collectively, "the properties"), all of which are located in North Carolina. After obtaining information for defendants regarding the properties and facilitating and participating in meetings aimed at purchasing the properties, plaintiffs "assisted [defendants] in procuring certain golf course assets of Carolina Golf Services in the State of North Carolina at a price which, upon information and belief, exceeds forty million dollars." Plaintiffs claim that defendants then "excluded" plaintiffs from

subsequent transactions regarding the properties, and, as a result, plaintiffs "did not receive any commission for the services they performed." Plaintiffs allege that they are entitled to "a reasonable commission of $1,320,000, which is three percent of the total purchase price of $44,000,000."

Plaintiffs subsequently amended their complaint to add MGG as a party. MGG was a Delaware corporation with offices in Massachusetts. According to plaintiffs, MAC acted on behalf of MCLLC and MGG, and either MCLLC or MGG, using the information provided by plaintiffs to MAC, actually purchased the properties.

On 24 May 2002, defendants moved to dismiss plaintiffs' complaint for lack of subject matter jurisdiction and to dismiss Newton and McGonigal for lack of standing. In an order entered 12 September 2002, New Hanover County Superior Court Judge W. Allen Cobb ("Judge Cobb") refused to dismiss the case for lack of subject matter jurisdiction but dismissed Newton and McGonigal for lack of standing. On 1 October 2002, Newton and McGonigal filed a Motion to Intervene and More Definitive Complaint, both of which requested that Newton and McGonigal be allowed to intervene in the matter. On 3 October 2002, defendants moved Judge Cobb to amend the 12 September 2002 order to be certified as a final judgment as to fewer than all the parties. On 10 October 2002, Judge Cobb denied defendants' motion to certify the 12 September 2002 judgment.

Defendants appealed the denial of certification and the denial of the motion to dismiss for lack of subject matter jurisdiction to this Court. In *Bruggeman v. Meditrust Co.*, 161 N.C. App. 347, 588 S.E.2d 585 (2003) (unpublished) ("*Bruggeman II*"), this Court dismissed defendants' appeal as interlocutory and affirmed Judge Cobb's ruling denying defendants' motion to certify the judgment.

While *Bruggeman II* was pending on appeal, New Hanover County Superior Court Judge Kenneth Crow ("Judge Crow") heard Newton and McGonigal's motion to intervene and a motion to stay filed by defendants. Judge Crow took the motions under advisement and, on 10 January 2003, announced in a proposed decision that the trial court would grant Newton and McGonigal's motion to intervene. On 16 January 2003, defendants filed a motion for a fact-finding order, pursuant to N.C. Gen. Stat. § 1A-1, Rule 52 (2003). On the same date, defendants filed a second motion to stay and a motion to certify the order permitting intervention for immediate appeal.

On 24 January 2003, Newton and McGonigal filed an Intervenors' Complaint. On 7 February 2003, defendants filed a motion to rehear the motions to intervene and to stay, a motion to strike the purported intervenors' complaint, and a motion to stay if the intervenors' motion to intervene was in fact granted. On 19 February 2003, all of the pending motions were brought before Judge Crow.

On 8 April 2003, based upon the allegations contained in Newton and McGonigal's purported intervenors' complaint, Judge Crow granted Newton and McGonigal's motion to intervene. Judge Crow stated that the order "in effect overrul[ed] or circumvent[ed]" Judge Cobb's previous order dismissing Newton and McGonigal for lack of standing. Accordingly, Judge Crow certified that the order was immediately appealable. It is from this order that defendants appeal.

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[1] We note initially that, in their brief, Newton and McGonigal move this Court to dismiss defendants' appeal. "Motions to an appellate court may not be made in a brief but must be made in accordance with N.C.R. App. P. 37." *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858, *disc. review denied and cert. denied*, 343 N.C. 511, 472 S.E.2d 8 (1996). Therefore, we limit our present review only to those issues properly preserved by the parties for appeal.

[2] The only issue on appeal is whether Judge Crow erred by granting Newton and McGonigal's motion to intervene. Because we conclude that Judge Crow erred, we vacate the 8 April 2003 order and remand the case for further proceedings.

N.C. Gen. Stat. § 1-294 (2003) provides as follows:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

Thus, a trial court is considered *functus officio* while an issue is appealed to this Court, and the trial court is generally without jurisdiction to issue an order in the case while the appeal is pending. *Carpenter v. Carpenter*, 25 N.C. App. 307, 309, 212 S.E.2d 915, 916 (1975). However, as discussed above, in the instant case, defendants appealed the following two issues to this Court on 11 October 2002:

(i) Judge Cobb's denial of defendants' motion to dismiss the action for lack of subject matter jurisdiction; and (ii) Judge Cobb's denial of defendants' motion to certify as a final judgment the order dismissing Newton and McGonigal for lack of standing. In *Bruggeman II*, this Court dismissed as interlocutory the issue of whether Judge Cobb erred in denying defendants' motion to dismiss for lack of subject matter jurisdiction. We also affirmed Judge Cobb's decision not to certify as a final judgment the previous order dismissing Newton and McGonigal for lack of standing. Nevertheless, while *Bruggeman II* was pending before this Court, Judge Crow granted Newton and McGonigal's motion to intervene. In light of N.C. Gen. Stat. § 1-294 and the cases that interpret it, we conclude Judge Crow erred.

We recognize that in *Bruggeman II* this Court dismissed as interlocutory defendants' appeal of the denial of defendants' motion to dismiss for lack of subject matter jurisdiction, and we note that it is well established that where an appeal is interlocutory, the trial court need not stay its proceedings while an appellate court decides the appeal. *Veazey v. Durham*, 231 N.C. 354, 357, 57 S.E.2d 375, 377 (1950); *Onslow County v. Moore*, 129 N.C. App. 376, 387-88, 499 S.E.2d 780, 788, *disc. review denied*, 349 N.C. 361, 525 S.E.2d 453 (1998). However, we also recognize that in *Bruggeman II*, this Court affirmed Judge Cobb's denial of defendants' motion to certify as a final judgment the order dismissing Newton and McGonigal for lack of standing. Had this Court decided instead to reverse the trial court's order, the previous order dismissing Newton and McGonigal for lack of standing would have been certified as a final judgment against Newton and McGonigal's claims. N.C. Gen. Stat. § 1A-1, Rule 54 (2003). Such a decision certainly would have affected Newton and McGonigal's standing to intervene in Bruggeman's suit. Thus, while *Bruggeman II* was pending before this Court, N.C. Gen. Stat. § 1-294 divested any trial court of its jurisdiction to consider any motion regarding Newton and McGonigal's intervention in the case. Therefore, we hold that Judge Crow's 8 April 2003 order is vacated, and we remand the case to superior court.

Defendants argue in their brief that Judge Crow's order granting intervention to Newton and McGonigal should be vacated because it "overrules" Judge Cobb's previous order dismissing Newton and McGonigal for lack of standing. Because we conclude that no barrier exists to prevent Newton and McGonigal from reasserting their motion to intervene on remand, and because the procedural history of this case strongly suggests that the issue raised by defendants may

be before this Court again soon, in the interest of judicial economy we address defendants' contention.

It is well established that "[t]he power of one judge of the Superior Court is equal to and coordinate with that of another." *Caldwell v. Caldwell*, 189 N.C. 805, 809, 128 S.E. 329, 332 (1925). Thus, "no appeal lies from one Superior Court judge to another[,] . . . one Superior Court judge may not correct another's errors of law[,] . . . and . . . one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). However, this Court has upheld a subsequent order issued by a different judge in the same action where the subsequent order was "rendered at a different stage of the proceeding," did not involve the same materials as those considered by the previous judge, and did not "present the same question" as that raised by the previous order. *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987); *compare Barbour v. Little*, 37 N.C. App. 686, 247 S.E.2d 252, *disc. review denied*, 295 N.C. 733, 248 S.E.2d 862 (1978) (denial of Rule 12(b)(6) motion to dismiss did not prevent same or different superior court judge from allowing subsequent motion for summary judgment) *and Alltop v. Penney Co.*, 10 N.C. App. 692, 179 S.E.2d 885, *cert. denied*, 279 N.C. 348, 182 S.E.2d 580 (1971) (same), *with State v. Neas*, 278 N.C. 506, 180 S.E.2d 12 (1971) (trial judge may not grant motion to dismiss previously denied by another judge) *and Stines v. Satterwhite*, 58 N.C. App. 608, 294 S.E.2d 324 (1982) (same—summary judgment).

In the instant case, Newton and McGonigal were dismissed for lack of standing by Judge Cobb's order prior to Judge Crow's order granting their motion to intervene. Standing requires "that the plaintiff have been injured or threatened by injury or have a statutory right to institute an action." *In re Baby Boy Scearce*, 81 N.C. App. 531, 541, 345 S.E.2d 404, 410, *disc. review denied*, 318 N.C. 415, 349 S.E.2d 589 (1986) (citing N.C. Gen. Stat. § 1-57 and *Sanitary District v. Lenoir*, 249 N.C. 96, 99, 105 S.E.2d 411, 413 (1958)). Thus, "[t]he gist of standing is whether there is a justiciable controversy being litigated amongst adverse parties with substantial interest affected[.]" *Texfi Industries v. City of Fayetteville*, 44 N.C. App. 268, 269-70, 261 S.E.2d 21, 23 (1979), *aff'd*, 301 N.C. 1, 269 S.E.2d 142 (1980). Permissive intervention, on the other hand, only requires that "an applicant's claim or defense and the main action have a question of law or fact in common." N.C. Gen. Stat. § 1A-1, Rule 24(b)(2) (2003). Thus, the

impetus behind Newton and McGonigal's motion for intervention was that there was a common question of law or fact being litigated in another action. Judge Crow's inquiry into the case regarding the merits of Newton and McGonigal's motion to intervene was therefore independent of Judge Cobb's previous inquiry into whether Newton and McGonigal had standing to sue defendants.

Defendants maintain that the previous dismissal of Newton and McGonigal for lack of standing required that the subsequent motion for intervention be denied. However, "[w]hether a party has standing is merely a factor courts may consider in exercising their discretion to grant permissive intervention once the requirements for permissive intervention are satisfied." 59 Am. Jur. 2d Parties § 207 (2003). In fact, the requirements of Rule 24(b)(2) make it "unnecessary for an intervenor to have a direct personal or pecuniary interest in the subject of the litigation." *Id.*; *Scearce*, 81 N.C. App. at 541, 345 S.E.2d at 410 ("An intervenor by permission need not show a direct personal or pecuniary interest in the subject of the litigation.").

Newton and McGonigal's breach of contract claim necessitated proof of the same elements as those alleged in Bruggeman's claim. Because Newton, McGonigal, and Bruggeman operated in a joint venture, both claims rely on proof of the same facts to establish an agreement with defendants. Thus, we believe that Newton and McGonigal's motion to intervene sufficiently asserts that their claim involves questions of fact or law common to Bruggeman's claim. We also believe that the motion meets the requirements for permissive intervention pursuant to Rule 24(b). However, as discussed above, because Judge Crow was without jurisdiction to issue an order regarding the motion to intervene, the motion to intervene was not properly before him.

In conclusion, we hold that the trial court was divested of its jurisdiction to consider any motion regarding Newton and McGonigal's intervention in the case while *Bruggeman II* was pending before this Court. Accordingly, Judge Crow's 8 April 2003 order is vacated, and the case is remanded for further proceedings.

Vacated and remanded.

Judge McGEE concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge concurring in part and dissenting in part.

I concur in the majority opinion's conclusion that the trial court's order must be vacated and remanded. I agree the trial court did not have jurisdiction to enter the order allowing Newton and McGonigal to intervene while an appeal was pending before this Court. I vote to vacate on these grounds. I dissent from the majority opinion's dicta on procedures on remand. A superior court judge does not possess jurisdiction to enter an order overruling an earlier order by another superior court judge on the same issue without a finding of substantial change in circumstances.

I. Background

Plaintiffs originally filed this action alleging a contract with defendants and asserting entitlement to a commission for locating certain properties purchased by defendants. On 24 May 2002, defendants moved to dismiss Newton and McGonigal for lack of standing and to dismiss for lack of subject matter jurisdiction. The trial court denied MCLLC's motion to dismiss for subject matter jurisdiction, but granted its motion to dismiss Newton and McGonigal for lack of standing. Defendants appealed. On appeal, plaintiffs cross-assigned error to the trial court's order dismissing Newton and McGonigal. In an unpublished opinion dated 18 November 2003, we dismissed defendants' appeal as interlocutory and affirmed the trial court's ruling denying their motion to certify the judgment. We did not reach plaintiffs' cross-assignment of error.

While the appeal was pending in this Court, on 24 January 2003, Newton and McGonigal filed a purported intervenors' complaint. On 8 April 2003, the trial court entered an order granting Newton and McGonigal's motion to intervene. The trial court ruled, "there has been no substantial change of circumstances" and expressly recognized that its order "in effect overrules or circumvents Judge Cobb's Superceding Order" dismissing Newton and McGonigal as plaintiffs. The trial court also granted defendants' motion to stay further proceedings.

II. Issues

The issues presented are whether: (1) the trial court had jurisdiction to enter an order while an appeal was pending; and (2) the trial court erred in overruling a nondiscretionary order of another superior court judge without a change of circumstances by permitting Newton and McGonigal to intervene after they had been dismissed for lack of standing.

III. Trial Court Jurisdiction

A. Effect of Appeal

The majority opinion concludes, pursuant to N.C. Gen. Stat. § 1-294, defendants' appeal in *Bruggeman II* divested the trial court of jurisdiction to consider Newton and McGonigal's intervention. I agree.

When an interlocutory order of the trial court is appealed, the trial court is not required to stay proceedings, but may disregard the appeal and proceed to try the action while the appeal on the interlocutory matter is in the appellate court. *Veazey v. Durham*, 231 N.C. 357, 364, 57 S.E.2d 375, 383, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Our Courts have upheld a *trial* on its merits while an interlocutory appeal is pending. *See T&T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 481 S.E.2d 347, *disc. rev. denied*, 346 N.C. 185, 486 S.E.2d 219 (1997). Under our statutes:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, *or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action* and not affected by the judgment appealed from.

N.C. Gen. Stat. § 1-294 (2003) (emphasis supplied). A fair reading of this statute together with *Veazey*, *T&T Development*, and other precedents regarding the effect of an interlocutory appeal suggests the trial court may proceed on *other matters* outside the ruling issued by the interlocutory judgment. The trial court, however, is stayed from ruling upon or overruling "the judgment appealed from, or upon the matter embraced therein." N.C. Gen. Stat. § 1-294.

Here, while the issue of Newton and McGonigal's standing was on appeal to this Court in *Bruggeman II*, another superior court judge issued an order ruling on the same matter pending on appeal. Based on plaintiffs' cross-assignment of error regarding Newton and McGonigal's intervention in the case, the trial court was divested of jurisdiction and could not hear any matters relating to the issue of their participation as a party in the case. Plaintiffs were not precluded from raising the issue of standing on appeal pursuant to N.C.R. App. P. 10(d) (2004). The trial court was divested of jurisdiction regarding this matter. *See* N.C. Gen. Stat. § 1-294. I concur in the majority opinion's ruling to vacate and remand for a new trial.

B. "Judge Shopping"

The majority opinion concludes, "Judge Crow's inquiry into the case regarding the merits of Newton and McGonigal's motion to intervene was therefore independent of Judge Cobb's previous inquiry into whether Newton and McGonigal had standing to sue defendants." I disagree. I agree with defendants' argument that the trial court erred in allowing Newton and McGonigal's motion to intervene because it expressly overruled another superior court judge's order dismissing them for lack of standing. No substantial change in circumstances had occurred since the earlier dismissal on standing had been entered.

Our Supreme Court has long recognized:

> "The power of one judge of the superior court is equal to and coordinate with that of another." *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 670, 151 S.E.2d 579, 580 (1966). Accordingly, it is well established in our jurisprudence that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.

State v. Woolridge, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003) (quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)); *see also Global Furniture, Inc. v. Proctor*, 165 N.C. App. 229, 234-35, — S.E.2d —, — (July 6, 2004) (No. COA03-1043). One judge in a concurrent court may reconsider or alter another judge's prior ruling "only in the limited situation where the party seeking to alter that prior ruling makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter." *Woolridge*, 357 N.C. at 549, 592 S.E.2d at 194 (quoting *State v. Duvall*, 304 N.C. 557, 562, 284 S.E.2d 495, 499 (1981)). In *Woolridge*, Justice Brady noted, "Given this Court's intolerance for the impropriety referred to as 'judge shopping' and its promotion of collegiality between judges of concurrent jurisdiction, this 'unseemly conflict [of one superior court judge overruling another]' . . . will not be tolerated." 357 N.C. at 550, 592 S.E.2d at 194 (internal citations and quotations omitted).

Judge Cobb dismissed Newton and McGonigal as parties for lack of standing on 12 September 2002. On 1 October 2002, Newton and

McGonigal moved the trial court to allow them to intervene. On 8 April 2003, Judge Crow allowed their motion. Newton and McGonigal argue that Judge Crow's order is distinguishable and does not overrule Judge Cobb's earlier decision. Judge Crow's order, however, expressly acknowledged, "this Order allowing intervention in effect overrules or circumvents Judge Cobb's Superceding Order, entered 12 September 2002 . . . ." In granting the motion, Judge Crow also concluded, "That between the time of the entry of Judge Cobb's Superceding Order, filed 12 September 2002, and the date of this Order, there has been *no substantial change of circumstances*." (emphasis supplied).

Under *Woolridge* and well-established jurisprudence, Judge Crow was without authority to reconsider, alter, or overrule Judge Cobb's earlier order without receiving evidence and making a finding to support "a substantial change in circumstances . . . which presently warrants a different or new disposition of the matter." 357 N.C. at 549-50, 592 S.E.2d at 194. The parties should have requested a hearing before Judge Cobb to obtain a ruling on the motion to intervene. Judge Crow noted in his order that he had spoken directly with Judge Cobb regarding the 12 September 2002 order, which tends to show that Judge Cobb was available to the parties.

One superior court judge does not have jurisdiction to enter an order altering or overruling another superior court judge's prior order without a showing and a finding that a substantial change in circumstances had occurred. *Id.* Judge Crow's order allowing Newton and McGonigal to intervene expressly concluded otherwise and must be vacated.

IV. Conclusion

Our Supreme Court has expressly refused to condone "judge shopping." *Id.* Whether or not Newton and McGonigal's motion to intervene has merit, Judge Cobb is the only superior court judge with jurisdiction to make such a ruling, absent evidence to support a finding of "a substantial change in circumstances." *Id.*

The trial court erred by: (1) ruling on a matter currently on appeal; and (2) in doing so, overruling another superior court judge on the same matter. Judge Crow's order allowing Newton and McGonigal to intervene must be vacated for lack of jurisdiction pursuant to N.C. Gen. Stat. § 1-294 and the requirements of *Woolridge*. I concur in part and respectfully dissent in part.

STATE OF NORTH CAROLINA v. MICHAEL BRUTON

No. COA03-1159

(Filed 17 August 2004)

1. Homicide— instructions—malice—deadly weapon

The instruction on malice in a first-degree murder prosecution was not plain error where the trial court noted that the knife used to stab the victim was not the cause of her death and omitted references to a deadly weapon.

2. Homicide— instructions—malice—just cause

There was no error in a first-degree murder instruction which omitted "without just cause, excuse or justification" from its definition of malice. Defendant's theory at trial was that he did not participate in the murder, not that he killed the victim with "just cause, excuse, or justification."

3. Arson— instructions—malice and intent

There was no plain error in a first-degree arson instruction in which the jury was told that the State was required to show that defendant acted with malice, meaning that it was necessary to show that defendant acted intentionally.

4. Homicide; Arson— sufficiency of evidence—defendant as perpetrator

The trial court did not err by denying defendant's motion to dismiss charges of first-degree murder and first-degree arson where defendant argued that there was insufficient evidence that he was the perpetrator but concedes that the evidence establishes that he was present, and there was other evidence that a reasonable mind might accept as adequate to support a conclusion that defendant committed these crimes.

5. Evidence— expert testimony—blood splatter

Admission of testimony from a forensic serology expert on blood splatter was not an abuse of discretion. Although defendant questioned the witness's qualifications as an expert on blood splatter, it was reasonable to conclude that her extensive experience with blood evidence made her better qualified than the jury to form an opinion as to the cause of particular bloodstains.

6. Indictment and Information— notice of charge—international treaty—no private cause of action

A first-degree murder defendant's reliance on the International Covenant on Civil and Political Rights was misplaced. That treaty was not self-executing and did not create a private cause of action.

7. Homicide— first-degree murder—short-form indictment—constitutional

The short form indictment for first-degree murder does not violate constitutional notice requirements.

Appeal by defendant from judgments dated 8 November 2002 by Judge William Z. Wood, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 26 May 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General John F. Maddrey, for the State.

Daniel Shatz for defendant-appellant.

McGEE, Judge.

Michael Bruton (defendant) was convicted on 7 November 2002 of first degree murder and first degree arson. The jury convicted defendant of first degree murder on the basis of malice, premeditation, and deliberation, as well as under the felony murder rule. The trial court sentenced defendant to life imprisonment without parole for the first degree murder conviction, and to a minimum term of sixty-four months to a maximum term of eighty-six months in prison for first degree arson, to be served consecutively.

The State's evidence at trial tended to show that Philomena Carter (Ms. Carter) died on 16 September 2000 from a lethal level of carbon monoxide in her blood due to smoke inhalation. Ms. Carter had also suffered numerous knife wounds to her head, blunt force trauma to both her head and chest, and defensive wounds to her hands. Ms. Carter's body was found in her house by the Winston-Salem Fire Department shortly after 2:00 p.m. on 16 September 2000. She was found lying on her back on the kitchen floor with a heavy metal chain wrapped around her left ankle. A blood-soaked garment, which smelled of an accelerant, was found in the kitchen. The Winston-Salem fire marshall located at least three pour patterns in Ms. Carter's residence, indicating points where some substance had

been thrown on the floor and lit in order to start the fire. It was the fire marshall's opinion that the fire had been set using an accelerant such as gasoline. A gasoline can was found in the utility room of the house.

Johnik Duncan (Duncan) testified that on the day of the fire, defendant called Duncan about coming to her apartment. Defendant called Duncan again later that day and said he was dropping someone off in Walnut Cove. Defendant thereafter arrived at Duncan's apartment around 6:00 or 6:30 p.m. that day. He was driving a white Jeep Cherokee, which Duncan had not seen before. Duncan testified that defendant told her to tell anyone who asked that he had arrived at her apartment between 1:00 and 1:30 p.m. and that he had been driving a red Honda Civic. Duncan told the police later that night that defendant had arrived at her apartment that day between 1:00 and 1:30 p.m. She told the same story to defendant's mother. Subsequently, Duncan informed police that defendant had arrived at her apartment at about 6:30 p.m. and that he had been driving a white Jeep Cherokee.

She further testified that when defendant arrived at her apartment on September 16, he asked her to hold the keys to the Jeep Cherokee. Duncan later presented the keys to the police. The police located the Jeep Cherokee, which belonged to Ms. Carter, between two buildings at Duncan's apartment complex late on the evening of the fire. A partial print found on the passenger door of the Jeep Cherokee was not defendant's.

Melvina Atwater (Atwater) testified that she discovered a blue nurse's bag in the dumpster near her apartment on September 16, between 3:00 and 5:00 p.m. Atwater found Ms. Carter's identification badge in the bag. A police investigator with the Winston-Salem Police Department responded to Atwater's location and found other items in the dumpster belonging to Ms. Carter. A paper shopping bag in the dumpster contained a blue "DKNY" t-shirt and a knife. A gas nozzle was found near the bag. Defendant testified that the "DKNY" t-shirt was his. There was blood on the front and back of the "DKNY" t-shirt, and a DNA profile of the blood matched that of Ms. Carter.

Officer Oather Golding (Officer Golding) with the Walnut Cove Police Department testified that on September 17 about 3:15 a.m., he observed an individual, a "Mr. Freeman," rummaging through the trash bin at a car wash in Walnut Grove. Mr. Freeman produced from the bin a pocketbook containing Ms. Carter's wallet, which contained

Ms. Carter's identification. Officer Golding took the pocketbook from Mr. Freeman and contacted the Winston-Salem Police Department.

A search of defendant's bedroom revealed a "Pepsi" t-shirt wrapped around a blade and handle, gray fleece cotton sweatpants, and a gray "Fubu" t-shirt. The sweatpants and "Fubu" t-shirt tested positive for residual gasoline. A latent print found on the broken knife blade was from defendant's right palm. The blood present on the broken knife blade had a mixture of DNA profiles, with the predominant profile matching Ms. Carter's. The weaker DNA profile was consistent with defendant. A blood sample taken from the sweatpants contained a mixture of Ms. Carter's DNA profile and that of another person. The DNA profile obtained from the "DKNY" t-shirt found in the dumpster matched the DNA profile of Ms. Carter, but not defendant.

Defendant testified that on 16 September 2000, he was dressed in gray sweatpants, a "Fubu" t-shirt, and the "DKNY" t-shirt. Defendant noted that the sweatpants seized by the police were not his. He arrived at Ms. Carter's home that day at 10:00 a.m. to assist her in disposing of an old mattress. According to defendant, as he and Ms. Carter returned from the dump, Ms. Carter mentioned that a guy was supposed to help her do some yard work that day, and defendant agreed to return to help.

Defendant stated at trial that he ate lunch at home that day and then returned to Ms. Carter's residence at around 1:30 p.m. Defendant testified he was introduced by Ms. Carter to a tall black man with a beard. He noticed in the driveway a lime green truck with paint peeling off of it. The man asked to have something to drink and Ms. Carter invited the man and defendant to come into the house. Defendant testified that while he was in the bathroom, he heard a thump and then found the unidentified man holding a knife. Ms. Carter's body was prone on the kitchen floor and blood was present. The man grabbed defendant by his "DKNY" t-shirt and then took defendant's identification and money. The man handed the knife to defendant and told defendant to place it in a paper bag, along with defendant's "DKNY" t-shirt. The man threatened to harm defendant's family if defendant did not comply.

According to defendant, the man gave defendant the keys to the Jeep Cherokee and told defendant to drive home and change his clothes while the man followed in his truck. As defendant left Ms. Carter's home, he noticed flames. He further testified that he went home, changed his clothes, and then drove the Jeep Cherokee to the

Summit Square apartment complex. The man and defendant took the Jeep Cherokee to a car wash in Walnut Cove. As the man and defendant were returning to Winston-Salem, the man jumped out of the Jeep Cherokee and ran between some buildings. Defendant then drove the Jeep Cherokee to Duncan's apartment. Thereafter, defendant telephoned his mother and paged the police after his mother informed him that the police were looking for him. Defendant stated that he did not put any items in the dumpster at the Summit Square Apartment Complex and that Duncan lied when she said that she saw defendant drive up in the Jeep Cherokee. Defendant previously told the police different versions of the events of 16 September, which defendant later admitted were fictional, but has subsequently maintained that the man with the green truck committed the offense.

I.

[1] Defendant first argues that the trial court erred in instructing the jury as to the element of malice required of first degree murder and first degree arson. Defendant contends that the trial court's instruction to the jury as to malice reduced the State's burden of proof as to malice, enabling the State to obtain a conviction without proving each element of the criminal offense.

Defendant failed to object to the instructions at trial and he now asserts plain error. Our Supreme Court has established that plain error review is limited to errors originating from a trial court's jury instructions or a trial court's rulings on admissibility of evidence. *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001), *cert. denied*, 358 N.C. 157, 593 S.E.2d 84 (2004). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

First degree murder is defined as the intentional and unlawful killing of a human being with malice, premeditation and deliberation. *State v. Coplen*, 138 N.C. App. 48, 59, 530 S.E.2d 313, 321, *cert. denied*, 352 N.C. 677, 545 S.E.2d 438 (2000).

> [M]alice, as it is ordinarily understood, means not only hatred, ill will, or spite, but also that condition of mind which prompts a person to take the life of another intentionally, without just cause, excuse, or justification, or to wantonly act in such a manner as to manifest depravity of mind, a heart devoid of a sense of social duty, and a callous disregard for human life.

State v. Crawford, 329 N.C. 466, 481, 406 S.E.2d 579, 587 (1991). Malice, in terms of hatred, ill will or spite, is generally referred to as express malice; whereas, implied malice originates from a condition of mind that prompts a person to intentionally inflict damage without just cause, excuse or justification. *State v. Sexton*, 357 N.C. 235, 237, 581 S.E.2d 57, 58 (2003). Furthermore, it is well-established that "[t]he intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984); *see also State* v. *Taylor*, 155 N.C. App. 251, 266, 574 S.E.2d 58, 68 (2002), *cert. denied*, 357 N.C. 65, 579 S.E.2d 572 (2003).

Noting that the knife used in the offense was not the cause of Ms. Carter's death, the trial court indicated that it would instruct the jury as to first degree murder in accordance with pattern jury instruction 206.14, but would "take out references to a deadly weapon." The trial court forecasted its instruction as to first degree murder and defendant did not object to the proposed language. Pursuant to the proposed instruction, the trial court informed the jury as to the malice component of first degree murder:

> First, that the [d]efendant intentionally and with malice killed the victim. Malice means not only hatred, ill-will or spite, as it is ordinarily—malice means not only hatred, ill-will or spite as it's ordinarily understood, to be sure, that is malice, but malice also means that condition of mind which prompts a person to take the life of another intentionally.

Defendant contends that it was incorrect for the trial court to edit out the portion of the instruction regarding the use of a deadly weapon and to omit the phrase that the killing was done "without just cause, excuse or justification," which is included in the pattern jury instruction. Defendant correctly asserts that the State must show either actual or implied malice on the part of defendant. However, it is defendant's contention that implied malice is limited to instances in which there is a presumption of malice based on the use of a deadly weapon, and because the trial court deemed the instruction as to use of a deadly weapon to be inapplicable, it was the State's burden to show actual malice.

In *Sexton*, our Supreme Court noted that "malice, like intent, is a state of mind and as such is seldom proven with direct evidence. Rather, malice is ordinarily proven by circumstantial evidence from which it may be inferred." *Sexton*, 357 N.C. at 238, 581 S.E.2d at 58

(recognizing that the definition of malice in arson cases is the same as in homicide cases). In so deciding, our Supreme Court rejected the defendant's claim that a showing of express malice is required in arson cases. *Id.* Furthermore, in addressing the presence of malice in the context of a killing, our Supreme Court has stated that "[c]ircumstances immediately connected with the killing by defendant, the viciousness and depravity of his acts and conduct attending the killing, are evidence of malice and properly considered." *State v. Fleming*, 296 N.C. 559, 563, 251 S.E.2d 430, 432 (1979).

At trial, there was substantial evidence of blunt force trauma and knife wounds inflicted on Ms. Carter, as well as the implicit savagery of the heavy chain draped around her ankle. Further, the medical evidence indicated she was alive at the time her home was consumed by fire, and that her death was the result of carbon monoxide poisoning.

Contrary to defendant's assertion, we do not view the trial court's instruction as creating a presumption of malice; instead, the State rightly bore the burden of showing malice as provided by the trial court's instruction. Malice could be proven by direct or circumstantial evidence. Thus, this Court finds no error in the trial court's instruction to the jury as to malice in terms of first degree murder.

[2] We note that defendant also asserts that the trial court erred in failing to include the phrase, "without just cause, excuse or justification" in its definition of malice. However, defendant failed to present further argument on the relevance of the omission beyond simply citing its absence as error. Furthermore, defendant's theory at trial was that he did not participate in the murder, not that he killed Ms. Carter under circumstances involving "just cause, excuse or justification." Since defendant's strategy at trial did not concern whether defendant acted with "just cause, excuse or justification," we conclude that the omission of that clause from the trial court's jury instruction was not in error.

[3] Defendant also argues that the trial court incorrectly instructed the jury as to the definition of malice as an element of first degree arson. In instructing the jury as to first degree arson, the trial court stated that first degree arson was the "malicious burning" of an occupied dwelling house and that malice meant "without just []cause or excuse." Moments later, the trial court instructed the jury that for its members to find defendant guilty of first degree arson, the State must prove, *inter alia*, that defendant "did this burning mali-

ciously, that is, that he intentionally and without justification or excuse burned this house."

Although admitting that the State need not demonstrate actual ill will towards the owner of the property, defendant asserts that the trial court's instruction alleviated the State's burden to demonstrate that defendant acted with the intent to damage the property of another.

In reviewing jury instructions for plain error, the instructions at issue must be viewed in their entirety. *State v. Stevenson*, 327 N.C. 259, 265, 393 S.E.2d 527, 530 (1990). The trial court instructed the jury that the State was required to show that defendant acted with malice, meaning that it was necessary for the State to show he acted intentionally. Thus, we conclude that the trial court's instruction as to malice in terms of first degree arson was not in error.

Defendant's assignments of error numbers two and three are overruled.

II.

[4] In defendant's assignment of error number nine, he contends that the trial court erred by denying his motion to dismiss. We disagree.

In considering a motion to dismiss, the trial court must view "all the evidence . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Pierce*, 346 N.C. 471, 491, 488 S.E.2d 576, 588 (1997). The State is required to produce substantial evidence (1) of each essential element of the offense charged and (2) of the defendant being the perpetrator of the offense. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002). "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 the case before us, defendant argues that the State failed to present substantial evidence that he was the perpetrator of the offenses. Defendant concedes that the State's forensic and circumstantial evidence "undeniably establishes that [defendant] was present when Ms. Carter was killed and that he handled the knife which was used to cut her." In addition, the State presented evidence that defendant was found in possession of Ms. Carter's Jeep Cherokee,

that clothes recovered from his bedroom had gasoline residue, that his "DKNY" t-shirt with Ms. Carter's blood on it was found with Ms. Carter's identification badge, and that the knife discovered in defendant's bedroom had a mixture consistent with Ms. Carter's and defendant's DNA. We find that this evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that defendant committed the crimes for which he was convicted. Defendant's assignment of error number nine is without merit.

III.

[5] Defendant next argues that the trial court erred by allowing an expert in forensic serology to testify regarding the nature of blood splatter. The analysis of bloodstain pattern interpretation is appropriate for expert opinion testimony. *State v. Goode*, 341 N.C. 513, 530, 461 S.E.2d 631, 641, (1995).

State Bureau of Investigation Agent Jennifer Elwell (Agent Elwell), in discussing her analysis of the blood on defendant's "DKNY" t-shirt, detailed the difference between cast off or impact spatter and a transfer pattern. She noted that there was "some definite cast off or impact spatter on the front of the shirt," as well as transfer. According to Agent Elwell a transfer blood pattern occurs when a bloody item comes in contact with a non-bloody area and cast off spatter is indicative of when blood begins to pool on an object and a force is applied to that pool of blood.

In *Goode*, our Supreme Court noted that in determining whether a witness is qualified to testify as an expert witness,

> "[i]t is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession. It is enough that the expert witness 'because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.' " Further, "the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony."

Goode, 341 N.C. at 529, 461 S.E.2d at 640-41 (citations omitted). After concluding that a witness may testify as an expert, the trial court must further determine whether the proffered evidence is relevant. *See* N.C. Gen. Stat. § 8C-1, Rule 401 (2003) (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Defendant does not argue Agent Elwell's testimony is not relevant. He does, however, contest her qualifications to testify as an expert witness as to bloodstain pattern interpretation. As a forensic serologist, Agent Elwell was trained to examine evidence for the presence of body fluids, such as blood, semen, and saliva. It is not unreasonable to conclude that, based on her extensive experience with blood evidence, she would be better qualified than a jury to form an opinion as to the cause of particular bloodstains. Thus, we cannot say that it was an abuse of the trial court's discretion to permit Agent Elwell's testimony. Defendant's assignment of error number seven is overruled.

IV.

[6] In his final argument, defendant assigns error to the trial court's denial of his motion to dismiss and to its entry of judgment convicting defendant of first degree murder. Defendant contends that Article 14(3)(a) of the International Covenant on Civil and Political Rights requires that a defendant be informed "promptly and in detail in a language which he understands of the nature and cause of the charge against him."

Defendant's reliance on the International Covenant on Civil and Political Rights is misplaced. It is evident from the legislative history at the time the treaty was ratified by the United States that Article 14(3)(a) was not to be regarded as self-executing. 138 Cong. Rec. S4781, at S4784 (1992) (The U.S. Senate's resolution of ratification includes the declaration that Articles 1 through 27 of the treaty are not to be self-executing). Furthermore, S. Exec. Rept., No. 102-23, 102nd Congress, 2nd Session, 15 (1992) stipulates that the purpose of including in the ratification of the treaty a declaration that those portions of the treaty are not self-executing "[i]s to clarify that the Covenant will not create a private cause of action in U.S. Courts." Defendant does not present any argument that the treaty created a private right of action.

[7] Defendant also contends that the indictment is insufficient to meet the notice requirement of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Our Supreme Court has "consistently held that the short-form indictment is sufficient to charge a defendant with first-degree murder." *State v. Barden*, 356 N.C. 316, 384, 572 S.E.2d 108, 150 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003); *State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000), *cert.*

denied, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). Specifically, "the short-form indictment is sufficient to charge first-degree murder on the basis of any of the theories, including premeditation and deliberation, set forth in N.C.G.S. § 14-17, which is referenced on the short-form indictment." *Braxton*, 352 N.C. at 174, 531 S.E.2d at 437. Therefore, we find defendant's assignments of error numbers four and five to be without merit.

Finally, "[a]ssignments 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). Accordingly, this Court will not consider defendant's remaining assignments of error.

No error.

Judges McCULLOUGH and ELMORE concur.

ELIZABETH EDMONDS, EMPLOYEE-PLAINTIFF v. FRESENIUS MEDICAL CARE, EMPLOYER SELF-INSURED (RSKCO, SERVICING AGENT), DEFENDANT

No. COA03-1044

(Filed 17 August 2004)

Workers' Compensation— medical causation—expert testimony—highest probability

Workers' compensation testimony from a doctor was the result of reasoned medical analysis rather than speculation and supported the findings and conclusions of the Industrial Commission that plaintiff's kidney problems came from medications taken for a compensable injury. Even though the doctor first testified that plaintiff's condition could be attributable to any one of four causes, he went on to systematically analyze those causes and determined that exposure to medications was the cause with the highest probability.

Judge STEELMAN dissenting.

Appeal by defendant from an opinion and award entered 5 May 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 May 2004.

Randy D. Duncan, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Mel J. Garofalo and Shannon P. Herndon, for defendant-appellant.

CALABRIA, Judge.

Fresenius Medical Care ("defendant") appeals from an opinion and award of the North Carolina Industrial Commission (the "Commission"), awarding Elizabeth Edmonds ("plaintiff") workers' compensation benefits for a work-related injury that occurred on 6 February 1998. We affirm.

Plaintiff, formerly a director of nursing for defendant, sustained a compensable back injury when she tried to prevent a file cart from overturning. In order to treat plaintiff's injury, plaintiff underwent various surgical procedures and was placed on numerous medications, including morphine administered through a surgically-placed internal pump and oral non-steroidal anti-inflammatory drugs ("non-steroidals"). Plaintiff was evaluated as having a twenty-five percent permanent partial disability rating to her back and as being capable of light duty work. Nonetheless, because of continuing pain and the morphine pump, plaintiff was unable to operate a motor vehicle to travel to and from work.

Further evidence presented to the Commission showed that plaintiff was diagnosed as an insulin-dependent Type I diabetic in 1978. In addition to her diabetes, plaintiff is also hypertensive. Creatinine levels in plaintiff's urine jumped from a normal level of .7 in December of 1997 prior to the compensable injury to an abnormally high level of 1.2 in October 2001 after treatment of her compensable injury with the non-steroidals. Dr. W. Patrick Burgess ("Dr. Burgess"), an internist and nephrologist, explained that the increasing creatinine levels in plaintiff's urine indicated reduced renal function.

Plaintiff filed for workers' compensation benefits for back and urological injuries due to the accident on 6 February 1998. Although defendant initially admitted plaintiff's right to compensation, on 22 May 2001, defendants requested a hearing on whether termination of benefits was proper on the grounds that suitable employment had been found for plaintiff. In plaintiff's response, plaintiff requested a "determination if [plaintiff's] diabetes, urological and other conditions have been caused or aggravated by the injury at work and treatment, and whether defendants are responsible."

In an opinion and award filed 23 August 2002, the deputy commissioner concluded defendant failed to prove plaintiff unjustifiably refused suitable employment and plaintiff failed to prove the non-steroidals taken during treatment of her compensable back injury worsened her kidney problems or was the cause of any decrease in her renal function. Both parties appealed, and in an order filed 5 May 2003, the Commission affirmed the deputy commissioner's conclusion regarding whether plaintiff unjustifiably refused suitable employment. However, the Commission went on to conclude, based in part on the deposition testimony of Dr. Burgess, that plaintiff had "proved by the greater weight of the evidence that the non-steroidal medications taken by plaintiff because of her compensable back injury worsened or exacerbated her pre-existing kidney problems." Defendant appeals.

On appeal, defendant asserts the Commission erred in concluding plaintiff's pre-existing kidney problems were worsened or exacerbated by the non-steroidals taken as part of her treatment for the compensable back injury. Specifically, defendant contends the Commission's reliance on Dr. Burgess' deposition testimony is misplaced for a number of reasons, including (1) that his opinion regarding medical causation failed to rise to the level of a reasonable degree of medical certainty, was hypothetical and based on assumptions regarding dosage and timing of the non-steroidals and (2) that there were other possible sources other than the non-steroidals that could have caused plaintiff's kidney problems. In short, defendant argues Dr. Burgess' testimony amounted to nothing more than mere speculation which was not sufficiently reliable to rise to the level of competent evidence upon which the Commission's finding of fact, that the non-steroidals taken by plaintiff worsened her kidney problems, could be predicated.

In reviewing the Commission's opinion and award, this Court is limited to determining "(1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). " '[T]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)).

The employee bears the burden of establishing that his worker's compensation claim is compensable. *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003). Where there exists a reasonable relationship between the injury and the employment, the injury is compensable as work-related. *Id.* "[T]he [employee] must prove that the accident was a causal factor [of the injury] by a 'preponderance of the evidence[.]' " *Id.*, 357 N.C. at 232, 581 S.E.2d at 752 (quoting *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158-59, 357 S.E.2d 683, 685 (1987)). The competency of expert opinion testimony for determinations of causation in complicated medical questions (or those questions above the layman's ordinary experience and knowledge) turns on whether the opinion is based on mere speculation or conjecture. *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). If the opinion is based on mere speculation or conjecture, it is not sufficiently reliable to constitute competent evidence. *Id.* Thus, in *Holley*, our Supreme Court explained that such expert opinion testimony must " 'take the case out of the realm of conjecture and remote possibility' " in order to constitute " 'sufficient competent evidence tending to show a proximate causal relation' " between the injury and the work-related accident. *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (quoting *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942)). Where the expert's opinion is that there "could" or "might" be a causal relationship, it is admissible if helpful for purposes of showing medical causation; however, it is not sufficiently reliable to constitute competent evidence of medical causation, especially if additional evidence suggests such testimony was merely a guess. *Id.*, 357 N.C. at 233, 581 S.E.2d at 753.

In the instant case, the Commission found, in relevant part, as follows:

> Given the evidence of record that renal failure can occur in individuals with a short exposure history to non-steroidal anti-inflamatories, and Dr. Burgess's testimony indicating a possible link between plaintiff's worsening renal condition and her use of non-steroidal anti-inflamatories, the Full Commission finds that plaintiff's use of such medication to treat her back injury more likely than not worsened or exacerbated her pre-existing kidney problems.

The Commission went on to conclude plaintiff proved by the greater weight of the evidence that the exposure to non-steroidals

was the medical cause of her deteriorated renal function and awarded compensation.

Dr. Burgess testified that plaintiff's renal insufficiency could possibly be attributable to any one of four causes: (1) diabetes, (2) hypertension, (3) exposure to non-steroidals, and (4) a combination of the preceding three possibilities. Dr. Burgess defined "possible" as something that was "not out of the realm of being something we see happening." He also gave conflicting testimony regarding his familiarity with the timing and dosage of the non-steroidal treatment administered to plaintiff. Standing alone, such testimony clearly lacks sufficient reliability to constitute competent evidence of medical causation under *Holley*.

Nonetheless, later in his testimony, Dr. Burgess clarified his earlier testimony regarding the possibilities of medical causation as follows:

> One of [hypertension, diabetes, the exposure to the non-steroidals, or some combination] is the most likely. . . . What's against the hypertension is, the length of time of hypertension hasn't really been long enough to be hypertension. What's against the diabetes is, the findings of a fairly normal sized or even small kidney and little or no protein in the urine are both indicators that she does not—it is probably not diabetic nephrosclerosis. Now, she has in her history had a period of time when she had protein in her urine, but my explanation for that is, both of those times when she was told she had protein in her urine, her diabetes was out of control, and diabetes out of control does induce proteinuria or protein in the urine. So I think she had protein in her urine a couple times, but those were both related to episodes of high sugar. . . . I think [the exposure to the drugs is] the highest probability.

Moreover, Dr. Burgess testified that renal involvement resulting from "chronic medical illness[es]," such as hypertension or diabetes, would result in creatinine levels that

> would probably continue changing . . . . The fact that they took a step change is probability wise more in favor of an acute injury; that now the drug has been removed, the injury has been—whatever the injury was, it's there, and it's no longer—the insult is gone, so she's staying the same. That's the more likely explanation.

Finally, Dr. Burgess reiterated that a change in creatinine levels due to exposure to the non-steroidals

> would occur during [the period of time when she was taking the non-steroidals] and when the drug is removed, then there would be possibility of a little improvement and then stabilization. If it was diabetes [or hypertension] . . . I would expect . . . just a slow progression . . . . That's just the way they tend to react. It's a systemic disease that's a part of her. If, on the other hand, it's something external to her like an injury, then I would expect there would be a step change and then stabilization, which is sort of how she's acting.

Thus, while Dr. Burgess' testimony is not ideally conclusive, it is clear that Dr. Burgess specifically itemized the possible causes of plaintiff's renal insufficiency, systematically analyzed those causes, and finally determined exposure to the non-steroidals was the cause that had the "highest probability."

Dr. Burgess similarly clarified his testimony regarding his familiarity with the details of plaintiff's exposure to the non-steroidals. Dr. Burgess stated that, when he first saw plaintiff, he had not researched her exposure to the non-steroidal treatment and did not "have the details or how many months or years [plaintiff had taken the non-steroidals.]" Nonetheless, Dr. Burgess was able to expressly affirm that plaintiff "took the medication over a long enough period of time" based upon the information with which he had been provided. He further testified that if plaintiff "came back and told [him] it was only for a week, I would have trouble making that association [between the period of exposure to the non-steroidal and the reduced renal function]. But if it had been months or years, then that's another issue."

Thus, while Dr. Burgess indicated an inability to state with a reasonable degree of medical certainty that the non-steroidals were the cause of plaintiff's renal insufficiency, it does not necessarily follow that his testimony was not competent evidence of medical causation. The Commission's reliance on expert testimony regarding medical causation in workers' compensation awards does not, as defendant seems to argue, rise or fall on a doctor's use of the term "reasonable degree of medical certainty." Rather, under *Holley*, "could" or "might" testimony, standing alone, is insufficient to show medical causation, especially where there exists additional evidence tending to show the expert's testimony is merely speculation or conjecture. However, in the instant case, the expert testimony consisted of more than "could"

or "might" testimony, and additional evidence tended to show that Dr. Burgess' testimony was the product of a reasoned medical analysis as opposed to mere speculation. Accordingly, Dr. Burgess' testimony constituted competent evidence supporting the findings of fact by the Commission, which, in turn, supported the conclusion of law that plaintiff proved "by the greater weight of the evidence that the non-steroidal medications taken by plaintiff because of her compensable back injury worsened or exacerbated her pre-existing kidney problems." Defendant's assignments of error are overruled.

Affirmed.

Judge WYNN concurs.

Judge STEELMAN dissents.

STEELMAN, Judge dissenting.

I must respectfully dissent from the majority opinion based upon the holdings of our Supreme Court in *Holley v. ACTS, Inc.*, 357 N.C. 228, 581 S.E.2d 750 (2003), and *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 538 S.E.2d 912 (2000).

In reviewing findings of fact of the Industrial Commission (the "Commission"), our standard of review is to determine whether those findings are supported by competent evidence. *Faison v. Allen Canning Co.*, 163 N.C. App. 755, 751, 594 S.E.2d 446, 448 (2004). If so, then they are binding on appeal, even though there was evidence to support contrary findings. *McRae v. Toastmaster*, 158 N.C. 70, 75, 579 S.E.2d 913, 916 (2004). It is not the role of the appellate courts to sift through the evidence and find facts that are different from those actually found by the Commission.

In this case, Dr. Burgess's testimony on medical causation was conflicting. The Industrial Commission made the following findings of fact causally connecting plaintiff's treatment with non-steroidal anti-inflammatory drugs to her renal failure:

> 19. Dr. Burgess testified that plaintiff's exposure to the non-steroidal anti-inflammatory drugs, "possibly" or "could or might" have worsened plaintiff's kidney function. Dr. Burgess could not say that it was probable; he could only say that it was possible. He stated he could not give an opinion, to a reasonable degree of medical certainty, without knowing all the information surround-

> ing the drugs. Dr. Burgess testified that plaintiff's kidney disease could be attributed to a number of factors, including diabetes, hypertension, a drug source injury, or a blunt trauma injury. Finally, Dr. Burgess testified that because plaintiff had both diabetes and hypertension, she is more likely to need dialysis.
>
> 20. Given the evidence of record that renal failure can occur in individuals with a short exposure history to non-steroidal anti-inflamatories, and Dr. Burgess's testimony indicating a possible link between plaintiff's worsening renal condition and her use of non-steroidal anti-inflamatories, the Full Commission finds that plaintiff's use of such medication to treat her back injury more likely than not worsened or exacerbated her pre-existing kidney problems.

Based upon these findings, the Commission concluded that plaintiff showed, by the greater weight of the evidence, that the non-steroidal medications taken to treat her compensable back injury exacerbated her pre-existing kidney problems.

> In *Holley* our Supreme Court stated:
>
> 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."

Holley, 357 at 233, 581 S.E.2d at 753 (internal citations omitted).

In this case, the only medical testimony linking the administration of non-steroidal anti-inflammatory drugs to plaintiff's reduced renal function was that of Dr. Burgess. As found by the Commission, his testimony was only that the drugs "possibly" or "could or might" have caused plaintiff's renal problems. Further, the Commission found that Dr. Burgess could not give an opinion to a reasonable degree of medical certainty on causation. This testimony does not rise above a guess or mere speculation and does not meet the requirements set forth in *Holley*. *Id.*

Clearly, the Commission recognized the weakness of Dr. Burgess's testimony and attempted in finding of fact twenty to buttress his opinion with testimony of other witnesses that a short exposure to non-steroidal anti-inflamatories can result in renal failure. The Commission thus attempted to link together the testimony

of several expert witnesses and render its own medical opinion that the medications "more likely than not worsened or exacerbated her pre-existing kidney problems." Further, Dr. Burgess also testified that a short exposure to non-steroidal anti-inflamatories can result in renal failure yet he did not reach the same conclusion as the Commission. It is not the role of the Commission to render expert opinions. In cases involving complex medical questions, only an expert can give opinion evidence as to the cause of an injury. *Holley*, 357 at 232, 581 S.E.2d at 753.

I would hold that plaintiff has failed to prove that her loss of renal function was causally related to the administration of non-steroidal anti-inflamatories. Without that causal link, the kidney injuries did not arise out of a compensable injury and she is not entitled to compensation for those injuries under Chapter 97.

C.D. HARMAN, PLAINTIFF v. WILLIAM I. BELK, DEFENDANT

No. COA02-1470

(Filed 17 August 2004)

Libel and Slander— deposition testimony—absolute privilege

The trial court did not err by reserving its decision on defendant's motion for a directed verdict in a slander case based on deposition testimony and then by denying the motion when renewed by defendant following the jury's verdict in defendant's favor because any error was harmless when the trial court would have been justified in granting defendant's motion for a directed verdict since: (1) a defamatory statement made in due course of a judicial proceeding is absolutely privileged and will not support a civil action for defamation even if it was made with express malice when the statement is sufficiently relevant to the proceeding; (2) the deposition was a judicial proceeding and defendant's statements were made in response to a deposition question by opposing counsel only after defendant balked in answering the question and was directed by both the deposing counsel and his own lawyer to respond; and (3) defendant's statements were not so palpably irrelevant to the subject matter of the controversy that no reasonable man could doubt its irrelevancy or impropriety, thus making the statements absolutely privileged.

Appeal by plaintiff from judgment entered 26 March 2002 and order entered 2 May 2002 by Judge Charles C. Lamm, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 August 2003.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr. and Preston O. Odom, III, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Mel J. Garofalo and M. Duane Jones, for defendant-appellee.

GEER, Judge.

Plaintiff C.D. Harman appeals a judgment entered on a jury verdict finding that defendant William I. Belk did not slander plaintiff during the course of a deposition in another lawsuit. We hold that any error in the conduct of the trial was harmless because the trial court should have granted defendant's motion for a directed verdict following the close of plaintiff's evidence. The deposition was a judicial proceeding and Belk's comments were not palpably irrelevant to that proceeding. The comments were, therefore, absolutely privileged.

Factual Background

Defendant Belk was engaged in the business of manufacturing bottled water through a company called Old Well Water, Inc. The company intended to enter into licensing agreements with colleges and universities to permit it to use the schools' logos and market the water on campus and at various other outlets. Old Well entered into a distribution relationship with Collegiate Distributing, Inc., a company formed for that purpose by plaintiff Harman's son, Sayers Harman. The plaintiff in this lawsuit, C.D. Harman ("Harman"), was an officer and director of and a source of financing for Collegiate Distributing.

Ultimately, Old Well Water and Belk sued Collegiate Distributing and Sayers Harman for breach of contract. Collegiate Distributing and Sayers Harman asserted various counterclaims, including breach of contract, unfair and deceptive trade practices, and fraud. They also filed a third-party complaint against William Reed Raynor, another officer of Old Well Water. At the trial of the Old Well lawsuit, the jury found in favor of Collegiate Distributing and Sayers Harman, but awarded only $1.00, which was then trebled to $3.00. They appealed and, in an unpublished opinion, this Court found no error. *Old Well Water, Inc. v. Collegiate Distrib., Inc.*, 150 N.C. App. 717, 565 S.E.2d 112 (2002) (unpublished).

During the course of the Old Well litigation, counsel for Collegiate Distributing and Sayers Harman deposed Belk. C.D. Harman was present at the deposition. When Belk was asked about a letter he had received from Sayers Harman making certain demands, Belk testified that the letter suggested to him "that [Sayers Harman's] father and he were knaving [sic] on how to figure out at this juncture to sabotage our corporation, and to try to take our agreements and our trademarks." Belk also stated that he believed C.D. Harman had been speaking to Collegiate Licensing and Georgia Tech, possibly in an effort to disrupt Old Well Water's licensing agreements. He indicated that by late summer 1998, he was suspicious of Sayers Harman's and C.D. Harman's intentions toward Old Well Water.

Counsel for Collegiate Distributing and Sayers Harman explored Belk's assertions:

Q. What evidence do you know that Sayers Harman's father, Dale Harman, engaged in any sort of a conspiracy to damage Old Well?

A. We'll let Jack [Belk's counsel] do that on his questioning with Sayers.

Q. Well, I'm asking you what do you know.

[Belk's Counsel]: If you presently have personal knowledge of precisely what Mr. Dale Harman has done testify to that. If you don't, say so, and let's pursue it through other forms of discovery.

A. It's third party.

Q. . . . What third-party information do you have that he has engaged in such activities?

A. Through the other owners of Old Well Water and their employees and family.

Q. And what information is that that you've learned from these third parties?

A. Well, I said it is third party so I'll wait on that.

Q. Well, I'm not going to wait. I want you to answer the question. What do you know?

[Belk's Counsel]: (To witness) Well, he is entitled to ask you if a third party told you something then you have to

answer what the third party told you even if it is not of your personal knowledge.

A. There were instances that Sayers told Will Raynor that his father had devised a way to take our inventory. He was coming up there and was not going to pay for it in order to stiff us. He told the warehouse person that he was not—that Sayers was not—told him that he wasn't going to sell our twenty ounce, so that we could not survive. He calls up—personal knowledge—with my distributor up here and spooks them to where they want to—they feel uncomfortable working with us. Cunningham. They are calling up Collegiate Licensing to try to see if they can help revoke our license. Just by the letters and the questions that you are asking. He told my partners that he—that I had put this initial investment but that he was going to get me out and work with them exclusively after I had put up the initial money for a loan. He mislead [sic] us on that—and kept a secret that we did not know. That Will and Elizabeth were his only payroll outside of himself. He misrepresented the fact that he was—had education and competence and business background to set up a distributorship and we—and then kept us away from what he was doing where we didn't even know who the employees were, what he was doing, or anything.

Q. Now, all of those statements you are using pronouns. But do any of those pronouns apply to Dale Harman. And, that was the question, what did Dale Harman do to damage—

A. Dale Harman is the alter ego and he is the one that is behind this whole thing.

Q. Are you saying—

A. Reed Raynor told me pointblank that Dale Harman the first time he [met] him bragged about that he was in some special forces in the Marines and he liked to hurt people, that he broke their knees, and that he was a crud [sic] man. I thought that was kind of strange to hear that from a person that could have been his future father-in-law or I mean outlaw.

. . . .

Q. What exactly did Dale Harman do that you know of or have personal knowledge of someone telling you that he did?

A. I know that this is his money in the corporation. I know that he is an officer and director. I'm pretty positive that he is paying for the lawsuit. I'm pretty positive he has been talking to Collegiate Licensing. And I'm going to find out. Because if he is, he is going to be liable for it. I believe that he is behind this whole scenario. . . .

Q. But, you have no personal knowledge of any of that?

A. This is from what I was told.

. . . .

Q. What did Reed Raynor tell you that Dale Harman specifically did in relation to the things that you have gone on about?

A. As a lawyer he liked to sue the city every year for his taxes and that he liked to blackmail people.

Q. Is that all he told you about Dale Harman?

A. He told me that he bragged all the time when he was with him in social—that he liked hurting people.

Harman filed this action alleging that Belk's statements during this deposition constituted slander *per se*. Defendant Belk filed a motion for summary judgment that was denied on 12 June 2000. The case was tried before a jury beginning 18 March 2002. At the close of plaintiff's evidence and at the close of defendant's evidence, defendant moved for a directed verdict on the grounds of absolute privilege. On each occasion, the trial court reserved ruling. The jury returned a verdict in favor of defendant, finding that defendant did not slander plaintiff. At that point, the trial court denied defendant's motion for a directed verdict and subsequently entered judgment on the jury's verdict on 26 March 2002. Plaintiff filed a motion for a new trial that was denied. Plaintiff has appealed from the judgment and the denial of his motion for a new trial, while defendant has cross-assigned error as to the trial court's denial of the motion for a directed verdict.

On appeal, plaintiff contends: (1) the trial court should have directed a verdict in plaintiff's favor or peremptorily instructed the jury that defendant was liable for slander; (2) the trial court should have instructed the jury that Belk could be held liable for republishing slanderous statements by a third person; and (3) the trial court abused its discretion in denying the motion for a new trial. Defendant, however, contends that the case should never have gone to the jury

because his statements, made in the course of a judicial proceeding, were absolutely privileged.

Our Supreme Court has "consistently held that when, upon a consideration of the whole record, it clearly appears that the appellant, under no aspect of the testimony, is entitled to recover and that the evidence considered in the light most favorable to him is such that the trial judge would have been fully justified in giving a peremptory instruction, or directing a verdict, against him on the determinative issue or issues, *any error committed during the trial will be deemed harmless.*" *Freeman v. Preddy*, 237 N.C. 734, 736, 76 S.E.2d 159, 160 (1953) (emphasis added). We must, therefore, first consider defendant's cross-assignment of error and determine whether the trial court would have been justified in granting defendant's motion for a directed verdict. If we answer that question in the affirmative, then any error argued by plaintiff would be harmless.

Defendant Belk relies upon the rule "that a defamatory statement made in due course of a judicial proceeding is absolutely privileged and will not support a civil action for defamation, even though it be made with express malice." *Jarman v. Offutt*, 239 N.C. 468, 472, 80 S.E.2d 248, 251 (1954) (physician's affidavit regarding plaintiff's insanity absolutely privileged). The public policy underlying this privilege "is grounded upon the proper and efficient administration of justice. Participants in the judicial process must be able to testify or otherwise take part without being hampered by fear of defamation suits." *Houpe v. City of Statesville*, 128 N.C. App. 334, 346, 497 S.E.2d 82, 90 (internal citations omitted), *disc. review denied*, 348 N.C. 72, 505 S.E.2d 871 (1998).

In deciding whether a statement is absolutely privileged, a court must determine (1) whether the statement was made in the course of a judicial proceeding; and (2) whether it was sufficiently relevant to that proceeding. *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 672, 355 S.E.2d 838, 841 (1987). These issues are questions of law to be decided by the court. *Scott v. Statesville Plywood & Veneer Co.*, 240 N.C. 73, 76, 81 S.E.2d 146, 149 (1954) ("the question of relevancy or pertinency is a question of law for the courts"); *Harris*, 85 N.C. App. at 674, 355 S.E.2d at 842 (holding that absolute privilege applies to proposed, but unfiled, complaint).

Statements made in a deposition are unquestionably statements made in the course of a judicial proceeding if they meet the relevance requirement. *See* 50 Am. Jur. 2d *Libel and Slander* § 300 (1995) ("The

absolute privilege has been extended to statements made . . . in pretrial deposition and discovery proceedings."). Plaintiff does not contend otherwise. *See also Gibson v. Mutual Life Ins. Co. of N.Y.*, 121 N.C. App. 284, 290-91, 465 S.E.2d 56, 60 (1996) (statements made during a break in a deposition were made in the course of a judicial proceeding); *Rickenbacker v. Coffey*, 103 N.C. App. 352, 357, 405 S.E.2d 585, 588 (statements made by a witness in a pre-deposition conference were absolutely privileged), *disc. review denied*, 330 N.C. 120, 409 S.E.2d 600 (1991).

The primary issue on this appeal is whether Belk's deposition testimony was sufficiently related to the underlying judicial proceeding. Our Supreme Court has held that statements in a judicial proceeding lose the privilege only "if they are not relevant or pertinent to the subject matter of the action, . . . and the matter to which the privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety." *Scott*, 240 N.C. at 76, 81 S.E.2d at 149. On the other hand, if the statement at issue "is so related to the subject matter of the controversy that it may become the subject of inquiry in the course of the trial, the rule of absolute privilege is controlling." *Id.*

As in *Gibson*, Belk made his statements in response to questions posed by counsel at a deposition. *Gibson*, 121 N.C. App. at 291, 465 S.E.2d at 61 ("[T]he statements meet the relevance requirement as they were made in connection with numerous questions [the witness] was asked during the course of the deposition."). Significantly, under the North Carolina Rules of Civil Procedure, counsel could only ask questions "relevant to the subject matter involved in the pending action[.]" N.C.R. Civ. P. 26(b)(1). *See also* Restatement (Second) of Torts § 588, comment c (1977) ("If the defamatory matter is published in response to a question put to the witness by either counsel or by the judge, that fact is sufficient to bring it within the protection of the privilege, notwithstanding the fact that it is subsequently adjudged to be inadmissible."). Here, Belk's statements were made not only in response to a deposition question by opposing counsel, but also only after he balked in answering the question and was directed by both the deposing counsel and his own lawyer to respond. If Belk's answers were responsive to those questions, they were by definition within the course of a judicial proceeding.

During the deposition of Belk, counsel for Collegiate Distributing and Sayers Harman explored Belk's contention that C.D. Harman and

his son were engaged in a conspiracy to damage Belk's company, Old Well Water. The Old Well litigation appears to have been a battle regarding who breached whose contract and who was trying to undermine whose business. Belk's answers reflect an attempt to explain why he believed that plaintiff Harman was involved in an attempt to undermine Belk's business and was the moving force behind Collegiate Distributing's counterclaims, including what personality traits might motivate Harman to engage in such conduct. While Belk's theories might be dismissed by some, but not all, as dubious, "[t]he fact that the defamatory publication is an unwarranted inference from the alleged or existing facts is not enough to deprive the party of his privilege, if the inference itself has some bearing upon the litigation." Restatement (Second) of Torts § 587, comment c (1977).

Belk's statements were answers to counsel's questions and not "so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety." *Scott*, 240 N.C. at 76, 81 S.E.2d at 149. They were, therefore, absolutely privileged. This conclusion is necessary given the policies behind the privilege. In years past, courts have struggled with a discovery process hampered by excessive objections and instructions not to answer in the course of depositions. *See, e.g.*, M.D.N.C. R. 26.1(b)(2)(i) ("Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court."). To authorize a slander suit based on deposition testimony that the witness, perhaps mistakenly, felt was responsive to questions he was required to answer would likely cause disruption of depositions in the future and hinder the effectiveness of our civil discovery process. It would not be consistent with the policy of "the proper and efficient administration of justice" underlying the absolute privilege. *Houpe*, 128 N.C. App. at 346, 497 S.E.2d at 90.

Since the statements alleged to be slanderous were made in the course of a judicial proceeding and were sufficiently related to that proceeding, the statements were absolutely privileged. The trial court would, therefore, have been justified in granting defendant's motion for a directed verdict. We need not, therefore, address plaintiff's contentions regarding the conduct of the trial or the denial of his motion for a new trial since any error was harmless. *Freeman*, 237 N.C. at 736, 76 S.E.2d at 160.

In reserving his decision on defendant's motion for a directed verdict and then denying the motion when renewed by defendant following the jury's verdict in defendant's favor, the trial court was following the procedure recommended by the Supreme Court:

> Where the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury. If the jury returns a verdict in favor of the moving party, no decision on the motion is necessary and an appeal may be avoided.

Manganello v. Permastone, Inc., 291 N.C. 666, 669-70, 231 S.E.2d 678, 680 (1977). Here, when the jury returned a verdict in favor of defendant, it was unnecessary for the trial court to grant defendant's motion for a directed verdict. We, therefore, hold that there was no error.

No error.

Judges McGEE and BRYANT concur.

STEVEN LEE WALLACE, PLAINTIFF-APPELLEE v. M, M & R, INC., INDIVIDUALLY; M, M & R, INC., D/B/A THE SPORTS PAD COMPLEX; ADAM THOMAS REDFIELD, JON RYAN WHALEY, AND ROGER DALE SOUTHARD, JR., DEFENDANTS-APPELLANTS

No. COA03-845

(Filed 17 August 2004)

1. Premises Liability— failure to provide safe and secure premises—negligent hiring and training—bouncers

The trial court did not err in an acting for damages arising out of the failure to provide safe and secure premises and negligent hiring and training of security staff at a nightclub by denying defendants' motions for directed verdict and motion for judgment notwithstanding the verdict, because a jury could reasonably find that defendants' bouncers were acting within the scope of their employment at the time of the pertinent incident when: (1) an organized plan was developed for the bouncers to approach plaintiff and his friend for the purported purpose of removing them from the premises; (2) the police had been notified but instead of waiting for their arrival, the manager and bouncers decided to approach plaintiff and his friend which was an action

taken as a group decision in consultation with the manager in compliance with the job description of a bouncer at a bar; and (3) the bouncers' action, though guised as an opportunity to remove plaintiff and his friend, quickly turned into a beating and this action was performed with negligent or improper method opening defendants to liability.

2. Damages and Remedies— punitive damages—motion for judgment notwithstanding verdict—manager participation

The trial court did not err in an acting for damages arising out of the failure to provide safe and secure premises and negligent hiring and training of security staff at a nightclub by denying defendants' motion for judgment notwithstanding the verdict as to punitive damages based on alleged insufficient evidence that the nightclub's manager participated in or condoned the attack on plaintiff within the meaning of N.C.G.S. § 1D-15(c) because by his own testimony, the manager failed to intervene in the beating of plaintiff when he did not ask the bouncers to stop or attempt to break up the attack on plaintiff in any way.

3. Emotional Distress— negligent infliction—directed verdict

Although defendants contend plaintiff's claim for negligent infliction of emotional distress cannot be sustained, the record shows the trial court granted a directed verdict as to plaintiff's negligent infliction of emotional distress claim as to all defendants.

Appeal by defendants M, M & R, Inc., individually, and M, M & R, Inc., d/b/a The Sports Pad Complex, from an order entered 25 September 2002 and from judgment entered 26 November 2002 by Judge Clifton W. Everett, Jr. in Superior Court, Pitt County. Heard in the Court of Appeals 1 April 2004.

Law Offices of Frank A. Cassiano, Jr., by Frank A. Cassiano, Jr., for plaintiff-appellee.

The Robinson Law firm, by Leslie S. Robinson, for defendants-appellants.

McGEE, Judge.

Steven Lee Wallace (plaintiff) filed a complaint on 19 September 2000 against M, M & R, Inc., individually; M, M, & R, Inc., d/b/a The Sports Pad Complex; Joseph Mark Saieed (Saieed), Adam Thomas

Redfield (Redfield), Jon Ryan Whaley (Whaley), and Roger Dale Southard, Jr. (Southard), alleging that M, M & R, Inc., individually, and M, M & R, Inc., d/b/a The Sports Pad Complex (defendants) failed to provide safe and secure premises and that defendants negligently hired and trained their security staff. Defendants filed an answer on 23 October 2000. At trial, a jury determined defendants were liable to plaintiff in the amount of $35,000 for compensatory damages and $210,000 for punitive damages. Defendants moved for judgment notwithstanding the verdict on 7 June 2002. The trial court denied defendants' motion on 25 September 2002. Defendants M, M & R, Inc., individually, and M, M & R, Inc., d/b/a The Sports Pad Complex, appeal.

The evidence at trial tended to show that plaintiff was injured on the evening of 5 February 2000 while he was a patron at a nightclub owned and operated by defendants. Plaintiff and Danny Elwell (Elwell) were sitting at the nightclub's bar when they saw Whaley, one of defendants' employees, who was working that evening as a bouncer. Whaley had been struck on the head with a beer bottle at the nightclub a week earlier. January Wright (Wright), the bartender on duty on the evening of 5 February, told Whaley she heard plaintiff and Elwell discussing the earlier assault. Whaley radioed Southard, the operations manager for the Sports Pad, and told him that the people who had assaulted him were reportedly in the nightclub. Southard sent Whaley to take a closer look to try to determine if plaintiff and Elwell were the individuals who had assaulted Whaley. Whaley was unsure whether plaintiff and Elwell were the assailants, so Southard sent other employees who had been present on the night of the assault to attempt to determine whether plaintiff and Elwell were the parties responsible for the assault. Two employees told Southard they believed that plaintiff and Elwell had committed the attack on Whaley. Plaintiff testified that he was not at the nightclub the night Whaley was assaulted.

Southard decided that plaintiff and Elwell should be removed from the nightclub. Southard gathered several on-duty employees to inform them of his plan. Whaley testified that Southard asked Redfield, an employee who was allegedly off duty that night, to assist in removing plaintiff and Elwell from the nightclub. Southard and the employees divided into two groups of three bouncers each and approached plaintiff and Elwell at the bar. They formed a semi-circle around plaintiff and Elwell, told plaintiff and Elwell to leave the premises, and took away their drinks. As plaintiff and Elwell rose to

leave, Redfield punched plaintiff in the head. Whaley then struck plaintiff's head on the other side. Plaintiff fell to the floor and was punched and kicked repeatedly by Redfield, Whaley, and the other on-duty bouncers. Whaley stomped on plaintiff's head while plaintiff was on the floor. As plaintiff was being beaten, two bouncers dragged Elwell outside. Southard testified that no one made an effort to restrain Redfield, the off-duty employee, from participating in the attack. As a result of the beating, plaintiff was rendered "unconscious and unresponsive[.]" Furthermore, plaintiff was bleeding from his right ear, was having trouble breathing, and sounded as if he was aspirating. After the beating, the bouncers then allegedly slapped plaintiff's face while they dragged plaintiff's unconscious body across the floor.

The police arrived shortly after the beating ended. Plaintiff was taken to the hospital where he remained until 10 February 2000. Plaintiff suffered some hearing loss, as well as vertigo, extreme panic attacks, and anxiety.

Prior to the events of 5 February 2000, testimony indicated that Saieed, defendants' president and operator, was aware that Whaley had a past history of violence against bar patrons. In fact, Whaley had been dismissed once due to an incident involving excessive force but was subsequently rehired. Southard also testified that he was aware that Redfield had used excessive force against a bar patron in the past.

[1] Defendants argue that the trial court erred by denying defendants' motions for directed verdict and defendants' motion for judgment notwithstanding the verdict. For the reasons below, we disagree. "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). "[T]he trial court must consider the evidence in the light most favorable to the nonmoving party, giving [the nonmoving party] the benefit of all reasonable inferences to be drawn therefrom and resolving all conflicts in the evidence in [the nonmoving party's] favor." *Id.* (quoting *Taylor v. Walker*, 320 N.C. 729, 733-34, 360 S.E.2d 796, 799 (1987)). A motion should be granted only when the evidence is insufficient to support a verdict in the nonmoving party's favor. *Dockery v. Hocutt*, 357 N.C. 210, 217, 581 S.E.2d 431, 436 (2003). A motion for directed verdict or judgment notwithstanding the verdict should be denied if the trial court finds there is "more than a scintilla of evidence sup-

porting each element of the plaintiff's claim[.]" *Hutelmyer v. Cox*, 133 N.C. App. 364, 369, 514 S.E.2d 554, 558, *disc. review denied*, 351 N.C. 104, 541 S.E.2d 146 (1999).

"When there is a dispute as to what the employee was actually doing at the time the tort was committed, all doubt must be resolved in favor of liability and the facts must be determined by the jury." *Edwards v. Akion*, 52 N.C. App. 688, 698, 279 S.E.2d 894, 900, *aff'd*, 304 N.C. 585, 284 S.E.2d 518 (1981). Furthermore, "[w]here the employee's actions conceivably are within the scope of employment and in furtherance of the employer's business, the question is one for the jury." *Medlin v. Bass*, 327 N.C. 587, 593, 398 S.E.2d 460, 463 (1990).

On the issue of vicarious liability for the act of an employee, our Supreme Court has stated:

> If the servant was engaged in performing the duties of his employment at the time he did the wrongful act which caused the injury, the employer is not absolved from liability by reason of the fact that the employee was also motivated by malice or ill will toward the person injured, or even by the fact that the employer had expressly forbidden him to commit such act.

Wegner v. Delicatessen, 270 N.C. 62, 66, 153 S.E.2d 804, 807-08 (1967). In *Wegner*, an employee at the defendant's restaurant slammed a glass down on the plaintiff's table. The plaintiff told the employee that he did not think his actions were "too funny." *Id.* at 64, 153 S.E.2d at 806. The employee left and immediately returned to the plaintiff's table and threatened to cut the plaintiff's eyes out with a fork. As the plaintiff attempted to leave the restaurant, the employee, who had been restrained by a fellow employee, broke away and struck the plaintiff. *Id.* Our Supreme Court held that, "[w]hatever the source of his animosity toward the plaintiff may have been, he did not strike the plaintiff as a means or method of performing his duties as [an employee]." *Id.* at 68, 153 S.E.2d at 809. However, our Supreme Court also noted a different situation would have arisen had the glass that the employee smashed on the plaintiff's table broken and injured the plaintiff. In such a case, "the employee would have been performing an act which he was employed to do and his negligent or improper method of doing it would have been the act of his employer in the contemplation of the law." *Id.*

The facts of the present case align analogously with our Supreme Court's hypothetical scenario. In the case before our Court, the facts

indicate that a jury could reasonably find that the bouncers were acting within the scope of their employment at the time of the incident. Southard, the operations manager, first sent Whaley, and then two more employees, to check on plaintiff and Elwell. When the employees expressed some assurance that plaintiff and Elwell were the patrons who had attacked Whaley, Southard rounded up the bouncers. An organized plan was developed. Two flanks of three bouncers each approached plaintiff and Elwell with the purported purpose of removing them from the premises. The police had been notified, but instead of awaiting their arrival, Southard and the bouncers decided to approach plaintiff and Elwell. Such an action, taken as a group decision in consultation with Southard, the manager, is in compliance with the job description of a bouncer at a bar. Such an action is, as *Wegner* instructs, "performing an act which [an employee] was employed to do[.]" *Id.* The bouncers' action, though guised as an opportunity to remove plaintiff and Elwell, quickly turned into a beating. That this action was performed with "negligent or improper method" opens defendants to liability. Once Redfield struck plaintiff and the beating commenced, Southard made no effort to restrain the bouncers. "Acting within the scope of employment means doing what one was employed or authorized to do." *Edwards*, 52 N.C. App. at 693, 279 S.E.2d at 897. Therefore, there was sufficient evidence by which a jury could conclude that plaintiff was injured while defendants' employees were acting within the scope of their duties. Defendants' argument is without merit.

[2] Defendants next argue that the trial court erred by failing to allow the motion for judgment notwithstanding the verdict as to punitive damages. This Court has said:

> Under G.S. § 1D-15(c), punitive damages may not be assessed against a corporation unless "the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." N.C. Gen. Stat. § 1D-15(c). As the legislature has not seen fit to define the word "manager" in this context, we must accord that word its plain meaning. *See Grant Const. Co. v. McRae*, 146 N.C. App. 370, 376, 553 S.E.2d 89, 93 (2001) (if word not defined in statute, courts must accord word plain meaning and refrain from judicial construction). A "manager" is one who "conducts, directs, or supervises something." *Webster's Third New International Dictionary* 1372 (1968).

Miller v. B.H.B. Enters., Inc., 152 N.C. App. 532, 539-40, 568 S.E.2d 219, 225 (2002). In *Miller*, we considered whether the plaintiff failed to present sufficient evidence that an officer, director, or manager of the defendant participated in or condoned the attack on the plaintiff within the meaning of N.C.G.S. § 1D-15(c). We found that the manager of the defendant's restaurant was a "manager" within the meaning of N.C.G.S. § 1D-15(c). In *Miller*, the restaurant manager had supervisory powers, including the power to hire and fire employees. The manager also worked "directly under" and "hand-in-hand" with the owner of the defendant's restaurant. *Miller*, 152 N.C. App. at 540, 568 S.E.2d at 225.

We find *Miller* to be instructive in its interpretation of N.C.G.S. § 1D-15. Thus, we find the record in the present case contains sufficient evidence that indicates that Southard was a "manager" of defendants. Southard was operations manager of defendants on 5 February 2000. He was the most senior employee on duty at the time the incident occurred. At trial, Southard testified that as operations manager, he "gave directions." He further noted that, "[he] dispense[d] the liquor [and] [he] dispose[d] [of] the money." Southard set the work schedules for the bouncers and supervised them when they arrived for work. He employed supervisory power over the bartenders by assuring they "got to the proper place" and he also "gave them the money they needed." Southard also offered input as to whether employees should be hired or fired, and he engaged in periodic meetings to discuss personnel.

Moreover, we considered in *Miller* whether the manager "condoned" the attack on a patron of the defendant's restaurant for the basis of finding punitive damages. *Id.* "The plain meaning of 'condone' is to 'forgive or overlook,' *The Oxford American Dictionary* 197 (1999), or 'permit the continuance of.' *Webster's Third New International Dictionary* 473 (1968)." *Miller*, 152 N.C. App. at 540, 568 S.E.2d at 225. In *Miller*, the evidence indicated that the manager failed to intervene and failed to direct his employees to intervene in a situation where the plaintiff was struck and repeatedly kicked by employees of the defendant. The manager stood "right there" as the plaintiff was beaten. *Id.* We concluded that there was sufficient evidence to show that the manager condoned this attack on the plaintiff within the plain meaning of N.C.G.S. § 1D-15.

In the present case, we find the evidence, taken in the light most favorable to plaintiff, was sufficient to show that Southard condoned the attack on plaintiff. When Southard was notified that plaintiff and

Elwell were in the bar, he sent Whaley and two other employees to see if plaintiff and Elwell were the assailants. After several minutes, Southard then gathered his staff of bouncers. They went over to plaintiff and Elwell in two groups and formed a semi-circle around plaintiff and Elwell. Whaley testified that Southard also asked Redfield to assist in removing plaintiff and Elwell. By his own testimony, Southard failed to intervene in the beating of plaintiff. He did not ask the bouncers to stop or attempt to break up the attack on plaintiff in any way. We find defendants' argument to be without merit.

[3] Defendants finally argue that plaintiff's claim for negligent infliction of emotional distress cannot be sustained; however, the record shows that the trial court granted a directed verdict as to plaintiff's negligent infliction of emotional distress claim as to all defendants. Defendants' argument is thus without merit.

N.C.R. App. P. 28(b)(6) provides that "[a]ssignments 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." Accordingly, defendants' remaining assignments of error are deemed abandoned.

No error.

Judges CALABRIA and STEELMAN concur.

JAMES LESLIE JAVUREK, PETITIONER v. TAX REVIEW BOARD DEPARTMENT OF STATE TREASURER, NORTH CAROLINA, RESPONDENT

No. COA03-1016

(Filed 17 August 2004)

Taxation— challenge to income tax assessment—failure to pay tax or file bond—no subject matter jurisdiction

The trial court properly concluded that it lacked subject matter jurisdiction over a challenge to an income tax assessment where plaintiff did not first pay the tax or file a bond, as required by statute. N.C.G.S. § 105-241.3.

Appeal by petitioner from order entered 30 January 2003 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 April 2004.

James Leslie Javurek, pro se, petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Michael D. Youth, for respondent-appellee.

GEER, Judge.

Petitioner James Leslie Javurek appeals from the trial court's order denying his motion for summary judgment and dismissing his action against respondent Tax Review Board. Because Javurek failed to comply with the statutory requirements for a challenge of a tax assessment, we hold that the trial court properly concluded it lacked subject matter jurisdiction and affirm.

Factual Background

In April 2001, Javurek and his wife filed North Carolina tax returns for 1998 and 1999 showing tax owed in the amount of $82.00 for 1998 and $1,216.00 for 1999. They did not, however, pay the tax due. In June 2001, Javurek received Notices of Individual Income Tax Assessment stating that he owed $125.41 in tax, penalty, and interest for tax year 1998 and $1,762.25 in tax, penalty, and interest for tax year 1999. By letter dated 26 June 2001, Javurek requested a hearing before the Secretary of Revenue regarding the assessments, pursuant to N.C. Gen. Stat. § 105-241.1. At the 24 September 2001 hearing, Javurek argued that he was not a taxpayer and that his wages were not subject to tax. The Department of Revenue issued a Final Decision on 10 December 2001, concluding that the assessments were "final and collectible."

Pursuant to N.C. Gen. Stat. § 105-241.2, Javurek filed a petition for administrative review with the Tax Review Board ("the Board") on 8 March 2002. On 12 August 2002, having received no decision from the Board on his petition for review, Javurek filed this action, captioned "Request for Judicial Review, Writ of Prohibition and Order of Judgment." Javurek sought an order divesting the Board of jurisdiction and prohibiting any further action by the Secretary of Revenue regarding the assessments. The Board filed a response in the civil action on 23 September 2002, seeking dismissal of the action.

On 15 October 2002, in the administrative proceeding, the Board issued its decision, concluding that the petition for administrative review was frivolous and filed for the purpose of delay. The Board, therefore, dismissed the petition pursuant to N.C. Gen. Stat. § 105-241.2(c).

Javurek filed a motion for summary judgment in the civil action on 11 October 2002. On 30 January 2003, the Superior Court held a hearing on Javurek's motion for summary judgment, but concluded that it lacked jurisdiction under N.C. Gen. Stat. §§ 105-241.3 and 105-267. On the same day, the court entered a written order denying the motion for summary judgment and dismissing the action. Petitioner filed notice of appeal from that order on 25 February 2003.

Discussion

Javurek's primary contention on appeal is that the trial court erred in dismissing his action for lack of subject matter jurisdiction because he complied with the required statutory procedures.[1] Our General Assembly has prescribed two specific methods by which a taxpayer may appeal from an administrative assessment of taxes: N.C. Gen. Stat. § 105-241.1 *et seq.* (2003) and N.C. Gen. Stat. § 105-267 (2003). *See Duke v. State*, 247 N.C. 236, 239, 100 S.E.2d 506, 508 (1957) (describing the procedures set out in N.C. Gen. Stat. § 105-267 and 105-241.1 *et seq.*). Because Javurek did not comply with either statutory procedure, the superior court lacked subject matter jurisdiction over his civil action.

"The principle is generally upheld by the courts that statutory remedies granted to a taxpayer must first be exhausted before applying to the courts." *Gill v. Smith*, 233 N.C. 50, 52, 62 S.E.2d 544, 545 (1950). *See also Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979) (internal citations omitted) ("[W]here the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts. This is especially true where a statute establishes, as here, a procedure whereby matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose.").

1. Javurek also argues that the trial court erred in allowing the Board to raise the issue of subject matter jurisdiction for the first time at the summary judgment stage. Because the question of subject matter jurisdiction may be raised at any time, *Vance Constr. Co. v. Duane White Land Corp.*, 127 N.C. App. 493, 494, 490 S.E.2d 588, 589 (1997), this argument is without merit.

Javurek contends that he complied with the requirements set out in N.C. Gen. Stat. § 105-241.1 *et seq.* N.C. Gen. Stat. § 105-241.1 provides for assessment of tax due by the Department of Revenue and establishes hearing procedures for taxpayers who contest the assessments. N.C. Gen. Stat. § 105-241.2 provides for administrative review of the Secretary of Revenue's assessment:

> (a) Petition for Administrative Review.—Without having to pay the tax or additional tax assessed by the Secretary under this Chapter, any taxpayer may obtain from the Tax Review Board an administrative review with respect to the taxpayer's liability for the tax or additional tax assessed by the Secretary. Such a review may be obtained only if the taxpayer has obtained a hearing before the Secretary and the Secretary has rendered a final decision with respect to the taxpayer's liability. . . .
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> . . . .
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> (c) Frivolous Petitions.—Upon receipt of a petition requesting administrative review as provided in the preceding subsection, the Tax Review Board shall examine the petition and the records and other data transmitted by the Secretary pertaining to the matter for which review is sought, and if it appears from the records and data that the petition is frivolous or filed for the purpose of delay, the Tax Review Board shall dismiss the petition for review.

N.C. Gen. Stat. § 105-241.2.

Here, Javurek complied with the procedures for contesting his assessment and for obtaining review by the Board as set out in N.C. Gen. Stat. §§ 105-241.1 and 105-241.2. The Board, however, determined that his petition for administrative review was frivolous and dismissed it pursuant to N.C. Gen. Stat. § 105-241.2(c).

The statutory appeal procedure from a decision by the Board is set out in N.C. Gen. Stat. § 105-241.3, incorrectly captioned "Appeal without payment of tax from Tax Review Board decision[,]" which provides:

> (a) Any taxpayer aggrieved by the decision of the Tax Review Board may, *upon payment of the tax, penalties and interest asserted to be due or upon filing with the Secretary a bond* in such form as the Secretary may prescribe in the amount of said taxes, penalties and interest conditioned on payment of any lia-

> bility found to be due on an appeal, appeal said decision to the superior court under the provisions of Article 4 of Chapter 150B of the General Statutes . . . .
>
> (b) When an appeal is taken under this section from the Tax Review Board's dismissal of a petition for administrative review under the provisions of G.S. 105-241.2(c), the question of appeal shall be limited to a determination of whether the Tax Review Board erred in its dismissal, and in the event that the court finds error, the case shall be remanded to the Tax Review Board to be heard.

N.C. Gen. Stat. § 105-241.3 (emphasis added). Thus, under the statute, a taxpayer may appeal from the Board's decision to superior court only after paying the amount due or filing a bond. There is nothing in this record to indicate that Javurek paid the tax or filed a bond, as required by the statute. Javurek, apparently relying on the incorrect caption, argues that he complied with this procedure. However, "[t]he law is clear that captions of a statute cannot control when the text is clear." *In re Appeal of Forsyth County*, 285 N.C. 64, 71, 203 S.E.2d 51, 55 (1974). Under the plain language of the statute, Javurek failed to comply with the statutory prerequisites for the superior court to have jurisdiction to engage in a review of the Board's decision.[2]

Javurek was free to abandon his administrative proceeding in favor of a civil action challenging the tax assessments. Our General Statutes provide:

> Any taxpayer who has obtained an administrative review by the Tax Review Board as provided by G.S. 105-241.2 and who is aggrieved by the decision of the Board may, in lieu of appealing pursuant to the provisions of G.S. 105-241.3, within 30 days after notification of the Board's decision with respect to liability *pay the tax and bring a civil action for its recovery* as provided in G.S. 105-267.

N.C. Gen. Stat. § 105-241.4 (emphasis added). As our Supreme Court has explained:

> Having taken advantage of the opportunity for a review by the Tax Review Board, the person assessed may, if he so elects, abandon the process of administrative review and seek relief from the

2. It is also questionable whether this action could be construed to be an appeal from the Board's dismissal of his petition for review since Javurek filed this action over two months before the Board's decision was rendered.

> Superior Court under its original jurisdiction. G.S. 105-241.4. Of course, if he asks the Superior Court to exercise its original jurisdiction he must, as a condition precedent thereto, pay his tax under protest and sue to recover as provided by G.S. 105-267.

Duke, 247 N.C. at 240, 100 S.E.2d at 508-09.

N.C. Gen. Stat. § 105-267 in turn provides, in relevant part:

> No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter ["Levy of Taxes"]. Whenever a person has a valid defense to the enforcement of the collection of a tax, the person shall pay the tax to the proper officer, and that payment shall be without prejudice to any defense of rights the person may have regarding the tax. At any time within the applicable protest period, the taxpayer may demand a refund of the tax paid in writing from the Secretary and if the tax is not refunded within 90 days thereafter, may sue the Secretary in the courts of the State for the amount demanded.

Our Supreme Court "has held that G.S. 105-267 . . . establish[es] the general rule that there shall be no injunctive or declaratory relief to prevent the collection of a tax, *i.e.*, the taxpayer must pay the tax and bring suit for a refund." *Cedar Creek Enters., Inc. v. State of N.C. Dep't of Motor Vehicles*, 290 N.C. 450, 455, 226 S.E.2d 336, 339 (1976). In this case, Javurek failed to comply with the procedure set out in N.C. Gen. Stat. § 105-267, under which he was required to first pay the tax and then sue the state for a refund.

This is true even though Javurek has asserted violations of the constitution. This Court has explained that the procedure outlined in N.C. Gen. Stat. § 105-267 must be followed even where, as here, the taxpayer is challenging the constitutionality of a tax:

> Plaintiffs' due process claim rests on their contention that the only avenue for contesting a jeopardy tax assessment is under G.S. 105-267, which prevents a court from taking jurisdiction over a contested tax assessment suit unless the aggrieved taxpayer first pays the tax and then seeks a refund from the North Carolina Department of Revenue.
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> . . . .
>
> . . . Even in cases where the taxpayer is challenging the constitutionality of a tax, failure to comply with the "State's statutory

postpayment refund demand procedure" set forth in the statute bars the court from hearing the taxpayer's claim.

Salas v. McGee, 125 N.C. App. 255, 257-58, 480 S.E.2d 714, 716, *disc. review denied*, 345 N.C. 755, 485 S.E.2d 298 (1997). *See also Gulf Oil Corp. v. Clayton*, 267 N.C. 15, 20, 147 S.E.2d 522, 526 (1966) (N.C. Gen. Stat. § 105-267, which "requires the taxpayer to pay the amount of the disputed tax and sue the State for its recovery . . . is [the] appropriate procedure for a taxpayer who seeks to test the constitutionality of a statute or its application to him."); *47th Street Photo, Inc. v. Powers*, 100 N.C. App. 746, 749, 398 S.E.2d 52, 54 (1990) ("a constitutional defense to a tax does not exempt a plaintiff from the mandatory procedure for challenging the tax set out in § 105-267"), *disc. review denied*, 329 N.C. 268, 407 S.E.2d 835 (1991).

When construed liberally, in accordance with his *pro se* status, Javurek's petition could be viewed as a request for an order requiring the Board to act on his petition. His "Request for Judicial Review, Writ of Prohibition and Order of Judgment" was brought under a provision of the Administrative Procedure Act ("APA"), which provides in part: "Unreasonable delay on the part of any agency . . . in taking any required action shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency . . . ." N.C. Gen. Stat. § 150B-44 (2003). When, however, the Board issued its decision on his administrative petition on 15 October 2002, the action became moot. *See In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977) (appeal is moot "[w]hen events occur during the pendency of [the] appeal which cause the underlying controversy to cease to exist[.]").

Moreover, Javurek did not merely seek an order compelling action by the Board on his petition for review. Instead, he sought an order divesting the Board of jurisdiction and prohibiting any further action by the Secretary of Revenue regarding the assessments. Such an action is expressly forbidden by N.C. Gen. Stat. § 105-267 ("No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter ["Levy of Taxes"]."). Our Supreme Court has held that "[s]ection 105-267 . . . bars courts absolutely from entertaining suits of any kind brought for the purpose of preventing the collection of any tax imposed in Subchapter I ["Levy of Taxes"]." *Bailey v. State*, 330 N.C. 227, 242, 412 S.E.2d 295, 304 (1991), *cert. denied*, 504 U.S. 911, 118 L. Ed. 2d 547, 112 S. Ct. 1942 (1992), *overruled on other grounds by Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998).

Finally, Javurek also appears to argue that the statutory procedures set out in N.C. Gen. Stat. § 105-241.1 *et seq.* and N.C. Gen. Stat. § 105-267 are unconstitutional because they do not provide for a hearing before the taxpayer must pay the tax. The Supreme Court has already rejected this contention: "This statute [N.C. Gen. Stat. § 105-267] permitting payment to be made under protest with a right to bring an action to recover the monies so paid is constitutional and accords the taxpayer due process." *Kirkpatrick v. Currie*, 250 N.C. 213, 215, 108 S.E.2d 209, 210 (1959). The Supreme Court's reasoning compels the conclusion that the procedures set out in N.C. Gen. Stat. § 105-241.1 *et seq.*, which also require payment of the tax before filing suit, likewise do not offend due process.

In conclusion, because Javurek did not comply with the procedures prescribed by N.C. Gen. Stat. § 105-241.3, § 105-241.4, or § 105-267, the superior court lacked subject matter jurisdiction over the civil action. Therefore, we affirm the trial court's order denying Javurek's motion for summary judgment and dismissing the action. Our disposition of this case renders unnecessary any consideration of Javurek's remaining assignments of error.

Affirmed.

Judges BRYANT and ELMORE concur.

IN THE MATTER OF: A.P & S.P.

No. COA03-1516

(Filed 17 August 2004)

Child Abuse and Neglect— standing to appeal—juvenile neglect—paternal step-grandparent

An appeal by a paternal step-grandfather from an order in a child neglect case was dismissed for lack of standing. Although respondent asserted that he was a proper party because he was a custodian of the children prior to the petitions alleging neglect, the conclusion that respondent was standing in loco parentis to the children is not warranted. The evidence indicates that the children were merely placed in the temporary care of respondent and the grandmother with the parents making ef-

forts to maintain a parent-child relationship. While respondent and the grandmother were listed on the petitions, they were not parties to the actions.

Appeal by respondent from order entered 24 June 2003 by Judge Shirley H. Brown in District Court, Buncombe County. Heard in the Court of Appeals 16 June 2004.

Buncombe County Department of Social Services, by Renae S. Alt, for petitioner-appellee.

Michael N. Tousey for Guardian ad Litem.

Mercedes O. Chut for respondent-appellant.

McGEE, Judge.

Buncombe County Department of Social Services (DSS) filed a petition dated 7 August 2002 alleging that A.P. was a neglected juvenile. DSS filed a separate petition dated 15 August 2002 alleging that S.P. was a neglected juvenile. The petitions alleging neglect of A.P. and S.P. (collectively the children) listed the following persons as the children's parents, guardian, custodian, or caretaker: J.P. and J.P. (as mother and father, collectively parents), B.H. as paternal grandmother, and S.H. (respondent) as paternal step-grandfather. In an order entered 23 October 2002, the trial court adjudicated the children neglected, ordered that temporary custody of the children be granted to DSS with placement in the discretion of DSS, and ordered that visits between the children and their parents be suspended until further hearings. The trial court again ordered that custody of the children remain with DSS in an order entered 18 November 2002.

DSS filed a motion to cease visitation between the children and B.H. on 7 February 2003. In an order filed 10 March 2003, the trial court ordered that the children remain in the custody of DSS but further ordered reunification with the parents as the best plan for the children. In an order filed 9 April 2003, the trial court allowed DSS' motion to cease visitation and ordered that visitation between the children and B.H. cease. In an order filed 24 June 2003, the trial court ordered that the children remain in the custody of DSS, that the best plan for the children was adoption, and that all visits between the children and all family members be suspended. Respondent appeals. In a motion filed 11 December 2003, guardian ad litem of the children moved this Court to dismiss respondent's appeal.

The issue before this Court is whether respondent, as paternal step-grandfather of the children, is an appropriate party to appeal the 24 June 2003 order.

N.C. Gen. Stat. §§ 7B-1001 and 7B-1002 (2003) designate when a right to appeal exists in a juvenile matter and which persons possess the right to appeal. N.C. Gen. Stat. § 7B-1001 provides that "[u]pon motion of a proper party as defined in G.S. 7B-1002, review of any final order of the court in a juvenile matter under this Article shall be before the Court of Appeals." The statute further provides that a "final order" includes "[a]ny order of disposition after an adjudication that a juvenile is abused, neglected, or dependent[.]" N.C. Gen. Stat. § 7B-1001(3) (2003). In this case, the order from which respondent appeals is an order of disposition after the children were adjudicated neglected. Accordingly, there is no dispute that the order is appealable.

Under N.C. Gen. Stat. § 7B-1002, "[a]n appeal may be taken by the guardian ad litem or juvenile, the juvenile's parent, guardian, or custodian, the State or county agency." In this case, respondent asserts that he is a proper party to appeal this order. Respondent argues that he "was the custodian of the [c]hildren prior to initiation of the juvenile petition[s] alleging neglect in Buncombe County." Accordingly, respondent asserts that "he clearly has a right to pursue the present appeal." However, DSS disputes respondent's assertion.

N.C. Gen. Stat. § 7B-101(8) (2003) defines a "[c]ustodian" as "[t]he person or agency that has been awarded legal custody of a juvenile by a court or a person, other than parents or legal guardian, who has assumed the status and obligation of a parent without being awarded the legal custody of a juvenile by a court." There is no question that respondent has not been awarded legal custody of the children. However, the analysis must focus on whether respondent qualifies as one "who has assumed the status and obligation of a parent without being awarded the legal custody" of the children.

In support of his contention that he was the "custodian" of the children prior to initiation of the petitions alleging neglect, respondent claims to have been "made a party to the juvenile court proceedings in Buncombe County[.]" Respondent's claim to being a party hinges on the following: (1) that he and his wife were listed on the petitions as "parents, guardian, custodian, or caretaker" and (2) that he was served with a petition and summons regarding the alleged neglect of each child.

Despite respondent's argument, we do not find that he was the custodian of the children simply because he and his wife were listed on the petitions. Rather, a juvenile petition sets forth the names of persons who fit within any one of four categories, including parent, guardian, custodian, and caretaker. A petition also designates the relationship or title each listed person has with respect to the child or children involved. In the petitions at issue, J.P. and J.P. were named as mother and father. B.H. and respondent were also named in the petitions. However, they were designated simply as paternal grandmother and paternal step-grandfather. The fact that respondent and his wife were not deemed "custodians" in the petitions is evidence indicating they were listed simply because they fulfilled the role of caretakers. Further evidence that respondent was merely a caretaker is the fact that respondent's attorney submitted a report to the trial court on 22 January 2003 on behalf of respondent titled "Report to the Court on behalf of *Caretaker* [Respondent]." (emphasis added). This report stated that "[Respondent] and his wife [] have had [A.P.] in their home often throughout her life and have an established relationship with [A.P.] as *primary caretakers*." (emphasis added). If, in fact, respondent qualified only as a caretaker, N.C. Gen. Stat. § 7B-1002 does not grant him a right to appeal.

In further support of respondent's claim to being custodian of the children, he stressed the 12 September 2002 report of the guardian ad litem which stated that the children "are in custody of their paternal Grandmother and paternal Grand Step-father[.]" Again, we do not find this argument persuasive. This report referred to the children being in the "custody" of their grandparents and was simply the guardian ad litem's way of specifying where the children were physically located. The use of the term "custody" in the guardian ad litem's report does not establish respondent's legal status with respect to the children.

We note that over time the definition of custodian has undergone changes. Under N.C. Gen. Stat. § 7A-278(7) (1969), custodian was defined as "a person or agency that has been awarded legal custody of a child by a court, or a person other than parents or legal guardian who stands in loco parentis to a child." Subsequently, the General Assembly narrowed the definition and limited custodian to only "[t]he person or agency that has been awarded legal custody of a juvenile by a court." N.C. Gen. Stat. § 7A-517(11) (1995). However, the definition was again changed, effective 27 October 1998, and broadened to include, in addition to one who had been awarded legal custody, "a

person, other than parents or legal guardian, who has assumed the status and obligation of a parent without being awarded the legal custody of a juvenile by a court." It is this version of the definition that is presently in effect. *See* N.C. Gen. Stat. § 7B-101(8).

Cases interpreting N.C. Gen. Stat. § 7A-278(7) have stated that " '[t]he term "in loco parentis" means in the place of a parent, and a "person in loco parentis" may be defined as one who has assumed the status and obligations of a parent without a formal adoption.' " *Shook v. Peavy*, 23 N.C. App. 230, 232, 208 S.E.2d 433, 435 (1974) (quoting 67 C.J.S., "Parent and Child," § 71, p. 803). *See also Morgan v. Johnson*, 24 N.C. App. 307, 308, 210 S.E.2d 503, 504 (1974). Thus, the current definition of custodian and the 1969 version essentially have the same meaning.

The concept of *in loco parentis* has been addressed in the context of whether parental immunity exists in tort actions. For example, *Liner v. Brown*, 117 N.C. App. 44, 449 S.E.2d 905 (1994), *disc. review denied and cert. denied*, 340 N.C. 113, 456 S.E.2d 315 (1995) involved the issue of whether the defendants stood *in loco parentis* to a child who drowned in their swimming pool. In that case, our Court analyzed the meaning of *in loco parentis* and stated that "[a] person does not stand *in loco parentis* 'from the mere placing of a child in the temporary care of other persons by a parent or guardian of such child.' " *Liner*, 117 N.C. App. at 49, 449 S.E.2d at 907 (quoting *State v. Pittard*, 45 N.C. App. 701, 703, 263 S.E.2d 809, 811, *disc. review denied*, 300 N.C. 378, 267 S.E.2d 682 (1980)). Rather, " '[t]his relationship is established only when the person with whom the child is placed intends to assume the status of a parent—by taking on the obligations incidental to the parental relationship, particularly that of support and maintenance.' " *Id.*

In the case before us, A.P. was initially placed with respondent and B.H. around 11 March 2002 after A.P.'s mother reported that she had been forced out of the home by A.P.'s father. About a month later, both parents signed case plans agreeing to participate in parenting classes. A.P.'s father also agreed to participate in substance abuse classes and to maintain stable housing and employment. In addition, A.P.'s mother agreed to follow up with therapy and maintain stable housing and employment. The fact that both parents signed a case plan and made commitments to participate in programs is evidence that they did not intend for A.P. to remain with respondent and B.H. indefinitely. Rather, A.P.'s placement was viewed as more of a temporary arrangement.

When S.P. was born in May 2002, she remained with her parents because DSS thought the parents had made progress. However, the parents began having problems, and on 13 August 2002, respondent and B.H. signed a kinship agreement in which they agreed to provide placement for S.P. In orders entered 23 October 2002 and 18 November 2002, the trial court ordered that temporary custody of the children remain with DSS. In addition, DSS was given discretion for placement of the children, including, but not limited to the home of respondent and B.H. After allegations of sexual abuse, the children were moved from respondent's home to foster care on 12 November 2002.

The evidence does not indicate that respondent and B.H. assumed the role and status of parents to the children. First, the children spent only a relatively short amount of time with respondent and B.H. before they were moved to foster care. The evidence shows that A.P. lived with respondent and B.H. for approximately eight months while S.P. lived with them for only about three months. Second, the children were not simply abandoned by their parents. Rather, when A.P. was first placed with respondent and B.H., her parents made efforts to improve parenting skills, to maintain a suitable environment for her, and to restore the parent-child relationship. Similarly, the parents made efforts regarding S.P. until the kinship agreement was signed. Thus, we conclude that the children were merely placed in the temporary care of respondent and B.H. Under *Liner*, such placement does not warrant the conclusion that respondent was standing *in loco parentis* to the children.

In contrast to the case before us, *In re Kowalzek*, 32 N.C. App. 718, 233 S.E.2d 655 (1977) provides an example of when individuals do qualify as custodians with standing to challenge a custody order. *Kowalzek* involved a child whose mother left him with his father when the child was about one year old. *Kowalzek*, 32 N.C. App. at 719, 233 S.E.2d at 656. About three months after his mother left, the child's father was killed in an accident. *Id.* By emergency order, the child was placed in the physical custody of a woman who had begun to care for the child when the child's mother left. *Id.* Subsequently, an order was entered placing the child with the woman who had cared for him and that woman's sister (the respondent). *Id.* After a full hearing, the child was placed with the respondent and her husband (collectively the respondents). *Id.* at 719-20, 233 S.E.2d at 656. Subsequently, custody was modified and the child was placed with his mother. *Id.* at 720, 233 S.E.2d at 656-57.

This Court held that the respondents qualified as custodians under N.C. Gen. Stat. § 7A-278(7) and thus had standing to appeal. *Kowalzek*, 32 N.C. App. at 721-22, 233 S.E.2d at 657. This conclusion was based on the fact that the child had been in the physical custody of the respondents; the respondents had supported the child for several months; and the respondents had expressed a desire to keep the child permanently. *Id.* at 721, 233 S.E.2d at 657. Furthermore, it is noteworthy that the child's mother had failed to acknowledge the child when she applied for public assistance after leaving her husband and the child. *Id.* at 719, 233 S.E.2d at 656. In addition, she had failed to seek any information about the child after her husband was killed. *Id.* Also, the respondents had been "explicitly referred to as parties" in the proceedings. In light of these facts, this Court concluded that the respondents had undertaken "the obligations of parents" and stood *in loco parentis* to the child. *Id.* at 721, 233 S.E.2d at 657.

The case before us differs from *Kowalzek* in several significant ways. First, the child in *Kowalzek* was essentially without a natural parent because he had been abandoned by his mother and his father had been killed. Second, the respondents in *Kowalzek* were explicitly considered parties in the custody proceedings. In contrast, in our case, both parents made efforts to maintain a parent-child relationship with A.P. and S.P. Furthermore, respondent and B.H. were not made parties to the actions. Rather, they were merely listed on the petitions. Accordingly, respondent lacks standing to appeal under N.C. Gen. Stat. § 7B-1002.

Appeal dismissed.

Judges McCULLOUGH and ELMORE concur.

ANDREW ARNOLD POWELL, JR., PETITIONER v. NORTH CAROLINA CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION, RESPONDENT

No. COA03-1139

(Filed 17 August 2004)

Police Officers— revocation and suspension of law enforcement certification—receiving or transferring stolen vehicles—obstruction of justice

The trial court erred by reversing and remanding respondent North Carolina Criminal Justice Education and Training Standards Commission's final agency decision to revoke and suspend the law enforcement certification of petitioner based on committing the felony of possession of a stolen vehicle and obstruction of justice, because: (1) the trial court's review failed to analyze the final agency decision with respect to possession of a stolen vehicle, the felony offense under which respondent was proceeding against petitioner; (2) by identifying the period of possession and the identity of the stolen vehicle by color, year, make, model, and VIN, petitioner's assertion that the facts alleged were "so unspecific as to be inadequate" is without merit; (3) the issue of whether the evidence of record sufficiently supported the findings of fact was beyond the Court of Appeals' scope of review when the trial court undertook no analysis of the pertinent supporting evidence; and (4) respondent failed to argue that the trial court's order was erroneous with respect to the misdemeanor obstruction of justice charge, and thus, any argument concerning error relative to that charge is abandoned.

Appeal by respondent from order entered 26 June 2003 by Judge Judson D. DeRamus, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 25 May 2004.

Moss, Mason & Hill, by Matthew L. Mason and William L. Hill, for petitioner-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Lorrin Freeman, for respondent-appellant.

CALABRIA, Judge.

The North Carolina Criminal Justice Education and Training Standards Commission ("respondent") appeals the trial court's order

reversing and remanding with instructions to vacate respondent's final agency decision to revoke and suspend the law enforcement certification of Andrew Arnold Powell, Jr. ("petitioner"). We reverse the decision of the trial court and remand for further proceedings.

Petitioner was employed by the Madison Police Department as a law enforcement officer in February of 2000. As a pre-requisite to such work, petitioner sought and acquired law enforcement officers' certification on 15 October 1986. Besides his duties as a law enforcement officer, petitioner also owned two used car dealerships and a trailer park located in Virginia.

On or about 25 February 2000, Investigator Gerald Cheney ("Cheney") of the North Carolina Division of Motor Vehicles conducted a routine business inspection of one of petitioner's dealerships. Cheney's inspection consisted of recording the Vehicle Identification Number ("VIN") of selected vehicles and then validating the VIN's via the dealer's title documentation. One of the vehicles Cheney attempted to examine was a 1993 Toyota Camry bearing dealer tags, which petitioner frequently used as his personal automobile. After comparing the VIN on the door of the Camry to the Camry's confidential VIN, Cheney determined the two VIN's did not match. When Cheney requested documentation, petitioner was unable to produce any title or bill of sale for the Camry and opined such documentation might be at his other dealership. Cheney allowed petitioner to drive the Camry to an appointment but warned him not to allow anything to happen to the car. Cheney inspected twenty cars with appropriate supporting documentation for each car. When petitioner returned later that day to the dealership, he opted not to drive the Camry in favor of bringing "another car for Chaney to inspect." Cheney later determined the Camry's confidential VIN corresponded to a car previously reported stolen.

The following day, petitioner drove the Camry to the trailer park in Virginia after a tenant complained of a water leak. Petitioner had previously received notice of recurring drug activity at the trailer park. When petitioner left the Camry unattended to inspect the premises, it was stolen. Petitioner reported the theft to the authorities in Virginia; however, petitioner later authorized the investigation of the theft to be moved into an "inactive" category and did not file an insurance claim with respect to the stolen car. After the theft of the Camry, petitioner was unable to locate the documents regarding the title and/or bill of sale at the other dealership and subsequently maintained they must have been in the trunk of the stolen Camry.

In a letter dated 23 August 2001, respondent's director informed petitioner the Standards Committee found probable cause existed to believe petitioner's certification as a law enforcement officer should be (1) permanently revoked on the grounds that he committed the felony of "Receiving or Transferring Stolen Vehicles" and (2) suspended for not less than five years on the grounds that he committed the misdemeanor offense of obstruction of justice. The matter was heard before an administrative law judge ("ALJ") on 12 August 2002. Petitioner maintained, in pertinent part, that (1) no other car inspected had any problems, (2) there was no evidence petitioner changed the VIN or had reason to know the car was stolen, (3) petitioner was not informed until after the Camry was stolen from the trailer park that it had previously been reported stolen, and (4) he purchased the Camry at an auction and sometimes sellers pass stolen vehicles back into North Carolina from other states with a falsified title to sell at such auctions without the purchaser's knowledge. In the proposed decision, the ALJ concluded petitioner committed both offenses at issue, and petitioner's law enforcement certification should be suspended for not less than five years and permanently revoked. In the final agency decision, respondent adopted the ALJ's proposed decision. Relevant to this appeal, conclusion of law four provides:

> [o]n or about February 26, 2000, Petitioner committed the felonious offense of "Receiving or Transferring Stolen Vehicles" when the Petitioner unlawfully, willfully and feloniously did possess a vehicle, to wit, a 1993 black Toyota Camry, having reason to believe said vehicle has been stolen or unlawfully taken in violation of N.C.G.S. § 20-106.

Petitioner sought judicial review.

The trial court's order, issued 26 June 2003, reversed and remanded the final agency decision for vacation. The trial court held conclusion of law four was patently erroneous because "there is no one felony offense of 'Receiving or Transferring Stolen Vehicles.' " In addition, the trial court held conclusion of law four lacked required findings of fact to "support a conclusion of law that the petitioner either committed the felony offense of knowingly receiving a stolen vehicle with intent to procure title or the felony offense of knowingly transferring a stolen vehicle with intent to pass title." Finally, the trial court questioned the adequacy of respondent's pleadings in the 23 August 2003 letter since the pleadings failed to charge the offenses of receiving a stolen vehicle or transferring a

stolen vehicle "with sufficient certainty to apprise petitioner of the specific accusation against him so as to enable him to prepare his defense." Respondent appeals.

"Judicial review of the final decision of an administrative agency in a contested case is governed by [N.C. Gen. Stat. §] 150B-51(b) of the APA." *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004). "The proper standard for the superior court's judicial review 'depends upon the particular issues presented on appeal.' " *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citations and internal quotation marks omitted). Where "a petitioner contends the [b]oard's decision was based on an error of law, 'de novo' review is proper. *Id.* (citations and internal quotation marks omitted). "[T]he appellate court examines the trial court's order [regarding an agency decision] for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.*, at 14, 565 S.E.2d at 18 (citation omitted). Where, as here, the trial court examines the agency's final decision and finds it affected by errors of law, *de novo* review is proper. Because the trial court expressly undertook *de novo* review, we need only determine whether the trial court did so properly.

The trial court correctly noted N.C. Gen. Stat. § 20-106 (2003) prohibits three distinct Class H felonies: (1) possessing a stolen vehicle, (2) receiving a stolen vehicle, and (3) transferring a stolen vehicle. Thereafter, the entirety of the trial court's analysis is limited to only the latter two prohibited offenses. For example, the trial court held

> the "FINDINGS OF FACT" [relevant to respondent's conclusion that petitioner violated N.C. Gen. Stat. § 20-106] do not include findings that petitioner on or about February 26, 2000, *received from, or transferred to*, another person, the Camry with the *intent to procure or pass title*, or that he then knew or had reason to know the Camry had been stolen or unlawfully taken, thus the respondent's findings do not support a conclusion of law that petitioner *either committed the felony offense of knowingly receiving a stolen vehicle with intent to procure title or the felony offense of knowingly transferring a stolen vehicle with intent to pass title.*

(Emphasis added). Likewise, in considering respondent's pleading that "petitioner committed 'the' felonious offense of 'Receiving or

Transferring Stolen Vehicles,' " the trial court reasoned the letter which served as respondent's pleading did

> not sufficiently charge petitioner with *either one or both of these felony offenses* since the charges are in the alternative and not conjunctive. Further, the necessary essential elements of intent (*receive/procure, transfer/pass*) with respect to title are not alleged nor is the name of another person associated with such *receipt or transfer*. The alleged dates of "the" offense cover a range of approximately five years. There is no allegation of the State or County in which the *receipt or transfer* occurred. In summary, respondent's pleading does not . . . clearly allege all essential elements of *either one of the two alternative charges*.

(Emphasis added).

The error in the trial court's review is manifest: it fails to analyze the final agency decision with respect to possession of a stolen vehicle, the felony offense under which respondent was proceeding against petitioner. Contrary to the trial court's order, respondent's letter dated 23 August 2001 informed petitioner that respondent had reason to believe petitioner "committed the felonious offense of 'Receiving or Transferring Stolen Vehicles' by unlawfully, willfully, and feloniously *possessing a vehicle* [petitioner] had reason to believe had been stolen or unlawfully taken." (Emphasis added). The letter went on to describe the color, year, make, model, and VIN of the stolen vehicle as well as the time period petitioner possessed the vehicle.

Having determined the trial court failed to consider the felony offense of possession of a stolen vehicle, we need only determine whether such consideration was warranted. We conclude it was for multiple reasons. First, as the trial court correctly noted, N.C. Gen. Stat. § 20-106 prohibits possessing, receiving, and transferring a stolen vehicle.[1] Second, N.C. Gen. Stat. § 20-106 is entitled "Receiving or transferring stolen vehicles," and respondent's letter simply incorporated that title. Such incorporation does not limit respondent to charging either of the latter two prohibited offenses. The General Assembly deemed the title of the statute broad enough to cover three

1. Petitioner contends respondent failed to give appropriate notice by failing to "reference . . . the particular sections of the statutes and rules involved[.]" *See* N.C. Gen. Stat. § 150B-38(b)(2) (2003). However, N.C. Gen. Stat. § 20-106, the statute petitioner was accused of violating, has no subsections and is, in fact, a single sentence. In addition, the letter clearly specified possession was the basis of revocation.

offenses, and we can discern no compelling reason why it would be competent to designate only two of the three offenses within that statute. Third, the elements of possession of a stolen vehicle under N.C. Gen. Stat. § 20-106 are (1) a person possesses a vehicle (2) that he knows or has reason to believe was stolen or unlawfully taken, *see State v. Craver*, 70 N.C. App. 555, 559, 320 S.E.2d 431, 434 (1984), which parallels the letter's language that petitioner "possess[ed] a vehicle" he "had reason to believe had been stolen or unlawfully taken." We reverse the trial court's order and remand for further consideration as to the offense of possession of a stolen vehicle.

We also hold summarily that, by identifying the period of possession and the identity of the stolen vehicle by color, year, make, model, and VIN, petitioner's assertion that the facts alleged were "so unspecific as to be inadequate" is without merit.

Finally, to the extent the trial court's order rests upon the absence of a finding of fact "that petitioner on or about February 26, 2000 . . . then knew or had reason to know the Camry had been stolen or unlawfully taken," the order does not properly consider the express language contained in conclusion of law four of the final agency decision, which provides that petitioner possessed the Camry with "reason to believe said vehicle ha[d] been stolen or unlawfully taken in violation of N.C.G.S. § 20-106." *See Insurance Co. v. Keith*, 283 N.C. 577, 581, 196 S.E.2d 731, 734 (1973) (finding immaterial whether a challenged finding was "denominated a finding of fact, a conclusion of law, or a combination of both"). The trial court undertook no analysis of the supporting evidence; therefore, the issue of whether the evidence of record sufficiently supports the findings of fact is beyond our scope of review in this appeal.

Respondent has not argued that the trial court's order was erroneous in any respect with regards to the misdemeanor obstruction of justice charge. Accordingly, any argument concerning error by the trial court relative to that charge is deemed abandoned. N.C. R. App. P. 28(b)(6) (2004).

Reversed and remanded.

Judges WYNN and LEVINSON concur.

STATE OF NORTH CAROLINA v. MICHAEL BRIAN JOHNSON

No. COA03-254

(Filed 17 August 2004)

Discovery— sexual offense victim—sealed DSS file—favorable to defendant—material

Undisclosed portions of a DSS file about abuse of a statutory sexual offense victim should have been disclosed to defendant, and his conviction was reversed for that error. The information provided an alternative explanation for the abuse and was sufficient to undermine confidence in the outcome of the trial.

Appeal by defendant from judgment entered 31 January 2002 by Judge Loto G. Caviness in Henderson County Superior Court. Heard in the Court of Appeals 2 December 2003.

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

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

TIMMONS-GOODSON, Judge.

Michael Brian Johnson ("defendant") appeals his conviction for first-degree statutory sexual offense. For the reasons discussed herein, we hold that defendant is entitled to a new trial.

On 9 July 2001, defendant was indicted for first-degree statutory sexual offense. On 29 December 2002, defendant was also charged with first-degree rape by a bill of information. Prior to trial, defendant subpoenaed records compiled by the Henderson County Department of Social Services ("DSS") regarding the minor victim, Kelly.[1] DSS refused to provide defendant with Kelly's file, and on 24 January 2002, moved the trial court to examine the file *in camera* and redact certain information from the file. The trial court judge subsequently conducted an *in camera* inspection of the DSS file and determined that only a portion of the file was "relevant to the criminal cause and the defenses presented." The trial judge provided that portion of the file to the parties and thereafter sealed the remaining information of

1. To protect the identity of the minor child, this Court will refer to her by the pseudonym "Kelly."

the DSS file in the court file, to be reviewed by an appellate court were defendant to appeal.

The case proceeded to trial. The State's evidence against defendant consisted primarily of testimony by Kelly that defendant had engaged in inappropriate sexual activities with her and opinion testimony by two doctors who examined Kelly and concluded that Kelly had been sexually abused. Defendant presented evidence denying the charges. On 31 January 2002, the jury found defendant guilty of first-degree statutory sex offense and guilty of rape of a child under the age of thirteen. The trial court arrested judgment on the rape charge and sentenced defendant to 288 to 355 months incarceration for the statutory sex offense charge. Defendant appeals.

The dispositive issue on appeal is whether certain previously undisclosed portions of the DSS file should have been provided to defendant. Defendant argues that the undisclosed portions of the file contained information favorable and material to his case. We agree.

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963). "Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676, 87 L. Ed. 2d 481, 490 (1985). *See also Giglio v. United States*, 405 U.S. 150, 154, 31 L. Ed. 2d 104, 108 (1972). In determining whether evidence in the possession of the State should be disclosed to defendant, "[a] judge is required to order an *in camera* inspection and make findings of fact concerning the evidence at issue only if there is a possibility that such evidence might be material to guilt or punishment and favorable to the defense." *State v. Phillips*, 328 N.C. 1, 18, 399 S.E.2d 293, 301 (1991). "But just because defendant asks for an *in camera* inspection does not automatically entitle him to one. Defendant still must demonstrate that the evidence sought to be disclosed might be material and favorable to his defense." *State v. Thompson*, 139 N.C. App. 299, 307, 533 S.E.2d 834, 840 (2000). "[A]lthough asking defendant to affirmatively establish that a piece of evidence not in his possession is material might be a circular impossibility, [this Court] at least require[s] him to have a substantial basis for believing such evidence is material." *Id.* at 307, 533 S.E.2d at 840. "[I]f the judge, after the *in camera* examination, rules against the defendant on his motion, the judge should order the

sealed statement placed in the record for appellate review." *State v. Hardy*, 293 N.C. 105, 128, 235 S.E.2d 828, 842 (1977).

In *State v. McGill*, 141 N.C. App. 98, 101-02, 539 S.E.2d 351, 355 (2000) this Court concluded:

> On appeal, this Court is required to examine the sealed records to determine if they contain information that is "both favorable to the accused and material to [either his] guilt or punishment." If the sealed records contain evidence which is both "favorable" and "material," defendant is constitutionally entitled to disclosure of this evidence.

(quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 94 L. Ed. 2d 40, 57 (1987)) (other citations omitted). " 'Favorable' evidence includes evidence which tends to exculpate the accused, as well as 'any evidence adversely affecting the credibility of the government's witnesses.' " *McGill*, 141 N.C. App. at 102, 539 S.E.2d at 355 (quoting *United States v. Trevino*, 89 F.3d 187, 189 (4th Cir. 1996)). Evidence is "material" where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, 87 L. Ed. 2d at 494. Furthermore, "[a] defendant is not entitled to a new trial based on trial errors unless such errors were material and prejudicial." *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983). The violation of a defendant's constitutional rights is prejudicial unless this Court "finds that it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b) (2003).

In the instant case, we have reviewed the DSS file sealed by the trial court in order to determine if information contained within the file is favorable and material to defendant's case. After reviewing the sealed documents, we conclude that there is favorable and material evidence in the file that should have been provided to defendant for review prior to trial.

The DSS file presented to the trial court for *in camera* inspection is composed of over 100 pages. The file contains medical documents, DSS case file documents, and various medical correspondences, as well as an indication that Jeremy,[2] Kelly's older brother, may have sexually abused her.

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2. To protect the identity of the minor child, the Court will hereinafter refer to him by the pseudonym "Jeremy."

According to the DSS file, Jeremy is a mentally disturbed and troubled teen. Contained within the file is an intake report ("the intake report"), completed by Henderson County Child Protective Services employee T. Roberts ("Roberts"). The intake report states that on the afternoon of 15 November 2000, one of Kelly's family members contacted DSS because she was concerned for Kelly's safety. Roberts spoke with the family member on the phone and completed the intake report, marking the report for "immediate response." The family member stated that she believed that Jeremy was a threat to Kelly and that Kelly should not be left alone with him. The family member told Roberts that Jeremy is often left alone with Kelly and that she fears Jeremy will harm Kelly, even if unintentionally. The family member reported that Lee,[3] the children's biological mother, "leaves [Kelly] with [Jeremy] alone." The family member also reported that "[Jeremy] and a [seventeen-year-old] friend were doing wrestling holds on [Kelly] and she would cry for several hours." The family member further reported that she believed "[Lee] left [Kelly] alone with [Jeremy] while she went to look for [defendant] at a bar last Saturday night."

On the evening of 15 November 2000, Social Worker Patty Dalton ("Dalton"), met with Jeremy and Lee. A copy of Dalton's report of the meeting is contained within the DSS file. During their meeting, Jeremy told Dalton that he had been sent to Eckerd Camp, a reform school, because he had taken a dagger to his previous school. Jeremy stated that he had been physically aggressive to his sister and mother in the past. He also stated that he had physically fought with his mother, but said it had not happened "in a while." He also admitted that he had wrestled with Kelly and that Kelly had cried because he was "too rough with her."

The DSS file also contains information tending to show that Kelly had previously lied regarding her injuries. The file contains a report regarding Kelly's case that was produced by Social Worker M. Ballard ("Ballard"). On 22 March 2001, Kelly reported to Ballard that Barbara[4], Kelly's stepmother, had "whipped" Kelly "two times" while her father watched. Kelly stated that she had been "whipped" for "[m]essin' with the baby chickens." However, Ballard's report states that the next day, Kelly informed Ballard that "she had lied when she

3. To protect the identity of the minor children, the Court will hereinafter refer to the children's mother by the pseudonym "Lee."

4. To protect the identity of the minor children, the Court will hereinafter refer to the children's stepmother by the pseudonym "Barbara."

said she had gotten marks from a whipping at [her father] and [Barbara's] house." Kelly stated that "[her father and Barbara] had never hit her with a belt [and that] she doesn't know how she got these marks."

The State stresses in its brief that the DSS file offers "no new material evidence on this point," because Kelly's credibility was sufficiently challenged at trial by testimony from Jeremy and Lee. However, we note that Jeremy and Lee testified only to Kelly's truthfulness in her interactions with her family. Jeremy and Lee did not testify to Kelly's truthfulness in her interactions with the social workers investigating her alleged abuse, a point we find particularly germane to defendant's trial for first-degree statutory sex offense.

The information in the DSS file most favorable to defendant's case is the comments made by Lee indicating that she may have caused some of Kelly's injuries, and that Jeremy may have sexually abused Kelly. On 5 June 2001, Lee met with Social Worker G. Massicotte ("Massicotte") to discuss Kelly's Child Medical Evaluation ("CME"). A copy of Massicotte's report is contained within the DSS file. Massicotte reported that "[Lee] stated . . . that the scar mentioned in the [CME] could possibl[y] be the result of [Lee] scratching [Kelly] with her finger nail while [Lee] was putting ointment on [Kelly] in the vagina area where the scar is located." Lee also stated to Massicotte that "there was a remote possibility that [Jeremy] could have done something to [Kelly]." Lee told Massicotte that "[Jeremy] would have a yeast infection at the same time [Kelly] would have a yeast infection and that they would both clear up at the same time."

In sum, the DSS file indicates that Jeremy has a history of physical violence, that he and Kelly had yeast infections at the same time, and that Lee left Jeremy and Kelly in the house alone on several occasions. The file indicates that Kelly, the State's leading witness against defendant, told a social worker that she had lied in one of her previous meetings with the social worker. The file also indicates that Lee believes she could have caused at least one of Kelly's injuries herself, and that it is possible that Jeremy had sexually abused Kelly.

Because the information contained within the DSS file provides an alternative explanation for Kelly's abuse, we conclude that the information contained within the file is favorable to defendant's case. Furthermore, because we also conclude that the information is sufficient to undermine the confidence in the outcome of the trial, we

further conclude that the information is material, in that had the information been available for presentation at trial, a "reasonable probability" exists that "the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682, 87 L. Ed. 2d at 494. Therefore, because the information contained within the file was favorable and material to defendant's case, we hold that defendant was constitutionally entitled to disclosure of the contents of the file, and that it was prejudicial error for the trial court to refuse to disclose the information to defendant. Accordingly, we reverse defendant's convictions and remand the case for a new trial. Prior to defendant's trial on remand, the trial court should disclose to defendant the information contained within the DSS file.

Reversed and remanded.

Judges WYNN and McCULLOUGH concur.

CAROLYN H. OAKLEY, PLAINTIFF v. JON H. OAKLEY, DEFENDANT

No. COA03-915

(Filed 17 August 2004)

1. Divorce— alimony—separation agreement—procedure for modifying or vacating alimony

Defendant husband erred by moving to terminate alimony under Rule 60(b)(6), because: (1) when the parties submitted their separation agreement to the court, it became a court order and was subject to the rules concerning such orders; and (2) N.C.G.S. § 50-16.9 outlines the procedure for modifying or vacating alimony awards.

2. Divorce— alimony—separation agreement—cohabitation

The trial court did not err by concluding that plaintiff wife did not cohabitate with a person of the opposite sex to whom she was unrelated by blood or marriage in violation of the parties' separation agreement, because defendant husband failed to present evidence of activities beyond plaintiff and her boyfriend's sexual relationship and their occasional trips and dates to show the assumption of marital rights, duties, and obligations which are usually manifested by married people.

3. Contempt— civil—failure to pay alimony—ability to comply

The trial court erred by finding defendant husband in contempt of court for willful failure to pay alimony to plaintiff wife in accordance with the parties' incorporated separation agreement, because there was no determination in the trial court's findings of defendant's present ability to comply with the terms of the order.

Appeal by defendant from order entered 21 October 2002 by Judge William L. Daisy in Guilford County District Court. Heard in the Court of Appeals 26 April 2004.

Dawn Sheek for plaintiff-appellee.

Dotson, Kirkman & Morris, LLP, by Marshall F. Dotson, III, for defendant-appellant.

THORNBURG, Judge.

This is an appeal from an order, issued after a bench trial, concluding that plaintiff had not lost her alimony rights due to cohabitation and finding defendant in contempt of a previous court order. Plaintiff and defendant were married on or about 25 February 1983 and separated on 30 December 1997. The parties are the parents of one child. A "Separation Agreement and Property Settlement Agreement" ("the agreement") was entered into by the parties on 20 March 1998. This agreement was incorporated into a divorce judgment granted to the parties on 27 October 1999. The agreement included many detailed provisions, including one related to alimony for plaintiff. Under the agreement, defendant was obligated to pay to plaintiff alimony "through June 30, 2005 or until . . . WIFE'S [plaintiff's] cohabitation with a person of the opposite sex to whom she is unrelated by blood or marriage, whichever event shall first occur."

Defendant paid alimony to plaintiff until April of 2000. At some point in May of 2000, defendant's attorney sent plaintiff a letter informing her that defendant would no longer pay her alimony due to her cohabitation with Richard Smith. On 7 November 2001, plaintiff filed a motion for contempt against defendant due to his failure to pay alimony and several other failures to comply with the separation agreement that are not at issue here. Defendant in turn made a motion under N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) to vacate the court's order of alimony due to plaintiff's cohabitation. The trial court found that plaintiff was not cohabiting and found defendant in contempt of the court order for not paying alimony.

[1] We first note that defendant erred in moving to terminate alimony under Rule 60(b)(6). "[W]henever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments." *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983). When the parties submitted their separation agreement to the court, it became a court order and subject to the rules concerning such orders. N.C. Gen. Stat. § 50-16.9 clearly outlines the procedure for modifying or vacating alimony awards. "Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985). Defendant should have moved to terminate the alimony award under N.C. Gen. Stat. § 50-16.9, not Rule 60(b)(1). However, the motion was assessed under the standards of N.C. Gen. Stat. § 50-16.9 by the trial court and we will review the matter as if defendant had in fact made the motion under that statute.

On appeal, defendant argues that the trial court erred in concluding that plaintiff did not cohabit with Smith and that the trial court erred in finding him in contempt of court for not paying alimony. "[W]hen 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 Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992).

[2] Defendant first argues that the trial court erred in concluding that plaintiff did not cohabit with Smith. The parties are not in disagreement as to the essential facts presented before the trial court. Rather, defendant is arguing that the trial court erred as a matter law in its application of N.C. Gen. Stat. § 50-16.9(b). Defendant asserts that the facts presented met the definition of cohabitation as provided in the statute. N.C. Gen. Stat. § 50-16.9(b) defines cohabitation:

> As used in this subsection, cohabitation means the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage, or a private homosexual relationship. Cohabitation is evidenced by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not

> necessarily dependent on, sexual relations. Nothing in this section shall be construed to make lawful conduct which is made unlawful by other statutes.

N.C. Gen. Stat. § 50-16.9(b) (2003).

The evidence presented in this case, through the testimony of the parties, their son and the plaintiff's neighbor, primarily addressed plaintiff and Smith's intimate relationship and the number of nights that Smith spent at plaintiff's home. The trial court also received some testimony as to plaintiff and Smith taking overnight trips, having dinners together and watching television together. We also note that there was evidence that plaintiff and Smith were engaged to be married at the time of the hearing, though there was no evidence presented that plaintiff and Smith were engaged at the time that defendant ceased paying alimony.

This Court recently emphasized that "[i]n order for the trial court to conclude that cohabitation has occurred, it should make findings that the type of acts included in the statute [N.C. Gen. Stat. § 50-16.9(b)] were present." *Long v. Long*, 160 N.C. App. 664, 667, 588 S.E.2d 1, 3 (2003). Thus, in order for a trial court to conclude that one party has engaged in cohabitation, there must be evidence that the party engaged in the "voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include but are not necessarily dependent on, sexual relations." N.C. Gen. Stat. § 50-16.9(b).

The holding in *Long* is in line with how our courts have dealt with issues of cohabitation in another context, the resumption of marital relations. Under N.C. Gen. Stat. § 52-10.1, married couples may execute separation agreements, however the executory terms of a separation agreement are terminated upon the "resumption of the marital relation." *In re Estate of Adamee*, 291 N.C. 386, 391, 230 S.E.2d 541, 545 (1976). N.C. Gen. Stat. § 52-10.2 defines the resumption of marital relations as the "voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances. Isolated incidents of sexual intercourse between the parties shall not constitute resumption of martial relations." N.C. Gen. Stat. § 52-10.2 (2003). The cases that apply this statute address whether married couples have reconciled and resumed cohabitation by looking at the particular circumstances that evidence a husband and wife relationship. We find these cases instructive in determining what constitutes marital rights, duties and obligations under N.C. Gen. Stat. § 50-16.9.

Our courts use one of two methods to determine whether the parties have resumed their marital relationship, depending on whether the parties present conflicting evidence about the relationship. *See Schultz v. Schultz*, 107 N.C. App. 366, 420 S.E.2d 186 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). In the first test, developed from *Adamee*, where there is objective evidence, that is not conflicting, that the parties have held themselves out as man and wife, the court does not consider the subjective intent of the parties. *Schultz*, 107 N.C. App. at 373, 420 S.E.2d at 190. The other test grew out of the opinion in *Hand v. Hand*, 46 N.C. App. 82, 264 S.E.2d 597, *disc. rev. denied*, 300 N.C. 556, 270 S.E.2d 107 (1980), and addresses cases where the objective evidence of cohabitation is conflicting and thus allows for an evaluation of the parties' subjective intent. *Schultz*, 107 N.C. App. at 371, 420 S.E.2d at 189.

The only conflict in the objective evidence presented in the instant case was the number of nights per week that Smith spent the night at plaintiff's home. We find the objective test announced in *Adamee* and applied in *Schultz* instructive in this instance. The court in *Adamee*, quoting *Young v. Young*, 225 N.C. 340, 34 S.E.2d 154 (1945), said that "cohabitation means living together as man and wife, though not necessarily implying sexual relations. Cohabitation includes other marital responsibilities and duties." *Adamee*, 291 N.C. at 392, 230 S.E.2d at 546. This Court in *Schultz* applied the *Adamee* test and found cohabitation based on evidence such as the fact that the former husband kept an automobile at the common residence, lived in the residence continuously, moved his belongings to the residence, paid the utility bills and mowed the lawn. *Schultz*, 107 N.C. App. at 373, 420 S.E.2d at 190. The Court also considered that the former wife did the laundry, worked in the yard with the former husband and engaged in sexual relations with him. *Id.*

As defendant in the instant case presented no evidence of activities beyond plaintiff's and Smith's sexual relationship and their occasional trips and dates, we see no assumption of any "marital rights, duties, and obligations which are usually manifested by married people," such as those outlined in *Schultz*. Thus, the trial court did not err in concluding that plaintiff had not cohabited. Accordingly, the trial court did not err in denying defendant's motion to terminate alimony.

[3] Defendant also argues that the trial court erred in finding him in contempt of the court order for not paying alimony. As we noted

above, separation agreements approved by the court and incorporated into a judgment are treated as court orders and are "enforceable by the contempt powers of the court." *Walters*, 307 N.C. at 386, 298 S.E.2d at 342. N.C. Gen. Stat. § 5A-21 states in part:

> Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2003). "This Court's review of a trial court's finding of contempt is limited to a consideration of 'whether the findings of fact by the trial judge are supported by competent evidence and whether those factual findings are sufficient to support the judgment.' " *General Motors Acceptance Corp. v. Wright*, 154 N.C. App. 672, 677, 573 S.E.2d 226, 229 (2002) (quoting *McMiller v. McMiller*, 77 N.C. App. 808, 810, 336 S.E.2d 134, 136 (1985)).

"A defendant in a civil contempt action will be fined or incarcerated only after a determination is made that the defendant is capable of complying with the order of the court." *Reece v. Reece*, 58 N.C. App. 404, 406-07, 293 S.E.2d 662, 663-64 (1982). Thus, a trial court must first make a finding of a defendant's present ability to comply with an order before concluding that a defendant is in civil contempt of an order. In the instant case, the trial court's only finding of fact regarding defendant's contempt was:

> The Defendant's willful failure to comply with the court's previous order is willful and without legal justification and therefore Defendant is in contempt of this court.

As there was no determination in the trial court's findings of the defendant's present ability to comply with the terms of the order in question, we reverse and remand to the trial court for further findings of fact consistent with this opinion.

Affirmed in part, reversed and remanded in part.

Chief Judge MARTIN and Judge HUNTER concur.

STATE OF NORTH CAROLINA v. HARRY GOODMAN, III, DEFENDANT

No. COA03-541

(Filed 17 August 2004)

Confessions and Incriminating Statements— violation of Miranda warnings—exclusion of physical evidence not required

The trial court did not err in a first-degree murder case by denying defendant's motion to suppress physical evidence including the victim's body, an autopsy report, and other derivative evidence obtained as the result of an interrogation in violation of defendant's Miranda rights, because: (1) when a statement to law enforcement is not actually coerced but nonetheless obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), or *Edwards v. Arizona*, 451 U.S. 477 (1981), the statement itself must be suppressed but physical evidence obtained as a result of the violation need not be; (2) the importance of ensuring that all relevant evidence be submitted to the jury outweighs the need to exclude evidence that was gathered as the result of a noncoercive statement made in violation of the rule of *Miranda* as extended by *Edwards*, and the deterrent value of the rule is satisfied by the exclusion of the statement; and (3) the Court of Appeals is bound by *State v. May*, 334 N.C. 609 (1993), and *May* is consistent with *United States v. Patane*, 159 L. Ed. 2d 667 (2004), which held that the fruit of the poisonous tree doctrine does not apply to failures to give Miranda warnings, since this case and May did not involve a failure to give Miranda warnings but rather addressed postwarning violations.

Appeal by defendant from judgment entered 13 January 2003 by Judge Michael Helms in Montgomery County Superior Court. Heard in the Court of Appeals 4 February 2004.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

GEER, Judge.

Defendant pled guilty to first degree murder, but appeals from the trial court's denial of his motion to suppress physical evidence obtained as the result of an interrogation that arguably violated his rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) and *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981). Because we are bound by *State v. May*, 334 N.C. 609, 611-12, 434 S.E.2d 180, 181 (1993), *cert. denied*, 510 U.S. 1198, 127 L. Ed. 2d 661, 114 S. Ct. 1310 (1994), we affirm.

Factual Background

At 9:30 p.m. on 9 April 1999, Montgomery County sheriff's deputies responded to a call directing them to the home of Bobby Wade Freeman. When law enforcement arrived, they found a large bloodstain on the living room carpet and a bloody coat against the front door, but no sign of Mr. Freeman. The sheriff's department issued a 50-mile radius "look-out" for Mr. Freeman's truck. A deputy discovered it on the shoulder of a road with defendant slumped in the driver's seat, a "crack" cocaine pipe between his legs. The truck seat appeared to be stained with blood.

Defendant was searched and taken into custody. Three credit cards bearing Mr. Freeman's name were in his pocket. Lt. Chris Poole transported defendant to the sheriff's office and advised him of his *Miranda* rights. After signing a waiver of those rights, defendant admitted stealing Mr. Freeman's truck and using his credit cards, but denied killing Mr. Freeman. Defendant was charged with cocaine possession and taken before a magistrate to set bond. While riding with Lt. Poole in an elevator to the jail, defendant told Lt. Poole that he would not answer any more questions until he spoke with an attorney.

The sheriff's department and other organizations began searching for Mr. Freeman, focusing initially on the area around Mr. Freeman's home and then searching outward in a spiral pattern. On 14 April 1999, when police had still failed to find Mr. Freeman, Lt. Poole and SBI Special Agent John Reid removed defendant from the jail and

took him across the street to Lt. Poole's office. They told him they were not going to question him about the murder, but that they had information he had killed Mr. Freeman and might know where the body was. Defendant told them he "did not want to die over this" and said he would take the officers to the body.

Defendant rode with Lt. Poole and Agent Reid in a patrol car, directing them to the end of Odessa Road, a dead-end road about five miles from where defendant was arrested. Mr. Freeman's body was located 10 to 12 feet off the road in a sparsely wooded area. The body was covered by a blanket, a plastic tarp, and branches.

Defendant filed a pretrial motion to suppress his statements to Lt. Poole and Agent Reid and to suppress the physical evidence obtained as a result of those statements, including Mr. Freeman's body, the autopsy report, and other derivative evidence. At a hearing on 9 September 2002, the trial court found that Lt. Poole and Agent Reid took defendant into their custody on 14 April 1999 and "caused the defendant to make statements, both oral and non-verbal, in violation of his *Miranda* and constitutional rights." The court allowed defendant's motion to suppress his oral and non-verbal statements, but denied his motion to suppress the physical evidence based on the inevitable discovery exception to the exclusionary rule. On 13 January 2003, pursuant to a plea agreement in which he reserved his right to appeal the partial denial of his motion to suppress, defendant was sentenced to life in prison without parole.

Discussion

The standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. *State v. Smith*, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003). If the trial court's conclusions of law are supported by its factual findings, we will not disturb those conclusions. *State v. Logner*, 148 N.C. App. 135, 138, 557 S.E.2d 191, 193-94 (2001).

The State does not dispute that defendant's statements to Lt. Poole and Agent Reid regarding the location of Mr. Freeman's body were obtained in violation of his rights under *Miranda* and *Edwards*. Defendant argues that the physical evidence obtained as a result of those statements is, therefore, "fruit of the poisonous tree" and should have been suppressed under the exclusionary rule. Our Supreme Court has held, however, in *State v. May*, 334 N.C. 609, 434

S.E.2d 180 (1993), that when a statement to law enforcement is not actually coerced but nonetheless obtained in violation of *Miranda* or *Edwards*, the statement itself must be suppressed, but physical evidence obtained as a result of the violation need not be. *Id.* at 612, 434 S.E.2d at 182.

In *May*, the defendant signed a waiver of his *Miranda* rights, but invoked his right to counsel after the officers started interrogating him. Two days later, officers persuaded the defendant's girlfriend to call defendant. As a result of questions suggested by the officers, the defendant told his girlfriend where he had hidden items related to a murder. These statements led the officers to a knife, a pair of gloves, and a gag. In upholding the trial court's denial of a motion to suppress the physical evidence, the Supreme Court held:

> If the record shows there was no actual coercion but only a violation of the *Miranda* warning requirement, it is not necessary to give too broad an application to the exclusionary rule. The statement which is obtained by the violation of the *Miranda* rule must be excluded but some evidence which is obtained as a result of the violation does not have to be excluded.

Id. The Court reasoned that the importance of ensuring that all relevant evidence be submitted to the jury "outweighs the need to exclude evidence which was gathered as the result of a non-coercive statement made in violation of the prophylactic rule of *Miranda* as extended by *Edwards*." *Id.* at 613, 434 S.E.2d at 182. The Court concluded that "[t]he deterrent value of the rule is satisfied by the exclusion of the statement made as a result of the *Miranda* or *Edwards* violations." *Id.*

This case is materially indistinguishable from *May*. Because, however, of our Supreme Court's emphasis in *May* on the prophylactic nature of *Miranda*, the continued viability of its holding was arguably called into doubt by *Dickerson v. United States*, 530 U.S. 428, 147 L. Ed. 2d 405, 120 S. Ct. 2326 (2000), which held that *Miranda* was a constitutional rule and not just prophylactic. *See State v. Phelps*, 156 N.C. App. 119, 125 n.1, 575 S.E.2d 818, 822 n.1 (2003), *rev'd*, 358 N.C. 142, 592 S.E.2d 687 (2004). In light of the United States Supreme Court's recent decision in *United States v. Patane*, —— U.S. ——, 159 L. Ed. 2d 667, 124 S. Ct. 2620 (2004), we conclude that *May* is still controlling.

In *Patane*, a three-judge plurality held that the "fruit of the poisonous tree" doctrine does not apply to failures to give *Miranda*

warnings. *Id.* at ——, 159 L. Ed. 2d at 680, 124 S. Ct. at 2631. Although *May*, like this case, did not involve a failure to give *Miranda* warnings, but rather addressed post-warning violations, the reasoning of Justices Kennedy and O'Connor, concurring in the judgment, suggests that *May* is consistent with *Patane*. Justice Kennedy stressed that *Dickerson* did not undermine the Court's prior precedents and specifically pointed to cases involving post-warning *Miranda* violations, including *Oregon v. Elstad*, 470 U.S. 298, 84 L. Ed. 2d 222, 105 S. Ct. 1285 (1985) and *Michigan v. Tucker*, 417 U.S. 433, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974)—the primary authority upon which *May* relied. In addition, the plurality and the concurrence both embraced a weighing analysis identical with that of *May*. As Justice Kennedy stated, "In light of the important probative value of reliable physical evidence, it is doubtful that exclusion can be justified by a deterrence rationale sensitive to both law enforcement interests and a suspect's rights during an in-custody interrogation." *Patane*, —— U.S. at ——, 159 L. Ed. 2d at 680, 124 S. Ct. at 2631.

Accordingly, we are still bound by *May*. Under *May*, the trial court properly denied the motion to suppress the physical evidence. We do not, therefore, need to reach the question whether this evidence should have been excluded under the inevitable discovery doctrine.

Affirmed.

Chief Judge MARTIN and Judge STEELMAN concur.

PHYLLIS MOODY, ADMINISTRATRIX OF THE ESTATE OF OSCAR JENKINS MOODY, DECEASED EMPLOYEE, PLAINTIFF-APPELLEE v. MECKLENBURG COUNTY, EMPLOYER, SELF-INSURED, DEFENDANT-APPELLANT

No. COA03-459

(Filed 17 August 2004)

1. Workers' Compensation— findings—credibility of decedent during medical treatment—findings not required on all evidence

The Industrial Commission did not err in a workers' compensation case by not addressing the credibility of the decedent in the statements he made during medical treatment. The Commis-

sion properly weighed the evidence before it and found those facts necessary to support its conclusions. The Commission is not required to make findings about all of the evidence before it.

2. Workers' Compensation— findings—acceptance of doctor's testimony—findings on reasons not required

The Industrial Commission did not err in a workers' compensation case by accepting the opinion of a doctor without making a finding on decedent's credibility. The Commission is not required to elaborate on why it believes one witness or piece of evidence over another.

3. Workers' Compensation— findings—injury and causation—supported by evidence

The Industrial Commission did not err in a workers' compensation case by finding that the decedent sustained a concussion or brain injury that caused anxiety disorders and depression and prevented employment. The findings were supported by the evidence, and the conclusions by the findings.

Appeal by defendant from opinion and award entered 20 December 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 February 2004.

Cox, Gage & Sasser, by Margaret B. DeVries, for plaintiff-appellee.

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

McGEE, Judge.

Mecklenburg County (employer) appeals from an opinion and award of the North Carolina Industrial Commission (the Commission) entered 20 December 2002 finding that Oscar Jenkins Moody (Moody) suffered a compensable injury by accident while working for employer.

The evidence before the Commission tended to show that Moody was a deputy sheriff employed as a trustee coordinator with the Mecklenburg County Sheriff's Department. Moody was involved in an automobile collision on 15 August 1994 as he was driving "downtown to headquarters." Moody's vehicle hydroplaned and was hit by an oncoming truck. Moody testified that the acci-

dent resulted in injuries to his left knee, right shoulder, back, neck, and head.

Employer paid Moody temporary total disability compensation from the date of the accident until October 1999. A deputy commissioner entered an opinion and award on 24 September 1999 terminating temporary total disability benefits for Moody retroactive to 13 April 1996. The Commission reversed the deputy commissioner's award and ordered that employer pay additional workers' compensation benefits, including (1) payment for "reasonable and necessary medical and psychological treatment" because of the injury by accident, (2) payment for weekly benefits from the date of injury until death, and (3) payment for permanent injuries. Employer appeals. We note that due to Moody's death prior to entry of the Commission's opinion and award, Phyllis Moody, Administratrix of Moody's estate (Administratrix), was substituted for Moody.

Employer's first argument is two-fold: (1) that the Commission erred in failing to make any findings regarding Moody's credibility and/or (2) that the Commission erred in failing to make any findings regarding Moody's medical care providers' reliance on Moody's credibility in rendering their opinions.

[1] Regarding the first prong of the argument, employer asserts that Moody's credibility was "clearly the key issue in this case" and therefore, the Commission should have addressed Moody's credibility. We note at the outset that employer does not attack Moody's credibility based on the testimony he provided as a witness at the hearing. Rather, employer attacks Moody's credibility with respect to the conflicting information Moody provided throughout his treatment. Employer argues that Moody provided "misinformation to his physicians in an apparent attempt to exaggerate the extent of his disability." Specifically, employer notes that the emergency room report after the accident conflicts with how Moody later described the accident and injuries. Thus, employer asserts that the Commission should have made a finding regarding Moody's credibility.

It is well settled that the Commission is "the sole judge of the weight and credibility of the evidence[.]" *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). In addition, "[t]he Commission is not required . . . to find facts as to all credible evidence. That requirement would place an unreasonable burden on the Commission. Instead, the Commission must find those facts

which are necessary to support its conclusions of law." *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 476, 525 S.E.2d 203, 205, *cert. denied*, 352 N.C. 589, 544 S.E.2d 781 (2000) (citations omitted).

In this case, the Commission made multiple findings regarding the accident and Moody's subsequent course of medical treatment. Employer is correct in its assertion that the Commission did not make a specific finding of fact to address Moody's credibility. However, as stated above, the Commission is not required to make findings regarding all of the evidence before it. "It is the exclusive province of the Industrial Commission to weigh and evaluate the evidence before it and find the facts." *Lucas v. Thomas Built Buses*, 88 N.C. App. 587, 589, 364 S.E.2d 147, 149 (1988).

Here, it appears that the Commission properly weighed the evidence before it and found those facts which were necessary to support its conclusions. More specifically, it is evident that the Commission examined the various statements Moody made to the emergency room doctors because the Commission found as a fact that Moody "gave inconsistent accounts about his possible loss of consciousness after the 15 August 1994 accident." This finding implies that the Commission did evaluate the statements Moody made to his medical care providers. Although the Commission did not make an explicit finding regarding Moody's credibility, such a finding was not required.

Employer cites two cases in arguing that reversal is warranted when the Commission fails to make "specific findings of fact as to the crucial questions necessary to support the Industrial Commission decision[.]" We note that the cases cited by employer, *Grant v. Burlington Industries, Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985) and *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982), for the proposition that findings of fact are required, do not deal with the Commission's failure to make findings regarding credibility. In *Grant*, our Court found that "the factual findings in this case are insufficient to determine the rights of the parties on the issue of disability." *Grant*, 77 N.C. App. at 249, 335 S.E.2d at 333. Similarly, in *Hilliard*, our Supreme Court held that the Commission "failed to make specific findings of fact as to the crucial questions necessary to support a conclusion as to whether plaintiff had suffered any disability as defined by G.S. 97-2(9)." *Hilliard*, 305 N.C. at 596, 290 S.E.2d at 684. Accordingly, this argument is without merit.

[2] Under the second prong of employer's first argument, employer argues that the opinion of Dr. Patricia L. Gross (Dr. Gross) was based in large part on Moody's credibility. Accordingly, employer argues that the Commission "should have made a finding on [Moody's] credibility before accepting Dr. Gross' testimony or rejected that testimony entirely." For the reasons stated below, we disagree.

As explained above, the Commission is not required to make findings on all credible evidence. *See London*, 136 N.C. App. at 476, 525 S.E.2d at 205. *See also Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 602, 532 S.E.2d 207, 213 (2000). Further, we note that

> [t]his Court in *Adams* made it clear that the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another.

Deese, 352 N.C. at 116-17, 530 S.E.2d at 553.

In finding of fact number fourteen, the Commission "accept[ed] the diagnoses and causation analysis of Dr. Gross and reject[ed] those of Dr. Gualtieri." Dr. Gross is a neuropsychologist who testified in a deposition that Moody suffered a "concussion with brief loss of consciousness that led to a mild frontal lobe syndrome." She testified that this injury resulted in permanent brain damage with cognitive and personality effects. As stated above, the Commission is not required to elaborate on why it believes one witness or piece of evidence over another. Employer's argument that the Commission should have made a finding about Moody's credibility prior to accepting Dr. Gross' testimony is essentially an argument that the Commission needs to justify or explain why it found Dr. Gross credible. Under *Deese*, such an explanation is not required. Accordingly, this argument is without merit.

[3] Employer next argues in multiple assignments of error that the Commission erred in finding that Moody sustained a concussion or brain injury in the accident which caused anxiety disorders and depression and prevented Moody's employment. The challenged findings of fact include the following:

3. Decedent sustained a concussion in the accident. A concussion can occur by the shaking of the brain without a direct impact to the head.

4. . . . Decedent gave inconsistent accounts about his possible loss of consciousness after the 15 August 1994 accident. Confusion is a common symptom in cases of concussion.

. . .

18. The accident of 15 August 1994 caused decedent to suffer a brain injury, which, in turn, caused anxiety disorders and depression that prevented decedent from working beginning immediately after the 15 August 1994 accident and continuing.

In addition, employer challenges the following conclusions of law:

2. As a result of the injury by accident of 15 August 1994, decedent developed physical injuries, anxiety disorders, and depression. Defendant is responsible for such reasonable and necessary medical treatment, psychological treatment, and counseling rendered . . . .

3. Due to the psychological conditions suffered by decedent following the 15 August 1994 injury by accident, decedent was unable [to] earn wages in any employment from 15 August 1994 and continuing until his death.

"When reviewing an Industrial Commission decision, our Court is 'limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.' " *Smith v. First Choice Servs.*, 158 N.C. App. 244, 248, 580 S.E.2d 743, 747 (quoting *Deese*, 352 N.C. at 116, 530 S.E.2d at 553 (2000)), *disc. review denied*, 357 N.C. 461, 586 S.E.2d 99 (2003). " 'The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)).

Findings of fact numbers three and four which state that Moody suffered a concussion are supported by Dr. Gross' deposition testimony. Dr. Gross stated that Moody suffered "a concussion with brief loss of consciousness[.]" In addition, Dr. Gross recorded Moody's diagnosis in her neuropsychological evaluation as "[c]oncussion with

brief loss of consciousness (less than 1 hour)." Further, in this case, employer's Form 19 states that as a result of a motor vehicle accident, Moody "suffered concussion, [left] knee injury, [right] back bruise and other multiple injuries."

Finding number eighteen is also supported by Dr. Gross' testimony. She stated in her deposition testimony that as a result of the 15 August 1994 accident, Moody suffered "a mild brain injury with post-concussive syndrome." She further stated that this injury would affect Moody permanently. In addition, Dr. Gross stated that according to a report of Moody's wife, after the accident, Moody "was more reclusive, refused to do things that he used to do socially, whereas he used to be very outgoing, family oriented." She further testified that the brain injury exacerbated Moody's personality disorder and caused behavioral and emotional effects. As a result, Dr. Gross testified that Moody's brain injury would "[a]bsolutely" prevent his return to work as a deputy. Similarly, Dr. Edward C. Holscher testified in his deposition that "probably 80 to 90 percent" of Moody's inability to work because of psychiatric problems was due to the 15 August 1994 accident.

Lastly, both of the disputed conclusions of law are supported by the findings of fact. Specifically, finding number eighteen supports these conclusions of law. Accordingly, this argument is without merit.

Affirmed.

Judges WYNN and TYSON concur.

LARRY E. JACKSON, EMPLOYEE, PLAINTIFF v. FLAMBEAU AIRMOLD CORP., EMPLOYER, AND LIBERTY MUTUAL INSURANCE CO., CARRIER, DEFENDANTS

No. COA02-1326

(Filed 17 August 2004)

Workers' Compensation— dismissal of claim—notice and findings insufficient

The sua sponte dismissal of a workers' compensation claim for failure to prosecute was improper, as was the failure to make necessary findings and conclusions supporting the order.

Appeal by plaintiff from an order entered 19 March 2002 by Chairman Buck Lattimore of the North Carolina Industrial Commission. Heard in the Court of Appeals 10 September 2003.

Lawrence, Rigsbee & Best, P.A., by Natarlin R. Best, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by P. Collins Barwick, III, Tracy C. Myatt, and Kari R. Johnson, for defendants-appellees.

GEER, Judge.

Plaintiff Larry E. Jackson appeals the North Carolina Industrial Commission's dismissal of his claim with prejudice for failure to prosecute. Because the Commission did not provide plaintiff with notice and an opportunity to be heard prior to dismissing his claim and because the Commission failed to support its decision with the required findings of fact and conclusions of law, we reverse and remand for further proceedings.

On 25 August 1998, Deputy Commissioner Mary Moore Hoag entered an opinion and award concluding that plaintiff had contracted the occupational disease of bilateral carpal tunnel syndrome as a result of his work for defendant-employer and that he had sustained a compensable injury by accident to his shoulder on 26 April 1996 when he attempted to open a jammed door on defendant-employer's blow mold machine. She awarded temporary total disability "until he returns to work or until further Order of the Commission."

Due to his wife's employment, plaintiff subsequently moved to Japan, spending most of the year there with his family, but returning to North Carolina for a portion of each summer. In 2001, a dispute arose related to plaintiff's undergoing bilateral carpel tunnel surgery. Plaintiff requested a hearing because of "[d]efendant's failure to provide payment and reimbursement for necessary medical expenses relating [to] hand-occupational disease [and] shoulder accidents arising from employment[.]" Defendants responded that "plaintiff-employee has not made himself available for previously authorized carpal tunnel releases agreed to by defendants."

The hearing was continued from the 5 June 2001 docket until an unspecified date because plaintiff was out of the country until 18 June 2001 and plaintiff's counsel had a conflict. On 19 June 2001, plaintiff's counsel, by letter to Chief Deputy Commissioner Stephen

Gheen, requested a special setting of the previously scheduled hearing and that the hearing be conducted by teleconference. The record does not indicate that the Commission addressed this request. On 11 July 2001, counsel for defendants wrote Deputy Commissioner Morgan Chapman reporting that he had received a calendar setting the case for hearing on 21 August 2001. He wrote: "I believe you will be contacted in the near future regarding particular issues which are pending and plaintiff's difficulty in remaining in the United States for the hearing on August 21st." Counsel for defendants suggested that "it may assist everyone to have a pre-hearing conference with you by telephone or in person if you have the time prior to hearing this case."

In a letter dated 15 August 2001 to Deputy Commissioner Chapman, counsel for defendants indicated that the parties had participated in a conference call with the deputy commissioner. Counsel also reported that plaintiff's counsel had informed him by telephone on or about 13 August 2001 that the plaintiff would be returning to Japan prior to the hearing date and that "she would be arranging some type of telephonic arrangement for Mr. Jackson to allegedly appear at the hearing on Tuesday, August 21st by phone from Japan." Counsel for defendants objected to this arrangement and asked that the case be removed from the 21 August 2001 setting or continued to a later date before Deputy Commissioner Chapman so that appropriate arrangements could be made.

The next document in the record is an Order of Dismissal by Deputy Commissioner Chapman filed 29 August 2001. The order stated:

> At the call of this case for hearing, there was no appearance by either plaintiff or defendants. The undersigned was subsequently informed that [plaintiff's counsel] had called [defense counsel] and had advised him that these cases had been dismissed by Deputy Commissioner Taylor. In fact, these had not been dismissed and, since Deputy Commissioner Taylor did not have the cases pending before her, no order would have been filed in the cases by Deputy Commissioner Taylor.
>
> These cases had been set on two previous occasions and had not been heard in large part because plaintiff had moved to Japan and was not available for the hearing. He had returned to this country for surgery regarding these claims this summer and was expected to be at the hearing. Although [defense counsel] indicated prior to the date of hearing that [plaintiff's counsel] wanted

> to take plaintiff's testimony by telephone, plaintiff had not requested that option and had not been granted permission to take his testimony by telephone. [Plaintiff] was expected to be at the hearing. In view of the problems in this case, the case would not have been continued barring extraordinary circumstances. Assuming the accuracy of the information provided, it was unreasonable for [plaintiff's counsel's] office to not examine the document to determine the parties involved. Furthermore, there has been no written communication from [plaintiff's counsel] since the date of hearing. Consequently, it appears that these cases should be dismissed.

There are no materials in the record that help explain more clearly to this Court what precisely occurred that caused the parties not to appear at the hearing.

Plaintiff moved for reconsideration, stating that counsel for plaintiff had followed up with counsel for defendants regarding his 15 August 2001 request for a continuance. Counsel for defendants had indicated that he had a conflict on 21 August 2001 because he had another hearing scheduled for the same date. Deputy Commissioner Chapman declined to address the request for reconsideration because plaintiff had already appealed to the Full Commission.

On appeal, an administrative panel of the Full Commission affirmed Deputy Commissioner Chapman's order. The Commission's order stated in its entirety:

> The undersigned have reviewed the competent evidence of record. Having found no good grounds to reconsider the evidence, receive further evidence, or hear the parties or their representatives, the Full Commission AFFIRMS the Order of Dismissal of the Deputy Commissioner and plaintiff's claim is hereby DISMISSED WITH PREJUDICE.

Plaintiff has appealed from this order of dismissal.

N.C. Gen. Stat. § 97-80(a) (2003) grants the Industrial Commission the power to make rules consistent with the Workers' Compensation Act in order to carry out the Act's provisions. Under the authority of this statute, the Commission adopted Rule 613(1)(c). That rule states:

> *Upon proper notice and an opportunity to be heard*, any claim may be dismissed with or without prejudice by the

> Industrial Commission on its own motion or by motion of any party for failure to prosecute or to comply with these Rules or any Order of the Commission.

Workers' Comp. R. of N.C. Indus. Comm'n 613(1)(c), 2002 Ann. R. (N.C.) 770 (emphasis added). Because the deputy commissioner's order dismissed plaintiff's claim for failure to prosecute, she was required to comply with Rule 613(1)(c).

By its terms, Rule 613(1)(c) dictates that a claim not be dismissed unless the affected party is given notice and an opportunity to be heard. In this case, dismissal was ordered *sua sponte* by the deputy commissioner, with neither party receiving notice that such an order was pending or contemplated. This procedure violated Rule 613(1)(c). *Lee v. Roses*, 162 N.C. App. 129, 131-32, 590 S.E.2d 404, 406 (2004) ("Rule 613(1)(c) of the Workers' Compensation Rules permits the dismissal of a claim with prejudice for failure to prosecute upon proper notice and an opportunity to be heard.").

Further, in *Lee*, this Court reversed an order of the Full Commission under Rule 613(1)(c) when, as here, it failed to make findings of fact and conclusions of law necessary to support the order of dismissal. *Id.* at 131, 590 S.E.2d at 406. Under *Lee*, prior to dismissing a claim pursuant to Rule 613(1)(c), the Commission must, in its order, address three factors:

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

Id. at 133, 590 S.E.2d at 407 (quoting *Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001)). Just as this Court observed in *Lee*, "neither the deputy commissioner nor the Full Commission made findings of fact or conclusions of law addressing any of the above cited factors. Thus, the order is not sufficient as a matter of law to dismiss the plaintiff's claim with prejudice for failure to prosecute." *Id.* at 133, 590 S.E.2d at 407.

Accordingly, the Full Commission in this case erred when it summarily affirmed the deputy commissioner's order entered without notice and an opportunity to be heard and when it failed to make the necessary findings of fact and conclusions of law to support its order. The order of dismissal is reversed and this case is remanded

to the Industrial Commission for further proceedings consistent with this opinion.

Reversed and remanded.

Chief Judge MARTIN and Judge BRYANT concur.

HARRY LAND AND WIFE, KATHY LAND, PLAINTIFFS V. TALL HOUSE BUILDING CO., DEFENDANT, AND ASSURANCE COMPANY OF AMERICA, INC., AS ASSIGNEE OF TALL HOUSE BUILDING CO., THIRD-PARTY PLAINTIFF V. DRYVIT SYSTEMS, INC.; COLIN W. MCKEAN, INDIVIDUALLY AND D/B/A SOUTHERN SYNTHETIC & PLASTER; EDWARD MCKEAN, INDIVIDUALLY AND D/B/A SOUTHERN SYNTHETIC & PLASTER; PICKARD ROOFING COMPANY, INC.; AND MARVIN WINDOWS, INC., THIRD-PARTY DEFENDANTS

No. COA03-1083

(Filed 17 August 2004)

1. **Construction Claims— governed by contract—no joint contribution claims**

Summary judgment was correctly granted for defendant Dryvit, a third-party defendant, on joint contribution claims arising from the construction of a house. The builder failed to perform the terms of the contract, the law of contract governed, and the builder could not be a joint tortfeasor. The plaintiff here, the insurance company and assignee of the builder, stood in place of the builder and had no claim for contribution.

2. **Construction Claims— governed by contract—no indemnity claim—damage to building alone—economic loss rule**

Summary judgment was correctly granted for defendant Dryvit on indemnity claims arising from the construction of a house. The law of contract rather than of tort governs the obligations and remedies of the parties in this case. Moreover, there was no damage other than to the house itself. This is purely economic loss, which bars any negligence claims.

Appeal by Assurance Company of America, Inc., (as assignee of Tall House Builders, Inc.) from order entered 12 May 2003 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 29 April 2004.

Dean & Gibson, L.L.P., by Christopher J. Culp; and Dinsmore & Shohl, L.L.P., by Joseph N. Tucker and Julie Muth Goodman, for Assurance Company of America, Inc., appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Hada V. Haulsee and David J. Mazza, for Dryvit Systems, Inc., appellee.

McCULLOUGH, Judge.

Assurance Company of America, Inc. ("ACA"), as assignee of Tall House Builders, Inc. ("Tall House"), appeals from an order granting summary judgment to Dryvit Systems, Inc. ("Dryvit").

The forecast of evidence tended to show that Harry and Kathy Land ("The Lands") entered into a contract with Tall House in which Tall House agreed to serve as the general contractor for the construction of a residence in Durham County, North Carolina. Tall House used direct exterior finish systems ("DEFS"). Dryvit was the manufacturer of the DEFS, also known as Fastrak System 4000, and Southern Synthetic ("Southern Synthetic") applied the product to the house.

After construction was completed, the Lands moved into the house. In May of 1998, the Lands sued Tall House alleging construction defects. One month later, Tall House filed a third-party complaint against Dryvit and Southern Synthetic.

By December of 1999, the Lands and Tall House reached a settlement agreement. In the agreement, Tall House paid the Lands $199,900.00 for a dismissal of all claims against Tall House. In exchange, the Lands agreed to assign "all claims, rights and causes of action they may have against any other person or entity concerning any damage to the House to [Tall House's insurer,] Assurance Company of America ('ACA')." As part of the settlement, Tall House dismissed its counterclaims against the Lands for unpaid amounts to Tall House. And, although it had settled with the Lands, Tall House preserved its right to continue its claims against Dryvit.

On 5 July 2000, third-party defendant Dryvit moved for summary judgment on all of Tall House's claims. On 1 August 2000, the Durham County Superior Court entered an order granting summary judgment for Dryvit on all of Tall House's claims. The trial court's order did not specify the grounds upon which it was based. Tall House appealed the 1 August 2000 order to this Court.

We held that the trial court committed reversible error in granting Dryvit's motion for summary judgment. *Land v. Tall House Bldg. Co.*, 150 N.C. App. 132, 137, 563 S.E.2d 8, 11 (2002). We noted that ACA was the real party in interest because "the [settlement] agreement mandated [that] ACA, as insurer for Tall House, pay $199,900.00 to the Lands, and in return the Lands had to assign all of their rights from the dispute to ACA." *Id.* at 135, 563 S.E.2d at 10. "Thereafter, Tall House was no longer actually involved in the litigation." *Id.* Although ACA should have substituted itself for Tall House, the trial court erred in granting summary judgment at that point in the litigation. *Id.* at 135-36, 563 S.E.2d at 10. Instead, the court should have ordered a continuance to allow reasonable time for ACA to substitute itself for Tall House. *Id.* at 136-37, 563 S.E.2d at 10-11.

On remand, the trial court granted a motion substituting ACA as the real party in interest. Dryvit renewed its motion for summary judgment on 5 August 2002. Once again, the trial court granted Dryvit's motion for summary judgment.

ACA, standing in the shoes of Tall House, appeals. On appeal, ACA argues that the trial court erred in granting the motion for summary judgment on the contribution and indemnity claims against Dryvit. We disagree and affirm the decision of the trial court.

I. Standard of Review

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. Gen. Stat. § 1A-1, Rule 56(c) (2003). "[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). "Further, the evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Id.*

II. Contribution Claims

[1] ACA contends that the trial court erred in granting summary judgment on the contribution claims against Dryvit. However, our Supreme Court has indicated that "[o]rdinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor." *Ports Authority v. Roofing Co.*, 294 N.C. 73, 81, 240 S.E.2d

345, 350 (1978), *rejected on other grounds by Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 328 S.E.2d 274 (1985). Although there are exceptions to this rule, none apply to the present case. *Ports Authority*, 294 N.C. at 82, 240 S.E.2d at 350-51. The general rule has also been applied in cases involving contracts to build a home. In *Spillman v. American Homes*, 108 N.C. App. 63, 64, 422 S.E.2d 740, 741 (1992), the plaintiffs filed a tort claim alleging that defendant improperly constructed and installed their mobile home. The *Spillman* Court rejected the validity of this claim and stated:

> Absent the existence of a public policy exception, as in the case of contracts involving a common carrier, innkeeper or other bailee, . . . a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. *It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation.*

Id. at 65, 422 S.E.2d at 741-42 (emphasis added).

The similarities between *Spillman* and the present case are striking. As was the case in *Spillman*, the Lands had a contract with Tall House for the construction of a home. After the home was completed, the Lands began to experience problems with water intrusion and other structural defects. We believe that Tall House failed to perform the terms of the contract, and this failure resulted in injury to the subject matter of the contract, the home. Thus, the law of contract, not the law of negligence, defines the obligations and remedies of the parties.

Since there can be no recovery based on a negligence theory, ACA's contribution claim must also fail. N.C. Gen. Stat. § 1B-1 (2003) governs the right of contribution in North Carolina. "Under this statute, there is no right to contribution from one who is not a joint tort-feasor." *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 43, 587 S.E.2d 470, 477 (2003), *disc. review denied*, 358 N.C. 235, 595 S.E.2d 152 (2004). Because Tall House could only be liable to the Lands for breach of contract, it could not be a joint tort-feasor. Therefore, standing in the shoes of Tall House, ACA has no claim for contribution against Dryvit or any other party. This assignment of error is overruled.

III. Indemnity Claims

[2] ACA suggests that the trial court erred in granting summary judgment on the indemnity claims against Dryvit. Once again, its argument appears to be rooted in tort theory. In its brief, ACA states that "[i]n order to prevail on its indemnity claims, ACA merely had to demonstrate that any *negligence* or fault on Tall House's part was passive or secondary, as opposed to the active *negligence* of Dryvit."

"*Tort law* provides for indemnity of one secondarily liable by one who is primarily liable." *In re Huyck Corp. v. Magnum Inc.*, 309 N.C. 788, 793, 309 S.E.2d 183, 187 (1983) (emphasis added). However, applying this principle to the present case is problematic for a number of reasons.

First, we have already mentioned that the *law of contract, not the law of torts,* defines the obligations and remedies of the parties. As we stated in *Kaleel Builders*, "we acknowledge no negligence claim where all rights and remedies have been set forth in the contractual relationship." *Kaleel Builders*, 161 N.C. App. at 42, 587 S.E.2d at 476.

Second, the economic loss doctrine "prohibits recovery for economic loss in tort." *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 401, 499 S.E.2d 772, 780 (1998). "Instead, such claims are governed by contract law[.]" *Id.* The courts have construed the term "economic losses" to include damages to the product itself. *Id.* However, "[w]here a defective product causes damage to property other than the product itself, losses attributable to the defective product are recoverable in tort rather than contract." *Id.* at 402, 499 S.E.2d at 780.

At least one federal court has considered what constitutes damage to property "other than the product itself" for the purposes of the economic loss rule. *Wilson v. Dryvit Systems, Inc.*, 206 F. Supp. 2d 749, 753 (E.D.N.C. 2002), *aff'd,* 71 Fed. Appx. 960 (2003). In North Carolina, "when a component part of a product or a system injures the rest of the product or the system, only economic loss has occurred." *Id.* More importantly, the Court made the following statement about the exact same product at issue in the case at bar:

> Dryvit's DEFS cladding is an integral component of plaintiffs' house. The damage caused by the allegedly defective Fastrak therefore constitutes damage to the house itself. No "other" property damage has resulted, and plaintiffs have suffered purely eco-

nomic losses. Thus, plaintiffs' negligence claims against Dryvit are barred by the economic loss rule, and Dryvit is entitled to summary judgment on those claims.

Id. at 754.

We believe that a similar result is warranted in the present case. As was the case in *Wilson*, any damage caused by the DEFS constitutes damage to the house itself. Since no other property damage has resulted, this is purely economic loss. Therefore, the economic loss rule bars any negligence claims against Dryvit. This includes ACA's indemnity claims which were rooted in tort. Accordingly, this assignment of error is dismissed.

After carefully considering the record and arguments of the parties, we conclude that the trial court acted properly in all respects. Therefore, the trial court's decision to grant summary judgment to Dryvit is

Affirmed.

Judges HUDSON and LEVINSON concur.

NORTHFIELD DEVELOPMENT COMPANY, INC., PLAINTIFF v. CITY OF BURLINGTON, A POLITICAL SUBDIVISION OF THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA03-1024

(Filed 17 August 2004)

Cemeteries; Zoning— denial of special use permit—subject matter jurisdiction—certiorari proceeding—writ of mandamus

The trial court did not have subject matter jurisdiction over a case where plaintiff company sought an order compelling defendant city to issue a special use permit for operation of a cemetery and seeking monetary damages, because: (1) N.C.G.S. § 160A-381(c) sets forth the procedure for review of the denial of an application for a special use permit by a city council, every decision of the city council shall be subject to review by the superior court by proceedings in the nature of certiorari, and the superior court sits as the appellate court rather than as a trial court; (2) in the instant case rather than petitioning for certiorari,

plaintiff filed a civil action seeking review of the city council's decision and an order of the court directing the city to issue the special use permit, the trial court never requested any record of the proceedings before defendant nor was such record ever filed in the matter, and the parties engaged in extensive discovery and thereafter sought resolution of the case by each party filing a motion for summary judgment which is improper for a certiorari proceeding; (3) without a record to review, the trial court could not apply the proper appellate standard of review, and in turn neither could the Court of Appeals; and (4) assuming arguendo that plaintiff's complaint states a claim for mandamus, it does not confer jurisdiction over this claim when issuance of a writ of mandamus is an exercise of original and not appellate jurisdiction.

Appeal by plaintiff from judgments entered 28 April 2003 and 29 May 2003 by Judge Kenneth C. Titus in Alamance County Superior Court. Heard in the Court of Appeals 18 May 2004.

Smith, James, Rowlett & Cohen, L.L.P., by Seth R. Cohen and J. David James, for plaintiff-appellant.

Robert M. Ward, Attorney for City of Burlington, and Thomas, Ferguson & Mullins, L.L.P., by Jay H. Ferguson, for defendant-appellee.

STEELMAN, Judge.

Plaintiff, Northfield Development Co, Inc., appeals two orders and judgments of the trial court, dismissing its claims against defendant.

On 10 June 1999, plaintiff submitted an application to defendant for a special use permit to allow it to operate a cemetery upon a fifty acre tract located within the extraterritorial zoning jurisdiction of defendant. Defendant's planning director requested that plaintiff submit additional information, including a site plan. Plaintiff refused to submit the additional information. On 3 August 1999, the Burlington Town Council (defendant), without holding a public hearing on the matter, denied plaintiff's request for a special use permit. On 21 September 1999, plaintiff filed a complaint against defendant. This action was subsequently dismissed without prejudice on 6 April 2001. Plaintiff filed the present action on 5 April 2002.

Plaintiff's complaint asserts that the North Carolina Cemetery Act, Chapter 65 of the North Carolina General Statutes, established a

complete and integrated regulatory scheme, and that defendant was not entitled to request additional information in connection with plaintiff's application for a special use permit. Plaintiff asserted two causes of action. First, it sought an order compelling defendant to issue the special use permit. Second, it sought monetary damages, alleging the denial of the permit was unreasonable, arbitrary, and capricious in violation of Article I, Section 19 of the North Carolina Constitution, and also violated the North Carolina Cemetery Act.

This matter came on before the Superior Court of Alamance County on 17 March 2003, upon plaintiff's motion for partial summary judgment, defendant's motion to dismiss for failure to state a claim upon which relief could be granted, and defendant's motion for summary judgment. By order and judgment filed 28 April 2003, the trial court denied plaintiff's motion for partial summary judgment and defendant's motion to dismiss plaintiff's second claim. This order granted defendant's motion to dismiss plaintiff's first claim based upon mootness, and also granted defendant's motion for summary judgment as to plaintiff's second claim. Plaintiff gave notice of appeal from this order and judgment on 20 May 2003. On 28 May 2003, Judge Titus entered an amended order and judgment, from which plaintiff appealed on 21 July 2003. The amended order and judgment contained minor wording changes from the original order and judgment. The decretal portion of the two orders and judgments are identical. Defendant asserted a cross-assignment of error, asserting the trial court erred in denying its motion to dismiss plaintiff's second claim.

We first address whether this Court or the trial court had jurisdiction over this matter. The issue of whether a court has subject matter jurisdiction may be raised at any time during a proceeding, and the issue may be raised for the first time on appeal. *Wood v. Guilford Cty.*, 355 N.C. 161, 164, 558 S.E.2d 490, 493 (2002); N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (2003). Even if the parties did not raise the issue in their briefs, the court may raise the question of subject matter jurisdiction by its own motion. *Howell v. Morton*, 131 N.C. App. 626, 629, 508 S.E.2d 804, 806 (1998). Further, the parties cannot stipulate to give a court subject matter jurisdiction where no such jurisdiction exists. *Alford v. Shaw*, 327 N.C. 526, 533, 398 S.E.2d 445, 448-49 n.1 (1990).

In North Carolina, there is no inherent right to appeal. *Cox v. Kinston*, 217 N.C. 391, 396, 8 S.E.2d 252, 257 (1940). Rather, avenues of appeal are created by statute. *Id.* N.C. Gen. Stat. § 160A-381(c) expressly sets forth the procedure for review of the denial of an

application for a special use permit by a city council. "[E]very such decision of the city council shall be subject to review by the superior court by proceedings in the nature of certiorari." N.C. Gen. Stat. § 160A-381(c) (2003). Upon the filing of the petition for review by certiorari, the trial court issues an order directing that the record of the proceedings before the municipality be brought up before the court. In reviewing the actions of the town council pursuant to N.C. Gen. Stat. § 160A-381, the superior court sits as an appellate court, not as a trial court. *Estates, Inc. v. Town of Chapel Hill*, 130 N.C. App. 664, 667, 504 S.E.2d 296, 299 (1998), *disc. review denied*, 350 N.C. 93, 527 S.E.2d 664 (1999). In determining whether it was proper for a town council to deny an application for a special use permit, the applicable standard of review depends upon the nature of the error asserted by petitioner. *Hewett v. County of Brunswick*, 155 N.C. App. 138, 142, 573 S.E.2d 688, 691 (2002). The reviewing court conducts a *de novo* review where the petitioner asserts an error of law. *Id.* If the petitioner alleges that the council's decision was arbitrary and capricious, as is the case here, the reviewing court applies the whole record test. *Id.* This requires the reviewing court to examine the entire record to determine if the agency's decision was supported by substantial evidence. *Id.* The trial court may not consider evidence outside of the record. *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 662, *cert. denied*, 496 U.S. 931, 110 L. E. 2d 651 (1990). Nor is it proper for a trial court in a certiorari proceeding to grant summary judgment. *Id.*

In this case, the Burlington City Council denied plaintiff's request for a special use permit. Rather than petitioning for certiorari, plaintiff filed a civil action seeking review of the city council's decision, and an order of the court directing the city to issue the special use permit. The trial court never requested any record of the proceedings before defendant, nor was such record ever filed in this matter. Instead, the parties engaged in extensive discovery, including the taking of five depositions, filing five affidavits, and then sought resolution of the case by each party filing a motion for summary judgment. This is precisely what our Supreme Court in *Batch* held could not occur in a certiorari proceeding. Without a record to review, the trial court cannot apply the proper appellate standard of review, and in turn, neither can this Court.

This matter was not commenced by the filing of a complaint on 5 April 2002. This matter was commenced by the filing of plaintiff's application for a special use permit with defendant on 10

June 1999. The courts of this State are limited to reviewing this matter in an appellate posture under the provisions of N.C. Gen. Stat. § 160A-381(c). It is the province of the General Assembly to create alternative avenues of appeal and review, not the courts. Since plaintiff failed to file a petition for a writ of certiorari seeking review of this matter, both the trial court and this Court are without jurisdiction to hear plaintiff's first claim.

In its order and judgment, the trial court characterized plaintiff's first claim as a "mandamus claim." Assuming *arguendo* that plaintiff's complaint does state a claim for mandamus, we hold that this did not confer jurisdiction over this claim.

Where a statute stipulates a specific route for an appeal to the superior court for review, this procedure is the exclusive means for obtaining judicial review. *See N.C. Central University v. Taylor*, 122 N.C. App. 609, 613, 471 S.E.2d 115, 118 (1996), *aff'd per curiam*, 345 N.C. 630, 481 S.E.2d 83 (1997). A writ of mandamus is only to be issued where there is no other legal remedy. *Young v. Roberts*, 252 N.C. 9, 17, 112 S.E.2d 758, 765 (1960). As stated above, N.C. Gen. Stat. § 160A-381(c) provides for review of a denial of a special use permit by the parties filing a petition for writ of certiorari to the superior court. Furthermore, the " 'issuance of a writ of *mandamus* is an exercise of original and not appellate jurisdiction.' " *Id.* (citations omitted). As noted above, in reviewing the town council's decision denying the permit, the trial court sits as an appellate court. *Estates, Inc.*, 130 N.C. App. at 667, 504 S.E.2d at 299. Thus, plaintiff cannot create jurisdiction by couching its claim in the guise of a mandamus proceeding.

Plaintiff's second claim sought monetary damages from defendant for its denial of the special use permit. As the trial court was without jurisdiction to hear plaintiff's first claim, plaintiff cannot prevail on this issue.

For the reasons discussed above, the trial court's orders and judgments are vacated and this matter is remanded to the trial court for proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges WYNN and CALABRIA concur.

STATE OF NORTH CAROLINA v. GEORGE CLEVELAND BOSTON

No. COA03-932

(Filed 17 August 2004)

1. Larceny— instructions—lesser included offense

The failure to instruct on the lesser included offense of misdemeanor larceny was error where there was conflicting evidence on the "from the person" element of larceny from the person.

2. Criminal Law— admissions in argument—ineffective assistance of counsel—remedy—motion for appropriate relief

The appropriate remedy for defense counsel's alleged failure to obtain defendant's consent to make admissions during opening arguments was a motion for appropriate relief in superior court. N.C.G.S. § 15A-1415(b)(3).

Appeal by defendant from judgment entered 11 February 2003 by Judge W. Russell Duke, Jr. in Chowan County Superior Court. Heard in the Court of Appeals 26 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General Jill F. Cramer, for the State.

Russell J. Hollers III, for defendant-appellant.

THORNBURG, Judge.

On 11 February 2003, a jury convicted George Cleveland Boston ("defendant") of common law robbery and being an habitual felon. At trial, the evidence presented by the State and by defendant differed significantly.

The State's evidence included the following: William Skinner ("Mr. Skinner") testified that a former co-worker of his brought defendant to Mr. Skinner's house. Defendant or the co-worker asked if Mr. Skinner would be interested in buying some guns. Mr. Skinner said yes. Defendant indicated that he had the guns out in the car and left the house. The following day defendant returned to Mr. Skinner's house. Mr. Skinner agreed to buy guns from defendant and gave defendant a check for fifty dollars. Defendant left and did not return with the guns. The next morning Mr. Skinner stopped payment on the check.

That night defendant returned for the third time to Mr. Skinner's house. Defendant knocked on the back door and Mr. Skinner let him in the house. Mr. Skinner declined to purchase two more guns from defendant. During this conversation Mr. Skinner was sitting in the den. At some point defendant asked for a blank check, which Mr. Skinner declined to give. Defendant then wanted to put his cigarette out. When Mr. Skinner turned to give defendant an ash tray, defendant hit Mr. Skinner on the head, knocking him to the ground. Defendant jumped on top of Mr. Skinner and started trying to get Mr. Skinner's wallet out of his pocket. Defendant succeeded in taking Mr. Skinner's wallet, which contained papers including personal information and one hundred and twenty dollars ($120.00). Defendant then left the house. Mr. Skinner called the police and told the officer what had happened.

In addition to Mr. Skinner's testimony, the State presented the testimony of the police officer who responded to Mr. Skinner's call. The officer's description of Mr. Skinner's report to the officer concerning the theft of the wallet was essentially the same as Mr. Skinner's testimony at trial. The officer also testified about Mr. Skinner's appearance the night of the incident. The officer said that Mr. Skinner was bleeding, he had scrapes on his head, and he was shaking. The officer also testified that Mr. Skinner's hair was all in a mess, his shirt was untucked, and his belt was undone.

Defendant testified to the events that led to his conviction as follows: Defendant sold one gun to Mr. Skinner. Mr. Skinner paid with a two-party check, which defendant cashed. The next day defendant sold a second gun to Mr. Skinner, but this time was unable to cash Mr. Skinner's check. Defendant returned to Mr. Skinner's house for the third time and asked Mr. Skinner about the check. Mr. Skinner said that he was not going to give defendant any more money. During this conversation, defendant noticed a wallet on a little table near where defendant was standing. Defendant then took the wallet and walked out the door. Defendant testified that Mr. Skinner did not see defendant take the wallet. Defendant also testified that he did not "put his hands on" Mr. Skinner or "physically abuse" Mr. Skinner.

The trial judge initially indicated to counsel that he planned to instruct the jury on common law robbery, larceny from the person, and misdemeanor larceny. The attorney for the State requested that the judge not instruct on misdemeanor larceny. Over the objection of defense counsel, the trial court followed the State's request and instructed the jury that the possible verdicts were common law rob-

bery, larceny from the person, or not guilty. After the jury returned verdicts of guilty of common law robbery and being an habitual felon, the trial court sentenced defendant to a minimum of one hundred forty-four (144) months to a maximum of one hundred eighty-two (182) months in the custody of the North Carolina Department of Correction. Defendant appeals.

We have reviewed the assignments of error brought forward by defendant, and we find reversible error in the trial court's refusal to instruct the jury on the crime of misdemeanor larceny.

I

[1] Defendant contends that the trial court erred by refusing to instruct the jury on the charge of misdemeanor larceny, a lesser included offense of larceny from the person. *State v. Lee*, 88 N.C. App. 478, 479, 363 S.E.2d 656, 657 (1988). Where the evidence supports the defendant's guilt of a lesser included offense, the defendant is entitled to have the question submitted to the jury. *State v. Summitt*, 301 N.C. 591, 596, 273 S.E.2d 425, 427 (1981), *cert. denied*, 451 U.S. 970, 68 L. Ed. 2d 349 (1981). However, where the evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, the trial court is not required to submit a lesser included offense to the jury. *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972).

Defendant argues that there was conflicting evidence relating to the "from the person" element of the larceny from the person charge. "[F]or larceny to be 'from the person,' the property stolen must be in the immediate presence of and under the protection or control of the victim . . . ." *State v. Barnes*, 345 N.C. 146, 149, 478 S.E.2d 188, 190 (1996) (citing *State v. Buckom*, 328 N.C. 313, 317-18, 401 S.E.2d 362, 365). In *Barnes* the North Carolina Supreme Court held that the evidence did not support a conviction for larceny from the person where the defendant stole a bank bag from an unattended bank kiosk. *Id.* at 150-51, 478 S.E.2d at 191. Further evidence before the *Barnes* court indicated that the teller of the kiosk was twenty-five to thirty feet away from the kiosk, at another shop. *Id.* at 147, 478 S.E.2d at 189. In *State v. Lee*, 88 N.C. App. 478, 363 S.E.2d 656 (1988), this Court held that the evidence did not support a larceny from the person conviction where the defendant stole a handbag from a shopping cart while the owner was four or five steps away, looking up and down the shelves and talking to another person. *Id.* at 479, 363 S.E.2d at 656.

In the instant case, defendant testified that he and Mr. Skinner were in the same room of Mr. Skinner's house, that he and Mr. Skinner were talking, and that when Mr. Skinner turned away, defendant took a wallet from a table in the same room. Defendant testified further that Mr. Skinner did not see defendant take the wallet. Under *Barnes* the property stolen must be "in the immediate presence *and under the protection or control* of the victim at the time the property is taken." *Id.* at 149, 478 S.E.2d at 190 (emphasis added). By testifying that Mr. Skinner did not see defendant take the wallet and that Mr. Skinner was turned away from the wallet when the wallet was taken, we hold that defendant presented conflicting evidence as to whether the wallet was under the protection or control of Mr. Skinner at the time it was taken.

This holding is consistent with the North Carolina Supreme Court's decision in *State v. Buckom*, 328 N.C. 313, 401 S.E.2d 362 (1991). In *Buckom*, the Court held that the "from the person" element of larceny from the person was supported by evidence that the defendant took money from the open drawer of a cash register at the same time the cashier was reaching in the drawer to make change. *Id.* at 318, 401 S.E.2d at 365. What distinguishes *Buckom* from *Lee* and *Barnes* is not only the distance involved, which is relevant to immediate presence, but also the awareness of the victim of the theft at the time of the taking, which is relevant to protection and control. This distinction is further supported by dicta in *Buckom* and *Barnes*. Both cases cited the example of diamonds placed on the counter and "under the jeweler's eye" as remaining under the protection of the jeweler. *Buckom*, 328 N.C. at 318, 401 S.E.2d at 365; *Barnes*, 345 N.C. at 148, 478 S.E.2d at 190.

In the instant case, defendant presented evidence that the wallet was not under the eye of, or the protection or control of, Mr. Skinner at the time the wallet was taken. Thus, defendant presented conflicting evidence on the "from the person" element of larceny from the person, and the trial court erred by refusing to instruct the jury on the lesser included offense of misdemeanor larceny. Defendant is, therefore, entitled to a new trial in accordance with this ruling.

II

[2] As our ruling on defendant's first assignment of error is dispositive, we address only one of defendant's remaining arguments. Defendant contends that the trial court erred by failing to determine

whether defendant consented to admissions made by defense counsel during opening argument regarding the theft of the wallet. Because the record is silent as to defendant's consent to his attorney's admissions during opening argument, we do not pass on this assignment of error. The appropriate remedy, if any, is for defendant to file a motion for appropriate relief in superior court based upon ineffective assistance of counsel pursuant to N.C. Gen. Stat. § 15A-1415(b)(3) (2003); *see State v. House*, 340 N.C. 187, 197, 456 S.E.2d 292, 297 (1995) (holding that the Court will not presume from a silent record that defense counsel argued the defendant's guilt without the defendant's consent and indicating that the appropriate avenue for relief, if any, is through the filing of a motion for appropriate relief). We note that our ruling herein is without prejudice to defendant's right to file such motion.

New trial.

Chief Judge MARTIN and Judge HUNTER concur.

IN THE MATTER OF G. DEWEY HUDSON

No. COA03-556

(Filed 17 August 2004)

1. District Attorneys— dismissal of inquiry into grounds for removal of district attorney—appeal

There is no appeal from an order of the superior court dismissing an affidavit charging a district attorney with one or more grounds for removal under N.C.G.S. § 7A-66, because: (1) although the statute specifically provides that the district attorney may appeal an order of removal to the Court of Appeals, it does not grant to anyone a right to appeal a dismissal of the inquiry by the superior court; (2) the affiant was not a party to the removal proceeding under N.C.G.S. § 7A-66 and thus had no right to appeal the trial court's dismissal of the proceeding; and (3) the legislature could have included a right of appeal from the dismissal of the proceeding under N.C.G.S. § 7A-66 but chose not to do so.

2. Appeal and Error— preservation of issues—failure to include notice of appeal—attorney fees as a sanction

Although an affiant who filed a sworn affidavit charging that grounds existed for removal of a district attorney from office appeals from an order assessing affiant with attorney fees in the amount of $5,000 as a sanction under N.C.G.S. § 1A-1, Rule 11, N.C.G.S. § 6-21.5, or the inherent authority of the Court to redress an incorrect and inappropriate application of the law in this case, affiant's appeal is dismissed because: (1) the record of appeal does not include a notice of appeal, thus divesting the appellate courts of jurisdiction; and (2) affiant did not include a petition for writ of certiorari, and the Court of Appeals declines to treat his appeal as such.

Appeal by affiant from order entered 13 January 2003 by Judge W. Allen Cobb, Jr., and order entered 23 March 2003 by Judge Thomas D. Haigwood, in Sampson County Superior Court. Heard in the Court of Appeals 28 January 2004.

Law Offices of Jonathan S. Dills, P.A., by Jonathan S. Dills, for appellant.

E.C. Thompson, III, P.C., by E.C. Thompson, III, and Burrow and Hall, by Richard L. Burrows, for appellee.

STEELMAN, Judge.

On 30 December 2002 Joseph W. Morton filed a sworn affidavit pursuant to N.C. Gen. Stat. § 7A-66 (2004), charging that grounds existed for District Attorney G. Dewey Hudson (Hudson) to be removed from office as District Attorney for Prosecutorial District 4. In his affidavit, Morton asserted four grounds for Hudson's removal from office: (1) willful misconduct in office; (2) habitual intemperance; (3) conduct prejudicial to the administration of justice which brings the office into disrepute; and (4) knowingly authorizing or permitting an assistant district attorney to engage in conduct constituting grounds for removal.

Upon the filing of the affidavit, the Clerk of Superior Court of Sampson County forwarded the affidavit to Judge Russell J. Lanier, Jr., Senior Resident Superior Court Judge for District 4A. Due to Judge Lanier being assigned out of his district, he assigned the matter to be heard by Judge W. Allen Cobb, Jr. On 3 January 2003, Judge Lanier advised both Morton and Hudson of this assignment, in writ-

ing. Upon receipt of the affidavit, Judge Cobb by letter dated 10 January 2003 advised Morton and Hudson of its receipt, and that he would act on the matter within thirty days, as required by statute.

On 13 January 2003, at 10:49 a.m., Judge Cobb filed an order finding that the charges in the affidavit, if true, did not constitute grounds for removal pursuant to N.C. Gen. Stat. § 7A-66. The proceeding was dismissed and no evidentiary hearing was conducted. On 13 January 2003 at 2:35 p.m., Hudson filed a response to Morton's affidavit with the Clerk of Court. Morton filed notice of appeal on 27 January 2003.

On January 2003, Hudson filed a motion for sanctions against Morton pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. This motion was heard on 10 February 2003 before Judge Haigwood. On 23 March 2003 an order was entered assessing attorney's fees in the amount of $5,000.00 against Morton based upon Rule 11, N.C. Gen. Stat. § 6-21.5 (2004), or the "inherent authority of the Court to redress an incorrect and inappropriate application of the law in this case." The record and briefs in this matter are devoid of any indication that appellant gave notice of appeal from Judge Haigwood's order. The parties agreed to consolidate the two appeals in this matter.

I. Judge Cobb's Order Dismissing the Proceeding

[1] We first address the issue of whether an appeal can lie from an order of the superior court dismissing an affidavit charging a district attorney with one or more grounds for removal under 7A-66. We conclude that there is no appeal from such an order.

A proceeding to remove a district attorney "is neither a civil suit nor a criminal prosecution," it is an inquiry and thus the rules of civil and criminal procedure do not apply. *In re Spivey*, 345 N.C. 404, 418, 480 S.E.2d 693, 701 (1997). Upon filing of an affidavit seeking removal of a district attorney, the superior court is required to perform a two-prong analysis. First, the court must determine whether "the charges if true constitute grounds for suspension" of the district attorney. Second, the court must also find "probable cause for believing that the charges are true." If the court finds both of these things exist, then a hearing is to be held upon the charges, upon due notice to the district attorney. N.C. Gen. Stat. § 7A-66.

Following a hearing, if the superior court finds that grounds for removal exist, then the court "shall enter an order permanently

removing the district attorney from office[.]" N.C. Gen. Stat. § 7A-66. The statute specifically provides that the district attorney may appeal an order of removal to the Court of Appeals. It does not grant to anyone a right to appeal a dismissal of the inquiry by the superior court.

In proceedings under N.C. Gen. Stat. § 7A-66, the affiant is not a party, but rather is merely a citizen presenting possible grounds for removal to the court. In *Spivey*, the trial court appointed a member of the bar to act as counsel to present evidence to the court. This procedure was approved by the Supreme Court. *Spivey*, 345 N.C. at 417, 480 S.E.2d at 700. Further, Spivey asserted before the Supreme Court that the trial court erred by designating the affiants as petitioners and allowing them to participate as parties in the proceeding. The Supreme Court acknowledged that "the procedural irregularities Spivey complains of occurred here," but held that there was no prejudice. *Id.* at 418, 480 S.E.2d at 701. We hold that Morton as affiant was not a party to the removal proceeding under N.C. Gen. Stat. § 7A-66 and thus had no right to appeal Judge Cobb's dismissal of the proceeding.

We further note that N.C. Gen. Stat. § 7A-66 addresses the issue of appeal specifically, providing a right of appeal to district attorneys who are removed from office under the statute. The legislature includes no such remedy for the charging affiant, or others, when the proceeding against the district attorney is dismissed. Because the legislature could have included a right of appeal from the dismissal of a proceeding under N.C. Gen. Stat. § 7A-66 but refused to do so, we take counsel in *expressio unius est exclusio alterus*, which stands for the proposition that "when a law expressly describes a particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded," 73 Am. Jur. 2d *Statutes* § 129 (2004); *Christensen v. Harris County*, 529 U.S. 576, 583, 146 L. Ed. 2d 621, 629 (2000). Accordingly we hold that no right of appeal exists in the instant case.

A review of similar type proceedings supports this conclusion. There is no provision for appeal of a dismissal of a complaint against a judge before the Judicial Standards Commission. N.C. Gen. Stat. § 7A-377 (2004). There is no provision for appeal of a decision by a chief district court judge not to conduct a hearing on the removal of a magistrate. N.C. Gen. Stat. § 7A-173 (2004). Additionally, there is no

appeal of the dismissal of a complaint against an attorney by the Disciplinary Hearing Commission of the State Bar. *State Bar v. Rudisill*, 159 N.C. App. 704, *disc. rev. denied* 357 N.C. 579, 589 S.E.2d 127 (2003).

Finally, we note that N.C. Gen. Stat. § 7A-66 was not intended to be a vehicle for persons to air their disputes with their district attorneys. Nor is it a proper vehicle to challenge the wisdom, legality, or constitutionality of the manner in which district attorneys operate their offices or handle their dockets in the courts of this State. There exist other avenues for challenging such matters, *see e.g. Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858 (1994). Morton had no right to appeal Judge Cobb's order and his appeal must be dismissed.

II. Judge Haigwood's order imposing sanctions

[2] There is but one notice of appeal contained in the record in this matter, appealing from Judge Cobb's order of 13 January 2003. There is no notice of appeal of Judge Haigwood's order of 25 March 2003.

Rule 3 of the Rules of Appellate Procedure provides that a party entitled to appeal may take appeal by filing notice with the clerk of superior court and serving copies upon all parties in a timely manner. When the record does not include a notice of appeal, the appellate courts are without jurisdiction. *Crowell Constructors v. State*, 328 N.C. 563, 402 S.E.2d 407 (1991); *Currin-Dillehay Bldg. Supply, Inc. v. Frazier*, 100 N.C. App. 188, 394 S.E.2d 683 (1990). We are thus required to dismiss this portion of Morton's appeal. *Melvin v. St. Louis*, 132 N.C. App. 42, 510 S.E.2d 177 (1999), *cert. denied*, *Melvin v. St. Louis*, 350 N.C. 309, 534 S.E.2d 594 (1999). Morton does not include a petition for writ of certiorari, and we decline to treat his appeal as such.

APPEAL DISMISSED.

Chief Judge MARTIN and Judge GEER concur.

DIANNE STOCKTON, PLAINTIFF v. ESTATE OF TERRY DARNELL THOMPSON, RANDY M.L. THOMPSON, ADMINISTRATOR, DEFENDANT

No. COA03-749

(Filed 17 August 2004)

Paternity— deceased father—other known children—intervention not allowed

Those not listed in N.C.G.S. § 49-16 may not intervene in a paternity proceeding, and the trial court correctly denied a motion to intervene by the guardian of the other children of the deceased putative father.

Appeal by intervenor-appellant from orders entered 14 March and 28 March 2003 by Judge Beth S. Dixon in District Court, Rowan County. Heard in the Court of Appeals 4 March 2004.

Woodson, Sayers, Lawther, Short, Parrott & Walker, LLP, by Sean C. Walker, for plaintiff-appellee Diane Stockton.

James L. "Jeremy" Carter, Jr., for defendant-appellee Estate of Terry Darnell Thompson.

Linwood O. Foust, for intervenor-appellant.

McGEE, Judge.

The issue before this Court is whether a party not designated in N.C. Gen. Stat. § 49-16 may intervene in a civil paternity action commenced pursuant to N.C. Gen. Stat. § 49-14.

Terry Darnell Thompson (decedent) died on 1 September 2001 in a motorcycle accident. At the time of his death, decedent had two minor, legitimated daughters, Tekia C. Jordon and Tené Caroline Jordan (Tekia and Tené).

J.T. was born 1 March 2002 to Dianne Stockton (plaintiff), who was living with decedent at the time of decedent's death. Genetic testing conducted on decedent's brother and mother revealed a 99.96% probability that decedent was J.T.'s biological father. Prior to decedent's death, he repeatedly acknowledged that he was the father of J.T. and stated his intention to care for J.T.

A petition was filed by the administrator of decedent's estate on 7 August 2002 requesting that the trial court appoint guardians ad

litem for the known minor children of decedent, Tekia and Tené, and for decedent's known illegitimate child, J.T. The petition further requested that the trial court determine the status of the heirs to decedent's estate. The trial court appointed guardians ad litem on 7 August 2002 for all heirs at law noted in the administrator's petition. On 14 January 2003, the natural guardian of Tekia and Tené filed a response to the estate's petition in which the guardian alleged that the statute of limitations for J.T.'s paternity claim barred the action, and thus, Tekia and Tené were the sole heirs to decedent's estate. The guardian ad litem for J.T. filed an answer to the response. At the 5 February 2003 hearing regarding the estate's petition, the clerk of court held that Tekia and Tené were heirs to the estate, but the clerk deferred ruling as to J.T's status pending the resolution of a paternity action regarding J.T.

Plaintiff filed a paternity action on 5 February 2003 alleging that J.T. was the biological child of decedent. The guardian ad litem for Tekia and Tené filed a motion to intervene in the paternity action on 10 February 2003 in order to protect their pecuniary interest in decedent's estate. Tekia's and Tené's guardian ad litem also filed an answer to plaintiff's complaint asserting that the statute of limitations had passed for initiating a paternity action. In an order filed 14 March 2003, the trial court denied the motion to intervene and on 27 March 2003, the trial court denied Tekia's and Tené's guardian ad litem's motion for reconsideration of the motion to intervene. The guardian ad litem for Tekia and Tené appeals.

We first note that the trial court's order denying appellant's motion to intervene is interlocutory. *See generally Alford v. Davis*, 131 N.C. App. 214, 216, 505 S.E.2d 917, 919 (1998); *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). The order in this case is interlocutory because the trial court had not disposed of the entire controversy among the parties. *United Services Automobile Assn. v. Simpson*, 126 N.C. App. 393, 395, 485 S.E.2d 337, 339 *disc. review denied*, 347 N.C. 141, 492 S.E.2d 37 (1997). Interlocutory orders are generally not subject to immediate appeal; however, "immediate appellate review is permitted pursuant to N.C. Gen. Stat. § 1-277 [2003] and N.C. Gen. Stat. § 7A-27(a) [2003], if the order adversely affects a substantial right which the appellant may lose if not granted an appeal before final judgment." *Id.*; *see also* N.C. Gen. Stat. § 1-277 (2003); N.C. Gen. Stat. § 7A-27 (2003).

By failing to address the interlocutory nature of the order in a brief to this Court, appellant violated N.C.R. App. P. 28(b)(4).

However, pursuant to N.C.R. App. P. 2, this Court elects, in its discretion, to hear the merits of appellant's argument. We conclude that appellant's motion to intervene involves a substantial right which would be irreparably impaired if the trial court's order was not reviewed prior to the trial court's final judgment in the underlying paternity action.

The paternity action regarding J.T. was filed pursuant to N.C. Gen. Stat. §§ 49-14 and 49-16 by J.T.'s biological mother. N.C. Gen. Stat. § 49-16 (2003) explicitly lists those individuals who have standing to participate in a paternity proceeding. Under the statute which is entitled, "Parties to proceeding," a paternity action may be brought by

> (1) The mother, the father, the child, or the personal representative of the mother or the child. [or]
>
> (2) When the child, or the mother in case of medical expenses, is likely to become a public charge, the director of social services or such person as by law performs the duties of such official[.]

N.C.G.S. § 49-16. It is logical to conclude that the General Assembly anticipated that the only defendant in a paternity proceeding would be the putative parent. N.C. Gen. Stat. § 49-14 (2003) provides for the procedure by which a civil action to establish paternity may be initiated by those specifically listed in N.C.G.S. § 49-16. "The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002). "When confronting an issue involving statutory interpretation, [an appellate court's] 'primary task is to determine legislative intent while giving the language of the statute its natural and ordinary meaning unless the context requires otherwise.' " *Spruill v. Lake Phelps Vol. Fire Dep't, Inc.*, 351 N.C. 318, 320, 523 S.E.2d 672, 674 (2000) (quoting *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988)).

In *Smith v. Bumgarner*, 115 N.C. App. 149, 151, 443 S.E.2d 744, 745 (1994), this Court recognized that "[t]he legislative purpose of an action under G.S. § 49-14 is to provide the basis or means of establishing the identity of the biological father so that the child's right to support may be enforced and the child will not become a public charge." In *Smith*, our Court acknowledged that in enacting N.C.G.S. § 49-16, the General Assembly knowingly abrogated the common law and specifically listed those individuals and entities who may bring an

action pursuant to N.C.G.S. § 49-14. *Smith*, 115 N.C. App. at 151-52, 443 S.E.2d at 745-46 ("If the legislature had intended to require the child to be joined as a necessary party in an action under G.S. § 49-14, then it would have specifically stated such[.]"). We conclude that the General Assembly, in explicitly listing who may be a party to a paternity proceeding pursuant to N.C.G.S. § 49-14, did not intend for others not set forth in the statute to intervene in such a paternity proceeding. To hold otherwise, would render ineffective the clear and unambiguous meaning of N.C.G.S. § 49-16. Thus, appellant's argument is without merit.

Affirmed.

Judges CALABRIA and STEELMAN concur.

PAUL E. SPRINKLE AND CARLA JONES (NOW SPRINKLE), PLAINTIFFS V. NORTH CAROLINA WILDLIFE RESOURCES COMMISSION, DEFENDANT

No. COA03-1409

(Filed 17 August 2004)

Appeal and Error— jurisdiction below after notice of appeal— amended order

The Industrial Commission did not have jurisdiction to rule on attorney fees for plaintiff in an amended order filed after the State gave notice of appeal from the original Tort Claims order. An appeal to the Court of Appeals divests the Industrial Commission of jurisdiction to issue opinions and awards; even though an appeal is not perfected until docketed in the Court of Appeals, perfection relates back to the notice of appeal.

Appeal by plaintiffs from decision and order on 12 June 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 March 2004.

Parker, Poe, Adams & Bernstein L.L.P., by R. Bruce Thompson II, for plaintiff appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General William H. Borden, for the State appellee.

McCULLOUGH, Judge.

The issues addressed herein are before this Court in the following posture: The claim at issue in this case was brought by Paul Sprinkle and his wife Carla Jones ("plaintiffs" when referred to collectively) under the North Carolina Tort Claims Act, N.C. Gen. Stat. §§ 143-291, *et seq.* (2003). The case was heard before Deputy Commissioner Lorrie L. Dollar of the Industrial Commission on 6 September 2001. Commissioner Dollar filed a decision and order on 10 May 2002 finding the State liable and awarding plaintiffs $31,007.08 in damages. On 7 January 2003, the Full Commission filed a decision and award affirming the decision of the Deputy Commissioner and additionally awarding attorney's fees. The State filed a notice of appeal on 10 February 2003. The issues on appeal in that case are disposed in *Sprinkle v. N.C. Wildlife Resources Comm.*, 165 N.C. App. 721, 600 S.E.2d 473 (2004) (No. COA03-797), filed the same day as this case. The Full Commission filed an amended decision and order on 12 June 2003 denying plaintiffs' motion for attorney's fees. On 7 July 2003, plaintiffs filed a notice of appeal to the amended decision of the Industrial Commission denying plaintiffs' attorney's fees.

An appeal to this Court divests the Industrial Commission of jurisdiction to issue opinions and awards. N.C. Gen. Stat. § 1-294 (2003); *Andrews v. Fulcher Tire Sales and Service*, 120 N.C. App. 602, 606-07, 463 S.E.2d 425, 428 (1995). Though an appeal is not perfected until docketed in this Court, perfection relates back to the time that notice of appeal is given. *Woodard v. Local Governmental Employees' Retirement Sys.*, 110 N.C. App. 83, 87, 428 S.E.2d 849, 851 (1993).

In the instant case, the Commission filed a decision and award on 7 January 2003. The State gave notice of appeal of that decision and award, which was received by the Commission on 10 February 2003. At that point, the Commission was divested of jurisdiction in the matter. Nevertheless, on 12 June 2003, the Commission filed an amended award even though the appeal of the first order was still pending. Therefore, the amended decision was issued without jurisdiction, and is hereby vacated.

The Commission's amended decision and award filed 12 June 2003 is hereby vacated.

Judges WYNN and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

ARISPE v. ARISPE No. 03-946	Guilford (01CVD4121)	Reversed
BAK v. CUMBERLAND CTY. HOSP. SYS., INC. No. 03-994	Cumberland (00CVS4194)	Affirmed
CARROLL v. STRICKLAND No. 03-540	Edgecombe (01CVS1482)	Affirmed
CLARK v. CITY OF WINSTON-SALEM No. 03-1273	Ind. Comm. (I.C. 475939)	Affirmed
CLODFELTER v. CLODFELTER No. 03-1256	Guilford (96CVD11358)	Reversed and remanded
GIBBS v. GUILFORD TECHNICAL CMTY. COLLEGE No. 03-574	Guilford (00CVS5926)	Affirmed
IN RE B.E.L. & N.D. No. 03-1224	Catawba (02J88) (02J324)	Affirmed
IN RE B.J.M. No. 03-1297	Alamance (00J110)	Affirmed
IN RE C.S. No. 03-1165	Franklin (01J59)	Affirmed
IN RE J.D.S. No. 03-1395	Wake (02J482)	Affirmed
IN RE T.P. No. 03-973	Rockingham (02J60)	Vacated in part, affirmed in part, and remanded
IN RE WILL OF IVEY No. 03-1030	Moore (02CVS672)	Affirmed
MORGAN v. BLACK MOUNTAIN CTR./N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 03-555	Wake (01CVS1450)	Affirmed in part, remanded in part
OGLE v. W&O MASONRY No. 03-1148	Ind. Comm. (I.C. 063665)	Affirmed
PAGE v. HARRIS TEETER, INC. No. 03-1304	Guilford (01CVS12017)	Affirmed
ROSA v. LONG No. 03-1074	Clay (01CVS81)	No error

SHOFFNER v. WAL-MART STORES, INC. No. 03-116	Ind. Comm. (I.C. 619730)	Reversed and remanded
STARON v. CLODFELTER No. 03-1257	Guilford (96CVD11358)	Vacated and remanded
STARON v. CLODFELTER No. 03-1258	Guilford (96CVD11358)	Vacated and remanded
STATE v. ANDERSON No. 03-1265	Nash (99CRS7340) (99CRS7341)	Affirmed
STATE v. BETHEA No. 03-1339	Forsyth (01CRS57370) (01CRS57470)	Reversed and remanded for further proceedings
STATE v. DAVIS No. 03-910	Cumberland (01CRS50225)	No error
STATE v. DELCONTE No. 03-462	Macon (01CRS50675) (01CRS50677) (02CRS83) (02CRS84) (02CRS85) (02CRS86) (02CRS87) (02CRS88)	No prejudicial error
STATE v. FREEMAN No. 03-810	Columbus (01CRS2275) (01CRS4971)	No error in part; judgment arrested for first degree rape conviction
STATE v. HARRIS No. 03-916	Durham (01CRS55103) (01CRS55104)	New trial
STATE v. LOCKLEAR No. 03-1260	Robeson (99CRS1799)	No error
STATE v. LYONS No. 03-792	Wake (02CRS67780) (02CRS29771) (02CRS29773)	Affirmed
YOUNG v. MASTROM, INC. No. 03-762	Moore (84CVD946) (85CVD6) (85CVD117)	Affirmed

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APPEAL AND ERROR—Continued

Cross-appeal—mootness—A cross-appeal was moot where it was dependent on another issue correctly resolved for plaintiff by the trial court. **Home Sav. Bank v. Colonial Am. Cas. & Surety Co., 189.**

Disclosure of interview—discovery order not appealed—The issue of whether the trial court erred by ordering disclosure of an Internal Affairs interview in a criminal prosecution was not before the Court of Appeals because the State did not appeal the order granting defendant's request for discovery. **State v. Villeda, 431.**

Failure to object—lack of notice—Respondents waived any objection to improper notice of a permanency planning order for neglected juveniles when they and their attorneys appeared and participated without objection. **In re J.S., 509.**

Jurisdiction below after notice of appeal—amended order—The Industrial Commission did not have jurisdiction to rule on attorney fees for plaintiff in an amended order filed after the State gave notice of appeal from the original Tort Claims order. An appeal to the Court of Appeals divests the Industrial Commission of jurisdiction to issue opinions and awards; even though an appeal is not perfected until docketed in the Court of Appeals, perfection relates back to the notice of appeal. **Sprinkle v. N.C. Wildlife Res. Comm'n, 902.**

Plain error—jury poll—not applicable—A defendant did not object to a jury poll and did not preserve the issue for review. Plain error analysis applies only to jury instructions and evidentiary matters. **State v. Burrell, 134.**

Plain error review—instructions and evidence only—Plain error review did not apply to an argument concerning information revealed to the jury by the judge just before the jury was polled. Plain error doctrine is limited to jury instructions and evidentiary matters. **State v. Taylor, 750.**

Preservation of issues—denial of request for jury instruction—failure to object—agreement with court—Defendants did not preserve for appeal the denial of their request for a jury instruction on permissive use where they not only did not object, but said, "That's fine" when the court read its intended instruction. **Cannon v. Day, 302.**

Preservation of issues—failure to follow appellate rules—Although intervenors in their brief move the Court of Appeals to dismiss defendants' appeal, motions to an appellate court may not be made in a brief but must be made in accordance with N.C. R. App. P. 37. **Bruggeman v. Meditrust Co., LLC, 790.**

Preservation of issues—failure to include notice of appeal—attorney fees as a sanction—Although an affiant who filed a sworn affidavit charging that grounds existed for removal of a district attorney from office appeals from an order assessing affiant with attorney fees in the amount of $5,000 as a sanction, affiant's appeal is dismissed because the record on appeal did not include a notice of appeal. **In re Hudson, 894.**

Preservation of issues—failure to make argument—Plaintiff's two assignments of error that she failed to argue in her brief are deemed abandoned. **Henderson v. Henderson, 477.**

CRIMINAL LAW—Continued

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Judgment and commitment—not supported by verdict—A judgment and commitment for possession of cocaine with intent to sell and deliver was not supported by a verdict of guilty of possession of cocaine, and the case was remanded for entry of a judgment and commitment for possession of cocaine. **State v. Simmons, 685.**

Jury deliberations—written statements in jury room—not prejudicial—Allowing the jury to take written statements from a statutory rape and sex offense victim and her mother into the jury room during deliberations was not prejudicial where the evidence was identical to that presented on direct examination. **State v. Bingham, 355.**

Motion for mistrial—objection sustained—curative instruction—The trial court did not abuse its discretion in a felonious possession of stolen goods case by denying defendant's motion for a mistrial after a witness testified that he learned that defendant was in prison where the court granted defendant's motion to strike and gave a curative instruction. **State v. McQueen, 454.**

DAMAGES AND REMEDIES

Failure to mitigate damages—summary judgment—The trial court erred in a negligence action by granting summary judgment in favor of defendant, a separate prime contractor also serving as project expediter, on the ground that plaintiff subcontractor failed to mitigate damages because failure to mitigate damages is not an absolute bar to all recovery. **Pompano Masonry Corp. v. HDR Architecture, Inc., 401.**

Home office expenses—summary judgment—The trial court erred in a negligence action by granting summary judgment in favor of defendant, a separate prime contractor also serving as project expediter, on the ground that plaintiff subcontractor is prevented from recovering home office expenses, because: (1) although a plaintiff is not entitled to recover any home office expenses not contemplated in their contract with a defendant, no such contract or privity exists between plaintiff and defendant in the instant case; and (2) assuming arguendo that plaintiff is in fact prevented from recovering home office expenses, the trial court is authorized only to dismiss plaintiff's claims to those particular damages and not plaintiff's entire claim. **Pompano Masonry Corp. v. HDR Architecture, Inc., 401.**

Punitive damages—motion for judgment notwithstanding verdict—manager participation—The trial court did not err in an acting for damages arising out of the failure to provide safe and secure premises and negligent hiring and training of security staff at a nightclub by denying defendants' motion for judgment notwithstanding the verdict as to punitive damages based on alleged insufficient evidence that the nightclub's manager participated in or condoned the attack on plaintiff. **Wallace v. M, M & R, Inc., 827.**

EVIDENCE—Continued

ble indecent liberties case involving three of defendant's children by excluding evidence pertaining to certain incidents occurring between the children and persons other than defendant because the record shows the trial court admitted evidence of all the earlier incidents or accusations provided they occurred either during the same general time period as the charged offenses or before the alleged victims reported defendant to law enforcement authorities. **State v. Lawrence, 548.**

Expert testimony—blood alcohol extrapolation—The admission of expert testimony about an impaired driving defendant's alcohol concentration at the time of an automobile accident was not an abuse of discretion even though the witness used an average alcohol elimination rate when doing a retrograde extrapolation. Moreover, there was other evidence sufficient for a DWI conviction in the observations of the officer who arrested defendant; driving while impaired can be established by either blood alcohol level or the opinion of a highway patrolman. **State v. Taylor, 750.**

Expert testimony—blood splatter—Admission of testimony from a forensic serology expert on blood splatter was not an abuse of discretion. Although defendant questioned the witness's qualifications as an expert on blood splatter, it was reasonable to conclude that her extensive experience with blood evidence made her better qualified than the jury to form an opinion as to the cause of particular bloodstains. **State v. Bruton, 801.**

Fire—beneficial financial impact—The trial court did not abuse its discretion in a first-degree murder case by admitting evidence regarding a fire at a home defendant shared with the victim husband, because: (1) although defendant objected to the presentation of this evidence during the testimony of one witness, two other witnesses had already testified concerning the fire without objection by defendant, and the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character; (2) the evidence discussing the beneficial impact of the fire on the couple's finances, along with the evidence of the death of defendant's first husband, strengthens the application of the doctrine of chances and lessens the probability that the second husband's death occurred as an accident; (3) the chain of events before the victim's death forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury; and (4) even if the evidence was admitted in error, defendant failed to show how it prejudiced her given the voluminous amount of evidence and testimony presented during the trial. **State v. Lanier, 337.**

Hearsay—admissions by party-opponent—government agents—The exception to the hearsay rule for admissions by an agent of a party-opponent applies to statements by government agents for the purpose of a criminal proceedings. Here, statements by a Highway Patrol trooper to attorneys and to an internal affairs officer about why he stopped Hispanics were admissible in a DWI trial because the trooper was an agent of the government and the statements concerned matters within the scope of his agency. N.C.G.S. § 8C-1, Rule 801(d)(D). **State v. Villeda, 431.**

Hearsay—nontestimonial statements—right of confrontation—Hearsay statements made by a murder victim to his wife and daughter concerning the shooting of the victim during a robbery were nontestimonial and not rendered

EVIDENCE—Continued

inadmissible by *Crawford v. Washington*, 541 U.S. —— (2004) where they were made during personal conversations that took place over a period of several days after the shooting at a time when the victim's physical condition was improving and he could have expected to personally testify at the trial. **State v. Blackstock, 50.**

Hearsay—opinion testimony—plain error analysis—The trial court did not commit plain error in a first-degree sexual offense case by admitting hearsay and opinion testimony of a witness who had not been qualified as an expert. **State v. Dyson, 648.**

Hearsay—state of mind exception—residual hearsay exception—The trial court erred in a first-degree murder and robbery with a dangerous weapon case by admitting hearsay statements made by the victim to his wife and daughter concerning the robbery and shooting, because: (1) the statements were made several days after the robbery and therefore were not admissible under N.C.G.S. § 8C-1, Rule 803(3) to show the victim's then-existing state of mind during the robbery; (2) the statements made by the victim to his wife and daughter did not bear particular guarantees of trustworthiness required for admissiblity under the residual hearsay exception for testimony by unavailable witnesses set forth in N.C.G.S. 8C-1, Rule 804(b)(5) since, although the victim may had no motivation to speak untruthfully to either the police captain or his wife and daughter, his statement to the officer that he was shot during a struggle for the gun versus the statement to his relatives that he was shot while on his knees with his hands in the air pleading for his life cannot be reconciled without the benefit of cross-examination, which defendant was denied; and (3) the improperly admitted hearsay statements contained the only evidence of premeditation and deliberation, and thus, the jury's verdict of first-degree murder cannot stand on that basis but can still rest on the felony murder theory with vacation of the armed robbery conviction which serves as the basis for the felony murder. **State v. Blackstock, 50.**

Identity of confidential informant—factors favoring nondisclosure—The trial court's refusal to disclose the identity of a confidential informant to a cocaine trafficking defendant was not error where the factors favoring nondisclosure outweighed the factors favoring disclosure. **State v. Valladares, 598.**

Law abiding person—pertinent—exclusion not prejudicial—Evidence of a cocaine trafficking defendant's character as a law-abiding person tended to establish that defendant did not commit the crime and was incorrectly excluded, but there was no prejudice because the State presented overwhelming evidence of defendant's guilt. **State v. Valladares, 598.**

Possession of firearm by felon—probation for underlying offense revoked—relevant—Evidence that defendant's probation had been revoked was admissible in a prosecution for possession of a firearm by a felon. The evidence was relevant to proving defendant's status as a felon and the court's limiting instructions were sufficient to cure any prejudice. **State v. Boston, 214.**

Prior bad acts or crimes—death of former husband—absence of accident—doctrine of chances—remoteness—motive—The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion in limine to prevent the State from offering evidence concerning the death of

EVIDENCE—Continued

defendant's former husband by drowning six years prior to the death of her second husband by arsenic poisoning because the mysterious illness of both men and the similarities between the two deaths rendred the circumstances of the first husband's death relevant to show that the death of the second husband was not accidental according to the doctrine of chances. **State v. Lanier, 337.**

Prior bad acts or crimes—erroneously admitted—prejudicial—There was prejudice in the erroneous introduction of a prior embezzlement in an embezzlement prosecution because the evidence against defendant was not overwhelming and the result hinged on the jury's assessment of defendant's credibility. **State v. Cook, 630.**

Prior bad acts or crimes—introduced by State to attack credibility—The trial court erred in an embezzlement prosecution by allowing the State to introduce evidence of a prior incident of embezzlement for which a charge was dismissed under a deferred prosecution agreement where the sole purpose was to attack defendant's credibility. The distinctions between N.C.G.S. § 8C-1, Rule 404(b) and Rule 609 may not be blurred. **State v. Cook, 630.**

Prior bad acts or crimes—sale and use of cocaine—intent, knowledge, motive—The admission of testimony mentioning defendant's prior bad acts, including the sale and use of cocaine, was admissible in a prosecution for conspiracy to traffic in cocaine and for trafficking in cocaine by possession. Under the circumstances, the testimony was proper to show defendant's intent, knowledge, and motive. **State v. Valladares, 598.**

Prior bad acts or crimes—sexual act with minor—motive—intent—common plan—The trial court did not abuse its discretion in a first-degree sexual offense case by admitting testimony concerning a prior sexual act committed by defendant with another minor eleven years earlier to show intent, motive and common plan. **State v. Dyson, 648.**

Prior juvenile delinquency adjudications—admissible in subsequent adjudications—Evidence of prior juvenile delinquency adjudications was properly admitted to impeach the juvenile's credibility in a subsequent adjudication proceeding. The clear intent of the legislature in adopting N.C.G.S. § 8C-1, Rule 609(d) and N.C.G.S. § 7B-3201(b) was to provide that a prior juvenile adjudication is admissible in a juvenile proceeding where the juvenile takes the stand in his own defense, even though that evidence is not admissible in a criminal case. **In re S.S.T., 533.**

Testimony—child protective services worker—sexual assault—corroboration—The trial court did not commit plain error in a first-degree sexual offense case by admitting for corroboration testimony of a child protective services worker regarding statements made to her by the child victim although there was some variation between the testimony of the victim and that of the witness. **State v. Dyson, 648.**

Witness—impeachment—waiver—The trial court did not err in a first-degree murder case by allowing the State to impeach its own witness, because: (1) there was no indication that the State's impeachment was used as a mere subterfuge to present improper evidence to the jury; (2) the State impeached the witness's credibility by comparing his testimony to representations he made on the pertinent insurance application; and (3) defendant waived any error since the application

TAXATION—Continued

State University for student housing was not exempt from ad valorem taxation by the pertinent county for 2001 and 2002. **In re Appeal of Appalachian Student Housing Corp., 379.**

Challenge to income tax assessment—failure to pay tax or file bond—no subject matter jurisdiction—The trial court properly concluded that it lacked subject matter jurisdiction over a challenge to an income tax assessment where plaintiff did not first pay the tax or file a bond, as required by statute. **Javurek v. Tax Review Bd., 834.**

Property—appraisal value—cost approach—income approach—A whole record test revealed that the Property Tax Commission did not err by relying on an independent appraiser's determination of property value to determine that the true value of taxpayer's hotel property was $2,880,000 instead of using the county appraiser's value of $4,813,953. **In re Appeal of Weaver Inv. Co., 198.**

TERMINATION OF PARENTAL RIGHTS

Cessation of reunification efforts—notice—jurisdiction—The trial court had jurisdiction to order that reunification efforts cease despite petitioner not filing a motion requesting relief from those efforts. The court obtained jurisdiction when petitioner filed a petition alleging that the minors were neglected, and that jurisdiction continues until terminated by the court or the juveniles become emancipated. **In re J.S., 509.**

Diligent efforts requirement—deleted—The trial court did not err by determining that respondent's parental rights should be terminated without finding that petitioner DSS made diligent efforts to reunite the family. N.C.G.S. § 7A-289.32(3), on which respondent relies, has been replaced by N.C.G.S. § 7B-1111(a)(2), which deleted the diligent efforts requirement. **In re J.W.J., T.L.J., D.M.J., 696.**

Jurisdiction—venue—The trial court in Johnston County properly exercised jurisdiction in a termination of parental rights case where the child was a lifelong resident of Wake County but was in Johnston County when the petition was filed, and respondent was incarcerated in Johnston County when the petition was filed. Respondent confuses jurisdiction and venue; if he felt that Johnston County was an improper setting for the proceeding, it was incumbent upon him to move for a change of venue or to object to venue. **In re J.L.K., 311.**

N.C. termination petition—Arkansas custody order—subject matter jurisdiction—A petition to terminate a mother's parental rights in North Carolina, filed by the father, should have been dismissed for lack of subject matter jurisdiction where respondent was in Arkansas, which had issued an earlier custody order, the children were in North Carolina, and the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) did not apply. **In re N.R.M., T.F.M., 294.**

Neglect and abandonment—sufficiency of evidence—The evidence was sufficient to support termination of the parental rights of an incarcerated parent where respondent had limited contact with his daughter during the six months before the petition; he had limited communication between incarcerations; his alcohol problems prevented a showing of proper parental con-

TERMINATION OF PARENTAL RIGHTS—Continued

cern well before he was incarcerated; and he did not provide financial support. **In re J.L.K., 311.**

Not reduced to writing within 30 days—no prejudice—An termination of parental rights order was not vacated where the written order was filed 89 days after the hearing. While that delay violated the 30-day requirement of N.C.G.S. § 7B-1109(e), there is no authority compelling vacation, and vacating the order is not the proper remedy in this case because respondent did not show prejudice from the delay. **In re J.L.K., 311.**

Permanency planning order—findings insufficient—A permanency planning order relieving social services of reunification and visitation efforts was remanded for further findings where the trial court entered a cursory two page order which was insufficient to allow meaningful appellate review. **In re J.S., 509.**

Prior dependency adjudication—allegations of neglect—not binding—In a termination of parental rights proceeding, a prior adjudication that the child was dependent was an adjudication only of dependency, despite allegations of neglect, and was binding only for the time frame of that order. **In re J.N.S., 536.**

Summary judgment—not allowed—The General Statutes contain no provision allowing use of summary judgment in a juvenile proceeding. Moreover, the requirement in N.C.G.S. § 7B-1109(e) that the court take evidence and make findings in a termination of parental rights proceeding is incompatible with summary judgment. **In re J.N.S., 536.**

TRIALS

Motion for judgment notwithstanding verdict—denial of motion for directed verdict—The trial court did not err in a common law fraud and unfair and deceptive trade practices case by denying defendant's motion for judgment notwithstanding the verdict where plaintiffs presented sufficient evidence to withstand defendant's earlier motions for directed verdict. **Godfrey v. Res-Care, Inc., 68.**

Motion for new trial—procedural irregularity—The trial court did not abuse its discretion in a common law fraud and unfair and deceptive trade practices case by denying defendant's motion for a new trial because there was no procedural error regarding the trial court's decision not to instruct the jury about a directed verdict for defendant as to some claims. **Godfrey v. Res-Care, Inc., 68.**

Motion for relief from final judgment—failure to demonstrate extraordinary circumstances—The trial court did not abuse its discretion in a common law fraud and unfair and deceptive trade practices case by denying defendant's motion for relief from final judgment under N.C.G.S. § 1A-1, Rule 60(b)(6) because the trial court properly instructed the jury as to its determination of the amount of damages that would put plaintiffs in the same position. **Godfrey v. Res-Care, Inc., 68.**

UNFAIR TRADE PRACTICES

Capacity to deceive reasonable businessperson—summary judgment—The trial court did not err by granting summary judgment in favor of defendants

WORKERS' COMPENSATION—Continued

years after his injury and more than two years from the Form 21 filing. While a Form 21 is a method for establishing disability, it does not always constitute a final award; in this case, the decedent's condition was uncertain and the Form 21 was a preliminary agreement for disability payments rather than a final determination of disability. That occurred in a separate claim on 19 April 2001, and death occurred within two years of that date. **Estate of Apple v. Commercial Courier Express, Inc., 514.**

Dismissal of claim—notice and findings insufficient—The sua sponte dismissal of a workers' compensation claim for failure to prosecute was improper, as was the failure to make necessary findings and conclusions supporting the order. **Jackson v. Flambeau Airmold Corp., 875.**

Findings—acceptance of doctor's testimony—findings on reasons not required—The Industrial Commission did not err in a workers' compensation case by accepting the opinion of a doctor without making a finding on decedent's credibility. The Commission is not required to elaborate on why it believes one witness or piece of evidence over another. **Moody v. Mecklenburg Cty., 869.**

Findings—credibility of decedent during medical treatment—findings not required on all evidence—The Industrial Commission did not err in a workers' compensation case by not addressing the credibility of the decedent in the statements he made during medical treatment. The Commission properly weighed the evidence before it and found those facts necessary to support its conclusions. The Commission is not required to make findings about all of the evidence before it. **Moody v. Mecklenburg Cty., 869.**

Findings—injury and causation—supported by evidence—The Industrial Commission did not err in a workers' compensation case by finding that the decedent sustained a concussion or brain injury that caused anxiety disorders and depression and prevented employment. The findings were supported by the evidence, and the conclusions by the findings. **Moody v. Mecklenburg Cty., 869.**

Injury—accident—heart attack—The Industrial Commission did not err in a workers' compensation case by concluding that a worker's heart attack was a compensable injury by accident. **Madison v. International Paper Co., 144.**

Injury—accident—misstep while exiting van—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee flight attendant suffered an injury by accident on 18 November 1999 when she misstepped while exiting from a hotel van with an unexpectedly short final step where the steps also overlapped with the curb. **Konrady v. U.S. Airways, Inc., 620.**

Injury—causation—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee flight attendant proved that her injury was causally related to a short step on a hotel van. **Konrady v. U.S. Airways, Inc., 620.**

Maximum medical improvement—healing period—maximum vocational recovery—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee reached maximum medical improvement (MMI) on 25 January 1999 and that plaintiff employee's entitlement to combined benefits under N.C.G.S. §§ 97-29 and 97-30 was greater than his entitlement

WORD AND PHRASE INDEX

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