NORTH CAROLINA COURT OF APPEALS REPORTS

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166 N.C. APP.

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

JOHN C. MARTIN

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RICHARD A. ELMORE
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ALAN Z. THORNBURG

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GERALD ARNOLD
SIDNEY S. EAGLES, JR.

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	First Division	
1	J. RICHARD PARKER	Manteo
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1. Appointed and sworn in 1 January 2006 to replace W. Douglas Albright who retired 31 December 2005.
2. Appointed and sworn in 4 January 2006.

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	RUSSELL SHERRILL III	Raleigh
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SAMUEL M. TATE	Morganton
JOHN L. WHITLEY[11]	Wilson

1. Appointed Chief Judge effective 1 December 2005 to replace John L. Whitley who retired 30 November 2005.
2. Appointed and sworn in 20 January 2006 to replace Garey M. Ballance who resigned 14 October 2005.
3. Resigned 2 January 2006.
4. Resigned 31 December 2005.
5. Appointed Chief Judge 13 October 2005 to replace Richard W. Stone who was appointed to Superior Court.
6. Appointed and sworn in 28 December 2005.
7. Appointed and sworn in 21 December 2005 to replace Elizabeth M. Kelligrew who resigned 14 October 2005.
8. Appointed and sworn in 29 December 2005 to replace Peter L. Roda who retired 31 October 2005.
9. Appointed and sworn in 5 December 2005.
10. Appointed and sworn in 29 October 2005.
11. Effective 1 December 2005.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
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Chief of Staff
KRISTI HYMAN

Deputy Chief of Staff
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CONSTITUTION OF THE UNITED STATES 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

STATE OF NORTH CAROLINA v. CHRISTOPHER DEON GATTIS, DEFENDANT

No. COA03-452

(Filed 7 September 2004)

1. Evidence— hearsay—medical treatment or diagnosis exception—excited utterance

The trial court did not err in a first-degree murder, first-degree burglary, and assault with a deadly weapon case by excluding certain statements defendant made at the hospital and to his child's mother, because: (1) although defendant contends the State opened the door to an overheard statement by asking a police officer whether he ever heard defendant say anything about the victim, defendant failed to make this argument to the trial court; (2) the statement in a note that an emergency room nurse wrote at the time defendant was being examined by a physician regarding the gun going off accidentally during a fight is only relevant to fault and therefore does not fall within the scope of N.C.G.S. § 8C-1, Rule 803(4) relating to medical diagnosis or treatment; (3) by simply introducing into evidence a statement made by a defendant, the State does not open the door for the introduction of another statement made by defendant at some other time during that day; and (4) the statements defendant made to his child's mother were not excited utterances and established only the undisputed facts that defendant and the victim had an argument, that both were shot, and that defendant was bleeding.

2. Criminal Law— closing arguments—defense of accident

The trial court did not erroneously deprive defendant of his right to present the defense of accident in a first-degree murder, first-degree burglary, and assault with a deadly weapon case by prohibiting defendant from using the word "accidentally" in his closing argument, because: (1) evidence does not raise the defense of accident where defendant was not engaged in lawful conduct when the killing occurred; and (2) to the extent defendant contends the trial court's ruling precluded him from negating premeditation and deliberation, the closing argument reveals otherwise.

3. Criminal Law— trial court's remarks—failure to show prejudice

Defendant was not deprived of a fair and impartial trial by certain remarks of the judge in a first-degree murder, first-degree burglary, and assault with a deadly weapon case, because: (1) defendant failed to refer the Court of Appeals to any particular statement of the trial court that he is challenging regarding the trial court's instruction to the jurors to view the exhibits quickly, and thus, has failed to properly present this question for review; and (2) the trial court did not err by making credibility findings outside the presence of the jury.

4. Evidence— hearsay—state of mind exception

The trial court did not err in a first-degree murder, first-degree burglary, and assault with a deadly weapon case by admitting under N.C.G.S. § 8C-1, Rule 803(3) statements that the victim made to seven individuals regarding her relationship with the victim in the period before her death and regarding conversations she had with defendant on the day of her death, because: (1) in addition to bearing directly on the victim's relationship with defendant at the time she was killed, the evidence related to the State's contention regarding defendant's motive in killing the victim; (2) the evidence refuted defendant's contention that defendant had an ongoing relationship with the victim and went to her house to visit with her and not with any intention of harming her; and (3) the victim's statements on 23 March 2001 were directly pertinent to the confrontation that led to her death that evening.

5. Jury— peremptory challenges—*Batson* motion

The trial court did not err in a first-degree murder, first-degree burglary, and assault with a deadly weapon case by deny-

ing defendant's *Batson* motion made in response to the State's peremptory strike of the first African-American juror to be questioned, because: (1) although the trial court improperly indicated that a pattern must be shown to establish a violation of *Batson*, the trial court gave defendant an opportunity to present a prima facie case pursuant to *Batson*; and (2) without any contention that the jury pool was selected in a discriminatory fashion, defendant's assertion that the limited number of African-Americans in the pool yet to be questioned supported a claim of race discrimination was inadequate to establish a prima facie case under *Batson*.

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

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

Appeal by defendant from judgments entered 3 May 2002 by Judge J.B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 17 March 2004.

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

Nora Henry Hargrove, for defendant-appellant.

GEER, Judge.

Defendant Christopher Deon Gattis appeals from his conviction of first degree murder in the shooting death of his estranged wife, Charlotte Gattis, and of related charges of first degree burglary and assault with a deadly weapon. Defendant contends primarily that the trial court improperly excluded statements he made after the shooting and improperly admitted testimony of hearsay statements by Ms. Gattis. We hold that the trial court's evidentiary rulings did not constitute prejudicial error and that defendant has not identified any other error warranting a new trial.

Facts

The State's evidence tended to show the following. Defendant and Ms. Gattis were separated and living apart following a stormy marriage. Ms. Gattis and her daughter from a previous relationship had rented an apartment and Ms. Gattis had begun dating another

man, Jason Stover. Defendant, however, hoped to persuade Ms. Gattis to return to him.

On 23 March 2001, Ms. Gattis' daughter was spending the night at someone else's house and Mr. Stover came over to Ms. Gattis' apartment at 11:40 p.m. While they were watching television, they heard a noise like a "key to glass." Mr. Stover tried to determine where the sound was coming from and saw a person standing outside the apartment's glass patio doors. Ms. Gattis recognized defendant and immediately called 911. As she did, she called out, "Chris I'm calling 911. . . . I'm calling the police." Defendant repeatedly demanded that she open the door and let him in.

At some point, while defendant pressed against the door, the door came open and defendant fell into the kitchen, holding a gun. Defendant and Mr. Stover began to wrestle over the gun. When defendant pointed his gun directly at Mr. Stover, Mr. Stover turned and ran outside. As he ran, he heard defendant yell "[y]ou're going to die," followed by a gunshot.

Defendant's gun did not have a magazine and had to be loaded by hand, one bullet at a time. After defendant took his first shot, and while Ms. Gattis was talking to the 911 operator, defendant loaded another bullet into the gun. Defendant then struggled with Ms. Gattis, placing her in a headlock with his left arm. The struggle and two shots were recorded on the 911 telephone line.

At defendant's trial, the State introduced a recording of the 911 tape. The jury heard the following:

> DISPATCHER: 911.
>
> FEMALE CALLER: Yes, I need a police at Glenwood Apartments.
>
> DISPATCHER: Let me connect you. Hold on.
>
> (Phone rings.)
>
> (Gunshot heard.)
>
> FEMALE CALLER: I need a police at Glenwood Apartment, Apartment 81.
>
> DISPATCHER: Burlington Police and Fire, Curtis. What's the problem?
>
> FEMALE CALLER: My husband shooting at somebody.

DISPATCHER: He's shooting at somebody?

FEMALE CALLER: Yes.

DISPATCHER: Who's he shooting at?

FEMALE CALLER: Please get them here.

DISPATCHER: Ma'am, I'm sending them over there. Can you tell me some information [?]

FEMALE CALLER: Ma'am, his name is Chris Gattis. Chris Gattis.

DISPATCHER: Who is Chris Gattis? Ma'am?

FEMALE CALLER: Chris.

MALE VOICE: I'm going to kill you right here.

FEMALE CALLER: Chris. Chris. (Screaming.) Oh, my God. Oh, my God. Chris, no. Not my baby. Where's my baby? Where's my baby?

DISPATCHER: Ma'am.

FEMALE CALLER: Where's my baby? Where's my baby? Where's my baby? Where's my baby?

DISPATCHER: Ma'am.

FEMALE CALLER: Oh, my God.

(UNINTELLIGIBLE)

FEMALE CALLER: Where's my baby? Where's my baby? Where's my baby? Where's my baby?

MALE VOICE: Kill you today.

FEMALE CALLER: Please don't. Please don't. My little girl.

DISPATCHER: Ma'am.

FEMALE CALLER: Oh, God. I don't want you to go to jail. I don't want you to go to jail. I don't want you to go to jail.

(MALE VOICE HEARD)

FEMALE CALLER: I don't want you to go to jail.

DISPATCHER: Ma'am.

POLICE: Apartment 81. (UNINTELLIGIBLE)

DISPATCHER: Ma'am. Hello.

POLICE: I heard the shot.

FEMALE CALLER: Don't kill me. Don't kill me. Chris, don't kill me. No, no, don't kill me. Look at me. Chris, don't kill me. Chris. Chris. (Screaming.) No, don't kill me. Don't kill me.

(Gunshot heard.)

POLICE: At Chapel Hill and Mebane.

DISPATCHER: I had a female screaming on open line. Sound like another shot. She's not screaming anymore.

POLICE: (UNINTELLIGIBLE)

DISPATCHER: Hello. They are on their way. I already called them. Hello. She ain't screaming no more. I don't know if they slammed the phone down or he shot her.

POLICE: Mebane and Maple.

DISPATCHER: Hello.

POLICE: (UNINTELLIGIBLE)

Officer Ward of the Burlington Police Department found Ms. Gattis dead in one of the bedrooms. An autopsy revealed that she died from a single gunshot wound to the right side of her face. The muzzle of the gun had been approximately half an inch or less from Ms. Gattis' face when the gun was fired.

Defendant fled the apartment before the police arrived. He went to a telephone booth, where he called Ms. Gattis' mother and told her, "Charlotte is dead. I shot her. I killed her." He said he was sorry. He also called Jeanette Florence, the mother of his son. Ms. Florence picked up defendant in her car and drove him to a hospital because he had a bullet wound in his left arm. Blood drops were ultimately found near the pay phone, along with two bullets and a trigger guard.

Defendant arrived at the emergency room at about 2:30 a.m. on 24 March 2001 and told a police officer there, "I'm the one y'all are looking for." Defendant was treated for his bullet wound, which was described as having an entrance wound on the underside and an exit wound on the top side of his arm. Defendant's clothes, which were stained with what appeared to be dried blood, were taken into evidence. A bullet was found in one pocket.

During the afternoon of 24 March 2001, defendant gave a statement to the police. Defendant said he did not want his marriage to Ms. Gattis to end and that he suspected she was seeing Mr. Stover. Defendant told police he went to the apartment to confirm his suspicions, slid open the back patio door, and then returned to his car to get his 9-millimeter gun. He said when he returned, he heard Ms. Gattis and Mr. Stover laughing inside and loaded his gun. He told the police that he had planned to break into the back door with a screwdriver, but found the door open. According to defendant, he entered the apartment, briefly struggled with Mr. Stover, fired at him as he ran away, and reloaded his gun. In describing his struggle with Ms. Gattis, defendant claimed, "I had her head under my left arm, and she had her hand on the gun. The gun was about one foot from her head. The gun went off and she fell to the ground." He also reported that when he reached Ms. Florence on the telephone, "I told her that Charlotte and I had fought over the gun and it went off."

Defendant was indicted for first degree murder, first degree burglary, and assault with a deadly weapon with intent to kill. The State sought to convict defendant of first degree murder predicated both on malice, premeditation, and deliberation and on the felony murder rule. The jury found defendant guilty of first degree murder under both theories. He was also found guilty of first degree burglary and assault on Mr. Stover with a deadly weapon. The jury did not find that defendant intended to kill Mr. Stover. After the sentencing phase, the jury recommended life imprisonment. The trial court imposed a life sentence without parole for the first degree murder conviction, a consecutive sentence of 103 months to 133 months for first degree burglary, and a third consecutive sentence of 150 days for assault with a deadly weapon.

I. Defendant's Hearsay Statements.

[1] Defendant first contends that the trial court erred in excluding certain statements that he made at the hospital and to Ms. Florence. Since these statements are out-of-court statements offered for the truth of the matter asserted, they constitute hearsay and are inadmissible unless they fall within one of the exceptions to the hearsay rule. N.C. Gen. Stat. §§ 8C-1, Rules 801(c), 802 (2003). We examine each of defendant's statements separately.

A. *Statement Overheard by Police Officer Marshall.*

Defendant argues that the trial court erred in excluding the testimony of Officer Marshall, the police officer at the emergency room,

about statements Marshall overheard defendant make to a physician about the cause of defendant's bullet wound. Defendant's offer of proof indicated that Marshall would testify that he heard defendant say that he had gotten into a fight with his wife and that his written report stated that defendant said "he got into an altercation with his wife in which the gun went off."

Defendant contends on appeal that the State "opened the door" to this overheard statement by asking Marshall, "Did you ever hear him say anything about Charlotte Gattis?" Our review of the record reveals that defendant did not argue this theory of admissibility to the trial court. Rather, defendant argued at trial that the statement was admissible under Rule 803(2) (2003) (the "excited utterance" exception), under Rule 803(4) (2003) (statements made for purposes of medical treatment or diagnosis), and based on the State's introduction of defendant's statement taken on the afternoon of 24 March 2001.

Our Supreme Court "has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount' " in the appellate courts. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). We will not, therefore, address defendant's theory that the State opened the door. Since defendant does not make any other argument on appeal regarding this statement, we overrule this as-signment of error.

B. *Statement Recorded by the Nurse.*

Defendant also sought to introduce a note that emergency room nurse Denise Jones wrote at the time defendant was being examined by a physician: "Patient states alleged argument with spouse, wrestling with a 9 millimeter gun was accidentally discharged." Defendant first argues that the statement contained in the note was admissible under Rule 803(4) as a statement made for medical treatment or diagnosis.

Rule 803(4) excepts from the hearsay rule "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." N.C. Gen. Stat. § 8C-1, Rule 803(4). The Supreme Court has held that statements

qualify for admission under Rule 803(4) only if (1) "the declarant intended to make the statements at issue in order to obtain medical diagnosis or treatment[;]" and (2) "the declarant's statements were reasonably pertinent to medical diagnosis or treatment." *State v. Hinnant*, 351 N.C. 277, 289, 523 S.E.2d 663, 670-71 (2000). Because we hold that defendant's statements were not reasonably pertinent to diagnosis or treatment, we need not address whether defendant had the requisite intent.

Defendant contends that the doctor needed to know that defendant's wound was a bullet hole because of the possibility that a bullet was still lodged in defendant's body. Although the fact that defendant had suffered a gunshot wound would be pertinent to treatment, both Ms. Jones and the physician testified that the manner in which the bullet wound occurred—such as a gun accidentally discharging during an altercation—was not pertinent to how the wound was treated. The commentary to Rule 803(4) specifically provides that "[s]tatements as to fault would not ordinarily qualify under this latter language." N.C. Gen. Stat. § 8C-1, Rule 803(4), Commentary. Since the statement regarding the gun going off accidentally during a fight is relevant only to fault, it does not fall within the scope of Rule 803(4). *See, e.g., Rock v. Huffco Gas & Oil Co.*, 922 F.2d 272, 277-78 (5th Cir. 1991) (when doctors testified that they only needed to know that plaintiff twisted his ankle and did not need to know how it occurred, plaintiff's statements regarding how accident occurred were inadmissible under Fed. R. Evid. 803(4)).

Defendant also argues that the nurse's note should have been admitted because the statement made in the early morning hours corroborated his statement to police made later in the afternoon. Defendant relies on the principle that "if the State introduces into evidence part of a statement made by a defendant, the defendant is entitled to have the rest of the statement introduced, even if self-serving, so long as the statements are part of the same verbal transaction." *State v. Safrit*, 145 N.C. App. 541, 549, 551 S.E.2d 516, 522 (2001). Nevertheless, "by simply introducing into evidence a statement made by a defendant, the State does not open the door for the introduction of another statement made by the defendant at some other time during that day." *Id.* at 549-50, 551 S.E.2d at 522. Since defendant's remark to the doctor and nurse was not part of the statement made to the police and, in fact, was made hours earlier, the State did not open the door to its admission.

C. *Statements to Ms. Florence.*

Defendant next contends that the trial court erred in excluding statements he made to Ms. Florence while calling her from a pay phone after the shooting and while she drove him to the hospital. On *voir dire*, Ms. Florence testified that defendant told her on the phone that "Charlotte had been shot, that he had been shot and that he was bleeding real bad"; that "they had got into it" and "while they were getting into it, that the gun had went off, and that she had got shot and that he had got shot." Ms. Florence testified that while she drove defendant to the hospital, he told her that "they got into it," but did not provide further details. Ms. Florence further testified that defendant "just said that he, that he got shot and she got shot while they were getting into it."

Defendant contends the statements were admissible under Rule 803(2), which excludes from the hearsay rule "excited utterances," defined as "[a] statement relating to a startling event or condition made while declarant was under the stress of excitement caused by the event or condition." The trial court declined to admit the statements on the ground that defendant made them after he had "ample time to reflect upon his, his prior activities." Even assuming, without deciding, that it was error to exclude this evidence, any error was harmless.

N.C. Gen. Stat. § 15A-1443(a) provides that, "[a] defendant is prejudiced by errors relating to rights . . . 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 . . . ." N.C. Gen. Stat. § 15A-1443(a) (2003). The statements that defendant made to Ms. Florence establish only the undisputed facts that he and Ms. Gattis had an argument, that both of them were shot, and that defendant was bleeding. With the exception of the statement that "while they were getting into it, that the gun had went off," the statements do not specifically advance defendant's defense that his shooting of Ms. Gattis was unintended. In light of the 911 tape recording, defendant's statement to police, and other overwhelming evidence of guilt, there is no reasonable possibility that inclusion of this testimony would have altered the outcome of the trial. *State v. Lloyd*, 321 N.C. 301, 310, 364 S.E.2d 316, 322 (exclusion of defendant's statements that he found the body was harmless in light of "overwhelming" circumstantial evidence that he murdered the victim), *vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 181, 109 S. Ct. 38 (1988).

II. Prohibition Against Arguing Accident.

[2] Defendant contends he was wrongfully deprived of his right to present the defense of accident when the trial court prohibited him from using the word "accidentally" in his closing argument. During closing arguments, defense counsel stated:

> I would submit to you, the medical examiner said her hands could have been on the gun. I submit to you that's consistent with Mr. Gattis's statement, that they were wrestling over the gun. And yes, the trigger pull on that gun is a certain amount. But she was pulling the gun. He was holding the gun, and that's why the gun accidentally went off.

The trial court sustained the State's objection on the grounds that defendant had not requested an instruction on accident and, in any event, the accident defense was not available given the evidence. The court did not give any instruction to the jury about use of the word "accident," but directed counsel not to argue accident further.

The law is clear that "evidence does not raise the defense of accident where the defendant was not engaged in lawful conduct when the killing occurred." *State v. Riddick*, 340 N.C. 338, 342, 457 S.E.2d 728, 731 (1995). In *Riddick*, although the defendant claimed his gun went off accidentally when he was startled by a loud noise, the Supreme Court affirmed the trial court's refusal to instruct as to accident because the evidence was undisputed "that the defendant sought out the victim, that the defendant intentionally confronted the victim with a loaded firearm, that the defendant assaulted the victim, and that the gun was in the defendant's hand when two bullets, one of which entered the victim's body, were fired from it." *Id.* at 343, 457 S.E.2d at 731.

The undisputed evidence here shows that defendant was not engaged in lawful conduct when he shot Ms. Gattis. Defendant unlawfully entered her home, with a loaded gun, threatened both Ms. Gattis and Mr. Stover with the gun, unlawfully fired the gun and reloaded, and—by his own admission—struck Ms. Gattis in the head with the gun before the fatal bullet was fired. As a result, the defense of accident was unavailable to defendant. *See also State v. Lytton*, 319 N.C. 422, 426, 355 S.E.2d 485, 487 (1987) (undisputed evidence that established at least the crime of involuntary manslaughter precluded the defense of accident). Since defendant was not entitled to rely upon the defense of accident, the trial court did not err in barring him from arguing accident to the jury.

We further note that to the extent defendant contends the trial court's ruling precluded him from negating premeditation and deliberation, the closing argument reveals otherwise. Defense counsel argued extensively that the defendant lacked premeditation and deliberation and that the shooting was unintentional. Defendant was simply precluded from using the word "accidentally" a second time.

III. Remarks of the Trial Court.

[3] Defendant contends he was deprived of a fair and impartial trial tribunal by certain remarks of the judge. Defendant first argues that the trial court instructed the jurors to view the exhibits quickly, thereby conveying an impression of "impatience and a negative opinion of [defendant's] case." Rule 10(c)(1) of the Rules of Appellate Procedure provides that "[a]n assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." In the assignment of error directed to this issue, defendant cites only the portion of the transcript in which defense counsel "object[ed] to the Court having said to the jury on several occasions they need to see things quickly and we're going to move the trial along." Since defendant has not referred this Court to any particular statement of the trial court that he is challenging, he has not properly presented this question for review.

Defendant next argues that the judge expressed bias in stating that "somebody has not told the truth" about whether defendant signed a waiver of his rights before giving a statement to police. The actual assignment of error cited for this argument contends that the trial court erred in denying defendant's motion to recuse the trial judge based on this statement. In his appellate brief, however, defendant argues that the statement violated N.C. Gen. Stat. §§ 15A-1222 and -1232.

The record shows that the jury was not present when the judge made this statement. This statement was one of several findings of fact the judge made following an evidentiary hearing outside the presence of the jury regarding defendant's objection to the admission of defendant's statement to the police on the grounds that defendant did not sign a *Miranda* waiver. The trial court found that defendant's claim that he did not sign the waiver was not credible and allowed the admission of the statement.

N.C. Gen. Stat. § 15A-1222 (2003) prohibits the judge from expressing "during any stage of the trial[] any opinion in the presence

of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1232 (2003) prohibits the judge from expressing an opinion regarding whether a fact has been proven while "instructing the jury[.]" As these statutes make clear, the prohibition is inapplicable when, as here, the jury is not present. *See State v. Rogers*, 316 N.C. 203, 220, 341 S.E.2d 713, 723 (1986) ("N.C.G.S. § 15A-1222, which forbids the expression of an opinion by the trial court, is inapplicable when the jury is not present during the questioning."), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177, 118 S. Ct. 248 (1997) and *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). Defendant's objection—essentially a motion to suppress—required the trial court to determine credibility on a specific issue. The trial court did not err in making credibility findings outside the presence of the jury.

IV. Hearsay Statements of the Deceased.

[4] Defendant next contends the trial court erred in admitting under Rule 803(3) statements that Ms. Gattis made to seven individuals. Under Rule 803(3), " '[e]vidence tending to show the victim's state of mind is admissible so long as the victim's state of mind is relevant to the case at hand.' " *State v. Bishop*, 346 N.C. 365, 379, 488 S.E.2d 769, 776 (1997) (quoting *State v. Stager*, 329 N.C. 278, 314, 406 S.E.2d 876, 897 (1991)). A victim's state of mind is relevant "if it bears directly on the victim's relationship with the defendant at the time the victim was killed." *Id.*

We first note that defendant has not properly presented this issue for review. In his assignment of error and in his brief, defendant has specified only the portions of the transcript relating to the trial court's oral rulings and, contrary to N.C.R. App. P. 10(c), has not identified any specific portion of actual testimony that is inadmissible. We cannot, therefore, determine precisely which questions and answers are being challenged on appeal. Our review of the rulings does not, however, reveal any error.

The rulings identified by defendant allowed the State to elicit testimony from friends and family members as to (1) statements made by Ms. Gattis regarding her relationship with defendant in the period before her death; and (2) statements made by Ms. Gattis regarding conversations she had with defendant on the day of her death. Both categories of statements were admissible.

The State offered testimony that Ms. Gattis had told a number of people that her marriage with defendant was over, that she had no

desire to reconcile despite defendant's efforts to persuade her to do so, and that her decision to end the marriage was based on defendant's sexual relationships with other women and their disagreements over money. In addition to bearing directly on Ms. Gattis' relationship with defendant at the time she was killed, this evidence related to the State's contention regarding defendant's motive in killing Ms. Gattis: her refusal to reconcile and her involvement with another man. Moreover, it also tended to refute defendant's contention, asserted in defense counsel's opening statement, that defendant had an ongoing relationship with Ms. Gattis and went to her house to visit with her and not with any intention of harming her. *See State v. Carroll*, 356 N.C. 526, 543, 573 S.E.2d 899, 910 (2002) (victim's hearsay statements that she wanted defendant to move out because she was tired of him taking her money to buy drugs were admissible under Rule 803(3) because the statements "indicate difficulties in the relationship prior to the murder"), *cert. denied*, 539 U.S. 949, 156 L. Ed. 2d 640, 123 S. Ct. 2624 (2003); *Bishop*, 346 N.C. at 380, 488 S.E.2d at 776 (victim's hearsay statements that defendant was in debt to the victim, defendant was refusing to repay her, and the victim was insisting on repayment "were relevant to show a motive for the killing" and, therefore, were admissible under Rule 803(3)); *State v. Westbrooks*, 345 N.C. 43, 59, 478 S.E.2d 483, 493 (1996) (statements by victim reflecting concern about his marriage and his wife's handling of finances were admissible under Rule 803(3) as bearing directly on the nature of the relationship between the victim and the defendant and as relevant to the issue of a motive for the victim's murder). Ms. Gattis' statements were, therefore, properly admitted by the trial court.

The State also offered testimony regarding conversations that Ms. Gattis had with others in which she described events with defendant earlier on the day of her death, including Ms. Gattis' statement that she told defendant she did not wish to reconcile, causing him to become upset, and her concern that he had a gun. Our Supreme Court, in *State v. Corbett*, 339 N.C. 313, 332, 451 S.E.2d 252, 262 (1994), stated that a victim's state of mind is relevant if "it related directly to circumstances giving rise to a potential confrontation with defendant on the day she was murdered." Under *Corbett*, Ms. Gattis' statements on 23 March 2001 were admissible because they were directly pertinent to the confrontation that led to her death that evening. *See also State v. McLemore*, 343 N.C. 240, 245-46, 470 S.E.2d 2, 5 (1996) (victim's statement shortly before she was killed that she was going to "lay down the law" admissible as re-

lating directly to circumstances giving rise to potential confrontation with the defendant).

V. *Batson* Challenge.

[5] Defendant contends the trial court improperly denied his *Batson* motion made in response to the State's peremptory strike of the first African-American juror to be questioned. We disagree.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution forbid the use of peremptory challenges for a racially discriminatory purpose. *State v. Barden*, 356 N.C. 316, 342, 572 S.E.2d 108, 126 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074, 123 S. Ct. 2087 (2003). In *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), the United States Supreme Court set out a three-part test to determine whether a prosecutor has impermissibly used peremptory challenges to excuse prospective jurors on the basis of race. *Id.* at 89, 90 L. Ed. 2d at 83, 106 S. Ct. at 1712. Under this test, the defendant must first make a *prima facie* showing that the State exercised a peremptory challenge on the basis of race. *Id.* If such a showing is made, the prosecutor is required to offer a facially valid and race-neutral rationale for the peremptory challenge. *Id.* At that point, the trial court must determine whether the defendant has carried his ultimate burden of proving purposeful discrimination. *Id.*

The issue of discrimination is a question of fact and the trial court's ruling will be upheld unless the appellate court is convinced that the trial court's decision is "clearly erroneous[.]" *State v. McCord*, 140 N.C. App. 634, 652, 538 S.E.2d 633, 644 (2000), *disc. review denied*, 353 N.C. 392, 547 S.E.2d 34 (2001). When the trial court rules that a defendant has failed to make the required *prima facie* showing of race discrimination, our review is limited to whether the trial court erred in making that preliminary determination regardless of whether the State has offered reasons for its exercise of the peremptory challenges. *Barden*, 356 N.C. at 343, 572 S.E.2d at 127.

In this case, the juror was on the first panel questioned during *voir dire* and was the first juror for whom the prosecutor used a peremptory strike. The record shows the following exchange:

> STATE: State's going to excuse [the prospective juror].
>
> COURT: Excuse him? [court excuses prospective juror].
>
> . . . .

DEFENSE: Your Honor.

COURT: That's the first one. It's not a pattern yet.

DEFENSE: All right.

COURT: I'll be glad to hear you.

DEFENSE: I was just going to say because there are only a few blacks on the panel as I observed it.

. . . .

STATE: I can state a reason. He's 19 and he's unemployed. My experience in death penalty cases, this is my eleventh one, that teen-agers aren't going to give real consideration to the death penalty.

COURT: Well, I don't think I have to rule at this point. However, I'm very cautious about the, the federal case on that; and I won't let the State and I won't let the defendant be excusing anyone for, because of race. But this is the very first one, Mr. Collins; and I think that any objection you have at this point is over-ruled.

To the extent the trial court's remarks indicate a belief that a pattern must be shown to establish a violation of *Batson*, the trial court was incorrect. The excusal of even a single juror for a racially discriminatory reason is impermissible. *State v. Robbins*, 319 N.C. 465, 491, 356 S.E.2d 279, 295, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226, 108 S. Ct. 269 (1987) ("Even a single act of invidious discrimination may form the basis for an equal protection violation."). Nevertheless, the trial court's statement that "I'll be glad to hear you" indicates that he gave defendant an opportunity to present a *prima facie* case pursuant to *Batson*.

Although the first step of the *Batson* analysis is not intended to be a high hurdle for defendants to cross, *Barden*, 356 N.C. at 345, 572 S.E.2d at 128, a defendant must make some showing suggestive of race discrimination. The only reason articulated by defendant in this case to support a claim of race discrimination was the limited number of African-Americans in the pool yet to be questioned. Without any contention that the jury pool was selected in a discriminatory fashion, that assertion is little more than a recognition that the excused juror was African-American and, standing alone, is inadequate to establish a *prima facie* case under *Batson*. *State v. Ross*, 338

N.C. 280, 286, 449 S.E.2d 556, 562 (1994) ("Defendant's unsubstantiated allegation that a prospective black juror was excluded from the jury on the basis of race is not sufficient to establish a prima facie case of racial discrimination."). We hold that the trial court's decision that defendant failed to present a *prima facie* case under *Batson* was not clearly erroneous.

VI. Short-form Indictment.

[6] Finally, defendant argues that the short-form indictment charging him with first degree murder failed to specify that he killed Ms. Gattis with premeditation, deliberation, or a specific intent to kill. Based on the Supreme Court's ruling in *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702, 124 S. Ct. 43 (2003), this assignment of error is overruled.

No error.

Chief Judge MARTIN and Judge HUDSON concur.

THE CURRITUCK ASSOCIATES—RESIDENTIAL PARTNERSHIP, A NORTH CAROLINA GENERAL PARTNERSHIP, PLAINTIFF-APPELLEE V. RAY E. HOLLOWELL, JR., D/B/A SHALLOWBAG BAY DEVELOPMENT COMPANY, DEFENDANT-APPELLANT V. KITTY HAWK ENTERPRISES, INC., THIRD-PARTY DEFENDANT

SHALLOWBAG BAY DEVELOPMENT COMPANY, LLC, PLAINTIFF-APPELLANT V. THE CURRITUCK ASSOCIATES—RESIDENTIAL PARTNERSHIP, DEFENDANT-APPELLEE

No. COA03-1082
No. COA03-1085

(Filed 7 September 2004)

1. Jurisdiction; Rules of Civil Procedure— motion to enforce settlement agreement—failure to cite rule of civil procedure—notice

The trial court did not lack jurisdiction and authority to grant appellee's motion to enforce the parties' settlement agreement regarding the purchase of property even though appellee failed to cite a specific rule of civil procedure in the motion, because: (1) a motion that does not comply with N.C.G.S. § 1A-1, Rule 6 is not defective if the parties are aware of the grounds upon which the

movant is relying; (2) although it is of great benefit to the courts for counsel to name and number the rule pursuant to which the motion is made, the only requirement is that the grounds for the motion and the relief sought be consistent with the Rules of Civil Procedure; (3) a settlement agreement may be enforced by filing a new action or by filing a motion in the cause even if the parties and their settlement agreement are still before the trial court; and (4) appellants were notified of the impetus of the motion and the relief sought, and they were given a chance to respond.

2. **Compromise and Settlement— motion to enforce settlement agreement—meeting of minds—statute of frauds—doctrine of frustration of purpose**

The trial court did not err by granting appellee's motion to enforce the parties' settlement agreement regarding the purchase of property, because: (1) a valid offer was made and accepted in the correspondence between the parties, thus showing the parties reached a meeting of the minds; (2) the statute of frauds does not require all of the provisions of the contract to be set out in a single instrument and a memorandum is sufficient if the contract provisions can be determined from separate but related writings; (3) in the instant case, the correspondence identified the parties, the purchase price, and the property to be sold; (4) sufficient evidence existed to support the trial court's determination that appellants' counsel had the authority to bind his clients and appellants have not rebutted the presumption that their counsel acted on their behalf; and (5) assuming arguendo that a water shortage would destroy the value of the property included in the settlement agreement, appellants have not reasonably protected themselves by the terms of the settlement agreement, it was unconvincing to argue that appellants could not reasonably foresee a condition in 2002 that they had prepared for in 1996, and there was no implied condition to the contract that a changed condition would excuse performance in order for the doctrine of frustration to apply.

Judge HUNTER dissenting.

Appeal by plaintiff Shallowbag Bay Development Company, L.L.C. and defendant Ray E. Hollowell, Jr., d/b/a Shallowbag Bay Development Company, from order entered 22 May 2003 by Judge W. Russell Duke in Dare County Superior Court. Heard in the Court of Appeals 24 May 2004.

Poyner & Spruill, L.L.P., by J. Nicholas Ellis, Esq., for appellee.

Ragsdale Liggett P.L.L.C., by George R. Ragsdale and Walter L. Tippett, Jr., for appellants.

TIMMONS-GOODSON, Judge.

In separate appeals, Shallowbag Bay Development Company, L.L.C. ("Shallowbag") and Ray E. Hollowell, Jr. ("Hollowell") (collectively, "appellants") appeal the trial court order dismissing their claims. Prior to argument, the appeals were consolidated pursuant to N.C.R. App. P. 40 (2004). After reviewing the merits of the consolidated appeal, we affirm the trial court's order.

The facts and procedural history pertinent to the instant appeal are as follows: In February 1996, The Currituck Associates-Residential Partnership ("appellee") and appellants entered into a contract whereby appellee would sell appellants a 9.2 acre parcel of property located in Currituck County ("the contract"). The parcel was located within The Currituck Club ("Currituck Club") a Planned Unit Development in Currituck County. Portions of Currituck Club had previously been developed by appellee. Appellants planned to name the parcel Windswept Ridge Villas ("Windswept Ridge") and construct ninety-six residential condominium units on it.

The contract contemplated a six-year "take down" of seven pieces of the property designated "pads" by the parties. On 20 March 1997, the parties closed the sale of the first pad. After two modifications of the contract, the parties closed the sale of the second pad on 12 January 1999. On 1 September 1999, the parties closed the purchase of the third pad. However, the parties failed to close the sale of the fourth pad, which was contemplated for Fall 2000.

On 30 April 2001, appellee notified Hollowell that appellants were in default under the contract. On 1 June 2001, appellee filed a Complaint against Hollowell and requested that the trial court declare that "Hollowell materially breached the [contract] and [appellee] is therefore discharged from further obligations thereunder or, in the alternative, for a declaration of the rights and duties of the parties under the [contract][.]" Hollowell filed an Answer and Counterclaim on 20 September 2001, claiming that appellee had breached the contract and requesting damages and specific performance of the terms of the contract. That same day, Shallowbag Bay filed a Complaint against appellee, alleging the

same breach and requesting the same remedies as Hollowell's Answer and Counterclaim.

Appellee initiated discovery in the litigation and the parties scheduled witness depositions for Summer and Fall 2002. On 28 August 2002, appellants' counsel extended a settlement offer to appellee, whereby appellants would close on the remaining pads by 15 January 2002 for an agreed upon price. In a letter dated 30 August 2002, appellee's counsel responded to the offer and accepted many of its terms. Appellee also proposed that it have an option to repurchase the third pad if appellants failed to close the purchase of pads four through six by 15 January 2003. On 30 August 2002, appellants' counsel sent appellee's counsel a letter accepting appellee's proposal. Appellants suggested that the only issue preventing the parties from settling their claims was the marketing of the condominiums after purchase.

On 3 September 2002, appellee's counsel confirmed via email that an agreement between the parties had been reached regarding appellants' marketing of Windswept Ridge. The email also stated that "in view of our settlement, please permit this email to confirm [that] the depositions scheduled for later this week will not take place." On 6 September 2002, appellee's counsel sent an email to appellants' counsel, attaching a "Mutual Release and Settlement Agreement" that outlined the parties' agreement.

On 2 October 2002, appellee's counsel solicited appellants' comments regarding the "Mutual Release and Settlement Agreement." Appellants' counsel responded that he "had hoped to have the draft purchase agreement in place for attachment" to his response, but that he would nevertheless "forward the settlement agreement to [appellee's counsel] [on 3 October 2002] with or without [the comments]." On 3 October 2002, appellants' counsel sent appellee's counsel an email describing his "changes to the initial draft of the settlement agreement." Attached to the email was a copy of the "redlined changes." The email stated that appellants' counsel "must reserve the right to supplement or change [his] comments after [Hollowell's] review." The email outlined the "revised document" and noted that appellant "would like to have a full blown purchase contract" replace a portion of the "Mutual Release and Settlement Agreement" that concerned the purchase of pads four through six. On 16 October 2002, appellee's counsel responded to appellants' email and outlined various "points to discuss" concerning the agreement.

At appellants' request, Quible and Associates, P.C. ("Quible") prepared data regarding Currituck Club's water system in November 2002. After reading Quible's report, appellants became concerned about the supply of potable water in Currituck Club. After appellants' counsel notified appellee's counsel about these concerns, the parties began communications regarding the execution of a storm water management easement and deed.

On 16 December 2002, appellee's counsel sent appellants' counsel an email inquiring whether the "deal [was] going to close by Jan. 15." Appellee's counsel indicated that he was "starting to have [] doubts that [appellants] [were] going to purchase Pads 4-6." On 23 December 2002, appellants' counsel sent appellee's counsel a "draft contract" outlining the terms of a "Purchase Agreement." Appellee's counsel responded with two emails on 23 December 2002. The first email included "comments on the Purchase Agreement." The second email contained the following statements:

> The parties have a settlement. [Appellants] cannot now come up with some "issues" to try to back out of the agreement.
>
> I hope we're not getting to this point, but I do want to make sure your client realizes that this agreement will be enforced.

The parties did not close the purchase of pads four through six by 15 January 2003. Instead, their counsel continued to negotiate terms of the storm water easement and deed. In Spring 2003, appellants became increasingly concerned about the adequacy of the potable water available to Currituck Club, as well as legal issues surrounding Currituck Club's water supplier. On 7 March 2003, appellee informed appellants that if they did not close the purchase of pads four through six by 21 March 2003, it would exercise its option to repurchase pad three.

The parties failed to close the purchase of pads four through six by 21 March 2003, and on 4 April 2003, appellee filed a Motion to Enforce Settlement Agreement in Dare County Superior Court. In an order filed 22 May 2003, the trial court concluded that the parties had reached an agreement in September 2002 that satisfied the requirements of the statute of frauds. The trial court then granted appellee's motion to enforce the settlement agreement, and it ordered that appellee be given sixty days to exercise its option to repurchase pad three. The trial court also dismissed appellants' claims

with prejudice and taxed attorneys' fees and costs against appellants. It is from this order that appellants appeal.

The issues on appeal are: (I) whether the trial court lacked jurisdiction and authority to entertain and grant appellee's Motion to Enforce Settlement Agreement; and (II) whether the trial court erred in granting appellee's Motion to Enforce Settlement Agreement.

[1] Appellants first argue that the trial court lacked jurisdiction and authority to consider appellee's Motion to Enforce Settlement Agreement. Appellants contend that because appellee failed to cite a specific rule of civil procedure in its Motion to Enforce Settlement Agreement, the trial court lacked jurisdiction and authority to enter the order. We disagree.

North Carolina's superior and district courts require that "[a]ll motions, written or oral, shall state the rule number or numbers under which the movant is proceeding." General Rules of Practice For the Superior and District Courts, Rule 6 (2003). However, N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (2003) requires only that motions to the trial court "state with particularity the grounds therefor, and . . . set forth the relief or order sought." Thus, since "[t]he directive of [Rule 6] has the salutory purpose of ensuring that the [trial] court and the parties are aware of the grounds upon which the movant is relying," a motion that does not comply with Rule 6 is not defective if the parties are given adequate notice. *Wood v. Wood*, 297 N.C. 1, 6, 252 S.E.2d 799, 802 (1979); *see Home Health and Hospice Care, Inc. v. Meyer*, 88 N.C. App. 257, 262, 362 S.E.2d 870, 872 (1987) (stating that "failure to give the number of the rule is not necessarily fatal" to a motion or claim). Therefore, although "it would be of great benefit to the trial court and this appellate court for counsel to name and number the rule pursuant to which the motion is made," *Id.*, this Court only requires that "the grounds for the motion and the relief sought . . . be consistent with the Rules of Civil Procedure." *Gallbronner v. Mason*, 101 N.C. App. 362, 366, 399 S.E.2d 139, 141, *disc. review denied*, 329 N.C. 268, 407 S.E.2d 835 (1991), *writ of mandamus dismissed*, 333 N.C. 167, 424 S.E.2d 909 (1992).

In the instant case, appellee's motion requested that the trial court enforce the settlement agreement and order the following:

> (a) That the Contract between [appellee] and [appellants] is terminated and that [appellee] is under no obligation to sell Pads 4-6 to [appellants].

(b) That the Notice of Lis Pendens filed by [appellants] against [appellee's] property be canceled.

(c) That from the date the order enforcing the settlement agreement is filed with the Clerk of Court, that [appellee] have 60 days from that date in which to exercise an option to purchase Pad 3 of [Windswept Ridge] from [appellants] for $585,000. If such option is exercised, [appellee] would be required to close on the purchase of Pad 3 at [Windswept Ridge] from [appellant] within 60 days from the date that such option is exercised.

(d) That all claims for relief asserted by [appellant] against [appellee] be dismissed with prejudice and that [appellee], its owners, partners, managers, employees and agents be released from any and all such claims asserted by [appellants] in the two lawsuits.

(e) That the Court enforce any other terms of the settlement agreement it deems just and proper.

(f) That the Court tax attorneys' fees and costs against [appellant] that are associated with the enforcement of the parties' settlement agreement.

In *State ex rel. Howes v. Ormond Oil & Gas Co.*, 128 N.C. App. 130, 493 S.E.2d 793 (1997), the defendant appealed the trial court order requiring it to comply with the terms of a consent judgment that had been proposed by the State. After reviewing the record, we concluded that the defendant did not agree to the terms of the consent judgment, and that the consent judgment was not an "accurate memorialization of the parties' intent regarding their [prior] settlement agreement." *Id.* at 135, 493 S.E.2d at 796. Thus, we held that the trial court erred in incorporating the terms of the proposed consent judgment into its order, and we vacated the trial court order. *Id.* at 136, 493 S.E.2d at 796. Although the State had filed its motion in the same action the agreement purported to dismiss, we allowed the trial court to consider whether the State was entitled to specific performance of the settlement agreement on remand. *Id.* at 137, 493 S.E.2d at 797. Appellants contend that this instruction was dicta, and that this Court has not yet decided whether a party may file a motion in the cause to enforce a settlement agreement in lieu of dismissing the cause and filing a second claim for breach of contract. We disagree.

In support of our instructions in *Howes*, we stated:

> Although our courts have not laid down a precise method for the enforcement of [settlement agreements], the general rule in other jurisdictions is that a party may enforce a settlement agreement by filing a voluntary dismissal of its original claim and then instituting another action on the contract, or it may simply seek to enforce the settlement agreement "by petition or motion in the original action." . . . Here, the parties and their settlement agreement were still before the trial court when the State sought entry of the proposed consent judgment which, as the court's judgment makes clear, was actually a demand for specific performance of the parties' settlement agreement. By asking the court to enter judgment in accordance with what it believed were the terms of the parties' settlement agreement, the State evidenced its readiness to comply with the terms of that agreement and Ormond's refusal to do likewise. The trial court having concluded that the State was entitled to have the parties' settlement agreement enforced, we hold that the trial court may enter a judgment in this case in accordance with the terms found in the parties' settlement agreement.

128 N.C. App. at 136-37, 493 S.E.2d at 796-97 (citation omitted). Thus, we are bound by our previous determination that a settlement agreement may be enforced by filing a new action or by filing a motion in the cause, even if "the parties and their settlement agreement [are] still before the trial court." *Id.* at 137, 493 S.E.2d at 797.

In the instant case, appellee's motion was in writing and filed during the original action. It described the contract between the parties and the negotiations between the parties that led to the alleged agreement. Attached to the motion were approximately fifty pages of correspondence between the parties. The motion clearly sought to enforce the settlement agreement pursuant to case law, and to dismiss appellants' claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 41 (2003). Thus, appellants were notified of the impetus of the motion and the relief sought, and they were given a chance to respond. Therefore, we conclude that appellee's motion satisfied the mandates requiring particularity in pleadings. Accordingly, we hold that the trial court had jurisdiction over appellee's motion, and that its order granting the motion did not deprive appellants of their due process rights.

[2] Appellants next argue that the trial court erred in granting appellee's Motion to Enforce Settlement Agreement. Appellants assert that the correspondence between their counsel and appellee's counsel only established an "agreement to agree" between the parties, not an enforceable settlement agreement. We disagree.

In the instant case, on 28 August 2002, appellants' counsel sent appellee's counsel a letter regarding the then-pending litigation. That letter reads, in pertinent part:

> Pursuant to our recent discussions, I have revisited settlement options with [appellants]. [Appellants] [are] now willing to settle through termination of the current contract (and its modifications) and the execution of a new agreement stipulating that on or before January 15, 2003, the parties will perform as complete the following:
>
> . . . .
>
> (2) [Appellants] will close on the purchase of the three remaining pads . . . at a cost of $472,500 each for a total of $1,417,500.
>
> . . . .
>
> I believe all of the items stated above are consistent with terms stated in your correspondence to me dated February 25 and March 28, 2002. Please review this offer with your client and contact me by Friday at noon.

The parties engaged in subsequent telephone conversations, and on 30 August 2002, appellee's counsel sent appellants' counsel a letter stating:

> I just want to follow up on our telephone conversation of August 30 regarding the possible settlement of the litigation. . . . I am going to refer to your August 28, 2002 letter to me because that contains the most recent settlement parameters.
>
> [The letter then reproduces the seven "settlement parameters" contained in seven paragraphs of the 28 August 2002 letter. All but one of the parameters, contained in paragraph five, was followed by bold type that stated "This is acceptable to [appellee]."]
>
> As you can see, [appellee] is in essential agreement with the terms outlined in your letter in six of the seven paragraphs. The only substantial difference is that we have given you a

> more detailed proposal concerning the issues contained in Paragraph 5. . . . Hopefully, the parties can come together[.]
>
> Finally, [appellee] has one additional term. As you know, Pad 3 is currently owned by [appellants], but it has not been improved. Should [appellants] not close by January 15, 2003 on the remaining three pads, [appellee] would have the option to buy back Pad 3 for $585,000. It would have 60 days from January 15, 2003 to exercise that option and 60 days after the date of exercise to close on the purchase of Pad 3.
>
> I believe these are the main items that need to be agreed upon by the parties and I look forward to hearing from you and your client as soon as possible. At the present time, I would like to leave the deposition for Mr. Hollowell, which is scheduled for September 4, set so that we can take it if the parties cannot settle their claims before that time.

That same day, appellants' counsel responded with a letter reading in pertinent part:

> [The parties] are very near agreement. First, the additional term regarding the repurchase of pad 3 is acceptable.
>
> The sole matter remaining in dispute is whether [appellants] will be permitted to staff and otherwise market a model unit. Quite simply, we need to be able to market villas in the same manner that they have been marketed up to now. . . .
>
> Please review this letter with your client and contact me. If you would like to speak with me later today, please call [.]

On 3 September 2002, appellants' counsel sent appellee's counsel an email stating:

> I received your message and am pleased that we have reached an agreement. Please permit this email to confirm that Mr. Hollowell will hire an inside marketing agent/broker to handle sales of the villas and will not engage the services of an independent, third-party brokerage company. The remaining terms of the settlement agreement are consistent with those stated in our recent series of correspondence.

Further, in view of our settlement, please permit this email to confirm the depositions scheduled for later this week will not take place. . . .

On 6 September 2002, appellee's counsel sent the following email to appellants' counsel:

> Here's the Mutual Release and Settlement Agreement I've drafted. Please contact me ASAP and let me know if any changes are necessary. If not, I'll have duplicate originals executed by our folks and you can have [appellant] do the same.

Based upon these communications, the trial court concluded that a valid settlement agreement existed between the parties on 6 September 2002.

Appellants first contend that the trial court erred in finding that the parties had reached a meeting of the minds. We disagree.

If supported by competent evidence, a trial court's findings of fact are conclusive on appeal. *Hill v. Town of Hillsborough*, 48 N.C. App. 553, 558, 269 S.E.2d 303, 306 (1980). "[M]utual assent and the effectuation of the parties' intent is normally accomplished through the mechanism of offer and acceptance." *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980). In the instant case, the 28 August 2002 letter established appellants' willingness to "revisit" settlement options and their attempt to enter into a new agreement. The letter concluded by acknowledging its status as an "offer." In appellee's response to this letter on 30 August 2002, appellee's counsel acknowledged a possibility of settlement between the parties, accepted all but one of appellants' offered terms, and proposed an additional term. In his response sent the same day, appellants' counsel acknowledged that the parties were "very near agreement," and immediately accepted the additional term proposed by appellee. Appellants' counsel then discussed his client's position on the "sole matter remaining in dispute," and he invited appellee's counsel to call him with a response as early as that afternoon. In the email sent to appellee's counsel on 3 September 2002, appellants' counsel stated that he was "pleased that [the parties] [had] reached an agreement." The email "confirm[ed]" that the "sole matter remaining in dispute" on 30 August 2002 had been settled, and, "in view of [the] settlement," it "confirm[ed] the depositions scheduled for later [that] week w[ould] not take place." Thus, a valid offer was made and accepted in the correspondence between the parties. Therefore, we conclude the correspondence sufficiently supports the trial court's finding that the parties reached a meeting of minds.

While a meeting of the minds is essential to form an agreement between the parties, a contract is "nugatory and void for indefiniteness" if it leaves any "material portions open for future agreement." *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974).

Defendants contend the agreement in the instant case is null and void because no final writing was ever executed by the parties. However, noting that the statute of frauds "does not require all of the provisions of the contract to be set out in a single instrument[,]" our Supreme Court has stated that "[t]he memorandum . . . is sufficient if the contract provisions can be determined from separate but related writings." *Hines v. Tripp*, 263 N.C. 470, 474, 139 S.E.2d 545, 548 (1965); N.C. Gen. Stat. § 22-2 (2003). We conclude the correspondence in the instant case was sufficient to satisfy the requirements of *Hines*.

The 28 August 2002 letter from appellants' counsel to appellee's counsel contained the purchase price of pads four through six as well as the date by which the purchase must have been closed. Both the 28 August 2002 letter and appellee's 30 August 2002 reply contained a sufficient description of the land to be sold. Each correspondence made clear that appellants were the buyers and appellee was the seller. Thus, the correspondence identified the parties, the purchase price, and the property to be sold. "These are the essential elements of the contract." *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 600, 173 S.E.2d 496, 503, *cert. denied*, 276 N.C. 728 (1970). Therefore, we conclude that the trial court did not err in finding that the terms of the settlement agreement could be determined from the correspondence between the parties' attorneys.

Appellants also contend that because the settlement agreement in the instant case was agreed to by their counsel it was not "signed by the party to be charged therewith," and therefore violates the statute of frauds. N.C. Gen. Stat. § 22-2. We disagree.

"[T]he statute [of frauds] expressly recognizes that the writing which it requires may be signed by an agent, and it has long been established that the authority of the agent to do so need not be in writing." *Yaggy*, 7 N.C. App. at 600-01, 173 S.E.2d at 503. Nevertheless, "[s]pecial authorization from the client is required before an attorney may enter into an agreement discharging or terminating a cause of action on the client's behalf." *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 655 (2000). However, "there is a presumption in North Carolina in favor of an attorney's authority to act for the client he professes to represent." *Id.* Thus, "[o]ne who challenges the actions of an attorney as being unauthorized has the burden of rebutting this presumption and proving lack of authority to the satisfaction of the court." *Id.*

In the instant case, as detailed above, the correspondence between counsel commenced with appellants' counsel making an offer on appellants' behalf, after first noting that he had "revisited settlement options" with appellants and that appellants were "willing to settle[.]" Hollowell was copied via facsimile and U.S. mail on each correspondence letter sent to appellee's counsel, including the 28 August 2002 letter opening negotiations and the 30 August 2002 letter stating that "[w]e have reviewed your letter and are very near agreement." Thus, we conclude sufficient evidence exists in the instant case to support the trial court's determination that appellants' counsel had the authority to bind his clients. Furthermore, appellants have not rebutted the presumption that their counsel acted on their behalf. Therefore, we hold that the trial court did not err in making its conclusion that the settlement agreement in the instant case was a valid contract.

Appellants maintain that the potential problems with the supply of water for Currituck Club ruined the value of the property they were to purchase under the settlement agreement. Appellants assert that because their purpose in purchasing the property was frustrated, the settlement agreement should be rescinded even if we conclude it is valid. However, assuming *arguendo* that a water shortage would destroy the value of the property included in the settlement agreement, we nevertheless decline to rescind the contract in the instant case.

The doctrine of frustration of purpose operates as a defense to a contract only if the frustrating event was not allocated to the complaining party by the terms of the contract and was not reasonably foreseeable to the party. *Brewer v. School House, Ltd.*, 302 N.C. 207, 211, 274 S.E.2d 206, 209 (1981). "The doctrine . . . is based upon the fundamental premise of giving relief in a situation where the parties could not reasonably have protected themselves by the terms of the contract against contingencies which later arose." *Faulconer v. Wysong & Miles Co.*, 155 N.C. App. 598, 601, 574 S.E.2d 688, 691 (2002) (quoting 17 Am. Jur. 2d Contracts § 401 (1964)).

In the instant case, we conclude appellants could have reasonably protected themselves by the terms of the settlement agreement. As appellants admit in their brief, "[t]he 1996 Contract provided protections to Appellants in the form of a representation that adequate water treatments [sic] facilities were present or would be constructed and a certain level of water and sewer capacity would be available." However, appellants chose not to seek such "protection"

by adding a similar provision to the settlement agreement, although the settlement agreement concerned the same property and parties as the 1996 Contract. We are unconvinced that appellants could not reasonably foresee a condition in 2002 that they had prepared for in 1996. Furthermore, for the doctrine of frustration to apply, "there must be an implied condition to the contract that a changed condition would excuse performance." *Id.* at 602, 574 S.E.2d at 691. After reviewing the correspondence between the parties, including the Mutual Release and Settlement Agreement, we conclude no such condition exists in the instant case. Therefore, we hold that the trial court did not err in enforcing the settlement agreement.

Affirmed.

Chief Judge MARTIN concurs.

Judge HUNTER dissents.

HUNTER, Judge, dissenting.

Since the parties did not reach a meeting of the minds and create an executed document setting out the terms of the settlement agreement, I disagree with the majority's conclusion that the trial court properly granted the Motions To Enforce Settlement Agreement, and therefore, I respectfully dissent.

I disagree with the trial court's findings and conclusions that there was a settlement agreement between the parties on 6 September 2002. For our appellate review, the findings were not supported by competent evidence. *Hill v. Town of Hillsborough*, 48 N.C. App. 553, 558, 269 S.E.2d 303, 306 (1980). Likewise, "[t]he conclusions of law drawn by the trial court from its findings of fact are fully reviewable *de novo* by the appellate court." *Mann Contr'rs, Inc. v. Flair with Goldsmith Consultants-II, Inc.*, 135 N.C. App. 772, 775, 522 S.E.2d 118, 121 (1999) (citing *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980)).

Here, the trial court's conclusions are not sufficiently supported by competent evidence. Appellee filed a breach of contract suit against appellants on 1 June 2001 and appellants filed a counter lawsuit against appellee on 20 September 2001. Before these cases were heard, the parties engaged in extensive negotiations to settle their contested claims. Appellee eventually filed motions to enforce the terms of the negotiations, which were granted by the trial court.

Courts should be extremely cautious in determining that parties have entered into a settlement agreement when the only evidence is multiple correspondence and documents exchanged between their counsel, but no documents signed by the parties which formalize the agreement. Here, the parties' counsel, through e-mails and letters, constantly stated that "execution of a settlement agreement" was a provision to settling their claims. All terms were never completely agreed upon, and even if they were, the parties never signed a document finalizing the agreement.

For a valid contract to exist, the parties must have a meeting of the minds concerning material terms. *Chappell v. Roth*, 353 N.C. 690, 548 S.E.2d 499 (2001). In that case, our Supreme Court opined:

> The "mutually agreeable" release was part of the consideration, and hence, material to the settlement agreement. The parties failed to agree as to the terms of the release, and the settlement agreement did not establish a method by which to settle the terms of the release. Thus, no meeting of the minds occurred between the parties as to a material term; and the settlement agreement did not constitute a valid, enforceable contract.

Id. at 693, 548 S.E.2d at 500.

As in *Chappell*, there was no meeting of the minds in the case now before us. The parties' correspondence shows that negotiations and revisions of the settlement documents went before and beyond 6 September 2002. The evidence tends to show through the correspondence that both parties' counsel had agreed on (1) the numbered items that appellants proposed on 28 August 2002, (2) appellee's suggested "buy-back" clause of Pad 3 proposed on 30 August 2002, and (3) appellant's marketing capabilities on 3 September 2002. However, the parties never agreed to all of the terms of the final document, and its execution was a material fact and condition to the parties having an agreement.

In contrast, in *Bank v. Wallens and Schaaf v. Longiotti*, 26 N.C. App. 580, 217 S.E.2d 12 (1975), this Court opined that reference to a more complete document does not necessarily indicate that material portions of the agreement have been left open for future negotiations. It could mean only that immaterial matters, which are of no consequence, will be added to complete the agreement. *Id.* However, in the case before us, the final document was material to their agreement. The parties' counsel made changes to it until 7 March 2003, in order

for the agreement to be executed and finalized at closing, which never occurred.

Starting on 25 February 2002 with appellee's counsel offering to settle with an "execution of a settlement agreement," the parties began to show their intent not to be bound until they executed a settlement agreement. Appellants' willingness to settle on 28 August 2002 was based on "termination of the current contract (and its modifications) and the execution of a new agreement[.]" Appellee did not object to that requirement in its 30 August 2002 e-mail response and counsel stated "[he was] going to refer to [appellants'] August 28, 2002 letter to [him] because that contain[ed] the most recent settlement parameters."

Then, on 3 September 2002, appellants' counsel stated in an e-mail that he was "pleased that [they had] reached an agreement. . . . The remaining terms of the settlement agreement [were] consistent with those stated in [their] recent series of correspondence." That recent series of correspondence included both parties agreeing that they wanted the execution of a settlement agreement, a mutual release and a non-disparagement clause. In response to appellants' counsel's e-mail, on 6 September 2002, appellee's counsel sent an e-mail with an attached Mutual Release and Settlement Agreement, and he asked to be notified if any changes were necessary.

The evidence also tends to show that in the 2 September 2002 e-mail to appellee's counsel, appellants' counsel stated "in view of [the] settlement, please permit [that] e-mail to confirm the depositions scheduled for later [that] week [would] not take place." On 23 December 2002, appellee's counsel stated "[t]he parties ha[d] a settlement. [Appellant could not] now come up with some 'issues' to try to back out of the agreement." Nevertheless, these statements do not undermine both parties' expressed desire to have an executed contract and their continuous negotiations to finalize their agreement by executing a document setting it out.

After 6 September 2002, the parties continued to negotiate in correspondence dated 2 October 2002, 3 October 2002, 16 October 2002, 26 November 2002, 2 December 2002, 16 December 2002, 19 December 2002, 23 December 2002, 3 January 2003, 8 January 2003, 14 January 2003, 7 March 2003 and 24 March 2003. On 2 October 2002, appellee's counsel asked for comments on the Settlement Agreement "so [they could] keep [the] settlement moving towards finalization."

On 11 November 2002, the parties began to have additional communication involving appellants' concerns about the potable water system in the Currituck Club. On 8 January 2003, appellants' counsel stated his client had deposited money in the trust account "for use in closing the transaction contemplated by [their] settlement negotiations in the event a settlement [was] ever reached." Because of the water supply concerns, a stormwater easement was included on 14 January 2003 as an additional document to finalize the agreement, which did not exist on 6 September 2002.

On 7 March 2003, appellee's counsel offered:

> [I]f [appellants did] not desire to sell back Pad 3 to [appellee], but prefer[ed] to retain it, that would be satisfactory. . . . [He] believe[d they could] conclude the settlement by simply having documents executed that relieve[d appellants] from any obligation to purchase Pads 4-6 and relieve[d appellee] of any obligations to sell [appellants] Pads 4-6.

This e-mail shows that appellee was offering terms different from what the parties had negotiated by 6 September 2002. Furthermore, as late as 24 March 2003, appellee's counsel sent an e-mail in response to a telephone conversation with appellants' counsel the previous week. It suggested that appellants had proposed different terms to replace the previous negotiations, including that appellants did not intend to buy Pads 4-6 and wanted to sell to appellee their two condos in the Currituck Club. These last communications between appellee and appellants indicate that the parties were still negotiating the terms of the contract. By 24 March 2003, over twenty-eight weeks after 6 September 2002, they had not entered into a formalized agreement.

In addition, as found in *Hines v. Tripp*, 263 N.C. 470, 139 S.E.2d 545 (1965), the statute of frauds "does not require all of the provisions of the contract to be set out in a single instrument." *Id.* at 474, 139 S.E.2d at 548. However, a contract is "nugatory and void for indefiniteness" if it leaves any "material portions open for future agreement." *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974). The facts of the case *sub judice* show that even if the statute of frauds' written requirements for entering into a valid contract for land were satisfied, these parties never agreed to be bound by any contractual terms until they executed the finalized agreement or signed other binding documents. As further proof, the following clause was included in each draft of the proposed settlement agree-

ment: "13. COUNTERPARTS: This Settlement Agreement may be executed in multiple counterparts and *shall be binding upon all parties when a counterpart has been signed by all parties hereto* and for all intents and purposes as if all of the parties had signed a single document." (Emphasis added.)

The parties never signed separate documents nor did they sign this agreement and thus, were not bound by any of the settlement agreement negotiations at any time.

Therefore, I disagree with the majority because the parties contemplated the execution of a settlement agreement to finalize their negotiations and did not on 6 September 2002 have the present intent to be bound by any terms. I would hold that the trial court erred in granting the Motions to Enforce Settlement Agreement and I would let the lawsuits proceed accordingly.

TEJAL VYAS, LLC AND DR. P.K. VYAS, PLAINTIFFS v. CARRIAGE PARK LIMITED PARTNERSHIP, VILAS DEVELOPMENT CORP., GANESAN VISVABHARATHY, AND STONESAN VISVABHARATHY, DEFENDANTS

No. COA03-1144

(Filed 7 September 2004)

1. Jurisdiction— long arm statute—out-of-state investment

Defendants were subject to jurisdiction under North Carolina's long arm statute where there was a solicitation in a memorandum sent to plaintiffs' attorney in North Carolina about defendants' investment proposal, and a thing of value shipped from North Carolina in a check sent from plaintiffs to defendants for one investment unit. N.C.G.S. § 1-75.4.

2. Jurisdiction— minimum contacts—out-of-state investment

Defendants did not have the necessary minimum contacts with North Carolina for the exercise of personal jurisdiction without a due process violation where there was an investment presentation in Georgia, material sent from Illinois to North Carolina after plaintiffs initiated contact, and a telephone call from defendants to plaintiffs' attorneys in North Carolina at plaintiffs' request. Five factors are reviewed to determine

whether minimum contacts exist: the quantity of contacts, the nature and quality of contacts, the source and connection of the cause of action to the contacts, the interest of the forum state, and the convenience of the parties.

Judge TIMMONS-GOODSON dissenting.

Appeal by plaintiffs from order entered 13 May 2003 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 19 May 2004.

Herring McBennett Mills & Finkelstein, PLLC, by Mark A. Finkelstein, for plaintiffs-appellants.

Hafer & Caldwell, P.A., by Colleen Kochanek, for defendants-appellees.

TYSON, Judge.

Tejal Vyas, LLC and Dr. P.K. Vyas ("Dr. Vyas") (collectively, "plaintiffs") appeal the trial court's order granting the motions to dismiss for lack of personal jurisdiction filed by Carriage Park Limited Partnership ("Carriage Park"), Vilas Development Corp., Ganesan Visvabharathy ("Visvabharathy"), and Stonesan Visvabharathy (collectively, "defendants"). We affirm.

I. Background

In 1994, Visvabharathy made a presentation concerning financial investments at a conference for physicians practicing in the southeast region of the United States. Dr. Vyas attended this conference held in Georgia. During the presentation, Visvabharathy discussed real estate investments, such as Carriage Park, and informed the conference attendees of the opportunity to invest in Carriage Park through Vilas Development Corp., the general partner of Carriage Park. Visvabharathy provided attendees with contact information for Vilas Development Corp.

After the presentation, Dr. Vyas approached Visvabharathy to further discuss investment opportunities. Visvabharathy "described the Carriage Park investment to him in general terms." Plaintiffs contacted defendants in Illinois seeking to invest in Carriage Park and invested $100,000.00. The investment was facilitated by plaintiffs' attorneys, both of whom are licensed North Carolina attorneys. A Subscription Agreement was signed by plaintiffs on 18

July 1994 and sent to defendants in Illinois. Plaintiffs and their attorneys communicated with Visvabharathy via telephone and by mail through 2000.

On 6 August 2002, plaintiffs instituted this action against defendants alleging breach of fiduciary duty, breach of contract, and misrepresentation. On 11 October 2002 and 1 February 2003, defendants filed motions to dismiss plaintiffs' complaint pursuant to N.C.R. Civ. P. 12(b)(2) for lack of personal jurisdiction over defendants. Following a hearing, the trial court issued an order on 9 May 2003 containing the following findings of fact:

1. The plaintiff, Tejal Vyas, is a North Carolina Limited Liability Company and the plaintiff, Dr. P.K. Vyas, is an individual citizen and resident of Wake County, North Carolina.

2. Carriage Park Limited Partnership is an Illinois limited partnership and Vilas Development Corporation is an Illinois corporation. Defendant Ganesan R. Visvabharathy is a citizen and resident of Illinois.

3. Defendants made an investment presentation in the State of Georgia to a group of physicians which included the plaintiff[s].

4. Plaintiffs contacted defendants in Illinois to invest in the Carriage Park Investment property.

5. At no time did any of the defendants solicit business in North Carolina.

6. All of the investment property, the documentation regarding the investments, the investor's accountants, and the attorneys regarding the property are located in Illinois.

7. The only parties located in North Carolina are the plaintiffs and the plaintiffs' attorney.

8. There are not sufficient contacts in North Carolina by the defendants to allow the North Carolina courts to assume jurisdiction.

II. Issue

The sole issue on appeal is whether the trial court erred in granting defendants' motions to dismiss for lack of personal jurisdiction.

III. Standard of Review

"The standard of review of an order determining 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." *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833 (1995). "If presumed findings of fact are supported by competent evidence, they are conclusive on appeal despite evidence to the contrary." *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 285, 350 S.E.2d 111, 114 (1986).

A court must engage in a two-part inquiry to determine whether personal jurisdiction over a non-resident defendant is properly asserted. *Better Business Forms, Inc.*, 120 N.C. App. at 500, 462 S.E.2d at 833. First, the court must determine whether North Carolina's "long-arm" statute authorizes jurisdiction over the defendant. N.C. Gen. Stat. § 1-75.4 (2003). If so, the court must determine whether the court's exercise of jurisdiction over the defendant is consistent with due process. *Better Business Forms, Inc.*, 120 N.C. App. at 500, 462 S.E.2d at 833.

IV. North Carolina's Long-Arm Statute

[1] Personal jurisdiction is proper here under two provisions of North Carolina's long-arm statute:

> (4) Local Injury; Foreign Act—In any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury:
>
> (a) Solicitation or services activities were carried on within the State by or on behalf of the defendant [and] . . . .
>
> . . .
>
> (5) Local Services, Goods or Contracts—In any action which:
>
> . . .
>
> (d) Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction.

N.C. Gen. Stat. § 1-75.4(4)(a) and (5)(d) (2003).

The memorandum sent to plaintiffs' attorney in North Carolina to consider defendants' investment proposal constitutes a solicitation

under N.C. Gen. Stat. § 1-75.4(4)(a). *See Godwin v. Walls*, 118 N.C. App. 341, 349, 455 S.E.2d 473, 480, *disc. rev. allowed*, 341 N.C. 419, 461 S.E.2d 757 (1995) (stating the statute does not require proof of such injury; the plaintiff need only allege an injury). Also, the $100,000.00 check sent from plaintiffs in North Carolina to defendants in Illinois for payment for one investment unit in Carriage Park constitutes a "thing[] of value" shipped from this state by plaintiffs to defendants on their order or direction pursuant to N.C. Gen. Stat. § 1-75.4(5)(d). For either of these two reasons, the defendants are subject to jurisdiction under North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4.

V. Due Process

[2] Since at least one requirement under North Carolina's long-arm statute allows plaintiffs to assert jurisdiction over defendants, the inquiry becomes whether plaintiffs' assertion of jurisdiction over defendants complies with due process. "When personal jurisdiction is alleged to exist pursuant to the long-arm statute, the question of statutory authority collapses into one inquiry—whether defendant has the minimum contacts with North Carolina necessary to meet the requirements of due process." *Hiwassee Stables, Inc. v. Cunningham*, 135 N.C. App. 24, 27, 519 S.E.2d 317, 320 (1999) (citing *Murphy v. Glafenhein*, 110 N.C. App. 830, 431 S.E.2d 241, *disc. rev. denied*, 335 N.C. 176, 436 S.E.2d 382 (1993)).

The Due Process Clause of the Fourteenth Amendment limits the power of a state to exercise *in personam* jurisdiction over a nonresident defendant. *Hiwassee Stables, Inc.*, 135 N.C. App. at 28, 519 S.E.2d at 320. In determining whether the exercise of personal jurisdiction comports with due process, the crucial inquiry is whether the defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940), [*reh'g denied*, 312 U.S. 712, 85 L. Ed. 1143 (1941)]).

To generate minimum contacts, the defendant must have purposefully availed itself of the privilege of conducting activities within the forum state and invoked the benefits and protections of the laws of North Carolina. *International Shoe Co.*, 326 U.S. at 319, 90 L. Ed. at 104; *Buying Group, Inc. v. Coleman*, 296 N.C. 510, 515, 251 S.E.2d 610, 614 (1979); *Hiwassee Stables, Inc.*, 135 N.C. App. at

28, 519 S.E.2d at 320-21; *Godwin*, 118 N.C. App. at 353, 455 S.E.2d at 482. The relationship between the defendant and the forum state must be such that the defendant should "reasonably anticipate being haled into" a North Carolina court. *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 632, 394 S.E.2d 651, 656 (1990). The facts of each case determine whether the defendant's activities in the forum state satisfy due process. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445, 96 L. Ed. 485, 492, *reh'g denied*, 343 U.S. 917, 96 L. Ed. 1332 (1952).

Here, we hold defendants did not engage in sufficient minimum contacts in North Carolina to justify the exercise of personal jurisdiction without violating defendants' due process rights.

Plaintiffs assign error to only two of the trial court's findings of facts: "5) At no time did any of the defendants solicit business in North Carolina;" and "8) There are not sufficient minimum contacts in North Carolina by defendants to allow the North Carolina courts to assume jurisdiction." Finding of fact No. 8 is the ultimate issue on appeal and will be addressed after weighing all of the evidence. *See Hiwassee Stables, Inc.*, 135 N.C. App. at 27, 519 S.E.2d at 317. Evidence to support finding of fact No. 5 shows that after an investment presentation in Georgia, plaintiffs contacted and requested defendants to send investment materials to them from Illinois to North Carolina. Defendants also spoke with plaintiffs' attorneys in North Carolina upon plaintiffs' request after plaintiffs received the investment offering. Our Supreme Court has held that "a contractual relationship between a North Carolina resident and an out-of-state party alone does not *automatically* establish the necessary minimum contacts with this State." *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 367, 348 S.E.2d 782, 786 (1986). The presentation and initial discussions between plaintiffs and defendants occurred in Georgia. Plaintiffs initiated contact with defendants in Illinois. Competent evidence in the record supports the trial court's finding of fact No. 5.

To determine whether the remaining finding of fact is supported by competent evidence, and thus conclusive on appeal, we review five factors from precedents to determine whether minimum contacts existed. *Eluhu v. Rosenhaus*, 159 N.C. App. 355, 583 S.E.2d 707 (2003), *aff'd*, 358 N.C. 372, 595 S.E.2d 146 (2004) (No personal jurisdiction involving alienation of affections claim where the defendant was physically present in North Carolina, owned and rented property in North Carolina, and had resided in North Carolina).

The factors are: "(1) the quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience of the parties." *Cherry Bekaert*, 99 N.C. App. at 632, 394 S.E.2d at 655 (quoting *New Bern Pool & Supply Co. v. Graubart*, 94 N.C. App. 619, 624, 381 S.E.2d 156, 159, *aff'd per curium*, 326 N.C. 480, 390 S.E.2d 137 (1990)); *Tutterrow v. Leach*, 107 N.C. App. 703, 708, 421 S.E.2d 816, 819 (1992), *appeal dismissed*, 333 N.C. 466, 428 S.E.2d 185 (1993).

This Court must also weigh and consider the interests of and fairness to the parties involved in the litigation. *Tutterrow*, 107 N.C. App. at 708, 421 S.E.2d at 819; *see Eluhu*, 159 N.C. App. 355, 583 S.E.2d 707. Where evidence supports unchallenged findings of fact, "this Court must affirm the order of the trial court" dismissing this action for lack of personal jurisdiction over defendants. *Better Business Forms, Inc.*, 120 N.C. App. at 500, 462 S.E.2d at 833.

A. Quantity of Contacts

The evidence shows that plaintiffs and defendants independently traveled to Georgia to give and attend a presentation at a physicians' convention. After returning to North Carolina, plaintiffs initiated contact with defendants in Illinois to inquire about the investment opportunities discussed in Georgia and requested defendants to mail investment materials to North Carolina. *See CFA Medical, Inc. v. Burkhalter*, 95 N.C. App. 391, 395, 383 S.E.2d 214 (1989) ("Which party initiates the contact is taken to be a critical factor in assessing whether a non-resident defendant" is subject to personal jurisdiction based on minimum contacts.)

B. Nature and Quality of Contacts

Defendants have never been physically present in North Carolina. Any contact by defendants with plaintiffs in North Carolina resulted from an initiation and request by plaintiffs. Defendants' contacts were to mail the brochure and place a telephone call to plaintiffs' attorney in North Carolina, at plaintiffs' request.

C. Source and Connection of the Cause of the Action to the Contacts

Plaintiffs' cause of action arises out of partnerships, real property, services, and activities located solely in Illinois. Neither defendants nor any of the investment property is located in North Carolina.

D. Interest of the Forum State

Plaintiffs expressly agreed that the Subscription Agreement was to be governed by the laws of Illinois. While choice of law clauses are not determinative of personal jurisdiction, they express the intention of the parties and are a factor in determining whether minimum contacts exist and due process was met. *Corbin Russwin, Inc. v. Alexander's Hdwe., Inc.*, 147 N.C. App. 722, 728, 556 S.E.2d 592, 597 (2001).

E. Convenience of the Parties

Defendants all reside in or are entities based in Illinois. None have been physically present in North Carolina. Defending against a suit in North Carolina would be inconvenient.

After reviewing all five factors, competent evidence supports the trial court's conclusion that defendants did not engage in requisite minimum contacts to satisfy the Due Process Clause. U.S. Const. amend. V and amend. XIV, § 1. The trial court properly granted defendants' motions to dismiss. Plaintiffs' assignments of error are overruled.

The dissenting opinion argues that defendants' activities satisfy the statutory and constitutional requirements for personal jurisdiction and cites *Carson v. Brodin*, 160 N.C. App. 366, 585 S.E.2d 491 (2003) and *New Bern Pool & Supply Co.*, 94 N.C. App. 619, 381 S.E.2d 156.

In *Carson*, a North Carolina couple sued a Virginia resident they hired to construct a home in Virginia. This Court upheld the plaintiffs' assertion of personal jurisdiction over the defendant based on two factors which are distinguishable from the facts here.

First, the defendant in *Carson* made two, possibly three, trips to North Carolina. *Carson*, 160 N.C. App. at 368, 585 S.E.2d at 494. The defendant met personally with the plaintiffs while in North Carolina to discuss the construction project. *Id.* The trips to the forum state and face-to-face meetings were determinative factors to this Court in upholding personal jurisdiction to the plaintiffs. *Id.* at 372, 585 S.E.2d at 496 (other factors included, entering into a contract with North Carolina residents that was executed in North Carolina, making numerous phone calls, mailings into the state during the contract negotiations, and sending bills into North Carolina which were paid from plaintiffs' North Carolina bank account).

Unlike *Carson*, no evidence shows defendants ever visited North Carolina during the events at issue or for any other business transaction, a fact acknowledged by the dissenting opinion. The only personal contact between the parties occurred in Georgia following defendants' investment presentation. After returning to North Carolina, plaintiffs telephoned defendants and requested investment literature. The remaining relationship existed over the telephone and through the mail with plaintiffs in North Carolina and defendants in Illinois. The lack of any prior visits to or physical presence in North Carolina by defendants distinguishes this case from *Carson*. Also, the contract in *Carson* involved a consumer contract between homeowners and a builder. Here, the parties are sophisticated investors in a speculative commercial venture and represented by counsel.

The second distinction the dissenting opinion shows to justify upholding personal jurisdiction over defendants are three particular items mailed between the two parties: (1) a memo from defendants to plaintiffs soliciting investments for a real estate venture in Illinois; (2) a Subscription Agreement executed by plaintiffs in North Carolina and mailed to defendants in Illinois; and (3) plaintiffs' check drawn on a North Carolina bank and mailed to defendants in Illinois. The dissenting opinion claims this series of correspondence establishes minimum contacts between the forum state and defendants. These items were all necessary components of the contract being negotiated and executed for sale of an investment interest in real estate located in Illinois. The result was a single contract between the parties. Both our Supreme Court and this Court have recognized that more contacts with the forum state by a defendant is required.

Our Supreme Court ruled that a "substantial connection" to the state is required in addition to a single contract to uphold personal jurisdiction. *Tom Togs, Inc.*, 318 N.C. at 367, 348 S.E.2d at 786 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 85 L. Ed. 2d 528, 545 (1985); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L. Ed. 2d 223 (1957); *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970)). In *Tom Togs, Inc.*, the out of state defendants performed their obligations under the contract in the forum state, a critical point in finding personal jurisdiction. 318 N.C. at 367, 348 S.E.2d at 786-87. The Court also considered the defendants made an offer to the plaintiff whom defendants knew to be located in North Carolina, the plaintiff accepted the offer in North Carolina, and the goods were manufactured and shipped from this State.

This Court has ruled that "the mere act of entering into a contract with a forum resident . . . will not provide the necessary minimum contacts with the forum state, especially when all the elements of the defendants' performance . . . are to take place outside the forum." *Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 532, 265 S.E.2d 476, 480 (1980) (citing *Iowa Electric Light and Power Co. v. Atlas Corp.*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911, 63 L. Ed. 2d 327 (1980)).

The contract's purpose was to invest in real estate ventures located in Illinois. The agreement required defendants to perform their obligations in Illinois, governed by Illinois law. Defendants' only connection to North Carolina was plaintiffs' limited liability company registered and located in North Carolina that contracted with defendants to become an investor. Our Courts require more than a single contact with an out of state defendant to satisfy the due process requirements for personal jurisdiction. *Phoenix America Corp.*, 46 N.C. App. at 532, 265 S.E.2d at 480.

The dissenting opinion also cites *New Bern Pool & Supply Co.* where personal jurisdiction was upheld despite the defendant never having physically visited North Carolina. 94 N.C. App. 619, 381 S.E.2d 156. In that case, the plaintiff, a North Carolina corporation, responded to an advertisement in a trade magazine placed by the defendant, a New Jersey resident, for the sale of an airplane. *Id.* at 621, 381 S.E.2d at 157. After consummating the sale, the plaintiff experienced troubles with the plane and filed suit. *Id.* This Court found personal jurisdiction in North Carolina based on several factors: the defendant solicited the sale of the airplane in a national trade magazine, made numerous telephone calls and mailings to the plaintiff in North Carolina, and directed plaintiff to forward funds drawn on a North Carolina bank to New York. *Id.* at 625-26, 381 S.E.2d at 160. In addition, the opinion noted that

> [i]n terms of convenience to the parties . . . repairs to the aircraft in question were performed in North Carolina[,] . . . witnesses to [the] repairs . . . are residents of North Carolina, and FAA personnel who were potential witnesses as a result of having inspected the plane in North Carolina, were also residents of North Carolina.

Id. at 625, 381 S.E.2d at 160.

The key distinctions between the case at bar and *New Bern Pool & Supply Co.* are how the parties became acquainted and where the post-contractual activities occurred. Defendants here never visited North Carolina. They did not advertise directly to the State or its citizens to solicit or maintain commercial interests within North Carolina. The sales presentation occurred in Georgia. The defendant in *New Bern Pool & Supply Co.* placed an advertisement in a national trade magazine delivered to the plaintiff in North Carolina for the sale of an airplane. 94 N.C. App. at 624, 381 S.E.2d at 159. This Court ruled that advertising in national magazines alone is not determinative of personal jurisdiction. *Hankins v. Somers*, 39 N.C. App. 617, 621, 251 S.E.2d 640, 643, *disc. rev. denied*, 297 N.C. 300, 254 S.E.2d 920 (1979) (citing *International Shoe Co.*, 326 U.S. at 316, 90 L. Ed. at 102). Defendants solicited business from a limited audience, in a live presentation given in another state, and did not solicit plaintiffs by placing an ad in a national magazine delivered in North Carolina.

The dissenting opinion also cites *New Bern Pool & Supply Co.* and its discussion on the convenience of the parties that where the post-contractual activities occurred strengthens a finding of personal jurisdiction. In *New Bern Pool & Supply Co.*, witnesses to the repairs of the faulty aircraft, the FAA inspectors, and the repairs themselves were located and occurred in North Carolina. 94 N.C. App. at 625-26, 381 S.E.2d at 160. Here, defendants, the real estate partnership, partnership documents and witnesses, the investor's accountants, and the underlying investment property are located in Illinois. Two of the three counts complained of by plaintiffs, Breach of Fiduciary Duty and Breach of Contract, arise from alleged activities, or a lack thereof, in Illinois. Convenience of the parties mitigates for defendants. Plaintiffs' assignments of error are overruled.

VI. Conclusion

Plaintiffs failed to show the trial court erred in granting defendants' motions to dismiss for lack of personal jurisdiction. The order of the trial court is affirmed.

Affirmed.

JUDGE McGEE concurs.

JUDGE TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge dissenting.

I respectfully dissent from the majority's opinion which affirms summary judgment in favor of defendants.

The majority has established that defendants' activity satisfies the statutory requirements of the jurisdictional analysis. Thus, I focus this dissent on the question of whether defendants have the minimum contacts with North Carolina necessary to meet the requirements of due process. I find the cases of *Carson v. Brodin*, 160 N.C. App. 366, 585 S.E.2d 491 (2003) and *New Bern Pool & Supply Co. v. Graubert*, 94 N.C. App. 619, 381 S.E.2d 156 (1989), *aff'd*, 326 N.C. 480, 390 S.E.2d 137 (1990), to be instructive on the issue.

In *Carson*, the plaintiffs were North Carolina residents who decided to build a vacation home in Virginia. They entered into a contract with the defendant, a Virginia resident, to construct the home. The plaintiffs initiated contact with the defendant in Virginia. The plaintiffs signed the initial construction contract in Virginia. The defendant mailed a subsequent contract to the plaintiffs in North Carolina, which they signed and mailed back to the defendant in Virginia. The defendant visited the plaintiffs in North Carolina two or three times to discuss the construction project, he telephoned them in North Carolina on numerous occasions, and sent numerous mailings to them in North Carolina. The plaintiffs sued the defendant in North Carolina for breach of contract, breach of warranty, and negligence, all relating to the construction of their home in Virginia. The defendant challenged North Carolina's jurisdiction over the matter, arguing that his contacts in North Carolina were not sufficient to give the state personal jurisdiction over him.

On appellate review, this Court held that "[b]y negotiating within the state and entering into a contract with North Carolina residents, defendant purposefully availed himself of the privilege of conducting activities within North Carolina with the benefits and protection of its laws." *Carson*, 160 N.C. App. at 372, 585 S.E.2d at 496 (citing *Hanson v. Denckla*, 357 U.S. 235 (1958)). "Defendant's actions in contracting with North Carolina residents establish minimum contacts for specific jurisdiction because the actions are directly related to the basis of plaintiffs' claim." *Id.* (citing *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 115, 516 S.E.2d 647, 651 (1999)). "Because we have found minimum contacts sufficient to establish specific jurisdiction, due process is satisfied." *Id.* at 372-73, 585 S.E.2d at 496.

In the case *sub judice*, the evidence presented tends to show that defendants corresponded with plaintiffs or plaintiffs' attorneys in North Carolina via mail and telephone on numerous occasions. The mail correspondence included the following: a memorandum mailed by defendants to North Carolina soliciting investments in the Carriage Park project; a subscription document executed by plaintiffs in North Carolina and mailed to defendants in Illinois; and a check issued by plaintiffs in North Carolina, drawn on a North Carolina bank, and mailed to defendants in Illinois. I submit that these mailings and telephone calls are evidence of three factors in a minimum contacts analysis. *See New Bern Pool & Supply Co.*, 94 N.C. App. at 624, 381 S.E.2d at 159 ("The factors to be considered are (1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties.") (citation omitted).

The minimum contacts analysis is satisfied as follows: The mailings and telephone calls demonstrate the "quantity of the contacts" by demonstrating the volume of communication between plaintiffs and defendants at the time of the transaction. The communications demonstrate the "nature and quality of the contacts" as evidence of a high-level transaction involving substantial documentation and a sum of $100,000. Finally, the communications demonstrate the "source and connection of the cause of action to the contacts" as evidence that the transaction that is the subject of these communications is the transaction that is in dispute in this case.

The fourth factor, "the interest of the forum state," is best described by the following language from *New Bern Pool & Supply Co.*: "The interest of the State of North Carolina in providing consumer protection for its citizens and corporate entities and a forum for the adjudication of controversies involving them is substantial." 94 N.C. App. at 625, 381 S.E.2d at 160. This Court should have an interest in providing a forum for plaintiffs to resolve this controversy, particularly because it involves such a large investment of $100,000.

With regard to the fifth factor, "convenience of the parties," we note that "[t]here is almost always some hardship to the party required to litigate away from home." *Byham v. House Corp.*, 265 N.C. 50, 60, 143 S.E.2d 225, 234 (1965). However, this state has a greater interest in providing a convenient forum for its citizens to seek redress for injuries. *Inspirational Network, Inc. v. Combs*, 131

N.C. App. 231, 241, 506 S.E.2d 754, 761 (1998). "In light of the powerful public interest of [North Carolina] in protecting its citizens against out-of-state tortfeasors, the court has more readily found assertions of jurisdiction constitutional." *Id.* (citing *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 608, 334 S.E.2d 91, 93 (1985)).

I concede that the case *sub judice* is distinguished from *Carson* by the fact that defendant did not travel to North Carolina as the defendant in *Carson* did. However, I do not consider this to be a determinative factor in awarding personal jurisdiction. In *New Bern Pool & Supply Co.*, this Court asserted personal jurisdiction over a defendant who did not travel to North Carolina in connection with the transaction at issue. 94 N.C. App. 619, 381 S.E.2d 156.

In *New Bern Pool & Supply Co.*, the plaintiff was a resident of Craven County, North Carolina, who responded to an advertisement for a Beechcraft Baron airplane that the defendant, a New Jersey resident, placed in an aviation trade magazine. After their initial telephone conversation, the defendant mailed to the plaintiff photographs and specifications for the airplane. The plaintiff mailed to the defendant a check for $5,000 in exchange for the defendant's promise not to sell the airplane until the plaintiff had the opportunity to travel to New York to examine and inspect the airplane. The parties also negotiated the terms of a potential deal before the plaintiff went to New York.

The plaintiff flew to New York, examined and inspected the airplane, and closed the deal with the defendant. On that day, the plaintiff twice asked the defendant to give him the log books for the airplane. The defendant did not give the plaintiff the log books. The following morning, as the plaintiff prepared to return to North Carolina, he again asked the defendant for the log books. The defendant gave the log books to the plaintiff just prior to his departure. The plaintiff flew the Beechcraft Baron airplane to North Carolina. During the flight home, the plaintiff discovered that some of the navigation aids aboard the airplane were not functioning properly. The plaintiff later discovered that the airplane was overdue for an inspection.

The plaintiff filed a complaint against the defendant, which the defendant sought to have dismissed on summary judgment for lack of personal and subject matter jurisdiction. The trial court denied the defendant's motion for summary judgment, and this Court found no error in the trial court's judgment. This Court held as follows:

> Defendant's intentional acts in this case are such that defendant can be said to have purposely availed himself of the privilege of doing business in the State of North Carolina to the extent that defendant should have reasonably anticipated being haled into court in this State. We conclude that defendant had sufficient minimum contacts with the State of North Carolina so as to allow the trial court to exert personal jurisdiction over him and that the maintenance of this action in North Carolina does not offend traditional notions of fair play and substantial justice.

94 N.C. App. at 626, 381 S.E.2d at 160. In the case *sub judice*, as in *New Bern Pool & Supply Co.*, the totality of the circumstances provides an adequate basis for personal jurisdiction, even though defendants did not travel to North Carolina.

I am satisfied, pursuant to *Carson* and *New Bern Pool & Supply Co.*, that defendants' actions establish minimum contacts in North Carolina to establish jurisdiction without offending our "traditional conception of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 326 (1945). Thus, I would reverse the order for summary judgment and remand to the trial court.

JILL WOMBLE WOOD, PLAINTIFF v. McDONALD'S CORPORATION, JOHNNY LYNN TART, JOHNNY TART ENTERPRISES, INC., AND T & T MANAGEMENT CORPORATION, DEFENDANTS

No. COA03-953

(Filed 7 September 2004)

1. Appeal and Error— appealability—partial summary judgment

A substantial right was not affected by the denial of partial summary judgment for defendant T&T on the issues of negligence and contributory negligence in a slip and fall case. Defendants may still prevail before the jury and the appeal was dismissed as interlocutory.

2. Appeal and Error— appealability—denial of summary judgment—law of the case—substantial right exception—injury requirement

An appeal was dismissed as interlocutory where it was from the denial of summary judgment without review on the merits, based on a finding that a ruling by a prior judge was the law of the case. The substantial right exception requires both a substantial right and injury from deprivation of that right; here, there was no showing of different evidence had there been any further hearing on the issue.

3. Premises Liability— slip and fall—restaurant franchise—multi-tiered corporate structure—agency—issue of fact

The trial court erred by granting summary judgment for a restaurant management company in a slip and fall action at a McDonald's restaurant where the evidence raised an issue as to daily control and agency.

4. Joint Venture— summary judgment—control of conduct—sharing of profits

The trial court correctly granted summary judgment for the individual defendant on a joint venture claim in a slip and fall case where there was no forecast of evidence (1) that defendant corporations had the legal right to control the conduct of the individual defendant in running the restaurant where the slip and fall occurred, and (2) that the individual defendant and the corporate defendants shared in the profits from the restaurant.

5. Corporations— piercing the corporate veil—summary judgment for individual defendant

The trial court correctly granted summary judgment for the individual defendant on a piercing the corporate veil claim in a restaurant slip and fall case. Although the individual defendant formed all of the involved corporations, the corporate formalities were observed with care, each corporation has some insurance coverage, and defendant gave clear notice of the corporation he believed was the proper defendant from his first answer.

Appeal by plaintiff and cross-appealed by defendants from an order entered 12 March 2003 by Judge Peter McHugh in Guilford County Superior Court. Heard in the Court of Appeals 22 April 2004.

Smith, James, Rowlett & Cohen, L.L.P., by J. David James; Greeson Law Offices, by Harold F. Greeson; and Bell, Davis & Pitt, P.A., by Stephen M. Russell, for plaintiff appellant-appellee.

Smith Moore L.L.P., by Stephen P. Millikin, Richard A. Coughlin, and Lisa K. Shortt, for defendant appellants-appellees.

McCULLOUGH, Judge.

The issues in this appeal arise from the following undisputed facts: On 4 January 1998, plaintiff went to a McDonald's restaurant (the "restaurant") located in Greensboro, North Carolina. She and her husband were on their way to a matinee movie. Plaintiff's husband remained in the car while she entered the restaurant to purchase a cup of coffee. She entered by way of a single door in the rear of the restaurant and walked towards the front counter. To her left, plaintiff noticed an employee sweeping debris on the floor near the restaurant's side double-door entrance. Plaintiff veered slightly to the right to avoid stepping into any of the debris, and walked to the front of the counter without incident.

After being served her coffee, plaintiff turned to the condiment counter to get cream and sweetener. Finding there to be only cream, which she there added, she returned to the serving counter to get sweetener. Plaintiff was given sweetener, added it, placed a lid on the coffee, and then turned to leave.

She had intended to exit by means of the double doors on the side of the restaurant. She turned to her right from the counter and faced the double doors, but saw that the employee had swept the pile of debris in front of those doors. Plaintiff decided that she would exit from the rear door, by which she had entered, to avoid the debris. With her eyes on the debris so as not to step in it, she rounded the corner of the serving counter. Plaintiff's right foot suddenly shot out from under her and she fell to the floor landing on her back and right elbow. She immediately felt pain in her elbow, and then hot scalding pain as the coffee cup burst onto her stomach.

She lay there for a moment in pain, and saw the employee that had been sweeping the floor looking at her. He dropped his broom and walked past her. She got up and made her way to the serving counter where she spoke to the employee that had served her

coffee, and told him what happened. He offered her another cup of coffee. Plaintiff left the store and ran to her car to tell her husband what happened.

Plaintiff's husband went back in the store to get plaintiff napkins to wipe off the coffee. He entered by the back door. Taking the same route to the counter his wife had taken, he saw the coffee spill. Nearby he saw a dirty, floor-colored french fry. The lone, half-mashed french fry was approximately five feet from the principal pile of debris that was blocking the side double doors. He proceeded to the counter and spoke with the manager. He then took the manager to the scene of the accident, and showed her the spot where the french fry remained with what he believed to be his wife's heel print in it.

Plaintiff's husband returned to the car and took her to the hospital where she arrived at approximately 4:00 p.m. On the day of the incident, X-rays showed no fracture. However, it was later determined that she had in fact fractured her elbow, and had median nerve damage. She contracted reflex sympathetic dystrophy.

The McDonald's restaurant in question was purchased outright from McDonald's Corporation by defendant Johnny Tart ("Mr. Tart") on 2 January 1997. He then assigned his ownership to T & T Management Corporation ("T & T").

Mr. Tart had formed T & T on 24 January 1994 for the purpose of assigning McDonald's franchises to the corporation. T & T was a C corporation, and owned everything but the building and land of franchises it was assigned (it owned the cookers, fryers, freezer, etc.). He formed two other C corporations for this same purpose: Tracor, Inc., was formed on 13 July 1994; and Kayln Corporation was formed on 8 March 1995. Additionally, on 3 July 1995, Mr. Taft formed Johnny Tart Enterprises, Inc. ("JT Enterprises"), an S corporation. He formed JT Enterprises for the purpose of charging a fee to his three C corporations for providing administrative services so that these fees would not be taxed as income to the C corporations and instead deductible as business expenses. JT Enterprises and T & T, by signature of Mr. Tart as president of each, entered into a Management Services Agreement ("MSA").

On 25 July 2000, plaintiff filed her complaint against McDonald's Corporation, Kayln Corporation, Mr. Tart individually, and JT Enterprises, alleging she was injured due to their negligence in her slip and fall on 4 January 1998. In their answers, all defendants named

T & T as the owner and operator of the McDonald's where the incident occurred. On 30 May 2001, plaintiff filed a motion to amend the complaint to add T & T as an additional defendant. By order of Judge William Z. Wood, Jr., dated 5 September 2001, plaintiff's motion to amend was allowed. Additionally, Judge Wood ordered the following:

> [T]he party being added as a party defendant, this being T & T Management Corporation, may plead and assert a statute of limitations defense as to all claims asserted and alleged against T & T Management Corporation, as may the other defendants, and an issue shall be presented to the jury at the trial of this case as to whether an agreement was or was not made for plaintiff and counsel for T & T Management Corporation and defendants that plaintiff could wait until after proposed depositions were taken in this action in April, 2001, to join T & T Management Corporation as a party defendant and to allege and assert claims against T & T Management Corporation by an Amended Complaint. If the jury should answer this issue "No," then the claims alleged and asserted by plaintiff against T & T Management Corporation would be and are barred as a matter of law. If the jury should answer this issue "Yes," that there was such an agreement, then the claims against T&T would not be barred as a matter of law.

Defendants filed a motion appealing Judge Wood's order. We dismissed the appeal as interlocutory on 28 January 2002.

An amended complaint naming T & T as an additional defendant, and dropping Kayln Corporation, was filed 21 September 2001. On 24 January 2003, plaintiff filed a voluntary dismissal without prejudice as to defendant McDonald's.

Defendants filed motions for summary judgment in May and June of 2002. These motions where heard by Judge McHugh on 27 January 2003. In an order filed 12 March 2003, Judge McHugh found that plaintiff had forecast evidence that a restaurant employee either created or had notice of the alleged hazardous condition that caused plaintiff's fall and therefore denied defendants' motions for summary judgment on that ground. The trial court also denied defendants' motion for summary judgment based upon the claim that plaintiff's own evidence showed that she had been contributorily negligent as a matter of law. The trial court did grant summary judgment to Mr. Tart and JT Enterprises. Lastly, the trial court ordered the following:

> The Motion for Summary Judgment of T & T Management Corporation be and it is hereby denied for the reasons that the court finds and determines that the Order of Judge Wood of September 5, 2001, on Plaintiff's Motion to Amend under Rule 15 precludes this court from considering the Motion for Summary Judgment under Rule 56 of T & T Management Corporation on its merits, and the court has not done so for the reason that the Order of Judge Wood is the law of the case.

The trial court found that pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) of the North Carolina Rules of Civil Procedure, there was no just reason to delay entering final judgment as to the dismissal of Mr. Tart and JT Enterprises. Both plaintiff and defendants filed notices of appeal.

In this appeal plaintiff argues that the trial court erred in granting summary judgment in favor of JT Enterprises and Mr. Tart because they are liable under various theories of agency and corporate law. Pursuant to Rule 10(d) of the North Carolina Rules of Appellate Procedure, without appeal, defendants cross-assigned as error the basis in law used by the lower court in granting summary judgment in favor of Mr. Tart and JT Enterprises.

In addition defendants argue in their appeal that the trial court erred in denying summary judgment on the claims of defendants' negligence and on their contention that plaintiff's own evidence showed she was contributory negligent. Furthermore, defendants raised the issue that Judge Wood's 5 September 2001 order was not the law of the case governing the trial court, and the trial court should have considered T & T's motion for summary judgment pursuant to Rule 56(b).

As a threshold matter, we hold that those issues raised by defendants' cross-appeal and appeal, are interlocutory and improperly before this Court. We then address the merits of plaintiff's two issues on appeal.

Interlocutory Orders

[1] "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). "The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is

presented to the appellate courts." *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985)."[I]n two instances a party is permitted to appeal interlocutory orders[.]" *Liggett Group*, 113 N.C. App. at 23, 437 S.E.2d at 677. First, a party is permitted to appeal from an interlocutory order when the trial court enters "a final judgment as to one or more but fewer than all of the claims or parties" and the trial court certifies in the judgment that there is no just reason to delay the appeal of those claims. N.C. Gen. Stat. § 1A-1, Rule 54(b); *Liggett Group*, 113 N.C. App. at 23, 437 S.E.2d at 677. Second, a party is permitted to appeal from an interlocutory order when "the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Southern Uniform Rentals v. Iowa Nat'l Mutual Ins. Co.*, 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1988); N.C. Gen. Stat. § 1-277 (2003). Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds.

Defendants cross-assign as error that part of the 12 March 2003 order which denied summary judgment as to them. The gravamen of defendants' cross-appeal and appeal is twofold. First, defendants contend that the trial court erred in finding an issue of material fact as to whether defendant was negligent and whether plaintiff was contributorily negligent. Second, defendant T & T claims it was denied a substantial right by Judge Wood's 5 September 2001 order granting the motion to amend adding T & T, as that order precluded T & T from later motioning for summary judgment on statute of limitations grounds. Neither of these are properly before this Court.

I. Negligence and Contributory Negligence

The law is clear that a trial court's determination that there is an issue of fact of negligence or contributory negligence is interlocutory. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b). It has long been held that " '[l]ike negligence, contributory negligence is rarely appropriate for summary judgment.' " *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 830, 562 S.E.2d 75, 79, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 192 (2002) (quoting *Ballenger v. Crowell*, 38 N.C. App. 50, 55, 247 S.E.2d 287, 291 (1978)). Nor has a substantial right been affected by allowing negligence or contributory claims to survive summary judgment because defendants may still prevail on either of these issues before a jury.

II. Denial of Summary Judgment without Review of the Merits

[2] We next to turn to the more difficult issue: Whether Judge McHugh's interlocutory order, applying the law of the case of Judge Wood's order and denying T & T's motion for summary judgment on statute of limitations grounds without addressing the merits, is now reviewable. There is some issue as to whether Judge McHugh was bound by Judge Wood's order, as that hearing was held on a motion to amend plaintiff's complaint to add T & T and was not before the court for summary judgment review. T & T was not yet a party to this action until the order to amend was filed and plaintiff's complaint filed on 21 September 2001. However, without considering whether Judge McHugh was in fact bound by Judge Wood's order in regard to T & T's ability to raise the statute of limitations by motion for a summary judgment, we apply the "substantial rights" test to determine whether the denial of summary judgment to T & T, without reviewing the merits of the motion, affected such a right.

Whether a party may appeal an interlocutory order pursuant to the substantial right exception is determined by a two-step test. *Miller v. Swann Plantation Development Co.*, 101 N.C. App. 394, 395, 399 S.E.2d 137, 138 (1991). "[T]he right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). The substantial right test is "more easily stated than applied." *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). And such a determination "usually depends on the facts and circumstances of each case and the procedural context of the orders appealed from." *Estrada v. Jaques*, 70 N.C. App. 627, 642, 321 S.E.2d 240, 250 (1984). Because we hold that defendant T & T was not "injured" by Judge McHugh's order denying their motion for summary judgment without review of the merits, we need not address the first prong of the test.

The facts and circumstances of this case show the following: At issue during the motion to amend hearing was whether T & T could be added as a party when the statute of limitations on any claim plaintiff might have against T & T had run. This was the same issue that T & T sought to have Judge McHugh review in their summary judgment motion. Plaintiff claimed that the attorney for then named defendants and unnamed T & T had waived the statute of limitations by stating, in correspondence, that plaintiff could take depositions before amending their complaint to add T & T. Additionally, plaintiff

argued that T & T was estopped from raising the statute of limitations as a bar to the court's jurisdiction. At the hearing, the attorney that was representing the named defendants for the motion to amend was also representing unnamed T & T.[1] The court asked:

> THE COURT: Why was Mr. Millikin representing T & T as well as the other parties?
>
> [DEFENDANT'S ATTORNEY]: I don't think that is clear. In all honesty, I do not know the answer to that, given that there is the same insurance carrier involved. I suspect that is the case, just out of complete candor to the Court, but I don't know if that was represented or not. Perhaps it was.

The entire hearing was centered around the actions of T & T, as represented by their attorney and whether these actions waived the statute of limitations or created equitable rights in plaintiff. Because plaintiff filed a verified brief for this motion alleging waiver and equitable estoppel, the court recessed to allow T & T's attorney to file an affidavit to raise an issue of fact. The court reasoned:

> THE COURT: [T]his is a little unusual because we've got a brief that's been verified. I guess any pleading can be verified, just like a brief, and treat it like an affidavit, I guess, for a summary judgment.
>
> ****
>
> THE COURT: I think if I'm going to treat it as an affidavit, I better treat an affidavit as an affidavit. Both sides deserve the same. Can [T & T attorney] get it back by Thursday or do you want to do it some other week? I've got three weeks of civil court.

It is clear that Judge Wood treated this as a hearing for summary judgment on the issues of waiver and equitable estoppel. Pursuant to his attempt to correctly posture the case, he allowed T & T's attorney to submit an affidavit while recessing the court. In response to plaintiff's supposition that, if T & T's affidavit did not raise a disputed fact, the court should rule on waiver and estoppel as a matter of law, Judge Wood stated:

> I know; I know. It may still go on. I understand that. But I just want to see if it's undisputed or not at this stage. I think that needs to be decided before we go any further.

1. The attorney for defendants was not present for the first day of the motion to amend hearing before Judge Wood as he was being treated for a medical condition. A fellow attorney from his firm represented the interests of defendants.

In the rehearing after T & T's attorney's affidavit was submitted, Judge Wood found the disputed facts on these issues to be a question for the jury, and told the parties to frame the issues so that they would reach a jury.

The determination of whether or not the conduct of T & T's attorney raised an issue of fact that T & T had waived the statute of limitations or created equitable rights in plaintiff was heard and determined as if in summary judgment. Before the court was the verified brief of plaintiff, and the affidavit of T & T's attorney. T & T was therefore not prejudiced by being denied an additional summary judgment hearing, and we have been provided no material difference in what evidence would have been forecast had they received any further preliminary hearing on the merits of this issue. Therefore, the issue of whether T & T is protected from liability in this case is presently interlocutory.

Dismissal of JT Enterprises

[3] In their first issue on appeal, plaintiff contends that JT Enterprises was improperly dismissed from this case on defendants' motion for summary judgment. As the trial court did not grant summary judgment on the issues of negligence and contributory negligence, the court ruled as a matter of law that there was no theory of agency liability for the underlying claims to retain JT Enterprises as a party to this action. Based on the analysis below, we reverse this dismissal.

Summary judgment is proper where there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). In determining whether summary judgment is proper, the trial court must view the evidence in the light most favorable to the non-moving party, giving the non-moving party the benefit of all reasonable inferences. *Coats v. Jones*, 63 N.C. App. 151, 154, 303 S.E.2d 655, 657, *aff'd*, 309 N.C. 815, 309 S.E.2d 253 (1983). The burden to establish the nonexistence of any triable issue of fact rests on the moving party. *Boudreau v. Baughman*, 322 N.C. 331, 342, 368 S.E.2d 849, 858 (1988).

Principles of agency arise when parties manifest consent that one shall act on behalf of the other and subject to their control. *Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 277, 357 S.E.2d 394, 397, *disc. review denied*, 320 N.C. 631, 360 S.E.2d 87 (1987). Whenever the principal retains the right "to control and direct the manner in which the

details of the work are to be executed" by his agent, the doctrine of *respondeat superior* operates to make the principal vicariously liable for the tortious acts committed by the agent within the scope of their employment. *Hayes v. Elon College*, 224 N.C. 11, 15, 29 S.E.2d 137, 140-41 (1944); *see also Harmon v. Contracting Co.*, 159 N.C. 22, 27-28, 74 S.E. 632, 634 (1912); *Scott v. Lumber Co.*, 232 N.C. 162, 165, 59 S.E.2d 425, 426-27 (1950). Our Supreme Court has held:

> [A] principal's vicarious liability for the torts of his agent depends *on the degree of control retained* by the principal over the details of the work as it is being performed. The controlling principle is that vicarious liability arises from the right of supervision and control.

Vaughn v. Dept. of Human Resources, 296 N.C. 683, 686, 252 S.E.2d 792, 795 (1979) (emphasis added). Determining whether the degree of control rises to a level of *respondent superior* is a question of fact. *Miller v. Piedmont Steam Co.*, 137 N.C. App. 520, 524-25, 528 S.E.2d 923, 926-27, *disc. review denied*, 352 N.C. 590, 544 S.E.2d 782 (2000); *see also Hayman*, 86 N.C. App. at 278-79, 357 S.E.2d at 397-98; *Phillips v. Restaurant Mgmt. of Carolina, L.P.*, 146 N.C. App. 203, 209, 552 S.E.2d 686, 690-91 (2001), *disc. review denied*, 355 N.C. 214, 560 S.E.2d 132 (2002) (where summary judgment was reversed because the court found an issue of fact as to whether employee's acts were within the scope of his employment and in furtherance of Restaurant Management's business).

In *Miller* and *Hayman*, both under summary judgment review, this Court looked to the terms of the agreements between the franchisor and franchisee to determine whether there was an issue of fact that franchisor maintained such daily control as to constitute the franchisee as an agent. In this case, the relevant agreement is the Management Services Agreement (MSA) between the franchisee's assignee, T & T, and the management company, JT Enterprises.

The MSA contains the following provisions:

> Services Covered. The Management Company shall render the following services to the Operator [T & T] with respect to the Unit [restaurant were plaintiff was injured] specified.
>
> (a) General and daily supervision of the operations of the Units. Further, to the extent agreed to by the parties, general and daily supervision of the operations of any other like food

service business now or hereafter owned or operated by the operator during the term of this agreement.

****

(i) For personnel working in the Units, hire all of the Operator's personnel jointly with Operator's designated representative and, thereafter, supervise such personnel.

(j) Purchase all food and equipment, and maintain inventory controls over food, supplies and equipment.

(k) Supervise the maintenance, repairs and clean up of the Units so that [*sic.*] all times their appearance will conform to the standards established by McDonald's Corporation.

(Emphasis added.) Additionally, under the Compliance with Franchise Agreement provision of the agreement, JT Enterprises is bound to:

> [R]ecognize[] and acknowledge[] that its compliance, and the compliance of the managers and other personnel under its supervision, direction and/or control, with all of the terms, covenants and conditions of the franchise agreement . . . .

Unlike the agreements at issue in *Miller* and *Hayman*, we find this agreement sufficient to raise an issue of fact as to the daily control of JT Enterprises over the McDonald's franchise where plaintiff was injured. The Courts in *Miller* and *Hayman* found no issue of fact as to whether an agency relationship existed, because under the franchise agreements, in those cases the franchisor retained no control over the hiring, firing, or supervision of personnel. *Miller*, 137 N.C. App. at 524-25, 528 S.E.2d at 926-27; *Hayman*, 86 N.C. App. at 278-79, 357 S.E.2d at 397-98. These Courts also focused on whether the contractual remedy of the franchisor, in the event of a breach, would affect daily control. The MSA does not set out any such remedies and we focus our analysis on the overall daily control of personnel and operations as evidenced by the MSA.

In the case at bar, using the language of the MSA, JT Enterprises has the following duties: "General and daily supervision of the operations of the Units"; "hire all of the Operator's personnel jointly with Operator's designated representative and, thereafter, supervise such personnel"; "[p]urchase all food . . . maintain inventory controls over food, supplies, and equipment"; and "[s]upervise the maintenance,

repairs, and clean up of the Units so that [*sic*] all times their appearance will conform to the standards established by McDonald's Corporation." Under the MSA, JT Enterprises assists both in the hiring and the supervising of the personnel of the franchise and therefore distinguishes this case from *Miller* and *Hayman*. Additionally under the MSA, JT Enterprises purchases all food and maintains the restaurant's food inventories, a duty which at least raises an issue of fact of daily control over a fast food restaurant.

Therefore, we hold that the terms of the MSA raise an issue of fact as to whether JT Enterprises management duties over the restaurant where plaintiff was injured, are sufficient for a jury to determine if JT Enterprises asserted daily control over the establishment. We therefore reverse the lower court's grant of summary judgment in favor JT Enterprises.

Dismissal of Mr. Tart

[4] Plaintiff's second issue on appeal is that the trial court erred in granting summary judgment in favor of Mr. Tart. Plaintiff argues Mr. Tart should remain a party to this action under either the doctrine of "joint venture," or the doctrine of "piercing the corporate veil."

"Joint venture" is synonymous with "joint adventure." *See Pike v. Trust Co.*, 274 N.C. 1, 8, 161 S.E.2d 453, 460 (1968). For a joint adventure to exist, " 'there must be (1) an agreement, express or implied, to carry out a single business venture *with joint sharing of profits*, and (2) an *equal right of control* of the means employed to carry out the venture.' " *Rhoney v. Fele*, 134 N.C. App. 614, 620, 518 S.E.2d 536, 541 (1999) (quoting *Edwards v. Northwestern Bank*, 39 N.C. App. 261, 275, 250 S.E.2d 651, 661 (1979)), *disc. review denied*, 351 N.C. 360, 542 S.E.2d 217 (2000). "The control required for imputing negligence under a joint enterprise theory is not actual physical control, but the *legal right* to control the conduct of the other with respect to the prosecution of the common purpose." *Slaughter v. Slaughter*, 93 N.C. App. 717, 721, 379 S.E.2d 98, 101, *disc. review allowed*, 325 N.C. 273, 384 S.E.2d 519 (1989), *disc. review dismissed as improvidently allowed*, 326 N.C. 479, 389 S.E.2d 803 (1990).

In the instant case, for a "joint venture" to exist between Mr. Tart and the corporations of T & T and JT Enterprises, our law requires evidence that these corporations had the legal right to control the conduct of Mr. Tart in "prosecution of the common purpose" of running the profitable restaurant where plaintiff was injured.

Furthermore, that these corporations were sharing in the profits of the venture. No such evidence has been forecast.

The only evidence of record shows that Mr. Tart was president and 50% shareholder of JT Enterprises and T & T. Furthermore, the evidence shows that Mr. Tart did not "share" in the profits with either of these corporations. With JT Enterprises, a Sub-chapter C corporation, Mr. Tart was both president and an employee, receiving "biweekly" paychecks. With T & T, a Sub-chapter S corporation, Mr. Tart received the monthly profits of T & T flowing to him as personal, taxable income. Mr. Tart stated in his deposition, that, "[i]f at the end of the year there's any [profits] left over, you have an option to either leave it in the business or take a vacation or buy some Christmas presents or what have you." Plaintiff has offered no evidence that T & T is sharing in the corporate profits. Thus, this theory of liability fails.

[5] Plaintiff next attempts to keep Mr. Tart individually as a party to this action by piercing the corporate structure utilized to operate his restaurants and presenting them as a mere instrumentality of himself. We do not believe the evidence as forecast raises an issue of fact as to this theory.

It is well recognized that courts will disregard the corporate form or "pierce the corporate veil," and extend liability for corporate obligations beyond the confines of a corporation's separate entity whenever necessary to prevent fraud or to achieve equity. *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985). This Court has enumerated three elements which support an attack on a separate corporate entity:

> " ' "(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> " ' "(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> " ' "(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of." ' "

B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 9, 149 S.E.2d 570, 576 (1966) (citations omitted). Case law has provided a number of factors for a reviewing court to consider when determining whether to pierce the corporate veil:

1. Inadequate capitalization.

2. Non-compliance with corporate formalities.

3. Complete domination and control of the corporation so that it has no independent identity.

4. Excessive fragmentation of a single enterprise into separate corporations.

Glenn, 313 N.C. at 455, 329 S.E.2d 331 (citations omitted). No one factor has been deemed dispositive by our Courts, and thus we read the totality of the forecast evidence and of factors set forth in *Glenn* in determining whether an issue of fact exists sufficient to survive summary judgment.

Mr. Tart's undisputed affidavit shows that each of the corporations of which he is president, including JT Enterprises and T & T, adhered with great care to corporate formalities: they keep completely separate records, regular meetings were held of directors and shareholders, minutes were kept for all meetings and corporate actions, and by-laws for each corporation were in place. Additionally, each had obtained the same insurance liability coverage amounting to $26 million dollars. From Mr. Tart's first answer to plaintiff's complaint, he gave clear notice of who he believed was the proper, fully insured defendant:

> [T]his franchise was sold and assigned to T & T Management Corporation by written Assignment and Consent To Assignment effective January 2, 1997. From and after January 2, 1997, the franchise to the McDonald's at this location was owned by T&T Management Corporation which operated this McDonald's restaurant, with management services being provided to T & T management Corporation by Johnny Tart Enterprises, Inc. under a Management Services Agreement . . . dated January 1, 1997.

In light of the forecast evidence, we do not find Mr. Tart has abused the corporate structure, and therefore affirm the lower court's grant of summary judgment in favor of Mr. Tart on all theories of liability.

Conclusion

In this opinion, we have dismissed as interlocutory all issues raised in defendants' cross-assignments of error in plaintiff's appeal, and those assignments of error in their own appeal. We have reversed the lower court's grant of summary judgment dismissing defendant JT Enterprises because we believe there to be an issue of fact concerning whether JT Enterprises is liable under principles of agency. We have affirmed the lower court's grant of summary judgment in favor of Mr. Tart as plaintiff has forecast no evidence to support any theory of individual liability on his part.

Therefore, after thorough review of the briefs, records, transcripts, and depositions, we hereby

Reverse in part and affirm in part.

Judges HUDSON and LEVINSON concur.

THOMAS W. HILL, PLAINTIFF v. GARFORD TONY HILL, JEWEL ANNE HILL, D. SAMUEL NEILL, BOYD B. MASSAGEE, JR., M.M. HUNT, J.P. HUNT, BARBARA HILL GARRISON, WILLIAM LLOYD GARRISON, ERVIN W. BAZZLE, CINCINNATI INSURANCE CO., AND ESTATE OF SADIE C. HILL, DEFENDANTS

No. COA03-969

(Filed 7 September 2004)

1. **Pleadings— Rule 11 sanctions—factual certification requirement—sufficiency of evidence**

   There was sufficient evidence to support the trial court's finding that plaintiff violated the factual certification requirement of Rule 11. Although plaintiff argues that the only evidence was his testimony, Rule 11 motions are based on the entire record of the case and not just the testimony and evidence presented during the hearing.

2. **Appeal and Error— attorney fees on appeal—not a Rule 11 sanction**

   Attorney fees and costs in defending an appeal may only be awarded under N.C. R. App. P. 34 by an appellate court, and not by the trial court under N.C.G.S. § 1A-1, Rule 11.

3. Pleadings— Rule 11 sanctions—discovery costs

Attorney fees and costs incurred during discovery as a result of plaintiff's complaint are a proper basis for an award of attorney fees and costs under Rule 11. N.C.G.S. § 1A-1, Rule 26(g) requires an attorney or unrepresented party to sign each discovery request, response, or objection, and the signature constitutes a certification parallel to that required by Rule 11.

4. Pleadings— Rule 11 sanctions—retroactive

The trial court did not abuse its discretion by awarding Rule 11 sanctions for discovery retroactively rather than at the time of the behavior. The frivolous nature of the complaint was not discernible until after the evidence had been entered and the summary judgment granted.

5. Pleadings— Rule 11 sanctions—amount—basis

The trial court did not abuse its discretion in the amount of Rule 11 sanctions it awarded where the court reviewed extensive affidavits itemizing defense expenses. Furthermore, while plaintiff's unsubstantiated allegation of ex parte communication between defense counsel and judges may be a matter for judicial discipline, it has no bearing on the award of reasonable attorney fees as a Rule 11 sanction.

6. Pleadings— Rule 11 sanctions—discovery

The trial court did not abuse its discretion by awarding attorney fees as a Rule 11 sanction for discovery items and a letter that carried the file number of both this suit and an earlier, related action.

7. Pleadings— Rule 11 sanctions—amount—motions to dismiss included

The trial court did not abuse its discretion by taxing plaintiff with fees and costs for defendants' motions to dismiss as a Rule 11 sanction. Plaintiff violated Rule 11 the moment he signed the complaint and expenses incurred during a motion to dismiss, whether granted or denied, are reasonable expenses incurred due to plaintiff signing and filing a frivolous complaint.

8. Appeal and Error— attorney fees on appeal—authority for award

The trial court abused its discretion by awarding defendants the attorney fees they incurred due to plaintiff's appeal under

N.C.G.S. § 6-21.5. Application of that statute is confined to the trial division; Rule 34 of the North Carolina Rules of Appellate Procedure is the only proper basis for awarding expenses, including attorney fees, incurred due to an appeal.

9. Appeal and Error— preservation of issues—assignments of error—required

Plaintiff did not assign error to the issue of whether a jury should have determined plaintiff's good faith and motives in a Rule 11 sanctions case, and the issue was not properly before the Court of Appeals.

Appeal by plaintiff from judgment entered 15 January 2003 by Judge Richard L. Doughton in Henderson County Superior Court. Heard in the Court of Appeals 20 April 2004.

William E. Loose, for plaintiff-appellant.

Long, Parker, Warren & Jones, P.A., by W. Scott Jones, for D. Samuel Neill, Boyd B. Massagee, Jr., M.M. Hunt, J.P. Hunt, Ervin W. Bazzle, Garford Tony Hill, Jewel Anne Hill, Barbara H. Garrison & William L. Garrison, defendants-appellees.

CALABRIA, Judge.

This appeal arises from sanctions imposed upon plaintiff on 15 January 2003 for violation of N.C. Gen. Stat. § 1A-1, Rule 11 (2003) and N.C. Gen. Stat. § 6-21.5 (2003) in the underlying action, *Hill v. Hill*, 147 N.C. App. 313, 556 S.E.2d 355 (2001) ("*Hill I*"),[1] a dispute among the heirs of Sadie Clark Hill ("Sadie Hill" or "Sadie"). We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Sadie Hill was the mother of five children, including plaintiff Thomas W. Hill ("plaintiff") and defendants Garford Tony Hill ("Tony Hill" or "Tony") and Barbara Hill Garrison ("Barbara Garrison" or "Barbara"). Sadie died in March 1997. Although Sadie's will divided her assets equally among her children, plaintiff was dissatisfied when he reviewed a 1987 contract ("1987 contract") between Sadie and Tony Hill and defendant Jewel Anne Hill ("Jewel Hill" or "Jewel"), in which Sadie conveyed her stock in the family business, Appalachian Apple Packers, Inc. ("AAP"), to Tony and Jewel, making them the sole shareholders.

1. This case was an unpublished opinion reported pursuant to N.C. R. App. P. 30(e).

Plaintiff asked Barbara Garrison, the administratrix of the Estate of Sadie C. Hill ("estate"), to bring suit against Tony and Jewel for allegedly using undue influence and fraud in their business dealings with Sadie. Specifically, plaintiff argued certain real property that was conveyed by Sadie to AAP in 1969 should be returned to the estate. Barbara declined his request. Plaintiff then brought a suit against Tony and Jewel Hill, which alleged undue influence, fraud and misrepresentation of material facts in their business dealings with Sadie. This first suit survived dismissal when this Court held that plaintiff could properly bring suit on behalf of the estate as a real party in interest, since the administratrix of the estate had declined to do so. *Hill v. Hill*, 130 N.C. App. 484, 506 S.E.2d 299 (1998).[2]

On 15 January 1999, while the above-mentioned suit proceeded, plaintiff filed the instant action in Henderson County Superior Court alleging fraud, undue influence, and misappropriation of AAP corporate funds by Tony and Jewel Hill. Plaintiff's complaint also sought recovery for breach of duty against attorneys Neill and Massagee. Plaintiff further sought recovery for breach of duty against Barbara Garrison as administratrix of the estate, alleging that both Barbara and her husband, William L. Garrison, conspired with Tony and Jewel Hill to defraud Sadie Hill of her property and interest in AAP. Finally, the complaint sought recovery from M.M. Hunt and J.P. Hunt for alleged involvement in the misappropriation of AAP corporate funds and from Ervin W. Bazzle ("Bazzle"), appointed after Barbara Garrison withdrew, for alleged breach of his duty as administrator of the estate.

In orders filed 21 July 2000 and 2 August 2000, the trial court found there were no genuine issues of material fact as to plaintiff's claims and granted all defendants' motions for summary judgment. In *Hill I*, this Court affirmed the trial court's grants of summary judgment.

On 15 January 2003, the trial court awarded attorney's fees and costs to defendants as sanctions against plaintiff under N.C. Gen. Stat. § 1A-1, Rule 11 and N.C. Gen. Stat. § 6-21.5. Defendants Neill, Massagee, Bazzle, M.M. Hunt and J.P. Hunt were awarded $45,822.16. Defendants Barbara and William Garrison were awarded $27,894.78. Defendants Tony and Jewel Hill were awarded $42,559.75. The sanctions imposed upon plaintiff totaled $116,276.69. This

2. This case was an unpublished opinion reported pursuant to N.C. R. App. P. 30(e).

amount included fees incurred by defendants due to plaintiff's appeal to this Court in *Hill I* and his subsequent petition for discretionary review to our Supreme Court, which was denied. *Hill v. Hill*, 356 N.C. 612, 574 S.E.2d 680 (2002).

I. Rule 11 Sanctions

A. Imposition of Sanctions

[1] Plaintiff asserts the trial court improperly imposed sanctions under Rule 11 against him. In pertinent part, Rule 11 provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record. . . . A party who is not represented by an attorney shall sign his pleading, motion, or other paper. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C. Gen. Stat. § 1A-1, Rule 11(a). Thus, Rule 11 requires the signer to certify "that the pleadings are: (1) well grounded in fact, (2) warranted by existing law, 'or a good faith argument for the extension, modification, or reversal of existing law,' and (3) not interposed for any improper purpose." *Grover v. Norris*, 137 N.C. App. 487, 491, 529 S.E.2d 231, 233 (2000). "A breach of the certification as to any one of these three [requirements] is a violation of the Rule." *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992). This Court reviews *de novo* a

> trial court's order imposing Rule 11 sanctions . . . [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.

Renner v. Hawk, 125 N.C. App. 483, 491, 481 S.E.2d 370, 375 (1997).

In the instant case, the trial court found the plaintiff violated all three requirements of Rule 11. After careful review of the record, we

find plaintiff violated the factual certification requirement, justifying the imposition of sanctions, and we only address his argument regarding this requirement. Plaintiff argues that there was insufficient evidence to support finding of fact 30 of the trial court's judgment and order, which states, "Plaintiff did not make a reasonable inquiry into the true and existing facts . . . allege[d] in [his] Complaint. . . . A reasonable individual with knowledge of the facts available to the Plaintiff . . . would not have believed [his] position was well grounded in the relevant facts." An appellate court, "analyzing whether a complaint meets the factual certification requirement, . . . must [determine]: (1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." *McClerin v. R-M Industries, Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995).

Upon review of the record, we find plaintiff failed to undertake a reasonable inquiry, which would have revealed "his position was [not] well grounded in fact." *Id.* An attorney representing the estate made an independent investigation of plaintiff's claims and "concluded that there was insufficient evidence to establish a factual basis to prove any claims of fraud or undue influence upon Sadie Hill." If plaintiff had similarly inquired into the facts, he would have found ample evidence showing Sadie Hill to have been competent and fully involved in managing both her business and personal affairs throughout the 1980's and until her death in 1997. Most significantly, the evidence shows that Sadie Hill retained both independent legal and tax counsel for the purpose of drafting and reviewing the 1987 contract. Accordingly, the trial court's finding was supported by a sufficiency of the evidence.

Plaintiff also argues that the only evidence at the Rule 11 hearing concerning his inquiry into the factual basis of his claim was his own testimony, which supported the proposition that he made a reasonable inquiry and reasonably believed his position to be well grounded in fact. Plaintiff fails to recognize that defendants' Rule 11 motions were explicitly based on the record of the case. Thus, the entire record was before the court at the Rule 11 hearing, not merely the testimony and evidence presented during the hearing.

B. Appropriateness of Amount

Plaintiff next asserts the trial court abused its discretion in the amount of sanctions awarded under Rule 11(a). We disagree, *except*

to the extent the trial court awarded attorney's fees and costs incurred by defendants due to plaintiff's appeal to this Court in *Hill I* and subsequent petition to our Supreme Court.

> If the trial court concludes that
>
> a pleading, motion, or other paper is signed in violation of [Rule 11], 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). As with any statutorily authorized award of attorney's fees, we review the trial court's award of attorney's fees under Rule 11 using an abuse of discretion standard. *Martin Architectural Prods., Inc. v. Meridian Constr. Co.*, 155 N.C. App. 176, 182, 574 S.E.2d 189, 193 (2002). The abuse of discretion standard "is intended to give great leeway to the trial court and a clear abuse of discretion must be shown." *Central Carolina Nissan, Inc. v. Sturgis*, 98 N.C. App. 253, 264, 390 S.E.2d 730, 737 (1990). Nevertheless, "it is fundamental to the administration of justice that a trial court not rely on irrelevant or improper matters in deciding issues entrusted to its discretion." *Id.*

[2] Plaintiff first argues that the trial court abused its discretion under Rule 11 by awarding attorney's fees and costs incurred by defendants in defending plaintiff's *Hill I* appeal and petition. Plaintiff contends N.C. R. App. P. 34 is the only proper basis for sanctioning appellants by awarding attorney's fees and costs to appellees. In pertinent part, N.C. R. App. P. 34 provides:

> (a) court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:
>
> (1) the appeal was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

. . .

(b) A court of the appellate division may impose one or more of the following sanctions:

. . .

(2) monetary damages including, but not limited to,

a. single or double costs,

. . .

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

(c) A court of the appellate division may remand the case to the trial division for a hearing to determine one or more of the sanctions under (b)(2) or (b)(3) of this rule.

Our courts have not directly addressed whether trial courts have discretion, under Rule 11, to award attorney's fees and costs incurred after filing of a notice of appeal and due directly to the appeal. *See Griffin v. Sweet*, 136 N.C. App. 762, 525 S.E.2d 504 (2000) (mentioning this issue but not addressing it due to reversal on other grounds). Accordingly, we look to decisions under the Federal Rules of Civil Procedure for guidance. *See Turner v. Duke University*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (stating that "[d]ecisions under the federal rules are . . . pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules").

In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 L. Ed. 2d 359 (1990), the U.S. Supreme Court addressed the issue of whether a district court had discretion to award attorney's fees, which defendants incurred due to plaintiff's appeal of a Rule 11 sanction. The U.S. Supreme Court decided the district court did not have discretion. The Court interpreted Fed. R. Civ. P. 11 in relation to Fed. R. Civ. P. 1 and Fed. R. App. P. 38 and reasoned that "Rule 11 does not apply to appellate proceedings." *Id.* at 406, 110 L. Ed. 2d at 382. The counterpart North Carolina rules, N.C. Gen. Stat. § 1A-1, Rules 1 and 11 and N.C. R. App. P. 34, closely track the above-mentioned

federal rules. Thus, we find the U.S. Supreme Court's analysis sound with regard to the relationship between our Rule 11 and N.C. R. App. P. 34.

In applying the U.S. Supreme Court's analysis to our rules, we note that Rule 11 must be interpreted with reference to N.C. Gen. Stat. § 1A-1, Rule 1, *see id.*, which states the North Carolina Rules of Civil Procedure only "govern the procedure in the superior and district courts of the State of North Carolina. . . ." Whereas, the North Carolina Rules of Appellate Procedure "govern procedure in all appeals from the trial courts of the trial division to the courts of the appellate division. . . ." N.C. R. App. P. 1.

In this light, "extending the scope of [Rule 11] to cover any expenses, including fees on appeal, incurred 'because of the filing[,]' " *Cooter & Gell*, 496 U.S. at 406, 110 L. Ed. 2d at 382, would grant to trial courts discretion under Rule 11 to award attorney's fees and costs incurred due to an appeal "when the appeal would not be sanctioned under the appellate rules." *Id.* at 407, 110 L. Ed. 2d at 383. "Rule 11 is more sensibly understood as permitting an award only of those expenses directly caused by the filing, logically, those at the trial level." *Id.* at 406, 110 L. Ed. 2d at 382. The authority to sanction frivolous appeals by shifting "expenses incurred on appeal . . . onto appellants" is exclusively granted to the appellate courts under N.C. R. App. P. 34. *Id. Cf. Four Seasons Homeowners Assoc., Inc. v. Sellers*, 72 N.C. App. 189, 323 S.E.2d 735 (1984) (reversing a trial court award of $4,480 for attorney's fees incurred by plaintiff due to defendants' appeal to this Court); N.C. Gen. Stat. § 1-294 (2003) (staying "all further proceedings in the court below . . . [except those] upon any other matter included in the action and not affected by the judgment appealed from").

This limit on Rule 11's scope also "accords with the policy of not discouraging meritorious appeals." *Cooter & Gell*, 496 U.S. at 408, 110 L. Ed. 2d at 383. If trial courts had discretion to routinely compel appellants "to shoulder the appellees' attorney's fees, valid challenges to [trial] court decisions would be discouraged." *Id.* Accordingly, attorney's fees and costs incurred in defending an appeal may only be awarded under N.C. R. App. P. 34 by an appellate court. Thus, in the instant case, the trial court abused its discretion under Rule 11 by improperly awarding to defendants attorney's fees and costs incurred after plaintiff's filing of notice of appeal and due directly to his appeal to this Court and petition to our Supreme Court.

[3] Plaintiff also argues the trial court abused its discretion by awarding, under Rule 11, attorney's fees and costs incurred during discovery proceedings because N.C. Gen. Stat. § 1A-1, Rule 26(g) is the only proper basis upon which to award such expenses. "N.C.G.S. § 1A-1, Rule 26(g) requires an attorney or unrepresented party to sign each *discovery request, response, or objection.* Such signature constitutes a certification parallel to that required by Rule 11." *Brooks v. Giesey*, 334 N.C. 303, 317, 432 S.E.2d 339, 347 (1993) (emphasis added). The document at issue is plaintiff's complaint, a pleading, which is covered under Rule 11, not a "discovery request, response, or objection." *Id.*; N.C. Gen. Stat. § 1A-1, Rule 11(a). Attorney's fees and costs incurred during discovery as a result of plaintiff's complaint are a proper basis for an award of attorney's fees and costs under Rule 11.

[4] Plaintiff next argues the trial court abused its discretion by retroactively levying sanctions for discovery rather than sanctioning at the time of the behavior. In support, plaintiff directs us to *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 464 S.E.2d 47 (1995), and quotes portions of *Matter of Yagman*, 796 F.2d 1165 (9th Cir. 1986). *Pleasant Valley Promenade*, however, stands for the proposition that "the denial of a motion for summary judgment is not an automatic bar to imposition of Rule 11 sanctions." *Pleasant Valley Promenade*, 120 N.C. App. at 659, 464 S.E.2d at 55. Further, the portion of *Matter of Yagman* quoted by plaintiff is not the portion quoted in *Pleasant Valley Promenade*. Moreover, the *Matter of Yagman* quotation relied upon by this Court in *Pleasant Valley Promenade* is counter to plaintiff's argument:

> As noted by the United States Court of Appeals for the Ninth Circuit in *Matter of Yagman*:
>
> > In some situations, liability under proper sanctioning authority will not be immediately apparent or may not be precisely and accurately discernible until a later time. For example, findings under Rule 11 occasionally cannot be made until after the evidentiary portion of the trial. A claim may appear to raise legitimate and genuine issues before trial, even in the face of summary judgment challenges, but will be unmasked as not well-founded in fact after the claimant has presented his evidence.
>
> *Matter of Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986), *cert. denied, Real v. Yagman*, 484 U.S. 963, 98 L. Ed. 2d 390 (1987)

(emphasis added). We agree with the reasoning of the Court in *Matter of Yagman.*

Id. at 660, 464 S.E.2d at 55-56. In the instant case, the trial court likely could not have known to sanction plaintiff during discovery because the frivolous nature of his complaint was not discernible until after evidence had been entered and summary judgment for defendants ordered.

[5] Plaintiff further argues the trial court failed to scrutinize defense counsels' expense affidavits and abused its discretion by entering a "round-figure, lump-sum" award. Plaintiff again relies on *Matter of Yagman* for his contention. In that case, the district court imposed sanctions in the amount of $250,000.00. *Matter of Yagman*, 796 F.2d at 1182. The United States Court of Appeals for the Ninth Circuit reversed the order, finding, *inter alia*, that the district court made "no attempt to itemize or quantify the sanctions." *Id.* at 1185. In contrast, the trial court, in the instant case, reviewed the extensive affidavits itemizing defense counsel expenses and, on this basis, ordered plaintiff to pay defendants' attorney's fees and costs in the total amount of $116,276.69.

Plaintiff also argues, based on unsubstantiated allegations of *ex parte* communications, that the trial court abused its discretion by awarding attorney's fees for defense counsels' time spent in those alleged *ex parte* discussions with the assigned trial judges. The only authority plaintiff cites for this proposition is N.C. Code of Judicial Conduct, Canon 3.A(4) (2004), which prohibits *ex parte* discussions between judges and parties. An alleged violation of the Code of Judicial Conduct may be a proper basis for pursuing disciplinary proceedings against a judge pursuant to "Article 30 of Chapter 7A of the General Statutes of North Carolina." N.C. Code of Judicial Conduct, Preamble (2004). However, unsubstantiated allegations of *ex parte* communications do not bear on the award of reasonable attorney's fees as a sanction under Rule 11.

[6] Plaintiff next argues the trial court abused its discretion by awarding attorney's fees and costs for discovery items that carried both the file number of his first suit, 97 CVS 725, and that of the instant case, 99 CVS 67. In support of this contention, plaintiff directs us to depositions carrying both file numbers in their caption and a letter sent by defense counsel. A deposition taken for both cases clearly was needed for each case and would have been taken for either one. The letter referenced by plaintiff did not deal with

depositions but merely asked for a response to discovery requests in both cases.

[7] Plaintiff's final argument is that the trial court abused its discretion by awarding fees and costs for defendants' 12(b)(6) motions, which were denied. Plaintiff, however, violated Rule 11 at the moment he signed the complaint. *See Bryson*, 330 N.C. at 657, 412 S.E.2d at 334 (stating that "[t]he text of [Rule 11] requires that whether the document complies with . . . the Rule is determined as of the time it was signed"). Accordingly, expenses incurred during a motion to dismiss, whether granted or denied, are reasonable expenses incurred due to plaintiff signing and filing the frivolous complaint.

II. § 6-21.5 Sanctions

[8] Since the trial court properly awarded attorney's fees and costs under Rule 11, with the exception of those incurred due to plaintiff's prior appeal to this Court and petition to our Supreme Court, we need only address whether the trial court, under N.C. Gen. Stat. § 6-21.5, had discretion to award attorney's fees incurred by defendants due to plaintiff's appeal and petition. Under N.C. Gen. Stat. § 6-21.5,

> [i]n any civil action or special proceeding the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. *The filing of a general denial or the granting of any preliminary motion . . .* is not in itself a sufficient reason for the court to award attorney's fees, but *may be evidence to support the court's decision to make such an award.* A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees. *The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section.*

(Emphasis added).

The emphasized portions of N.C. Gen. Stat. § 6-21.5 clearly indicate that its application is confined to the trial division. *See Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (stating that "[w]here the language of a statute is clear, the courts must give the statute its plain meaning"); *Winston-Salem Wrecker Ass'n v. Barker*, 148 N.C. App. 114, 121, 557 S.E.2d 614, 619 (2001) (observing

that "[b]ecause statutes awarding an attorney's fee to the prevailing party are in derogation of the common law, N.C.G.S. § 6-21.5 must be strictly construed"). Thus, similar to Rule 11, N.C. Gen. Stat. § 6-21.5 is most "sensibly understood as permitting an award only of [attorney's fees] directly caused by the filing, logically, those at the trial level." *Cooter & Gell*, 496 U.S. at 406, 110 L. Ed. 2d at 382. This interpretation also "accords with the policy of not discouraging meritorious appeals." *Id.* at 408, 110 L. Ed. 2d at 383. Accordingly, N.C. R. App. P. 34 is the only proper basis for awarding expenses, including attorney's fees, incurred due to an appeal, and the trial court abused its discretion under N.C. Gen. Stat. § 6-21.5.

III. Jury Trial

[9] Plaintiff asserts that, in the Rule 11 hearing, the trial court violated his rights under the Seventh Amendment of the U.S. Constitution and Article I, Section 25 of the N.C. Constitution by not granting his motion to have a jury determine his good faith and motives. Plaintiff, however, failed to assign this issue as error. "[T]he scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal." *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991); N.C. R. App. P. 10(a). Accordingly, this issue is not properly before us, and we decline to address it.

For the foregoing reasons, we affirm, in part, the trial court's order of sanctions under N.C. Gen. Stat. § 1A-1, Rule 11. We reverse, in part, the trial court's order of sanctions, having determined the trial court abused its discretion under Rule 11 and N.C. Gen. Stat. § 6-21.5 in awarding attorney's fees and costs incurred by defendants due to plaintiff's appeal to this Court and petition to our Supreme Court. The trial court's decision is remanded for further findings of fact, separating the attorney's fees and costs incurred by defendants at the trial level from those incurred after plaintiff's filing of notice of appeal and directly stemming from defendants' defense of plaintiff's appeal and petition. We instruct the trial court, after making these findings, to issue an order under Rule 11 awarding only those fees and costs incurred at the trial level.

Affirmed in part, reversed in part, and remanded.

Judges WYNN and STEELMAN concur.

STATE OF NORTH CAROLINA v. JOHN MARVIN TRENT

No. COA03-1019

(Filed 7 September 2004)

Criminal Law; Searches and Seizures— motion to suppress— order entered out of term and out of session

The trial court erred in a robbery with a dangerous weapon case by denying defendant's motion to suppress seized evidence where the order was entered out of term and out of session, and defendant is entitled to a new trial, because: (1) an order of a superior court in a criminal case must be entered during the term, during the session, in the county, and in the judicial district where the hearing was held, and an order entered in violation of these requirements is null and void and without legal effect absent consent of the parties; (2) in the instant case, the trial court did not make a ruling on the motion in court during the term and the State admitted that the court entered the order after the term had expired; (3) even though the evidence of guilt was overwhelming, the question of prejudice to defendant is never reached when the order denying the motion to suppress was null and void and of no legal effect; and (4) even though defendant did not raise this issue at trial, jurisdictional questions which relate to the power and authority of the court to act in a given situation may be raised at any time.

Judge LEVINSON dissenting.

Appeal by defendant from judgment entered 28 August 2002 by Judge W. Osmond Smith, III, in Caswell County Superior Court. Heard in the Court of Appeals 29 April 2004.

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

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

McCULLOUGH, Judge.

Defendant John Marvin Trent was charged with robbery with a dangerous weapon. The State's evidence tended to show that Sayed Rawi operated a convenience store located across from the Casville

Volunteer Fire Department in Caswell County. He knew defendant and Steven Brown (Brown) because the men were regular customers. On 8 May 2001, the two men entered the convenience store at about 10:00 p.m. Defendant had a handgun, and Brown had a shotgun. Both men demanded money. Rawi complied with this request and gave the men some money. However, shortly thereafter, Brown took the barrel of his shotgun and hit Rawi in the head. At the time, defendant and Brown were wearing masks. However, the masks were too large for the suspects' faces, and Rawi could "see everything."

After defendant and Brown left, Rawi called 911. Deputy John Loftus reached the convenience store about five minutes after learning about the robbery. At that time, Rawi told Deputy Loftus that defendant and Brown were the perpetrators. Deputy Loftus then received a call indicating that law enforcement officers stopped the suspects. Deputy Loftus escorted Rawi to the stopped vehicle, and Rawi identified the suspects without hesitation.

Defendant received and waived his *Miranda* warnings. Initially, defendant denied any involvement in the robbery. Deputy Loftus noticed a ski mask with a white surgical mask attached over the mouth sitting in plain view in the back of the vehicle. Deputy Loftus also searched the vehicle and found $171.00 in cash.

Defendant's mother, Jean Trent, arrived at the scene. She took Deputy Eugene Riddick to her home where Deputy Riddick seized a shotgun and a pistol. He found the shotgun in defendant's closet and the pistol under defendant's mattress. Jean Trent also stated that she was "tired of covering up for John with guns at the house."

Officer Robert Pearson of the North Carolina Highway Patrol was in his vehicle when he received a "BOLO" (be on the lookout) for suspects in a convenience store robbery. Officer Pearson stopped at the store and learned that the two suspects, a black male and a white male, had fled on foot. After getting into his car and driving onto Ashland Road, Officer Pearson saw a car slow down and stop beside his patrol car. Officer Pearson thought that the occupants had information, but he became suspicious after the car began to move away. Officer Pearson followed the vehicle and the driver stopped near the shoulder of the road.

As Officer Pearson stopped his car, Deputy Riddick arrived. Officer Pearson approached the black male driver, while Deputy Riddick approached the white male passenger. Officer Pearson

noticed that the driver was sweating, even though it was not hot that evening. He believed that the driver must have been engaged in some kind of physical activity because the driver was sweating so profusely.

Defendant offered evidence including testimony from his father, Clyde Trent. Clyde Trent testified that the pistol was his. He also indicated that the gun was jammed, and often a shell would not go into the chamber.

Danielle Kirby testified that she is Steven Brown's girlfriend. She owned the vehicle that Brown was driving on 8 May 2001. Kirby testified that she worked at a restaurant and that Brown was going to pick her up when her shift ended. Kirby testified that she kept her tip money in the vehicle's glove compartment until Brown decided to hide it in a tissue box. Finally, Kirby mentioned that on 8 May 2001, the amount would have been almost $200.00, but she was not sure about the exact amount. On 28 August 2002, the jury found defendant guilty as charged. Defendant appeals.

On appeal, defendant argues that the trial court erred by denying defendant's motion to suppress where the order was entered out of term and out of session. We agree and conclude that defendant is entitled to a new trial.

"[A]n order of the superior court, in a criminal case, must be entered during the term, during the session, in the county and in the judicial district where the hearing was held." *State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984). Absent consent of the parties, an order entered in violation of these requirements is null and void and without legal effect. *Id.*

Our Supreme Court has considered this issue previously and has reached different conclusions based on the circumstances of each case. Defendant claims that he is entitled to a new trial based on the Court's decision in *Boone*, while the State contends that *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984) is controlling.

We believe that the decision in *State v. Palmer*, 334 N.C. 104, 431 S.E.2d 172 (1993) clarifies the difference between *Boone* and *Horner*. As interpreted by the *Palmer* Court, *Boone* stands for the proposition that an order is a nullity if "the judge d[oes] not make a ruling on the motion *in court* during *the term*, but sign[s] the order after the term ha[s] expired." *Id.* at 108, 431 S.E.2d at 174 (emphasis added). In contrast, the trial judge in *Horner* made a ruling on the motion "in open

court during the term[] at which the motion[] [was] heard." *Id.* Thus, the fact that the written order was filed after the term concluded did not invalidate it. *Id.* at 108-09, 431 S.E.2d at 174.

In the present case, the motion to suppress hearing commenced on 11 October 2001. The hearing was continued and resumed on 17 January 2002. On that date, the trial judge stated: "Rather than rule on this right now, I'm going to review the evidence presented in greater detail, consider the authority argued and submitted by the parties and give you a ruling subsequently." At the end of his remarks, the judge stated, "I will try to get you a ruling as soon as I reasonably can after giving it thorough consideration." Thus, at that stage of the litigation, there was no ruling in open court during the Spring 2002 Term.

The judge held no further proceedings until 26 August 2002. This was seven months after the prior hearing. More importantly, it occurred during a new term which began in the Fall of 2002. *See State v. Smith*, 138 N.C. App. 605, 607-08, 532 S.E.2d 235, 237 (2000) (explaining that " 'term' in this jurisdiction generally refers to the typical six-month assignment of superior court judges to a judicial district, while 'session' designates the typical one-week assignment to a particular location during the term"), *disc. review improvidently allowed*, 353 N.C. 355, 543 S.E.2d 477 (2001). It was at this 26 August 2002 hearing that the court first announced, on the record and in open court, that defendant's motion to suppress was denied. Further, the State acknowledges that the written order was not filed until 21 August 2003 which was "out of session and term as those categories are traditionally defined."

Based on the principles set forth in *Boone* and *Horner*, we must conclude that this order was a nullity. As was the case in *Boone*, the judge in the present case did not make a ruling on the motion *in court during the term*. Furthermore, the State admits that the court entered the order after the term had expired.[1] While we do not intend to emphasize form over substance, the circumstances of this case and the prior decisions of our appellate courts compel the result we reach today. The proper remedy is to grant defendant a new trial. *Boone*, 310 N.C. at 295, 311 S.E.2d at 559.

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1. Although the judge stated that he informed the parties of his decision before announcing it on 26 August 2002, nothing in the record indicates that this was done in open court or during the Spring 2002 Term. As we have indicated, for the order to be valid, the ruling must be made in open court during the term in which the motion was heard. *Palmer*, 334 N.C. at 108, 431 S.E.2d at 174.

The dissent suggests that the overwhelming evidence of defendant's guilt should require this Court to assess the record for prejudice before we order a new trial. In *Boone*, defendant was arrested after the police stopped his vehicle and discovered over 10 pounds of marijuana in the trunk. *Id.* at 285-86, 311 S.E.2d at 554. Even though the evidence of guilt was likewise overwhelming, our Supreme Court stated that the order denying the motion to suppress "being null and void and of no legal effect . . . the question of prejudice to the defendant is never reached." *Id.* at 289, 311 S.E.2d at 556. Since our Supreme Court has previously determined that a new trial should be awarded without looking to determine prejudice, we have no authority to set out a different analysis today.

Finally, the State argues that defendant may not make this objection on appeal because he failed to raise it at trial. However, our Supreme Court expressly rejected this position in *Boone* and noted that "[j]urisdictional questions which relate to the power and authority of the court to act in a given situation may be raised at any time." *Id.* at 288, 311 S.E.2d at 556.

For the reasons mentioned herein, defendant is entitled to a

New trial.

Judge HUDSON concurs.

Judge LEVINSON dissents.

LEVINSON, Judge, dissenting.

The majority holds that, because the trial court's order denying the motion to suppress is a nullity, defendant is entitled to a new trial. I agree that, on the record before us, the order appears to be a nullity. I do not agree, however, that the outcome of defendant's trial was prejudiced by the trial court's technical error in failing to enter an order at the right time and in the right place. Rather, it is my view that defendant received a fair trial, free of prejudicial error.

Defendant made two pre-trial motions to suppress evidence. One motion sought to have the trial court suppress any identification evidence provided by the victim, Sayed Rawi, on the ground that the evidence was the product of an impermissibly suggestive show-up procedure. The other motion sought to have the trial court suppress the statement defendant made to police officers after his arrest, along

with any evidence obtained as a result of defendant's statement.[2] A superior court judge conducted a hearing and heard evidence on these motions to suppress.

At a later time, the motions were denied by the same superior court judge who conducted the hearing. Prior to the empaneling of the jury, the judge made the following statement in open court:

> [T]he defendant and co-defendant in this case . . . previously made prior motions to suppress evidence related to identification procedures and evidence related to a search, and the Court conducted the hearing pretrial and has previously notified counsel for the State and the defendant of the Court's ruling in denying that. Those motions . . . were put on the record at an earlier time, and the Court will put that in the Court's written order with findings of fact and conclusions of law.

(emphasis supplied). This statement by the trial judge raises a question as to whether the ruling on the motions was made in term and in session. Affording the trial court an opportunity to clarify this statement on remand would, at a minimum, be preferable to a wholesale reversal of this conviction.[3]

According to the majority, the dispositive issue is merely whether the trial judge failed to enter an order in term and in session; the effect that the impotent order has on defendant's ability to have a fair trial goes unconsidered. Of course, it is true that prejudice to the defendant is not a consideration when deciding whether an order is a nullity. *See State v. Boone*, 310 N.C. 284, 288-98, 311 S.E.2d 552, 556 (1984). It makes little sense, however, to reverse the conviction at issue because an order entered in the case is void without regard to whether the outcome of defendant's trial was prejudiced. The North Carolina Supreme Court decisions cited by the majority do not require a reversal in this case on such technical grounds, and this Court has held that the dispositive issue in such a situation is whether the trial court's technical error prejudices the defendant:

> Unless an oral ruling is made in open court, *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984), an order substantially

2. Defendant's written motion to suppress did not specify what evidence was alleged to have been obtained as a result of defendant having made the statement.

3. It bears mentioning that the trial court's apparent error amounts to a failure to follow a statutory requirement that does not, in and of itself, implicate constitutional concerns.

> affecting the rights of parties to a cause pending in the superior court at a term must be made in the county and at the term when and where the question is presented, and, except by agreement of the parties, may not be entered otherwise. *State v. Boone*, 310 N.C. 284, 287, 311 S.E. 2d 552, 555 (1984). An order entered contrary to this rule is a nullity, *id.* at 286, 311 S.E.2d at 555, and entering an order *nunc pro tunc* does not change this result. *Thompson v. Gennett*, 255 N.C. 574, 122 S.E.2d 205 (1961). However, while prejudice to the defendant is not a factor affecting the nullity of the order, *State v. Boone*, 310 N.C. at 288, 311 S.E. 2d at 556, it is a factor determinative of defendant's right to a new trial. *See State v. Partin*, 48 N.C. App. 274, 283, 269 S.E.2d 250, 255, *disc review denied and appeal dismissed*, 301 N.C. 404, 273 S.E.2d 449 (1980)[.]

State v. Mandina, 91 N.C. App. 686, 693, 373 S.E.2d 155, 160 (1988) (emphasis supplied) (upholding an untimely entered denial of motion to change venue).

The majority reads *State v. Boone* as establishing a broad rule that any time an order denying a motion to suppress is entered out of term and out of session and a new hearing on the motion is not held, any conviction resulting from defendant's trial must automatically be reversed. Read closely and in context, *Boone* does not require a reversal in the case at hand.

In *Boone*, the defendant was convicted and imprisoned for felonious possession of more than one ounce of marijuana. *Boone*, 310 N.C. at 285, 311 S.E.2d at 553. The basis of this conviction was ten pounds of marijuana seized from the trunk of the defendant's car. *Id.* at 286, 311 S.E.2d at 554. Defendant made a pre-trial motion to suppress, which was denied by a Judge Peele out of term and out of session. *Id.* at 288, 311 S.E.2d at 555. At defendant's trial, which was held before a different judge, Judge Strickland, defendant argued that the denial of his motion was a nullity and renewed his motion to suppress; this motion was denied without a hearing. *Id.* at 286, 311 S.E.2d at 554. Significantly, the defendant in *Boone* never received a valid ruling on his motion to suppress by a judge who had actually heard the evidence pertaining to that motion. Logically, the Supreme Court required a new trial.

In so doing, the Supreme Court rejected the State's argument that an order is not a nullity unless it is entered out of term and out of session and the defendant suffers prejudice. *Id.* at 288-89, 311 S.E.2d at

556. Specifically, the Court held that if an order is entered out of term and out of session, the order is a nullity, and prejudice is not a consideration in determining the threshold question of whether the order itself is void: "[T]he critical decision, the ruling of the court . . . was not made . . . until after the session had ended. That Order being null and void and of no legal effect . . . the question of prejudice to the defendant is never reached." *Id.* In my view, the proper reading of this language is that prejudice is not necessary for an order to be null. However, this language does not negate the well established, elementary rule that "legal error does not entitle a defendant to a new trial unless it is prejudicial." *State v. Sanders*, 303 N.C. 608, 617, 281 S.E.2d 7, 12 (1981); *see also State v. Williams*, 1 N.C. App. 127, 132, 160 S.E.2d 121, 125 ("A new trial will not be granted for mere technical error which could not have affected the result, but only for error which is prejudicial, amounting to the denial of a substantial right."), *aff'd*, 274 N.C. 328, 163 S.E.2d 353 (1968).

The record is bereft of any indication that defendant was prejudiced by the trial court's failure to deny the motion to suppress in the same term and session in which it was made. Indeed, even if a ruling was not made in term and in session as is required, a ruling was made, at the very latest, before defendant's trial began by the same judge who had conducted the hearing on the motions to suppress. Defendant makes no argument that the failure of the trial court to enter a timely order prejudiced his ability to prepare a defense. Under the majority's rationale, the trial judge was apparently required to forget that he had already heard evidence and arguments on the motion and begin anew. I do not read *Boone* as requiring such a result.

In my view, the appropriate course of action for this Court is to view the case as if no order was entered at all and, in that posture, determine whether the trial court committed prejudicial error in admitting the challenged evidence. Our review is governed by the following well established principle:

> when there is no material conflict in the evidence presented at a motion to suppress evidence, the trial judge may admit the challenged evidence without specific findings of fact, although findings of fact are preferred. In that event, the necessary findings are implied from the admission of the challenged evidence.

State v. Norman, 100 N.C. App. 660, 663, 397 S.E.2d 647, 649 (1990) (internal citations and quotation marks omitted). There was no material conflict in the testimony presented at the hearing concerning

the identification of defendant, and this identification evidence was properly admitted.[4] There was a material conflict in the testimony with respect to defendant's statement; however, any error in admitting the statement and the resulting evidence was harmless.

Identification Evidence

"Identification evidence must be suppressed on due process grounds where the facts show that the pretrial identification procedure was so suggestive as to create a very substantial likelihood of irreparable misidentification." *State v. Wilson*, 313 N.C. 516, 528-29, 330 S.E.2d 450, 459 (1985). "[A] suggestive identification procedure has to be unreliable under a totality of the circumstances in order to be inadmissible." *State v. Breeze*, 130 N.C. App. 344, 350, 503 S.E.2d 141, 146 (1998).

> The factors to be examined to determine the likelihood of irreparable misidentification include: (1) the opportunity of the witness to view the individual at the time of the event; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the individual; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the event and the confrontation.

Wilson, 313 N.C. at 529, 330 S.E.2d at 460.

In the instant case, the victim of the robbery, Sayed Rawi, was familiar with the defendant prior to the robbery because defendant frequented Rawi's convenience store. Rawi was able to see defendant's face through the mask that defendant was wearing on the night of the robbery. During a previous conversation, defendant had shown Rawi his tongue piercing, and Rawi noticed this tongue piercing on the night of robbery. When police arrived at the scene of the crime, Rawi immediately indicated that defendant was one of the men who had robbed him and even provided the police with defendant's name. Once the car being driven by two suspects had been stopped, an officer accompanied Rawi to the place where the suspects were being

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4. In the instant case, defendant has not argued, or even suggested, that he intended or was able to offer any additional evidence bearing on his motions to suppress if a new hearing on the motions was held by the trial court. As such, this Court may review the record and determine whether the challenged evidence was properly admitted. I withhold comment on the effect of a defendant's ability to offer additional or different evidence at a new hearing on a motion to suppress evidence where the ruling denying the motion is null.

detained, and Rawi identified defendant from several feet away with no hesitation. On these uncontoverted facts, the victim's ability to positively identify defendant as the perpetrator of the crime cannot be attributed to his viewing of defendant in custody. Thus, the trial court properly admitted the identification evidence offered by Rawi.

Defendant's Statement and Evidence Obtained as Result

With respect to defendant's motion to suppress defendant's statement to police officers and certain evidence alleged to have been procured as a result of that statement, there is material conflict in the evidence that was offered at the suppression hearing. Specifically, the State's evidence tended to show that defendant was informed of, and elected to waive, his *Miranda* rights, but defendant testified that he was questioned before being read his *Miranda* rights and that his requests for an attorney were repeatedly ignored. However, the failure of the trial court to enter an order resolving this conflict has not prejudiced defendant.

Even assuming *arguendo*, that the trial court did err in admitting the evidence related to defendant's statement, this error was harmless beyond a reasonable doubt, as the independent evidence of defendant's guilt was compelling. *See State v. Ladd*, 308 N.C. 272, 284, 302 S.E.2d 164, 172 (1983) (holding that erroneous admission of defendant's statement was harmless beyond a reasonable doubt where evidence of defendant's guilt was "overwhelming."). Specifically, the victim immediately informed police officers that defendant was one of the perpetrators of the robbery under circumstances where the victim was familiar with defendant's appearance, voice, and name. Defendant was detained by police offers near the scene of the crime; he was in a vehicle with the person the victim identified as being the other robber. The victim immediately, and without hesitation, identified defendant as one of the robbers upon seeing him in custody. A ski mask like the one involved in the robbery was found in plain view on the backseat of the vehicle. Defendant's mother invited police officers into her home where, with consent, they found a loaded .45 caliber pistol, which the victim identified as being the pistol used during the robbery. In light of this evidence, the admission of defendant's statement was harmless error, if it was error at all.

In sum, the trial court's apparent failure to enter an order denying defendant's motions to suppress in the same term and session in which they were heard does not necessarily entitle him to a new

trial. This is especially so where, as here, defendant's trial preparation was not hampered by the entry of the untimely order, and this Court can conduct effective appellate review. In my view, the trial court properly admitted the identification evidence, and its admission of defendant's statement and the evidence allegedly procured as a result of the statement was harmless error if it was error at all. Moreover, careful review of defendant's remaining arguments on appeal reveals that they are without merit. As such, defendant's assignments of error should be overruled and the unanimous jury verdict convicting defendant of robbery with a dangerous weapon should be left undisturbed.

I respectfully dissent.

SAMMIE E. WILLIAMS AND WILLIAMS SEAFOOD, INC., PETITIONERS v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF COASTAL MANAGEMENT AND N.C. COASTAL RESOURCES COMMISSION, RESPONDENTS

No. COA03-595

(Filed 7 September 2004)

1. Costs— attorney fees—substantial justification

The trial court erred by granting attorney fees to petitioners pursuant to N.C.G.S. § 6-19.1 for the judicial review portion of a case involving an application for a Coastal Area Management Act permit to fill a portion of a tract of real estate in order to construct a freezer building on the land, because respondents have shown that their denial of petitioners' request for the permit was based on substantial justification including that the property was subject to regular or occasional flooding thus making it coastal wetlands.

2. Discovery— requests for admissions—costs of proof—attorney fees—reasonable belief would prevail

The trial court abused its discretion by granting attorney fees to petitioners pursuant to N.C.G.S. § 1A-1, Rule 37(c) in a case involving an application for a Coastal Area Management Act permit to fill a portion of a tract of real estate in order to construct

a freezer building on the land, because respondents had reasonable grounds to believe that they would prevail on the matter which petitioners requested them to admit.

3. Costs— assessable cost—attorney's meals and travel expenses

The trial court erred by granting costs to petitioners under N.C.G.S. § 6-20 for the meals and travel of petitioners' attorney in a case involving an application for a Coastal Area Management Act permit to fill a portion of a tract of real estate in order to construct a freezer building on the land because travel expenses of a party, including costs for mileage, meals, and hotels, are not an assessable cost listed in N.C.G.S. § 7A-305 and are not an assessable cost as provided by law.

4. Appeal and Error— cross-assignment of error—cross-appeal—waiver

Petitioners' failure to properly cross-appeal any error regarding the denial of their motion for attorney fees incurred in developing their takings claim pursuant to N.C.G.S. § 113A-123 waived consideration of the matter on appeal.

5. Appeal and Error— preservation of issues—failure to argue

Petitioners' remaining cross-assignments of error are deemed abandoned because petitioners presented no arguments as to these additional cross-assignments of error.

Appeal by respondents from judgment entered 17 January 2003 by Judge William C. Griffin, Jr. in Hyde County Superior Court. Heard in the Court of Appeals 4 February 2004.

Pritchett & Burch, PLLC, by Lars P. Simonsen, for petitioners-appellees.

Attorney General Roy Cooper, by Special Deputy Attorney General and Jill B. Hickey and Assistant Attorney General Meredith Jo Alcoke, for the State.

STEELMAN, Judge.

Respondents, the North Carolina Department of Environment and Natural Resources, Division of Coastal Management (DCM) and the North Carolina Coastal Resources Commission (CRC), appeal a trial court order granting attorney's fees and costs to petitioners,

Sammie E. Williams and Williams Seafood, Inc. For the reasons discussed herein, we reverse.

On 15 November 1999 petitioners applied for a Coastal Area Management Act permit to fill a portion of a tract of real estate in order to construct a freezer building on the land. By letter dated 14 August 2000, respondent, DCM, refused to issue the permit because it determined the area to be filled and developed was coastal wetlands, the filling of which was inconsistent with the following rules of the North Carolina Coastal Resources Commission: 15A N.C.A.C. 7H.0205(c-d); 15A N.C.A.C. 7H.0208(a)(1); and 15A N.C.A.C. 7H.0208(a)(2)(B). *See also* N.C. Gen. Stat. § 113A-120(a)(8) (requiring the denial of a permit application "[i]n any case, that the development is inconsistent with the State guidelines or the local land-use plans"). Petitioners filed a petition for a contested case hearing on 30 August 2000. The focus of the contested case hearing was whether the project area was a coastal wetland. A coastal wetland is defined as any marsh area that has (1) regular or occasional flooding by tides, including wind tides, but not including hurricanes or tropical storm tides; *and* (2) the presence of one or more of ten designated marsh plant species. N.C. Gen. Stat. § 113-229(n)(3) (2003); 15A N.C.A.C. 7H.0205 (2003). Petitioners did not contest that the project area contained coastal wetland plant species, only that the land was not subject to regular or occasional flooding. Following the hearing, Administrative Law Judge Beecher R. Gray entered a recommended decision on 2 August 2001. Judge Gray concluded the project area was not subject to regular or occasional flooding by tides and therefore, respondents erred in denying petitioners' permit request. The matter then came before CRC, who declined to follow Judge Gray's recommended decision, instead issuing a final agency decision affirming DCM's denial of petitioners' application for a permit. Petitioners petitioned for judicial review and asserted a takings claim pursuant to N.C. Gen. Stat. § 113A-123 and N.C. Gen. Stat. § 150B-43. Following a hearing, Judge William C. Griffin, Jr. entered an order on 25 July 2002 concluding the CRC's decision that the property at issue was coastal wetlands, subject to regular or occasional flooding, was arbitrary and capricious, and not based upon substantial evidence. Respondents chose not to appeal the superior court's decision.

Petitioners thereafter filed a motion for attorney's fees and costs. Pursuant to N.C. Gen. Stat. § 6-19.1, Judge Griffin granted petitioners' motion and awarded petitioners attorney's fees and costs for the judicial review portion of the case, excluding the 25.05 hours

expended on the takings issue and also excluding the expert witness fees. Judge Griffin also awarded attorney's fees and costs pursuant to Rule 37(c) of the North Carolina Rules of Civil Procedure for the administrative portion of the proceedings. Respondents appeal.

I. Award of Attorney's Fees Under N.C. Gen. Stat. § 6-19.1

[1] In respondents' first assignment of error they contend the trial court erred in awarding attorney's fees to petitioners pursuant to N.C. Gen. Stat. § 6-19.1 for the judicial review portion of the case. We agree.

The judicial review portion of the case encompassed all of the proceedings commencing with the filing of the petition for judicial review in the Superior Court of Hyde County. The portion of the case that occurred prior to that filing is referred to as the administrative portion of the case. N.C. Gen. Stat. § 6-19.1 provides that the trial court may, in its discretion, award attorney's fees to a prevailing party contesting state action pursuant to N.C. Gen. Stat. § 150B-43 where the trial judge concludes that certain criteria are present. N.C. Gen. Stat. § 6-19.1 (2000)[1]. Those criteria are (1) the prevailing party is not the state; (2) the prevailing party petitions for attorney's fees within thirty days following final disposition of the case; (3) the trial court "finds that the agency acted without substantial justification in pressing its claim against the party;" and (4) the trial court "finds that there are no special circumstances that would make the award of attorney's fees unjust." *Id.* However, the trial court's determination that the State acted without "substantial justification" is a conclusion of law and is reviewable by this Court on appeal. *Whiteco Industries, Inc. v. Harrelson*, 111 N.C. App. 815, 819, 434 S.E.2d 229, 232-33 (1993), *disc. review denied, appeal dismissed*, 335 N.C. 566, 441 S.E.2d 135 (1994). It is proper for this Court to consider the entire record in our determination of whether "substantial justification" existed. *Crowell Constructors, Inc. v. State ex rel. Cobey*, 342 N.C. 838, 842, 467 S.E.2d 675, 678 (1996).

For the purposes of N.C. Gen. Stat. § 6-19.1, "substantial justification" means "justified to a degree that could satisfy a reasonable

1. This case is governed by the previous version of N.C. Gen. Stat. § 6-19.1, which did not allow for the recovery of attorneys fees and costs for the administrative portion of the case. *Walker v. North Carolina Coastal Resources Comm'n*, 124 N.C. App. 1, 12, 476 S.E.2d 138, 145 (1996), *disc. review denied*, 346 N.C. 185, 486 S.E.2d 220 (1997). The new version allows for such recovery, but is applicable to contested cases commenced after 1 January 2001. 2000 N.C. Sess. Law ch. 190 § 1. Petitioners commenced this contested case on 30 August 2000.

person." *Id.* at 844, 467 S.E.2d at 679 (citations omitted). In order to show it acted with substantial justification, the burden is on the agency to "demonstrate that its position, at and from the time of its initial action, was rational and legitimate to such [a] degree that a reasonable person *could* find it satisfactory or justifiable in light of the circumstances then known to the agency." *Id.* (emphasis in original). It should be noted that this standard is not to be so strictly construed as to require the state agency to show the infallibility of each action it takes. *Id.* However, this standard should not be so loosely construed as to require the agency to only show its actions are not frivolous. *Id.* The fact that the trial judge stated the agency's determination that the property at issue was coastal wetland was arbitrary and capricious and not based on substantial evidence is not determinative of the question of "substantial justification." *Walker v. N.C. Coastal Resources Comm.*, 124 N.C. App. 1, 6, 476 S.E.2d 138, 142 (1996) (citing *Pierce v. Underwood*, 487 U.S. 552, 569, 101 L. Ed. 2d 490, 507 (1988) ("fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified")).

Based on our review of the record and transcripts before us, we conclude that respondents have shown that their denial of petitioners' request for the permit was based on substantial justification. The existence of one or more of the designated plant species on the property was not at issue. The sole area of dispute was whether the property was subject to regular or occasional flooding by tides. In petitioners' permit application, they stated that a portion of the site contained coastal wetlands and in their cover letter to the application acknowledged that the property floods, albeit rarely. This required respondents to consider the frequency with which the property flooded. Respondents based their decision to deny petitioners' permit request on the findings of Terry Moore, David Moye, and the recommendations of several state and federal agencies. Mr. Moore had worked for DCM for more than twenty years and had been district manager in the Englehard area for ten years. Mr. Moye had worked in the Englehard district for eleven years as a field representative. Each of these witnesses were qualified as experts in coastal wetlands biology and the identification of coastal wetlands at the hearing before the administrative law judge. Mr. Moore testified he had seen the property flooded by wind tides on numerous occasions. Furthermore, Mr. Moye had witnessed the property flooded by wind tides on at least one occasion, and had taken a photo showing the flooding.

In addition to Mr. Moore and Mr. Moye's findings, DCM circulated petitioners' permit request to fourteen state and federal review agencies. The North Carolina Division of Marine Fisheries, the National Marine Fisheries Service, and the U.S. Fish and Wildlife Service agreed the permit request should be denied as construction of the freezer would result in a loss of coastal wetlands.

The award of attorney's fees should only be granted in cases where the state agency acted without "substantial justification." N.C. Gen. Stat. § 6-19.1. This is not such a case. In reaching its decision to deny the permit request, respondents utilized the specialized expertise of its employees, who were qualified as experts. *See Webb v. N.C. Dept. of Envir., Health, and Nat. Resources*, 102 N.C. App. 767, 770, 404 S.E.2d 29, 32 (1991). Furthermore, respondents relied on the expertise of several state and federal agencies in deciding to deny the permit request.

Based upon our review of the records, we conclude that at the time respondents denied petitioners' permit request they were justified to a degree that could satisfy a reasonable person in asserting their opinion that the property in question was subject to regular or occasional flooding and was thus, coastal wetlands. Since we hold that respondents were substantially justified in denying the permit request, petitioners are not entitled to recover attorney's fees under N.C. Gen. Stat. § 6-19.1 for the judicial portion of the proceedings. *See Crowell*, 342 N.C. at 846, 467 S.E.2d at 680-81.

II. Award of Attorney's Fees Under Rule 37(c)

[2] In respondents' second assignment of error they contend the trial court improperly awarded attorney's fees and costs pursuant to Rule 37(c) of the North Carolina Rules of Civil Procedure. We agree.

Discovery may be conducted in contested case hearings under N.C. Gen. Stat. § 150B-28 of the Administrative Procedure Act to which the Rules of Civil Procedure apply. N.C. Gen. Stat. § 150B-28 (2003). Rule 37(c) provides:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that

> (i) the request was held objectionable pursuant to Rule 36(a), or (ii) the admission sought was of no substantial importance, or (iii) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (iv) there was other good reason for the failure to admit.

N.C. Gen. Stat. § 1A-1, Rule 37(c) (2003).

After filing a petition for a contested case hearing in the Office of Administrative hearings, petitioners sent requests for admissions to respondents pursuant to Rule 36(a) of the North Carolina Rules of Civil Procedure. Respondents responded on 8 December 2000 with the following answers:

> 2. Admit that the Fill Area does not constitute a "salt marsh or other marsh" as those terms are used in Title 15A N.C.A.C. 07H.0205.
>
> **RESPONSE**: DENIED.
>
> 3. Admit that the Fill Area is not subject to regular or occasional flooding by tides, including wind tides.
>
> **RESPONSE**: DENIED.

The trial court concluded that "[t]he petitioners proved the truth of the matters asserted in the requests for admissions denied by the respondents in this case. The respondents had no reasonable grounds to believe that they might prevail on these matters." The trial court found that petitioners' counsel expended 108.8 hours proving the truth of the above matters.

Sanctions imposed under Rule 37 will not be reversed on appeal absent a showing of abuse of discretion. *Cloer v. Smith*, 132 N.C. App. 569, 573, 512 S.E.2d 779, 782 (1999). Respondents contend the trial court abused its discretion in awarding petitioners attorney's fees because they had reasonable grounds to believe they would prevail on the matter under the provisions of Rule 37(c)(iii). The party wishing to avoid court-imposed sanctions for non-compliance with discovery requests bears the burden of showing the non-compliance was justified. *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996). The official commentary to this rule explains that this provision "emphasizes that the true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail." N.C. Gen. Stat. § 1A-1, Rule 37 official commentary. Thus, the language of this exception, "prevail on the

matter," refers to the specific matter the requesting party sought to be admitted and not whether the party would win the case. *See United States v. Article of Drug*, 428 F. Supp. 278, 281 (E.D. Tenn. 1976) (applying Rule 37(c)(3) of the Federal Rules of Civil Procedure,[2] the court stated that it found "the claimant had reasonable ground to believe that it might prevail on the matter which the plaintiff requested it to admit"). N.C. Gen. Stat. § 6-19.1 permits the trial judge to award attorney's fees except where the agency acted with substantial justification, which means "justified to a degree that could satisfy a reasonable person." *Crowell*, 342 N.C. at 844, 467 S.E.2d at 679. Each of these standards are based on reasonableness: that is, the "reasonable ground" standard of Rule 37(c)(iii) and the "reasonable person" standard of N.C. Gen. Stat. § 6-19.1. We find these two standards to be identical, although the time frames for determining whether the conduct of the respondents was reasonable is not identical. Under N.C. Gen. Stat. § 6-19.1 the court must determine what the state agency knew at the time the permit application was denied. Under Rule 37(c), the court's inquiry must focus on what the agency knew at the time they answered the request for admissions. In this case, we find the record shows that the agency's knowledge concerning the question of whether the property was a "salt marsh" and if regular or occasional flooding occurred due to the tides, was essentially the same at each of the relevant time periods.

Having concluded in the first issue that respondents had a substantial justification for denying petitioners' permit request, we also conclude they had reasonable grounds to believe they might prevail on the matters they were requested to admit. Accordingly, we find the trial judge abused his discretion in awarding petitioners attorney's fees under Rule 37(c).

III. Award of Costs Included Attorney's Meals and Expenses

[3] Respondents further contend the trial court erred when it awarded costs to petitioners for the administrative and judicial portions of the proceedings because the award of costs contained expenses incurred by petitioners' attorney for meals and travel. We note that respondents have appealed only the portion of the award of costs attributable to the meals and travel expenses of petitioners' attorney.

2. " '[T]he North Carolina Rules of Civil Procedure are, for the most part, verbatim recitations of the federal rules.' " *Brooks v. Giesey*, 334 N.C. 303, 317, 432 S.E.2d 339, 347 (1993) (citations omitted). Therefore, decisions under the federal rules are useful in developing our philosophy as to the North Carolina rules. *Id.*

N.C. Gen. Stat. § 6-20 allows the trial court to award costs in its discretion. N.C. Gen. Stat. § 6-20 (2003). However, in civil cases, assessable costs are limited to those items listed in N.C. Gen. Stat. § 7A-305. *Crist v. Crist*, 145 N.C. App. 418, 423, 550 S.E.2d 260, 264 (2001). "In addition to those costs enumerated in section 7A-305, the trial court is permitted to 'assess costs as provided by law.' " *Id.* (citations omitted); N.C. Gen. Stat. § 7A-305(e) (2003). Travel expenses of a party, including costs for mileage, meals, and hotels are not an assessable cost listed in N.C. Gen. Stat. § 7A-305 and are not an assessable cost "as provided by law." *Id.* at 424, 550 S.E.2d at 265. *See also City of Charlotte v. McNeely*, 281 N.C. 684, 694, 190 S.E.2d 179, 187 (1972). The award of costs for an attorney's meals and travel expenses is error and should be reversed. *Crist*, 145 N.C. App. at 424, 550 S.E.2d at 265.

In the present case, there are two instances in which the trial court ordered respondents to pay petitioners' costs which included petitioners' attorney's meals and travel expenses. According to our calculations, these awards of costs contained a total of $269.92 attributable to meals and expenses. It was error for the trial court to assess as a cost petitioners' attorney's meals and travel expenses. Consequently, we remand this matter to the trial court to modify its award of costs to exclude petitioners' attorney's meals and travel expenses. As respondents failed to challenge the remaining portion of costs accessed by the trial court, we do not consider their validity, and assume the remainder of the award to be proper.

IV. Petitioners' Cross-assignments of Error

[4] In petitioners' brief, they bring forth an argument based upon a cross-assignment of error. Petitioners assert that the superior court erred when it denied their motion for attorney's fees incurred in developing their takings claim pursuant to N.C. Gen. Stat. § 113A-123.

An appellee may cross-assign as error, without taking a separate appeal, "any action or omission of the trial court which . . . deprived the appellee of an alternative basis in law for *supporting* the judgment, order, or other determination from which appeal has been taken." N.C.R. App. P. 10(d) (emphasis added). In their cross-assignment of error, petitioners do not present an "alternative basis in law for supporting" the judgment. Rather, petitioners' purported cross-assignment asserts that the trial court erred when it failed to award attorney's fees to petitioners for the takings claim, not ad-

ditional reasons supporting why the trial court's order awarding attorney's fees for the judicial and administrative proceedings should be upheld. The correct method to raise these questions on appeal would have been a cross-appeal. *Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, Inc.*, 134 N.C. App. 468, 473, 518 S.E.2d 28, 32 (1999); *Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 588, 397 S.E.2d 358, 361 (1990). Petitioners' failure to properly cross-appeal any such error waives our consideration of the matter on appeal. *Lewis v. Edwards*, 147 N.C. App. 39, 51, 554 S.E.2d 17, 24-25 (2001).

[5] In the Record on Appeal, the petitioners-appellees raised several additional cross-assignments of error. Rule 28(b)(6) of the Rules of Appellate Procedure restricts our review to questions that are supported by the arguments made in the brief. N.C.R. App. P. 28(b)(6) (2003). *See Smith v. Noble*, 155 N.C. App. 649, 650-51, 573 S.E.2d 719, 720 (2002). Where a party fails to bring forward any argument or authority in their brief to support their assignments of error, those assignments of error are deemed abandoned. N.C.R. App. P. 28(b)(6). Here, petitioners presented no arguments as to these additional cross-assignments of error and thus, the remaining cross-assignments of error are deemed abandoned.

For the reasons discussed herein, the trial court's award of attorney's fees to petitioners under N.C. Gen. Stat. § 6-19.1 and Rule 37(c) are reversed and this matter is remanded to the trial court for entry of an order setting the costs to be assessed against respondents in accordance with section III of this opinion.

REVERSED AND REMANDED.

Chief Judge MARTIN and Judge GEER concur.

NEW COVENANT WORSHIP CENTER AND LONDON EVANGELISTIC MINISTRIES, AS SUCCESSORS AND ASSIGNS OF LAUREL HILL FULL GOSPEL CHURCH, INC., AS SUCCESSORS AND ASSIGNS OF RACHEL'S CHAPEL FREE WILL BAPTIST CHURCH, THROUGH ITS TRUSTEES, HENRY THOMAS LUNCEFORD, ERNEST SPARKS, AND ERNEST ELMORE SPARKS, PLAINTIFFS V. CHARLES WRIGHT, RUTH WRIGHT, AND ALICE OXENDINE, DEFENDANTS

No. COA03-914

(Filed 7 September 2004)

1. Mortgages and Deeds of Trust— reverter clause—fee upon condition subsequent

The trial court erred by granting defendants' counterclaim determining that Laurel Hill New Covenant Worship Center is the legitimate owner of the Rachels Chapel Property based on the enforcement of reverter clauses contained in the 1967 and 1985 deeds, because: (1) unlike a fee simple determinable, there is no automatic reversion in a fee upon a condition subsequent upon the happening of the stated contingency, and the estate continues until the grantor or his heirs exercises the right of reentry or brings a possessory action to terminate the estate; (2) the grantor's heirs had taken insufficient steps to defeat the estate originally granted to the pertinent church, and the heirs could not deed the property to defendants until they took proper steps to terminate the estate originally granted by the grantor to the Rachels Chapel Free Will Baptist Church; and (3) nothing supports the trial court's proposition that a conveyance of property constitutes a re-entry for purposes of terminating a fee simple subject to condition subsequent.

2. Adverse Possession— physical entry—nonpermissive possession—color of title

The trial court did not err by denying plaintiff London Evangelistic Ministries' prayer for relief to quiet title to certain real property in favor of defendants based on the conclusion that plaintiff did not establish title to the pertinent property based on title by more than twenty years of adverse possession or title by more than seven years of adverse possession under color of title, because: (1) plaintiff presented insufficient evidence to show it actually occupied the pertinent property and although a portion of the wing of a new brick building apparently extends onto the pertinent property, such extension does not constitute actual possession of the entire pertinent tract; (3) plaintiff failed to show its

alleged possession was nonpermissive; (4) neither a 1978 nor a 1985 deed of trust served as color of title, and further, the deed cannot qualify as color of title if the grantee knows a deed is fraudulent; and (5) any use of the property was permissive and not adverse.

Appeal by plaintiffs from judgment entered 30 December 2002 by Judge B. Craig Ellis in Superior Court, Scotland County. Heard in the Court of Appeals 18 May 2004.

Van Camp, Meacham & Newman, PLLC, by Michael J. Newman, for plaintiff appellant London Evangelistic Ministries.

W. Philip McRae for defendant appellees.

WYNN, Judge.

Plaintiff London Evangelistic Ministries appeals from judgment of the trial court denying its action to quiet title to certain real property in favor of Defendants Charles Wright, Ruth Wright, and Alice Oxendine. Plaintiff contends the trial court erred by (1) enforcing reverter clauses in the deeds to the property; (2) concluding Plaintiff did not obtain the property by adverse possession; and (3) failing to address issues surrounding a 1985 deed of trust executed by Plaintiff. For the reasons stated herein, we affirm in part and reverse in part the decision of the trial court.

On 3 August 2001, Plaintiff, together with New Covenant Worship Center, filed a verified action pursuant to section 41-10 of the North Carolina General Statutes to quiet title to certain real property located in Scotland County, North Carolina. Defendants counterclaimed, asserting they were the rightful owners of the property at issue. The matter came before the trial court on 4 November 2002. At the hearing, evidence was presented tending to show the following: Sallie W. Jackson owned a certain tract of land ("original tract") on which a wood frame building, commonly referred to as "Rachels Chapel" was located. On 19 September 1967, Jackson conveyed by warranty deed a portion of the original tract, including the wood frame building, to a church congregation known as "Rachels Chapel Free Will Baptist Church." The 1967 deed was recorded in the Scotland County Registry. The 1967 deed contained the following language:

> But this conveyance is made subject to the express condition that the premises herein conveyed shall revert and become the property of the party of the first part or her heirs at any time that said premises shall not be used as a church site by the Rachels Chapel Free Will Baptist Church congregation.

The congregation known as Rachels Chapel Free Will Baptist Church subsequently outgrew Rachels Chapel and approached Jackson with the request she convey another parcel of land in order to erect a larger, more modern church building. On 9 June 1977, Jackson conveyed by warranty deed a second adjacent parcel of the original tract of land to "Jerry Wayne Norton, Billy G. Ledwell, Sr., [and] Henry T. Lunceford, acting in their capacity as Trustees of Rachels Chapel Free Will Baptist Church." The 1977 deed, also duly recorded at the Scotland County Registry, contained no reversion language or other restrictions.

In order to construct a new church building, the trustees of Rachels Chapel Free Will Baptist Church on 23 January 1978 obtained a loan from Richmond Federal Savings and Loan Association in the amount of $38,000.00. The loan was secured by a recorded deed of trust to the two parcels of land. The Rachels Chapel Free Will Baptist Church congregation subsequently built a new brick church building on the parcel of land described in the 1977 deed. A portion of the wing of the new building, however, extended onto the parcel of land described in the 1967 deed. On 17 March 1981, a third party conveyed to the trustees of Rachels Chapel Free Will Baptist Church by warranty deed a third parcel of land, adjacent to the two other parcels.

The parties presented conflicting evidence as to whether the Rachels Chapel Free Will Baptist Church congregation continued to use Rachels Chapel. On 14 January 1985, a group known as "Laurel Hill Full Gospel Church, Inc." was issued articles of incorporation by the North Carolina Secretary of State. The articles of incorporation designated Laurel Hill Full Gospel Church, Inc. as a non-profit corporation organized for the purpose of performing "church and religious activities of Laurel Hill Full Gospel Church, Inc." On 4 May 1985, Laurel Hill Full Gospel Church, Inc. made a payment on the 1978 loan for the new brick building. That same day, the board of directors for Laurel Hill Full Gospel Church, Inc. issued a statement announcing their intent to dissolve the corporation. The statement further noted that "[t]he assets of said corporation have been turned over to the [Plaintiff] as of April 20, 1985. At that time the Board members resigned . . . their positions and turned all responsibility of the church

over to the Board of Directors of the [Plaintiff corporation]." On 9 May 1985, Richmond Federal Savings and Loan Association issued a letter to Plaintiff along with a copy of the note and deed of trust for the original 1978 loan. The letter advised Plaintiff that if it "want[ed] a new note and deed of trust in a different name, [it] would be required to refinance and make a new loan." Plaintiff subsequently paid off the balance of the 1978 loan. The North Carolina Secretary of State issued articles of dissolution to Laurel Hill Full Gospel Church, Inc. on 16 May 1985.

Plaintiff contended at trial it obtained possession of the three tracts of land from Laurel Hill Full Gospel Church, Inc. upon the dissolution. Plaintiff presented evidence of a deed of trust dated 5 December 1985 in the amount of $28,484.00, which was the sum Plaintiff asserted its founder and president, Warren M. London, invested in the brick building. The recorded deed of trust lists the grantors as being "Cecilia Greene, Keith London, Larry M. London and Phyllis London, Trustees of Rachels Chapel Free Will Baptist Church (also called Rachels Free Will Baptist Church)" and pledges as security for the deed of trust the Rachels Chapel property, along with the adjacent tract on which the brick building was located. Cecilia Greene was the wife of Warren London, while the other listed trustees were his sons and daughter-in-law. Plaintiff presented no other evidence, such as bills of sale, warranty deeds or other documents demonstrating a transfer of any assets purportedly owned by Laurel Hill Full Gospel Church, Inc.

Plaintiff approached Jackson at some point during the mid-1980's and received her permission to remove pews from the Rachels Chapel building. On 26 September 1985, Jackson conveyed by non-warranty deed the parcel of land described in the 1967 deed to "Marvin Bullock, John White, [and] Judy Pond acting in their capacity as Trustees of Sandhills Free Will Baptist Church." The 1985 deed contained the following language:

> But this conveyance is made subject to the express condition that the premises herein conveyed shall revert and become the property of the grantor or her heirs at the end of ten years if the property shall not then be used for church purposes for a Free Will Baptist church and shall revert and become the property of the grantor or her heirs at any time after ten years that the premises shall cease being used for church purposes by a Free Will Baptist Church.

> It is agreed that the premises and the building shall be known as Rachels Chapel Church without regard to the name of the Free Will Baptist church which shall be using the premises for church purposes.

The 1985 deed was duly recorded in Scotland County.

After assuming physical possession of the brick church building, Plaintiff advertised and rented the premises to various church congregations of various denominations other than Free Will Baptist. One such group was New Covenant Worship Center, a Christian faith congregation originally founded by Defendants Ruth Wright and Alice Oxendine. New Covenant Worship Center hired as its pastor Howard Mayers, and authorized him to approach Plaintiff to rent the new church building for its place of worship. Plaintiff rented only the main portion of the brick building to New Covenant Worship Center, and not the wing of the building.

In early 2001, the congregation of New Covenant Worship Center discovered Mayers had attempted to use church funds for personal purposes. During a confrontation with Defendants Wright and Oxendine, Mayers asserted the lease he had signed with Plaintiff was in his personal name, and ordered Wright and Oxendine to leave the premises. New Covenant Worship Center discharged Mayers during May of 2001, and his ministerial license was subsequently revoked. A group of individuals consisting primarily of Mayers and his immediate family portrayed themselves as being New Covenant Worship Center for a short period of time after May of 2001 through the commencement of the instant action, but the group thereafter disbanded and abandoned the new church building, which was later rented to another congregation. The remaining church congregation of the original New Covenant Worship Center, including individual Defendants, began calling themselves "Laurel Hill New Covenant Worship Center" to distinguish themselves from Mayers and his followers.

In the summer of 2001, Defendants began searching for a new place of worship. The Rachels Chapel building had meanwhile fallen into disrepair, was filled with refuse, and had become a dumping ground for abandoned automobiles. Defendants contacted Nancy J. Shelley, the daughter of the late Sallie Jackson, and inquired about using Rachels Chapel for their church. On 20 June 2001, Jackson's three daughters, who were also her heirs, and their respective spouses, conveyed the parcel of land described in the 1967 deed to "Alice Oxendine, Lacy Sanderson, and Alice Wright, as the Trustees of

Laurel Hill New Covenant Worship Center." Defendants thereafter contacted Plaintiff and demanded possession of the Rachels Chapel property. Plaintiff subsequently filed the instant action.

Upon conclusion of the evidence, the trial court made detailed findings of fact and concluded that Laurel Hill New Covenant Worship Center was the rightful owner of the Rachels Chapel property, and denied Plaintiff's prayer for relief to quiet title as to that parcel of land. The trial court noted that Defendants had not challenged Plaintiff's possession of the adjacent parcels of land described in the 1977 and 1981 deeds, despite an apparent defective chain of title. The trial court entered judgment accordingly, and Plaintiff appealed.

Plaintiff argues on appeal (1) the reverter clauses contained in the 1967 and 1985 deeds are not enforceable; (2) Plaintiff obtained the Rachels Chapel property through adverse possession; and (3) the 1985 deed of trust gave it possession of the Rachels Chapel property. For the reasons stated herein, we affirm in part and reverse in part the judgment of the trial court.

As an initial matter, we observe that the findings of fact made by a trial court in a bench trial are conclusive on appeal if there is competent evidence to support them, even where there may be evidence to support findings to the contrary. *County of Moore v. Humane Soc'y of Moore Cty.*, 157 N.C. App. 293, 296, 578 S.E.2d 682, 684 (2003). Conclusions of law, by contrast, are entirely reviewable on appeal. *Id.*

[1] Plaintiff argues the trial court erred in enforcing the reverter clauses contained in the 1967 and 1985 deeds because the heirs of Jackson had taken insufficient steps to defeat the estate originally granted by Jackson to Rachels Chapel Free Will Baptist Church. We agree with Plaintiff.

The trial court correctly concluded that the reversion language of the 1985 deed created a fee simple on condition subsequent and that re-entry could be exercised by Sallie Jackson or her heirs. The language of the 1967 deed similarly created a fee upon condition subsequent. A fee upon a condition subsequent is created where the grantor expressly reserves the right to re-enter the property, provides for a forfeiture, for a reversion, or that the instrument shall be null and void. *Mattox v. State*, 280 N.C. 471, 476, 186 S.E.2d 378, 382 (1972); *Brittain v. Taylor*, 168 N.C. 271, 273, 84 S.E. 280, 281 (1915). Here, the 1985 deed provided that "this conveyance is made subject

to the express condition that the premises herein conveyed shall revert and become the property of the grantor or her heirs at the end of ten years if the property shall not then be used for church purposes for a Free Will Baptist church." The earlier 1967 deed made the conveyance "subject to the express condition that the premises herein conveyed shall revert and become the property of the party of the first part or her heirs at any time that said premises shall not be used as a church site by the Rachels Chapel Free Will Baptist Church congregation." Thus, the estates were subject to forfeiture, which could be exercised by Jackson, the grantor, or her heirs, upon the happening of the stated contingency. However, unlike a fee simple determinable, "[i]n a fee upon a condition subsequent, there is no *automatic* reversion upon the happening of the stated contingency . . . ." *Mattox*, 280 N.C. at 476, 186 S.E.2d at 382 (emphasis added); *see also Brittain*, 168 N.C. at 276, 84 S.E. at 282 (providing that, where the conditions subsequent are broken, such does not *ipso facto* produce a reversion of the title, and the estate continues in full force until the proper steps are taken to consummate the forfeiture); *accord*, James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 4-13(b), at 73 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999). Rather, the estate continues until the grantor, or her heirs, exercises the right of re-entry or brings a possessory action to terminate the estate. *Higdon v. Davis*, 315 N.C. 208, 216, 337 S.E.2d 543, 547 (1985) (if a conveyance is of a fee subject to a condition subsequent, the grantor or his heirs must re-enter after breach of the condition in order to terminate the grantee's fee); *Mattox*, 280 N.C. at 476-77, 186 S.E.2d at 382; *Brittain*, 168 N.C. at 276-77, 84 S.E. at 282-83.

In the instant case, neither party presented any evidence that Jackson or her heirs have at any time either (1) re-entered the Rachels Chapel property or (2) brought an action to terminate the continuing estate. Defendants could not perform this task on the heirs' behalf. *See Higdon*, 315 N.C. at 216, 337 S.E.2d at 548 (noting that, "when there is a right of re-entry for condition broken in regard to a fee granted subject to a condition subsequent, that right is exercisable only by the grantor or his heirs"); *Brittain*, 168 N.C. at 276, 84 S.E. at 282-83. The trial court concluded that "the deed from [Jackson's heirs] constituted an exercise of the option of re-entry and vested title in the subject premises in 'Laurel Hill New Covenant Worship Center.' " We have been unable to discover any authority, however, to support the trial court's proposition that a conveyance of property constitutes a "re-entry" for purposes of terminating a fee

simple subject to condition subsequent. Thus, the estate created by the 1967 deed was not terminated by the later 1985 deed by Jackson to Sandhills Free Will Baptist Church or the 2001 deed by Jackson's heirs to Laurel Hill New Covenant Worship Center. The trial court therefore erred in concluding that title to the Rachels Chapel property was vested in Laurel Hill New Covenant Worship Center.

[2] The trial court's erroneous conclusion in this regard, however, does not necessarily mean the trial court erred in denying Plaintiff's motion to quiet title. An action to quiet title to realty pursuant to section 41-10 of the North Carolina General Statutes requires two essential elements: (1) the plaintiff must own the land in controversy, or have some estate or interest in it; and (2) the defendant must assert some claim to such land adverse to the plaintiff's title, estate or interest. N.C. Gen. Stat. § 41-10 (2003); *Wells v. Clayton*, 236 N.C. 102, 107, 72 S.E.2d 16, 20 (1952); *see also Heath v. Turner*, 309 N.C. 483, 488, 308 S.E.2d 244, 247 (1983) (stating that, in an action to quiet title under section 41-10, the plaintiffs bear the burden of proving valid title in themselves). Although the evidence demonstrated that Defendants do not have valid title to the Rachels Chapel property at present, Plaintiff failed to establish its own interest in the property. Plaintiff presented no deed, bill of sale, or other legal document demonstrating rightful title to or interest in the Rachels Chapel property. The statement issued by the board of directors for Laurel Hill Full Gospel Church, Inc., recited merely that the assets of the corporation had been turned over to Plaintiff. The statement did not detail any particular asset owned by Laurel Hill Full Gospel Church, Inc., however. Plaintiff argues it established title to the property based on (1) title by more than twenty years of adverse possession, and (2) title by more than seven years of adverse possession under color of title. We are not persuaded.

Plaintiff failed to establish adverse possession of the Rachels Chapel property on several grounds. First, Plaintiff presented insufficient evidence to show it actually occupied the Rachels Chapel property. "A mere intention on the part of a claimant 'to claim land adversely,' unaccompanied by a physical entry or a taking of possession of the land, will never ripen into title." Webster § 14-4, at 641. As noted by our Supreme Court, adverse possession

> consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its

> present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner.

Locklear v. Savage, 159 N.C. 236, 237-38, 74 S.E. 347, 348 (1912); *see also Walker v. Story*, 253 N.C. 59, 60, 116 S.E.2d 147, 148 (1960) (concluding that, in an action for ejectment, the trial court properly found in favor of the defendant because the plaintiff offered no evidence of possession of disputed land by him or his grantors and thus did not sustain his burden of establishing his superior title to land); *Merrick v. Peterson*, 143 N.C. App. 656, 664, 548 S.E.2d 171, 176 (holding that where the plaintiff never actually possessed the property, her claim of adverse possession could not prevail), *disc. review denied*, 354 N.C. 364, 556 S.E.2d 572 (2001).

Here, the evidence showed and the trial court found that, after the new brick building was built upon the second parcel of land from the original tract, no one used the Rachels Chapel property, and it eventually fell "into disrepair and . . . bec[ame] a dumping ground for old cars and was filled with junk and refuse for many years." Although a portion of the wing of the new brick building apparently extends onto the Rachels Chapel property, such extension does not constitute actual possession of the entire Rachels Chapel tract. *See Carswell v. Morganton*, 236 N.C. 375, 377, 72 S.E.2d 748, 749 (1952) (providing that an adverse possessor of land without color of title cannot acquire title to any greater amount of land than that which he has *actually occupied* for the statutory period).

Second, Plaintiff failed to show its alleged possession of the Rachels Chapel property was non-permissive. *See Lancaster v. Maple St. Homeowners Ass'n*, 156 N.C. App. 429, 436, 577 S.E.2d 365, 371 ("Our Courts have long recognized that the party asserting the adverse possession claim must prove that their taking and possessing the land of another was hostile."), *affirmed per curiam*, 357 N.C. 571, 597 S.E.2d 672 (2003). The trial court found that, even after it assumed physical possession of the brick building in the mid-1980's, Plaintiff "acknowledged the continuing rights of Sallie W. Jackson with regard to Rachels Chapel by asking for and receiving consent from her to remove pews from the Rachels Chapel building." Plaintiff therefore failed to show its possession of the Rachels Chapel property, if any, was hostile for the twenty-year time period.

Plaintiff also failed to prove title to the property under color of title. Adverse possession under color of title consists of an occupancy under a writing purporting 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. *McManus v. Kluttz*, — N.C. App. —, 599 S.E.2d 438 (2004). In order to constitute an effective transfer for purposes of color of title, a transaction must (1) be in writing; (2) purport to pass title; and (3) contain an adequate description of the property transferred. *Foreman v. Sholl*, 113 N.C. App. 282, 287, 439 S.E.2d 169, 173-74 (1994); Monica Kivel Kalo, *The Doctrine of Color of Title in North Carolina*, 13 N.C. Cent. L.J. 123, 141 (1982).

Plaintiff relies upon two transactions to establish color of title. First, Plaintiff argues the 1978 deed of trust establishes color of title. We do not agree. Under a deed of trust, legal title is conveyed to the trustee to hold for the benefit of the lender until the loan is repaid. Webster § 13-1, at 538. Plaintiff was not the trustee on the 1978 deed of trust; indeed, its name does not appear anywhere on the document. As the document does not purport to pass title to Plaintiff, it cannot serve as color of title. Second, Plaintiff contends the 1985 deed of trust serves as valid color of title. Again, we must disagree. The 1985 deed of trust conveyed legal title to Edward Johnston, Jr. as trustee. According to Plaintiff, the loan for which the 1985 deed of trust was secured has never been satisfied. Thus, the 1985 deed of trust, like the 1978 deed of trust, does not purport to convey title to Plaintiff and cannot serve as color of title. It is moreover notable that the 1985 deed of trust lists "Cecilia Greene, Keith London, Larry M. London and Phyllis London, Trustees of Rachels Chapel Free Will Baptist Church (also called Rachels Free Will Baptist Church)" as the grantors. Plaintiff presented no evidence of any connection between these alleged trustees and the original Rachels Chapel Free Will Baptist Church congregation. Cecilia Greene was the wife of the grantee, Warren London, founder and president of Plaintiff corporation, while the other listed trustees were his sons and daughter-in-law. It is well settled that, if the grantee knows a deed is fraudulent, the deed cannot qualify as color of title. *Foreman*, 113 N.C. App. at 290, 439 S.E.2d at 175; Webster § 14-11, at 656.

Finally, the trial court found that any use of the Rachels Chapel property was permissive and not adverse. Any possession under color of title "must be actual, open, hostile, exclusive, and continuous for the required [seven-year] time period." *McManus*, — N.C. App. at

—, 599 S.E.2d at —. We conclude Plaintiff did not acquire title to the Rachels Chapel property by virtue of constructive adverse possession under color of title. We have reviewed Plaintiff's remaining arguments and find them to be without merit.

In summary, we conclude the trial court erred in granting Defendants' counterclaim by determining that the Laurel Hill New Covenant Worship Center is the legitimate owner of the Rachels Chapel property. Jackson's heirs could not deed the property to Defendants until they take proper steps to terminate the estate originally granted by Jackson to the Rachels Chapel Free Will Baptist Church. The decision of the trial court is reversed in this regard. As Plaintiff failed to establish its title to the property, however, the trial court properly denied Plaintiff's prayer for relief to quiet title. The decision of the trial court is hereby,

Affirmed in part and reversed in part.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA v. TIMMY WAYNE SPEIGHT

No. COA03-776

(Filed 7 September 2004)

1. **Indigent Defendants— funds for expert witnesses—insufficient particularized showing**

The denial of funds for medical and accident reconstruction experts for a DWI and second-degree murder defendant was not error where defendant's unsupported assertions showed only a mere hope or suspicion of favorable evidence. Moreover, any alleged error in denying funds for the accident reconstruction expert was not prejudicial because defendant wanted the expert to undermine malice and the jury ultimately acquitted defendant of second-degree murder.

2. **Evidence— consumption of alcohol by driver—observations of officer**

An officer's testimony that a DWI and second-degree murder defendant had consumed sufficient alcohol to be impaired was

admissible because the officer detected the odor of alcohol in the car and on defendant's breath, observed the scene of the collision and its severity, interviewed four or five witnesses, and had been on a traffic enforcement unit for five years.

3. Evidence— motion to suppress—timely and sufficient—other evidence admitted

The denial of a DWI and second-degree murder defendant's motion to suppress the results of an SBI analysis of his blood samples was erroneous but not prejudicial. The State was placed on notice that defendant would seek to suppress this evidence by the inclusion of "any and all blood or breath alcohol level tests" in defendant's amended motion to suppress. Moreover, defendant was not required to file a motion to suppress prior to trial because the blood was seized as the result of a warrantless consent search and the State gave notice of its intent to use the evidence only five days prior to trial rather than the 20 days required by N.C.G.S. § 15A-975(b). However, there was no prejudice because the State introduced evidence of a separate blood analysis performed by the hospital.

4. Witnesses— expert—blood testing and accident reconstruction

There was no error in the admission of expert testimony from the State's accident reconstruction expert and the State's expert on blood testing analysis in a trial for DWI and second-degree murder. Both accident reconstruction and blood testing have been recognized as sufficiently reliable methods of scientific testing, and both witnesses were better qualified than the jury to form an opinion on their respective subjects.

5. Sentencing— aggravating factors—not found by jury—remanded

A defendant's motion for appropriate relief was granted where a jury did not decide the aggravating factors considered by the court in imposing aggravated sentences. Although the State argued harmless error, a case must be remanded for new sentencing when the trial judge errs in a finding in aggravation and imposes a sentence beyond the presumptive.

Appeal by defendant from judgments entered 30 August 2002 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 30 March 2004.

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

Margaret Creasy Ciardella for defendant-appellant.

HUNTER, Judge.

Timmy Wayne Speight ("defendant") appeals from three separate judgments dated 30 August 2002 entered consistent with a jury verdict finding him guilty of two counts of involuntary manslaughter and one count of driving while impaired ("DWI"). As a result of his convictions, defendant was given an active sentence of two consecutive prison terms, with minimum terms of twenty months and corresponding maximum terms of twenty-four months on the involuntary manslaughter convictions and an additional consecutive sentence of twelve months for the DWI conviction. For the reasons stated herein, we conclude there was no prejudicial error at trial, however, we remand for resentencing.

The State's evidence tends to show that defendant was driving a Camaro northbound on Highway 11 in Pitt County, North Carolina. Several witnesses testified that defendant was cutting in and out of heavy rush hour traffic and driving at speeds estimated between sixty and eighty miles per hour. As traffic passed through a stoplight, defendant's car cut in front of another vehicle. Defendant lost control of his vehicle, skidded across the median, hit a pole, and collided head on into a white Buick traveling in the opposite direction with such force that the Buick was flipped upside down. The collision killed both the driver of the Buick, Lynwood Thomas, and his son, Donald Thomas, a passenger in the car.

One of the responding EMS technicians testified that as he was attending to defendant in his car at the scene, the EMS technician detected the odor of alcohol. While defendant was being extracted from his vehicle, Officer M. L. Montayne ("Officer Montayne") of the Greenville Police Department, also detected a slight odor of alcohol inside the Camaro. Officer Montayne also received accounts from four or five witnesses who observed defendant's driving and the resulting collision.

Defendant was transported to a hospital via ambulance, and Officer Montayne followed. At the hospital, Officer Montayne talked with defendant and noted a moderate odor of alcohol on defendant's

breath. Based upon the severity of the collision, the witnesses' observations, and the odor of alcohol in the car and on defendant's breath, Officer Montayne reached the opinion that defendant had consumed sufficient alcohol to appreciably impair his mental and physical faculties and charged defendant with DWI.

After Officer Montayne read defendant his chemical testing rights, defendant signed a form acknowledging he understood those rights and signed a separate form consenting to giving blood samples. Defendant also subsequently signed a form consenting to the release of all of his medical records to the district attorney's office. Blood samples were taken and given to the State Bureau of Investigation ("SBI") for analysis. The SBI analysis revealed defendant had a blood alcohol level of .10 and further analysis showed the presence of THC, a chemical found in marijuana, in defendant's blood. There was also evidence that analysis of defendant's hospital records showed defendant with a blood alcohol level of .11 based on the hospital's testing. At trial, an SBI analyst gave expert testimony that he performed retroactive analysis of both the SBI blood testing and the hospital's blood testing, which would extrapolate defendant's blood alcohol level back to the time of the accident. The results of both extrapolations showed that at the time of the collision, defendant had a .13 blood alcohol level.

Defendant was indicted on two counts of second degree murder and one count of DWI. Prior to trial, defendant moved as an indigent defendant for funds to hire a medical expert and an accident reconstruction expert. The trial court denied both motions. On 21 August 2002, the State filed a motion to allow the State to use defendant's medical records, including "toxicology blood screens and other lab tests." The same day, defendant filed a motion to suppress any evidence of defendant's medical records. The following day, defendant amended his motion to suppress to expressly include a request to suppress "[a]ny and all medical records, ***including but not limited to any and all blood or breath alcohol level tests***." At trial, which began on 26 August 2002, when the State sought to introduce evidence of the SBI blood test analysis, defendant objected, noting his prior motion to suppress medical records. The trial court denied the motion on the grounds that the SBI blood test was not a medical record and that the motion to suppress was not timely filed. The jury acquitted defendant of both counts of second degree murder, but found him guilty of two counts of involuntary manslaughter and one count of DWI.

The issues presented are whether (I) the trial court erred in denying defendant funds to hire experts; (II) Officer Montayne's testimony that in his opinion defendant was impaired was an improper opinion by a lay witness; (III) the trial court committed prejudicial error in denying the motion to suppress as untimely; and (IV) the trial court properly allowed the State to present expert testimony in the fields of accident reconstruction and blood testing.

I.

[1] Defendant first argues that the trial court erred in denying him funds to hire an accident reconstruction expert and a medical expert. We disagree.

"An indigent defendant's right to the assistance of an expert at state expense 'is rooted in the Fourteenth Amendment's guarantee of fundamental fairness and the principle that an indigent defendant must be given a fair opportunity to present his defense.' " *State v. Parks*, 331 N.C. 649, 655, 417 S.E.2d 467, 471 (1992) (quoting *State v. Tucker*, 329 N.C. 709, 718, 407 S.E.2d 805, 811 (1991)). In *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985), the United States Supreme Court "held that when a defendant makes a preliminary showing that his sanity will likely be a 'significant factor at trial,' the defendant is entitled, under the Constitution, to the assistance of a psychiatrist in preparation of his defense." *State v. Moore*, 321 N.C. 327, 335, 364 S.E.2d 648, 652 (1988) (quoting *Ake*, 470 U.S. at 74, 84 L. Ed. 2d at 60). North Carolina courts have subsequently expanded the holding in *Ake* to instances where an indigent defendant has sought the state funded assistance of experts in areas other than psychiatry, but requiring "that such experts need not be provided unless the defendant 'makes a threshold showing of specific necessity for the assistance of the expert' requested." *Id.* (quoting *State v. Penley*, 318 N.C. 30, 51, 347 S.E.2d 783, 795 (1986)).

In *Moore*, the North Carolina Supreme Court further held that:

> In order to make a threshold showing of specific need for the expert sought, the defendant must demonstrate that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it will materially assist him in the preparation of his case.

Id. "In determining whether the defendant has made the requisite showing of his particularized need for the requested expert, the court 'should consider all the facts and circumstances known to it at the

time the motion for . . . assistance is made.' " *Id.* at 336, 364 S.E.2d at 652 (quoting *State v. Gambrell*, 318 N.C. 249, 256, 347 S.E.2d 390, 394 (1986)). "The determination of whether a defendant has made an adequate showing of particularized need lies largely within the discretion of the trial court." *State v. Brown*, 357 N.C. 382, 387, 584 S.E.2d 278, 281 (2003). "While particularized need is a fluid concept determined on a case-by-case basis, ' "[m]ere hope or suspicion that favorable evidence is available is not enough." ' " *Id.* (quoting *State v. Page*, 346 N.C. 689, 696-97, 488 S.E.2d 225, 230 (1997)). "Furthermore, 'the State is not required by law to finance a fishing expedition for the defendant in the vain hope that "something" will turn up.' " *State v. McNeill*, 349 N.C. 634, 650, 509 S.E.2d 415, 424 (1998) (quoting *State v. Alford*, 298 N.C. 465, 469, 259 S.E.2d 242, 245 (1979)).

Defendant in the case *sub judice* relies on both *Moore* and *Parks*, arguing that they are analogous to the present case. Both of those cases are, however, distinguishable. In *Moore*, the defendant moved to be provided funds from which to hire a psychiatrist in order to determine whether he was competent to waive his Miranda rights. *Moore*, 321 N.C. at 334-35, 364 S.E.2d at 651-52. The Supreme Court noted that at the motion hearing defendant made a particularized showing that:

> "(1) Defendant has an IQ of 51;
>
> (2) Defendant's "mental age" is equivalent to that of an eight or nine year old;
>
> (3) Defendant's vocabulary is equivalent to that of a fourth or fifth grade elementary student;
>
> (4) According to expert testimony, defendant cannot understand complicated instructions;
>
> (5) According to family members, defendant could not understand the rights read by Detective Crawford without further explanation;
>
> (6) According to the expert testimony, defendant is easily led and intimidated by others;
>
> (7) According to a friend of defendant, defendant can be "run over" by "anybody";
>
> (8) Defendant's low intelligence level may have rendered him unable to understand the nature of any statement he may have made;

(9) Defendant's mental retardation may have rendered him unable to knowingly waive his rights;

(10) The state's case against defendant was predicated in significant measure on defendant's confession because G. G. could not identify her assailant."

Id. at 336-37, 364 S.E.2d at 652-53. The Supreme Court concluded that this evidence was sufficient to show the defendant had a particularized need for psychiatric expert assistance. *Id.* The *Moore* Court also held that the defendant in that case was entitled to funds for a fingerprint expert where the defendant made five specific verified allegations in support of his motion. *Id.* at 343-44, 364 S.E.2d at 656-57. Likewise, in *Parks*, the defendant placed nine specific facts and circumstances before the trial court, which our Supreme Court concluded were sufficient to establish that his mental health was likely to be a significant factor at trial and the assistance of an expert was reasonably likely to materially assist him in the preparation of his case. *Parks*, 331 N.C. at 657-58, 417 S.E.2d at 472-73.

In this case, with regard to his motion to hire an accident reconstruction expert, defendant alleged no specific facts or circumstances either in his written motion or in his argument before the trial court. Instead, he simply informed the trial court that he desired an accident reconstruction expert to review the State's evidence to see if there was any evidence to undermine the malice element of the second degree murder charges. This undeveloped assertion by defendant is insufficient to establish the particularized showing required to receive state funds for expert assistance. *See State v. Artis*, 316 N.C. 507, 512-13, 342 S.E.2d 847, 851 (1986). Moreover, this was not a case in which the basic facts of the incident were in dispute: defendant was weaving in and out of rush hour traffic at a relatively high rate of speed until he lost control of his car and struck the victims' vehicle head on in the opposite lane of travel. Furthermore, because the jury ultimately found that defendant had not committed second degree murder, any alleged error in the denial of an expert to assess whether defendant had acted with malice was not prejudicial.

With regard to his motion for a medical expert, defendant asserted that he needed an expert to review his medical records to determine (1) whether defendant was able to give valid consent to the blood testing and release of his medical records, and (2) what defendant's state of mind may have been at the time of the accident. Defendant admitted his assertions were "speculation." Again, defend-

ant's unsupported assertions do not establish a sufficiently particularized showing requiring a trial court to grant him state funds with which to hire an expert. They instead show only a mere hope or suspicion that favorable evidence might be turned up. Therefore, the trial court did not err in denying defendant's motions for funds to hire expert witnesses.

II.

[2] Defendant next contends Officer Montayne's testimony that in his opinion defendant had consumed sufficient alcohol to appreciably impair his mental and physical faculties at the time of the collision was inadmissible because it was speculative and lacked a proper foundation. We disagree.

This case is squarely controlled by our Supreme Court's ruling in *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000), which stated:

> "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue."
>
> N.C.G.S. § 8C-1, Rule 701 (1999). Additionally, it is a well-settled rule that a lay person may give his opinion as to whether a person is intoxicated so long as that opinion is based on the witness's personal observation. *State v. Lindley*, 286 N.C. 255, 258, 210 S.E.2d 207, 209 (1974).
>
> [T]his Court has held that "an odor [of alcohol], *standing alone*, is no evidence that [a driver] is under the influence of an intoxicant." *Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 793 (1970). However, in that same case, this Court also stated, "the '[f]act that a motorist has been drinking, when considered in connection with faulty driving . . . or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of [N.C.G.S. §] 20-138.' " *Id.* at 185, 176 S.E.2d at 794 (quoting *State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965)).

Rich, 351 N.C. at 398, 527 S.E.2d at 305-06.

In *Rich*, the almost identical facts of an accident caused by a drunk driver resulted in the deaths of two people. The North Carolina Supreme Court upheld the admission of lay witness opinion testi-

mony by the investigating officer that the defendant was impaired. *See id.* at 398-99, 527 S.E.2d at 306. In that case, the investigating officer not only detected the odor of alcohol on defendant, but also observed the crash scene and observed the defendant at the hospital. *See id.* In addition, the officer interviewed two witnesses to the collision. *See id.*

In the case *sub judice*, Officer Montayne not only detected the odor of alcohol in the car and on defendant's breath, but as in *Rich*, observed the scene of the collision and its severity. He interviewed four or five witnesses who informed him of defendant's cutting in and out of traffic during rush hour at high speed. Moreover, Officer Montayne had been employed by the Greenville Police Department Traffic Safety Unit for five years, and that unit had exclusive responsibility over traffic enforcement in Greenville. Thus, as in *Rich*, Officer Montayne's lay opinion that defendant was impaired was sufficiently based upon his perception of defendant and his observations at the scene of the accident. Therefore, the trial court did not err in admitting this testimony.

III.

[3] Defendant next contends the trial court erred in denying his motion to suppress evidence of the results of the SBI analysis of his blood samples as untimely. We agree, but conclude that denial of this motion to suppress was not prejudicial.

The State first contends that the motion to suppress did not include any reference to the SBI analysis of blood drawn from defendant at the hospital, and thus the State had no notice defendant would seek to suppress this evidence. Defendant, however, specifically amended his pre-trial motion to suppress to include, in bold and italicized print, all medical records "including but not limited to any and all blood or breath alcohol level tests." (Emphasis omitted.) The reference to "any and all blood or breath alcohol level tests" is sufficient to put the State on notice that defendant would seek to suppress any and all blood alcohol testing performed as a result of blood samples taken during his treatment at the hospital following the accident.

Even assuming that the motion to suppress did not include the SBI test results, we nevertheless conclude that defendant's motion to suppress was not untimely even though not filed prior to trial. N.C. Gen. Stat. § 15A-975 provides that generally a motion to suppress evi-

dence in a criminal case must be filed prior to trial. *See* N.C. Gen. Stat. § 15A-975(a) (2003). Where, however, the State has failed to give notice twenty days prior to trial of its intent to use evidence seized as a result of a warrantless search, a motion to suppress may be made at trial. *See* N.C. Gen. Stat. § 15A-975(b).

In this case, blood was seized from defendant as the result of a warrantless consent search and the State did not give notice of its intent to use such evidence until five days prior to trial. Thus, defendant was not required to file a motion to suppress this evidence prior to trial. *See State v. Fisher*, 321 N.C. 19, 27, 361 S.E.2d 551, 555 (1987) (even though defendant had notice that the State had evidence of blood samples seized in a warrantless search, defendant did not have notice of the State's intent to use that evidence).

We nevertheless conclude that denial of the motion to suppress the SBI testing results on this ground did not result in prejudicial error. The State also introduced evidence of analysis performed on the blood samples by the hospital, separate from the SBI analysis. Defendant made no objection to this evidence, thus waiving any assertion of error. The analysis of the hospital testing showed defendant had a blood alcohol level of .11, which witness Glover's retroactive extrapolation to the time of the accident indicated defendant had a blood alcohol level of .13, the same as the results of the retroactive testing on the SBI analysis.[1] Thus, although the trial court erred in denying the motion to suppress on the ground that it was not timely filed, the error was harmless.[2]

IV.

[4] Defendant next contends the trial court erred in admitting the expert testimony of the State's accident reconstruction expert and an SBI expert on blood testing analysis. Defendant contests these witnesses' expertise on two fronts. He argues first that neither witness possessed sufficient expertise in their fields, and second that the trial court failed to take into consideration the reliability of the areas of their expertise.

1. The extrapolation from both samples by Glover was based on the average rate that alcohol is eliminated from the human body. However, Glover also testified that defendant's actual rate of alcohol elimination was consistent with the average alcohol elimination rate.

2. We make no determination as to the substantive merits of defendant's motion to suppress this evidence, because the trial court did not make findings of fact or rule on the merits of the motion to suppress prior to summarily denying the motion on the procedural grounds addressed in this opinion.

" 'The essential question in determining the admissibility of opinion evidence is whether the witness, through study or experience, has acquired such skill that he was better qualified than the jury to form an opinion on the subject matter to which his testimony applies.' " *State v. Tyler*, 346 N.C. 187, 204, 485 S.E.2d 599, 608 (1997) (quoting *State v. Mitchell*, 283 N.C. 462, 467, 196 S.E.2d 736, 739 (1973)). Furthermore, before expert testimony, scientific or otherwise, is admitted into evidence, "the trial court must determine whether the expert's method of proof is sufficiently reliable as an area of expert testimony." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 459, 597 S.E.2d 674, 686 (2004) (citing *State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-40 (1995)); *see Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149, 143 L. Ed. 2d 238, 251 (1999); *State v. Berry*, 143 N.C. App. 187, 202-03, 546 S.E.2d 145, 156 (2001). The trial court is to be given flexibility in what factors to consider when determining the reliability of expert testimony. *See State v. Davis*, 142 N.C. App. 81, 89-90, 542 S.E.2d 236, 241 (2001). Absent new evidence, a trial court need not redetermine in every case the reliability of a particular field of knowledge that is consistently accepted as reliable by our Courts. *Taylor v. Abernethy*, 149 N.C. App. 263, 274, 560 S.E.2d 233, 240 (2002); *see also Howerton*, 358 N.C. at 459, 597 S.E.2d at 687. "[W]ithout discretionary authority trial courts would be unable to avoid 'reliability proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.' " *Davis*, 142 N.C. App. at 90, 542 S.E.2d at 241 (quoting *Kumho Tire Co.*, 526 U.S. at 152, 143 L. Ed. 2d at 253). Accordingly, we review the trial court's decision to admit expert testimony for an abuse of discretion. *See id.*

At the outset, we note that both accident reconstruction, *see State v. Holland*, 150 N.C. App. 457, 463, 566 S.E.2d 90, 94 (2002), and blood testing, *see State v. McDonald*, 151 N.C. App. 236, 239, 565 S.E.2d 273, 275 (2002), have been recognized by this Court as sufficiently reliable methods of scientific testing. Furthermore, both experts testified to their qualifications in their respective fields and our review of the record shows that each had acquired skills to the extent that they were better qualified than the jury to form an opinion on their respective subjects. The State's proffered accident reconstruction expert, Sergeant John Tomer, had been employed with the Highway Patrol for twenty years, had taken classes in collision investigation, and had taught approximately seven classes in accident

reconstruction. The State's blood analysis expert, Paul Glover, holds a masters degree in biology, is a research scientist and chemical specialist with the Forensic Tests for Alcohol Branch of the North Carolina Department of Health and Human Services, and is in charge of evaluating individuals who apply for a permit to conduct blood alcohol analysis. Thus, the trial court did not err in admitting this expert testimony. Accordingly, there was no prejudicial error in defendant's trial.

V.

[5] Finally, defendant has filed a motion for appropriate relief contending the trial court's imposition of a sentence in the aggravated range was done in violation of the Sixth Amendment to the United States Constitution as interpreted by *Blakely v. Washington*, —— U.S. ——, 159 L. Ed. 2d 403 (2004).

> In *Blakely*, the U.S. Supreme Court held that a trial court alone may not impose a sentence in excess of the "statutory maximum," unless either a jury's verdict finds that additional facts, or aggravating circumstances, warrant an increased sentence, or the defendant has waived his Sixth Amendment right to trial by jury. . . . [T]he "statutory maximum" for an offense is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, U.S. at , 159 L. Ed. 2d at 413. The Court further explained "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, —— U.S. at ——, 159 L. Ed. 2d at 413-14.

State v. Allen, 166 N.C. App. 139, 148, 601 S.E.2d 299, 305-06 (2004).

Defendant received two consecutive aggravated sentences of a minimum of twenty and a maximum of twenty-four months for involuntary manslaughter and a consecutive aggravated sentence of twelve months for impaired driving. As the jury did not decide the aggravating factors considered by the trial court, defendant's Sixth Amendment right to a trial by jury was violated. *See Blakely*, —— U.S. at ——, 159 L. Ed. 2d at 412.

Nonetheless, the State argues that under a harmless error analysis, defendant's sentences should be upheld. However, as explained in *State v. Allen*, "[o]ur Supreme Court has definitively stated that when

'the [trial] judge [has] erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing.' " *Allen*, 166 N.C. App. at 149, 601 S.E.2d at 306 (quoting *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983)). Accordingly, we grant defendant's motion for appropriate relief and remand this case to the trial court for resentencing consistent with the holding in *Blakely*.

No prejudicial error in trial; remanded for resentencing.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA v. DAMON DEMOND STAFFORD

No. COA03-760

(Filed 7 September 2004)

1. **Appeal and Error— preservation of issues—failure to argue in brief**

The four assignments of error that defendant failed to argue in his brief are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

2. **Sentencing— resentencing—robbery with dangerous weapon—improper alteration of original**

The trial court erred by amending defendant's sentences on the two charges of robbery with a dangerous weapon after the trial court entered a final judgment and after defendant filed a notice of appeal, and the case is remanded for reinstatement of the judgments entered on 29 November 2001 because the purpose of the resentencing was to alter the original sentence.

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

Although defendant contends the trial court violated his double jeopardy rights by submitting both counts of robbery with a dangerous weapon to the jury where both indictments reference a taking of the same property but name different victims, this assignment of error is overruled because defend-

ant did not object at trial to the submission of both counts on constitutional grounds.

4. Burglary and Unlawful Breaking or Entering; Homicide; Robbery— felony breaking or entering—first-degree murder—robbery with dangerous weapon—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of double first-degree murder, double robbery with a dangerous weapon, and felony breaking or entering, and by denying defendant's motion to set aside the verdict, because: (1) there was sufficient evidence of two killings committed in the perpetration of a robbery to constitute double first-degree murder; (2) in regard to the robbery with a dangerous weapon charges, defendant provided no evidence to refute the account of how the victims' briefcase containing the family's personal property was taken from the house, and the discrepancy of a victim's testimony is a matter properly left for the jury as the fact finders; and (3) in regard to the felony breaking or entering charge, defendant did not provide any evidence to refute the account of how he came to be present inside the victims' house.

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

The short-form murder indictments used to charge defendant with two counts of first-degree murder were constitutional.

Appeal by defendant from judgments entered 29 November 2001 by Judge Beverly T. Beal in Gaston County Superior Court. Heard in the Court of Appeals 15 March 2004.

Attorney General Roy Cooper, by Assistant Attorney General Robert C. Montgomery, for the State.

Leslie C. Rawls for defendant.

TIMMONS-GOODSON, Judge.

Damon Demond Stafford ("defendant") appeals his convictions of two counts of first-degree murder, two counts of robbery with a dangerous weapon, and felony breaking or entering. For the reasons that follow, we conclude that there was no error at trial, but vacate the trial court's order amending defendant's sentence, and remand for resentencing.

The evidence presented at trial tends to show the following: On 13 August 1999, Donald James Hunt ("Mr. Hunt"), his wife Janie Pearl Hunt ("Mrs. Hunt"), and their adult son Donald James Hunt, Jr. ("D.J."), were asleep in their home in Gastonia, North Carolina. Mr. and Mrs. Hunt were sleeping in the bedroom and D.J. was sleeping in the living room. The three were awakened by intruders who announced themselves as the police, and ordered Mr. and Mrs. Hunt out of bed and into the living room. One of the intruders asked D.J. if he drove a black Explorer. D.J. answered in the affirmative and the intruder struck him on the back of the head with a gun. All three victims were instructed at gunpoint to lie on the floor. One of the intruders removed jewelry that D.J. was wearing and took money from D.J.'s pocket. The intruders repeatedly asked D.J. questions such as "Where is the money?" and "Where is the stuff?" to which D.J. replied that he had no drugs and no money other than that which was in his pocket.

The intruders began searching the house and demanded more money. D.J. told them that money could be found upstairs. One of the intruders took Mrs. Hunt with him to the upstairs bedroom where he searched for money. After failing to locate any money, the intruder returned Mrs. Hunt to the living room and the three intruders began threatening to kill the victims. A struggle ensued between D.J., Mr. Hunt and the intruders. The altercation between Mr. Hunt and intruder Devan Lashawn Bynum ("Bynum") progressed into a nearby bedroom. D.J. testified that at that point, defendant walked to the door of the bedroom and began firing a gun into the room. D.J. then saw defendant take a briefcase belonging to the family and run out of the rear door, followed by the third intruder. Mr. Hunt and Bynum died as a result of the gunshot wounds.

At trial, defendant was convicted of two counts of first-degree murder in the deaths of Mr. Hunt and Bynum, two counts of robbery with a dangerous weapon, and breaking or entering. On 29 November 2001, defendant was sentenced to life imprisonment without parole for each count of first-degree murder, seventy-five months to ninety-nine months for each count of robbery with a dangerous weapon, and ten to twelve months for felony breaking or entering. The trial court ordered these sentences to be served consecutively.

Defendant entered a notice of appeal to this Court on 29 November 2001. Eight months later, on 15 July 2002, the trial court reconvened for a "resentencing hearing" at which time the trial court entered "corrected judgment" and commitment worksheets, amend-

ing defendant's sentence to a term of seventy-seven months to 102 months for each count of robbery with a dangerous weapon. Defendant appeals these convictions and amended sentences.

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[1] As an initial matter, we note that defendant's brief contains arguments supporting only five of the original nine assignments of error on appeal. The four 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 presented on appeal are whether the trial court erred by (I) amending defendant's sentences on the charges of robbery with a dangerous weapon after defendant's notice of appeal; (II) submitting both counts of robbery with a dangerous weapon to the jury; (III) denying defendant's motions to dismiss and motion to set aside the verdict; and (IV) proceeding to trial on short-form murder indictments.

[2] In his first assignment of error, defendant argues, and the State concedes, that the trial court erred by amending defendant's sentences on the two charges of robbery with a dangerous weapon after the trial court entered a final judgment, and after defendant filed a notice of appeal.

> The law is well established in this State that
>
> > the [trial] court has inherent power to amend judgments by correcting clerical errors or supplying defects so as to make the record speak the truth. The correction of such errors is not limited to the term of court, but may be done at any time upon motion, or the court may on its own motion make the correction when such defect appears. But this power to correct clerical errors and supply defects or omissions must be distinguished from the power of the court to modify or vacate an existing judgment. And the power to correct clerical errors after the lapse of the term must be exercised with great caution and may not be extended to the correction of judicial errors, so as to make the judgment different from what was actually rendered.

Shaver v. Shaver, 248 N.C. 113, 118, 102 S.E.2d 791, 795 (1958) (citations omitted).

In the case *sub judice*, after hearing penalty phase evidence, the trial court entered findings of aggravating factors for both counts of

robbery with a dangerous weapon. Accordingly, the trial court had the statutory authority to "impose a sentence that is permitted by the aggravated range described in G.S. 15A-1340.17(c)(4)." N.C. Gen. Stat. § 15A-1340.16(b) (2003). Given that robbery with a dangerous weapon is a class D felony, *see* N.C. Gen. Stat. § 14-87 (2003), and that defendant was a prior record level II offender, the authorized aggravated sentence was seventy-seven to ninety-five months. N.C. Gen. Stat. § 15A-1340.17(c)(4) (2003). However, the judgment imposed by the trial court sentenced defendant to a term of seventy-five to ninety-nine months for each count of robbery with a dangerous weapon. This sentence falls within the presumptive range of sixty-one to seventy-seven months. *Id.*

On 15 July 2002, the trial court convened for a resentencing hearing, at which time the judge stated the following:

> In case 99 CRS 29086, the Court found the Defendant had been convicted of robbery with a dangerous weapon of Donald James Hunt, a Class D felony, prior record level II. The Court indicated that . . . aggravating factors were found. The Court did not make any findings in mitigation. At that point the Court sentenced the Defendant to a sentence of not less than 75 nor more than 99 months. That sentence is not from the aggravated range. That sentence is from the presumptive range.
>
> . . . .
>
> So the problem in 99 CRS 29086 is that the Defendant was sentenced in the inappropriate range. Then the Court sentenced the Defendant in regard to robbery with a dangerous weapon of Donald James Hunt, Jr., a Class D felony, prior record level II. The Court indicated that the same aggravating factors that had previously been found in 99 CRS 29087 were also found as to this charge. The Court made no findings in mitigation and did not intend to find and did not find that there were any mitigating factors, and the Court then imposed another sentence of 75 months minimum, 99 months maximum, which also was not in the aggravated range but was in the presumptive range which was not the correct sentencing procedure.

The judge proceeded to increase the sentence for each count of robbery with a dangerous weapon to a term of seventy-seven months to 102 months.

The State has conceded that the trial court was acting under a misapprehension. The State has not argued that the original sentence was error. Thus, we conclude that the purpose of the resentencing was to alter the original sentence from that which was rendered on 29 November 2001. Accordingly, we vacate the trial court's judgments entered on 15 July 2002, and remand this case for the trial court to reinstate the judgments entered on 29 November 2001.

[3] Defendant next assigns error to the trial court for submitting both counts of robbery with a dangerous weapon to the jury where both indictments reference a taking of the same property, but name different victims. Defendant argues that he was unlawfully convicted of both counts of robbery with a dangerous weapon in violation of the laws against Double Jeopardy and in the face of insufficient evidence. We disagree.

As an initial matter, we note, and defendant concedes, that defense counsel did not object to the submission of both counts of robbery with a dangerous weapon to the jury at trial on constitutional grounds. Defendant may not raise the constitutional issue of Double Jeopardy for the first time on appeal. *State v. Scott*, 99 N.C. App. 113, 116-17, 392 S.E.2d 621, 623 (1990), *appeal dismissed and rev. granted by* 327 N.C. 486, 397 S.E.2d 234 (1990), *aff'd in part and rev'd in part by* 331 N.C. 39, 413 S.E.2d 787 (1992). Because defendant failed to raise the Double Jeopardy issue at trial, we decline to review the issue on appeal. We discuss *infra* the question of whether the trial court erred by denying defendant's motions to dismiss the charges of robbery with a dangerous weapon due to insufficient evidence.

[4] Defendant argues that the trial court erred by denying his motions to dismiss all charges and motion to set aside the verdict. We disagree.

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

(1984). Any contradictions or discrepancies in the evidence should be resolved by the jury. *Id.* "The standard of review of a trial court's denial of a motion to set aside a verdict for lack of substantial evidence is the same as reviewing its denial of a motion to dismiss." *State v. Duncan*, 136 N.C. App. 515, 520, 524 S.E.2d 808, 811 (2000) (citing *State v. Young*, 120 N.C. App. 456, 462 S.E.2d 683 (1995)).

In the case *sub judice*, defendant was convicted of five crimes. Upon review, we analyze the sufficiency of the evidence as to each offense.

Defendant was convicted of first-degree murder in the death of Devan Lashawn Bynum. First-degree murder is defined by statute as a "willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon." N.C. Gen. Stat. § 14-17 (2003).

At trial, D.J. testified that the intruders became frustrated when they could not find money in the house, and threatened to kill Mr. Hunt, Mrs. Hunt and D.J. Mr. Hunt, who was lying on the floor, jumped up, grabbed Bynum, and wrestled him into the bedroom. At trial, D.J. described the sequence of events as follows:

A: Stafford was beside me holding my father; but when my father jumped up and grabbed Bynum, Stafford went in the room after him.

Q: Okay. . . . What happened after Stafford went in the other room?

A: I could see him standing right there in the doorway, and then I heard like maybe five or six shots.

Q: Okay. Did you see who was doing the shooting?

A: He was right there in the doorway, yes.

Q: Who was shooting?

A: Stafford.

D.J. testified that he did not see Bynum in the house after the shooting. D.J. then testified that when he saw defendant and the third intruder run out of the house, he retrieved his brother's handgun from a cabinet and ran out of the front door where he observed the three

men running side-by-side down the street. He testified that Bynum was between the other two men.

The Hunts' neighbor, Kathryn Wilson ("Wilson"), testified that after the shooting, she observed three men running down the street. All three were carrying guns, and one was carrying a briefcase. Wilson testified that one of the men was running with a limp.

Bynum's girlfriend, Shamona Brice ("Brice"), testified that at or around 3:00 p.m. on 13 August 1999, she was at her home when her brother came in the house and had clothes in his hand that she recognized as the clothes that Bynum was wearing that day.

Thomas Olofsson ("Olofsson") and Teresa Nolan ("Nolan") were neighbors of defendant's girlfriend at the time. Each testified that mid-afternoon on 13 August 1999, defendant drove a car onto their property with two passengers in the car. Olofsson testified that the passenger in the front seat was "lethargic." Olofsson and Nolan testified that defendant asked Nolan to call 9-1-1 as Olofsson helped to pull the front-seat passenger out of the car. Olofsson testified that he did not notice any injuries on the front-seat passenger, but that there was blood on the seat of the car. Olofsson and Nolan testified that the front-seat passenger was wearing only boxer shorts, which he took off when he got out of the car. Nolan testified that someone then said, "Get back in the car. You have been shot." Nolan, who at this time was calling for an ambulance, testified that "after we called 9-1-1 and got them on the phone [defendant] was like never mind, we'll take him to the hospital."

Reed Moore ("Moore") was a security officer at Carolinas Medical Center in Charlotte, North Carolina. Moore testified that on 13 August 1999 at around 3:30 p.m., he was posted in the emergency room when the following events occurred:

> A: [T]wo gentlemen came into the emergency room. They was [sic] driving a vehicle and pulled up to the front door. They offloaded another individual—one had his feet, and one had his head—and brought him to the emergency room door. I said, "Do you need help?" He had been shot. We carried him to the emergency room and placed him on a bed in the emergency room, and they took out and left out the door.
>
> Q: Did they say anything prior to leaving out of the door?
>
> A: No, they didn't.

Q: Okay. And what happened after that?

A: They got in their car and left.

. . . .

Q: Could you describe the three gentlemen that came in?

A: Okay. Two of the gentlemen—they was [sic] dressed casually, but the third person that was—that had been shot didn't have any clothes on.

Dr. James Michael Sullivan ("Dr. Sullivan"), the pathologist who performed the autopsy on Bynum, testified that Bynum suffered two gunshot wounds, and that one of those gunshot wounds was a fatal injury. Dr. Sullivan pronounced Bynum dead at 3:36 p.m.

We conclude that this is sufficient evidence of a killing committed in the perpetration of a robbery to constitute first-degree murder. Defendant provided no evidence to refute this account of Bynum's death. Therefore, viewing this evidence in the light most favorable to the State, we hold that the trial court properly denied defendant's motion to dismiss the first-degree murder charge in the death of Bynum and the motion to set aside the verdict.

Defendant was also convicted of first-degree murder for the death of Mr. Hunt. Again we highlight D.J.'s testimony about the shooting of his father during the course of the armed robbery, recounted *supra*. Mrs. Hunt testified that after defendant and the two other intruders left the house, she went into the bedroom where Mr. Hunt was lying on the floor. She stated that "[h]e was bleeding and rolling, and he told me to put a pillow under his leg. He couldn't feel his leg." Dr. Peter Whittenberg ("Dr. Whittenberg"), the pathologist who performed the autopsy on Mr. Hunt, later testified that Mr. Hunt suffered four gunshot wounds, and "[t]he cause of death on Mr. Hunt was blood loss or hemorrhaging due to a gunshot wound to the abdomen."

Once again, we conclude that this is sufficient evidence of a killing committed in the perpetration of a robbery to constitute first-degree murder. Defendant provided no evidence to refute this account of Mr. Hunt's death. Therefore, viewing this evidence in the light most favorable to the State, we hold that the trial court properly denied defendant's motion to dismiss the first-degree murder charge in the death of Mr. Hunt and the motion to set aside the verdict.

Defendant was also convicted of robbery with a dangerous weapon of Mr. Hunt. A person is deemed to have committed robbery with a dangerous weapon when that person,

> 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 . . . .

N.C. Gen. Stat. § 14-87 (2003).

At trial, D.J. testified that defendant and two others held him, Mr. Hunt and Mrs. Hunt at gunpoint as they searched the house. D.J. testified that after defendant shot Mr. Hunt, defendant entered the bedroom where Mr. Hunt was lying wounded on the floor, "grabbed the briefcase and ran from the bedroom back through the living room back out the back door." He stated that the briefcase contained documents belonging to each of the family members, including "[c]ar titles, insurance papers, [and] important stuff that the family just kept in the briefcase." Defendant provided no evidence to refute this account of how the briefcase containing the family's personal property was taken from the house. Therefore, viewing this evidence in the light most favorable to the State, we hold that the trial court properly denied defendant's motion to dismiss this charge and motion to set aside the verdict.

Defendant was also convicted of robbery with a dangerous weapon of D.J. At trial, D.J. first testified that another intruder took the money from his pocket, then he testified that he couldn't remember if defendant or the other intruder was the person who took the money from his pocket. Defendant provided no evidence to clarify how D.J.'s money was taken. The State also provided additional evidence on this charge in that, in addition to the money taken from D.J.'s pocket, D.J. also saw defendant remove the briefcase containing his family's personal documents from the house. Therefore, viewing this evidence in the light most favorable to the State, we hold that the trial court properly denied defendant's motion to dismiss the charge of robbery with a dangerous weapon of D.J. as the discrepancy in D.J.'s testimony is a matter properly left for the jury as the finders of fact. We also hold that the trial court properly denied the motion to set aside the verdict.

Defendant's final conviction was for felony breaking or entering. This charge is appropriate where a person "breaks or enters any building with intent to commit any felony or larceny therein." N.C. Gen. Stat. § 14-54 (2003).

> Evidence of a breaking when available is relevant, but the absence of such evidence is not a fatal defect of proof to support a conviction of breaking and entering under G.S. 14-54 where there is proof of entry. Nor is proof of entry where there is proof of breaking necessary to support a conviction on a charge of breaking and entering under the statute.

Blakeney v. State, 2 N.C. App. 312, 317, 163 S.E.2d 69, 72 (1968) (citations omitted).

At trial, Mrs. Hunt testified as follows: "I was asleep; and a noise woke me up; and looking from the bed toward the kitchen and a guy was coming toward me with a gun saying 'Police. Police.' " When asked to elaborate on the noise, Mrs. Hunt said "[j]ust a loud noise like thunder or something—a loud noise. It just woke me up." D.J. testified that he heard "a loud noise like an explosion. . . . It came from the back, but I couldn't see because the kitchen door was shut. . . . I heard someone say, 'Police. Police. Get down.' " He said that at that time a man with a gun walked into the room. Two of the investigating officers testified that when they arrived at the house, "the back door was broken, it wouldn't close anymore," and "the molding around the back door was laying in the floor in front of the back door." Immediately upon entering the house, defendant and the other intruders threatened the victims and demanded money and drugs.

Defendant did not provide any evidence to refute this account of how he came to be present inside the Hunts' house. Therefore, viewing this evidence in the light most favorable to the State, we hold that the trial court properly denied defendant's motion to dismiss and motion to set aside the verdict on this charge.

[5] Defendant's last assignment of error states that the trial court erred by proceeding to trial on short-form murder indictments in violation of defendant's constitutional rights. We disagree.

Our Supreme Court has consistently held that short-form murder indictments are constitutionally sound. *State v. Hunt*, 357 N.C. 257, 278, 582 S.E.2d 593, 607, *cert. denied*, 539 U.S. 985, *petition denied*, 539 U.S. 985 (2003); *see also State v. Wallace*, 351 N.C. 481, 504, 528

S.E.2d 326, 341 (upholding short-form indictment for murder), *cert. denied*, 531 U.S 1018 (2000), *reh'g denied*, 531 U.S. 1120 (2001). Accordingly, we decline to address this assignment of error as it is without merit.

No error in trial, vacate and remand for resentencing.

Judges LEVINSON and THORNBURG concur.

LARRY WOOLARD, PLAINTIFF v. JONATHAN DAVENPORT, INDIVIDUALLY AND JONATHAN DAVENPORT D/B/A DAVENPORT FORD LINCOLN MERCURY, INC., JONATHAN DAVENPORT D/B/A ALLIANCE NISSAN, INC., DAVENPORT FORD LINCOLN MERCURY, INC., AND ALLIANCE NISSAN, INC., DEFENDANTS

No. COA02-1757

(Filed 7 September 2004)

1. **Contracts— business sale—multiple documents and parties—standing to sue**

The trial court erred by granting a dismissal for failure to state a claim for breach of contract in an action arising from the sale of an automobile dealership. The sale was effected with multiple documents and multiple parties and defendant argued that plaintiff lacked standing because he was not a party to two of those documents. However, plaintiff alleged that the entire agreement was fashioned from all of the documents and, moreover, showed that he is a third party beneficiary of the two documents.

2. **Corporations— action by minority shareholders—breach of fiduciary duty**

The trial court erred by granting a dismissal for failure to state a claim for breach of fiduciary duty and unfair and deceptive trade practices arising from the sale of an automobile dealership. No facts on the face of the complaint and attached exhibits necessarily defeated those claims; the Court of Appeals has stated that minority shareholders in a closely held corporation who allege wrongful conduct and corruption by the majority shareholders may bring an individual action against those shareholders as well as a derivative action.

Appeal by plaintiff from orders entered 23 September 2002 and 21 October 2002 by Judge James R. Vosburgh in Martin County Superior Court. Heard in the Court of Appeals 8 October 2003.

Bailey & Dixon, L.L.P., by Patricia P. Kerner and Hannah G. Styron, and Hopkins & Associates, by Grover Prevatte Hopkins, for plaintiff-appellant.

The Twiford Law Firm, P.C., by John S. Morrison and David R. Pureza, for defendants-appellees Jonathan Davenport, individually and d/b/a Davenport Ford Lincoln Mercury, Inc.; Jonathan Davenport d/b/a Alliance Nissan, Inc.; and Alliance Nissan, Inc.

Wayland J. Sermons, Jr., P.A., by Wayland J. Sermons, Jr., for defendant-appellee Davenport Ford Lincoln Mercury, Inc.

ELMORE, Judge.

The dispute giving rise to this appeal concerns the parties' attempt to effectuate the sale of the assets of an automobile dealership, WSB Motor Company, Inc. d/b/a Williamston Motor Company (WSB). Larry Woolard (plaintiff) contends he entered into an enforceable agreement with the following individuals and entities, for the purpose of ultimately transferring to defendant Davenport Ford Lincoln Mercury, Inc. (DFLM) the assets of WSB:[1] Jonathan Davenport (Davenport), both in his individual capacity and d/b/a Davenport Ford Lincoln Mercury, Inc. and d/b/a Alliance Nissan, Inc.; DFLM; and Alliance Nissan, Inc. (Alliance) (collectively, defendants). On 31 May 2000 plaintiff filed his complaint, alleging that certain of defendants' actions in connection with the transaction constituted breach of contract, breach of fiduciary duty, and unfair and deceptive trade practices.

Plaintiff's complaint characterized the parties' agreement as follows:

> 6. The Plaintiff and Defendants entered into several contracts which effectuated the transfer of assets and sale of the Plaintiff's business, [WSB]. . . .

1. Although not specifically alleged in plaintiff's complaint, it is undisputed that plaintiff was president and principal shareholder of WSB at all times relevant to this litigation. WSB is repeatedly characterized as "Plaintiff's business" in the complaint, and, as discussed *infra*, certain of the documents attached as exhibits to the complaint show that plaintiff is president of WSB.

> 7. There was adequate consideration for all the contracts entered into between the parties but only when all the writings are taken together. Each individual writing constitutes a portion of the agreement between the parties. The entire agreement is fashioned in all the writings and therefore they all must be viewed as one contract with several writings evidencing a portion of the agreement.
>
> . . . .

Attached as exhibits to the complaint, and incorporated therein by reference, were the "several writings" that plaintiff alleges "all must be viewed as one contract" and when "taken together" constitute the "entire agreement" between the parties. Defendants assert that two of these documents are of particular importance in the present appeal: Exhibit C (the Sales Agreement), which sets forth such essential terms of the subject transaction as the parties, the assets to be transferred, the purchase price, and the closing date; and Exhibit A (the Management Agreement), which, in addition to identifying the parties, also defines certain rights and obligations of both defendant Davenport and plaintiff in connection with the transaction, both before and after the transaction's completion.

Exhibit C, the Sales Agreement, states by its terms that it "is entered into effective as of February 9, 1999, by and between WSB MOTOR COMPANY, INC., d/b/a WILLIAMSTON MOTOR COMPANY, a North Carolina corporation, hereinafter referred to as 'Seller,' and JONATHAN DAVENPORT, . . . hereinafter referred to as 'Buyer.' " The Sales Agreement goes on to provide that "Seller is the owner of the business known and operated as Williamston Motor Company (the "Business") . . . . Seller desires to sell to Buyer the assets of the Business." The Sales Agreement's signature block indicates it is to be executed on behalf of "Seller" by WSB's president. Plaintiff, therefore, is not a party to the Sales Agreement; instead, the corporate entity WSB is defined as the "seller" of the assets to be acquired in the subject transaction by defendant Davenport.[2]

Nor is plaintiff a party to Exhibit A, the Management Agreement, which by its terms is "entered into by and between WSB Motor

2. The Sales Agreement, as well as other documents attached as exhibits to plaintiff's complaint, evidence defendant Davenport's intent, upon closing, to assign all of his newly-acquired interest in the assets of WSB to defendant DFLM. These documents provide that plaintiff, *inter alia*, is to be a 25% shareholder in DFLM and is to participate in the operation of DFLM, for which plaintiff is to receive a salary and other benefits.

Company, Inc., D/B/A Williamston Motor Company, a North Carolina corporation, . . . and Jonathan Davenport," and was signed by plaintiff in his capacity as WSB's president. Pursuant to the Management Agreement, defendant Davenport "commence[d] service as the principle dealership management officer [of WSB] effective January 25, 1999" pending completion of the subject transaction. The Management Agreement obligated Davenport to "operate the dealership in an ethical and prudent manner . . . and otherwise maintain the goodwill and integrity of the dealership." Plaintiff's complaint alleges, *inter alia*, that defendants, through various acts and omissions, failed to so operate the dealership.

It is, however, undisputed that plaintiff is, and that WSB is not, a party to exhibits D through H attached to plaintiff's complaint. These exhibits include: exhibit D, which granted to defendant Davenport an option to purchase plaintiff's interest in certain real property; exhibit E, which set forth the terms by which defendant DFLM would lease from plaintiff and others the real property upon which the dealership was situated; exhibit F, which set forth the terms of plaintiff's participation in the operation of defendant DFLM; exhibit G, by which defendant DFLM agrees to timely service certain of plaintiff's loans; and exhibit H, a promissory note by which defendant DFLM agreed to make certain payments to plaintiff. In addition to the allegations regarding defendants' operation of the dealership, plaintiff's complaint also alleges that defendants breached various terms of the agreement set forth in exhibits D through H.

Defendants collectively answered plaintiff's complaint on 15 September 2000, denying generally plaintiff's allegations and asserting that plaintiff's complaint should be dismissed for failure to state a claim upon which relief can be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). The affirmative defenses asserted by defendants in their answer did not include failure to join a necessary party, failure to prosecute the action in the name of the real party in interest, or lack of standing by plaintiff.[3] The Rule 12(b)(6) motion contained in defendants' answer did not specify the grounds upon which the motion was premised. At the hearing on defendants' motion to dismiss, defendants argued, apparently for the first time, that because WSB, and not plaintiff, was signatory to the Sales Agreement and the

3. On 13 February 2002, defendant DFLM filed an amended answer, wherein it likewise failed to assert failure to join a necessary party or to prosecute the action in the name of the real party in interest, or plaintiff's lack of standing, as affirmative defenses.

Management Agreement—i.e., two of the several documents alleged in plaintiff's complaint to collectively constitute "one contract" and the parties' "entire agreement"—plaintiff lacked standing to sue on any claims arising from the agreement, and WSB was the real party in interest, in whose name any such claims must be prosecuted.

By order entered 23 September 2002, the trial court dismissed plaintiff's complaint with prejudice pursuant to Rule 12(b)(6), concluding that "the Complaint and the documents attached thereto and incorporated therein disclose facts that necessarily defeat Plaintiff's claims." On 7 October 2002, plaintiff filed a motion to alter or amend the judgment pursuant to N.C. Gen. Stat. § 1A-1, Rules 59(a) and (e) and 60(a) and (b). On 9 October 2002, plaintiff filed a motion to amend his complaint and join, pursuant to N.C. Gen. Stat. § 1A-1, Rules 17(a), 19, 20, and 21, WSB as a party plaintiff. Each of plaintiff's motions were denied by order entered 21 October 2002. Plaintiff now appeals (1) the 23 September 2002 order dismissing his complaint with prejudice for failure to state a claim, and (2) the 21 October 2002 order denying each of his post-judgment motions.

[1] By his first assignment of error, plaintiff contends the trial court erred in dismissing, with prejudice, his claims for failure to state a claim upon which relief may be granted. Plaintiff specifically argues that his claims are not defeated by any facts disclosed on the face of his complaint and the several documents attached thereto as exhibits. After careful review, we agree.

The question presented by a Rule 12(b)(6) motion to dismiss is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted. *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). The effect of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint by presenting the question of whether the complaint's allegations are sufficient to state a claim upon which relief can be granted under any recognized legal theory. *Isenhour v. Hutto*, 350 N.C. 601, 604, 517 S.E.2d 121, 124 (1999). It is well-settled that a plaintiff's claim is properly dismissed under Rule 12(b)(6) when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the claim; (2) the complaint on its face reveals the absence of facts sufficient to make a valid claim; or (3) the complaint discloses some fact that necessarily defeats the claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985). Documents attached as exhibits to the complaint and incorporated therein by reference are properly considered when rul-

ing on a 12(b)(6) motion. *Property Owners Assoc. v. Curran and Property Owners Assoc. v. Williams*, 55 N.C. App. 199, 284 S.E.2d 752 (1981), *disc. review denied*, 305 N.C. 302, 291 S.E.2d 151 (1982).

In the present case, plaintiff asserted claims against defendants for breach of contract, breach of fiduciary duty, and unfair and deceptive trade practices. "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of [the] contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). This Court has held that where the complaint alleges each of these elements, it is error to dismiss a breach of contract claim under Rule 12(b)(6). *Toomer v. Garrett*, 155 N.C. App. 462, 481-82, 574 S.E.2d 76, 91, *disc. review denied*, 357 N.C. 66, 579 S.E.2d 576 (2003).

Despite the trial court's conclusion to the contrary, we fail to discern any fact disclosed on the face of the complaint or the documents attached thereto which necessarily defeats plaintiff's claim for breach of contract. Plaintiff alleges the existence of an agreement to effectuate the transfer of WSB's assets to defendants, and attaches to the complaint a copy of the several individual writings of which the complaint alleges "[e]ach . . . constitutes a portion of the agreement between the parties. The entire agreement is fashioned in all the writings and therefore they all must be viewed as one contract with several writings evidencing a portion of the agreement." Plaintiff's complaint also contains allegations which, if taken as true, are sufficient to allege breach of this agreement.

We are not persuaded by defendants' argument that because plaintiff is not a party to two of these *individual* writings, plaintiff either lacks standing or is not the proper party to prosecute a claim for breach of the *entire* agreement. While the trial court's order does not specify which facts disclosed on the face of the complaint and attached exhibits it concluded "necessarily defeat Plaintiff's claims" for breach of contract, the parties have focused their appellate arguments on the fact that plaintiff is not a party to *two* of the several individual contracts which plaintiff alleges, when taken together, are supported by adequate consideration and constitute the entire agreement between the parties—namely, exhibit A, the Management Agreement, and exhibit C, the Sales Agreement.

First, it is undisputed that plaintiff is a party to the five individual writings attached to the complaint as exhibits D through H. Plaintiff's complaint alleges that (1) exhibits D through H each set forth various terms of the parties' agreement to effectuate the sale of

WSB's assets, and, when taken together with exhibits A and C, collectively set forth the terms of the entire agreement and are supported by adequate consideration; and (2) defendants breached this agreement by, *inter alia*, violating many of the terms set forth in exhibits D through H. As discussed *supra*, plaintiff has therefore alleged each element of breach of contract, *see Poor*, 138 N.C. App. at 26, 530 S.E.2d at 843, such that dismissal of this claim under 12(b)(6) is error. *See Toomer*, 155 N.C. App. at 481-82, 574 S.E.2d at 91.

Second, our Supreme Court has stated that for purposes of reviewing a 12(b)(6) motion made on the grounds that the plaintiff lacked standing, "[a] real party in interest is a party who is benefitted or injured by the judgment in the case. An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject-matter of the litigation." *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (quoting *Parnell v. Insurance Co.*, 263 N.C. 445, 448-49, 139 S.E.2d 723, 726 (1965)). In the present case, plaintiff's complaint specifically alleges that (1) his claims are predicated upon the *entire* agreement, which is the subject matter of the litigation; (2) *he* has a substantial interest in this subject matter; and (3) *he* stands to either benefit, or suffer injury, from any judgment ultimately rendered on his claims, as evidenced by the following portion of his pleading:

> 31. Integral to the entire transaction, all of the documents, all of the contracts and all of the negotiations between the parties was the Plaintiff's desire to honorably discharge certain indebtedness due to creditors in a timely and regular manner.
>
> 32. [DFLM] undertook to discharge these obligations and provide an income stream to the Plaintiff for the discharge . . . .
>
> 33. [DFLM], by and through its agents and directors Davenport, Lattermore and Edwards, have conspired to frustrate the intent and completion of this critical consideration as hereinabove set out and the transfer of properties; such action being civil conspiracy and an unethical and deceitful practice in trade and commerce.
>
> 34. Davenport, Lattermore and Edwards have actively or by inattention and improper supervision and management of the corporate affairs, permitted unwarranted and inappropriate erosions to the corporate economy and trade practices which jeopardized

> the solidity of the corporation directly and the bargained for result of the Plaintiff.

Accordingly, we are not persuaded by defendants' argument that plaintiff is not the proper party to prosecute a claim for breach of contract on these facts.

Finally, even ascribing *arguendo* any significance to the fact that plaintiff was not a party to either the Management or Sales Agreements, we are unable to conclude that the disclosure of these facts on the face of the complaint and the exhibits attached thereto constitutes an "insurmountable bar to recovery" on plaintiff's breach of contract claims such that these claims are properly dismissed under Rule 12(b)(6). *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970) (stating Rule 12(b)(6) "generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery"). Our appellate courts have previously stated that "[t]o withstand a motion to dismiss for failure to state a claim in a breach of contract action, a plaintiff's allegations must either show it was in privity of contract, or it is a *direct beneficiary* of the contract." *Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*, 143 N.C. App. 1, 8, 545 S.E.2d 745, 750, *aff'd*, 354 N.C. 565, 556 S.E.2d 293 (2001) (emphasis added). In North Carolina, a third party beneficiary to an agreement may properly maintain an action for its breach, where the agreement is made for the third party's direct benefit and the benefit accruing to him is not merely incidental. *Carding Developments, Inc. v. Gunter & Cooke*, 12 N.C. App. 448, 454-55, 183 S.E.2d 834, 838 (1971). Moreover, "[a] party to a contract is ordinarily not a necessary party in a suit brought against the other contracting party by a beneficiary who claims the contract has been breached." *Id.* at 452, 183 S.E.2d at 837.

In the present case, plaintiff's complaint does not specifically allege that he was a third party beneficiary with respect to either the individual Management or Sales Agreements. However, we conclude that plaintiff, by the allegations of his complaint as set forth above and by the facts disclosed on the face of the exhibits attached thereto, has shown that he is a third party beneficiary to both the Management and Sales Agreements *individually*, as well as a direct party to the parties' *entire* agreement, of which the Management and Sales Agreements are but a part. As such, plaintiff is a proper party to maintain an action for breach of the parties' agreement, and while WSB may also be a proper party to do so, WSB is not a *necessary* party to the maintenance of such an action.

We hold that no facts disclosed on the face of the complaint and attached exhibits either necessarily defeat, or prove an insurmountable bar to plaintiff's claims for breach of contract.

[2] Plaintiff also asserted claims against defendants for breach of fiduciary duty and unfair and deceptive trade practices, which claims were also dismissed under Rule 12(b)(6) by the trial court's order. As with the breach of contract claim, we fail to discern any fact disclosed on the face of the complaint or the documents attached thereto which necessarily defeats these claims.

This Court has previously stated that "*minority shareholders* in a closely held corporation who allege wrongful conduct and corruption against the majority shareholders in the corporation may bring an *individual* action against those shareholders, in addition to maintaining a derivative action on behalf of the corporation." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 405, 537 S.E.2d 248, 259 (2000) (emphasis added), *disc. review denied*, 353 N.C. 378, 547 S.E.2d 14 (2001). In *Norman*, the plaintiffs, who were minority shareholders in a corporation, asserted claims against the individual majority shareholders for, *inter alia*, breach of fiduciary duty and unfair and deceptive trade practices. The trial court dismissed the plaintiffs' complaint under Rule 12(b)(6), on the grounds that their claims were derivative in nature and plaintiffs therefore lacked standing to prosecute the claims. This Court reversed, reasoning that

> [i]t seems particularly appropriate to allow minority shareholders to file individual actions when a dispute arises within the context of a family owned corporation, or other corporation in which all shares of stock are held by a relatively small number of shareholders . . . . When the close relationships between the shareholders in a "family" or closely held corporation tragically break down, the majority shareholders are obviously in a position to exclude the minority shareholders from management decisions, leaving the minority shareholders with few remedies.

Norman, 140 N.C. App. at 404, 537 S.E.2d at 258.

In the present case, with respect to the ownership of shares in defendant DFLM and the respective participation of defendant Davenport and plaintiff therein, plaintiff's complaint alleges as follows:

> 2. Defendant Davenport . . . on information and belief, is the major and dominating stockholder and President of Defendant [DFLM] and Defendant [Alliance] . . . .
>
> . . .
>
> 4. The Defendant [DFLM] is a corporation organized by Defendant Davenport as his alter ego for the purpose of running Williamston Motor Company, the Plainitff's automobile dealership. Defendant Davenport, as the alter ego of said corporation, is and has been conducting, managing, and controlling the affairs of [DFLM] since its incorporation . . . as though it were his own business . . . .
>
> . . .
>
> 39. On information and belief, Willie Edwards and George Lattermore are stockholders of [DFLM] . . . .
>
> . . .
>
> 42. The corporation [DFLM], since its inception . . . has not held a Board of Directors Meeting or a Shareholder's Meeting of which the Plaintiff is aware; therefore, as twenty-five percent (25%) Shareholder and Treasurer of [DFLM], the Plaintiff has not been allowed to participate in the business transactions of the corporation.

The complaint further alleges that defendant Davenport, acting in concert with Lattermore and Edwards, the other two shareholders in DFLM, committed a series of acts and omissions which resulted in diversion of corporate funds and opportunities from DFLM, and by which plaintiff, as the remaining shareholder in DFLM, suffered harm. We conclude that plaintiff's complaint alleges claims for breach of fiduciary duty and unfair and deceptive trade practices which are sufficient to survive a 12(b)(6) motion. Moreover, our Supreme Court has stated that:

> there are two major, often overlapping, exceptions to the general rule that a shareholder cannot sue for injuries to his corporation: (1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder, and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders.

Barger v. McCoy Hillard & Parks, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997). As noted *supra*, plaintiff's complaint further alleges that defendants' conduct caused him to suffer harm separate and distinct from that suffered by DFLM, in the form of, *inter alia*, diminished income stream and failure to repay certain of plaintiff's personal indebtedness.

We hold that no facts disclosed on the face of the complaint and attached exhibits either necessarily defeat, or prove an insurmountable bar to plaintiff's claims for breach of fiduciary duty or unfair and deceptive trade practices.

In sum, we reverse the trial court's order dismissing, with prejudice, plaintiff's complaint for failure to state a claim upon which relief may be granted, and remand this matter to the trial court for further proceedings not inconsistent with this opinion. In light of our resolution of this issue, we do not reach plaintiff's assignments of error regarding the trial court's denial of his post-judgment motions.

Reversed.

Judges TIMMONS-GOODSON and HUDSON concur.

STATE OF NORTH CAROLINA v. LEVAR JAMEL ALLEN

No. COA03-1369

(Filed 7 September 2004)

1. Evidence— cause of child's injuries—testimony by physician's assistant

The testimony of a physician's assistant who treated a child abuse victim about the cause of the child's injuries was properly admitted based upon the witness's 27 years of experience. Moreover, there is no record that defendant requested voir dire and no authority mandating voir dire without such a request.

2. Child Abuse and Neglect— felonious child abuse—burning—evidence sufficient

A motion to dismiss a charge of felonious child abuse inflicting serious bodily injury for insufficient evidence was correctly denied where defendant is the child's father and was supervising

him on the day the injuries were inflicted; they were at home alone; the child was 10 months old; a physician's assistant testified that the child's burns were caused by someone holding a hot object on the child; a burn on the child's hand was severe enough for a skin graft and a week in the hospital; he had trouble crawling due to burns on his hands and feet; and he remained unable to use a finger on his burned hand one year later.

3. Constitutional Law— speedy trial—delay not purposeful or oppressive

The denial of a speedy trial motion was not error where defendant did not present any evidence that the delay of thirteen months between arrest and trial was purposeful or oppressive or could have been avoided by reasonable effort by the prosecutor.

4. Evidence— child abuse—baby bottle

A baby bottle was correctly admitted in a prosecution for felonious child abuse where there was testimony that the child's burns were round and inconsistent with the curling iron which defendant contended was the accidental cause of the injuries. Defendant did not show that the probative value was substantially outweighed by the danger of unfair prejudice.

5. Discovery— child abuse—sealed DSS file—no exculpatory evidence

The trial court did not err in a prosecution for felonious child abuse by ruling that a DSS file did not contain exculpatory evidence. The Court of Appeals reviewed the sealed records and found nothing favorable to the accused or material to the charges at issue in this case.

6. Sentencing— aggravating factors—found by judge

A motion for appropriate relief was granted by the Court of Appeals and the case was remanded for resentencing where the trial court unilaterally found the existence of an aggravating factor and thereupon sentenced defendant in the aggravated range. N.C.G.S. § 15A-1340.16.

Appeal by defendant from judgment dated 31 January 2003 by Judge J. Gentry Caudill in Gaston County Superior Court. Heard in the Court of Appeals 9 June 2004.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Granberry Corbett, for the State.

Richard E. Jester for defendant-appellant.

BRYANT, Judge.

Levar Jamel Allen (defendant) appeals a judgment dated 31 January 2003 entered consistent with a jury verdict finding him guilty of felonious child abuse inflicting serious bodily injury.

The State's evidence tended to show the following: On 7 November 2001, B.K.C. (the mother) lived with her 10-month-old child, and defendant (the child's father). Around 1:00 p.m., B.K.C. went to work and left the child in defendant's care. At about 4:15 p.m., defendant called B.K.C. at work, screaming and yelling that the child had been burned. Defendant said that B.K.C. had left her curling iron on in the bathroom and the child had burned himself when he somehow pulled the curling iron down from the bathroom counter. B.K.C. left work and arrived home around 5:00 p.m.

When B.K.C. arrived home, defendant opened the door and was standing there with a diaper bag packed. B.K.C. found the child lying on the bed. The child appeared in shock, shaking, and scared. B.K.C. discovered that defendant had put ointment on the burn in the child's hand and had covered that burn using a homemade bandage. Defendant helped B.K.C. and the child into the car, but did not go to the hospital with them. At the hospital, B.K.C. removed the child's clothing and found round burns on the child's stomach and knee, in addition to the burn she previously discovered on his hand. The burns were treated and the child was released that day.

At the treating physician assistant's request, B.K.C. later took the child to be seen by a plastic surgeon, and on 4 December 2001, a skin graft was performed on the child's hand. The child was in the hospital for one week following the skin graft. Thereafter, the child had trouble crawling due to the burns on his hand and knee. Approximately one year later (January 2003), the child remained unable to use the pinky finger on that hand, and had visible scars on his knee.

At trial, Thomas McLaughlin, P.A. testified that he was the physician's assistant who treated the child's burns on 7 November 2001. McLaughlin had approximately 27 years experience as a physician's assistant and had worked at the hospital emergency room for six

years. Previously, he had worked in the emergency room at the University Hospital in Charlotte, where his duties included the diagnosis and treatment of illnesses, injuries and wounds. During the course of his career, he maintained the required annual 100 hours of continuing medical education (most in emergency room treatment), and had treated thousands of patients, including numerous patients with varying degrees of burns.

McLaughlin found that the child had either second or third degree burns on the palm of his hand, wrist, stomach, and knee. Based on the severity of the burn to the hand, he referred the child to a plastic surgeon. McLaughlin also reported the incident to the Gaston County Department of Social Services (DSS).

McLaughlin opined that the burns were inconsistent with a burn suffered from grabbing a curling iron as the burns were round and not linear in shape. Based on the severity of the burns and the belief that a person would not hold on to a hot object long enough to cause burns that deep, McLaughlin concluded that the burns were caused by someone holding an object on the child. McLaughlin also concluded that the burns were most likely caused by a round object.

At trial, defendant testified, denying allegations that he intentionally injured the child. He also testified that he was very upset at police and DSS efforts to interrogate him. He did, however, accept responsibility for the accidental burning, acknowledging that if he had been more vigilant in watching the child, the injury would not have occurred.

The issues on appeal are whether the trial court erred in: (I) permitting Thomas McLaughlin, P.A. to testify as to the cause of the child's injuries; (II) failing to dismiss the charge; (III) denying defendant's motion to dismiss for lack of a speedy trial; (IV) admitting State's exhibit 32 (a baby bottle) into evidence; (V) its ruling that the DSS file did not contain exculpatory evidence; and (VI) imposing a sentence in the aggravated range in violation of the Sixth Amendment and *Blakely v. Washington.*

I

[1] First, defendant argues that the trial court erred in permitting Thomas McLaughlin, P.A. to testify as to causation of the child's injuries in that he was not properly qualified as an expert, the defendant was not allowed to *voir dire* him as to experience,

and McLaughlin did not have the requisite training to give causation testimony.

Our Supreme Court has held that " '[w]hether the witness has the requisite skill to qualify him as an expert is chiefly a question of fact.' " *State v. Zuniga*, 320 N.C. 233, 252, 357 S.E.2d 898, 911 (1987) (citation omitted). "[T]he trial court's decision concerning whether or not a witness has qualified as an expert is ordinarily within the court's sound discretion," *Maloney v. Wake Hosp. Sys.*, 45 N.C. App. 172, 175, 262 S.E.2d 680, 689 (1980) (citing *Edwards v. Hamill*, 266 N.C. 304, 145 S.E.2d 884 (1966)), and will not be disturbed unless the decision is not supported by the evidence, *Zuniga*, 320 N.C. at 252, 357 S.E.2d at 911. In addition, it is not necessary that an expert be a specialist or even licensed in a specific profession to provide expert testimony on the subject at issue. *See Zuniga*, 320 N.C. at 252, 357 S.E.2d at 911; *State v. Evangelista*, 319 N.C. 152, 163-64, 353 S.E.2d 375, 383-84 (1987) (citing *State v. Phifer*, 290 N.C. 203, 225 S.E.2d 786 (1976)); *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984).

Here, McLaughlin testified that he had approximately 27 years experience as a physician's assistant and had worked at the hospital emergency room for six years. Previously, he had worked in the emergency room at the University Hospital in Charlotte, where his duties included the diagnosis and treatment of illnesses, injuries and wounds. During the course of his career, he maintained the required annual 100 hours of continuing medical education (most in emergency room treatment), and had treated thousands of patients, including numerous patients with varying degrees of burns.

Significant evidence supports the trial court's decision to qualify McLaughlin as an expert witness. In addition, the record is void of any evidence that defendant requested to *voir dire* the witness; and our Court has been unable to locate any authority mandating *voir dire* particularly absent request by one of the parties. This assignment of error is overruled.

II

[2] Second, defendant argues that the trial court erred in failing to dismiss the charge.

A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. 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. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all 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).

N.C. Gen. Stat. § 14-318.4(a3) defines felony child abuse inflicting serious bodily injury as:

> A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class C felony. "Serious bodily injury" is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

In the instant case, the State's evidence tended to show that defendant is the child's father and he was supervising the child on the day the injuries were inflicted. They were home alone. The child was 10 months old at that time. McLaughlin testified that the burns were caused by someone (intentionally) holding a hot object on the child. In addition, the second or third degree burn to the child's hand was severe enough that McLaughlin had to refer the child to a plastic surgeon for treatment.

On 4 December 2001, a skin graft was performed on the child's hand. The child was in the hospital for one week following the skin graft. Thereafter, the child had trouble crawling due to the burns on his hand and knee. Approximately one year later (January 2003), the child remained unable to use the pinky finger on that hand, and had visible scars on his knee.

There is sufficient evidence as to each element of the offense charged and that defendant was the perpetrator of the offense. This assignment of error is overruled.

III

[3] Third, defendant argues that the trial court erred in denying his motion to dismiss for lack of a speedy trial in violation of the Sixth Amendment of the United States Constitution and Article I, Section 18 of the North Carolina Constitution.

> In *Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117, 92 S. Ct. 2182 (1972), the United States Supreme Court identified four factors "which courts should assess in determining whether a particular defendant has been deprived of his right" to a speedy trial under the federal Constitution. These factors are: (i) the length of delay, (ii) the reason for the delay, (iii) the defendant's assertion of his right to a speedy trial, and (iv) whether the defendant has suffered prejudice as a result of the delay. *See id.*; *see also State v. Flowers*, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150, 118 S. Ct. 1094 (1998). We follow the same analysis when reviewing such claims under Article I, Section 18 of the North Carolina Constitution. *See Flowers*, 347 N.C. at 27, 489 S.E.2d at 406; *State v. Jones*, 310 N.C. 716, 721, 314 S.E.2d 529, 532-33 (1984).

State v. Grooms, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000). Defendant bears the burden of showing that the delay was caused by the neglect or willfulness of the prosecution. *Id.*; *see also State v. Johnson*, 275 N.C. 264, 273, 167 S.E.2d 274, 280 (1969) ("The proscription is against purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort.").

There was a total of thirteen months between the time of defendant's arrest and the time of trial. During this time, defendant was arrested in South Carolina in December 2001. He was extradited to North Carolina and placed in custody at Gaston County jail in January 2002, and arraigned in February 2002. His first public defender moved out of state in July 2002, and another public defender was appointed. The second public defender was released due to a conflict of interest, and a third public defender was appointed.

The third public defender filed a bond reduction motion and that matter came for hearing in September 2002. At that hearing, the public defender requested the case be set for trial. The prosecutor assigned to the case had another murder trial set for October 2002 and could not schedule this case until November 2002; however, the

November court session was unavailable as another murder trial was scheduled with a different prosecutor.

Defendant filed his motion to dismiss for lack of a speedy trial in November 2002, and the motion was heard in December 2002. As of the date of hearing on this motion, the case was tentatively scheduled for hearing in January 2003. The case came for hearing in January 2003, as tentatively scheduled.

Defendant has failed to present any evidence that the delay was "purposeful or oppressive" or could have been avoided by reasonable effort by the prosecutor, *see Johnson*, 275 N.C. at 273, 167 S.E.2d at 280, or caused by neglect, *Grooms*, 353 N.C. at 62, 540 S.E.2d at 721. This assignment of error is overruled.

IV

[4] Fourth, defendant argues that the trial court erred in admitting State's exhibit 32 (a baby bottle) over the defendant's objection because the exhibit was not relevant evidence.

Rule 401 defines relevant evidence as such "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2003). Rule 403 restricts the admission of relevant evidence by stating that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (2003).

Here, the defendant alleged that the burns were caused when the child pulled a hot curling iron off of the bathroom counter. The State, however, offered testimony from McLaughlin that the burns were round and not lineal in shape; therefore, the burn marks were inconsistent with the pattern that would be caused by a curling iron. The State introduced a baby bottle as demonstrative evidence of the type of baby bottle found on the stove in the home, and asked McLaughlin whether the burns could have been caused by a baby bottle. McLaughlin replied that the burn pattern was consistent with a round object, which could include a baby bottle. Over defendant's objection, the trial court specifically found this demonstrative evidence was admissible pursuant to Rule 401.

We conclude that State's exhibit 32 was relevant evidence in that testimony was introduced that the burns were round in shape, and

inconsistent with a burn pattern caused by a curling iron. Defendant has not shown that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. This assignment of error is therefore overruled.

V

[5] Fifth, defendant argues that the trial court erred in its ruling that the DSS file did not contain any exculpatory evidence.

> A defendant who is charged with . . . abuse of a minor has a constitutional right to have the records of the child abuse agency that is charged with investigating cases of suspected child abuse, as they pertain to the prosecuting witness, turned over to the trial court for an in camera review to determine whether the records contain information favorable to the accused and material to guilt or punishment. If the trial court conducts an in camera inspection but denies the defendant's request for the evidence, the evidence should be sealed and "placed in the record for appellate review." 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.

State v. McGill, 141 N.C. App. 98, 101-02, 539 S.E.2d 351, 355 (2000) (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.' " *Id.* at 102, 539 S.E.2d at 355 (citations omitted). " 'Evidence is material only if 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.' " *Id.* at 103, 539 S.E.2d at 356 (citations omitted).

We have reviewed the sealed DSS records and found no favorable or material evidence relating to the charges at issue in this case. This assignment of error is overruled.

Motion for appropriate relief

[6] In defendant's subsequent motion for appropriate relief, defendant argues that the trial court's imposition of a sentence in the aggra-

vated range (the offense was especially heinous, atrocious and cruel) was done in violation of the Sixth Amendment to the U.S. Constitution and *Blakely v. Washington*, — U.S. —, 159 L. Ed. 2d 403 (2004).

In *Blakely*, the U.S. Supreme Court held that a trial court alone may not impose a sentence in excess of the "statutory maximum," unless either a jury's verdict finds that additional facts, or aggravating circumstances, warrant an increased sentence, or the defendant has waived his Sixth Amendment right to trial by jury. The *Blakely* Court based its holding on its previous holding in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, — (2000): " 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be presented to a jury, and proved beyond a reasonable doubt.' " *Blakely*, — U.S. at —, 159 L. Ed. 2d at 412. The *Blakely* Court held that the "statutory maximum" for an offense is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, — U.S. at —, 159 L. Ed. 2d at 413. The Court further explained that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, — U.S. at —, 159 L. Ed. 2d at 413-14.

In the case *sub judice*, the trial court imposed a sentence in the aggravated range pursuant to N.C. Gen. Stat. § 15A-1340.16, which reads in pertinent part:

> (a) Generally, Burden of Proof.—The court shall consider evidence of aggravating . . . factors present in the offense that make an aggravated . . . sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists . . . .
>
> (b) When Aggravated . . . Sentence Allowed.—If the court finds that aggravating . . . factors exist, it may depart from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If the court finds that aggravating factors are present and are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range described in G.S. 15A-1340.17(c)(4). . . .

> (c) Written Findings; When Required.—The court shall make findings of the aggravating . . . factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). Findings shall be in writing. The requirement to make findings in order to depart from the presumptive range applies regardless of whether the sentence of imprisonment is activated or suspended.

N.C.G.S. § 15A-1340.16 (2003).

The *Blakely* Court analyzed the following portions of the 2000 Washington Criminal Code:

> A judge may impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence." § 9.94A.120(2). The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. § 9.94A.390. Nevertheless, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense." *State v. Gore*, 143 Wn. 2d 288, 315-316, 21 P. 3d 262, 277 (2001). When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. § 9.94A.120(3).

Blakely, —— U.S. at ——, 159 L. Ed. 2d at 411.

The portion of North Carolina's criminal sentencing statute applicable to the case *sub judice* appears substantially similar to the portion of Washington's criminal sentencing statute analyzed in *Blakely*. We therefore conclude the reasoning of *Blakely* applies to our criminal sentencing statute (N.C. Gen. Stat. § 15A-1340.16) as well.

We note that the State, in its response to defendant's motion for appropriate relief, concedes the trial court's sentencing of defendant in the aggravated range "[u]nder the ruling in *Blakely*, . . . constitutes a violation of defendant's constitutional rights." The State, however, "contends that any violation of defendant's constitutional right in this case was harmless error and therefore defendant is not entitled to have his sentence vacated."

Our Supreme Court has definitively stated that when "the [trial] judge [has] erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing." *State v. Ahearn*, 307 N.C. 584, 602, 300

S.E.2d 689, 701 (1983). In the case *sub judice*, it is undisputed that the trial judge unilaterally found the existence of an aggravating factor and, thereupon, sentenced defendant in the aggravated range. The State's argument, when viewed in light of the ruling articulated in *Ahearn*, must fail, as this Court should properly remand the case for resentencing. Accordingly, we grant defendant's motion for appropriate relief and remand this case to the trial court for resentencing consistent with the holding in *Blakely*.

No error in trial; remanded for resentencing.

Judges TYSON and STEELMAN concur.

DAVID L. LINCOLN ET UX, JANICE Y. LINCOLN, PLAINTIFFS V. NANCY BUECHE, JASON FORBES, 1ST CHOICE REALTY OF GREENSBORO, INC., D/B/A RE/MAX 1ST CHOICE, AND COUNTY OF GUILFORD, DEFENDANTS

No. COA03-750

(Filed 7 September 2004)

1. Costs— voluntary dismissal—mandatory

The taxing of costs is mandatory when a plaintiff voluntarily dismisses an action under N.C.G.S. § 1A-1, Rule 41(a)(1), unless the action was brought in forma pauperis.

2. Costs— attorney fees—justiciable issues in pleadings

An award of attorney fees against plaintiffs under N.C.G.S. § 6-21.5 was error where plaintiffs' pleadings and other relevant documents, read indulgently, raised justiciable issues concerning the implied warranty of habitability for plaintiffs' new house.

3. Pleadings— Rule 11 sanctions—attorney fees—findings insufficient—objective reasonableness present

The award of attorney fees against plaintiffs under N.C.G.S. § 1A-1, Rule 11 was error where the trial court did not support its conclusion that plaintiffs had violated Rule 11 with any findings, further failed to indicate which prong of the Rule 11 test plaintiffs violated, and a de novo review of the pleading does not indicate that plaintiffs or their attorneys acted without objective reasonableness when they signed the pleading.

4. Costs— attorney fees—Rule 68—authorization under another statute needed

Attorney fees can be awarded under Rule 68 only when there is authorization for taxing them as costs under some other rule or statute. In the absence of that authority, the award of attorney fees under N.C.G.S. § 1A-1, Rule 68 in this case was error.

5. Unfair Trade Practices— attorney fees—insufficient findings and conclusions—frivolous and malicious action

An award of attorney fees under N.C.G.S. § 75-16.1 was an abuse of discretion where the trial court did not find or conclude that plaintiffs knew or should have known that the action was frivolous and malicious and the Court of Appeals, upon its review of the record, could not say that plaintiffs knew or should have known that the action was frivolous and malicious.

6. Costs— attorney fees—voluntary dismissal—refiling

The trial court abused its discretion by assessing additional attorney fees if plaintiffs refiled their action as allowed under N.C.G.S. § 1A-1, Rule 41(a). The role of the court is to determine costs and not to encourage or discourage the filing of an action under N.C.G.S. § 1A-1, Rule 41(a).

7. Trials— recording proceedings—trials rather than hearings

There was no error in the trial court's failure to record a hearing on a motion for costs and attorney fees. N.C.G.S. § 7A-95(a) provides that court reporters shall be utilized for trials; although plaintiffs argue that this hearing constituted a trial because the imposition of sanctions amounts to a determination on the merits, the case was disposed of on the merits when plaintiffs filed a series of voluntary dismissals.

Appeal by plaintiff from judgment entered 28 January 2003 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 4 March 2004.

J. Michael Thomas for plaintiff-appellants.

Hicks McDonald Noeker LLP, by David W. McDonald, for defendant-appellees.

STEELMAN, Judge.

Plaintiffs' complaint alleged that David and Janice Lincoln (plaintiffs) purchased a home built by defendant Nancy Bueche (Bueche) located in the Town of Summerfield in Guilford County. Bueche obtained a building permit as an "owner-builder" on 22 November 1999, showing the estimated cost of construction to be $196,504.00. She constructed the dwelling with the assistance of defendant Jason Forbes (Forbes), who was formerly a licensed contractor.

On 11 April 2000, prior to the construction of the house being completed, Bueche listed the house for sale with Re/Max First Choice Realty. Plaintiffs purchased the house from Bueche for $250,000.00 on 14 August 2000. At the time of closing, the house was not finished, and no certificate of occupancy had been issued by Guilford County. Plaintiffs alleged that they were induced to close on the house based upon misrepresentations of Bueche that the house would be completed and a certificate of occupancy obtained within four days of closing, or in no event later than Labor Day. The certificate of occupancy was not issued until 18 October 2000, and plaintiffs alleged that the house was never properly completed.

On 1 November 2001 plaintiffs commenced this action by filing a summons and complaint asserting ten separate claims against the various defendants. The claims asserted against Bueche were for recision of an illegal contract, fraud, unfair and deceptive trade practices, breach of contract, breach of implied warranty, and civil conspiracy. Plaintiffs asserted claims against Forbes for unfair and deceptive trade practices. Additional claims were asserted against Re/Max First Choice Realty and Guilford County, which were subsequently dismissed by plaintiffs.

Bueche and Forbes moved to dismiss plaintiffs' action pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief could be granted. On 8 May 2002, Judge Lindsay R. Davis, Jr. dismissed plaintiffs' claim for civil conspiracy, but denied the motion as to the remaining claims.

On 15 November 2002, Bueche and Forbes moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. On 22 November 2002, plaintiffs voluntarily dismissed the fraud claim against Bueche, without prejudice. On 5 December 2002, the date of the scheduled hearing of defendants' motion for summary

judgment, plaintiffs voluntarily dismissed all of their remaining claims, without prejudice.

Bueche and Forbes filed a motion for costs and attorney's fees on 23 December 2002, based upon Rules 11 and 68 of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 6-1, N.C. Gen. Stat. § 6-21.5, and N.C. Gen. Stat. § 75-16.1. On 27 January 2003, Judge Burke entered an order granting the motion. Plaintiffs were ordered to pay $2,516.46 in costs. The order further provided that if plaintiffs did not refile their lawsuit, they would be required to pay Bueche and Forbes $12,483.54 in attorney's fees. However, if plaintiffs wished to refile their lawsuit, then they were required to pay attorney's fees in the amount of $23,400.00 prior to refiling the action. The order recited that the costs and attorney's fees were taxed pursuant to Rules 11 and 68 of the Rules of Civil Procedure and N.C. Gen. Stat. §§ 6-1, 6-21.5 and 75-16.1. Plaintiffs appeal the trial court's order taxing them with costs and attorney's fees.

[1] We first note that when a plaintiff voluntarily dismisses an action under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, Rule 41(d) mandates plaintiff "shall be taxed with the costs of the action unless the action was brought in forma pauperis." The taxing of costs in this situation is mandatory. *Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 732, 596 S.E.2d 891, 893 (2004) (citations omitted). In their appeal, plaintiffs do not assert that the type or amount of costs, exclusive of attorney's fees assessed as costs, were improper. We affirm the trial court's award of the non-attorney's fees costs in the amount of $2,516.46.

[2] In their first assignment of error, plaintiffs contend that the trial court erred in awarding attorney's fees under N.C. Gen. Stat. § 6-21.5, because the complaint raised justiciable issues. We agree.

N.C. Gen. Stat. § 6-1 (2003) provides for costs to the "party for whom judgment is given," in accordance with chapters 6 and 7A of the General Statutes. N.C. Gen. Stat. § 6-21.5 (2003) provides for an award of attorneys' fees to the prevailing party in a civil action or special proceeding if the trial court finds there was "a complete absence of a justiciable issue of either law or fact" raised by the losing party in the pleadings. N.C. Gen. Stat. § 6-21.5. This statute requires review of all relevant pleadings and documents to determine whether attorneys' fees should be awarded. *Bryson v. Sullivan*, 330 N.C. 644, 660, 412 S.E.2d 327, 335 (1992). "the trial court is required to evaluate whether the losing party persisted in litigating the case after a point

where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue." *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 258, 400 S.E.2d 435, 438 (1991).

Plaintiffs contest the trial court's second conclusion of law, that "[e]ach of the seven claims asserted by plaintiffs against defendants Bueche and Forbes is defective in one or more respects, and there is a complete lack of justiciable issue as to any one of them," and its sixth conclusion of law, that "[t]here is a complete lack of justiciable issue as to each of the seven claims for relief asserted against the defendants Bueche and Forbes."

Surviving a Rule 12(b)6 motion is not determinative on the issue of justiciability. *Winston-Salem Wrecker Ass'n v. Barker*, 148 N.C. App. 114, 119, 557 S.E.2d 614, 618 (2001). A justiciable issue is one that is "real and present as opposed to imagined or fanciful." *Sunamerica*, 328 N.C. at 257, 400 S.E.2d at 437. " 'Complete absence of a justiciable issue' suggests that it must conclusively appear that such issues are absent even giving the losing party's pleadings the indulgent treatment which they receive on motions for summary judgment or to dismiss." *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 326, 344 S.E.2d 555, 437 (1986), *disc. rev. denied*, 318 N.C. 284, 348 S.E.2d 344 (1986).

The fifth claim for relief against Bueche in plaintiffs' complaint alleges that Bueche breached an implied warranty of habitability in the construction of the residence in question, and that plaintiffs suffered compensatory and incidental damages from said breach. In North Carolina, the doctrine of implied warranty of habitability requires that:

> [I]n every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling then under construction, the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and that this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee.

Hartley v. Ballou, 286 N.C. 51, 62, 209 S.E.2d 776, 783 (1974). "The test is whether there is a failure to meet the prevailing standard of workmanlike quality." *Gaito v. Auman*, 313 N.C. 243, 252, 327 S.E.2d 870, 877 (1985). An implied warranty of workmanlike quality may be waived, but only by "clear, unambiguous language, reflecting the fact that the parties fully intended such result." *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 202, 225 S.E.2d 557, 568 (1976).

Bueche contends that when she began constructing the house she intended to live in it, and was not building the house for the purpose selling it for a profit. However, there is substantial evidence in the pleadings and relevant documentation to the contrary. In Bueche's deposition, referenced in plaintiffs' brief to the trial court in opposition to defendant's motion for costs and attorney's fees, she admits that she formed a corporation, NABCO, in May of 2000 for the purpose of real estate development. The house in question was sold to plaintiffs on 1 August 2000. Bueche further admitted that she and defendant Forbes, both officers of NABCO, had developed six additional properties for sale, either individually or through NABCO. The plan for plaintiffs' house had been used by Forbes prior to the construction of plaintiffs' house, and was used by Bueche and Forbes for one of the subsequent properties she developed. In an affidavit, Bueche's real estate agent testified that he was always under the impression that Bueche and Forbes were in business together, and that the sale of the house in question was part of "a business project." There was sufficient evidence contained in the relevant pleadings and documents to present a justiciable issue that Bueche was "in the business of building such dwellings."

Plaintiffs' complaint in the instant case alleges, *inter alia*, that Bueche breached the implied warranty of habitability by positioning "the landing and steps from the house into the garage such that one bay of the garage is unusable as a parking space for a motor vehicle[.]" In *Lapierre v. Samco Dev. Corp.*, 103 N.C. App. 551, 556, 406 S.E.2d 646, 648 (1991), this court upheld a jury verdict finding that defendant breached an implied warranty of habitability where it constructed stairs in the garage in such a manner that, according to plaintiff's testimony, "he had to pull to the back wall of the garage to have enough room to open the door and had to 'squeeze' between the side of the car and the stairway to reach the kitchen."

Giving plaintiffs' pleadings the indulgent treatment which they receive on motions for summary judgment or to dismiss, our review of the pleadings and other relevant documentation fails to support

that there was a complete absence of any justiciable issue of fact or law. Awarding attorney's fees under N.C. Gen. Stat. § 6-21.5 was thus improper.

[3] In their second and fourth assignments of error, plaintiffs contend the trial court erred in awarding defendants attorney's fees under Rule 11 of the North Carolina Rules of Civil Procedure. We agree.

"According to Rule 11, 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. A breach of the certification as to any one of these three prongs is a violation of the Rule." *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992).

Unlike N.C. Gen. Stat. § 6-21.5, when evaluating an award of attorney's fees under Rule 11 "reference should be made to the document itself, and the reasonableness of the belief that it is warranted by existing law should be judged as of the time the document was signed. Responsive pleadings [and other relevant documents] are not to be considered." *Id.* at 656, 412 S.E.2d at 333 (citations omitted). The trial court must determine if the plaintiffs (or their attorneys) acted with "objective reasonableness under the circumstances" when they signed the pleading in question. *Turner v. Duke University*, 325 N.C. 152, 164 (1989). The purpose of Rule 11 sanctions is "to prevent abuse of the legal system." *Grover v. Norris*, 137 N.C. App. 487, 495, 529 S.E.2d 231, 235 (2000).

This court reviews the awarding of sanctions based on Rule 11 *de novo*, while the type and amount of the sanctions are reviewed by an abuse of discretion standard. *Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989).

> The reviewing court must determine whether the findings of fact of the trial court are supported by sufficient evidence, whether the conclusions of law are supported by the findings of fact, and whether the conclusions of law support the judgment. As a general rule, remand is necessary where a trial court fails to enter findings of fact and conclusions of law regarding a motion for sanctions pursuant to Rule 11. "However, remand is not necessary when there is no evidence in the record, considered in the

light most favorable to the movant, which could support a legal conclusion that sanctions are proper."

Sholar Bus. Assocs., Inc. v. Davis, 138 N.C. App. 298, 303-04, 531 S.E.2d 236, 240 (2000). In the instant case, the trial court failed to support its conclusion that plaintiffs had violated Rule 11 with any findings of fact, and further failed to indicate which prong(s) of the Rule 11 test plaintiffs' pleading purportedly violated. Upon our *de novo* review of the pleading in question, we find nothing to support a conclusion that plaintiffs (or their attorneys) acted without "objective reasonableness under the circumstances" when they signed the pleading in question. The trial court erred in awarding attorney's fees based on Rule 11.

[4] In their third assignment of error, plaintiffs argue that the trial court erred in concluding that Bueche and Forbes are entitled to an award of attorneys' fees and costs under Rule 68 of the North Carolina Rules of Civil Procedure. We agree.

Rule 68 provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with the cost then accrued. . . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

N.C. Gen. Stat. § 1A-1, Rule 68 (2003). Attorneys fees may be awarded under Rule 68 if they are "part of the 'costs then accrued' when defendant made his offer to plaintiff[.]" *Purdy v. Brown*, 307 N.C. 93, 96, 296 S.E.2d 459, 462 (1982). There is no provision in Rule 68 authorizing the trial courts to award attorneys fees. Attorneys fees can be awarded in the context of Rule 68 where there exists authorization to tax them as costs under some other Rule or statute. In the absence of such authority, the awarding of attorney's fees to defendants under the provisions of Rule 68 was error.

[5] In their fifth assignment of error, plaintiffs argue the trial court erred by awarding attorneys fees pursuant to N.C. Gen. Stat. § 75-16.1 (2003). We agree.

N.C. Gen. Stat. § 75-1.1(a) (2003) states: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or

practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-16.1 provides:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1 [the unfair and deceptive acts or practices statute], the presiding judge, may in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C. Gen. Stat. § 75-16.1 (2003). Thus, in order to prevail on a motion for attorneys' fees under N.C. Gen. Stat. § 75-16.1, the defendant must (1) be the "prevailing party" and (2) prove that the plaintiff "knew, or should have known, the (N.C. Gen. Stat. § 75-1.1) action was frivolous and malicious." "Award or denial of such fees . . . is within the discretion of the trial judge." *McDonald v. Scarboro*, 91 N.C. App. 13, 23, 370 S.E.2d 680, 686 (1988). "In awarding attorneys fees under G.S. 75-16.1, the trial court must make findings of fact to support the award." *Lapierre v. Samco Dev. Corp.*, 103 N.C. App. 551, 561, 406 S.E.2d 646, 651 (1991).

> "What is an unfair or deceptive trade practice usually depends upon the facts of each case and the impact the practice has in the marketplace." The [Supreme] Court [defines] an unfair practice as one which "offends established public policy as well as . . . [one which] is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." A deceptive practice is one which has the "capacity or tendency to deceive;" proof of actual deception is not necessary. "In determining whether a representation is deceptive, its effect on the average consumer is considered."

Abernathy v. Ralph Squires Realty Co., 55 N.C. App. 354, 357, 285 S.E.2d 325, 327 (1982). In the instant case, plaintiffs alleged that while marketing the house in question Bueche and Forbes intentionally represented that it was being constructed by a licensed general contractor when such was not the case, and that Bueche illegally and deceptively obtained the building permit for the house in order to facilitate construction by an unlicensed contractor.

N.C. Gen. Stat. § 87-1 (2003) mandates that any person undertaking to construct any building that will cost thirty thousand dollars or more will be deemed a "general contractor" and must be so licensed by the State of North Carolina. An exception is made for persons who intend to occupy the building after its completion. Violation of this statute is a class 2 misdemeanor. N.C. Gen. Stat § 87-13 (2003).

The evidence in this record shows that the house was sold to plaintiffs for $250,000.00 and that neither defendant Bueche nor defendant Forbes were licensed contractors in the State of North Carolina during the building of the residence in question. Defendant Bueche never lived in the house, and in fact listed and sold the property before construction on it was completed. Evidence in the record supports plaintiffs contention that they believed the house was being constructed by a licensed general contractor. Defendants actions could fairly be viewed by plaintiffs as deceptive, and the use of unlicensed contractors to build houses for the marketplace has a substantially injurious impact on consumers.

The trial court failed to make any conclusion of law that plaintiffs knew or should have known that the action was frivolous and malicious, and also failed to make any findings of fact that would support such a conclusion under N.C. Gen. Stat. § 75-16.1. Upon our review of the record, we cannot say that plaintiffs knew, or should have known, that the action was frivolous and malicious, and find that the trial court abused its discretion in awarding attorney's fees under N.C. Gen. Stat. § 75-16.1.

[6] In their sixth assignment of error, plaintiffs argue the trial court's order awarding attorneys' fees and costs constituted an abuse of discretion in that it assessed an additional award of attorney's fees in the amount of $10,956.46 in the event that plaintiffs re-filed the instant action as allowed under Rule 41(a) of the North Carolina Rules of Civil Procedure. We agree.

Rule 41(a) of the North Carolina Rules of Civil Procedure allows a party to voluntarily dismiss an action and to then refile the action within one year. Upon filing such a dismissal, that party shall be taxed with the costs of the action under Rule 41(d). These costs may include attorney's fees if authorized by rule or statute. It is the role of the trial court to determine which costs are properly assessed to the dismissing party and to determine the amount of such costs in accordance with the applicable appellate decisions of this State. It is not the role of the trial court to encourage or discour-

age a party from refiling an action under Rule 41(a). It was improper for the trial court to set the amount of attorney's fees at one figure if plaintiffs refiled their action, and another in the event they chose not to refile their action. The trial court should have assessed costs and attorney's fees at the amount supported by the evidence. It was then up to the dismissing parties to decide whether or not they wished to refile their action.

[7] In their seventh assignment of error, plaintiffs argue the trial court violated N.C. Gen. Stat. § 7A-95 (2003) by failing to have the hearing on defendants' motion for costs and attorneys' fees recorded by a court reporter. We disagree.

N.C. Gen. Stat. § 7A-95(a) provides: "Court reporting personnel shall be utilized if available, for the reporting of trials in the superior court." Plaintiffs argue that a hearing on attorney's fees and costs constitutes a trial where the imposition of sanctions amounts to a determination of the case on the merits. This case was disposed of on the merits when the plaintiffs filed a series of voluntary dismissals, not by the court's rulings on defendants' motions for costs. What was before the court on 6 January 2003 was not a trial, but a motion for costs and attorney's fees. There was no requirement under N.C. Gen. Stat. § 7A-95 that the motion hearing be taken down by a court reporter. This assignment of error is without merit.

AFFIRMED IN PART, AND REVERSED IN PART.

Judges McGEE and CALABRIA concur.

STATE OF NORTH CAROLINA v. JAMES CONRAD RAWLINS, JR., DEFENDANT

No. COA03-1042

(Filed 7 September 2004)

1. Credit Card Crimes— financial transaction card theft—no variance with proof

There was not a fatal variance between the indictment and the proof where defendant's indictment for unlawfully using another's credit cards included the allegation that he received the

cards with the intent to use, sell and transfer them to another person, but the State did not present evidence that defendant transferred the cards to another person. There is not a fatal variance where an indictment charges the entire statute conjunctively and the State offers evidence supporting only one of the means by which the crime may have been committed.

2. Credit Card Crimes— single taking rule—not applicable

The "single taking" rule of common-law larceny (by which several items stolen in one act is a single offense) does not apply to financial transaction card theft. The statutory language is clear: taking, obtaining, or withholding a single card gives rise to a single count of financial transaction card theft. Therefore, two charges of financial transaction card theft were not duplicative where two different cards were obtained or withheld from the same person.

3. False Pretense— use of stolen credit cards—distinct transactions

Three indictments for obtaining property by false pretenses were not duplicative where they arose from one incident at one store involving the use of stolen credit cards. There were three distinct transactions separated by several minutes in which different cards were used.

4. Criminal Law— instructions—prima facie evidence

The trial court's instruction on prima facie evidence, considered as a whole, did not shift the burden of proof to a defendant charged with financial transaction card theft.

5. Sentencing— habitual felon—predicate conviction—possession of cocaine—felony

A conviction for obtaining habitual felon status was not erroneous where it was based in part on a conviction for possession of cocaine, which is defined as a misdemeanor punishable as a felony. That statute has been construed as making possession of cocaine a felony.

Appeal by defendant from judgment entered 10 December 2002 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 15 June 2004.

Attorney General Roy Cooper, by Assistant Attorney General Robert K. Smith, for the State.

Brian Michael Aus for the defendant-appellant.

WYNN, Judge.

Defendant, James Conrad Rawlings, Jr., argues (1) there was a fatal variance between the indictment allegations and the evidence presented at trial; (2) several duplicative indictments should have been dismissed; (3) the trial court erroneously instructed the jury as to the meaning of 'prima facie evidence; and (4) the habitual felon indictment was invalid. After careful review, we conclude no error was committed in the trial below.

The evidence tended to show that in June 2002 Angela Davenport's and C. Whitfield Gibson's credit cards were used without authorization at a Wal-Mart store in Raleigh, North Carolina. Davenport testified that on 7 June 2002 she discovered two credit cards were missing and reported them as stolen. On the same date, Gibson was notified that unauthorized purchases on and attempted uses of his credit card had occurred at a Wal-Mart store in Raleigh. Both individuals testified they had not authorized anyone to use their credit cards.

Stephanie Campbell was a cashier in the Wal-Mart photo lab on 7 June 2002. She indicated that Defendant, whom she had briefly dated, came to her register accompanied by a man whom she did not know. Defendant, in three separate transactions, purchased the following from Campbell:

(1) a HP Computer for $711.46 with Gibson's credit card,

(2) a George Foreman Grill for $63.73 with Davenport's credit card,

(3) a Sony Camcorder for $316.01 with Gibson's credit card.

Campbell testified that Defendant would swipe several cards until each transaction was successfully processed as some of the credit cards were not accepted by her register. She believed the credit cards belonged to Defendant's business partners. Campbell identified Defendant as the individual depicted on Wal-Mart's security videotape.

Defendant was indicted and convicted of three counts of obtaining property by false pretenses, three counts of financial transaction

card theft, and of attaining habitual felon status and received a consolidated sentence in the presumptive range of a minimum of 96 months and a maximum of 125 months. Defendant appeals.

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[1] Defendant contends there was a fatal variance between the indictment and the evidence offered at trial because the State failed to sufficiently prove he possessed three credit cards with the intent to use, sell *and* transfer them. We disagree.

The indictments stated in pertinent part:

> The jurors for the State upon their oath present that on or about the 7th day of June, 2002, in Wake County the defendant named above unlawfully, willfully and feloniously did take, obtain or withhold a financial transaction card from the person, possession, custody and control of Amanda Davenport, the cardholder whose named on the face of the card and to whom the card # [omitted] had been issued by Providian Visa, without the cardholder's consent and with the intent to use it and with knowledge that the card had been so taken obtained and withheld, did receive the financial transaction card with the intent to use, sell *and* transfer it to another person. This act was done in violation of G.S. 14-113.9(a)(1).

(emphasis supplied). Defendant argues the State was required to prove beyond a reasonable doubt that he possessed three credit cards with intent to use, sell and transfer them. As the State did not present any evidence that Defendant intended to or did in fact transfer the credit cards to another person, Defendant contends a fatal variance exists between the indictment and the evidence.

"Where an indictment sets forth conjunctively two means by which the crime charged may have been committed, there is no fatal variance between indictment and proof when the state offers evidence supporting only one of the means charged." *State v. Gray*, 292 N.C. 270, 293, 233 S.E.2d 905, 920 (1977). N.C. Gen. Stat. § 14-113.9(a)(1)[1] may

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1. The statute provides:

A person is guilty of financial transaction card theft when:

(1) He takes, obtains, or withholds a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it; or who, with knowledge that it has been so taken, obtained or withheld, receives the financial transaction card with intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder.

> be violated in four ways: one may (1) take, (2) obtain or (3) withhold a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it; or one may (4) receive a financial transaction card with intent to use it or sell it or transfer it to a person other than the issuer or cardholder, knowing at the time that the card has been so taken, obtained or withheld, i.e., knowing at the time he received it that another person had taken, obtained or withheld the card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it.

State v. Brunson, 51 N.C. App. 413, 416, 276 S.E.2d 455, 457-58 (1981). As stated by our Supreme Court,

> the general rule is well settled that an indictment or information must not charge a party disjunctively or alternatively in such manner as to leave it uncertain what is relied on as the accusation against him. Two offenses cannot be alleged alternatively in the same count. As a general rule, where a statute specifies several means or ways in which an offense may be committed in the alternative, it is bad pleading to allege such means or ways in the alternative. Where a statute makes it an offense to do this or that or the other, mentioning several things disjunctively, the whole may be charged conjunctively, and the defendant may be found guilty of either one, and it is generally held to be fatal to charge disjunctively in the words of the statute.

State v. Williams, 210 N.C. 159, 161, 185 S.E. 661, 662 (1936) (citations omitted). Thus, we conclude a fatal variance between the indictment and the proof did not exist in this case.

[2] Defendant also argues one of the financial transaction card theft indictments and two of the obtaining property by false pretenses indictments should have been dismissed as they were duplicative of the charges alleged in the other indictments.

We first note that Defendant did not properly preserve this argument for appellate review as he neither moved to dismiss the indictments nor presented this argument to the trial court. *See* N.C. R. App. P. 10(b)(1); *State v. Call*, 353 N.C. 400, 426, 545 S.E.2d 190, 206-07 (2001). However, pursuant to our discretion under N.C. R. App. P. 2, we will review this argument.

Defendant was indicted on three counts of financial transaction card theft, with two indictments referencing two different cards belonging to Davenport. Under N.C. Gen. Stat. § 14-113.9, a person is guilty of financial transaction card theft when:

> (1) He takes, obtains, or withholds a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it; or who, with knowledge that it has been so taken, obtained or withheld, receives the financial transaction card with intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder.

In this case, the facts do not indicate the circumstances under which Davenport and her two Visa cards parted her company. Indeed, the record does not demonstrate that Defendant took Davenport's cards. Davenport testified she noticed they were missing on 7 June 2002, and that by the time she reported them missing, one had been used at Wal-Mart. Davenport testified she did not know Defendant and could not identify him in court. Given these facts, the jury could only have convicted Defendant of financial transaction card theft on theories that Defendant either "obtained" or "withheld" the cards at issue, alternative means of violating N.C. Gen. Stat. § 14-113.9(a)(1).

Defendant contends that the "single taking" rule applicable in common-law larceny cases should be applicable to financial transaction card theft.[2] However, the language of the financial transaction card theft statute is clear and unambiguous: "A person is guilty of financial transaction card theft when he takes, obtains or withholds a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it." N.C. Gen. Stat. § 14-113.9(a)(1). Significantly, the statute explicitly uses the word "a" and references "card" in the singular. Thus, the taking, obtaining or withholding of a single card—without the cardholder's consent and with the intent to use that card—could give rise to a single count of financial transaction card theft in violation of the statute. Accordingly, the single taking rule does not apply to financial transaction card theft.

[3] Defendant also argues the three obtaining property by false pretenses indictments were duplicative. Although the same entity, Wal-

2. Under the "single taking" rule, "when a perpetrator steals several items at the same time and place as part of one continuous act or transaction, a single offense is committed. *State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992).

Mart, was deceived in this case, the facts indicate three distinct transactions occurred. According to State's Exhibits 1, 2, and 3, the following transactions occurred:

(1) The HP Computer was purchased at 9:10 with Gibson's credit card after the person attempted to use two other credit cards unsuccessfully;

(2) After another customer was assisted, a George Foreman Grill was purchased at 9:17 with one of Davenport's credit cards;

(3) Ten minutes later, a Sony Camcorder was purchased at 9:27 with Gibson's credit card after the person attempted to use three other credit cards unsuccessfully.

To be found guilty of obtaining property by false pretenses, the following elements must be established: "1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Walston*, 140 N.C. App. 327, 332, 536 S.E.2d 630, 633 (2000). In this case, there were three distinct transactions separated by several minutes in which different credit cards were used. Thus, we conclude the indictments were not duplicative.

[4] Defendant next challenges the trial court's jury instructions in which the term 'prima facie evidence' was defined. In the original jury instruction, the trial court incorporated N.C. Gen. Stat. § 14-113.10 which states:

> When a person has in his possession or under his control financial transaction cards issued in the names of two or more other persons other than members of his immediate family, such possession shall be prima facie evidence that such financial transaction cards have been obtained in violation of G.S. 14-113.9(a).

During deliberations, the jury asked the trial court for a copy of N.C. Gen. Stat. § 14-113.10. In addition to reading and providing the jury with a copy of the statute, the trial court rendered the following instruction:

> Black's Law Dictionary indicates that prima facie means a fact presumed to be true unless disproved by some evidence to the contrary. Prima facie evidence is evidence which if unexplained or uncontradicted is sufficient to establish a fact.

However, our Supreme Court has held 'prima facie evidence' means evidence sufficient to justify, but not compel, an inference by which a jury may, but need not, find a presumed fact. *See State v. Williams*, 288 N.C. 680, 220 S.E.2d 558 (1975) (stating "presumptions and inferences may arise upon proof of another fact or combination of facts [and] . . . include: (2) a prima facie case or an inference may arise upon proof of the basic facts by which the jury may (but need not) find the presumed fact"); *Home Finance Co. v. O'Daniel*, 237 N.C. 286, 291, 74 S.E.2d 717, 721 (1953) (discussing 'prima facie evidence'). Although the trial court did not state that proof of the facts mentioned in N.C. Gen. Stat. § 14-113.10 permits the jury to draw an inference that financial transaction card theft has occurred, we conclude the jury instruction was neither erroneous nor prejudicial.

"When analyzing jury instructions, we must read the trial court's charge as a whole. We construe the jury charge contextually and will not hold a portion of the charge prejudicial if the charge as a whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal." *State v. Fowler*, 353 N.C. 599, 624, 548 S.E.2d 684, 701 (2001) (citations omitted).

Defendant does not challenge the constitutionality of the statutory presumption; rather, Defendant contends the trial court's definition of 'prima facie evidence,' which was neither based in statute nor case law, erroneously shifted the burden of proof to Defendant. However, construing the entire instruction as a whole, we conclude the trial court's instruction was not erroneous. First, in the re-instruction, the trial court instructed the jury three times that the State had to prove the elements of the charges and the elements of the statutory presumption beyond a reasonable doubt. In pertinent part, after reading N.C. Gen. Stat. § 14-113.10, the trial court stated: "So please understand that for this statute to apply, the State would have to prove beyond a reasonable doubt those facts necessary for it to be implicated." Thereafter, the trial court defined 'prima facie' and 'prima facie evidence' as follows:

> Black's Law Dictionary indicates that prima facie means a fact presumed to be true unless disproved by some evidence to the contrary. Prima facie evidence is evidence which if unexplained or uncontradicted is sufficient to establish a fact.

As explained by our Supreme Court:

> If the words of instruction describe an inference which must be drawn upon the proof of basic facts, then the presumption is mandatory in nature. Mandatory presumptions which conclusively prejudge the existence of an elemental issue or actually shift to defendant the burden to disprove the existence of an elemental fact violate the Due Process Clause. Mandatory presumptions which merely require defendant to come forward with some evidence (or take advantage of evidence already offered by the prosecution) to rebut the connection between the basic and elemental facts do not violate the Due Process Clause so long as in the presence of rebutting evidence (1) the mandatory presumption disappears, leaving only a mere permissive inference, and (2) the other requirements for permissive inferences . . . are met. Mandatory presumptions which require defendant to come forward with a quantum of evidence significantly greater than "some evidence" may run afoul of due process by shifting the burden of persuasion to defendant. In the absence of any rebutting evidence, however, no issue is raised as to the nonexistence of the elemental facts and the jury may be directed to find the elemental facts if it finds the basic facts to exist beyond a reasonable doubt. A mandatory presumption is generally examined on its face; its validity depends ultimately upon its hypothetical accuracy in the general run of cases in which it might be applied. Finally, if the prosecution relies solely upon a presumption, whether mandatory or permissive, to make out its case, then the rational connection between the basic and elemental facts must be such that a jury could infer the existence of the elemental facts beyond a reasonable doubt.

State v. White, 300 N.C. 494, 268 S.E.2d 481, 489-90 (1980). In defining 'prima facie' and 'prima facie evidence,' the trial court indicated that a fact was presumed to be true or the evidence was sufficient to establish a fact unless it was explained, contradicted, or disproved by some evidence to the contrary. Thus, we conclude that the definition of 'prima facie' and 'prima facie evidence' did not shift the burden to Defendant.

[5] Finally, Defendant argues that his conviction on obtaining the status of habitual felon should be vacated because one of the underlying charges supporting that charge, possession of cocaine, is defined by statute to be a misdemeanor. However, in *State v. Jones*, 358 N.C. 473, — S.E.2d — (2004) our Supreme Court recently

found the statutory language in defining possession of cocaine as a misdemeanor to be ambiguous in light of further statutory language indicating that possession of cocaine shall be "punishable as a felony." *Id.* at 478, —— S.E. 2d at —— (stating "Defendant's interpretation of section 90-95(d) (20 evinces, at best, an ambiguity in the General Assembly's use of the phrase 'punishable as a felony,' thus making the statute susceptible to more than one interpretation"). Thereafter, our Supreme Court construed the ambiguous language under the statute in favor of the State's contention that the legislature intended to make possession of cocaine a felony. *Id.* at 479, —— S.E.2d at —— (stating "Our interpretation of N.C.G.S. § 90-95(d) (2) is not only supported by the statute's language and phrasing but also accords with the statute's legislative history"). Accordingly, we must reject Defendant's assignment of error.

No error.

Judges CALABRIA and LEVINSON concur.

MARY NICOLE BOONE VOGLER, WIDOW, MARILYN "SUE ANN" CLYMER, GUARDIAN *AD LITEM* FOR KRISTIN DAKOTA VOGLER, MINOR CHILD, AND MARK BOONE, GUARDIAN *AD LITEM* FOR MEGAN NICOLE BOONE, MINOR STEPCHILD, OF BILLY CHARLES VOGLER, DECEASED EMPLOYEE, PLAINTIFFS v. BRANCH ERECTIONS COMPANY, INC., EMPLOYER, THE GOFF GROUP, CARRIER (NOW DISMISSED), N.C. GUARANTY ASSOCIATION (NOW ADDED), STATUTORY INSURER, DEFENDANTS

No. COA03-1032

(Filed 7 September 2004)

Workers' Compensation— amended opinion—ten percent increase—insolvent insurer—guaranty association

The Industrial Commission erred in its amended opinion and award by determining that a ten percent increase in compensation assessed against an employer under N.C.G.S. § 97-12 due to the employer's willful violations of OSHA safety standards was a "covered claim" for which the N.C. Guaranty Association was liable after the employer's insurer became insolvent without considering the provisions of the insurance policy between the employer and its insolvent insurer because (1) the Guaranty Act

and the cases interpreting it require that the Commission determine whether an employee's claim is covered under an insurance policy before holding defendant Guaranty Association liable for an insolvent insurance company's nonpayment of a claim; (2) the Commission abused its discretion by declining to receive the policy as evidence and by failing to take into account the terms of the policy while reconsidering the case when the Association's recent entry into the case, coupled with its argument that it was statutorily prevented from the obligation claimed by plaintiffs, is good grounds for the Commission to reconsider the evidence and receive further evidence in the case; and (3) the Commission's determination was not supported by sufficient findings of fact when it concluded the additional compensation was part of a covered claim.

Appeal by defendants from opinion and award entered 28 April 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 May 2004.

J. Randolph Ward, for defendant-appellee Branch Erections Company, Inc.

Nelson Mullins Riley & Scarborough, L.L.P., by Christopher J. Blake and Joseph W. Eason, for defendant-appellant N.C. Guaranty Association.

TIMMONS-GOODSON, Judge.

Defendant North Carolina Guaranty Association ("the Association") appeals the amended opinion and award of the North Carolina Industrial Commission ("the Commission") awarding plaintiffs a ten percent increase in worker's compensation. For the reasons stated herein, we reverse the Commission's amended opinion and award and remand the case for further proceedings.

The facts and procedural history pertinent to the instant appeal are as follows: On 23 March 2000, Billy Charles Vogler ("decedent") was an employee of Branch Erections Company, Inc. ("Branch"). Decedent was working on a communications tower when a nearby crane broke from its platform and fell, striking decedent and causing him to fall twenty feet to the ground. As a result of his injuries, decedent was killed. Decedent is survived by his wife, Mary Nicole Boone Vogler, his daughter, Kristin Dakota Vogler, and his stepdaughter, Megan Nicole Boone (collectively, "plaintiffs").

Shortly after decedent's injury, the Occupational Safety and Health Administration ("OSHA") investigated the accident. The OSHA investigator determined that Branch had failed to inspect the crane turret bolts for two years prior to the accident, although OSHA regulations require daily inspection of the crane's turret bolts when the crane is in use. The OSHA investigator further determined that Branch's failure to inspect the crane and other equipment resulted in worn, cracked, and rusty crane turret bolts on the crane, which caused the crane to snap and fall on top of decedent. The OSHA investigator ultimately cited Branch for twenty violations of OSHA regulations, all of which were characterized as "serious."

Subsequent to decedent's death, plaintiffs filed a worker's compensation claim against Branch and its insurer, Reliance Insurance Company ("Reliance"). On 14 December 2001, North Carolina Industrial Commission Deputy Commissioner George T. Glenn ("Deputy Commissioner Glenn") issued an opinion and award entitling plaintiffs to weekly benefits, expenses for decedent's burial, medical expenses incurred by decedent as a result of the accident, and attorneys' fees. In addition to this award, Deputy Commissioner Glenn concluded as a matter of law that "[p]laintiffs are entitled to a 10% penalty due to [Branch's] willful violations of OSHA safety standards," and ordered that "[Branch and Reliance] shall pay a ten percent (10%) penalty of the total amount due plaintiffs." Branch appealed the award to the Commission. On 17 July 2002, the Commission issued an opinion and award affirming Deputy Commissioner Glenn's decision.

On 3 October 2001, Reliance was declared insolvent. Thus, pursuant to the Insurance Guaranty Association Act ("Guaranty Act"), N.C. Gen. Stat. § 58-48-1 (2003) *et. seq*, the Association assumed Reliance's obligations to the case.

On 13 August 2002, the Association filed a Motion For Joinder As Party; And To Reconsider And To Alter And Amend Judgment. The Association asserted that it was not responsible for payment of the ten percent "penalty" for Branch's willful violation of OSHA safety rules because the "penalty" was not covered by the Guaranty Act and because plaintiffs' claim was not covered by the policy between Branch and Reliance. On 20 September 2002, Branch filed a response to the Association's motion for reconsideration, asserting that the Association is obligated to pay the ten percent "penalty" under the Worker's Compensation Act and that the Guaranty Act does not excuse the Association from liability. The Association filed a reply asserting that it is not the legal successor of Reliance, and reiterating

its assertion that the ten percent "penalty" is not covered by the Guaranty Act or by Branch's insurance policy with Reliance.

On 28 April 2003, the Commission issued an amended opinion and award. The Commission's amended opinion and award contained the following pertinent conclusions of law:

> 9. [The Association] denies any obligation to pay the additional compensation awarded pursuant to N.C. Gen. Stat. § 97-12 based upon two arguments. First, [the Association] asserts that the additional compensation is not within the coverage of the insurance policy issued by Reliance because the policy specifically requires [Branch] to be responsible for any payment in excess of the benefits regularly provided by the Worker's Compensation Act, including those imposed due to the employer's failure to comply with a health or safety law or regulation. This first issue is a coverage question not properly before the Commission for determination at this time. The record before us contains no evidence concerning the contractual provisions of the insurance policy on which to base findings of fact and conclusions of law. Although portions of the policy were attached to the briefs of the parties, no evidence on the coverage issue is properly before the Commission because no evidence was presented at the Deputy Commissioner hearing. Therefore, the coverage question is reserved for further hearing and subsequent determination in the event the parties are unable to resolve this issue.
>
> 10. Secondly, [the Association] argues that the award of additional compensation under N.C. Gen. Stat. § 97-12 constitutes a "penalty" and that the Guaranty Act specifically excludes amounts awarded as punitive or exemplary damages. *See*, N.C. Gen. Stat. § 58-48-20(4). However, the clear language of N.C. Gen. Stat. § 97-12 provides that "*compensation* shall be increased ten percent (10%)" (emphasis added). The North Carolina Court of Appeals has stated that " '[I]f the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms.' " *Morris Communications Corp. v. City of Asheville*, 145 N.C. App. 597, 605, 551 S.E.2d 508, 514 (2001), *citing Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993). Thus, based upon a clear reading of the statute, the ten per-

> cent additional compensation awarded pursuant to N.C. Gen. Stat. § 97-12 is compensation or punitive damages. Therefore, the additional compensation is part of a covered claim and must be paid by [the Association].

It is from this amended opinion and award that the Association appeals.

The issues presented on appeal are: (I) whether the Commission erred by failing to consider Branch's insurance policy with Reliance; and (II) whether the Commission erred by concluding that the increase in compensation pursuant to N.C. Gen. Stat. § 97-12 was not a "penalty." Because we conclude the Commission erred by failing to consider Branch's insurance policy with Reliance in making its determination, we reverse the Commission's opinion and award and remand the case for further proceedings.

On appeal of a decision by the Commission, this Court is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The 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." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 602, 532 S.E.2d 207, 213 (2000). However, the Commission must also "make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends." *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977). Thus, "[a]lthough the Industrial Commission is the sole judge of the credibility and the evidentiary weight to be given to witness testimony, the Commission's conclusions of law are fully reviewable." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (citations omitted). "When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Industrial Piping*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987).

Where an insurer has become insolvent, the Guaranty Act requires that the Association:

(1) Be obligated to the extent of the *covered claims* existing prior to the determination of insolvency and arising within 30 days after the determination of insolvency, or before the policy expiration date[.] . . . *In no event shall the Association be obligated to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises.*

[and]

(2) Be deemed the insurer to the extent of the Association's obligation on the *covered claims* and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.

N.C. Gen. Stat. § 58-48-35(a)(1) and (2) (2003) (emphasis added).

The Guaranty Act defines a "covered claim" in pertinent part as follows:

> "Covered claim" means an unpaid claim, including one of unearned premiums, which is in excess of fifty dollars ($50.00) and *arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy . . . . "Covered claim" shall not include any amount awarded . . . as punitive or exemplary damages*[.]

N.C. Gen. Stat. § 58-48-20(4) (2003) (emphasis added).

In accordance with the Guaranty Act, this Court has previously limited the Association's obligations to those benefits the employee would have recovered as a beneficiary of his employer's insurance policy. In *Greensboro v. Reserve Ins. Co.*, 70 N.C. App. 651, 321 S.E.2d 232 (1984), we held that the Association was not liable for prejudgment interest owed to the plaintiffs. We recognized that "it is the identity of the Association as a statutory creation that relieves it from liability for prejudgment interest." *Id.* at 664, 321 S.E.2d at 240. Thus, we concluded that, "[a]s the Superior Court of Pennsylvania reasoned in a 1980 case, interpreting statutes similar to North Carolina's, a guaranty association is not the legal successor of the insolvent insurer; rather, it is obligated to pay claims only to the extent of covered claims, which shall not include any amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises." *Id.* (citing *Sands v. Pa. Ins. Guaranty Ass'n.*, 423 A. 2d 1224, 1229 (1980)). Similarly, in *BarclaysAmerican/Leasing, Inc. v. N.C. Ins. Guaranty Ass'n*, 99 N.C. App. 290, 392 S.E.2d 772 (1990), *disc.*

review denied, 328 N.C. 328, 402 S.E.2d 829 (1991), we recognized that the plaintiff's claim was excluded by the underlying insurance policy, and thus neither the insolent insurer nor the Association was liable for the plaintiff's claim. Accordingly, we reversed the trial court's decision granting summary judgment in favor of the plaintiff, and we remanded the case for entry of summary judgment in favor of the Association, whom we noted was not required to assume the obligation of uncovered claims. *Id.* at 294, 392 S.E.2d at 774.

In the instant case, the Association argued in its motion for reconsideration that the ten percent increase in compensation awarded by Deputy Commissioner Glenn was "not within the coverage of the insurance policy issued by Reliance[.]" The insurance policy between Branch and Reliance ("the policy") reads in pertinent part:

> PART ONE—WORKERS' COMPENSATION INSURANCE
>
> . . . .
>
> F. Payments You Must Make
>
> You are responsible for any payments in excess of the benefits regularly provided by the workers' compensation law including those required because:
>
> 1. of your serious and willful misconduct;
>
> . . . .
>
> 3. you fail to comply with a health or safety law or regulation[.]
>
> PART TWO—EMPLOYER'S LIABILITY INSURANCE
>
> . . . .
>
> C. Exclusions
>
> This insurance does not cover:
>
> . . . .
>
> 4. any obligation imposed by a workers' compensation, occupational disease, unemployment compensation or disability benefits law or any similar law;
>
> . . . .
>
> 11. fines or penalties imposed for violation of federal or state law[.]

The Association provided the Commission with a copy of the policy and argued in support of the terms of the policy when the case was reconsidered. As detailed above, in the amended opinion and award, the Commission concluded that the issue of whether plaintiff's claim was a "covered claim" under the policy was not "properly before the Commission for determination" because "the record . . . contains no evidence concerning the contractual provisions of the insurance policy on which to base findings of fact and conclusions of law . . . because no evidence was presented at the Deputy Commissioner hearing." However, in its next conclusion of law the Commission nevertheless determined that "the additional compensation is part of a covered claim and must be paid by the Association." We conclude that the Commission erred.

The Commission chose not to determine the issue in the instant case because Deputy Commissioner Glenn had not determined the issue or received evidence pertaining to it. However, the Commission cited no authority for its conclusion that, because the Deputy Commissioner had not considered an issue, it could not in turn consider the issue. We note that the Worker's Compensation Act provides that on appeal of a Deputy Commissioner's opinion and award, the Commission "shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]" N.C. Gen. Stat. § 97-85 (2003). "Whether good ground is shown is within the sound discretion of the Commission, and the Commission's determination in that regard will not be reviewed on appeal absent abuse of discretion." *Thompson v. Burlington Industries*, 59 N.C. App. 539, 543, 297 S.E.2d 122, 125 (1982), *cert. denied*, 307 N.C. 582, 299 S.E.2d 650 (1983).

As detailed above, the Guaranty Act and the cases interpreting it require that the Commission determine whether an employee's claim is covered under an insurance policy before holding the Association liable for an insolvent insurance company's nonpayment of a claim. However, in the instant case, the Commission refused to consider the policy proffered by the Association, despite allowing the Association to join the case as a party, thereby granting the Association the right to assert its own defenses. We conclude that the Association's recent entry into the case, coupled with the Association's argument that it was statutorily prevented from the obligation claimed by plaintiffs, is "good ground" for the Commission to reconsider the evidence and receive further evidence in the case, in the form of the policy between

Branch and Reliance. Thus, we also conclude the Commission abused its discretion by declining to receive the policy as evidence and by failing to take into account the terms of the policy while reconsidering the case.

Furthermore, as discussed above, in any opinion and award, the Commission must make those "specific findings with respect to [the] crucial facts" necessary to determine whether an employee is entitled to compensation. *Gaines*, 33 N.C. App. at 579, 235 S.E.2d at 859. Accordingly, the Commission's conclusions must be supported by sufficient findings of fact. *Peagler*, 138 N.C. App. at 602, 532 S.E.2d at 213. In the instant case, the Commission concluded that the additional compensation was part of a "covered claim," despite failing to make any findings of fact regarding the policy and despite previously concluding that the issue of whether the additional compensation was part of a "covered claim" was not properly before the Commission. Therefore, we further conclude that the Commission's determination is not supported by sufficient findings of fact.

In light of our conclusions, we hold that the Commission erred in its amended opinion and award, and, accordingly, we reverse the amended opinion and award and remand the case for further proceedings. On remand, the Commission shall receive and consider the evidence it deems necessary for a proper determination of plaintiffs' claims consistent with this opinion, including the insurance policy between Branch and Reliance.

Reversed and remanded.

Judges McGEE and TYSON concur.

STATE OF NORTH CAROLINA v. ABRAHAM JACOB DEWBERRY

No. COA03-1552

(Filed 7 September 2004)

1. Evidence— hearsay—declaration against interest—excluded

The exclusion of hearsay in a prosecution for first-degree murder and assault was not an abuse of discretion where defendant, who was claiming self-defense, wanted to introduce testimony that a gun had been removed from the victim's car after the

shooting. Defendant contended that the statements should have been admitted as a declaration against interest under N.C.G.S. § 8C-1, Rule 804 (b)(3), but the court determined that the statement was not sufficiently against the declarant's interest and that there were insufficient independent, nonhearsay indications of trustworthiness.

2. Evidence— client's statements to attorney—hearsay

The trial court did not err by refusing to compel a witness's attorney to answer questions in a first-degree murder and assault prosecution where the statements that defendant was seeking had already been correctly excluded as hearsay.

3. Appeal and Error— preservation of issues—excluded evidence—no offer of proof—other evidence admitted

The exclusion of evidence of conduct by a murder victim was not properly preserved for appeal where defendant made no showing of what the answer would have been. Moreover, there would have been no prejudice because there was other evidence of the victim's penchant for violence.

Appeal by defendant from judgment and commitment entered 18 July 2003 by Judge James L. Baker, Jr. in Rutherford County Superior Court. Heard in the Court of Appeals 16 June 2004.

Roy Cooper, Attorney General, by Thomas G. Meacham, Jr., Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant.

STEELMAN, Judge.

Defendant was convicted by a jury of first-degree murder and assault with a deadly weapon inflicting serious injury. Defendant was sentenced to life imprisonment without parole for the murder charge, and a consecutive active term of 34 to 50 months for the assault charge. Defendant appeals.

State's evidence tends to show that on the evening of 21 July 2002, defendant was driving Bill Berry (Berry) in a Ford Explorer when they came upon Gene Walton (Walton) and Charlie Byers (Byers) stopped in the road in a white Honda. Walton was in the driver's seat. Defendant and Berry left the Explorer and approached

the Honda. Defendant was carrying a handgun. Defendant fired his gun multiple times into the Honda, aiming at Walton. Byers fell out of the passenger side of the vehicle and defendant walked around the Honda in Byers' direction. Byers ran off, and defendant returned to Walton and shot him several more times, then returned to his Explorer and left. Walton died from his wounds, and Byers, who was shot once in the side, recovered. Defendant did not deny shooting the two men, but claimed he acted in self-defense when Walton reached for a gun. The police did not find any weapon at the crime scene.

The State offered the testimony of two witnesses who heard defendant repeatedly yelling "Talk that s**t now, mother f****r" as he was shooting into the Honda. Byers testified that Walton did not have a gun with him that evening, and other witnesses testified that they did not see Walton with a gun before the shooting. Byers also testified that he and Walton never spoke with John McDowell (McDowell) the day of the shooting.

Defendant presented testimony from McDowell, who stated that he saw Walton on a regular basis, and that he was usually armed with a pistol. McDowell further testified that about an hour before the shooting he spoke with Walton, and while looking into the Honda during the conversation, he saw a handgun inside the vehicle. McDowell did not mention seeing the gun to investigators on the night of the shooting, and first mentioned it about two weeks before defendant's trial.

Byers testified that Walton sometimes carried a gun, and that he had taken out a warrant on Walton for an incident where Walton shot over his head. Byers further testified that he was on probation at the time of the shooting, and that it would have been a violation of his probation to be in the Honda if Walton did, in fact, have a gun with him.

Teresa Phillips (Phillips) was the girlfriend of defendant and the mother of his two children. They were not living together at the time of the shooting. She had been having sexual relations with Walton. She testified that she sometimes saw Walton with a handgun. She further testified that Walton attempted to get her to stop seeing defendant, but that she refused because of the children. This angered Walton, and Phillips testified that Walton told her "he had something for" the defendant and showed her his gun. She told defendant about the incident, and warned him to be careful. Shandell

Davis testified that she had seen Walton with a gun, and knew that he owned a gun in the past.

Defendant testified at trial. He testified that when Phillips told him about her exchange with Walton, he felt he was in danger, in particular because he had heard that Walton had shot at someone just a few weeks prior to the shooting in the instant case. According to defendant, while on his way to visit a friend he came across Walton and Byers stopped in the road. He told Berry that he was going to ask Walton what was going on between him and Phillips. He brought his gun with him because he was worried Walton might try and shoot him. Defendant testified that he asked Walton, "Gene, man, what's going on with you and Teresa?" He claimed that Walton responded "f**k you, n****r" and reached for a gun. It was at this point, according to defendant, that he started shooting Walton. After Byers ran off, defendant claimed that Berry went inside the passenger side of the car and emerged with a gold chain and Walton's gun. Defendant's father testified that Berry approached him on 6 October 2002 and gave him a silver handgun, which defendant's father then turned over to defendant's attorneys. He was not allowed to testify that Berry told him it was the gun he took from the Honda on the night of the shooting.

Defendant tried to introduce evidence that Berry had told defendant's father, his own attorney, and defendant's attorneys that he had removed the gun from the Honda after the shooting that night. Defendant also sought to introduce evidence that Berry's attorney told both the prosecutor and defendant's attorneys that Berry had told him this as well. Berry was called at trial and asked if he had removed the gun from the Honda. He answered "I choose not to answer that." On *voir dire*, the trial court ruled over defendant's objection that the hearsay statements of Berry were not admissible under Rule 804(b)(3) of the North Carolina Rules of Evidence. The trial court instructed the jury on self-defense.

[1] In his second assignment of error defendant argues the trial court erred in not allowing into evidence hearsay statements attributed to Berry tending to support defendant's claim of self-defense. We disagree.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.R. Evid. Rule 801(c). Hearsay

evidence is not admissible unless allowed by statute or the Rules of Evidence. N.C.R. Evid. Rule 802. Rule 804 provides exceptions for the admissibility of hearsay in certain circumstances when the declarant is unavailable. Rule 804(a)(1) states that a declarant is "unavailable" under the rule if he is exempted by ruling from the court from testifying due to privilege. Rule 804 further states:

> (b) *Hearsay exceptions.*—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> > (3) Statement Against Interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Admission of evidence under the provision of Rule 804 (b)(3) concerning criminal liability requires satisfying a two prong test: 1) the statement must be against the declarant's penal interest, and 2) the trial judge must find that corroborating circumstances insure the trustworthiness of the statement. *State v. Kimble*, 140 N.C. App. 153, 157, 535 S.E.2d 882, 885 (2000). In order for a hearsay statement to pass the first prong of the test, it must actually subject the declarant to criminal liability, *State v. Singleton*, 85 N.C. App. 123, 129, 354 S.E.2d 259, 263 (1987), and it "also must be such that the declarant would understand its damaging potential" (i.e. that a reasonable man in declarant's position would not have said it unless he believed it to be true). *State v. Tucker*, 331 N.C. 12, 25, 414 S.E.2d 548, 555 (1992).

In order to satisfy the second prong, there needs to be "some other independent, nonhearsay indication of the trustworthiness" of the statement. *State v. Artis*, 325 N.C. 278, 305-06, 384 S.E.2d 470, 485 (1989), *vacated and remanded on other grounds by Artis v. North Carolina*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). "The determination of whether the trustworthiness of the statement is indicated by corroborating circumstances is a preliminary matter to be decided by the trial judge." *State v. Wardrett*, 145 N.C. App. 409, 415, 551 S.E.2d 214, 218 (2001) (citation omitted).

> Broad discretion must be given the trial judge in
>
> determining the reliability of the declaration and the declarant by consideration of such factors as spontaneity, relationship between the accused and the declarant, existence of corroborative evidence, whether or not the declaration had been subsequently repudiated and whether or not the declaration was in fact against the *penal interests* of the declarant.

State v. Wardrett, 145 N.C. App. 409, 415, 551 S.E.2d 214, 219 (2001), citing *State v. Haywood*, 295 N.C. 709, 729, 249 S.E.2d 429, 441-42 (1978). "The facts and circumstances surrounding the commission of the crime and the making of the declaration must corroborate the declaration and indicate the probability of trustworthiness." *Haywood*, 295 N.C. at 730, 249 S.E.2d at 442. The existence of a motive for declarant to have offered a false statement will be evidence arguing against its admission. *Id.* at 729, 249 S.E.2d at 441.

In the instant case, the trial court granted the State's motion to exclude the evidence, stating "I cannot find any circumstantial guarantees of trustworthiness. It is certainly not to be disputed that the statement is against his interest. But I do not believe that it is so far contrary to his pecuniary or proprietary interest that a reasonable man in his position would not have made the statement unless he believed it to be true. I think there are a multiple of reasons [why] such a statement could have been given."

Defendant contends that the trial court applied the incorrect standard and that the correct standard is whether the statement was against the declarant's *penal* interest, not his *pecuniary or proprietary* interest. We agree that the trial judge mis-spoke in phrasing the ruling in terms of the civil aspect of the test rather than the criminal aspect. However, the essential ruling of the court was that the statement was against the declarant's interest, but that it was not a statement that "a reasonable man in his position would not have made . . . unless he believed it to be true." The trial court further held that it did not find circumstantial guarantees of trustworthiness to exist under the second prong of the test. The trial court thus made express rulings that the testimony met neither prong of the test for admissibility under Rule 803(b)(3).

The facts surrounding the crime and the declaration tend to show that Berry was present at the crime with defendant, that he was near the Honda when defendant shot the victims, and that he left the scene with defendant in the Explorer after the shooting. Berry made a state-

ment to police on 15 August 2002, less than a month after the shooting. In this statement, Berry never mentioned that Walton had a gun, or that he saw or removed a gun from the Honda. After giving his statement, Berry was arrested for being an accessory after the fact to the crimes defendant was charged with.

It is true that Berry potentially faced new charges of larceny of a firearm by telling others he had removed a gun from Walton's vehicle that night. However, it is also true that he was already facing charges (accessory after the fact), and that if defendant was acquitted at trial, the State would not have been able to proceed against Berry on the accessory charge. *State v. Robey*, 91 N.C. App. 198, 371 S.E.2d 711, *cert. denied*, 323 N.C. 479, 373 S.E.2d 874 (1988). Accessory after the fact to first-degree murder is a Class C felony. N.C. Gen. Stat. § 14-7 (2003). Larceny of a firearm is a Class H felony. N.C. Gen. Stat. § 14-72 (2003). The maximum sentence for a Class C felony is 261 months. N.C. Gen. Stat. § 15A-1340.17. The maximum sentence for a Class H felony is 30 months. *Id.* There was a clear motive for Berry to fabricate the story, even in light of the potential new charges. Thus, we cannot say that the trial judge abused his discretion in finding the statement was not so far against his penal interests that "a reasonable man in his position would not have made the statement unless he believed it to be true." Defendant has failed to demonstrate that he met the requirements of the first prong of the test.

As to the second prong of the test, the trial judge is in the best position to determine the credibility and weight to be given the proffered evidence. In light of all of the evidence, we cannot say the trial judge abused his broad discretion in determining defendant failed to meet his burden of showing that there existed independent, nonhearsay indications of trustworthiness. Defendant thus has failed to meet the requirements of the second prong of the test for admissibility under N.C. Gen. Stat. § 804(b)(3). This assignment of error is without merit.

[2] In defendant's first assignment of error he argues the trial court erred in refusing on the grounds of attorney client privilege to compel Berry's attorney to answer certain questions. These questions pertained to Berry's statements to his attorney about the gun Berry supposedly retrieved from Walton's vehicle after the shooting. We disagree.

The trial court had refused to allow testimony of hearsay statements made by Berry concerning his supposed retrieval of the gun

from Walton's vehicle after the shooting. Having found no error in the exclusion of the hearsay testimony, we find no error in refusing to allow Berry's attorney to testify to it. This assignment of error is without merit.

[3] In defendant's third assignment of error he argues the trial court erred in sustaining the State's objection to defendant's attempts to offer into evidence specific instances of conduct by the victim. We disagree.

Shandell Davis (Davis), a witness called by the State, was cross-examined by defendant about her knowledge of Walton's reputation for violence. The trial court sustained the State's objection to defendant's question: "The altercations that you had heard about, did any of them involve a gun?" Defendant argues that the evidence was improperly excluded because it added weight to defendant's contention that he acted in self-defense, and that his fear of Walton was reasonable.

> While evidence of character is generally inadmissible, N.C.R. Evid. 404(a)(2) provides that evidence of pertinent character traits of a victim offered by an accused is admissible. N.C.R. Evid. 405(b) allows for proof of character by evidence of specific instances of conduct in cases where character is an essential element of a charge, claim or defense. Where defendant argues he acted in self-defense, evidence of the victim's character may be admissible for two reasons: "to show defendant's fear or apprehension was reasonable or to show the victim was the aggressor."

State v. Ray, 125 N.C. App. 721, 725, 482 S.E.2d 755, 758 (1997) (citations omitted). "Defendant may admit evidence of the victim's character to prove defendant's fear or apprehension was reasonable and, as a result, his belief in the need to kill to prevent death or imminent bodily harm was also reasonable." *State v. Watson*, 338 N.C. 168, 187, 449 S.E.2d 694, 706 (1994), *cert denied*, *Watson v. North Carolina*, 514 U.S. 1071, 131 L. Ed.2d 569 (1995), *overruled in part on other grounds*, *State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995). The specific incident of conduct a defendant seeks to enter into evidence becomes relevant "only if defendant knew about it at the time of the shooting." *State v. Shoemaker*, 80 N.C. App. 95, 101, 341 S.E.2d 603, 607 (1986).

"In order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required

unless the significance of the evidence is obvious from the record." *State v. Ray*, 125 N.C. App. 721, 726, 482 S.E.2d 755, 758 (1997). When the defendant objects to the exclusion of testimony, but does not assert or make an offer of proof for the record of what the witness' testimony would be, this Court "cannot assess the significance of the evidence sought to be elicited[.]" *Id.*, 482 S.E.2d at 758-59.

In the instant case, defendant has made no showing of what the witness' answer to the question would have been, and thus we cannot determine whether the evidence could have been properly admitted under Rule 405(b).

Furthermore, assuming *arguendo* that sustaining the State's objection was error, defendant has not met his burden of proving he was prejudiced by the error. *See State v. Watson*, 338 N.C. 168, 188, 449 S.E.2d 694, 706 (1994), *Overruled on other grounds by State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995). There was plenary evidence from multiple witnesses who testified to Walton's reputation for violence in the community, and who testified that Walton often carried a gun. There was testimony from John McDowell, who said he saw Walton with a handgun in his vehicle shortly before the shooting. Charlie Byers testified that Walton shot at him (over his head) a few weeks prior to the shooting in question. The defendant's father testified that Berry flagged him down in his automobile some time after the shooting and gave him a handgun, which he turned over to defendant's attorneys. Phillips testified that Walton made threatening remarks to her about the defendant hours before the shooting and while he was holding a handgun. She further identified the handgun given to defendant's father by Berry as the same one she saw Walton brandish. Defendant testified that Phillips had informed him of Walton's threat, and that he feared for his safety. He further testified that when he approached Walton's vehicle that night, Walton reached for a handgun and that is why he shot Walton. Defendant also testified that Berry took a gold chain and a handgun from Walton after the shooting, and he identified the gun obtained from Berry as the same gun he saw that night.

The exclusion of Davis' testimony, even if it would have been that Walton was involved in an altercation that involved a gun, does not rise to the level of prejudice on these facts because the plenary evidence that was already before the jury, showing Walton's penchant for violence and use of a handgun. This assignment of error is without merit.

NO ERROR.

Judges TYSON and BRYANT concur.

CITY OF BURLINGTON, A MUNICIPAL CORPORATION, PLAINTIFF v. BONEY PUBLISHERS, INC., D/B/A *THE ALAMANCE NEWS*, DEFENDANT

No. COA03-904

(Filed 7 September 2004)

1. **Appeal and Error— appealability—interlocutory order—improper Rule 54 certification—writ of certiorari**

Although the trial court erred by granting a Rule 54 certification of a 20 November 2002 order when it was not a final judgment as to any of the claims or counterclaims presented by the parties, the Court of Appeals granted defendant's subsequent petition for writ of certiorari to review the 20 November 2002 order.

2. **Open Meetings; Public Records— government entity filing for declaratory judgment—openness in daily workings of public bodies**

Plaintiff city did not have a right under the Public Records Act or the Open Meetings Law to initiate a declaratory judgment action to determine whether the city was in compliance with the Open Meetings and Public Records laws, because allowing a governmental agency to bring a declaratory judgment action against someone who has not initiated litigation will have a chilling effect on members of the public by requiring them to defend civil actions they otherwise might not have commenced, thus frustrating the legislature's purpose of furthering the fundamental right of every person to have prompt access to information in the possession of public agencies.

On writ of certiorari to review order filed 20 November 2002 by Judge James C. Spencer, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 31 March 2004.

City Attorney Robert M. Ward; and Thomas, Ferguson & Mullins, L.L.P., by Jay H. Ferguson, for plaintiff-appellee.

Everett, Gaskins, Hancock & Stevens, L.L.P., by C. Amanda Martin, for defendant-appellant.

BRYANT, Judge.

Boney Publishers, Inc. d/b/a *The Alamance News* (defendant) appeals an order filed 20 November 2002 denying defendant's motion for partial summary judgment and declaring that the City of Burlington (plaintiff) was not constitutionally or statutorily barred from bringing a declaratory judgment action to determine whether the City was in compliance with North Carolina's open meetings and public records laws.

On 15 July 2002, the Burlington City Council (Council) met for a work session. A motion was made pursuant to N.C. Gen. Stat. § 143-318.11(a) and approved to hold a closed session allowing the Council to discuss potential and pending litigation. Jay Ashley, reporter for *The Alamance News*, and another reporter from a different organization left the meeting. Those remaining in the meeting included Council members, the city clerk, city attorney Robert Ward, private attorney Reginald Gillespie (who had been retained to represent the City in five pending lawsuits discussed during the closed session), and Alamance County Area Chamber of Commerce president Sonny Wilburn. Wilburn was present for part of the closed session in order to advise the Council and the attorneys on issues of land valuation and marketability, as these issues related to possible settlement of the pending lawsuits. The Council met for approximately 90 minutes with Wilburn present and approximately 15 minutes outside of Wilburn's presence. Wilburn left the meeting during a break. During the break, Ashley asked Ward to explain why Wilburn had been allowed to be present in a meeting called pursuant to attorney-client privilege. In his response, Ward explained that outside parties are permitted to participate in closed sessions when there is a logical reason to include them in the meeting. Ward said he relied on a guidebook published by the Institute of Government for his position on the issue.

On 30 July 2002, Tom Boney, publisher of *The Alamance News*, attended an open meeting of the Council, where he voiced his objection to Wilburn's presence in the 15 July 2002 closed session, arguing Wilburn's presence destroyed the attorney-client privilege and ren-

dered the purpose of the meeting void. Boney contended that the closed session was illegal and requested access to the closed session minutes. Ward responded that the closed session was held in accordance with state law. Boney was not given a copy of the minutes of the closed session.

On 14 August 2002, Boney delivered a letter to Ward, the city manager, the city clerk, and to each Council member. In his letter, Boney again stated he believed the attorney-client privilege had been destroyed by Wilburn's presence and the meeting had been improperly convened pursuant to N.C. Gen. Stat. § 143-318.11(a)(3). Boney demanded the closed session minutes and stated his willingness to pursue legal action to compel the City's compliance. Responding to Boney's letter, Ward repeated his position that outside individuals may be included in a closed session if there is a logical reason for them to be present. Ward did not articulate what logical reason justified Wilburn's presence, but provided Boney with citations to two cases: one from South Carolina and one from Texas in support of his position.

On 19 August 2002, Boney sent a second letter again requesting the minutes of the closed session. The following day (20 August 2002), Boney appeared at another Council meeting to request access to the closed session minutes. On 21 August 2002, via a letter signed by Ward, the city manager, and the city clerk, Ward responded that certain individuals had been requested to attend the closed session, and the presence of those individuals was essential in order to accomplish the purposes of the closed session. The letter also stated that the minutes would be withheld pursuant to N.C. Gen. Stat. § 143-318.10(e), until such time as public inspection would not frustrate the purpose of the closed session.

On 22 August 2002, the City initiated a declaratory judgment action against defendant in order to resolve the conflict between the City and defendant. Defendant counterclaimed. This matter came for hearing at the 16 September 2002 civil session of Alamance County Superior Court with the Honorable James C. Spencer, Jr. presiding. The superior court framed the issue as follows:

> Did the presence of a third party at the July 15, 2002 closed meeting of the Burlington City Council vitiate the asserted attorney-client privilege {N.C.G.S. 143-318.11(a)(3)} and thereby result in a violation of the North Carolina Open Meetings Law?

By order filed 25 September 2002, the superior court found that Wilburn was an agent of the City; Wilburn was present at the meeting for the purpose of facilitating the rendition of legal services; and everyone present understood the confidential nature of the closed meeting. The court concluded that the City acted properly in holding the closed session and in withholding the minutes. Defendant did not appeal from this ruling nor assign error to any portion of this order.

Defendant thereafter filed a motion for partial summary judgment "with respect to the declaratory judgment claim instituted by the plaintiff." This matter came for hearing at the 4 November 2002 civil session of Alamance County Superior Court before Judge Spencer. The court framed the issue as follows:

> Was it constitutionally and statutorily permissible for the plaintiff, City of Burlington, to initiate a declaratory judgment action against the defendant, The Alamance News, seeking a determination of the [C]ity's rights and obligations with respect to a dispute which had arisen between the plaintiff and the defendant as to whether the City was in or out of compliance with the North Carolina Open Meetings Law and Public Records Law?

By order filed 20 November 2002, the court concluded there was no constitutional or statutory bar to plaintiff's initiation of a declaratory judgment action seeking a determination of the City's rights and obligations with respect to whether the City was in compliance with the North Carolina Open Meetings Law and Public Records Law, and concluded defendant's motion should be denied. Defendant filed notice of appeal on 20 December 2002 from the 20 November 2002 order. The superior court granted Rule 54 certification on 21 January 2003. On 16 May 2003, this Court granted defendant's petition for writ of certiorari to review the 20 November 2002 order.

Interlocutory appeal

[1] A judgment is either interlocutory or a final determination of the rights of parties. N.C.G.S. § 1A-1, Rule 54(a) (2003); *see Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). An order is interlocutory if it is entered during the pendency of an action and does not dispose of the case, but requires further action by the trial court to finally determine the rights of all the parties involved in the controversy. *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. Generally, there

is no right to appeal from an interlocutory order. *See* N.C.G.S. § 1A-1, Rule 54(b) (2003). Our courts, however, have recognized two avenues for appealing interlocutory orders.

Under Rule 54(b), when multiple claims are involved in an action and the court enters a final judgment that adjudicates one or more of the claims, such judgment, although interlocutory in nature, may be appealed if the trial judge certifies that there is no just reason for delay. N.C.G.S. § 1A-1, Rule 54(b); *see Hoots v. Pryor*, 106 N.C. App. 397, 401, 417 S.E.2d 269, 272 (1992). In this case, the trial court certified the denial of partial summary judgment as immediately appealable pursuant to Rule 54(b); however, such certification is not dispositive when the order appealed from is interlocutory. *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998).

In the instant case, the trial court entered two separate orders. The first order, filed 25 September 2002, decreed:

> 1. The oral motion of the defendant, made at the September 16, 2002 hearing, for defendant's attorneys to be granted access to the minutes of the July 15, 2002 closed meeting of the Burlington City Council is DENIED;
>
> 2. The July 15, 2002 closed meeting of the Burlington City Council was, and is declared to have been, held in compliance with the requirements of the North Carolina Open Meetings Law;
>
> 3. The actions of the City of Burlington in denying, at the present time, access to the minutes of the July 15, 2002 closed meeting of the Burlington City Council are, and are declared to be, in compliance with the requirements of the North Carolina Public Records Law and Open Meetings Law;
>
> 4. The prayer of defendant for injunctive relief arising out of the conduct of the City of Burlington surrounding the July 15, 2002 closed meeting of the Burlington City Council is DENIED;
>
> 5. **Inasmuch as there are claims in defendant's Counterclaim not addressed at the September 16, 2002 hearing, the matter is retained for further pro-**

ceedings, including any determination respecting costs and attorney fees.

(emphasis added). Defendant did not appeal from this order.

Concerning the 20 November 2002 order from which defendant did appeal, the only issue before the superior court was whether:

> it [was] constitutionally and statutorily permissible for the plaintiff, City of Burlington, to initiate a declaratory judgment action against the defendant, The Alamance News, seeking a determination of the [C]ity's rights and obligations with respect to a dispute which had arisen between the plaintiff and the defendant as to whether the City was in or out of compliance with the North Carolina Open Meetings Law and Public Records Law?

Our review of the complaint and counterclaims reveal that the 20 November 2002 order was not a final judgment as to any of the claims or counterclaims presented by the parties. Therefore, Rule 54 certification was not properly granted as to the 20 November 2002 order. However, on 16 May 2003, this Court granted defendant's subsequent petition for writ of certiorari to review the 20 November 2002 order.

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[2] The issue on appeal is whether the Public Records Act and Open Meetings Act were designed to allow a government entity to file for declaratory judgment.

Public Records Act

In *McCormick v. Hanson Aggregates Southeast, Inc.*, 164 N.C. App. 459, 596 S.E.2d 431 (2004),[1] this Court addressed the issue of whether a governmental entity could file a declaratory action. *McCormick*, 164 N.C. App. at 463, 596 S.E.2d at 434 (quoting N.C.G.S. § 132-9(a) (2003)) (" '[a]ny person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying' "). The *McCormick* Court concluded:

> The North Carolina Public Records Act clearly gives the public a right to access records compiled by government agencies. *See News and Observer Publ'g Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992) (" 'the legislature intended to provide that, as

1. Plaintiff's motion for a temporary stay was allowed by our Supreme Court on 21 June 2004.

> a general rule, the public would have liberal access to public records' ") (quoting *News and Observer v. State*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984)); N.C.G.S. § 132-1(b) (2003) (the public records compiled by the agencies of North Carolina government "are the property of the people"). "The Public Records Act permits public access to all public records in an agency's possession 'unless either the agency or the record is specifically exempted from the statute's mandate.' " *Gannett Pacific Corp. v. N.C. State Bureau of Investigation*, 164 N.C. App. 154, 156, 595 S.E.2d 162, 164, 2004 N.C. App. LEXIS 693, at *3-4 (2004) (citing *Times-News Publishing Co. v. State of North Carolina*, 124 N.C. App. 175, 177, 474 S.E.2d 450, 452 (1996)). Further, the Public Records Act does not appear to allow a government entity to bring a declaratory judgment action; only the person making the public records request is entitled to initiate judicial action to seek enforcement of its request.

McCormick, 164 N.C. App. at 463-64, 596 S.E.2d at 434. The *McCormick* Court held, "based on the Public Records Act and the policy consideration for disclosure under the act . . . the use of a declaratory judgment action in the instant case was improper." *McCormick*, 164 N.C. App. at 464, 596 S.E.2d at 434. Likewise, we hold use of a declaratory judgment action under the Public Records Act was improper in the instant case.

Open Meetings Act

Generally, "[i]t is the policy of this State, as announced by the General Assembly, to conduct the public's business in public." *Boney v. Burlington City Council*, 151 N.C. App. 651, 657-58, 566 S.E.2d 701, 705-06 (2001) ("The purpose of the Open Meetings Law is 'to promote openness in the daily workings of public bodies.' " (citation omitted)); N.C.G.S. § 143-318.9 (2003) ("Whereas 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.").

Under certain circumstances, a public body may hold a closed meeting, N.C.G.S. § 143-318.11 (2003); however, the body is required to "keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired," N.C.G.S. § 143-318.10(e) (2003). "Such minutes and

accounts shall be public records within the meaning of the Public Records Law, G.S. 132-1 et seq.; provided, however, that minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session." N.C.G.S. § 143-318.10(e) (2003).

Uniform with the Public Records Act, the Open Meetings Act does not appear to allow a government entity to bring a declaratory judgment action; only a person seeking a declaration that an action of a public body was in violation of the Open Meetings Act is entitled to initiate judicial action to seek enforcement of its request. *See* N.C.G.S. § 143-318.16 (2003) ("Any person may bring an action in the appropriate division of the General Court of Justice seeking such an injunction; and the plaintiff need not allege or prove special damage different from that suffered by the public at large."); N.C.G.S. § 143-318.16A(a) (2003) ("Any person may institute a suit in the superior court requesting the entry of a judgment declaring that any action of a public body was taken, considered, discussed, or deliberated in violation of this Article. . . . Any person may seek such a declaratory judgment, and the plaintiff need not allege or prove special damage different from that suffered by the public at large."); *Eggimann v. Wake County Bd. of Educ.*, 22 N.C. App. 459, 463, 206 S.E.2d 754, 757 (1974) (stating that the "provisions of former G.S. 143-318.6 [now G.S. § 143-318.16] were intended to apply only to a situation where a citizen has been refused access to a meeting required to be open").

Likewise, the same consideration we noted in our opinion in *McCormick* as to the propriety of a government agency bringing a declaratory judgment action as to public records, applies in the instant case to a government agency bringing a declaratory judgment action as to open meetings. Allowing a governmental agency to bring a declaratory judgment action against someone who has not initiated litigation will have a chilling effect on the public, in essence eliminating the protection offered them under the statute by requiring them " 'to defend civil actions they otherwise might not have commenced, . . . thus frustrating the Legislature's purpose of furthering the fundamental right of every person . . . to have prompt access to information in the possession of public agencies.' " *McCormick*, 164 N.C. App. at 463, 596 S.E.2d at 434 (2004) (quoting *Filarsky v. Superior Court*, 28 Cal. 4th 419, 423, 121 Cal. Rptr. 2d 844, 845, 49 P.3d 194, 195 (2002)).

Based on the purpose of promoting " 'openness in the daily workings of public bodies,' " *Boney*, 151 N.C. App. at 658, 566 S.E.2d at 706 (citation omitted), and the policy consideration for disclosure under the act, it was error for the trial court to allow a public body to file a declaratory judgment action in the instant case.

Reversed.

Judges McCULLOUGH and ELMORE concur.

IN THE MATTER OF: THE APPEAL OF PAVILLON INTERNATIONAL FROM THE DECISION OF THE POLK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING PROPERTY TAX EXEMPTION FOR TAX YEAR 2001

No. COA03-1357

(Filed 7 September 2004)

1. Taxation— ad valorem—exemption for charitable purposes

The Property Tax Commission did not err by determining that a Michigan nonprofit corporation that operated a residential treatment center in North Carolina for individuals with addictions, disorders, and life crises was exempt from ad valorem taxation pursuant to N.C.G.S. § 105-278.7, because: (1) the company's fee of $12,500 for this type of care was more analogous to the fee range charged by state facilities than the fee range charged by private for-profit institutions; (2) the amount of free care provided by the company was not inconsiderable when compared to the client fees it has generated; (3) while financial ability to pay was one of the admission criteria, clinical appropriateness was the primary determinative factor and nobody had been turned down for financial reasons; (4) the company's work benefitted a large segment of the community in other ways besides its care for indigents and those incapable of paying the full price including free training to mental health care professionals across North Carolina, educational services and training to professionals, school systems, and ministers, hosting conferences in the state for addiction professionals, and reducing the burden on Polk County in providing mental health care; and (5) in the absence of charitable contributions helping to subsidize client fees, the company would be unable to continue operations.

2. Taxation— ad valorem—ownership by charitable association or institution

The Property Tax Commission did not err by determining that a Michigan nonprofit corporation that operated a residential treatment center in North Carolina for individuals with addictions, disorders, and life crises was exempt from ad valorem taxation even though Polk County asserts the company's property was not wholly owned by a charitable association or institution, because the county merely incorporated its previous argument that the company is not operated exclusively for charitable purposes, and the Court of Appeals already found this argument to be without merit.

3. Taxation— ad valorem—exemption for portion of property

Although Polk County contends that only the portion of a Michigan nonprofit corporation's property used wholly and exclusively for charitable purposes should be exempt from taxation based on the percentages of indigent care and need-based scholarship funds, the Court of Appeals already rejected this argument.

Appeal by Polk County from decision of the North Carolina Property Tax Commission. Heard in the Court of Appeals 25 May 2004.

Parker, Poe, Adams & Bernstein, L.L.P., by Charles C. Meeker and Cynthia L. Wittmer, for Polk County, appellant.

Nelson, Mullins, Riley, & Scarborough, L.L.P., by Charles H. Mercer, Jr. and Reed J. Hollander, for Pavillon International, appellee.

CALABRIA, Judge.

Polk County appeals the final decision of the North Carolina Property Tax Commission ("Commission"), which determined Pavillon International ("Pavillon") was exempt from *ad valorem* taxation pursuant to N.C. Gen. Stat. § 105-278.7 (2003). We affirm.

Pavillon, a Michigan nonprofit corporation with a certificate of authority to conduct affairs in North Carolina, operates a residential treatment center in North Carolina for individuals with addictions, disorders, and life crises. Admittance is based on a number of factors with clinical appropriateness being the primary consideration. One of

the programs Pavillon offers is an intensive, residential, closed-group session lasting four weeks. The Commission characterized the program as "occur[ring] in stages [with each] stage address[ing] the personal and unique needs of the individuals that are enrolled." The program incorporates human development, twelve-step, and psychiatric models. Studies indicate that sixty-five percent of the participants in Pavillon's four-week program maintain total abstinence after six months as compared to the industry average of twenty to thirty percent and a state program average of under twenty percent. As of 1 January 2001, Pavillon's four-week program cost $12,500. To help defray the cost of the program, Pavillon reserves ten percent of its beds for indigent individuals and also provides need-based scholarships.

For the 2001 tax year, Pavillon submitted an application seeking to exempt an 8,800 square foot addition from property taxation.[1] Polk County's assessor denied the application, and Pavillon appealed to the Polk County Board of Equalization and Review, which upheld the denial on 15 June 2001. Pavillon appealed to the Commission, which heard the appeal on 16 January 2003 and concluded as a matter of law that Pavillon "did show that the subject property is wholly and exclusively used . . . for a nonprofit charitable purpose" and was engaged in activities "benefit[ting] humanity and a significant segment of the community without the expectation of pecuniary profit or reward." Accordingly, the Commission exempted Pavillon from *ad valorem* taxation. Polk County asserts on appeal that the Commission erred in allowing the exemption because Pavillon (I) failed to show that its real and personal property is "wholly and exclusively used" for charitable purposes, as required by N.C. Gen. Stat. § 105-278.7(a) and (b), (II) failed to show that the property is owned by a "charitable association or institution," as required by N.C. Gen. Stat. § 105-278.7(c), and (III) showed, at most, that only a part of its property is entitled to exemption due to whole and exclusive use for charitable purposes.

The applicable standard of review in an appeal from a decision of the Commission is governed by N.C. Gen. Stat. § 105-345.2 (2003), which provides, in pertinent part, that an appellate court reviews the Commission's findings, inferences, conclusions or decisions to determine whether they are:

1. Pavillon's facility was built in two stages. Because the first stage was financed via revenue bonds issued by the North Carolina Medical Care Commission that remained outstanding during the relevant tax period, only taxation of Pavillon's 8,800 square foot addition, which was not financed via such revenue bonds, is at issue in this case.

(1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the Commission; or

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (2003). Such determinations are based upon a "review [of] the whole record or such portions thereof as may be cited by any party . . . ." N.C. Gen. Stat. § 105-345.2(c) (2003). "We will review all questions of law *de novo* and apply the whole record test where the evidence is conflicting to determine if the Commission's decision has any rational basis." *In re Univ. for the Study of Human Goodness & Creative Grp. Work*, 159 N.C. App. 85, 88-89, 582 S.E.2d 645, 648 (2003) (internal citations omitted).

Recently, this Court has reiterated that

> The whole record test does not permit the appellate court to substitute its judgment for that of the agency when two reasonable conflicting results could be reached, but it does require the court, in determining the substantiality of evidence supporting the agency's decision, to take into account evidence contradictory to the evidence on which the agency decision relies. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the whole record supports the Commission's findings, the decision of the Commission must be upheld.

Id., 159 N.C. App. at 89, 582 S.E.2d at 649 (internal citations and quotation marks omitted).

[1] The primary issue presented in this case is whether the Commission erred in determining Pavillon was entitled to exemption from *ad valorem* taxes pursuant to N.C. Gen. Stat. § 105-278.7(a) (2003), which applies to "[b]uildings, the land they actually occupy, and additional adjacent land necessary for the convenient use of any such building[,]" and N.C. Gen. Stat. § 105-278.7(b) (2003), which applies to personal property. Both subsections provide, in pertinent part, that the subject property "shall be exempted from taxation if

wholly owned by an agency listed in subsection (c), below, and if . . . [w]holly and exclusively used by its owner for nonprofit . . . charitable purposes[.]" N.C. Gen. Stat. § 105-278.7 (a),(b). Subsection (f)(4) defines a charitable purpose as "one that has humane and philanthropic objectives; it is an activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward." N.C. Gen. Stat. § 105-278.7(f)(4) (2003). In applying these statutory provisions to the facts of this case, we are mindful that "[w]ith respect to taxation statutes, provisions for exemptions are strictly construed and ambiguities are resolved in favor of taxation. A taxpayer who seeks the benefit of an exemption has the burden of showing that he comes within the exclusion upon which he relies." *Southminster, Inc. v. Justus*, 119 N.C. App. 669, 673-74, 459 S.E.2d 793, 796 (1995). "The rule of strict construction does not, however, require that the statute be 'stintingly or even narrowly construed' or that relevant language in the statute be given other than its plain and obvious meaning." *Id.*, 119 N.C. App. at 674, 459 S.E.2d at 796 (quoting *Wake County v. Ingle*, 273 N.C. 343, 347, 160 S.E.2d 62, 65 (1968)).

Polk County argues Pavillon failed to show that the property at issue was wholly and exclusively used for a charitable purpose. Polk County concedes Pavillon's facility serves a useful and beneficial purpose but contends the cost of treatment limits the segment of the community it benefits such that it cannot be considered charitable. We find Polk County's arguments unpersuasive for numerous reasons. First, the testimony before the Commission revealed that Pavillon's fee of $12,500 for this type of care is more analogous to the fee range of $4,928 to $5,656 charged by state facilities than the fee range of $35,000 to $50,000 charged by private, for-profit institutions. Similar treatment in hospitals within the state, according to further testimony adduced at the hearing, could cost between $28,000 and $56,000 for four weeks.

Second, the amount of free care provided by Pavillon is not inconsiderable when compared to the client fees it has generated. From September 1996 through 1999, Pavillon provided free care in the amount of $1,809,748 ($730,200 for indigent beds and $1,079,548 for partial scholarships) while generating client fees of $5,000,544.[2]

2. Polk County points out that Pavillon's total income in 2000 was $2,283,900 but Pavillon's need-based partial scholarships awarded during that time amounted to only $99,425 (or approximately 4.4 percent of their income). However, we note Pavillon also provided indigent care and Mr. Van Hecke, who facilitated Pavillon's

Polk County seems to argue the $1,079,548 in partial scholarships included capital funds raised for the construction of the addition. However, Mr. Van Hecke expressly affirmed the $1,079,548 represented "scholarship money that [was] used to help pay for people who couldn't otherwise afford the cost[.]" While Mr. Van Hecke also testified that "the contribution of the 1.1 million [dollars]. . . in terms of the accounting" was applied in part to the addition rather than free care, that testimony actually referred to the $1,141,214 in contributions disclosed on the 2001 consolidated financial statement prepared by Arthur Andersen, not the $1,079,548 paid in scholarships.

Third, the testimony before the Commission indicated that, while financial ability to pay is one of the admission criteria, clinical appropriateness was the primary determinative factor, and "nobody [had been] turned down" for financial reasons. This testimony was borne out by Pavillon's exhibits. For example, as noted previously, Pavillon paid a total of $1,809,748 in indigent and scholarship dollars between September of 1996 through 1999. In addition to the ten percent of beds reserved for indigent clients, Pavillon awarded individual scholarships in amounts up to and equivalent to the value of an indigent bed. For example, from January through December 1998, an indigent bed was valued at $8,900 and during that same time period, Pavillon awarded need-based scholarships between $400 and $8,900. From January through December 2002, an indigent bed was valued at $14,500 and during that same time period, Pavillon awarded need-based scholarships between $600 and $14,500. Mr. Van Hecke testified Pavillon tried "to spread [funds from contributors] out to affect as many people as [they could.]" Both in terms of collective dollars spent on need-based scholarships and indigent care and based on individual scholarships granted, the record bears out that clinically appropriate individuals received treatment without regard to ability to pay.

Fourth, Pavillon's work benefitted a large segment of the community in other ways besides its care for indigents and those incapable of paying the full price. For example, Pavillon provides free training to mental health care professionals across North Carolina to "train them in some of the newer methodologies" and "raise the bar

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move from Canada to North Carolina, testified without contradiction that the records listing the indigent and partial scholarships were neither the most appropriate measure of free care nor the most accurate summary of the amount of free care administered by Pavillon.

of treatment in the state." Pavillon also provides educational services and training to professionals, school systems, and ministers and has hosted conferences in the state for addiction professionals over multiple years, all provided out of its own funds or with grant money received from outside sources. Finally, Harold Bain, the clinical supervisor of the alcohol and drug unit for the Rutherford/Polk Area Mental Health program, affirmed that Pavillon's activities in Polk County "reduce[d] the burden on Polk County in providing mental health care" and without Pavillon's activities, he "would have difficulty placing people and . . . getting [them] care."

Fifth, the testimony before the Commission indicated that, in the absence of charitable contributions helping to subsidize client fees, Pavillon would be unable to continue operations. For the 2001 tax year, Pavillon received $1,141,214 in contributions and $2,982,139 in fees from program participants. Pavillon's 2001 consolidated financial statements reveal Pavillon "experienced a negative cash flow from operations. The ability . . . to continue operations and meet its obligations is dependent on the continued support of its major donors[.]" We find these reasons support Pavillon's claim of entitlement to exemption from *ad valorem* taxes because it was wholly and exclusively used for a charitable purpose.

Our analysis is bolstered by this Court's holding in *In re Taxable Status of Property* that a nonprofit nursing home was a charitable institution and used the property for charitable purposes despite the fact that it charged a fee because the fee requirement was frequently ignored. *Id.*, 45 N.C. App. 632, 263 S.E.2d 838 (1980). This Court found persuasive that the payments by residents were insufficient to cover the cost of the direct operating expenses of the home and the deficit was made up by contributions. *Id. In re Appeal of Barham*, 70 N.C. App. 236, 319 S.E.2d 657 (1984) and *In re Chapel Hill Residential Retirement Center*, 60 N.C. App. 294, 299 S.E.2d 782 (1983), cited by Polk County in support of its arguments, are distinguishable. Both cases involved retirement centers seeking to qualify as exempt from *ad valorem* taxes on the grounds that the property was used for charitable purposes. *Id.* In *Chapel Hill*, this Court distinguished *Taxable Status* and upheld the denial of exemption on the grounds that *Taxable Status* "involved property owners who were receiving and relying upon donations from outside sources for the operation of their programs." *Chapel Hill*, 60 N.C. App. at 304, 299 S.E.2d at 788. In *Barham*, this Court noted "that the funding for the every day operation of the project will come mainly from the funds paid in by the

residents" and observed "only a small percentage of the elderly could feasibly participate in [the] retirement center." *Barham*, 70 N.C. App. at 243-44, 319 S.E.2d at 661. As in *Taxable Status* and in contrast to *Barham* and *Chapel Hill*, Pavillon's operation is dependent on the receipt of charitable donations from outside sources for its programs and, through need-based partial scholarships and full indigent scholarships, it has never turned anyone away due to financial inability. This assignment of error is overruled.

[2] In its second assignment of error, Polk County asserts Pavillon's property is not wholly owned by a charitable association or institution because charitable or religious corporations, as defined in N.C. Gen. Stat. § 55A-1-40(4) (2003), are required to be "organized exclusively for one or more of the purposes specified in section 501(c)(3) of the Internal Revenue Code of 1986 or any successor section[,]" which includes charitable purposes. Assuming *arguendo* N.C. Gen. Stat. § 55A-1-40(4) provides the applicable definition, Polk County merely incorporates its previous argument that Pavillon is not operated exclusively for charitable purposes. Because we have already found this argument to be without merit, this assignment of error is overruled.

[3] In its third and final assignment of error, Polk County alternatively argues that, if this Court determines that some portion of Pavillon's property is wholly and exclusively used for charitable purposes, only that portion should be exempt from taxation. Polk County incorporates its previous discussion regarding the percentages of indigent care and need-based scholarship funds. Having already rejected this argument, we overrule this assignment of error.

Pavillon assigns as error the Commission's failure to exempt Pavillon from *ad valorem* taxes on the grounds that it meets the requirements of N.C. Gen. Stat. § 105-278.8. Because we find the Commission correctly determined that Pavillon was exempt under N.C. Gen. Stat. § 105-278.7, we need not address this assignment of error.

Affirmed.

Judges WYNN and LEVINSON concur.

STATE OF NORTH CAROLINA v. CELESTE MARCHE HINES

No. COA03-1334

(Filed 7 September 2004)

1. **Robbery— use of a weapon—sufficiency of evidence**

A motion to dismiss an armed robbery charge for insufficient evidence was correctly denied where defendant argued that the State had not presented substantial evidence that a weapon was used, but a doctor testified that the victim's head injury was caused by blunt force from an object such as a crowbar or baton and was not consistent with a fall.

2. **Assault— on a handicapped person—hearing impairment**

The denial of a motion to dismiss a charge of aggravated assault on a handicapped person was correct where defendant argued that the State did not show that the victim's hearing problem substantially impaired her ability to defend herself, but the victim testified that she had difficulty hearing a person approaching from behind. N.C.G.S. § 14-32.1(a).

3. **Indictment and Information— indictment and instruction—fatal variance**

There was a fatal variance between an indictment for aggravated assault on a handicapped person and the instruction where the instruction permitted the jury to convict on a criminal negligence theory which was not alleged in the indictment. This substantially affected defendant's ability to prepare a defense.

4. **Assault— on a handicapped person—sentencing**

The trial court did not err by entering judgment on a charge of aggravated assault on a handicapped person where a judgment was also entered on a charge of armed robbery of that person. N.C.G.S. § 14-32.1(e) (which bars punishment for assaulting a handicapped person when conduct is covered by another statute providing greater punishment) does not apply here.

Appeal by defendant from judgments entered 23 April 2003 by Judge Melzer A. Morgan, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 10 June 2004.

Attorney General Roy Cooper, by Assistant Attorney General Joseph E. Herrin, for the State.

Kathryn L. VandenBerg for defendant-appellant.

THORNBURG, Judge.

Celeste Marche Hines ("defendant") appeals her convictions of one count of robbery with a dangerous weapon (01 CRS 55914), one count of aggravated assault on a handicapped person (01 CRS 22179), two counts of obtaining property by false pretenses (02 CRS 12603), one count of financial card theft and one count of financial card fraud (02 CRS 12604). For the reasons stated herein, we vacate the judgment of the trial court on the aggravated assault on a handicapped person charge. We find no prejudicial error in defendant's remaining convictions.

The issues presented on appeal are whether the trial court erred (1) by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon; (2) by denying defendant's motion to dismiss the charge of aggravated assault on a handicapped person; (3) in its instructions to the jury on the charge of aggravated assault on a handicapped person; and (4) by not arresting judgment on the charge of aggravated assault on a handicapped person.

At trial, the victim, Delores Sampedro ("Sampedro"), who is hearing impaired, and defendant offered two versions of the events of 14 June 2001. According to Sampedro's testimony, on 14 June 2001 she was stopped at a stop sign on her way home from grocery shopping when her car was rear-ended. When she exited her vehicle to see if it was damaged, the driver of the other car, later identified as defendant's cousin Ronda Singletary ("Singletary"), apologized for the accident and suggested that they move their cars to an adjacent road to avoid blocking traffic. Both parties did so. After moving her car, Sampedro again exited her vehicle. Singletary and defendant, who had been riding as a passenger, also exited their vehicle. Singletary and Sampedro discussed exchanging insurance information and defendant and Singletary returned to their vehicle. Singletary began writing on the back of an envelope. Sampedro then approached defendant's vehicle to obtain the insurance information, and Singletary asked Sampedro to write down her information. Before giving anything to Sampedro, Singletary suggested that Sampedro make sure her car would start. Sampedro returned to her vehicle, turned the key in the ignition and the engine promptly started.

Sampedro then realized that she still had not obtained Singletary's information, so she checked her side mirror to make sure there were no approaching cars and started to open her car door. Sampedro remembers nothing else until she woke up in the emergency room.

Dr. Christopher Lepak treated Sampedro at Forsyth Memorial Hospital's emergency room on 14 June 2001 and testified for the State. Dr. Lepak testified that, in his opinion, Sampedro "had received a blunt force trauma to her head" and that this head injury was inconsistent with a fall. He opined that while her broken clavicle and other scrapes may have been the result of a fall, "I can for sure say that the head [injury] was not from a fall." At the close of the State's evidence the trial court denied defendant's motion to dismiss all the charges against her.

Defendant took the stand and testified that after the accident occurred and the women discussed exchanging insurance information, Sampedro was standing at the passenger side of the car with her pocketbook on her arm. After receiving a signal from Singletary, defendant grabbed Sampedro's pocketbook and Singletary drove off. Defendant denied striking Sampedro on the head, and testified that she did not see Singletary strike Sampedro with anything either. At the close of defendant's case, defendant renewed her motion to dismiss all the charges against her, which the trial court denied. The jury returned a guilty verdict on all charges. Defendant was sentenced to a minimum of 96 months and a maximum of 125 months in the custody of the North Carolina Department of Correction for robbery with a dangerous weapon. The sentences for the remaining charges were suspended. Defendant appeals.

I

[1] Defendant first contends that the trial court erred by denying her motion to dismiss the charge of robbery with a dangerous weapon for insufficient evidence. We disagree.

"When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982). "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). If a jury could reasonably infer defendant's guilt when the evidence is viewed in the light most favorable to the State, then the motion must be denied. *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620-21 (2002).

The elements of robbery with a dangerous weapon are: "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of the person is endangered or threatened." *State v. Mann*, 355 N.C. 294, 303, 560 S.E.2d 776, 782 (2002), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). Defendant argues that the State failed to present substantial evidence that a weapon was used in the robbery of Sampedro. However, at trial Dr. Lepak testified that in his opinion Sampedro's head injury resulted from a blunt force trauma and was inconsistent with a fall. He stated that the abnormal shape and severe swelling present in Sampedro's head injury "suggest[ed] massive trauma to the head from a blunt force object" possibly "a baton, crowbar, [or] something of that size and length." This testimony would permit a reasonable jury to infer the existence of a dangerous weapon. *See State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 664 (1965) (finding that the appearance of the wound on the victim's scalp permitted the inference that a dangerous weapon was used). Moreover, in *State v. Singletary*, — N.C. App. —, 594 S.E.2d 64, 69 (2004), this Court held that the trial court in Singletary's trial did not err by denying the motion to dismiss this charge based on the same evidence of Sampedro's injury. Accordingly, we conclude that the motion to dismiss this charge in the instant case was properly denied.

II

[2] Defendant next contends that the trial court erred in denying her motion to dismiss the aggravated assault on a handicapped person charge because the State failed to show that the victim was handicapped as defined by N.C. Gen. Stat. § 14-32.1, the statute which creates this offense. Again, we disagree.

In relevant part, N.C. Gen. Stat. § 14-32.1 provides:

(a) For purposes of this section, a "handicapped person" is a person who has:

(1) A physical or mental disability, such as decreased use of arms or legs, blindness, deafness, mental retardation or mental illness; or

(2) Infirmity which would substantially impair that person's ability to defend himself.

N.C. Gen. Stat. § 14-32.1(a) (2003). Defendant argues that the State failed to show that Sampedro's hearing problem would have "substantially impaired" Sampedro's ability to defend herself.

Viewing the evidence in the light most favorable to the State, as we must, we conclude that sufficient evidence of the victim's handicap was presented to allow a reasonable jury to find that Sampedro was handicapped for the purposes of the statute at issue. On direct examination, Sampedro testified that she would not be able to hear someone come up behind her unless "that person was making a lot of noise." Further, when asked by the District Attorney if being out on the street where the accident occurred would affect her ability to hear, she stated that it would be "[m]ore difficult because there would be environmental noises which would interfere with [her] detecting any person coming up." Sampedro also testified that she underwent surgery to improve her hearing through the insertion of an implant, but at the time of the incident she had not been "fitted up with the exterior equipment, so it did not help in being able to . . . hear or understand." Accordingly, we conclude that the State presented substantial evidence that Sampedro is a handicapped person within the meaning of N.C. Gen. Stat. § 14-32.1. This assignment of error is overruled.

III

[3] Defendant next argues that the trial court's instruction to the jury on the aggravated assault on a handicapped person charge was a material and fatal variance from the indictment. We agree and vacate the judgment for this count.

"It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980). Further, when a variance exists between the bill of indictment and the jury charge, the Court must inquire whether the variance was prejudicial error, and therefore fatal. *State v. Rhyne*, 39 N.C. App. 319, 324, 250 S.E.2d 102, 105 (1979). Such an inquiry requires an examination of the purposes of an indictment. *Id.* The four recognized purposes of an indictment are (1) to identify the crime with which defendant is charged, (2) to protect defendant against being charged twice for the

same offense, (3) to provide defendant with a basis on which to prepare a defense, and (4) to guide the court in sentencing. *Id.* at 324, 250 S.E.2d at 105-06.

In the instant case, the State's indictment for aggravated assault on a handicapped person includes the following language:

> [T]he defendant named above unlawfully, willfully and feloniously did alone or acting in concert, assault and strike a handicapped person, Delores Victori Sampedro, by having in possession and use of a dangerous weapon to wit: an unknown blunt force object causing trauma to the head of the victim.

The trial court instructed the jury as follows:

> For you to find the defendant guilty of this offense, the State must prove four things beyond a reasonable doubt: First, that the defendant acting by herself or acting together with another person assaulted Delores Sampedro by intentionally striking Ms. Sampedro in the head, *or intentionally assaulted Ms. Sampedro by pulling off in the car when part of Ms. Sampedro's body was in the car or near enough to be hit by the car as it pulled away.*

(Emphasis added). Thus, the instruction given permitted the jury to convict defendant on a criminal negligence theory of assault,[1] a theory not alleged in the indictment.

We find that the variance between the indictment and the jury instruction substantially affected defendant's ability to prepare a defense. The trial court's instruction allowed the jury to convict defendant on a theory of assault for which defendant had not been indicted. On the stand, defendant admitted grabbing Sampedro's purse, but denied intentionally striking her with a blunt force object presumably based upon the theory of the crime alleged by the State in the indictment. Allowing the jury to convict defendant on the unindicted assault by criminal negligence theory constituted prejudicial and reversible error. For this reason, the judgment entered upon defendant's conviction for aggravated assault on a handicapped person must be vacated. *See State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986) (vacating the judgment entered upon the

1. The intent required for an assault offense "may be implied from culpable or criminal negligence, if the injury or apprehension thereof is the direct result of intentional acts done under circumstances showing a reckless disregard for the safety of others and a willingness to inflict injury." *State v. Coffey*, 43 N.C. App. 541, 543, 259 S.E.2d 356, 357 (1979) (internal citation omitted).

defendant's conviction when the trial court's instructions permitted the jury to convict the defendant on a different theory of rape than was alleged in the indictment).

IV

[4] Defendant's remaining argument is that the trial court erred in entering judgment on the charge of aggravated assault on a handicapped person where the relevant statute provides that a defendant is not guilty of this offense if her conduct is covered by another provision of law providing greater punishment. Defendant asserts that in light of this statutory language, punishing defendant's conduct under both the aggravated assault on a handicapped person and robbery with a dangerous weapon statutes violated the clear intent of our legislature. As this issue could recur on remand, we address it herein. *See State v. Lloyd*, 354 N.C. 76, 128, 552 S.E.2d 596, 631 (2001).

In her appellate brief, defendant concedes that the robbery with a dangerous weapon offense and the aggravated assault on a handicapped person offense each contain an element the other does not, and, thus, are separate offenses for the purposes of a double jeopardy analysis. *See Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 309 (1932) ("the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not"). However, in North Carolina, the intent of the legislature controls whether an individual may be punished for the same conduct under more than one criminal statute. *See State v. Bailey*, 157 N.C. App. 80, 86-87, 577 S.E.2d 683, 687-88 (2003). Thus, defendant asserts that the language of the assault on a handicapped person statute shows that our legislature did not intend for an individual to be punished under this statute as well as under another statute allowing for greater punishment. The specific language in the assault on a handicapped person statute allows for punishment "[u]nless [defendant's] conduct is covered under some other provision of law providing greater punishment . . . ." N.C. Gen. Stat. § 14-32.1(e) (2003).

As support for her argument, defendant cites this Court's recent holding in *State v. Ezell*, 159 N.C. App. 103, 582 S.E.2d 679 (2003). In *Ezell* the Court stated:

> N.C. Gen. Stat. § 14-32.4 contains specific language indicating that the legislature intended that § 14-32.4 apply only in the absence of other applicable provisions. Section 14-32.4 indicates

that it applies "*[u]nless* the conduct is covered under some other provision of law providing greater punishment."

Id. at 109, 582 S.E.2d at 684 (alternation in original). However, in *Ezell*, the defendant was convicted and sentenced pursuant to N.C. Gen. Stat. §§ 14-32 and 14-32.4, two assault provisions, whereas the defendant in the instant case was charged with violations of one assault statute and one robbery statute. Accordingly, we distinguish *Ezell*. Moreover, we note that North Carolina courts have consistently allowed convictions for both robbery with a dangerous weapon and felonious assault. *See, e.g., State v. Alexander*, 284 N.C. 87, 93-94, 199 S.E.2d 450, 454-55 (1973), *cert. denied*, 415 U.S. 927, 39 L. Ed. 2d 484 (1974). Thus, we conclude that the statutory language cited by defendant bars punishment under both this provision and another provision of an assault statute. Since we are not called upon to make such an application in the case at bar, defendant's argument is unavailing. This assignment of error is overruled.

No error as to defendant's convictions in case numbers 01 CRS 55914, 02 CRS 12603 and 02 CRS 12604.

Vacate the judgment for aggravated assault on a handicapped person, case number 01 CRS 22179.

Judges HUDSON and GEER concur.

HECTOR DIAZ, PETITIONER v. DIVISION OF SOCIAL SERVICES AND DIVISION OF MEDICAL ASSISTANCE, NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA03-1151

(Filed 7 September 2004)

Public Assistance— Medicaid—undocumented alien—emergency medical condition

The trial court did not err by allowing Medicaid coverage for the treatment of an emergency medical condition for petitioner who is a non-citizen of the United States and is not admitted for permanent residence or otherwise living in the United States under color of law, because: (1) petitioner's condition was mani-

festing itself by acute symptoms requiring immediate medical attention, and the diagnosis was acute lymphocytic leukemia; and (2) absent medical treatment in the form of chemotherapy, petitioner's health would have been placed in serious jeopardy and he would have died.

Appeal by respondent from judgment and order entered 23 May 2003 by Judge James W. Webb in Guilford County Superior Court. Heard in the Court of Appeals 20 May 2004.

Ott Cone & Redpath, P.A., by Melanie M. Hamilton, for petitioner appellee.

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

McCULLOUGH, Judge.

Respondent North Carolina Department of Health and Human Services, Division of Medical Assistance appeals the trial court's decision to allow Medicaid coverage for petitioner Hector Diaz. A brief summary of the facts follows.

Petitioner Hector Diaz is not a citizen of the United States and is not admitted for permanent residence or otherwise living in the United States under color of law. In October of 2000, petitioner began to suffer from sore throat, nausea, vomiting, bleeding gums, and increased lethargy. Biopsies later revealed that petitioner was suffering from acute lymphocytic leukemia.

On 25 October 2000, petitioner began chemotherapy treatments. Subsequently, petitioner went to the intensive care unit for treatment of an infection. He returned to the regular unit on 12 November 2000 and was discharged on 22 November 2000.

Petitioner returned to the hospital on 25 November 2000 and proceeded to the second module of treatment. He developed a fever on 10 December 2000 and received antibiotics. He was discharged on 15 December 2000. The plan was for him to return for another biopsy before being readmitted for the third module of treatment. Petitioner returned to the hospital from 5 January 2001 through 8 January 2001 for the third module of treatment. The next two admissions in January of 2001 proceeded with no problems. Petitioner was admitted again in February of 2001, and his final module began on 16 April 2001.

There were three separate applications for Medicaid that were submitted on behalf of petitioner. Respondent approved coverage for medical services rendered in October, November, and December of 2000 and again in March and May of 2001. Respondent denied Medicaid coverage for all other admissions. Following three separate hearings, respondent issued three final agency decisions affirming the denials of Medicaid coverage.

Petitioner sought judicial review through three separate petitions. The trial court entered a judgment and order reversing the final agency decision. It determined that petitioner was entitled to Medicaid coverage for the treatment of his emergency medical condition. This included the care he received beginning on 22 October 2000 and the services rendered under the standard course of medical treatment.

Respondent appeals. On appeal, respondent argues that the trial court erred by extending Medicaid benefits to petitioner for the treatment of an emergency medical condition. We disagree and affirm the decision of the trial court.

I. Standard of Review

Chapter 150B of the North Carolina General Statutes addresses 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." This statute also notes that in cases that are not governed by N.C. Gen. Stat. § 150B-51(c), the standard of review is "the same as it is for other civil cases." *Id.*

Since this case is not governed by N.C. Gen. Stat. § 150B-51(c), 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 the findings of fact which are therefore binding on appeal. Our role is to determine whether the conclusions of law were proper in light of these facts.[1]

II. Legal Background and Issue on Appeal

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 those who are not permanent residents under color of law may not receive full Medicaid coverage. *Id.* The sole exception to this exclusion in both the North Carolina rule and the federal regulations is that payment is authorized for medical care that is necessary for the treatment of an emergency medical condition. *Id.* at 4, 589 S.E.2d at 919-20. In this case, petitioner acknowledges that he 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.

The *Luna* Court described the definition of "emergency medical condition" under federal law:

> 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.

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1. We have applied this standard of review in two recent cases which considered the same issue. In *Luna v. Div. of Soc. Servs.*, 162 N.C. App. 1, 2, 589 S.E.2d 917, 918 (2004), we evaluated "whether the Department correctly applied the law in determining that certain care and services did not constitute treatment for Petitioner's emergency medical condition." Similarly, in *Medina v. Div. of Soc. Servs.*, — N.C. App. —, — S.E.2d — (No. COA03-875, filed 20 July 2004), the issue was whether certain medical services were for the treatment of an emergency medical condition. Therefore, there is a precedent for the standard of review which we employ today.

Id. at 4-5, 589 S.E.2d at 920 (citation omitted). In a subsequent case, we elaborated on what the term "emergency medical condition" means in North Carolina:

> 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.*

Medina v. Div. of Soc. Servs., 165 N.C. App. 502, —— S.E.2d —— (No. COA03-875, filed 20 July 2004).

The decisions in *Luna* and *Medina* are important to the resolution of the present case because they considered whether certain medical services were for the treatment of an emergency medical condition. In *Luna*, we noted that the trial court did not make adequate findings of fact to support its conclusions of law. *Luna*, 162 N.C. App. at 13, 589 S.E.2d at 924-25. Ultimately, we remanded the case and instructed the trial court to make findings on the following issues before deciding the legal issue of coverage:

> (1) whether [petitioner's] 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.

We reached the same result in *Medina*. There, the trial court "failed to show whether petitioner's condition was manifesting itself by acute symptoms." *Medina*, 165 N.C. App. at 508, —— S.E.2d at ——. The trial court also did not address "whether the absence of immediate medical attention" would "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)." *Id.* Therefore, we remanded the case for further findings. *Id.*

As we did in *Luna* and *Medina*, we must examine the findings of fact and conclusions of law. Here, the trial court made the following pertinent findings of fact:

2. Petitioner is not a citizen of the United States, nor is he admitted for permanent residence or otherwise permanently residing in the United States under color of law. The Petitioner does, however, meet all other eligibility criteria for Medicaid.

3. Petitioner was first seen at The Moses Cone Memorial Hospital on October 22, 2000. His symptoms included a one-week history of a sore throat, a four-day history of nausea and vomiting, decreased intake, bleeding gums and increasing lethargy. During the course of his 10/22/00 admission, Petitioner was diagnosed with acute lymphocytic leukemia ("ALL") and malnutrition, among other things.

4. Absent medical treatment in the form of chemotherapy, Petitioner's health would have been placed in serious jeopardy and he would have died.

5. The Petitioner received standard courses of treatment for his condition of ALL consisting of diagnostic services and several series of chemotherapy treatments.

6. The Petitioner's condition was an acute, life-threatening condition, not a chronic condition, and treatment was given accordingly.

7. The treatment received by the Petitioner was not ongoing treatment for a medical condition which was a chronic debilitating condition.

The trial court also made the following relevant conclusions of law:

3. As a "non-qualified alien," the Petitioner is only eligible for Medicaid coverage for care and services necessary for the treatment of an emergency medical condition.

4. The Petitioner was suffering from a medical condition in the form of a lethal cancer, acute lymphocytic leukemia ("ALL") when he [was] first presented to Moses Cone Memorial Hospital on 10/22/00.

5. Petitioner's presenting symptoms on 10/22/00 were acute symptoms of sufficient severity such that immediate medical attention was needed.

6. Petitioner's chemotherapy treatments, which were initiated during his October 22, 2000 admission under the standard medical protocol, began as soon as was medically feasible and therefore constituted immediate medical attention.

7. If Petitioner had not received immediate medical attention in the form of diagnostic tests and chemotherapy, his health would have been placed in serious jeopardy, and he would almost certainly have died.

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10. The Petitioner's continuing chemotherapy treatment under the standard medical course of treatment and medical protocol constituted medically necessary, appropriate and continuing treatment for the Petitioner's emergency medical condition.

11. The final agency decision applied improper legal standards in concluding that the treatment Petitioner received was not treatment for an emergency medical condition.

12. The final agency decision denying Medicaid coverage for the treatment the Petitioner received was based on an incorrect interpretation of the governing federal statute and regulation, and was, therefore, affected by error of law.

Based on these findings of fact and conclusions of law, the trial court reversed the agency and granted Medicaid coverage "for the Petitioner for treatment of his emergency medical condition[.]" This included all necessary care beginning on 22 October 2000 and encompassed all care under the standard medical course of treatment.

We believe that the trial court in the present case made the key factual findings that were lacking in *Luna* and *Medina*. Here, the trial court explained that petitioner's condition was manifesting itself by acute symptoms. Conclusion of law 5 mentioned that petitioner's symptoms on 22 October 2000 were "acute symptoms" that required "immediate medical attention." Similarly, finding of fact 3 identified what those symptoms were and stated that the diagnosis was acute lymphocytic leukemia.

Second, the trial court specified that the absence of immediate medical attention would result in the consequences listed in the North Carolina rule: health in serious jeopardy, serious impairment of bodily functions, or serious dysfunction of any bodily organ or part.

In finding of fact 4, the trial court explained that "[a]bsent medical treatment in the form of chemotherapy, Petitioner's health would have been placed in serious jeopardy and he would have died."

Based on these findings, the trial court was correct in concluding that petitioner was entitled to Medicaid for the treatment of his emergency medical condition. The decision of the trial court is

Affirmed.

Judges HUDSON and LEVINSON concur.

JAMES WOOD AND WIFE, PAT WOOD, PLAINTIFFS V. BD&A CONSTRUCTION, L.L.C., AND BD&A REALTY & CONSTRUCTION, INC., AND BOB DEGABRIELLE & ASSOCIATES, INC., DEFENDANTS

No. COA03-1296

(Filed 7 September 2004)

Statutes of Limitation and Repose— construction of home— fraud—willful or wanton negligence—equitable estoppel

The trial court did not err by granting defendants' motion to dismiss claims for breach of warranties, breach of implied warranty, negligence, negligent misrepresentation, breach of contract, and unfair and deceptive trade practices in the construction of a home based on expiration of the statute of repose under N.C.G.S. § 1-50(a)(5), because: (1) plaintiffs' complaint failed to allege fraud, which must be pled with particularity, to support application of N.C.G.S. § 1-50(a)(5)(e); (2) plaintiffs' complaint failed to allege willful or wanton negligent to support application of N.C.G.S. § 1-50(a)(5)(e); and (3) plaintiffs have not sufficiently alleged equitable estoppel when the cause of delay in filing the instant action was not defendants' representations that it had addressed the window problem, but rather plaintiffs' delay in discovering the other defects in the home.

Appeal by plaintiffs from order entered 1 August 2003 by Judge Dwight L. Cranford in Dare County Superior Court. Heard in the Court of Appeals 27 May 2004.

C. Everett Thompson, II, for plaintiff-appellants.

Poyner & Spruill, LLP, by J. Nicholas Ellis and Gregory S. Camp, for defendant-appellees.

THORNBURG, Judge.

Plaintiffs are the owners of a house and lot in Manteo, North Carolina. In 1995, plaintiffs contracted with defendants for the design and construction of the house. The house was substantially completed and certificates for occupancy were issued in April 1996.

Shortly after plaintiffs occupied the home, water intrusion leaks began to appear at various locations on the walls and around the windows and doors of the house. One of the major leaks involved water getting around the deck flashing and running down the inside and outside of the sheathing in one corner of the house. Defendants repaired this defect. Plaintiffs also experienced leaks around the windows of the master bedroom and the great room and two sliding doors. Defendants notified plaintiffs that there were problems with the Andersen windows in the house, which defendants felt might be the source of the continued leaks. The Andersen windows were replaced in early 1997.

In August 2002, plaintiffs undertook some maintenance to the house and discovered construction defects and damage to the house as a result of water intrusion. On 11 February 2003, plaintiffs filed the instant action alleging that the defects in the house resulted from latent defects in the design and construction of the house by defendants. Plaintiffs brought claims for breach of warranties, breach of implied warranty, negligence, negligent misrepresentation, breach of contract and unfair and deceptive trade practices. On 6 March 2003, defendants moved to dismiss the plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), asserting that plaintiffs' claims were barred by the applicable statutes of limitations and statutes of repose. The trial court granted defendants' motion to dismiss due to the expiration of the statute of repose found in N.C. Gen. Stat. § 1-50. Plaintiffs appeal.

Plaintiffs argue on appeal: (1) that the statute of limitations has not expired as the claim was not discovered until less than a year before the action was commenced; (2) that the defendants are equitably estopped from raising either the statutes of limitations or the statute of repose; and (3) that the statute of repose in N.C. Gen. Stat.

§ 1-50 does not apply as defendants' actions constituted fraud or willful or wanton negligence.

"In our review of the trial court's dismissal of this action pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), we must consider the allegations of the plaintiffs' complaint as true." *Arroyo v. Scottie's Professional Window Cleaning*, 120 N.C. App. 154, 155, 461 S.E.2d 13, 14 (1995), *disc. review improvidently allowed*, 343 N.C. 118, 468 S.E.2d 58 (1996). "A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a complaint by presenting 'the question of whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory.' " *Cage v. Colonial Building Co.*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994) (quoting *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991)) (alteration in original). A motion should be granted if it appears to a certainty that a plaintiff is entitled to no relief under any set of facts which could be proved in support of the claim. *Cage*, 337 N.C. at 683, 448 S.E.2d at 116.

The applicable statute of repose is found in N.C. Gen. Stat. § 1-50(a)(5), which provides in part:

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

N.C. Gen. Stat. § 1-50 (a)(5)(a) (2003). This statute "is designed to limit the potential liability of architects, contractors, and perhaps others in the construction industry for improvements made to real property." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 427-28, 302 S.E.2d 868, 873 (1983). Plaintiffs have the burden of proving that their cause of action was brought within the period of the applicable statute of repose. *Tipton & Young Construction Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 118, 446 S.E.2d 603, 605 (1994).

Plaintiffs' complaint alleges that the house was substantially complete in April 1996. This action was not filed until 11 February 2003, more than six years since the substantial completion of the house. The statute of repose would clearly apply in this case, though plaintiffs argue that defendants are precluded from relying on the

statute of repose by virtue of N.C. Gen. Stat. § 1-50(a)(5)(e). N.C. Gen. Stat. § 1-50(a)(5)(e) provides:

> The limitation prescribed by this subdivision shall not be asserted as a defense by any person who shall have been guilty of fraud, or willful or wanton negligence in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property, or to a surety or guarantor of any of the foregoing persons, or to any person who shall wrongfully conceal any such fraud, or willful or wanton negligence.

N.C. Gen. Stat. § 1-50(a)(5)(e) (2003). Plaintiffs argue that their complaint alleges that defendants engaged in fraud or willful or wanton negligence, and thus that defendants cannot rely on the protection of the statute of repose. However, plaintiffs' complaint, in fact, failed to allege fraud, which must be plead with particularity. Thus, we find no error by the trial court in declining to apply N.C. Gen. Stat. § 1-50(a)(5)(e) to the instant case based on fraud.

We further hold that plaintiffs' complaint failed to allege willful or wanton negligence to support the application of N.C. Gen. Stat. § 1-50(a)(5)(e).

> "Negligence . . . connotes inadvertence. Wantonness, on the other hand, connotes intentional wrongdoing . . . . Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others." Stated otherwise, " '[a]n act is wanton when it is done of wicked purpose . . .,' " and wilful negligence is the "deliberate purpose not to discharge some duty necessary to the safety of the person or property of another."

Cacha v. Montaco, Inc., 147 N.C. App. 21, 31, 554 S.E.2d 388, 394 (2001), *cert. denied*, 355 N.C. 284, 560 S.E.2d 797 (2002) (internal citations omitted). In their complaint, plaintiffs never allege wanton negligence, only negligence and negligent misrepresentation, and make no assertions of intentional wrongdoing. Plaintiffs' assignment of error as to the trial court's failure to apply N.C. Gen. Stat. § 1-50(a)(5)(e) on the basis of willful and wanton negligence by the defendants fails as well.

Plaintiffs further argue that defendants should be equitably estopped from asserting the statute of repose as a defense. A party

may be estopped from pleading and relying on a statute of limitations defense when delay has been induced by acts, representations, or conduct which would amount to a breach of good faith. *Nowell v. Tea Co.*, 250 N.C. 575, 108 S.E.2d 889 (1959). Equitable estoppel may also defeat a defendant's statute of repose defense. *One North McDowell Assn. v. McDowell Development Co.*, 98 N.C. App. 125, 389 S.E.2d 834, *disc. review denied*, 327 N.C. 432, 395 S.E.2d 686 (1990).

In their brief, plaintiffs argue that defendants' act of blaming the leaks on the Andersen windows amounted to a breach of good faith and thus equitably estops the defendants from relying on the statute of repose as a defense. Plaintiffs made the following allegations in their complaint regarding the Andersen windows:

> 13. Defendants, through Eric Avery, notified the Plaintiffs that they had discovered a serious problem with the Andersen windows in their new home at 38 Hammock Drive, Manteo, Dare County, North Carolina which, they felt, might be the source of the continued leaks. Defendants arranged with Andersen windows to have all the double hung windows repaired.
>
> 14. Defendants, by and through their president E. Andrew Keeney, notified Plaintiffs by letter dated May 15, 1997, a copy of which letter is attached hereto as "Exhibit A," explaining that the difficulties and problems Plaintiffs were experiencing were caused by and as a result of defects in the Andersen windows installed in Plaintiffs' home.
>
> . . . .
>
> 39. The Defendants' misrepresentations include, on information and belief, that the home constructed by them would be of the highest quality, moisture resistant, low maintenance and cost efficient; that the Defendants had mechanisms in place to monitor Plaintiffs home for construction defects, including prospective leaks, so as to always protect the owners' investment in the property; that the leaks had been repaired and remedied; and that the manufacturers' and third parties and not Defendants were to blame for leaks at Plaintiffs' home.
>
> 40. Defendants made these representations knowing them to be false or without regard to whether they were true or negligent, to induce Plaintiffs to rely and act thereon and Plaintiffs did rely and act upon the misrepresentations to their damage.

We note that the letter referred to in paragraph 14 as "Exhibit A" is not included in the record on appeal, and thus is not included in our evaluation of whether plaintiffs effectively pled equitable estoppel.

> Actual fraud, bad faith, or an intent to mislead or deceive is not essential to invoke the equitable doctrine of estoppel. It is not necessary that there be misrepresentations of existing facts, as in fraud. If the debtor makes representations which mislead the creditor, who acts upon them in good faith, to the extent that he fails to commence his action in time, estoppel may arise. The tolling of the statute may arise from the honest but entirely erroneous expression of opinion as to some significant legal fact. Equity will deny the right to assert the defense of the statute of limitations when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith.

Duke University v. Stainback, 320 N.C. 337, 341, 357 S.E.2d 690, 692-93 (1987) (internal citations omitted). In order for equitable estoppel to bar application of the statute of repose, a plaintiff must have been induced to delay filing of the action by the conduct of the defendant that amounted to the breach of good faith.

In *Nowell*, plaintiffs hired defendant contractor to construct a building that plaintiffs then leased to a third party, Great Atlantic & Pacific Tea Co. *Nowell*, 250 N.C. at 576, 108 S.E.2d at 889. After plaintiffs experienced problems with the building, defendant assured plaintiffs that he would perform any necessary correction to the building in the future due to re-occurring problems in his construction work. *Id.* at 578, 108 S.E.2d at 891. The plaintiffs entered possession of the building, and after the statute of limitations had run, defendant refused to assume further responsibility or correct plaintiffs' continuing problems with the building. *Id.* The North Carolina Supreme Court concluded that plaintiffs had effectively pled equitable estoppel and that plaintiffs "relied upon the promise and did not sue while efforts to correct the structural errors were under way. The appellant [defendant], by its promises, invited the delay and should not complain that the invitation was accepted." *Id.* at 579, 108 S.E.2d at 891.

In the instant case, plaintiffs alleged that they told defendants that they "continued to experience water leakage evidenced below the edges of the windows in the master bedroom on the north side and the windows of the great room also on the north side." The plain-

tiffs then alleged that the defendants told them that the Andersen windows were the cause of the leaks and defendants then replaced the windows. Plaintiffs make no allegations as to the condition of the house between the replacement of the windows in 1997 until the plaintiffs discovered other problems in 2002. On the face of plaintiffs' complaint, it appears that defendants remedied the problem with leaking below the windows that plaintiffs complained of in 1996 and 1997. The cause of delay in filing in the instant action was not the defendants' representations that it had addressed the window problem, but rather the plaintiffs' delay in discovering the other defects in the home. As there are no allegations as to how plaintiffs' reliance on the particular representations regarding the Andersen windows prevented them from filing suit within the applicable statute of repose, we find that plaintiffs have not sufficiently alleged equitable estoppel. See *Jordan v. Crew*, 125 N.C. App. 712, 720, 482 S.E.2d 735, 739, *disc. review denied*, 346 N.C. 279, 487 S.E.2d 548 (1997). Plaintiffs' assignment of error fails.

Due to our conclusion that plaintiffs have not alleged fraud, willful or wanton negligence or equitable estoppel, and consequently that the statute of repose bars plaintiffs' claims in this action, we do not address plaintiffs' argument regarding the statute of limitations. The trial court correctly granted the defendants' motion to dismiss.

Affirmed.

Judges HUDSON and GEER concur.

IN THE MATTER OF: J.A.O.

No. COA03-629

(Filed 7 September 2004)

Termination of Parental Rights— neglect—abandonment—remote chance of adoption

The trial court abused its discretion by terminating respondent mother's parental rights to her sixteen-year-old son based on neglect and abandonment under N.C.G.S. § 7B-1111(a)(1) and (7), because: (1) it cannot be in the minor child's best interest to terminate respondent's parental rights and thereby render the child

a legal orphan; (2) it is highly unlikely that a child of this age and physical and mental condition would be a candidate for adoption, much less selected by an adoptive family; and (3) the remote chance of adoption does not justify the momentous step of terminating respondent's parental rights.

Appeal by respondent from order entered 11 December 2002 by Judge Peter L. Roda in Buncombe County District Court. Heard in the Court of Appeals 26 February 2004.

John Adams, Esq., for petitioner-appellee Buncombe County Department of Social Services.

Michael Tousey and Judy Rudolph for guardian ad litem-appellee.

Mary Exum Schaefer for respondent-appellant.

TIMMONS-GOODSON, Judge.

Respondent appeals the trial court order terminating her parental rights to her sixteen-year-old son, Jeff.[1] For the reasons discussed herein, we reverse.

The facts and procedural history pertinent to the instant appeal are as follows: On 15 May 2002, Buncombe County Department of Social Services ("DSS") filed a petition to terminate respondent's parental rights ("the petition") to her minor son, Jeff. The petition alleged that sufficient grounds existed to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2003) and N.C. Gen. Stat. § 7B-1111(a)(7) (2003). On 21 October 2002, the trial court conducted a hearing on the petition. After hearing testimony and receiving evidence from the parties, the trial court determined that sufficient grounds existed to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2003) and N.C. Gen. Stat. § 7B-1111(a)(7) (2003). The trial court also determined that it was in Jeff's best interest to terminate respondent's parental rights. Accordingly, in an order entered 11 December 2002, the trial court terminated respondent's parental rights to Jeff. Respondent appeals.

The dispositive issue on appeal is whether the trial court erred in terminating respondent's parental rights. Because we conclude that

1. For the purposes of this opinion, we will refer to the minor child by the pseudonym "Jeff."

the trial court abused its discretion in terminating respondent's parental rights, we reverse the trial court's order.

In the instant case, the trial court concluded at the adjudicatory stage that sufficient grounds existed to terminate respondent's parental rights based on neglect and abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (7). At the dispositional stage, respondent argued that it was in Jeff's best interest not to terminate respondent's parental rights because (i) respondent had taken sufficient steps to correct the problems that led to the grounds for termination, and (ii) adoption of Jeff was highly unlikely. The trial court nevertheless concluded that it was in Jeff's best interest to terminate respondent's parental rights. We disagree.

Termination of parental rights involves a two-stage process. *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 Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002). "If the trial court determines that grounds for termination exist, it proceeds to the dispositional stage, and must consider whether terminating parental rights is in the best interests of the child." *Id.* at 98, 564 S.E.2d at 602. "[This Court] review[s] the trial court's decision to terminate parental rights for abuse of discretion." *Id.*

"Evidence heard or introduced throughout the adjudicatory stage, as well as any additional evidence, may be considered during the dispositional stage." *Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910. "[E]ither party may offer relevant evidence as to the child's best interests." *In re Pierce*, 356 N.C. 68, 76, 565 S.E.2d 81, 86 (2002). "Such evidence may therefore include facts or circumstances demonstrating either: (1) the reasonable progress of the parent, or (2) the parent's lack of reasonable progress that occurred before or after . . . the filing of the petition for termination of parental rights." *Id.* at 76, 565 S.E.2d at 86-87.

In the instant case, respondent's evidence tended to show that respondent had made reasonable progress to correct the conditions that led to the petition to terminate her parental rights. Although respondent admitted to stopping visits with Jeff in 1999, she explained that she stopped visiting Jeff because he had been transferred to Cumberland Hospital in Virginia, more than six hours away

from respondent's residence. Debbie Ensley ("Ensley"), the social worker in charge of Jeff's case, testified that respondent had frequently visited Jeff prior to 1997. Ensley further testified that respondent was asked by DSS to suspend her visitations with Jeff in 1997 because of an increase in Jeff's violent behavior. Respondent complied with DSS's request, and remained "an active part of the treatment team at that point." Respondent continued visitations with Jeff until 1999, when Jeff was transferred to Park Ridge Hospital and subsequently Cumberland Hospital.

Respondent testified that when Ensley notified her of Jeff's transfer to Cumberland Hospital, Ensley "told me that he was going—they were going to send him up to Virginia, that I couldn't see him." Respondent testified that she was told in 1997 that her visits with Jeff were "making him worse." Respondent testified that she did not visit Jeff in Virginia because she did not have a vehicle or other transportation to Virginia, and she "didn't want [Jeff] to have to suffer like he did[.]" Respondent testified that she nevertheless remained in frequent contact with the Mashburns, Jeff's foster parents. Respondent also testified that she had written Jeff letters after he had been subsequently transferred to a hospital in Florida, but that the letters were never delivered. Respondent further testified that she now owns a vehicle, has had stable employment since 1999, and lives in a rented efficiency apartment. Two witnesses testified to respondent's love and care for Jeff and her efforts to reunite with her son. Betty,[2] respondent's sister, testified that respondent is a "loving" mother and is currently looking for a larger apartment, "hoping she'll get [Jeff] back." Brenda McPherson ("McPherson"), a life-long friend of respondent, testified that respondent is "a very good mother, [a] very loving and caring mother" who "has always showed a lot of concern [for Jeff]." McPherson testified that she has had experience helping sexually abused and hyperactive children as a member of Angel Group, a support group, and would be willing to help respondent and Jeff. Respondent also testified that she has a support system of family and friends as well as a "pediatrician that will help me in any way" with Jeff.

Dee Shelton ("Shelton"), Jeff's guardian ad litem, also argued that it was in Jeff's best interest not to terminate respondent's parental rights. In a 16 October 2002 report to the trial court, Shelton made the following observations and conclusions:

2. For the purposes of this opinion, we will refer to respondent's sister by the name "Betty."

> The facts of this case may show that [respondent] has had and would continue to have difficulties parenting [Jeff] and it is not likely that [respondent] would be able to adequately provide the constant medical and mental health care that [Jeff] currently needs or will need in the future. [Respondent] is remorseful that she was unable to attend to her child's needs in the proper manner and that her ex-husband may have disciplined [Jeff] harshly.
>
> [Respondent] and foster mother both informed this GAL that the professionals involved over the years have not been in agreement as to diagnosis or cause of [Jeff's] problems. The current therapist believes that [Jeff's] problems exist due to his mental state and not environment. The Department of Social Services petition fixes the blame for [Jeff's] situation on his mother. This GAL has been unable to establish an opinion of who or what is to blame for the very sad state this child is in. However, his parent has not been allowed to be a part of his life for several years. During that time, a number of caring professionals have made gallant efforts to meet [Jeff's] needs, without noticeable improvement.
>
> This GAL cannot understand the need to terminate the rights of [respondent] when it is unlikely that another parent or family will be sought to come forward for this child. The one family who are familiar with [Jeff] and profess and show love for him do not consider adoption of this child as they recognize their limitations. . . .
>
> This GAL does not believe that terminating the rights of [respondent] at this time, ultimately leaving [Jeff] an orphan, would be in the best interest of [Jeff]. While it may be difficult to reintroduce his mother into his life, he has so few people to show concern for him personally, it should be considered with the assistance of a therapist. [Respondent] may provide a valuable asset to his future when he no longer has a whole team of professional people looking after his needs.

At the dispositional stage, Shelton reiterated her concerns regarding the termination of respondent's parental rights. At the close of the disposition hearing, counsel for the guardian ad litem argued:

> Again, this is a pretty unique situation. I don't know that this has happened in the entire time I've been a guardian ad litem or attorney advocate, but we do not believe that it would be in the best interest to terminate the rights [to] this young man. I think we'd

> be making him a legal orphan to no good advantage. He is 14 years old[3] and over 200 pounds, and as you can see by this assessment of him, he is quite violent. Judge, [Jeff's current physicians] think they're going to be able to put him in a Level 3 placement. That's just not going to happen. A Level 4 placement [in North Carolina] says they can't handle him. So I don't know what's going to happen and where this youngster's going to go, but I just don't see that adoption—the guardian does not see that adoption is something that's really in [Jeff's] best interest and in any way is going to assist him and will, indeed, cut him off from any family that he might have. . . . I think the bottom line is that the guardian just does not believe this would be in the best interest of [Jeff] to terminate his parental rights, based on—the parental rights of his mother.

After reviewing the evidence presented at the adjudicatory and dispositional stages, we conclude that the trial court abused its discretion in determining that it was in Jeff's best interest to terminate respondent's parental rights. "One of the underlying principles guiding the trial court in the dispositional stage is the recognition of the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severance of a relationship with biological parents or legal guardians." *Blackburn*, 142 N.C. App. at 612, 543 S.E.2d at 910. "As our Supreme Court noted in *In re Montgomery*, the legislature has properly recognized that in certain situations, even where the grounds for termination could be legally established, the best interests of the child indicate that the family unit should not be dissolved." *Id.* at 613, 543 S.E.2d at 910 (citing *In re Montgomery*, 311 N.C. 101, 107, 316 S.E.2d 246, 251 (1984)). Because we have determined that it cannot be in Jeff's best interest to terminate respondent's parental rights and thereby render Jeff a "legal orphan," we conclude that the instant case presents the situation contemplated by our legislature and recognized by the Court in *Montgomery*.

As detailed above, Jeff is a troubled teenager with a woefully insufficient support system. He has been placed in foster care since the age of eighteen months and has been shuffled through nineteen treatment centers over the last fourteen years. Respondent, Jeff's biological mother, is the only family member connected to and inter-

3. At the time of the termination hearing, Jeff was fourteen years old. However, as discussed *supra*, Jeff is currently sixteen years old.

ested in Jeff. His biological father was not present at the termination proceeding and could not be located through judicial summons. Although Jeff's foster family have shown support and care for him, they are unwilling to adopt him and undertake the important responsibilities associated with caring for an individual who possesses significant and life-long debilitating behaviors. Jeff has a history of being verbally and physically aggressive and threatening, and he has been diagnosed with bipolar disorder, attention deficit hyperactivity disorder, pervasive developmental disorder, borderline intellectual functioning, non-insulin dependent diabetes mellitus, and hypertension. As the guardian ad litem argued at trial, it is highly unlikely that a child of Jeff's age and physical and mental condition would be a candidate for adoption, much less selected by an adoptive family.

We recognize that, as the trial court noted, a small "possibility" of Jeff's adoption nevertheless remains. However, we are unconvinced that the remote chance of adoption in this case justifies the momentous step of terminating respondent's parental rights. Thus, after "balancing the minimal possibilities of adoptive placement against the stabilizing influence, and the sense of identity, that some continuing legal relationship with natural relatives may ultimately bring, we must conclude that termination would only cast [Jeff] further adrift." *In re A.B.E.*, 564 A.2d 751, 757 (D.C. Cir. 1989). Therefore, we hold that the trial court abused its discretion by terminating respondent's parental rights to Jeff. Accordingly, we reverse the trial court's order and remand the case for further proceedings.

Reversed and remanded.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. THOMAS MAYNARD BARNHILL

No. COA03-852

(Filed 7 September 2004)

Searches and Seizures— traffic stop—speed of vehicle—personal observation of officer—probable cause

The trial court erred by suppressing DWI evidence seized as a result of a speeding stop on the grounds that the officer had no speed detection device nor training in estimating speed and could

not articulate objective criteria on which to base his opinion of the vehicle's speed. The officer had an unobstructed view of the vehicle and ample opportunity to observe its progress, and his observation of its speed, the sound of its racing engine, and the car bouncing as it passed through an intersection furnished a sufficient blend of circumstances to establish a fair probability that defendant was speeding.

Appeal by plaintiff from judgment entered 13 March 2003 by Judge Milton F. Fitch, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 20 April 2004.

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

Angela H. Brown for defendant-appellant.

STEELMAN, Judge.

The State appeals the trial court's order suppressing all the evidence obtained by an officer pursuant to his stop of defendant's vehicle. As a result of the stop, defendant was charged with speeding and driving while impaired.

The evidence presented at the hearing on the motion to suppress tended to show that on 22 June 2001, Officer Matthew Malone of the East Carolina University Police Department was on duty. He had parked his patrol car in a parking lot belonging to the university, which was on Fourth Street. At approximately 1:50 a.m., Officer Malone noticed a white Chevrolet truck heading eastbound on Fourth Street towards him. In Officer's Malone's opinion the vehicle was exceeding a safe speed, as he estimated the vehicle to be traveling 40 m.p.h. in a 25 m.p.h. zone. He testified he was basing this estimation on the fact he observed the truck for approximately five to ten seconds, and in that time the truck traveled approximately 750 feet, or a block and a half. However, on cross-examination, Officer Malone acknowledged he may have previously testified at defendant's civil revocation hearing, on 19 July 2001, that defendant's vehicle traveled 750 feet in thirty-five to forty seconds. Officer Malone also based his opinion that defendant was speeding on the fact that when he first saw the truck he could hear the vehicle's engine racing and the sound was "pretty loud" as defendant accelerated. Officer Malone further testified that the intersection through which defendant proceeded

was slightly elevated in the middle and when defendant came through the intersection it appeared the truck was bouncing because it had gone through at a high rate of speed. After observing defendant's vehicle, Officer Malone activated his blue lights and initiated a traffic stop. Defendant immediately began to brake and pulled over to the curb. As a result of that stop, defendant was charged with driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 and driving a vehicle at "a speed greater than is reasonable and prudent under the conditions then existing" in violation of N.C. Gen. Stat. § 20-141(a).

On cross-examination, Officer Malone admitted he had never received any training in visually estimating the speed of moving vehicles, he was not certified to operate any type of speed detection device, and he did not know in measurable terms the actual distance the vehicle traveled, but estimated the distance. Additionally, the trial court found that Officer Malone did not testify that he witnessed defendant engage in any other criminal, traffic, or equipment violations.

The trial court concluded Officer Malone had not articulated any objective criteria on which to base his opinion of the vehicle's speed. As a result, the trial judge ordered all evidence obtained by the police as a result of the vehicle stop, be suppressed as its procurement violated defendant's constitutional right to be free from unreasonable search and seizure. The State appeals.

The State has the right to appeal an order by the superior court granting a motion to suppress prior to trial. N.C. Gen. Stat. § 15A-979(c) (2003). The sole issue before this Court is whether the trial court erred in granting defendant's motion to suppress. We conclude the trial court erred, and we accordingly reverse.

When evaluating a trial court's ruling on a motion to suppress, its findings of fact will be binding on appeal if supported by any competent evidence. *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). " ' "Although the trial court's findings of fact are generally deemed conclusive where supported by competent evidence, 'a trial court's conclusions of law regarding whether the officer had reasonable suspicion [or probable cause] to detain a defendant is reviewable *de novo*." ' " *State v. Wilson*, 155 N.C. App. 89, 93-94, 574 S.E.2d 93, 97 (2002) (citations omitted) (alteration in original), *cert. denied*, 540 U.S. 843, 157 L. Ed. 2d 78 (2003). Furthermore, the trial court's conclusions of law " 'must be legally correct, reflecting a correct

application of applicable legal principles to the facts found.' " *Barden*, 356 N.C. at 332, 572 S.E.2d at 121 (citations omitted).

In the instant case, the trial court's conclusions of law reflect an incorrect application of legal principles to the facts found. In the trial court's conclusion of law it stated:

> 3. Any and all evidence obtained by the police as a result of the vehicle stop should be suppressed because the seizure of Mr. Barnhill's vehicle was **an unreasonable investigatory stop and not justified by a reasonable and articulable suspicion so as to yield a substantial possibility that criminal conduct had occurred, was occurring, or was about to occur.** *State v. Battle, 109 N.C. App. 367(1993)*

(emphasis in original). The trial court applied the "reasonable and articulable suspicion" standard to determine whether the stop of defendant's vehicle was justified. "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." *Wilson*, 155 N.C. App. at 94, 574 S.E.2d at 97. Where an officer makes a traffic stop based on a readily observed traffic violation, such as speeding or running a red light, such a stop will be valid if it was supported by probable cause. *Id. See also State v. Reynolds*, 161 N.C. App. 144, 147, 587 S.E.2d 456, 458 (2003). The standard the trial court applied, the reasonable suspicion standard, does not apply here, as the basis for the stop was speeding, a readily observed traffic violation.

Thus, we apply the probable cause standard to the facts of this case to determine if Officer Malone had sufficient justification to stop defendant's vehicle. "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.' " *Wilson*, 155 N.C. App. at 94, 574 S.E.2d at 97-98 (citations omitted). Officer Malone testified at the suppression hearing that he believed defendant to be speeding based on his personal observation of the speed of the vehicle, the racing of the engine, and the bouncing of the car through the intersection.

The trial court concluded, in what was designated as finding of fact No. 13,[1] that "[i]n the absence of any objective facts, or specific

1. The trial court's finding of fact No. 7, included in the record, is misnumbered and should be numbered 13. We also note that the classification as either a finding of fact or conclusion of law is not determinative. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997). Finding of fact No. 13 is more appropriately classified as

training in speed estimation the Officer's opinion that the vehicle was traveling 40 m.p.h. is subjective and therefore immaterial and did not give the Officer legal justification to stop the Defendant's vehicle." The court also made the following findings regarding Officer Malone:

> 12(d). He could not provide any objective facts as to corroborate his opinion as to his opined distance or time.
>
> 12(g). He could not articulate any objective criteria on which to base his opinion of the vehicle's speed;

The order of the trial court would have the effect of preventing an officer from stopping a vehicle based solely upon the officer's observations, in the absence of some additional "objective facts" or "objective criteria" which supported the officer's opinion based upon his or her personal observations. This is contrary to the established case law and the North Carolina Rules of Evidence.

The North Carolina Rules of Evidence allow the opinion of a layperson to be admissible evidence if the witness is not testifying as an expert and his opinions or inferences are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2003). Furthermore, it is well established in this State, that any person of ordinary intelligence, who had a reasonable opportunity to observe a vehicle in motion and judge its speed may testify as to his estimation of the speed of that vehicle. *Insurance Co. v. Chantos*, 298 N.C. 246, 250, 258 S.E.2d 334, 336 (1979); *State v. Clayton*, 272 N.C. 377, 382, 158 S.E.2d 557, 560 (1968). " 'Absolute accuracy, however, is not required to make a witness competent to testify as to speed.' " *Clayton*, 272 N.C. at 382, 158 S.E.2d at 561.

Defendant suggests that it is irrelevant whether the officer's testimony was admissible or whether he was competent to testify at trial, as the issue is whether he had sufficient cause to stop defendant's truck. We disagree. Here, Officer Malone's competency to estimate the speed of the truck is being called into question because of his lack of specialized training to visually estimate speed. We find it relevant that if an ordinary citizen can estimate the speed of a vehicle, so can Officer Malone.

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a conclusion of law and as such, we review it *de novo*. *State v. Hyatt*, 355 N.C. 642, 653, 566 S.E.2d 61, 69 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823, (2003).

Furthermore, it is not necessary that an officer have specialized training to be able to visually estimate the speed of a vehicle. Excessive speed of a vehicle may be established by a law enforcement officer's opinion as to the vehicle's speed after observing it. In *State v. Wilson*, this Court found that a trooper's personal observation of the speed of defendant's vehicle, coupled with his observation that the vehicle was following to closely, provided him with "a sufficient blend of circumstances to establish . . . probable cause" to believe a violation had occurred. 155 N.C. App. at 95, 574 S.E.2d at 98 (2002).

The facts here are analogous. In the instant case, Officer Malone had an unobstructed view of the vehicle, as well as ample opportunity to observe defendant's progress up Fourth Street. Furthermore, Officer Malone's personal observation of the speed of defendant's truck, coupled with the sound of the engine racing and the bouncing of the car as it passed through the intersection, furnished him with a sufficient blend of circumstances to establish there was a fair probability that defendant was exceeding a speed greater than was reasonable and prudent under the conditions existing at that time in violation of N.C. Gen. Stat. § 20-141(a). Thus, Officer Malone had probable cause to stop defendant's vehicle.

As a result, the stop did not violate defendant's right to be free from unreasonable search and seizure. Since the stop was valid, any evidence which resulted from the stop need not be suppressed. *See State v. Carter*, 322 N.C. 709, 712, 370 S.E.2d 553, 555 (1988). Accordingly, we find the trial court erred in granting defendant's motion to suppress.

It should also be noted that in the trial court's conclusion of law No. 4, it stated: "Further, the Charging Officer's stated suspicion for the stop of the Defendant's vehicle was not based on any objective criteria, but rather on the Officer's subjective opinion, as such, an officer's subjective opinion is **immaterial.** *State v. McClendon*, 350 N.C. 630 (1999)[.]" (emphasis in original). The trial court's reliance on *State v. McClendon* is misplaced. In *McClendon*, our Supreme Court adopted the holding in *Whren v. United States*, 517 U.S. 806, 135 L. Ed. 2d (1996), and held that when judging police action related to probable cause, it should be judged in objective and not subjective terms. *State v. McClendon*, 350 N.C. 630, 635-36, 517 S.E.2d 128, 132 (1999). *McClendon* does not stand for the proposition that an officer cannot entertain a subjective impression, such as to speed. Rather, it holds that an officer's subjective motivation for stopping a vehicle is

irrelevant as to whether there are other objective criteria justifying the stop. *Id.* at 636, 517 S.E.2d at 131-32 (concluding police had probable cause and were justified in stopping defendant's vehicle for a speeding violation, despite the subsequent investigation for illegal drugs). Thus, the trial court's reliance on *McClendon*, for the proposition that an officer's suspicion for a stop which was based on that officer's subjective opinion was immaterial, is incorrect.

For the reasons discussed herein, we reverse the order of the trial court and this matter is remanded to the trial court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges WYNN and CALABRIA concur.

IN RE: T.B.K.

No. COA03-1286

(Filed 7 September 2004)

Termination of Parental Rights—addicted parent—guardian ad litem for parent—required

A termination of parental rights order was reversed and remanded for the appointment of a guardian ad litem for the parent and a rehearing where there were allegations and findings about respondent's drug use but a guardian ad litem was not appointed for her. The trial court must appoint a guardian ad litem when a motion to terminate alleges dependency due to incapability of the parent to provide proper care as spelled out in N.C.G.S. § 7B–1111(6) and that incapability is the result of one of the conditions enumerated in N.C.G.S. § 7B–1101(1).

Appeal by respondent from order entered 27 February 2003 by Judge Donna H. Johnson in Cabarrus County District Court. Heard in the Court of Appeals 10 June 2004.

Kathleen Arundell Widelski for petitioner-appellee.

Katharine Chester for respondent-appellant.

THORNBURG, Judge.

Respondent is the mother of the minor child, T.B.K. T.B.K. was born on 16 June 2000. In January 2001, the Cabarrus County Department of Social Services ("DSS") received a neglect report alleging that respondent was addicted to drugs, on the run with her boyfriend, involved in illegal activities and generally unable to care for T.B.K. On 7 April 2001, respondent and DSS entered a case plan to address the issues raised by the neglect report. Under the case plan respondent was supposed to attend NA and/or AA meetings, submit to random drug screens, attend parenting classes and address other concerns about her home life. While respondent did receive a substance abuse evaluation, she failed to attend any substance abuse group meetings and admitted to continued drug use. On 13 March 2001, respondent was charged with driving while impaired after she flipped her car over with T.B.K. in the car. Respondent was also charged with possession of cocaine on 19 April 2001.

Respondent and DSS entered into a substantially similar case plan on 3 July 2001. On 14 August 2001, respondent submitted to a drug screen and tested positive for cannabinoid and cocaine. On 15 August 2001, DSS filed a petition alleging that respondent and T.B.K.'s father neglected T.B.K. DSS received non-secure custody of T.B.K. on that date as well. On 10 September 2001, respondent stipulated to a finding of neglect. The trial court ordered respondent to submit to a psychological evaluation, to submit to a substance abuse assessment, to attend a parenting course, to maintain stable employment and housing and to abstain from the abuse of alcohol and controlled substances. The trial court also ordered that T.B.K. remain in the custody of DSS.

Initially, respondent made "substantial progress" in addressing the issues which led to T.B.K.'s placement with DSS and the permanent plan for T.B.K. was reunification with respondent. However, shortly after the birth of respondent's second child, J.C., the court began to have concerns about respondent's progress. At the permanency planning review hearing, on 14 March 2002, the trial court found that respondent was no longer making progress on her case plan goals. Respondent refused to submit to drug screenings on 29 January 2002 and 1 March 2002. Respondent missed three scheduled visits with T.B.K. and failed to be at the hospital while T.B.K. was undergoing surgery. DSS was having difficulty contacting respondent due to her phone being lost or disconnected. Respondent had not been in contact with her substance abuse program for two weeks.

At the 9 May 2002 permanency planning review hearing, the trial court found that respondent had made no progress in her efforts to regain custody of T.B.K. Respondent failed to provide proof of her attendance at any AA/NA meetings, she failed to attend substance abuse treatment, she failed to maintain contact with DSS as ordered, she missed numerous scheduled visits with T.B.K., she failed to submit to drug screens, she was unemployed after having been fired from her job and she admitted to the use of controlled substances both before and after the birth of her second child. Respondent was arrested on 6 April 2002 and was still in custody at the time of the May review.

DSS filed a motion to terminate respondent's parental rights on 30 September 2002. A hearing on the motion was conducted on 16 January 2003 and 14 February 2003. Respondent's parental rights were terminated in an order entered on 27 February 2003. Respondent appeals.

Respondent argues on appeal: (1) that the trial court erred in terminating respondent's parental rights when she had not been appointed a guardian ad litem as required by N.C. Gen. Stat. § 7B-1101; (2) that the trial court erred in failing to hold the termination hearing within ninety days as required by statute; (3) that the trial court erred in failing to hold a bifurcated hearing; (4) that the trial court erred in terminating respondent's parental rights where there was no timely appointment of a guardian ad litem for T.B.K. and no evidence to show that any services were performed by the guardian ad litem; and (5) that there was not clear, cogent and convincing evidence of any of the grounds for termination found by the trial court. After a careful review of the record and briefs, we agree that the trial court erred in not appointing a guardian ad litem to respondent. We reverse and remand.

In the motion in the cause to terminate respondent's parental rights, DSS alleged that grounds to terminate existed under several provisions of N.C. Gen. Stat. § 7B-1111. One of the alleged grounds is that respondent is incapable of providing for the proper care and supervision of the juvenile such that the juvenile is a dependent juvenile within the meaning of N.C. Gen. Stat. § 7B-101 and that there is a reasonable probability that such incapability will continue for the foreseeable future. While the motion does not specifically cite the statute, the language of the motion tracks N.C. Gen. Stat. § 7B-1111(6), which spells out when a parent shall be found to

be "incapable of providing for the proper care and supervision of the juvenile." N.C. Gen. Stat. § 7B-1111(6) (2003).

The mandates of N.C. Gen. Stat. § 7B-1101 must be followed when N.C. Gen. Stat. § 7B-1111(6) is invoked. N.C. Gen. Stat. § 7B 1101 provides, in pertinent part:

> In addition to the right to appointed counsel set forth above, a guardian ad litem shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent in the following cases:
>
> > (1) Where it is alleged that a parent's rights should be terminated pursuant to G.S. 7B-1111(6), and the incapability to provide proper care and supervision pursuant to that provision is the result of *substance abuse*, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition.

N.C. Gen. Stat. § 7B-1101 (2003) (emphasis added). Thus, where a motion alleges dependency due to incapability as spelled out in N.C. Gen. Stat. § 7B-1111(6), and the incapability is the result of one of the conditions enumerated in N.C. Gen. Stat. § 7B-1101(1), the trial court must appoint a guardian ad litem. Respondent argues that her incapability was alleged in the motion to be the result of substance abuse, one of the conditions enumerated in N.C. Gen. Stat. § 7B-1101(1). We agree based on the analysis *infra,* and thus the trial court erred in not appointing her a guardian ad litem.

DSS included the following factual allegations in the motion to support the alleged grounds for termination:

> The (CCDSS) investigation revealed that the mother was on the run with her boyfriend but recently left him. The mother admitted to using cocaine, marijuana and prescription drugs (Zanax, Oxycodone, Valium and Loratab). The mother admitted that her drug addiction was keeping her from caring for her child properly. She admitted to not interacting with her child for days at a time because she was so sick she can not get off the couch. The CCDSS substantiated neglect and the case was transferred to Case Management/Case Planning on March 8, 2001 to assist the mother in seeking treatment for her substance abuse problems.
>
> On March 13, 2001 the mother was driving under the influence with the child in the car and flipped the car over. The officer

involved indicated that the child could have easily been killed. The mother admitted to the assigned social worker that she had drank [sic] four beers before driving with the child.

On April 6, 2001 the mother contacted CCDSS and stated she wanted to kill herself. She was taken to Northeast Medical Center and admitted to Stanly Memorial Behavioral Healthcare. The mother checked herself out on April 8, 2001.

The mother tested positive for marijuana at the child's birth. On April 7, 2001, the mother tested positive for cocaine and benzodiazepines while at Stanly Memorial. The mother tested positive for cocaine and marijuana on February 27, 2001 and May 11, 2001; and on July 2, 2001 the mother tested positive for marijuana.

On April 19, 2001 the mother was charged with possession of cocaine.

The mother secured an assessment from Piedmont Behavioral Healthcare in June but has failed to follow through with recommendations which included meeting with a counselor, attending a substance abuse group and attending NA/AA meetings.

At a review hearing on March 14, 2002, the court found that the mother had made some progress but there were areas of concern that needed to be addressed.

On May 9, 2002, the court found that [respondent] had failed to make reasonable progress in complying with the court-ordered Family Services Case Plan. [Respondent] had continued to use controlled substances and had failed to attend substance abuse treatment. The court changed the plan for the child to adoption.

On June 13, 2002 a permanency planning hearing was held. The court found that it was not possible for the child to return to his home within six months; that reasonable efforts to return the child to his own home were clearly futile or would be inconsistent with the child's health, safety and need for a safe permanent home within a reasonable period of time.

During the pendancy [sic] of this action, the mother was incarcerated and remains in the North Carolina Department of Corrections [sic] at this time of the filing of this motion.

. . . .

> [Respondent] has contributed nothing towards the child's cost of care since August 15, 2001. The cost of the child's care since August 15, 2001 has been $1644.75.

The remaining factual allegations were in reference to the respondent-father. Six of the ten allegations make explicit reference to respondent's substance abuse issues. These allegations tend to show that DSS intended to rely upon respondent's substance abuse issues as the basis of her incapability to care for T.B.K.

This Court has held that the statutory language of N.C. Gen. Stat. § 7B-1101 expressly mandates that a guardian ad litem be appointed in cases where the motion alleges dependency due to one of the conditions listed in the statute. *In re Richard v. Michna*, 110 N.C. App. 817, 431 S.E.2d 485 (1993) (interpreting N.C. Gen. Stat. § 7A-289.23, now codified as N.C. Gen. Stat. § 7B-1101). Further, this Court has held that where the motion alleges dependency and the majority of the dependency allegations tend to show that a parent or guardian is incapable, as the result of some debilitating condition listed in the statute, of providing for the proper care and supervision of his or her child, that N.C. Gen. Stat. § 7B-1101 mandates that a guardian ad litem be appointed. *In re Estes*, 157 N.C. App. 513, 579 S.E.2d 496, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 390 (2003). In both of these cases, the failure to meet this requirement for the appointment of a guardian ad litem resulted in remand of the case to the trial court for the appointment, as well as for a rehearing.

This Court has also reversed and remanded a case for the appointment of a guardian ad litem where the trial court did not find dependency but the motion sufficiently alleged dependency and evidence was presented regarding the respondent's relevant debilitating condition. *In re J.D.*, 164 N.C. App. 176, — S.E.2d — (4 May 2004) (03COA71-2), *disc. review denied*, 358 N.C. 732, — S.E.2d — (12 August 2004) (240P04). In *Richard*, this Court further held that though there was no evidence to suggest prejudice to the respondent due to the failure to appoint a guardian ad litem, that "the mandate of the statute must be observed, and a guardian ad litem must be appointed." *Richard*, 110 N.C. App. at 822, 431 S.E.2d at 488.

In the instant case, we find nothing in the record to indicate that respondent was appointed a guardian ad litem and petitioner admits this omission by the court in its brief. The motion clearly alleges dependency and most of the relevant factual allegations refer to respondent's substance abuse issues. Further, the trial court heard

evidence and made findings in the termination order concerning respondent's substance abuse issues. As such, it was error for the trial court to not appoint a guardian ad litem to respondent in this case.

We need not discuss respondent's other assignments of error due to our conclusion that the case must be remanded for the appointment of a guardian ad litem to respondent and rehearing. After careful consideration, we reverse and remand to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

Judges HUDSON and GEER concur.

IN THE MATTER OF: APPEAL OF JOHNNIE M. BATTLE ESTATE FROM THE ORANGE COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING REAL PROPERTY TAXATION FOR TAX YEAR 2002

No. COA03-922

(Filed 7 September 2004)

1. **Appeal and Error— preservation of issues—improper notice of appeal—writ of certiorari**

Although taxpayer lost his right to appeal based on his first notice of appeal failing to comply with the requirements under N.C.G.S. § 105-345(a) to state the grounds upon which the taxpayer asserted the Property Tax Commission erred and the second notice of appeal being filed outside the thirty-day time period and also without authority to show that the second notice of appeal could amend or relate back to the first notice of appeal, the Court of Appeals exercised its discretion under N.C. R. App. P. 21 to consider taxpayer's appeal as a petition for writ of certiorari.

2. **Taxation— ad valorem—revaluation of property—race of taxpayer**

The Property Tax Commission did not err by following the applicable statutory provisions to determine the values of the pertinent properties for ad valorem taxation even though taxpayer contends the North Carolina Constitution requires the

legislature to forge a relationship between the amount of taxes imposed and the race of the taxpayer upon whom they are imposed, because: (1) taxpayer does not contest that the assessment reflects the true values in money of the subject properties; (2) by taxpayer's own admission, the taxes levied on the subject properties were uniformly determined by their fair market values or true values in money and were not related in any way to the race or any other classification of the person responsible for paying the taxes; (3) taxpayer failed to sufficiently demonstrate that N.C.G.S. § 105-317 was intentionally or purposefully administered in such a way as to discriminate against the taxpayer or others similarly situated; and (4) a holding that the current statutory scheme is unconstitutional based on taxpayer's reasoning would require the legislature to give the taxpayer and persons similarly situated a lower tax liability on the subject properties than what would be proportional to their true values based upon racial considerations.

Appeal by taxpayer from the final decision entered 27 March 2003 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 20 April 2004.

McSurely & Osment, by Alan McSurely, for taxpayer.

Coleman, Gledhill, Hargrave & Peek, P.C., by Geoffrey E. Gledhill, Leigh Peek, and S. Sean Borhanian, for Orange County.

CALABRIA, Judge.

In 2001, Orange County conducted a revaluation of all property located within the county. As a result of this revaluation, two parcels of land (the "subject properties") owned by the Estate of Johnnie M. Battle (the "taxpayer") and located in the downtown area of Chapel Hill were assigned a total value of $279,406.00.[1] The taxpayer disagreed and appealed the valuation to the Property Tax Commission (the "Commission") sitting as the State Board of Equalization and Review. Prior to a hearing before the Commission, the parties stipulated that the subject properties "ha[d] been appraised in accord with application of the Orange County Schedule of Values." The parties further stipulated that "Orange County appraised [the subject proper-

1. This total value reflects a downward adjustment made by the Orange County Board of Equalization and Review from the initial total value.

ties] without reference to the race of the property owners, as the County's schedule of values and their application [are] colorblind."

The Commission heard arguments from the taxpayer and the County. The taxpayer contended that the County's colorblind policy perpetuated a racist structure in North Carolina that originated prior to the Civil War. The Commission found, in pertinent part, as follows:

> 5. The County properly applied its schedule of values, rules and standards to Taxpayer's properties consistent with the County's appraisal of similar properties.
>
> 6. The value assigned by the County Board to Taxpayer's properties did not **substantially** exceed the true values in money of the subject properties as of January 1, 2001.
>
> 7. The true values in money of the subject properties, as of January 1, 2001, were [the values assigned by the County Board to the subject properties].

Based on these findings of fact, the Commission concluded as a matter of law that the taxpayer failed to show by competent, material and substantial evidence that (1) "the subject properties were not properly appraised" according to the applicable statutory provisions, (2) "the County employed an arbitrary or illegal method of appraisal" as to the subject properties, or (3) the assigned values substantially exceeded the true values in money of the subject properties. The Commission further concluded that the true values in money of the subject properties were equal to the assigned values by the County Board. The Commission then confirmed the decision of the County Board regarding the values assigned to the subject properties. The taxpayer appeals.

[1] The County asserts, as an initial matter, that the taxpayer's appeal is barred as a result of the taxpayer's failure to timely notice his appeal. North Carolina General Statutes § 105-345(a) (2003) provides:

> No party to a proceeding before the Property Tax Commission may appeal from any final order or decision of the Commission unless within 30 days after the entry of such final order or decision the party aggrieved by such decision or order shall file with the Commission notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved

> party considers said decision or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commission.

Moreover, N.C. Gen. Stat. § 105-345.2(c) (2003) provides, in pertinent part, that an "[a]ppellant 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."

A party's right to appeal an administrative agency's decision is limited to those situations where (1) a statute grants the right of appeal and (2) the party's appeal "conform[s] to the statutes granting the right of appeal and regulating the procedures." *In re Appeal of General Tire*, 102 N.C. App. 38, 40, 401 S.E.2d 391, 393-94 (1991). In the instant case, the Commission entered its final decision on 27 March 2003. A certified copy of the order was delivered to the taxpayer as required by N.C. Gen. Stat. § 105-290(b)(3) (2003), which, the taxpayer asserts, was received on 21 April 2003. The following day, the taxpayer filed a notice of appeal; however, that notice failed to set forth any grounds for appeal. Thereafter, the thirty-day period in which to file an effective notice of appeal expired on 28 April 2003. On 30 April 2003, the taxpayer filed a second notice of appeal attempting to "amend the Notice of Appeal filed . . . on 22 April 2003 to comply with the statute's requirement that the appellant" set forth the grounds for appeal.

The preceding facts make clear that taxpayer's first notice of appeal failed to comply with N.C. Gen. Stat. § 105-345(a) because it lacked any grounds on which the taxpayer asserted the Commission erred. The second notice of appeal likewise failed to comply with N.C. Gen. Stat. § 105-345(a) because it was filed outside of the thirty-day time period provided. Moreover, the taxpayer has cited no authority for the proposition that the second notice of appeal can "amend" or relate back to the first notice of appeal, and the relevant statutory provisions do not support it. Thus, while the taxpayer had a right to appeal, that right to appeal was lost by the taxpayer's failure to take timely action. Nevertheless, Rule 21 of the North Carolina Rules of Appellate Procedure provides, in pertinent part, that a "writ of certiorari may be issued . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21 (2004). We choose to consider the taxpayer's appeal as a petition for writ of certiorari pursuant to N.C. R. App. P. 21 (2004) in order to address the merits of the arguments.

[2] North Carolina General Statutes § 105-345.2(b) provides as follows:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are: (1) In violation of constitutional provisions; or (2) In excess of statutory authority or jurisdiction of the Commission; or (3) Made upon unlawful proceedings; or (4) Affected by other errors of law; or (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or (6) Arbitrary or capricious.

Tax assessments are presumed correct, and the burden falls on the taxpayer to show the assessment was erroneous. *In re Appeal of Bermuda Run Prop. Owners*, 145 N.C. App. 672, 674-75, 551 S.E.2d 541, 543 (2001). To overcome this presumption of correctness of *ad valorem* tax assessments, a taxpayer may produce "competent, material and substantial" evidence showing (1) the county tax supervisor used an arbitrary method of valuation or an illegal method of valuation and (2) " 'the assessment *substantially* exceeded the true value in money of the property[.]' " *Id.* (quoting *In re Appeal of Camel City Laundry*, 123 N.C. App. 210, 214, 472 S.E.2d 402, 404 (1996)).

The taxpayer does not assert the County's schedule of values is erroneous, nor does the taxpayer assert the values resulting from the appraisal of the subject properties were inconsistent with the County's appraisal of similar properties. The taxpayer does not contend that the assigned values improperly reflect the subject properties' true values. Indeed, it was admitted before the Commission that there were offers to purchase the subject properties in excess of the values assigned by the County for tax purposes. Since the taxpayer does not contest that the assessment reflects the true values in money of the subject properties, we hold the Commission followed the applicable statutory provisions in correctly determining their values for *ad valorem* taxation.

Nonetheless, the taxpayer asserts on appeal that "century-long *de jure* discrimination in educational, employment, housing and

other necessities of life" caused the County's colorblind *per se* comparative method of assessing taxes to be racially discriminatory. The taxpayer seeks "some relief from this onerous, so-called 'colorblind' method of valuing their property as if all other things were 'equal' " under Article I, Section 19 of the North Carolina Constitution, which provides "nor shall any person be subject to discrimination by the State because of race, color, religion, or national origin." However, we note that by taxpayer's own admission, the taxes levied on the subject properties were uniformly determined by their fair market values or true values in money and were not related in any way to the race or any other classification of the person responsible for paying the taxes.

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

Kresge Co. v. Davis, 277 N.C. 654, 662, 178 S.E.2d 382, 386 (1971) (quoting *Snowden v. Hughes*, 321 U.S. 1, 8, 88 L. Ed. 497, 503 (1944)). In the instant case, the taxpayer has failed to sufficiently demonstrate that N.C. Gen. Stat. § 105-317 was intentionally or purposefully administered in such a way as to discriminate against the taxpayer or others similarly situated.

Moreover, we note a holding that the current statutory scheme is unconstitutional based on the taxpayer's reasoning would require the legislature to give the taxpayer (and persons similarly situated) a lower tax liability on the subject properties than what would be proportional to their true values based upon racial considerations. While classifications regarding taxation made by the legislature can be reviewed by the courts of North Carolina and measured against constitutional strictures, *see, e.g., In re Appeal of Chapel Hill Day Care Ctr., Inc.*, 144 N.C. App. 649, 658-60, 551 S.E.2d 172, 178-79 (2001), this Court is unaware of any case where the judiciary has been asked to *force* the legislature to make classifications such as that sought by the taxpayer. When asked to undertake such action, we find instructive our Supreme Court's statement that "[u]nder Article V of the Constitution of North Carolina, the power to levy taxes vests exclusively in the legislative branch of the government; and it is within the exclusive power of the General Assembly to provide the method and prescribe the procedure for discovery, listing and assessing property for taxation." *DeLoatch v. Beamon*, 252 N.C. 754, 757, 114 S.E.2d 711,

713 (1960). The policy considerations involved in measuring the propriety of taxation against past discrimination (and making classifications based upon such considerations) are best left to our legislature; thus, the taxpayer has sought relief in the wrong forum. We additionally note any classification of the kind sought by the taxpayer would have to pass constitutional muster. *See Grutter v. Bollinger*, 539 U.S. 306, 326, 156 L. Ed. 2d 304, 331 (2003) (citation omitted) (reiterating that, under the Equal Protection Clause of the federal Constitution, "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny' "). We conclude the taxpayer's argument, that the North Carolina Constitution requires the legislature to forge a relationship between the amount of the taxes imposed and the race of the taxpayer upon whom they are imposed, to be without merit. This case is not suited to resolution by resort to a taxpayer's rights to equal protection, and constitutional provisions guaranteeing such rights are inapposite. The final decision of the Commission is affirmed.

Affirmed.

Judges TIMMONS-GOODSON and STEELMAN concur.

RICHARD WARREN KING AND LAURA R. KING, PLAINTIFF-APPELLEES V. MILLARD T. OWEN, III, AND OWEN SURVEYING INCORPORATED, AND CHICAGO TITLE INSURANCE COMPANY, DEFENDANTS-APPELLANTS V. WILLIAM R. DAVIS, INDIVIDUALLY, AND WILLIAM R. DAVIS AS A GENERAL PARTNER OF COOPER, DAVIS & COOPER, ATTORNEYS AT LAW, A NORTH CAROLINA GENERAL PARTNERSHIP, THIRD PARTY DEFENDANTS

No. COA03-1414

(Filed 7 September 2004)

Arbitration and Meditation— validity of arbitration agreement— failure to show mutual agreement—equitable estoppel

The trial court did not err by finding that no valid arbitration agreement existed between defendant title insurance company and plaintiffs, because: (1) defendant failed to meet its burden to prove the parties mutually agreed to arbitrate their dispute; (2) the record is devoid of any indication that equitable estoppel was raised by defendant before the trial court; (3) defendant failed to

raise the issue at trial concerning whether plaintiffs' failure to object to the arbitration provision within a reasonable period of time constituted an acceptance of that provision of the policy; and (4) the first time an arbitration clause appeared was in the final title policy which was issued over three months after closing of the pertinent property.

Appeal by defendants-appellants from order entered 28 August 2003 by Judge Ola Lewis in Cumberland County Superior Court. Heard in the Court of Appeals 26 May 2004.

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, by William O. Richardson, Ronnie M. Mitchell, Coy E. Brewer, Charles M. Brittain, III, for plaintiffs-appellees.

Maupin Taylor, P.A., by Mark S. Thomas, Ronald R. Rogers, and Joshua B. Royster, attorneys for defendants-appellants.

STEELMAN, Judge.

Richard and Laura King (plaintiffs) acquired a tract of land in Fayetteville, North Carolina on 1 October 1999. They intended to operate a gas station and convenience store on the property. Prior to closing, plaintiffs hired Millard Owen, III and Owen Surveying Incorporated (Owen) to survey the property, and hired William Davis of Cooper, Davis & Cooper, Attorneys at Law, a North Carolina General Partnership (third party defendants), as their attorney for the closing. Third party defendants did not order a commitment for title insurance prior to closing. A policy of title insurance on the property was issued to plaintiffs on 11 January 2000 by Chicago Title Insurance Company (Chicago Title).

Following the acquisition of the property, plaintiffs discovered that it was encumbered by an easement to the North Carolina Department of Transportation. Plaintiffs contend that the easement renders the property unfit for their intended use. On 26 July 2001 plaintiffs filed a complaint against Owen claiming they were negligent in conducting the survey of the property. Owen filed a third party complaint against third party defendants. On 28 February 2003 plaintiffs amended their complaint and added Chicago Title as a party defendant. On 2 May 2003 Chicago Title filed its answer, which included a demand for arbitration of plaintiff's claims against it, a motion to stay claims pending arbitration, and a motion to dismiss. The motion to stay claims pending arbitration and to compel arbitra-

tion was heard on 2 June 2003. The trial court denied Chicago Title's motion by order dated 25 August 2003. Chicago Title appeals.

In Chicago Title's first assignment of error, it argues that the trial court erred in finding no valid arbitration agreement existed between Chicago Title and plaintiffs. We disagree.

An interlocutory order that denies arbitration affects a substantial right, and thus this Court has jurisdiction over an appeal from such an order. *Keel v. Private Bus., Inc.*, 2004 N.C. App. LEXIS 571 (N.C. Ct. App. 2004); *Raspet v. Buck*, 147 N.C. App. 133, 135, 554 S.E.2d 676, 677 (2001).

"[W]e note that public policy favors settling disputes by means of arbitration. However, before a dispute can be settled in this manner, there must first exist a valid agreement to arbitrate. The law of contracts governs the issue of whether there exists an agreement to arbitrate." *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271, 423 S.E.2d 791, 794 (1992) (citations omitted). The party seeking arbitration bears the burden of proving the parties mutually agreed to the arbitration provision. *Milon v. Duke Univ.*, 145 N.C. App. 609, 617, 551 S.E.2d 561, 566 (2001) *rev'd on other grounds by* 355 N.C. 263; 559 S.E.2d 789 (2002), *cert. denied*, 536 U.S. 979, 153 L. Ed. 2d 878 (2002).

The trial court's order in this matter made detailed findings of fact and conclusions of law. On appeal, findings of fact made by the trial court are binding upon the appellate court in the absence of an assignment of error challenging those findings. *Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc.*, 263 N.C. 641, 651, 140 S.E.2d 330, 337 (1965); *Dollar v. Town of Cary*, 153 N.C. App. 309, 310, 569 S.E.2d 731, 733 (2002). In this case, Chicago Title does not challenge any of the trial court's findings. Our review is therefore limited to whether those findings support the trial court's conclusions of law. *Rural Plumbing*, 263 N.C. at 651, 140 S.E.2d at 337.

In the instant case the trial court found the following facts: 1) plaintiffs purchased the property on 1 October 1999; 2) page 2 of the settlement statement showed that plaintiff's paid $470.00 at closing to purchase title insurance; 3) at no time did plaintiffs discuss or negotiate with Chicago Title any arbitration provision; 4) plaintiffs did not execute an agreement containing an arbitration provision; 5) plaintiffs were not provided with any title insurance contract, agreement or policy containing an arbitration provision at closing; 6) on 4 January 2000 plaintiffs' attorney submitted to Chicago Title his final

title opinion on plaintiffs' property; 7) Chicago Title mailed to plaintiffs on or about 11 January 2000 a copy of a title insurance policy with a stated effective date of 1 October 1999; 8) the policy of title insurance did not bear plaintiffs' signatures, nor did it request plaintiffs to sign and return any documents; 9) no document containing an agreement to arbitrate was signed by plaintiffs, discussed with them, or provided to them at the time of closing.

Based on these findings of fact (which are not disputed by Chicago Title and are thus binding on appeal) the trial court concluded no valid arbitration agreement existed because Chicago Title failed to meet its burden to prove the parties mutually agreed to arbitrate their dispute. The trial court denied Chicago Title's motion to stay pending arbitration. We hold that the trial court's findings of fact support its conclusion that Chicago Title failed to demonstrate that there existed an agreement to arbitrate between the parties.

This case is governed by the now repealed Uniform Arbitration Act, N.C. Gen. Stat. Chapter 1, Article 45A.[1] In the instant case, plaintiff paid a one time premium of $470.00 at closing for title insurance. Plaintiffs did not receive the insurance policy in question until nearly three and one half months later. Chicago Title offered no evidence that plaintiffs were aware of the arbitration clause in the policy at the time they closed on the property, much less that the clause was the result of independent negotiation. As this Court stated in *Routh*, "an arbitration clause, such as the one at issue in the present case, is ordinarily negotiated at the outset of a contractual relationship in an 'arms-length negotiation.' " *Routh*, 108 N.C. App. at 274, 423 S.E.2d at 796. It was Chicago Title's burden to prove the existence of a valid arbitration agreement, and it was the province of the trial court to determine if Chicago Title met its burden. *Id.* at 271-72, 423 S.E.2d at 794.

As part of its argument under its first assignment of error, Chicago Title argues that plaintiffs are equitably estopped from denying their agreement to the arbitration provision. North Carolina Rules of Civil Procedure, Rule 8(c) requires that certain affirmative defenses, including estoppel and waiver, must be set forth affirmatively in a party's pleading. In its answer, Chicago Title pled eight sep-

1. "Repealed by Session Laws 2003-345, s. 1, effective January 1, 2004, and applicable to agreements to arbitrate made on or after that date." N.C. Gen. Stat. Chapter 1, Article 45A (2004). The contested arbitration agreement in the instant case was contained in a title insurance policy issued in 2000.

arate defenses to plaintiffs' complaint, including laches and failure to mitigate damages. Neither estoppel nor waiver were pled as defenses by Chicago Title in this matter.

The record before this Court is devoid of any indication that equitable estoppel was raised by Chicago Title before the trial court. Chicago Title cannot swap horses between courts in order to obtain a better mount on appeal. *Russell v. Buchanan*, 129 N.C. App. 519, 521, 500 S.E.2d 728, 730 (1998), *rev' denied*, 348 N.C. 501, 510 S.E.2d 655 (1998); *see also Anderson v. Assimos*, 356 N.C. 415, 572 S.E.2d 101 (2002).

Chicago Title further contends that plaintiffs failure to object to the arbitration provision within a reasonable period of time constitutes an acceptance of that provision of the policy. This is an assertion that plaintiff's waived any objection to the arbitration provision by their conduct. The record in this case is devoid of any indication that this theory was asserted before the trial court, and cannot now be raised upon appeal. *Russell*, 129 N.C. App. at 521, 500 S.E.2d at 730.

We further note that Chicago Title cites the reasoning of the Alabama Supreme Court in the case of *McDougle v. Silvernell*, 738 So. 2d 806 (Ala. S.C. 1999) as persuasive on the issue of whether there was an agreement to arbitrate in this case. In *McDougle*, plaintiffs acquired real estate and subsequently learned of defects in the title. Suit was instituted against the attorneys who handled the closing and certified the title. The attorneys were agents for the title insurance company. At closing a commitment for title insurance was issued to plaintiffs which stated that the commitment was subject to the conditions and stipulations contained in the title insurance company's form policy. Subsequent to closing, a policy of title insurance was issued containing a provision requiring arbitration of "any controversy or claim" arising out of the policy. The Supreme Court of Alabama held that the arbitration clause was incorporated by reference into the commitment for title insurance and was thus enforceable.

The present case is distinguishable from *McDougle*. There was no commitment for title insurance issued in this case prior to or at closing. The first time an arbitration clause appeared was in the final title policy which was issued over three months after closing. This assignment of error is without merit.

Having found that the trial court correctly held that there was not a valid and enforceable arbitration agreement, we need not address Chicago Title's remaining assignments of error.

AFFIRMED.

Judges TYSON and BRYANT concur.

TOMMY R. COE, EMPLOYEE, PLAINTIFF v. HAWORTH WOOD SEATING, EMPLOYER; AND THE TRAVELERS INSURANCE COMPANY, CARRIER; DEFENDANTS

No. COA03-1349

(Filed 7 September 2004)

1. **Workers' Compensation— trial return to work—receipt of benefits**

   The Court of Appeals did not address a workers' compensation issue concerning a trial return to work because it was not necessary for the resolution of the matter before the Court. However, the Court agreed with plaintiff that the rule governing such work was not applicable because plaintiff was not receiving benefits.

2. **Workers' Compensation— link between work and injury—expert testimony**

   A doctor's testimony in a workers' compensation case was sufficient to establish the casual link between plaintiff's work and an injury from the overuse of his left arm.

3. **Workers' Compensation— termination—refusal of work—work restrictions**

   The evidence in a workers' compensation case was sufficient to support the Commission's findings and conclusions that plaintiff's termination was not related to a compensable injury. Plaintiff was justified in refusing a job that was not within his work restrictions and the evidence supports the finding that defendant terminated plaintiff for his refusal.

Appeal by defendants from Opinion and Award entered 16 June 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 June 2004.

Crumley & Associates, P.C., by Pamela W. Foster and Amy S. Berry, for plaintiff-appellee.

Angelina M. Maletto, for defendant-appellants.

HUDSON, Judge.

Defendants appeal an Opinion and Award entered 30 April 2003 by the North Carolina Industrial Commission, awarding compensation to plaintiff, Tommy R. Coe, for a work related injury. We affirm.

BACKGROUND

We begin with a summary of pertinent facts, as found by the Full Commission. Plaintiff injured his right arm at work on 11 July 2000 while changing a gear on a molder machine that suddenly jerked. Plaintiff immediately reported the injury, received medical attention that day, and returned to work with restrictions including limited right arm use and no overhead lifting. Despite therapy, the pain, weakness, and intermittent paresthesia continued. On 23 August 2000, plaintiff's treating physician, Dr. Kevin Supple, diagnosed plaintiff's right arm injuries as a torn rotator cuff, shoulder rotator cuff tendinosis, and AC joint arthrosis.

On 12 September 2000, the morning of his scheduled shoulder surgery, plaintiff cancelled the procedure due to concerns about his heart condition, high blood pressure, and the uncertainty of a favorable outcome. On 21 September 2000, Dr. Supple gave plaintiff an injection and new work restrictions of no lifting more than ten pounds and no overhead use of the right arm. The doctor later revised the restrictions to no use of the right arm due to continued pain.

On 5 October 2000, plaintiff tripped at work, exacerbating his right arm injury. Dr. Supple prescribed medication, continued therapy, and continued work restrictions. Because of plaintiff's restricted use of his right arm, plaintiff performed his duties as a machine operator with his left hand only, and began to experience problems with his left arm which he reported to his employer.

Plaintiff's doctor sent a letter dated 27 November 2000 to the employer explaining the difficulties with the machine operator requirements and concerns about the overuse of the left arm. On 6 December 2000, plaintiff, Dr. Supple, and a rehabilitation professional met and decided that plaintiff needed to be permanently restricted to sedentary work, with no lifting over ten pounds, and no activity that could aggravate his right shoulder.

Plaintiff took a voluntary layoff in the first two months of 2001 and was instructed by defendant-employer to return to work on 6 March 2001. However, plaintiff was hospitalized by a cardiologist and did not return to work until 11 April 2001.

On 18 May 2001, plaintiff saw Dr. Supple again for pain in his left arm. Defendant did not approve the visit since it classified plaintiff's left arm pain as a non-compensable injury. Dr. Supple diagnosed plaintiff with advanced rotator cuff tendinosis and a possible tear in the left rotator cuff which, in his opinion, was caused by overuse of the left arm while working under restrictions to the right. Dr. Supple placed plaintiff on work restrictions that included no lifting over ten pounds and no repetitive use of either arm.

Plaintiff returned to work and was assigned as a machine operator but with no particular machine specified. Plaintiff went home in the middle of the day on 25 May 2001 and decided not to return due to his inability to perform as a machine operator. On 30 May 2001, defendant-employer notified plaintiff that it considered him to have voluntarily resigned as of 25 May 2001, as per company policy.

On 12 July 2001, plaintiff's doctor signed an Industrial Commission Form 28U, indicating that plaintiff was unable to perform the position of a machine operator, which was sent to the Industrial Commission and defendants. At a hearing on 7 November 2001, Deputy Commissioner Bradley W. Houser awarded plaintiff ongoing total disability compensation from 12 July 2001 through the date of the order, in a lump sum, and continuing until such time as plaintiff returns to work or until further order of the Commission. In addition, the deputy Commissioner ordered the defendants to pay all costs associated with the cancelled 12 September 2000 surgery and costs of the Commission proceedings.

The Full Commission affirmed the Deputy Commissioner's Opinion and Award on 30 April 2003 with the following modifications: ongoing total disability payments shall begin from 18 May 2001 and defendants are not liable for costs of the cancelled surgery. Defendants appeal.

ANALYSIS

The standard of review in worker's compensation cases is well established. The Industrial Commission's findings of fact are "conclusive on appeal if supported by any competent evidence." *Perkins v.*

Arkansas Trucking Serv., 351 N.C. 634, 637, 528 S.E.2d 902, 903 (2000). This Court is precluded from assessing credibility or re-weighing evidence and will only determine if the record contains any evidence to support the challenged finding. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'ing denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). Only if the Commission acts under a misapprehension of the law, will the award "be set aside and the case remanded for a new determination using the correct legal standard." *Bollenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987). Here, competent evidence supports the Commission's findings and the application of the law.

[1] Defendant first contends that the North Carolina Industrial Commission (NCIC) erred by finding that plaintiff's inability to perform his job 18 May 2001 constituted a failed trial return to work. Plaintiff contends, however, that the statute and rule governing trial return to work (N.C. Gen. Stat. § 97-32.1 and Rule 404A) do not apply here, because plaintiff was not receiving benefits. Because we agree that the trial return to work framework is not applicable for the reasons articulated by plaintiff, and because we need not reach this issue in order to resolve the matter before us, we decline to address this issue.

[2] Defendant next contends that the evidence was insufficient to establish the work-relatedness of the left arm injury. However, 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). "All that is necessary is that an expert express an opinion that a particular cause was capable of producing this injurious result." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 600, 532 S.E.2d 207, 211-12 (2000).

Here, upon careful review of the record, we find that Dr. Supple's expert testimony qualifies as competent evidence regarding the causal link between plaintiff's work and overuse of his left arm. Thus, this argument has no merit.

[3] Finally, defendant contends that the evidence failed to support the Commission's findings and conclusions that plaintiff's termination was not related to the compensable injury. Again, we disagree:

FINDINGS OF FACT

11. According to the physical demands classification of the Dictionary of Occupational Titles, defendant-employer's job description of the Machine Operator positions indicates that these jobs with defendant-employer are heavy labor jobs, requiring frequent lifting of up to 60 pounds and pushing hand trucks which may weigh as much as several hundred pounds. These job descriptions are reflected in Plaintiff's Exhibits 2 and 4. According to the Dictionary of Occupational Titles, the position of Machine Operator usually is a medium capacity job.

* * * * *

19. At this examination [18 May 2001], Dr. Supple assigned plaintiff permanent, light duty restrictions of no lifting over ten pounds, and no overhead or repetitive use of the right, or left arm. Plaintiff gave defendant-employer a copy of his restrictions, but was instructed to return to work at his normal job as a machine operator, although it could not be determined exactly upon which machine plaintiff was to work. Thereafter, plaintiff informed defendant-employer that he had forgotten to take his medication that day, and he was given permission to go home to take it. Upon arriving home, plaintiff determined that he would not return to work because of his inability to perform the machine operator job. On 30 May 2001, defendant-employer sent plaintiff a certified letter informing him that he had been deemed to have voluntarily resigned as of 25 May 2001.

* * * * *

21. Based upon the credible evidence of record, the Full Commission finds that plaintiff's inability to perform the machine operator position provided to him by defendant-employer subsequent to 18 May 2001 was a failed trial return to work. Furthermore, because the machine operator position was not suitable given plaintiff's restrictions, his refusal to perform it was justified.

* * * * *

CONCLUSIONS OF LAW

4. The machine operator position provided by the defendants to plaintiff following his 11 July 2000 injury by accident was unsuit-

able, and his refusal of it was justified. N.C. Gen. Stat. § 97-32. Furthermore, defendants have failed to produce sufficient evidence upon which to find that plaintiff's termination on 30 May 2001 was for reasons unrelated to his compensable injury, and was for misconduct or fault for which a non-disabled employee would also have been terminated. Seagraves v. Austin Co. of Greensboro, 123 N.C. App. 228, 472 S.E.2d 587 (1996). Accordingly, plaintiff did not constructively refuse suitable work with defendant employer. N.C. Gen. Stat. § 97-32; Seagraves v. Austin Co. of Greensboro, 123 N.C. App. 228, 472 S.E.2d 587 (1996).

Here, Findings 11 and 19 clearly indicate that the machine operator job was not within plaintiff's work restrictions. The Commission found that, as a result, the job was not "suitable," and plaintiff was justified in refusing the job. Because the evidence supports the finding that defendant then terminated plaintiff for his refusal, the Commission's conclusion number 4 was supported by these findings, which, in turn, is consistent with the applicable law.

Affirmed.

Judges GEER and THORNBURG concur.

DELMON LEE, JR., PLAINTIFF-APPELLANT v. E. NORRIS TOLSON, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE N.C. DEPARTMENT OF REVENUE, DEFENDANT-APPELLEE

LARRY FITCH CLARK, SR., PLAINTIFF-APPELLANT v. E. NORRIS TOLSON, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE N.C. DEPARTMENT OF REVENUE, DEFENDANT-APPELLEE

No. COA03-1183

(Filed 7 September 2004)

Taxation— action in superior court—time limits—jurisdiction

The trial court properly granted summary judgment for defendant Secretary of Revenue in an action to recover taxes assessed on moonshine because the time limit for filing in the courts after an unsuccessful administrative action had expired. The Court of Appeals could not use certiorari to invoke juris-

diction which the superior court could not itself invoke. N.C.G.S. §§ 105-241.4, 105-266.1; N.C.R. App. P. 3(c).

Appeal by plaintiffs from judgment entered by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 9 June 2004.

Thomas Edward Hodges for the plaintiffs-appellants.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower for the defendant-appellee Secretary of Revenue.

ELMORE, Judge.

On 15 January 1999, Alcohol Law Enforcement (ALE) and the Harnett County Sheriff's Department obtained search warrants and simultaneously conducted a raid on a distillery located on lands of Larry Fitch Clark, Sr. (Clark) and a raid on the residence of Delmon Lee, Jr. (Lee). The raids resulted in the seizure of a distillery, 1,552 gallons of moonshine and 9,485 gallons of mash from Clark's property, and $37,200.00 in cash from Lee's residence.

The Secretary of Revenue (Secretary) prepared a warrant for collection of taxes against Clark and Lee, with a total tax indebtedness of $35,420.42, including penalties and interest. The warrant was executed by levying on seized cash in the custody of the Harnett County Sheriff's Department in the amount of $35,420.42. Because the assessment was paid within 48 hours of possession, the penalties and interest were eliminated, and a sum of $5,194.00 was returned to Lee.

Lee and Clark mailed letters protesting the assessment of taxes against them to the Secretary. A hearing was held by the Assistant Secretary, and the tax assessment was upheld. Plaintiffs filed for administrative review before the Tax Review Board. The Tax Review Board confirmed the Assistant Secretary's decision. Plaintiffs then filed suit in Harnett County Superior Court pursuant to N.C. Gen. Stat. § 105-267. The trial court granted Defendant Secretary's motion for summary judgment. From that order granting summary judgment, plaintiffs appeal.

As a preliminary issue, we must first address whether plaintiffs-appellants timely filed the appeal, and whether they timely filed suit in the superior court. We hold that suit was not timely brought in the lower court, and consequently, summary judgment was appropriate.

Our General Statutes clearly define the time limits relevant to this case. The process for protesting a levied tax is outlined in N.C. Gen. Stat. § 105-267 (2003):

> 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. 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. The protest period for a tax levied in Article 2A, 2C, or 2D of this Chapter is 30 days after payment. The protest period for all other taxes is three years after payment.

N.C. Gen. Stat. § 105-267 (2003). We note that unauthorized substances taxes are levied under article 2D.

Plaintiffs here followed proper procedure as it pertained to the administrative process. Once that process was exhausted, in this case not in their favor, they had the option to bring suit in the courts of this State within a prescribed time period.

N.C. Gen. Stat. § 105-241.4 (2003) governs actions to recover taxes paid:

> Within 30 days after notification of the Secretary's decision with respect to liability under this Subchapter or Subchapter V, any taxpayer aggrieved thereby, in lieu of petitioning for administrative review thereof by the Tax Review Board under G.S. 105-241.2, may pay the tax and bring a civil action for its recovery as provided in G.S. 105-267.
>
> 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.
>
> Either party may appeal to the appellate division from the judgment of the superior court under the rules and regulations

prescribed by law for appeals, except that if the Secretary appeals, the Secretary is not required to give any undertaking or make any deposit to secure the cost of the appeal. . . .

N.C. Gen. Stat. § 105-241.4 (2003).

N.C. Gen. Stat. § 105-266.1 (2003) governs refunds of overpayment of taxes, and plaintiffs argue that this is the basis for their appeal:

(a) If a taxpayer claims that a tax or an additional tax paid by the taxpayer was excessive or incorrect, the taxpayer may apply to the Secretary for refund of the tax or additional tax at any time within the period set by the statute of limitations in G.S. 105-266.

. . .

(c) **Within 90 days after notification of the Secretary's decision with respect to a demand for refund of any tax or additional tax under this section, an aggrieved taxpayer may, instead of petitioning for administrative review by the Tax Review Board under G.S. 105-241.2, bring a civil action against the Secretary for recovery of the alleged overpayment.** If the alleged overpayment is more than two hundred dollars ($ 200.00), the taxpayer may bring the action either in the Superior Court of Wake County or in the superior court of the county in which the taxpayer resides; . . . . If upon trial it is determined that there has been an overpayment of tax or additional tax, judgment shall be rendered therefor, with interest, and the State shall refund the amount due.

(d) **Either party may appeal to the appellate division from the judgment of the superior court under the rules and regulations prescribed by law for appeals**, except that the Secretary, if he should appeal, shall not be required to give any undertaking or make any deposit to secure the cost of such appeal.

(e) Nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2, and, with respect to tax paid to the Secretary of Revenue, the rights granted by this section are in addition to the rights provided by G.S. 105-267.

N.C. Gen. Stat. § 105-266.1 (2003) (emphasis added).

The rules and regulations prescribed for taking the appeal are embodied in our Rules of Appellate Procedure. N.C.R. App. P. 3(c) (2004) governs the time for taking appeals:

> In civil actions and special proceedings, a party must file and serve a notice of appeal:
>
> (1) within **30 days** after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or
>
> (2) within 30 days after service upon the party of a copy of the judgment if service was not made within that three-day period; provided that
>
> (3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the 30-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subsections (1) and (2) of this subdivision (c). . . .

N.C.R. App. P. 3(c) (2004) (emphasis added).

In the case at bar, the total tax of $35,420.42 was assessed on 19 January 1999. Plaintiffs paid within 48 hours, avoiding thereby penalty and interest. On 18 February 1999, plaintiffs mailed their protest letters to the Secretary of Revenue. On 23 July 1999, the Assistant Secretary held the administrative tax hearing. A final decision dated 10 April 2000 was rendered which denied plaintiffs' request for a refund. Plaintiffs filed notice of intent to petition for administrative review to the Tax Review Board on 9 May 2000, and filed the petition for review on 10 July 2000. The hearing before the Review Board was held on 15 August 2001. The Board rendered a decision affirming the Assistant Secretary's decision on 9 November 2001.

Plaintiffs filed a petition to extend time to file their civil complaint on 17 May 2002, which was granted extending the time to file until 5 June 2002. The petition was filed over six months after the Board's decision was rendered. Under any of the above statutes, when this petition was filed, the time limit to file had already expired. Plaintiffs filed their complaint on 5 June 2002. Defendant filed a motion for Summary Judgment, which was granted in an order

entered 19 February 2003. Plaintiffs' notice of appeal was filed properly on 11 March 2003.

The order which granted an extension of time to file suit could not effectively extend the time limit because it had already expired before a motion was made. *See, e.g., Reap v. City of Albemarle,* 16 N.C. App. 171, 191 S.E.2d 373 (1972) (ruling that after the time for docketing the record on appeal in this Court had expired, the trial judge could not then enter a valid order extending the time).

In some cases, this Court will entertain an untimely appeal by granting a writ of certiorari under Rule App. P. 21(a). This rule says that when the right to appeal has been lost by a party because they did not take timely action, the court has discretion to grant a writ of certiorari. However, this rule does not apply because the parties in this case lost the right to appeal by not taking action at the superior court level, and not by failing to timely file with this court. It would not be just to apply it, since summary judgment was justified by these aforementioned procedural grounds, and that summary judgment was timely appealed to this Court. Therefore, we cannot now invoke jurisdiction for the superior court which that court could not itself invoke. Summary judgment was properly granted because of the expired time limit for bringing suit.

We affirm the summary judgment on the grounds that the plaintiff did not timely bring suit in the trial court. Because this issue is dispositive, we do not reach the plaintiffs' remaining assignments of error.

Affirmed.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. ROY JACOB BELL

No. COA03-1382

(Filed 7 September 2004)

1. Kidnapping— first-degree—variance between indictment and charge—conflicting evidence—plain error

There was plain error where defendant was indicted for first-degree kidnapping based on confinement and restraint but not removal, the jury was instructed on first-degree kidnapping

on restraint or removal, and the verdict did not indicate the theory on which the conviction was based. Such a variance between the indictment and charge constitutes error; whether it is plain error depends upon the nature of the evidence at trial. In this case, the evidence on the theories of restraint and removal was conflicting.

2. Sentencing— prior record level—evidence sufficient

There was no error in a defendant's sentencing where he contended that the State failed to prove his prior record level, but the State submitted a worksheet and both defendant and his counsel made statements which constitute stipulations. Moreover, defendant as the appellant had the burden of including a copy of the worksheet and failed to do so; the trial judge will be assumed to have correctly applied the law where the record is devoid of any indication otherwise.

Appeal by defendant from judgment entered 2 June 2003 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 9 June 2004.

Roy Cooper, Attorney General, by Harriet F. Worley, Assistant Attorney General, for the State.

Russell J. Hollers III, for defendant-appellant.

STEELMAN, Judge.

Defendant, Roy Jacob Bell, was indicted for assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, and first-degree kidnapping. On 30 May 2003, a jury found defendant guilty of assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon, and first degree kidnapping. The trial court sentenced defendant to consecutive active sentences of 42 to 60 months on the assault charge, 107 to 138 months on the robbery charge, and 121 to 155 months on the kidnapping charge.

The State's evidence at trial tended to show: On 28 October 2002, Johnny Clyburn was driving defendant home when defendant asked for a beer. Mr. Clyburn stopped by his own home and invited defendant in for a beer. Once inside, defendant asked Mr. Clyburn for some money. After defendant's request was denied, he "lost it" and began beating Mr. Clyburn. Mr. Clyburn testified the assault commenced in

the den and he lost consciousness. Mr. Clyburn testified that he awoke in his bedroom, with his hands and feet bound.

Defendant brings forward two assignments of error: (1) the trial court committed plain error in instructing the jury on a theory of kidnapping not included in the indictment; and (2) the trial court erred in sentencing defendant as a Level V offender. We reverse in part and affirm in part.

[1] In his first assignment of error defendant contends the trial judge committed plain error in instructing the jury on a theory of kidnapping not charged in the indictment. Since defendant failed to object to the kidnapping instructions at trial, we must consider whether the instructions given amount to plain error. N.C. R. App. P. 10(c)(4).

The plain error rule only applies rarely, in truly exceptional cases. *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983). To constitute plain error, defendant must convince the appellate court that absent the error, the jury probably would have reached a different verdict. *Id.* at 661, 300 S.E.2d at 379.

N.C. Gen. Stat. § 14-39 sets forth the elements of the felony of kidnapping. Section (a) enumerates three separate bases for kidnapping: confinement, restraint, or removal. N.C. Gen. Stat. § 14-39(a) (2003). The indictment against defendant in this case alleged both confinement and restraint, but did not allege removal. In instructing the jury on the charge of kidnapping and the lesser-included offense of first-degree kidnapping, the trial judge told the jury they could convict defendant on the theory of either restraint or removal. The jury verdict shows that defendant was found guilty of first-degree kidnapping, but does not indicate whether this was based upon the theory of restraint or removal. Our Supreme Court has held that such a variance between the indictment and the jury charge constitutes error. *State v. Tucker*, 317 N.C. 532, 537-38, 346 S.E.2d 417, 420 (1986). Whether this error constitutes plain error depends on the nature of the evidence introduced at trial. *See id.* at 539, 346 S.E.2d at 421 (noting the appellate court must review the entire record in its determination of whether plain error occurred).

In *State v. Tucker*, the indictment charged kidnapping based upon the theory of removal, however the judge instructed the jury on the theory of restraint. *Id.* at 538, 346 S.E.2d at 421. Our Supreme Court held "[i]n light of the highly conflicting evidence . . . on the unlawful

removal and restraint issues . . ." the instructional error constituted plain error, and a new trial was warranted. *Id.* at 540, 346 S.E.2d at 422. In *State v. Lucas*, the indictment charged defendant with kidnapping based upon the theory of confinement and the judge instructed the jury on the theory of removal. 353 N.C. 568, 585-86, 548 S.E.2d 712, 724-25 (2001). Our Supreme Court held that "the evidence of confinement, restraint and removal was compelling" and found there to be no plain error. *Id.* at 588, 548 S.E.2d at 726. In *State v. Gainey*, the indictment charged on the theory of removal, but the judge instructed the jury on the theories of restraint and removal. *State v. Gainey*, 355 N.C. 73, 94, 558 S.E.2d 463, 477, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). Our Supreme Court held that "[t]he evidence in the case *sub judice* is not highly conflicting," and found there to be no plain error. *Id.* at 94-95, 558 S.E.2d at 477-78. It was also noted that defendant admitted to the confinement, restraint, and removal of the victim. *Id.* at 94-95, 558 S.E.2d at 477. Finally, in *State v. Smith*, the indictment charged on the theory of removal and the judge instructed the jury on the theories of confinement, restraint, and removal. 162 N.C. App. 46, 50, 589 S.E.2d 739, 742 (2004). This Court held that the evidence was "highly conflicting with respect to the theory alleged in the indictment[,]" found there to be plain error, and directed that the defendant receive a new trial. *Id.* at 53, 589 S.E.2d at 744.

The evidence in the instant case was highly conflicting. While there was no dispute that defendant assaulted Mr. Clyburn, the only witnesses to these events were Mr. Clyburn and defendant. Mr. Clyburn testified at trial that defendant attacked him in the den and he passed out. Mr. Clyburn then testified that he awoke in his bedroom with defendant standing over him and his hands and legs were bound. On the night of the assault, Mr. Clyburn gave a statement to Officer Legrand of the Greensboro Police Department. Mr. Clyburn told the officer that he fell asleep while talking with defendant and when he woke up had been beaten and bound. On 4 November 2002, Mr. Clyburn gave a statement to Detective Solomon, also of the Greensboro Police Department. Detective Solomon testified Mr. Clyburn had a "hard time sometimes getting his facts straight." (T. 184). Mr. Clyburn told Detective Solomon: "Roy tied my hands quietly in front of me with an iron cord. Roy then got an extension cord and tied my feet together while I was still standing." Defendant then beat Mr. Clyburn into unconsciousness. When Mr. Clyburn awoke he was in the bedroom and not in the den.

Defendant acknowledged beating Mr. Clyburn, but denied tying him up. Defendant's testimony was that the entire incident took place in Mr. Clyburn's den. A crime scene technician with the Greensboro Police Department testified that there was considerable blood spatter in the den, but the only blood found in the bedroom was found on two pieces of bloody clothing worn by Mr. Clyburn. There were also signs of a struggle in the den.

Given the sharply conflicting nature of the evidence in this case on the theories of restraint and removal, we find this case is controlled by the decisions in *Tucker* and *Smith*, rather than those in *Lucas* and *Gainey*. We hold the instructional error of the trial court constitutes plain error and that defendant is entitled to a new trial on the kidnapping charge.

[2] In his second assignment of error, defendant contends the State failed to prove defendant's prior record level, and under the rationale of *State v. Hanton*, 140 N.C. App. 679, 540 S.E.2d 376 (2000), defendant is entitled to a new sentencing hearing on all charges. We disagree.

Under the provisions of N.C. Gen. Stat. § 15A-1340.14(f) the State bears the burden of proving defendant's prior convictions by a preponderance of the evidence. The State may meet this burden in one of four ways: (1) stipulation of the parties; (2) submission of an original or a copy of the court record of the prior convictions; (3) submission of a copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or the Administrative Office of the Courts; or (4) by any other method the court finds to be reliable. N.C. Gen. Stat. § 15A-1340.14(f) (2003). The submission of a prior record level worksheet (AOC form CR-600) without further proof of a defendant's convictions, does not meet the requirements of N.C. Gen. Stat. § 15A-1340.14(f). *State v. Riley*, 159 N.C. App. 546, 557, 583 S.E.2d 379, 387 (2003). *See also State v. Morgan*, 164 N.C. App. 298, 595 S.E.2d 804 (2004); *State v. Hanton* 140 N.C. App. at 689, 540 S.E.2d at 382.

In this case, the transcript of the sentencing hearing reveals that the State submitted a worksheet showing common law robbery convictions in 1982, 1985, 1987, and a misdemeanor larceny conviction in 1983, in addition to convictions that defendant admitted while on the witness stand during examination by his own counsel. After being afforded an opportunity to review the convictions with his client, defense counsel stated: "I think his record shows prior convictions

for common law robbery but nothing of the nature of armed robbery or kidnapping."

We hold that this constituted a stipulation as to the common law robbery convictions under *State v. Eubanks*, 151 N.C. App. 499, 565 S.E.2d 738 (2002). These three convictions amount to twelve record level points. *See* N.C. Gen. Stat. § 14-87.1 (2003); N.C. Gen. Stat. § 15A-1340.14(b)(3) (2003). Further, we hold that defendant's own testimony as to his other convictions during the trial of the case constituted a stipulation as to these convictions under N.C. Gen. Stat. § 15A-1340.14(f)(1) and (f)(4). At the sentencing hearing the trial judge specifically inquired concerning defendant's record "in addition to the offenses to which the defendant admitted to on the stand." The record defendant admitted to included three convictions of driving while impaired; *see* N.C. Gen. Stat. § 20-138.1 (2003); and one conviction of misdemeanor larceny; *see* N.C. Gen. Stat. § 14-72 (2003). Each of these offenses carries one record point for a total of four points. *See* N.C. Gen. Stat. § 15A-1340.14(b)(5) (2003). Taken together with the twelve points from the three common law robbery convictions, there were more than enough convictions proven to constitute the fifteen points necessary for the trial court to have found defendant to be a prior record Level V.

We also note that the record on appeal does not contain the record level worksheet. As the appellant, the burden is on defendant to include a copy of the record level worksheet as it pertains to an determination by the trial court from which the appeal is taken. *See State v. Phillips*, 149 N.C. App. 310, 313-14, 560 S.E.2d 852, 855 (2002); N.C. R. App. P. 9(a)(3)(g). *See also State v. Burney*, 302 N.C. 529, 533, 276 S.E.2d 693, 695 (1981) (noting "[i]t is incumbent upon the appellant to ensure that the record is properly made up and transferred to the court"). The purpose of this is to better facilitate our review of the assignments of error before us. "This Court is bound by the record before it," and where the record is void of anything indicating otherwise, we will assume the trial judge correctly applied the law and ruled appropriately. *State v. Williams*, 304 N.C. 394, 415, 284 S.E.2d 437, 451 (1981), *cert. denied*, 456 U.S. 932, 72 L. Ed. 2d 450 (1982).

For the reasons discussed herein, we find the trial court erred and grant defendant a new trial on the kidnapping charge. As to defendant's second assignment of error, we find no error.

NEW TRIAL as to kidnapping charge;

NO ERROR as to the convictions for assault with a dangerous weapon inflicting serious injury and robbery with a dangerous weapon.

Judges TYSON and BRYANT concur.

QUESSIE BROWN, PLAINTIFF v. JOYCE DAVIS KING, DEFENDANT

No. COA03-1378

(Filed 7 September 2004)

1. Statutes of Limitation and Repose— rescission—fraud—mistake

The trial court did not err by denying defendant's motion to dismiss plaintiff's claims seeking rescission of the execution of mortgage and loan documents based on expiration of the three-year statute of limitations under N.C.G.S. § 1-52 on the ground of fraud or mistake, because: (1) although the fraudulent transactions occurred on 25 August 1995, plaintiff offered evidence that she did not learn of them until she was served with the notice of foreclosure on 18 July 2001 and she filed the instant action on 18 July 2001; and (2) the jury specifically found that plaintiff filed her claim before the statute of limitations expired.

2. Process and Service— in personam jurisdiction—process directed to another party to action

The trial court did not err by exercising in personam jurisdiction over defendant even though defendant alleges insufficient service of process based on the fact that she was served with process directed to another party to the action, because: (1) the only return of service in the court's file contained certification from the sheriff that defendant was served 14 August 2001; and (2) defendant failed to meet her burden to make an evidentiary showing or submit affidavits in support of her allegation.

3. Appeal and Error— preservation of issues—punitive damages—failure to argue—failure to assign error

Although defendant contends the trial court erred by awarding $95,000 in punitive damages based on the fact that the award was greater than the statutory limit of three times actual dam-

ages, this assignment of error is deemed abandoned because: (1) in her brief, defendant argues the court erred by awarding punitive damages for a nominal trespass on a life estate; and (2) defendant failed to argue this assignment of error and also failed to assign error to the issue actually argued in her brief. N.C. R. App. 10(a).

4. Costs; Damages and Remedies— attorney fees—punitive damages—election of remedies

The trial court did not err by awarding $34.381.90 in attorney fees to plaintiff for breach of fiduciary duty pursuant to N.C.G.S. § 75-16.1 even though plaintiff elected to seek punitive damages and an equitable remedy, because attorney fees and punitive damages serve different interests and are not based on the same conduct, there is no double redress for a single wrong, and plaintiff is not required to elect between them to prevent duplicitous recovery.

Appeal by defendant from judgments entered 14 May 2003 and 9 June 2003 by Judge Robert C. Ervin in the Superior Court in Mecklenburg County. Heard in the Court of Appeals 17 June 2004.

Bledsoe & Bledsoe, P.L.L.C., by Louis A. Bledsoe, Jr., for plaintiff-appellee.

Lawrence U. Davidson, III, for defendant-appellant.

HUDSON, Judge.

Defendant appeals judgments entered after trial by jury, which awarded $95,000 in punitive damages and $34,381.90 in attorney fees to plaintiff for breach of fiduciary duty. Defendant argues that the court erred in failing to dismiss the claims against her, in exercising *in personam* jurisdiction over her, and in awarding punitive damages and attorney fees to plaintiff. For the reasons discussed below, we disagree and affirm the judgments and awards.

The evidence tended to show that plaintiff Quessie Brown was born 9 April 1900. Plaintiff's husband and defendant Joyce Davis King's husband were friends and worked together at Mr. King's funeral home. After plaintiff's husband died, defendant befriended plaintiff and provided her assistance with such matters as transportation to the doctor and errand running. In November 1994, defendant offered to continue helping to assist plaintiff and to look

after her affairs for the rest of her life in exchange for plaintiff deeding her Charlotte home to defendant. On 15 November 1994, plaintiff deeded her home to defendant, reserving a life estate for herself. Plaintiff also executed a power of attorney naming defendant as her attorney-in-fact.

On 23 August 1995, defendant executed a personal loan note for $26,000 to Quality Mortgage USA, Inc., and a deed of trust on plaintiff's home as plaintiff's attorney-in-fact. Defendant used the proceeds in her funeral home business. Plaintiff did not learn about these transactions until 18 November 1999, when the sheriff served her with a Notice to Foreclose.

Defendant moved to dismiss. In denying the motion, the court found that service of process on defendant was sufficient as matter of law, and that defendant had made no evidentiary showing and submitted no affidavits in support of her motion. The jury found that the action was filed before the expiration of the statute of limitations, and that defendant took advantage of her position of trust and confidence to execute the mortgage and loan documents. The jury further found that defendant did not act openly, fairly and honestly in executing the transactions and that her conduct was the proximate cause of plaintiff's injury. Plaintiff elected to pursue her claim in rescission rather than as a claim for damages. The jury awarded punitive damages of $95,000 and the court granted additional equitable relief and attorney fees.

[1] Defendant first argues that the court erred in denying her motion to dismiss because plaintiff's claims are barred by the statute of limitations. We disagree.

The applicable statute of limitations for plaintiff's claim is three years. N.C. Gen. Stat. § 1-52 (2001). "For relief on the ground of fraud or mistake; *the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.*" N.C. Gen. Stat. § 1-52 (9) (2001) (emphasis added); *see also Neugent v. Beroth Oil Co.*, 149 N.C. App. 38, 54, 560 S.E.2d 829, 839 (2002), *cert. denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). Here, although the fraudulent transactions occurred on 25 August 1995, plaintiff offered evidence that she did not learn of them until she was served with the notice of foreclosure on 18 November 1999. Plaintiff filed the instant action on 18 July 2001. The jury specifically found that plaintiff filed her claim before the statute of limitations expired.

[2] Defendant next argues that the court erred in exercising *in personam* jurisdiction over her. Defendant contends that she was served with process directed to another party to the action, and therefore, the court never obtained jurisdiction over her. We disagree.

Defendant contends that she was served with a summons actually directed upon the registered agent for DLJ Mortgage Accepting Corporation. However, the only return of service in the court's file contained certification from the sheriff that "Joyce King" was served 14 August 2001. The standard for proving nonservice in this exact circumstance has been addressed by our Supreme Court:

> When the return shows legal service by an authorized officer, nothing else appearing, the law presumes service. The service is deemed established unless, upon motion in the cause, the legal presumption is rebutted by evidence upon which a finding of nonservice is properly based. Upon hearing such motion, the burden of proof is upon the party who seeks to set aside the officer's return or the judgment based thereon to establish nonservice as a fact; and, notwithstanding positive evidence of nonservice, the officer's return is evidence upon which the court may base a finding that service was made as shown by the return.
>
> Service of process, and the return thereof, are serious matters; and the return of a sworn authorized officer should not be lightly set aside.
>
> Therefore, this Court has consistently held that an officer's return or a judgment based thereon may not be set aside unless the evidence consists of more than a single contradictory affidavit (the contradictory testimony of one witness) and is clear and unequivocal.

Harrington v. Rice, 245 N.C. 640, 642, 97 S.E.2d 239, 241 (1977) (internal quotation marks and citations omitted).

Here, defendant requested a hearing on her motion to dismiss based on an alleged insufficiency of process, which was filed with her unverified answer. The court denied the motion on grounds that defendant had failed to make an evidentiary showing or submit affidavits in support of her allegation. Because defendant failed to meet her burden of proof, the court's denial of her motion to dismiss was proper.

[3] Defendant next argues that the court erred in awarding punitive damages of $95,000. Defendant assigned error to "[t]he court's award-

ing punitive damages greater than the statutory limit of three times actual damages." In her brief, however, defendant argues that the court erred in awarding punitive damages for a nominal trespass on a life estate. Because defendant failed to argue her third assignment of error, we deem it abandoned. Because defendant failed to assign error to the issue actually argued in her brief, it is not properly before this Court. N.C.R. App. 10(a).

[4] Defendant next argues that the court erred in awarding attorney fees pursuant to N.C. Gen. Stat. § 75-16.1 when the plaintiff had elected to seek punitive damages and an equitable remedy. For the reasons discussed below, we disagree.

"Since [attorney fees and punitive damages] serve different interests and are not based on the same conduct, there is no double redress for a single wrong, and plaintiff is not required to elect between them to prevent duplicitous recovery." *United Lab. v. Kuykendall*, 335 N.C. 183, 193, 437 S.E.2d 374, 380 (1993). In that case, our Supreme Court discussed in detail the doctrine of election as it applies to attorney fees and punitive damages:

> One aspect of the doctrine of election of remedies is that a plaintiff may not recover inconsistent remedies. Remedies are inconsistent when one must necessarily repudiate or be repugnant to the other. Thus, a party may not sue for rescission of a contract and for its breach. Since recovering attorneys fees and punitive damages is not inconsistent, that aspect of the doctrine of election of remedies that precludes inconsistent remedies does not prevent plaintiff from recovering both.
>
> Another aspect of the doctrine of election of remedies is to prevent double redress for a single wrong. . . . To recover punitive damages at common law a plaintiff must show that the defendant acted in a willful or oppressive manner. To recover attorneys fees for unfair practices, however, the plaintiff must also show that "there was an unwarranted refusal by [the defendant] to fully resolve the matter which constitutes the basis of . . . the suit." N.C.G.S. § 75-16.1(1). Since recovery of attorneys fees requires proof different from that which gives rise to punitive damages, the claims do not arise from the same course of conduct.
>
> Furthermore, the policies behind recovering attorneys fees and recovering punitive damages are wholly different. Punitive dam-

ages are designed to punish willful conduct and to deter others from committing similar acts. The purpose of attorneys fees in Chapter 75, however, is to "encourage private enforcement" of Chapter 75.

Id. at 191-92, 379-80. Here, plaintiff was properly awarded both attorney fees and punitive damages based on the necessary findings by the court and jury.

Affirmed.

Judges GEER and THORNBURG concur.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. STAGECOACH VILLAGE, A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANT

No. COA03-1026

(Filed 7 September 2004)

Appeal and Error— appealability—interlocutory order—condemnation proceeding—substantial right not affected

Plaintiff Department of Transportation's appeal from an order of the trial court joining as necessary parties each individual lot owner as a defendant in a condemnation action filed by plaintiff against defendant homeowners' association is dismissed as an appeal from an interlocutory order, because: (1) parties to a condemnation proceeding must resolve all issues other than damages at a hearing pursuant to N.C.G.S. § 136-108, and an appeal from a trial court's order rendered in such hearings is interlocutory since these hearings do not finally resolve all issues; (2) the trial court did not certify this case pursuant to N.C.G.S. § 1A-1, Rule 54(b); and (3) the only two issues affecting substantial rights in condemnation hearings are title to property and area taken, and neither issue is involved in this case.

Appeal by plaintiff from order entered 27 March 2003 by Judge John O. Craig, III, in Superior Court, Guilford County. Heard in the Court of Appeals 18 May 2004.

Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett-Baker and Special Deputy Attorney General W. Richard Moore, for plaintiff appellant.

Horsley & Peraldo, P.A., by Jeffrey K. Peraldo, and Smith Moore LLP, by Bruce P. Ashley and R. James Cox, Jr., for defendant appellee.

WYNN, Judge.

Plaintiff North Carolina Department of Transportation appeals from an order of the trial court joining as necessary parties each individual lot owner as a defendant in a condemnation action filed by Plaintiff against Defendant homeowners' association, Stagecoach Village. Plaintiff argues the trial court erred in determining that Defendant did not have standing to pursue each individual lot owner's claim, and in joining the lot owners as necessary parties in the condemnation action. For the reasons set forth herein, we must dismiss the instant appeal as interlocutory.

The procedural and factual history of the instant appeal is as follows: On 15 January 2002, Plaintiff filed a complaint for condemnation, declaration of taking, and notice of deposit in Guilford County Superior Court regarding certain property owned by the Defendant homeowner's association. The property at issue was common area property owned by Defendant in which each lot owner of the Stagecoach Village townhouse development also owned an easement. In its answer to Plaintiff's complaint, Defendant asserted the individual lot owners were necessary parties to the condemnation action inasmuch as each lot owner's property rights were adversely affected by the taking. On 9 October 2002, Defendant filed a motion pursuant to section 136-108 of the North Carolina General Statutes for a determination, *inter alia*, of whether the individual lot owners were necessary parties to the condemnation action. The motion came before the trial court on 16 December 2002, following which the trial court entered an order joining as necessary parties every record owner of a lot in the Stagecoach Village townhouse development. Plaintiff appealed from this order.

The dispositive issue on appeal is whether the instant action affects the substantial rights of the parties such that the present interlocutory appeal should be reviewed at this time. We hold it does not and must therefore dismiss the appeal.

Parties to a condemnation proceeding must resolve all issues other than damages at a hearing pursuant to section 136-108 of the North Carolina General Statutes. Section 136-108 provides as follows:

> After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.

N.C. Gen. Stat. § 136-108 (2003). Because section 136-108 hearings do not finally resolve all issues, an appeal from a trial court's order rendered in such hearings is interlocutory. *Dep't of Transp. v. Rowe*, 351 N.C. 172, 174, 521 S.E.2d 707, 708-09 (1999); *Department of Transp. v. Byerly*, 154 N.C. App. 454, 456, 573 S.E.2d 522, 523 (2002). Only two circumstances exist in which a party may appeal an interlocutory order. *Rowe*, 351 N.C. at 174-75, 521 S.E.2d at 709. "First, the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action." *Id.* at 174-75, 521 S.E.2d at 709; N.C. Gen. Stat. § 1A-1, Rule 54(b) (2003). Such is not the case here. Second, a party may appeal an interlocutory order that "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950); *see also* N.C. Gen. Stat. § 1-277 (2003); N.C. Gen. Stat. § 7A-27 (2003). Thus, the instant appeal from the interlocutory condemnation order is proper if it affects the substantial rights of the parties.

Title to property and area taken in a condemnation action are "vital preliminary issues" affecting substantial rights. *Rowe*, 351 N.C. at 176, 521 S.E.2d at 709; *Highway Commission v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967). Where an order resulting from a condemnation hearing concerns title and area taken, such an order must be immediately appealed, despite its interlocutory nature. *Nuckles*, 271 N.C. at 14, 155 S.E.2d at 784. However, these are the only two condemnation issues affecting substantial rights from which immediate appeal must be taken. Although the reasoning in *Nuckles* implies that *all* issues other than damages arising in a section 136-108 hearing are "vital preliminary issues" affecting substantial rights, our Supreme

Court in *Rowe* held that an appeal from an interlocutory condemnation order contesting only the unification of the tracts of property at issue, and "not what parcel of land [was] being taken or to whom that land belong[ed]," did not affect any substantial rights of the appellants. *Rowe*, 351 N.C. at 176, 521 S.E.2d at 709. In doing so, the *Rowe* Court expressly restricted its earlier decision in *Nuckles*, stating that "[t]o the extent that *Nuckles* has been expanded to other issues arising from condemnation hearings, we now limit that holding to questions of title and area taken." *Id.* The Court further noted that, although the parties to a condemnation hearing must resolve all issues other than damages at the section 136-108 hearing, the statute did not require the parties to appeal those issues before proceeding to the damages trial. *Id.* Thus,

> [e]ven assuming that the unification order affected some substantial right, defendants were not required to immediately appeal the trial court's determination. The appeals process "is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment." As a result, interlocutory appeals are discouraged except in limited circumstances. The language of N.C.G.S. § 1-277 is permissive not mandatory. Thus, where a party is entitled to an interlocutory appeal based on a substantial right, that party may appeal but is not required to do so. To the extent language in *Charles Vernon Floyd, Jr. & Sons, Inc. v. Cape Fear Farm Credit*, 350 N.C. 47, 51, 510 S.E.2d 156, 159 (1999), suggests otherwise, it is hereby disavowed.

Id. at 176, 521 S.E.2d at 709-10 (quoting *City of Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951)) (citations omitted). The Court concluded that "[i]n a condemnation proceeding, an interlocutory appeal is permissive, not mandatory, except in the limited circumstances that existed in *Nuckles*." *Id.* at 177, 521 S.E.2d at 710.

In the instant case, there is no dispute concerning the area taken or title to the condemned property. Rather, Plaintiff challenges the trial court's determination of necessary and proper parties to the case, and Defendant's ability to adequately represent the individual lot owners in the condemnation proceeding. Plaintiff offers no explanation as to how the order of the trial court "will work an injury to him if not corrected before an appeal from the final judgment." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. Because the appeal does not

require resolution of issues involving title and area taken, the interlocutory order does not affect the parties' substantial rights. *Rowe*, 351 N.C. at 176, 521 S.E.2d at 709; *Department of Transp. v. Mahaffey*, 137 N.C. App. 511, 515, 528 S.E.2d 381, 384 (2000) (concluding that, because the issues addressed by the trial court in the section 136-108 hearing did not relate to title or area taken, immediate appeal was unnecessary). Inasmuch as the parties' substantial rights are unaffected by the trial court's order, the instant appeal is improper and must be dismissed. *Rowe*, 351 N.C. at 176, 521 S.E.2d at 709 (discouraging interlocutory appeals from condemnation orders except under the limited circumstances presented by *Nuckles*); *Byerly*, 154 N.C. App. at 456-57, 573 S.E.2d at 524 (dismissing as interlocutory the second argument propounded by the defendants, who contended the trial court in a section 136-108 hearing failed to classify the going concern value of the defendants' business as property taken or damaged by the Department of Transportation).

The instant appeal is hereby,

Dismissed.

Judges CALABRIA and STEELMAN concur.

IN THE MATTER OF: A.L.

No. COA03-696

(Filed 7 September 2004)

Appeal and Error— delinquency adjudication—disposition not appealed—jurisdiction

An appeal from a delinquency adjudication was dismissed for lack of jurisdiction where the notice of appeal was filed after the disposition hearing but referred only to the adjudication. Under N.C.G.S. § 7B-2602 (2003), appealable final orders in juvenile matters include orders of disposition after an adjudication, but the statute does not authorize appeals following the adjudicatory portion of the case. Nothing here indicates that the disposition order was appealed.

IN RE A.L.

[166 N.C. App. 276 (2004)]

Appeal by juvenile from finding of delinquency entered 29 October 2002 by Judge Elaine M. O'Neal in the District Court in Durham County. Heard in the Court of Appeals 3 March 2004.

Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham, for the State.

Joseph E. Kennedy, for juvenile-appellant.

HUDSON, Judge.

On 29 October 2002, the court adjudicated juvenile A.L. delinquent upon a violation of N.C. Gen. Stat. § 14-177, which prohibits crime against nature. The juvenile was nine-years-old at the time of the hearing. On 8 December 2002, the court entered an order of disposition. As explained below, we dismiss this appeal for lack of jurisdiction.

Evidence at the hearing tended to show that on 17 July 2002, A.L. was playing outside a neighbor's house with an unsupervised group of children ranging in age from eleven months to twelve years. An eleven-year-old child held the eleven-month-old baby on his lap, when A.L. asked the group of kids if anyone dared him to put his "thing" in the baby's mouth. Another boy said "Me", whereupon A.L. unzipped his pants and placed his penis in the baby's mouth.

The Court of Appeals has limited jurisdiction to review final orders of the trial court in juvenile matters. Notice of appeal must be made in open court at the time of the hearing or in writing within ten days after the entry of the order. N.C. Gen. Stat. § 7B-2602 (2003). Appealable final orders include "[a]ny order of disposition after an adjudication that a juvenile is delinquent or undisciplined." *Id.* "The statute does not authorize an appeal following the *adjudicatory* portion of the case." *In re Pegram*, 137 N.C. App. 382, 383, 527 S.E.2d 737, 738 (2000 (emphasis in original).

It is well established that "[f]ailure to give timely notice of appeal . . . is jurisdictional, and an untimely attempt to appeal must be dismissed." *In re Lynette H.*, 323 N.C. 598, 602, 374 S.E.2d 272, 274 (1988) (quoting *Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 189, 301 S.E.2d 98, 99-100 (1983)). Here, the juvenile's attorney filed a notice of appeal on 8 December 2002, following the hearing on disposition. The notice of appeal, however, refers only to the order entered 29 October 2002, with its "finding adjudication of delinquency," and mentions neither the disposition nor the order dated 8 December 2002.

Since nothing in the record indicates that the order was appealed, we must conclude that we have no jurisdiction to review this matter. Accordingly, we dismiss this appeal.

Dismissed.

Judges MARTIN and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

ANDERSON v. LACKEY No. 03-768	Mecklenburg (92CVD8015)	Dismissed in part, affirmed in part
BROWN v. DODSON No. 03-954	Buncombe (01CVS4642)	Affirmed in part, reversed in part, and remanded
CARR v. WAKE MED. CTR. No. 03-984	Wake (02CVS10646)	Dismissed
CAUDILL v. BOARD OF ADJUST. FOR CITY OF GREENSBORO No. 03-1352	Guilford (03CVS5259)	Vacated and remanded
COOK v. WATSON ELEC. CONSTR. CO. No. 03-456	Ind. Comm. (I.C. 926481)	Reversed and remanded
COUNCIL v. SLACK No. 03-1125	Durham (01CVS3619)	Reversed and remanded
DANAI v. DANAI No. 03-1075	Durham (03CVD824)	Affirmed
ELLIOTT v. COUNTY OF HALIFAX No. 03-1055	Halifax (01CVS1822)	Affirmed
HERGET v. KI NETWORKS, INC. No. 03-1269	Wake (02CVS7661)	Affirmed in part, vacated in part
HILL v. HILL No. 03-970	Henderson (97CVS725)	Affirmed
IN RE J.D.G. No. 03-1306	Wake (02J201)	Appeal dismissed
IN RE S.E. & E.E. No. 03-529	Cumberland (01J468) (01J469)	Affirmed
JPG, INC. v. DICK BECK PROF'L MKTG., INC. No. 03-974	Wake (02CVS13138)	Reversed
LUHMANN v. HOEING No. 03-23-2	Carteret (00CVS691)	*No error*
MANNING v. COUNTY OF HALIFAX No. 03-1118	Halifax (02CVS3)	Affirmed

McCOLLUM v. ATLAS VAN LINES No. 03-897	Ind. Comm. (I.C. 007481)	Affirmed
McCORQUODALE v. FRANKLIN BAKING CO. No. 03-1321	Ind. Comm. (I.C. 868982)	Affirmed
MILLER v. OWENS No. 03-1101	Mecklenburg (01CVS23195)	Affirmed
MORRIS v. THOMAS No. 03-1171	Durham (02CVS4206)	Affirmed
OLD REPUBLIC SUR. CO. v. RELIABLE HOUSING, INC. No. 03-1264	Guilford (00CVS8477)	Affirmed as modified
PROGRESS SYNFUEL HOLDINGS, INC. v. U.S. GLOBAL, LLC. No. 03-1379	Wake (03CVS5113)	Plaintiff's appeal is dismissed
STATE v. ADAMS No. 03-497	Cabarrus (02CRS51770)	Affirmed
STATE v. ALFORD No. 03-819	Robeson (96CRS14256) (96CRS14257)	New trial
STATE v. BATTLE No. 03-223	Craven (02CRS54511)	No error
STATE v. BLACKWELL No. 03-793	Durham (97CRS6390) (97CRS6391) (97CRS6421)	No prejudicial error in trial; remanded for resentencing
STATE v. DAY No. 03-1039	Guilford (01CRS95581) (01CRS95582)	No error
STATE v. DOUGLAS No. 03-329	Forsyth (01CRS35350) (01CRS59100)	No error
STATE v. FREDERICK No. 03-1240	Harnett (00CRS10999) (00CRS11000) (00CRS53140) (00CRS53155) (00CRS53157) (00CRS53197) (00CRS53142)	No error

STATE v. GARRETT No. 03-985	Dare (02CRS51103) (02CRS51105)	No error
STATE v. HILTON No. 03-470	Rockingham (02CRS5113)	Affirmed
STATE v. HUCKABEE No. 03-938	New Hanover (02CRS10602) (02CRS10603) (02CRS10604) (02CRS15116)	Affirmed
STATE v. JOHNSON No. 03-1252	Buncombe (02CRS13685) (02CRS55609)	No error
STATE v. JONES No. 03-976	Forsyth (00CRS59355) (01CRS52)	No error
STATE v. JONES No. 03-1451	Currituck (02CRS50698) (02CRS50699)	New trial
STATE v. MATTHEWS No. 03-1354	Mecklenburg (99CRS22862) (99CRS22864) (99CRS25295)	No error
STATE v. McCLINTON No. 03-426	Guilford (02CRS84204)	Affirmed
STATE v. MERRITT No. 03-1511	Harnett (02CRS6702) (02CRS55269) (02CRS55271)	No error
STATE v. ORE No. 03-1121	Stokes (00CRS50278) (00CRS50279) (00CRS50304) (03CRS50257) (03CRS50395) (03CRS50398) (03CRS50399) (03CRS50402) (03CRS50403) (03CRS50412) (03CRS50413) (03CRS50415) (03CRS50416) (03CRS50417) (03CRS50418)	Dismissed

	(03CRS50423) (03CRS50424) (03CRS50426) (03CRS50427)	
STATE v. PAUL No. 03-1178	Alamance (02CRS57668) (02CRS57669) (02CRS57670)	No error
STATE v. ROBINSON No. 03-1201	Sampson (03CRS1393) (03CRS3972) (03CRS51716)	No error in part. Arrest judgment as to felonious assault inflicting serious bodily injury, case No. 03CRS3972
STATE v. RUSSELL No. 03-424	Wake (02CRS30639)	No error
STATE v. SATTERFIELD No. 03-912	Cabarrus (00CRS8794)	Affirmed
STATE v. TABOR No. 03-496	Mecklenburg (00CRS43936)	Affirmed
STATE v. WAGNER No. 03-943	Forsyth (02CRS31746) (02CRS31747)	No error
VISUAL OUTDOOR ADVER., INC. v. CITY OF SANFORD BD. OF ADJUST. No. 02-1619	Lee (02CVS228)	Affirmed
WINGFIELD v. N.C. CENT. UNIV. No. 03-1221	Ind. Comm. (I.C. 956523)	Affirmed

JOHN W. WHITE AND HIS WIFE, KATHERINE A. WHITE, PLAINTIFFS v. CONSOLIDATED PLANNING, INC.; PARK AVENUE SECURITIES, LLC; GUARDIAN INVESTOR SERVICES CORPORATION; THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA; KEYPORT LIFE INSURANCE COMPANY; PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY; AND ROBERT W. WHITE, DEFENDANTS

No. COA03-483

(Filed 5 October 2004)

1. **Employer and Employee— negligent hiring—reasonable investigation**

The trial court erred by granting defendant financial planning company's motion to dismiss plaintiff customer's claim for negligent hiring of plaintiff's son, an insurance agent who misappropriated funds from plaintiff's various insurance and annuity products, because the allegations were sufficient to assert that defendant company could have discovered the unfitness of plaintiff's son had it conducted a reasonable investigation prior to hiring him.

2. **Fiduciary Relationship— breach of fiduciary duty—insurance agent**

The trial court erred by granting defendant financial planning company's motion to dismiss plaintiff customer's claim for breach of fiduciary duty regarding plaintiff's son who misappropriated funds from plaintiff's various insurance and annuity products while employed as an insurance agent of defendant company, because: (1) the complaint sufficiently alleged that a relationship of confidence and trust existed between plaintiff and plaintiff's son, individually and in his capacity as an employee and agent of defendant company; (2) plaintiff was not required to allege wrongful benefit as an element of this claim since it is an element of constructive fraud; and (3) plaintiff sufficiently alleged that he relied upon false representations of the status of his investment accounts provided by his son in his capacity as an employee and agent of defendant company and that plaintiff's son in carrying out his duties as an agent and employee of defendant company converted plaintiff's funds to his own use.

3. **Fraud— constructive—motion to dismiss—sufficiency of evidence**

The trial court did not err by granting defendant financial planning company's motion to dismiss plaintiff customer's claim for constructive fraud, because: (1) an allegation of the payment

of commissions for transactions actually performed is not sufficient to survive a motion to dismiss a claim for constructive fraud; and (2) the allegation failed to show that defendant sought to benefit itself by taking unfair advantage of plaintiff.

4. Employer and Employee— vicarious liability—scope of employment

The trial court erred by granting summary judgment on claims of fraud, conversion, and unfair and deceptive trade practices to the extent that the judgment was based on defendant financial planning company's lack of vicarious liability because: (1) the torts at issue occurred through defendant employee's investment advice, his completion of customer forms, his processing of loans, and his administration of customer accounts; (2) defendant company selected and employed defendant employee specifically to perform the functions that he exploited to accomplish his fraud and theft; and (3) plaintiff presented sufficient evidence to permit a jury to find that defendant employee was acting within the scope of his employment.

5. Negligence— breach of duty—duty to exercise reasonable skill, care, and diligence

The trial court erred by granting summary judgment on plaintiff customer's negligence claim based on defendant financial planning company's breach of duty to discover defendant insurance agent employee's misappropriation of funds from plaintiff's various insurance and annuity products, because: (1) defendant company did not contend that defendant employee was acting outside the scope of his employment when he agreed to obtain the pertinent insurance policy and annuities; (2) plaintiff offered evidence that defendant company reaped commissions from its relationship with plaintiff, additional evidence showing that defendant company agreed to procure insurance for plaintiff which showed defendant owed plaintiff a duty to exercise reasonable skill, care, and diligence in doing so; and (3) plaintiff offered sufficient expert testimony regarding the standard of care in the insurance industry to show there was a genuine issue whether defendant company breached its duty to plaintiff.

6. Unfair Trade Practices— summary judgment—sufficiency of evidence—in or affecting commerce

The trial court erred by granting summary judgment in favor of defendant financial planning company on an unfair and decep-

tive trade practices claim arising out of defendant insurance agent employee's misappropriation of funds from plaintiff's various insurance and annuity products, because: (1) the pertinent life insurance policy and fixed-rate annuities appear to be insurance products and not securities or other capital-raising financial instruments; and (2) conduct relating to insurance products is covered by Chapter 75.

7. Estoppel— equitable—defense of expiration of statute of limitations

Plaintiff customer was entitled to proceed to trial on his equitable estoppel claim regarding defendant financial planning company's motion for summary judgment on the grounds that plaintiff's conversion, negligence, and fraud claims were barred by the applicable statute of limitations, because: (1) equitable estoppel may be asserted against defendant company if defendant insurance agent employee acted within the scope of his employment, and plaintiff has submitted sufficient evidence to permit a jury to impute defendant employee's actions to defendant company; and (2) a jury could draw the inference that defendant company lulled plaintiff into a false sense of security by failing, after learning of defendant employee's dishonesty, to notify plaintiff of defendant employee's acts, to reassign plaintiff to another account executive or to forward statements received for plaintiff's account.

8. Statutes of Limitation and Repose— fraud—reasonable diligence—fiduciary—discovery rule

The trial court erred by concluding that plaintiff customer's fraud claim against defendant financial planning company was barred by the statute of limitations based on the fact that plaintiff did not file suit until August 2001 which was more than three years after all but two of the transactions occurred, because: (1) the evidence presented by plaintiff would permit, although not require, a jury to conclude that as a result of defendant employee's acts of concealment, plaintiff did not fail to exercise reasonable diligence in discovering the fraud; and (2) a lack of reasonable diligence may be excused when the fraud was committed by a fiduciary, plaintiff's evidence supports a finding of a fiduciary relationship with defendant employee and with defendant company, and the record contains no undisputed evidence of an event that would necessarily have placed plaintiff on notice that defendants were failing to disclose all essential facts.

9. Statutes of Limitation and Repose— negligence—pecuniary loss

The trial court did not err by concluding that plaintiff customer's negligence claim against defendant financial planning company was barred by the statute of limitations based on the fact that plaintiff did not file suit until August 2001 which was more than three years after all but two of the pertinent transactions occurred, subject only to its claim of equitable estoppel, because: (1) contrary to plaintiff's contention, N.C.G.S. § 1-52(16) which includes a discovery rule applies only to claims for personal injury or physical damage to claimant's property rather than a claim for purely pecuniary loss; and (2) when the General Assembly has intended to include pecuniary loss within the scope of a discovery rule, it has done so expressly. However, the two loan transactions occurring on 15 December 1998 and 22 February 1999 are not time-barred under N.C.G.S. § 1-52(5).

10. Statutes of Limitation and Repose— conversion—withdrawal of funds without permission

The trial court did not err by concluding that plaintiff customer's conversion claim against defendant financial planning company was barred by the statute of limitations based on the fact that plaintiff did not file suit until August 2001 which was more than three years after all but two of the pertinent transactions occurred, because: (1) contrary to plaintiff's contention, N.C.G.S. § 1-52(16) which includes a discovery rule applies only to claims for personal injury or physical damage to claimant's property, and plaintiff's claim that defendant employee converted his funds does not amount to a claim for physical damage to property; and (2) although plaintiff contends that his conversion claim did not accrue and the statute of limitations did not begin to run until he demanded the converted property and either defendant company or defendant employee refused to return it, defendant employee did not rightfully come into personal possession of plaintiff's funds, the wrongful taking and defendant employee's possession of the funds were simultaneous, and the conversion occurred when defendant employee withdrew the funds from the annuities without plaintiff's permission.

Appeal by plaintiff John W. White from judgments entered 27 February 2002 by Judge Lindsay R. Davis, Jr. and 26 November 2002

by Judge Russell G. Walker, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 14 January 2004.

Kilpatrick Stockton, L.L.P., by David C. Smith and Tonya R. Deem, for plaintiffs-appellants.

Sharpless & Stavola, P.A., by Lynn E. Coleman, for defendant-appellee Consolidated Planning, Inc.

GEER, Judge.

This appeal presents the question whether the sins of the son should be visited upon the father. Plaintiff-appellant John W. White ("plaintiff") lost more than $300,000.00 when his son Robert W. White ("Robert White"), an account executive and Senior Vice President for defendant Consolidated Planning, Inc. ("Consolidated"), misappropriated the funds. Plaintiff has appealed from the trial court's orders granting Consolidated's motion to dismiss plaintiff's claims for negligent hiring, breach of fiduciary duty, constructive fraud, and one instance of conversion and granting summary judgment to Consolidated on plaintiff's remaining claims for negligence, conversion, fraud, and unfair and deceptive trade practices.

For reasons discussed below, we reverse the trial court's dismissal of the negligent hiring, breach of fiduciary duty, and conversion claims, but affirm as to the constructive fraud claim. We reverse the trial court's entry of summary judgment on the claims of fraud, conversion, and unfair and deceptive trade practices to the extent that the judgment was based on Consolidated's lack of vicarious liability because plaintiff has presented sufficient evidence to permit a jury to find that Robert White was acting "within the scope of his employment" as our courts have defined that phrase. We agree with the trial court that plaintiff's claims for conversion and negligence are barred by the statute of limitations, but hold that there are genuine issues of material fact as to the timeliness of plaintiff's fraud claim and as to whether Consolidated is equitably estopped from pleading the statute of limitations with respect to each of plaintiff's claims. Finally, we hold that plaintiff has forecast sufficient evidence that he will be able to present a *prima facie* case of negligence and unfair and deceptive trade practices. We, therefore, affirm in part and reverse in part.

Facts

The evidence presented on defendant's motion for summary judgment, when viewed in the light most favorable to the plaintiff, tends

to show the following. Defendant Consolidated provides financial planning services to both individuals and businesses, specifically including retirement planning analyses. It is a general agent for defendant Guardian Life Insurance Company ("Guardian") and has agency agreements to sell insurance products for companies such as defendant Keyport Life Insurance Company ("Keyport") and defendant Provident Life and Accident Insurance Company ("Provident"). Consolidated employed John and Katherine White's son, Robert White, a licensed insurance agent, as an account executive in its Winston-Salem office between March 1992 and May 1999. As part of Consolidated's marketing plan, the company gave Robert White the title of Vice President and, later, Senior Vice President even though he was not an officer of the company. Robert White sold annuity products and life insurance policies for several companies, earning commissions for himself and Consolidated. He was authorized to handle client funds and service client accounts.

Both Mr. and Mrs. White, who are retirees, purchased various insurance and annuity products through their son using money that they had saved through employer-sponsored retirement plans. Consolidated founder and president Charles R. Dobson, Sr. testified that Consolidated considered the Whites to be customers of Consolidated when purchasing these products. The Whites had no prior investment experience and had never before worked with a financial advisor.

Robert White recommended that his father invest his retirement funds in Keyport annuities. On or about 19 December 1993, plaintiff, through his son, rolled over funds from his retirement into a Keyport annuity in the amount of $177,508.21 ("first Keyport annuity"). On or about 18 April 1994, plaintiff purchased, again through his son, a second annuity issued by Keyport in the amount of $267,926.75 ("second Keyport annuity"). Consolidated and Robert White both received commissions for these transactions.

Beginning in 1995, Robert White, because of a gambling addiction, began systematically siphoning funds from plaintiff's annuities without plaintiff's knowledge. To obtain the money, Robert White notified Keyport that plaintiff's address was that of his own office at Consolidated. Robert White then forged plaintiff's signature on requests to withdraw funds from the annuities. Keyport disbursed the funds either by checks delivered to Robert White at Consolidated's address or by wire transfer into an account that he specifically

created for the funds. In nine transactions, Robert White withdrew a total of $127,820.91 from the Keyport accounts.

To hide the thefts, Robert White provided fictitious Keyport account statements to plaintiff, which the Whites testified led them to believe plaintiff's funds were intact. Plaintiff did not receive account statements or other correspondence directly from Keyport because Robert White had listed Consolidated's address as the record address for the annuities. Fearing, however, that his parents would learn of the thefts through tax documents, Robert White convinced the Whites to leave their tax preparer, told them he would handle their taxes, and then failed to file their tax returns for 1996 through 1999.

In March 1997, Robert White induced his father to transfer funds from the second Keyport annuity to an annuity issued by Provident by falsely promising him that the Provident policy would generate a particular rate of return. In fact, the Provident annuity had a lower rate of return. In addition, Robert White did not tell his father that the transfer would incur a surrender charge of $12,350.44 to Keyport and commissions to Robert White and Consolidated.

As he had with the Keyport annuities, Robert White notified Provident that plaintiff's address was that of Consolidated's office with the result that plaintiff did not receive any account statements or correspondence directly from Provident. Robert White forged plaintiff's signature on four separate requests to withdraw funds from the Provident annuity, withdrawing a total of $175,402.33. Robert White hid these transactions by providing his father with false account statements on Consolidated letterhead. By 8 January 1998, the Provident annuity had been fully surrendered.

On 28 June 1996, Robert White purchased a $200,000.00 life insurance policy from Guardian for his father. As he had with the Keyport and Provident annuities, Robert White changed the record address for the policy although on this occasion, he used his own home address so that all documentation regarding the Guardian policy was sent to Robert White's home. Significantly, Guardian had a policy of not forwarding disbursements on its policies to an agency address; it required that all checks be sent to the policy owner's address of record. Between July 1998 and February 1999, Robert White requested four loans on the policy (totaling approximately $10,000.00) for his own use and without his father's knowledge.

With respect to the 15 December 1998 and 22 February 1999 loan requests, Robert White submitted them for processing to Consolidated, as general agent for Guardian, rather than to Guardian. Robert White faxed a memo to Consolidated's office in Charlotte requesting that the loan proceeds on plaintiff's policy be sent to Robert White's home address "ASAP, please." When Robert White failed to repay the loans, the policy was canceled and the obligations were repaid from the policy principal. Plaintiff was unaware that his policy had been canceled because correspondence regarding the policy was sent to Robert White's home.

In April 1999, Pamela Westbrook, another client of Consolidated and Robert White, filed a complaint with the National Association of Securities Dealers reporting that Robert White had misappropriated money from her account by liquidating one of her investments and placing her funds in his personal bank account, by providing her with fraudulent account statements, and by requesting that she sign blank customer service forms. After an investigation of this complaint, Consolidated terminated Robert White on 28 May 1999.

Consolidated contacted certain other clients whose accounts Robert White had handled to determine if he had mishandled their funds. In August 1999, Consolidated clients Hilary and Robin McKeown complained that Robert White had mishandled their funds by placing them in an account they did not request. Consolidated reassigned Robert White's accounts to other representatives.

With respect to the Whites, however, Consolidated did not inform the Whites that their son had been terminated or disclose that he had mishandled funds in client accounts. Consolidated allowed Robert White to take plaintiff's Provident and Keyport account files with him, but kept the Guardian file. The company did not reassign the Whites to another account representative or investigate the status of their accounts to determine whether Robert White had mishandled their funds. Consolidated also did not forward to the Whites the account statements and other correspondence that Robert White had fraudulently arranged to have sent to the Consolidated office. Plaintiff offered evidence that Consolidated's standard practice was to allow mail addressed to the clients of terminated executives to accumulate at Consolidated's office.

Robert White assured his parents that his separation from Consolidated was amicable and a mutual decision. He told them that

he would continue to manage their accounts. The Whites did not learn that their son had been terminated and their funds misappropriated until April 2001 when Mrs. White called Keyport for information about a tax form. A representative of Keyport told Mrs. White that only $30,000.00 was left in the first Keyport annuity, and that the second Keyport annuity had been fully surrendered in February 1997 and transferred to the Provident annuity in March 1997. When Mrs. White called Provident, she was told that the Provident annuity had been fully exhausted. Robert White admitted to his parents that day that he had stolen their money and spent it gambling or trading stocks. From 1995 through 1999, Robert White stole in excess of $300,000.00 from his parents.

Procedural History

The Whites filed this action on 9 August 2001 against Consolidated, Park Avenue Securities, LLC ("PAS"), Guardian Investor Services Corporation ("GISC"), Guardian, Keyport, Provident, and Robert White, seeking damages as a result of the misappropriation of their retirement funds. Default was entered against Robert White on 15 November 2001. On 11 January 2002, Judge Lindsay R. Davis, Jr. entered a consent order staying the claims of Mrs. White against PAS, GISC, and Consolidated pending arbitration. Mrs. White's claims are not, therefore, the subject of this appeal. Only Mr. White's claims are before this Court.

On 27 February 2002, Judge Davis granted the corporate defendants' motion to dismiss in part, including plaintiff's claims against Consolidated for negligent hiring, conversion of the Keyport annuities, breach of fiduciary duty, and constructive fraud. Plaintiff thereafter settled with PAS, GISC, Guardian, Keyport, and Provident and filed a voluntary dismissal as to them, leaving Consolidated as the sole defendant. On 26 November 2002, Judge Russell G. Walker, Jr. granted Consolidated's motion for summary judgment as to the remaining claims, including conversion, fraud, unfair and deceptive trade practices, and negligence. Plaintiff appeals from both the motion to dismiss order and the summary judgment order.

Motion to Dismiss

We first address plaintiff's contention that the trial court erred in dismissing, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, their claims for negligent hiring, breach of fiduciary

duty, and constructive fraud.[1] In deciding a motion to dismiss pursuant to Rule 12(b)(6), the trial court must determine " 'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.' " *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)). The court must construe the complaint liberally and "should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Id.* at 277-78, 540 S.E.2d at 419.

A. Negligent Hiring

[1] The trial court dismissed plaintiff's claim that Consolidated should be held liable for Robert White's conduct because of its negligent hiring of White. The elements of a claim for negligent hiring are: (1) a specific tortious act by the employee; (2) the employee's incompetence or unfitness; (3) the employer's actual or constructive notice of the employee's incompetency or unfitness; and (4) injury resulting from the employee's incompetency or unfitness. *Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990).

The only element at issue with respect to this claim is Consolidated's actual or constructive knowledge. A plaintiff may establish the necessary knowledge by showing that the employer either "knew or reasonably could have known" of the employee's unfitness. *Id.* at 592, 398 S.E.2d at 463. Plaintiff alleged that "Rob White has been engaging in similar illegal activity since about 1992. Upon information and belief, such activity led to termination from his previous employer." Plaintiff further alleged that Consolidated was negligent in "[f]ailing to properly investigate the background of Defendant Rob White prior to allowing him to handle customer accounts, when such an investigation reasonably would have revealed his improprieties[.]" When construed liberally, these allegations are sufficient to assert that Consolidated would have discovered Robert White's unfitness had it conducted a reasonable investigation prior to hiring him and are sufficient to allege a negligent hiring claim. *Deitz v. Jackson*, 57 N.C. App. 275, 278-79, 291 S.E.2d 282, 285 (1982) (reversing dismissal because allegations that

1. Although the trial court also granted the motion to dismiss plaintiff's conversion claim as to the Keyport annuities based on the statute of limitations, we will address all of the conversion claims at one time below.

the defendants had a duty to hire a competent construction company, breached that duty, and plaintiff was injured as a result, provided "adequate notice of the nature and extent of a legally recognized claim"). The trial court erred in granting the motion to dismiss as to plaintiff's negligent hiring claim.

B. Breach of Fiduciary Duty and Constructive Fraud

Plaintiff asserted causes of action for both breach of fiduciary duty and constructive fraud. Although the elements of these causes of action overlap, each is a separate claim under North Carolina law. *Governor's Club, Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 249, 567 S.E.2d 781, 787 (2002), *aff'd per curiam*, 357 N.C. 46, 577 S.E.2d 620 (2003).

[2] A claim for breach of fiduciary duty requires the existence of a fiduciary relationship. In *Vail v. Vail*, 233 N.C. 109, 114, 63 S.E.2d 202, 206 (1951), the Supreme Court explained: "In general terms, a fiduciary relation is said to exist '[w]herever confidence on one side results in superiority and influence on the other side; where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence.' " *Id.* (quoting 37 C.J.S. *Fraud* § 2, at 213). In *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (internal quotation marks omitted), the Court explained:

> The relation . . . not only includes all legal relations, such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, factor and principal, guardian and ward, partners, principal and agent, trustee and *cestui que trust*, but it extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.

In this case, the complaint alleged that "[a] relationship of confidence and trust" existed between plaintiff and Robert White, individually and in his capacity as "an employee and agent" of Consolidated. It alleged that "[b]ecause of [the Whites'] lack of expertise in financial affairs," they relied upon Robert White and Consolidated to properly manage their funds. We find that these allegations, together with further facts and circumstances set forth in the complaint, adequately plead the existence of a fiduciary relationship. *Vail*, 233 N.C. at 111, 63 S.E.2d at 204 (defendant son was a fiduciary when he "frequently acted as [his mother's] agent" in handling her rental real estate);

Phillips v. State Farm Mut. Auto. Ins. Co., 129 N.C. App. 111, 113, 497 S.E.2d 325, 327 ("An insurance agent acts as a fiduciary with respect to procuring insurance for an insured[.]"), *disc. review denied*, 348 N.C. 500, 510 S.E.2d 653 (1998); *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 599, 394 S.E.2d 643, 650 (1990) (quoting *Kim v. Professional Bus. Brokers Ltd.*, 74 N.C. App. 48, 51-52, 328 S.E.2d 296, 299 (1985)) (" '[A] broker representing a purchaser or seller in the purchase or sale of property owes a fiduciary duty to his client based upon the agency relationship itself.' "), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (1991).

Defendant contends that there can be no breach of fiduciary duty without an allegation "that the defendant [sought] to benefit wrongfully from the transaction." Wrongful benefit is, however, an element of constructive fraud and not of a claim for breach of fiduciary duty. *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) ("In order to maintain a claim for constructive fraud, . . . the defendant must seek to benefit himself."). For this claim, plaintiff was only required to plead a breach of Consolidated's fiduciary duty.

Plaintiff alleges that he relied upon false representations of the status of his Keyport, Provident, and Guardian accounts provided by Robert White "in his capacity as an employee and agent" of Consolidated and that Robert White, "in carrying out his duties as an agent and employee" of Consolidated, converted plaintiff's funds to his own use. On the basis of these allegations, we conclude that the complaint sufficiently alleged a breach of fiduciary duty to withstand a motion to dismiss.

[3] We reach a different conclusion as to plaintiff's claim for constructive fraud. To survive a motion to dismiss, a cause of action for constructive fraud must allege (1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured. *Sterner v. Penn*, 159 N.C. App. 626, 631, 583 S.E.2d 670, 674 (2003). Intent to deceive is not an element of constructive fraud. *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971). The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself.

Since we have already found sufficient allegations of a fiduciary relationship, the controlling issue as to the constructive fraud claim

is whether the complaint sufficiently alleges a wrongful benefit to Consolidated as a result of the transactions involving plaintiff's funds. A plaintiff must allege that the benefit sought was more than a continued relationship with the plaintiff or payment of a fee to a defendant for work it actually performed. *Sterner*, 159 N.C. App. at 631-32, 583 S.E.2d at 674. In arguing that his complaint is sufficient on this issue, plaintiff points only to his allegations that Consolidated benefitted through the payment of commissions. This Court held in *Sterner*, however, that an allegation of the payment of commissions for transactions actually performed is not sufficient to survive a motion to dismiss a claim for constructive fraud. *Id.* at 632, 583 S.E.2d at 674 ("We conclude, therefore, that the complaint, taken in the light most favorable to plaintiff, alleges simply that defendants benefitted by earning commissions on the sales transactions ordered by [the agent]. This allegation, by itself, is not enough; it fails to show that defendants sought to benefit themselves by taking unfair advantage of plaintiff, as our law requires."). We hold that the trial court properly granted the motion to dismiss plaintiff's constructive fraud claim.

Motion for Summary Judgment

[4] We next consider the trial court's entry of summary judgment in favor of Consolidated on the claims of negligence, conversion, fraud, and unfair and deceptive trade practices. Consolidated moved for summary judgment on three grounds: (1) it was not vicariously liable for Robert White's acts and thus not liable for claims of fraud, conversion, and unfair and deceptive trade practices; (2) plaintiff failed to present sufficient evidence of negligence and unfair and deceptive trade practices; and (3) plaintiff's claims for fraud, conversion, and negligence are barred by the statutes of limitation.[2]

"It is well established that the standard of review of the grant of a motion for summary judgment requires a two-part analysis of whether, (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law." *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000) (internal quotation marks omitted), *aff'd per curiam*, 353 N.C. 445, 545 S.E.2d 210 (2001). The moving party has the burden of establishing the absence

2. Neither party has raised the statute of limitations issue in connection with plaintiff's claim for unfair and deceptive trade practices.

of any genuine issue of material fact and that it is entitled to judgment as a matter of law. *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999). Both before the trial court and on appeal, the evidence must be viewed in the light most favorable to the non-moving party and all inferences from that evidence must be drawn against the moving party and in favor of the non-moving party. *Id.* We review the trial court's grant of summary judgment *de novo*. *Shroyer v. County of Mecklenburg*, 154 N.C. App. 163, 167, 571 S.E.2d 849, 851 (2002).

A. Vicarious Liability

As a general rule, a principal will be liable for its agent's wrongful acts under the doctrine of *respondeat superior* when the agent's act (1) is expressly authorized by the principal; (2) is committed within the scope of the agent's employment and in furtherance of the principal's business; or (3) is ratified by the principal. *B. B. Walker Co. v. Burns Int'l Sec. Servs., Inc.*, 108 N.C. App. 562, 565, 424 S.E.2d 172, 174, *disc. review denied*, 333 N.C. 536, 429 S.E.2d 552 (1993). The only issue in dispute on this appeal is whether Robert White's acts were committed within the scope of his employment with Consolidated.

Consolidated contends that it cannot be held vicariously liable for the intentional misconduct of its employee Robert White. In North Carolina, intentional torts have rarely been considered within the scope of an employee's employment. *Medlin*, 327 N.C. at 594, 398 S.E.2d at 464. Nevertheless, " 'rarely' does not mean 'never.' " *Borneman v. United States*, 213 F.3d 819, 827 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070, 148 L. Ed. 2d 661, 121 S. Ct. 759 (2001).

The viability of plaintiff's claims against Consolidated is controlled by our Supreme Court's decision in *Thrower v. Coble Dairy Products Coop., Inc.*, 249 N.C. 109, 105 S.E.2d 428 (1958). In *Thrower*, the employer-defendant's salesman engaged in a scheme to steal from his employer's clients. While taking orders and filling out invoices during sales, as he was required to do by his employer, he removed the carbon on invoice tickets when listing purchases, but reinserted it before obtaining the plaintiff's signature. Through this strategy, he obtained blank copies of invoices bearing only the customer's carbon signature. The salesperson then filled out false invoices on the blank carbon copies and submitted them for payment, converting, without his employer's knowledge, nearly $16,000.00 of the customer's money for his personal use.

The *Thrower* Court held that this evidence was "amply sufficient to support the court's findings that [the employee] was 'an employee, agent, and servant of the defendant corporation . . . acting in the course and scope of his employment[.]' " *Id.* at 111, 105 S.E.2d at 430. The Court stated first: "The general rule is that a principal is responsible to third parties for the fraud of its agent while acting within his authority." *Id.* The Court explained:

> "It is elementary that the principal is liable for the acts of his agent, whether malicious or negligent, and the master for similar acts of his servant, which result in injury to third persons, when the agent or servant is acting within the line of his duty and exercising the functions of his employment." *Dickerson v. Atlantic Refining Co.*, 201 N.C. 90, 159 S.E. 446 (1931). "There is no reason that occurs to us why a different rule should be applicable to cases of deceit from what applies to other torts. A corporation can only act through its agents, and must be responsible for their acts. It is of the greatest public importance that it should be so. If a manufacturing and trading corporation is not responsible for the false and fraudulent representations of its agents, those who deal with it will be practically without redress and the corporation can commit fraud with impunity." *Peebles v. Patapsco Guano Co.*, 77 N.C. 233 (1877). *The master is liable for the unlawful or negligent acts of his servant if about the master's business, and if doing or attempting to do that which he was employed to do.*

Id. at 111-12, 105 S.E.2d at 430 (emphasis added).

In applying these principles to the employee's embezzlement, the Court noted that the salesperson was "about [his] master's business" because he "was selected and sent out by the defendant as its agent to sell and deliver, and collect for its products." *Id.* at 112, 105 S.E.2d at 430. The Court, as a result, held:

> The evidence in this case shows the [trial] court found the fraud was committed in the sale of defendant's products and in the padding of accounts its agent was authorized to collect. The defendant is liable for plaintiff's loss.

Id. See also Norburn v. Mackie, 262 N.C. 16, 23, 136 S.E.2d 279, 284 (1964) ("The general rule is that a principal is responsible to third parties for injuries resulting from the fraud of his agent committed during the existence of the agency and within the scope of

the agent's actual or apparent authority from the principal, even though the principal did not know or authorize the commission of the fraudulent acts.").

Thrower is consistent with Restatement (Second) of Agency § 261 and § 262 (1958), previously adopted by this Court in *Parsons v. Bailey*, 30 N.C. App. 497, 501-02, 227 S.E.2d 166, 168-69, *disc. review denied*, 291 N.C. 176, 229 S.E.2d 689 (1976). Section 261 provides: "A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud." The section provides the following illustration that parallels both *Thrower* and the facts of this case:

> 2. A, local manager of P, a telegraph company, gives padded statements of account to T, a patron of the company, who pays in accordance with such statements. A deposits the money to P's credit, withdraws the surplus, and absconds. P is subject to liability to T for the excessive payments.

Restatement, § 261, comment a.

The Restatement stresses that it is irrelevant "that the servant or other agent acts entirely for his own purposes, unless the [victim] has notice of this." *Id.* § 262. Section 262 gives the following illustration:

> 1. P, whose business is that of advising persons concerning investments, represents to T that A is his manager. At P's office, T seeks advice of A concerning investments. A, acting solely to promote an enterprise of which he is the owner, makes deceitful statements in regard to it, on the strength of which T invests and loses. P is subject to liability to T.

Id., comment a. *See also Parsons*, 30 N.C. App. at 501-02, 227 S.E.2d at 168 ("It makes no difference that the agent was acting in his own behalf and not in the interests of the principal when the fraudulent act was p[er]petrated unless the third parties had notice of that fact.").

In determining liability, the critical question is whether the tort was committed in the course of activities that the employee was authorized to perform. Thus, in *Thrower*, as in the illustrations in the Restatement, the conversion of funds occurred as part of the very tasks that the employer had given the employee authority to perform. This distinction is in accord with *Dickerson v. Atlantic Refining Co.*,

201 N.C. 90, 159 S.E. 446 (1931), upon which Consolidated relies. The Court stated in *Dickerson*:

> "[I]t is sufficient if the agent was authorized to perform the act in the performance of which the wrong was committed; for the principal is responsible, not only for the act itself, but for the ways and means employed in the performance thereof. The principal may be perfectly innocent of any actual wrong or of any complicity therein, but this will not excuse him, for the party who was injured by the wrongful act is also innocent; and the doctrine is that where one of two or more innocent parties must suffer loss by the wrongful act of another, it is more reasonable and just that he should suffer it who has placed the real wrongdoer in a position which enabled him to commit the wrongful act, rather than the one who had nothing whatever to do with setting in motion to cause of such act."

Id. at 98, 159 S.E. at 451 (quoting Reinhard on Agency § 335).

Plaintiff offered evidence that the torts at issue here occurred through Robert White's investment advice, his completion of customer forms, his processing of loans, and his administration of customer accounts. Testimony of Consolidated officers and employees shows that Consolidated authorized and expected Robert White to solicit applications for life insurance and annuity products, to make recommendations about the suitability of investments, to handle loan requests on insurance policies, to inform customers of their account balances, to assist in cash withdrawals from annuities, transmit change-of-address forms, and to handle customer funds. Thus, Consolidated, like the employer in *Thrower*, had selected and employed White specifically to perform the functions that he exploited to accomplish his fraud and theft. Consolidated may, therefore, be held liable for Robert White's conduct.

Consolidated points to *B. B. Walker*, 108 N.C. App. at 566, 424 S.E.2d at 174-75, in which this Court held that an employer could not be held liable when its security guards stole the customer's property that they had been assigned to protect. *Id.* at 565-66, 424 S.E.2d at 174. A comparison of *B. B. Walker* and *Thrower* demonstrates the difference between cases in which an employee is able to commit a tort solely by virtue of his employment and presence on the employer's premises, and those in which an employee is able to commit a tort by performing the precise tasks that he was hired to do and was held out to the public as authorized to perform. In *B. B. Walker*, the defendant

security company's guards stole the plaintiff's property; they were able to commit the tort not because they were performing the task that they were assigned to perform—to protect the customer's property—but because they were stationed at the defendant's warehouse and had access to the property. *Id.* In *Thrower*, the salesman was able to embezzle customer funds solely by virtue of the tasks that he was assigned and authorized to perform, including accepting sales orders, filling out invoices, and billing customers. *Thrower*, 249 N.C. at 112, 105 S.E.2d at 430.

We hold that plaintiff's evidence places it in the *Thrower* category of cases. *See Wabash Indep. Oil Co. v. Wills Ins. Agency*, 248 Ill. App. 3d 719, 724-25, 618 N.E.2d 1214, 1218, *appeal denied*, 153 Ill. 2d 570, 624 N.E.2d 818 (1993) (holding insurance agency liable for conversion by its agent based on vicarious liability). A jury could find, on the basis of this evidence, that Robert White was acting within the scope of his employment or authority and Consolidated was, as a result, liable for Robert White's fraud, conversion, and unfair and deceptive trade practices. Because plaintiff's evidence raises a genuine issue of material fact, the trial court erred in entering summary judgment in favor of Consolidated for these claims on the basis of vicarious liability.

B. Negligence

[5] In addition to arguing that Consolidated is vicariously liable for Robert White's acts, plaintiff contends that Consolidated is directly liable to plaintiff for its own negligence. As support for his contention that the trial court erred in granting summary judgment on his negligence claim, plaintiff first argues that the trial court should not have allowed Consolidated to argue the merits of the negligence claim because it was not properly raised in defendant's motion for summary judgment.

Rule 7(b)(1) of the North Carolina Rules of Civil Procedure requires that a motion state "with particularity the grounds therefor . . . ." Consolidated's motion for summary judgment stated only that the negligence claim was barred by the statute of limitations. In its brief to the trial court, however, Consolidated contended that plaintiff's evidence was insufficient to establish the elements of a claim for negligence. Plaintiff objected to the trial court, but the court chose to consider Consolidated's arguments as to the sufficiency of the evidence. The particularity requirement was adopted from Fed. R. Civ. P. 7(b). N.C.R. Civ. P. 7, comment to 2000 Amendment. The com-

mentary to our rule reports that "[t]he federal courts do not apply the particularity requirement as a procedural technicality to deny otherwise meritorious motions. Rather, the federal courts apply the rule to protect parties from prejudice, to assure that opposing parties can comprehend the basis for the motion and have a fair opportunity to respond." *Id.* Because plaintiff has not pointed to anything more that he would or could have done had he received greater notice of the issue, we cannot determine that the trial court abused its discretion.

With respect to the merits of plaintiff's claim for negligence, he was required to prove the existence of a legal duty owed to the plaintiff by the defendant, breach of that duty, and a causal relationship between the breach and plaintiff's injury or loss. *Sterner*, 159 N.C. App. at 629, 583 S.E.2d at 672. Defendant has not disputed that it owed a duty of care to plaintiff. Instead, defendant attempts to categorize plaintiff's negligence claim as strictly a claim for negligent retention. We do not view plaintiff's negligence theory so narrowly.

As this Court has recognized, "[i]t is well established in this State that if an insurance agent or broker undertakes to procure for another insurance against a designated risk, the law imposes upon him the duty to use reasonable skill, care and diligence to procure such insurance and holds him liable to the proposed insured for loss proximately caused by his negligent failure to do so." *Kaperonis v. Underwriters at Lloyd's, London*, 25 N.C. App. 119, 128, 212 S.E.2d 532, 538 (1975). In *Kaperonis*, an insurance agent agreed to obtain fire insurance for the plaintiff and attempted to do so through another insurance agency. The second agency purported to provide the desired insurance, forwarding what was ultimately learned to be a fake insurance certificate. When, after a fire, it was discovered that the policy was non-existent and the second agency had been engaged in massive mail fraud, this Court held that the initial agent could be held liable for negligence:

> The question presented, then, is whether the evidence was sufficient to support a jury finding that the defendants failed to exercise reasonable skill, care and diligence in allowing themselves to be misled by the fraudulent acts of others or in failing to make a timely discovery of the fraud. We hold that it was.

Id.

Here, plaintiff offered evidence that Consolidated, through Robert White, agreed to procure insurance for plaintiff, including life insurance and annuities. Not even defendant contends that Robert White was acting outside the scope of his employment when he agreed to obtain the Guardian life insurance policy and the Keyport and Provident annuities. *See Olvera v. Charles Z. Flack Agency, Inc.*, 106 N.C. App. 193, 198-99, 415 S.E.2d 760, 763 (1992) (phone call to employee of agency regarding policy was sufficient to give rise to a duty of care on the part of the agency). Further, plaintiff offered evidence that Consolidated reaped commissions from its relationship with plaintiff, additional evidence that Consolidated agreed to procure insurance for plaintiff. Once Consolidated agreed to procure insurance for plaintiff, it owed plaintiff a duty to exercise reasonable skill, care, and diligence in doing so. We are then faced with the question posed in *Kaperonis*: whether Consolidated failed to exercise reasonable skill, care, and diligence when it failed to discover Robert White's fraud and conversion. Like the Court in *Kaperonis*, we hold that plaintiff's evidence is sufficient to survive a motion for summary judgment.

Plaintiff offered sufficient expert testimony regarding the standard of care in the insurance industry to raise a genuine issue of material fact as to whether Consolidated breached its duty to plaintiff. Plaintiff's expert testified that Consolidated did not act in accordance with insurance industry standards by (1) failing to implement anti-fraud policies and procedures despite industry warnings to do so and despite problems with another Consolidated employee; (2) failing to enforce its existing anti-fraud policies and those of Guardian; (3) failing to have any management personnel or procedures in the Winston-Salem office to ensure supervision of account executives; (4) permitting mail, including checks, addressed to customers to be received by account executives at Consolidated's office without any oversight by management; (5) failing to require agents to provide Consolidated's main office with copies of customer records; and (6) ignoring "red flags" that should have suggested that Robert White might be committing fraud. Plaintiff's expert expressed the view that Consolidated's "very lax supervision, very lax setting up of procedures for the office to follow" was "almost an invitation for something to go wrong." He concluded, "Consolidated . . . was deaf, dumb and blind on this episode." This evidence is sufficient to allow a reasonable jury to find that Consolidated breached its duty to plaintiff when it failed to discover Robert White's misconduct.

C. Unfair and Deceptive Trade Practices

[6] In addition to arguing that it could not be held vicariously liable for Robert White's unfair and deceptive trade practices, Consolidated contends that summary judgment as to that claim was proper because plaintiff could not demonstrate that Robert White's acts were "in or affecting commerce." N.C. Gen. Stat. § 75-1.1 (2003). To establish a *prima facie* case of unfair and deceptive trade practices, a plaintiff must show that (1) the defendant committed an unfair or deceptive act or practice, (2) the act was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff. *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664, 464 S.E.2d 47, 58 (1995). The sole issue on appeal is the second element.

Consolidated argues that because Robert White's acts were related to "investment transactions," they do not fall within the scope of N.C. Gen. Stat. § 75-1.1. While N.C. Gen. Stat. § 75-1.1(d) provides that a party claiming exemption from Chapter 75 bears the burden of proving its exemption, our Supreme Court appears to have placed the burden on a plaintiff to prove that the conduct falls within the definition of "commerce" and does not fall within one of the exclusions recognized by the courts. *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 592, 403 S.E.2d 483, 492 (1991) ("For plaintiff to be entitled to the Act's remedies, it must show that defendants' conduct falls within the statutory framework allowing recovery.").

In *Skinner v. E. F. Hutton & Co.*, 314 N.C. 267, 275, 333 S.E.2d 236, 241 (1985), the Supreme Court held that "securities transactions are beyond the scope of N.C.G.S. 75-1.1." The Court, in reaching this conclusion, relied to a substantial extent on the fact that securities transactions are " 'already subject to pervasive and intricate regulation' " under the North Carolina Securities Act and the federal securities laws. *Id.* (quoting *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162, 167-68 (4th Cir. 1985)). In *HAJMM*, the Court expanded this exception to cover "the trade, issuance and redemption of corporate securities or similar financial instruments[.]" *HAJMM*, 328 N.C. at 594, 403 S.E.2d at 493. The Court explained that Chapter 75 applies to "the manner in which businesses conduct their regular, day-to-day activities, or affairs," while "[t]he issuance of securities is an extraordinary event done for the purpose of raising capital . . . ." *Id.*[3] This

3. The Court was considering revolving fund certificates. It concluded that they were "in essence, corporate securities. . . . [whose] purpose is to provide and maintain adequate capital for enterprises that issue them." *Id.* at 593, 403 S.E.2d at 493.

Court has since applied *HAJMM* to exclude a loan agreement from Chapter 75 coverage: "Because the loan agreement at issue here, which also granted [plaintiff] the right to purchase stock [in a company] in the future, was primarily a capital-raising device, it was not 'in or affecting commerce' for purposes of Chapter 75." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 62, 554 S.E.2d 840, 848 (2001).

Consolidated's focus on whether plaintiff purchased the life insurance and annuities as investments does not apply the proper test. Under *HAJMM*, the question is whether the transactions at issue involved securities or other financial instruments involved in raising capital. The Guardian life insurance policy and the fixed-rate annuities at issue in this case appear to be insurance products and not securities or other capital-raising financial instruments. *See* N.C. Gen. Stat. § 58-58-23 (2003) (insurance code's regulation of annuities); N.C. Gen. Stat. § 78A-2(11) (2003) (excluding insurance policies and fixed-rate annuities from the statutory definition of "securities"). Our courts have repeatedly held that conduct relating to insurance products is covered by Chapter 75. *See, e.g., Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 469, 343 S.E.2d 174, 179 (1986) ("[P]eople who buy insurance are consumers whose welfare Chapter 75 was intended to protect[.]"); *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 183, 268 S.E.2d 271, 273 (1980) (holding that Chapter 75 provides a remedy for unfair practices in the insurance industry).

Without some evidence that the Guardian life insurance policy or the annuities constituted securities or other capital-raising instruments, the transactions at issue fall within the scope of Chapter 75. Because the parties do not raise any issue as to any other element of plaintiff's cause of action under N.C. Gen. Stat. § 75-1.1, we hold that the trial court erred in granting summary judgment on this cause of action.

D. Statute of Limitations

[7] Consolidated moved for summary judgment on the grounds that plaintiff's conversion, negligence, and fraud claims are barred by the applicable statutes of limitation. Consolidated relies upon the fact that plaintiff did not file suit until August 2001, more than three years after all but two of the transactions occurred. While the statute of limitations for conversion, negligence, and fraud is three years, N.C. Gen. Stat. § 1-52 (2003), plaintiff contends that the "discovery rule" applies and he filed suit within three years of discovering his claims.

Alternatively, he argues that Consolidated should be equitably estopped from asserting the statute of limitations.

The question whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 352 (1985). When a defendant asserts the statute of limitations as an affirmative defense, the burden rests on the plaintiff to prove that his claims were timely filed. *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 547, 589 S.E.2d 391, 396-97 (2003), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 194 (2004).

With respect to equitable estoppel, if the evidence gives rise to only one inference from undisputed facts, then the doctrine of equitable estoppel is a question for the court. *Keech v. Hendricks*, 141 N.C. App. 649, 653, 540 S.E.2d 71, 75 (2000). When, however, "there are facts in dispute as to the existence of the elements of equitable estoppel, the issue of estoppel is for the jury." *Friedland v. Gales*, 131 N.C. App. 802, 809, 509 S.E.2d 793, 798 (1998).

1. Equitable Estoppel

North Carolina courts "have recognized and applied the principle that a defendant may properly rely upon a statute of limitations as a defensive shield against 'stale' claims, but may be equitably estopped from using a statute of limitations as a sword, so as to unjustly benefit from his own conduct which induced a plaintiff to delay filing suit." *Id.* at 806, 509 S.E.2d at 796. The essential elements of equitable estoppel are:

> "(1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice."

Id. at 807, 509 S.E.2d at 796-97 (quoting *Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 370, 396 S.E.2d 626, 628-29 (1990)). There need not be actual fraud, bad faith, or an intent to mislead or deceive for the doctrine of equitable estoppel to apply. *Duke Univ. v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 692 (1987).

Here, viewed in the light most favorable to plaintiff, the evidence shows that by rerouting the true account statements and forwarding to plaintiff fabricated statements, Robert White intentionally prevented plaintiff from discovering that he had been injured and had a cause of action. *See Friedland*, 131 N.C. App. at 809, 509 S.E.2d at 798 (equitable estoppel supported by fact "defendant actively concealed his wrongful conduct"); *Bryant v. Adams*, 116 N.C. App. 448, 460, 448 S.E.2d 832, 838 (1994) (equitable estoppel applied when defendant "thwarted discovery efforts regarding specific facts"), *disc. review denied*, 339 N.C. 736, 454 S.E.2d 647 (1995).

Equitable estoppel may be asserted against Consolidated as a result of the acts of Robert White if he acted within the scope of his employment. *Hatcher v. Flockhart Foods, Inc.*, 161 N.C. App. 706, 709, 589 S.E.2d 140, 142 (2003) (holding that defendant could be equitably estopped from asserting statute of limitations by imputing agent's concealment to defendant), *disc. review denied*, 358 N.C. 234, 595 S.E.2d 150 (2004). As we have held, plaintiff has submitted sufficient evidence to permit a jury to impute Robert White's actions to Consolidated. In addition, a jury could, based on Consolidated's failure—after learning of Robert White's dishonesty—to notify plaintiff of Robert White's acts, to reassign plaintiff to another account executive, or to forward statements received for plaintiff's account, draw the inference that Consolidated "lulled [plaintiff] into a false sense of security" and it "breached the golden rule and fair play, justifying the entry of equity to prevent injustice." *Stainback*, 320 N.C. at 341, 357 S.E.2d at 693.

With respect to plaintiff's conduct, plaintiff offered evidence that he lacked actual knowledge of Robert White's thefts until April 2001 and that he had no reason to suspect that any misconduct was occurring with respect to his account because of the fraudulent statements that he received. Although Consolidated argues that plaintiff should have become suspicious and called Keyport, Provident, or Guardian, as they did in April 2001, we believe that question cannot be resolved on summary judgment. It requires drawing inferences from the evidence in favor of Consolidated, the moving party.

We hold that plaintiff was entitled to proceed to trial on his equitable estoppel claim. We stress, however, "that our holding by no means is intended to say that as a matter of law the defendant is equitably estopped from asserting the statute of limitations as a defense." *Keech*, 141 N.C. App. at 654, 540 S.E.2d at 75. We merely hold that the evidence raises a permissible inference that the elements of equitable

estoppel are present, and estoppel, in this case, is a question of fact for the jury, upon proper instructions from the trial court. *Id.*

Despite our holding regarding equitable estoppel, we must still consider the parties' arguments regarding the statute of limitations since a jury could conclude that defendant should not be equitably estopped from asserting the statute of limitations. We address each cause of action challenged by Consolidated separately.

2. Fraud

[8] Under N.C. Gen. Stat. § 1-52(9) a claim for fraud must be filed within three years of the aggrieved party's "discovery . . . of the facts constituting the fraud[.]" Under this statute, "discovery" means either actual discovery or "when the fraud should have been discovered in the exercise of reasonable diligence." *Darsie*, 161 N.C. App. at 547, 589 S.E.2d at 396. Ordinarily, the question of when fraud, in the exercise of reasonable diligence, should be discovered is a question of fact for the jury. *Id.* at 548, 589 S.E.2d at 397. When, however, "the evidence is clear and shows without conflict that the claimant had both the capacity and opportunity to discover the fraud but failed to do so, the absence of reasonable diligence is established as a matter of law." *Id.*

Because evidence exists that plaintiff did not receive actual knowledge of Robert White's actions until April 2001, the primary question on appeal is whether plaintiff offered sufficient evidence to give rise to an issue of fact regarding the imputation of knowledge. As discussed in connection with equitable estoppel, the evidence presented by plaintiff would permit, although not require, a jury to conclude that as a result of Robert White's acts of concealment, plaintiff did not fail to exercise reasonable diligence.

In addition, our courts have held that a lack of reasonable diligence may be excused when the fraud was committed by a fiduciary. *Id.* at 551, 589 S.E.2d at 398. *See also Jennings v. Lindsey*, 69 N.C. App. 710, 715, 318 S.E.2d 318, 321 (1984) ("The existence and nature of a confidential relationship between the parties to a transaction may excuse a failure to use due diligence."). This principle does not apply, however, "[w]here something happens which reasonably excites suspicion that a fiduciary has failed to disclose all essential facts[.]" *Darsie*, 161 N.C. App. at 552, 589 S.E.2d at 399. Plaintiff's evidence supports a finding of a fiduciary relationship with Robert White and with Consolidated. The record contains no undisputed evidence

of an event that would necessarily have placed plaintiff on notice that Robert White and Consolidated were failing to disclose all essential facts. The record thus contains sufficient evidence to defeat summary judgment on plaintiff's fraud claim based on the statute of limitations.

3. Negligence

[9] Claims based on negligence are governed by N.C. Gen. Stat. § 1-52(5), specifying a three-year statute of limitations "for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated." Although this provision, unlike the one governing fraud claims, does not include a "discovery rule," plaintiff contends that N.C. Gen. Stat. § 1-52(16) applies to his negligence claim. N.C. Gen. Stat. § 1-52(16) states, in pertinent part:

> Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of action [for professional malpractice], shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

N.C. Gen. Stat. § 1-52(16). Plaintiff asks us to construe this provision to cover his claim for purely pecuniary loss. We decline to do so.

By its terms, this provision applies only to claims for "personal injury or physical damage to claimant's property." This language is unambiguous and cannot be read as drawing within its scope pecuniary loss unrelated to personal injury or physical property damage. Plaintiff's proposed construction would read the word "physical" out of the statute. *See First Investors Corp. v. Citizens Bank, Inc.*, 757 F. Supp. 687, 691 (W.D.N.C. 1991) ("The North Carolina courts have clearly not expanded the meaning of 'physical damage to property' beyond the traditional meaning of the phrase. Its application has been limited to cases wherein latent damages have been discovered in the form of personal injuries or physical damage to property."), *aff'd*, 956 F.2d 263 (4th Cir. 1992).

Moreover, when the General Assembly has intended to include pecuniary loss within the scope of a discovery rule, it has done so expressly. Thus, in N.C. Gen. Stat. § 1-15(c) (2003) (emphasis added), the legislature provided:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: *Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property* which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made . . . .

This provision was adopted in 1977, two years before enactment of N.C. Gen. Stat. § 1-52(16). Had the General Assembly intended to include "economic or monetary" loss—unrelated to personal injury or physical damage to property—in N.C. Gen. Stat. § 1-52(16), it would have done so.

Since we conclude that N.C. Gen. Stat. § 1-52(16) does not apply to plaintiff's negligence claim, we hold that plaintiff's negligence claim is barred by the statute of limitations, subject only to its claim of equitable estoppel. We note, however, that two of the Guardian loan transactions occurred on 15 December 1998 and 22 February 1999. Since plaintiff filed suit on 9 August 2001, negligence relating to those transactions is not time-barred under N.C. Gen. Stat. § 1-52(5).

4. Conversion

[10] The trial court dismissed plaintiff's conversion claim with regard to the Keyport annuities and granted summary judgment as to plaintiff's conversion claim based on the Provident annuity.[4] Conversion is " 'the unauthorized assumption and exercise of the right of ownership over the goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.' " *White v. White*, 76 N.C. App. 127, 129, 331 S.E.2d 703, 704 (1985) (quoting *Spinks v. Taylor*, 303 N.C. 256, 264, 278 S.E.2d 501, 506 (1981)). This cause of action is governed by the three-year statute of limitations in N.C. Gen. Stat. § 1-52(4) "[f]or taking,

4. Plaintiff's brief on appeal appears to limit his conversion claims to the annuities.

detaining, converting or injuring any goods or chattels, including action for their specific recovery."

As with N.C. Gen. Stat. § 1-52(5), governing negligence, the conversion statute of limitations does not expressly include a "discovery" clause. Plaintiff argues, however, that N.C. Gen. Stat. § 1-52(16) should apply to his conversion claim. Because, as we discussed above, plaintiff's claim that Robert White converted his funds does not amount to a claim for physical damage to property, we disagree. Robert White took plaintiff's funds; he did not physically damage them. *See First Investors Corp.*, 757 F. Supp. at 691 (holding that the statute of limitations for conversion is not subject to the discovery rule in N.C. Gen. Stat. § 1-52(16)).

Plaintiff relies primarily on *Aetna Casualty & Sur. Co. v. Anders*, 116 N.C. App. 348, 447 S.E.2d 504 (1994), a case involving an insurance company's subrogation claim against an employee who had embezzled money from the insured. In *Aetna*, the Court was not required to reach the issue involved in this case. The Court assumed, but did not expressly decide, that N.C. Gen. Stat. § 1-52(16) applied to the embezzlement claim and concluded that the plaintiff insurer's claim *was barred* under N.C. Gen. Stat. § 1-52(16). The Court was not required to address the issue here: whether N.C. Gen. Stat. § 1-52(16) restores a claim for conversion of funds otherwise barred by N.C. Gen. Stat. § 1-52(4).

In addition, it is not clear from *Aetna* that the Court applied the discovery rule. The Court noted that "defendant argues the last date on which defendant could have committed a tortious act giving rise to the cause of action was 11 November 1988, making the statute of limitations' expiration date 11 November 1991." *Aetna*, 116 N.C. App. at 350, 447 S.E.2d at 505. The Court then held: "Because the statute of limitations would have run on the laundry's right to file the cause of action on 11 November 1991, plaintiff lost its right to file the suit after that date." *Id.* at 350-51, 447 S.E.2d at 505. The Court thus appears to have held that the statute of limitations began running with the last tortious act and not with the discovery of the tort.

Alternatively, plaintiff, citing *White*, 76 N.C. App. at 129, 331 S.E.2d at 705, argues that his conversion claim did not accrue and the statute of limitations did not begin to run until he demanded the converted property and Consolidated or Robert White refused to return it. In *White*, the Court explained the scope of this principle: " 'Where there has been no wrongful taking or disposal of the goods, and the

defendant has merely come rightfully into possession and then refused to surrender them, demand and refusal are necessary to the existence of the tort.' " *Id.* at 130, 331 S.E.2d at 705 (quoting *Hoch v. Young*, 63 N.C. App. 480, 483, 305 S.E.2d 201, 203 (statute did not begin to run until plaintiff stock owner demanded return from defendant who lawfully came into possession), *disc. review denied*, 309 N.C. 632, 308 S.E.2d 715 (1983)). Here, Robert White did not rightfully come into personal possession of plaintiff's funds; the "wrongful taking" and White's possession of the funds were simultaneous. The conversion occurred when Robert White exercised unlawful dominion over the funds—in other words, when Robert White withdrew the funds from the annuities without plaintiff's permission.

Plaintiff's conversion claims are, therefore, barred by the statute of limitations subject to plaintiff's claim for equitable estoppel.[5]

Conclusion

In summary, we reverse the trial court's granting of the motion to dismiss as to plaintiff's claims for negligent hiring and breach of fiduciary duty. We affirm the dismissal of the claim for constructive fraud. With respect to the motion for summary judgment, we reverse the grant of summary judgment as to plaintiff's claims for fraud, conversion, negligence, and unfair and deceptive trade practices. Although we hold that the statute of limitations has run on plaintiff's claims for conversion and negligence, we hold that genuine issues of material fact exist as to plaintiff's claim of equitable estoppel and the application of the fraud statute of limitations.

Affirmed in part; reversed in part.

Judges McGEE and HUNTER concur.

5. Because the parties have only briefed the questions whether the discovery rule in N.C. Gen. Stat. § 1-52(16) applies to conversion causes of action and whether *White* and *Hoch* apply under the circumstances of this case, we do not express an opinion as to whether there is any other basis to apply a discovery rule to a conversion cause of action.

EUNICE C. ECKARD, EXECUTRIX OF THE ESTATE OF STEVEN VINCENT ECKARD, DECEASED, AND STATE OF NORTH CAROLINA, EX. REL., EUNICE C. ECKARD, EXECUTRIX OF THE ESTATE OF STEVEN VINCENT ECKARD, DECEASED, PLAINTIFFS V. CHANAE EVON SMITH, MARK STEPHEN MCCOLLUM, STEVE WALLACE, PHILLIP H. REDMOND, SHERIFF OF IREDELL COUNTY, HARTFORD FIRE INSURANCE COMPANY, AND IREDELL COUNTY, DEFENDANTS

No. COA02-1379

(Filed 5 October 2004)

1. Appeal and Error— appealability—interlocutory order—Rule 54(b) certification—writ of certiorari

Although the two orders in a wrongful death action from which plaintiff has appealed are interlocutory orders based on the fact that plaintiff's claims against defendant Smith remain to be resolved, the Court of Appeals will hear both appeals, because: (1) the trial court's order granting summary judgment to the remaining defendants was certified under Rule 54(b); and (2) the Court of Appeals elects to treat plaintiff's purported appeal of the grant of summary judgment in favor of the unnamed insurance company as a petition for writ of certiorari to address the merits of the appeal in the interest of justice and judicial economy.

2. Wrongful Death— vehicular police pursuit of law violator—gross negligence—moving roadblock

The trial court did not err in a wrongful death action resulting from the vehicular pursuit of a law violator by granting summary judgment in favor of defendant law enforcement officers based on lack of evidence of gross negligence, because: (1) the officers had a compelling reason to apprehend defendant suspect, who had reportedly stolen a car by forcibly ejecting its occupant; (2) the identity of the suspect was not known to the officers when they initiated the chase; (3) law enforcement's ability to apprehend a known individual at a later date does not preclude a pursuit when officers have good reason to attempt to remove the driver from the road due to the immediate and significant potential danger to the public, and in the instant case defendant suspect appeared mentally unstable, had been throwing rocks at cars, stole a car, and was driving erratically; (4) the pursuit was not a high-speed chase, never exceeded the speed limit, and in fact decreased to 25 to 35 miles per hour just before the collision; (5) allegations that the officers acted in a grossly negligent man-

ner in ways that did not, in the end, play a substantial part in bringing about the collision cannot form the basis for liability, and in the instant case plaintiff failed to demonstrate any connection between the conduct and the accident that resulted in decedent's death; and (6) the pertinent officers' actions in initiating and performing a moving roadblock did not rise to a level of wanton conduct done with conscious or reckless disregard for the rights and safety of others.

3. Statutes of Limitation and Repose— wrongful death—uninsured motorist carrier

The trial court did not err by granting summary judgment in favor of the unnamed defendant uninsured motorist (UM) carrier based on expiration of the two-year statute of limitations applicable to wrongful death actions under N.C.G.S. § 1-53(4), because: (1) although N.C.G.S. § 20-279.21(b)(3)(a) does not specify a time limitation for service of the UM carrier, our Court of Appeals previously held that service must be accomplished within the statute of limitations applicable to the accident; (2) although plaintiff did have various alias and pluries summonses issued, those summonses did not preserve plaintiff's claim against the UM carrier when the individual defendants were personally served with the original summonses; (3) the UM carrier is not precluded from asserting the statute of limitations as a defense where plaintiff has not timely commenced her action against it even though the defense may not be available to the tortfeasor; (4) a claim against a UM carrier is actually one for the tort allegedly committed by the uninsured motorist, and thus, the statute of limitations applicable to the uninsured motorist controls as to the UM carrier as well; and (5) plaintiff failed to submit sufficient evidence to support a claim of equitable estoppel with respect to the unnamed insurance company's statute of limitations defense since plaintiff did not demonstrate that the unnamed insurance company acted intentionally or through culpable negligence to induce reliance by plaintiff.

Judge GEER concurring in part and dissenting in part.

Appeal by plaintiff executrix from order entered 5 June 2001 by Judge Sanford L. Steelman, Jr. in Iredell County Superior Court, and from order entered 17 April 2002 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 21 August 2003.

Starnes and Killian, PLLC, by Wesley E. Starnes; and Wilson, Lackey & Rohr, P.A., by David S. Lackey, for plaintiffs-appellants.

Kennedy Covington Lobdell & Hickman, LLP, by Wayne P. Huckel and Christopher L. Ekman, for defendants-appellees McCollum, Wallace, Redmond, Hartford Fire Insurance Company and Iredell County.

H. Brent Helms for unnamed defendant-appellee.

BRYANT, Judge.

Eunice C. Eckard, plaintiff-executrix of Steven Vincent Eckard's (Mr. Eckard's) estate, appeals from two orders entered 5 June 2001 and 17 April 2002 granting summary judgment: one entered in favor of the law enforcement defendants Lt. McCollum, Chief Deputy Wallace, Sheriff Redmond, Iredell County and Hartford Fire Insurance Company (Iredell defendants); and the other entered in favor of the unnamed defendant uninsured motorist (UM) carrier, Indemnity Insurance Company of America (Indemnity Insurance).

On the afternoon of 13 August 1998, in Statesville, North Carolina, Sheriff's Deputy Eric Drye was flagged down by several people in a McDonald's parking lot. They told him that a woman—barefoot and wearing a medical bracelet—had been throwing rocks at cars in the parking lot, but that she was now headed toward the First Union Bank. Deputy Drye "took it as there was somebody that wasn't maybe in their right mind."

At the bank, Deputy Drye learned that the woman had again been throwing rocks at cars, but had since driven off in a stolen, white Chevrolet Blazer in the direction of a nearby Wal-Mart. Deputy Drye drove towards the Wal-Mart until he encountered what appeared to be the stolen Blazer. The driver of the Blazer seemed to be an unskilled driver; she was weaving back and forth, repeatedly running off the road and crossing the center line. Other vehicles moved out of the way to avoid being struck. The Blazer was, however, traveling within the speed limit. Following the Blazer north on Highway 21, Deputy Drye activated his emergency lights and sirens, but the Blazer refused to stop.

Responding to a call by Deputy Drye, Deputy David Gagnon attempted to stop the Blazer by positioning his car diagonally across the northbound lane of Highway 21. The Blazer swerved around his

car, and Deputy Gagnon fell in behind Deputy Drye with the two officers continuing to follow the Blazer north on Highway 21. As the Blazer exited Highway 21 onto the ramp for southbound I-77, the deputies once again tried to block the vehicle, but were unable to do so. The Blazer continued on I-77, driving erratically but within the posted speed limit.

The Blazer exited onto westbound I-40. Acting supervisor Lieutenant Mark McCollum had positioned his vehicle at the base of the I-40 on-ramp with his emergency lights and sirens activated. The Blazer swerved around him and collided with the left front quarter panel of his car. Lieutenant McCollum pulled in behind the Blazer, with Deputies Drye and Gagnon following behind him, and the pursuit continued on westbound I-40. There was "heavy citizen traffic" on I-40.

Shortly thereafter, Chief Deputy Steve Wallace joined the pursuit, pulling his unmarked vehicle in front of the Blazer. The Blazer had been traveling at about 55 miles per hour, but with Chief Deputy Wallace positioned in front of the Blazer, the cluster of vehicles slowed to 25 to 35 miles per hour. An audiotape indicates Chief Deputy Wallace radioed that they needed to "try to get a marked unit up beside here to box [her] in. We've gotta stop this." At that point, the Blazer was in the left lane of the highway, and Chief Deputy Wallace's and Lt. McCollum's vehicles were within a car's length in front of and behind the Blazer.

When the Blazer braked abruptly, Lt. McCollum's vehicle collided with the Blazer, causing the Blazer's trailer hitch to puncture the bumper of the police car and temporarily attach the two vehicles. The Blazer then swerved sharply left into the median. Lieutenant McCollum's car broke loose, and the Blazer collided head-on with the vehicle driven by Mr. Eckard, in an eastbound lane of I-40. Lieutenant McCollum's vehicle in turn struck several eastbound vehicles. A second deputy, also part of the pursuit, collided with yet another vehicle. Mr. Eckard died from injuries sustained in the accident.

The accident occurred in the early afternoon at approximately 2:00 p.m. The pursuit had covered 10 to 15 miles and lasted 12 to 15 minutes. The driver of the Blazer was identified as Chanae Evon Smith (Smith).

At the time of the accident, Smith was 17 years old and living with her parents. She had hitchhiked to Iredell Memorial Hospital on 12 August 1998, the day before the accident, for unspecified treatment,

but was released the same day. She then went to her pastor's house for spiritual guidance at least twice. On 13 August 1998, Smith again went to Iredell Memorial Hospital, but left on her own. As of 13 August 1998, Smith did not have a driver's license, had never driven a car, and was not insured.

On 8 August 2000, plaintiff filed a wrongful death action against defendant Smith and the Iredell defendants (defendants Lt. McCollum, Chief Deputy Wallace, Sheriff Phillip Redmond, Hartford Fire Insurance Co., and Iredell County). The Iredell defendants filed an answer on 9 October 2000; defendant Smith filed an answer on 13 October 2000.

On 16 November 2000, a copy of the complaint and copies of the summonses served on the defendants were sent by certified mail to the uninsured motorist (UM) carrier, Indemnity Insurance. On 19 February 2001, Indemnity Insurance filed its answer and motion to dismiss. Indemnity Insurance filed a renewed motion to dismiss on 25 May 2001 with a supporting affidavit, arguing that plaintiff failed to serve the UM carrier within the applicable statute of limitations. At the hearing on the motion to dismiss, Judge Sanford L. Steelman converted the motion into a motion for summary judgment and granted the motion in an order entered 5 June 2001.

The Iredell defendants filed a motion for summary judgment on 7 March 2002. In an order entered 17 April 2002, Judge Mark E. Klass granted the motion and, pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), certified that the order was a final judgment as to all defendants except Smith and that there was no just reason for delay. On 25 April 2002, plaintiffs filed notice of appeal from Judge Steelman's and Judge Klass' orders.

Interlocutory Nature of the Appeal

[1] Because plaintiff's claims against defendant Smith remain to be resolved, the two orders from which plaintiff has appealed are interlocutory orders. *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001) (an interlocutory order is an order made during the pendency of an action that does not dispose of the entire case). An interlocutory order is immediately appealable if either: (1) the trial court has certified the case for appeal under Rule 54(b) of the Rules of Civil Procedure; or (2) the challenged order affects a substantial right of the appellant that would be lost without immediate review. *Embler*, 143 N.C. App. at 165, 545 S.E.2d at 261.

Here, the trial court's order granting summary judgment to the Iredell defendants is properly before this Court based on the trial court's Rule 54(b) certification. The trial court entered final judgment as to the Iredell defendants, leaving only the claims against Smith to be tried, and found that "there is no just reason for delay."

The order granting judgment in favor of Indemnity Insurance, however, includes no Rule 54(b) certification. Although the burden is on the appellant to establish that a substantial right will be affected without an immediate appeal, *Embler*, 143 N.C. App. at 165, 545 S.E.2d at 262, plaintiff has not argued that his appeal from Judge Steelman's order implicates a substantial right and we can discern none. We note that plaintiff has failed to provide "[a] statement of grounds for appellate review" in violation of Rule 28(b)(4). Nevertheless, under the unique circumstances of this case, we believe that justice and judicial economy will best be served by allowing an immediate appeal as to the Indemnity Insurance order and, therefore, we elect in our discretion to treat the purported appeal as a petition for writ of certiorari and to address the merits of the appeal. *Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co.*, 141 N.C. App. 569, 574, 541 S.E.2d 157, 161 (2000).

The issues on appeal are whether the trial court properly granted summary judgment in favor of the: (I) Iredell defendants; and (II) UM carrier, Indemnity Insurance Company of America.

I

Summary Judgment as to the Iredell Defendants

[2] Plaintiff first contends that the trial court erred in granting summary judgment for the Iredell defendants. Defendants moved for summary judgment on the grounds that "[p]laintiffs' claims are subject to a standard of gross negligence, and the evidence viewed in the light most favorable to [p]laintiffs establishes that the conduct of the Iredell [d]efendants on August 13, 1998 did not rise to the level of gross negligence, as a matter of law."

Under Rule 56(c) of the Rules of Civil Procedure, summary judgment "shall be rendered forthwith 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 the party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2003). The moving party has the

burden of establishing the absence of any genuine issue of material fact, and the trial court should view the evidence in the light most favorable to the nonmoving party. *Norris v. Zambito*, 135 N.C. App. 288, 293, 520 S.E.2d 113, 116 (1999). "[A]lthough it is seldom appropriate to grant summary judgment in a negligence action, it is 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).

On appeal, this Court has the task of determining 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). We review the trial court's grant of summary judgment *de novo*. *Shroyer v. County of Mecklenburg*, 154 N.C. App. 163, 167, 571 S.E.2d 849, 851 (2002).

Our Supreme Court has held that "in any civil action resulting from the vehicular pursuit of a law violator, the gross negligence standard applies in determining the officer's liability." *Parish*, 350 N.C. at 238, 513 S.E.2d at 551. Since Mr. Eckard's death arose out of the deputies' pursuit of defendant Smith, who had stolen a vehicle, the question before this Court is whether plaintiff submitted sufficient evidence to permit a jury to conclude that defendants' conduct constituted gross negligence.

Gross negligence has been defined as "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 61, 603 (1988). An act is wanton " 'when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.' " *Yancey v. Lea*, 354 N.C. 48, 52, 550 S.E.2d 155, 157 (2001) (quoting *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37-38 (1929)).

This Court pointed out in *Norris*, 135 N.C. App. at 294-95, 520 S.E.2d at 117-18, that our appellate courts have examined numerous factors in determining whether a police pursuit constituted gross negligence. These factors relate to a single issue: "the probability of injury to the public by the officers' decision to pursue and continue to pursue the suspect." *Norris*, 135 N.C. App. at 294, 520 S.E.2d at 117. The Court in *Parish* explained, however, that despite the risk of injury to the public, policy reasons exist for allowing pursuits:

> "Political society must consider not only the risks to passengers, pedestrians, and other drivers that high-speed chases engender, but also the fact that if police are forbidden to pursue, then many more suspects will flee—and successful flights not only reduce the number of crimes solved but also create their own risks for passengers and bystanders."

Parish, 350 N.C. at 245, 513 S.E.2d at 555 (quoting *Mays v. City of East St. Louis, Ill.*, 123 F.3d 999, 1003 (7th Cir. 1997)). An officer "must conduct a balancing test, weighing the interests of justice in apprehending the fleeing suspect with the interests of the public in not being subjected to unreasonable risks of injury." *Parish*, 350 N.C. at 236, 513 S.E.2d at 550. "Gross negligence" occurs when an officer consciously or recklessly disregards an unreasonably high probability of injury to the public despite the absence of significant countervailing law enforcement benefits.

Plaintiff challenges as gross negligence (a) defendants' initial decision to pursue defendant Smith, (b) the continued pursuit after repeated unsuccessful efforts to cause her to stop, (c) the manner of conducting the pursuit, and (d) the efforts to force Smith to slow to a stop on I-40. We examine each of these contentions.

Plaintiff argues that the pursuit was unnecessary even though Smith's identity was unknown, because her identity could have been discovered and she could have been apprehended at a later date. In considering a decision to initiate a pursuit, a court must first look to the reason for the pursuit: "If the officer was attempting to apprehend someone suspected of violating the law, the police officer would fall squarely within the [gross negligence] standard of care." *Norris*, 135 N.C. App. at 294, 520 S.E.2d at 117. The court must then "consider whether the suspect was known to police and could be arrested through means other than apprehension via a high speed chase; or whether the fleeing suspect presented a danger to the public that could only be abated by immediate pursuit." *Id.* (internal citations omitted).

In the present case, the officers had a compelling reason to apprehend the suspect, who had reportedly stolen a car by forcibly ejecting its occupant. The identity of the suspect was not known to the officers when they initiated the chase. While Smith's identity could perhaps—but not certainly—have been ascertained by checking the records of nearby hospitals, this Court has already held that law enforcement's ability to apprehend a known individual at a later date does not preclude a pursuit when officers have "good reason to

attempt to remove [the driver] from the road due to the immediate and significant potential danger to the public." *Norris*, 135 N.C. App. at 295, 520 S.E.2d at 118. The evidence is undisputed that Smith appeared mentally unstable, she had been throwing rocks at cars, she stole a car, and she was driving very erratically. Given these circumstances, the decision to immediately pursue Smith, rather than to first engage in a possibly futile attempt to identify her, does not constitute gross negligence.

With respect to the continuation of the pursuit, the evidence is undisputed that the pursuit never exceeded the speed limit and, in fact, decreased to 25 to 35 miles per hour just before the collision. This was not a high-speed pursuit. The pursuit occurred in broad daylight on a dry, straight highway with no possibility of intersections. When these facts are compared to those of prior appellate decisions, we are compelled to hold that plaintiff has failed to demonstrate that continuation of the pursuit was gross negligence. *See, e.g., Parish*, 350 N.C. at 246, 513 S.E.2d at 555-56 (officer not grossly negligent where he pursued a vehicle at 2:00 a.m. in clear, dry conditions and light traffic on I-85 for five miles at speeds reaching 130 miles per hour); *Bullins*, 322 N.C. at 581-82, 369 S.E.2d at 602 (14 minute pursuit over 18 miles at speeds of 100 miles per hour on U.S. 220 was not plain negligence even though several vehicles had to pull off the road to avoid collision); *Norris*, 135 N.C. App. at 290, 520 S.E.2d at 115 (officer not grossly negligent where he chased the suspect at speeds of 70 miles per hour in a 35 mile per hour residential zone until the suspect ran a red light).

Plaintiff next points to various conduct that occurred during the course of the pursuit, including Chief Deputy Wallace's driving an unmarked car, Lt. McCollum's not having a standard light bar on his car, deputies attempting roadblocks without permission, an excessive number of deputies engaging in the pursuit, Chief Deputy Wallace's using two feet to drive, and Lt. McCollum's exceeding the speed limit in responding to the call regarding the pursuit. Plaintiff was required not only to prove that such conduct constituted gross negligence, but also to prove "the existence of a causal connection between the conduct and the accident." *Parish*, 350 N.C. at 246, 513 S.E.2d at 556; *see District of Columbia v. Walker*, 689 A.2d 40, 46 (D.C. App. 1997) ("[T]he primary focus must be not upon the conduct of the [police] officers in all its aspects, but only upon that particular conduct that might be said to have proximately caused the collision. Allegations that the officers acted in a grossly negligent manner

in ways that did not, in the end, play a substantial part in bringing about the collision cannot form the basis for liability."). Even if this conduct could be considered to exceed simple negligence, plaintiff has failed to demonstrate any connection between the conduct and the accident that resulted in Mr. Eckard's death. Plaintiff makes no argument that had defendants not engaged in this conduct, the accident would not have occurred.

Plaintiff's final challenge alleging gross negligence involves defendants' efforts to force Smith's Blazer to stop by means of a moving roadblock. Radio communications from Chief Deputy Wallace were interpreted to mean "that . . . [they] were going to try to box her in, try to slow her down and force her to the shoulder of the road or the emergency strip of the road."

Lieutenant McCollum's written statement explained the intent in greater detail:

> Somewhere near the US 21/I-40 interchange Chief Deputy Wallace was able to position his patrol vehicle in front of the suspect vehicle; everyone was still traveling I-40[(W)]. . . . As the pursuit neared the N.C. 115/I-40(W) interchange, Chief Wallace and myself were going to attempt to slow the pursuit down even more, and hopefully to an uneventful end. This was going to be attempted by Wallace staying in front of the suspect vehicle, and myself staying close behind the suspect vehicle; and for Wallace and myself gradually decreasing our speed to a steady even stop. In order to do this, Wallace and myself had to contain the suspect vehicle in a safe zone or "Box" between our 2 vehicles. Wallace began slowing his vehicle, the suspect was abruptly also slowing. I was likewise slowing my vehicle. We all decreased our speeds down to approximately 40 MPH. Wallace started slowing again, the suspect did not slow immediately, but did then begin. I moved my patrol vehicle close in order to tighten the safe zone or "Box" This would hopefully close off escape routes and bring everything to a safe conclusion.

This description of Chief Deputy Wallace's and Lt. McCollum's strategy matches up with Lt. McCollum's description of a "moving roadblock":

> The definition of a moving roadblock is surrounding of a vehicle that's failing to stop to the point to where you, whether they want to stop or not, force them to stop. You start slowing the speed down even if they don't wish to slow the speed down. . . . A mov-

ing roadblock ends up being the same [as a stationary roadblock], other than you try to surround this particular car or vehicle that's failing to stop with as many units as you can to where ideally it is totally encapsulated, and then it is forced to stop by the car in front bringing everything to a stop.

A jury could, based on this evidence, conclude that defendants Chief Deputy Wallace and Lt. McCollum were executing a moving roadblock with the intent of forcing the Blazer to stop on I-40. The question is whether this conduct constituted gross negligence under the circumstances.

While it appears our appellate courts have not yet specifically addressed moving roadblocks, there is nothing in our jurisprudence that requires application of a different standard of gross negligence in evaluating facts surrounding a moving roadblock versus other types of police pursuits. Therefore we analyze moving roadblocks as we would any other type of police pursuit, using the standard of gross negligence generally applied to police pursuit cases. As previously noted, gross negligence occurs when an officer consciously or recklessly disregards an unreasonably high probability of injury to the public despite the absence of significant countervailing law enforcement benefits.

In the instant case, the facts indicate that the relevant stretch of I-40 on which the moving roadblock occurred that day was dry and in good condition, it was a straight stretch of road with rolling hills, the weather was sunny and clear, and traffic was moderate to heavy. At all times during the pursuit, including during the moving roadblock, all of the defendants had their blue lights flashing and their sirens on. The pursuit of Smith on I-40 lasted for only three miles, and was at all times at or below the posted speed limit, with a speed of only 25 m.p.h. just prior to the accident. The dissent focuses on the fact that traffic on I-40 that afternoon was moderate to heavy, a fact that *may* lead a jury to believe initiating a moving roadblock at that time was grossly negligent. However, the amount of traffic could also be considered as a motivating factor in the defendants' decision to initiate a moving roadblock, thereby reducing the possibility of injury to other motorists on I-40 that day.

Lieutenant McCollum and Chief Deputy Wallace attempted to control defendant Smith's movement by slowing her down, trying to cushion her from other motorists on the road by placing officers in front of and behind her vehicle. Smith's "unskilled" and "erratic" driv-

ing, and the fact that she struck an officer's vehicle while merging onto I-40, was sufficiently alarming such that the officers needed to do more than simply follow her; they needed to reduce the immediate and significant danger Smith posed to other motorists.

During the moving roadblock, all of the officers involved maintained control of their vehicles with the exception of Lt. McCollum, who lost control of his vehicle when Smith suddenly started braking. However, Lt. McCollum's loss of control of his vehicle under these circumstances is significantly less severe than that of the officer in *Bray v. N.C. Dep't of Crime Control & Public Safety*, 151 N.C. App. 281, 564 S.E.2d 910 (2002). In *Bray*, the officer lost control of his vehicle while engaged in a high speed pursuit. He was determined to have been speeding excessively on a curving rural road when he crossed the center line, striking and injuring a civilian motorist. However, his actions in pursuing a suspect were not found to be wanton conduct constituting gross negligence. *Bray*, 151 N.C. App. at 283, 564 S.E.2d at 912. In the instant case, Lt. McCollum's actions, when compared with those of the officer in *Bray*, do not rise to the level of wanton conduct constituting gross negligence.

Based on the dissent's analysis, any moving roadblock would constitute evidence of gross negligence, as there is almost always a substantial risk of collision or "high liability." The defendants here recognized there was a potential danger to civilians associated with a moving roadblock, just as there is with any pursuit. However, they conducted the moving roadblock in such a manner that it lasted for only about three miles and was undertaken at relatively low speeds. Our Supreme Court has held that " 'police officers have a duty to apprehend lawbreakers and society has a strong interest in allowing the police to carry out that duty without fear of becoming insurers for the misdeeds of lawbreakers.' " *Parish*, 350 N.C. at 236, 513 S.E.2d at 550 (citation omitted). Police officers are required " 'to act decisively and to show restraint at the same moment, and their decisions have to be made "in haste, under pressure, and frequently without the luxury of a second chance." ' " *Parish*, 350 N.C. at 246, 513 S.E.2d at 556 (citations omitted).

North Carolina's standard of gross negligence, with regard to police pursuits, is very high and is rarely met.[1] Unless we are to

1. *See Parish*, 350 N.C. 231, 513 S.E.2d 547 (police pursuit that reached speeds of 120 to 130 m.p.h., and passed multiple civilian motorists on interstate, did not constitute gross negligence); *Young v. Woodall*, 343 N.C. 459, 471 S.E.2d 357 (1996) (police pursuit at 2:00 a.m., in which officer exceeded posted speed limit, did not activate his

impose a different and higher standard for police pursuits involving moving roadblocks, the facts in the instant case cannot be distinguished from our present case law. Defendants Chief Deputy Wallace and Lt. McCollum's actions in initiating and performing a moving roadblock do not rise to a level of "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Bullins*, 322 N.C. at 583, 369 S.E.2d at 603. Viewing the evidence in the light most favorable to plaintiffs, we agree with the trial court that plaintiffs have failed to establish that the actions of the Iredell defendants rose to the level of gross negligence as a matter of law. Accordingly, this assignment of error is overruled.

Uninsured Motorist (UM) Carrier

[3] Plaintiff contends that her claim against the uninsured motorist (UM) carrier Indemnity Insurance is not barred by the two-year statute of limitations applicable to wrongful death actions. We disagree.

N.C. Gen. Stat. § 20-279.21(b)(3)(a), provides that in order for a UM carrier to be bound by a judgment against the uninsured motorist, the insurer must be "served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law." N.C.G.S. § 20-279. 21(b)(3)(a) (2003). Once the insurer is properly served, it becomes "a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name." *Id.*

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siren or blue lights, did not notify his dispatcher, and struck a civilian motorist, did not constitute gross negligence); *Bray*, 151 N.C. App. at 283, 564 S.E.2d at 912 (police pursuit in which officer caused an accident, after speeding excessively and crossing the center line on a curving rural road, did not constitute gross negligence); *Bray*, 151 N.C. App. at 284, 564 S.E.2d at 912 (quoting *Young*, 343 N.C. at 463, 471 S.E.2d at 360) (officer's pursuit of a suspect " 'without activating the blue light or siren, his entering the intersection while the caution light was flashing, and his exceeding the speed limit were acts of discretion on his part which may have been negligent but were not grossly negligent' "); *Norris*, 135 N.C. App. 288, 520 S.E.2d. 113 (police pursuit at speed of 70 m.p.h. in a 35 m.p.h. zone, where suspect ran a red light and struck and killed a civilian motorist, did not constitute gross negligence); *Clark v. Burke County*, 117 N.C. App. 85, 450 S.E.2d 747 (1994) (police pursuit at 75 m.p.h. in a 45 m.p.h. zone resulting in an accident in which the passengers in the suspect vehicle were killed, did not constitute gross negligence); *Fowler v. N.C. Dep't of Crime Control & Pub. Safety*, 92 N.C. App. 733, 736, 376 S.E.2d 11, 13 (1989) (officer's pursuit of a suspect at speeds of approximately 115 m.p.h., "without activating either his siren or flashing blue lights," did not constitute gross negligence).

Although the statute does not specify a time limitation for service of the UM carrier, this Court in *Thomas v. Washington*, 136 N.C. App. 750, 525 S.E.2d 839 (2000), held that service must be accomplished within the statute of limitations applicable to the accident. *Thomas*, 136 N.C. App. at 754, 525 S.E.2d at 842 ("the three-year tort statute of limitations, which begins running on the date of an accident, also applies to the uninsured motorist carrier"). More recently, this Court held: "In requiring the UM carrier to be included in the underlying tort action, the legislature intended to subject the insured's action against the carrier to the statute of limitations for the tort claim." *Sturdivant v. Andrews*, 161 N.C. App. 177, 179, 587 S.E.2d 510, 511 (2003).

Because plaintiff has sued for wrongful death, the applicable statute of limitations is two years. N.C.G.S. § 1-53(4) (2003). The accident occurred on 13 August 1998 and the statute of limitations, therefore, ran on 13 August 2000. Plaintiff filed suit against Smith and the Iredell defendants on 8 August 2000. Defendants were all served with the complaint and original summonses no later than 17 August 2000. It is undisputed that plaintiff did not serve Indemnity Insurance with the complaint and summonses until 16 November 2000. Under *Thomas* and *Sturdivant*, plaintiff's UM claim is barred by the statute of limitations.

Although plaintiff did have various alias and pluries summonses issued, this Court in *Thomas* held that those summonses did not preserve plaintiff's claim against the UM carrier when, as here, the individual defendants were personally served with the original summonses. *Thomas*, 136 N.C. App. at 755, 525 S.E.2d at 843. In addition, contrary to plaintiff's suggestion, it is irrelevant that the uninsured motorist, defendant Smith, has no statute of limitations defense because she was timely sued. *Reese v. Barbee*, 129 N.C. App. 823, 827, 501 S.E.2d 698, 701 (1998), *aff'd by equally divided court*, 350 N.C. 60, 510 S.E.2d 374 (1999) ("[The UM carrier] is not precluded from asserting the statute of limitations as a defense where plaintiff has not timely commenced her action against it, even though the defense may not be available to the tort-feasor.").

Plaintiff argues further that the statute of limitations should not begin to run as to the UM carrier until the plaintiff has discovered the identity of the UM carrier. She contends that *Thomas* should be limited to cases in which the UM carrier is known by the plaintiff. This argument cannot be reconciled with the rationale underlying *Thomas* and *Sturdivant*. Those opinions squarely reject the proposition that a separate statute of limitations applies to a claim against the UM car-

rier and hold that the statute of limitations commences running at the same time as to both the UM motorist and the UM carrier.

This rationale is also compelled by the Supreme Court's opinions in *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 573 S.E.2d 118 (2002) and in *Brown v. Lumberman's Mut. Casualty Co.*, 285 N.C. 313, 204 S.E.2d 829 (1974). In *Pennington*, the Court wrote:

> In the situation where a tortfeasor has no liability insurance coverage, the injured insured's UM carrier generally would be the only insurance provider exposed to liability for the insured's claim for damages. As such, it follows that the UM provider need be made a party to the suit and be served with a copy of the summons and complaint *within the statute of limitations governing the underlying tort.*

Pennington, 356 N.C. at 577, 573 S.E.2d at 122 (emphasis added). Likewise, in *Brown*, the Court explained that a claim against a UM carrier "is actually one for the tort allegedly committed by the uninsured motorist." *Brown*, 285 N.C. at 319, 204 S.E.2d at 834. For that reason, the statute of limitations applicable to the uninsured motorist controls as to the UM carrier as well.

Alternatively, plaintiff argues that Indemnity Insurance should be estopped from asserting the defense of the statute of limitations. Plaintiff has submitted evidence that the accident report listed the name of the insurance company for the vehicle driven by Mr. Eckard (and owned by his employer) as "Indemnity of North America." An employee of the Department of Insurance informed a paralegal for plaintiff's counsel that no such insurance company or any similarly named company was licensed in North Carolina. Plaintiff's counsel sent a letter on 30 September 1998 to the owner of the vehicle requesting a copy of the policy or the name of the insurance company, but never received a response. Shortly after this action was filed, the paralegal again contacted the Department of Insurance and was notified that an insurance company named Indemnity Insurance Company of North America was in fact licensed in North Carolina. Based on the initial communication with the Department of Insurance, plaintiff suggests that at the time the complaint was filed, Indemnity Insurance was not licensed or authorized as required by N.C. Gen. Stat. § 20-279.20(a).

"Equitable estoppel arises when [a party] by [its] acts, representations, admissions, silence, or when [it] has a duty to speak, inten-

tionally or through culpable negligence, induces another to believe that certain facts exist and that the other person rightfully relies on those facts to his detriment." *Pierce v. Johnson*, 154 N.C. App. 34, 43, 571 S.E.2d 661, 667 (2002). Equitable estoppel may be invoked, in a proper case, to bar a defendant from relying upon the statute of limitations. *Duke University v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 692 (1987) (holding that the defendant was estopped from pleading the statute of limitations as a defense when his attorney's conduct misled the plaintiff and reasonably caused the plaintiff to refrain from suing the defendant).

Here, plaintiff has failed to demonstrate that Indemnity Insurance acted intentionally or through culpable negligence to induce reliance by plaintiff. The hearsay statements in the affidavit reporting the paralegal's initial conversation with the Department of Insurance do not by themselves constitute competent evidence that Indemnity Insurance was in fact unlicensed at the time of the filing of the complaint. Plaintiff has not, therefore, submitted sufficient evidence to support a claim of equitable estoppel with respect to Indemnity Insurance's statute of limitations defense.

Conclusion

We affirm the trial court's order granting summary judgment for the Iredell defendants and Indemnity Insurance.

Affirmed.

Judge McGEE concurs.

Judge GEER concurs in part, dissents in part.

GEER, Judge, concurring in part and dissenting in part.

I concur fully with the majority opinion as to plaintiff's claims against the uninsured motorist carrier, Indemnity Insurance. With respect to the claims asserted against the Iredell defendants, I agree that plaintiff failed to demonstrate gross negligence in defendants' decision to initiate and continue the pursuit of Chanae Smith, but I would hold that plaintiff's evidence creates an issue of fact as to whether defendants McCollum and Wallace executed a moving roadblock to force Smith to stop and whether, in doing so, they were grossly negligent.

I believe that plaintiff's evidence—elicited from defendants themselves—that there was a 90% chance of an accident resulting from the maneuver, that the pursuit was surrounded on either side by "heavy citizen traffic," and that there was no need to stop Smith at that particular spot on I-40 is sufficient evidence to permit a jury to find defendants grossly negligent. If a 90% chance of an accident in the midst of heavy traffic, as a matter of law, cannot prove gross negligence, then it is difficult to imagine what evidence would be enough. Accordingly, I would reverse the trial court's order granting summary judgment to the Iredell defendants.

As the majority acknowledges, when the evidence is viewed in the light most favorable to the plaintiff, it would permit a reasonable juror to conclude that defendants Wallace and McCollum intended to terminate the pursuit on I-40 by forcing the Blazer to a stop through a moving roadblock. While defendants deny performing a moving roadblock and claim that "[a]t most, the Iredell Defendants were trying to contain the Blazer by maintaining a box between it and civilian traffic[,]" this assertion ignores the requirement that the evidence be viewed in the light most favorable to the plaintiff. A jury could construe Wallace's radio transmission about moving a marked unit up to "stop this" as expressing a desire to force the Blazer to stop. Deputy Drye understood Wallace to mean "that . . . we were going to try to box her in, try to slow her down and force her to the shoulder of the road or the emergency strip of the road."

Lt. McCollum's written statement explained the intent in greater detail:

> Somewhere near the US 21/I-40 interchange Chief Deputy Wallace was able to position his patrol vehicle in front of the suspect vehicle, everyone was still traveling I-40-W. . . . As the pursuit neared the NC 115/I-40(W) interchange, Chief Wallace and myself were going to attempt to slow the pursuit down even more, *and hopefully to an uneventful end.* This was going to be attempted by Wallace staying in front of the suspect vehicle, and myself staying close behind the suspect vehicle; and for Wallace and myself gradually decreasing our speed *to a steady even stop.* In order to do this, Wallace and myself had to contain the suspect vehicle in a safe zone or "Box", between our 2 vehicles. Wallace began slowing his vehicle, the suspect was abruptly also slowing. I was likewise slowing my vehicle. We all decreased our speeds down to approximately 40 MPH. Wallace started slowing again, the suspect did not slow immediately, but did then begin. I moved

> my patrol vehicle close in order to tighten the safe zone or "Box". *This would hopefully close off escape routes and bring everything to a safe conclusion.*

(Emphasis added) This description of Wallace's and McCollum's strategy matches up with Lt. McCollum's description of a "moving roadblock":

> *The definition of a moving roadblock is surrounding of a vehicle that's failing to stop to the point to where you, whether they want to stop or not, force them to stop.* You start slowing the speed down even if they don't wish to slow the speed down. . . . A moving roadblock ends up being the same [as a stationary roadblock], other than you try to surround this particular car or vehicle that's failing to stop with as many units as you can to where ideally it is totally encapsulated, and then *it is forced to stop by the car in front bringing everything to a stop.*

(Emphasis added) I believe that a jury could, based on this evidence, conclude that defendants Wallace and McCollum were executing a moving roadblock with the intent of forcing the Blazer to stop on I-40.

The majority and I differ on the question whether evidence of this conduct, under the circumstances, is sufficient to prove gross negligence. Although no prior North Carolina appellate opinion has found sufficient evidence of gross negligence in a police pursuit case, I believe the evidence in this case regarding the attempted moving roadblock was sufficient to survive defendants' motion for summary judgment.

First, our appellate courts' prior opinions have not addressed moving roadblocks or other attempts to bring the fleeing vehicle to a halt. In fact, in finding no gross negligence, our courts have specifically relied upon the fact that officers kept their distance from the fleeing vehicle and on the lack of evidence that officers tried to force the fleeing vehicle to stop. Thus, in *Parish v. Hill*, 350 N.C. 231, 245, 513 S.E.2d 547, 555 (1999), the Supreme Court cited the following facts as dispositive on the question of gross negligence:

> In the instant case, [the officers] pursued defendant over a stretch of approximately ten miles of roadway, during a time of the day when traffic was very light. At no time did they attempt to overtake defendant's vehicle or force defendant's vehicle from the roadway. In fact, when defendant's vehicle crashed on US 70

> on its way to Durham, [the officers] were well behind defendant's vehicle and were traveling at a reduced speed.

See also Bullins v. Schmidt, 322 N.C. 580, 582, 369 S.E.2d 601, 602-03 (1988) (by the time of the accident, officers had reduced their speed and increased the distance between them and the fleeing vehicle because of the presence of other vehicles); *Clark v. Burke County*, 117 N.C. App. 85, 90, 450 S.E.2d 747, 748 (1994) (there was no evidence that the officer ever pulled beside the vehicle or tried to pass it or run it off the road). Here, by contrast, a jury could find that defendants McCollum and Wallace were attempting to force the Blazer from the road, and, to achieve that purpose, they were each less than a car's length from the Blazer when they sandwiched the car.

Second, plaintiff also offered evidence that defendants knew that a moving roadblock created a substantial hazard. Lt. McCollum testified that with a moving roadblock, "[n]ine times out of ten, there's going to be some contact with other units around or civilians" if the fleeing vehicle does not wish to slow down. He acknowledged, "That's why there's a high liability issue." In addition, after Wallace's radio transmission, there was discussion over the radio about choosing an older patrol car to move up next to the Blazer, suggesting defendants expected that there would likely be a collision. Yet, according to plaintiff's evidence, defendants did not wait until a patrol car could move alongside before attempting to force the Blazer to stop.

Third, the jury could take into account the fact that the officers initiated the moving roadblock maneuver, with its 90% chance of collision, at a time when the traffic was heavy and moving at significant speeds. No prior case has involved the degree of traffic present in this case. *See, e.g., Bullins*, 322 N.C. at 584, 369 S.E.2d at 604 ("traffic was light and the road was dry"); *Norris v. Zambito*, 135 N.C. App. 288, 291, 520 S.E.2d 113, 115 (1999) ("the roads were in good condition and free of other motorists"); *Fowler v. N.C. Dep't of Crime Control & Pub. Safety*, 92 N.C. App. 733, 736, 376 S.E.2d 11, 13, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 773 (1989) (trooper encountered only one other vehicle during pursuit). While the amount of traffic did not necessarily, given the circumstances of this case, mean that the pursuit itself was gross negligence, a jury could view an attempt to execute a moving roadblock in heavy citizen traffic as being grossly negligent. As defendants acknowledge, the pursuit was in the left lane immediately prior to the accident, but the flow of traffic in the right

lane made it impossible for a marked unit to move up alongside the Blazer in the right lane. Plaintiff's evidence would permit the jury to conclude that defendants effectively allowed the civilian traffic in the right lane to serve as a side of the "box" for the moving roadblock.

The evidence also indicates that defendants knew (1) that there was a strong possibility that defendant Smith would change lanes or otherwise move sideways; and (2) Smith did not fear a collision. Defendant Wallace reported that while he was in front of the Blazer, it was "jerking from side to side within the lane, changing lanes, you know, obviously a danger." At times, the Blazer's left tires fell off the pavement and into the relatively narrow median before returning to the pavement. According to defendant Wallace, the Blazer "would turn sharply from side to side" and "would run up behind" his vehicle. Defendant Wallace also believed that the Blazer attempted to hit him from behind.

Thus, the record contains evidence that would allow, but not require, a jury to find that defendants were executing a moving roadblock with the intent of forcing the Blazer to stop while in the left-hand lane of I-40; that defendants knew that a moving roadblock with an uncooperative suspect would result in a collision 90% of the time; that defendants did not wait until the Blazer, which had been weaving between lanes and into the median, could be surrounded by patrol cars; and that defendants proceeded with the moving roadblock despite heavy citizen traffic in the right lane and across the relatively narrow median. This evidence would permit a jury to conclude that there was a high probability of injury to the public from the execution of the moving roadblock.[2]

I agree with the majority that the probability of injury from the moving roadblock must be weighed against any law enforcement need to terminate the pursuit at that point on I-40. Defendants have, however, pointed to no reason that they needed to stop the Blazer at the point on I-40 where the accident occurred rather than wait until a more rural setting when traffic had cleared. Instead, they have argued

2. The majority appears to misconstrue the nature of a "moving roadblock" when it states that defendants "conducted the moving roadblock in such a manner that it lasted for only about three miles and was undertaken at relatively low speeds." The majority mistakes the pursuit with Wallace in front and McCollum behind the Blazer for the moving roadblock. As McCollum's testimony explained, a "moving roadblock" is an attempt to force a vehicle to stop. It is a form of roadblock. The risk here did not arise from the low-speed pursuit, but from the decision to try to force the Blazer to stop.

that there was no effort to halt the Blazer and that they were, in fact, trying to continue the pursuit and protect the public from a collision with the Blazer. As explained above, that is an issue of fact for the jury to decide.

The majority opinion attempts to supply the missing evidence, stating: "The dissent focuses on the fact that traffic on I-40 that afternoon was moderate to heavy, a fact that *may* lead a jury to believe initiating a moving roadblock at that time was grossly negligent. However, the amount of traffic could also be considered as a motivating factor in the defendants' decision to initiate a moving roadblock, thereby reducing the possibility of injury to other motorists on I-40 that day." Although this supposition appears to conflict with the requirement that this Court view all evidence and draw all inferences in favor of the non-moving party, it also conflicts with defendants' own brief. Defendants stated: "[T]he risks to continuing the pursuit were attenuated by the moderate speed, the absence of cross intersections or traffic signals, the one-way flow of traffic, and the clear road conditions." In addition, Wallace testified that he heard a deputy report over the radio that the deputies could have "put her in the ditch. But at that point she had not done anything to warrant that type of activity." Another deputy testified in his deposition that Smith's erratic driving did not justify forcing her into a ditch—one of the outcomes of a moving roadblock. Thus, even if defendants had relied upon the law enforcement reason articulated by the majority opinion, plaintiff offered evidence that placed the legitimacy of that reason in dispute.

The majority also points to the fact that only one officer lost control of the vehicle during the execution of the moving roadblock. Since the risk, as defendant McCollum testified, was from the recalcitrant driver being pursued, I do not understand how the fact that only one officer lost control establishes a lack of gross negligence as a matter of law. *Bray v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 281, 564 S.E.2d 910 (2002), cited by the majority, does not support the result reached by the majority opinion. In *Bray*, this Court was reviewing a decision by the Industrial Commission under the State Tort Claims Act—the equivalent of reviewing a jury verdict. *Bray* cannot support the granting of a motion for summary judgment. Moreover, the plaintiff in *Bray* argued only that the trooper's crossing of the middle line on a rural road while conducting a high speed pursuit constituted gross negligence. *Bray* did not address a decision to force a car to stop on a

heavily-traveled interstate when, viewing the evidence in the light most favorable to the plaintiff, there was no need to stop the car at that point.

I would reverse the trial court's grant of summary judgment because I believe plaintiff forecast sufficient evidence to permit a reasonable juror to find that defendants were grossly negligent in attempting to perform a moving roadblock under the existing circumstances, especially given that defendants have offered no evidence of any legitimate law enforcement reason for attempting to stop the Blazer in the midst of heavy citizen traffic.

COASTAL PLAINS UTILITIES, INC., PLAINTIFF v. NEW HANOVER COUNTY, NEW HANOVER COUNTY BOARD OF COMMISSIONERS, IN THEIR OFFICIAL CAPACITIES; THE TOWN OF CAROLINA BEACH, A NORTH CAROLINA MUNICIPAL CORPORATION; THE TOWN OF KURE BEACH, A NORTH CAROLINA MUNICIPAL CORPORATION; T.A. LOVING, INC.; AND ATLANTIC CONSTRUCTION, DEFENDANTS

No. COA03-525

(Filed 21 September 2004)

1. Appeal and Error— appealability—partial summary judgment—substantial right affected—potential for inconsistent verdicts

A partial summary judgment arising from the construction of a water and sewer system was interlocutory but affected a substantial right and was appealable because there was a potential for inconsistent verdicts.

2. Easements— water system—no wrongful interference

The location of a water and sewer system built by a county alongside an older, private system did not wrongfully interfere with the private company's nonexclusive easements and summary judgment was correctly granted for defendants.

3. Utilities— UDPA—construction of new water system

There was no basis for holding municipal defendants liable under the Underground Damage Prevention Act (which requires that utility owners be notified before excavations begin) in an action by the owner of an existing private water and sewer system arising from the construction of a new public system. The

companies doing the excavating were notified of the names of underground utility owners in the area and plaintiff was informed of the construction and asked to mark its lines.

4. Agency— utilities contractors—design of public water system—evidence of agency insufficient

Summary judgment for defendants was proper on a claim that New Hanover County was liable for damages to plaintiff's private water system caused by the design of a new public system. The County produced evidence that the work was done by independent contractors and defendant did not produce evidence of agency.

5. Negligence— utilities contractors—liability of county—respondeat superior—evidence insufficient

Summary judgment for defendants was proper on plaintiff's claims that New Hanover County was liable through respondeat superior for damages to plaintiff's private water system by contractors during construction of a new public system. Plaintiff did not offer evidence that the contractors were agents of the County.

6. Negligence— construction of new water system—not inherently dangerous

Summary judgment was correctly granted against plaintiff on its claim that the construction of a new public water system near plaintiff's private system was an inherently dangerous activity for which the County had a nondelegable duty of care. Plaintiff's injuries did not flow from the risk of contamination.

7. Trespass— construction of new water system—liability of county for contractor

Summary judgment was properly granted against a private water company on its trespass claim against the County resulting from construction of a new public water system.

8. Counties— liability for contractors—notice of statutory violation

The theory that a county could be held liable for the acts of contractors if it had notice that the contractors were violating a statute was not available under the circumstances of this case. The Court of Appeals declined reasoning that would impose additional duties not specified in the Underground Damage Prevention Act.

9. Cities and Towns— construction of new water system—agency—evidence insufficient

Summary judgment was granted correctly for municipalities on claims for damage to a private water system during construction of a new system where the new system was built by contractors for the county. Plaintiff contended that the municipalities were liable as beneficiaries but failed to cite supporting authority, and argued liability under respondeat superior but failed to offer sufficient evidence of agency. Participation by the towns in meetings with the contractors about problems arising from the construction was precisely the watchfulness required of a town when a major construction project impacts the town and does not give rise to a principle-agent relationship.

10. Nuisance— construction of public water system—ownership interest in private system—issue of fact

The trial court should not have granted summary judgment for Carolina Beach on a nuisance claim by the owner of a private water system arising from the construction of a new public system. Carolina Beach's argument for summary judgment was that plaintiff's pleading and evidence did not show the necessary property interest, but, viewed in the light most favorable to plaintiff, there was evidence sufficient to raise an issue of material fact.

11. Appeal and Error— absence of argument or authority—judgment not set aside

The Court of Appeals declined to set aside a summary judgment in the absence of any argument or authority.

Appeal by plaintiff from orders and judgment entered 2 December 2002 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 17 March 2004.

Hunton & Williams, by Edward S. Finley, Jr., for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Mark A. Davis, Douglas W. Hanna and Matthew S. Healey, for defendants-appellees New Hanover County and New Hanover County Board of Commissioners.

J. Albert Clyburn, P.L.L.C., by J. Albert Clyburn, for defendant-appellee The Town of Carolina Beach.

Andrew A. Canoutas, for defendant-appellee The Town of Kure Beach.

Taylor, Penry, Rash & Riemann, PLLC, by Neil A. Riemann, for defendant-appellee T.A. Loving, Inc.

No brief filed on behalf of defendant-appellee Atlantic Construction.

GEER, Judge.

This appeal arises from the construction of a new water and sewer system in Carolina Beach and Kure Beach alongside existing water lines owned by plaintiff Coastal Plains Utilities, Inc. ("Coastal"). Coastal appeals from orders granting summary judgment on all claims to defendants New Hanover County and the New Hanover County Board of Commissioners ("the County"), Kure Beach, and Carolina Beach and granting partial summary judgment to defendant T.A. Loving, Inc. ("Loving") on its claims for wrongful interference with easement and nuisance. We hold that the evidence failed to establish a genuine issue of material fact regarding the municipal defendants' direct liability for plaintiff Coastal's damages and failed to demonstrate that the contractors involved in the project were agents of the municipal defendants so as to support liability based on *respondeat superior*. Coastal also failed to present sufficient evidence to warrant reversing the grant of partial summary judgment to Loving. With respect, however, to Coastal's claim of nuisance asserted against Carolina Beach, we hold that the trial court erred in granting partial summary judgment.

Facts

The evidence, viewed in the light most favorable to Coastal, tended to show the following. Since 1966, Coastal has provided water service to customers in the Wilmington Beach and Hanby Beach communities, using a system that was originally constructed in the 1950s. In 2000, the Wilmington Beach area was annexed by the neighboring town of Carolina Beach and the Hanby Beach area was annexed by the neighboring town of Kure Beach.

In 1997, New Hanover County entered into an agreement with the towns of Carolina Beach and Kure Beach, under which the County agreed to fund and construct a new sewer system for the towns. The agreement was amended in 1999 to include a water distribution system to be installed at the same time. Upon completion of the con-

struction, the towns would operate and maintain the water and sewer system, charging a usage fee to repay the debt incurred by the County to fund the project. After the debt was satisfied, the County would convey the system to the towns.

Development of the new water and sewer system began in October 2000. The County contracted with Engineering Systems, P.A. to design the system and develop specifications and construction documents for the project. Once the plans were complete, the County contracted with Loving to construct the portion of the system serving Carolina Beach and with Atlantic Construction ("Atlantic") to construct the portion of the system serving Kure Beach.

Actual construction of the system began in late 2000. The plans and specifications prepared by Engineering Services required the contractors to use the "open trench" method of construction, which involves digging an open trench in which the utility lines are installed. During construction of the new system, the contractors inflicted numerous cuts to Coastal's lines. The damage to the lines disrupted service to Coastal customers. In some instances, the contractors repaired the broken steel lines with plastic PVC pipe, which according to Coastal, undermined the mechanical integrity of its lines.

In addition, Carolina Beach had previously begun using two wells close to Coastal's existing wells. During the same period as the construction, Coastal began to suspect that Carolina Beach's wells were adversely affecting its wells. According to Coastal's expert witness, as a result of the Carolina Beach wells, Coastal was able to draw less water from its wells, resulting in water pressure problems for Coastal's customers.

Responding to complaints from Coastal's customers, the North Carolina Utilities Commission began monitoring Coastal's system in 2000. On 13 July 2001, the Utilities Commission issued an order finding that Coastal had "abandoned its system" and that an emergency existed with respect to Coastal's water system. On 16 July 2001, Superior Court Judge Benjamin Alford appointed Carolina Beach and Kure Beach as emergency operators of Coastal's water system and ordered Coastal to deliver all billing information for its customers to the towns. According to the record before this Court, Coastal has not operated its system since.

On 2 July 2001, Coastal filed a complaint asserting claims for wrongful interference with easement, trespass to chattels, and negli-

gence against the County, Carolina Beach, Kure Beach, Loving, and Atlantic.[1] In addition to damages, Coastal sought a temporary restraining order, a preliminary injunction, and a permanent injunction preventing defendants from proceeding with the construction. Also on 2 July 2001, Coastal's request for a temporary restraining order and preliminary injunction was granted with the proviso that construction could continue if defendants complied with certain orders of the court. On 4 January 2002, Coastal filed an amended complaint alleging an additional claim against Carolina Beach for nuisance and an injunction preventing Carolina Beach from operating its wells in an unreasonable manner.

All parties filed motions for summary judgment. The matter was heard during the 4 November 2002 civil session of New Hanover County Superior Court. On 2 December 2002, the trial court granted summary judgment in favor of the County, Kure Beach, and Carolina Beach on all claims and entered partial summary judgment in favor of Loving and Atlantic on the claims of wrongful interference with easement and nuisance. The trial court denied Coastal's motion for partial summary judgment on its claim of wrongful interference with easement. From those orders, Coastal filed notice of appeal to this Court on 7 December 2002. Coastal has since settled its claims against Atlantic. At the time of this appeal, Coastal's claims against Loving for trespass to chattels and negligence are still pending.

Motions to Dismiss the Appeal

[1] At the outset, we must address the motions to dismiss this appeal as interlocutory filed by the County, Carolina Beach, and Kure Beach (collectively, "the municipal defendants"). We agree that the appeal is interlocutory, but hold that the appeal involves a substantial right and is, therefore, properly before us.

When an order resolves some, but not all, of the claims in a lawsuit, any appeal from that order is interlocutory. *Mitsubishi Elec. & Elecs. USA, Inc. v. Duke Power Co.*, 155 N.C. App. 555, 559, 573 S.E.2d 742, 745 (2002). Because claims against Loving are still pending, this appeal is interlocutory. An interlocutory appeal is permissible only if (1) the trial court certified the order under Rule 54 of the

1. The New Hanover County Commissioners were sued solely in their official capacity. An official capacity suit brought against a government official is "merely another way of pleading an action against the governmental entity." *Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 725 (1998). Therefore, references to "the County" in this opinion also encompass the County Commissioners.

Rules of Civil Procedure, or (2) the order affects a substantial right that would be lost without immediate review. *Embler v. Embler*, 143 N.C. App. 162, 164-65, 545 S.E.2d 259, 261 (2001). Since the orders at issue in this appeal do not contain a Rule 54 certification, we must determine whether the orders affect a substantial right of plaintiff that cannot be preserved in the absence of an interlocutory appeal.

Our Supreme Court has observed that " 'the right to avoid the possibility of two trials *on the same issues* can be . . . a substantial right.' " *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (quoting *Survey of Developments in North Carolina Law*, 1978, 57 N.C. L. Rev. 827, 908 (1979)). *See also Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982) ("[B]ecause of the possibility of inconsistent verdicts in separate trials, the order allowing summary judgment for fewer than all the defendants in the case before us affects a substantial right."). The Court explained further in *Green* that "[o]rdinarily the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Green*, 305 N.C. at 608, 290 S.E.2d at 596. This Court has interpreted the language of *Green* as creating a two-part test "requiring a party to show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 735-36, 460 S.E.2d 332, 335 (1995).

The municipal defendants argue that there is no danger of inconsistent verdicts here because the Coastal and Loving trial would not involve the same factual issues as any subsequent trial against the municipal defendants. They cite *Jarrell v. Coastal Emergency Servs. of the Carolinas, Inc.*, 121 N.C. App. 198, 464 S.E.2d 720 (1995), in which this Court held that because the first trial would be on liability, while the sole issue for the second trial would be whether a master-servant relationship existed such that the defendant could be held liable under a *respondeat superior* theory, the plaintiff's claims did not present identical factual issues that created the possibility of inconsistent verdicts. *Id.* at 200, 464 S.E.2d at 722-23.

Here, however, because Coastal asserts claims based on direct liability as well as *respondeat superior*, subsequent trials would not be limited to the issue whether a master-servant or principal-agent relationship existed. Moreover, even as to the *respondeat superior* claims, defendants have acknowledged that they would seek to retry

the issues of causation and damages, thus creating a risk of inconsistent verdicts on those issues. For example, in the trial against Loving, a jury could find that Coastal's damages resulted from the new construction or the Carolina Beach wells, while the jury in a second trial could find that the damages arose out of unrelated deterioration to the Coastal system. In addition, Loving would argue at its trial that any damage was the result of the design of the system and was not due to any negligence of Loving. The municipal defendants would, however, likely argue in any subsequent trial that the damage was caused by Loving. Accordingly, we hold that because there is a potential for inconsistent verdicts, the orders appealed from affect a substantial right and are immediately appealable.

Standard of Review

The North Carolina Rules of Civil Procedure provide that 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). In deciding the motion, " 'all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.' " *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting 6 James W. Moore et al., *Moore's Federal Practice* § 56-15[3], at 2337 (2d ed 1971)).

The party moving for summary judgment has the burden of establishing the lack of any triable issue. *Collingwood v. General Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Id.* In opposing a motion for summary judgment, the non-moving party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C.R. Civ. P. 56(e).

On appeal, this Court's task is to determine, on the basis of the materials presented to the trial court, whether 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*, 276 S.E.2d 283 (1981). A trial court's ruling on a motion for summary judgment is reviewed

de novo as the trial court rules only on questions of law. *Va. 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).

Wrongful Interference with Easement

[2] Coastal first argues that the present location of the County's water and sewer system wrongfully interferes with Coastal's recorded easements by interfering with Coastal's access to its own system for purposes of repair and maintenance and by risking contamination of Coastal's water or more damage to Coastal's system in the future.[2] Coastal attempts to hold each of the defendants liable for the wrongful interference.

Coastal has acknowledged that its easements were nonexclusive. When an easement is nonexclusive, the grantor may later grant similar easements to others, including the general public. *Commercial Fin. Corp. v. Langston*, 24 N.C. App. 706, 712, 212 S.E.2d 176, 180, *cert. denied*, 287 N.C. 258, 214 S.E.2d 429 (1975). In that case, to make out a claim for wrongful interference with easement, a party must show "an interference inconsistent with plaintiff's easement." *Carolina Power & Light Co. v. Bowman*, 229 N.C. 682, 686, 51 S.E.2d 191, 194 (1949). The mere invasion or entry onto an easement is insufficient to prove interference. Instead, the use must "materially impair or unreasonably interfere with the exercise of the rights granted in the easement." *Carolina Cent. Gas Co. v. Hyder*, 241 N.C. 639, 642, 86 S.E.2d 458, 460 (1955). In addition, "once an interference with an easement has been shown, in order to make out a cause of action a plaintiff bears the burden of proving that the interference injured his interests in some way." *Century Communications, Inc. v. The Housing Authority of the City of Wilson*, 313 N.C. 143, 148-49, 326 S.E.2d 261, 265 (1985).

The undisputed evidence indicates Coastal has not operated its system since July 2001 when Carolina Beach and Kure Beach were appointed as emergency operators of the system. On 7 August 2001, the Utilities Commission entered an order providing that "the appointment of the emergency operators shall remain effective until further order of the Commission." The record contains no order of the Commission relieving the emergency operators. On 6 May 2002, Ralph B. Harper, Environmental Engineer with the Public Water Supply Section of the Division of Environmental Health, notified

2. We address below Coastal's arguments regarding damage to its system inflicted during the construction.

Coastal that Coastal's wells had been "deleted from [the Division's] inventory as sources of water because they had not been used since July of 2001" and, at that time, had failed state inspections. Coastal's President Allie Moore testified in August 2002 that Coastal had been "relieved of that water works[,]" he was "out of business[,]" and "[t]he system is destroyed."

In sum, Coastal has presented no evidence that (1) it is still operating its system and using its easements, (2) that prior to the emergency operator order the location (as opposed to the construction) of the new water and sewer system actually interfered with Coastal's easement, or (3) that it will be operating its system in the future. Coastal has offered no explanation and we fail to see how there can be a material interference with Coastal's easements causing any injury to Coastal if Coastal is no longer operating its water system. Therefore, summary judgment was properly granted as to this claim.

Liability Under the Underground Damage Prevention Act

[3] Coastal argues that the municipal defendants failed to comply with the Underground Damage Prevention Act ("the UDPA"), N.C. Gen. Stat. §§ 87-100 (2003) *et seq.* With respect to the County, Coastal argues: "[The County] also is liable under Article 8 of Chapter 87 of the General Statutes because it planned the excavation and failed to comply with its responsibilities under that Article. [The County] owns the encroaching facilities." As for Kure Beach and Carolina Beach, Coastal claims that they breached their duties under N.C. Gen. Stat. § 87-105, as "person[s] financially responsible" for the excavation. Under the statute, " '[p]erson financially responsible' means that person who ultimately receives the benefits of any completed excavation activities . . . ." N.C. Gen. Stat. § 87-101(7).

This Court has held that the UDPA establishes a duty of care owed by persons engaged in excavation to owners of underground utilities. *Continental Tel. Co. of N.C. v. Gunter*, 99 N.C. App. 741, 743-44, 394 S.E.2d 228, 230, *disc. review denied*, 237 N.C. 633, 399 S.E.2d 325 (1990). The UDPA provides in N.C. Gen. Stat. § 87-102(a) (emphasis added) that "before commencing any excavations . . . in private easements of a utility owner, *a person planning to excavate* shall notify each utility owner having underground utilities located in the proposed area to be excavated, either orally or in writing, not less than two nor more than 10 working days prior to starting, of his intent to excavate." The statute further requires the "person financially responsible" for the excavation to provide to "the person responsible

for doing the excavating" the names of all underground utility owners in the area of the proposed excavation. N.C. Gen. Stat. § 87-105. Another section places additional duties on "each person excavating." N.C. Gen. Stat. § 87-104.

The County concedes it was the "person financially responsible" for the excavation and that its duty as such was to provide "the person responsible for doing the excavating" with the names of utility owners in the area being excavated. Coastal has argued no basis for any claim that the municipal defendants were the "person[s] excavating" and subject to N.C. Gen. Stat. § 87-104. We need not decide whether Kure Beach and Carolina Beach were "person[s] financially responsible" because the undisputed evidence shows that the people doing the excavation—Loving and Atlantic—received the notification required by N.C. Gen. Stat. § 87-105. In addition, consistent with N.C. Gen. Stat. § 87-102, the record shows that there was a meeting between the County, the contractors, and Coastal and that Coastal was advised of the construction and was asked to mark the lines where its pipes lay. The record contains no basis for holding the municipal defendants liable under the UDPA.

Claims Against the County Based on Damage to Coastal's System

Coastal contends that the County is directly liable for the damage to Coastal's water system because the County designed the project in a way that necessarily resulted in damage to Coastal's system. Coastal also contends that the County is liable for damage resulting from tortious conduct of the contractors Loving and Atlantic during the construction of the new system based on *respondeat superior* and because any duty was nondelegable. We will address each of these claims individually.

A. Liability Based on Design of the System

[4] According to Coastal, it "has stated a claim against [the County] because [the County] designed the new systems so as to interfere with [Coastal's]. The specifications, drawings and contracts were issued in [the County's] name." The undisputed evidence shows, however, that the County did not design the system itself, but rather contracted with an engineering firm, Engineering Services, P.A., to design the system. Wyatt Blanchard, the County Engineer, explained in his unrefuted affidavit that "[the County] does not have the staff to design and construct the proposed sewer system for the Wilmington/Hanby Beach area. Therefore, the role of [the County]

was to fund the project and contract with companies to perform the necessary work. . . . On April 15, 1998, [the County] entered into a contract with Engineering Services, P.A. to design, develop specifications and construction documents for the project intended to provide public sewer to the areas known as Carolina Beach and Kure Beach."

In discussing the County's insurance policy and its exclusion of claims arising out of the activities of professionals, including architects and engineers, Coastal asserts in its brief that "[Coastal] makes no claim against any such professional on [the County's] staff. [Coastal's] claims are against [the County] as owner of the project and as employer of the agents that injured [Coastal's] property." This assertion appears to disclaim any contention that the County's staff improperly designed the system.

We assume, although Coastal's brief is not clear on this point, that Coastal is contending that the County is liable for the acts of Engineering Services in designing the system. The general rule is that a company is not liable for the torts of an independent contractor committed in the performance of the contracted work. *Page v. Sloan*, 12 N.C. App. 433, 439, 183 S.E.2d 813, 817 (1971), *aff'd*, 281 N.C. 697, 190 S.E.2d 189 (1972). The issue before this Court is, therefore, whether Coastal submitted sufficient evidence to give rise to a genuine issue of material fact on the question whether Engineering Services was an agent of the County or an independent contractor.

As this Court has previously stated, "[t]here are two essential ingredients in the principal-agent relationship: (1) Authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent." *Vaughn v. N.C. Dep't of Human Resources*, 37 N.C. App. 86, 91, 245 S.E.2d 892, 895 (1978), *aff'd*, 296 N.C. 683, 252 S.E.2d 792 (1979). More recently, this Court has confirmed that " '[t]he critical element of an agency relationship is the right of control . . . .' " *Wyatt v. Walt Disney World, Co.*, 151 N.C. App. 158, 166, 565 S.E.2d 705, 710 (2002) (quoting *Williamson v. Petrosakh Joint Stock Co.*, 952 F. Supp. 495, 498 (S.D. Tex. 1997)). Specifically, " 'the principal must have the right to control *both the means and the details of the process* by which the agent is to accomplish his task in order for an agency relationship to exist.' " *Id.* (quoting *Williamson*, 952 F. Supp. at 498; emphasis added). *See also Hylton v. Koontz*, 138 N.C. App. 629, 636, 532 S.E.2d 252, 257 (2000) (internal quotation marks omitted) (whether or not a party has retained the right of control "as to details" is the "vital test" in determining

whether an agency relationship exists), *disc. review denied*, 353 N.C. 373, 546 S.E.2d 603 (2001); *Hoffman v. Moore Regional Hosp.*, 114 N.C. App. 248, 251, 441 S.E.2d 567, 569 (the principal must have "control and supervision over the details of the [agent's] work"), *disc. review denied*, 336 N.C. 605, 447 S.E.2d 391 (1994). An independent contractor, by contrast, is one who " 'exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work.' " *McCown v. Hines*, 353 N.C. 683, 686, 549 S.E.2d 175, 177 (2001) (quoting *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 384, 364 S.E.2d 433, 437 (1988)).

The contract between Engineering Services and the County provided that Engineering Services was an independent contractor. While the parties' label on their relationship is not controlling evidence, *Williams v. ARL, Inc.*, 133 N.C. App. 625, 629, 516 S.E.2d 187, 191 (1999), Coastal has not offered any evidence suggesting that Engineering Services was anything but an independent contractor. Indeed, Coastal does not address the relationship at all other than to describe Engineering Services as the County's "outside engineering consultant[.]" In addition, Gilbert Dubois, the "Construction Observer" employed by Engineering Services, stated in an unrefuted affidavit: "No agent or employee of the County supervised me or directed my hours of operation."

Since the County supported its motion for summary judgment with evidence that Engineering Services was an independent contractor, the burden shifted to Coastal to present evidence of agency. It failed to do so. Without evidence of agency, the County cannot be held liable based on the conduct of Engineering Services. Accordingly, summary judgment was proper on Coastal's claims to the extent they are based on the design of the new water and sewer system.

B. Liability Based on the Construction of the System

1. Respondeat Superior

[5] With respect to damages arising out of Loving's and Atlantic's construction of the system (as opposed to the design of the system), we must determine if Coastal offered sufficient evidence to raise an issue of fact regarding whether Loving and Atlantic were agents of the County or independent contractors. The County again points to the provision in the parties' contracts stating that the relationship

was one of independent contractors. Because this label is not controlling, we look to the factors traditionally reviewed by our courts in determining whether a person is an independent contractor: whether the person (1) is engaged in an independent business, calling, or occupation; (2) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (3) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (4) is not subject to discharge because he adopts one method of doing the work rather than another; (5) is not in the regular employ of the other contracting party; (6) is free to use such assistants as he may think proper; (7) has full control over such assistants; and (8) selects his own time. *McCown*, 353 N.C. at 687, 549 S.E.2d at 177-78. "No particular one of these factors is controlling in itself, and all the factors are not required. Rather, each factor must be considered along with all other circumstances to determine whether the [person] possessed the degree of independence necessary for classification as an independent contractor." *Id.*, 549 S.E.2d at 178.

Having reviewed the evidence submitted by the parties in light of these factors, we hold that Coastal has failed to submit sufficient evidence to give rise to an issue of fact on the question of agency. The undisputed evidence reveals that each of the contractors is engaged in the business of construction, independent from the County. In constructing the systems in accordance with Engineering Services' plans, the agents and employees of the contractors exercised independent use of their skill, knowledge, and training. The contractors determined their own hours of operation and hired their own employees and the County had no right to control how they divided up work among the employees and subcontractors. In addition, the contracts provided that each of the contractors would construct a specified portion of the water/sewer system at a fixed price: Loving was paid $3,307,537.00 to construct the system in Carolina Beach, and Atlantic was paid $1,406,648.50 to construct the system in Kure Beach.

Coastal does not address the factors set out in *McCown*, but rather argues that because the contractors were required to construct the system in accordance with plans and specifications provided by the County defendants, the contractors were agents of the County defendants. The Supreme Court has long rejected such a contention. The Court stated in *Economy Pumps, Inc. v. F. W. Woolworth Co.*, 220 N.C. 499, 502, 17 S.E.2d 639, 641 (1941):

> When a contractor has undertaken to do a piece of work, according to plans and specifications furnished, . . . , this relation

> of independent contractor is not affected or changed because the right is reserved for the engineer, architect or agent of the owner or proprietor to supervise the work to the extent of seeing that the same is done pursuant to the terms of the contract.

See also McCown, 353 N.C. at 688, 549 S.E.2d at 178 (instructions from owner requiring certain placement of shingles were "decisions within the control of the owner" and did not alter the independent contractor relationship); *Oldham & Worth, Inc. v. Bratton*, 263 N.C. 307, 313, 139 S.E.2d 653, 658 (1965) (person was an independent contractor when his "contractual obligation was to construct [defendant's] residence in accordance with the Drawings and Specifications" and defendant "was concerned only with the final result, namely, the construction and completion of the residence in accordance with the Drawings and Specifications"); *Ramey v. Sherwin-Williams Co.*, 92 N.C. App. 341, 345, 374 S.E.2d 472, 474 (1988) ("[T]he fact that a worker is supervised to the extent of seeing that his work conforms to plans and specifications does not change his status from independent contractor to employee.").

As this Court has observed:

> "An owner, who wants to get work done without becoming an employer, is entitled to as much control of the details of the work as is necessary to ensure that he gets the end result from the contractor that he bargained for. In other words, there may be a control of the quality or description of the work itself, as distinguished from control of the person doing it, without going beyond the independent contractor relation."

Cook v. Morrison, 105 N.C. App. 509, 514, 413 S.E.2d 922, 925 (1992) (quoting 1C A. Larson, *The Law of Workmen's Compensation* § 44.21 (1991)). Thus, in *Ramey*, 92 N.C. App. at 345, 374 S.E.2d at 474, this Court found that the worker was an independent contractor even though he was required to follow a blueprint and was visited at the job site once a week by an employee of defendant to make sure there were no problems. Similarly, in *Cook*, 105 N.C. App. at 514, 413 S.E.2d at 925, "[t]hat the defendant occasionally gave instructions and made suggestions to [the worker] concerning engineering requirements set out in the blueprints for the sewer system [did] not create an employer-employee relationship." Here, the fact that the contractors were required to construct the system in accordance with Engineering Services' plans and specifications did not transform the contractors into agents of the County.

Coastal also points to the purported supervision of Loving and Atlantic by Gilbert Dubois, undisputedly an employee of Engineering Services and not of the County. Coastal cites no authority suggesting that a company can be converted from an independent contractor into an agent as a result of supervision by a second independent contractor. Moreover, Dubois' uncontradicted affidavit states: "At no time was I authorized to control or supervise the independent contractors, T.A. Loving and Atlantic Construction. My involvement was limited to observation and inspection. It was not my job to direct the contractors."

Because Coastal has failed to offer evidence demonstrating that the contractors were agents of the County, summary judgment was also proper as to Coastal's claims to the extent they are based on *respondeat superior*.

2. Nondelegable Duty

[6] Alternatively, Coastal argues that the County can be held liable for the acts of Loving and Atlantic even if they are independent contractors. Although one who employs an independent contractor is generally not liable for the contractor's acts, our Supreme Court has recognized an exception when the employer has hired the independent contractor to perform an inherently dangerous activity. *Woodson v. Rowland*, 329 N.C. 330, 352, 407 S.E.2d 222, 235 (1991). "One who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others[.]" *Id.*

To establish a breach of the nondelegable duty, a plaintiff must show: (1) the activity causing the injury was, at the time of the injury, inherently dangerous, (2) the employer knew or should have known, at the time of the injury, of the inherent dangerousness of the activity, (3) the employer failed to take reasonable precautions or ensure that such precautions were taken to avoid the injury, and (4) this negligence was a proximate cause of the plaintiff's injuries. *O'Carroll v. Texasgulf, Inc.*, 132 N.C. App. 307, 312, 511 S.E.2d 313, 317-18, *disc. review denied*, 350 N.C. 834, 538 S.E.2d 198 (1999). In *Woodson*, our Supreme Court held that "[i]t must be shown that because of [the circumstances surrounding the activity], the [activity] itself presents 'a recognizable and substantial danger inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor.' " *Woodson*, 329 N.C. at

356, 407 S.E.2d at 237 (quoting *Evans v. Elliott*, 220 N.C. 253, 259, 17 S.E.2d 125, 128 (1941)).

Coastal contends that the water and sewer project was inherently dangerous because of the potential for contamination of the water delivered to consumers. We need not determine whether Loving and Atlantic were performing an inherently dangerous activity because Coastal's injuries and damages do not arise out of the risk of contamination. Coastal cannot demonstrate that its damages were caused by the County's breach of any nondelegable duty of safety.

[7] Coastal also argues that the employer of an independent contractor "may be liable for trespass to land or chattels if the independent contractor's trespass was committed at the direction of the employer, or where the work necessarily involved a trespass (41 Am. Jur. § 50) or where trespass is likely to occur. *Id.*; Restatement, Torts 2d, § 427B." Coastal relies upon the design of the new water and sewer system in arguing that the project was likely to result in a trespass. As discussed above, however, independent contractor Engineering Services designed the project and not the County. *Cf. Woodson*, 329 N.C. at 358, 407 S.E.2d at 238 (holding that a developer is not liable for actions of subcontractor based on a nondelegable duty when it lacks expertise in construction and justifiably relies entirely on the expertise of its general contractor). Coastal has not pointed to any evidence that the project, if properly designed, would likely have caused a trespass. Without such evidence, the County could not be held liable under this theory. *Compare Horne v. City of Charlotte*, 41 N.C. App. 491, 493-94, 255 S.E.2d 290, 292 (1979) (municipality was liable when it hired an independent contractor to remove trash and weeds from plaintiff's property, a contract requiring a trespass).

[8] Finally, Coastal contends, without citing any North Carolina authority, that the County can be held liable if it had notice that the contractors were violating a statute, such as the UDPA. Without deciding whether this theory applies in North Carolina, we hold that it is unavailable under the circumstances of this case. Our General Assembly has specified in the UDPA the duties owed by the party financially responsible for the excavation and by the party performing the excavation. Application of Coastal's reasoning would impose on the party financially responsible additional duties not specified in the statute and would disrupt the allocation provided for in the UDPA. We decline to do so without indication that this approach is consistent with the intent of the General Assembly.

Claims Against Kure Beach and Carolina Beach Based on Damage to Coastal's System

[9] Coastal attempts to hold Kure Beach and Carolina Beach vicariously liable for the acts of the County and its contractors. Although Coastal argues that the towns are liable for the County's actions because they will be the beneficiaries of the system, it has failed to cite any supporting authority for this argument. Our appellate rules require that arguments of appellants "contain citations of the authorities upon which the appellant relies." N.C.R. App. P. 28(b)(6). Coastal has, therefore, abandoned this argument. *State v. Thompson*, 110 N.C. App. 217, 222, 429 S.E.2d 590, 592 (1993).

With respect to *respondeat superior* liability, as discussed earlier, the critical element of an agency relationship " 'is the right of control.' " *Wyatt*, 151 N.C. App. at 166, 565 S.E.2d at 710 (quoting *Williamson*, 952 F. Supp. at 498). Coastal has failed to offer any evidence that the towns had a "right to control" the contractors. With respect to the contractors, neither Kure Beach nor Carolina Beach had a contract with either Loving or Atlantic. Coastal's brief refers repeatedly to the liability of the "employer" of a contractor for the acts of the contractor, but provides no evidence that either town employed the contractors. Coastal has pointed to no evidence that the towns have any legal right, apart from their police power, to require the contractors to do anything.

Coastal has instead relied on the towns' participation in meetings with the contractors and expressions of concern as to problems arising out of the construction. For example, Coastal cites a letter from Kure Beach Public Works to the County's engineer in which he included a "quick list of concerns that we came up with yesterday from the Kure Beach project[,]" including problems such as debris and sand washing into ditches and the need to seed areas with grass. This letter, the towns' monitoring of the construction, and the towns' participation in meetings do not show that the towns had the right to control the means and the details of the construction project, but rather that the towns were performing precisely the role required of a town in connection with a major construction project impacting that town. As the cases discussed in connection with the County's liability demonstrate, this degree of watchfulness does not give rise to a principal-agent relationship.

The trial court properly granted summary judgment to the towns based on damage arising from the design and construction of the water and sewer system.

Claims Against Carolina Beach Based on its Wells

[10] Coastal has also asserted a nuisance claim against Carolina Beach, alleging that two of Carolina Beach's wells make "unreasonable use" of an underground stream that is also the source for Coastal's wells. Carolina Beach's sole argument in support of the trial court's summary judgment order as to the nuisance claim is that Coastal failed to plead in its complaint and to produce sufficient evidence in opposition to summary judgment that it had the necessary property interest to assert a nuisance claim.

A party, such as Coastal, asserting a riparian right "must show that [it] is a riparian proprietor or that in some way [it] has acquired riparian rights in the stream." *Durham v. Cotton Mills*, 141 N.C. 615, 627, 54 S.E. 453, 457 (1906). "[A] riparian proprietor is entitled to the natural flow of a stream running through or along his land in its accustomed channel, undiminished in quantity and unimpaired in quality, except as may be occasioned by the reasonable use of the water by other like proprietors." *Smith v. Town of Morganton*, 187 N.C. 801, 803, 123 S.E. 88, 89 (1924).

Coastal alleged in its complaint that it owned the wells and attached to the complaint various deeds and other documents conveying the real property and easements making up the waterworks that now form Coastal's water system. Although Coastal has not submitted evidence pinpointing the location of its wells in relation to the deeds, when the evidence is viewed in the light most favorable to Coastal, the documents expressing an intent to convey ownership of all of the assets of the waterworks, specifically including the wells, are sufficient to give rise to a genuine issue of material fact as to whether Coastal has the necessary property interest to assert a nuisance claim.

Since the sole issue raised before this Court is Coastal's property interest, we hold that the trial court erred in granting summary judgment as to this claim. We express no opinion regarding any of the other elements of the claim.

Claims Against Loving

[11] Although Coastal assigned error to the trial court's grant of summary judgment to Loving with respect to the wrongful interference with easement claim, Coastal has not argued this issue separately as to Loving.[3] We have already held that the trial court properly granted

3. Coastal has not assigned error regarding the entry of judgment for Loving as to the nuisance claim.

summary judgment as to Coastal's argument that the present location of the water and sewer system interferes with its water system. We also note, however, that Coastal has cited no authority supporting such a claim against Loving, which has no ongoing interest in the water and sewer system. With respect to the damage to Coastal's water lines during Loving's construction, Coastal has made no argument and cites no authority why this conduct supports a claim for wrongful interference with easement as opposed to trespass to chattels and negligence, the claims that are still pending against Loving. In the absence of any argument or authority, we decline to set aside the trial court's grant of summary judgment for Loving as to the claim for wrongful interference with easement.

Affirmed in part and reversed in part.

Judges McCULLOUGH and HUDSON concur.

WMS, INC., CELLULAR PLUS OF NORTH CAROLINA, INC., AND DAVID KILPATRICK, PLAINTIFFS V. JERRY W. WEAVER, ALLTEL COMMUNICATIONS, INC., AND ALLTEL COMMUNICATIONS OF THE CAROLINAS, INC., DEFENDANTS

No. COA03-1063

(Filed 5 October 2004)

1. **Arbitration and Mediation— ambiguous arbitration agreement—authority to construe**

The trial court erred by modifying an arbitration panel's award to eliminate treble damages on an unfair trade practices claim where the arbitration agreement was ambiguous and the arbitrators had the authority to construe the remedial provision. Neither the trial court nor the appellate court may vacate the arbitration award based on a disagreement with the arbitrators about the proper construction of the contract's term.

2. **Arbitration and Mediation— attorney fees—issue not raised at arbitration—waived**

Defendant Alltel waived its right to contest an arbitration panel's authority to award attorney fees by not raising the issue at arbitration. Defendant opposed the fees based on whether

they were warranted under N.C.G.S. § 75-16, but did not object to the panel's consideration of the issue despite several opportunities to do so.

Appeal by plaintiff Cellular Plus of North Carolina, Inc. and cross-appeal by defendants Alltel Communications, Inc. and Alltel Communications of the Carolinas, Inc. from the order and judgment entered 24 April 2003 by Judge Ripley E. Rand in Wake County Superior Court. Heard in the Court of Appeals 28 April 2004.

Herring, McBennett, Mills & Finkelstein, P.L.L.C., by Mark A. Finkelstein and Stephen W. Petersen, for plaintiffs-appellants/cross-appellees.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Burley B. Mitchell, Jr., Pressly M. Millen, and Sean E. Andrussier, for defendants-appellees/cross-appellants Alltel Communications, Inc. and Alltel Communications of the Carolinas, Inc.

GEER, Judge.

This appeal arises out of the challenge of defendants Alltel Communications, Inc. and Alltel Communications of the Carolinas, Inc. (collectively "Alltel") to an arbitration award in favor of plaintiff Cellular Plus of North Carolina, Inc. ("Cellular Plus"). The trial court ruled that the arbitration panel had no authority under the parties' arbitration agreement to award treble damages, but that the panel could properly award attorneys' fees. The parties have each appealed. We hold that the trial court erred in setting aside the treble damages award, but affirm the trial court's ruling as to the attorneys' fees.

Factual Background

On 19 December 2000, plaintiffs WMS, Inc. ("WMS"), Cellular Plus, and David Kilpatrick filed suit in Wake County Superior Court against defendants Alltel and Jerry W. Weaver, asserting various claims arising out of business dealings between the parties, including a claim for unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1 (2003). Cellular Plus and Alltel had entered into a dealer agreement dated 4 June 1999 (the "Agreement"). Pursuant to the Agreement, Cellular Plus, an independent dealer, agreed to market Alltel's wireless cellular communication services in exchange for payment of commissions by Alltel.

On 8 January 2001, defendants moved to compel arbitration pursuant to the Agreement. Section 16.19 of the Agreement provided:

> Arbitration: (a) Any controversy, dispute, or claim arising out of [or] relating to this contract, the relations between ALLTEL and [Cellular Plus], or the Service provided by ALLTEL, including but not limited to a claim based on or arising from an alleged tort or a dispute as to the applicability of this provision to any dispute, shall be settled by arbitration administered by the American Arbitration Association under its Wireless Industry Arbitration rules. (b) The arbitrator may not vary the terms of the parties' agreement. (c) All statutes of limitations which would otherwise be applicable in a judicial action brought by a party shall apply to any arbitration and shall be given effect by the arbitrators. (d) Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. (e) The arbitrator shall have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, nor shall any party seek punitive damages relating to any matter arising out of this contract in any other forum. (f) All claims shall be arbitrated individually, and there shall be no consolidation or class treatment of any claim. (g) The parties expressly agree that, notwithstanding the foregoing, in the event either party believes the Agreement has been or will be unlawfully terminated and emergency relief is required, such party may apply to the American Arbitration Association therefor under its "Optional Rules for Emergency Measures of Protection."

On 15 February 2001, the trial court entered an order concluding "that all of the claims alleged in the Amended Complaint are governed by the arbitration clause" and directing plaintiffs to "pursue their claims with the American Arbitration Association pursuant to the terms of the arbitration clause[.]"

On 10 October 2002, following an evidentiary hearing, the three-member arbitration panel issued a "Posthearing Order," stating, "[t]he parties have stipulated and the Arbitrators direct" that (1) the hearing would remain open for submission of briefs, oral arguments, and submission of other exhibits; and (2) "[t]o the extent that the Arbitrators may deem it appropriate to make an award of attorneys fees, counsel for the parties will be requested, not later than the close of the oral arguments on November 25, 2002, to submit affidavits with respect to same." In a second "Posthearing Order," dated 26 November 2002, the panel stated that if it found defendants liable under N.C. Gen.

Stat. § 75-1.1, it would enter an interim award by 25 December 2002 "on all issues except for any award of Attorney's fees." If the panel decided that an award of attorneys' fees would be appropriate, the panel would receive affidavits from counsel for all parties on the issue of attorneys' fees and an award would be entered no later than 31 January 2003.

On 23 December 2002, the panel issued an "Interim Award." Pursuant to an agreement between the parties, the Interim Award contained no specific findings of fact. The award dismissed all claims asserted by plaintiffs WMS and Kilpatrick, as well as all claims asserted against defendant Weaver. In the award, the arbitrators concluded that Alltel had breached the Agreement and that Alltel had "engaged in unfair and deceptive acts and practices under Section 75-1.1 of the General Statutes of North Carolina." The arbitrators awarded Cellular Plus damages in the amount of $962,500.00, "said amount to be trebled in accordance with Section 75-16 of the General Statutes . . . to make the award $2,887,500[.]" With respect to attorneys' fees, the interim award provided:

> (7) This award shall be deemed to be an interim award pending consideration by the Panel of Arbitrators of a further award to [Cellular Plus], pursuant to Section 75-16.1 of the General Statutes of North Carolina, allowing a reasonable attorney fee to the attorneys representing [Cellular Plus]. *Pursuant to the consent and stipulation of the parties at the oral arguments held in this case on November 25, 2002*, counsel for [Cellular Plus] and counsel for [Alltel] shall submit to the Panel not later than January 15, 2003, affidavits of said counsel, together with affidavits of third parties having knowledge of facts pertinent to the issue, if any, with respect to (1) the reasonableness of the amount of the attorneys' fees and expenses charged by [Cellular Plus'] counsel as set out in the affidavits submitted to the Panel and to opposing counsel by [Cellular Plus'] counsel on November 25, 2002 and (2) whether there was an unwarranted refusal by [Alltel] to fully resolve the matter constituting the basis of the claims in this case. *Pursuant to the consent and stipulation of the parties at the oral arguments held in this case on November 25, 2002, the Panel will consider and make a decision and an award on said issues based upon said affidavits.* A Final Award in this arbitration proceeding, with respect to attorneys fees, if any, will be entered not later than January 31, 2003.

(Emphasis added)

On 31 January 2003, the arbitrators issued a "Final Award" in which they concluded "that there was an unwarranted refusal by [Alltel] to fully resolve the matter . . . under Section 75-1.1 of the General Statutes[.]" The arbitrators, therefore, awarded Cellular Plus attorneys' fees in the amount of $352,640.00. The Final Award provided that the parties would pay equally the administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the arbitrators totaling $91,515.13.

On 3 February 2003, Alltel filed a motion in Wake County Superior Court, requesting that the court either (1) vacate the arbitrators' interim and final awards "on the grounds that the arbitrators exceeded their powers in awarding [Cellular Plus] treble damages and attorneys' fees," or (2) modify the arbitrators' interim and final awards to eliminate the awards of treble damages and attorneys' fees. On 13 February 2003, Cellular Plus moved the trial court to confirm the arbitrators' interim and final awards.

The trial court concluded, in pertinent part:

> 5. The arbitration panel did not have the authority under Section 16.19(e) of the parties' Arbitration Agreement to award treble damages to Plaintiffs pursuant to N.C. Gen. Stat. § 75-16 based on the finding of unfair and deceptive trade practices. Plaintiffs do not cite to any evidence that Defendants waived this issue by participating in the arbitration of it, and a review of the arbitration proceedings and the filings in this matter reveal that Defendants did challenge the authority of the arbitration panel to deal with the issue of treble damages at the hearing on that issue.
>
> 6. The arbitration panel did not have the authority pursuant to Section 16.19(a) of the parties' Arbitration Agreement and Rules R-41 and R-4[8] of the Wireless Industry Arbitration Rules to award attorneys' fees to Plaintiffs pursuant to N.C. Gen. Stat. § 75-16.1.
>
> 7. While as a preliminary matter the arbitration panel did not have the authority noted in CONCLUSION OF LAW # 6 to award attorneys' fees pursuant to the agreement, Defendants waived the right to contest the authority of the arbitration panel to address this matter by fully arguing the attorneys' fees issue before the arbitration panel without contending that the arbitrators lacked authority to decide that issue and without preserving that argument for further judicial review. As such, Defendants have

waived the right to challenge the award of attorneys' fees on judicial review of the award.

Based on these conclusions, the trial court modified the arbitrators' award to provide for an award to Cellular Plus in the amount of $962,500.00 in actual damages. The court declined to alter the award of attorneys' fees. The trial court subsequently denied Cellular Plus' motion pursuant to Rule 59, asking the court to reinstate the treble damages award based on a 7 April 2003 decision of the United States Supreme Court, *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 155 L. Ed. 2d 578, 123 S. Ct. 1531 (2003).

On 30 April 2003, Cellular Plus filed a notice of appeal from the portion of the trial court's order vacating the arbitrators' award of treble damages. On 16 May 2003, Alltel filed its notice of cross-appeal from the portion of the order confirming the arbitrators' award of attorneys' fees. We address Cellular Plus' appeal and Alltel's cross-appeal in turn.

Since this appeal arises from a decision on a motion to confirm an arbitration award, we first note "that a strong policy supports upholding arbitration awards." *Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 234, 321 S.E.2d 872, 879 (1984). As our Supreme Court has stressed:

> "There is no right of appeal and the Court has no power to revise the decisions of 'judges who are of the parties' own choosing.' An award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus . . . arbitration instead of ending would tend to increase litigation."

Id. at 236, 321 S.E.2d at 880 (quoting *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 41 N.C. App. 407, 414-15, 255 S.E.2d 414, 419-20 (1979)).

I

[1] As the trial court recognized, this case presents a preliminary question: Does the Federal Arbitration Act ("FAA") or does the North Carolina Uniform Arbitration Act govern the issues on this appeal? This question cannot be bypassed as the FAA preempts conflicting

state law, including state law addressing the role of courts in reviewing arbitration awards. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272, 130 L. Ed. 2d 753, 763, 115 S. Ct. 834, 838 (1995). If the FAA requires that a particular question be determined by the arbitrators, while state law would allow a court to address the issue, the FAA controls. We must, therefore, first determine whether the parties' arbitration agreement falls under the FAA.

The FAA governs any "contract evidencing a transaction involving commerce." 9 U.S.C. § 2 (2000). Under *Allied-Bruce*, the FAA's term "involving commerce" is considered the functional equivalent of "affecting commerce." *Allied-Bruce*, 513 U.S. at 277, 130 L. Ed. 2d at 766, 115 S. Ct. at 841. It is broader than the term "in commerce" and "signals an intent to exercise Congress' commerce power to the full." *Id.* The trial court concluded below that the FAA governs in this case. While the parties hedge their bets on appeal, they have not directly challenged the trial court's determination. In addition, we see no basis in the record for any conclusion other than that the contract at issue evidences a transaction involving commerce. The FAA, therefore, controls. As a result, this Court is bound, in deciding this appeal, by decisions of the United States Supreme Court construing and applying the FAA.

The FAA allows a court to vacate an award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4) (2000), *amended by* Act of May 7, 2002, 9 U.S.C.A. § 10(a)(4) (West Supp. 2004). Defendants asked the trial court to vacate the arbitration award in this case on the grounds that the arbitration panel did not have the power, under the parties' contract, to award treble damages. Defendants rely on the provision in their arbitration agreement stating: "The arbitrator shall have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, nor shall any party seek punitive damages relating to any matter arising out of this contract in any other forum."

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 131 L. Ed. 2d 76, 115 S. Ct. 1212 (1995), the United States Supreme Court addressed an issue almost identical to the one presented here. The defendant in *Mastrobuono* had moved to vacate an arbitration award that included punitive damages, arguing that the arbitrators had, in awarding punitive damages, exceeded their power under the arbitration agreement. The Supreme Court characterized

the question presented as "whether the arbitrators' award is consistent with the central purpose of the [FAA] to ensure 'that private agreements to arbitrate are enforced according to their terms.' " *Id.* at 53-54, 131 L. Ed. 2d at 82, 115 S. Ct. at 1214 (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 103 L. Ed. 2d 488, 500, 109 S. Ct. 1248, 1255-56 (1989)).

The Supreme Court first observed that the parties' contract did not expressly preclude punitive damages. *Id.* at 59, 131 L. Ed. 2d at 85, 115 S. Ct. at 1217. The defendant pointed to two provisions that it contended, when read together, necessarily led to the conclusion that the arbitrators were barred from awarding punitive damages. The Supreme Court, however, concluded that those provisions were not "an unequivocal exclusion of punitive damages claims," *id.* at 60, 131 L. Ed. 2d at 86, 115 S. Ct. at 1217, but rather rendered the arbitration agreement ambiguous, *id.* at 62, 131 L. Ed. 2d at 87, 115 S. Ct. at 1218. The Court then applied the principles that (1) ambiguities as to the scope of an arbitration clause must be resolved in favor of arbitration, and (2) a court should construe ambiguous language in a contract against the interest of the party that drafted it. Based on this analysis, it held that "[t]he arbitral award should have been enforced as within the scope of the contract." *Id.* at 64, 131 L. Ed. 2d at 88, 115 S. Ct. at 1219. The Court accordingly reversed the decision vacating the award. *Id.*

Courts have since interpreted *Mastrobuono* as holding "that arbitrators presumptively enjoy the power to award punitive damages unless . . . the arbitration contract *unequivocally excludes* punitive damages claims." *See, e.g., Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 999 (5th Cir. 1995) (emphasis added). Under *Mastrobuono*, an arbitrator does not exceed his powers if (1) state law allows the remedy for the specified cause of action, and (2) the arbitration contract does not unequivocally preclude it. *Id.* at 998. When these two requirements are met, the award falls "under the arbitrator's broad discretion to decide damages and fashion remedial relief." *Id.*

There is no dispute in this case that North Carolina law allows an award of treble damages in an unfair and deceptive trade practices case. N.C. Gen. Stat. § 75-16 (2003). Under *Mastrobuono*, we must next determine whether the parties' arbitration agreement unequivocally precludes an award of treble damages.

Although the words "treble damages" do not appear in the parties' agreement, defendants contend that the phrase "any other damages not measured by the prevailing party's actual damages" unambiguously refers to treble damages because, according to defendants, it could not refer to anything else. Since there are a host of damages remedies "not measured by the prevailing party's actual damages," we disagree with defendants' contention.

Statutory remedies are the most prevalent type of such damages. For example, the Copyright Act provides that "[t]he copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, *and any profits of the infringer* that are attributable to the infringement and are not taken into account in computing the actual damages." 17 U.S.C. § 504(b) (2000) (emphasis added). Alternatively, the statute permits, upon the copyright owner's election, an award of statutory damages "not less than $750 or more than $30,000 as the court considers just" unless the court finds that the infringement was committed willfully, in which case "the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000." 17 U.S.C. § 504(c)(1) & (2) (2000). Neither the infringer's profits nor the statutory damages are "damages measured by the prevailing party's actual damages[.]" *See also* 15 U.S.C. § 1117(a) (2000) (authorizing award of both actual damages and the Lanham Act violator's ill-gotten profits); 18 U.S.C. § 2520(c)(2)(A) & (B) (2000) (with respect to any entity's unlawful interception, disclosure, or intentional use of a wire or electronic communication, allowing a court to assess as damages the greater of actual damages and "any profits made by the violator as a result of the violation" or "statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000"); N.C. Gen. Stat. § 66-154(b) (2003) (emphasis added) (for violation of the North Carolina Trade Secrets Protection Act, allowing an award "measured by the economic loss *or the unjust enrichment* caused by misappropriation of a trade secret, whichever is greater").

In addition to statutory remedies not measured by actual damages, defendants have also overlooked restitutionary awards. As this Court has explained:

> "The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep." A plaintiff may receive a windfall in some cases, but this is acceptable in order to

> avoid any unjust enrichment on the defendant's part. The principle of restitution "is to deprive the defendant of benefits that in equity and good conscience he ought not to keep . . . even though plaintiff may have suffered no demonstrable losses."

Booher v. Frue, 86 N.C. App. 390, 393-94, 358 S.E.2d 127, 129 (1987) (internal citations omitted; quoting D. Dobbs, *Law of Remedies*, § 4.1, at 224 (1973)), *aff'd per curiam*, 321 N.C. 590, 364 S.E.2d 141 (1988). For example, damages awarded under a theory of restitution may be measured by the increased value of the assets unlawfully in the hands of the defendant or by the profits earned by the defendant. 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 4.1(4), at 566-67 (2d ed. 1993). Neither of these types of damages are measured by a plaintiff's actual damages.

Finally, defendants have also overlooked "presumed damages." In a defamation *per se* case, under appropriate circumstances (as dictated by First Amendment considerations), some courts have held a plaintiff may recover "presumed damages" without proof of actual damages. Thus, in *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1142 (7th Cir. 1987), *cert. denied*, 485 U.S. 993, 99 L. Ed. 2d 512, 108 S. Ct. 1302 (1988), the Seventh Circuit held that a tobacco company was entitled to $1,000,000.00 in presumed damages despite its inability to prove that it had suffered any actual loss or other actual damages.[1]

This summary of available "damages" remedies demonstrates a wide variety of damages awards that would fall within the scope of the disputed phrase. The question remains, however, whether "treble damages" also unequivocally falls within the scope of the phrase.

Plaintiffs argue that because treble damages are a multiple of actual damages, they are "measured by" actual damages. This is a reasonable construction. Courts have routinely referred to treble damages as being measured by actual damages. *See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 415, 90 L. Ed. 2d 413, 420, 106 S. Ct. 1922, 1926 (1986) ("The shipper claimed treble damages measured by the difference between the rates set pursuant

1. Plaintiff has also suggested that nominal damages fall within the scope of "damages not measured by the prevailing party's actual damages." Since nominal damages tend to be in the amount of $1.00, it seems unlikely that the parties had nominal damages in mind when they entered into the agreement. Nevertheless, we note that the New Mexico Supreme Court has affirmed an award of $5,000.00 in "nominal damages." *Ruiz v. Varan*, 110 N.M. 478, 483-84, 797 P.2d 267, 272-73 (1990). Such an award is not, of course, measured by actual damages.

to agreement and those that had previously been in effect."); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86, 50 L. Ed. 2d 701, 710, 97 S. Ct. 690, 696 (1977) ("It nevertheless is true that the treble-damages provision, which . . . measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy."); *Moore v. Radian Group, Inc.*, 233 F. Supp. 2d 819, 826 (E.D. Tex. 2002) ("[A] private plaintiff would have standing to sue for treble damages measured by that portion of a PMI payment that is excessive . . . ."), *aff'd*, 69 Fed. Appx. 659 (5th Cir. 2003); *In re Chlorine & Caustic Soda Antitrust Litigation*, 116 F.R.D. 622, 626 (E.D. Pa. 1987) ("Plaintiffs seek to recover treble damages from defendants measured by the alleged overcharge resulting from defendants' conspiracy to fix prices."). Plaintiffs also reasonably suggest that if the parties truly had intended to limit damages only to actual damages, the contract would simply say "the arbitrator shall have no authority to award damages in excess of actual damages." Given the unusual phrasing of the provision and the fact that courts have previously described "treble damages" as being measured by actual damages, we hold both that plaintiff's interpretation is plausible and that, in any event, there is no unequivocal exclusion of treble damages, as required by *Mastrobuono*.

This discussion is not meant to conclude that plaintiff's construction of the disputed phrase is correct. It is simply a reasonable one, as is defendants'. When a contract is " 'fairly and reasonably susceptible to either of the constructions asserted by the parties[,]' " then it is deemed ambiguous. *Barrett Kays & Assocs., P.A. v. Colonial Bldg. Co.*, 129 N.C. App. 525, 528, 500 S.E.2d 108, 111 (1998) (quoting *Bicket v. McLean Sec., Inc.*, 124 N.C. App. 548, 553, 478 S.E.2d 518, 521 (1996)). If ambiguous, then " 'interpretation of the contract is for the jury.' " *Id.* (quoting *Int'l Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989). Here, it is necessary to determine whether the question should be resolved by the arbitrators, who were the triers-of-fact, or by the courts.

Mastrobuono suggests that a conclusion that the contract term is ambiguous should lead to the holding that the arbitrators did not exceed their powers. More recent cases by the United States Supreme Court support this view of *Mastrobuono* by holding that the interpretation of ambiguous contract terms not involving a gateway question of arbitrability is a question for the arbitrators unless the arbitration agreement provides otherwise. In *PacifiCare Health Sys., Inc. v.*

Book, 538 U.S. 401, 155 L. Ed. 2d 578, 123 S. Ct. 1531 (2003), plaintiffs argued that they could not be compelled to arbitrate claims arising under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 (2000), because their arbitration agreement with the defendant prohibited an arbitrator from awarding treble damages. After observing that the terms of the contract—precluding an award of "punitive damages" or "extra contractual damages of any kind"—were ambiguous when applied to treble damages, the Court held that the question "whether the remedial limitations at issue here prohibit an award of RICO treble damages is not a question of arbitrability." *PacifiCare*, 538 U.S. at 407 n.2, 155 L. Ed. 2d at 584 n.2, 123 S. Ct. at 1536 n.2. The Court, therefore, declined to address the issue when it had not first been considered by the arbitrator. *Id.* at 407, 155 L. Ed. 2d at 583, 123 S. Ct. at 1536.

PacifiCare was followed by *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 156 L. Ed. 2d 414, 123 S. Ct. 2402 (2003). In *Green Tree*, the Court was presented with the question whether an arbitration agreement barred class arbitration. The Court held that it could not resolve the question "because it is a matter for the arbitrator to decide." *Id.* at 447, 156 L. Ed. 2d at 419, 123 S. Ct. at 2405. The Court explained:

> Under the terms of the parties' contracts, the question—whether the agreement forbids class arbitration—is for the arbitrator to decide. The parties agreed to submit to the arbitrator "*all* disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract." And the dispute about what the arbitration contract in each case means (*i.e.*, whether it forbids the use of class arbitration procedures) is a dispute "relating to this contract" and the resulting "relationships." Hence the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question.

Id. at 451-52, 156 L. Ed. 2d at 422, 123 S. Ct. at 2407 (internal citations omitted). The Court acknowledged, however, that questions of arbitrability—such as the validity of an arbitration clause or its applicability to the underlying dispute between the parties—were questions to be decided by the courts. *Id.* at 452, 156 L. Ed. 2d at 422-23, 123 S. Ct. at 2407.

In this case, as in *Green Tree*, the parties agreed broadly that "[a]ny controversy, dispute, or claim arising out of [or] relating to this contract, the relations between ALLTEL and Agent, or the Service

provided by ALLTEL . . . shall be settled by arbitration . . . ." The interpretation of the provision precluding an award of "damages not measured by the prevailing party's actual damages" is a dispute "relating to this contract" and, by the terms of the arbitration agreement, must be "settled by arbitration." The issue does not fall into the narrow exception recognized in *Green Tree* because *PacifiCare* has already held that interpretation of a remedies provision "is not a question of arbitrability." *PacifiCare*, 538 U.S. at 407 n.2, 155 L. Ed. 2d at 584 n.2, 123 S. Ct. at 1536 n.2.

Defendants have argued that *Green Tree* is not binding because it is a four-judge plurality opinion. We are, however, still bound to follow *Green Tree*, as the Supreme Court indicated in *Hughes Elecs. Corp. v. Garcia*, 540 U.S. 801, 157 L. Ed. 2d 12, 124 S. Ct. 102 (2003) ("Judgment vacated, and case remanded to the Court of Appeal of California, . . ., for further consideration in light of *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. [444], 156 L. Ed. 2d 414, 123 S. Ct. 2402 (2003)."). Moreover, the federal courts have found the plurality opinion to be the controlling precedent since it represents the position taken by the justices who concurred on the narrowest grounds. *See, e.g., Pedcor Mgmt. Co. v. Nations Personnel of Texas, Inc.*, 343 F.3d 355, 358-59 (5th Cir. 2003). The Fifth Circuit explained, *id.* at 358, that Justice Stevens' concurrence was not the narrowest ground and that Justice Stevens had, in any event, stated that "arguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court," and that "Justice Breyer's opinion expresses a view of the case close to my own." *Green Tree*, 539 U.S. at 455, 156 L. Ed. 2d at 424, 123 S. Ct. at 2408-09.

Additionally, defendants contend that *Green Tree* does not apply to appeals from arbitration awards, but rather is only applicable in the context of a motion to compel arbitration. Defendants have, however, overlooked the fact that *Green Tree* was an appeal from the South Carolina Supreme Court's affirmance in two separate cases of a trial court's confirmation of an arbitration award. In one of the cases, the trial court had certified a class action and then compelled arbitration resulting in a class award, while in the second case, the question of class certification was initially decided by the arbitrator. On appeal, the South Carolina Supreme Court construed the arbitration agreements to authorize class arbitration. The United States Supreme Court vacated the judgments because, as explained above, the decision regarding class certification was a question for the arbitrator. Even though a class had been certified in one case by the

arbitrator, the Court ruled that because the arbitrator's determination followed the earlier trial court decision,

> there is at least a strong likelihood . . . that the arbitrator's decision reflected a court's interpretation of the contracts rather than an arbitrator's interpretation. That being so, we remand the case so that the arbitrator may decide the question of contract interpretation—thereby enforcing the parties' arbitration agreements according to their terms.

Id. at 454, 156 L. Ed. 2d at 423-24, 123 S. Ct. at 2408. In other words, if the arbitrator had made his decision completely independently of the courts, as here, the award would have been confirmed. The procedural posture of this case does not materially differ from that of *Green Tree.*

Even if *Green Tree* is disregarded, *Carteret County v. United Contractors of Kinston, Inc.*, 120 N.C. App. 336, 347, 462 S.E.2d 816, 823 (1995), compels the conclusion that our courts have no authority to vacate the arbitration award of treble damages. In *United Contractors,* plaintiff asked the trial court to vacate an arbitration award on the grounds that the parties' contract prohibited the arbitrator's award of increased overhead expenses. In rejecting this argument, this Court reasoned:

> In this case, the arbitration agreement reads: "Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration . . . ." . . . Here, whether defendant would be entitled to increased overhead expenses due to the extension of the contract completion date is an issue arising out of the contract and falls within the scope of the arbitration agreement. Since the arbitrators had the power to rule on the issue, even if they erroneously considered evidence of increased overhead expenses it would not be ground to vacate the award.

Id. Although this decision construes N.C. Gen. Stat. § 1-567.13(a)(5) (2001)[2] and not the FAA, it is consistent with *Green Tree.*

2. Although the General Assembly has repealed N.C. Gen. Stat. § 1-567.13 through § 1-567.20, *see* Act to Repeal the Uniform Arbitration Act and to Enact the Revised Uniform Arbitration Act, ch. 345, sec. 1, 2003 N.C. Sess. Laws 973 (July 14, 2003), the statutory changes affect only arbitration agreements made on or after 1 January 2004. *See id.*, ch. 345, sec. 4, 2003 N.C. Sess. Laws 983.

We hold that the parties' arbitration agreement with its remedial limitation is ambiguous and that the arbitrators, therefore, had the authority to construe that provision. Neither the trial court nor this Court may vacate the arbitration award based on a disagreement with the arbitrators about the proper construction of the contract's term. Accordingly, we hold that the trial court erred in modifying the arbitrators' award to eliminate the award of treble damages.

II

[2] Alltel cross-appeals from the portion of the trial court's order confirming the arbitrators' award to Cellular Plus of $352,640.00 in attorneys' fees. As noted above, although the trial court concluded that the arbitration panel did not have the authority under the agreement to award attorneys' fees, it ruled that Alltel had waived the right to contest the authority of the arbitration panel by failing to argue to the arbitrators that they lacked authority to award fees. Because we agree with the trial court's determination that Alltel waived its right to contest the arbitration panel's authority to award attorneys' fees, we need not decide whether an award of attorneys' fees was permitted by the parties' agreement.

Our review of the record reveals that at arbitration, Alltel opposed Cellular Plus' application for attorneys' fees solely on the basis that such an award was not warranted under N.C. Gen. Stat. § 75-16.1 (2003). In the arbitration proceeding, Alltel never raised the issue whether the panel lacked authority to award fees and never objected to the panel's consideration of such an award, despite several clear opportunities to do so. First, one of the arbitrators stated at the conclusion of the evidence that the panel intended to consider awarding attorneys' fees. Second, the arbitrators' Posthearing Order indicated that they "may deem it appropriate to make an award of attorneys fees[.]" Finally, the arbitrators, in their interim award, instructed the parties to submit affidavits "with respect to (1) the reasonableness of the amount of the attorneys' fees . . . and (2) whether there was an unwarranted refusal by [Alltel] to fully resolve the matter[.]" This interim award stated that the arbitrators would consider these affidavits, and "[p]ursuant to the *consent and stipulation* of the parties . . . will consider and make a decision and an award [regarding attorneys' fees] . . . based upon said affidavits." (Emphasis added) Significantly, at the conclusion of its memorandum in opposition to Cellular Plus' application for attorneys' fees, Alltel implored the arbitration panel to "*exercise its discretion* to award [Cellular Plus] no attorneys' fees under N.C.G.S. § 75-1.1." (Emphasis added)

Defendants rely upon *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 423 S.E.2d 747 (1992). In *Nucor*, our Supreme Court held that "[t]he specific, uncomplicated language of N.C.G.S. § 1-567.11 clearly reflects the legislative intent that attorneys' fees are not to be awarded for work performed in arbitration proceedings, unless the parties specifically agree to and provide for such fees in the arbitration agreement." *Id.* at 153-54, 423 S.E.2d at 750.[3] Defendants argue that since the arbitration agreement at issue in this case did not specifically permit attorneys' fees, *Nucor* required that the trial court vacate the arbitrators' award of fees.

Nucor did not address the situation when, as here, both parties have consented to consideration of the attorneys' fee issue by the arbitration panel and no party lodged any objection to the panel's awarding fees. Indeed, to agree with defendants' argument, we would have to disregard the policies upon which *Nucor* is based, as well as established North Carolina authority barring a party from raising objections in confirmation proceedings that could have been, but were not, raised prior to or during the arbitration proceeding.

In *Nucor*, the Supreme Court reached its holding in reliance upon "important policy considerations," including promotion of the purpose of arbitration "to provide and encourage an expedited, efficient, relatively uncomplicated, alternative means of dispute resolution, with limited judicial intervention or participation, and without the primary expense of litigation—attorneys' fees." *Id.* at 154, 423 S.E.2d at 750. As support, the Court cited *Cyclone Roofing*, discussed above, *McNeal v. Black*, 61 N.C. App. 305, 300 S.E.2d 575 (1983), and *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

In *McNeal*, this Court held that a party's "participation in the arbitration without making any protest or demand for jury trial . . . waived any right to object to the award later on these grounds." 61 N.C. App. at 307, 300 S.E.2d at 577. The Court noted that "[a] party may waive a constitutional as well as a statutory benefit by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it." *Id.* Based on these principles and the purpose of arbitration to reach a final settlement of disputed matters without litigation, the Court held that a party "cannot be allowed to participate in arbitration, raising no objections, and then refuse to be bound

3. N.C. Gen. Stat. § 1-567.11 (2001) states: "Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award."

by an adverse award. This type of conduct would serve to defeat the purpose of arbitration." *Id.* at 308, 300 S.E.2d at 577. In *Thomas*, this Court held, applying identical reasoning, that a party could not seek to vacate an arbitration award based on the bias of an arbitrator if the party, knowing of the grounds for disqualification, did not object at the arbitration proceeding. 51 N.C. App. at 353-54, 276 S.E.2d at 746.

Likewise, in *Andrews v. Jordan*, 205 N.C. 618, 172 S.E. 319 (1934), the Supreme Court held that the defendants waived any objection to the arbitrators' failure to comply with statutorily prescribed deadlines. The Court noted that defendants were notified of the hearing dates, made no objection and, indeed, agreed to those dates. *Id.* at 624, 172 S.E. at 322. In concluding that the defendants had waived any right to attack the award, the Court held " 'if the parties participate in the arbitral hearing without objection to the point that a time limitation has expired it will be held generally that they have thereby waived the time provision.' " *Id.* (quoting Wesley A. Sturges, *Commercial Arbitration and Awards*, at 524-25 (1930)).

Here, there is no question that defendants could have argued to the arbitrators that the parties' agreement together with *Nucor* precluded any award of attorneys' fees. Instead of doing so, they litigated plaintiff's entitlement to fees. We can see no meaningful distinction between a failure to object to an award of attorneys' fees and a failure to object to arbitration generally, to the timeliness of the hearing dates, or to the bias of an arbitrator. If, as our courts have held, a failure to object during arbitration regarding these significant matters leads to waiver, then defendants here necessarily waived any right to seek vacation of the attorneys' fee award. *See also McDaniel v. Bear Stearns & Co.*, 196 F. Supp. 2d 343, 364-65 (S.D.N.Y. 2002) (internal citations omitted) ("Courts have held that, consistent with [N.Y. C.P.L.R. § 7513], arbitrators *may* award attorneys' fees if either (1) the parties' agreement to arbitrate so provides, or (2) the parties acquiesce to the payment of attorneys' fees . . . . Although [defendant] argued that its actions did not warrant a sanction, it never raised a *legal objection* to the award of attorneys' fees. Because [defendant] never maintained, as it does here, that attorneys' fees are unlawful, it implicitly conceded that it was within the Panel's authority to award such fees.").[4] *Cf. Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (noting that it is well settled in this jurisdiction that any contention not raised and argued in the trial court may not be

4. N.Y. C.P.L.R. § 7513 is identical to N.C. Gen. Stat. § 1-567.11.

raised and argued for the first time in an appellate court), *disc. review denied*, 358 N.C. 550, 600 S.E.2d 469 (2004). We therefore hold that the trial court properly confirmed the arbitrators' award of attorneys' fees.

Reversed in part and affirmed in part.

Judges BRYANT and ELMORE concur.

JUDITH ANN MEEHAN (LAWRANCE), PLAINTIFF v. BRUCE CHARLES LAWRANCE, DEFENDANT

No. COA03-1318

(Filed 21 September 2004)

1. Child Support, Custody, and Visitation— equitable estoppel—oral modification

The trial court did not err in a child custody, civil contempt, and child support case by concluding that plaintiff mother was not equitably estopped from enforcing the provisions of the 1996 order relating to the provision of health insurance premiums for the minor children and the repayment of a $5,000 promissory note even though defendant father contends plaintiff consented to an oral modification during an October 1997 meeting with their attorneys and this agreement was set out in a letter between the attorneys, because: (1) substantial evidence supported the trial court's conclusion that plaintiff never agreed to orally modify that portion of the 1996 order that required defendant to provide health insurance for the children, plaintiff's attorney wrote defendant's attorney a letter stating that defendant would continue to pay for the health insurance for the children, and defendant admitted that he failed to provide insurance after May 1997 and stopped the health insurance four months before any alleged agreement was reached during the October 1997 meeting; and (2) defendant failed to show he detrimentally relied on the perceived agreement with plaintiff, and defendant benefitted by retaining the money he was required to use to purchase insurance for his minor children.

2. Contempt— civil—failure to comply with court order

The trial court did not err in a child custody and child support case by concluding that defendant father was in willful contempt of court for failing to repay a $5,000 promissory note as required by a 1996 court order, because: (1) defendant was aware of his obligation to pay $5,000 plus interest, but admittedly failed to pay based on the fact that he paid higher taxes due to plaintiff mother's failure to jointly file tax returns with him in 1995; (2) presuming that plaintiff and defendant entered an agreement forbearing payment of the promissory note, defendant failed to comply with the oral agreement; (3) defendant failed to make any assignment of error and presented no argument to support his assertion that the trial court's order does not contain sufficient findings to satisfy the remaining statutory enumerated factors set forth under N.C.G.S. § 5A-21(a); and (4) there was substantial evidence supporting the trial court's finding regarding defendant's willfulness and ability to comply with the 1996 order.

3. Contempt— civil—failure to provide health insurance for minor children

The trial court did not err in a child custody and child support case by concluding that defendant father was in contempt of court for failing to provide health insurance for his minor children as required by a 1996 court order, because: (1) substantial evidence showed plaintiff mother never agreed to modify this portion of the 1996 order and also showed defendant's knowledge and stubborn resistance to satisfy this portion of the 1996 order; (2) defendant admitted he stopped the health insurance four months before there was any agreement reached during an October 1997 meeting; (3) defendant continually requested plaintiff to provide health insurance for the children, but she objected; and (4) defendant knew of his obligation, yet failed to provide coverage.

4. Child Support, Custody, and Visitation— support—substantial change of circumstances

The trial court did not abuse its discretion in a child custody, civil contempt, and child support case by increasing defendant father's child support obligation where defendant alleged that no material and substantial change of circumstances existed, because: (1) a material and substantial change occurred regarding the financial circumstances of the parties since a 1996

order, and these changes in the financial circumstances impacted both parties' ability to support their minor children and justify a modification of the child support obligation; and (2) although plaintiff mother moved for an increase in child support, defendant filed a motion with the trial court alleging a material and substantial change in circumstances and seeking a modification of the 1996 order.

5. Contempt— civil—failure to pay child support

The trial court did not err in a child custody, civil contempt, and child support case by failing to find defendant father in contempt for his failure to pay $1,200 in child support as required in the 1996 order even though defendant paid $1,000 per month, because: (1) plaintiff mother's testimony and her attorney's letter demonstrated the parties agreed to modify defendant's child support obligation during an October 1997 meeting; (2) although parties may not modify a child support order through extrajudicial agreements, this evidence supports the trial court's finding that defendant did not act willfully; (3) plaintiff failed to show that defendant possessed any knowledge that he was required to continue payment under the 1996 order as opposed to the agreement reached between the parties; and (4) plaintiff failed to show defendant's stubborn resistance to pay child support.

6. Child Support, Custody, and Visitation— support—calculation of gross income—overtime pay

The trial court did not abuse its discretion in a child custody, civil contempt, and child support case by failing to include defendant father's 2002 overtime pay in calculating his gross income, because: (1) defendant testified that his 2002 overtime pay was atypical and a result of a colleague who had died and two other colleagues who were on maternity leave during that time; (2) defendant testified that he did not anticipate receiving any overtime pay in the future; and (3) no evidence was presented to show defendant earned substantial overtime in any year other than 2002.

7. Child Support, Custody, and Visitation— support—calculation of gross income—credit for travel expenses

The trial court did not abuse its discretion in a child custody, civil contempt, and child support case by allowing defendant father a $300 per month credit for travel expenses related to visitation with the minor children, because: (1) evidence was

presented to support defendant's testimony that he spent, on average, between $300 and $500 monthly in visitation-related expenses; (2) defendant spent $125 per month for airfare for the children, and the trial court ordered defendant to pay all air fare costs; and (3) defendant often drove between North Carolina and Georgia to visit the children and transported the children upon plaintiff's demand to an airport located two hours away from defendant's home.

8. Child Support, Custody, and Visitation— support—calculation of health insurance premiums

The trial court did not abuse its discretion in a child custody, civil contempt, and child support case by calculating the amount defendant father owed for health insurance premiums plaintiff mother paid to be $14,203.70 instead of $18,984.70 as claimed by plaintiff, a difference of $4,781 for insurance premiums plaintiff paid between October 1995 to May 1997, because: (1) defendant testified he provided health insurance for the children until May 1997; and (2) defendant produced evidence to corroborate this testimony and showed the children were covered under his health insurance policy from 1 November 1996 to 31 May 1997.

Appeal by defendant and cross-appeal by plaintiff from order entered 19 March 2003 by Judge Joseph A. Blick in Pitt County District Court. Heard in the Court of Appeals 25 August 2004.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III, and Terri W. Sharp, for plaintiff-appellee/cross-appellant.

W. Gregory Duke, for defendant-appellant/cross-appellee.

TYSON, Judge.

Bruce Charles Lawrance ("defendant") appeals from an order entered 19 March 2003 ("2003 Order") following a hearing on the parties' motions and claims regarding custody, contempt, and child support. Judith Ann Meehan ("plaintiff") cross-appeals from the 2003 Order. We affirm.

I. Background

The undisputed findings of fact establish plaintiff and defendant were married on 21 June 1986 in Pitt County, North Carolina. Two children were born of the marriage. The parties separated in January 1995 and executed a separation agreement and property settlement

("Separation Agreement") containing provisions relating to the custody and support of the minor children. The parties stipulated to joint custody with plaintiff having primary legal and physical custody. The Separation Agreement was incorporated into the divorce judgment filed 19 January 1996 and became an Order of the trial court ("1996 Order").

Under the 1996 Order, defendant was required to: (1) establish a mutual fund account for each child using proceeds from the sale of stock in Consolidated Medical Systems; (2) pay child support of $600.00 per month, per child; (3) make contributions totaling $600.00 per year into a Legg Mason investment account for each child; (4) maintain health and hospitalization insurance coverage for the minor children; (5) pay one-half of the uninsured medical, pharmaceutical, and dental expenses incurred by the minor children; (6) pay the sum of $5,000.00 as a lump sum property settlement payment. Plaintiff received primary custody of the minor children. Defendant received a specific schedule of visitation, which included alternate weekends, summer, and holidays.

In October 1997, the parties, both represented by counsel, met in an attempt to enter a consent order to modify the terms of the 1996 Order. The parties discussed modifying defendant's payment of child support by reducing it from $1,200.00 per month, $600.00 per child, to $1,000.00 per month, $500.00 per child. Defendant also was to pay an additional $500.00 twice per year. These discussions were never reduced to a written order. Defendant, however, acted as if an agreement had been reached and reduced his child support payments to $1,000.00 per month. He never paid the additional $500.00 twice per year during the years of 1998 to 2002.

In January 1998, plaintiff informed defendant she would be temporarily relocating to Georgia for employment. Plaintiff and the minor children moved near Atlanta, Georgia, in February 1998. Plaintiff's job became permanent, and she remained in Atlanta. Without court-ordered modification of the visitation privileges, the parties initially agreed on a schedule of visits between the minor children and defendant. The minor children traveled by air between North Carolina and Georgia on a fairly consistent basis. On some occasions, defendant traveled to Atlanta to visit the children.

Defendant's gross monthly income was determined to be $10,827.00. His average monthly expenses equaled $7,288.00. Defendant spent an average of $300.00 per month in visiting the minor

children out-of-state or for arranging his children's transportation. He also pays $1,000.00 per month in child support, or $500.00 per month, per child. Plaintiff's monthly gross base wage is $6,380.00 per month. Her employer pays $1,200.00 monthly for her vehicle and $2,700.00 monthly towards her mortgage payment. The trial court included the monthly automobile and mortgage payments and determined plaintiff's monthly income to be $10,280.00. Her fixed expenses totaled $1,183.00 per month, excluding the automobile and mortgage payments. Plaintiff also spends approximately $788.00 per month for a "nanny," who cares for the children after school and prepares meals for the family. The "nanny" receives additional pay for cleaning the home. Plaintiff and the minor children were determined to have individual needs totaling $3,127.75 monthly, which includes a monthly insurance premium of $214.00 for the children.

From July 1999 to August 2001, both parties filed a series of motions. Plaintiff filed: (1) in July 1999, a motion alleging defendant was in contempt for failure to pay monies required under the 1996 Order; (2) on 31 May 2001, a motion alleging defendant was in contempt of prior orders of the trial court; (3) on 30 August 2001, a motion alleging a claim for modification of custody; and (4) on 20 November 2001, a motion seeking modification of child support.

Defendant filed: (1) in February 2001, a motion in the cause alleging a change of circumstances justifying a modification of the 1996 Order; and (2) on 1 May 2001, an amended motion setting forth claims for modification of custody, contempt, and requesting a psychological evaluation.

In September 2001, the trial court granted defendant's motion for a psychological evaluation of the children. The remaining motions were heard on 19 August 2002. On 19 March 2003, the trial court ordered defendant, among other things, to: (1) pay plaintiff $1,322.00 monthly for the support and maintenance of the children; (2) reimburse plaintiff in the amount of $14,203.70 for the amount of health insurance premiums she had paid; and (3) pay plaintiff $5,000.00 plus interest of $4,871.00 for a promissory note as part of the lump sum settlement in the 1996 Order. Both parties appeal.

II. Issues

The issues arising out of defendant's appeal are whether: (1) plaintiff is equitably estopped from enforcing the provisions of the 1996 Order relating to the provision of health insurance premiums for the minor children and the repayment of the $5,000.00 promissory

note; (2) defendant is in contempt of court for not repaying the $5,000.00 promissory note; (3) defendant is in contempt of court for failing to provide health insurance for the minor children; and (4) the trial court erred by increasing defendant's child support obligation where no material and substantial change of circumstances existed.

Plaintiff's cross-appeal presents the issues of whether the trial court erred in: (1) failing to require defendant to pay past due child support after defendant reduced his payments; (2) calculating an increase in child support by failing to consider defendant's overtime and improperly allowing him credits for travel expenses related to visitation with the minor children; and (3) calculating the amount defendant was obligated to pay plaintiff for health insurance on the minor children.

III. Standard of Review

The trial court is given broad discretion in child custody and support matters. Its order will be upheld if substantial competent evidence supports the findings of fact. *Shipman v. Shipman*, 357 N.C. 471, 474-75, 586 S.E.2d 250, 253-54 (2003); *see Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998) ("It is the duty of the reviewing court to examine all of the competent evidence in the record supporting the trial court's findings and to then decide if it is substantial."). If the record indicates substantial evidence to support the trial court's findings of fact, "such findings are conclusive on appeal, even if record evidence 'might sustain findings to the contrary.' " *Pulliam*, 348 N.C. at 625, 501 S.E.2d at 903 (citations and quotations omitted). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254 (quoting *Pulliam*, 348 N.C. at 625, 501 S.E.2d at 903 (quoting *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975))).

"Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Our analysis turns to whether the findings of fact support the conclusions of law. *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254 (citing *Pulliam*, 348 N.C. at 628, 501 S.E.2d at 904).

IV. Oral Agreement to Modify

[1] Defendant contends plaintiff is equitably estopped from enforcing provisions of the 1996 Order. He argues she consented to

an oral modification during the October 1997 meeting with their attorneys and this agreement was set out in a letter between the attorneys. We disagree.

A. The Agreement

Defendant asserts that finding of fact number thirty-five is not supported by competent evidence. The trial court found:

> 35. That pursuant to the terms of the 1996 ORDER, defendant was required to maintain health insurance on both minor children. During the negotiations of October 1997, with Mr. Dixon and Mr. Duke [the parties' attorneys], the issue of health insurance was discussed between the parties, with the defendant requesting that plaintiff begin maintaining the health insurance on both minor children. *The plaintiff did not consent to this modification, either orally or in writing.* Defendant has failed to maintain proper insurance on the minor children since May 1997. . . . [B]etween June 1997 and August 2002, plaintiff has paid the total sum of $14.203.70 for health insurance premiums for the minor children. . . .

(Emphasis supplied). Plaintiff testified the parties briefly discussed the payment of health insurance premiums during the October 1997 meeting. During the meeting, plaintiff informed defendant he needed to pay for the children's health insurance. Plaintiff testified nothing further was mentioned at the meeting. After the meeting, plaintiff spoke with defendant on the telephone and reminded him of his obligation to provide health insurance coverage for the children.

Plaintiff's attorney wrote defendant's attorney a letter confirming portions of the agreement reached during the October 1997 meeting. This letter was received into evidence by the trial court. The letter stated defendant "would continue to pay for the health insurance for the children . . . ." Although he objected to the admission of the letter at trial, defendant has neither assigned error to its admission nor argues here that the trial court improperly considered this evidence. Defendant's brief admits, "Evidence was presented at trial that the Plaintiff's attorney wrote a letter to the Defendant's attorney which supported the Defendant's understanding of the parties' oral agreement."

Defendant testified to his understanding that the parties agreed plaintiff would provide health insurance on the children. Defendant also admitted during his testimony that he failed to provide insurance

after May 1997 and "stopped the health insurance four months before any 'agreement' " was reached during the October 1997 meeting. Substantial evidence supports the trial court's conclusion that plaintiff never agreed to orally modify that portion of the 1996 Order that required defendant to provide health insurance for the children.

B. Equitable Estoppel

This Court has recognized the doctrine of equitable estoppel may apply in child support arrangements:

> "Equitable estoppel arises when an individual by his acts, representations, admissions, or by his silence when he has a duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist, and such other person rightfully relies and acts upon that belief to his detriment." *Thompson v. Soles*, 299 N.C. 484, 487, 263 S.E.2d 599, 602 (1980). "A party seeking to rely on equitable estoppel must show that, in good faith reliance on the conduct of another, he has changed his position for the worse." *Griffin v. Griffin*, 96 N.C. App. 324, 328, 385 S.E.2d 526, 529 (1989).

Baker v. Showalter, 151 N.C. App. 546, 548, 566 S.E.2d 172, 174 (2002). In *Baker*, the parties agreed on an amount of child support, which was incorporated and entered into the divorce judgment. *Id.* The parties subsequently orally agreed to reduce defendant's child support obligation. *Id.* at 547-48, 566 S.E.2d at 173. This Court rejected the defendant's argument that she detrimentally relied on the oral agreement to reduce her child support payments. *Id.* "Individuals may not modify a court order for child support through extrajudicial written or oral agreements." *Id.* at 551, 566 S.E.2d at 175 (citations omitted). We reiterated and relied on the reasoning from *Griffin*, wherein this Court ruled "the defendant was not equitably estopped from bringing the action because there was no detrimental reliance; the "only change made in [plaintiff's] position was the retention to his benefit of money owed for the support of his children." *Id.* at 549, 566 S.E.2d at 174 (quoting *Griffin*, 96 N.C. App. at 328, 385 S.E.2d at 529).

Here, defendant has failed to show he detrimentally relied on the perceived agreement with plaintiff. As in *Griffin*, defendant benefitted by retaining the money he was required to use to purchase insurance for his minor children. 96 N.C. App. at 328, 385 S.E.2d at 529. The trial court did not err in failing to apply the doctrine of equitable estoppel to bar plaintiff's enforcement of the 1996 Order. This assignment of error is overruled.

V. Contempt

Defendant contends the trial court erred in finding him to be in contempt of court for failure to comply with the 1996 Order. Civil contempt may be imposed for a party's failure to comply with a court order, so 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).

Defendant does not challenge that portion of the trial court's order finding him to be in contempt for his failure to: (1) make contributions to the minor children's mutual fund accounts; (2) pay half of his children's uninsured medical expenses; (3) pay $500.00 twice yearly as additional child support. These findings sufficiently support the trial court's conclusion of law holding defendant in civil contempt. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

Defendant argues he cannot be held in contempt for his failure to: (1) pay plaintiff $5,000.00 as a lump sum settlement; and (2) provide health insurance for the minor children between June 1997 and August 2002. We disagree and address each of defendant's arguments in turn.

A. Promissory Note

[2] Defendant assigns error to the trial court's finding that defendant had "willfully failed to pay $5,000.00 or any sum owed pursuant to the [promissory] note." In explaining the "willfulness" requirement necessary to find a party in civil contempt, our Supreme Court has noted this term "imports knowledge and a stubborn resistance." *Cox v. Cox*, 10 N.C. App. 476, 477, 179 S.E.2d 194, 195 (1971) (quoting *Mauney v. Mauney*, 268 N.C. 254, 258, 150 S.E.2d 391, 393 (1966)).

Here, the trial court found that defendant was aware of his obligation to pay $5,000.00 plus interest, but admittedly failed to pay

because he paid higher taxes due to plaintiff's failure to jointly file tax returns with him in 1995. A letter from defendant to plaintiff dated April 1996, three months after the 1996 Order, was entered into evidence without objection from defendant and supports this finding. During the October 1997 meeting, plaintiff orally agreed to forgive the $5,000.00 payment on the condition that defendant comply with all other provisions in the 1996 Order. Presuming plaintiff and defendant entered an "agreement" forbearing payment of the promissory note, defendant failed to comply with the oral agreement. Defendant failed to assign error to portions of the trial court's order finding he did not comply with the 1996 Order and was not relieved of his obligation to pay the $5,000.00. Substantial evidence supports the trial court's finding that defendant willfully failed to pay the lump sum payment required by the 1996 Order.

We hold the trial court did not err in finding defendant willfully failed to pay the $5,000.00 plus interest owed on the promissory note. Defendant failed to make any assignment of error and presents no argument to support his assertion that the trial court's order does not contain sufficient findings to satisfy the remaining statutorily enumerated factors set forth in N.C. Gen. Stat. § 5A-21(a). Defendant has waived appellate review of this portion of his argument. N.C.R. App. P. 10(a) (2004) ("the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . ."). Further, our review of the record and transcript indicates substantial evidence supports a finding of civil contempt. Evidence was admitted to support the trial court's finding regarding defendant's willfulness and ability to comply with the 1996 Order. This assignment of error is overruled.

B. Health Insurance

[3] Defendant also contends he cannot be held in contempt for failing to provide health insurance coverage for the minor children. We disagree. In support of his argument, defendant asserts the parties agreed to modify the 1996 Order to relieve him of the obligation to provide health insurance for the children. We have already rejected defendant's argument and held that substantial evidence shows plaintiff never agreed to modify this portion of the 1996 Order.

Substantial evidence further shows defendant's "knowledge and stubborn resistance" to satisfy this portion of the 1996 Order. *Cox*, 10 N.C. App. at 477, 179 S.E.2d at 195. Defendant admitted he "stopped the health insurance four months before there was any

'agreement' " reached during the October 1997 meeting. He continually requested plaintiff to provide health insurance for the children, but she objected.

Defendant knew of his obligation under the 1996 Order, yet failed to provide insurance coverage for his children from June 1997 to August 2002. His "stubborn resistance" to plaintiff's repeated demand for him to comply with the 1996 Order supports the trial court's order finding him to be in civil contempt. *Id.* This assignment of error is overruled.

VI. Child Support

A. Defendant's Appeal

[4] Defendant contends the trial court erred by increasing his child support obligation because no material and substantial change of circumstances existed to affect the welfare of the minor children. We disagree.

N.C. Gen. Stat. § 50-13.7(a) (2003) provides, "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 by either party . . . ." "[M]odification of a child support order involves a two-step process. The court must first determine a substantial change of circumstances has taken place; only then does it proceed to . . . calculate the applicable amount of support." *Trevillian v. Trevillian*, 164 N.C. App. 223, 224-25, 595 S.E.2d 206 (2004) (quoting *McGee v. McGee*, 118 N.C. App. 19, 26-27, 453 S.E.2d 531, 535-36 (1995), [*disc. rev. denied*, 340 N.C. 359, 458 S.E.2d 189 (1995)]).

In determining whether a material and substantial change of circumstances has occurred, the trial court "must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both changed circumstances which will have *salutary* effects upon the child and those which will have *adverse* effects upon the child." *Pulliam*, 348 N.C. at 619, 501 S.E.2d 899 (emphasis supplied). Changed circumstances can be shown through evidence of:

> a substantial increase or decrease in the child's needs; a substantial and involuntary decrease in the income of the noncustodial parent even though the child's needs are unchanged; a voluntary decrease in income of either supporting parent,

> absent bad faith, upon a showing of changed circumstances relating to child oriented expenses; and, for support orders that are at least three years old, proof of a disparity of fifteen (15) percent or more between the amount of support payable under the original order and the amount owed under North Carolina's Child Support Guidelines based upon the parties' current income and expenses.

Wiggs v. Wiggs, 128 N.C. App. 512, 515, 495 S.E.2d 401, 403 (1998) (internal citations omitted), *overruled on other grounds*, *Pulliam*, 348 N.C. 616, 501 S.E.2d 898. " 'Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion.' " *Trevillian*, 164 N.C. App. at 226, 595 S.E.2d at 208 (quoting *Mason v. Erwin*, 157 N.C. App. 284, 287, 579 S.E.2d 120, 122 (2003)).

Here, the trial court concluded:

> a material and substantial change in the financial circumstances of the parties since the 1996 ORDER, including a substantial increase in the income of both parties, an increased cost of living for both parties, and an increase in the costs of the needs and extra-curricular activities of the minor children.

Defendant failed to assign error to this conclusion and has waived appellate review. N.C.R. App. P. 10 (2004). Our review of the record and transcript indicates this portion of the trial court's order is supported by the evidence presented and its findings of fact.

The uncontroverted findings of fact show that following entry of the 1996 Order: (1) plaintiff and the minor children moved from Pitt County, North Carolina, to Cobb County, Georgia; (2) plaintiff's employer provided her with a vehicle and a residence in which the children lived; (3) defendant moved from Pitt County to Wilmington, North Carolina, purchased a new home, and started a new job; (4) "plaintiff manifested her intent to the defendant to cut off all communication with the defendant;" (5) both of the children participated in recreational and team sports; and (6) plaintiff was incurring additional child care expenses due to her new job in Atlanta. Plaintiff testified, without objection by defendant, that she was paying an increased amount in educational expenses and the minor children had become involved "in a lot of extracurricular activities." Defendant testified that both he and plaintiff spent a

significant amount of money in travel expenses related to visitation with the minor children as a result of plaintiff's relocation to Georgia in 1998.

Evidence in the record and the trial court's findings sufficiently support the trial court's conclusion that a material and substantial change occurred regarding the financial circumstances of the parties since the 1996 Order. These changes in the financial circumstances impacted both parties' ability to support their minor children and justify a modification of the child support obligation.

We further note that although *plaintiff* moved for an increase in child support, *defendant* filed a motion with the trial court alleging a "material and substantial change in circumstances" and seeking a modification of the 1996 Order. His argument on appeal that the record insufficiently supports a finding of a change in circumstances is without merit. This assignment of error is overruled.

B. Plaintiff's Cross-Appeal

[5] Plaintiff's cross-appeal challenges the trial court's failure to find defendant in contempt for his failure to pay $1,200.00 in child support as required in the 1996 Order. Plaintiff argues defendant willfully disobeyed the 1996 Order by paying $1,000.00 per month in child support. We disagree.

Both parties presented evidence at trial to show the parties reached an oral agreement during the October 1997 meeting regarding the amount defendant would pay in child support. Although an order was never entered by the court, plaintiff acknowledged the agreement. At trial, *plaintiff* read a letter into evidence written by *her* attorney following the meeting that indicated she agreed to "a reduction in child support from $1,200 to a $1,000 per month . . . ." Plaintiff testified that except for one month in 2000, defendant paid the child support of $1,000.00 each month since October 1997.

Plaintiff's testimony and her attorney's letter demonstrate the parties agreed to modify defendant's child support obligation during the October 1997 meeting. Although parties may not modify a child support order through extrajudicial agreements, this evidence supports the trial court's finding that defendant did not act willfully. *Baker*, 151 N.C. App. at 551, 566 S.E.2d at 175. Plaintiff has failed to show that defendant possessed any "knowledge" that he was required to continue payment under the 1996 Order as opposed to the agreement reached between the parties. *Cox*, 10 N.C. App. at 477, 179

S.E.2d at 195. Further, plaintiff has failed to point to any evidence in the record to show defendant's "stubborn resistance" to pay child support. *Id.* This assignment of error is overruled.

VII. Calculating Child Support

[6] Plaintiff also contends the trial court erred by failing to include defendant's overtime pay in calculating his gross income and by allowing him a credit for travel expenses related to visitation with the minor children. We disagree.

The North Carolina Child Support Guidelines ("Guidelines") set forth the requirements to determine a parent's child support obligation. The Guidelines apply:

> in cases in which the parents' combined adjusted gross income is equal to or less than $ 15,000 per month ($ 180,000 per year). For cases with higher combined adjusted gross income, child support should be determined on a case-by-case basis, provided that the amount of support awarded may not be lower than the maximum basic child support obligation shown in the Schedule of Basic Child Support Obligations.

Trevillian, 164 N.C. App. at 225, 595 S.E.2d at 207 (quoting Child Support Guidelines, "Determination of Support in Cases Involving High Combined Income," Annotated Rules of North Carolina (2002)). In determining each parent's child support obligation:

> an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to "meet the reasonable needs of the child" and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took "due regard" of the particular "estates, earnings, conditions, [and] accustomed standard of living" of both the child and the parents. It is a question of fairness and justice to all concerned.

Coble v. Coble, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (emphasis and alteration in original) (quoting *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E.2d 407, 410 (1976)). Here, the evidence shows and the trial court found the parties' combined adjusted gross monthly income was $21,107.00, which exceeds the upper limit covered by the most recent version of the Guidelines. The Guidelines are inap-

plicable at bar and the trial court was required to make a case-by-case determination. *See Trevillian*, 164 N.C. App. at 225, 595 S.E.2d at 207-08.

A. Overtime Pay

Evidence establishes defendant received overtime pay during the year 2002. Defendant testified his 2002 overtime pay was atypical and a result of a colleague who had died and two other colleagues who were on maternity leave during that time. Defendant testified he did not anticipate receiving any overtime pay in the future. No evidence was presented to show defendant earned substantial overtime in any year other than 2002. The trial court did not abuse its discretion by failing to include defendant's 2002 overtime pay in calculating each party's obligation.

B. Travel Expenses

[7] Defendant testified he spent $3,337.00 between February 2001 and June 2002 for visitation expenses unrelated to airplane expenditures. Evidence was also presented to support defendant's testimony that he spent, on average, between $300.00 to $500.00 monthly in visitation-related expenses. The trial court found defendant spent $125.00 per month for airfare for the children. Defendant often drove between North Carolina and Georgia to visit the children and transported the children upon plaintiff's demand to an airport located two hours away from defendant's home. The trial court's order contemplates visitation between defendant and his minor children in both North Carolina and Georgia. The adjustment of $300.00 per month is supported by competent evidence. Further, the trial court ordered defendant to pay all air fare costs. The trial court did not abuse its discretion in allowing defendant a credit for these expenses.

C. Trial Court's Findings

The trial court made specific findings regarding each party's gross monthly income, mortgage and car payments, and other expenses. The trial court also made findings regarding expenses for the children, including after school care. These findings are sufficiently specific to indicate the trial court took "due regard" of the particular "estates, earnings, conditions [and] accustomed standard of living of both the child[ren] and the parents" as required by *Coble*. 300 N.C. at 712, 268 S.E.2d at 189. The trial court properly considered each party's ability to pay and did not abuse its discretion by excluding defendant's overtime pay and crediting for travel expenses to defendant. This assignment of error is overruled.

VIII. Health Insurance Calculations

[8] Plaintiff contends the trial court erred in calculating the amount defendant owed for health insurance premiums she paid. Plaintiff asserts she was owed $18,984.70, which is $4,781.00 more than the $14,203.70 ordered by the court. As substantial evidence supports the trial court's findings, we disagree.

Plaintiff asserts she began paying for health insurance for the minor children in October 1995, because defendant discontinued health insurance coverage for the minor children in September 1995. Plaintiff contends she is owed $4,781.00 for the amount she paid for insurance premiums from October 1995 to May 1997. Plaintiff testified she was not aware of any time when she and defendant both provided health insurance coverage for the children.

Defendant testified he provided health insurance for the children until May 1997. He produced evidence to corroborate this testimony and showed the children were covered under his health insurance policy from 1 November 1996 to 31 May 1997.

In a non-jury trial, "[t]he weight, credibility, and convincing force of [the] evidence is for the trial court, who is in the best position to observe the witnesses and make such determinations." *Freeman v. Freeman*, 155 N.C. App. 603, 608, 573 S.E.2d 708, 712 (2002), *disc. rev. denied*, 357 N.C. 250, 582 S.E.2d 32 (2003) (citing *Upchurch v. Upchurch*, 128 N.C. App. 461, 495 S.E.2d 738, *disc. rev. denied*, 348 N.C. 291, 501 S.E.2d 925 (1998)). Here, the judge, as fact finder, could give more weight and credibility to defendant's testimony and evidence indicating he had provided health insurance for the minor children until May 1997. The trial court did not err by denying plaintiff's claims of insurance payments made prior to May 1997 and by ordering defendant to reimburse her for health insurance premiums after that date. This assignment of error is overruled.

IX. Conclusion

Plaintiff was not equitably estopped from enforcing certain provisions of the 1996 Order regarding health insurance coverage for the children and requiring repayment of the promissory note. The trial court did not err in holding defendant in contempt for his willful violation relating to these provisions.

The trial court did not abuse its discretion in: (1) increasing defendant's child support obligation after finding a material and sub-

stantial change of circumstances occurred, which affected the welfare of the minor children; (2) calculating the increase by excluding defendant's overtime and crediting him for travel expenses related to visitation with the minor children; and (3) calculating the amount defendant owed plaintiff for health insurance coverage on the children.

Many of plaintiff's and defendant's assignments of error relate to rulings by the trial court that we review under an abuse of discretion standard. Both parties failed to show the trial court abused its discretion. The trial court's order is affirmed.

Affirmed.

Judges HUDSON and BRYANT concur.

STATE OF NORTH CAROLINA v. VINCENT LAMONT HARRIS

No. COA03-1071

(Filed 5 October 2004)

1. **Evidence— rape shield law—exception—prior sexual contact relevant to injuries**

Evidence of a second-degree rape victim's prior sexual encounter on the day of the rape should have been admitted because it may have accounted for some of her injuries and was relevant to whether she consented to sex with defendant. A new trial was also granted on a common law robbery charge because the victim's credibility was essential to all of the charges. N.C.G.S. § 8C-1, Rule 412(b)(2).

2. **Sentencing— aggravating factors—underlying facts—requirements for finding**

A fact used to aggravate a sentence beyond the presumptive term must be found beyond a reasonable doubt by a jury, stipulated to by the defendant, or be found by a judge after the defendant has waived his right to a jury.

3. Sentencing— sexual predator classification—not an aggravating factor

Defendant should not have been found to be a predator as a nonstatutory aggravating factor for second-degree rape. There are procedures for classifying a defendant as a sexually violent predator, but that finding is purely for classification (and includes requirements such as registration) but does not have sentencing implications.

Judge LEVINSON dissenting in part and concurring in part.

Appeal by defendant from judgments entered 26 and 27 February 2003 by Judge Abraham Penn Jones in Granville County Superior Court. Heard in the Court of Appeals 20 May 2004.

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott, for the State.

Thomas R. Sallenger for defendant appellant.

McCULLOUGH, Judge.

Defendant was found guilty on the charges of common law robbery and second degree rape. The State's evidence tended to show the following: On 13 April 2002, Shannon Parrott, a sixteen-year-old high school student and the alleged victim in this case, was meeting her friend Kevin at Southern States to walk together to Johnny's house, their mutual friend. When Kevin did not arrive, the victim walked on to Johnny's house alone. She alleges she left for Johnny's sometime after midnight, and walked in total six or seven miles. En route to Johnny's house, she approached a Texaco gas station and saw a group of men hanging around a trash dump. As she walked past these men, defendant approached her and put his arm around her. Defendant asked the victim if she smoked marijuana, and she replied that she no longer did. Defendant asked where the victim was going a number of times, and she replied that she was going home. Defendant then grabbed her by the back of the neck and dragged her in an alleyway between a house and a church. At the time, the victim was wearing a jacket, T-shirt, sweat pants, and carrying her book bag. In the alleyway, he threw her on the ground, yanking down both her underwear and her pants. He then put his penis in the victim's vagina without her consent. When the victim tried to scream, defendant put his hand over her mouth and told her to be quiet. He then turned her over and put his penis in her rectum. He then made defendant pull her clothes

back on and look for his cell phone. The phone was never seen by the victim. He then threw her down, and forced his penis in the victim's vagina a second time without her consent. Next, he went through her bag and asked if she had any money. Defendant told the victim to pee and he told her he would kill her if she told anyone about the incident. Next, he took six rings from the victim's fingers. Defendant left the victim, and she went to her friend Johnny's house and told him what had happened. The following day the victim told her mother who took her to the police department. While there, the victim identified defendant in a photo lineup. The police department requested that she go to Maria Parham Hospital for a rape kit. At the hospital, a culdoscope was used to take pictures of lacerations, bruising, and tears on the victim's vaginal and rectal areas.

Defendant's evidence tended to show the following: Eugene Latta, a witness on the night in question, observed defendant and victim together just walking and talking. He then saw them and they were all hugged up. Latta did not hear a scream and he did not see a rape. During his cross-examination, Latta admitted to making a statement to police that he saw a male subject pull a girl to the side of the church against her will. He wrote the name of defendant. He claimed this statement was false and that he wrote it so the charge would not be pinned on him.

Defendant was 29 years old, married, and had three children. On the night in question, defendant first saw the victim walking near the Texaco gas station at around 11 o'clock. Defendant asked her what she was doing, and she said she was going to a friend's, and that someone had told her that her boyfriend was mad at her for getting caught having sex in the woods. They talked about hooking up and in fact did so an hour later. Then he and the victim smoked marijuana together before engaging in consensual sexual intercourse lasting twenty minutes. The intercourse was tacitly agreed to in exchange for the marijuana. The victim then offered defendant her rings in exchange for more marijuana. He gave one of the rings to his brother that night for money.

The issues raised by defendant's appeal are as follows: that the trial court erred when it did not allow defendant to question the victim concerning other alleged sexual activity she had on the day of the incident; that the trial court erred when it denied defendant's motion to dismiss the charge of second degree rape and common law robbery; and that the trial court erred in composing defendant's sentence

in finding the aggravating factors that defendant's offenses were especially heinous, atrocious, or cruel; and that defendant was a "predator." We now address these issues.

I. Rape Shield

[1] Defendant, as preserved by objection at trial, now contends that he should have been able to question the victim concerning alleged sexual activity she had on the evening of the day in question. Specifically, defendant argues that the following testimony, elicited by defendant during an *in camera voir dire*, should have been allowed to be heard by the jury:

> Q. [Defense counsel]: [Victim], can you tell what you did earlier in the day on April 13th?
>
> A. [The victim]: I went to a friend's house after school.
>
> Q. After school.
>
> A. Yes.
>
> Q. What day of the week was it?
>
> A. I'm not—
>
> Q. (Interposing) I believe, it was a Friday. So, after school you went to a friends.
>
> A. Yes, ma'am.
>
> * * * *
>
> Q. Okay, and what did y'all do?
>
> A. We walked around the neighborhood with some of her friends.
>
> * * * *
>
> Q. Okay. And are there woods nearby?
>
> A. Yes, ma'am.
>
> Q. Were you in those woods?
>
> A. Yes, ma'am.
>
> Q. Who were you with?
>
> A. My boyfriend.
>
> * * * *

Q. . . . Do you go to school with him or did you go to school with him . . . ?

A. Yes, ma'am.

Q. Okay, did you have sex with him?

A. Attempted to.

* * * *

Q. . . . [Was] [your friend] and her friend with you at that time?

A. Yes, ma'am.

Q. Did they have sex?

A. They attempted to also.

Q. Okay, so you had your clothes off? Right?

A. I had on a skirt.

* * * *

Q. (Interposing) A skirt, okay.

A. My clothes were still on.

Q. Did he have his pants down?

A. I believe so.

Q. Okay, why did you not have sex?

A. Because it didn't—something told me it wasn't right. It didn't feel right. That it—something told—I had the gut instinct that it would be wrong and that something bad would happen.

Q. Okay, was the fact that he couldn't get hard have anything to do with it?

A. No, ma'am.

Q. Were y'all smoking pot.

A. No, ma'am.

Q. How long were y'all out in the woods?

A. Not long.

Q. All right. Thirty minutes or less?

A. Less.

Q. Okay. Had you taken a towel out there with you so y'all would have something to lay on?

A. [My friend] did.

Q. Okay. Now, did y'all get in a little bit of trouble with [your friend]'s mom because somebody saw y'all out there?

A. Yes, ma'am.

Q. All right, tell us what happened.

A. [My friend]'s mom made me go home and she took [my friend] to the Granville County Hospital.

The State then asked:

Q. [The State]: [Victim], when you attempted to have sex with [your boyfriend], did he hurt you in anyway.

A. No, ma'am.

Q. Did you attempt any anal intercourse? Did you have anal intercourse with [him]?

A. No ma'am.

The trial court then asked:

THE COURT: [Victim], when you had the sexual encounter with this other person, prior to the events that you testified to with respect to the defendant, was there sexual penetration? Do you remember? Do you know what I am talking about?

A. [The victim]: No sir.

THE COURT: You don't. Let me be more explicit with you, if I can.

The boy with whom you had the—the boy with whom you tried to have sex earlier that day, did he put his penis into your vagina.

A. No, not quite.

THE COURT: Not quite. Did he attempt to?

A. Yes, sir.

The court did not allow any of this testimony to be heard based upon its application of North Carolina's rape shield law. Defendant contends one of the exceptions to the law applies.

N.C. Gen. Stat. § 8C-1, Rule 412 (2003), provides that "the sexual behavior of the complainant is irrelevant to any issue in the prosecution" except in four narrow situations. The exception defendant attempted to apply at trial, and that is the basis of this issue on appeal, states as follows:

> (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant[.]

N.C. Gen. Stat. § 8C-1, Rule 412(b)(2). Defendant's defense at trial was consent. He believed that the evidence of the prior sexual encounter the victim had with her boyfriend may account for some of the physical evidence of the alleged force by defendant which was used for the rape conviction.

The State argues that this issue is governed by *State v. Fortney*, 301 N.C. 31, 269 S.E.2d 110 (1980). *Fortney* analyzed and found as constitutional the nearly identical rape shield law, N.C. Gen. Stat. § 8-58.6 (1980), before it was moved into N.C. Gen. Stat. § 8C-1 and the rules of evidence. *Fortney*, 301 N.C. at 36, 269 S.E.2d at 112. In *Fortney*, three different blood types of semen were found on the victim's panties, stockings, and robes. Upon cross-examination, the victim testified that she had intercourse with her boyfriend a day and a half before the rape, and that she was wearing the same underwear she wore the morning of the rape. She further testified she had not washed her bathrobe for at least a year and that her prior roommate, a sister, had worn it at times. At the conclusion of the *in camera voir dire* in that case, the trial court did not allow any questioning as to the various sources of the semen finding them to be irrelevant and inadmissible. *Id.* at 33, 269 S.E.2d at 110. The court did allow the defense counsel to question the victim at trial as to her sexual activity with third persons on the night of the crime. *Id.* Our Supreme Court found there to be no error made by the trial court in the *in camera* review. The court went on to state in dicta:

> The statute's exceptions provide ample safeguards to insure that relevant evidence is not excluded. G.S. 8-58.6(b)(2) specifically provides: "(b) The sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior: . . . (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant. . . ." *This exception is clearly intended, inter alia, to allow evidence showing*

the source of sperm, injuries or pregnancy to be someone or something other than the defendant. See generally, Tanford & Bocchino, *supra* at 553.

Id. at 41, 269 S.E.2d at 114 (emphasis added) (footnote omitted).

In the instant case, we find the facts of *Fortney* distinguishable, and the dicta interpreting Rule 412(b)(2), then N.C. Gen. Stat. § 8-58.6(b)(2), applicable. Unlike *Fortney*, the sexual activity sought to be admitted before the jury relates to a sexual encounter by the victim on the day of the alleged rape. However, even in *Fortney*, the trial judge allowed questioning as to sexual encounters with third parties on the night of the crime. However, evidence of intercourse on the same day is clearly not always admissible. *See State v. Rhinehart*, 68 N.C. App. 615, 316 S.E.2d 118 (1984) (The victim had consensual sex with her former boyfriend of four years on the night of the incident.). In this case the evidence is relevant and probative as to whether or not the victim consented to having sex with defendant. Had she consented, then it is within reason that no physical evidence of vaginal injury on the victim was caused by defendant. Thus, if the jury found the lacerations on the vagina (which evidence was used by the State to prove the rape) to have been caused by the attempted sexual encounter earlier that day, they could still harbor reasonable doubt as to whether or not the victim consented to having sex with defendant. The fact that there was evidence of lacerations and bruising to the victim's rectal area does not negate the relevancy of the victim's sexual encounter on the day of the incident and that injuries to her vaginal area may have been caused by someone other than defendant. One element of second degree rape is that the intercourse be vaginal. N.C. Gen. Stat. § 14-27.3 (2003).

Therefore, we reverse on this issue, and grant a new trial in which the evidence of the prior sexual encounter on the day of the alleged rape should be admitted. *See State v. Guthrie*, 110 N.C. App. 91, 428 S.E.2d 853, *disc. review denied*, 333 N.C. 793, 431 S.E.2d 28 (1993). Furthermore, we reverse and grant a new trial on the charge of common law robbery as we believe the victim's credibility after cross-examination as to her prior sexual encounter is essential to support all charges stemming from the entire criminal transaction.

II. Aggravating Factors

Though defendant has been granted a new trial, we here address those issues relating to defendant's sentencing which may

recur at any new trial and to which defendant assigned as error. On the felony judgment form finding aggravating and mitigating factors, the trial court found the statutory aggravating factor that "the offense was especially heinous, atrocious, or cruel." Additionally, the court found the nonstatutory aggravating factor that defendant "IS A PREDATOR[]." These findings by the court were used to enhance defendant's sentence for his offenses into the aggravated sentencing range. Defendant believes both of these factors in aggravation were found in error. We agree.

A. The Offense was Especially Heinous, Atrocious, or Cruel

[2] The U.S. Supreme Court recently held that the "statutory maximum" for any offense is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, — U.S. —,—, 159 L. Ed. 2d 403, 413. The high Court further explained that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without any additional findings*." *Blakely*, — U.S. at —, 159 L. Ed. 2d at 413-14 (emphasis added). Thus, any additional findings that may be used to increase a defendant's sentence, but not found by the jury, are otherwise made in violation of defendant's Sixth Amendment Right to trial by jury. *Id.* at —, 159 L. Ed. 2d at 415. The only exception to this would be if the defendant has stipulated to those facts which have increased his sentence, or waived his right to a jury. *Id.* at —, 159 L. Ed. 2d at 417-18.

Our Court, in *State v. Allen*, 166 N.C. App. 139, 149, 601 S.E.2d 299, 306 (2004), adopted the high Court's principles in *Blakely* to North Carolina's sentencing scheme concerning a court's ability to enhance a defendant's sentence by finding factors in aggravation. *See* N.C. Gen. Stat. § 15A-1340.16 (2003). In *Allen* we held that, pursuant to *Blakely*, the defendant was denied his Sixth Amendment right to a jury trial when the trial court unilaterally found that the offense that defendant committed in that case was "especially heinous, atrocious and cruel." *Allen*, 166 N.C. App. at 147-48, 601 S.E.2d at 305.

Therefore, pursuant to *Allen* and *Blakely*, should the court at any new trial use a factor in aggravation to impose a sentence beyond the presumptive term for which defendant has been found guilty, the fact must be found by the following: beyond a reasonable doubt by the

jury, stipulated to by defendant, or defendant shall have waived his right to a jury such that judicial fact finding would be appropriate.

B. Defendant is a Predator

[3] Turning to the next sentencing issue that may arise at any new trial. The term "predator" in the North Carolina's criminal code, as related to sex offenses, is a specifically defined legal classification of sex offenders. N.C. Gen. Stat. § 14-208.6(6) (2003) defines a "sexually violent predator" as:

> (6) "Sexually violent predator" means a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses directed at strangers or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.

N.C. Gen. Stat. § 14-208.20 (2003) provides procedures for determining if an individual is a sexually violent predator for the purpose of this criminal classification. The statute states:

> (a) . . . If the district attorney intends to seek the classification of a sexually violent predator, the district attorney shall within the time provided for the filing of pretrial motions under G.S. 15A-952 file a notice of the district attorney's intent. . . .
>
> (b) Prior to sentencing a person as a sexually violent predator, the court shall order a presentence investigation in accordance with G.S. 15A-1332(c). However, the study of the defendant and whether the defendant is a sexually violent predator shall be conducted by a board of experts selected by the Department of Correction. The board of experts shall be composed of at least four people. Two of the board members shall be experts in the field of the behavior and treatment of sexual offenders, one of whom shall be selected from a panel of experts in those fields provided by the North Carolina Medical Society and not employed with the Department of Correction or employed on a full-time basis with any other State agency. One of the board members shall be a victims' rights advocate, and one of the board members shall be a representative of law enforcement agencies.
>
> (c) When the defendant is returned from the presentence commitment, the court shall hold a sentencing hearing in accord-

> ance with G.S. 15A-1334. At the sentencing hearing, the court shall, after taking the presentencing report under advisement, make written findings as to whether the defendant is classified as a sexually violent predator and the basis for the court's findings.

N.C. Gen. Stat. § 14-208.20. When classified as a sexually violent predator, a defendant, among other requirements, must maintain registration as a sex offender for life. *See* N.C. Gen. Stat. § 208.23; N.C. Gen. Stat. § 14-208.6A (2003). However, there are no sentencing implications in the court's finding of a defendant to be a predator under this statute that allow the court to extend a defendant's sentence beyond the presumptive range for the sex crime for which he has been convicted. It is purely a means of classification.

We believe that in the case at bar, in light of the potential misuse and confusion which may be caused due to the other legal implications of the term predator, the court's listing "DEFENDANT IS A PREDATOR" as a nonstatutory factor in aggravation was improper and should not be considered at any new trial for such purposes.

After close review of the transcript, record, and briefs, we hereby grant defendant a new trial.

New trial.

Judge HUDSON concurs.

Judge LEVINSON dissents in part and concurs in part.

LEVINSON, Judge, dissenting in part and concurring in part.

I respectfully disagree with the majority opinion's reasoning and conclusion concerning the application of Rule 412 to the second degree rape conviction. I would find no error in this conviction. I also dissent from the majority's conclusion that defendant's conviction for common law robbery should be reversed. I would vote to find no error in the trial of either felony. I concur with the majority's decision to remand for resentencing in light of *Blakely v. Washington*, —— U.S. ——, 159 L. Ed. 2d 403 (2004).

The trial court did not err by excluding evidence of the victim's sexual activity with her boyfriend. The admissibility of evidence of a victim's sexual activity with individuals other than the defendant is

generally prohibited by the rape shield law, N.C.G.S. § 8C-1, Rule 412 (2003). Under Rule 412(b)(2), such evidence is admissible if it is "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." "This exception is clearly intended, *inter alia*, to allow evidence showing the source of sperm, injuries or pregnancy to be someone or something other than the defendant." *State v. Fortney*, 301 N.C. 31, 41, 269 S.E.2d 110, 115 (1980). Thus, "**evidence showing the source** of . . . **injuries** . . . to be someone or something **other than the defendant**" is admissible. However, "[n]aked inferences of prior sexual activity by a rape victim with third persons, without more, are irrelevant to the defense of consent in a rape trial." *Id.* at 44, 269 S.E.2d at 117. In the instant case, there was no evidence that the victim's prior sexual activities were the source of her injuries; accordingly, the trial court properly excluded evidence of these.

Appellate cases finding error in a trial court's exclusion of evidence of sexual activity with third parties are those in which there was some **evidence** tending to support the defense theory that the victim's injuries or condition were not caused by the defendant. *See, e.g., State v. Ollis*, 318 N.C. 370, 348 S.E.2d 777 (1986) (where victim testified on *voir dire* that she was raped by a **second** man on the same night that the defendant raped her, defendant should be allowed to cross-examine victim about the other rape); *State v. Wright*, 98 N.C. App. 658, 392 S.E.2d 125 (1990) (where doctor testified that victim's vaginal irritation might be caused by masturbation, testimony of her grandmother that she frequently saw victim engaged in masturbation was relevant).

In the instant case, the victim testified that defendant forcibly raped her vaginally and also forced her to engage in anal sex. The State presented uncontradicted testimony, from the supervising forensic nurse in the Sexual Assault Program of the hospital where the victim was treated, that the victim suffered multiple "areas of lacerations, skin tears, [and] bruising" of her genital area, including labial lacerations, perineal bruising, and "multiple areas of [rectal] lacerations." In addition, her cervix was "very bruised and swollen," and she exhibited "active oozing [and] bleeding" of her anus. The nurse testified further that, although it might be physically "possible" for an individual to receive these injuries by consensual participation in "rough sex," she found the injuries consistent with sexual assault.

It was in this evidentiary context that the defendant tried to introduce the evidence that the victim had engaged in consensual sexual

activity with her boyfriend earlier that day, which activity did **not include** vaginal or anal intercourse, and which **did not hurt or injure the victim**. Neither the victim's testimony on *voir dire*, nor any other evidence or testimony, suggested any possibility that the earlier sexual activity was the source of the victim's injuries. Accordingly, the victim's earlier episode of "fooling around" with her high school boyfriend did **not** constitute "evidence of specific instances of sexual behavior . . . showing that the act or acts charged were not committed by the defendant" and thus was not admissible under Rule 412(b)(2).

The majority opinion indicates that the evidence of the victim's other sexual activities with others would be useful to the defense, as a *theoretical* alternative source of the victim's vaginal and anal injuries. However, the test for admissibility is not whether or not the proffered evidence would be helpful to the defense, but whether it is **legally relevant** to an issue in the case. *See* N.C.G.S. § 8C-1, Rule 402 (2003) ("relevant evidence is admissible, . . . Evidence which is not relevant is not admissible"); N.C.G.S. § 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."). Absent any evidence that the earlier sexual activity caused vaginal or anal injury, it does not tend to show that someone other than the defendant committed the offenses, and thus has no legal relevance. In his brief, defendant baldly asserts that "any tears and fissures as described by [the victim] could just as likely have been created by [the victim's] encounter with her friend." However, without some affirmative evidence or testimony supporting this position, it is simply speculation, and does not render otherwise inadmissible testimony admissible.

The defendant argues further that evidence that the victim had sex with someone else was "competent to corroborate the testimony of the defendant that there had been no violence nor any force utilized during the course of the encounter and that the defendant was not the cause of the tears and fissures." Defendant misstates the law in this regard. Such evidence is admissible only if there is some **basis other than the defendant's denial that he committed rape**, tending to show that the other activity led to vaginal tearing.

Moreover, "to receive a new trial, defendant has the burden of showing that there was a reasonable possibility the jury would have reached a different verdict had the error in question not been com-

mitted. N.C.G.S. § 15A-1443(a)." *State v. Ligon*, 332 N.C. 224, 239, 420 S.E.2d 136, 145 (1992). In the instant case, I conclude that even assuming, *arguendo*, that the trial court erred by excluding the evidence, the defendant was not prejudiced thereby. The *voir dire* testimony was that the victim had engaged in consensual sexual activity that did not hurt her, and that did not include vaginal or anal intercourse. This evidence would not have affected the outcome of the trial for several reasons.

First, defendant was able to present evidence that the injuries could have existed before the alleged rape. For example, the forensic nurse acknowledged that the injuries could have occurred 6-12 hours preceding the encounter with the defendant. Secondly, there was uncontradicted expert testimony that the victim's multiple, severe vaginal and rectal injuries were consistent with a sexual assault. Because the *voir dire* testimony actually **negates** the prospect that she was hurt as a result of the earlier encounter—and suggests there was neither vaginal nor anal intercourse—this testimony would have done nothing to rebut or contradict the State's evidence as to the origin of the injuries. Third, a comparison of the uncontradicted evidence concerning the victim's injuries with the *voir dire* testimony leaves little doubt that the jury would have reached the same result.

I would further note that the trial court gave thoughtful consideration to this issue before rendering its ruling. After conducting an extensive *voir dire*, the trial court weighed the relevancy and Rule 412 issues very carefully, and stated:

> I think the Rape Shield law is designed to protect women from the shotgun defense that if she would do it with Jack, she'd do it with Jim[.] . . . And I think the only time it really becomes pertinent, this prior sexual behavior if defendant testifies that she was raped *and up until that time—well, there is some—**something very significant about the physical activity of some prior event that could have caused the same thing***. I think here, even if there's prior sex, the tearing really is a red—in some way a red herring. It's not really—whether it is tearing during consensual or nonconsensual sex, it's not really dispositive of whether there is a consent between her and Mr. Harris, one way or the other. (emphasis added).

The trial court was correct. The fact that the injuries were so significant, together with the absence of any suggestion on *voir dire* that the victim was injured by her boyfriend, supports the trial court's

determination that there was no evidence that the injuries originated during earlier sexual activity. Further, as the judge observed, earlier sexual activity of the victim, whether gentle or "rough," does not bear on the question of the victim's consent to have sex with defendant. "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)). I cannot conclude, applying deferential review, that the trial court erred by excluding this evidence.

Finally, I believe that this is precisely the type of evidence that the rape shield law is intended to exclude. Where there is no evidence that places the prior sexual activity within an exception to the statute, its admission serves no valid purpose and is not relevant. In his brief, the defendant states that "the determination of the fact of whether there was forcible penetration is made more probable by evidence of [the victim's] sexual encounter with another male within 24 hours of the date of the alleged offense in this cause." This is, of course, **exactly** what Rule 412 excludes.

I also dissent from the majority opinion that the common law robbery conviction should be reversed because questions related to the victim's prior sexual encounter may bear on defendant's common law robbery charge. For the reasons stated above, I disagree. Moreover, defendant does not even make an argument related to whether the trial court's failure to admit certain evidence should result in a new trial. Defendant's only argument on appeal is nonsuit. " 'Common law robbery is defined as the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear.' " *State v. Shaw*, 164 N.C. App. 723, 728, 596 S.E.2d 884, 888 (2004) (quoting *State v. Herring*, 322 N.C. 733, 739, 370 S.E.2d 363, 368 (1988)). There is clearly substantial evidence of every element of the common law robbery offense. I would find no error as to common law robbery.

STATE OF NORTH CAROLINA v. ANTOINE DENARD YOUNG, DEFENDANT

No. COA03-257

(Filed 5 October 2004)

1. **Evidence— hearsay—not offered for truth of matter asserted—corroboration**

The trial court did not err in a possession with intent to sell and deliver marijuana case by allowing three officers to testify regarding statements made to them by another officer describing the activities of defendant and others witnessed by that officer during a surveillance operation, because: (1) the challenged testimony was offered not to prove the truth of the matters asserted therein, but rather to explain the officers' conduct after they arrived at the scene; (2) the trial court specifically instructed the jury that each officer's testimony was not offered for the truth of the matter asserted; and (3) while an officer's trial testimony did not specifically denominate any of the behavior as illegal drug activity, it cannot be said that the testimony of the other three officers was not corroborative of the officer's testimony.

2. **Sentencing— improper punishment—exercising right to plead not guilty**

The trial court erred by considering defendant's decision to plead not guilty to possession with intent to sell and deliver marijuana in determining his sentence, resulting in imposition of a harsher sentence based on defendant exercising his right to a jury trial on that charge, and the case is remanded for a new sentencing hearing because the totality of the trial court's comments evidenced an improper intent by the trial court to punish defendant for exercising his right to plead not guilty.

Appeal by defendant from judgment entered 22 October 2002 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 19 November 2003.

Attorney General Roy Cooper, by Assistant Attorney General Deborrah L. Newton, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

ELMORE, Judge.

Antoine Denard Young (defendant) appeals his convictions of possession with intent to sell and deliver marijuana and attaining habitual felon status. Defendant also appeals from the sentence imposed by the trial court following these convictions. For the reasons stated herein, we find no prejudicial error in the guilt-innocence phase of defendant's trial, but vacate his sentence and remand to the trial court for a new sentencing hearing.

The evidence presented by the State at trial tends to show the following: At approximately 6:00 p.m. on 5 August 2001, Officer Brett Moyer of the Winston-Salem Police Department was conducting surveillance from a vacant house on East 17th Street across from Cleveland Avenue Homes, a Winston-Salem public housing project in an area routinely patrolled by Officer Moyer, when he observed defendant, defendant's brother Robert Young, and five or six other people across the street. Officer Moyer testified that defendant was seated in a chair on the sidewalk next to a brown Pontiac automobile which was parked at the curb. Robert was leaning against the car, and the others were milling about on the sidewalk. Officer Moyer observed, through binoculars, a black male approach defendant. Defendant handed the black male what appeared to be a "plastic bag with something in it" and the black male handed defendant money, then walked away. Defendant handed the money to Robert, and at that point Officer Moyer directed another officer conducting the surveillance with him to begin videotaping the scene across the street. This videotape was introduced into evidence at trial and played for the jury. Officer Moyer testified that a heavyset black female then approached defendant's chair and appeared to converse with defendant. Both the black female and defendant were moving their arms, but they were positioned in such a way that Officer Moyer "couldn't see exactly what was happening[.]" The black female then approached Robert and shook his hand with a "palming handshake" in which she "cupped [her] hand," before walking away.

Officer Moyer testified that defendant then got up from his chair and walked a short distance through an opening in a fence and onto the Cleveland Avenue Homes property. Defendant approached one of the buildings and bent low to the ground near a crawl space vent at the building's base "for just a second" before standing up and returning to the sidewalk area with "his hand up carrying something in his hand." While at the crawl space vent, defendant's back was to Officer Moyer such that Officer Moyer "couldn't see[] . . . what, if anything,

[defendant] was doing." Defendant then walked over to the brown Pontiac parked at the curb near where he had been sitting and got into the vehicle on the front passenger side, and "got down low in the seat and . . . after a second" got out of the car.

Officer Moyer testified that throughout the surveillance he had been in radio contact with his "arrest team," which consisted of Winston-Salem Police Department patrol officers T.G. Porter, Mark Bollinger, and Steven Snyder, relating to them his observations and giving a physical description of both defendant and Robert. After observing defendant get into and out of the car, Officer Moyer requested that the arrest team come to the scene and take defendant and Robert into custody. Officers Porter, Bollinger, and Snyder arrived minutes later, and defendant and Robert were taken into custody without incident.

At trial, Officers Porter, Bollinger, and Snyder were each allowed to testify, over defendant's objection, regarding Officer Moyer's descriptions to them of the activity he observed during his surveillance operation. Before this portion of each officer's testimony, the trial court instructed the jury that this testimony was received only for corroborative purposes or for determining Officer Moyer's credibility. Officer Porter testified that after he arrived at the scene, Officer Moyer told him that defendant had engaged in some activity at the crawl space vent of the nearby Cleveland Avenue Homes building. Officer Porter then "walked over to the crawl space and . . . looked in and found a clear, plastic bag with four small Ziploc bags in it containing a green vegetable material. . . . [I]t was marijuana." Officer Porter testified that this was "consistent with the way individuals will package marijuana or other narcotics for sale[.]" Officer Bollinger testified as to Officer Moyer's description of the interaction between the black female and defendant and Robert. Officer Bollinger also testified that his search incident to the arrest of Robert revealed that Robert was carrying $192.00, mostly in small bills, and that Robert did not have any drugs or drug paraphernalia on his person. Finally, Officer Snyder testified that after Officer Moyer described to him defendant getting in and out of the brown Pontiac parked on the curb near where defendant had been sitting, Officer Snyder searched the car and found a small Ziploc bag containing marijuana under the front passenger seat. Officer Snyder also testified that his search incident to the arrest of defendant revealed no money, drugs, or drug paraphernalia on defendant's person.

At trial, the parties stipulated that the green vegetable matter seized by the officers from the crawl space vent and the car was marijuana, weighing a total of 6.6 grams. Defendant presented no evidence. After the jury returned its verdict finding defendant guilty of possession with intent to sell and deliver marijuana, defendant pled guilty to being a habitual felon. The trial court found no aggravating or mitigating factors and sentenced defendant from the presumptive range to between 96 and 125 months imprisonment. Defendant timely filed notice of appeal on 31 October 2002.

[1] By his first assignment of error, defendant contends that the trial court committed reversible error by allowing Officers Porter, Bollinger, and Snyder to testify regarding statements made to them by Officer Moyer describing the activities of defendant and others witnessed by Officer Moyer during the surveillance operation. Defendant argues that because the testimony of each officer contains some additional details not present in Officer Moyer's testimony, the challenged testimony went beyond corroboration of Officer Moyer's testimony and instead constituted inadmissible hearsay. We disagree.

The State asserts, and we agree, that the challenged testimony of Officers Porter, Bollinger, and Snyder as to observations related to them by Officer Moyer from his surveillance was offered not to prove the truth of the matters asserted therein, but rather to explain the officers' conduct after they arrived at the scene. We note at the outset that the trial court specifically instructed the jury that each officer's testimony was *not* offered for the truth of the matter asserted. The officers' conduct upon arrival included searching the crawl space vent area and the Pontiac, both areas Officer Moyer described to the arrest team as having been visited by defendant immediately before the arrest team was called in, and arresting defendant after marijuana was found in both locations.

Our Supreme Court has stated that:

> [t]he North Carolina Rules of Evidence define "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1999). Out-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay. *Specifically, statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed.*

State v. Gainey, 355 N.C. 73, 87, 558 S.E.2d 463, 473, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002) (citations omitted) (emphasis added); *see also State v. Canaday*, 355 N.C. 242, 248, 559 S.E.2d 762, 765 (2002).

In the present case, defendant first challenges the testimony of Officers Porter, Bollinger, and Snyder that Officer Moyer told each of them, prior to their arrival at the scene, that he had observed defendant involved in illegal drug activity. Defendant argues that because Officer Moyer never testified that he observed anything which he could positively identify as drugs during his surveillance, this testimony from the three arresting officers went so far beyond corroboration of Officer Moyer's testimony as to constitute inadmissible hearsay. However, we conclude that this testimony from each officer was offered not to prove that defendant was engaged in illegal drug activity, but rather to explain (1) why the arrest team was called to the scene and (2) each officer's subsequent conduct upon arrival, which consisted of Officer Porter searching the crawl space vent area and seizing marijuana found therein packaged in a manner indicative of sale; Officer Bollinger arresting Robert and seizing $192.00, mostly in small bills, from his person; and Officer Snyder searching the Pontiac, seizing marijuana therefrom, and arresting defendant. Accordingly, this testimony does not constitute inadmissible hearsay under the authority of *Gainey* and *Canaday*. Moreover, we disagree with defendant's contention that this testimony did not corroborate Officer Moyer's testimony.

While defendant correctly asserts that Officer Moyer never testified that he observed anything he could positively identify as illegal drugs during his surveillance, Officer Moyer did testify that he observed a black male approach defendant and hand defendant money in exchange for a "plastic bag with something in it," and that defendant then handed the money to Robert. Officer Moyer also testified that he observed a black female who first conversed with defendant while their arms were moving, then approached Robert and shook his hand with a "palming handshake" in which she "cupped [her] hand," before walking away. Officer Moyer further testified that he observed defendant walk to the crawl space vent area, bend low to the ground for a second, stand up and raise his hand with something in it, walk to the Pontiac parked near the curb, get in and sit low in the seat briefly, then get out of the car. While Officer Moyer's trial testimony did not specifically denominate any of this behavior as "illegal drug activity," we cannot say that the testimony of Officers Porter,

Bollinger, and Snyder that Officer Moyer, in summoning them to arrest defendant, so characterized the totality of the behavior he described at trial is not corroborative of Officer Moyer's testimony.

Defendant next challenges, on the same grounds, specific portions of each officer's testimony. First, defendant excepts to the trial court's admission of the following testimony by Officer Porter:

Q. [by the Assistant District Attorney]: Did you have any communication with Officer Moyer at that time?

A. Yes, ma'am.

Q. And what did he say to you?

A. . . . He advised us that, as we were arriving, [defendant] approached the little crawl space vent—

Q. Yes, sir.

A. —and had dropped something into that vent or that crawl space area.

[DEFENDANT'S TRIAL COUNSEL]: Objection.

THE COURT: This testimony is offered for corroborative purposes. It's not offered for the truth of the matter asserted. You may proceed. Objection overruled.

Q. So, after he indicated that there was some activity at the crawl space, what did you do, Officer?

A. I walked over to the crawl space.

Q. And tell the members of the jury what you found[] . . . .

A. . . . So, I walked over to the crawl space and I looked in and found a clear, plastic bag with four small Ziploc bags in it containing a green vegetable material.

We again note that the trial court instructed the jury that this testimony was not offered for the truth of the matter asserted. The transcript reveals that immediately after eliciting Officer Porter's testimony regarding Officer Moyer's statement to him about defendant's activity at the crawl space vent, the prosecutor proceeded to question Officer Porter about his subsequent search of the crawl space vent area. She did not follow up on Officer Porter's testimony that Officer Moyer told him that defendant "had dropped something" into the crawl space vent area, which was admittedly different from Officer

Moyer's testimony, from which the reasonable conclusion could be drawn that defendant instead took something out of the crawl space vent. Again, we conclude that this testimony from Officer Porter was offered not for the truth of the matter asserted, but rather to explain Officer Porter's actions, taken subsequent to Officer Moyer's statement to him about defendant's activity at the crawl space vent, of approaching the crawl space vent, searching it, and seizing therefrom marijuana packaged in a manner which he testified was indicative of sale. Accordingly, this testimony does not constitute inadmissible hearsay. *Gainey*, 355 N.C. at 87, 558 S.E.2d at 473; *Canaday*, 355 N.C. at 248, 559 S.E.2d at 765.

Defendant next challenges admission of the following testimony by Officer Bollinger, characterizing it as inadmissible hearsay:

> Q. [by the Assistant District Attorney]: What information did you have about the activity that was being investigated on August 5th of 2001?
>
> A. By radio traffic we were told that several subjects were involved in what appeared to be drug activity in the 1700 or—excuse me—thousand block of 17th Street, East 17th. We were given—
>
> [DEFENDANT'S TRIAL COUNSEL]: Objection.
>
> THE COURT: Overruled. Ladies and gentlemen, this is not offered for the truth of the matter asserted. This officer is testifying as to what another officer heard [sic]. You're to consider the evidence as presented in this courtroom to determine whether there was something illegal going on or not. You may proceed, [Assistant District Attorney].
>
> Q. Officer, if you would tell the members of the jury[] . . . about what information you received upon arriving at the 1000 block of East 17th Street.
>
> A. Basically, I was just told—I was given a description of a—of a subject involved in activity and was told to respond to that area and take that person into custody.
>
> Q. And did you get any information about what activity specifically had been afoot, so to speak?
>
> A. What I was told was that a—a female—well, I was given some descriptions. I was told that a black female would get a small

bag of what appeared to be marijuana from a—from a black male subject, and I was given his description, and that they—that the female would take the marijuana to a, what appeared to be, a buyer and that the—a transaction would take place and that the female would, in turn, take the money that she had obtained and hand it off to a different subject, a third party.

Q. Were you just given a description of the black male and what he was wearing that she received something from?

A. I was told that the—well, I was told that the—that she would receive items from the—or the marijuana, what appeared to be marijuana, from a black male wearing a white T-shirt and blue jeans, and that, in turn, she would take the—the money that she got back and hand it to a black male wearing blue jean shorts and a white T-shirt that had a red emblem on it.

Q. When you arrived on the scene, did you find people who matched those descriptions?

A. Yes, ma'am.

Q. Were those persons taken into custody?

A. Yes, ma'am.

Again, we note that the trial court instructed the jury that this testimony was not offered for the truth of the matter asserted. The transcript indicates that immediately after eliciting Officer Bollinger's testimony regarding what Officer Moyer told him about the interaction between the black female and defendant and Robert, the prosecutor's line of questioning turned to Officer Bollinger's subsequent arrival at the scene, visual identification of defendant and Robert, and arrest of Robert. Again, the prosecutor did not follow up on Officer Bollinger's testimony that Officer Moyer told him that the black female would "get a small bag of what appeared to be marijuana" from defendant and "take the marijuana to . . . what appeared to be a buyer" and then "take the money that she had obtained and hand it off to" Robert, which testimony contained some additional details not present in Officer Moyer's trial testimony about his observations regarding the interaction between the black female and defendant and Robert. We note that while Officer Moyer's testimony on this point was less detailed, a reasonable conclusion that the black female was serving as a "middleman" in drug transactions involving defend-

ant could nevertheless be drawn from Officer Moyer's testimony that the black female first approached defendant in such a way that she obstructed Officer Moyer's view, conversed with him while moving her arms, and then moved towards Robert and shook his hand with a "palming handshake."

Again, we conclude that the challenged testimony from Officer Bollinger was offered not for the truth of the matter asserted, but rather to explain his actions, taken subsequent to Officer Moyer's statement to him about the interaction between defendant and Robert and the black female, of responding to the scene, visually identifying defendant and Robert, placing Robert under arrest, and seizing incident to the arrest $192.00 in mostly small bills from Robert's person. We therefore conclude that Officer Bollinger's testimony on this point does not constitute inadmissible hearsay. *Gainey*, 355 N.C. at 87, 558 S.E.2d at 473; *Canaday*, 355 N.C. at 248, 559 S.E.2d at 765.

Finally, defendant challenges admission of the following testimony by Officer Snyder, also characterizing it as inadmissible hearsay:

Q. [by the Assistant District Attorney]: Did Officer Moyer direct you to any other area where [defendant] had been to search?

A. Yes. Right adjacent to where there was a fence line and beyond that on the housing authority side, there's some vents, some—I guess they would be like basement vents to the—to the bottom of the building. [Officer Moyer] [d]irected me to that area where he told me via radio that [defendant] had gone back and forth to that area, that he believed that's where he was keeping his marijuana.

[DEFENDANT'S TRIAL COUNSEL]: Objection, move to strike.

THE COURT: Objection overruled. Ladies and gentlemen, once again, his testimony is offered for corroborative purposes. You may consider it as it corroborates what the witness testified to previously. If it's inconsistent with it, you can consider it as it effects the credibility of the witness. You may proceed.

Q. After Officer Moyer told you he believed that there was marijuana in the crawl space, was a search conducted of the crawl space?

[DEFENDANT'S TRIAL COUNSEL]: Objection to the form.

THE COURT: Overruled.

A. Yes, there was.

Q. What was located in the crawl space, Officer?

[DEFENDANT'S TRIAL COUNSEL]: Objection.

THE COURT: Overruled.

A. There was a small bag with some . . . $10 bags of marijuana. . . .

Q. Did you conduct a search of the vehicle that had been parked where [defendant] was standing?

A. Yes. Upon Officer Moyer advising me that he had also observed [defendant] go to the front passenger area of his vehicle towards the floorboard area and under his seat, I had responded to that area upon information Officer Moyer gave me and found a bag of marijuana under the—in that area also.

As with the challenged portions of Officer Porter's and Officer Bollinger's testimony, we note that the trial court instructed the jury that this testimony was not offered for the truth of the matter asserted. The transcript indicates that immediately after eliciting Officer Snyder's testimony that Officer Moyer told him to search the crawl space vent area because Officer Moyer believed "that's where [defendant] was keeping his marijuana," Officers Porter and Snyder proceeded to do so, where they recovered marijuana packaged in a manner consistent with its sale. Officer Snyder then testified that he searched the brown Pontiac "[u]pon Officer Moyer advising me that he had also observed defendant go to the front passenger area of his vehicle towards the floorboard area and under his seat," and recovered marijuana from that location as well. As with the challenged testimony from Officers Porter and Bollinger, we conclude that this testimony from Officer Snyder was offered not for the truth of the matter asserted, but rather to explain his actions, taken subsequent to Officer Moyer's statements to him about his observations of defendant's activity at the crawl space vent and in the front seat of the brown Pontiac. We therefore conclude that the challenged portion of Officer Snyder's testimony does not constitute inadmissible hearsay. *Gainey*, 355 N.C. at 87, 558 S.E.2d at 473; *Canaday*, 355 N.C. at 248, 559 S.E.2d at 765.

Defendant's first assignment of error is overruled.

[2] Turning to his second assignment of error, defendant contends that the trial court improperly considered defendant's decision to plead not guilty to the possession with intent to sell and deliver marijuana charge in determining his sentence, resulting in imposition of a harsher sentence because defendant exercised his right to a jury trial on that charge. We agree.

Regarding the influence on a trial court's sentence of a criminal defendant's decision to not plead guilty and to pursue a jury trial, this Court has previously stated:

> Although a sentence within the statutory limit will be presumed regular and valid, such a presumption is not conclusive. *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). "If the record discloses that the [trial] court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of [the] defendant's rights." *Id.* A defendant has the right to plead not guilty, and "he should not and cannot be punished for exercising that right." *Id.* at 712-13, 239 S.E.2d at 465. Thus, "[w]here it can be reasonably inferred the sentence imposed on a defendant was based, even in part, on the defendant's insistence on a jury trial, the defendant is entitled to a new sentencing hearing." *State v. Peterson*, 154 N.C. App. 515, 517, 571 S.E.2d 883, 885 (2002).

State v. Gantt, 161 N.C. App. 265, 271, 588 S.E.2d 893, 897 (2003), *disc. review allowed*, 358 N.C. 157, 593 S.E.2d 83 (2003).

In the present case, our review of the record indicates that while hearing pre-trial motions, the trial court discussed with defense counsel defendant's prior record level. Following this discussion, the trial court stated as follows:

> Now, [defendant], if you pled straight up, I know the State is not going to offer you any pleas, but *if you pled straight up I'd sentence you at the bottom of the mitigated range.* But that's—that's about as good as we can get with these habitual felons[] . . . . (emphasis added)

The trial court then proceeded to discuss the likelihood that evidence of defendant's prior drug convictions would be admissible should defendant pursue a jury trial, as well as the futility of an instruction to the jury not to consider defendant's previous drug activity as evi-

dence of his guilt on the current charge. The trial court then stated as follows to defense counsel:

> Now, if you go to trial and he's convicted, I'll be perfectly honest with you, I'm not going to sentence him—I doubt I would sentence him in the aggravated range. I may, but it just depends upon how bad it is, but he definitely would probably get a sentence in the—he would definitely get a sentence in the presumptive range. I probably wouldn't go back to the mitigated range since I'm offering this now prior to trial, but I'll let you think about it, unless you already know that he's not interested in it.

Defendant thereafter chose not to plead guilty and exercised his right to a jury trial on the marijuana possession with intent to sell and deliver charge. After the jury returned its guilty verdict on that charge, defendant pled guilty to having attained habitual felon status. The trial court then proceeded to sentencing, stating as follows:

> All right. [Defense counsel], you care to be heard on behalf of your client? I believe I previously indicated what the Court's position would be at sentencing, but I'll still consider whatever you have to say.

Following defense counsel's brief argument for imposition of a mitigated sentence, the trial court found no aggravating or mitigating factors and, pursuant to the sentence enhancement required by defendant's habitual felon plea, imposed a sentence from the presumptive range for a class C felony. *See* N.C. Gen. Stat. § 14-7.6 (2003); *see also* N.C. Gen. Stat. § 15A-1340.17(c), (d) (2003).

We conclude that because it can be "reasonably inferred" on this record that defendant's sentence was based, at least in part, on his refusal to plead guilty and to instead pursue a jury trial, defendant is entitled to a new sentencing hearing. *Peterson*, 154 N.C. App. at 517, 571 S.E.2d at 885. Before the jury was empaneled, the trial court informed defendant that if he entered a plea of guilty to the possession with intent to sell and deliver charge, the trial court would "sentence [defendant] at the bottom of the mitigated range." The trial court then warned defendant that if he instead pursued a jury trial which resulted in a conviction, defendant "would definitely get a sentence in the presumptive range" and that the trial court "probably wouldn't go back to the mitigated range since I'm offering this now prior to trial[.]" We note that while these statements were made after a discussion of defendant's prior offense history, the record does not

indicate that the trial court had yet been made aware of what evidence, if any, might exist to support any of the statutory factors in support of a mitigated sentence. Following defendant's conviction on the drug charge and subsequent guilty plea on the habitual felon charge, the trial court stated that it had "previously indicated what the Court's position would be at sentencing" before imposing a sentence from the presumptive range, which was, indeed, consistent with its pre-trial expression of intent should defendant pursue a jury trial. We hold that the totality of these comments evidence an improper intent by the trial court to punish defendant for exercising his right to plead not guilty. *State v. Boone*, 293 N.C. 702, 712-13, 239 S.E.2d 459, 465 (1977). We therefore remand this matter to the trial court for a new sentencing hearing.

No error in trial, vacate and remand for resentencing.

Judges BRYANT and CALABRIA concur.

ROY RONALD HENSLEY, EMPLOYEE, PLAINTIFF v. INDUSTRIAL MAINTENANCE OVERFLOW, EMPLOYER, AND PMA INSURANCE GROUP, CARRIER, DEFENDANTS

No. COA03-1140

(Filed 21 September 2004)

1. **Workers' Compensation— total disability—outside income—skills not transferable**

The Industrial Commission did not err by concluding that a workers' compensation plaintiff was totally rather than partially disabled, even though he earned income from a tobacco allotment and a mobile home park. There was evidence to support findings that plaintiff was not actively involved in operating the tobacco allotment and that the skills he used to set up and run the mobile home park were not transferable. Findings supported by competent evidence must stand even if there is evidence to the contrary.

2. **Workers' Compensation— findings showing that evidence considered—sufficiency**

The Industrial Commission did not err in a workers' compensation case by not giving a reason for disregarding the opinion of

plaintiff's treating physician and not making detailed findings about defendant's surveillance videotape. The Commission made findings about the doctor and the tape which showed that it considered all of the evidence; nothing more was required.

Appeal by defendants from Opinion and Award entered 5 May 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 April 2004.

David Gantt, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Neil P. Andrews and Nadia Z. Schroth, for defendants-appellants.

GEER, Judge.

In this appeal from an Opinion and Award of the North Carolina Industrial Commission, defendants Industrial Maintenance Overflow ("Industrial") and Industrial's insurance carrier, the PMA Insurance Group, challenge the Commission's conclusion that plaintiff Roy Ronald Hensley is totally disabled. Defendants contend Mr. Hensley's income from a tobacco allotment and ownership of a mobile home park established that he is only partially disabled. Because the Commission made the findings of fact required by *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 107-08, 530 S.E.2d 54, 61 (2000) and because those findings are supported by competent evidence, we affirm the Commission's Opinion and Award.

Facts

At the time of the hearing, Mr. Hensley was 59 years old and had a twelfth-grade education. He worked for Industrial as an ironworker for 20 years, setting up cranes and rigging for the installation of telephone towers and equipment. On 30 October 1998, Mr. Hensley was injured at work when a 20-ton dolly "broke loose," struck him in the left knee, and smashed him against a wall, hurting both knees. Mr. Hensley went to St. Joseph's Urgent Care the next day and was immediately referred to Blue Ridge Bone and Joint Clinic, an orthopedic practice, for further evaluation.

Mr. Hensley was diagnosed with an ACL tear to his left knee, and on 8 December 1998 underwent surgery to repair the knee. Defendants accepted the claim pursuant to a Form 60 and paid medical expenses and compensation benefits. After returning to work for four weeks, Mr. Hensley sought medical treatment for pain

in his right knee. A 3 March 1999 MRI revealed a torn medial meniscus in Mr. Hensley's right knee, and Dr. David Cappiello performed surgery on 17 March 1999 to repair it.

In April 1999, Mr. Hensley returned to light duty work with Industrial. Industrial did not require him to perform any climbing or other duties that exceeded his existing restrictions, and plaintiff was usually able to handle his responsibilities in this light duty position. The Commission found that the position was an accommodation not available to the general public. Defendants dispute this finding.

On 10 November 1999, Mr. Hensley resigned from his light-duty job after he was accused of stealing time by improperly filling out time cards. Beginning on 22 November 1999, Mr. Hensley worked part-time for Rogers and Son Welding for several weeks. Jerry Rogers, who had previously worked with Mr. Hensley, testified that Mr. Hensley could barely climb around the trucks and onto ladders and had considerable problems walking and working on concrete. Mr. Rogers noticed Mr. Hensley limping when he walked.

Mr. Hensley's right knee continued to bother him during his employment with Rogers. On 18 January 2000, Dr. Cappiello performed a total knee replacement of Mr. Hensley's right knee. On 18 December 2000, Dr. Cappiello reported that "patient appears to be doing better since his last visit" and stated, "I would like him to progress his activities as tolerated[.]" In handwriting at the bottom of the note appeared:

> Dr. Cappiello
>
> Please addendum this note to say[:]
>
> Pt. was released to return to full duty in his July visit. He has resigned from his prev job but has been running his mobile home park. Pt can continue to work.
>
> Otherwise they say they have to continue his w/c pay till he is fully released.

(Emphasis original) This request was apparently prompted, as the Commission found, by an inquiry from the medical case manager in this matter. In a 23 January 2001 addendum, Dr. Cappiello wrote: "The patient was released to resume full duty at work in July, 2000. I have been informed that he has resigned from his previous job, but is now running a mobile home park. Therefore, he is working in some capacity at this time. He is now discharged from treatment with 30

percent permanent partial disability of his right lower extremity[.]" Dr. Cappiello also imposed a permanent restriction of no climbing.

Dr. William L. Griffin, an orthopedic specialist, provided a second opinion. Dr. Griffin assigned Mr. Hensley a 30% permanent partial disability to his lower right extremity and a 40% permanent partial disability to his left knee. Dr. Griffin indicated that Mr. Hensley is limited to sedentary work with no lifting over 30 pounds; no repetitive lifting; no stooping, squatting, kneeling or climbing; and no standing or walking for prolonged periods. Dr. Griffin stated that he believes Mr. Hensley will require replacement of his left knee within five years and that both Mr. Hensley's right and left knee problems resulted from his compensable injury.

Several witnesses, who had known Mr. Hensley for many years, testified about substantial changes in Mr. Hensley's physical capabilities following his injury, including his limited ability to walk. Terry Sprouse, a contractor who had known Mr. Hensley for 25 years and observed him on job sites both before and after his injury, testified that he would not be willing to employ Mr. Hensley in his present condition because he would likely injure himself further or cause accidents to other workers.

The Commission found, based on this evidence and Mr. Hensley's testimony, that Mr. Hensley cannot stand or walk for any sustained period of time and that he cannot climb or sleep for more than a few hours at a time because of his continuous knee pain. In addition, it found that Mr. Hensley has poor balance and that he remains off his feet and resting more than half of the day.

Since leaving work with Industrial, Mr. Hensley's income has been limited to his wages from Rogers and Son Welding, income from his mobile home park, and income from his tobacco allotment. Mr. Hensley began developing a mobile home park in 1992 as a means of securing retirement income. The first mobile home was placed in the park in June 1999, approximately eight months after Mr. Hensley's injury. Mr. Hensley's activities in running the park have primarily consisted of collecting rent; he has had others perform most of the physical labor involved in the park's development and maintenance. Mr. Hensley's income tax returns show he received $5,572.00 in gross rental income in 1999 and $25,289.00 in gross rental income in 2000. Mr. Hensley, who also owns a tobacco allotment, had previously raised tobacco himself, but after his injury, he leased the allotment to others.

Mr. Hensley participated in job search activities with defendants' vocational counselor. He worked with Manpower and pursued all other leads provided by the counselor without success in finding full or part-time employment. Mr. Hensley also completed 15 to 20 job applications on his own without obtaining work. Although N.C. Vocational Rehabilitation was consulted, the only job possibility that it suggested was piecework at a sheltered workshop, earning $15.00 per day.

On 11 March 2002, Randy Adams, M.Ed., a Certified Vocational Evaluator, evaluated Mr. Hensley and reported:

> If Mr. Hensley's complaints of pain are considered, it is my vocational opinion that he would not be able to perform any substantial gainful activity as it may be found in the local, state or national economy. He would be considered totally disabled from work.

Mr. Adams further testified that Mr. Hensley did not have any skills from the management of his mobile home park that would be transferrable to other types of work and that he was "relegated to sedentary type work." Mr. Adams further testified that Mr. Hensley's verbal and math skills, as well as his digital dexterity (in the bottom 10th percentile), rendered him unable to perform most types of sedentary work.

On 5 March 2001, plaintiff filed a Form 90, reporting that he had received earnings from work during the period between 30 October 1998 and 31 December 2000. Defendants filed a Form 24 seeking to terminate Mr. Hensley's ongoing wage compensation and seeking a credit for overpayment of wage compensation. On 4 September 2001, following a Form 24 telephonic informal hearing, Special Deputy Commissioner Myra L. Griffin filed an order disapproving defendant's application. Defendants requested a hearing.

On 18 September 2002, Deputy Commissioner W. Bain Jones, Jr. filed an Opinion and Award, concluding that Mr. Hensley was totally disabled as a result of a compensable injury to both of his knees on 30 October 1998, that defendants had not met their burden as to termination of plaintiff's benefits, and that plaintiff was entitled to total disability benefits until further order of the Commission. Defendants appealed to the Full Commission, but on 5 May 2003 the Full Commission affirmed, with modifications, Deputy Commissioner Jones' Opinion and Award. Defendants filed

a timely notice of appeal to this Court from the Full Commission's Opinion and Award.

Standard of Review

In reviewing an Opinion and Award from the Industrial Commission, this Court is bound by the Commission's findings of fact when they are supported by any competent evidence, but legal conclusions are fully reviewable. *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000). Determinations of the weight and credibility of evidence are for the Commission; this Court simply determines whether the record contains any evidence tending to support the finding. *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). Findings of fact not assigned as error are conclusively established on appeal. *Robertson v. Hagood Homes, Inc.*, 160 N.C. App. 137, 140, 584 S.E.2d 871, 873 (2003).

I

[1] We first consider defendants' contention that the Commission erred in concluding that Mr. Hensley is totally disabled under N.C. Gen. Stat. § 97-29 (2003), as opposed to partially disabled under N.C. Gen. Stat. § 97-30 (2003), given the income that he receives from his ownership of a tobacco allotment and a mobile home park. The Supreme Court in *Lanning* set forth the test to be applied in determining whether an employee's ownership of a business supports a finding of earning capacity:

> [T]he test for determining whether the self-employed injured employee has wage-earning capacity is that the employee (i) be actively involved in the day to day operation of the business and (ii) utilize skills which would enable the employee to be employable in the competitive market place notwithstanding the employee's physical limitations, age, education and experience. In the instant case, given plaintiff's exertional limitations, education, and experience, would he be hired to work in the competitive market place?

Lanning, 352 N.C. at 107, 530 S.E.2d at 61.

The Court stressed that questions regarding whether plaintiff's self-employment involves marketable skills and whether plaintiff is actively involved in the day-to-day operation of the business "are questions of fact." *Id.* at 108, 530 S.E.2d at 61. In *Lanning*, the Court held that this Court "usurped the fact-finding role of the Commission"

when it made these determinations. *Id.* The Supreme Court reversed this Court and directed that the case be remanded to the Commission to make the necessary findings of fact. *See also Devlin v. Apple Gold, Inc.*, 153 N.C. App. 442, 448, 570 S.E.2d 257, 262 (2002) (finding that although the Commission made adequate findings as to the employee's involvement in day-to-day operation of his business, it failed to make findings as to whether the employee's management skills "are competitively marketable in light of his physical limitations, age, education and experience"). In this case, the Commission made the findings required by *Lanning* and, more recently, *Devlin.* The issue on appeal is whether those findings are supported by any competent evidence.

With respect to the tobacco allotment, the Commission found that "[a]fter working tobacco since 6th grade, [Mr. Hensley] has been forced by his compensable injuries to lease the allotment to non-family members for the last two seasons. Prior to his knee injuries, [Mr. Hensley] raised tobacco and put hay up, which he can no longer do." Defendants did not assign error to this finding and it is therefore binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Because the Commission's finding is binding, it conclusively establishes that Mr. Hensley was not actively involved in the day-to-day operation of his tobacco allotment. *Lanning*, 352 N.C. at 108, 530 S.E.2d at 60. As this finding of fact establishes that the tobacco allotment did not meet one prong of the *Lanning* two-prong test, we need not address whether Mr. Hensley gained any marketable skills from his tobacco allotment. Under *Lanning*, the Commission's finding supports its conclusion that Mr. Hensley's income from the tobacco allotment did not establish wage-earning capacity.

The major focus of defendants' appeal is Mr. Hensley's ownership of the mobile home park. With respect to the mobile home park, the Commission found "that the skills shown by plaintiff in setting up and running his mobile home park are not transferable to a job for hire" and that "[t]here was no showing that there was a job in the competitive environment consisting of the minimal things that plaintiff did to collect income from [his trailer park and tobacco allotment]."[1]

1. This latter finding was labeled a conclusion of law. Findings of fact that are mislabeled conclusions of law are, nonetheless, factual findings. *Gainey v. N.C. Dep't of Justice*, 121 N.C. App. 253, 257 n.1, 465 S.E.2d 36, 40 n.1 (1996) ("Although denominated as a conclusion of law, we treat this conclusion as a finding of fact because its determination does not involve the application of legal principles.").

These findings are supported by the expert testimony of Mr. Adams:

> Q: Okay. Would he have had any transferable skills from that mobile home park work as you understood it?
>
> A: No. He was the owner of the mobile home park by virtue that he, this is investment for him. He saved his money and he bought it. In other words, he's kind of the self-appointed supervisor, you know. In other words, there, there's not any real skills that would've been developed . . . from this job or sole proprietorship that would be transferable to a system performing other work.

Defendants urge that it can be "inferred from the record" that Mr. Hensley's skills in owning the mobile home park would qualify him for a number of jobs, such as trash collector or ticket collector, but defendants offered no evidence to support this claim. Even if defendants had, Mr. Adams' testimony would still comprise sufficient evidence to support the Commission's finding that Mr. Hensley's ownership of the mobile home park did not meet the second prong of the *Lanning* test.

Defendants argue that Mr. Adams' testimony is not competent because he based his assessment on Dr. Griffin's opinions rather than the opinions of Mr. Hensley's treating physician, Dr. Cappiello. Defendants also urge that the Commission should not have given greater weight to Dr. Griffin's opinion than Dr. Cappiello. Defendants make no other argument regarding the competency of Dr. Griffin and Mr. Adams.

Our Supreme Court has squarely held that only the Commission may determine what weight to afford which evidence. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) ("the [F]ull Commission is the sole judge of the weight and credibility of the evidence"). The Commission was entitled to choose, as it did, to give greater weight to Dr. Griffin than Dr. Cappiello and it was entitled to determine that Mr. Adams' testimony was credible even though he relied upon Dr. Griffin rather than the treating physician. *Johnson v. S. Tire Sales & Serv.*, 358 N.C. 701, 710-11, 599 S.E.2d 508, 515 (2004) (Commission could not be reversed for failing to give greater weight to the treating physician's opinion); *Drakeford v. Charlotte Express*, 158 N.C. App. 432, 441, 581 S.E.2d 97, 103 (2003) (Commission entitled to credit one doctor's testimony over a second

doctor). Under our standard of review, if there is competent evidence to support the Commission's findings of fact, those findings must stand, even if there is evidence to the contrary. *Dial v. Cozy Corner Rest., Inc.*, 161 N.C. App. 694, 697, 589 S.E.2d 146, 149 (2003).[2]

II

[2] Defendants further challenge the Commission's conclusion that Mr. Hensley is totally disabled on the grounds that the Commission failed to make findings as to all the evidence presented. Specifically, defendants contend that the Commission erred (1) in giving no reason why it disregarded the opinion of the treating physician and (2) in not making detailed findings about defendants' surveillance videotape. We disagree.

Our Supreme Court has recently described the responsibilities of the Industrial Commission:

> The Commission, having exclusive original jurisdiction over workers' compensation proceedings, is required to hear the evidence and file its award, "together with a statement of findings of fact, rulings of law, and other matters pertinent to the questions at issue." N.C.G.S. § 97-84 (2003). While the Commission is not required to make findings as to each fact presented by the evidence, it must find those crucial and specific facts upon which the right to compensation depends so that a reviewing court can determine on appeal whether an adequate basis exists for the Commission's award.

Johnson, 358 N.C. at 705, 599 S.E.2d at 511. As this Court has held, the Commission need not make exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence. *Smith v. Beasley Enters., Inc.*, 148 N.C. App. 559, 562, 577 S.E.2d 902, 904 (2002).

Here, defendants do not point to any omission of "crucial and specific facts upon which the right to compensation depends[.]" *Johnson*, 358 N.C. at 705, 599 S.E.2d at 511. Indeed, the Commission made comprehensive findings of fact addressing each issue to be decided. Nor can defendants contend that the Commission failed to indicate that it considered or weighed all the evidence. *Beasley*, 148 N.C. App. at 561, 577 S.E.2d at 904. The Commission made specific

2. For the same reason, we find no merit to defendants' contention that the Commission erroneously relied upon testimony by Mr. Hensley's longtime friends. Only the Commission may decide credibility.

findings about Dr. Cappiello and his treatment of Mr. Hensley. It also included a finding of fact summarizing the videotape surveillance report, including the dates and hours of the surveillance and generally what was observed. These findings show that it considered all the evidence. Nothing more was required. *Deese*, 352 N.C. at 116-17, 530 S.E.2d at 553 ("Requiring the Commission to explain its 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."); *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 62 (Commission not required to explain why it rejected certain doctor's testimony), *disc. review denied*, 349 N.C. 228, 515 S.E.2d 700 (1998).

Defendants asserted in oral argument that their remaining contentions were dependent upon this Court's holding that the Commission erred in concluding that Mr. Hensley is totally disabled. Because of our disposition of this appeal, we need not address those arguments.

Affirmed.

Judges BRYANT and ELMORE concur.

MILO J. HOFFMAN, JR., PLAINTIFF v. GREAT AMERICAN ALLIANCE INSURANCE COMPANY, AMERICAN ALLIANCE INSURANCE COMPANY, GREAT AMERICAN ASSURANCE COMPANY, INC., F/K/A AGRICULTURAL INSURANCE COMPANY AND GREAT AMERICAN INSURANCE COMPANY, DEFENDANTS

No. COA03-947

(Filed 21 September 2004)

Insurance— uninsured motorist—collision with bicycle—police report and timely notice of claim

Summary judgment was correctly granted for defendants on an uninsured motorist claim arising from a bicycle accident where plaintiff made no showing that he complied with clear and unambiguous policy terms or the statutory requirements of N.C.G.S. § 20-279.21(b)(3)(b). Plaintiff never filed a police report and waited five days to contact his insurance agent; he

expressed doubt in his initial statements about whether he had been struck at all and his bicycle showed no damage; and his failure to provide information to the police on the day of the accident materially prejudiced the insurer's ability to investigate and defend the claim.

Appeal by plaintiff from judgments entered 2 May 2003 and 9 May 2003 by Judge Kenneth C. Titus in Orange County Superior Court. Heard in the Court of Appeals 21 April 2004.

Poe, Hoof & Associates, by J. Bruce Hoof, for plaintiff-appellant.

Haywood, Denny & Miller, L.L.P., by George W. Miller, Jr., for defendants-appellees.

TYSON, Judge.

Dr. Milo J. Hoffman, Jr. ("plaintiff") appeals from summary judgment entered for Great American Alliance Insurance Company, American Alliance Insurance Company, and Great American Assurance Company, Inc., (collectively, "defendants") and the trial court's dismissal of plaintiff's action with prejudice for failure of plaintiff to: (1) allege specific facts upon which to base a claim; and (2) allege compliance with conditions precedent to making a claim for uninsured motorist ("UM") coverage. We affirm.

I. Background

Plaintiff was riding his bicycle on the edge of a two-lane road at 7:30 a.m. on 8 July 1999 while on vacation in Ocean Drive Beach, South Carolina. A car approached plaintiff from behind and attempted to pass him. As the car "pulled out to pass [plaintiff], [the driver] didn't pull out very far." Plaintiff claimed that before the car passed by him completely, "I turned my bike away from the vehicle and started to go off the road. And my attention is diverted and I am not looking to the left. I am looking to the right where I am getting ready to go looking for, you know, any obstacles or anything." No other vehicles were on the road and plaintiff was able to describe in detail information about the driver and the vehicle.

Plaintiff stated his bicycle was traveling between 18 and 20 miles per hour at the time of the incident and the vehicle was traveling approximately 25 miles per hour. When asked about the topography of the land surrounding the road, plaintiff stated in his deposition

there "was a little grass growing, yeah. I mean, it's sand with grass growing in it, but there's grass." Plaintiff further claims before he fell off his bike, "there's a good possibility the front wheel had already left the roadway" and "a third of the driver's car" had already passed him.

After falling, plaintiff thought he only skinned his knee. He finished his bike ride then rode back to his vacation home without reporting the accident to the police. As the day progressed, plaintiff's wrist and arm began swelling and he sought treatment at North Myrtle Beach Emergency Care where his wrist and elbow were x-rayed twice. The doctor on duty told plaintiff that his wrist was sprained and recommended that plaintiff wear a sling for a few days. Plaintiff did not notify a law enforcement officer, his insurance agent, or defendants of the alleged "hit and run" accident.

Plaintiff returned to his home in Chapel Hill four days after the accident. Plaintiff felt increased pain in his arm and sought treatment on 13 July 1999 from Dr. Paul Wright, an orthopaedic surgeon, who correctly diagnosed and treated plaintiff for two fractures in his right arm. Plaintiff is a right-handed dentist, and the injury hampered his ability to practice dentistry in his usual manner for a substantial period of time.

On the same day plaintiff learned that he had fractured his right arm, plaintiff contacted his insurance agent, Don White. Plaintiff had an automobile insurance policy with defendants that provided plaintiff with UM coverage. Plaintiff's coverage required that "[defendants] must be notified promptly of how, when and where the accident or loss happened." Furthermore, plaintiff's coverage stated that "[a] person seeking Uninsured or Combined Uninsured/Underinsured Motorists Coverage must also: 1. Promptly notify the police if a hit-and-run driver is involved." On 19 July 1999, plaintiff's insurance agent responded to plaintiff by letter that stated:

> Given that you cannot categorically state that you were actually struck by the hit and run automobile, and that a report was not made to the local police department, thoughts of a UM claim did not even enter my mind. In fact, in the absence of actually having been struck by the automobile, I was of the impression that the possibility of even having a compensable Medical Payments claim was doubtful.

Plaintiff's insurance agent filed a UM claim on 19 July 1999.

On 11 August 1999, defendants contacted plaintiff by letter requesting a recorded statement via telephone. Defendants spoke with plaintiff on 17 August 1999 and recorded his statement regarding the accident. In the statement, plaintiff told defendants that he "believe[d] that the driver kind of bumped my rear tire . . . and that's what sent me flying." When defendants asked plaintiff if he was certain the car made contact with the bike, plaintiff responded:

> Uh, what is certainty? Do I have damage to my bicycle? No. Do I have memory that I was absolutely struck beyond a shadow of a doubt. But it is my belief that I was bumped by the car because of the way that all things happened . . . I mean, I'm riding my bike, everything's fine, I'm turning away from that car and the next thing I know I'm flying through the air.

Defendants denied plaintiff's claim on 9 September 1999 because plaintiff "advised [he] could not make a statement under oath that a vehicle struck [him]." After plaintiff's claim was denied, he retained an attorney. Plaintiff's attorney received a letter from defendants on 6 December 1999 stating that the claim was denied because, "[y]our client's statement was unclear as to whether or not he was struck by this phantom vehicle."

Plaintiff filed a complaint on 8 July 2002 against defendants alleging defendants failed to compensate plaintiff for bodily injury pursuant to plaintiff's UM coverage provided by defendants. On 29 October 2002 defendants answered, denied they breached their obligation to compensate plaintiff, moved to dismiss pursuant to Rule 12(b)(6), and alleged plaintiff failed to comply with the requirements for filing a UM claim. Defendants moved for and were granted summary judgment on 11 April 2003. Plaintiff appeals.

II. Issue

The sole issue is whether the trial court erred in granting defendant's motion for summary judgment on the grounds plaintiff failed to comply with the requirements of the insurance policy.

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 (2004), *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 cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense."

Draughon, 158 N.C. App. at 708, 582 S.E.2d at 345 (quoting *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. rev. denied*, 340 N.C. 359, 458 S.E.2d 187 (1995)). "Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.' " *Draughon*, 158 N.C. App. at 708, 582 S.E.2d at 345 (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664, *disc. rev. denied*, 353 N.C. 262, 546 S.E.2d 401 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001)).

IV. Conditions Precedent and Statutory Requirements

Here, plaintiff does not assert that summary judgment was inappropriately granted because genuine issues of material facts are in dispute. Rather, plaintiff argues the trial court erred in its interpretation of a question of law. We disagree. A policyholder's failure to "promptly" notify the insurer and law enforcement of an accident involving a hit and run driver, as required by both the insurance policy and N.C. Gen. Stat. § 20-279.21(b)(3)(b), serves as a bar to plaintiff's UM claim. The trial court reached the appropriate conclusion of law.

A. Statutory Provisions

The specific statutory and policy provisions upon which defendants rely are found in the Financial Responsibility Act ("FRA") at N.C. Gen. Stat. § 20-279.21(b)(3)(b). Plaintiff's UM coverage requires "[defendants] must be notified promptly of how, when and where the accident or loss happened." Further, plaintiff's policy stated that "[a] person seeking Uninsured or Combined Uninsured/Underinsured Motorists Coverage must also: 1. Promptly notify the police if a hit-and-run driver is involved."

The statutory provision governing UM claims requires:

> [w]here the insured, under the uninsured motorist coverage, claims that he has sustained bodily injury as the result of collision between motor vehicles and asserts that the identity of the operator or owner of the vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained, the insured may institute an action directly against the insurer: *Provided, in that event the insured, or someone in his behalf, shall report the accident within 24 hours or as soon thereafter as may be practicable, to a police officer* . . . .

N.C. Gen. Stat. § 20-279.21(b)(3)(b) (emphasis supplied). "The provisions of the statute enter into and form a part of the policy." *Lichtenberger v. Insurance Co.*, 7 N.C. App. 269, 273, 172 S.E.2d 284, 287 (1970).

The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute. *Woodson v. Rowland*, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991); *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). "The avowed purpose of the [FRA] . . . is to compensate the innocent victims of financially irresponsible motorists." *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763. The Act is remedial in nature and is "to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *Id.* The purpose of the Act, "is best served when [every provision of the Act] is interpreted to provide the innocent victim with the fullest possible protection." *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 324 N.C. 221, 225, 376 S.E.2d 761, 764 (1989).

While there is no dispute concerning the established purpose of the FRA, the statute requires "physical contact," which shows the intent to "protect insurance companies from fraudulent hit and run claims that were actually caused by the insured's negligence." *Andersen v. Baccus*, 109 N.C. App. 16, 20, 426 S.E.2d 105, 108 (1993) (citing *McNeil v. Hartford Accident and Indemn. Co.*, 84 N.C. App. 438, 442, 352 S.E.2d 915, 917 (1987)).

"The legislative purpose of a statute is first ascertained by examining the statute's plain language." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give [the statute] its plain

and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 Strong, N.C. Index 2d, Statutes § 5 (1968)). The plain language of N.C. Gen. Stat. § 20-279.21(b)(3)(b) states "the insured, or someone in his behalf, *shall* report the accident within 24 hours or as soon thereafter as may be practicable, to a police officer[.]" (Emphasis supplied).

Defendants assert plaintiff never filed a police report, despite his detailed knowledge of the car and driver that purportedly hit him, and that he was advised to do so, in the insurance agent's letter to plaintiff, dated 19 July 1999. The requirement that the insured must contact a law enforcement officer satisfies both purposes of the FRA: (1) to protect innocent victims; and (2) to prevent fraudulent claims. When, the insured fails to comply with the statutory requirements of prompt notice of hit and run incidents to the police, the legislature's intent to prevent fraudulent claims is nullified.

In addition to requiring notice of a hit and run to the police, both N.C. Gen. Stat. § 20-279.21(b)(3)(b) and the insurance policy require notice of the accident to the insurance carrier. We find no cases that have previously interpreted the notice to police provisions under the UM statute. Plaintiff argues our Supreme Court's interpretation of "notice to insurance carriers" applies to notice to the police, citing *Great American Ins. Co. v. C. G. Tate Construction Co.*, 315 N.C. 714, 340 S.E.2d 743 (1986) ("*Tate I*") and *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 573 S.E.2d 118 (2002) ("*Pennington*").

Plaintiff asserts it is logical that the Supreme Court's interpretation of the notice to carrier provision regarding liability claims (*Tate I*) and underinsured motorists ("UIM") claims (*Pennington*) applies equally to the notice to police provision for UM claims presented here. Under N.C. Gen. Stat. § 20-279.21(b)(4), there is no requirement that the *underinsured* motorist notify the police. The statute merely directs the insured to "give notice of the initiation of the suit to the underinsured motorist insurer." N.C. Gen. Stat. § 20-279.21(b)(4) (emphasis supplied). The statute does not prescribe the type of notice, the content of the notice, or the method by which it is to be given. The statute is similarly devoid of any particulars concerning the time frame when notice to the insurer must be provided. Given the lack of direction and specificity of N.C. Gen. Stat. § 20-279.21(b)(4) regarding the notification requirement, we do not agree the legislature intended N.C. Gen. Stat. § 20-279.21(b)(3)(b) to be interpreted as "liberally" as N.C. Gen. Stat. § 20-279.21(b)(4), par-

ticularly when a hit and run, a serious criminal act, occurred. *See Proctor*, 324 N.C. at 225, 376 S.E.2d at 764.

The differences in the two notice requirements show the legislature did not intend these provisions be constructed the same. N.C. Gen. Stat. § 20-279.21(b)(3)(b) unequivocally requires that "the insured, or someone in his behalf, *shall* report the accident within 24 hours or as soon thereafter as may be practicable, to a police officer . . . ."(Emphasis supplied). In sharp contrast, N.C. Gen. Stat. § 20-279.21(b)(4) does not specify the form, substance, or manner of the notice to be given the UIM carrier. These key distinctions show the legislature's intent that plaintiff is subject to the more stringent requirements of N.C. Gen. Stat. § 20-279.21(b)(3)(b), not the notice provision of N.C. Gen. Stat. § 20-279.21(b)(4) as plaintiff asserts. Plaintiff's claim for UM benefits was absolutely barred by his failure to comply with the specific notice requirements as set forth in N.C. Gen. Stat. § 20-279.21(b)(3)(b), and the plain and unambiguous requirements of the insurance contract. Defendant asserts plaintiff *never* notified any law enforcement officer of the alleged accident.

B. Analysis Under *Tate I* and *Pennington*

Plaintiff argues the *Tate I* and *Pennington* analysis should be extended to hit and run UM claims. We disagree. Plaintiff failed to meet the three-prong test devised by the Supreme Court in liability claims (*Tate I*) and UIM claims (*Pennington*). *Pennington* set forth the three-pronged test to determine whether late notice to an *insurer* bars recovery:

> When faced with a claim that notice was not timely given, the trier of fact must first decide whether the notice was given as soon as practicable. If not, the trier of fact must decide whether the insured has shown that he acted in good faith, e.g., that he had no actual knowledge that a claim might be filed against him. If the good faith test is met the burden then shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay.

Pennington, 356 N.C. at 580, 573 S.E.2d at 124 (quoting *Great Am. Ins. Co.*, 303 N.C. at 399, 279 S.E.2d at 776). Here, plaintiff concedes that he did not notify defendants of the claim for UM coverage on the day he was injured, or immediately thereafter, and does not affirmatively assert he ever filed a police report to comply with the statute or the express provisions of the insurance contract.

Plaintiff also fails the second prong of the *Tate I* analysis: whether plaintiff acted in good faith after his failure to timely notify defendants. The record shows that plaintiff did not "promptly" notify defendants of the alleged accident. Under our Supreme Court's analysis of the three-part test, the good faith inquiry is a subjective inquiry that examines a plaintiff's actual knowledge at the time of the accident. *Tate*, 315 N.C. at 720, 340 S.E.2d at 747.

Plaintiff testified in his deposition that on the day of the accident, his wrist became sore. As the day progressed, plaintiff sought treatment at North Myrtle Beach Emergency Care, where his wrist and elbow were x-rayed twice. The doctor on duty told plaintiff that his wrist was sprained and that he should wear a sling for a few days. Plaintiff did not contact defendants or the police. On the day of the accident, plaintiff "actually" knew he had suffered a bodily injury and failed to "promptly" report it to either his insurance agent or to law enforcement. Plaintiff expressed doubt whether the vehicle made any contact with plaintiff's bicycle in his reports to his agent and in his recorded interview. Instead, plaintiff waited five days to contact his insurance agent and never filed the police report.

The third prong of the *Pennington* test is: whether the delay materially prejudiced the insurer's ability to investigate and defend the UM claim as a result of the delay. 356 N.C. at 580, 573 S.E.2d at 124. The following factors are relevant considerations by the fact-finder:

> the availability of witnesses to the accident; the ability to discover other information regarding the conditions of the locale where the accident occurred; any physical changes in the location of the accident during the period of delay; the existence of official reports concerning the occurrence; the preparation and preservation of demonstrative and illustrative evidence, such as the vehicles involved in the occurrence, or photographs and diagrams of the scene; the ability of experts to reconstruct the scene and the occurrence; and so on.

Insurance Co., 303 N.C. at 398, 279 S.E.2d at 776 (quoting *Great Am. Ins. Co. v. C.G. Tate Constr. Co.*, 46 N.C. App. 427, 437, 265 S.E.2d 467, 473 (1980), *modified by*, 303 N.C. 387, 279 S.E.2d 769 (1981)).

The third prong of the *Pennington* test is not designed to determine whether the insurer has suffered material prejudice in any and all respects. Rather, the prejudice relates to the ability of the insurer

to investigate and attempt to discover the identity of the hit and run driver to defend the claim in question. *See Great Am. Ins. Co.*, 303 N.C. at 397-400, 279 S.E.2d at 775-77. In his statement to the insurance company, plaintiff states:

> I can tell you that there was a lady driving the car, I can tell you that she did not appear to be a really young person or a real old gray haired. I can tell you that the car was a whitish color, possibly an off white, or a real dirty car, a dirty white, and an American car, not a brand new one. . . . the license plate was almost an orange kind of color. I spotted a license plate at a distance a couple of days later that appeared to be the same color and as I drove up on that car it was a Pennsylvania plate[.]

Further, in his deposition, plaintiff testified that the driver was a Caucasian female and no passengers were traveling with the driver. Given the incident occurred in a resort area, at the height of the tourist season, on a clear morning, where no other vehicles were present and the specificity of detail the plaintiff knew about the possible out-of-state driver and vehicle, his failure to "promptly" provide this pertinent information to the police on the day of the accident materially prejudiced the insurer's ability to investigate, determine the identity of the driver of the vehicle, and its ability to defend the UM claim. Substantial evidence in the record supports the trial court's conclusion. Plaintiff's argument to extend the three-pronged test in *Tate I* and *Pennington* to determine whether late notice to an *insurer* bars recovery is without merit. The UM statute clearly and plainly requires the filing of a police report and notice within a reasonable time to the insurer for hit and run UM claims.

V. Conclusion

Viewed in the light most favorable to plaintiff, plaintiff made no showing that he complied with the clear and unambiguous policy terms or statutory requirements of N.C. Gen. Stat. § 20-279.21(b)(3)(b). Plaintiff was put on notice from his insurance agent, less than eleven days after the incident occurred, of the requirement to file a police report. In his initial statements to his insurance agent and in his recorded statement within a month after the accident, plaintiff expressed doubt whether he had been struck at all. Plaintiff's bicycle showed no damage and he continued to ride his undamaged bicycle for blocks following the incident. The trial court properly granted summary judgment to defendants. The judgment of the trial court is affirmed.

Affirmed.

Judges McGEE and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. ALVIS LUTHER EVANS, DEFENDANT, AND ROBERT L. McQUEEN, SURETY

No. COA03-1114

(Filed 21 September 2004)

Bail and Pretrial Release— bond forfeiture—surrender of defendant—motion for relief from final judgment—extraordinary circumstances

The trial court did not abuse its discretion by denying a surety's motion for relief from final judgments of bail bond forfeitures based upon "extraordinary circumstances" under N.C.G.S. § 15A-544.8, even though the surety surrendered defendant to the county sheriff and the trial court may have erred in failing to grant the surety's initial motions to set aside the bond forfeitures under N.C.G.S. § 15A-544.5(b)(3), because the surety's failure to appeal the orders denying his initial motions divested him of the right to appellate review of the merits of those orders.

Judge WYNN dissenting.

Appeal by surety from order entered 10 March 2003 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 25 May 2004.

David Phillips, for the Cumberland County Board of Education.

Parish & Cooke, by James R. Parish, for the surety.

CALABRIA, Judge.

Robert L. McQueen ("McQueen") appeals the trial court's denial of his motion for relief from final judgment of bond forfeiture. We affirm.

In November 2001, McQueen posted bonds for Alvis Luther Evans ("the defendant") in the amount of $10,000.00 for each of two counts of trafficking in cocaine, and $5,000.00 for one count of maintaining a

place for controlled substances. The defendant failed to appear, and the bonds were ordered forfeited on 6 May 2002 with a final judgment date of 17 October 2002.

On 12 October 2002, McQueen located the defendant and surrendered him to the Cumberland County Sheriff. Three days later, on 15 October 2002, McQueen filed *pro se* motions to set aside the forfeitures under N.C. Gen. Stat. § 15A-544.5, certifying that he had served copies of the motions on the district attorney and the school board attorney by mailing copies to each by first class mail on 15 October 2002. However, the record shows the notice was postmarked on 24 October 2002 and received by the Board of Education on 28 October 2002. Based upon the delay in service, the school board requested McQueen's motions to set aside the bond forfeitures be denied.

On 26 November 2002, the trial court denied McQueen's motions indicating "this case is one of nine cases on the Superior Court calendar to be heard on this date and in each case the Cumberland County Board of Education received notice on the 13th day after filing." The trial court concluded that "the Surety's actions do establish a pattern of conduct that is in fact denying the statutory required period of time for response by the Cumberland County Board of Education." Though the 26 November orders were immediately appealable pursuant to N.C. Gen. Stat. § 15A-544.5(h) (2003), McQueen filed no appeal, and the forfeitures became final judgments as of 17 October 2002. Thereafter, McQueen initiated a new proceeding on 31 January 2003 by filing a motion for relief from final judgment of forfeiture. The trial court denied said motion by order entered 10 March 2003. From this denial, McQueen appeals.

In ruling on motions for relief from a final judgment of forfeiture, the trial court is guided by N.C. Gen. Stat. § 15A-544.8 (2003), which provides the exclusive avenue for relief:

> (b) Reasons.—The court may grant the defendant or any surety named in the judgment relief from the judgment, for the following reasons, *and none other*:
>
> (1) The person seeking relief was not given notice . . . .
>
> (2) *Other extraordinary circumstances* exist that the court, in its discretion, determines should entitle that person to relief.

(emphasis added). Should the court determine at the hearing that statutory grounds for relief exist, it "may grant the party any relief

from the judgment that the court considers appropriate, including the refund of all or a part of any money paid to satisfy the judgment." N.C. Gen. Stat. § 15A-544.8(c)(4) (2003).

Initially, we note McQueen did not raise insufficient notice before the trial court or on appeal; accordingly, our review is limited to whether the trial court abused its discretion in failing to find that "other extraordinary circumstances" existed that would entitle McQueen to relief from final judgment. On appeal, McQueen draws this Court's attention to the mandatory provisions of N.C. Gen. Stat. § 15A-544.5 (2003), which involves a trial court's review of a bond forfeiture and mandates the setting aside of such forfeiture when certain, exclusively-enumerated events occur. In relevant part, N.C. Gen. Stat. § 15A-544.5(b)(3) requires a bond forfeiture to be set aside when "[t]he defendant has been surrendered by a surety on the bail bond . . . ." Assuming *arguendo* McQueen's surrender of the defendant in the instant case met the requirements of N.C. Gen. Stat. § 15A-544.5(b)(3) and the trial court erred in failing to set aside the bond forfeitures, we are not of the opinion that such error is conclusive of our analysis of the trial court's denial of relief from final judgment of forfeiture under N.C. Gen. Stat. § 15A-544.8.

Accepting McQueen's argument would be tantamount to holding that the trial court, as a matter of law, abuses its discretion by failing to equate the statutory criteria for setting aside a forfeiture listed in N.C. Gen. Stat. § 15A-544.5(b)(1)-(6) (2003) with "extraordinary circumstances" for purposes of obtaining relief from final judgment under N.C. Gen. Stat. § 15A-544.8(b)(2). However, nothing in the statutes suggests the General Assembly intended to give a surety an opportunity, under the mantle of N.C. Gen. Stat. § 15A-544.8's "extraordinary circumstances," to re-capitulate to the trial court arguments concerning the alleged fulfilment of one of the statutory events which would mandate the setting aside of a forfeiture after those arguments were rejected and the motion was denied under N.C. Gen. Stat. § 15A-544.5.

A final reason to distinguish between McQueen's failure to observe the appropriate statutory method provided for raising these arguments to the appellate division under N.C. Gen. Stat. § 15A-544.8 and a proper appeal of such arguments under N.C. Gen. Stat. § 15A-544.5 is as follows: while the setting aside of a forfeiture that has not become final imposes no burden on any party, the court's grant of relief from a final judgment of forfeiture can be burdensome

on local school boards, which, as beneficiaries of the proceeds from forfeited appearance bonds, may be required to pay a "refund of all or a part of any money paid to satisfy the judgment" under N.C. Gen. Stat. § 15A-544.8(c)(4).

Thus, regardless of whether the trial court erred in denying McQueen's motions to set aside the forfeitures, McQueen's failure to appeal those orders divested him of the right to appellate review of their merits. We will not resurrect the arguments of that appeal or ignore the effect of failing to properly appeal those orders by holding, as a matter of law, that the trial court abuses its discretion when it abstains from equating an arguably erroneous denial of a motion to set aside forfeiture with "extraordinary circumstances" under N.C. Gen. Stat. § 15A-544.8.

Affirmed.

Judge LEVINSON concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge dissenting.

This case presents the issue of whether a bondsman who has surrendered a defendant to proper legal authorities is entitled to have a final judgment of bond forfeiture set aside based upon extraordinary circumstances under N.C. Gen. Stat. § 15A-544.8 (2003). As this Court's precedent indicates such a surrender constitutes extraordinary circumstances, I respectfully dissent.

The efforts of a bondsman resulting in the detention of a principal on the charge for which the bond was secured constitutes extraordinary cause. *See State v. Locklear*, 42 N.C. App. 486, 488-89, 256 S.E.2d 830, 832 (1979) (stating "[t]he efforts of the bondsman, while not dramatic, did result in the principal's detention on the charge for which the bond had secured the principal's appearance" and recognizing "the goal of the bonding system is the production of the defendant, not increased revenues for the county school fund . . . and in this case the surety's efforts led directly to achieving that goal"); *see also State v. Coronel*, 145 N.C. App. 237, 245, 550 S.E.2d 561, 567 (2001) (stating "our appellate courts have held that extraordinary cause exists where the professional surety actually recovered the defendant after the ninety-day deadline, although the surety's efforts

were not dramatic") (quotations omitted).[1] In this case, McQueen surrendered Defendant prior to entry of the final judgment of forfeiture. If the surrender of a defendant *after* the final judgment of forfeiture has been entered constituted extraordinary cause, then surely the surrender of a defendant *before* the final judgment of forfeiture has been entered constitutes extraordinary cause.

Indeed, appellate cases focus upon the efforts of the surety to secure the presence of the defendant in determining whether to grant relief from a final judgment of bond forfeiture. As stated in *State v. Robinson*, 145 N.C. App. 658, 661, 551 S.E.2d 460, 462 (2001):

> "The goal of the bonding system is the production of the defendant[.]" *State v. Locklear*, 42 N.C. App. 486, 489, 256 S.E.2d 830, 832 (1979) (citation omitted). In *Locklear*, our Court affirmed the trial court's order to remit the bond to the surety because "[t]he efforts of the bondsman, while not dramatic, did result in the principal's detention on the charge for which the bond had secured the principal's appearance." *Id.* In *State v. Vikre*, our Court affirmed the trial court's denial of the surety's petition to remit and held that "the efforts made by the sureties . . . did not lead to [defendant's] appearance in [court], the primary goal of the bonds." *Vikre*, 86 N.C. App. 196, 199, 356 S.E.2d 802, 804 (citations omitted), *disc. review denied*, 320 N.C. 637, 360 S.E.2d 103 (1987). Therefore our Court found that "we cannot say, as a matter of law, that the sureties' evidence conclusively demonstrates . . . justifying remission of the bonds[.]" *Id. See also State v. Pelley*, 222 N.C. 684, 688, 24 S.E.2d 635, 638 (1943) ("the very purpose of the bond was not to enrich the treasury of [the] County, but to make the sureties responsible for the appearance of the defendant at the proper time").

See also State v. Fonville, 72 N.C. App. 527, 325 S.E.2d 258 (1985) (extraordinary cause found where a private surety brought a defendant to court after entry of the forfeiture judgment to pay his fine). Moreover, the factors to be considered in determining whether extraordinary circumstances exist favor the surety in this case. These factors include:

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1. Effective January 1, 2001, N.C. Gen. Stat. § 15A-544, which governed bail bond forfeiture, was repealed. N.C. Gen. Stat. § 15A-544.1 et seq. currently governs bail bond forfeiture and is applicable in this case. Although the time limitations and procedures under N.C. Gen. Stat. § 15A-544.1 et seq. are different from N.C. Gen. Stat. § 15A-544, the case law governing the definition of various statutory terms remains good authority.

[1.] the inconvenience and cost to the State and the courts;

[2.] the diligence of sureties in staying abreast of the defendant's whereabouts prior to the date of appearance and in searching for the defendant . . . ;

[3.] [in cases where the defendant has died], the surety's diligence in obtaining information of the defendant's death . . . ;

[4.] the risk assumed by the sureties;

[5.] the surety's status, be it private or professional.

Coronel, 145 N.C. App. at 248, 550 S.E.2d at 569 (citations omitted). In this case, the surety located and surrendered the defendant prior to the entry of final judgment of forfeiture at no expense to the State.[2]

In denying McQueen's motion, the trial court did not consider McQueen's surrender of defendant or his efforts in procuring defendant's surrender in determining whether extraordinary cause was shown. Rather, the trial court denied McQueen's motion for relief from final judgment of forfeiture because the erroneous certificate of service denied the school board an opportunity to object to his motion to set aside bond forfeiture in several cases. This is not the focus of the extraordinary cause test and, moreover, McQueen's actions did not prejudice the school board.

In this case, McQueen timely filed a written motion to set aside the forfeiture with the sheriff's surrender acknowledgment attached before the expiration of 150 days after receipt of the bond forfeiture notice. On the standardized motion form, McQueen indicated he mailed a copy of the motion to the school board attorney on 15 October 2002; however, the motion was not postmarked until 24 October 2002.

Under N.C. Gen. Stat. § 15A-544.5(d)(4), if the board of education does not object by the tenth day after the motion is served, the clerk shall enter an order setting aside the forfeiture. If the motion is served via mail, the school board has an additional three days in which to object to the motion. *See* N.C. Gen. Stat. § 1A-1, Rule 6(e)

2. After surrendering the defendant, the surety filed a *pro se* motion to set aside the bond forfeiture under N.C. Gen. Stat. § 15A-544.5. This statutory provision mandates that a bond forfeiture shall be set aside if the surety surrenders the defendant within the requisite time period. N.C. Gen. Stat. § 15A-544.5 (2003). Notwithstanding the surety's compliance with this provision, the trial court erroneously denied the surety's motion.

(2003).[3] The school board contends that because the certificate of service indicates McQueen served the motion via mail on 15 October 2002, the bond forfeiture would have been automatically set aside on 28 October 2002 if the school board did not timely object. However, McQueen did not mail the motion to the school board until 24 October 2002, as evidenced by the envelope's postmark. The school board received the motion on 28 October 2002. Thus, the school board argued that McQueen had effectively denied the school board time to object to the motion in an attempt by the surety to achieve the automatic set aside of the forfeiture that would occur.

However, the school board could have moved for more time to respond to McQueen's motion. N.C. Gen. Stat. § 1A-1, Rule 5(b) states that:

> [W]ith respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to the party or by mailing it to the party at the party's last known address or, if no address is known, by filing it with the clerk of court. . . . Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Moreover, N.C. Gen. Stat. § 1A-1, Rule 5(d) states:

> With respect to all pleadings and other papers as to which service and return has not been made in the manner provided in Rule 4, proof of service shall be made by filing with the court a certificate either by the attorney or the party that the paper was served in the manner prescribed by this rule, or a certificate of acceptance of service by the attorney or the party to be served. Such certificate shall show the date and method of service or the date of acceptance of service.

The certificate of service gives rise to a rebuttable presumption of proper service upon the other party. *See N. State Fin. Co., Inc. v. Leonard*, 263 N.C. 167, 170, 139 S.E.2d 356, 358 (1964) (stating "When the return shows legal service by an authorized officer, nothing else appearing, the law presumes service. The service is deemed estab-

3. As N.C. Gen. Stat. § 15A-544.5 requires service of the motion in accordance with N. C. Gen. Stat. § 1A-1, Rule 5, Rule 6, which governs the computation and extension of time, is applicable.

lished unless, upon motion in the cause, the legal presumption is rebutted by evidence upon which a finding of nonservice is properly based. Upon hearing such motion, the burden of proof is upon the party who seeks to set aside the officer's return or the judgment based thereon to establish nonservice as a fact; and, notwithstanding positive evidence of nonservice, *the officer's return* is evidence upon which the court *may* base a finding that service was made as shown by the return.") (citations omitted); *see also Hocke v. Hanyane*, 118 N.C. App. 630, 633, 456 S.E.2d 856, 860 (1995) (stating "the certificate of service itself indicates sufficient compliance with Rule 4 to raise a rebuttable presumption of valid service") (quotation omitted). Thus, the school board could have rebutted the presumption that it was served on 15 October 2002 by providing the trial court with the postmarked envelope indicating the motion was not mailed until 24 October 2002. Upon showing the motion was not mailed until 24 October 2002, the school board would have had thirteen days from 24 October to object to the surety's motion to set aside the bond forfeiture. *See* N.C. Gen. Stat. § 15A-544.5(d)(4) (stating "[i]f neither the district attorney nor the board of education has filed a written objection to the motion by the tenth day after the motion is *served*, the clerk shall enter an order setting aside the forfeiture") (emphasis added).

Second, although the school board argues the surety is effectively denying it an opportunity to object to the surety's motions to set aside bond forfeitures, the school board did not have a basis for objecting in this case. Indeed, N.C. Gen. Stat. § 15A-544.5 requires a bond forfeiture be set aside upon the showing of one of six reasons. In this case, the surety, by surrendering the defendant to the county sheriff within the relevant time period, met one of the six reasons. Thus, the school board did not have a basis for objecting to the surety's motion and was not prejudiced by delay in the mailing of the motion.

Moreover, the school board is not without a remedy against a surety whose certification of service date repeatedly fails to reflect the accurate date upon which the surety mailed or served the school board. Indeed, a surety's failure to follow the procedures set forth in N.C. Gen. Stat. § 15A-544.5 could be addressed by filing a complaint with the Commissioner of Insurance. Under N.C. Gen. Stat. § 58-71-80(a) (2003):

> The Commissioner may deny, suspend, revoke, or refuse to renew any license under this Article . . . [w]hen in the judgment

> of the Commissioner, the licensee has in the conduct of the licensee's affairs under the license, demonstrated incompetency, financial irresponsibility, or untrustworthiness; or that the licensee is no longer in good faith carrying on the bail bond business; or that the licensee is guilty of rebating, or offering to rebate, or offering to divide the premiums received for the bond.

As N.C. Gen. Stat. § 58-71-35 specifically references Article 26 of Chapter 15A (Bail) as the provision governing bail forfeiture and remittance, the surety's failure to adhere to those procedures in good faith could form the basis for the denial, suspension, revocation or refusal to renew a surety's license by the Commissioner of Insurance.

Finally, notwithstanding the majority's concern that relief from a final judgment of forfeiture may place a burden upon school boards, precedent indicates the impact upon school boards is not to be considered in determining whether extraordinary circumstances have been demonstrated and cannot be a basis for denying a motion for relief from a judgment of forfeiture. As stated in *State v. Lanier*, "[t]he school board, as the trial judge observed, may indeed need the funds more than the surety. However, this is not the test. . . . The required test is whether "extraordinary cause" is shown. *State v. Lanier*, 93 N.C. App. 779, 781, 379 S.E.2d 109, 110-11 (1989).

In sum, the trial court's decision is reviewed for an abuse of discretion. N.C. Gen. Stat. § 15A-544.8(b)(2) (2001); *see also State v. McCarn*, 151 N.C. App. 742, 745, 566 S.E.2d 751, 753 (2002). "An abuse of discretion results when an act is not done according to reason or judgment, but depending upon the will alone and done without reason." *McCarn*, 151 N.C. App. at 745, 566 S.E.2d at 753 (quotations omitted). In my opinion, the trial court's decision was without reason because: (1) precedent indicates extraordinary cause was shown; (2) the board of education did not have any basis for objecting to McQueen's motion to set aside the bond forfeiture; (3) the school board could have moved for additional time in which to respond, as the certificate of service only raises a presumption of service, and in this case the school board could rebut the presumption by demonstrating service occurred on a different date; (4) there are other means by which the school board can address the surety's noncompliance with statute; and (5) the burden upon school boards is not a part of the extraordinary cause test.

MOORE'S FERRY DEVELOPMENT CORPORATION, PLAINTIFF v. CITY OF HICKORY, DEFENDANT AND THIRD-PARTY PLAINTIFF v. MOORE'S FERRY OWNERS ASSOCIATION, INC. (AKA MOORE'S FERRY HOMEOWNERS ASSOCIATION, INC.), THIRD-PARTY DEFENDANT

No. COA03-1271

(Filed 21 September 2004)

Cities and Towns— control of streets—easements and licenses

Summary judgment should not have been granted for a city in an action seeking revocation of a license for a homeowner's association to build a visitor's center on the right-of-way of a newly annexed street. Although the city claimed statutory authority to grant easements and to license appliances and fixtures on rights of way, this was not an easement and the building was neither an appliance (a device or instrument) nor a fixture (it was not built by the owner of the land and the terms of the license indicate that it was to remain personal property and not pass with the land). N.C.G.S. § 160A-296(a)(6); N.C.G.S. § 160A-296(a)(8).

Appeal by plaintiff from order entered 9 May 2003 by Judge Timothy L. Patti in Catawba County Superior Court. Heard in the Court of Appeals 27 May 2004.

Rufus F. Walker, Jr., for plaintiff-appellant.

Gorham, Crone, Mace & Green, by John W. Crone, III, for defendant-appellee.

Shumaker, Loop & Kendrick, LLP, by Steven A. Meckler, for third-party defendant.

THORNBURG, Judge.

Plaintiff appeals from an order granting summary judgment in favor of defendant and denying a motion for summary judgment filed by plaintiff.

Facts

The record tends to establish the following: Plaintiff is a North Carolina corporation in the real estate development business. In 1985, plaintiff owned a tract of land in Catawba County and developed it into a subdivision known as the Landing at Moore's Ferry ("Old Moore's Ferry"). In January 1986, Old Moore's Ferry was

annexed into defendant's jurisdiction. Old Moore's Ferry included a guardhouse at the intersection of 3rd Street, N.W. and Icard Ferry Road. The guardhouse is located upon a small strip of land which was retained as a privately-held common area within the right-of-way for 3rd Street, N.W. Plaintiff organized a homeowners' association, Moore's Ferry Owner's Association ("Homeowners' Association"), on 28 April 1986. On or about 27 May 1994, defendant approved Phase VI of Old Moore's Ferry and in so doing accepted as a city street 42nd Avenue Drive, N.W., which ran from 3rd Street, N.W. in an easterly direction into the subdivision to its terminus as a cul-de-sac.

On or about 24 November 1998, defendant annexed a subdivision, also known as the Landing at Moore's Ferry ("New Moore's Ferry"), which was located to the east of the terminus of 42nd Avenue Drive, N.W. On 2 February 1999, defendant's City Council considered a petition to lift a moratorium on any further extension of 42nd Avenue Drive, N.W. The moratorium had been put in place to prevent extending the road to provide a connection between Old Moore's Ferry and New Moore's Ferry. The minutes from that City Council meeting reflect that members of Homeowners' Association opposed the extension of the street as they felt that the two neighborhoods were dissimilar. The City Council discussed granting a license to Homeowners' Association to build a guardhouse on 42nd Avenue Drive, N.W. at the intersection with 3rd Street, N.W. The City Council went on to approve the lifting of the moratorium and further approved a motion that directed defendant's attorney to draft a licensing agreement to govern the construction and maintenance of a guardhouse on 42nd Avenue Drive, N.W. The draft was to be brought back to the City Council for deliberation and vote.

The right-of-way for 42nd Avenue Drive, N.W. was subsequently extended and now runs from 3rd Street, N.W. in an easterly direction through Old Moore's Ferry and New Moore's Ferry to N.C. Highway 127. On 18 July 2000, defendant's City Council approved a revocable license agreement between defendant and Homeowners' Association authorizing the construction of a visitor's information center on 42nd Avenue Drive, N.W. at the intersection with 3rd Street, N.W. The revocable license agreement, entered into on 1 August 2000, authorizes Homeowners' Association "to enter and go upon [42nd Avenue Drive, N.W.] to lay out, construct, and maintain a Visitor's Information Center . . . ." Included in the license were the following conditions:

2. [Homeowners' Association] may erect and fix in and upon [42nd Avenue Drive, N.W.] a Visitor's Information Center provided that:

a. Said Information Center in no way or manner restricts, prevents, or discourages the general public from using the road and right-of-way upon which the guardhouse is erected, generally known now as 42nd Avenue Drive, NW, Hickory, North Carolina.

The City shall review and approve any and all plans and specifications of said Information Center, but shall in no way be responsible for the construction or maintenance of same.

1. [Homeowners' Association] shall, and hereby does, indemnify and save harmless the City and any and all of its agents, servants and employees from any and all liability for injuries to, or death of any individual as a result of the construction or maintenance of said Visitor's Information Center, and [Homeowners' Association] further does indemnify and save harmless the City and any of its agents, servants or employees from any and all suits or claims which arise or may arise as a result of the construction or maintenance of said Visitor's Information Center.

2. The Visitor's Information Center shall be constructed and maintained in such a manner that it will in no way discourage, prevent, or restrict the general public from using the right of way upon which it is constructed. In addition thereto, there shall be no signs or devices to prevent or give the appearance that the Visitor's Information Center in any manner is attempting to prevent, discourage, or restrict the general public from using the right of way upon which it is located.

3. The City shall have the right to come on or about the property referenced herein at any time to monitor the Visitor's Information Center to insure that it is constructed, maintained, and used for the specific purposes and subject to the specific conditions and restrictions as set forth herein.

4. This is a purely revocable license and the City may, at any time, revoke same upon 30 days written notice of its intent to revoke.

5. Upon revocation of this license agreement, [Homeowners' Association] shall, within 90 days of the date of said revoca-

tion, remove the Information Center and leave the property in the same condition it was in prior to construction of the Information Center.

Plaintiff filed this action seeking to have the license revoked, the structure removed and damages imposed against defendant. Defendant answered and initiated a third-party complaint against Homeowners' Association for indemnification and removal of the structure should the trial court find for plaintiff. Plaintiff and defendant each moved for summary judgment on the matter. After a hearing, the trial court granted defendant's motion and denied plaintiff's motion. Plaintiff appeals.

The sole issue on appeal is whether the trial court erred by granting summary judgment on plaintiff's claim in favor of defendant. Plaintiff's claim was based upon the premise that it was unlawful for defendant to license Homeowners' Association to construct a structure in the public street right-of-way and that the structure created an obstruction of the right-of-way and a public nuisance. Plaintiff makes virtually identical arguments on appeal. Defendant argues on appeal that the structure was not a private obstruction or a public nuisance and that defendant had statutory authority to issue the license. After careful consideration of the record and briefs, we reverse and remand.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. *Gray v. Hager*, 69 N.C. App. 331, 317 S.E.2d 59 (1984).

Statutory Authority

"The town authorities hold the streets in trust for the purposes of public traffic and cannot, in the absence of statutory power, grant to anyone the right to obstruct the street to the inconvenience of the public, even for public purposes, and for private purposes not at all." *Blowing Rock v. Gregorie*, 243 N.C. 364, 370, 90 S.E.2d 898, 902-03 (1956) (quoting *Butler v. Tobacco Co.*, 152 N.C. 416, 68 S.E. 12 (1910)). Defendant asserts that N.C. Gen. Stat. §§ 160A-296(a)(6) and (8) provide statutory authority for the license at issue here.

N.C. Gen. Stat. § 160A-296(a)(6)

N.C. Gen. Stat. § 160A-296(a)(6) provides:

> (a) A city shall have general authority and control over all public streets, sidewalks, alleys, bridges, and other ways of public passage within its corporate limits except to the extent that authority and control over certain streets and bridges is vested in the Board of Transportation. General authority and control includes but is not limited to:
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> . . . .
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> (6) The power to regulate, *license*, and prohibit digging in the streets, sidewalks, or alleys, or placing therein or thereon any pipes, poles, wires, fixtures, or appliances of any kind either on, above, or below the surface.

N.C. Gen. Stat. § 160A-296(a)(6) (2003) (emphasis added). Defendant argues that the agreement is a license and that the structure in question can be classified as either a fixture or an appliance. Thus, defendant argues that this statute authorizes the granting of the license.

Our courts have not previously found it necessary to address the meaning of "appliance" in the context of a city's control of its public streets. An "appliance" is "a device or instrument, especially one operated by electricity and designed for household use." *The American Heritage Dictionary* 121 (2nd College ed. 1985). Clearly, neither this definition nor any other reasonable meaning of the word "appliance" can apply to the structure in question. Defendant's argument that the structure is an appliance fails.

A "fixture" is "personal property that is attached to land or a building and that is regarded as an irremovable part of the real property." *Black's Law Dictionary* 669 (8th ed. 2004). In *Little v. National Service Industries, Inc.*, 79 N.C. App. 688, 340 S.E.2d 510 (1986), this Court quoted the definition of a fixture found in 1 Thompson on Real Property, " '[a] fixture has been defined as that which, though originally a moveable chattel, is, by reason of its annexation to land, or association in the use of land, regarded as a part of the land, partaking of its character . . . .' " *Id.* at 692, 340 S.E.2d at 513 (quoting 1 Thompson on Real Property, 1980 Replacement, § 55 at 179 (1980)). The factors to be examined in identifying fixtures include: "(1) the manner in which the article is attached to the realty; (2) the nature of the article and the purpose for which it is attached to the realty; and

(3) the intention with which the annexation of the article to the realty is made." *Little*, 79 N.C. App. at 692, 340 S.E.2d at 513 (internal citations omitted).

In addition to these tests, "when additions are made to the land by its owner, it is generally viewed that the purpose of the addition is to enhance the value of the land, and the chattel becomes a part of the land." *Id.* (citing *Belvin v. Paper Co.*, 123 N.C. 138, 31 S.E. 655 (1898); *Moore v. Vallentine*, 77 N.C. 188 (1877)). "On the other hand, where the improvement is made by one who does not own the fee, such as a tenant, the law is indulgent and, in order to encourage industry, the tenant is permitted 'the greatest latitude' in removing equipment which he has installed upon the land." *Little*, 79 N.C. App. at 693, 340 S.E.2d at 513 (citing *Overman v. Sasser*, 107 N.C. 432, 12 S.E. 64 (1890)). Further, "[w]here the controversy is between parties connected to the transaction in some manner, as in a controversy between the owner of the land and the one who annexed the chattel, the subjective intent of the parties as evidenced by their words, conduct, or agreements, express or implied, is the relevant intent." *Little*, 79 N.C. App. at 693, 340 S.E.2d at 513.

In the instant case, the structure in question was erected in the public right-of-way by Homeowners' Association. Thus, the presumption that the structure was to become a part of the real property did not arise since the structure was not erected by the owner of the land. Also, we conclude that the subjective intent of the parties is relevant as plaintiff is the owner of the underlying land upon which this structure has been built.

"Summary judgment is generally not appropriate where intent or other subjective feelings are at issue." *Little*, 79 N.C. App. at 695, 340 S.E.2d at 514-15 (citing *Feibus & Co., Inc. v. Construction Co.*, 301 N.C. 294, 271 S.E.2d 385 (1980)). "The rule that intent should generally be a question of fact for the jury does not mean, however, that it should always be so." *Little*, 79 N.C. App. at 695, 340 S.E.2d at 515.

Here, the intent of the parties is not in dispute. This intent is evidenced by the terms of the license between the parties and the various responsibilities of the parties under the license. The structure was erected pursuant to a license that provided that the license was purely revocable and that defendant could at any time revoke same upon 30 days written notice of its intent to revoke. The license further provided: "Upon revocation of this license agreement, [Homeowners'

Association] shall, within 90 days . . . remove the Information Center and leave the property in the same condition it was in prior to construction . . . ." During the term of the license, neither plaintiff nor defendant was responsible for the repair and maintenance of this structure even though it was on their property and right-of-way, respectively. By the terms of the license, Homeowners' Association was to "indemnify and save harmless [defendant] . . . from any and all liability for injuries to, or death of any individual as a result of the construction or maintenance of said Visitor's Information Center, and . . . from any and all suits or claims which arise or may arise as a result of the construction or maintenance . . . ." Thus, the terms of the license show that the parties never intended for the structure to become a part of the land so as to pass with the real property; the structure was to remain personal property. Accordingly, the structure cannot be classified as a fixture.

As we conclude that the structure is neither an appliance nor a fixture, N.C. Gen. Stat. § 160A-296(a)(6) does not provide defendant with statutory authority to permit Homeowners' Association to build in the street right-of-way. *See Gregorie*, 243 N.C. at 370, 90 S.E.2d at 902-03. We recognize that the determination of whether something qualifies as a fixture is a fact-specific inquiry. Given the clear intent of the parties to this license that the structure constructed in the public right-of-way be completely removable and the responsibility of Homeowners' Association, we limit our holding to the facts of this case.

N.C. Gen. Stat. § 160A-296(a)(8)

Defendant also contends that N.C. Gen. Stat. § 160A-296(a)(8) confers statutory authority for the agreement in question. N.C. Gen. Stat. § 160A-296(a)(8) provides:

> (a) A city shall have general authority and control over all public streets, sidewalks, alleys, bridges, and other ways of public passage within its corporate limits except to the extent that authority and control over certain streets and bridges is vested in the Board of Transportation. General authority and control includes but is not limited to:
>
> . . . .
>
> (8) The power to grant easements in street rights-of-way as permitted by G.S. 160A-273.

N.C. Gen. Stat. § 160A-296(a)(8) (2003). Homeowners' Association and defendant clearly labeled their agreement a license. A license is "a permission, usually revocable, to commit some act that would otherwise be unlawful." *Black's Law Dictionary* 938 (8th ed. 2004). Whereas, an easement is "an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose . . . . Unlike a lease or license, an easement may last forever . . . ." *Black's Law Dictionary* 548 (8th ed. 2004).

The agreement between Homeowners' Association and defendant did not pass an interest in land, as would be the case with an easement; rather, it only gave permission to Homeowners' Association to build a structure. Also, the agreement was revocable for any reason upon 30 days written notice. We conclude that the agreement between defendant and Homeowners' Association is a license and thus, N.C. Gen. Stat. § 160A-296(a)(8) does not provide statutory authority for defendant to permit Homeowners' Association to place a structure in the street right-of-way.

As we find no statutory authority that permits defendant to authorize the placement of a structure in the public street right-of-way, we conclude that defendant was without authority to enter into the license agreement with Homeowners' Association. Due to this conclusion, we do not address whether the structure created an obstruction of the right-of-way and/or a public nuisance. We reverse the trial court's entry of summary judgment for defendant and remand for entry of summary judgment in favor of plaintiff.

Reversed and remanded.

Judges HUDSON and GEER concur.

LYNETTA DRAUGHON, PERSONAL REPRESENTATIVE OF THE ESTATE OF MAX DRAUGHON, DECEASED, PLAINTIFF v. HARNETT COUNTY BOARD OF EDUCATION AND BARRY HONEYCUTT, JACKIE SAMUELS, STEPHEN AUSLEY, JASON SPELL, ANTHONY BARBOUR, PERRY SAENZ, DON WILSON, JR., RAYMOND MCCALL, AND BRIAN STRICKLAND, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, DEFENDANTS

No. COA03-1324

(Filed 5 October 2004)

1. Jurisdiction— lack of service raised in answer—not a general appearance—reassertion of jurisdictional defense in subsequent motion—not required

The trial court did not err by granting defendant Honeycutt's motion to dismiss for insufficient service and lack of personal jurisdiction where he was never served with a summons and complaint, filed an answer that included the defenses of insufficient service and no personal jurisdiction, and thereafter filed a motion to tax costs to plaintiff as a result of a prior voluntary dismissal. Although plaintiff contends that the motion to tax costs was a general appearance, defendant did not make any motion seeking affirmative relief before he filed his answer and the answer properly included the defenses of insufficient service and no personal jurisdiction. A defendant is not required to reassert his jurisdictional defenses in each subsequent motion.

2. Jurisdiction— discovery—not a general appearance—jurisdictional defenses previously asserted

Participating in discovery does not constitute a general appearance; here, the defendant had asserted his jurisdictional defenses in his first filed pleading.

3. Statutes of Limitation and Repose— raised in supplemental answer—after summons had run

The trial court did not abuse its discretion by granting defendant Honeycutt's motion to supplement his answer to assert the statute of limitations. Honeycutt was never served, all of the defendants filed a collective answer before the statute of limitations ran, the last alias and pluries summons directed to Honeycutt expired after the statute of limitations expired, and he filed this motion.

4. Statutes of Limitation and Repose— expiration of summons—summary judgment

The trial court appropriately granted summary judgment for defendant Honeycutt, a high school football coach, in an action that arose from the heatstroke death of one of his players. Although a number of alias and pluries summonses were issued, all expired without service and any subsequent action would be outside the statute of limitations.

Appeal by plaintiff from order entered 11 March 2003 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 26 August 2004.

Gary, Williams, Parenti et al., by Alton C. Hale Jr., and Keith A. Bishop, PLLC, by Keith A. Bishop, for plaintiff-appellant.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Warren T. Savage; Tharrington & Smith, L.L.P., by Jonathan A. Blumberg and Lisa Lukasik; and Cranfill, Sumner & Hartzog, L.L.P., by Patricia L. Holland, for defendant-appellee Honeycutt.

STEELMAN, Judge.

Plaintiff Lynetta Draughon, the personal representative of the Estate of Max Draughon, appeals from an order dismissing plaintiff's claims against defendant Honeycutt with prejudice. For the reasons discussed herein, we affirm.

Plaintiff's intestate was a football player at Triton High School in Harnett County, North Carolina. He collapsed during football practice on the morning of 8 August 1998 and died the following day at UNC Memorial Hospital from complications due to heatstroke. Defendant Honeycutt was the head football coach for Triton at that time. A more detailed discussion of the facts of the case can be found in this Court's earlier opinion, *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 580 S.E.2d 732 (2003), *aff'd*, 358 N.C. 137, 591 S.E.2d 520 (2004). On 3 August 2000, plaintiff filed a wrongful death action. On 6 July 2001, plaintiff voluntarily dismissed that action without prejudice. That same day, plaintiff refiled her claim against Harnett County Board of Education, Barry Honeycutt, Jackie Samuels, Stephen Ausley, Jason Spell, Anthony Barbour, Perry Saenz, Don Wilson, Jr., Raymond McCall, and Brian Strickland in their individual and official capacities, seeking monetary damages for the wrongful death of Max Draughon. Previously, this Court affirmed summary

judgment dismissing plaintiff's claims against defendants Stephen Ausley, Raymond McCall, Jason Spell, and Don Wilson, Jr. *Id.* at 215, 580 S.E.2d at 737. This Court subsequently affirmed summary judgment dismissing plaintiff's claims against defendant Brian Strickland. *Draughon v. Harnett Cty Bd. of Educ.*, 158 N.C. App. 705, 710, 582 S.E.2d 343, 346 (2003), *aff'd*, 358 N.C. 137, 591 S.E.2d 520 (2004).

This appeal pertains to the trial court's dismissal of all plaintiff's claims against defendant Honeycutt. The trial court's order dismissed plaintiff's complaint for insufficient process, insufficient service of process, and lack of personal jurisdiction under Rule 12(b)(2), 12(b)(4), and 12(b)(5); for failure to state a claim upon which relief could be granted under Rule 12(b)(6) of the Rules of Civil Procedure; as being barred by the statute of limitations under Rule 12(c) and Rule 56; and for failure to prosecute under Rule 41(b). The remaining facts of this case will be discussed in the context of plaintiff's assignments of error.

We note that plaintiff does not appeal from any of the trial court's findings of fact, and as such those findings are presumed to be supported by competent evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

[1] In plaintiff's first assignment of error she contends the trial court erred in granting Honeycutt's motion to dismiss for insufficient service of process and lack of personal jurisdiction. We disagree.

In order for a court to obtain personal jurisdiction over a defendant, a summons must be issued and service of process secured by one of the statutorily specified methods. *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996); N.C. Gen. Stat. § 1A-1, Rule 4(j) (2003). If a party fails to obtain valid service of process, "a court does not acquire personal jurisdiction over the defendant and the action must be dismissed." *Bentley v. Watauga Bldg. Supply, Inc.*, 145 N.C. App. 460, 462, 549 S.E.2d 924, 925 (2001).

Plaintiff does not contest that Honeycutt was never served with a copy of the summons and complaint in this action. Rather, plaintiff contends the filing of a Motion for Costs on 15 October 2001 by defendant Honeycutt constituted a general appearance by Honeycutt, and precluded Honeycutt from asserting the defense of lack of personal jurisdiction.

Since Honeycutt was never served with the summons and complaint, the only way the trial court may exercise jurisdiction

over him is if he makes a general appearance in the case. N.C. Gen. Stat. § 1-75.7(1) (2003). To preserve the defenses of insufficiency of service, service of process, and lack of personal jurisdiction, the defendant must assert them in either a motion filed prior to any responsive pleading or include them in his answer or other responsive pleading permitted by the Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 12(h)(1) (2003); *Ryals v. Hall-Lane Moving and Storage Co.*, 122 N.C. App. 242, 247-48, 468 S.E.2d 600, 604, *disc. review denied*, 343 N.C. 514, 472 S.E.2d 19 (1996). If a defendant makes a general appearance in conjunction with or after a responsive pleading challenging jurisdiction pursuant to Rule 12(b), his right to challenge personal jurisdiction is preserved. *Id.* at 247-48, 468 S.E.2d at 604; *Lynch v. Lynch*, 302 N.C. 189, 197, 274 S.E.2d 212, 219, *modified and affirmed*, 303 N.C. 367, 279 S.E.2d 840 (1981) ("[A] general appearance will waive the right to challenge personal jurisdiction only when it is made *prior to* the proper filing of a Rule 12(b)(2) motion contesting jurisdiction over the person.") (emphasis added).

Honeycutt obtained an extension of time to respond to plaintiff's 6 July 2001 complaint. This did not constitute a general appearance, as a defendant may move for and obtain an extension of time within which to answer or otherwise plead, without such action being considered a general appearance. N.C. Gen. Stat. § 1-75.7(1) (2003). All of the defendants filed a collective answer on 10 September 2001, which asserted a number of defenses. The Third Defense stated:

> Defendant[] Honeycutt, . . . move[s] the Court, pursuant to G.S. § 1A-1, Rules 12(b)(2), 12(b)(4), and 12(b)(5), to dismiss this action for insufficient process, insufficient service of process, and *lack of personal jurisdiction*, on the grounds that Plaintiff has not served any of these Defendants in a manner authorized by G.S. §1A-1, Rule 4, or any other applicable law and that Plaintiff has failed to prove any proper service of any adequate process on these Defendants at any time.

(emphasis added). There is no evidence in the record that Honeycutt made any motion to the court seeking affirmative relief before he and the other defendants filed their answer. The answer properly included the defenses of insufficiency of service, service of process, and lack of personal jurisdiction. Thus, defendant Honeycutt properly preserved these issues for later resolution by the trial court.

On 12 September 2001, Honeycutt and the other defendants filed a motion to tax costs against plaintiff pursuant to Rule 41(b) of the

North Carolina Rules of Civil Procedure. This motion requested that costs be taxed to plaintiff as a result of taking a voluntary dismissal in the previous wrongful death action filed on 3 August 2000. Plaintiff contends this constituted a general appearance since Honeycutt sought affirmative relief on matters unrelated to the issue of jurisdiction over the person without restating his challenge to the court's jurisdiction. The record clearly shows that Honeycutt raised the issues of insufficiency of process, service of process, and lack of personal jurisdiction prior to the filing of the motion for costs. As noted above, this preserved those issues. Furthermore, nowhere in our case law do we require a defendant to reassert his jurisdictional defenses in each subsequent motion he files. *See Ryals*, 122 N.C. App. at 247, 468 S.E.2d at 604. By asserting his jurisdictional defenses in his first filed pleading, Honeycutt "fulfill[ed] his obligation to inform the court and his opponent of possible jurisdictional defects." *Id.* at 248, 468 S.E.2d at 604. Nor does it appear in the record that Honeycutt ever attempted to withdraw his jurisdictional or service defenses. *See Hall v. Hall*, 65 N.C. App. 797, 800, 310 S.E.2d 378, 381 (1984). Thus, Honeycutt's right to challenge the court's jurisdiction was preserved and the filing of the motion for costs did not waive that right.

[2] Plaintiff further contends that Honeycutt engaged in extensive discovery, which constituted a general appearance or a waiver of the defense of lack of personal jurisdiction. This is incorrect. This Court has held that it does not constitute a general appearance for a defendant to file an answer or participate in discovery. *Ryals*, 122 N.C. App. at 247, 468 S.E.2d at 604. This assignment of error is without merit.

[3] In plaintiff's second assignment of error she contends the trial court erred in granting Honeycutt's motion for summary judgment which dismissed plaintiff's claims against Honeycutt based upon the statute of limitations. Our analysis of this issue also includes plaintiff's fourth assignment of error, in which she asserts it was error for the trial court to grant Honeycutt's motion to supplement his answer to assert the statute of limitations as an affirmative defense.

> Rule 15(d) of the Rules of Civil Procedure provides:
>
> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented, ...

N.C. Gen. Stat. § 1A-1, Rule 15(d) (2003). Motions to allow supplemental pleadings should ordinarily be granted because by definition they encompass matters that arose after the date of the original pleading, unless a substantial injustice would result to the opposing party. *vanDooren v. vanDooren*, 37 N.C. App. 333, 337-38, 246 S.E.2d 20, 23-24, *cert. denied*, 295 N.C. 653, 248 S.E.2d 258 (1978). *See also* 1 G. Gray Wilson, *North Carolina Civil Procedure* § 15-13, at 315-17 (2d ed. 1995).

In this case, at the time Honeycutt filed his answer, on 10 September 2001, the summons directed to Honeycutt had not expired. However, the summons did subsequently expire on 22 November 2002. On 3 February 2003, Honeycutt moved the court pursuant to Rule 15(d) of the Rules of Civil Procedure to supplement his answer to assert the expiration of the summons and that plaintiff's claims against Honeycutt were barred by the applicable statute of limitations. The trial court found and the record confirms that the statute of limitations had not run at the time of the filing of Honeycutt's answer and that Honeycutt could not have properly asserted that defense at that time. Upon the expiration of the summons directed to Honeycutt, it was proper for him to move to supplement his pleadings. We find the decision of the trial court granting Honeycutt's motion to supplement his pleadings was a reasoned one, and the granting of the motion was not an abuse of discretion.

[4] It was also appropriate for the trial court to grant Honeycutt's motion for summary judgment. Rule 4 of the Rules of Civil Procedure provides for service of process. N.C. Gen. Stat. § 1A-1, Rule 4 (2003). This rule requires that a summons be served within sixty days from the date it was issued. N.C. Gen. Stat. § 1A-1, Rule 4(c). If the plaintiff fails to effectuate service of the summons within this time period, Rule 4(d) permits the action to be continued. The continuance will relate back to the date the original summons was issued, if the summons is endorsed by the clerk or if an alias or pluries summons is issued within ninety days of the issuance of the last preceding summons. *Id.* The endorsement or the alias or pluries summons must be served within sixty days of issuance. *Id.* However, when neither an endorsement or an alias or pluries summon is issued within this ninety day period, the action is discontinued as to any defendant who was not served within the allotted time. N.C. Gen. Stat. § 1A-1, Rule 4(e). A party may still obtain an endorsement or alias or pluries summons, but it will not relate back to the date of the prior summons; issuance of the new summons commences an entirely new action. *Id.*;

Lemons v. Old Hickory Council, Boy Scouts, Inc., 322 N.C. 271, 275, 367 S.E.2d 655, 657 (1988). *See also Johnson v. City of Raleigh*, 98 N.C. App. 147, 148-49, 389 S.E.2d 849, 851, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 176 (1990).

The trial court found as facts: (1) the original summons directed to Honeycutt in this action was issued on 6 July 2001; (2) plaintiff procured a number of alias and pluries summonses directed to Honeycutt in this action, the last being issued on 23 August 2002; (3) Honeycutt included his jurisdictional and service objections in his answer; (4) no alias and pluries summons were issued after 23 August 2002; and (5) no return of service has been filed with the court showing Honeycutt had ever been served with a copy of the summons or complaint in this action. Thus, when plaintiff failed to have this action continued as to defendant Honeycutt through endorsement or issuance of alias or pluries summons before the expiration of her last summons on 22 November 2002, this action was discontinued as to Honeycutt on that date. *See* N.C. Gen. Stat. § 1A-1, Rule 4(e); *Lemons*, 322 N.C. at 275, 367 S.E.2d at 657; *Russ v. Hedgecock*, 161 N.C. App. 334, 336-37, 588 S.E.2d 69, 70-71 (2003), *disc. review denied*, 342 N.C. 896, 467 S.E.2d 905 (2004).

The statute of limitations for plaintiff's wrongful death action expired two years after the date of the death of plaintiff's intestate on 8 August 2000. N.C. Gen. Stat. § 1-53(4) (2003). When the final summons in the present action expired on 22 November 2002, the present action was discontinued and any subsequent endorsement of the summons would have constituted a new action, commenced after the expiration of the statute of limitations.

Plaintiff contends it was improper for the court to grant summary judgment in favor of Honeycutt because he had made a general appearance prior to the expiration of the final alias and pluries summons on 22 November 2002, and thus she did not need to effectuate service on Honeycutt. This argument is identical to the one asserted by plaintiff in her first assignment of error. As we stated above, Honeycutt preserved his right to challenge the court's jurisdiction since he filed his responsive pleading challenging jurisdiction before he made a general appearance and thus, the trial court never obtained jurisdiction over him. Since plaintiff neglected to effectuate proper service on Honeycutt, the trial court properly found that plaintiff's action for wrongful death against Honeycutt was barred by the applicable statute of limitations. It was thus proper for the trial court to

grant Honeycutt's motion for summary judgment. These assignments of error are without merit.

Since we have affirmed the trial court's grant of summary judgment in favor of defendant Honeycutt based upon the statute of limitations, it is unnecessary for us to address plaintiff's third assignment of error.

AFFIRMED.

Judges CALABRIA and ELMORE concur.

LILLIE FREEMAN KEMP, PLAINTIFF v. KRISTY GAYLE SPIVEY AND TABOR CITY RESCUE SQUAD, DEFENDANTS

No. COA03-1022

(Filed 5 October 2004)

1. **Pleadings— compulsory counterclaim—negligence—total damages still speculative—claim fully mature**

   Plaintiff's negligence claim was in fact an unfiled compulsory counterclaim where plaintiff participated in an earlier action as a third-party defendant and all claims in that action were settled. Plaintiff was fully aware of the events and circumstances of her injury and was unaware only of the total damages.

2. **Pleadings— compulsory counterclaim—earlier settled action—waiver**

   The dismissal of a negligence claim as an unfiled compulsory counterclaim to an earlier settled action was reversed and remanded where the parties were not given a full opportunity to present evidence on estoppel.

   Judge GEER concurring.

Appeal by plaintiff from order filed 19 March 2003 by Judge B. Craig Ellis in Columbus County Superior Court. Heard in the Court of Appeals 21 April 2004.

Hill & High, L.L.P., by John Alan High, for plaintiff-appellant.

Barnes, Braswell & Haithcock, P.A., by Glenn A. Barfield, for defendant-appellees.

BRYANT, Judge.

Lillie Freeman Kemp (plaintiff) appeals an order filed 19 March 2003 granting Kristy Gayle Spivey and Tabor City Rescue Squad's (defendants') joint motion to dismiss the complaint based on a violation of N.C. Gen. Stat. § 1A-1, Rule 13(a) (compulsory counterclaim).

On 14 January 1999, Kemp and Spivey were involved in an automobile accident. At the time of the collision, Kemp, a school bus driver, was operating a school bus with students onboard. Spivey, an emergency technician, was operating a Rescue Squad ambulance. Several persons, both on the school bus and ambulance, were injured.

Multiple claims were filed between 1999 and 2000 in Columbus County concerning the accident. In each of the claims, the plaintiffs alleged that Spivey, in the course and scope of her employment with the Rescue Squad, negligently operated the ambulance, causing the collision. Defendants Spivey and the Rescue Squad answered in each case, denying negligence on the part of Spivey, and filed third-party complaints against Kemp, alleging Kemp's negligence caused or contributed to the collision. In each case, Kemp was represented by the Attorney General's Office of the State of North Carolina. In each case, Kemp filed an answer to the third-party complaint and counterclaimed for indemnity. Each civil action was resolved by way of a settlement agreement and a release from further liability. Kemp was represented in each settlement agreement by an attorney from the Attorney General's Office who participated in, and signed each settlement and release agreement.

Kemp filed her complaint against defendants on 21 December 2001, alleging Spivey, while acting in the course and scope of her duties as an employee of the Rescue Squad negligently operated an ambulance, causing the accident. Defendants filed an answer denying negligence on the part of Spivey and asserting the affirmative defense of contributory negligence. On 10 February 2003, defendants filed a motion to dismiss Kemp's complaint on the ground that the claim was a compulsory counterclaim that she failed to previously assert, and thus waived her right to bring the separate action. By order filed 19 March 2003, the trial court granted defendants' motion to dismiss.

Kemp presents two arguments on appeal: (I) whether her claim was mature at the time the original complaints and third-party com-

plaints were filed; and (II) whether the trial court erred in dismissing her claim instead of allowing her to maintain a separate action.

I

[1] Kemp first argues that her claim was not mature at the time the original complaints and third-party complaints were filed; therefore, she was not barred from filing her counterclaim thereafter. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 13(a) provides as follows regarding 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. But the pleader need not state the claim if
>
> > (1) At the time the action was commenced the claim was the subject of another pending action, or
> >
> > (2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

N.C.G.S. § 1A-1, Rule 13(a) (2003).

"The purpose of Rule 13(a), making certain counterclaims compulsory, is to enable one court to resolve 'all related claims in one action, thereby avoiding a wasteful multiplicity of litigation.' " *Gardner v. Gardner*, 294 N.C. 172, 176-77, 240 S.E.2d 399, 403 (1978) (citation omitted). Determining whether a particular claim "arises out of the same transaction or occurrence" requires consideration of "(1) whether the issues of fact and law are largely the same; (2) whether substantially the same evidence is involved in each action; and (3) whether there is a logical relationship between the two actions." *Brooks v. Rogers*, 82 N.C. App. 502, 507-08, 346 S.E.2d 677, 681 (1986). In addition, there must be "a logical relationship in the nature of the actions and the remedies sought." *Id.* at 508, 346 S.E.2d at 681.

We are satisfied in the instant case that plaintiff's claim for damages is a compulsory counterclaim with regard to defendants' previously filed third-party claims. Kemp argues, however, at the time the third-party complaints were filed, she was unaware of the total amount of her damages; therefore, her claim was not mature.

N.C. Gen. Stat. § 1A-1, Rule 13(e) provides: "Counterclaim maturing or acquired after pleading.—A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading." In the instant case, Kemp was fully aware of the events and circumstances leading to her injury; only the exact amount of injury sustained was speculative. In *Moretz v. Northwestern Bank*, 67 N.C. App. 312, 313-14, 313 S.E.2d 8, 9-10 (1984), this Court stated:

> Plaintiff contends that the trial court erred in dismissing his suit under Rule 13(a) of the Rules of Civil Procedure because plaintiff's G.S. § 75-1.1 action for unfair trade practices had not matured at the time plaintiff answered defendant's complaint in the prior action between plaintiff and defendant and was therefore not a compulsory counterclaim. While we must disagree with this argument, we nevertheless hold for other reasons that plaintiff's suit should not have been dismissed under Rule 13(a).
>
> It is clear from plaintiff's complaint that all of the transactions and occurrences constituting defendant's unfair practices had taken place when plaintiff filed his answer in the previous action and plaintiff concedes that when he answered defendant's complaint, he was aware of those events and circumstances. The injury was therefore then extant, the only unknown aspect of the matter being the extent of plaintiff's damages.

Accordingly, the speculative nature of the amount of damages sustained in the instant case did not render the claim premature at the time the third-party complaints were filed. This assignment of error is overruled.

II

[2] Kemp next argues that the trial court erred in dismissing her claim rather than allowing her to maintain the claim as a separate action.

We are unable to locate any North Carolina cases analyzing whether a separate action should be dismissed outright when the

original actions have already been settled by agreement of the parties versus a judicial determination. We have, however, located two federal cases interpreting Rule 13(a) of the Federal Rules of Civil Procedure regarding similar circumstances.[1]

In *Dindo v. Whitney*, 451 F.2d 1, 3 (1st Cir. 1971) (citations omitted), the court stated:

> The bar arising out of Rule 13(a) has been characterized variously. Some courts have said that a judgment is res judicata of whatever could have been pleaded in a compulsory counterclaim. Other courts have viewed the rule not in terms of res judicata, but as creating an estoppel or waiver. The latter approach seems more appropriate, at least when the case is settled rather than tried. The purposes of the rule are "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." If . . . the case is settled, normally the court has not been greatly burdened, and the parties can protect themselves by demanding cross-releases. In such circumstances, absent a release, better-tailored justice seems obtainable by applying principles of equitable estoppel.
>
> If, in the case at bar, Dindo, clearly having opportunity to assert it, . . . knew of the existence of a right to counterclaim, the fact that there was no final judgment on the merits should be immaterial, and a Rule 13(a) bar would be appropriate. His conscious inaction not only created the very additional litigation the rule was designed to prevent it exposed the insurer to double liability. We are not persuaded that a final judgment is a sine qua non to invocation of the bar; there is nothing in the rule limning the term "judgment."

cf. La Follette v. Herron, 211 F.Supp. 919, 921 (E.D. Tenn. 1962)

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1. Fed. R. Civ. P. 13(a) is substantially similar to our Rule 13(a). Specifically, Federal Rule 13 (a) provides:

> 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. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

> The insured had no day in court on the question of negligence of [defendant]. Conceivably plaintiff was at fault in not filing a counterclaim and thus preserving his rights. On the other hand, it would be abhorrent to deprive him of this right if he had no opportunity to present it prior to the settlement and dismissal of the first case. This court is constrained to find that plaintiff did not have an opportunity to present his claim in court prior to the compromise settlement.

In the instant case, Kemp was aware of the events and circumstances leading to her claim. Moreover, she had an opportunity to present her counterclaim prior to settlement of the prior actions. Kemp was represented by attorneys from the Office of the Attorney General in each of the settlement agreements, and the signature of Kemp's counsel appears on each of the settlement and release agreements. In fact, in four out of the five civil actions, the State of North Carolina agreed to pay one-half of the damages on behalf of Kemp, and in the fifth settlement the State agreed to pay one-third of the damages on behalf of Kemp. In one civil action the plaintiff filed additional claims against Kemp, as a third-party defendant, and Kemp then filed an answer to the additional claims and the cross-claim by Spivey and the Rescue Squad, Inc. Based on the logic articulated in *Dindo* and *LaFollette*, it appears plaintiff may be estopped from bringing suit; however, we reverse and remand this case as it appears the parties were not given full opportunity to present evidence on the issue of estoppel.

When determining whether a complaint is sufficient to withstand a Rule 12(b)(6) motion to dismiss, the trial court must discern "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." *Shell Island Homeowners Ass'n. Inc. v. Tomlinson*, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999). "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).

"A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." *Sterner v. Penn*, 159 N.C. App. 626, 628, 583 S.E.2d 670, 672 (2003). When a party contends that the "complaint has failed to state a claim for which relief is available and where the trial court consid-

ers matters outside the pleading . . ., the motion shall be treated as one for summary judgment . . . and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion." N.C.G.S. § 1A-1, Rule 12(b).

In the instant case, the trial court stated in its order that it "after hearing the arguments and presentation of evidence by the respective parties' counsel has determined that the defendants' motion to dismiss the plaintiff's action should be allowed." The trial court's consideration of evidence other than the pleading is contrary to the purpose of Rule 12(b)(6). *See Eastway Wrecker Service v. City of Charlotte*, 165 N.C. App. 639, 647, — S.E.2d —, — (2004) (McGee, J. dissenting). Based on the trial court's consideration of matters in addition to the complaint, defendant's Rule 12(b)(6) motion was thereby converted into a motion for summary judgment. N.C.G.S. § 1A-1, Rule 12(b).

Upon conversion of the motion as one for summary judgment, the parties were not afforded 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). Accordingly, this case is remanded so as to allow the parties full opportunity for discovery and presentation of all pertinent evidence.

Reversed and remanded for further proceedings.

Judge ELMORE concurs.

Judge GEER concurs in a separate opinion.

GEER, Judge, concurring.

I concur with the majority opinion, but write separately to stress that the trial court should be free to independently assess whatever evidence the parties submit on the question whether plaintiff should be estopped from pursuing her claims because of her failure to file counterclaims in the prior actions. I believe that plaintiff has submitted evidence that suggests estoppel would not be appropriate, but I also believe that defendants should have an opportunity to present contrary evidence after discovery, if necessary.

In the prior actions, plaintiff was sued only for indemnification and contribution. She was represented by the Attorney General's

Office pursuant to N.C. Gen. Stat. § 143-300.1 (2003). This statute gives the Attorney General authority to settle a case brought against a bus driver and provides that the settlement funds are to be paid by the State Board of Education. N.C. Gen. Stat. § 143-300.1(d). The statute gives no indication that a bus driver has any control over the litigation if defended by the Attorney General. *Cf. Keith v. Glenn*, 262 N.C. 284, 286, 136 S.E.2d 665, 667 (1964) ("[A] settlement, made without insured's assent or subsequent ratification, while protecting the insurer from further claims, would not bind the insured."); *Bradford v. Kelly*, 260 N.C. 382, 384, 132 S.E.2d 886, 887-88 (1963) ("However, it is now settled law in this State that the exercise of this privilege by the insurer [to settle claims brought against the insured] will not bar the right of the insured, or anyone covered by his policy, to sue the releasor for his damages where he has neither ratified nor consented to such settlement.").

Plaintiff has submitted evidence, in the form of her own affidavit and the affidavit of the Assistant Attorney General who represented her, that the Assistant Attorney General was not allowed to represent plaintiff on her individual claims for personal injury, that he did not personally meet with her until 15 November 2001, and that it was only on that date that he told plaintiff that she would need to seek her own attorney to file any personal injury claim. The record before this Court is not clear, but it appears that all of the cases in which plaintiff could have filed the compulsory counterclaim prior to filing her own lawsuit had been settled prior to 15 November 2001. Plaintiff filed this lawsuit on 27 December 2001, just over a month after meeting with the Assistant Attorney General. I believe that this evidence—to which defendants have not yet had an opportunity to respond—appears to give rise to an issue of fact regarding the question of estoppel.

LYNETTA DRAUGHON, PERSONAL REPRESENTATIVE OF THE ESTATE OF MAX DRAUGHON, DECEASED, PLAINTIFF V. HARNETT COUNTY BOARD OF EDUCATION AND BARRY HONEYCUTT, JACKIE SAMUELS, STEPHEN AUSLEY, JASON SPELL, ANTHONY BARBOUR, PERRY SAENZ, DON WILSON, JR., RAYMOND MCCALL, AND BRIAN STRICKLAND, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, DEFENDANTS

No. COA03-1325

(Filed 5 October 2004)

1. Trials— motion for continuance denied—no abuse of discretion

The trial court did not abuse its discretion by denying plaintiff's motion to continue a motions hearing where one of the attorneys who represented plaintiff appeared, that attorney acknowledged that the motion for a continuance was moot, five of the motions to be heard were plaintiff's, and plaintiff had noticed those motions for hearing that day.

2. Pleadings— motion to amend—denied—undue delay and bad faith

The trial court did not abuse its discretion by denying plaintiff's motion to amend her complaint for undue delay and bad faith. Plaintiff filed the motion to amend her complaint four years and eight months after the death of her intestate (a high school football player who died from heatstroke), two years and eight months after the original complaint was filed, one year and eleven months after the second complaint was filed, and less than one week before the scheduled hearing on defendant school board's motions to dismiss and for summary judgment. Furthermore, plaintiff's motion to amend contained no additional factual allegations demonstrating direct liability of the board, but instead attempted to spin the existing factual allegations to state a direct theory against the board which was not in the original complaint.

3. Negligence— vicarious liability—individual claims dismissed

The trial court did not err by granting summary judgment for a school board in an action arising from the death of a high school football player where the claims against the board were based on vicarious liability and the underlying individual claims were dismissed.

Appeal by plaintiff from orders entered 20 May 2003 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 26 August 2004.

Keith A. Bishop, PLLC, by Keith A. Bishop, and Gary, Williams, Parenti et al., by Alton C. Hale Jr., for plaintiff-appellant.

Tharrington & Smith, L.L.P., by Jonathan Blumberg and Lisa Lukasik, Bailey & Dixon, LLP by Gary Parsons & Warren Savage, and Cranfill, Sumner & Hartzog, LLP by Patricia L. Holland, for defendant-appellee Harnett County Board of Education.

STEELMAN, Judge.

Plaintiff's intestate was a football player at Triton High School in Harnett County, North Carolina. He collapsed during football practice on the morning of 8 August 1998 and died the following day at UNC Memorial Hospital from complications due to heatstroke. A more detailed discussion of the facts of the case can be found in this Court's earlier opinion at *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 208, 580 S.E.2d 732 (2003), *aff'd*, 358 N.C. 137, 591 S.E.2d 520 (2004). On 3 August 2000, plaintiff filed an action seeking monetary damages for the wrongful death of Max Draughon. On 6 July 2001, plaintiff voluntarily dismissed that complaint without prejudice. That same day, plaintiff refiled her claims in this action.

On 14 April 2003, both plaintiff and the Harnett County Board of Education (Board) appeared before the Superior Court of Harnett County and argued seven motions. Plaintiff appealed from and assigned as error four of the orders entered following the 14 April 2003 hearing. In the orders appealed from, the trial court: (1) denied plaintiff's motion to amend her complaint; (2) denied plaintiff's motion to continue the hearing of the Board's motions for summary judgment; and (3) dismissed plaintiff's complaint. Further discussion of the relevant facts will be contained in the analysis of plaintiff's assignments of error.

[1] In plaintiff's first assignment of error she contends the trial court erred in denying her Motions to Continue/Reschedule Motion Hearing Date. There are two "Motions to Continue/Reschedule Motion Hearing Date" at issue in this appeal. Both relate to a 14 April 2003 hearing date, which date was set in open court on 17 February 2003, in the presence of both parties' counsel and without objection by plaintiff.

It is within the trial court's discretion to grant or deny a motion for a continuance, and that ruling will not be overturned absent a showing of abuse of discretion. *State v. Williams*, 355 N.C. 501, 540, 565 S.E.2d 609, 632 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). Generally, continuances are not favored; *May v. City of Durham*, 136 N.C. App. 578, 581, 525 S.E.2d 223, 227 (2000); and therefore, the trial court should only grant a continuance where the moving party demonstrates "good cause . . . and upon such terms and conditions as justice may require." N.C. Gen. Stat. § 1A-1, Rule 40(b) (2003). The burden of proof rests on the moving party to demonstrate sufficient grounds justifying the continuance. *May*, 136 N.C. App. at 581, 525 S.E.2d at 227. When ruling on a motion to continue the trial judge must consider not only the grounds given for the motion, but "whether the moving party has acted with diligence and in good faith, and may consider facts of record as well as facts within his judicial knowledge." *Id.*

On 17 February 2003, plaintiff's counsel and the Board's counsel appeared in Harnett County Superior Court for hearings on, *inter alia*, defendants Honeycutt and the Board's motion to dismiss plaintiff's claims pursuant to Rule 41(b) of the Rules of Civil Procedure. Plaintiff objected to the court hearing the Board's motion to dismiss because plaintiff had not been given five days notice as required by Rule 6(d) of the Rules of Civil Procedure. The trial court sustained plaintiff's objection and set the matter for hearing on 14 April 2003. The trial court set this date after hearing from the parties and without any objections from any of the parties.

Three days later, plaintiff filed her first motion to continue. In support of this motion, plaintiff asserted that the 14 April 2003 hearing should be continued because the case was scheduled for mediation on 13 May 2003. On 8 April 2003, plaintiff filed a second motion to continue. In this motion, plaintiff asserted, for the first time, conflicts of two of the four attorneys representing plaintiff, stating: (1) Keith Bishop was scheduled to begin a trial in Wake County on 14 April 2003, and was also scheduled to give an oral argument before the Court of Appeals on 15 April 2003; and (2) Linda Capobianco, one of plaintiff's attorneys of record, no longer practiced with the Florida law firm of Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando.

On 14 April 2003, Alton Hale, an attorney licensed to practice in North Carolina, with the firm of Gary, Williams, et. al., appeared before the Superior Court of Harnett County on behalf of plaintiff.

At no time during the hearing did Mr. Hale state he was unprepared to represent his client or was incapable of effectively representing his client.

We cannot say the court abused its discretion in denying plaintiff's motion for a continuance since the record reveals that: (1) Mr. Hale, one of the attorneys who had participated in the case, appeared in court on 14 April 2003 on plaintiff's behalf; (2) Mr. Hale acknowledged in open court the motion for a continuance was moot; and (3) five of the motions to be heard were plaintiff's own motions which she had noticed for hearing that day. This assignment of error is without merit.

[2] In plaintiff's second assignment of error, she contends the trial court erred when it denied her motion to amend her complaint to "clarify" her theories of liability asserted against the Board.

Leave of court to amend a pleading is left within the trial court's discretion, and such decision is not reversible absent a showing of abuse of discretion. *Isenhour v. Universal Underwriters Ins. Co.*, 345 N.C. 151, 154, 478 S.E.2d 197, 199 (1996). Plaintiff contends the trial court did not state a reason justifying its refusal to grant plaintiff leave to amend and that this omission is essentially a *per se* abuse of discretion. Where it is unclear as to why the trial court denied leave to amend, this Court may consider any apparent reasons for the denial. *Kinnard v. Mecklenburg Fair*, 46 N.C. App. 725, 727, 266 S.E.2d 14, 16, *aff'd*, 301 N.C. 522, 271 S.E.2d 909 (1980).

A motion to amend may be denied for " '(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments.' " *Carter v. Rockingham Cty. Bd. of Educ.*, 158 N.C. App. 687, 690, 582 S.E.2d 69, 72 (2003) (citations omitted). In deciding if there was undue delay, the trial court may consider the relative timing of the proposed amendment in relation to the progress of the lawsuit. *Stetser v. TAP Pharm. Prods.*, 165 N.C. App. 1, 31, 598 S.E.2d 570, 590 (2004). Plaintiff did not file her motion to amend her complaint until 6 April 2003. This was four years and eight months after the death of plaintiff's intestate, two years and eight months after the original complaint was filed, one year and eleven months after the second complaint was filed, and less than one week before the scheduled hearing on the Board's motions to dismiss and for summary judgment. Based on these circumstances alone, we cannot say the trial judge abused his discretion in denying the motion based on undue delay.

See Brown v. Lyons, 93 N.C. App. 453, 456, 378 S.E.2d 243, 245 (1989); *Kinnard*, 46 N.C. App. at 727, 266 S.E.2d at 16.

Further, in the trial court's order denying plaintiff's motion to amend, it states: "[t]he Court finds and concludes that the only claims stated in Plaintiff's Complaint against the Defendant Harnett County Board of Education are claims based upon alleged vicarious liability." In plaintiff's brief, she asserts that her complaint clearly contains direct claims of negligence against the Board and that she "filed her motion to amend her complaint to clarify her theories of liability because defendants, in filing their motion for summary judgment, took the opportunistic position that Plaintiff's complaint alleged only a vicarious liability theory of negligence liability." Nowhere in plaintiff's complaint, her motion to amend, or in her brief to this court, is it clear what theory of direct liability plaintiff is asserting against the Board. Of the alleged wrongful acts done by "the Defendants," none specifically address any conduct of the Board. The complaint contains several allegations of conduct by "the Defendants" without specifying which defendant committed the acts. Nowhere does plaintiff assert that the Board had a policy in effect regarding football practice or that the Board knew the coaches were doing something wrong or failed to adequately supervise the coaches. Instead, plaintiff attempts to take a line in her complaint which states: "the several defendants" "fail[ed] to take adequate precautions to prevent an occurrence of this nature[,]" and tries to convert this language, which referred to the coaches at practice that day, and twist it to say the Board should have taken "adequate precautions" to supervise the coaches. Further, plaintiff's motion to amend the complaint contained no additional factual allegations demonstrating direct liability of the Board, but instead attempted to spin the existing factual allegations to state a direct theory against the Board which was not in the original complaint.

Throughout the course of this litigation, plaintiff has consistently stated that her claims against the Board were based solely on vicarious liability and depended on the allegations of negligence asserted against the other defendants. In her complaint, plaintiff states "Harnett County Schools, as principal, is liable for the acts and omissions of its agents and employees in their official capacities, ..." On 12 April 2002, plaintiff's counsel argued to the trial court at a motions hearing that:

> Harnett County Board of Education's exposure in this case is based on vicarious liability theory. In other words, we have not

> alleged that Harnett County Board of Education directly went out off to any field and did anything.
>
> And their liability depends on the allegations of every one of the defendants we've brought into the case . . . .

Similarly, in a brief filed before this Court on 3 September 2002, in this same case, (COA02-646), plaintiff's counsel stated: "Plaintiff alleged that the institutional defendant's liability depended on the individual defendants' joint and several liabilities." In plaintiff's petition for writ of certiorari to this Court in the above referenced case, she asserted that she "filed her complaint against the individual defendants alleging direct negligence, and against the institutional defendant, Harnett County School Board, alleging vicarious negligence on a Respondeat Superior theory." These admissions by plaintiff are binding and she cannot now assert in good faith that she has maintained a direct cause of action against the Board since the initiation of this cause of action.

We hold that the trial court did not abuse its discretion in denying plaintiff's motion to amend based upon both undue delay and bad faith. This assignment of error is without merit.

[3] In plaintiff's fourth assignment of error she contends the trial court erred in granting the Board's motion for summary judgment.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). The movant bears the ultimate burden of demonstrating the absence of any triable issue of fact. *Kennedy v. Haywood Cty.*, 158 N.C. App. 526, 527, 581 S.E.2d 119, 120 (2003). Here, the trial court granted summary judgment in favor of the Board stating:

> There is no genuine issue as to any material fact, and Defendant Harnett County Board of Education is entitled to judgment as a matter of law on the limited ground that plaintiff's Complaint against it, which alleges liability in the Harnett County Board of Education based upon vicarious liability theory, is precluded as a matter of law now that each of the individually-named defendants has been dismissed on the merits.

Plaintiff only asserted claims against the Board based upon alleged vicarious liability. The general rule in North Carolina is that

judgment on the merits in favor of the agent precludes any action against the principal where, as here, the principal's liability is purely derivative. *Guthrie v. Conroy*, 152 N.C. App. 15, 26, 567 S.E.2d 403, 411 (2002) (citing *Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E.2d 203, 205 (1974)). *See also Taylor v. Hatchery, Inc.*, 251 N.C. 689, 691, 111 S.E.2d 864, 865-66 (1960).

Each of the claims against the individually named defendants in the action have been dismissed on the merits. On 17 December 2001, the trial court granted summary judgment in favor of four of the defendants—Stephen Ausley, Raymond McCall, Jason Spell and Don Wilson, Jr., which was affirmed in *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 580 S.E.2d 732 (2003), *aff'd*, 358 N.C. 137, 591 S.E.2d 520 (2004). On 4 March 2002, the trial court granted summary judgment in favor of defendant Brian Strickland, which this Court affirmed in *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 582 S.E.2d 343 (2003), *aff'd*, 358 N.C. 137, 591 S.E.2d 520 (2004). On 20 November 2002, the trial court entered an order dismissing three additional defendants from this action—Jackie Samuels, Anthony Barbour, and Perry Saenz. The trial court dismissed these defendants pursuant to Rule 37(d) of the North Carolina Rules of Civil Procedure as sanctions for plaintiff's failure to serve answers or objections to interrogatories or requests for production of documents properly served by defendants. Plaintiff failed to perfect her appeal as to these three defendants, and the appeal was subsequently dismissed on 21 July 2003. Plaintiff filed a petition for writ of certiorari requesting this Court hear the appeal. This Court denied the petition on 24 October 2004. On 11 March 2003, the trial court dismissed the claims against defendant Barry Honeycutt based upon the statute of limitations. This Court affirmed the lower court's ruling in *Draughon v. Harnett Cty. Bd. of Educ.*, —— N.C. App. ——, —— S.E.2d —— (2004) (COA03-1324, filed 5 October 2004). The trial court properly dismissed plaintiff's claim against the Board and entered summary judgment in its favor since all of the individual defendants had been dismissed from the action. This assignment of error is without merit.

Since we have affirmed the trial court's entry of summary judgment dismissing plaintiff's claim against the Board, it is unnecessary to address plaintiff's third assignment of error.

For the reasons discussed herein, we affirm the rulings of the trial court.

AFFIRMED.

Judges CALABRIA and ELMORE concur.

SANCO OF WILMINGTON SERVICE CORPORATION, PETITIONER v. NEW HANOVER COUNTY, THE NEW HANOVER COUNTY BOARD OF COMMISSIONERS, AND NEW HANOVER COUNTY BOARD OF EDUCATION, RESPONDENTS

No. COA03-602

(Filed 21 September 2004)

1. **Administrative Law— construction of ordinance—review de novo**

A court reviewing a question of law concerning the construction of an ordinance should apply a de novo standard of review.

2. **Zoning— appeal from review committee to Board of Commissioners—ministerial ordinance—appeal limited to applicant**

The superior court did not err when it found that the Board of Commissioners acted ultra vires in allowing a neighborhood preservation group to appeal a zoning decision from a review committee to the Board of Commissioners. The ordinance was clearly ministerial and petitioner was entitled to the permit as a matter of law once it complied with the terms of the ordinance; moreover, the plain language of the ordinance, read in its entirety, allows only the applicant the right of appeal.

Appeal by respondents from judgment entered 11 September 2002 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 5 February 2004.

Shipman & Hodges, L.L.P., by Gary K. Shipman and William G. Wright, for petitioner-appellee.

E. Holt Moore, III, Assistant County Attorney, for respondents-appellants New Hanover County and New Hanover County Board of Commissioners.

ELMORE, Judge.

I.

In this appeal, New Hanover County and the New Hanover County Board of Commissioners (collectively, respondents) appeal from a judgment of the New Hanover County Superior Court, which judgment voided and nullified a decision of the Board of Commissioners to amend an approval previously awarded to Sanco of Wilmington Service Corporation (petitioner) on petitioner's application for approval of its subdivision plat. For the reasons stated herein, we affirm the trial court's order and judgment.

On 22 August 2001, petitioner received preliminary approval from the Technical Review Committee of the New Hanover County Planning Board (TRC)[1] for a project to construct a condominium complex. The approved plan for the complex included 427 condominium units. Soon after this approval, a petition signed by thirteen individuals was received by the New Hanover County Planning Department. This petition from a group calling itself "Concerned Citizens for Neighborhood Preservation" (Concerned Citizens) requested a public hearing so that their concerns could be heard.

Over petitioner's objection, the Board of Commissioners held a hearing on 1 October 2001 to address the Concerned Citizens' petition. At that hearing, the Chair of the Board of Commissioners stated that the proceeding was "an administrative action, not a quasi-judicial action." After hearing from various parties, the Board of Commissioners voted to "amend" the decision of the TRC so as to reduce the number of approved condominium units from 427 units to approximately 213 using approximately 85 acres of land.[2] Some additional requirements imposed by the Board of Commissioners were subsequently removed.

Petitioner responded on 7 November 2001 by filing a Petition for a Writ of Certiorari to the New Hanover County Superior Court. The petition sought a declaration that the approval of the project was only to have been a ministerial act in which policy decisions were not

1. Although the ordinance at issue here discusses the role and duties of the "Planning Board Chairperson," in practice that function is served by a body sitting as a Technical Review Committee. For the sake of simplicity, we will refer only to the Technical Review Committee (TRC).

2. This decision of the Board has alternatively been described as a remand to the TRC with instructions to approve the project as so described. The effect of the vote is indisputably the same irrespective of this distinction.

appropriate, and furthermore that pursuant to the local subdivision ordinance, no one other than petitioner possessed a right to appeal the decision of the TRC to the respondent Board.

After entertaining various motions, a hearing was held on 5 September 2002 before Judge Jay D. Hockenbury. In pertinent part, the order and judgment of the Superior Court concluded as a matter of law as follows:

> (2.) The process of reviewing and approving subdivision plans under the County's Subdivision Ordinance is a mere ministerial/administrative action, not subject to approval by the Board of Commissioners.
>
> . . .
>
> (6.) The Board of Commissioners had no power or authority under its Subdivision Ordinance on October 1, 2001 to conduct a hearing or consider an appeal from any third parties.
>
> (7.) As such, the actions of the New Hanover County Board of Commissioners of October 1, 2001, with respect to the hearing conducted in this matter and its determination with respect to the Petitioner's Subdivision were *ultra vires*, and accordingly, void and a nullity.

The effect of this order and judgment was to reinstate the original approval of petitioner's subdivision plat by the TRC. From this order and judgment, respondents appeal.

II.

[1] A court reviewing a question of law concerning the proper construction of an ordinance should apply a *de novo* standard of review. "If a petitioner contends the Board's decision was based on an error of law, *de novo* review is proper." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 140 N.C. App. 99, 102, 535 S.E.2d 415, 417 (2000), *aff'd*, 354 N.C. 298, 554 S.E.2d 634 (2001). Because this case presents issues turning upon the proper construction of an ordinance, *de novo* review was in fact the proper standard of review for the hearing conducted by the superior court below. *See, e.g., Ayers v. Bd. of Adjust. for Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201, *disc. review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994). As such, our review is limited to determining whether "the superior court committed error of law in interpreting and applying the municipal ordinance." *Capricorn Equity Corporation v. Town of*

Chapel Hill Bd. of Adjust., 334 N.C. 132, 137, 431 S.E.2d 183, 187 (1993). Because the superior court in this case was sitting as an appellate court on a question of law, "it could freely substitute its judgment for that of [the local government board] and apply *de novo* review as could the Court of Appeals with respect to the judgment of the superior court." *Id.*

III.

[2] By their first assignment of error, respondents contend that the superior court erred when it found that the Board of Commissioners had acted *ultra vires* in allowing Concerned Citizens to effect its purported appeal under New Hanover County Subdivision Ordinance 32 § 3(2)(c). The relevant portions of Ordinance 32 § 3(2) read as follows:

> (2) Upon completion of the preliminary plat review, the Planning Board shall approve or disapprove the plat.
>
> (a) If the preliminary plat is approved, approval shall be noted on the sepia. One print of the plat shall be transmitted to the subdivider and the sepia shall be retained by the Planning Department. (4/6/87)
>
> (b) When a preliminary plat is disapproved, the Planning Director shall specify the reasons for such action in writing. One copy of such reasons and the sepia shall be retained by the Planning Department and a print of the plat with the reasons for disapproval shall be given to the subdivider. If the preliminary plat is disapproved, the subdivider may make the recommended changes and submit a revised preliminary plat. (4/6/87)
>
> (c) Decisions of the Planning Board Chairperson may be appealed to the Board of County Commissioners at which time they may affirm, modify, supplement, or remand the decision of the Planning Board Chairperson. (7/6/92)

Petitioner prevailed in the Superior Court arguing that under Ordinance 32 § 3(2) only petitioner, as the applicant, possessed a right to appeal an adverse decision to the Board of County Commissioners. We agree with the superior court that the ordinance, when read in its entirety, afforded only the petitioner, as applicant, the right to appeal beyond the Planning Board, i.e., the TRC.

This reading of the New Hanover County ordinance gives the language its plain meaning as indicated from its context. The sub-

division ordinance at issue does not contain any requirement that there be public hearings or public comment on the preliminary plan. Moreover, it does not mention the role or other rights of those such as adjacent property owners in this process. The plain language of the statute only addresses the rights of the applicant and the corresponding duty of the Planning Board. Indeed, by repeatedly using the word "shall" the ordinance mandates certain specific actions of the county. To read the right to appeal mentioned in 32 § 3(2)(c) as applying to other parties, e.g. Concerned Citizens, would require us to read into the ordinance rights of and involvement by individuals, classes, or other third parties about whom the ordinance is otherwise silent.

Our reading of the ordinance is in accordance with the typical processes of plat approval followed in other counties and cities of this state, which typically call for a ministerial or administrative role on the part of the locality. While this Court has previously recognized that a local government may choose to employ a quasi-judicial rather than an administrative or ministerial process, such a quasi-judicial process has been found only when the ordinance clearly authorized the elected governmental board—*i.e.* a city council or a board of county commissioners—to hold a public hearing and exercise discretion in making its decision. *See Guilford Financial Services, LLC v. The City of Brevard*, 150 N.C. App. 1, 563 S.E.2d 27 (2002), *rev'd on other grounds*, 356 N.C. 655, 576 S.E.2d 325 (2003) (noting existence of a less common quasi-judicial system for plat approvals in contradistinction to a ministerial system). When designed as a ministerial process the plat approval is unlike the zoning process because issues "such as density and character of the neighborhood and streets" are not addressed by the local governmental authority. *Nazziola v. Landcraft Props., Inc.*, 143 N.C. App. 564, 566-67, 545 S.E.2d 801, 803 (2001). As such, under a ministerial scheme, an applicant's compliance with the established procedures and requirements of the plat approval process renders the applicant entitled to the permit as a matter of law. *Quadrant Corp. v. City of Kinston*, 22 N.C. App. 31, 32, 205 S.E.2d 324, 325 (1974).

In *Nazziola*, the opponents of a plat approval sued the City of Greensboro and the developer contending that opponents possessed a right to be heard on the project. This Court rejected that argument and held that "a subdivision ordinance must set forth the procedures for granting or denying approval of a subdivision plat prior to registration." *Nazziola*, 143 N.C. App. at 566, 545 S.E.2d at 803. While

the Greensboro ordinance differed from the ordinance in the case *sub judice* by specifically stating that only the applicant possesses a right to appeal to the City Council, the holding in *Nazziola* nevertheless indicates that a plat approval procedure may be perfectly valid and appropriate without public comment even from the adjacent property owners. It is simply not permissible for a local governmental body to deploy novel, *ad hoc* procedures not previously authorized in an ordinance.

Local governments derive their authority to establish regulations such as those at issue here from the State of North Carolina pursuant to N.C. Gen. Stat. § 153A-332. This statute mandates that "[a] subdivision ordinance adopted pursuant to this Part shall contain provisions setting forth the procedures to be followed in granting or denying approval of a subdivision plat before its registration." N.C. Gen. Stat. § 153A-332 (2003). When a local government deviates from the ordinances it has established, the adversely affected applicant may appeal the matter to courts of this state.[3] Our courts have the authority to nullify action taken by the local entity when it has deviated from its own ordinance concerning the issuance of permits on subdivisions. *Quadrant*, 22 N.C. App. 31, 205 S.E.2d 324; *see also*, *Nazziola*, 143 N.C. App. at 566, 545 S.E.2d at 803 ("An applicant who meets the requirements of the ordinance is entitled to the issuance of a permit as a matter of right; and, it may not be lawfully withheld.").

IV.

We hold that the ordinance at issue in this case was clearly ministerial. As such, once the petitioner had complied with the terms of ordinance 32 § 3(2)(c), it was entitled to the permit as a matter of law, and moreover the Board of Commissioners had no legal authority under the ordinance to hear the matter unless and until the plat applicant, rather than a third party such as Concerned Citizens, appealed from the TRC. We, therefore, affirm the order and judgment issued by the superior court.

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3. After the Board of Commissioners conducted the 1 October 2001 hearing, the New Hanover Co. Subdivision Ordinance was amended to include a new section, 32-3(4), which reads in pertinent part:

(4) Notice of Appeal:

An appeal from a decision regarding a preliminary plat shall be limited to the applicant, officials or departments of New Hanover County, or persons with a significant identifiable interest in the proposed plan, greater than that of the public at large, including but not limited to, adjacent property owners . . .

Affirmed.

Judges TIMMONS-GOODSON and BRYANT concur.

STATE OF NORTH CAROLINA v. JOHN JACOB MORTON

No. COA03-1150

(Filed 21 September 2004)

1. Evidence— hearsay—unavailable witness—right of confrontation

The trial court erred in a possession of stolen goods case by allowing inadmissible hearsay into evidence and the case is remanded for a new trial, because: (1) an unavailable witness's testimonial statements to a detective are inadmissible since defendant did not have a prior opportunity to cross-examine the unavailable witness regarding his statements and the admission of those statements during the trial was a violation of defendant's right to confrontation under the Sixth Amendment; and (2) as the State offered no evidence that defendant knew the items were stolen, in the absence of the unavailable witness's inadmissible statements, it cannot be concluded the error was harmless beyond a reasonable doubt.

2. Possession of Stolen Property— knowledge that goods were stolen—motion to dismiss—sufficiency of evidence

The trial court did not err in a possession of stolen goods case by denying defendant's motions to dismiss at the close of the State's evidence and at the close of all evidence even though defendant contends there was insufficient proof that he knew or had reasonable grounds to believe that the property in his possession was stolen, because: (1) although the only evidence produced by the State indicating that defendant knew the items were stolen came from inadmissible hearsay statements, such statements must be considered when reviewing the evidence on a motion to dismiss; and (2) the testimony tended to show that defendant knew he was purchasing stolen property, harassed the witness to obtain more, and loaned the witness the use of his van to haul the stolen property to his home.

Appeal by defendant from judgment entered 22 January 2003 by Judge Charles C. Lamm, Jr. in Yadkin County Superior Court. Heard in the Court of Appeals 7 June 2004.

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

Law Offices of J. Darren Byers, P.A., by J. Darren Byers, for defendant-appellant.

HUNTER, Judge.

John Jacob Morton ("defendant") appeals from a judgment filed on 22 January 2003 consistent with a jury verdict finding him guilty of possession of stolen goods. Defendant was sentenced to eight to ten months incarceration. We conclude that the trial court erred in allowing inadmissible hearsay into evidence and remand the case for a new trial.

The evidence tends to show that in August 2001, Johnny Isenhour ("Isenhour") reported that about $20,000.00 worth of his stored tools, equipment and repair parts for vehicles and tractors were stolen from a garage owned by his mother-in-law in Catawba County. He had not visited the garage in approximately two weeks before he discovered his missing property and had not given anyone permission to take it. At the beginning of the investigation, Isenhour gave Catawba County Detective Doug Carter ("Detective Carter") a very detailed description of every item taken, including makes, colors, and any markings Isenhour had put on them. Within seven to ten days, Isenhour identified some of his property in Alexander County, recovered by the sheriff's department.

A couple of days later Detective Carter called Isenhour and told him that the Catawba County Sheriff's Department had discovered other items for him to identify in photographs. Isenhour identified and retrieved more of his tools.

Later, Detective Freddy Sloan ("Detective Sloan") was able to secure a search warrant for defendant's cargo trailer at Vintage Flea Market. Detective Sloan and other officers inventoried, numbered, and photographed 256 items from defendant's trailer. The items that were recovered from the trailer included tools. Detective Sloan contacted Isenhour, who identified some of the property as belonging to him.

Before the trial, the State filed notice that it intended to offer William Miller's ("Miller") and James Watters' ("Watters") statements into evidence because it was unable to procure their attendance by process or other reasonable means. Defendant filed two motions *in limine*. One motion requested that the court confine the scope of the trial to the events that constituted the indictable offense and not include investigations and actions of law enforcement, alleged victims or perpetrators in other jurisdictions since the Yadkin County investigator's reports revealed that there was a multi-county investigation surrounding stolen goods. That motion was granted. The other motion moved the court to prohibit the introduction of Miller's and Watters' written statements and it was not granted by the trial court.

At trial, Miller was present and testified. He had already pled guilty to breaking into Isenhour's garage. He was defendant's friend and a former friend of Watters. He testified that he and another friend, Wayne Probst, committed the crime. He stored Isenhour's property in a storage building rented by Watters. Further, Miller testified that he sold the stolen property to Watters, but he never took any property to defendant and did not know Watters was selling property to defendant.

Watters was not present during the trial. Detective Carter had interviewed Watters on 24 August 2001 at approximately 3:54 p.m. because he was a suspect in the investigation of the break-in. The trial court allowed Watters' statements to be read into evidence by Detective Carter. Again, defendant objected to the reading of it to the jury, but the trial court overruled the objection. During the interview, Watters said he sold stolen property to defendant and defendant knew that it was stolen. Defendant also allowed Watters to use his blue Astro van to haul stolen property from Watters' storage shed to defendant's home. Watters stated that Isenhour's stolen property was the first load of merchandise that he had taken to defendant. He further stated that defendant knew the merchandise was stolen and defendant kept harassing him about getting more of it.

Chasity Prather ("Prather") was the only witness for defendant. She was Watters' ex-wife and defendant's former employee. She testified that she had spoken to Watters the morning of the trial and she knew where he was, in Hickory, North Carolina. She also testified that she was present one time when defendant paid Watters for merchandise.

Defendant assigns error to (I) the trial court admitting Watters' statements into evidence when he was not actually unavailable, (II) the trial court not granting defendant's motions to dismiss because the State failed to show defendant's knowing possession of stolen goods, and (III) the trial court admitting evidence of criminal investigations of defendant in other counties.

I.

[1] Defendant first argues that the trial court erred in allowing the hearsay statements of Watters to be introduced into evidence. We agree. Watters' statements to Carter were inadmissible hearsay even if the witness was unavailable. The Confrontation Clause of the United States Constitution, as interpreted by *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), provides "[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. It also provides that:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee.

Id. at 61, 158 L. Ed. 2d at 199.

Here, *Crawford* applies because Watters' statements to Carter, a detective for a sheriff's department, were testimonial in nature. They were made during an interview at the Catawba County Sheriff's Department after Watters' *Miranda* rights were given. *Crawford* does not define "testimonial" but clearly held, "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* at 68, 158 L. Ed. 2d at 203. "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." *Id.* at 52, 158 L. Ed. 2d at 193.

Therefore, in the case now before us, we hold that Watters' statements to Carter are inadmissible because defendant did not have a prior opportunity to cross-examine Watters regarding his statements and that the admission of those statements during the

trial was a violation of defendant's right to confrontation under the Sixth Amendment.

"[W]here there is an alleged violation of the defendant's constitutional rights, the State has the burden of showing that the error was 'harmless beyond a reasonable doubt.' " *State v. Dunn*, 154 N.C. App. 1, 17-18, 571 S.E.2d 650, 661 (2002) (quoting N.C. Gen. Stat. § 15A-1443 (2001)).

The principles of due process of law require the State to prove beyond a reasonable doubt every essential element of the crime charged. *See State v. White*, 300 N.C. 494, 499, 268 S.E.2d 481, 485 (1980). The elements of the crime with which defendant is charged, possession of stolen property, are (I) possession of personal property, (II) worth more than $1,000.00, (III) which has been stolen, (IV) knowing or having reasonable grounds to believe the property was stolen, and (V) having possession for a dishonest purpose. N.C. Gen. Stat. § 14-17.1; *see also State v. Bailey*, 157 N.C. App. 80, 86, 577 S.E.2d 683, 688 (2003). As the State offered no evidence that defendant knew the items were stolen, in the absence of Watters' inadmissible statements, we cannot conclude the trial court's error was harmless beyond a reasonable doubt. We therefore grant a new trial.

II.

[2] Defendant next contends that the trial court erred in denying his motions to dismiss at the close of the State's evidence and at the close of all of the evidence because there was insufficient proof that he knew or had reasonable grounds to believe that the property in his possession was stolen. *See* N.C. Gen. Stat. § 14-71.1 (2003). We disagree.

In order to survive a motion to dismiss in a criminal action, the evidence 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). All evidence actually admitted, whether competent or not, must be viewed in the light most favorable to the State, drawing every reasonable inference in favor of the State. *See State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992); *State v. Jones*, 342 N.C. 523, 540, 467 S.E.2d 12, 23 (1996) (citing *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991)). Whether the evidence presented is substantial is a question of law for the court. *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956). It is not a sufficient basis for granting a

motion to dismiss that some of the evidence was erroneously admitted by the trial court. *See Jones* at 540, 467 S.E.2d at 23.

Defendant contends there was insufficient evidence presented of the knowledge element of the crime, as the only evidence produced by the State indicating that defendant knew the items were stolen came from Watters' statements, read by Detective Carter. Although such statements were improperly admitted by the trial court, they must be considered when reviewing the evidence on a motion to dismiss.

Watters' testimony tended to show that defendant knew he was purchasing stolen property, harassed Watters to obtain more, and loaned Watters the use of his van to haul the stolen property to his home. We therefore conclude that substantial evidence was presented that supports the inference that defendant knew the items were stolen, and therefore the trial court did not err in denying defendant's motions to dismiss.

As the trial court erred in admitting Watters' hearsay testimony into evidence, and such an error was prejudicial to defendant, we therefore conclude defendant is entitled to a new trial.

The questions raised by defendant's additional assignment of error may not recur during a new trial and hence, will not be considered in this appeal.

New trial.

Chief Judge MARTIN and Judge TIMMONS-GOODSON concur.

IN RE: T.C.B.

No. COA03-1591

(Filed 21 September 2004)

Termination of Parental Rights— willful abandonment—pending sexual abuse investigation

The trial court erred by concluding that grounds existed to terminate respondent father's parental rights to his natural daughter based on willful abandonment under N.C.G.S. § 7B-1113, because: (1) respondent was instructed by legal coun-

sel not to have any contact with the minor child or the mother until pending criminal charges alleging respondent's sexual abuse with the minor child were resolved, the criminal charges were filed almost two years prior to the relevant six month period, and they were not resolved until several months after the termination of parental rights petition was filed; (2) during this time, DSS entered into a protection plan with the mother that provided there would be no visitation with respondent due to allegations of abuse that were being investigated; (3) none of the other findings of fact made by the district court support the conclusion of willful abandonment; and (4) child support payments were made during the relevant six month period of time.

Appeal by respondent from judgment dated 17 July 2003[1] by Judge Rebecca B. Knight in Buncombe County District Court. Heard in the Court of Appeals 25 August 2004.

No brief filed for petitioner-appellee.

Charlotte Gail Blake for respondent-appellant.

BRYANT, Judge.

P.N.S. (respondent-father) appeals a judgment adjudicating that grounds exist to terminate his parental rights as to his natural daughter T.C.B.

L.B. (the mother) and respondent are the natural parents of T.C.B., born 21 September 1995. Both the mother and the respondent were 14 years of age at the time T.C.B. was conceived. On 2 February 2002, the mother filed a petition to terminate the parental rights of respondent on the ground that he willfully abandoned T.C.B. as defined by N.C. Gen. Stat. § 7B-1111(a)(7). Respondent filed an answer requesting that his parental rights not be terminated. A guardian ad litem was appointed to represent the interest of the minor child.

This matter came for hearing at the 10 June 2003 session of Buncombe County District Court with the Honorable Rebecca B. Knight presiding. The district court entered an order finding that grounds existed to terminate the parental rights of respondent because he willfully abandoned the minor child for six months preceding the filing of the petition to terminate his parental rights.

1. The caption has been altered to show only the minor child's initials.

Respondent gave timely notice of appeal.

Right to appeal

N.C. Gen. Stat. § 7B-1113, provides that any parent who is a party to a termination of parental rights (TPR) "proceeding under this Article may appeal from an *adjudication or any order of disposition* to the Court of Appeals, provided that notice of appeal is given in writing within 10 days after entry of the order." N.C.G.S. § 7B-1113 (2003) (emphasis added). In the case *sub judice*, a final disposition was not entered in this case as evidenced by the district court's decree:

1. Grounds exist for termination of parental rights of the Respondent, [P.N.S.], to the minor child, [T.C.B.].

2. The court will withhold entry of a judgment terminating parental rights of [P.N.S.] until such time as the Petitioner files with the Clerk of Superior Court a petition to adopt by [the mother's boyfriend] and a consent to adopt signed by the Petitioner. Upon presentation to this court of the petition to adopt filed by [the mother's boyfriend] and the consent of the Petitioner to the adoption of the minor child by [the mother's boyfriend], the court will enter a final order terminating the parental rights of the Respondent, [P.N.S.].

3. That if a final order terminating parental rights of the Respondent, [P.N.S.], to the minor child [T.C.B.], is not entered prior to November 1, 2003, then the matter may be noticed in for further hearing on the Respondent's request for visitation. The Respondent's obligation to pay child support on behalf of [T.C.B.] shall continue unless the court grants an order terminating his parental rights.

However, pursuant to N.C. Gen. Stat. § 7B-1113, respondent has a right to appeal from the adjudication order. *See* N.C.G.S. § 7B-1113 (any parent who is a party to a termination of parental rights "proceeding under this Article may appeal from an adjudication or any order of disposition to the Court of Appeals").

Standard of Review

There are two stages involving a petition to terminate parental rights: adjudication and disposition. At the adjudication stage, the petitioner has the burden of proving by clear, cogent and convincing evidence that at least one statutory ground for termination exists.

In re McMillon, 143 N.C. App. 402, 408, 546 S.E.2d 169, 173-74 (2001); *see* N.C.G.S. § 7B-1109(f) (2003) (requiring findings of fact to be based on clear, cogent, and convincing evidence). A finding of one statutory ground is sufficient to support the termination of parental rights. *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984). Upon so finding, the district court proceeds to the disposition stage, where it determines whether termination of parental rights is in the best interest of the child. *McMillon*, 143 N.C. App. at 408, 546 S.E.2d at 174. On appeal, this Court reviews whether the district court's findings of fact are supported by clear, cogent and convincing evidence, and whether those findings support the district court's conclusions of law. *Id.* at 408, 546 S.E.2d at 174. If the decision is supported by such evidence, the district court's findings are binding on appeal, even if there is evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988).

On appeal, respondent argues that the district court erred in adjudicating that grounds existed to terminate his parental rights based on the allegation of willful abandonment. We agree and hold that the findings do not support the determination of willful abandonment and reverse the adjudication decision.

N.C. Gen. Stat. § 7B-1113, defines willful abandonment as when: "[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.G.S. § 7B-1113 (2003). "Abandonment imports any wil[l]ful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982). In this context, "the word 'willful' encompasses more than an intention to do a thing; there must also be purpose and deliberation." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). "Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *Id.* at 276, 346 S.E.2d at 514.

Here, the district court found willful abandonment based on the reasons that

> [t]he Respondent father has not had any visits with the child since August 1999 and has not requested any visits since the mother told him in August 1999 that he could not see the child for the weekend requested. The Respondent never exercised regular

and consistent visitation with the child since her birth. The Respondent has never had the child with him for an overnight visit since her birth. . . . The Respondent father has not sent the child letters, cards, or gifts on a regular basis. The criminal charges against the father limited Respondent's ability to be involved in parenting of his child but there were actions he could have taken that could have kept him more involved with his child. . . . The actions of the Respondent since the birth of the child constitute . . . abandonment of the child.

Analyzing the above, we are bound to determine whether the findings of fact support this conclusion, focusing on respondent's actions as they transpired during the relevant six month period preceding the filing of the TPR petition (September 2001) and the actual filing of the TPR petition (February 2002). We hold the findings of fact do not support this conclusion. Specifically, significant portions of findings of fact 13, 14, and 20 reveal:

13. . . . [Respondent] did have one visit with the minor child on August 15, 1999, when he took her to the Sourwood Festival. Later in August after he finished band camp, the respondent called the [mother] on a Thursday evening and asked if he could visit [T.C.B.] on Saturday. [The mother] said, "You can't call" and hung-up the telephone. The Respondent immediately called [the mother] back and asked what she meant and she said, "Someone will inform you shortly."

At some point after that, in the fall of 1999, the Respondent was charged with First Degree Sexual Offense and the alleged victim was the minor child, [T.C.B.]. The incident allegedly occurred the day he took the child to the Sourwood Festival. **The Respondent and his parents were instructed by attorney, Sean Devereux, who represented him in the criminal case that they should not attempt contact with the child or [L.B.] until the criminal case resolved.** The Respondent and his parents have not had any contact with the minor child or [L.B.] since that time except that gifts were sent for Christmas of that year. During the criminal proceedings, there were discussions involving the dismissal of the criminal charges if the respondent would relinquish his parental rights. The Respondent refused to voluntarily relinquish his parental rights because he did not want the child to grow up thinking he had done so to protect himself. **The State filed a voluntary dismissal of the**

criminal charges with prejudice in the spring of 2002. [Attorney] Devereux and the Respondent did not learn the charges had been dismissed until December 2002.

14. The Respondent received a settlement from a personal injury action that paid him $25,000.00 on his 18th, 19th, 20th, and 21th birthdays. **He started paying temporary child support of $200.00 per month beginning October 2001 until the matter was heard in court then Respondent began paying $494.00 per month. The Respondent also made a lump sum payment of $4,000.00 at some point after receiving his annuity payments. The Respondent made the last child support payment in April 2003.** He has not made any payments since then because he does not have any money. The Respondent has used all of the $100,000.00 received from the annuity settlement.

. . .

20. . . . **In the fall of 1999, the Department of Social Services entered into a protection plan with [the] mother that provided there would be no visitation with [Respondent] due to allegations of abuse that were being investigated.**

(emphasis added).

These findings clearly indicate respondent was instructed by legal counsel not to have any contact with the minor child nor the mother until the pending criminal charges were resolved. The criminal charges were filed almost two years prior to the relevant six month period, and were not resolved until several months after the TPR petition was filed. During this time, DSS entered into a protection plan with the mother that provided there would be no visitation with respondent due to allegations of abuse that were being investigated. None of the other findings of fact made by the district court support the conclusion of willful abandonment as defined by our court in prior opinions. *Cf. Searle*, 82 N.C. App. at 276-77, 346 S.E.2d at 514 ("Respondent had been released from prison for over one year before he sent any support money, and respondent admitted in his testimony that the custody order did not prevent him from supporting, calling or corresponding with the child."); *Apa*, 59 N.C. App. at 324, 296 S.E.2d at 813 ("except for an abandoned attempt to negotiate visitation and support, respondent 'made no other significant

attempts to establish a relationship with [M.A.A.] or obtain rights of visitation with [M.A.A.]' ").

The findings of fact do indicate, however, that child support payments were made during the relevant six month period of time. The findings state that respondent started paying temporary child support in the amount of $200.00 per month beginning October 2001 (one month after the relevant six month period) until the matter was heard in court (no date given), when respondent began paying $494.00 per month; and respondent also made a lump sum payment of $4,000.00 at some point after receiving his annuity payments. These findings regarding the payment of child support further serve to undermine the district court's conclusion of willful abandonment. Accordingly, this assignment of error is overruled.

Reversed and remanded.

Judges HUDSON and TYSON concur.

IN THE MATTER OF: S.B.

No. COA03-1001

(Filed 5 October 2004)

Termination of Parental Rights— guardian ad litem for parent—substance abuse

An order terminating a father's parental rights was reversed because the court did not appoint a guardian ad litem for him despite allegations and findings concerning substance abuse. N.C.G.S. § 7B-1111(a)(6).

Appeal by respondent father from order entered 26 March 2003 by Judge M. Patricia DeVine in Orange County District Court. Heard in the Court of Appeals 31 March 2004.

Northen Blue, L.L.P., by Carol J. Holcomb and Samantha H. Cabe, for petitioner-appellee Orange County Department of Social Services.

Epting & Hackney, by Karen Davidson, for Guardian Ad Litem.

Hosford & Hosford, P.L.L.C., by Sofie W. Hosford for respondent-appellant.

ELMORE, Judge.

O.B. (respondent) appeals from an order entered 26 March 2003 terminating his parental rights with respect to his daughter, S.B. We note that a companion case, captioned *In the Matter of: S.B.*, COA03-1239, is filed concurrently with this opinion.[1] For the reasons set forth herein, we reverse the trial court's order.

The pertinent procedural and factual history as reflected by the record is as follows: In 2001 petitioner Orange County Department of Social Services (OCDSS) became involved with respondent and his family, which included his wife P.B., P.B.'s two minor children M.A. and T.I., and S.B., the biological child of respondent and P.B. In April and May 2001, OCDSS received referrals citing domestic violence in the home. An OCDSS investigation ensued, resulting in a substantiation of neglect due to (1) domestic abuse witnessed by the minor children and (2) abuse of crack cocaine and alcohol by respondent. A restraining order was entered against respondent in May 2001 and he subsequently left the home, although he remained involved with OCDSS. During this time respondent related to OCDSS an approximately 20-year history of abusing alcohol and cocaine. Respondent also described a turbulent relationship with his wife, P.B., which spanned approximately the same 20-year period and during which the couple often separated, then reunited. In keeping with this pattern, respondent violated the May 2001 restraining order by living off and on in the home with P.B. and the minor children. Respondent was arrested for violating the restraining order in October 2001.

On 17 January 2002, the district court granted OCDSS non-secure custody of S.B. and her two half-siblings after OCDSS filed a petition alleging neglect and dependency. The petition alleged that P.B.'s poor mental health contributed to her inability to consistently meet the special needs of her minor children, and specifically referenced incidents in which (1) the children were left overnight with an inappropriate caretaker and (2) M.A., then 13 years old, was left alone during the day to care for T.I. and S.B., causing M.A. to miss school. Respondent admitted to continued drug and alcohol abuse after the

1. COA 03-1239, which was heard by a different panel of this Court on 19 May 2004, is a separate appeal by S.B.'s mother from a separate order terminating her parental rights with respect to S.B.

minor children were placed in OCDSS custody, and respondent resisted requests from both his wife and OCDSS to enter an inpatient substance abuse program. Respondent's continued substance abuse continued to cause conflict in his marriage. In August 2002, respondent acknowledged that his situation had not changed since the minor children were placed in OCDSS custody, and that he was not in a position to parent S.B. Throughout the summer and fall of 2002, respondent participated in TASC, an outpatient group substance abuse program, but he continued to report abusing substances during this time. During this time respondent also participated in CHANGE, a court-ordered program for domestic violence offenders.

Through October 2002 the permanent plan for each of the minor children was reunification, but in November 2002, after respondent acknowledged repeated substance abuse relapses and the situation between respondent and his wife remained unsettled, the permanent plan for S.B. was changed to adoption, and OCDSS was ordered to file a petition to terminate the parental rights of both respondent and P.B. with respect to S.B.

On 21 January 2003, OCDSS filed a motion in the cause to terminate respondent's parental rights with respect to S.B. The motion alleged, in pertinent part, as follows:

> 6. [Respondent] has neglected [S.B.] 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. [Respondent] has neglected [S.B.] in that:
>
> a) Respondent has a twenty year history of substance abuse.
>
> . . .
>
> 7. That [respondent] is incapable of providing for the proper care and supervision of [S.B.], such that [S.B.] is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition.
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> . . .

On 6 March 2003, a hearing was held on the OCDSS motion to terminate respondent's parental rights to S.B. By order entered 26 March

2003, the trial court granted the motion and terminated respondent's parental rights with respect to S.B. The trial court's order contained the following pertinent findings of fact:

> 15. Dr. Ziff concluded and this Court finds that [respondent] is addicted to cocaine and alcohol. In addition to his addiction issues, [respondent] suffers from mental illness personality disorder(s), and a thought disorder.
>
> 16. Due to [respondent's] addictions, his mental illness, and his personality disorder(s), he is not able to parent.
>
> . . .

Based on these findings, the trial court concluded as follows:

> 2. The criteria exists to terminate respondent's parental rights pursuant to North Carolina General Statutes 7B-1111(a)(6) in that [respondent] is incapable of providing for the proper care and supervision of [S.B.], such that [S.B.] is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition.
>
> . . . .

From this order, respondent now appeals.

At the outset, we note that Section 7B-1101 of our General Statutes *mandates* appointment of a guardian ad litem to represent a parent in proceedings to terminate that parent's parental rights "*[w]here it is alleged* that [the] parent's rights should be terminated pursuant to G.S. 7B-1111[a](6), and the incapability to provide proper care and supervision pursuant to that provision is the result of *substance abuse*, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition." N.C. Gen. Stat. § 7B-1101(1) (2003) (emphasis added).

Respondent's primary contentions on appeal are that various findings of fact are not supported by the record evidence, and that the findings in turn do not support the trial court's conclusion that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(6) to terminate

respondent's parental rights with respect to S.B. Although it is apparent from the record that (1) OCDSS' motion to terminate respondent's parental rights alleged, and the trial court concluded, that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(6) to terminate respondent's rights to S.B., and (2) a guardian ad litem was not appointed to represent respondent, respondent does not assign as error the trial court's failure to appoint a guardian ad litem to represent him during the termination proceedings. This Court has previously stated that "[w]hile N.C.R. App. P. 10(a) provides that 'the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal,' . . . N.C.R. App. P. 2 vests this Court with the authority to 'suspend or vary the requirements or provisions of any of [the Rules of Appellate Procedure] in a case pending before it upon application of a party or upon its own initiative' in order 'to prevent manifest injustice to a party[.]' " *In re Griffin*, 162 N.C. App. 487, 492, 592 S.E.2d 12, 16 (2004).

Our Supreme Court has recognized the " 'fundamental right of parents to make decisions concerning the care, custody, and control of their children,' " *Owenby v. Young*, 357 N.C. 142, 144, 579 S.E.2d 264, 266 (2003) (quoting *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000)), and has stated that the judiciary's "obligation to protect the fundamental rights of individuals is as old as the State." *Corum v. University of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). In light of the fundamental nature of respondent's right to parent S.B., we conclude that, on these facts, the potential for manifest injustice exists if the issue of the trial court's failure to appoint a guardian ad litem for respondent is not addressed. Accordingly, we hereby exercise our authority pursuant to N.C.R. App. P. 2 and suspend the provisions of N.C.R. App. P. 10(a) and 28(a) which limit our review to issues set forth as assignments of error in the record and briefs, so that we may consider *sua sponte* whether the trial court committed reversible error by failing to appoint a guardian ad litem for respondent. We hold that by failing to do so, the trial court committed reversible error.

Section 7B-1111(a)(6) (2003) of our General Statutes states that the trial court may terminate a parent's rights upon a finding that the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependant juvenile within the meaning of N.C. Gen. Stat. § 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. The statute specifically provides that "[i]ncapability

under this subdivision may be the result of *substance abuse*, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-1111(a)(6) (emphasis added).

This Court has previously held that "[i]n cases '[w]here it is alleged that a parent's rights should be terminated pursuant to G.S. 7B-1111(a)(6)[,]' our statutes require that a guardian ad litem be appointed to represent the parent." *In re Dhermy*, 161 N.C. App. 424, 429, 588 S.E.2d 555, 558 (2003) (quoting N.C. Gen. Stat. § 7B-1101(1)); *see also In re Estes*, 157 N.C. App. 513, 515, 579 S.E.2d 496, 498, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 390 (2003). Moreover, "[f]ailure to meet this requirement results in remand of the case to the trial court for appointment of a guardian ad litem, as well as a rehearing." *Dhermy* at 429, 588 S.E.2d at 558; *In re J.D.*, 164 N.C. App. 176, 182, 605 S.E.2d 643, 646-47 (2004). This is true even when the respondent parent fails to request a guardian ad litem, and even where the respondent mother was likely not prejudiced by the error. *In re Richard v. Michna*, 110 N.C. App. 817, 822, 431 S.E.2d 485, 488 (1993).

In the present case, the motion in the cause to terminate respondent's parental rights with respect to S.B. alleges that "[r]espondent has a twenty year history of heavy substance abuse," then proceeds to allege, as grounds for termination of respondent's rights, S.B.'s juvenile dependency due to respondent's "incapability" in language that tracks the statutory language of section 7B-1111(a)(6). Moreover, the trial court's order contains findings regarding respondent's addiction to cocaine and alcohol, as well as his mental illness and personality disorder, and the effect of these conditions on his ability to parent S.B. Finally, the trial court specifically concluded that "criteria exists to terminate respondent's parental rights pursuant to North Carolina General Statutes 7B-1111(a)(6)[.]" Accordingly, respondent was entitled, pursuant to section 7B-1101 and to previous decisions of our appellate courts, to appointment of a guardian ad litem before the trial court heard the motion to terminate his parental rights. Because the statutory mandate for appointment of a guardian ad litem was violated, we reverse the order terminating respondent's parental rights with respect to S.B. and remand this case for appointment of a guardian ad litem for respondent and a rehearing.

Reversed and remanded.

Judges McCULLOUGH and BRYANT concur.

IN THE MATTER OF: S.B.

No. COA03-1239

(Filed 5 October 2004)

Termination of Parental Rights—guardian ad litem for parent—emotional problems

An order terminating a mother's parental rights was reversed because the court did not appoint a guardian ad litem for her despite allegations and findings concerning depression, personality disorder, and emotional problems. N.C.G.S. § 7B–1111(a)(6).

Appeal by respondent mother from order entered 15 May 2003 by Judge M. Patricia DeVine in Orange County District Court. Heard in the Court of Appeals 19 May 2004.

Northen Blue, L.L.P., by Carol J. Holcomb and Samantha H. Cabe for the petitioner Orange County Department of Social Services.

Rebekah W. Davis for the respondent-appellant mother.

Karen Davidson for the Guardian Ad Litem.

ELMORE, Judge.

P.B. (respondent) appeals from an order entered 15 May 2003 terminating her parental rights with respect to her daughter, S.B. We note that a companion case, captioned *In the Matter of: S.B.*, COA03-1001 and filed concurrently with this opinion, sets forth a comprehensive history of petitioner Orange County Department of Social Service's (OCDSS) involvement with respondent, S.B, and other family members.[1] For the reasons set forth herein, we reverse the trial court's order.

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1. COA 03-1001, which was heard by a different panel of this Court on 31 March 2004, is a separate appeal by S.B.'s father O.B. from a separate order terminating his parental rights with respect to S.B.

The pertinent procedural and factual history as reflected by the record is as follows: S.B. is the biological child of respondent and her husband, O.B. Respondent and O.B. have had a twenty-year relationship marked by frequent instances of domestic violence and marital separation, as well as chronic substance abuse by O.B. On 17 January 2002, the district court granted OCDSS non-secure custody of S.B., as well as her two half-siblings, after OCDSS filed a petition alleging neglect and dependency. The petition alleged, *inter alia*, that respondent "is not mentally healthy. She sometimes appears to be socially phobic, unable to care for the family and unable to follow through with taking advantage of services offered to her." On 21 November 2002, following a permanency planning review hearing, the district court entered an order relieving OCDSS of reunification efforts and changed the permanent plan for S.B. to adoption.

On 21 January 2003, OCDSS filed a motion in the cause to terminate respondent's parental rights with respect to S.B. The motion alleged, in pertinent part, as follows:

> 7. That [respondent] is incapable of providing for the proper care and supervision of [S.B.], such that [S.B.] is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition.
>
> 8. Dr. David Ziff completed a psychological evaluation on Respondent which has previously been submitted as evidence and is part of the record. The evaluation indicates that Respondent suffers from depression, personality and emotional problems, which render her unable to parent [S.B.]
>
> . . . .

On 16 April 2003, a hearing was held on the OCDSS motion to terminate respondent's parental rights to S.B. By order entered 15 May 2003, the trial court granted the motion and terminated respondent's parental rights with respect to S.B. The trial court's order contained the following pertinent findings of fact:

> 10. Dr. David Ziff, a clinical and forensic psychologist, completed a psychological examination on [respondent] by prior Court Order. He found [respondent] to be limited in her intellectual

functioning, to have a personality disorder, NOS (not otherwise specified) with avoidant and dependent features and to suffer from depression. Dr. Ziff is of the opinion, and the Court so finds, that [respondent] is not able to adequately parent her children, all of whom have special needs, and this Court so finds.

. . .

16. [Respondent] is socially isolated and does not have adequate social support to assist with the difficult task of parenting her children. She does not have adequate independent living skills to care for herself and her children. She has not been able to make good decisions which would protect the children from certain risks and she has not learned, nor does she understand, the consequences of her behavior in relation to the children.

17. [Respondent] does not know or understand the normal developmental needs of children and she does not know how to develop a plan to meet those needs. She does not know or understand the effects of abuse and neglect on children nor how to develop a strategy to meet her children's special needs, which are the result of neglect and possible abuse.

. . .

22. [Respondent] is not able to parent the children who are now in the custody of [OCDSS].

. . .

The trial court then concluded as follows:

27. That [respondent] is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition.

. . .

The trial court then ordered that the parental rights of respondent with respect to S.B. be terminated. From this order, respondent now appeals.

By her first assignment of error, respondent contends the trial court erred by failing to appoint a guardian ad litem to represent her at the termination hearing. We agree.

Section 7B-1101 of our General Statutes *mandates* appointment of a guardian ad litem to represent a parent in proceedings to terminate that parent's parental rights "*[w]here it is alleged* that [the] parent's rights should be terminated pursuant to G.S. 7B-1111[a](6), and the incapability to provide proper care and supervision pursuant to that provision is the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition." N.C. Gen. Stat. § 7B-1101(1) (2003) (emphasis added). Section 7B-1111(a)(6) of our General Statutes states that the trial court may terminate a parent's rights upon a finding that the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependant juvenile within the meaning of N.C. Gen. Stat. § 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. The statute specifically provides that "[i]ncapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-1111(a)(6) (2003).

This Court has previously held that "[i]n cases '[w]here it is alleged that a parent's rights should be terminated pursuant to G.S. 7B-1111(a)(6)[,]' our statutes require that a guardian ad litem be appointed to represent the parent." *In re Dhermy*, 161 N.C. App. 424, 429, 588 S.E.2d 555, 558 (2003) (quoting N.C. Gen. Stat. § 7B-1101(1)); *see also In re Estes*, 157 N.C. App. 513, 515, 579 S.E.2d 496, 498, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 390 (2003). Moreover, "[f]ailure to meet this requirement results in remand of the case to the trial court for appointment of a guardian ad litem, as well as a rehearing." *Dhermy*, at 429, 588 S.E.2d at 558; *In re J.D.*, 164 N.C. App. 176, 182, 605 S.E.2d 643, 646-47 (2004). This is true even when the respondent parent fails to request a guardian ad litem, and even where the respondent mother was likely not prejudiced by the error. *In re Richard v. Michna*, 110 N.C. App. 817, 822, 431 S.E.2d 485, 488 (1993).

In the present case, the motion in the cause to terminate respondent's parental rights with respect to S.B. alleges in paragraph seven, as grounds for terminating respondent's parental rights, S.B.'s juvenile dependency due to respondent's "incapability" in language that

tracks the statutory language of section 7B-1111(a)(6). The motion then proceeds to allege, in paragraph eight, that respondent has been diagnosed as "suffer[ing] from depression, personality and emotional problems, which render her unable to parent" S.B. Moreover, the trial court's order contains findings regarding respondent's limited intellectual functioning and diagnoses of personality disorder and depression, as well as the effect of these conditions on her ability to parent S.B. Finally, in paragraph 27 of the TPR order, the trial court concluded as a matter of law that respondent is incapable of providing for S.B.'s proper care and supervision such that S.B. is a dependent juvenile, and that there is a reasonable probability respondent's incapability to do so will continue for the foreseeable future. We note that, as with the language employed by OCDSS in the TPR motion, the language employed by the trial court in this conclusion of law tracks the statutory language of section 7B-1111(a)(6). Accordingly, respondent was entitled, pursuant to section 7B-1101 and to previous decisions of our appellate courts, to appointment of a guardian ad litem before the trial court heard the motion to terminate her parental rights. Because the statutory mandate for appointment of a guardian ad litem was violated, we reverse the order terminating respondent's parental rights with respect to S.B. and remand this case for appointment of a guardian ad litem for respondent and a new hearing.

We do not reach respondent's remaining assignments of error because the first issue is dispositive.

Reversed and remanded.

Judges BRYANT and GEER concur.

MARY ELLEN TERESA LEDER, PLAINTIFF v. JOSEPH LEDER, DEFENDANT AND JOSEPH LEDER, PLAINTIFF v. MARY ELLEN TERESA LEDER, DEFENDANT

No. COA03-1007

(Filed 21 September 2004)

Costs; Discovery— sanctions—failure to comply with discovery order

The trial court did not abuse its discretion in a divorce case by sanctioning appellant husband under N.C.G.S. § 1A-1, Rule 37 for failure to comply with an order compelling discovery,

because: (1) given the trial court's ability to take judicial notice of the order and appellant's admission that he had refused his attorney's requests to sign appellee's interrogatories and did not intend to sign the interrogatories until they reflected the existence of a prenuptial agreement, the trial court had sufficient evidence on which to base its findings of fact without taking sworn testimony; (2) the trial court addressed the propriety of entering a default judgment and expressly considered the feasibility of lesser sanctions, but concluded these actions would not compel appellant to obey the court order; and (3) entering sanctions to remove the prenuptial agreement issue from the case was the only way to compel appellant to comply with the trial court's order.

Appeal by Joseph Leder from judgment entered 27 March 2003 by Judge Tanya T. Wallace in Union County District Court. Heard in the Court of Appeals 18 May 2004.

Charles B. Brooks, II, for Mary Ellen Teresa Leder, appellee.

John T. Burns, for Joseph Leder, appellant.

CALABRIA, Judge.

This appeal arises from a trial court order for sanctions against Joseph Leder ("appellant") for failure to comply with an order compelling discovery. We affirm.

On 1 October 1999, Mary Ellen Leder ("appellee") filed an action for divorce from bed and board, post-separation support, permanent alimony, and equitable distribution. Appellant answered the complaint and, as an affirmative defense, introduced a 1986 prenuptial agreement entered into by the parties in New York state. Appellant asserted the prenuptial agreement contained a waiver of maintenance barring appellee's post-separation support and alimony claims.

Appellee initiated discovery. However, appellant failed to answer appellee's interrogatories. Rather, on 9 May 2001, appellant filed an action for an absolute divorce and later amended his complaint to include a request for enforcement of the prenuptial agreement. Appellee responded with a motion to compel discovery. On 25 April 2002, the trial court entered an order compelling discovery, directing appellant to answer interrogatories by 10 May 2002 and produce all requested documents by 13 May 2002. In addition, the trial court

warned appellant that "[d]isobedience of [the] Order [would] be punishable as allowed by the Rules of Civil Procedure for failure to make discovery, and by the contempt powers of [the] Court." On 14 July 2003, the trial court consolidated appellee's and appellant's cases and ordered that no divorce judgment incorporating the prenuptial agreement would be entered until all discovery had been completed and the validity and effect of the prenuptial agreement had been construed and interpreted by the trial court.

When appellant failed to comply with the trial court's first order to compel discovery, appellee filed a second motion to compel discovery, a motion for a protective order, and a motion for sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 37 (2003). On 27 March 2003, the trial court granted all three motions. The trial court sanctions entered pursuant to N.C. Gen Stat. § 1A-1, Rule 37(b), included: (1) entering a default judgment against appellant on the issues of post-separation support and permanent alimony, with the amount and duration to be determined later; (2) striking all references to the prenuptial agreement in the pleadings; and (3) barring the use of any evidence or reference to the prenuptial agreement in any trial between the parties or decree entered by any court. We note, although interlocutory in nature, "an order imposing sanctions under Rule 37(b) is appealable as a final judgment." *Smitheman v. National Presto Industries*, 109 N.C. App. 636, 640, 428 S.E.2d 465, 468 (1993).

Appellant first asserts that the trial court erred by basing its findings of fact, in the "Order Regarding Sanctions," not on sworn testimony but on the oral argument of appellee's counsel and of appellant, *pro se*. This Court has long held that "a court may take judicial notice of earlier proceedings in the same cause." *In re Byrd*, 72 N.C. App. 277, 279, 324 S.E.2d 273, 276 (1985); N.C. Gen. Stat. § 8C-1, Rule 201 (2003). In addition, "[s]tatements of a party to an action, spoken or written, have long been admissible against that party as an admission if it is relevant to the issues and not subject to some specific exclusionary statute or rule." *Karp v. University of North Carolina*, 78 N.C. App. 214, 216, 336 S.E.2d 640, 641 (1985); N.C. Gen. Stat. § 8C-1, Rule 801(d) (2003). In the instant case, the trial court had before it the 25 April 2002 order compelling discovery and could take judicial notice of the order's findings of fact, conclusions of law, and decrees. Moreover, appellant admitted to the trial court that he had refused his attorney's requests to sign appellee's interrogatories and did not intend to sign the interrogatories until they reflected the existence of the prenuptial agreement. Given the trial court's

ability to take judicial notice and appellant's admission, the trial court had sufficient evidence on which to base its findings of fact without taking sworn testimony.

Appellant next asserts that the trial court abused its discretion by failing to consider lesser sanctions before entering sanctions directed to the outcome of the case. In pertinent part, N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) provides that:

> If a party . . . fails to obey an order to provide or permit discovery, . . . a judge of the court in which the action is pending may [sanction the party by] mak[ing] such orders in regard to the failure as are just, and among others the following:
>
> . . .
>
> b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, *or prohibiting him from introducing designated matters in evidence*;
>
> c. *An order striking out pleadings or parts thereof*, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, *or rendering a judgment by default against the disobedient party*[.]

(Emphasis added). A trial court's choice of sanctions under Rule 37 will not be reversed on appeal absent an abuse of discretion. *Brooks v. Giesey*, 106 N.C. App. 586, 592, 418 S.E.2d 236, 239 (1992). In *Benfield v. Benfield*, 89 N.C. App. 415, 423, 366 S.E.2d 500, 505 (1988), this Court found no abuse of discretion in striking "defendant's pleadings and prohibit[ing] him from supporting his contentions in regard to . . . equitable distribution . . . [after] [d]efendant wilfully disregarded [two] order[s] of the trial court . . . to provide further answers to the questions posed during [a] deposition." Similar to the defendant in *Benfield*, appellant wilfully disregarded two trial court directives requiring completion of discovery.

Moreover, the trial court expressly questioned and heard arguments specifically addressing the propriety of (1) entering a default judgment against appellant with respect to post-separation support and permanent alimony, (2) striking all references to the prenuptial agreement, and (3) barring the use of any evidence or reference to the prenuptial agreement in future proceedings. The trial court also expressly considered the feasibility of lesser sanctions. Two days later the trial court concluded in its order the following:

> [T]he imposition of a lesser sanction than that of entering a default judgment [against appellant] on the issue of post-separation support and permanent alimony; and striking any allegation in [appellant's] divorce complaint or his answer and counterclaim regarding any alleged or purported prenuptial agreement, forbidding him from introducing any evidence of the existence of any prenuptial agreement or mentioning the same, and ordering the same not be incorporated in any divorce decree entered in this matter would not compel [appellant] to obey this Order or further orders of the Court and the imposition of any lesser sanctions is unwarranted.

We find no abuse of discretion.

Appellant finally asserts that several of the trial court's findings of fact and three of its conclusions of law were not supported by substantial evidence. This Court must determine "whether [the] trial court's findings of fact are supported by substantial evidence . . . [and] if the trial court's factual findings support its conclusions of law." *Shipman v. Shipman*, 357 N.C. 471, 475, 586 S.E.2d 250, 254 (2003). " 'Substantial evidence' [is] relevant evidence which a reasonable mind . . . could accept as adequate to support a conclusion." *In re Golia-Paladin*, 344 N.C. 142, 149, 472 S.E.2d 878, 881 (1996).

Appellant assigns error to the trial court's findings of fact twelve, seventeen, eighteen, twenty-three, twenty-nine, thirty, and thirty-two. Findings of fact seventeen, twenty-three, and twenty-nine, in sum, state appellant's conduct and demeanor made it clear that he did not intend to comply with the trial court's order compelling discovery, except upon terms acceptable to him and that sanctions against him were required. As discussed above, the evidence tended to show appellant refused to sign the interrogatories and persisted in this refusal despite his attorney's requests and the trial court's order.

Findings of fact eighteen, thirty, and thirty-two, in pertinent part, state that the trial court "considered all sanctions allowed by Rule 37," including "entering lesser sanctions," but "these would not compel [appellant] to obey the Order of the Court." Again, as discussed above, the trial court during the hearing and prior to entering the order considered lesser sanctions. Further, appellant's stated reason for refusing to answer appellee's interrogatories, in violation of the

trial court's order, was that he would not sign the interrogatories unless they contained reference to the prenuptial agreement. Thus, on these facts, the trial court had sufficient evidence to find: (1) appellant's contentions concerning the prenuptial agreement were his basis for refusing to comply with the trial court's order compelling discovery and (2) entering sanctions to remove the prenuptial agreement issue from the case was the only way to compel appellant to comply with the trial court's order.

Finding of fact twelve, in pertinent part, states that "while [appellant] produced some documents, it [was] unclear whether [appellant] produced all of the documents requested, and [appellant] failed to produce said documents in the manner required by the rules of civil procedure. . . ." It was undisputed that appellant delivered a large number of documents to appellee's counsel. Appellant asserted he properly complied with the document request. Appellee's counsel argued appellant had not properly complied under the rules of civil procedure but failed to enter evidence supporting his argument. Accordingly, finding of fact twelve was not supported by sufficient evidence. However, striking finding of fact twelve does not affect the sufficiency of the remaining findings of fact to support the trial court's conclusions of law.

Appellant assigns error to conclusions of law three, five, and six, which state, in sum, that a lesser sanction would not compel appellant to obey the prior order or any future orders of the trial court and would be insufficient to mitigate the prejudice to appellee from appellant's refusal to obey the law and comply with the orders of the trial court. Findings of fact seventeen, eighteen, twenty-three, twenty-nine, thirty, and thirty-two were supported by sufficient evidence and with the unchallenged findings of fact are sufficient to support the challenged conclusions of law. For the foregoing reasons, we affirm the trial court's order of sanctions.

Affirmed.

Judges WYNN and STEELMAN concur.

SHERRIE R. URCIOLO, PLAINTIFF v. MICHAEL J. URCIOLO, DEFENDANT

No. COA03-1561

(Filed 21 September 2004)

1. **Divorce— equitable distribution—valuation—fair market value**

   The trial court did not err in an equitable distribution case by its valuation of a 1995 Harley-Davidson motorcycle, because the trial court's findings on the fair market value of the motorcycle are supported by the evidence in the record and are binding on appeal.

2. **Divorce— equitable distribution—marital property—presumption of in-kind distribution—liquid assets**

   The trial court erred in an equitable distribution case by requiring defendant husband to pay plaintiff wife $25,000, because: (1) there was insufficient evidence to rebut the presumption that an in-kind distribution of marital property is equitable, N.C.G.S. § 50-20(e); and (2) there were insufficient findings as to whether defendant possessed the liquid assets to satisfy the award.

Appeal by defendant from judgment entered 21 May 2003 by Judge A. Elizabeth Keever in Cumberland County District Court. Heard in the Court of Appeals 2 September 2004.

Hedahl & Radtke Family Law Center, by Debra J. Radtke for plaintiff-appellee.

Cooper, Davis & Cooper, Attorneys at Law, by William R. Davis for defendant-appellant.

STEELMAN, Judge.

Defendant, Michael J. Urciolo, appeals from a judgment of equitable distribution. For the reasons discussed herein, we affirm in part and reverse and remand in part.

Plaintiff, Sherrie R. Urciolo, and defendant were married on 19 September 1986 and separated on 5 October 1997. No children were born of the marriage. Plaintiff filed a complaint seeking the equitable distribution of marital property. The case was tried on 18 February 2003. Judge Keever entered judgment on 21 May 2003, which con-

cluded that an equal division of marital property was equitable, and made distribution of the marital property.

We note that trial courts are accorded great discretion in determining the equitable distribution of marital property. This discretion will not be upset on appeal absent clear abuse. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Therefore, in order to reverse the trial court's equitable distribution judgment on appeal, it must be found that it was unsupported by the evidence. *Id.*

[1] In defendant's first assignment of error, he argues the trial court's valuation of a 1995 Harley-Davidson Motorcycle was incorrect. We disagree.

The trial court's findings of fact pertinent to this assignment of error are as follows:

> 11. The 1995 Harley Davidson motorcycle was purchased in May of 1997 several months before the separation. The purchase price was $16,450.00 and the parties did make some customized additions to the motorcycle at the time of purchase. They also added a carburetor after the purchase. The NADA value of this motorcycle on the date of separation was $13,310.00 but does not consider customized additions or carburetors and monies paid down on the vehicle. The mortgage balance on the date of separation was $14,498.00. The motorcycle had a least same value as the purchase price of $16,450.00 leaving the equity on the date of separation of $1,952.00. The Plaintiff maintained this vehicle after the date of separation and has made payments on the loan.

The trial court's conclusions of law pertinent to this assignment of error are as follows:

> 6. All right, title and interest in the 1995 Harley Davidson motorcycle . . . is hereby transferred to Plaintiff and Plaintiff is awarded sole ownership of that property. Plaintiff shall be solely responsible for the debt, taxes and insurance owed thereon and shall hold Defendant harmless from said debt.

"In appellate review of a bench equitable distribution trial, the findings of fact regarding value are conclusive if there is evidence to support them, even if there is also evidence supporting a finding otherwise." *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 197, 511 S.E.2d 31, 34 (1999). "This Court is not here to second-guess values of marital and separate property where there is evidence to support the trial

court's figures." *Mishler v. Mishler*, 90 N.C. App. 72, 74, 367 S.E.2d 385, 386, *review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988). The trial court is not required to make exhaustive findings regarding evidence presented. *Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E.2d 595, 600 (1988). Rather, the trial court is only required to make specific findings as to the ultimate facts. *Embler v. Embler*, 159 N.C. App. 186, 189, 582 S.E.2d 628, 631 (2003).

In the instant case, both plaintiff and defendant testified to the value of the motorcycle. The National Automobile Dealers Association (NADA) value of the motorcycle was submitted to the trial court without objection. The trial court found as fact that the motorcycle was worth "a[t] least" $16,450.00. Defendant contends that the trial court's valuation of the motorcycle was erroneous because it was not a specific finding of value under the rationale of our Supreme Court's decision in *Patton v. Patton*. 318 N.C. 404, 407, 348 S.E.2d 593, 595 (1986). However, the findings of fact show that the trial court found the motorcycle had a net equity (the motorcycle's fair market value less any debt against it) of $1,952.00. We find that this is a sufficient finding of fact as to the fair market value of the motorcycle and does not violate the rationale of *Patton*. 318 N.C. at 407, 348 S.E.2d at 595. The trial court's findings on the fair market value of the motorcycle are supported by evidence in the record and are binding on appeal. This assignment of error is without merit.

[2] In his second assignment of error, defendant argues that the trial court's distributive award requiring defendant to pay plaintiff $25,000.00 was erroneous. Defendant argues there was insufficient evidence to rebut the presumption that an in-kind distribution of marital property is equitable, N.C. Gen. Stat. § 50-20(e) (2003), and insufficient findings as to whether defendant possessed the liquid assets to satisfy the award. We agree and remand this matter to the trial court for further findings of fact.

Previous decisions of this Court held that the trial court could properly order a distributive award instead of an in-kind distribution when the in-kind distribution was found to be impracticable. *See, e.g., Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999) (holding that the trial court must make a finding that an equitable distribution of the marital property in kind would be impractical). In 1997 N.C. Gen. Stat. § 50-20(e) was amended to "create a rebuttable presumption that an in-kind distribution of property is equitable." 1997 N.C. Sess. Laws 302 § 1. In creating this presumption the General

Assembly discarded the impracticality standard. *Id.* The trial court's order, in this case, is devoid of any findings of fact or conclusions of law pertaining to this presumption. The trial court did not follow the statutory presumption and made a distributive award. When there is a presumption in the law, the finder of fact is bound by the presumption unless it finds that the presumption has been rebutted. *See Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E.2d 772, 775-76 (1984). We hold that in equitable distribution cases, if the trial court determines that the presumption of an in-kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination. *See Heath*, 132 N.C. App. at 38, 509 S.E.2d at 805.

Further, N.C. Gen. Stat.§ 50-20(c) enumerates distributional factors to be considered by the trial court. One of those factors is "[t]he liquid or nonliquid character of all marital property and divisible property." N.C. Gen. Stat. § 50-20(c)(9) (2003). The trial court is required to make findings as to whether the defendant has sufficient liquid assets from which he can make the distributive award payment. *Embler*, 159 N.C. App. at 188-89, 582 S.E.2d at 630.

In the instant case, the trial judge only listed one source of liquid assets from which defendant could pay the distributive award. That liquid asset, held in the trust account of defendant's attorney, totaled $5,219.47. This amount, as Judge Keever stated in her order, is only partial payment for the distributive award of $25,000.00. Judge Keever made no findings as to whether defendant had other sufficient liquid assets to pay the distributive award. "Although defendant may in fact be able to pay the distributive award, defendant's evidence is sufficient to raise the question of where defendant will obtain the funds to fulfill this obligation." *Embler*, 159 N.C. App. at 188, 582 S.E.2d at 630.

We therefore reverse the trial court on this assignment of error, and remand this matter for additional findings of fact on whether the presumption of an in-kind distribution has been rebutted and whether defendant has sufficient liquid assets to pay the distributive award to plaintiff, consistent with this opinion.

On remand the trial court may in its discretion receive further evidence and argument from the parties if it deems necessary and appropriate to comply with this opinion. *Heath*, 132 N.C. App. at 38, 509 S.E.2d at 805.

Defendant argues in his third assignment of error that the trial court unequally distributed the marital property due to the faulty valuation of the 1995 Harley-Davidson motorcycle discussed in assignment of error number one. Because we have found defendant's first assignment of error to be without merit, his third assignment of error is also without merit.

AFFIRMED IN PART.

REVERSED AND REMANDED IN PART.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA v. DAVID RENE CRUZ, DEFENDANT, AND ROBERT L. McQUEEN, SURETY

No. COA03-1116

(Filed 21 September 2004)

Bail and Pretrial Release— bond forfeiture—motion for relief from final judgment

The trial court did not err by denying a surety's motion for relief from final judgment of bond forfeiture under N.C.G.S. § 15A-544.5 based on the reasoning set forth under *State v. Evans*, N.C. App. (Sept. 21, 2004) (No. COA03-1114).

Judge WYNN dissenting.

Appeal by surety from order entered 10 March 2003 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 25 May 2004.

David Phillips, for the Cumberland County Board of Education.

Parish & Cooke, by James R. Parish, for the surety.

CALABRIA, Judge.

Robert L. McQueen ("McQueen") appeals the trial court's denial of his motion for relief from final judgment of bond forfeiture. We affirm.

On 24 September 2001, David Rene Cruz ("the defendant") was arrested and charged with felony breaking and entering and felony conspiracy. The defendant's bond was $2,000.00, which was posted on 24 September 2001 by McQueen. On 7 June 2002, the defendant failed to appear, and the bond was ordered forfeited on the same date with a final judgment date of 11 November 2002. McQueen received appropriate notice.

On 24 July 2002, the defendant pled guilty to misdemeanor breaking or entering. Based upon the defendant's plea, on 8 October 2002, McQueen filed a *pro se* motion to set aside the bond forfeiture pursuant to N.C. Gen. Stat. § 15A-544.5 as all the charges for which the defendant was bonded to appear had been finally disposed of by the court other than by the State taking a dismissal with leave. McQueen indicated he served a copy of the motion on the district attorney and the school board attorney by mailing a copy to each by first class mail on 8 October 2002. However, McQueen did not mail a copy of the motion to the school board attorney until 17 October 2002. Based upon the delay in service, the school board requested McQueen's motion to set aside the bond forfeiture be denied.

On 26 November 2002, the trial court denied McQueen's motion upon finding that "the Surety [was] effectively denying the Board the Notice to which they are entitled by North Carolina General Statute 15A-544(d)(4)." Though the 26 November order was immediately appealable pursuant to N.C. Gen. Stat. § 15A-544.5(h) (2003), McQueen filed no appeal, and the forfeiture became a final judgment. Thereafter, McQueen initiated a new proceeding on 31 January 2003 by filing a motion for relief from final judgment of forfeiture. The trial court denied said motion by order entered 10 March 2003. From this denial, McQueen appeals.

In a related appeal, *State v. Evans*, —— N.C. App. ——, —— S.E.2d —— (Sept. 21, 2004) (No. COA03-1114), we addressed the same issues raised by the parties based upon similar facts. For the reasons stated in *State v. Evans*, we affirm.

Affirmed.

Judge LEVINSON concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge dissenting.

In a related appeal, *State v. Evans*, --- N.C. App. ---, --- S.E.2d --- (2004) (03-1114), filed 21 September 2004, this Court addressed the same issues raised by the parties based upon similar facts. In *Evans*, McQueen had surrendered the defendant to the sheriff prior to the entry of the final judgment of bond forfeiture. In this case, the defendant pled guilty prior to the entry of the final judgment of bond forfeiture. Based upon the defendant's guilty plea, McQueen sought the return of the bond amount. As *Evans* and the case *sub judice* are substantially similar, I respectfully dissent based upon the reasons stated in my dissent in *Evans*. Indeed, the factors for determining whether extraordinary circumstances exist favor McQueen.

STATE OF NORTH CAROLINA v. MARTINEZ TERRELL FISHER, DEFENDANT, AND ROBERT L. McQUEEN, SURETY

No. COA03-1117

(Filed 21 September 2004)

Bail and Pretrial Release— bond forfeiture—motion for relief from final judgment

The trial court did not err by denying a surety's motion for relief from final judgment of bond forfeiture under N.C.G.S. § 15A-544.5 based on the reasoning set forth under *State v. Evans*, N.C. App. (Sept. 21, 2004) (No. COA03-1114).

Judge WYNN dissenting.

Appeal by surety from order entered 10 March 2003 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 25 May 2004.

David Phillips, for the Cumberland County Board of Education.

Parish & Cooke, by James R. Parish, for the surety.

CALABRIA, Judge.

Robert L. McQueen ("McQueen") appeals the trial court's denial of his motion for relief from final judgment of bond forfeiture. We affirm.

On 18 October 2001, Martinez Terrell Fisher ("the defendant") was arrested and charged with possession with intent to sell and deliver marijuana and cocaine (01 CRS 63255). The defendant's bond was $2,500.00, which was posted on 19 October 2001 by McQueen. On 3 June 2002, the defendant failed to appear, and the bond was ordered forfeited on the same date with a final judgment date of 4 November 2002. McQueen received appropriate notice.

On 15 July 2002, the defendant pled guilty pursuant to a plea agreement. Based upon the defendant's plea, on 8 October 2002, McQueen filed a *pro se* motion to set aside the bond forfeiture pursuant to N.C. Gen. Stat. § 15A-544.5 as all the charges for which the defendant was bonded to appear had been finally disposed of by the court other than by the State taking a dismissal with leave. McQueen indicated he served a copy of the motion on the district attorney and the school board attorney by mailing a copy to each by first class mail on 8 October 2002. However, McQueen did not mail a copy of the motion to the school board attorney until 17 October 2002. Based upon the delay in service, the school board requested McQueen's motion to set aside the bond forfeiture be denied.

On 26 November 2002, the trial court denied McQueen's motion indicating "this case is one of nine cases on the Superior Court calendar to be heard on this date and in each case the Cumberland County Board of Education received notice on the 13th day after filing." Thus, the trial court concluded that "the Surety's actions do establish a pattern of conduct that is in fact denying the statutory required period of time for response by the Cumberland County Board of Education." Though the 26 November order was immediately appealable pursuant to N.C. Gen. Stat. § 15A-544.5(h) (2003), McQueen filed no appeal, and the forfeiture became a final judgment. Thereafter, McQueen initiated a new proceeding on 31 January 2003 by filing a motion for relief from final judgment of forfeiture. The trial court denied said motion by order entered 10 March 2003. From this denial, McQueen appeals.

In a related appeal, *State v. Evans*, — N.C. App. —, — S.E.2d — (Sept. 21, 2004) (No. COA03-1114), we addressed the same issues raised by the parties based upon similar facts. For the reasons stated in *State v. Evans*, we affirm.

Affirmed.

Judge LEVINSON concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge dissenting.

In a related appeal, *State v. Evans*, — N.C. App. —, — S.E.2d — (2004) (03-1114), filed 21 September 2004, this Court addressed the same issues raised by the parties based upon similar facts. In *Evans*, McQueen had surrendered the defendant to the sheriff prior to the entry of the final judgment of bond forfeiture. In this case, the defendant pled guilty prior to the entry of the final judgment of bond forfeiture. Based upon the defendant's guilty plea, McQueen sought the return of the bond amount. As *Evans* and the case *sub judice* are substantially similar, I respectfully dissent based upon the reasons stated in my dissent in *Evans*. Indeed, the factors for determining whether extraordinary circumstances exist favor McQueen.

STATE OF NORTH CAROLINA v. BILLY LEE McFAYDEN, JR., DEFENDANT, AND ROBERT L. McQUEEN, SURETY

No. COA03-1115

(Filed 21 September 2004)

Bail and Pretrial Release— bond forfeiture—motion for relief from final judgment

The trial court did not err by denying a surety's motion for relief from final judgment of bond forfeiture under N.C.G.S. § 15A-544.5, even though the surety surrendered defendant to the county sheriff, based on the reasoning set forth under *State v. Evans*, N.C. App. (Sept. 21, 2004) (No. COA03-1114).

Judge WYNN dissenting.

Appeal by surety from order entered 10 March 2003 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 25 May 2004.

David Phillips, for the Cumberland County Board of Education.

Parish & Cooke, by James R. Parish, for the surety.

CALABRIA, Judge.

Robert L. McQueen ("McQueen") appeals the trial court's denial of his motion for relief from final judgment of bond forfeiture. We affirm.

On 7 March 2002, Billy Lee McFayden, Jr. ("the defendant") was arrested and charged with trafficking in cocaine (02 CRS 52224) and two counts of possession with intent to sell and deliver and the sale and delivery of cocaine (02 CRS 52225 and 02 CRS 52226). A bond of $20,000.00 was imposed in 02 CRS 52224 and 02 CRS 52226, and a bond of $10,000.00 was set in 02 CRS 52225. On 8 March 2002, McQueen secured the defendant's release by posting the necessary bonds. On 7 August 2002, the defendant failed to appear, and the bonds were ordered forfeited on the same date with a final judgment date of 16 January 2003. McQueen received appropriate notice.

On 10 October 2002, McQueen surrendered the defendant to the Cumberland County Sheriff. Thereafter, on 15 October 2002, McQueen filed *pro se* motions to set aside the bond forfeitures pursuant to N.C. Gen. Stat. § 15A-544.5 based upon his surrender of the defendant to the county sheriff. McQueen indicated he served a copy of the motions on the district attorney and the school board attorney by mailing copies to each by first class mail on 15 October 2002. However, McQueen did not mail copies of the motions to the school board attorney until 24 October 2002. Based upon the delay in service, the school board requested McQueen's motions to set aside the bond forfeitures be denied.

On 26 November 2002, the trial court denied McQueen's motions, indicating "this case is one of nine cases on the Superior Court calendar to be heard on this date and in each case the Cumberland County Board of Education received notice on the 13th day after filing." Thus, the trial court concluded that "the Surety's actions do establish a pattern of conduct that is in fact denying the statutory required period of time for response by the Cumberland County Board of Education." Though the 26 November orders were immediately appealable pursuant to N.C. Gen. Stat. § 15A-544.5(h) (2003), McQueen filed no appeal, and the forfeitures became final judgments. Thereafter, McQueen initiated a new proceeding on 31 January 2003 by filing a motion for relief from final judgment of forfeiture. The trial court denied said motion by order entered 10 March 2003. From this denial, McQueen appeals.

In a related appeal, *State v. Evans*, — N.C. App. —, — S.E.2d — (Sept. 21, 2004) (No. COA03-1114), we addressed the same issues raised by the parties based upon similar facts. For the reasons stated in *State v. Evans*, we affirm.

Affirmed.

Judge LEVINSON concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge dissenting.

In a related appeal, *State v. Evans*, — N.C. App. —, — S.E.2d — (2004) (03-1114), filed 21 September 2004, this Court addressed the same issues raised by the parties based upon similar facts. For the reasons stated in my dissent in *Evans*, I respectfully dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 21 SEPTEMBER 2004

BAXLEY v. JACKSON No. 03-1155	Cumberland (00CVS9671)	Appeal dismissed
IN RE C.R. No. 03-1049	Guilford (94J424)	Affirmed
IN RE M.C. & C.P. & J.P. & R.C. No. 03-661	Cumberland (02J264) (02J265) (02J266) (02J267)	Affirmed
IN RE R.A.S. No. 03-1185	Robeson (00J112)	Affirmed
IN RE S.A.F. No. 03-1500	Mecklenburg (02J1039)	Affirmed
PROCTOR v. JOHNSON BODY SHOP, INC. No. 03-827	Durham (01CVS5267)	Affirmed in part; reversed in part
STATE v. BRAXTON No. 03-1010	Beaufort (01CRS53106) (01CRS53107)	No error
STATE v. CRISOSTOMO No. 03-1311	Cumberland (01CRS59485) (01CRS59487) (01CRS59488)	No error
STATE v. FESSLER No. 03-1246	Moore (01CRS53251)	No error
STATE v. HENDRICKS No. 03-1556	Guilford (02CRS102809) (03CRS24015)	No error
STATE v. MAYBERRY No. 03-1365	Brunswick (02CRS53776) (02CRS53778) (02CRS53779) (02CRS53781) (02CRS53782) (02CRS53783) (02CRS53784)	No error
STATE v. MILTON No. 03-1470	Onslow (02CRS56998)	No error
STATE v. PEGRAM No. 03-1495	Richmond (02CRS53972)	No error

STATE v. SCARBOROUGH No. 03-626	New Hanover (02CRS9882)	No error. Remanded for correction of judgment form
STATE v. TESAR No. 03-1124	Union (02CRS8038)	No error
STATE v. YAKSIC No. 03-635	Guilford (01CRS89607)	No error
WILKERSON v. WILKERSON No. 03-1370	Rutherford (01CVD264)	Vacated & remanded

FILED 5 OCTOBER 2004

BIEMANN & ROWELL CO. v. DONOHOE COS. No. 03-1408	Guilford (99CVS9132)	Affirmed
DAVIS v. DAVIS No. 03-1657	Wilkes (01CVD1158)	Affirmed
GUILFORD CTY. EX REL. RAY v. WILLIAMS No. 03-1232	Guilford (03CVD5697)	Reversed
HALL v. INTEGRATIVE CHIROPRACTIC CARE, P.A. No. 03-1469	Pitt (02CVS3357)	Affirmed
HARDISTER v. DEAN No. 03-1532	Randolph (99CVD2045)	Affirmed
IN RE A.R.P. No. 03-1664	Dare (02J19)	Affirmed
IN RE M.R.M., M.A.K., J.S.K. No. 03-1442	McDowell (00J93) (00J94) (00J95)	Affirmed
IN RE P.P. No. 03-1621	Lee (03J36)	Dismissed
IN RE S.L.D. No. 04-164	Stokes (00J116)	Affirmed
IN RE W.G.C. No. 03-1288	Mecklenburg (01J781)	Affirmed
NOYOLA v. HYTROL CONVEYOR CO. No. 03-427	Guilford (01CVS6366)	Affirmed
RAVEN v. ILLINOIS TOOLWORKS No. 03-1435	Ind. Comm. (I.C. 117229)	Affirmed

STATE v. ABRAMS No. 03-1547	Catawba (01CRS58884)	No error
STATE v. ADAMS No. 04-321	Pitt (01CRS51758) (01CRS51760) (01CRS52648) (01CRS55208) (01CRS59617) (01CRS59618)	Remanded for entry of findings
STATE v. BAILEY No. 04-269	Wake (03CRS69)	Vacated and remanded for entry of judgment for assault with a deadly weapon and appropriate sentencing
STATE v. BANNER No. 04-558	Caldwell (03CRS3198)	Affirmed
STATE v. BOLTON No. 04-174	Alamance (03CRS53676)	Remand for resentencing
STATE v. BROWN No. 04-479	Rowan (03CRS50435) (03CRS50436) (03CRS50437) (03CRS50438) (03CRS50439)	No error
STATE v. BURDETTE No. 04-462	Stokes (00CRS51651) (00CRS51652) (00CRS51653) (00CRS51683) (00CRS51684) (00CRS51690) (00CRS51691) (00CRS51692) (00CRS51693)	Affirmed in part, remanded in part
STATE v. COX No. 04-202	Rowan (02CRS54906)	No error
STATE v. FURR No. 04-408	Stanly (95CRS6588) (97CRS7196) (97CRS7197)	No error
STATE v. GRAY No. 03-1436	Beaufort (02CRS3952) (02CRS3953)	No error
STATE v. HARDEE No. 03-1606	Harnett (02CRS52994)	No error

STATE v. LOWRY No. 03-1141	Onslow (01CRS58395)	No error
STATE v. LYTLE No. 04-52	Wilson (03CRS51244) (03CRS51245)	Affirmed
STATE v. MABRY No. 04-156	Forsyth (02CRS61229)	Affirmed
STATE v. MARSH No. 04-410	Chatham (95CRS4591)	Vacated and remanded
STATE v. McCLURE No. 03-1520	Jackson (03CRS390) (03CRS396)	No error
STATE v. McMILLAN No. 04-167	Cumberland (02CRS53868)	No error
STATE v. MONK No. 04-59	Wake (02CRS100892) (02CRS100893)	No prejudicial error at trial; sentence vacated and remanded for resentencing
STATE v. MUNGO No. 04-388	Mecklenburg (00CRS21058)	Affirmed
STATE v. PARRISH No. 03-1638	Pender (03CRS51882)	No error
STATE v. PHELPS No. 04-298	Washington (02CRS50879)	No error
STATE v. SCOTT No. 04-134	Montgomery (01CRS52548) (02CRS3135)	Affirmed
STATE v. SETZER No. 04-352	Gaston (99CRS50000)	No error
STATE v. SOUTHWARD No. 04-270	New Hanover (02CRS56904) (02CRS15128)	No error
STATE v. SPENCER No. 03-1289	Gaston (02CRS67461) (02CRS67462) (02CRS67467)	No error
STATE v. VINSON No. 03-1612	Alamance (01CRS54464)	Appeal dismissed
STATE v. WRIGHT No. 03-1350	Forsyth (02CRS52402)	Affirmed

FIRST UNION NATIONAL BANK, PLAINTIFF v. STEPHEN PAUL BROWN AND GLOBAL SUPPORT SERVICES, INC., DEFENDANTS

No. COA03-599

(Filed 19 October 2004)

1. Appeal and Error— appealability—interlocutory order—Rule 54(b) certification

Although defendant company's appeal from an order granting summary judgment in favor of plaintiff bank is an appeal from an interlocutory order based on the fact that defendant company's cross-claims against defendant company president are still pending, the appeal is properly before the Court of Appeals because the trial court included a Rule 54(b) certification in its order entering final judgment as to plaintiff's claims against defendant company and defendant company's counterclaims against plaintiff.

2. Agency; Corporations— apparent authority—corporate loans and guarantees—personal loan—president's signature

The trial court erred by granting summary judgment in favor of plaintiff bank on the bank's claims to recover money from defendant company after a default on a 1999 guaranty based on defendant company president's signature on the guaranty, because: (1) neither party has offered direct evidence from defendant president or anyone else regarding the actual purpose of the loan or how the proceeds were in fact used, and the Court of Appeals has affirmed summary judgment only when the corporate-related purpose was undisputed; (2) a guaranty of a personal loan is not necessarily outside the apparent authority of an officer of a closely held corporation, and it supplies evidence giving rise to a genuine issue of fact; and (3) the evidence presented an issue of fact as to whether plaintiff bank had notice that defendant president was exceeding his authority when he signed the 1999 guaranty

3. Fiduciary Relationship; Fraud— breach of duty of good faith and fair dealing—misrepresentation by concealment

The trial court did not err by granting summary judgment in favor of plaintiff bank on defendant company's counterclaims for breach of the duty of good faith and fair dealing and misrepre-

sentation by concealment, because: (1) if the fact finder concludes that defendant president did not have apparent authority to enter into the guaranty on behalf of defendant company, then defendant company was not induced to enter into the contract by any nondisclosure, and plaintiff bank cannot be said to have accepted the contract without having made a required disclosure; and (2) even if defendant president did have apparent authority to sign a guaranty in defendant company's name, there is no authority suggesting that plaintiff may be held liable for breach of good faith and fair dealing or nondisclosure when negotiating with an officer of a company having apparent authority.

4. Unfair Trade Practices— use of corporate resolution with other loan documents—duty to disclose—objectively reasonable lawsuit

The trial court did not err by granting summary judgment in favor of plaintiff bank on defendant company's counterclaim for unfair and deceptive trade practices in violation of N.C.G.S. § 75-1.1, because: (1) plaintiff bank's use of a corporate resolution among the other loan documents that defendant president signed as a condition of the 1997 $250,000 loan was not unfair or deceptive when defendant company failed to present any evidence of harm from the act; (2) plaintiff bank did not owe a duty to the guarantor to disclose information about the principal debtor; and (3) contrary to defendant company's assertion, a lawsuit which is objectively reasonable cannot constitute an unfair trade practice.

Appeal by defendant Global Support Services, Inc. from order entered 13 February 2003 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 February 2004.

Parker, Poe, Adams & Bernstein, L.L.P., by Kiah T. Ford, IV and Maria Blue Barry, for plaintiff-appellee.

McKenna Long & Aldridge, L.L.P., by Gaspare J. Bono; and Hutson, Hughes & Powell, P.A., by James H. Hughes, for defendant-appellant Global Support Services, Inc.

No brief filed on behalf of defendant Stephen Paul Brown.

GEER, Judge.

This appeal arises out of a loan by First Union National Bank ("First Union") to defendant Stephen Paul Brown in the amount of

$250,000. In his capacity as President of Global Support Services, Inc. ("Global"), Brown purported to sign a guaranty of this personal loan by Global. When Brown defaulted on the loan, First Union sued Global to enforce the guaranty. Global, contending that Brown lacked authority to sign the guaranty, filed counterclaims against First Union for breach of the covenant of good faith and fair dealing, nondisclosure, and violation of N.C. Gen. Stat. § 75-1.1 (2003). The trial court entered summary judgment for First Union on all of the claims. Based on our review of the record, we conclude that there are genuine issues of material fact on the question of Brown's apparent authority to sign the guaranty, but that Global has failed to forecast sufficient evidence to establish a *prima facie* case on its counterclaims. We therefore reverse the entry of summary judgment in First Union's favor on First Union's claims, but affirm the entry of summary judgment for First Union on Global's counterclaims.

Facts

In September 1997, defendant Brown approached First Union about obtaining a $250,000 personal loan ("the $250,000 loan"). A credit approval request prepared by Mary Smith, a Vice President of First Union, indicated that the loan, which was to be funded 15 December 1997, was for the purpose of "financ[ing] start up operations of tape distribution company" and would be repaid from "cash flow from operations of company" and "personal income and assets of borrower." The credit approval request also specified that the loan would be guaranteed by the company.

On 16 December 1997, Global was incorporated as a Delaware corporation with defendant Brown and Don M. Brindley as co-owners of the company. Brown served as President and Secretary and was responsible for the day-to-day running of the business. Brindley was the Chief Executive Officer. According to Brindley's affidavit, Brown and he agreed that neither of them "could take funds, create debts, guarantee loans, sell shares, or otherwise encumber the assets of Global without the other owner's approval."

During the underwriting of Brown's $250,000 loan and prior to the incorporation of Global, e-mail communications circulated among various First Union loan officers expressing uncertainty as to which officers of Global would be authorized to sign the guaranty. On 16 December 1997, Mary Smith announced that "Paul Brown is going to be the only officer authorized to sign. . . . Paul Brown is CEO, VP & Secretary. Don Brindley will not be signing on the loan at all."

Brown's loan closed on 22 December 1997. On that date, Brown executed three documents: (1) a promissory note in favor of First Union for $250,000 ("the 1997 note"); (2) an unconditional guaranty that purported to bind Global as guarantor of the same loan ("the 1997 guaranty"); and (3) a "Certificate of Borrowing Resolution" on First Union letterhead ("the Certificate"). The 1997 note did not limit the purposes for which the $250,000 could be used and was signed by Brown in his personal capacity. The Certificate, presented by First Union to Brown for the first time on 22 December 1997, stated that it was a "true copy of the Resolution duly adopted by the Board of Directors as of 12/22/97 . . . ." The Certificate, as drafted by First Union, purported to authorize the Global "CEO/President/Secretary" to, among other things, "guarantee the obligations of others to Bank."

Although the Certificate also required Brown to subsequently provide First Union with a certified copy of an actual board resolution, Brown never did so. According to Brindley, he was not aware of the 1997 note or the guaranty signed by Brown on behalf of Global.

On 15 May 1998, Brown obtained a second loan from First Union for $400,000 ("the $400,000 loan"). At that time, Brindley executed an unconditional guaranty, also dated 15 May 1998, by which Brindley personally guaranteed repayment of the $400,000 loan. Brindley believed that Brown had sought this loan in order to obtain sufficient funds to become a co-equal owner of Global.

The 1997 note for the $250,000 loan was renewed and extended on 21 December 1998 by Brown's signature on a new promissory note ("the 1998 note"). Apparently, First Union did not obtain a new guaranty. The 1997 guaranty had provided that Global guaranteed not only the 1997 note but also "all modifications, extensions or renewals thereof." At the time of the 1998 renewal, Brindley was still unaware of the 1997 note, its extension, or Global's guaranty.

Brown never invested the full amount of the $400,000 loan into Global, but rather used a portion of the loan for personal expenses, including the purchase of a home. When the $400,000 became due, Brindley learned that First Union was going to renew the loan in reliance on Brindley's personal guaranty. Brindley called Mary Smith and informed her that he would not guarantee the renewal of the $400,000 loan.

Subsequently, Brindley discovered that Brown had then attempted to secure the $400,000 renewal by Global assets. According

to Brindley's affidavit, he again contacted Smith and "informed her that Global would not secure Brown's loan, and insisted that Global not be obligated to secure Brown's loan." On approximately 1 October 1999, Eileen Hague, a Global employee, also informed Smith that neither Global nor Brindley would renew the guaranty on Brown's $400,000 loan. Smith wrote Brown on 14 December 1999 stating:

> This letter verifies your loan [for $400,000] matured and expired on September 30, 1999. First Union National Bank did not renew this note under its original terms and released the personal guaranty of Mr. Don Brindley as of October 31, 1999.

On 22 December 1999, First Union again renewed and extended the $250,000 loan. Brown signed a promissory note in his individual capacity ("the 1999 note") and also a new "Unconditional Guaranty" as "President" of Global ("the 1999 guaranty"). Smith confirmed in an affidavit that she never spoke with Brindley about the $250,000 loan or the guaranty. Brindley was unaware that Brown had purported to obligate Global by the 1999 guaranty until 2001.

In August 2001, Janet Simpson of First Union called Brindley and informed him that Brown was in default on the $250,000 loan and told him, for the first time, that Global was the guarantor of the note. Brindley protested the guaranty, claiming that Brown had no authority to sign a guaranty on behalf of Global without Brindley's knowledge and approval.

After Global declined to pay the unpaid balance on the $250,000 loan, First Union filed suit on 8 October 2001 against Global and Brown seeking $196,337.96 plus interest. First Union brought suit only on the 1999 note and the 1999 guaranty. The complaint does not mention the 1997 note, the 1997 guaranty, or the 1998 note. Global not only answered the complaint, but asserted counterclaims against First Union for unfair and deceptive trade practices, breach of the duty of good faith and fair dealing, and misrepresentation by concealment. Global also brought cross-claims against Brown for breach of contract, breach of fiduciary duty/constructive fraud, misrepresentation by concealment, and conversion/unjust enrichment.

First Union moved for summary judgment against both Global and Brown. Global cross-moved for summary judgment on its counterclaims. On 13 February 2003, the trial court granted First Union's motion for summary judgment and entered judgment against Global

in the amount of $240,574.85, including principal, interest, and attorney's fees. The court also entered judgment in favor of First Union on Global's counterclaims. In a separate document, also filed on 13 February 2003, the court entered a consent judgment in the amount of $240,574.85 on behalf of First Union and against Brown. Global has appealed from the order granting summary judgment in favor of First Union.

[1] We first note that since Global's cross-claims against Brown are still pending, this appeal is interlocutory. *Mitsubishi Elec. & Elecs. USA, Inc. v. Duke Power Co.*, 155 N.C. App. 555, 559, 573 S.E.2d 742, 745 (2002). An interlocutory appeal is permissible only if (1) the trial court certified the order under Rule 54(b) of the Rules of Civil Procedure, or (2) the order affects a substantial right that would be lost without immediate review. *Embler v. Embler*, 143 N.C. App. 162, 164-65, 545 S.E.2d 259, 261 (2001). Since the trial court included a Rule 54(b) certification in its order entering final judgment as to First Union's claims against Global and Global's counterclaims against First Union, this appeal is properly before this Court.

I

[2] Global first contends that the trial court erred in granting summary judgment to First Union on the 1999 guaranty on the grounds that Brown's signature on the guaranty could not bind Global. Global further contends that it was entitled to summary judgment on First Union's claims.

The North Carolina Rules of Civil Procedure provide that 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). In deciding the motion, " 'all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.' " *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting 6 James W. Moore, *Moore's Federal Practice* § 56-15[3], at 2337 (2d ed. 1971)).

The party moving for summary judgment has the burden of establishing the lack of any triable issue. *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that the plaintiff

will be able to make out at least a prima facie case at trial." *Id.* at 66, 376 S.E.2d at 427. In opposing a motion for summary judgment, the non-moving party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C.R. Civ. P. 56(e).

On appeal, this Court's task is to determine, based on the materials presented to the trial court, whether 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*, 276 S.E.2d 283 (1981). A trial court's ruling on a motion for summary judgment is reviewed *de novo* as the trial court rules only on questions of law. *Va. 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).

Because First Union's complaint does not mention the 1997 guaranty, but sought only to enforce the 1999 guaranty, we address only Global's liability under the 1999 guaranty. Global argues initially that it cannot, as a matter of law, be bound under that guaranty because of N.C. Gen. Stat. § 55-8-32 (2003):

> (a) Except as provided by subsection (c), a corporation *may not* directly or indirectly lend money to or guarantee the obligation of a director of the corporation *unless*:
>
> (1) The particular loan or guarantee is approved by a majority of the votes represented by the outstanding voting shares of all classes, voting as a single voting group, except the votes of shares owned by or voted under the control of the benefited director; or
>
> (2) The corporation's board of directors determines that the loan or guarantee benefits the corporation and either approves the specific loan or guarantee or a general plan authorizing loans and guarantees.

(Emphasis added) As, however, First Union correctly points out, when the North Carolina Business Corporations Act, of which N.C. Gen. Stat. § 55-8-32 is a part, refers to a "corporation," it means only an entity incorporated under North Carolina law:

> "Corporation" or "domestic corporation" means a corporation for profit or a corporation having capital stock that is incorporated

> under or subject to the provisions of this Chapter and that is not a foreign corporation except that in G.S. 55-9-01 and G.S. 55-15-21 "corporation" includes domestic and foreign corporations.

N.C. Gen. Stat. § 55-1-40(4) (2003). When the Act intends to refer to a foreign corporation, it uses the term "[b]usiness entity." N.C. Gen. Stat. § 55-1-40(2a) (2003). Since N.C. Gen. Stat. § 55-8-32 sets out restrictions only on "corporations" and not on "business entities," it does not apply to Global, a Delaware corporation.[1]

First Union argues that Global's guaranty of Brown's loan was not necessarily unlawful under the applicable Delaware law. While the North Carolina statute uses a "may not . . . unless" construction with respect to corporate loans and guaranties, the applicable Delaware statute uses a broader "may . . . whenever" construction:

> Any corporation *may* lend money to, or guarantee any obligation of, or otherwise assist any officer or other employee of the corporation or of its subsidiary, including any officer or employee who is a director of the corporation or its subsidiary, *whenever*, in the judgment of the directors, such loan, guaranty or assistance may reasonably be expected to benefit the corporation. The loan, guaranty or other assistance may be with or without interest, and may be unsecured, or secured in such manner as the board of directors shall approve, including, without limitation, a pledge of shares of stock of the corporation. Nothing in this section contained shall be deemed to deny, limit or restrict the powers of guaranty or warranty of any corporation at common law or under any statute.

Del. Code Ann. tit. 8, § 143 (2004) (emphasis added).

We agree with First Union that the plain language of the Delaware statute does not prohibit First Union from arguing that Brown had

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1. Global asserts that "First Union cannot seriously argue that North Carolina common law applies to this dispute with Global, but that a North Carolina statute, which is not favorable to its position, does not. First Union cannot pick and choose which North Carolina law it believes governs this case." Global has mistaken the issue. We are not addressing a question of choice of law, but rather a question of statutory construction. If the General Assembly chooses not to include foreign corporations within the scope of N.C. Gen. Stat. § 55-8-32, it is irrelevant that North Carolina common law might otherwise apply. Global argues alternatively that Fla. Stat. § 607.0833 (2003) should apply because Global's principal place of business is in Florida. As with the North Carolina statute, however, the Florida statute applies only to a corporation, which "means a corporation for profit, which is not a foreign corporation, incorporated under or subject to the provisions of this act." Fla. Stat. § 607.01401(5) (2003).

authority to bind Global to a guaranty. Neither party, however, addresses a necessary preliminary question: which state's common law should we apply on the issue of Brown's authority? Since the parties in this case both assume the applicability of North Carolina common law, we will proceed accordingly. *Tennessee Carolina Transp., Inc. v. Strick Corp.*, 283 N.C. 423, 431, 196 S.E.2d 711, 716 (1973) ("However, in the case before us the parties have not contended that any law other than the law of Pennsylvania shall govern. We proceed accordingly . . . .").

As this Court explained in *Foote & Davies, Inc. v. Arnold Craven, Inc.*, 72 N.C. App. 591, 595, 324 S.E.2d 889, 892 (1985):

> A principal is liable upon a contract duly made by its agent with a third person in three instances: when the agent acts within the scope of his or her actual authority; when a contract, although unauthorized, has been ratified; or when the agent acts within the scope of his or her apparent authority, unless the third person has notice that the agent is exceeding actual authority.

First Union does not dispute that Global has submitted evidence that Brown was not authorized to sign the guaranty and does not contend that Global ratified the guaranty. First Union instead relies solely on Brown's apparent authority.

First Union contends that summary judgment was proper under *Zimmerman v. Hogg & Allen, P.A.*, 286 N.C. 24, 209 S.E.2d 795 (1974), on the grounds that the president of a close corporation always has apparent authority to bind a corporation by signing a contract. First Union has, however, overlooked two critical aspects of *Zimmerman*. First, the Supreme Court in *Zimmerman* held only that evidence such as that relied upon by First Union in this case was sufficient to give rise to an issue of fact warranting *denial of the motion for summary judgment*. *Id.* at 40, 209 S.E.2d at 805 ("Plaintiff met the burden imposed upon him by Rule 56(c), and, therefore, the trial judge erred by rendering summary judgment in favor of [the principal]."). *Zimmerman* did not hold that evidence of the signature of a president of a close corporation warrants resolution of apparent authority as a matter of law. This Court has noted, relying upon *Zimmerman*, that "[t]he law of apparent authority usually depends upon the unique facts of each case . . . ." *Foote & Davies*, 72 N.C. App. at 595, 324 S.E.2d at 893. In cases in which "the evidence is conflicting, or susceptible to different reasonable inferences, the nature and extent of an agent's authority is a question of fact to be determined by

the trier of fact." *Id.* The question is one of law for the court only "[w]here different reasonable and logical inferences may not be drawn from the evidence . . . ." *Id.*

Second, *Zimmerman* recognized that the president's apparent authority only extends to matters " 'that are within the corporation's ordinary course of business.' " *Zimmerman*, 286 N.C. at 32, 209 S.E.2d at 800 (quoting *Burlington Indus., Inc. v. Foil*, 284 N.C. 740, 758, 202 S.E.2d 591, 603 (1974)). When a president's act " 'relates to material matters that are outside the corporation's ordinary course of business, in the absence of express authorization for such act by the board of directors, the corporation is not bound.' " *Id.* (quoting *Burlington Indus.*, 284 N.C. at 759, 202 S.E.2d at 603). This Court has since held: "The president of a corporation is the head and general agent of the corporation and may act for it in matters that are within the corporation's ordinary course of business or incidental to it." *Foote & Davies*, 72 N.C. App. at 596, 324 S.E.2d at 893. *See also Bell Atl. Tricon Leasing Corp. v. DRR, Inc.*, 114 N.C. App. 771, 775, 443 S.E.2d 374, 376 (1994) ("The law of this state is clear as to the apparent authority of the president of a closely held corporation to enter into contracts for the corporation. The president of the corporation is the head and general agent of the corporation and may act for it in matters that are within the corporation's ordinary course of business or incidental to it."); *Sentry Enters., Inc. v. Canal Wood Corp.*, 94 N.C. App. 293, 297, 380 S.E.2d 152, 155 (1989) ("The president of a corporation has the apparent authority to bind the corporation to contracts which are within the corporation's ordinary course of business.").

Here, Brown was the president of Global, a closely held corporation. For First Union to be entitled to summary judgment based on Brown's apparent authority, the undisputed evidence and all inferences drawn from that evidence must establish that the 1999 guaranty was in the corporation's ordinary course of business or incidental to it. Our review of the evidence indicates that a genuine issue of material fact exists as to this question.

Neither party has offered direct evidence from Brown or anyone else regarding the actual purpose of the loan or how the proceeds were in fact used.[2] First Union points to the credit request application that its employee completed in 1997 indicating that the original

2. Global relies on its own unverified answers to First Union's request for admissions, but presents no authority allowing a party to rely upon its own unverified discovery responses in opposing summary judgment. *See* N.C.R. Civ. P. 56(c).

$250,000 loan was for the initial capitalization of Global. We observe that neither the form nor any affidavit indicates the source of this information. Since Global has not objected to consideration of this statement, we consider it as evidence supporting First Union's position. On the other hand, the $250,000 loan from 1997—closed three months after completion of the credit request form—was a personal loan and was not restricted to any particular purpose. By the time Brown signed the 1999 note and guaranty, the sole contracts at issue here, First Union had already loaned Brown an additional $400,000 for the capitalization of Global and had, in the loan documents, restricted use of the loan proceeds to Global's business. Global has also offered evidence that Brown never made the required investment to be a co-equal owner of Global. The evidence produced by both parties, although hardly substantial, is sufficient to raise an issue of fact regarding the purpose of the loan.

In *Zimmerman*, our Supreme Court held that the defendant's affidavits—stating (1) that the agent's investment activity was in the agent's personal capacity, (2) that the partnership was not in the business of making investments, and (3) that it knew nothing of the agent's activity—were sufficient to support the contention that the agent was not acting within the scope of his apparent authority. 286 N.C. at 37-38, 209 S.E.2d at 803. On the other hand, the *Zimmerman* plaintiff's evidence—suggesting (1) that the investment acts brought good will to the partnership and (2) that the firm in fact knew of them—"raised a genuine material issue for trial" and required reversal of the trial court's order granting summary judgment. *Id.* at 39-40, 209 S.E.2d at 804-05. This case presents a similar conflict in the evidence.

This Court has affirmed summary judgment only when the corporate-related purpose was undisputed. Thus, in *Foote & Davies*, 72 N.C. App. at 597, 324 S.E.2d at 893-94, the president of the defendant company had signed a guaranty in connection with a contract for the printing of a catalog for a wholly-owned subsidiary of the defendant company. Similarly, in *Bell Atlantic Tricon*, the president of the defendant corporation, which owned a fleet of trucks, had signed a guaranty of a business equipment lease for an affiliate corporation existing solely for the purpose of servicing those trucks. This Court held that the lease agreement was incidental to the defendant's business. *Bell Atlantic Tricon*, 114 N.C. App. at 775, 443 S.E.2d at 377. In both of these cases, the purpose of the guaranty and the guaranty's relationship to the defendant corporation's business interests were

undisputed. That is not the case here and, therefore, the trial court erred in granting summary judgment to First Union.

Global, however, contends that it was entitled to summary judgment on First Union's claims since the evidence is undisputed that the $250,000 loan was a personal loan. A guaranty of a personal loan is not necessarily outside the apparent authority of an officer of a closely held company. In *Investors Title Ins. Co. v. Herzig*, 320 N.C. 770, 774-75, 360 S.E.2d 786, 789 (1987), the Supreme Court held that the fact a partner in a law firm executed a title certificate on property that he owned for the purpose of obtaining a personal loan for himself did not establish as a matter of law that the partner's act "was not for carrying on the business of the partnership." Affidavits that the law firm had no knowledge of its partner's act and that it was done solely for the partner's personal benefit instead "create[d] a genuine issue of material fact on this question" of apparent authority. *Id.* at 775, 360 S.E.2d at 789. Likewise, the fact that the loan involved in this case was a personal one supplied evidence giving rise to a genuine issue of fact; it is not dispositive.

In addition to the dispute over the purpose of the loan, a dispute exists regarding First Union's knowledge of Brown's authority. A principal is not liable to a third person if "the third person has notice that the agent is exceeding actual authority." *Foote & Davies*, 72 N.C. App. at 595, 324 S.E.2d at 892. We hold that the evidence raises an issue of fact as to whether First Union had notice that Brown was exceeding his authority when he signed the 1999 guaranty. Global offered evidence that both Brindley and another Global employee told First Union prior to the signing of the 1999 guaranty that Brown had no authority to bind Global with respect to the $400,000 loan. In addition, Global points to evidence that First Union's internal procedures required authorization by Global's board of directors as a prerequisite to the loan and yet never obtained from Brown a certified copy of the actual board resolution. A jury could reasonably conclude, in light of these facts, that First Union, in the exercise of reasonable care, was not justified in believing that Brown had authority to bind Global through the 1999 guaranty. *See Zimmerman*, 286 N.C. at 31, 209 S.E.2d at 799 ("[T]he determination of a principal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances, conferred upon his agent."). First Union urges that the 1999 notification was limited to the $400,000 loan, while Global contends that the 1999 notification

should be dispositive as to its liability. Both arguments are more properly presented to a jury.

Global relies on *Wachovia Bank v. Bob Dunn Jaguar, Inc.*, 117 N.C. App. 165, 172, 450 S.E.2d 527, 532 (1994), in which the president of Bob Dunn Ford notified Wachovia that any guaranties had to have his personal approval and signature. Subsequently, a new corporation called Bob Dunn Jaguar was formed as a subsidiary of Bob Dunn Ford. Wachovia sought to enforce a guaranty signed by a vice president of Bob Dunn Ford for a Jaguar sold by Bob Dunn Jaguar. This Court affirmed the trial court's decision not to enforce the guaranty on the grounds that the earlier communication regarding guaranties and Bob Dunn Ford "divested [the vice president] of any authority which may have been imputed to him." *Id.* In response to Wachovia's claim that it was entitled to rely upon its belief that the guaranty signer's status as vice president authorized him to sign guaranties, the court held that the communication from the president provided "ample evidence from which plaintiff should have been on notice that [the vice president] was exceeding his authority." *Id.* While Global urges that *Bob Dunn Jaguar* justifies entry of summary judgment in its favor, it overlooks the fact that the trial court's decision in *Bob Dunn Jaguar* was reached after a bench trial.

For the foregoing reasons, we hold that neither party was entitled to summary judgment on First Union's claims. Genuine issues of material fact exist regarding whether Brown was acting within his apparent authority and whether First Union was on notice that Brown was exceeding his authority when he signed the 1999 guaranty.

II

Global next contends that the trial court erred in granting summary judgment to First Union on its counterclaims. We hold that the trial court properly concluded that Global failed to forecast sufficient evidence to support its counterclaims.

[3] Global first contends that First Union breached a duty of good faith and fair dealing and made a material misrepresentation by concealment when it failed to disclose that Brown was signing a guaranty on behalf of Global for a personal loan to Brown. Global argues that First Union should not have accepted a guaranty signed by Brown without verifying that he had authority to act when First Union had reason to believe that Global was being misled by Brown.

This Court has previously held that "in some instances a creditor owes a duty to the guarantor to disclose information about the principal debtor." *Gant v. NCNB Nat'l Bank of N.C.*, 94 N.C. App. 198, 199, 379 S.E.2d 865, 867, *appeal dismissed and disc. review denied*, 325 N.C.706, 388 S.E.2d 453 (1989). Specifically,

> "[i]f the creditor knows, or has good grounds for believing that the surety [or guarantor] is being deceived or misled, or that he is induced to enter into the contract in ignorance of facts materially increasing the risks, of which he has knowledge, and he has an opportunity, before accepting his undertaking, to inform him of such facts, good and fair dealing demand that he should make such disclosure to him; and if he accepts the contract without doing so, the surety [or guarantor] may afterwards avoid it."

Id. at 199-200, 379 S.E.2d at 867 (quoting *First-Citizens Bank & Trust Co. v. Akelaitis*, 25 N.C. App. 522, 526, 214 S.E.2d 281, 284 (1975); alteration in original).

It is unclear whether a breach of this duty to disclose is more properly labeled a breach of the covenant of good faith and fair dealing or a claim for negligent nondisclosure. *See Gant*, 94 N.C. App. at 200, 379 S.E.2d at 867 ("Plaintiff has alleged sufficient facts to state a claim against defendant, whether the cause of action is ultimately determined to be one for negligence or 'breach of duty of good faith,' as plaintiff has labeled her claims."). Although Global has asserted separate counterclaims for breach of the duty of good faith and fair dealing and "misrepresentation by concealment," it relies in each counterclaim on *Gant* to provide a duty to speak and points to the same facts as supporting each claim. We, therefore, address the counterclaims together.

The facts of this case do not fall within the scope of *Gant*. If the finder of fact concludes that Brown did not have apparent authority to enter into the guaranty on behalf of Global, then Global never entered into a guaranty of Brown's loan. Accordingly, Global was not "induced to enter into the contract" by any non-disclosure and First Union cannot be said to have "accept[ed] the contract" without having made a required disclosure. *Id.* at 199-200, 379 S.E.2d at 867. On the other hand, if Brown did have apparent authority to sign a guaranty in Global's name, the question arises whether First Union had a duty to make a disclosure to someone other than an agent of Global. Global has cited no authority suggesting that First Union may be held liable for a breach of good faith and fair dealing or non-disclosure

when negotiating with an officer of a company having apparent authority. We have found none. *See Furman Lumber, Inc. v. Mountbatten Sur. Co.*, No. 96-7906, 1997 U.S. Dist. LEXIS 12118, at *35 (E.D. Pa. Aug. 6, 1997) (creditors who had made the required disclosure to an agent of the guarantor "were under no duty to take any further affirmative action").

[4] Second, Global contends that the trial court erred in granting summary judgment to First Union on Global's counterclaim for unfair or deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1. Global points to the following acts as constituting violations of N.C. Gen. Stat. § 75-1.1: (1) "First Union's preparation and presentment of a fictitious corporate resolution[;]" (2) First Union's renewal of the corporate guaranty without disclosing it to Global; and (3) the filing and pursuit of this action.

In order to establish a claim under N.C. Gen. Stat. § 75-1.1, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice; (2) the action in question was in or affecting commerce; and (3) the act proximately caused injury to the plaintiff. *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). "A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Id.* Although it is a question of fact whether the defendant performed the alleged acts, it is a question of law whether those acts 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). 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).

First Union's use of the "corporate resolution" among the other loan documents that Brown signed as a condition of the 1997 $250,000 loan was not unfair or deceptive within the meaning of N.C. Gen. Stat. § 75-1.1. Global never saw this corporate resolution until this litigation and provides no explanation how the resolution could have deceived it or how it harmed Global. *See Melton v. Family First Mortgage Corp.*, 156 N.C. App. 129, 135, 576 S.E.2d 365, 370 (bank's backdating of loan application documents could not support claim under N.C. Gen. Stat. § 75-1.1 when plaintiff failed to present any evidence of harm from act), *aff'd per curiam*, 357 N.C. 573, 597 S.E.2d 672 (2003).

Global also contends that the same facts supporting its claim for breach of the covenant of good faith and fair dealing supports a claim for unfair and deceptive trade practices. For the same reasons that we held summary judgment was appropriate as to that counterclaim, we also hold those facts are insufficient to establish a claim under N.C. Gen. Stat. § 75-1.1.

Finally, Global argues that First Union's pursuit of this lawsuit constitutes an unfair and deceptive trade practice. In *Reichhold Chems., Inc. v. Goel*, 146 N.C. App. 137, 157, 555 S.E.2d 281, 293 (2001), *appeal dismissed*, 356 N.C. 677, 577 S.E.2d 635, *disc. review denied*, 356 N.C. 677, 577 S.E.2d 634 (2003), this Court held that a lawsuit which is "objectively reasonable" cannot constitute an unfair trade practice under N.C. Gen. Stat. § 75-1.1. Since Global has not demonstrated that this lawsuit was objectively unreasonable, it cannot form a basis for an unfair and deceptive trade practices claim.

Conclusion

We hold that the record reveals genuine issues of material fact with respect to First Union's claim for relief against Global and, therefore, reverse the trial court's entry of summary judgment in favor of First Union on that claim and remand this matter for such further proceedings as may be appropriate. We affirm the trial court's entry of summary judgment as to Global's counterclaims.

Affirmed in part, reversed in part and remanded.

Chief Judge MARTIN and Judge STEELMAN concur.

J&M AIRCRAFT MOBILE T-HANGAR, INC., DERYL PERRY, AND JUDY PERRY, PLAINTIFFS v. JOHNSTON COUNTY AIRPORT AUTHORITY, NORMAN B. GRANTHAM, AND ROYAL H. DICKSON, JR., DEFENDANTS

No. COA03-1202

(Filed 19 October 2004)

1. Injunctions— preliminary—failure to demonstrate irreparable harm

The trial court did not abuse its discretion by denying plaintiff company's motion for a preliminary injunction barring execution of a North Carolina default judgment based on alleged

insufficiency of service because, even if plaintiff can prove that it had no actual notice of the first complaint in a prior action thus giving it a reasonable chance of prevailing on the merits of its Rule 60 motion to set aside the default judgment, defendant did not demonstrate irreparable harm since the Georgia action to collect on the original North Carolina default judgment was stayed pending the outcome of this action.

2. Process and Service— sufficiency of service of process— Rule 60 motion

The trial court erred by granting defendant airport authority's motion to dismiss plaintiff company's complaint seeking to set aside a prior default judgment based on plaintiff's alleged failure to file this action within a reasonable time as required by N.C.G.S. § 1A-1, Rule 60(b)(4) because, construing the complaint liberally and taking all the facts as alleged, the complaint does assert a valid Rule 60 claim in that the judgment would be void if plaintiff was never properly served.

Judge GEER concurring in part and dissenting in part.

Appeal by plaintiff from order entered 11 July 2003 by Judge Knox V. Jenkins, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 19 May 2004.

James T. Johnson, P.A., by James T. Johnson for plaintiffs-appellants.

J. Mark Payne for the defendant-appellees.

ELMORE, Judge.

The first civil action in this case was filed 5 September 2001 in Johnston County, North Carolina. The action concerned airplane hangars which J&M Aircraft Mobile T-Hangar, Inc. (J&M) constructed at the Johnston County Airport, but were never paid for. The Airport Authority was responsible for making sure each of the airlines paid J&M for their individual hangars, and in return the Airport Authority was to earn a commission. The commission agreed upon was $1,000.00 for each of 40 hangars. J&M apparently never received full payment for the hangars and, in return, J&M never paid the Airport Authority their commission. The Airport Authority sued for the commission.

The plaintiff therein (the Airport Authority) attempted service on the defendant (J&M), a Georgia corporation, at its office in Georgia. J&M claimed it never received service, and that someone who works in the building where its office is located but does not work for J&M signed the receipt. The signature is apparently indecipherable. J&M was not aware of that action until well after the default judgment was entered against it. The default judgment awarded plaintiffs $37,000.00 plus 8% interest from 15 February 1999 until paid.

J&M learned of the default judgment when it was served with a complaint filed in Georgia attempting to enforce collection of the North Carolina default judgment. J&M and the Perrys, owners and employees of J&M, attempted to attack the North Carolina judgment in the Georgia court, claiming North Carolina had no jurisdiction. J&M's attorney requested a protective order and an injunction, which was denied by the Georgia trial court. The Georgia trial court then stayed the action in Georgia to allow J&M to attack the North Carolina judgment in North Carolina.

J&M attempted to obtain counsel in North Carolina but eventually filed a *pro se* complaint which was later amended when it retained counsel. The complaint included a Rule 60 motion to set aside the prior North Carolina default judgment. The complaint also moved the trial court for temporary, preliminary, and permanent injunctive relief to stay the enforcement of the judgment.

The North Carolina court ordered a temporary restraining order against the Airport Authority in June of 2003. Later that month, the trial court heard the motion for an injunction. The trial court denied the motion and granted the defendant's motion to dismiss, concluding as a matter of law that the service in the original action was sufficient under N.C. Gen. Stat. § 1A-1, Rule 4(j)(6)c. The trial court said that J&M failed to bring evidence to overcome the presumption of valid service. The trial court found the default judgment valid, and found no grounds for continuing the stay of the Georgia action.

From that denial of the Rule 60 motion and motion for injunction, and the granting of the motion to dismiss, J&M appeals.

I.

[1] J&M first assigns error to the trial court's denial of the motion for preliminary injunction, arguing that the appellants are reasonably likely to have prevailed on the merits and that appellants will suffer irreparable harm if the injunction is not issued.

The scope of appellate review in the granting or denying of a preliminary injunction is essentially *de novo*. An appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself. *Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 320 S.E.2d 693, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 559 (1984).

As a general rule, a preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation:

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

A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983).

The order denying the injunction contains findings of fact which tend to focus on the sufficiency of service. The trial court concluded as a matter of law that regardless of the sufficiency or insufficiency of process that the defendant did not file his Rule 60 motion "within a reasonable time" pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (2003). The record shows that J&M was aware and in possession of the complaint and default judgment in February 2002, and did not file the current action until 15 months later—19 months after the filing of the default judgment. The trial court concluded as a matter of law that "15 months is not a reasonable time for filing this action, particularly in light of the fact that the delay may materially affect the Airport's ability to pursue its claim were the Default Judgment to be set aside," citing *Howard v. Williams*, 40 N.C. App. 575, 253 S.E.2d 571 (1979).

A motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975); *Hilton v. Howington*, 63 N.C. App. 717, 306 S.E.2d 196 (1983), *disc. review denied*, 310 N.C. 152, 311 S.E.2d 291 (1984). While motions pursuant to subsections (b)(1), (b)(2), and (b)(3) of this rule must be made "not more than one year after the judgment, order, or proceeding was entered or taken," as well as "within a reasonable time," motions pursuant to subsections

(b)(4), (b)(5), and (b)(6) of this rule must simply be made "within a reasonable time," and what constitutes a "reasonable time" depends upon the circumstances of the individual case. *Nickels v. Nickels*, 51 N.C. App. 690, 277 S.E.2d 577, *disc. review denied*, 303 N.C. 545, 281 S.E.2d 392-93 (1981).

We note that J&M immediately retained counsel, tried to attack the judgment in Georgia, obtained a stay in Georgia in order to attack the judgment in North Carolina, and filed the Rule 60 motion within 15 months of having notice for the first time that there was a $37,000.00 judgment against it. If J&M can prove that it had no actual notice of the first complaint, then it has a reasonable chance of prevailing on the merits of the Rule 60 motion.

However, reasonable time notwithstanding, a party is also required to demonstrate irreparable harm. Here, defendant did not demonstrate irreparable harm since the Georgia action to collect on the original North Carolina default judgment was stayed pending the outcome of this action. The trial court did not err in denying the motion for injunctive relief, because irreparable harm was not shown.

II.

[2] J&M also assigns error to the trial court's decision to grant the motion to dismiss, arguing that its amended complaint stated a claim upon which relief could be granted.

The essential question on a motion for Rule 12(b)(6) is whether the complaint, when liberally construed, states a claim upon which relief can be granted on any theory. *Barnaby v. Boardman*, 70 N.C. App. 299, 318 S.E.2d 907 (1984), *rev'd on other grounds*, 313 N.C. 565, 330 S.E.2d 600 (1985). The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleadings, when taken as true, are legally sufficient to satisfy the elements of at least some legally recognized claim. *Arroyo v. Scottie's Professional Window Cleaning*, 120 N.C. App. 154, 461 S.E.2d 13 (1995), *disc. review improvidently allowed*, 343 N.C. 118, 468 S.E.2d 58 (1996).

Our standard of review is whether, construing the complaint liberally, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. *Country Club of Johnston Cty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 563 S.E.2d 269 (2002).

In this case, the trial court concluded as a matter of law:

14. Finding that plaintiff [J&M] failed to file this action within a reasonable time as required by N.C. Gen. Stat. § 1A-1, Rule 60(b)(4), the Court finds that Plaintiff J&M has failed to state any grounds upon which a claim may be based and, therefore, Defendant Airport's Motion to Dismiss should be granted.

15. The Court further finds that the proper action to set aside a Judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) is a motion in the cause and that a separate action has been filed in this matter is unsupported in law and may be dismissed on those grounds in addition to those other grounds set out above.

The verified amended complaint stated:

1. This is a civil action pursuant to Rule 60 of the North Carolina Rules of Civil Procedure to set aside that particular judgment obtained by Defendant . . . on November 2, 2001 in a previously filed Johnston County civil action, file number 01 CVS 2306 (this prior action is hereinafter referred to as "the prior civil action" and the November 2, 2001 judgment obtained therein is herinafter referred to as "the prior judgment" . . .). J&M was never served with the summons and complaint in the prior civil action, yet the Airport Authority represented to the Court that the summons and complaint had been served. Therefore the prior judgment should be set aside as void and as a result of a fraud upon the Court. If the prior judgment is set aside, J&M will defend the prior action on its merits.

Construing the complaint liberally, and taking all the facts as alleged, the complaint does assert a valid Rule 60 claim in that the judgment would be void if the defendant were never properly served. If the Rule 60 motion was made within a reasonable time, which we hold that it was, then the trial court erred in dismissing the action for failure to state a claim upon which relief may be granted.

We reverse the trial court and remand for further proceedings.

Reversed and remanded.

Judge BRYANT concurs.

Judge GEER concurs in the result in part and dissents in part by separate opinion.

GEER, Judge, concurring in the result in part and dissenting in part.

I differ from the majority because I believe that plaintiff J&M Aircraft Mobile T-Hangar, Inc. ("J&M") could only seek to set aside the default judgment by a motion in the original action brought by Johnston County Airport Authority (the "Airport Authority") and not through an independent action. Nevertheless, the trial court could, as it did, treat the action as a Rule 60(b) motion. Since, however, a motion to dismiss can only be filed as to a complaint, a counterclaim, or a cross-claim, principles governing motions to dismiss are not applicable to a motion under Rule 60(b) and, for that reason, I cannot fully concur in the majority opinion. I do agree, however, that the trial court's order granting the motion to dismiss should be reversed and the matter remanded for further proceedings.

Independent Action

In *Hassell v. Wilson*, 301 N.C. 307, 272 S.E.2d 77 (1980), the Supreme Court explained when an independent action is permissible and when a challenge must be by motion:

> Rule 60 provides for an attack on a judgment void because of lack of personal jurisdiction by way of motion in the cause or independent action. But which method must be used depends upon whether the jurisdictional defect appears on the face of the record. If the officer's return of process shows that service was duly made upon the party over which personal jurisdiction was required, then that party may attack the proceeding only by a motion in the cause; but if a defect in the service of process appears on the face of the return itself, the prior proceeding may be attacked either by motion in the cause or by an independent action.

Id. at 311-12, 272 S.E.2d at 80. Here, no defect of service appears on the face of the record; J&M could not establish a lack of service without filing affidavits. Accordingly, under *Hassell*, J&M was required to proceed by filing a Rule 60(b)(4) motion in the original lawsuit.

The fact that J&M filed instead an independent action is not necessarily fatal. The Supreme Court has also recognized that a

trial court may treat an independent action as if it were a motion in the cause:

> Plaintiffs, in their second cause of action, seek to attack the former judgment by independent action rather than by a motion in the original cause. On the facts alleged[,] their remedy, if any, is by motion in the cause. The court below, rather than dismiss, treated it as such. This was permissible.

Coker v. Coker, 224 N.C. 450, 451-52, 31 S.E.2d 364, 365 (1944) (internal citations omitted).

The trial court below properly stated, under the circumstances of this case, "that the proper action to set aside a Judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) is a motion in the cause and that a separate action has been filed in this matter is unsupported in law and may be dismissed on those grounds in addition to those other grounds set out above." Despite this conclusion, the court resolved the merits of the Rule 60(b)(4) claim; it thus necessarily treated the complaint as a motion in the cause. I believe that it would serve no purpose to affirm the trial court's dismissal based on the fact that this is an improper independent challenge to the judgment when J&M would still be entitled to file a motion in the cause and the issues would all have to be addressed in any event. As explained below, the Airport Authority would not be able to argue that the passage of time barred the motion.

I would, however, dismiss the claims brought by plaintiffs Deryl Perry and Judy Perry and the claims asserted against defendants Norman B. Grantham and Royal H. Dickens, Jr. Plaintiffs only seek to set aside the default judgment in the Airport Authority action and to obtain an injunction barring execution on that judgment. The only parties to the default judgment are the Airport Authority and J&M. Since I would deem this action to be a motion in the cause, the parties would again be limited to the Airport Authority and J&M. I believe the claims of Deryl Perry and Judy Perry and the claims against Grantham and Dickens should be dismissed. To this extent, I would affirm the trial court.

Timeliness of Claim

The trial court's conclusion that a Rule 60(b)(4) motion must be made within a reasonable time and that the motion to dismiss should be granted because J&M was dilatory in filing its action is contrary to the law. "Service of process, unless waived, is a jurisdictional require-

ment. If the summons and complaint were not served on defendant, the default judgment . . . is void . . . ." *Blair Auto Co. v. McLain*, 7 N.C. App. 567, 568, 173 S.E.2d 45, 46 (1970). If J&M is correct that it was not served with the Airport Authority's summons and complaint, then the trial court in that action lacked jurisdiction over J&M and the default judgment is void. Our courts have repeatedly held that "because a void judgment is a legal nullity, it may be attacked at any time." *Freeman v. Freeman*, 155 N.C. App. 603, 606, 573 S.E.2d 708, 711 (2002), *disc. review denied*, 357 N.C. 250, 582 S.E.2d 32 (2003). *See also Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 689, 567 S.E.2d 179, 184 (2002) (when orders were entered without personal jurisdiction over defendants, they were void and could be attacked at any time). J&M was, therefore, entitled to move under Rule 60(b)(4) "at any time" to set aside the default judgment on the grounds of lack of service. The trial court erred in concluding that J&M was dilatory and the Rule 60(b)(4) claim untimely.

Rebuttal of the Presumption of Service

The trial court also concluded that dismissal was justified because "[t]he record demonstrates no evidence other than a denial of service by the entity subject to the Default Judgment. Therefore, the evidence presented by J & M fails to overcome the presumption of valid service by failure to provide any independent evidence that service was not made." I believe that this assertion—a mixed statement of fact and law—is neither supported by competent evidence nor a correct application of the law.

The trial court correctly noted that the affidavit of the Airport Authority's counsel in the original action was sufficient to raise a presumption of valid service:

> Under N.C.G.S. § 1A-1, Rule 4(j2)(2) (2001), a party who seeks a default judgment "shall file an affidavit with the court showing proof of such service in accordance with the requirements of G.S. [§] 1-75.10(4)[.]" Rule 4(j2)(2) further provides that the affidavit, when accompanied by the postal delivery receipt signed by the person who received the summons, "raises a presumption that the person who received the mail . . . and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process[.]" Regarding this provision, this Court has long held that the provision in [Rule 4(j2)] . . . contemplates merely that the registered or certified mail be delivered to the address of the party to be served

> and that a person of reasonable age and discretion receive the mail and sign the return receipt on behalf of the addressee. *A showing on the face of the record of compliance with the statute providing for service of process raises a rebuttable presumption of valid service.*

Granville Med. Ctr. v. Tipton, 160 N.C. App. 484, 490-91, 586 S.E.2d 791, 796 (2003) (emphasis added; internal quotation marks omitted). Here, the Airport Authority attempted to serve J&M by certified mail, return receipt requested, and its counsel filed an affidavit including the information required by N.C. Gen. Stat. § 1-75.10(4) (2003) (setting forth the method for proof of service) and attaching the return receipt indicating delivery to J&M's address. This evidence was sufficient to raise a rebuttable presumption of valid service.

The question before the trial court was whether J&M produced evidence to rebut that presumption. In *Granville*, cited by the Airport Authority, this Court held that

> a defendant who seeks to rebut the presumption of regular service generally must present evidence that service of process failed to accomplish its goal of providing defendant with notice of the suit, rather than simply questioning the identity, role, or authority of the person who signed for delivery of the summons.

160 N.C. App. at 493, 586 S.E.2d at 797. The Court found the defendant's affidavit inadequate because it only alleged that the defendant had not employed a person with the same name as the person who signed the receipt, and "[c]onspicuously *absent* from defendant's affidavit is any allegation that he did not receive the summons, or did not receive notice of the suit." *Id.* at 493-94, 586 S.E.2d at 798.

In this case, the trial court inexplicably stated that the record contained no evidence other than a denial of service. In fact, J&M produced substantial evidence that it was not served. Its complaint was verified and asserts that the Airport Authority's "summons and complaint was never received by Judy Perry, Deryl Perry, or any agent or employee of J&M." In addition, J&M submitted the affidavits of each of its employees at the time of the purported service, including Deryl Perry (the president and sole shareholder of J&M), Judy Perry (the secretary and registered agent for J&M), employee David Perry, employee James Lane, and employee Robert Perry. Deryl Perry's affidavit establishes that J&M had no other employees during the pertinent time frame.

Each of the employees states that he or she did not receive the summons and complaint that was supposedly served. According to the affidavits, only Deryl and Judy Perry were allowed to sign for delivery of papers on behalf of J&M, and, in October 2001, the other employees would not have been working in the office and, therefore, would not have been available to sign for the delivery of any papers. Each affiant also states that he or she does not recognize the signature of the person who signed the return receipt and cannot identify the name on the receipt. Deryl Perry also filed a second affidavit that stated: "I did not receive a copy of the summons and complaint in the Johnston County lawsuit filed by the Johnston County Airport Authority . . . against J&M of which I am now aware the file number is 01 CVS 2306 . . . at any time in September, October or November 2001. No other employee or agent of J&M received a copy of the summons and complaint filed in the prior North Carolina action during this time."

Given the illegibility of the signature on the receipt, it is difficult to conceive of what additional evidence J&M could have produced to rebut the presumption. Through affidavits, it identified all of its employees, established that none of them signed the receipt or received the summons and complaint, and confirmed that J&M could not identify who signed the receipt. Since a court could reasonably conclude based on J&M's evidence that it was not served with the summons and complaint, that evidence was sufficient to rebut the presumption of service. *See* N.C. Gen. Stat. § 8C-1, Rule 301 (2003) (a party rebuts a presumption "by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist"). *See also In re Williams*, 149 N.C. App. 951, 959, 563 S.E.2d 202, 206 (2002) ("Respondent did not rebut this presumption by showing he never received the summons and complaint."); *Poole v. Hanover Brook, Inc.*, 34 N.C. App. 550, 555, 239 S.E.2d 479, 482 (1977) ("Defendant did not attempt to rebut this presumption by showing that he did not receive copies of the summons and complaint."), *disc. review denied*, 294 N.C. 183, 241 S.E.2d 518 (1978).

The trial court, however, found that J&M in fact admitted receiving the complaint:

> The Brief [in the Georgia action] included an admission that the Complaint was delivered but not delivered to the registered agent nor served by personal service. The Brief contained the following language: "Sometime in 2000 a person other than

> the agent for service as the Defendant received a certified letter at his residence. This letter was not addressed to the proper corporate agent and was not received by the corporate agent for service, merely *the letter was* simply *delivered.* [Emphasis added.] At no time did the Sheriff or Marshall or a certified recognized server deliver said service and process upon the Defendant."

(Emphasis original in trial court's order) Although it is unclear what J&M's Georgia counsel meant in the brief, this statement could not be an admission that J&M received the filed complaint. As the trial court's order acknowledges, the Airport Authority's complaint was filed on 1 September 2001. The summons would have been issued at the same time. The "letter" referenced in the brief was received "[s]ometime in 2000." That "letter" could not, therefore, have been the filed complaint and could not have included the summons as signed by the Clerk of Court. Whatever was included in "the letter" cannot support a finding of service. *Thomas & Howard Co. v. Trimark Catastrophe Servs., Inc.*, 151 N.C. App. 88, 91, 564 S.E.2d 569, 572 (2002) (mailing of summons and complaint prior to documents having been filed or signed by the Clerk of Court was not effective service). The trial court's finding that J&M in fact received the complaint is not supported by evidence.

In support of its conclusion that J&M has failed to rebut the presumption of valid service, the trial court relied upon *Steffey v. Mazza Constr. Group, Inc.*, 113 N.C. App. 538, 439 S.E.2d 241 (1994), *disc. review improvidently allowed*, 339 N.C. 734, 455 S.E.2d 155 (1995). *Steffey* did not, however, address the question before either the trial court or this Court. It considered only whether the plaintiff had met the requirements of Rule 4 sufficiently to give rise to the presumption of service in the first place. In *Steffey*, 113 N.C. App. at 540-41, 439 S.E.2d at 243, this Court rejected the City of Burlington's argument that service on a city is not valid under Rule 4 unless the mayor or city manager personally signs the return receipt. There was no contention in *Steffey* that the City had not received the summons and complaint; the City in fact timely moved to dismiss for insufficient service of process.

I would, therefore, hold that the trial court erred in concluding that J&M failed to rebut the presumption of service. Upon J&M's rebutting the presumption, the trial court was required to determine, based on all the evidence, whether J&M was in fact served with the Airport Authority's summons and complaint. *Cf.* N.C. Gen.

Stat. § 8C-1, Rule 301 ("When the burden of producing evidence to meet a presumption is satisfied, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact.").

In deciding that J&M had failed to rebut the presumption of service, the trial court did not consider all of the evidence, such as the affidavits. On a Rule 60(b)(4) motion, "[i]f there is 'competent evidence of record on both sides' of the Rule 60(b) motion, it is the duty of the trial court to evaluate such evidence . . . ." *Blankenship v. Town & Country Ford, Inc.*, 155 N.C. App. 161, 165, 574 S.E.2d 132, 134 (2002) (quoting *Sawyer v. Goodman*, 63 N.C. App. 191, 193, 303 S.E.2d 632, 634, *disc. review denied*, 309 N.C. 823, 310 S.E.2d 352 (1983)), *disc. review denied*, 357 N.C. 61, 579 S.E.2d 384 (2003).

The Airport Authority's affidavit of service is not conclusive, but rather must be weighed against J&M's affidavits and any other evidence presented by the parties. We observe that the affidavit of service asserts that J&M "was served through an agent of its Registered Agent," but the record does not currently contain any indication that the affiant has personal knowledge that the person who signed the receipt was an agent of Judy Perry, J&M's Registered Agent.[1] Because, however, the Airport Authority filed a motion to dismiss and relied upon only the presumption of service, it has not had an opportunity to produce evidence that service was valid. Upon remand, the trial court has the responsibility of determining the credibility of the witnesses and the weight of the evidence. *Blair Auto Co.*, 7 N.C. App. at 569, 173 S.E.2d at 46 (with respect to a motion to set aside a default judgment for lack of service, "[t]he credibility of the witnesses and the weight of the evidence was for determination by the trial judge in discharging his duty to find the facts").

Preliminary Injunction

With respect to the preliminary injunction, I agree with the majority that J&M has failed to demonstrate irreparable injury, but I reach this conclusion for different reasons. The majority opinion concludes that J&M failed to demonstrate irreparable harm because the Georgia execution proceedings were stayed pending the outcome of this case.

1. By way of comparison, in *Lemon v. Combs*, 164 N.C. App. 615, 596 S.E.2d 344, 346 (2004), the plaintiff presented not only the deputy sheriff's return of service (necessarily based on personal knowledge) attesting that he had personally served Sean Combs, but also submitted affidavits of the deputy sheriff and two other witnesses to the service.

I read the Georgia order differently. The order stays enforcement of the North Carolina judgment "until such time as all available appeals or actions in North Carolina are concluded or until the stay is terminated by another provision of this Order." A subsequent paragraph of the order provides (emphasis added): "The stay provided herein shall terminate and the other provisions hereof shall take effect upon the unsuccessful conclusion of the appeal or action to set aside in North Carolina *or the expiration or vacation of the stay in the North Carolina court . . . .*" The trial court's order in this case terminates the temporary restraining order and "orders that any and all stays of the Georgia action are hereby terminated and vacated." Subsequently, the trial court denied J&M's motion for a stay pending appeal and this Court denied the petition for writ of supersedeas. Because the stay in Georgia was contingent on an injunction here, I do not believe that the Georgia stay demonstrates a lack of irreparable harm.

It is, however, well established that:

> [t]he applicant for a preliminary injunction has the burden of proving the probability of substantial injury to the applicant if the activity of which it complains continues to the final determination of the action. It is not enough that a plaintiff merely allege irreparable injury. Rather, "[t]he applicant is required to set out with particularity facts supporting such statements so the court can decide for itself if irreparable injury will occur."

Town of Knightdale v. Vaughn, 95 N.C. App. 649, 651, 383 S.E.2d 460, 461 (1989) (internal citation omitted; quoting *United Tel. Co. of Carolina, Inc. v. Universal Plastics, Inc.*, 287 N.C. 232, 236, 214 S.E.2d 49, 52 (1975)). In this case, J&M bases its claim of irreparable injury solely on an allegation in the verified complaint that J&M would suffer "immediate and irreparable harm in the form of loss of property, damage to credit ratings and damage to the plaintiff's earning capacity." This allegation, even though verified, does not provide the particularity necessary to support a finding of irreparable injury. I, therefore, agree that the trial court properly denied the motion for a preliminary injunction.

STATE OF NORTH CAROLINA v. HARRY LEE FULLER

No. COA03-1555

(Filed 19 October 2004)

1. **Rape— second-degree—eleven-year-old victim—testimony sufficient**

There was no error in the denial of a motion to dismiss a second-degree rape prosecution where the eleven-year-old victim testified that defendant had put his "private" inside her "private" four to eight times.

2. **Rape— first-degree statutory—evidence sufficient**

There was no error in denying a motion to dismiss a first-degree statutory rape prosecution where there was evidence that defendant was more than four years older than the eleven-year-old victim and the child testified to penetration.

3. **Appeal and Error— constitutional claim—not raised at trial**

A claim of double jeopardy in a prosecution for first-degree statutory rape and second-degree forcible rape was not considered on appeal because it was not raised at trial.

4. **Sexual Offenses— with child—evidence sufficient**

The denial of a motion to dismiss a prosecution for first-degree sexual offense with a child was not error where the child testified that defendant forced fellatio.

5. **Indecent Liberties— child's testimony—sufficient**

The trial court did not err by denying a defendant's motion to dismiss an indecent liberties prosecution where the child's testimony was sufficient for the jury to infer that defendant acted to arouse or gratify sexual desire.

6. **Confessions and Incriminating Statements— statements by defendant—no Miranda warning—not yet arrested**

Statements made by defendant to a deputy while receiving treatment for an unrelated injury at a hospital were properly admitted in a prosecution for first-degree statutory rape and other offenses. The deputy did not inform defendant of his Miranda rights, but did tell him that he was not under arrest, was free to leave, and did not have to speak with him, and defendant was not in fact arrested until days later. Defendant had not been

indicted, an arrest warranted had not been issued, and *Fellers v. United States*, 540 U.S. —— (2004) is not controlling.

7. Evidence— letters from jail—no reasonable expectation of privacy

Letters defendant wrote to his wife from jail were properly admitted in a prosecution for first-degree statutory rape and other offenses. The letters were not marked "legal" or addressed to an attorney and were given to jail personnel to mail. There was no reasonable expectation of privacy.

8. Evidence— marital privilege—letters from jail

Letters sent by an incarcerated defendant to his wife that were seized by law enforcement officers were admissible despite defendant's claim of marital privilege. A third person who overhears a conversation between husband and wife may be examined as to that conversation, and confidential letters from husband to wife are admissible against the husband when brought into court by a third party.

9. Appeal and Error— assignments of error—authority not presented—testimony not specifically identified—review waived

Defendant waived appellate review of whether certain of his statements to a deputy should have been admitted by not presenting authority to support his assignment of error and by not specifically identifying those portions of testimony at issue. Moreover, defendant's statements were corroborated by other evidence.

10. Witnesses— expert—sexual assault nurse examiner

The trial court did not abuse its discretion in a prosecution for statutory rape and other offenses by allowing a nurse to testify as an expert sexual assault nurse examiner where she had been employed by the hospital for nineteen years; had served as a nurse manager in the emergency department for two years; had a bachelor of science in nursing and had received special sexual assault nurse examiner training in 1999; that training involved forty hours in the classroom and fifty-six hours of clinical practice; the witness was specifically trained to examine the victim's demeanor and body language as well as to look for physical evidence and signs of trauma; and the witness had been a certified sexual assault nurse examiner for three years at the time of trial.

11. Evidence— sexual offenses—medical testimony—injuries consistent with assault

The trial court did not err in a prosecution for statutory rape and other offenses by permitting a doctor and a nurse who were qualified as experts to testify about whether their examinations and findings were consistent with a child who had suffered kissing on the breast and vaginal penetration.

12. Sexual Offenses— first-degree statutory sexual offense—instruction on attempt denied—evidence not sufficient

The trial court did not err in a prosecution for first-degree statutory sexual offense by not giving an instruction on the lesser-included offense of attempted first-degree sexual offense. Although defendant testified that he attempted vaginal intercourse (but failed due to a back spasm), no evidence was presented that defendant attempted to engage in the sexual acts required for first-degree sexual offense.

Appeal by defendant from judgments entered 22 August 2003 by Judge Clarence E. Horton, Jr., in Stanly County Superior Court. Heard in the Court of Appeals 15 September 2004.

Attorney General Roy Cooper, by Assistant Attorney General R. Kirk Randleman, for the State.

Carlton, Rhodes & Carlton, by Gary C. Rhodes, for defendant-appellant.

TYSON, Judge.

Harry Lee Fuller ("defendant") appeals from judgments entered after a jury found him to be guilty of second-degree forcible rape, first-degree statutory rape, first-degree statutory sexual offense, and three counts of indecent liberties with a minor. We find no error.

I. Background

The State's evidence tended to show that on 30 June 2002, eleven-year-old P.E. ("the child") was visiting with B.F., defendant's daughter. Around 8:00 or 9:00 p.m., defendant, B.F., and the child were riding in defendant's car. Defendant asked B.F. to take the steering wheel, and he turned towards the child in the back seat and kissed her on the mouth. The child testified she felt defendant's tongue in her mouth. B.F. corroborated this portion of the child's testimony.

The three continued to ride around for about an hour and stopped by Sonic Drive-In for a milkshake before returning to defendant's home. After returning to defendant's residence, B.F. and defendant sat on couches and watched television. The child went to B.F.'s room and laid down.

About ten minutes later, defendant entered the bedroom, lifted the child's shirt, removed her panties, and began kissing her chest. While on top of her, defendant inserted his penis into her vagina "four to eight" times. Defendant also asked the child to perform oral sex on him. After the child performed oral sex, defendant inserted his finger into the child's vagina for "not even five minutes." Defendant also kissed the child on her "private" with his mouth.

Defendant left the room and returned with a washcloth. He used the washcloth to "wipe[] something off the bed." The child did not go to sleep that night and left around 6:00 or 7:00 a.m. the next morning. She took the church bus to Sunday school and told her friend, M.E., what had happened at defendant's house. M.E. testified and corroborated the child's testimony.

When the child returned home after church, she told her mother what had happened at defendant's house. The child's mother immediately transported the child to the hospital, where she was examined. Both Dr. Ann Alexander ("Dr. Alexander"), an Emergency Room Physician, and Gina Smith ("Nurse Smith"), a sexual assault nurse examiner, testified as expert witnesses that abrasions noted on the child's genitalia were consistent with vaginal penetration and that the redness noted on her breast was consistent with having been kissed on the breast.

Stanly County Sheriff's Deputy James Inman ("Deputy Inman") responded to the hospital where the child was being examined. He testified that he spoke with the child's mother regarding the accusations and identified defendant as a suspect. Deputy Inman did not question the child. Deputy Inman also became aware that defendant was present at the hospital for unrelated treatment for pain from an injury he obtained while riding a horse. Deputy Inman spoke with defendant, informed him that he was not under arrest, and told him that if defendant wanted him to leave, no further questions would be asked. Defendant told Deputy Inman that the child had rubbed his back and neck in a suggestive way while in the car. Upon returning home, he fell asleep on the sofa with his daughter and sometime during the night, he went to the bedroom to check on the

child. While at the hospital, defendant agreed to submit to a "suspect kit" for DNA testing.

Stanly County Sheriff's Detective Sergeant Clyde Coley ("Detective Coley") testified that he spoke with the child and her mother at their residence on 1 July 2002. Detective Coley testified to the child's accusations, which were consistent with her testimony. On 2 July 2002, warrants were issued for defendant, who was arrested and placed in Stanly County Jail. On 5 July 2002, Stanly County Sheriff's Deputy Marcus Clack ("Deputy Clack") was transporting defendant to the "change-out room" in the Stanly County Jail, where defendant was placed on suicide watch and given a "suicide robe."

In the "change-out room," defendant began to cry and stated he had smoked marijuana and taken Percocet during the day and in the evening when the incident occurred. Defendant also stated the child had approached him while he was on the couch. Defendant stated he was "partially out of it" and began to interact with the child. Defendant could not remember whether penetration occurred and stated he was confused of whom he was touching. Once he realized it was the child, "he pushed her away and said something to the effect that she'd better get out of here or leave before they both got in trouble." After making these statements, defendant requested to speak with Detective Coley.

Deputy Clack telephoned Detective Coley and informed him that defendant wanted to speak to him. Detective Coley told Deputy Clack that defendant had appointed counsel and defendant would need to provide written notification that he wanted to speak with Detective Coley. Deputy Clack called again a short time later and informed Detective Coley that defendant had prepared and signed a written statement, which stated, "I, Harry Fuller, waive right to legal counsel and can talk to Detective Coley."

Detective Coley went to the jail, informed defendant he had an attorney appointed, and that he was making a request to discuss these matters without the presence of his attorney. Defendant responded that he still wanted to talk with Detective Coley, signed a statement acknowledging the waiver of his rights, and stated he had some things he wanted to "get off his chest." Detective Coley noted these comments on a piece of paper where he later wrote defendant's statement and also noted the comments on the bottom portion of the *Miranda* rights form. After advising defendant he was represented by counsel and understood that he was

waiving that right, Detective Coley read defendant his *Miranda* rights and recorded his statement.

Defendant testified at trial. He stated, "I was up against the steering wheel trying to look at my daughter to speak to her. And it was as dump [sic] a thing to do, I see now. At the time I thought, well, I just—she repeated, but she did not—she reacted to it . . . [by] purs[ing] her lips and kissed." He testified he was asleep on the couch and awoke to find the child "setting [sic] on the corner of the couch barely perched and she was playing with my penis . . . ." He pushed her to the floor and told her to "get out of here . . . if my wife would have walked in on it, would have looked bad on both of us." He "passed right back out" due to the amount of Percocet in his system and slept until around 8:00 a.m. the next morning.

The jury found defendant to be guilty of all charges. The trial court entered judgment sentencing defendant to a minimum of 336 months to 413 months for the crimes of first-degree sex offense with a child, second-degree rape, first-degree rape of a child, and three counts of taking indecent liberties with a child. Defendant appeals.

II. Issues

The issues on appeal are whether the trial court erred by: (1) denying defendant's motions to dismiss; (2) allowing into evidence statements made by defendant while he was at Stanly County Hospital; (3) allowing the State to introduce and cross-examine defendant regarding intercepted letters he wrote to his wife while in jail; (4) allowing the State to offer evidence of defendant's "spontaneous" statement to detention officers while in custody and represented by counsel; (5) allowing Nurse Smith to be qualified as an expert and permitting her testimony of whether her examination was consistent with someone who had been sexually assaulted; (6) allowing Dr. Alexander to testify to whether her findings were consistent with someone who had been sexually assaulted; (7) allowing the child to testify that nothing "like this had ever happened to [her] before;" and (8) denying defendant's request for jury instructions on the lesser-included offense of attempt.

III. Motions to Dismiss

Defendant contends the trial court erred in denying his motions to dismiss made at the close of the State's evidence and again at the close of all evidence. Defendant offered evidence following presentation of the State's case, which precludes our review of the motion to

dismiss made at the close of the State's evidence. N.C.R. App. P. 3(b)(3) (2004). Our review is limited to a consideration of whether the trial court properly denied defendant's motion to dismiss made at the close of all evidence.

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.*

> If there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court's duty to submit the case to the jury. When the State's evidence is conflicting—some tending to incriminate and some to exculpate the defendant—it is sufficient to repel a motion for judgment of nonsuit, and must be submitted to the jury.

State v. Horner, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958) (citations omitted).

A. Second-Degree Rape

[1] "Second[-]degree rape is vaginal intercourse by force and against the will of the victim." *State v. Morrison*, 85 N.C. App. 511, 515, 355 S.E.2d 182, 185 (citing N.C. Gen. Stat. § 14-27.3(a)(1); *State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981)), *appeal dismissed and disc. rev. denied*, 320 N.C. 796, 361 S.E.2d 84 (1987). "The force required to constitute rape must be actual or constructive force used to achieve the sexual intercourse. Either is sufficient." *Morrison*, 85 N.C. App. at 515-16, 355 S.E.2d at 185 (citing *State v. Alston*, 310 N.C. 399, 312 S.E.2d 470 (1984)). "The use of force may be established by evidence that submission was induced by fear, duress or coercion." *State v. Midyette*, 87 N.C. App. 199, 201, 360 S.E.2d 507, 508 (1987) (citing *State v. Yancey*, 291 N.C. 656, 231 S.E.2d 637 (1977)), *aff'd*, 322 N.C. 108, 366 S.E.2d 440 (1988).

The child testified that defendant had "put his private inside of [her] private" between "four to eight" times. The child testified she was "scared" and "tried to push him off." This testimony is sufficient evidence for the jury to decide whether defendant forcibly engaged in

vaginal intercourse with the child against her will. This assignment of error is overruled.

B. First-Degree Statutory Rape

[2] To convict defendant of first-degree statutory rape, "the State had to prove that he engaged in vaginal intercourse with a victim under the age of thirteen years, when he was at least twelve years old and at least four years older than the victim." *State v. Degree*, 322 N.C. 302, 308, 367 S.E.2d 679, 683 (1988) (citing N.C. Gen. Stat. § 14-27.2(a)(1)).

Here, evidence was presented to show defendant was more than four years older than the eleven-year-old child. The child testified defendant "put his private inside of [her] private" between "four to eight" times. Nurse Smith also testified that during her examination of the child, the child informed Nurse Smith that defendant had penetrated her vagina with his penis "for four to eight times." This is sufficient evidence for the jury to determine whether defendant "engaged in vaginal intercourse." *Degree*, 322 N.C. at 308, 367 S.E.2d at 683. The trial court did not err in denying defendant's motion to dismiss for insufficiency of the evidence. This assignment of error is overruled.

[3] Defendant argues he cannot be prosecuted for both first-degree statutory rape and second-degree forcible rape. Defendant's double jeopardy issue and constitutional question was not raised at the trial court during his motion to dismiss. Further, defendant moved to dismiss "based on insufficiency of the evidence" and did not raise the issue during the jury charge conference, move to set aside the verdict or for a new trial, or request the court to arrest judgment on either charge because of double jeopardy issues.

Our appellate courts have long recognized that "we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." *State v. Jones*, 242 N.C. 563, 89 S.E.2d 129, 130 (1955). Since this argument was not raised before the trial court, this assignment of error is dismissed. *See Anderson v. Assimos*, 356 N.C. 415, 572 S.E.2d 101 (2002).

C. First-Degree Sexual Offense with a Child

[4] To sustain a motion to dismiss an indictment for first-degree sexual offense with a child, the evidence must show:

> (1) the defendant engaged in a "sexual act," (2) the victim was at the time of the act [thirteen] years old or less, and (3) the defendant was at that time four or more years older than the victim. G.S. 14-27.4. A "sexual act" is defined as "cunnilingus, fellatio, analingus, or anal intercourse . . . [or] the penetration, however slight, by any object into the genital or anal opening of another's body . . . [except for] accepted medical purposes."

State v. Ludlum, 303 N.C. 666, 667, 281 S.E.2d 159, 160 (1981) (quoting N.C. Gen. Stat. § 14-27.1(4)). Here, the child testified "[defendant] made me suck his private" with her mouth. Although defendant denied this accusation, the child's testimony presents more than a "scintilla of competent evidence" to allow the jury, as fact finder, to determine whether defendant was guilty of engaging in the sexual act of fellatio with the child. *Horner*, 248 N.C. at 344-45, 103 S.E.2d at 696. This assignment of error is overruled.

D. Indecent Liberties with a Child

[5] In order to obtain a conviction for taking indecent liberties with a minor, the State must prove:

> (1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.

State v. Rhodes, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987) (citing *State v. Hicks*, 79 N.C. App. 599, 339 S.E.2d 806 (1986)); *see also* N.C. Gen. Stat. § 14-202.1 (2003). "The fifth element, that the action was for the purpose of arousing or gratifying sexual desire, may be inferred from the evidence of the defendant's actions." *Rhodes*, 321 N.C. at 105, 361 S.E.2d at 580. "The uncorroborated testimony of the victim is sufficient to convict under N.C.G.S. § 14-202.1 if the testimony establishes all of the elements of the offense." *State v. Quarg*, 334 N.C. 92, 100, 431 S.E.2d 1, 5 (1993) (citing *State v. Vehaun*, 34 N.C. App. 700, 705, 239 S.E.2d 705, 709 (1977), *cert. denied*, 294 N.C. 445, 241 S.E.2d 846 (1978)).

Defendant was charged with three counts of taking indecent liberties with a minor. The evidence establishes the victim was an eleven-year-old child at the time of the incident and defendant was forty years old at the time of trial. The child testified that defendant:

(1) lifted her shirt and kissed her breasts; (2) kissed her "private" area with his lips; and (3) penetrated her vagina with his fingers. Following these acts, defendant obtained a washcloth from the bathroom and "wiped something off the bed." These actions are sufficient for the jury to infer that defendant's actions were "for the purpose of arousing or gratifying sexual desire." *Rhodes*, 321 N.C. at 105, 361 S.E.2d at 580.

Sufficient evidence was presented to support the elements of three charges of taking indecent liberties with a minor. The trial court did not err in denying defendant's motion to dismiss. This assignment of error is overruled.

IV. Statements at the Hospital

[6] Defendant contends the trial court erred in admitting into evidence statements he made to Deputy Inman. We disagree.

In *State v. Thomas*, this Court considered the question of whether "the interrogation in the emergency room was a custodial interrogation and that the defendant should have been apprised of his fifth and sixth amendment rights as vouchsafed by *Miranda v. Arizona*, 384 U.S. 436 (1966)." 22 N.C. App. 206, 208, 206 S.E.2d 390, 392, *appeal dismissed*, 285 N.C. 763, 209 S.E.2d 287 (1974). In *Thomas*, the trial court found defendant was "free to go at his pleasure;" the officers had "no intentions of arresting the defendant for any crime;" and the defendant "was coherent in thought and speech . . . [and] not noticeably sedated or under the influence of any alcohol or narcotic drugs . . . ." *Id.* at 210, 206 S.E.2d at 392. We held no "custodial interrogation" occurred because "the atmosphere and physical surroundings during the questioning manifest a lack of restraint or compulsion." *Id.* at 211, 206 S.E.2d at 393.

Deputy Inman failed to provide defendant with his *Miranda* rights prior to speaking with him at the hospital. However, on *voir dire*, Deputy Inman testified that he informed defendant he was not under arrest, was free to leave, and did not have to speak with him. Defendant was not arrested until several days later. The trial court found defendant was not in custody or under arrest at the hospital to require a *Miranda* warning.

Defendant's brief concedes, "Obviously, it cannot be contended that Defendant was in 'custody' at the hospital." Defendant cites no authority to support his assertion that his statements made at the hospital were erroneously admitted other than our United States

Supreme Court's recent holding in *Fellers v. United States*, 540 U.S. 519, 157 L. Ed. 2d 1016 (2004). In *Fellers*, law enforcement officers went to the defendant's home to discuss his involvement in methamphetamine distribution. 540 U.S. at 521, 157 L. Ed. 2d at 1021. At the time of the discussions, the officers possessed a warrant and a grand jury had indicted the defendant. *Id.*

Here, Deputy Inman had identified defendant as a suspect. However, defendant had not been indicted by a grand jury, and no warrant for arrest had been issued. *Fellers* is not controlling precedent for this portion of defendant's argument. Defendant was told he was not under arrest, was free to leave, and did not have to speak with the officers. Defendant also concedes the conversation was not a custodial interrogation. Defendant's argument is without merit. This assignment of error is overruled.

V. Letters from Jail

[7] Defendant argues the trial court erred in admitting into evidence derogatory statements about the child contained in letters he wrote to his wife while in jail, which were seized by law enforcement officers. We disagree.

In *State v. Wiley*, our Supreme Court reviewed the issue of the constitutional "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." 355 N.C. 592, 602, 565 S.E.2d 22, 32 (2002) (citing U.S. Const. amend. IV; *see also* N.C. Const. art. I, §§ 18, 19, 23), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). Specifically in *Wiley*, the Court considered "whether defendant [a prisoner] had an expectation of privacy in a letter, handed to jail personnel, contained in an unsealed envelope not marked with the words 'legal' and not addressed to an attorney." 355 N.C. at 603, 565 S.E.2d at 32. The Court held, "defendant did not hold a subjective expectation of privacy in the unsealed envelope he delivered to [the deputy], and even if he did, this expectation was not objectively reasonable." *Id.*

We find *Wiley* to be controlling and dispositive on this issue. The letters seized by jail personnel were not marked "legal," were given to jail personnel to be mailed with the outgoing mail, and were not addressed to an attorney.

[8] Defendant also argues the letters should not have been admitted because they contained marital communications. In *State v. Wallace*, our Supreme Court held the marital privilege "is personal to the par-

ties; a third person who happened to overhear a confidential conversation between husband and wife may be examined as to such conversation. A letter, also, written confidentially by husband to wife is admissible against the husband, when brought into court by a third party." 162 N.C. 623, 630, 78 S.E. 1, 12 (1913) (quoting Whar. Cr. Ev., sec. 398). The trial court did not err by admitting into evidence defendant's letters addressed to, but not delivered to his wife, written while he was incarcerated in the Stanly County Jail. This assignment of error is overruled.

VI. Spontaneous Statements to Law Enforcement Officers

[9] Defendant contends the trial court erred in admitting his statements to Deputy Clack after defendant visited with the jail nurse. We disagree.

Defendant argues that his statements were not knowingly or understandably made. Defendant failed to present any authority in support of this assignment of error and has waived appellate review. N.C.R. App. P. 10 (2004). Further, his brief fails to specifically identify those portions of testimony that were erroneously admitted.

Were we to find the trial court erred in allowing Deputy Clack to testify regarding defendant's statements, defendant's own testimony corroborated his statements to Deputy Clack. Additionally, defendant has not assigned error to the admission of his signed statement taken by Detective Coley, which were recorded after he received *Miranda* warnings and waived his right to counsel. This statement also corroborates the statements defendant made to Deputy Clack. This assignment of error is overruled.

VII. Expert Testimony

Defendant contends the trial court erred in allowing Nurse Smith, the examining nurse, to be qualified as an expert witness and also erred by allowing her testimony that her examination of the child presented conditions consistent with vaginal penetration. Defendant also argues the trial court erred in allowing Dr. Alexander to testify regarding whether the child's demeanor and injuries were consistent with someone who had been sexually assaulted.

A. Qualification

[10] Defendant argues Nurse Smith was not qualified to testify as an expert. In *Howerton v. Arai Helmet, Ltd.*, our Supreme Court reiter-

ated North Carolina's "three-step inquiry for evaluating the admissibility of expert testimony," set forth in *State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-41 (1995): "(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?" 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (internal citations omitted).

> It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. N.C.G.S. § 8C-1, Rule 104(a) (2003). When making such determinations, trial courts are not bound by the rules of evidence. *Id.* In this capacity, trial courts are afforded "wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion.

Id. (citations omitted).

Defendant does not challenge the first and third steps of *Goode*, but argues Nurse Smith was not qualified to testify as an expert. "The essential question in determining the admissibility of opinion evidence is whether the witness, through study and experience, has acquired such skill that he is better qualified than the jury to form an opinion as to the subject matter to which his testimony applies." *State v. Phifer*, 290 N.C. 203, 213, 225 S.E.2d 786, 793 (1976) (citations omitted), *cert. denied*, 429 U.S. 1050, 50 L. Ed. 2d 766 (1967).

Nurse Smith testified she had been employed at Stanly Memorial Hospital for nineteen years and had served as nurse manager in the emergency department for the two years prior to her testimony. She had a Bachelor of Science in nursing from the University of North Carolina at Pembroke and had additionally received special "sexual assault nurse examiner training" ("SANE") in 1999. As part of the SANE program, she spent forty hours in the classroom and completed fifty-six hours of clinical practice with law enforcement, rape crisis centers, and with victim assistance personnel. Nurse Smith testified she was specifically trained to examine "the victim's demeanor, how they're responding, their body language, their gestures and the things they say. And . . . also trained to look for physical evidence and signs

of trauma." At the time of trial, Nurse Smith had been a certified sexual assault nurse examiner for three years and had conducted several pelvic exams with sexual assault evidence collection kits. Nurse Smith was tendered and allowed to testify as an expert in "that specialized area as a sexual assault nurse examiner."

The trial court did not abuse its discretion in allowing Nurse Smith to testify as an expert in the area of a sexual assault nurse examiner. This assignment of error is overruled.

B. "Consistent With" Testimony

[11] Defendant asserts the trial court erred in allowing Nurse Smith to testify that the "excoriations" on the child's "labia majora" and that the redness of her breast were "consistent with vaginal penetration" and consistent with the child's statements that defendant had kissed her on her breast. Defendant also contends the trial court erred in allowing Dr. Alexander to testify that the child's injuries "were consistent with . . . penetration injury."

"It is undisputed that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified." *State v. Bullard*, 312 N.C. 129, 139, 322 S.E.2d 370, 376 (1984) (citing *Cogdill v. Highway Commission*, 279 N.C. 313, 182 S.E.2d 373 (1971)). Our Supreme Court clearly recognizes that "an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002). "The fact that this evidence may support the credibility of the victim does not alone render it inadmissible. Most testimony, expert or otherwise, tends to support the credibility of some witness." *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 367 (1987). "Furthermore, expert opinion on an ultimate issue is admissible." *Id.* at 31, 357 S.E.2d at 366 (citing N.C.R. Evid. 704).

Defendant does not assign error to the trial court's qualification of Dr. Alexander as an expert. We previously held the trial court did not abuse its discretion in qualifying Nurse Smith as an expert. Based on their qualifications, Nurse Smith and Dr. Alexander were permitted to testify regarding whether their examinations and findings were consistent with a child who had suffered vaginal penetration and kissing on the breast. This assignment of error is overruled.

VIII. Jury Instructions

[12] Defendant argues the trial court erred by failing to instruct the jury on the lesser-included offense of attempted first-degree sexual offense. We disagree.

"[A] defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support it," *State v. Johnson*, 317 N.C. 193, 205, 344 S.E.2d 775, 782 (1986), and where " 'the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.' " *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (quoting *Keeble v. United States*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847 (1973)). If the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense, and no evidence negates these elements other than the defendant's denial that he committed the offense, the defendant is not entitled to an instruction on a lesser offense. *Leazer*, 353 N.C. at 237, 539 S.E.2d at 925.

Here, defendant testified that while sleeping on the sofa, he awoke because someone was fondling his penis. He moved toward the person, but suffered a spasm in his spine that prevented him from completing any sexual contact. Defendant requested jury instructions on attempted first-degree rape, attempted first-degree sexual offense, and attempted second-degree rape. The trial court denied defendant's request for instructions on attempted first-degree sexual assault. The transcript and verdict sheets show the trial court instructed on and the jury considered the charges of attempted second-degree rape and attempted first-degree statutory rape.

The elements for first-degree sexual assault require the State to establish the defendant engaged in a "sexual act," such as "cunnilingus, fellatio, analingus, or anal intercourse . . . [or] the penetration, however slight, by any object into the genital or anal opening of another's body . . . [except for] accepted medical purposes." N.C. Gen. Stat. § 14-27.1(4). Although defendant testified he attempted vaginal intercourse with the person "fondling" him on the couch, which sustains an instruction on attempted second-degree rape and attempted first-degree statutory rape, no evidence was presented that defendant "attempted" to engage in a "sexual act." Defendant's testimony only asserts the events described above, and he denies any of the other acts of which he was convicted. Defendant fails to identify any testimony or evidence to support an instruction on attempted first-degree sexual offense. This assignment of error is overruled.

IX. Conclusion

The trial court did not err in denying defendant's motion to dismiss. Substantial evidence of each element was presented for all offenses charged. The trial court did not err in admitting defendant's statements to Deputy Inman made while not in "custody" at the hospital, before defendant had been indicted or an arrest warrant had been issued, and after defendant was told he was not under arrest and free to leave. Defendant failed to present any authority to support his argument that the trial court improperly admitted his statements to Deputy Clack and has waived appellate review of this assignment of error. The trial court did not err in admitting the letters defendant wrote to his wife from jail that were seized by jail personnel.

The trial court did not abuse its discretion in allowing Nurse Smith to be qualified as a sexual assault nurse examiner expert or in allowing her and Dr. Alexander to testify that their examinations were consistent with a child who had engaged in sexual activities. The trial court did not err by denying defendant's requested jury instruction on attempted first-degree sexual offense. We conclude defendant received a fair trial free from errors he preserved, assigned, and argued.

No Error.

Judges HUDSON and BRYANT concur.

JOHN ALEXANDER, EMPLOYEE, PLAINTIFF v. WAL-MART STORES, INC., EMPLOYER, AMERICAN HOME ASSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA03-1215

(Filed 19 October 2004)

1. Workers' Compensation— injury by accident—causation—back injury

The Industrial Commission erred in a workers' compensation case by finding a causal relationship between plaintiff employee's injury by accident when a fork-lift ran over his foot and the ruptured discs in his back because: (1) plaintiff's expert could not give an opinion with reasonable medical probability on the cause of plaintiff's back injury, and the expert prefaced her statements

on causation using language such as "my suspicion is" and "I suspect"; (2) the expert's testimony taken as a whole was that she did not possess enough information concerning plaintiff's back injury to provide more than her suspicion as to its cause; and (3) the other physicians whose depositions form part of the record on appeal were similarly uncertain as to the cause of plaintiff's back injury.

2. Workers' Compensation— temporary total disability—injury by accident

Although defendants contend the Industrial Commission erred in a workers' compensation case by awarding plaintiff employee temporary total disability benefits, this issue is remanded to the Commission for findings, conclusions, and awards consistent with the Court of Appeals' opinion because although the Commission erred by awarding plaintiff compensation for his back injury, defendants do not dispute that plaintiff suffered a compensable injury by accident to his foot on 8 April 1999.

3. Workers' Compensation— restitution—credit to employer—overpayment of temporary total disability benefits

The issue of defendants' entitlement to restitution from plaintiff employee in a workers' compensation case for alleged overpayment of temporary total disability benefits is remanded to the Industrial Commission for appropriate findings, conclusions, and awards in accordance with the disposition of the issues resolved by the Court of Appeals.

4. Workers' Compensation— treating physician—abuse of discretion standard

The Industrial Commission did not err in a workers' compensation case by its designation of plaintiff's treating physician, because defendants do not allege, and the Court of Appeals did not find, that the Commission abused its discretion.

5. Costs— attorney fees—workers' compensation

Although plaintiff employee requests that the Court of Appeals tax defendants with the costs of the instant workers' compensation appeal pursuant to N.C.G.S. § 97-88, a request for attorney fees under this statute is not properly raised as a cross-assignment of error, and thus, the Court of Appeals declines to review this request.

Judge HUDSON dissenting.

Appeal by defendants from opinion and award entered 24 March 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 June 2004.

Brumbaugh, Mu & King, P.A., by Nicole D. Wray, for plaintiff-appellee.

Young Moore and Henderson, P.A., by J. Aldean Webster III, for defendant-appellants.

THORNBURG, Judge.

Defendants Wal-Mart Stores, Inc. and American Home Assurance Company appeal from an opinion and award entered 24 March 2003 by the North Carolina Industrial Commission ("the full Commission") in favor of plaintiff John Alexander. Defendants argue four issues on appeal: (1) that the full Commission erred by finding a causal relationship between plaintiff's injury by accident at work and plaintiff's back injury; (2) that the full Commission erred in awarding plaintiff temporary total disability benefits; (3) that defendants are entitled to restitution from plaintiff because of overpayment of benefits; and (4) that the full Commission erred by designating Dr. Toni Harris as plaintiff's treating physician. In addition, plaintiff argues that this Court should tax defendants with the costs associated with this appeal.

Background

The evidence before the full Commission included the following: On 8 April 1999, plaintiff sustained a compensable injury by accident to his left foot while working for defendant Wal-Mart. Plaintiff was treated by several physicians for this injury including Dr. Toni Harris, who specializes in pain management. Dr. Harris administered an epidural to plaintiff, which caused plaintiff to experience severe back pain. Dr. Harris then discovered that plaintiff had herniated disks in his back. Dr. Harris wanted to investigate whether plaintiff's back problems were related to his foot and ankle pain. She attempted to refer plaintiff to a neurosurgeon for further evaluation, but defendants denied this referral.

Defendants did refer plaintiff to Dr. Robert Fletcher for an independent medical evaluation of plaintiff's foot and back injuries. Dr. Fletcher conducted this evaluation on 21 July 2000 and opined that plaintiff's back injury was not related to plaintiff's accident at work. On 17 July 2000, defendants filed an Industrial Commission form 33 requesting a hearing to determine "whether the medical treatment

plaintiff has been receiving is related to the 4-8-99 incident" and defendants' "further liability to plaintiff, if any."

Following a hearing on 9 May 2001, the Chief Deputy Commissioner of the North Carolina Industrial Commission issued an opinion and award ordering defendants to continue to pay plaintiff temporary total disability benefits until further order of the Commission. The opinion and award also designated Dr. Harris as plaintiff's treating physician and allowed Dr. Harris to authorize a referral to a neurosurgeon "should it be deemed necessary to effect a cure, provide relief or reduce the period of Alexander's disability." On 24 March 2003, the full Commission filed an opinion and award affirming the opinion and award of the chief deputy commissioner with minor modifications. Defendants appeal.

Standard of Review

The standard of review for an appellate court reviewing an appeal from the North Carolina Industrial Commission is limited to determining whether competent evidence supports the findings of fact and whether the findings of fact support the full Commission's conclusions of law. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). Thus, this Court may not "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). Furthermore, the evidence tending to support plaintiff's claim must be taken in the light most favorable to plaintiff, and 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).

Causation

[1] Defendants first contend that competent evidence does not support the full Commission's determination that the 8 April 1999 workplace accident caused plaintiff's ruptured disc. The full Commission made the following finding of fact on causation:

> The greater weight of the evidence establishes that plaintiff's ruptured disc was a result of his accident on April 8, 1999. Dr. Harris's testimony, taken as a whole, establishes that it was "likely" that the rupture occurred during the accident. Dr. Harris' opinion is given more weight than that of Dr. Fletcher. First, Dr. Fletcher was not aware that plaintiff had fallen during the acci-

dent, even though when made aware of that fact, he testified that it was not likely that a simple fall would cause the rupture.

Second, Dr. Harris testified that she had previously treated patients in which an asymptomatic disc as to back pain could produce the symptoms in the feet such as plaintiff was experiencing. Third, Dr. Fletcher, when confronted with Dr. Harris' opinions, admitted that he would not disagree with Dr. Harris based on his opinion of her medical skills.

Based on this finding, the full Commission concluded as a matter of law that "[p]laintiff has proven by the greater weight of the evidence that the ruptured disc at L5-S1 was caused by the accident of April 8, 1999."

After careful review of the record on appeal, we conclude that competent evidence does not support the full Commission's finding and conclusion that plaintiff's ruptured disc was caused by the 8 April 1999 workplace accident. Dr. Harris, by deposition, testified that she started treating plaintiff on 16 March 2000. Dr. Harris indicated that plaintiff had been referred to her for treatment of foot and ankle pain stemming from an injury at work. In order to determine "if there was any component of the foot pain from his back," Dr. Harris administered an epidural injection to plaintiff's back. Dr. Harris testified that plaintiff returned to her office shortly after the epidural complaining of back pain. An MRI ordered as a result of this complaint revealed a herniated disk at L5-S1. In her deposition, Dr. Harris explained that she believed the volume injected with the epidural put pressure on the disk, causing plaintiff to feel back pain.

Dr. Harris then stated:

> My suspicion is that . . . he probably, when he fell—I think when this thing ran over his foot, he didn't just stand there. He fell backwards as it was going over his foot. I mean, you can imagine that you would respond, your whole body would respond. I suspect that he got the herniated disk then . . . .

Thereafter, the following exchange occurred between Dr. Harris and plaintiff's attorney:

> Q. [Plaintiff's attorney] You testified that you suspected—suspected that his herniated disk occurred when he had the accident at work. Can you say that to a reasonable degree of medical probability?

A. [Dr. Harris] I don't know. I don't know. All I wanted to know at the time was I wanted to treat him, to see if his foot pain got any better, and that would tell us that some of the problem with the foot was from the back.

On cross examination this exchange transpired between defendants' attorney and Dr. Harris:

A. [Dr. Harris] I was not—I was not treating a back condition. I was treating—I was treating the foot pain. And if that one nerve that goes to that foot starts in the back, if I can't get that nerve down here, I'm going to try to get it in the back.

Q. [Defendants' attorney] But you are basing this on an assumption that he injured his back at the time of the fall?

A. [Dr. Harris] The chances are likely, but her [the claims adjuster] mistake was not letting me do this, 'cause if the foot didn't get any better, we could say, "Well the disk probably isn't doing it." You can't tell.

We conclude that this testimony does not support the full Commission's findings and conclusions that plaintiff's accident at work caused his back injury. In a workers' compensation case, the plaintiff has the burden of proving causation by the preponderance of the evidence. *Holley v. Acts, Inc.*, 357 N.C. 228, 231-32, 581 S.E.2d 750, 752 (2003). Where the nature of the injury alleged involves complicated medical questions, only an expert can give competent evidence as to causation. *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Further, "[a]lthough 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 N.C. at 233, 581 S.E.2d at 753 (2003) (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)) (internal citation omitted).

In the instant case, plaintiff presented Dr. Harris's expert testimony on causation as required by our Supreme Court's holding in *Click*. However, when asked directly, Dr. Harris could not give an opinion with reasonable medical probability on the cause of plaintiff's back injury. Furthermore, Dr. Harris prefaced her statements on causation using language such as "[m]y suspicion is" and "I suspect." Dr. Harris did use the word "likely," in response to a question on cau-

sation by defendants' attorney. However, the context in which it was used shows that Dr. Harris's concern was with a possible relationship between plaintiff's back injury and his foot pain, as opposed to an attempt to evaluate the causal link between the 8 April 1999 accident and plaintiff's back injury.

We conclude that Dr. Harris's testimony "taken as a whole" was that she did not possess enough information concerning plaintiff's back injury to provide more than her suspicion as to its cause. As she repeatedly indicated in her deposition, she was not treating plaintiff's back condition. She expressly qualified the statements she did make concerning the causation of plaintiff's back injury as her suspicions. Under the North Carolina Supreme Court's holding in *Young v. Hickory Business Furniture*, testimony of this nature is not sufficiently reliable to constitute competent evidence of causation. *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000); *cf. Edmonds v. Fresenius Med. Care*, —— N.C. App. ——, ——, 600 S.E.2d 501, 505 (2004) (causation evidence is competent if it is the product of a reasoned medical analysis). Accordingly, the full Commission erred in basing its finding of fact on causation upon Dr. Harris's testimony.

The other physicians whose depositions form part of the record on appeal were similarly uncertain as to the cause of plaintiff's back injury. In his deposition, Dr. Fletcher indicated that the type of herniated disc plaintiff was diagnosed with is not consistent with plaintiff's description of his accident at work. When asked to explain this opinion, Dr. Fletcher testified that he primarily sees lifting, bending, and pushing on objects as causing hernias and that he could not recall "seeing many herniated discs from that type of an incident [experienced by plaintiff]." Dr. Fletcher also testified that only in rare cases is it possible to have a herniated disc without experiencing any symptoms. Dr. Peter Chung testified, by deposition, that it was "possible" that the 8 April 1999 accident caused plaintiff's back injury, but that he "would prefer not to—to give any indications as to its probability" because "[t]hat would best be answered by an orthopedic or neurosurgeon, because there are many causes of disk herniation."

Thus, the record does not support a finding that plaintiff's 8 April 1999 accident at work caused his back injury. Accordingly, the full Commission erred by concluding as a matter of law that plaintiff established a causal relationship between the 8 April 1999 accident and his back injury.

Total Temporary Disability

[2] Defendants next argue that the full Commission erred by awarding plaintiff temporary total disability benefits. Although we agree that the full Commission erred by awarding plaintiff compensation for his back injury, defendants do not dispute that plaintiff suffered a compensable injury by accident to his foot on 8 April 1999. Accordingly, we remand consideration of this issue to the North Carolina Industrial Commission for findings, conclusions, and awards consistent with our holding herein.

Credit for Overpayment

[3] Defendants argue that they are entitled to restitution from plaintiff for alleged overpayment of temporary total disability benefits. Under N.C. Gen. Stat. § 97-42 (2003), the Industrial Commission may in certain circumstances award credit to an employer who voluntarily makes payments to an employee whose workers' compensation claim is being disputed. N.C. Gen. Stat. § 97-42 (2003); *see Foster v. Western-Electric Co.*, 320 N.C. 113, 116, 357 S.E.2d 670, 673 (1987). "The decision of whether to grant a credit is within the sound discretion of the Commission." *Shockley v. Cairn Studios, Ltd.*, 149 N.C. App. 961, 966, 563 S.E.2d 207, 211 (2002), *disc. rev. dismissed*, 356 N.C. 678, 577 S.E.2d 887-88 (2003). Accordingly, we remand consideration of this issue to the Industrial Commission for appropriate findings, conclusions, and awards in accordance with the disposition of the issues resolved herein.

Dr. Harris as Treating Physician

[4] Defendants argue that Dr. Harris should not be designated as plaintiff's treating physician. Under N.C. Gen. Stat. 97-25 (2003), either the employer or the employee in a workers' compensation matter may make a motion to designate the treating physician. *See Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 18, 510 S.E.2d 388, 393-94 (1999), *disc. rev. denied*, 350 N.C. 834, 538 S.E.2d 197 (1999). The Industrial Commission's approval or disapproval of these motions is subject to an abuse of discretion standard. *See Franklin v. Broyhill Furniture Indus.*, 123 N.C. App. 200, 207-08, 472 S.E.2d 382, 387 (1996), *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). In the instant case, defendants do not allege and this Court does not find that the full Commission abused its discretion in designating Dr. Harris as plaintiff's treating physician. Accordingly, this assignment of error is overruled.

Plaintiff's Request for Attorneys' Fees

[5] In his appellate brief, plaintiff requests that this Court tax defendants with the costs of the instant appeal pursuant to N.C. Gen. Stat. § 97-88 (2003). However, a request for attorneys' fees under this statute is not properly raised as a cross-assignment of error. *See Guerrero v. Brodie Contrs., Inc.*, 158 N.C. App. 678, 686, 582 S.E.2d 346, 351 (2003). Accordingly, we decline to review this request.

This matter is remanded to the North Carolina Industrial Commission for disposition in accordance with this opinion.

Reversed in part and remanded.

Judge ELMORE concurs.

Judge HUDSON dissents.

HUDSON, Judge, dissenting.

Having carefully reviewed the deposition and medical notes of Dr. Harris, I conclude that the majority has incorrectly applied the standard of review to finding of fact number 20. The crucial portion of the finding, which is quoted entirely in the majority opinion, says that "The greater weight of the evidence establishes that plaintiff's ruptured disc was a result of his accident on April 8, 1999. Dr. Harris' testimony, taken as a whole, establishes that it was 'likely' that the rupture occurred during the accident." Because the evidence does support this finding, I respectfully dissent.

Although the quotations from the majority opinion do reflect testimony in the deposition, there are also more definite expressions of opinion in other parts of the testimony and records. At the beginning of the deposition, counsel stipulated that this particular physician, Dr. Toni Harris is an expert in pain management. She treated the plaintiff beginning in March of 2000 for his foot pain. During the treatment, she began to suspect that the pain might be radiating from the back, and ordered an epidural injection to test that hypothesis. After the injection, plaintiff began to exhibit symptoms of pain near the site of the injection in his spine, and continued to have foot pain. In much of the deposition, the exasperated doctor tried repeatedly to get defense counsel to grasp that it was her opinion that the foot pain was due in part to direct trauma to the foot, and in

part to radiating pain from a disc problem, both of which she related to the work accident.

In the medical records, which the parties also stipulated into evidence, Dr. Harris states:

> 03/16/00
>
> . . . The [plaintiff] was involved in a work-related injury in April 1999. He was working at Wal-Mart when his left foot was run over by a fork-lift . . . The forklift went over the posterolateral aspect of the left foot and up the ankle. The force was great enough to push him down to the ground . . . The patient reports that he has numbness, tingling and throbbing pain in the left foot, with intermittent, sharp, shooting pain . . . The patient also reports pain extending up the legs . . .
>
> 06/01/00
>
> **Addendum:** I spoke to Melissa, the adjuster on the case . . . I tried to explain that the back injury was a part of the problem from the beginning. . . . (emphasis added)

In addition, in her testimony, she explained as follows:

> A. . . . I think there was a—in the foot, I think part of the problem in the foot was from the direct trauma of the foot.
>
> Q. Was that a foot injury?
>
> A. It's all a foot injury.
>
> Q. Okay.
>
> A. And part of it—you can't separate the body like that.
>
> Q. When you're saying—are you saying there's not an injury in the back?
>
> A. There's a herniated disk in the back. But it's pressing on the nerves, that's getting damaged—
>
> Q. The pathology is in the back?
>
> A. —that goes to the foot.
>
> Q. Right. It's the pathology in the back, though?
>
> A. The pathology in the back causing the problem in the foot.

And, most directly, counsel asked the doctor whether her opinions were based on an "assumption" that plaintiff's disk was injured the fall. It is clear from Dr. Harris' response that, in her opinion, it was "likely" that the foot pain started in the back.

The Commission's finding that Dr. Harris' testimony as a whole "establishes that it was 'likely' that the rupture occurred during the accident," tracks this testimony exactly.

In reaching the contrary conclusion, the majority applies the standard of review in a manner contrary to the repeated instructions of the Supreme Court. The Supreme Court has stated several times that the role of the Court of Appeals 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). In reviewing a workers' compensation claim, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). If there is any evidence at all, taken in the light most favorable to the plaintiff, the finding of fact stands, even if there is substantial evidence to the contrary. *Id.* The plaintiff is entitled to the benefit of every inference in his or her favor, whether or not he or she prevailed in the Commission. *Poole v. Tammy Lynn Ctr.*, 151 N.C. App. 668, 672, 566 S.E.2d 839, 841 (2002). The Full Commission is the "sole judge of the weight and credibility of the evidence," and this Court may not second-guess those determinations. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553.

Here, where the stipulated records and the testimony of Dr. Harris do support the Commission's findings, when viewed in light of the standard of review, the finding should be upheld. I do not believe it is the role of this Court to comb through the testimony and view it in the light most favorable to the defendant, when the Supreme Court has clearly instructed us to do the opposite. Although by doing so, it is possible to find a few excerpts that might be speculative, this Court's role is not to engage in such a weighing of the evidence. As demonstrated above, much of the evidence reveals that the doctor expressed her opinions repeatedly and without equivocation. Thus, I

conclude that the Commission's finding is supported, and that we should affirm the opinion and award.

IN THE MATTER OF: D.L., A.L.

No. COA03-1490

(Filed 19 October 2004)

1. **Appeal and Error— notice of appeal—failure of service—waiver**

DSS's participation in respondents' appeal waived any objection to failure of service of the notice of appeal. DSS does not argue that it never received service of appellate entries, the notice of the appointment of appellate counsel, or the proposed record on appeal, and does not contend that it was prejudiced by any failure by respondents to properly serve the notice of appeal.

2. **Child Abuse and Neglect— neglected juvenile—failure to appoint guardian ad litem for parent**

The failure to appoint a guardian for the mother in a neglected juvenile proceeding was not error where the petitions did not allege that the children were dependant juveniles and did not assert that the mother could not provide proper care as the result of a debilitating condition. N.C.G.S. § 7B-602(b)(1).

3. **Child Abuse and Neglect— neglected juveniles—permanency planning hearing—timeliness**

The trial court erred by not holding a permanency planning hearing within the statutory time limit (one year from the initial order), but the matter was reversed and remanded on other grounds. N.C.G.S. § 7B-907(a).

4. **Child Abuse and Neglect— neglected juveniles—permanency planning order—findings—not supported by evidence**

A permanency planning order was reversed and remanded where the court's findings were not supported by the evidence. Respondent, acting pro se, testified but did not address the permanency plan, and DSS offered only statements by its attorney (which are not evidence) and a DSS summary. Adopting the DSS summary was not sufficient to support the findings.

5. Child Abuse and Neglect— neglected juveniles—permanency planning hearing—tape of first hearing destroyed

A father's constitutional rights were not violated by the destruction of tapes recorded at a prior hearing concerning his allegedly neglected children. Although the father contended that the second hearing was a continuation of the first and that evidence presented at the first was crucial to the permanency planning order, the permanency planning order was not reached until the second hearing. The father did not assign error or enter notice of appeal to the first order, and did not present a narration of the evidence or identify portions of the record to support his argument.

6. Parent and Child— neglected juveniles—permanency planning order—findings—father's testimony

A permanency planning order was not supported by the evidence where the court made no findings about the only evidence presented: the father's testimony that he had completed parenting classes, was paying child support, and had attempted to maintain visits with the child.

Appeals by respondent mother and respondent father from order entered 7 October 2002 by Judge Theodore S. Royster, Jr., in Iredell County District Court. Heard in the Court of Appeals 1 September 2004.

Thomas R. Young, for petitioner-appellee Iredell County Department of Social Services.

Winifred H. Dillon, for respondent mother-appellant.

M. Victoria Jayne, for respondent father-appellant.

TYSON, Judge.

Shevalo Laney ("Laney") and Edward Dewight Little ("Little") (collectively, "respondents") appeal from the trial court's order entered following a permanency planning hearing. We reverse the trial court's order as it applies to Laney's appeal, and reverse and remand as the order applies to Little's appeal.

I. Background

On 23 July 2001, Iredell County Department of Social Services ("DSS") filed a juvenile petition alleging that D.L. and A.L. (collec-

tively, "the children") were neglected juveniles. Laney, mother of both minor children, and Little, father of D.L. and caretaker of A.L., were named respondents. The children were placed with their maternal grandfather, Edsel Laney ("grandfather"), on 26 July 2001. On 18 October 2001, both children were adjudicated to be neglected children. The trial court approved the children's placement with their grandfather.

On 2 March 2002, the trial court entered an order which relieved DSS of further reunification efforts with their parents and appointed their grandfather to serve as guardian. The trial court ordered visitation for respondents to take place at the grandfather's discretion. On 2 May 2002, respondents filed Motions in the Cause requesting return of both children to the custody of the mother, to reinstate reasonable efforts towards reunification, and requested a new psychological evaluation. Following a hearing on 17 May 2002, the trial court denied respondents' motions in part, but allowed Little's request for visitation and Laney's request for a new psychological evaluation.

On 13 September 2002, the trial court conducted a permanency planning hearing. The trial court announced its decision in open court to continue guardianship of the children with the grandfather and reaffirmed its decision to relieve DSS of reunification efforts. On 23 September 2002, respondents, acting *pro se*, filed written notice of appeal and attached a Certificate of Service certifying that "service of the foregoing Notice of Appeal was made upon the respective party by: Hand Delivery." Both respondents entered a separate Notice of Appeal and each signed their own Certificate of Service. Neither Laney's nor Little's Certificate of Service indicated the "respective party" or identified who had been served by "hand delivery." The trial court entered judgment on 7 October 2002.

DSS moves this Court to dismiss respondents' appeal for failure to timely file or properly serve Notice of Appeal.

II. Issues

The threshold issue on appeal is whether respondents properly filed and served Notice of Appeal on DSS.

The issues presented by Laney's appeal are whether the trial court erred by: (1) failing to appoint a guardian *ad litem* for her; (2) failing to hold a permanency planning hearing within twelve months of the original order as required by N.C. Gen. Stat. § 7B-907;

and (3) failing to allow her to present evidence at the permanency planning hearing.

The issues presented by Little's appeal are whether: (1) his constitutional and due process rights were violated by the destruction of tape recordings for the hearing held 17 May 2002; (2) evidence presented at the hearing on 13 September 2002 was sufficient to support the trial court's order for a permanent plan of guardianship for the minor children; and (3) Little received a fair permanency planning hearing.

III. Motion to Dismiss

[1] In a verified motion filed with this Court, DSS contends respondents failed to serve either DSS or its counsel with the Notices of Appeal filed by respondents. Rule 3 of our North Carolina Rules of Appellate Procedure allows a party to appeal from a district court order rendered in a civil action by: (1) filing notice of appeal with the Clerk of Superior Court; and (2) serving copies thereof upon all other parties. N.C.R. App. P. 3(a) (2004). In civil actions, a party must file and serve notice of appeal "within thirty days after entry of judgment." N.C.R. App. P. 3(c) (2004).

Rule 3(b), however, provides that appeals in juvenile matters shall be "taken in the time and manner" set forth in N.C. Gen. Stat. § 7B-1001. N.C.R. App. P. 3(b) (2004). Pursuant to N.C. Gen. Stat. § 7B-1001:

> Notice of appeal shall be given in writing within 10 days after entry of the order. . . . A final order shall include:
>
> . . . .
>
> (3) Any order of disposition after an adjudication that a juvenile is abused, neglected, or dependent . . . .

Although this statute speaks to the time and manner of appeal, the statute is devoid of any reference to proper *service* of such notice. Where the relevant juvenile statute is silent, the North Carolina Rules of Civil Procedure govern. *In re Brown*, 141 N.C. App. 550, 551, 539 S.E.2d 366, 368 (2000), *cert. denied*, 353 N.C. 374, 547 S.E.2d 809 (2001). Rule 5(a) of the North Carolina Rules of Civil Procedure provides that "every written notice . . . shall be served upon each of the parties . . . ." N.C. Gen. Stat. § 1A-1, Rule 5(a) (2003). Rule 5 provides

that such service can be made by hand delivery if, at the time of filing the written notice, a certificate is also filed certifying "the paper was served in the manner prescribed by this rule . . . ." N.C. Gen. Stat. § 1A-1, Rule 5(b) and (d) (2003).

Here, respondents filed a written "Certificate of Service" indicating that notice of appeal had been served upon the "respective party" by "Hand delivery." DSS argues that respondents' failure to indicate the name or address of the "respective party" served is a jurisdictional defect requiring dismissal of the appeal pursuant to N.C.R. App. P. 26(c) (2004). We disagree. Our Supreme Court held, "a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal . . . ." *Hale v. Afro-American Arts International*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993).

Respondents filed Notices of Appeal on 23 September 2002. The Appellate Entries form was filed with the trial court on 15 May 2003 and indicated DSS's attorney, address, and telephone number. The clerk of court was directed to "transmit a copy of these Appellate Entries to counsel for all parties." Further, on 20 June 2003, Notice of Appointment of Appellate Counsel was mailed to "all other parties on the Appellate Entries . . . ." A proposed Record on Appeal was served on DSS on 6 October 2003. On 7 November 2003, DSS's attorney wrote a letter to respondents' attorneys that referenced "Supplement to Record on Appeal" and requested several documents be "added to the record on appeal." The letter stated, "If you will include the material enclosed in an amended record . . . I will be glad to sign the stipulation of settlement previously tendered." DSS's counsel was the same individual identified on the Appellate Entries form filed 15 May 2003. DSS did not object to service of notice of appeal until 18 November 2003 when it filed its Motion to Dismiss this appeal.

DSS does not contend it was prejudiced by any failure of respondents to properly serve notice of appeal. In its motion, DSS asserts it "became aware of Respondent/Appellants' notice of appeal through communications with the clerk of court's office on a date several days subsequent and removed from [the date notice of appeal was filed.]" DSS does not argue it never received service of: (1) the Appellate Entries filed 15 May 2003; (2) the Notice of Appointment of Appellate Counsel filed 20 June 2003; or (3) the proposed Record on Appeal filed 6 October 2003. By participating in respondents' appeal prior to "raising the issue by motion," DSS waived any objection to

failure of service. *Hale*, 335 N.C. at 232, 436 S.E.2d at 589. DSS's Motion to Dismiss is denied.

IV. Guardian *Ad Litem*

[2] Laney argues the trial court erred by failing to appoint a guardian *ad litem* after she was diagnosed with a "schizo-affective disorder" during a psychological evaluation of the family. We disagree.

The trial court shall appoint a guardian *ad litem* to represent a parent:

> Where it is alleged that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101 in that the parent is incapable as the result of substance abuse, mental retardation, mental illness . . . or any other similar cause or condition of providing for the proper care and supervision of the juvenile . . . .

N.C. Gen. Stat. § 7B-602(b)(1) (2003). This statute "is narrow in scope and does not require the appointment of a guardian *ad litem* in every case where dependency is alleged . . . ." *In re H.W.*, 163 N.C. App. 438, 447, 594 S.E.2d 211, 216, *disc. rev. denied*, 358 N.C. 543, 599 S.E.2d 46 (2004). The specific language of the statute mandates the appointment of a guardian *ad litem* only if: "(1) the petition specifically alleges dependency; and (2) the majority of the dependency allegations tend to show that a parent or guardian is incapable as the result of some debilitating condition listed in the statute of providing for the proper care and supervision of his or her child." *Id.* (citing *In re Estes*, 157 N.C. App. 513, 518, 579 S.E.2d 496, 499, *disc. rev. denied*, 357 N.C. 459, 585 S.E.2d 390 (2003)). In the case of *In re H.W.*, this Court affirmed the trial court's judgment and held N.C. Gen. Stat. § 7B-602(b)(1) did not require the appointment, *sua sponte*, of a guardian *ad litem* for the respondent-father because the petition did not allege incapacity for the respondent-father. 163 N.C. App. at 447, 594 S.E.2d at 216.

Here, two separate juvenile petitions were originally filed for each child and alleged, "the juvenile is a NEGLECTED JUVENILE, in that the juvenile: (1) does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, . . . [and] lives in an environment injurious to the juvenile's welfare." The petitions at bar did not allege the children were "dependant juvenile[s]" and did not assert Laney was "incapable as the result of some debilitating condition . . . of providing for the proper care" of the children. *Id.* at 447, 594 S.E.2d at 216.

As no allegations of dependency were before the trial court, it was not required to appoint, *sua sponte*, a guardian *ad litem* for Laney. This assignment of error is overruled.

V. Timeliness of Permanency Planning Hearing

[3] Laney contends the trial court erred by failing to conduct a permanency planning hearing within twelve months of the date of the original order.

N.C. Gen. Stat. § 7B-907(a) (2003) states:

> In any case where custody is removed from a parent, guardian, custodian, or caretaker, the judge shall conduct a review hearing designated as a permanency planning hearing within 12 months after the date of the initial order removing custody, and the hearing may be combined, if appropriate, with a review hearing required by G.S. 7B-906.

"The purpose of the hearing is to 'develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time.' " *In re Dula*, 143 N.C. App. 16, 18, 544 S.E.2d 591, 593 (quoting N.C. Gen. Stat. § 7B-907(a)), *aff'd per curiam*, 354 N.C. 356, 554 S.E.2d 336 (2001).

Here, DSS obtained a nonsecure custody order for the children on 26 July 2001. On 28 February 2002, the court concluded a review hearing, appointed the children's grandfather as guardian, and scheduled a permanency planning hearing for 4 April 2002. No hearing occurred in April, and it was rescheduled for 17 May 2002. Prior to the hearing in May, respondents filed separate motions in the cause. Laney moved: (1) "for change of disposition pending appeal;" (2) "to restore placement of the minor children with the respondent mother;" (3) "to continue reasonable efforts;" and (4) "for a new psychological evaluation." Little moved for: (1) "[D.L. to] be returned to his custody . . . or in the alternative, (2) that the Court order that [DSS] re-start reunification efforts . . . ." Following a hearing on the motions on 17 May 2002, the trial court entered an order on 2 June 2002 that acknowledged "a permanency planning hearing was initially schedule [sic] for today's review . . ." and ruled instead on the respondents' motions. The trial court again rescheduled the permanency planning hearing for four days later on 6 June 2002.

The permanency planning hearing was again rescheduled. On 23 August 2002, Laney's attorney sent a facsimile to the presiding

judge, with copies to Little's and DSS's attorneys, informing the trial court:

> This permanency planning hearing was continued from 5/2, 5/16, 6/6, and 7/18 because it wasn't reached. . . . My client is very exasperated because of the delays, and requested that I set it on for 8/29, which I attempted to do. However, the clerk informs me that there are 32 cases on for that day, and that Friday already has something scheduled. . . . My client has asked me to see if the court could consider hearing it sooner than 9/12.

A hearing was finally held 13 September 2002, and an order was entered 7 October 2002.

According to N.C. Gen. Stat. § 7B-907(a), a permanency planning hearing was required to be conducted prior to 26 July 2002, no later than twelve months following entry of the initial nonsecure custody order on 26 July 2001. The permanency planning hearing was originally scheduled for 17 May 2002, and the parties appeared before the court on that day. Respondents, however, had filed motions in the cause several days prior to hearing, which the trial court, in its discretion, chose to initially address prior to conducting a permanency planning hearing.

The trial court erred by failing to conduct a permanency planning hearing within the time required under N.C. Gen. Stat. § 7B-907(a). In light of our holding below, the trial court's failure to conduct a timely permanency planning hearing is harmless.

VI. Evidence at Hearing

[4] Laney contends the trial court erred by failing to allow her to present evidence at the permanency planning hearing. We agree.

Our Supreme Court has held that in child custody matters:

> [w]henever the trial court is determining the best interest of a child, *any evidence* which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony. Without hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child.

In re Shue, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984) (emphasis supplied). In a permanency planning hearing, the trial court may

exclude evidence that is not "relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-907(b) (2003).

Here, the transcript shows the trial court allowed Laney, acting *pro se*, to speak at the hearing and afforded her an opportunity to be heard. She was limited, however, to matters regarding the permanency plan. The trial court stated:

> I'm going to limit you as to the permanency plan. I will not get into matters that have already been adjudicated and an order that has been entered as to that. I want you to understand that. And if you don't abide by my ruling to limit as to this permanency plan, then I'm not going to let you just ramble and go into things that have already been adjudicated. And with that caveat on my part, I'll hear from you as to whether you want to be sworn and put on sworn testimony, I'll be glad to hear from you.

Laney took the witness stand and was sworn. Laney received an opportunity to present evidence and availed herself of this opportunity by presenting her arguments.

Although she took the stand, a review of the transcript indicates she offered no testimony regarding the permanency plan and instead attempted to offer arguments regarding "local rules," the Bible, and her various attorneys. The trial court did not allow Laney to testify regarding legal advice she had received and certain verses from the Bible that she wished to present.

The transcript indicates DSS presented *no* testimony into evidence other than the DSS attorney's statements. Statements by an attorney are not considered evidence. *State v. Haislip*, 79 N.C. App. 656, 658, 339 S.E.2d 832, 834 (1986) (holding "statement by defendant's counsel . . . is not evidence") (citing *State v. Albert*, 312 N.C. 567, 579, 324 S.E.2d 233, 240-41 (1985)).

The only "evidence" offered by DSS was a summary prepared on 11 September 2002. "By stating a single evidentiary fact and adopting DSS and guardian *ad litem* reports, the trial court's findings are not 'specific ultimate facts . . . sufficient for this Court to determine that the judgment is adequately supported by competent evidence.' " *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (quoting *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002)); *see also In re Shue*, 311 N.C. at 597, 319 S.E.2d at 574 ("Without hearing

and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child."). The adoption of the DSS summary into the Order is insufficient to constitute competent evidence to support the trial court's findings of facts.

As *no* evidence was presented by either DSS or Laney regarding the permanency plan, the trial court's findings of fact are unsupported. Without any evidence to support its findings, the trial court erred in its conclusions of law. We reverse the permanency plan order as it relates to Laney and remand for a new permanency planning hearing where the parties may offer competent, material, and relevant evidence.

VII. Destruction of Tapes

[5] We now consider that portion of the appeal regarding Little's assignments of error. First, Little argues his constitutional and due process rights were violated by the destruction of tapes recorded during the 17 May 2002 hearing. He asserts evidence presented during that hearing is "crucial" because the 13 September 2002 hearing was a "continuation" of the permanency planning hearing conducted 17 May 2002. We disagree.

DSS's counsel, at the beginning of the hearing, stated, "the matter is on basically for continuation of a permanency planning hearing. The initial permanency planning hearing was conducted by Judge Gullette on 5-17 . . . ." Later, however, it was clarified that a permanency planning hearing was never conducted during the 17 May 2002 session. During the 13 September 2002 hearing, DSS's counsel clarified his earlier characterization of the hearing and informed the trial court:

> [On] February 28, 2002 . . . Miss Laney was here as was Mr. Little by their first set of counsel; and at that time the Court made determinations with regard to—with regard to the 7B—basically the 7B and 907 analysis. That was actually a review hearing. That was followed up by what we were supposed to have as a permanency planning hearing. The first of that occurred on 5-17. So the basic thing I have to say is that although the plan itself was changed, we were trying to follow that up with necessary permanency planning hearing within the period of time allotted by statute. We did get partly away into doing that, and they—both Respondent Mother and Respondent Father through their coun-

> sel had various issues raised with regard to permanency planning. But we didn't actually have—this hearing today is really the first opportunity we've actually had since that initial review which set the permanency plan in place. It's the first time we had today to actually put that in place as a permanent plan under the statute. . . .

Our review of the order entered following the 17 May 2002 hearing indicates that although "[a] permanency planning hearing was initially scheduled for today's review pursuant to N.C. Gen Stat. § 7B-907," the hearing was not conducted. The trial court's order stated, "A permanency planning hearing *shall be* conducted 6/6/02." (Emphasis supplied). The order indicates no permanency planning hearing was begun or conducted. Little's brief concedes "no previous order is deemed a permanency planning order." The record indicates the 13 September 2002 hearing was the first instance the issue of a permanency planning order was reached.

Little neither assigned error to nor entered notice of appeal on the 17 May 2002 order. Further, he has not attempted to present a narration of the evidence or identify portions of the record to support his argument. *See In re Clark*, 159 N.C. App. 75, 83, 582 S.E.2d 657, 662 (2003) (holding no error in destruction of tapes where respondent: (1) made no attempt to use N.C.R. App. P. 9(c)(1) "to provide a narration of the evidence in order to reflect the true sense of the evidence received to the extent the record does not do so;" and (2) "points to nothing specific in the record to support her argument"). This assignment of error is overruled.

VIII. Sufficiency of the Evidence

[6] Little next argues the permanency planning order is not supported by sufficient evidence. We agree.

As discussed above, DSS presented *no* competent evidence to support any of the findings. Further, as in the case of *In re Weiler*, the trial court here "made no statutory findings that reunification efforts would be futile or that the health and safety of the children were inconsistent with such efforts as required by section 7B-507(b)." 158 N.C. App. 473, 480, 581 S.E.2d 134, 138 (2003). The findings of fact are insufficient to support the conclusions of law.

Little testified he had completed parenting classes, was paying child support, and had attempted to maintain visits with the children.

The trial court made no findings regarding this testimony. The permanency planning order as it relates to Little is reversed and remanded for further findings of fact and conclusions of law in light of the only evidence presented, which was Little's testimony.

IX. Conclusion

Little argues he did not receive a fair permanency planning hearing. His brief fails to offer any argument or authority in support of his assertion. He has abandoned this assignment of error pursuant to N.C.R. App. P. 28(b)(6) (2004).

The trial court did not err in failing to appoint, *sua sponte*, a guardian *ad litem* for Laney. The trial court erred in failing to conduct a permanency planning hearing within the time required by N.C. Gen. Stat. § 7B-907. However, in light of our holding that the trial court's order is reversed for lack of competent evidence to support the findings of fact, this error is harmless.

Little's constitutional rights were not violated by the destruction of the tape recordings of the 17 May 2002 hearing. The trial court erred in making findings of fact that are not supported by competent evidence and in failing to make findings of fact regarding Little's testimony. The order is reversed and remanded for findings consistent with the evidence presented.

Reversed in part; Reversed and Remanded in part.

Judges HUDSON and BRYANT concur.

ROBERT WARD AND WIFE, BETTY MOTICKA, JAMES R. McCULLOUGH AND WIFE, LAURA J. McCULLOUGH, RALPH E. OUTCALT, AND DAVID KEITH JOHNSON, PETITIONERS v. MIKE C. INSCOE, C. RUXTON BOBBITT, JR., JERRY PARRISH, DAVE STALLINGS, DAVID E. MEEKINS, BAILEY ALSTON, ARLINE RICHARDSON, JOSEPH BROWN, RICHARD I. VAUGHAN, JR., WILLIAM F. TAYLOR, FRANK M. HESTER, JR., GENE C. AYSCUE, RUSTY RENSHAW, AND GARRY DAEKE IN THEIR OFFICIAL CAPACITY AS THE HENDERSON ZONING BOARD OF ADJUSTMENT, W. BROWNELL WRIGHT, ZONING ADMINISTRATOR OF THE CITY OF HENDERSON, BRANCH BANKING & TRUST COMPANY, RESPONDENTS

No. COA03-1649

(Filed 19 October 2004)

1. Zoning— conduct of hearing—notice

The Henderson Zoning Board of Adjustment did not violate petitioners' due process rights in its issuance of a special use permit allowing a bank to build drive-through lanes. The Board provided petitioners with notice of the initial public hearings, at which all parties availed themselves of the right to present their case. Although petitioners were not given specific notice of two hearings after an appeal and remand, those hearings involved only more specific findings on the evidence previously presented, and petitioners had general notice in that the hearings were held at the regularly scheduled and advertised meetings.

2. Zoning— special use permit—sufficiency of evidence—issuance not arbitrary

The trial court did not abuse its discretion in applying the whole record test to a decision by the Henderson Zoning Board of Adjustment to grant a special use permit for the construction of drive-through lanes at a bank. The Board conducted a careful and thorough investigation and the evidence supported issuance of the permit under the standards set out in the ordinance.

Appeal by petitioners from order entered 16 September 2003 by Judge Robert H. Hobgood in Vance County Superior Court. Heard in the Court of Appeals 15 September 2004.

Browne, Flebotte, Wilson & Horn, P.L.L.C., by Daniel R. Flebotte, for petitioners-appellants.

No brief filed for respondents-appellees Mike C. Inscoe, C. Ruxton Bobbitt, Jr., Jerry Parrish, Dave Stallings, David E. Meekins, Bailey Alston, Arline Richardson, Joseph Brown, Richard I. Vaughan, Jr., William F. Taylor, Frank M. Hester, Jr., Gene C. Ayscue, Rusty Renshaw, and Garry Daeke in Their Official Capacity as the Henderson Zoning Board of Adjustment, W. Brownell Wright, Zoning Administrator of the City of Henderson.

Royster, Cross & Currin, LLP, by Dale W. Hensley, for respondent-appellee Branch Banking & Trust Company.

TYSON, Judge.

Robert Ward, Betty Moticka, James R. McCullough, Laura J. McCullough, Ralph E. Outcalt, and David Keith Johnson ("petitioners") appeal the trial court's order, which affirmed the Henderson Zoning Board of Adjustment's ("Board") issuance of a Special Use Permit to respondent Branch Banking and Trust Company ("BB&T"). We affirm.

I. Background

BB&T applied to construct a bank building in a mixed use neighborhood that is zoned for office-institutional use under the City of Henderson Zoning Ordinance ("Ordinance"). The plans included four drive-thru lanes. Section 300B of the Ordinance allows drive-thru lanes with issuance of a special use permit by the Board. BB&T petitioned both the Board and the North Carolina Department of Transportation ("DOT") for approval of access permits and to construct the building with the drive-thru lanes.

On 3 October 2000, the Board, including members Mike C. Inscoe, C. Ruxton Bobbitt, Jr., Dave Stallings, David E. Meekins, Bailey Alston, Arline Richardson, Richard I. Vaughan, Jr., William F. Taylor, Gene C. Ayscue, and Rusty Renshaw conducted a public hearing and heard from BB&T's representatives supporting the application and from petitioners and other neighborhood residents opposing the construction. BB&T offered its plans for development. Petitioners and other opponents expressed concerns over the project's impact and raised safety, traffic, aesthetic, and economic issues. The Board continued the hearing for thirty days to await DOT's decision.

The Board reconvened on 7 November 2000 and additional evidence was heard and received from both sides. BB&T's representatives and a city engineer offered design plans showing the building and surrounding land use. Discussion addressed the possibility of widening the surrounding streets to accommodate increased traffic flow and access, ingress, egress to and from the new bank.

Petitioners testified concerning the project's potential impacts and effects on nearby residents. Their first concerns included increased traffic flows and the resulting safety issues for pedestrians and neighborhood children, the likelihood of property values being adversely affected, increased difficulty of residential parking, and that widening the street would require removal of many large, old shade trees. Other opponents voiced similar concerns.

After hearing from all those present at the meeting who wished to speak or present evidence, the Board voted four-to-one to approve the issuance of the special use permit. Several conditions were placed on the issuance, including: (1) not removing more trees than necessary, (2) planting buffer hedges between the site and neighboring homes, and (3) involving neighborhood residents in decisions concerning permanent sidewalks and steps.

Petitioners filed a Complaint and Petition for Writ of *Certiorari* on 1 December 2000 in the Vance County Superior Court, seeking review of the Board's decision. Petitioners alleged the Board failed to comply with procedures set forth in Sections 803 and 804 of the Ordinance and asserted the Board failed to make inquiries on the impact of the development on the neighborhood and to make factual findings. Board members Mike C. Inscoe, C. Ruxton Bobbitt, Jr., Jerry Parrish, Dave Stallings, David E. Meekins, Bailey Alston, Arline Richardson, Joseph Brown, Richard I. Vaughan, Jr., William F. Taylor, Frank M. Hester, Jr., Gene C. Ayscue, Rusty Renshaw, Garry Daeke, and W. Brownell Wright, Zoning Administrator of the City of Henderson, (collectively, "City Defendants") answered on 28 December 2000. BB&T answered on 6 March 2001.

The matter was heard on 5 July 2001 before Judge Hobgood. The trial court originally found:

> (1) The decision rendered by the Board of Adjustment on November 7, 2000 was deficient in that the required findings of fact by the Board of Adjustment were merely a recitation of the standards imposed upon the Board of Adjustment for the

issuance of a special use permit by the General Statutes of North Carolina and the City of Henderson Zoning Ordinances, rather than providing a detailed listing of the facts which the Board found from the preponderance of the evidence presented at the public hearing and which facts caused the Board of Adjustment to issue the special use permit to the Bank.

The trial court conducted a whole record review and found the Board considered all the evidence presented at the public hearing. The trial court ruled that substantial, competent, and material evidence supported the issuance of the special use permit and affirmed the Board's decision. Petitioners filed a timely notice of appeal to this Court on 31 January 2002.

In an unpublished opinion filed 5 May 2003, this Court vacated the trial court's decision. The case was remanded to the trial court to enter an order directing the Board to make factual findings sufficiently specific to facilitate judicial review of the Board's decision. *Ward v. Inscoe*, 157 N.C. App. 366, 578 S.E.2d 710 (2003) (unpublished).

The trial court issued an order on 3 June 2003. Later that day, the Board found facts supporting issuance of the special use permit. The Board did not receive or hear additional evidence. The permit was signed on 1 July 2003.

On 1 August 2003, petitioners filed a Petition for Writ of *Certiorari* and for Judicial Review alleging: (1) the Board's permit lacked evidence to support its findings of fact and conclusions of law; (2) the Board violated procedural requirements and committed errors of law; and (3) the Board violated the petitioners' due process rights. Petitioners based their last claim on failure to receive personal or general notice of or an opportunity to present evidence at the 3 June 2003 hearing. Both City Defendants and BB&T answered the petition.

The trial court entered a Stipulation and Consent Order on 2 September 2003 signed by all parties agreeing to treat petitioners' request and answers of the City Defendants and BB&T as motions for review of the Board's findings of fact. The trial court conducted a whole record review and affirmed the Board's decision on 16 September 2003. It found the Board's order contained sufficient factual findings for review and the existence of substantial, competent, and material evidence to support issuance of the special use permit. Petitioners appeal.

II. Issues

The issues on appeal are whether: (1) petitioners' due process rights were violated by not receiving personal notice of or an opportunity to be heard at the 3 June and 1 July 2003 meetings; and (2) the trial court abused its discretion by finding that substantial, competent, and material evidence supported the Board's issuance of the special use permit.

III. Petitioners' Due Process Concerns

[1] Petitioners contend the Board, sitting as a quasi-judicial body, failed to provide them with the "essential elements" of a fair trial. The Board met on 3 June 2003 and 1 July 2003 to find facts as directed by the trial court's order and did not provide personal notice to petitioners. Petitioners argue this failure to personally notify them of the hearings violated their due process rights under the Ordinance, North Carolina General Statutes, and North Carolina case law. We disagree.

Section 804 of the Ordinance states the Board is a quasi-judicial body. In *Refining Co. v. Board of Aldermen*, our Supreme Court set out the following requirements for a quasi-judicial proceeding:

> (1) follow the procedures specified in the ordinance; (2) conduct its hearings in accordance with fair-trial standards; (3) base its findings of fact only upon competent, material, and substantial evidence; and (4) in allowing or denying the application, . . . state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision.

284 N.C. 458, 471, 202 S.E.2d 129, 138 (1974). Section 804.6 of the Ordinance requires the Board to allow all parties the right to present their case, call witnesses, offer exhibits, and cross-examine. There is no dispute that all parties availed themselves with each of these rights at the two public hearings.

This Court addressed a similar issue in *In re Application of Raynor*, 94 N.C. App. 173, 379 S.E.2d 884, *appeal dismissed and disc. rev. denied*, 325 N.C. 546, 385 S.E.2d 495 (1989). The landowner applied to a town board for a conditional use permit to allow construction of a mobile home park on his property. *Raynor*, 94 N.C. App. at 174, 379 S.E.2d at 885. The neighbors petitioned the board to re-zone his property for only single family residences. *Id.* at 174, 379 S.E.2d at 885. Public hearings were held to receive evidence supporting and opposing the application and petition. *Id.* Following intro-

duction of the evidence, discussions continued during several regularly scheduled town meetings over the course of a few months. *Id.* During one of the meetings, the landowner offered to place conditions on his application to address opponents' concerns. *Id.* The neighbors did not receive personal notice of or attend the meeting. *Id.* The landowner's application was then approved. *Id.* The neighbors argued they were "entitled to a fair opportunity to be heard in quasi-judicial proceedings," and that right was denied by lack of notice. *Id.* at 175, 379 S.E.2d at 885.

This Court found no error. *Id.* at 178, 379 S.E.2d at 887. We based our decision on several factors similar to those here. The landowner did not offer additional evidence in the neighbors absence. *Id.* The meetings were held during regularly scheduled meeting times announced to the general public. *Id.* at 174, 379 S.E.2d at 885. The neighbors received opportunities to cross-examine adverse witnesses and to offer evidence in support of their position and in rebuttal of their opponents' contentions. *Id.* at 177, 379 S.E.2d at 886.

In the prior appeal of this case, we held that the trial court applied an improper review of the Board's decision. *Ward*, 157 N.C. App. at 366, 578 S.E.2d at 710. The Order issuing the special use permit contained testimony, discussed the standards for issuance, and imposed conditions on the permit. It did not include findings upon which the Board made its decision. The trial court determined "the [Board] *must have* considered the evidence" in issuing the permit despite the lack of findings, and affirmed the decision. *Id.* This Court remanded "this matter to the [trial] court for an order directing the [Board] to make factual findings that are sufficiently specific to enable review of the [Board's] decision." This Court noted that "extensive evidence" was presented to the Board in support of and in opposition to the issuance of the permit. *Id.*

Both parties acknowledge that no new evidence was considered by the Board during the subsequent meetings in June and July of 2003. The Order indicates the Board members who heard the evidence and arguments at the 3 October 2000 and 7 November 2000 hearings made the factual findings and cited directly from the transcripts of those public hearings. Public hearings ended on 7 November 2000. Any further meetings were intended solely to make findings of fact on the evidence previously presented by all parties. Petitioners received notice of and attended the public hearings and utilized multiple opportunities to be heard and present evidence.

The record also indicates the Board held its meetings on the first Tuesday of every month, a fact advertised by the Board and acknowledged by petitioners in their brief. Each hearing and meeting before the Board fell on the first Tuesday of the month. These regularly scheduled advertised meetings provided petitioners with general notice. As no further evidence was heard in June and July of 2003 and general notice existed, petitioners' due process rights were not violated.

The record and transcripts show petitioners, other neighborhood residents, and BB&T received notice and ample opportunity to be heard by and present evidence to the Board concerning the issuance of the special use permit at the public hearings. All parties presented evidence in support of or in opposition to the application. The public hearing extended over two months to await DOT's ruling on the access permits, which provided all parties additional time to gather and present evidence. The Board originally followed the guidelines of Sections 803 and 804, save 804.7, which we previously held required more specific findings of fact. Here, the Board's Order corrects that omission. This assignment of error is overruled.

IV. Standard of Review

[2] Petitioners assert the trial court abused its discretion in applying a whole record review to find that substantial, competent, and material evidence supports the issuance of a special use permit. We disagree.

Our Supreme Court outlined the appropriate standard of review of a decision by a quasi-judicial body in *Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 265 S.E.2d 379, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). A reviewing court is to:

(1) Review the record for errors in law;

(2) Insure that procedures specified by law in both statute and ordinance are followed;

(3) Insure that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents;

(4) Insure that decisions of town boards are supported by competent, material and substantial evidence in the whole record; and

(5) Insure that decisions are not arbitrary and capricious.

Id. at 626, 265 S.E.2d at 383. Both the trial court and this Court are bound by these standards of review. *Id.* at 627, 265 S.E.2d at 383.

V. Substantial, Competent, and Material Evidence

We consider whether the evidence before the Board, not the trial court, supported the issuance of the special use permit. *In re Application of Goforth Properties*, 76 N.C. App. 231, 233, 332 S.E.2d 503, 504, *disc. rev. denied*, 315 N.C. 183, 337 S.E.2d 857 (1985). In determining the sufficiency of the evidence, we apply the whole record test to review testimony and exhibits in support of and in opposition to the issuance of the permit. *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). In the prior appeal, this Court addressed guideline two and found the Board met procedures mandated by statute and the Ordinance. We have already held petitioners' due process rights were protected, which satisfies guideline three. We now review guidelines one, four, and five.

Guideline one requires a review of the trial court's decision for errors in law. This Court previously remanded this case to remedy an improper application of whole record review. Upon remand, that error in law was corrected by inclusion of factual findings within the Board's Order to enable appellate review. Our review of the trial court's 16 September 2003 order reveals a proper whole record review by the trial court, and that the Board's decision is based on substantial evidence that supports its findings of fact, which in turn support its conclusions of law.

We address guidelines four and five by reviewing evidence before the Board. Section 803 of the Ordinance provides,

> The [Board] shall hear and decide any application for a special use permit, and *shall* issue said permit where the applicant has demonstrated by the preponderance of the evidence that the standards of this Ordinance, including the following shall be met:
>
> (a) That the use will comply with the requirements of Article 600A and 600B of this Ordinance;
>
> (b) That the use will not materially and adversely affect the public health, safety, or welfare;
>
> (c) That the use will not substantially injure the value of adjoining or abutting properties;

(d) That the use will be in harmony with the area in which it is located; or be a matter of public need;

(e) That the use will not substantially contribute to an overburdening of municipal services;

(f) That the use will be in conformity with the Henderson Land Use Plan and other duly adopted plans and policies of the City.

The Board's Order specifically recited evidence presented at the public hearings, and addressed each element in its findings of fact.

The Board found under Sections A and B that the proposed use will comply with design standards of Article 600A and "*will not materially and adversely affect the public health, safety or welfare*" of the neighborhood. BB&T hired a landscape architect to ensure conformity with the Ordinance's design requirements. The Board determined that evidence presented at the hearings showing that expansion and modification of surrounding streets, improvements to storm drains, relocation of a fire hydrant, removal of undergrowth, and installation of a new traffic light, would help, not hinder public safety. The Board also found the increase in traffic counts estimated by DOT would not significantly impact public safety. Substantial evidence in the record supports this finding.

The Board addressed Sections C and D by noting the area is zoned office—institutional, "which is a transitional zone from residential to commercial uses." It recognized the area is "becoming substantially commercial," shown by recent construction of a drug store on the same block and few surrounding residences. The Board found that the addition of a bank would not upset the balance between the mixed use properties or substantially injure real estate values. To limit any impact on adjoining properties, the Board imposed conditions on the permit's issuance. These requirements addressed street parking, lighting, tree removal, buffers between the bank and adjoining property, and required BB&T to repair any damage caused by construction. Substantial evidence in the record supports this finding.

The Board found under Section E that the expansion and modification of the surrounding streets, sidewalks, storm drains, and fire hydrants "[would] *not substantially contribute to an overburdening of municipal services.*" BB&T's representatives acknowledged financial responsibility for all improvements. In addition, DOT determined the increase in traffic would not cause "significant overburdening of

the neighborhood streets." Substantial evidence in the record supports this finding.

The Board further found under Section F "the proposed use will be *in substantial conformity with the City of Henderson's Land Use Plan and other duly adopted plans and policies of the City.*" The Board also found the construction of a bank on the property was "permitted as a matter of right in the [office—institutional] zoning district" under the Ordinance. Only the addition of drive-thru lanes triggered the Ordinance requiring BB&T to apply for a special use permit. The Board found the bank, expansion and modifications to surrounding streets, the conditions placed on the permit, and any increase in traffic conformed with both the City of Henderson's Traffic Improvement and Capital Improvement plans. Substantial evidence in the record supports this finding.

In consideration of petitioners' and other opponents' concerns and the interests of the City, the Board included conditions in the Permit. Section 803.1 of the Ordinance allows the Board to place reasonable conditions on the issuance of the special use permit. Here, the Board imposed several requirements to address concerns expressed by petitioners and other neighborhood residents. In addition to full compliance with both the plans accepted by the Board and the Ordinance, the Order required BB&T to: (1) limit the removal of trees to areas necessary for ingress/egress; (2) replace sidewalks and steps damaged by construction; (3) design its lighting plan to avoid lights shining into adjoining homes; and (4) limit customer street side parking reserved for residents. The Board reserved the power to revoke the permit if BB&T does not conform to the conditions.

VI. Arbitrary and Capricious

Guideline five requires the Board's decision not to be arbitrary and capricious. An administrative ruling is deemed arbitrary and capricious when it is "whimsical," "willful[,] and [an] unreasonable action without consideration or in disregard of facts or law or without determining principle." *Lenoir Mem. Hosp. v. N.C. Dep't of Human Resources*, 98 N.C. App. 178, 181, 309 S.E.2d 448, 450 (quoting *Board of Education [of Blount County] v. Phillips*, 264 Ala. 603, 89 So.2d 96 (1956)), *disc. rev. denied*, 327 N.C. 430, 395 S.E.2d 682 (1990); *see also Tate Terrace Realty Investors v. Currituck County*, 127 N.C. App. 212, 222-23, 488 S.E.2d 845, 851 (quoting Black's Law Dictionary 105 (6th ed. 1990)), *disc. rev. denied*, 347 N.C. 409, 496 S.E.2d 394, *appeal dismissed*, 347 N.C. 409, 496 S.E.2d 386 (1997).

The Board conducted a careful and thorough investigation of the evidence supporting and opposing the special use permit. Petitioners failed to show and the record does not indicate that the Board acted unfairly or arbitrarily. The Board's decision was not arbitrary and capricious and was based on substantial, competent, and material evidence in the record. This assignment of error is overruled.

VII. Conclusion

Petitioners were provided with notice of the two public hearings, where they attended and opposed the application through testimony, exhibits, and cross-examination. The petitioners received general notice of the later meetings, which were held solely to remedy the lack of factual findings and to sign the Board's Order. No further public hearings were held and no new evidence was received or entertained. Petitioners' due process rights were protected during the hearings in October and November of 2000 and during the meetings in June and July of 2003.

The record and transcripts show BB&T presented substantial, competent, and material evidence in support of its application for a special use permit. The order of the trial court is affirmed.

Affirmed.

Judges HUDSON and BRYANT concur.

STATE OF NORTH CAROLINA v. ANGELA DEBORAH LEWIS, DEFENDANT

No. COA03-785

(Filed 19 October 2004)

Constitutional Law— right of confrontation—testimonial hearsay—identification by photographic line-up

Although defendant contends the trial court erred in an assault with a deadly weapon inflicting serious injury, nonfelonious breaking or entering, and robbery with a dangerous weapon case by admitting the testimony of an officer concerning statements made by the victim to him at her apartment and statements by another officer concerning the victim's identification of her in a photographic line-up under the residual hearsay

exception of N.C.G.S. § 8C-1, Rule 804(b)(5) after the victim died of unrelated causes, defendant's argument is not reached because the admission of the evidence was a violation of defendant's Sixth Amendment rights under the Confrontation Clause and defendant is entitled to a new trial on that ground since: (1) both the victim's statement to the police and her identification of defendant in the photo line-up constitute testimonial evidence that are inadmissible based on the fact that the witness was unavailable and defendant did not have a proper opportunity to cross-examine; (2) the fact that the information provided may be quite reliable or trustworthy is irrelevant; and (3) it cannot be concluded that the error was harmless beyond a reasonable doubt because once the evidence by the victim is excluded, there is no eyewitness testimony available giving an account of the crime or anyone who can place defendant with the victim during the time of its commission, there is no forensic evidence, and defendant never confessed to the crime.

Appeal by defendant from judgment entered 28 January 2003 by Judge James C. Spencer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 17 March 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Victoria L. Voight, for the State.

Paul M. Green for defendant-appellant.

ELMORE, Judge.

Angela Deborah Lewis (defendant) appeals from convictions for assault with a deadly weapon inflicting serious injury, non-felonious breaking or entering, and robbery with a deadly weapon.

I.

The State's evidence tended to show that on 8 January 2002, Nellie Carlson (Ms. Carlson), an elderly resident of Glenwood Towers in Raleigh, was discovered in her apartment by friend and neighbor Ida Griffin (Ms. Griffin). Ms. Griffin testified that she found the door ajar and entered, discovering her friend's apartment "just tore up all around." She noticed a broken flashlight, a phone left off the hook, and items from the coffee table strewn across the floor. Ms. Carlson was discovered "sitting at the table with her head hung down." She was swollen, bloody, and badly bruised. Ms. Griffin summoned

another neighbor, John Woods (Woods), for help, and they called the police. Woods would later tell police and testify at trial that he had seen defendant entering Glenwood Towers around noon the day of the incident.

After Officer Narley Cashwell (Officer Cashwell) of the Raleigh Police Department arrived, he summoned medical assistance and took the following statement from Ms. Carlson:

> I was in the hall opening my door. My door was locked. I—I was at the door and she slipped up behind me. She asked me for some money. I said what do I look like, the money tree. She said—she said, you don't like me because I'm black. I told her I don't like whatever color she was. I opened the door and she pushed me inside. She grabbed my hair and pulled my hair. She hit me with her fist. She also hit me with a flashlight, phone and my walking stick. She hit me in the ribs with my walking stick. She took a small brown metal tin that I had some change in. I also had some change on the table that she took. I know her. She comes up here all the time begging for money. She visits a man at the end of the hall. I don't know her name but he might.

Ms. Carlson described the assailant as "a black female in her 20s . . . [d]ark skin, about five nine in height, blue jeans and a homeless look." Ms. Griffin, Woods, and DeWayne Davis, a courtesy officer at Glenwood Towers, all recognized the description of the alleged assailant, but none could remember her name.

Officer Mark Utley (Officer Utley) of the Raleigh Police Department along with the Glenwood courtesy officer interviewed Burlee Kersey (Kersey), another resident believed to be familiar with the assailant. Kersey provided the name Angela Lewis in response to a description and the statement that she "comes over here all the time." Some days later, Davis found in his records a trespassing citation he had previously written to someone named Angela Lewis.

A medical examination showed that Ms. Carlson suffered bruising over her left eye, a contusion to her right frontal lobe, and a contusion to the right lower lobe of her lung. It was later confirmed that she had also suffered fractures to three of her ribs. While she was still in the hospital on the day of her attack, Officer Utley presented Ms. Carlson a photo line-up consisting of six photographs, including one of defendant. According to Officer Utley, Ms. Carlson identified defendant as her assailant.

At 6:05 pm on the day of Ms. Carlson's attack, Raleigh Police responded to a complaint by a woman reporting an assault and robbery against her near Glenwood Avenue. When police arrived, they found defendant, Angela Lewis, who gave her name as Angela Smith. She was bleeding and reported having been attacked from behind and robbed. The home address given by defendant was located at the Glenwood Towers. She provided two different Social Security numbers and gave other inconsistent information in her account of the alleged attack.

Defendant was transported to Wake Medical Center and taken in for questioning after being released from the hospital. She identified Kersey as a friend of hers whom she had previously visited, but she denied having been at Glenwood Towers that day.

No usable finger prints were recovered from Ms. Carlson's apartment. Roughly three months after this event, Ms. Carlson died of pneumonia and cancer. It was stipulated at trial that Ms. Carlson's death was "unrelated to the alleged commission of these offenses."

Defendant was tried on charges of assault with a deadly weapon inflicting serious injury, felonious breaking or entering, and robbery with a deadly weapon. At trial, defendant tried to exclude from evidence Ms. Carlson's statement to Officer Cashwell and her identification of defendant in Officer Utley's photo line-up. Both extrajudicial statements were admitted under the residual hearsay exception. North Carolina Rule of Evidence 804(b)(5) (2004). A jury found defendant guilty of all charges except the charge of felonious breaking or entering, on which she was found guilty of the lesser included offense of non-felonious breaking or entering. The trial court sentenced defendant to 192 to 249 months imprisonment. Defendant appeals. For the reasons stated herein, we reverse defendant's conviction and order a new trial.

II.

Defendant contends that two pieces of testimony introduced at trial were not properly admitted under the North Carolina Rules of Evidence. First, defendant alleges that it was error for the trial court to have allowed Officer Cashwell's testimony concerning statements made by Ms. Carlson to him at her apartment. At trial, defendant objected to Officer Cashwell's testifying as to what Ms. Carlson had stated to him, but following a *voir dire* this objection was overruled and the court concluded that this testimony could be admitted under

the residual hearsay exception. N.C.R. Evid. 804(b)(5) (2004). Second, Defendant argues that Officer Utley's testimony concerning Ms. Carlson's identification of her in a photographic line-up was also inadmissable hearsay. The record reflects that defendant properly objected to this testimony when offered at trial and thus preserved both issues for review.

On appeal, defendant argues that the trial court's findings regarding Ms. Carlson's statement to Officer Cashwell were insufficient to establish the "circumstantial guarantees of trustworthiness" necessary to admit a statement under the residual hearsay exception. N.C.R. Evid. 804(b)(5) (2004). Furthermore, defendant contends that the photo line-up would not fall under any exception to the prohibition on hearsay. N.C.R. Evid. 802 (2004). We, however, do not reach defendant's argument in reliance upon the North Carolina Rules of Evidence, because we conclude that admission of this evidence was a violation of defendant's rights under the Confrontation Clause of the United States Constitution's Sixth Amendment.

A. Confrontation Clause

"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." *State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (2004) (citing *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004)).

Because of the recent United States Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), we must first consider whether either of the statements at issue is properly classified as testimonial or nontestimonial. *State v. Blackstock*, 165 N.C. App. 50, 62, 598 S.E.2d 412, 420 (2004) ("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 *Crawford*, the Supreme Court abandoned the rationale of *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597 (1980), which had previously articulated which hearsay statement may be admitted at trial without violating the Sixth Amendment's Confrontation Clause. Under *Crawford*, courts must now draw a distinction between testimonial and nontestimonial evidence. If the evidence is nontestimonial, then "it is wholly con-

sistent with the Framers' design to afford the States flexibility in their development of hearsay laws—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203. If, however, the evidence is testimonial in nature, then "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.*

B. Testimonial Evidence

The decision in *Crawford* refused to define exactly what qualifies as testimonial evidence. The Court, however, specifically stated, "Whatever else the term [testimonial evidence] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to *police interrogations*." *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203 (emphasis added).

In the case *sub judice*, we determine whether either of Ms. Carlson's statements should be classified as testimonial evidence having been given in the course of a police interrogation.

This Court interpreted *Crawford* and the nature of the term "police interrogations" in *State v. Pullen*, 163 N.C. App. 696, 594 S.E.2d 248 (April 20, 2004) (No. 03-234). In *Pullen*, this Court ruled that a non-joined co-defendant's confession made to police in the course of their investigation was testimonial in nature. *Pullen*, 163 N.C. App. at 702, 594 S.E.2d at 252. Subsequently, this Court held that a witness's statements, including an affidavit, provided to police for the purpose of identifying a defendant and recounting events surrounding a crime are classified as testimonial. *Clark*, 165 N.C. App. at 284, 598 S.E.2d at 217-18. *See also*, *Moody v. State*, 594 S.E.2d 350, 354 n. 6 (Ga. 2004) (holding field investigations of witnesses by police to be testimonial evidence under *Crawford*). At trial, Officer Cashwell introduced Ms. Carlson's statement to him in his testimony. Because this information was taken in the course of a police investigation and provided evidence substantially similar in nature to that at issue in *Pullen* and *Clark*, we conclude that it was testimonial in nature.

Similarly, Officer Utley introduced Ms. Carlson's identification of the defendant in his photographic line-up. As in *Clark*, both the initial statement and the photo identification had been given to the police in the course of an investigation and used for the purpose of identifying the assailant. Just like Ms. Carlson's first statement, her identification in the photo line-up provided information that implicated defendant

and that was presented at trial in order to establish the State's case against defendant.

Hearsay, which is generally inadmissible, "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.R. Evid. 801(c) (2004). In this case, this evidence was offered to establish the truth of the matter asserted, i.e., the identity of the assailant. There was no instruction preventing the jury from using it for such a purpose, and indeed it did not appear to be offered for any other purpose. *See, e.g., Tennessee v. Street*, 471 U.S. 409, 414, 85 L. Ed. 2d 425, 431 (1985) (permitting uses of out-of-court statements for purposes other than establishing the truth of the matter asserted). In fact, the State's case relied heavily upon the evidence from the late Ms. Carlson to establish defendant's guilt.

A photo line-up was also employed by the police in *Clark*, but defendant failed to argue its inadmissability to this Court, and the assignment was deemed abandoned. As such, we are left to consider the photo identification in the case *sub judice* as a matter of first impression in this jurisdiction. In substance, the information obtained from a photo line-up is not very different from other evidence that is classified as testimonial under *Crawford*. Indeed, the photo line-up is very similar to the ex parte and extra-judicial examinations by government officials which *Crawford* makes clear the Sixth Amendment was meant to address. *Crawford*, 541 U.S. at 51-53, 158 L. Ed. 2d at 192-93; *see, e.g., State v. Webb*, 2 N.C. 103, 104 (1794) ("no man shall be prejudiced by evidence which he had not the liberty to cross-examine"); *see also State v. Forrest*, 164 N.C. App. 272, 280 596 S.E.2d 22, 27-28 (2004) (holding that a victim's immediate comments to officers on the scene were not initiated by police and therefore not testimonial), *aff'd per curiam*, — N.C. —, 611 S.E.2d — (2005).

Here Ms. Crawford's statements to police were highly dependent upon her ability to recall the crime clearly, and the photographic line-up is especially susceptible to being characterized, like the evidence at issue in *Crawford*, as having been "given in response to structured police questioning." *Crawford*, 541 U.S. at 53 n.4, 158 L. Ed. 2d at 194 n.4. The details provided by Ms. Carlson's statements are precisely those that would be probed and tested upon cross-examination. As such, we hold that the information obtained from the photo line-up and offered at trial through Officer Utley constituted testimonial evidence.

C. The Effect of the Error

The trial court found and the State contends that these statements are reliable and thus admissible. The fact that the information provided may be quite reliable or trustworthy, however, is irrelevant under *Crawford*. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Crawford*, 541 U.S. at 62, 158 L. Ed. 2d at 199. "Admitting a statement deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Id.* Moreover, Justice Scalia also noted in *Crawford* that "[t]he involvement of government officers in the production of testimonial evidence presents" a risk, and the Sixth Amendment's protections against testimonial hearsay primarily address that risk by controlling the use of certain types of evidence, including "interrogations by law enforcement officers." *Id.* at 53, 158 L. Ed. 2d at 194.

Because we hold that both Ms. Carlson's statement to the police and her identification of defendant in the photo line-up constitute testimonial evidence, we conclude that both were inadmissible unless the witness was unavailable and defendant had a proper opportunity to cross-examine. *Crawford*, 541 U.S. at 68-69, 158 L. Ed. 2d at 203; *Clark*, 165 N.C. App. at 284, 598 S.E.2d at 217-18. It is undisputed that Ms. Carlson was unavailable as a result of her untimely death before the start of the trial. Moreover, it is not disputed that defendant lacked a prior opportunity to cross-examine Ms. Carlson as to her statements.[1] Because defendant had no prior opportunity to cross-examine the witness, the use of her testimony at her trial constituted a violation of defendant's Sixth Amendment rights.

When such a violation occurs, we grant a new trial unless the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2003). "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." *State v. Sisk*, 123 N.C. App. 361, 370, 473 S.E.2d 348, 354 (1996), *aff'd in relevant part and disc. review allowed*, 345 N.C. 749, 483 S.E.2d 440 (1997) (citing N.C. Gen. Stat. § 15A-1443); *see also*, *Clark*, 165 N.C. App. at 289, 598 S.E.2d at 220-21.

1. It is, of course, irrelevant that defendant could cross-examine the officers who introduced Ms. Carlson's statements. *See Crawford*, 541 U.S. at 50-51, 158 L. Ed. 2d at 192.

In *Clark*, this Court found the evidence to be harmless beyond a reasonable doubt because there was other substantial evidence upon which the jury could have based its verdict, including evidence given by the victim herself. *Clark*, 165 N.C. App. at 290, 598 S.E.2d at 221. In the case *sub judice*, however, we cannot conclude that the error was harmless beyond a reasonable doubt. Once the evidence offered by Ms. Crawford is excluded, there is no eye-witness testimony available giving an account of the crime nor is there anyone who can place defendant with Ms. Carlson during the time of its commission. There is no forensic evidence such as fingerprints, hairs, or fibers placing defendant at the scene or otherwise implicating defendant. Furthermore, defendant never confessed to the crime. The most the State may offer is that Woods saw defendant enter the apartment building on the day in question, that defendant had been seen on the premises begging for money on previous occasions, and that defendant was less than cooperative when questioned about the crime.

The remaining evidence is not sufficient for us to conclude that excluding the victim's identification of defendant and her other testimony would have no bearing on jury deliberations. *Cf. 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 189-90 (1998) (holding that overwhelming evidence of guilt may render constitutional error harmless beyond a reasonable doubt). Indeed, the hearsay evidence presented by the State constituted the core of the case against defendant. As such, this erroneous admission of evidence is not harmless beyond a reasonable doubt as required by N.C. Gen. Stat. § 15A-1443(b).

III.

Because Ms. Carlson's statement to the police and her identification of defendant in the photo line-up constitute testimonial evidence, defendant's rights under the Sixth Amendment's Confrontation Clause were violated when the victim's death removed any possibility that defendant could cross-examine Ms. Carlson. Given the nature of the evidence at trial, we cannot hold that this error was harmless beyond a reasonable doubt. Accordingly, we grant defendant a new trial.

We note that in light of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), defendant has filed a Motion for Appropriate Relief as to the sentence imposed by the trial court. Because, however, we grant defendant a new trial, the motion is moot.

New Trial.

Judges McCULLOUGH and BRYANT concur.

JEANETTE L. BASS, EMPLOYEE, PLAINTIFF v. MORGANITE, INC., EMPLOYER, SELF-INSURED (GALLAGHER BASSET SERVICES, SERVICING AGENT), DEFENDANT

No. COA04-57

(Filed 19 October 2004)

1. Workers' Compensation— occupational disease—carpal tunnel syndrome

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff employee failed to prove that she contracted an occupational disease of carpal tunnel syndrome in connection with her job duties with defendant company, because: (1) plaintiff failed to satisfy her burden, but instead merely argued that no competent evidence existed to support a finding that plaintiff contracted carpal tunnel syndrome any other way besides her employment with defendant; (2) the unchallenged findings show that both of plaintiff's treating physicians admitted her symptoms started with a sliding door injury at her son's house in April 2000; and (3) the Commission was not required to give the testimony of plaintiff's expert witnesses more weight than that of another doctor who was an expert in hand and wrist disorders.

2. Appeal and Error— preservation of issues—failure to cite authority

Although plaintiff contends the Industrial Commission erred in a workers' compensation case by finding that a videotape was an accurate depiction of the primary duties of plaintiff's employment, this assignment of error is deemed abandoned because plaintiff failed to cite any authority in support of her argument.

3. Workers' Compensation— doctor testimony—weight of testimony

The Industrial Commission did not err in a workers' compensation case by according more weight to the opinion of a doctor who was an expert in hand and wrist disorders than the opinions

of plaintiff's treating physicians, because: (1) competent evidence supported the Commission's findings of fact and its decision to give greater weight to the testimony of the one doctor; and (2) plaintiff's argument that her honesty and credibility require the Commission to accept her testimony regarding her job duties as true is irrelevant to whether the Commission can afford more weight to one testifying physician over another.

4. Appeal and Error— preservation of issues—failure to cite authority—broad assertion

Although plaintiff contends the Industrial Commission erred in a workers' compensation case by failing to find that plaintiff's bilateral carpal tunnel syndrome was compensable, this assignment of error is deemed abandoned under N.C. R. App. P. 28(b)(6) because plaintiff's brief fails to present any authority in support of this broad assertion.

Appeal by plaintiff from opinion and award entered 29 September 2003 by Commissioner Bernadine S. Ballance. Heard in the Court of Appeals 23 September 2004.

Brent Adams & Associates, by Kristine Anisansel, for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Joy H. Brewer, for defendant-appellee.

TYSON, Judge.

Jeanette Bass ("plaintiff") appeals from an Opinion and Award entered by the Full Commission of the North Carolina Industrial Commission ("the Commission"). The Commission found plaintiff failed to prove she contracted an occupational disease in connection with her job duties with Morganite, Inc. ("defendant"). We affirm.

I. Background

The findings of the Commission show plaintiff was employed by defendant as a carbon brush inspector for nine years beginning 23 March 1992. As a brush inspector, plaintiff was required to perform tests on carbon brush samples using various machines in the lab. Plaintiff testified she was responsible for cutting and grinding the parts and measuring them for density, hardness, and resistance. She testified her job required constant use of her hands and that she gripped the parts as she manipulated them. Plaintiff was required to

lift up to fifteen pounds approximately twenty times a day. Plaintiff lifted up to one pound continuously throughout the day. She also lifted between fifty and seventy-five pounds between three and six times per week.

On 10 April 2000, plaintiff reported an injury to the plant nurse and complained she experienced pain in her right hand. Plaintiff stated the pain began on Saturday while she was attempting to open a sliding glass door at her son's house. Plaintiff was referred to neurologist Dr. Pamela Whitney ("Dr. Whitney"). Dr. Whitney performed a nerve conduction study, which showed plaintiff suffered from mild carpal tunnel syndrome. Based solely upon plaintiff's description of her job duties, Dr. Whitney opined that it "seems reasonable" that plaintiff's carpal tunnel syndrome was caused by her job.

On 27 July 2000, Dr. Robert L. Allen ("Dr. Allen"), a neurosurgeon, performed a carpal tunnel release on plaintiff's right hand. Plaintiff returned to work in October 2000 with restrictions to not perform heavy lifting.

Plaintiff again left work in January 2001 and was provided medical leave and received one-half her salary for six months. On 15 January 2001, plaintiff sought treatment from Dr. Richard Alioto ("Dr. Alioto"), an orthopedic surgeon, who examined both of plaintiff's wrists and diagnosed her with tendinitis. Dr. Alioto testified by deposition that plaintiff described the sliding door injury of April 2000 as the beginning of her carpal tunnel symptoms. In his opinion, this injury to her right wrist was "where she developed what sounded to me like symptoms of carpal tunnel syndrome . . . ."

Dr. Alioto provided a splint to plaintiff for her right wrist, limited her to lifting no more than five pounds. He also restricted her from performing repetitive type tasks. In March 2001, Dr. Alioto performed a "Phalen's test" on plaintiff's wrists, which showed normal results. Nerve conduction studies on plaintiff's left wrist revealed mild carpal tunnel syndrome. On 27 April 2001, he performed carpal tunnel release surgery on plaintiff's left wrist. Based upon plaintiff's description of her job duties, Dr. Alioto opined that plaintiff's employment "could have been" a contributing factor of carpal tunnel syndrome and that plaintiff's employment placed her at a greater risk of developing carpal tunnel syndrome over the general public not so employed.

Wanda Dorman ("Dorman") worked with plaintiff and testified that she agreed with plaintiff's job duty description. However,

Dorman testified that she did not hyper-extend or hyper-flex her wrist while performing the inspections and that holding the parts did not require "much grip pressure." Teresa Sanders ("Sanders"), another co-employee of plaintiff, testified that she had been employed with defendant as an inspector for five to six years. Sanders stated the tests performed by the inspectors are usually completed within approximately one hour. She also testified there are a variety of other activities that inspectors perform in addition to testing the parts.

On 9 January 2002, Dr. George S. Edwards ("Dr. Edwards"), an expert in hand and wrist disorders, examined plaintiff's hands and diagnosed her with bilateral carpal tunnel syndrome. He observed a video tape depicting an employee who demonstrated plaintiff's job duties in a similar, but slower, fashion. After viewing this video, Dr. Edwards opined that there was no causal relationship between plaintiff's job duties and her bilateral carpal tunnel syndrome.

Based on these findings, the Commission denied compensation benefits and concluded plaintiff failed to prove by the greater weight of the evidence that she contracted the occupational disease of carpal tunnel syndrome as a result of her employment. Plaintiff appeals.

II. Issues

The issues on appeal are whether the Commission erred by: (1) concluding plaintiff failed to prove she suffers from an occupational disease due to causes and conditions characteristic of and peculiar to her employment as a brush inspector with defendant; (2) finding the videotape accurately depicted the primary duties of plaintiff's employment; (3) according more weight to the opinion of Dr. Edwards as opposed to plaintiff's treating physicians Dr. Alioto and Dr. Whitney; and (4) failing to find that plaintiff's bilateral carpal tunnel syndrome is compensable.

III. Standard of Review

On appeal from the Commission in a workers' compensation claim, our standard of review requires us to consider:

> whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law. The findings of fact made by the Commission are conclusive upon appeal when supported by competent evidence, even when there is evidence to support a finding to the contrary. In weighing the evidence the

> Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony and may reject a witness' testimony entirely if warranted by disbelief of that witness.

Plummer v. Henderson Storage Co., 118 N.C. App. 727, 730, 456 S.E.2d 886, 888 (internal citations omitted), *disc. rev. denied*, 340 N.C. 569, 460 S.E.2d 321 (1995). "[W]here no exception is taken to a finding of fact . . ., the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citation omitted).

IV. Occupational Disease

[1] Plaintiff contends the Commission erred by failing to conclude plaintiff suffers from carpal tunnel syndrome as a result of her employment with defendant. We disagree.

An individual seeking benefits under the Workers' Compensation Act has the burden of proving each and every element of compensability. *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003) (citations omitted).

Under N.C. Gen. Stat. § 97-53, in order for carpal tunnel syndrome to be deemed compensable as an "occupational disease," plaintiff must prove: (1) the disease is characteristic of the trade or occupation; (2) the disease is not an ordinary disease of life to which the public is equally exposed outside of the employment; and (3) there is a causal connection between the disease and the employment. *Thompson v. Tyson Foods*, 119 N.C. App. 411, 413, 458 S.E.2d 746, 747 (1995) (citing *Hansel v. Sherman Textiles*, 49 N.C. App. 1, 6, 270 S.E.2d 585, 588 (1980), *rev'd on other grounds*, 304 N.C. 44, 283 S.E.2d 101 (1981)). The "causal connection" element determines whether the work environment "significantly contributed to, or was a significant causal factor in the disease's development." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E.2d 359, 369-70 (1983).

Here, the Commission concluded plaintiff failed to satisfy her burden of proving that she "contracted the occupational disease of carpal tunnel syndrome due to causes and conditions which are characteristic of and peculiar to her occupation." Plaintiff argues "no competent evidence exists to support a finding that plaintiff contracted her bilateral carpal tunnel syndrome any other way besides her employment with [defendant]." This argument fails to recognize our standard of review. Plaintiff addresses her first assignment of error:

> The Full Commission's Conclusion of Law reading that "Plaintiff failed to prove by the greater weight of the evidence that shat [sic] she has contracted the occupation disease of carpal tunnel syndrome due to causes and conditions which are characteristic of and peculiar to her occupation" on the basis that the only relevant and competent evidence in the record supports a finding that plaintiff has contracted the occupational disease carpal tunnel syndrome as a result of her job duties with Defendant . . . .

As plaintiff only excepted to portions of the Commission's finding number nine, we review her assignment of error for whether the other findings of fact support the Commission's conclusion of law. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731; *Plummer*, 118 N.C. App. at 730, 456 S.E.2d at 888.

The unchallenged findings show both of plaintiff's treating physicians, Dr. Whitney and Dr. Alioto, testified that plaintiff admitted her symptoms started with "the sliding door injury of April 2000." Dr. Alioto "opined that plaintiff's job with defendant *could have* been a contributing factor to plaintiff's contracting carpal tunnel syndrome." (Emphasis supplied). The Commission's findings show "Dr. Whitney opined that it '*seems reasonable*' that plaintiff's carpal tunnel syndrome was caused by her job." (Emphasis supplied). Dr. Edwards testified as an expert in hand and wrist disorders and opined that "there was *no* causal relationship between plaintiff's job duties and her bilateral carpal tunnel syndrome." (Emphasis supplied). These findings are unchallenged and conclusive on appeal.

The Commission also found, "The opinions of Dr. Edwards on causation and increased risk are given greater weight than those of Drs. Alioto and Whitney." The Commission was not required to give plaintiff's expert witnesses' testimony more weight than that of Dr. Edwards. *See infra 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); *see also Holley*, 357 N.C. at 234, 581 S.E.2d at 754. The Commission's conclusion of law that plaintiff failed to prove she suffered an occupational disease as a result of her employment is supported by the findings of fact. This assignment of error is overruled.

V. Videotape

[2] Plaintiff contends the Commission erred by finding the videotape submitted into evidence accurately depicted plaintiff's primary job duties. Plaintiff fails to cite any authority in support of her argument.

This assignment of error is deemed abandoned. N.C.R. App. P. 28(b)(6) (2004); *see also DOT v. Elm Land Co.*, 163 N.C. App. 257, 264, 593 S.E.2d 131, 136, *disc. rev. denied*, 358 N.C. 542, 599 S.E.2d 42 (2004).

VI. Weight of Testimony

[3] Plaintiff argues the opinions of Dr. Alioto and Dr. Whitney should be given greater weight than Dr. Edwards's opinion. We disagree.

"[O]n appeal, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). Plaintiff's argument that the Commission should have afforded more weight to her treating physicians is without merit.

The Commission gave Dr. Edwards's opinions on causation and increased risk greater weight than the opinions of Dr. Alioto and Dr. Whitney. Dr. Edwards's testified that the aging process plays a part in carpal tunnel syndrome and that carpal tunnel syndrome is "much more common" in women. Dr. Edwards also testified to a reasonable degree of medical certainty "that there was not a relationship between [plaintiff's] job and her development of carpal tunnel syndrome." Dr. Edwards opined that plaintiff's age was "the chief factor resulting in her carpal tunnel syndrome."

Competent evidence supports the Commission's findings of fact and its decision to give greater weight to Dr. Edwards's testimony than to Dr. Alioto's and Dr. Whitney's testimony. Plaintiff failed to offer any authority to support her assertion that the videotape did not accurately depict her job duties.

Plaintiff also argues her honesty and credibility require the Commission to accept her testimony regarding her job duties as true. Her argument is irrelevant to whether the Commission can afford more weight to one testifying physician over another. This assignment of error is overruled.

VII. Conclusion

[4] Plaintiff also assigned error to the Commission's "conclusion of law that 'plaintiff is not entitled to compensation under the Act.' " Plaintiff argues "there is relevant and competent evidence that man-

dates a finding that plaintiff's bilateral carpal tunnel syndrome is compensable." Plaintiff's brief fails to present any authority in support of this broad assertion. This assignment of error is abandoned pursuant to N.C.R. App. P. 28(b)(6).

The Commission's findings of fact are supported by competent evidence in the record. These findings support the Commission's conclusions of law. The Opinion and Award of the Full Commission is affirmed.

Affirmed.

Judges BRYANT and LEVINSON concur.

JAMES DONOGHUE, PETITIONER v. NORTH CAROLINA DEPARTMENT OF CORRECTION, RESPONDENT

No. COA03-1157

(Filed 19 October 2004)

Public Officers and Employees— demotion of probation and parole officer—allegations of gross inefficiency

Use of either the de novo review or whole record test reveals that the trial court did not err by failing to find that petitioner probation and parole officer engaged in grossly inefficient job performance by allowing a probationer to travel out of state and by failing to make weekend curfew checks of other probationers, because: (1) the Department of Corrections (DOC) failed to show that petitioner failed to perform his job satisfactorily when the terms of the probationary judgment regarding the probationer's travel were ambiguous, and it would have been the better practice for the sentencing court to state more clearly whether out-of-state travel was prohibited; (2) although the pertinent DOC manual does have language which prohibits out-of-state travel for cases like the probationer's except in emergency situations with specific approval, these guidelines seem to be inconsistent with testimony from judges, prosecutors, and public defenders who indicate that probation officers have discretion in supervising the terms of probation including the decision of whether to allow out-of-state travel; and (3) even though petitioner failed to make

weekend curfew checks of other probationers, petitioner was scheduled to work forty hours per week and usually completed his hours before the weekend began, he attended many evening treatment sessions to monitor probationers' treatment, his supervisor for over ten years was aware that petitioner was not working weekends since petitioner submitted regular employee time reports and the supervisor never suggested this was problematic, and petitioner was carrying a caseload of sixty probationers even though the recommended number of cases was twenty-five when the program was set up.

Appeal by respondent from order entered 24 June 2003 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 May 2004.

Attorney General Roy Cooper, by Assistant Attorney General Neil C. Dalton and Assistant Attorney General Joseph Finarelli, for the North Carolina Department of Correction respondent appellant.

Lesesne & Connette, by Edward G. Connette, for petitioner appellee.

McCULLOUGH, Judge.

Petitioner James L. Donoghue began working at the North Carolina Department of Correction (DOC) on or about 15 July 1983. During the course of his career, Donoghue established a good reputation for his work as a probation and parole officer. He was the first officer in North Carolina to create a specialized caseload of sex offenders. Donoghue was also instrumental in developing a list of "sex offender conditions" of probation, and the legislature adopted a number of his recommendations statewide.

On or about 12 March 2001, Donoghue was assigned to supervise a sex offender, M.V. There was some conflicting evidence regarding whether M.V. was allowed to travel out of state. First, the probationary judgment was ambiguous. The trial judge imposed the "regular conditions of probation" which are codified at N.C. Gen. Stat. § 15A-1343(b) (2003). Under that statute, M.V. had to "[r]emain within the jurisdiction of the court unless granted written permission to leave by the court or his probation officer." N.C. Gen. Stat. § 15A-1343(b)(2). However, in another portion of the judgment, the trial court ordered that M.V. "is not to leave the State of North

Carolina during the term of probation." To complicate matters further, the DOC's policies and procedures manual states that offenders subject to Level I Intermediate Punishment "are not allowed to travel out-of-state except in emergency situations with the specific approval of either the court or the Post-Release Supervision and Parole Commission."

M.V. asked for Donoghue's permission to travel outside of North Carolina for his job as a computer software salesman. After reviewing the judgment, various departmental policies, and the procedures manual, Donoghue authorized the out-of-state travel.

On 18 June 2001, the mother of M.V.'s victim complained because she believed that allowing M.V. to travel out of state was improper. On 20 June 2001, the Assistant Judicial District Manager over Donoghue, Cynthia Mitchell, received a phone call from a DOC senior official requesting an investigation.

Mitchell conducted an investigation which reviewed Donoghue's entire caseload. Based on this investigation, Donoghue was demoted from his PPO III position to a PPO I position. This demotion carried a five percent reduction in salary and was based on "grossly inefficient job performance, to wit: your failure to properly supervise offenders[.]" The demotion focused primarily on Donoghue's supervision of M.V., and to a lesser extent, his failure to conduct weekend supervision of other probationers.

In January of 2002, Donoghue filed a Petition for Contested Case hearing with the Office of Administrative Hearings. The presiding Administrative Law Judge (ALJ) conducted a contested case hearing and determined that the DOC failed to prove by the greater weight of the evidence that Donoghue had been demoted for just cause. The DOC appealed this decision to the State Personnel Commission (SPC). On 16 December 2002, the SPC issued its Decision and Order rejecting the decision of the ALJ and upholding the DOC's demotion of Donoghue. Donoghue filed a Petition for Judicial Review in Mecklenburg County Superior Court. On 24 June 2003, Judge Nathaniel J. Poovey issued an order which determined that Donoghue's actions did not rise to the level of "grossly inefficient job performance." The DOC appeals.

On appeal, the DOC argues that the superior court erred by failing to find that Donoghue engaged in grossly inefficient job performance. We disagree and affirm the decision of the trial court.

I. Standard of Review

Chapter 150B of the North Carolina General Statutes addresses 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). The standard of review that this Court utilizes is mentioned in N.C. Gen. Stat. § 150B-52 (2003). Amended in 2000, the current version of the statute states:

> 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 scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. *In cases reviewed under G.S. 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence.*

Id. (emphasis added).

This case falls under N.C. Gen. Stat. § 150B-51(c) (2003) because that section applies when "the agency does not adopt the administrative law judge's decision[.]" Here, although the ALJ issued a decision favoring the employee, the SPC rejected that decision and sided with the DOC. Normally, we would uphold the decision if the trial court's findings of fact were supported by substantial evidence.

This case, however, is more complicated because the trial court did not utilize the correct standard of review when considering the final agency decision. N.C. Gen. Stat. § 150B-51(c) states that "the [trial] court shall review the official record, de novo, and shall make findings of fact and conclusions of law." Here, the trial court utilized a whole record test instead of conducting *de novo* review when evaluating the Commission's findings. Therefore, the issue is whether, as a result of this error, we should employ *de novo* review instead of the substantial evidence test mentioned in N.C. Gen. Stat. § 150B-51(c).[1]

There is some precedent for using *de novo* review. In *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 677, 443 S.E.2d 114, 118 (1994), this Court noted that "where the initial reviewing court should have conducted *de novo* review, this Court will directly

1. We cannot be too critical of the trial court because the legislature added Section 150B-51(c) to the North Carolina Administrative Procedure Act in 2000. *Cape Med. Transp., Inc. v. N.C. Dep't of Health and Human Servs.*, 162 N.C. App. 14, 21, 590 S.E.2d 8, 13 (2004). Additionally, both parties requested review under the whole record test and "failed to call the recent statutory amendment to the attention of the trial judge."

review the State Personnel Commission's decision under a *de novo* review standard." More recently, we articulated this same principle in *Davis v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 513, 565 S.E.2d 716 (2002). There, the trial court applied the whole record test erroneously when reviewing an agency's decision to demote a member of the North Carolina State Highway Patrol. *Id.* at 513-16, 565 S.E.2d at 717-19. On appeal, this Court utilized the *de novo* standard of review. *Id.* at 516, 565 S.E.2d at 719.

We do not need to make a definitive determination regarding which standard of review to employ. Under either standard, *de novo* review or the more deferential framework articulated in N.C. Gen. Stat. § 150B-52, we would affirm the decision of the trial court.

II. Legal Background

Pursuant to N.C. Gen. Stat. § 126-35(a) (2003), "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." "In contested cases conducted pursuant to Chapter 150B of the General Statutes, the burden of showing that a career State employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the department or agency employer." N.C. Gen. Stat. § 126-35(d) (2003). The North Carolina Administrative Code permits demotion "for grossly inefficient job performance without any prior disciplinary action." N.C. Admin. Code tit. 25, r. 1J.0612(a)(2) (June 2004). The Code also defines "Gross inefficiency (Grossly Inefficient Job Performance)" as:

> A type of unsatisfactory job performance that occurs in instances in which the employee: fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency; and, that failure results in:
>
> (1) the creation of the potential for death or serious bodily injury to an employee(s) or to members of the public or to a person(s) over whom the employee has responsibility[.]

N.C. Admin. Code tit. 25, r. 1J.0614(f) (June 2004). Thus, the DOC must prove that (1) the employee failed to perform his job satisfactorily and (2) that failure resulted in the potential for death or serious bodily injury. *Id.* With these principles in mind, we turn to consider the assignment of error on appeal.

III. Grossly Inefficient Job Performance

The DOC first argues that Donoghue engaged in grossly inefficient job performance by allowing a probationer to travel out of state. We disagree.

The DOC has not shown that Donoghue failed to perform his job satisfactorily because the terms of the probationary judgment regarding M.V.'s travel were ambiguous. The trial judge imposed the "regular conditions of probation" which are set forth in N.C. Gen. Stat. § 15A-1343(b) (2003). Under that statute, M.V. had to "[r]emain within the jurisdiction of the court unless granted written permission to leave by the court or his probation officer." N.C. Gen. Stat. § 15A-1343(b)(2). However, in its judgment, the trial court also ordered that M.V. "is not to leave the State of North Carolina during the term of probation."

The DOC asserts that the court's more stringent prohibition against out-of-state travel supercedes the regular condition of probation which authorized out-of-state travel if M.V. received permission from the court or his probation officer. It cites a portion of N.C. Gen. Stat. § 15A-1343(b)(11) which states:

> Regular conditions of probation apply to each defendant placed on supervised probation unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court.

Whether the sentencing judge intended to "specifically exempt" defendant from the regular condition of probation that authorized travel is an open question. However, we understand, as the trial court did, why Donoghue would be confused after reading an order which appears to say two entirely different things. It would have been the better practice for the sentencing court to state more clearly whether out-of-state travel was prohibited. Furthermore, we accept Donoghue's explanation that he tried to find consistency in the two statements:

> And, when I read that [the court's statement that M.V. is not to leave North Carolina during the term of his probation], I interpreted that to mean stay in the state of North Carolina to be supervised, not transfer out of the state of North Carolina to be supervised by another state. That's what I read—took that to mean. I didn't take it to mean he's not allowed to travel out of state because there are other conditions that allowed him to

travel out of state contained in the judgment. So I looked at all these conditions and weighed it, and that's what I came up with.

Since the judgment of the sentencing court was ambiguous, we do not believe that Donoghue engaged in grossly inefficient job performance by permitting out-of-state travel.

We also note that Donoghue was forced to evaluate other conflicting information in deciding whether to authorize out-of-state travel. The DOC's Division of Community Corrections Policies and Procedures Manual ("the Manual") does have language which prohibits out-of-state travel for Level I Intermediate Punishment cases like M.V.'s "except in emergency situations with the specific approval of either the court or the Post-Release Supervision and Parole Commission[.]" However, these guidelines, as written, seem to be inconsistent with testimony from judges, prosecutors, and public defenders who indicate that probation officers have discretion in supervising the terms of probation, including the decision of whether to allow out-of-state travel. The manual also appears to conflict with the portion of the sentencing court's judgment which authorized out-of-state travel with Donoghue's permission.

Based on this information, we cannot conclude that Donoghue failed to perform his job satisfactorily by allowing out-of-state travel.

The DOC also contends that Donoghue's job performance was unsatisfactory because he failed to make weekend curfew checks. We do not agree. Evidence in the record reveals that Donoghue was scheduled to work forty hours per week. Since many probationers participated in evening treatment sessions, Donoghue attended such sessions to monitor probationers' treatment. As a result of working so many evening hours, Donoghue usually completed forty hours before the weekend began. Moreover, Donoghue's supervisor for over ten years was aware that Donoghue was not working weekends because Donoghue submitted regular employee time reports. This is significant because Donoghue's supervisor never suggested that this was problematic when she conducted regular audits of Donoghue's caseload.

There was also evidence that Donoghue was carrying a caseload of 60 probationers, even though the recommended number of cases was 25 when the program was set up. Donoghue simply had too many cases, too much territory to cover, and too many job demands. Under these circumstances, we cannot conclude that Donoghue engaged in grossly inefficient job performance.

As we have stated, the outcome of this case does not hinge upon which standard of review to employ. Our review of the record indicates that the trial court made findings of fact that were supported by competent evidence, and those findings, in turn, supported the conclusions of law. Furthermore, even under the less deferential *de novo* standard of review, the result would be the same. Therefore, the decision of the trial court is

Affirmed.

Judges HUDSON and BRYANT concur.

CARL ADAMS, DOYLE WOODROW ALEXANDER, AUDREY LOUISE ALLISON, ALBERT WILLIAM ARRINGTON, JR., JAMES RONNIE ARRINGTON, JUDITH HOPE ARRINGTON, HOYT JAY BARNES, SAMMY BARNETT, TOMMY BARNETTE, ROGER DEAN BEASLEY, CARROLL BECK, GLENN RAY BECK, JAMES ARTHUR BECK, THURMAN BLAINE, TRUDIE MARIE BLAINE, JAMES BOLDEN, TERRY LEE BROWNING, GRADY DALLAS BRYSON, MACK C. BRYSON, VERLIN LEO BRYSON, GORDON J. BUCHANAN, HAROLD DEMPSEY BUCHANAN, NANCY BUCHANAN, WILLIAM EDWARD BUCHANAN, DANNY SELLERS BUMGARNER, MILTON RUSSELL BURKE, JAMES RICHARD BYRD, JACK DEMPSEY CALDWELL, WALTER BOONE CALDWELL, LOYD ANDREW CARVER, DENNIS MARION CASEY, SR., ADA PRICE CLARK, ROBERT RAY CLARK, JAMES MORRIS COCHRAN, LOUIE COCHRAN, NEAL EDWARD CODY, DONALD WAYNE COGBURN, FRED EARL COGDILL, AUTHER EARNEST COOPER, CARL H. COWARD, SR., EUGENE T. CRAIG, JR., JOHNNIE NILE CRAWFORD, GREGORY ALAN DAVIS, HUGH MORRELL DAVIS, EDWARD EVANS DYER, WILLIAMS MARSHALL EDWARDS, RONALD JACKSON ESTES, JAMES RICHARD EVANS, ROSEMARY CALDWELL EVANS, VINSON EVANS, SAMUEL EDWARD FERGUSON, DORIS WHITAKER FINCANNON, CARROLL WILBURN FISHER, RAYMOND JACK FISHER, CLARENCE EUGENE FORD, ROBERT WILLIAM FOWLER, PAUL DON FRADY, THOMAS LAWRENCE FRAZIER, JOHN ALEXANDER FRIZZELL, SILAS KENNETH FRIZZELL, DOROTHY ELIZABETH FULCE, KENNETH HOWARD GIBSON, ARNOLD EMMITT GREEN, DAVIS DEAN GREEN, GEORGE WILLIAM GREEN, JAMES H. GREEN, KENNETH WALTER GREEN, DOUGLAS GREENE, JAMES GREENE, JAMES PAUL GROOMS, KENNETH CARROLL GROOMS, ROY WALTER GROOMS, JACK ALLEN HALL, JAMES HENRY HALL, JERRY STEPHEN HALL, MILDRED CHAMBERS HANNAH, MORRIS JAMES HANNAH, JOE EDWARD HAWKINS, ROGER DALE HENDRIX, BARBARA SMITH HENRY, ALBERT DEWIGHT HENSON, DONALD JEROME HENSON, JOHN VANCE HILL, BRUCE HOLDER, CHARLES HERMAN HOLDER, WILBURN VAN HOLLAND, CARL KENNETH HORTON, THOMAS DEWITT HYATT, CHARLES WAYNE HYDE, VINCENT LANNES INMAN, FRANKLIN DEWITT JAMES, WILLIAM KARLISLE JAMES, JAMES HAROLD JAMISON, LAWRENCE DANIEL JENKINS, DONNIE RAY JONES, CHARLES HOOPER JUSTICE, DANIEL HAROLD KELLEY,

MICHAEL DENNIS KELLY, JAMES GROVER LEATHERWOOD, RAYMOND SAMMY LEDFORD, PHILLIP LEOPARD, JACK CARPENTER LEWIS, ROY F. LINDSAY, CLAUDE OWEN LONG, BOONE BEVERLY LOWE, ROGER FRANK LOWE, JAMES ANDREW LUNSFORD, WILLIE THOMAS MANN, FREDERICK JOSEPH MARCUS, PEGGY MARTIN, LANEY CONSTANT MASON, FRANK MATHIS, WILLIAM NEWTON MAUCK, JAMES T. MAULDIN, JOHNNY ELLIS McCALL, ROBERT DELOS McCALL, JAMES EDWARD McCONNELL, HAZEL McELROY, JAMES LESLIE McFALLS, GENE ALLEN MEDFORD, JAYNES RILEY MEDFORD, RICHARD DALE MEDFORD, ROBERT TAYLOR MEDFORD, WILLIAM LAWRENCE MEDFORD, WILLIE ERVIN MEHAFFEY, EDWARD LEE MESSER, GLEN HORACE MESSER, HOWARD MESSER, STEVEN KIRBY MILLER, JAMES ROBERT MINTZ, JR., RUFUS CARROLL MINTZ, JAMES EDWARD MOODY, CLYDE ALLEN MORGAN, JERRY DEVOE MORROW, ROBERT KENNETH MORROW, SHELIA DIANE NICHOLS, HARLEY RAY OTTINGER, BARBARA ANN PARKS, CHARLES EDWIN PARKS, FRED PARTON, RAY ALFRED PARTON, WILLIAM PARTON, JACK PHILLIPS, WAYNE HILLIARD PITTS, NED HILLARD PRICE, JACK O'NEIL RAMEY, WILLIAM C. RASH, EDWIN PALMER RATCLIFFE, JUNIOR DAVID RATHBONE, LARRY DOUGLAS RATHBONE, MARY NELL RATHBONE, WAYNE BOYD RATHBONE, SEBY NEAL RHODARMER, ROBERT RAY RHODES, KENNETH ROBERTS, CLARENCE RAYMOND ROBINSON, DOUGLAS NEAL ROBINSON, GERALDINE MARIE ROBINSON, JOSEPH MOORE ROBINSON, SAMUEL E. ROBINSON, CHARLES ROBERT ROGERS, JACK ROGERS, RODERICK NEWTON ROGERS, MEDFORD DALE RUSSELL, RANSOM RUSSELL, MARTIN LELAND SCRUGGS, STUART EARL SCRUGGS, JR. HARLEY GLENN SELLERS, EARL JOSEPH SHELTON, LINDA JEAN SHEPPARD, BILLY BRUCE SHERRILL, DANIEL ANDY SHULER, JAMES ALLEN SHULER, THOMAS ERVIN SLUDER, STEVE WILLIS SMATHERS, DALLAS SMITH, JIMMY RAY SMITH, JOSEPH WILLIAM SMITH, BILL GENE SNIPES, EARL JULIOUS STEPHENS, HUTY STEPHENS, TED L. STEPHENS, BILLY RAY STILES, DANA STRICKLER, GARY ROY SUTTLES, FRANCIS EUGENE SUTTON, SR., JAMES FREDDIE SUTTON, NED LEROY SUTTON, NEIL TEAGUE, GENE BAXTER THOMASON, LOYE JOSEPH TRANTHAM, JERRY TRULL, RALPH TRULL, PATRICIA ANN TUCKER, PAUL JINNINGS WARD, SUSIE WARLICK, JAMES ROBERT WARREN, MARIE PHILLIPS WARREN, MINGUS ROBERT WELLS, FLOYD HARVEY WEST, ALLENEE WILKES, HILDA FAYE WILKES, BOBBY HAYES WILLIAMSON, LINDA JOYCE WILLIAMSON, LEONARD RAY WINCHESTER, JAMES MILAS WOOD, WINFRED RICHARD WRIGHT, CHARLES RAY WYATT, EMPLOYEES, PLAINTIFFS v. M.A. HANNA CO., EMPLOYER, FIREMAN'S FUND INSURANCE CARRIER; AND DAYCO CORP/M.A. HANNA, INC./POLYONE CORP., EMPLOYER, NATIONAL UNION FIRE INSURANCE CO., CARRIER; AND DAYCO PRODUCTS, INC./DAYCO PRODUCTS, L.L.C./MARK IV INDUSTRIES, INC., EMPLOYER, THE TRAVELERS PROPERTY AND CASUALTY CO., CARRIER; NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PENNSYLVANIA, CARRIER, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, CARRIER; DEFENDANTS

No. COA03-1280

(Filed 19 October 2004)

Workers' Compensation— rules for appeal to full Commission—findings by Commission required

The Court of Appeals vacated sanctions against counsel in a workers' compensation case and remanded for further proceedings where the Industrial Commission violated its own rules in the appeal to the Full Commission, and then simply upheld the findings of the deputy commissioner rather than making its own findings and conclusions.

Appeal by defendants from orders entered 11 April 2003 and 9 May 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 May 2004.

Brooks, Stevens & Pope, P.A., by Michael C. Sigmon and Matthew P. Blake, for defendants Dayco Products, Inc./Dayco Products, L.L.C./Mark IV Industries, Inc., Inc. and The Travelers Property & Casualty Co.

Lewis & Roberts, P.L.L.C., by Winston L. Page, for defendants Dayco Corp./M.A. Hanna, Inc./Polyone Corp. and National Union Fire Insurance Co.

Teague, Campbell, Dennis & Gorham, L.L.P., by Thomas M. Clare, for defendants M.A. Hanna Co. and Fireman's Fund Insurance.

Wallace & Graham, P.A., by Michael Pross, for plaintiffs.

HUDSON, Judge.

Plaintiffs filed claims alleging they had contracted asbestosis and other occupational diseases as a result of employment with defendant-employer. The Industrial Commission appointed Deputy Commissioner Douglas E. Berger to facilitate hearings of these claims *en masse*. On 18 May 2001, Deputy Commissioner Berger entered an order establishing procedures for taking the testimony of non-medical expert witnesses and related discovery. On 22 November 2002, Deputy Commissioner Berger entered an oral order requiring the attorneys for defendant Dayco Products, Inc./Dayco Products, L.L.C./Mark IV Industries, Inc. ("Dayco") to pay $10,000 to plaintiff's attorneys as a sanction for violating the 18 May order. On 2 December 2002, defendants gave notice of appeal to the Full Commission. On 10 December 2002, Deputy Commissioner Berger reduced to writing his prior oral order, and defendant appealed the written order on 24 December 2002.

On 28 January 2003, Industrial Commission Chairman Buck Lattimore entered an order which allowed the interlocutory appeal to go forward and referred it to the administrative panel of the Full Commission for an expedited hearing. The panel entered an administrative order on 11 April 2003, affirming and increasing the sanction to $20,000.

On 2 May 2003, defendant filed a motion for reconsideration, which the Full Commission denied on 9 May 2003. On 2 June 2003, defendant appealed to this Court. For the reasons discussed below, we vacate the order and remand to the Full Commission for further proceedings.

This case arises from an order imposing sanctions against counsel for defendant Dayco for violating an earlier discovery order. That order, from 18 May 2001, addressed the taking of testimony from Dr. William Dyson, a non-medical expert, and related discovery matters, and required in pertinent part the following:

> Prior to the special set hearing, Defendants are to provide Plaintiffs with 1) all documents that were provided to Dr. Dyson upon which he will render his expert opinion; 2) all correspondence directed to Dr. Dyson[;] and 3) a summary report provided by Dr. Dyson as to his expected testimony.

The deputy commissioner further addressed the procedures for taking expert testimony in later teleconferences and in oral and written orders.

During his 21 June 2002 deposition, Dr. Dyson disclosed the existence of photographs taken by defendants at the plaintiffs' workplace in November 2001. Defendant's attorneys had not provided these photographs to plaintiffs' counsel. On 29 July 2002, plaintiffs moved to strike the testimony of Dr. Dyson based upon the fact that defendants had failed to produce the photographs prior to his deposition. On 22 November 2002, Deputy Commissioner Berger entered his oral order imposing a sanction of $10,000 in attorney's fees against counsel for defendant Dayco for failure to comply with his 18 May 2001 order. Deputy Commissioner Berger made the sanctions payable immediately and certified the interlocutory order for immediate appeal.

Defendant Dayco appealed to the Full Commision. On 28 January 2003, Chairman Lattimore granted the request that the appeal go forward in an order which stated:

1. Defendants' request for immediate appeal of this Interlocutory Order to the Full Commission is hereby GRANTED.

2. This matter is hereby referred to the administrative panel of the Full Commission for expedited hearing.

3. Deputy Commissioner Berger's Interlocutory Order is hereby stayed pending issuance of an Opinion and Award by the administrative panel of the Full Commission.

On 11 April 2003, the Full Commission panel filed its order affirming Deputy Commissioner Berger's order, but increasing the amount of the sanctions to $20,000, payable immediately. The panel made no findings of fact in the order. Defendant Dayco then moved for reconsideration, which motion the Full Commission denied 9 May 2003.

The order imposing sanctions appealed here is interlocutory. Generally, interlocutory orders are not immediately appealable. *Sharp v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999), *disc. review denied*, 352 N.C. 150, 544 S.E.2d 228 (2000). However, an order imposing sanctions may affect a substantial right, and thus be immediately appealable. *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 140 N.C. App. 270, 277, 536 S.E.2d 349, 353 (2000); *Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 554-55, 353 S.E.2d 425, 426 (1987).

In their appeal to this Court, defendant Dayco challenges the procedure followed by the Full Commission, and the adequacy of the order. Industrial Commission Rule 701 establishes processes and procedures for appeals to the Full Commission. *See* Workers' Compensation Rules of the North Carolina Industrial Commission, Rule 701. Pursuant to Rule 701, upon receipt of notice of appeal of a decision of a deputy commissioner, the Full Commission will supply the appellant with a Form 44 Application for Review, which the appellant must complete, stating the specific grounds for appeal, and file along with his brief within twenty-five days after he receives the transcript. Appellee then has twenty-five days in which to file its responsive brief. The Full Commission, in its discretion, may waive the use of Form 44 and oral argument, and reach its decision based on the record, assignments of error and briefs. However, even though the Commission may waive the use of Form 44, the rule specifically requires that grounds for appeal be set forth with particularity.

Here, the 28 January 2003 order by Chairman Lattimore refers the appeal to "the administrative panel of the Full Commission for expe-

dited hearing." The appellant filed no Form 44 and none of the parties filed briefs to the Full Commission. Our review of the Workers' Compensation Act and the Commission's own rules discloses no authority for this process. Although this appeal of the deputy commissioner's 10 December 2002 order was interlocutory, it involved review by the Full Commission of an order entered after a hearing which contained findings of fact and conclusions of law. We conclude that this Full Commission review was governed by Rule 701 and N.C. Gen. Stat. § 97-85. The Full Commission apparently waived the filing of Form 44 and the holding of an oral argument in the appeal, as permitted by Rule 701. However, Rule 701 also gives appellant the right to file a brief in support of its argument, and the Full Commission here gave neither defendant Dayco nor the other parties any opportunity to be heard.

Dayco also argues that the Commission exceeded its authority and violated its own rules by failing to make its own findings and conclusions, and by failing to specify which of Dayco's attorneys' actions constituted sanctionable conduct. Plaintiffs, on the other hand, contend that the Commission acted properly by simply upholding the findings of the deputy commissioner.

Numerous appellate court decisions in recent years have established clearly that the Full Commission is the ultimate fact-finder whether or not it reviews a "cold record." N.C. Gen. Stat. § 97-85; *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 680-81, 509 S.E.2d 411, 413-14 (1998)). Further, the Commission must make findings of fact and conclusions of law on all issues raised by the evidence which are necessary for a determination of the matter. *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 61-62, *disc. review denied*, 349 N.C. 228, 515 S.E.2d 700 (1998).

Here, we conclude that the Commission has not followed the Act and its own rules, and has not carried out its duty to make findings of fact and conclusions of law. Thus, we vacate the order and remand so that it may do so.

Vacated and remanded for further proceedings.

Judges GEER and THORNBURG concur.

GUNVANTPURI B. GOSAI AND LATTABEN G. GOSAI, PLAINTIFFS V. ABEERS REALTY AND DEVELOPMENT MARKETING, INC. D/B/A ABEERS REALTY, INC.; ABEERS REALTY, INC.; SAMUEL P. SWETT; AND RICHARD E. MATTAR, AS SUBSTITUTE TRUSTEE, DEFENDANTS

No. COA03-884

(Filed 19 October 2004)

1. Real Property— buyer's agents—evidence of agency

There was sufficient evidence to support findings that defendants Swett and Abeers Realty were dual buyer's agents in the purchase of land by plaintiffs.

2. Fraud— purchase of land—broker secretly selling

The evidence supported findings that defendants Swett and Abeers Realty (buyer's agents) committed fraud in plaintiffs' purchase of land secretly owned by Swett. A broker can neither purchase from nor sell to the principal unless the latter expressly consents with full knowledge; moreover, fraud is presumed when property is transferred between the fiduciary and the principal.

3. Damages and Remedies— monetary damages and rescission—return of plaintiff to status quo

The trial court did not err by granting both the remedies of rescission and damages in an action arising from the fraudulent sale of land. While plaintiffs must generally elect their remedies, in this case rescission alone could not return plaintiffs to their prior position; moreover, they are entitled to the benefit of any bargain taken by defendants.

4. Mortgages and Deeds of Trust— declaring null and void—trustee as active party

The trial court did not err by relying on *Virginia Carolina Laundry Supply Corporation v. Scott*, 267 N.C. 145, to declare a deed of trust null and void where the trustee was an active party to the lawsuit but the known beneficiary was not a party. The rule remains the same whether the identity of the beneficiary is known or unknown.

5. Unfair Trade Practices— sale of real estate—within commerce—proof of fraud

A person engaged in the sale of real estate is engaged in commerce within the meaning of the Unfair and Deceptive Trade

Practices statute, and proof of fraud establishes that an unfair trade practices violation has taken place.

Appeal by defendants from judgment entered 31 March 2003 by Judge Richard Doughton in Watauga County Superior Court. Heard in the Court of Appeals 31 March 2004.

Hatch, Little & Bunn, L.L.P., by John N. McClain, Jr. and Phillip L. Whitson, for defendants-appellants.

Di Santi Watson Capua & Wilson, by Frank C. Wilson, III, for plaintiffs-appellees.

ELMORE, Judge.

Samuel P. Swett (defendant Swett) owns and operates Abeers Realty and Marketing, Inc. (Abeers Realty) and is the president and broker in charge. The record evidence tends to show that prior to 25 April 2000, defendant Swett informed Guvantpari B. Gosai (plaintiff) that he had a friend who owned a piece of property located at 151 Parkway Forest Drive, Boone, North Carolina (the property) that was for sale and asked if plaintiff wanted to see the property. In fact, the property had been previously purchased by defendant Swett for $29,000.00 and placed in the name of a third party, John Jordan. Defendant Swett did not reveal his ownership interest in the property to plaintiff. At this point, plaintiff expressed an interest in purchasing the property. Defendant Swett took plaintiff to see the property, which had been condemned. Plaintiff testified that he considered Swett to be acting as his agent. At no time while plaintiff and defendant Swett were at the property or thereafter did Swett inform plaintiff of his ownership interest in the property or the condemnation of the property.

On or about 25 April 2000, defendant Swett prepared an Offer to Purchase and Contract for the property between the third party, or his assigns, and plaintiff and his wife, Lattaben G. Goasi, for a purchase price of $130,000.00. On the face of the contract, defendant Swett and Abeers Realty are designated as dual agents in the property transaction.

On 8 June 2000, John Jordan executed a Warranty Deed transferring the property to Abeers Realty for a purchase price of $30,000.00. At trial, defendant Swett testified that no money was actually paid to John Jordan for the property.

On 19 June 2000, Abeers Realty executed a Warranty Deed transferring the property to plaintiff and his wife for a purchase price of $130,000.00. Plaintiff paid $25,000.00 down on the property and executed a Deed of Trust and Note to Abeers Realty for the balance of the purchase price. Between 19 July 2000 and 14 June 2002, plaintiff paid $17,000.00 in interest on the Note. On 25 July 2002, plaintiff filed suit against defendants seeking rescission of the Deed of Trust and Note and damages for fraud and unfair and deceptive trade practices arising out of defendant Swett's failure to disclose the condemnation of the property and his ownership of the property. On 31 March 2003, following a bench trial before the Honorable Richard Doughton, judgment was entered in favor of plaintiffs, from which defendants now appeal. For the reasons stated herein, we affirm.

[1] Defendants first assign error to the trial court's finding that defendants Swett and Abeers Realty were the plaintiff's agent during the subject transaction. In his role as fact finder, Judge Doughton made the following pertinent finding:

> 6. On or about April 25, 2000 Samuel P. Swett prepared an Offer to Purchase and Contract for the Property between John Jordan, or assigns as seller and the Plaintiffs as Buyer for a purchase price of $130,000. The Offer to Purchase and Contract shows on its face that Sam Swett and Abeers Realty, Inc. are acting as dual agents. The Court finds that Samuel P. Swett and Abeers Realty, Inc. according to all evidence presented to the Court, were the buyer's agent for the Plaintiffs at all relevant times during this transaction.

"Findings of fact made by the court in a nonjury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them, although the evidence might have supported findings to the contrary." *Curl v. Key*, 311 N.C. 259, 260, 316 S.E.2d 272, 273 (1984) (citations omitted). We have carefully reviewed the record and conclude that it contains ample evidence to support the trial court's finding that defendants Swett and Abeers Realty were the buyer's agent for the plaintiff. On its face, the contract designates defendants Swett and Abeers Realty as dual agents. Defendant testified that he had previously acted as buyer's agent for plaintiff in another property transaction. Defendant also testified that he told plaintiff about the property, took plaintiff to the property, and completed the Offer to Purchase at the request of plaintiff. Agency may be proven by written instruments or circumstances. "It may be

inferred from previous employment in similar acts or transactions, or from acts of such nature and so continuous as to furnish a reasonable basis of inference that they were known to the principal, and that he would not have allowed the agent so to act unless authorized." *Smith v. Kappas*, 218 N.C. 758, 766, 12 S.E.2d 693, 698 (1941). As such, this assignment of error is without merit.

[2] Next, defendants assign error to the trial court's conclusion of law that the defendants Swett and Abeer's Realty committed fraud. Our standard of review for this issue 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. "It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Buliding Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992).

In the case *sub judice*, the trial court made the following relevant findings of fact:

> 8. Samuel Swett purchased the Property for $29,000.00 on or about March 22, 2000, and placed the deed in the name of John C. Jordan.
>
> 9. At no time prior to the April 25, 2000 Offer to Purchase and Contract did Samuel Swett or any representative of Abeers Realty, Inc. disclose to Plaintiffs that Samuel Swett and not John Jordan, had actually bought the Property for $29,000.00 and was selling it to Plaintiffs for $130,000.00.
>
> 10. After the Offer to Purchase and Contract was entered into on April 25, 2000 on June 8, 2000, John Jordan, as Grantor, executed a Warranty Deed for the Property to Abeers Realty, Inc., as Grantee; the deed stamps paid on that deed reflects that the conveyance was for $30,000, but Abeers Realty, Inc. did, in fact not pay anything to John Jordan at that time.
>
> 11. That the transaction closed on June 19, 2000 and at that time a Warranty Deed dated June 14, 2000 from Abeers Realty, Inc. as Grantor to the Plaintiffs as Grantees was delivered to the office of Plaintiff's closing attorney; the Plaintiffs saw the Deed at closing and were aware at that time that Abeers Realty, Inc. was, in fact, the seller.

12. Up and through the closing, Plaintiffs were never told by Samuel P. Swett or any representative of Abeers Realty, Inc. that the said Defendants were going to make a profit of $100,000.00 in this transaction.

13. Plaintiffs paid $25,000.00 down for the Property at closing and executed a Deed of Trust and Note for $105,000 to Abeers Realty, Inc. for the balance of the purchase price.

14. The Court finds by the preponderance of the evidence that Defendant Samuel P. Swett knew that the Property had been condemned because of the falling away of its chimney but did not inform Plaintiffs at any time prior to closing of that material fact.

15. Plaintiff would not have purchased the Property if Samuel Swett had told them that he and/or Abeers Realty, Inc. was making $100,000.00 profit in the transaction or that the Property had been condemned.

As discussed above, these findings are supported by competent evidence in the record and are therefore binding on this Court. Based on the findings, the trial court made the following conclusion of law:

2. In this case, Plaintiffs were principals and Abeers Realty, Inc and Samuel P. Swett were the buyer's agent for the Plaintiffs. In selling property that he owned without disclosing fully everything about it, the Court finds by a preponderance of the evidence, that Samuel P. Swett and Abeers Realty, Inc. have committed fraud and unfair and deceptive trade practices.

A broker can neither purchase from nor sell to the principal unless the latter expressly consents thereto with full knowledge of all the facts and circumstances. *Real Estate Licensing Bd. v. Gallman*, 52 N.C. App. 118, 277 S.E.2d 853 (1981). Moreover, when property is transferred between a fiduciary and his principal fraud does not have to be established by direct evidence, it is presumed. 2 Brandis N.C. Evidence Sec. 225 (1982). "After a *prima facie* case of constructive fraud is made out against a fiduciary by evidence showing a course incompatible with his duty, the fiduciary has the burden of showing that he did not take advantage of his principal and acted throughout in a fair, open and honest manner." *Spence v. Spaulding & Perkins, Ltd.*, 82 N.C. App. 665, 667-68, 347 S.E.2d 864, 866 (1986) (citations omitted). In the case *sub judice*, defendants do not contend that they acted in a fair, open and honest manner. Rather, defendants contend that they had no duty to inform plaintiffs of their ownership interest

in the subject property or profit margin. Because we hold that the trial court properly concluded that defendants were the agent of plaintiff, this contention finds no support in the law. As such, this assignment of error is overruled.

[3] Defendants also assign error to the remedies granted by the trial court. Defendants contend that the trial court erred in granting both monetary damages and rescission of the note and deed of trust to the plaintiffs, rather than requiring the plaintiffs to choose a single remedy. Generally, a plaintiff must "elect between [an] action to rescind, and [the] alternative and inconsistent action for damages." *F. E. Lykes & Co. v. Grove*, 201 N.C. 254, 257, 159 S.E. 360, 362 (1931). However, "[t]he rule is, if rescission of the contract does not place the injured party *in statu quo*, as where he has suffered damages which cancellation of the contract cannot repair, there is no principle of law which prevents him from maintaining his action for damages caused by the other party's fraud." *Kee v. Dillingham*, 229 N.C. 262, 265, 49 S.E.2d 510, 512 (1948). In this case and in accordance with the law, the trial court rescinded the note and deed of trust and awarded plaintiffs damages of $117,000.00; $17,000.00 of which represented the amount paid by plaintiffs to defendants in interest on the note and deed of trust and $100,000.00 of which represented the profit made by defendants in the subject transaction. Under the facts of this case, rescission alone could not return plaintiffs to their prior position. Moreover, plaintiffs are entitled to obtain any bargain that became available and was taken by defendants, their agents. *Spence v. Spaulding & Perkins, Ltd.*, 82 N.C. App. 665, 668, 347 S.E.2d 864, 868 (1986). Therefore, this assignment of error is without merit.

[4] Defendants also assign error to the trial court's reliance on *Virginia Carolina Laundry Supply Corporation v. Scott*, 267 N.C. 145, 148 S.E.2d 1 (1966), to set aside, satisfy of record and declare null and void the deed of trust when the beneficiary, whose identity was known, was not a party to the lawsuit. In *Virginia Carolina*, our Supreme Court held that where the trustee was a party to the lawsuit and participated actively in its defense, the beneficiary, whose identity was unknown, "cannot be deemed a necessary party to the action to set aside the deed of trust[.]" *Id.* at 150, S.E.2d at 4. Whether the identity of the beneficiary is known or unknown, the rule of law remains the same. In this case, the trial court did not err in relying on *Virginia Carolina* to set aside, satisfy of record and declare null and void the note and deed of trust when the trustee was an active party to the lawsuit.

[5] Finally, defendants assign as error the trial court's conclusion that defendants Swett and Abeers Realty committed unfair and deceptive trade practices. Defendants contend that the subject transaction was not "in or affecting commerce." N.C. Gen. Stat. § 75-1.1 (2003) declares unlawful "unfair and deceptive acts or practices in or affecting commerce." This Court has stated that "[t]he purpose of G.S. 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State and applies to dealings between buyers and sellers at all levels of commerce." *United Virginia Bank v. Air-Lift Associates*, 79 N.C. App. 315, 320, 339 S.E.2d 90, 93 (1986). Except for certain limited exemptions set forth in the statute, commerce includes "all business activities, however denominated." N.C. Gen. Stat. § 75-1.1(b) (2003). Specifically, a person engaged "in the sale of real estate is engaged in commerce within the meaning of G.S. 75-1.1." *Rosenthal v. Perkins*, 42 N.C. App. 449, 454, 257 S.E.2d 63, 67 (1979). Moreover, "a plaintiff who proves fraud thereby establishes that unfair and deceptive trade practices have occurred." *Davis v. Sellers*, 115 N.C. App. 1, 9, 443 S.E.2d 879, 884 (1994). The trial court's finding of unfair and deceptive trade practices is well supported by the evidence and was not error.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

CHRISTINA SISK, EMPLOYEE, PLAINTIFF v. TAR HEEL CAPITAL CORP., EMPLOYER, AND COMPANION PROPERTY & CASUALTY GROUP, CARRIER, DEFENDANTS

No. COA04-45

(Filed 19 October 2004)

1. Workers' Compensation— sexual harassment—not compensable

Emotional injuries resulting from sexual harassment are not compensable under the Workers' Compensation Act.

2. Workers' Compensation— sexual harassment—assault—not particular to job

A supervisor's inappropriate conversations and uninvited touchings were not covered under the Workers' Compensation Act as an assault. The supervisor's conduct was not shown to result from dangers particular to plaintiff's work.

Appeal by plaintiff from opinion and award entered 24 October 2003 by Commissioner Bernadine S. Ballance. Heard in the Court of Appeals 23 September 2004.

George W. Moore, for plaintiff-appellant.

C. Michelle Sain, for defendants-appellees.

TYSON, Judge.

Christina Sisk ("plaintiff") appeals an Opinion and Award filed by the Full Commission of North Carolina Industrial Commission ("Commission") finding plaintiff sustained an injury by accident occurring in the course of, but did not arise out of her employment. Tar Heel Capital Corporation ("defendant-employer") and Companion Property and Casualty Group (collectively, "defendants") filed cross-assignments of error arguing: (1) plaintiff's testimony concerning her employment conditions with defendant-employer lacked credibility; (2) plaintiff's injury did not occur in the course of her employment with defendant-employer; and (3) plaintiff has not been totally disabled since 16 August 2001. We affirm.

I. Background

Plaintiff began work for defendant-employer in July 1992. Defendant-employer operates a Wendy's Restaurant in Forest City, North Carolina. Plaintiff started as a crew employee and was promoted to shift supervisor in 1998. At both her initial hiring and subsequent promotion, defendant-employer presented plaintiff with documentation of defendant-employer's anti-harassment policy (the "policy"). The policy provided a procedure that employees should follow if they became victims of any form of harassment. Plaintiff signed acknowledgments of receipt of the policy on both occasions and took several quizzes testing her knowledge of the policy.

In March 2001, James Johnson ("Johnson") became general manager of the restaurant where plaintiff worked as a shift supervisor. Johnson filed disciplinary notices against plaintiff on two separate

occasions in May 2001. Plaintiff testified that around that time, Johnson began making sexually suggestive comments to her, touching her in inappropriate places, pulling her onto his lap, and placing his hand down her shirt. She testified Johnson's actions left bruises where he grabbed her.

On 17 July 2001, plaintiff gave notice of her resignation to Doug Kropelnicki ("Kropelnicki"), the district manager, and Wanda Farmer ("Farmer"), director of human resources. Her notice included, "I can no longer work with harassment at the hands of James Johnson." This was the first notice by plaintiff to defendant-employer of Johnson's behavior. Plaintiff acknowledged she had not followed defendant-employer's anti-harassment procedures.

Plaintiff visited a family practice physician complaining of panic attacks on 18 July 2001. The physician prescribed medication to help with anxiety and wrote plaintiff a note to remain out of work until 23 July 2001.

Defendant-employer conducted an investigation of Johnson's behavior and immediately suspended and eventually terminated his employment on 19 July 2001. That day, Tad Dolbier ("Dolbier"), director of operations, called plaintiff and told her Johnson had been fired, and that he appreciated plaintiff as a valued employee. He asked why she did not follow the anti-harassment procedures. Plaintiff responded, "I did not want to call and create a big stink," and "if I acted like it wasn't happening, maybe it would stop." Dolbier concluded by informing plaintiff that due to her doctor's note, she was entitled paid leave until 23 July 2001. Plaintiff did not return to work.

Farmer sent plaintiff a letter dated 30 July 2001 inquiring of her employment status. Farmer indicated plaintiff's job would remain open until 6 August 2001, but that her absences since 23 July 2001 would be unpaid. Farmer requested a phone call for an update. Plaintiff's attorney responded to Farmer's letter.

Plaintiff contacted her family physician on 6 August 2001. She requested, but was denied, another note saying she could not return to work until 8 August 2001. Plaintiff next sought medical attention from Dr. Michael Knoelke ("Dr. Knoelke"), a psychiatrist on 16 August 2001. Dr. Knoelke testified plaintiff complained of memories of Johnson's behavior that affected her ability to work and drive. Dr. Knoelke diagnosed plaintiff with post traumatic stress disorder including panic attacks and major depressive disorder. Plaintiff vis-

ited Dr. Knoelke on three occasions between September 2001 and May 2002. Each visit resulted in modifying her medication due to her varying levels of stress and depression.

Plaintiff filed a Form 18 with the Commission on 20 August 2001 alleging she was "continuously assaulted and harassed by her general manager, James Johnson, [and] she began having panic attacks . . . sought medical treatment . . . [and] has been unable to work." Plaintiff sought compensation from 16 July 2001 forward. Defendants denied plaintiff's claim on 10 September 2001. Plaintiff filed a Form 33 requesting her claim be assigned for hearing.

The deputy commissioner filed an Opinion and Award on 30 November 2002, which found that Johnson made sexually suggestive remarks, touched plaintiff inappropriately, pulled plaintiff onto his lap, placed his hand down her shirt, and had used his supervisory position to place plaintiff at risk. The deputy commissioner found plaintiff became emotionally upset, was diagnosed with post traumatic stress disorder including panic attacks and major depressive disorder, and currently received treatment from Dr. Knoelke. The deputy commissioner concluded as a matter of law that plaintiff suffered "an injury by accident" and was "entitled to total disability [and] medical expenses incurred" from 18 July 2001 until she returned to work, or by further order of the Commission. Defendants appealed to the Full Commission.

The Full Commission reviewed the case on 22 May 2003 and found the same facts as the deputy commissioner. The Full Commission added that "based on prior appellate decisions, the Full Commission must find as fact that plaintiff's injury did not arise out of the nature of her employment [and] [p]laintiff has also failed to show that she contracted an occupational disease . . . ." *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986); *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 403, 233 S.E.2d 529, 532 (1977).

The Commission's conclusions of law determined plaintiff "established that she sustained an injury by accident occurring in the course of her employment with [defendant], but she failed to establish that her injury arose out of the employment." Specifically, the Commission stated, "sexual assaults are not deemed to be incident to or a natural and probable consequence of the employment under current law." Plaintiff's claim under the Worker's Compensation Act was denied. Plaintiff appeals.

II. Issues

The issues on appeal are whether: (1) an injury caused by sexual harassment properly falls within the jurisdiction of the Workers' Compensation Act (the "Act"); and (2) the Act covers injuries resulting from intentional assaults by co-employees.

III. Standard of Review

We review *de novo* the Commission's conclusions of law. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citing *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997)), *disc. rev. denied*, 347 N.C. 671, 500 S.E.2d 86 (1998). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the Commission." *In re Appeal of the Greens of Pine Glen Ltd. Part.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)).

IV. Sexual Harassment and the Act

[1] Plaintiff argues sexual harassment and her resulting mental injury are compensable under the Act. We disagree.

The Act covers injuries sustained from risks incidentally and directly connected to that particular employment. *Goodwin v. Bright*, 202 N.C. 481, 483-84, 163 S.E. 576, 577 (1932). The injury is compensable if it arises out of and occurs in the course of employment. *Perry v. Bakeries Co.*, 262 N.C. 272, 274, 136 S.E.2d 643, 645 (1964). The employee must be performing duties authorized by the employer in furtherance of the employer's business. *Id.*

"Arises out of" refers to an injury that is a "natural and probable consequence" of the employment. *Clark v. Burton Lines*, 272 N.C. 433, 437, 158 S.E.2d 569, 571-72 (1968). There must be some *causal connection* between the employment and the injury. *Taylor v. Twin City Club*, 260 N.C. 435, 438, 132 S.E.2d 865, 868 (1963); *Cole v. Guilford County*, 259 N.C. 724, 726-27, 131 S.E.2d 308, 311 (1963) (emphasis supplied). An injury occurring "in the course of" employment happens when an employee is injured doing something reasonably expected of him or her at the time, place, and under the circumstances of the employment. *Alford v. Chevrolet Co.*, 246 N.C. 214, 217, 97 S.E.2d 869, 871 (1957). The injury must be peculiar to the job and not a common threat to the public generally. *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 198, 128 S.E.2d 218, 221 (1962).

A similar issue arose in *Hogan*, 79 N.C. App. 483, 340 S.E.2d 116. An employee "made sexually suggestive remarks to [the plaintiff] while she was working, coaxing her to have sex with him[,] . . . telling her that he wanted to 'take' her, . . . brush[ed] up against her, rub[bed] [himself] against her buttocks, and touch[ed] her buttocks with his hands." *Id.* at 490, 340 S.E.2d at 121. This Court determined emotional injuries resulting from sexual harassment were not a "natural and probable consequence or incident of the employment." *Id.* at 496, 340 S.E.2d at 124. We held that sexual harassment is a risk the public generally is exposed to and is "neither covered nor barred by the Act." *Id.*

Here, plaintiff testified that Johnson made sexually suggestive remarks, pulled her onto his lap, placed his hand down her shirt, grabbed her buttocks, and pushed her against a wall and a table. Plaintiff attempts to distinguish *Hogan* as controlling precedent by contending her emotional injuries resulted from physical assaults not present in *Hogan*. We disagree. The facts in *Hogan* are clear that the plaintiff endured similar verbal and physical assaults as plaintiff at bar.

We are bound by prior decisions of this Court. *In re Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). This assignment of error is overruled.

V. Intentional Assaults under the Act

[2] Plaintiff asserts her emotional injuries caused by Johnson's intentional assaults are covered under the Act. We disagree.

The Act provides compensation for injuries resulting only from accidents. *Lawrence v. Mill*, 265 N.C. 329, 330, 144 S.E.2d 3, 4 (1965); N.C. Gen. Stat. § 97-2(6) (2003). Our Supreme Court recognized that an assault may be classified as an accident if it is not expected or instigated by the employee. *Withers v. Black*, 230 N.C. 428, 433-34, 53 S.E.2d 668, 672-73 (1949). The assault must derive from dangers particular to the job and not common in everyday life. *Gallimore*, 292 N.C. at 403, 233 S.E.2d at 532; *Withers*, 230 N.C. at 434, 53 S.E.2d at 673. If the motive surrounding the assault is personal in nature and unrelated to the employment, resulting injuries are not covered by the Act. *Robbins v. Nicholson*, 281 N.C. 234, 238-39, 188 S.E.2d 350, 353-54 (1972).

Evidence shows Johnson verbally and physically assaulted plaintiff with inappropriate conversation and uninvited touching while at work. Plaintiff, a shift supervisor, worked directly under Johnson, the

general manager. Plaintiff suggests the danger leading to the assaults resulted from Johnson's position as plaintiff's superior. However, plaintiff fails to offer and the record is devoid of evidence indicating the assaults resulted from dangers particular to this job and should be imputed to the employer. There is no indication Johnson's conduct resulted from a dispute over employment issues or differed from harassment experienced in everyday life. Instead, the evidence suggests his motive and actions were entirely personal in nature. Johnson's actions were foul behavior against plaintiff, but it was separate from their common employment interests. This assignment of error is overruled.

VI. Conclusion

Emotional injuries resulting from sexual harassment are not compensable under the Act. *Hogan*, 79 N.C. App. at 496, 340 S.E.2d at 124. Plaintiff failed to prove the intentional assaults resulted from dangers particular to her position as shift supervisor of a restaurant. We affirm the Commission's denial of compensation to plaintiff. In light of our holding, we do not address defendants' assignments of error.

Affirmed.

Judges BRYANT and LEVINSON concur.

BRENDA WOOD, PLAINTIFF v. BARBARA D. HOLLINGSWORTH AND BARBARA D. HOLLINGSWORTH, PROFESSIONAL ASSOCIATION, DEFENDANTS

No. COA03-1590

(Filed 19 October 2004)

Attorneys— malpractice—running of the statute of limitations—after attorney-client relationship ended

The trial court erred by dismissing plaintiff's malpractice claim against her attorney for failure to state a claim. Plaintiff alleged that defendant failed to follow her instructions to file a lawsuit, failed to notify her that the suit had not been filed, failed to advise her of the statute of limitations, and failed to protect her interests by filing the lawsuit. Although defendants argued lack of privity because plaintiff's claim was barred by the statute of lim-

itations only after the attorney-client relationship ended, the complaint alleges that the negligent acts occurred prior to and on the date of the termination.

Appeal by plaintiff from order entered 16 September 2003 by Judge Susan C. Taylor in Cabarrus County Superior Court. Heard in the Court of Appeals 14 September 2004.

Bollinger & Piemonte, PC, by George C. Piemonte, for plaintiff-appellant.

Poyner & Spruill, by E. Fitzgerald Parnell, III and Rebecca B. Wofford, for defendants-appellees.

TIMMONS-GOODSON, Judge.

Brenda Wood ("plaintiff") appeals the trial court order granting defendants' motion to dismiss plaintiff's claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). For the reasons discussed herein, we reverse.

The facts and procedural history pertinent to the instant appeal are as follows: On 11 November 1998, plaintiff hired defendants to provide legal representation for her in connection with personal injuries and damages plaintiff sustained in an 8 March 1997 automobile collision ("the collision"). The parties entered into a written "Personal Injury Contract."

In December 1999, plaintiff met with defendant Barbara Hollingsworth ("Hollingsworth") to discuss an offer plaintiff had received from the insurance carrier of the other party involved in the collision. Plaintiff informed Hollingsworth that she would not accept the insurance carrier's offer, and then allegedly instructed Hollingsworth to file a lawsuit on her behalf.

In February 2000, Hollingsworth informed plaintiff that defendants' office was closing and that plaintiff should seek to obtain other counsel. The contract of employment was terminated and defendants' legal representation of plaintiff ended. At the date of termination, defendants had not filed the lawsuit plaintiff alleges she informed defendants to file on her behalf.

On 4 April 2000, plaintiff discussed the collision with attorney Cecil Whitley ("Whitley") and requested that Whitley represent her in a lawsuit against the other party involved in the collision. After meet-

ing with plaintiff, Whitley contacted the Cabarrus County Clerk of Court, who informed Whitley that no lawsuit had been filed on plaintiff's behalf regarding the collision. Plaintiff subsequently learned that because she had not filed suit by 8 March 2000, her claims were barred pursuant to the three-year statute of limitations imposed by N.C. Gen. Stat. § 1-52(16).

On 25 February 2003, plaintiff filed suit against defendants, alleging negligence on the part of defendants. Plaintiff's complaint ("the complaint") contains the following pertinent allegations:

> 8. In providing the Plaintiff with legal services [Hollingsworth] failed to exercise reasonable care and diligence in the application of her knowledge and skill as an attorney to Plaintiff's case and failed to provide legal services in accordance with the standards of practice among members of the legal profession with similar training and experience in the same or similar communities in, but not limited to, the following respects:
>
> a. [Hollingsworth] failed to follow the instructions of her client;
>
> b. [Hollingsworth] failed to notify her client, the Plaintiff, that a lawsuit had not been filed;
>
> c. [Hollingsworth] failed to advise her client, the Plaintiff, of the impending statute of limitations when she closed her practice;
>
> d. [Hollingsworth] allowed the statute of limitations to expire and failed to protect her client's, the Plaintiff, rights by timely filing a lawsuit against the tortfeasor.
>
> 9. The Defendants' duties including a duty to comply with the prevailing standard of care owed by a practitioner in her profession; and her acts and omissions cited herein fall below this applicable standard of care.
>
> 10. As the direct and proximate result of the negligent, unlawful and careless acts of the Defendants as described above, the Plaintiff has been damaged in an amount in excess of Ten Thousand Dollars ($10,000.00) for her injuries and damages.

On 28 March 2003, defendants filed an answer as well as a motion to dismiss plaintiff's claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2), (4), (5), (6) and N.C. Gen. Stat. § 1A-1, Rule 42(b). On 18

August 2003, the trial court heard arguments from both parties regarding the motion to dismiss. On 16 September 2003, the trial court denied defendants' motion to dismiss plaintiff's claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 42(b) and N.C. Gen. Stat. § 1A-1, Rule 12(b)(2), (4), and (5), but granted defendants' motion to dismiss plaintiff's claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Plaintiff appeals.

The only issue on appeal is whether the trial court erred by granting defendants' motion to dismiss pursuant to Rule 12(b)(6). Because we conclude that plaintiff's complaint properly states a claim upon which relief may be granted, we reverse and remand.

A motion to dismiss made pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint. *Castle Worldwide, Inc. v. Southtrust Bank*, 157 N.C. App. 518, 521, 579 S.E.2d 478, 480 (2003). "A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant notice of the nature and basis of [a plaintiff's] claim so as to enable him to answer and prepare for trial." *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987). "In analyzing the sufficiency of the complaint, the complaint must be liberally construed." *Id.*

In *Hodges v. Carter*, 239 N.C. 517, 519, 80 S.E.2d 144, 145-46 (1954), our Supreme Court stated that

> Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action [o]n behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

An attorney is thus liable in damages for any injury to his or her client which "proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly sit-

uated," or which proximately results "from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care." *Id.* at 520, 80 S.E.2d at 146. According to Rule 1.2(a) of the Revised Rules of Professional Conduct, "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation." Furthermore, according to Rule 1.16(d) of the Revised Rules of Professional Conduct, "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client [and] allowing time for employment of other counsel[.]"

In the instant case, plaintiff's complaint alleges that Hollingsworth was negligent in that she failed to "comply with the prevailing standard of care owed by a practitioner in her profession," and failed to "exercise reasonable care and diligence in the application of her knowledge and skill as an attorney[.]" Plaintiff's complaint contains specific acts of Hollingsworth's alleged negligence, including the failure to follow her client's instructions, the failure to notify her client that a lawsuit had not been filed on her behalf, the failure to advise her client of the running of the applicable statute of limitations, and the failure to protect her client's interests by timely filing a lawsuit on her behalf. Plaintiff's complaint further provides that, "as the direct and proximate result of the negligent, unlawful and careless acts" of defendants, plaintiff suffered damages in an amount in excess of $10,000. Thus, taking plaintiff's allegations to be true for the limited purpose of testing the adequacy of plaintiff's complaint, we conclude that plaintiff has sufficiently stated a claim for negligence in legal representation.

Defendants argue that plaintiff's complaint fails to state a proper claim for negligence in that the complaint fails to establish privity of contract between the parties. In support of their argument, defendants contend that plaintiff's injury occurred on 8 March 2000, following the termination of the attorney-client relationship. Thus, according to defendants, because no attorney-client relationship existed on the date plaintiff was injured, defendants are not liable for plaintiff's damages. We disagree.

In a legal malpractice action based upon an attorney's negligence, the plaintiff must allege and prove "(1) that the attorney breached the

duties owed to his client . . . and that this negligence (2) proximately caused (3) damage to the plaintiff." *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985) (citation omitted). We conclude that plaintiff's complaint meets these requirements. As detailed above, the complaint alleges that defendants' negligent acts occurred prior to and on the date of termination of the relationship rather than subsequent to the date of termination of the relationship. Thus, although plaintiff's alleged injury occurred on the date the statute of limitations ran, the acts that gave rise to plaintiff's injury occurred during the attorney-client relationship of plaintiff and defendants.

Furthermore, we note that "[t]he test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant." *Williams v. Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979). "[I]t is only in exceptional cases, in which reasonable minds cannot differ as to foreseeability of injury, that a court should decide proximate cause as a matter of law." *Id.* Thus, " 'proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case.' " *Id.* (quoting W. Prosser, Torts § 45 (4th ed. 1971)).

As detailed above, allegation ten in plaintiff's complaint states as follows:

> As the direct and proximate result of the negligent, unlawful and careless acts of the Defendants as described above, the Plaintiff has been damaged in an amount in excess of Ten Thousand Dollars ($10,000.00) for her injuries and damages.

We conclude that this allegation, when read in conjunction with the other allegations contained in plaintiff's complaint, is sufficient to give defendants "notice of the nature and basis of [plaintiff's] claim so as to enable [defendants] to answer and prepare for trial." *Forbis*, 301 N.C. at 701, 273 S.E.2d at 241. Whether defendants' alleged negligence in fact caused plaintiff's injury is a question for the trier of fact. *Williams*, 296 N.C. at 403, 250 S.E.2d at 258.

In light of the foregoing conclusions, we hold that the trial court erred in granting defendants' motion to dismiss. Accordingly, we reverse the trial court order and remand the case for further proceedings.

Reversed and remanded.

Judges HUNTER and McCULLOUGH concur.

IN THE MATTER OF W.H.

No. COA03-1189

(Filed 19 October 2004)

1. Appeal and Error— time for filing appeal—legal holiday

The State's motion to dismiss an appeal from a juvenile disposition as untimely was correctly denied where the last day for filing the appeal was the Friday after Thanksgiving, a legal holiday, and the appeal was filed on the following Monday.

2. Juveniles— Transcript of Admission—equivalent to guilty plea—not knowing and voluntary

A juvenile disposition was reversed and remanded where the court ordered a higher level of disposition than indicated on the Transcript of Admission. The acceptance of an admission by a juvenile is tantamount to the acceptance of a guilty plea by an adult. The trial court here did not sufficiently inform the juvenile of the most restrictive disposition that he could receive and his admission was not knowing and voluntary.

3. Juveniles— erroneous disposition level—completed disposition—remanded for correction of record

A juvenile case erroneously imposing a higher disposition level than warranted by the Transcript of Admission was remanded for correction of the record where the juvenile had completed the disposition.

4. Juveniles— release pending appeal—sufficiency of conclusions

Whether a juvenile should have been released pending appeal was moot where he had served his disposition and was discharged. However, the court's conclusions concerning the brutality of the incident, the juvenile's lack of cooperation with placement, and his unwillingness to work with family members were compelling reasons to order that the juvenile remain in custody.

5. Juveniles— disposition level—severity of victim's injuries

A more severe juvenile disposition based on a misunderstanding of the victim's injury was moot where the disposition was reversed on other grounds.

Appeal by juvenile from order entered 21 November 2002 by Judge Lawrence J. McSwain in Guilford County Superior Court. Heard in the Court of Appeals 9 June 2004.

Richard E. Jester for the juvenile appellant.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

McCULLOUGH, Judge.

This juvenile appeal arises from the following facts and circumstances: The juvenile admitted to misdemeanor assault inflicting serious injury on another student at his school. The offense occurred on 3 October 2002, while the juvenile was in his homeroom. The juvenile became angry with the student, the victim, who was looking at him. The juvenile began to threaten the victim and got in his face, saying, "See, I won't slam you." When the victim did not respond, the juvenile picked him up and body slammed him on the floor. The victim sustained injuries of bruised or fractured ribs, and a fractured elbow. The court entered a finding that the juvenile "did, in fact, commit the act as alleged in the petition."

At the same hearing, the juvenile admitted to a violation of a probation order that was based on previous minor offenses. The juvenile had violated the conditions of his probation by returning home after his curfew, and not cooperating with his group home placement.

The juvenile signed a Transcript of Admission (TOA) which stated that the most restrictive disposition on the misdemeanor assault charge was a Level 2 disposition, "which could include, among other things, detention for up to fourteen (14) 24-hour periods, an order that you cooperate with placement in a wilderness program or a residential treatment facility, or house arrest." The TOA did not contain an admission to the probation violation. The Court, and the attorneys representing the State and the juvenile signed the TOA.

Based on both the probation violation and the adjudication of delinquency, the Court ordered the juvenile a Level 3 disposition,

ordering the juvenile be placed in a juvenile development academy or a youth training center.

The juvenile raises three issues in this appeal: (I) the trial court erred in ordering the juvenile to a Level 3 disposition when the TOA stated his most restrictive disposition would be a Level 2; (II) the trial court failed to release the juvenile from custody pending his appeal, or failed to state any compelling reasons for keeping the juvenile in custody pending his appeal as is required by N.C. Gen. Stat. § 7B-2605 (2003); and (III) the trial court erred in ordering a Level 3 disposition based in large part on the fact the juvenile fractured the victim's ribs, though the evidence showed only that the victim's ribs were bruised.

[1] Before turning to these issues, we first address the State's motion to dismiss this case for lack of jurisdiction based on the running of the statute of limitations. N.C. Gen. Stat. § 7B-2602 (2003) provides for the following:

> [For] review of any final order . . . [n]otice of appeal shall be given in open court at the time of the hearing or in writing within 10 days after the entry of the order.

In this case, the record shows the written dispositional order was entered on 21 November 2002, and the appeal filed 2 December 2002. Therefore, for the appeal to have been timely, it would have had to be filed by November 29. However, because this date fell on the Friday of a legal holiday (Thanksgiving), the next timely filing date was the following Monday, 2 December 2002. *See* N.C.R. App. P. 27(a) (2003). Therefore, the State's motion is denied and we now turn to the issues in this appeal.

I. Transcript of Admission

[2] The juvenile asserts that the trial court erred in ordering a Level 3 disposition, when the juvenile's TOA indicated that the most restrictive disposition he was to be given on his charge was a Level 2. The State asserts that, during the hearing upon which the Level 3 disposition was based, the trial court informed the juvenile that the extent of its power, in light of the juvenile's prior record level, was to order the juvenile to training school, a Level 3 disposition. We agree with the juvenile.

We have long considered that the acceptance of an admission by a juvenile is tantamount to the acceptance of a guilty plea by an adult in a criminal case. *In re Johnson*, 32 N.C. App. 492, 493, 232 S.E.2d

486, 487-88 (1977). Thus, we have held that: "an 'admission' in a juvenile hearing is equivalent to a guilty plea in a criminal case, and that the record must therefore affirmatively show on its face that the admission was entered knowingly and voluntarily." *In re Chavis*, 31 N.C. App. 579, 581, 230 S.E.2d 198, 200 (1976), *cert. denied*, 291 N.C. 711, 232 S.E.2d 203 (1977). The fundamental basis for this is that "[t]he privilege [against self-incrimination] applies in juvenile proceedings the same as in adult criminal cases." *In re Burrus*, 275 N.C. 517, 530, 169 S.E.2d 879, 887 (1969), *aff'd*, 403 U.S. 528, 29 L. Ed. 2d 647 (1971).

To ensure the knowing and voluntary nature of a juvenile's admission, the trial court must comply with the procedures set forth in N.C. Gen. Stat. § 7B-2407 (2003). Under this statute, the court must determine that "the admission is a product of informed choice" made without improper pressure and that a factual basis for the admission exists. N.C. Gen. Stat. § 7B-2407(b) and (c). Moreover, a court may accept a juvenile's admission only after first addressing the juvenile personally and informing the juvenile on a number of different factors related to the charge, one of which is:

> (6) Informing the juvenile of the most restrictive disposition on the charge.

N.C. Gen. Stat. § 7B-2407(a)(6). If the face of the record does not affirmatively show the trial court's compliance with N.C. Gen. Stat. § 7B-2407 and the knowing and voluntary nature of the juvenile's admission, the adjudication of delinquency will be set aside. *In re Kenyon N.*, 110 N.C. App. 294, 296-97, 429 S.E.2d 447, 449 (1993).

In the case at bar, the TOA clearly indicated to all parties that the knowing and voluntary admission by the juvenile was based on the understanding that the most restrictive disposition he would receive was a Level 2. During the hearing, in attempting to comply with N.C. Gen. Stat. § 7B-2407(a)(6), the trial court had the following exchange with the juvenile:

> Q: . . . And did your lawyer tell you that the greatest power that I have in this courtroom is to be able to send people to training school?
>
> A: Yes, sir.
>
> Q: Now, I'm not saying that's what I'm going to do in your case. I don't know yet. It will depend on what all I hear, but I must let you know at least what my ultimate power is[.]

In light of the TOA, we believe the court did not sufficiently inform the juvenile of the most restrictive disposition that he himself could receive on the charge against him. The trial court did not mention that training school is a Level 3 disposition, and his mention of training school referred to sending "people" to training school based on certain charges, not this particular juvenile based on his charge. The court reflected its general power, not the extent of the court's power in this particular case.

Therefore, we cannot say that the juvenile's admission was knowing and voluntary. His admission was based on a belief that the most restrictive disposition he could receive was a Level 2, and the court, without sufficient notice to him or any accompanying chance to withdraw the admission, raised the most restrictive disposition he could receive to a Level 3.

As we have already held that a TOA is the equivalent to a plea agreement acting as a waiver of a juvenile's constitutional right against self-incrimination, we look to our laws related to criminal pleas for guidance on the proper resolution of this issue. N.C. Gen. Stat. § 15A-1024 (2003) provides that:

> If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

This law is clearly designed to ensure that a defendant's plea is knowing and voluntary, thus safeguarding the right against self-incrimination. Therefore, we hold that when a trial court plans to impose a disposition level higher than that set out in the TOA, the juvenile must be given a chance to withdraw his plea and be granted a continuance.

[3] In *State v. Puckett*, 299 N.C. 727, 264 S.E.2d 96 (1980), where N.C. Gen. Stat. § 15A-1024 was not complied with, our Supreme Court reversed and remanded the case such that the trial court's judgments were vacated, defendant's pleas of guilty were stricken, and the case was to be reinstated on the trial docket. In the case at bar, the juvenile has already completed the Level 3 disposition. Therefore we believe the most just resolution in light of these circumstances is to reverse the trial court's Level 3 disposition, and remand the case ordering clerical changes be made giving the juvenile the benefit of a

record showing him as having had a Level 2 disposition from the underlying offense of this case.[1]

On this issue, we reverse and remand.

II. Custody Pending Appeal

[4] Next, the juvenile contends the trial court erred in not ordering the juvenile be released pending appeal, or for not stating compelling reasons, in writing, to support an order that the juvenile remain in custody pending appeal in accord with N.C. Gen. Stat. § 7B-2605 (2003). We believe this issue is now moot in light of the fact that the juvenile has already served his Level 3 disposition and was discharged April of 2003. We note that the conclusions of law in this case specify the brutality of the incident at bar, and that the juvenile "deliberately chose to resist and not cooperate with out of home placement[,] [and] [t]hat he is not willing to work with family members who are willing to offer their services to assist and help him." We believe these would otherwise suffice as "compelling reasons" under N.C. Gen. Stat. § 7B-2605 had the trial court properly ordered the juvenile to remain in custody pending appeal.

III. Serious Injury

[5] Lastly, the juvenile contends that the trial court erred in ordering the juvenile to a Level 3 disposition, as this more severe disposition was based on an understanding by the court that the victim's ribs were fractured by the juvenile's assault. The juvenile argues that the evidence shows only that the victim's ribs were bruised. As we have reversed and remanded this case to correct the juvenile's disposition level to be a Level 2 in accordance with his TOA, this issue is also moot.

Reversed and remanded.

Judges McGEE and ELMORE concur.

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1. We note that admission of the probation violation was not part of the TOA and could, in other circumstances, have been used to impose a Level 3 disposition despite the TOA. However, in this case defendant's probation was based only on prior minor offenses and therefore could not be used to elevate his commitment to a Level 3. *See* N.C. Gen. Stat. § 7B-2510(f) (2003).

STATE OF NORTH CAROLINA v. RUSSELL ELLIS ROBERTS

No. COA03-1424

(Filed 19 October 2004)

1. Rape— statutory—fifteen-year-old victim

There was sufficient evidence of the victim's age in a statutory rape prosecution where the victim was 15 years and eleven months old. The fair meaning of "15 years" in the statutory rape statute includes children in their 15th year until they reach their 16th birthday.

2. Rape; Indecent Liberties— identification of defendant—sufficiency

The identification of defendant in a statutory rape and indecent liberties prosecution was sufficient where the victim identified defendant in a photo lineup and in court, her brother identified defendant as the man who gave them a ride that day, and the physical evidence corroborated the victim's account of events.

Appeal by defendant from judgment entered 27 March 2003 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 August 2004.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Margaret A. Force, for the State.

Margaret Creasy Ciardella for defendant-appellant.

HUNTER, Judge.

Russell Ellis Roberts ("defendant") appeals his conviction of one count of statutory rape of a person fifteen years old and one count of taking indecent liberties with a child, on the grounds the trial court erred in denying defendant's motion to dismiss both charges for insufficiency of the evidence. We disagree and find no error.

The State's evidence tended to show that on 13 September 2001, M.M., a fifteen-year-old female, along with her younger brother, B.M., accepted a ride from an adult male and young girl in a white car. The adult male, identified by M.M. as defendant, dropped off B.M. and the girl at their respective schools. He then took M.M. to a nearby park where he asked her to strip, a request she refused. M.M. pretended to speak with her mother on a non-functioning cell phone. Defendant

asked to use the cell phone and was told it would not work for outgoing calls. He then pushed M.M. to the ground until she gave him the phone. Defendant led M.M. into the surrounding woods and threatened her with a large limb when she began to cry. M.M. was instructed to undress and defendant directed her to lean against a tree while he proceeded to engage in vaginal intercourse with her from behind. Defendant withdrew, masturbated and ejaculated, then directed M.M. to put her clothes back on. After leaving the woods, defendant told M.M. he had a body in the trunk of his car and that she could be there too if she said anything about what had happened.

Defendant dropped M.M. off and she returned to her home and called her mother's fiancée, who contacted M.M.'s mother and the police. M.M. gave a description of the defendant to the police and was taken to the hospital and examined. A small amount of semen was found on M.M.'s shorts, however no identifiable DNA sample was found as a result of the examination.

Approximately one month after the incident, M.M.'s mother, Costa S. Miller ("Costa"), testified that defendant, driving a white car, approached her as she walked her son, B.M., to the bus stop and asked if he knew her. Costa suggested defendant must have mistaken her for her daughter after he asked if she wore glasses. B.M. identified defendant as the driver who had picked up him and his sister on the day of the earlier incident. Costa then called police. Defendant was identified from a photographic lineup by M.M. and arrested. Defendant presented no evidence at trial.

Defendant was charged with one count of statutory rape of a person fifteen years old and one count of taking indecent liberties with a child. Defendant was convicted of both charges and was sentenced to a minimum-maximum term of 302 to 372 months in prison.

Defendant contends the trial court erred in denying his motion to dismiss both charges for insufficient evidence. Defendant presents two independent grounds to support this argument: (1) the indictment was improper under the statute governing statutory rape of a fifteen year old, as the victim was more than fifteen, and (2) the evidence was insufficient as to both charges of the identity of defendant.

I.

[1] Defendant first contends insufficient evidence was given as to the age of the victim. Defendant argues the statute governing the crime of statutory rape, N.C. Gen. Stat. § 14-27.7A (2003), is properly

construed to apply only to those victims age fifteen or younger, and therefore not applicable in this case. We disagree.

Criminal statutes must be strictly construed against the State and liberally construed in favor of defendant. *See State v. Pinyatello*, 272 N.C. 312, 314, 158 S.E.2d 596, 597 (1968). However, the North Carolina Supreme Court has recognized that:

> " '[T]he canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.' "

State v. Jones, 358 N.C. 473, 478, 598 S.E.2d 125, 128 (2004) (quoting *United States v. Brown*, 333 U.S. 18, 25-26, 92 L. Ed. 442, 448 (1948)).

N.C. Gen. Stat. § 14-27.7A reads in pertinent part as follows:

> (a) 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, except when the defendant is lawfully married to the person.

Id. Here the fair meaning of "15 years old," in accord with the manifest intent of the legislature when viewed in the context of the historical development of this area of law, includes children during their fifteenth year, until they reach their sixteenth birthday.

In *State v. McGaha*, 306 N.C. 699, 295 S.E.2d 449 (1982), the North Carolina Supreme Court interpreted the 1981 statutory rape law, N.C. Gen. Stat. § 14-27.4(a)(1) (1981). *McGaha* held that the age requirement of " 'a victim who is a child of the age of 12 years or less' " excluded application of the law to a child aged twelve years and eight months because the child was "something more than twelve" years. *McGaha*, 306 N.C. at 700-01, 295 S.E.2d at 450 (emphasis omitted). The Court in *McGaha* relied on the decision in *Green v. P. O. S. of A.*, 242 N.C. 78, 87 S.E.2d 14 (1955). In *Green*, a funeral benefit association required members to not be "over fifty years," and the Court held that an individual who had passed his fiftieth birthday, but was not yet fifty-one, was over fifty years. *Green*, 242 N.C. at 82-83, 87 S.E.2d at 17. However, in both *McGaha* and *Green*, the Court noted the impact of the inclusion of modifiers on their interpretation, as

McGaha specified twelve years or less, *McGaha*, 306 N.C. at 700, 295 S.E.2d at 450, and *Green* interpreted not over fifty years. *Green*, 242 N.C. at 82-83, 87 S.E.2d at 17.

The language adopted by the legislature in N.C. Gen. Stat. § 14-27.7A lacks these modifiers, requiring only that the victim be fifteen years old. As the Court noted in *Green*, the legislative rules for construction of statutes and subsequent court decisions have found the term "year" to mean a twelve month calender year, unless otherwise expressed. *Green*, 242 N.C. at 83, 87 S.E.2d at 17, see N.C. Gen. Stat. § 12-3(3) (2003). Further, this Court has held that North Carolina follows the " 'birthday rule' " for determination of age, that is, a person attains a given age on the anniversary date of his or her birth. *See In re Robinson*, 120 N.C. App. 874, 876-77, 464 S.E.2d 86, 88 (1995). Under these rules and principles of construction, a person would become fifteen on their fifteenth birthday and remain fifteen for a twelve month calendar year.

The legislature, in passing § 14-27.7A in 1995, unlike in the 1981 statute interpreted in *McGaha*, specifically did not restrict the victim's age to below a certain year, but rather specified the statute applied to thirteen, fourteen, and fifteen year olds. When read in conjunction with N.C. Gen. Stat. § 14-27.2 (2003), which applies to a victim of vaginal intercourse who is a child *under* the age of thirteen years, it is clear the manifest intent of the legislature was for § 14-27.7A to protect children in the three full years following age twelve. To read the statute otherwise would override common sense and the evident statutory purpose. Therefore the term "15 years old" in § 14-27.7A is properly construed as applying to any victim within the calendar year following her fifteenth birthday, until she attains the age of sixteen.

Here, M.M. was fifteen years and eleven months at the time of the offense. Further, defendant, who was thirty-three at the time of trial, does not contest that he was more than six years older than M.M. when the offense occurred. Sufficient proof of age was therefore offered to support the indictment of defendant in the charge of statutory rape of a person fifteen years old and to survive a motion to dismiss on these grounds.

II.

[2] Defendant further contends the trial court erred in denying the motion to dismiss both charges particularly for insufficient evidence identifying him as the assailant. We disagree.

Defendant was charged with statutory rape, discussed *supra*, and indecent liberties with a child. In order to obtain a conviction for the latter,

> the State must prove (1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.

State v. Rhodes, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987). The first four elements may be proved by direct evidence and the final, "that the action was for the purpose of arousing or gratifying sexual desire, may be inferred from the evidence of the defendant's actions." *Id.* at 105, 361 S.E.2d at 580. Such a showing is sufficient evidence to withstand a motion to dismiss the charge of taking indecent liberties with a child. *Id.*

In reviewing challenges to the sufficiency of evidence, the court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *See State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002). Questions of credibility are for a jury's determination and are not questions for the court to resolve. *See State v. Gay*, 251 N.C. 78, 80, 110 S.E.2d 458, 459 (1959). The trial court should be concerned only with whether the evidence is sufficient for jury consideration, not with the weight of the evidence. *See State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982).

The State presented evidence that M.M. identified defendant as the man who assaulted her from a photographic lineup and noted specific features on the back of the photograph as the grounds for her identification. M.M. also identified the defendant in court. M.M. had ample opportunity to view defendant prior to and after the assault, and provided a detailed description to the police after the incident. Corroboration was offered by M.M.'s brother, B.M., that defendant was the man who offered them a ride on the morning of the assault. Additionally, M.M.'s account of the sexual assault was supported by evidence of semen found on her clothing at the time of the physical examination conducted the day of the incident.

Such evidence, along with the previously discussed proof of the respective ages of the victim and defendant, when viewed in the light

most favorable to the State, was sufficient to allow a reasonable inference of all elements of both crimes. Therefore the trial court properly denied the motion to dismiss.

For these reasons, we find the trial court properly concluded there was sufficient evidence to deny defendant's motion to dismiss.

No error.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. TIKELIA ZANTRA ROBINSON

No. COA03-1410

(Filed 19 October 2004)

1. **Appeal and Error— preservation of issues—failure to argue in brief**

Two of the original four assignments of error on appeal are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6) because defendant failed to argue them in her brief.

2. **Embezzlement— fiduciary relationship—merchandise associate or store clerk—clothing store**

Assuming arguendo that the trial court erred in an embezzlement case by instructing the jury that by law a fiduciary relationship existed between a merchandise associate and the clothing store where she worked, the error was not prejudicial because: (1) N.C.G.S. § 14-90 specifically references clerks, and witnesses testified that a merchandise associate is the same as a store clerk; and (2) the jury could have found defendant guilty of embezzlement in her nonfiduciary capacity as a store clerk based on the State's presentation of the remaining elements of the crime.

3. **Embezzlement— motion to dismiss—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of embezzlement, because the State provided substantial evidence that: (1) as a merchandise associate or sales clerk authorized to conduct sale transactions on behalf of the pertinent clothing company, defendant was an agent of the company; (2) pursuant to the terms of defendant's employment, she

was to receive and did receive property belonging to the company; and (3) defendant knew that the merchandise was not hers, and converted it to her own use or fraudulently sold some of the merchandise.

Appeal by defendant from judgment entered 12 June 2003 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 20 September 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert O. Crawford, III, for the State.

Robinson Law Office, by Charles Everett Robinson, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Tikelia Robinson ("defendant") appeals her conviction of embezzlement. For the reasons stated herein, we find no error in the trial court's judgment.

The State's evidence presented at trial tends to show the following: On 3 April 2000, defendant was hired as a merchandise associate at TJ Maxx Department Store ("TJ Maxx") in Rocky Mount, North Carolina. In September 2000, Dwayne Gooding ("Gooding"), a loss prevention detective for TJ Maxx, received information from transaction reports and store employees that defendant may have been selling merchandise for less than the marked price. On 21 September 2000, Gooding interviewed defendant, at which time she provided a written confession that during her employment she engaged in "underringing," "free bagging," and "markdown fraud." "Underringing" occurs when an employee receives merchandise from a customer for purchase, and the employee keys in a price on the cash register lower than the price stated on the price tag. "Free bagging" occurs when a customer presents multiple items for purchase at a cash register and the employee rings up fewer than all of the items, but places all of the items in a bag for the customer to take from the store. "Markdown fraud" occurs when an employee takes an item from the sales floor to a markdown machine, creates a price tag for the item that is lower than the true price of the item, and then purchases the item at the lower price. Defendant admitted to underringing and free bagging $15,000 in merchandise. She further admitted purchasing and selling to other employees $20,000 in merchandise by way of markdown fraud.

Defendant was arrested and charged with one count of embezzlement, and tried before a jury on 11 June 2003. At the charge conference following the conclusion of the evidence, counsel for defendant objected to any jury instruction on embezzlement and argued that larceny by an employee (N.C. Gen. Stat. § 14-74) was the appropriate charge. Defense counsel stated that if the trial court proceeded to instruct the jury on embezzlement that the court should also instruct on the definition of a fiduciary relationship. The trial court instructed the jury in pertinent part as follows:

> Ladies and gentlemen, the defendant Tikelia Robinson has been charged with embezzlement which occurs when a merchandise associate rightfully receives property in her role as merchandise associate and then intentionally, fraudulently and dishonestly uses it for some purpose other than which—other than that for which she received it.
>
> . . . .
>
> Ladies and gentlemen, a fiduciary is a person in whom another person has placed special faith, confidence and trust. Because of the trust and confidence placed in him by another person, a fiduciary is required to act honestly, in good faith, and in the best interests of that person.
>
> A fiduciary relationship may exist in a variety of circumstances. Any time one places special faith, confidence and trust in another person to represent his best interests, a fiduciary relationship exists. It is not necessary that it be a technical or legal relationship.
>
> By law, a fiduciary relationship exists between a merchandise associate and TJ Maxx.

The jury convicted defendant of embezzlement and the trial court sentenced her to a suspended sentence of forty-eight months supervised probation on the condition that she pay an undetermined probation supervision fee, $250 in court costs, a $1000 fine, and $20,000 in restitution. It is from this conviction that defendant appeals.

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[1] As an initial matter, we note that defendant's brief contains arguments supporting only two of the original four 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 the assignments of error addressed in defendant's brief.

The issues presented on appeal are whether the trial court erred by (I) instructing the jury regarding a fiduciary relationship; and (II) denying defendant's motion to dismiss.

[2] Defendant first argues that the trial court erred by instructing the jury that "[b]y law, a fiduciary relationship exists between a merchandise associate and TJ Maxx." Assuming arguendo that the trial court erred in providing the fiduciary instruction, we conclude that the error was not prejudicial to defendant where N.C. Gen. Stat. § 14-90 specifically references "clerks."

The General Statutes of North Carolina provide as follows with respect to embezzlement:

> If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, *or any other fiduciary*, or any officer or agent of a corporation, *or any agent, consignee, clerk, bailee or servant* . . . 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, goods or other chattels . . . which shall have come into his possession or under his care, he shall be guilty of a felony.

N.C. Gen. Stat. § 14-90 (2003) (emphasis added).

"The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972). "Where the statutory language is clear and unambiguous, 'the Court . . . must apply the statute to give effect to the plain and definite meaning of the language.' " *Carolina Power & Light Co. v. City of Asheville*, 158 N.C. 512, 518, ___ S.E.2d ___, ___ (2004) (quoting *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993)). The legislature's use of the conjunction "or," used to indicate an alternative, indicates that a person who serves in *any of the capacities described*, and engages in any of the activities described, may be found guilty of embezzlement.

In the present case, Gooding and Cynthia Taylor ("Taylor"), an assistant manager at the store, testified that a merchandise associate is the same as a store clerk. Clearly, clerks are among the group of persons that the legislature intended to cover by the statute. Thus, we conclude that the trial court properly instructed the jury that embez-

zlement can occur "when a merchandise associate rightfully receives property in her role as a merchandise associate and then intentionally, fraudulently and dishonestly uses it for some purpose . . . other than that for which she received it." Therefore, because the State presented sufficient evidence of the remaining elements of the crime, the jury could have found defendant guilty of embezzlement in her non-fiduciary capacity as a store clerk. Accordingly, we conclude that defendant was not prejudiced by the trial court's jury instruction regarding fiduciary relationship.

[3] Defendant next argues that the trial court erred by denying defendant's motion to dismiss. We disagree.

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) (citations omitted). 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. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

To survive a motion to dismiss a charge of embezzlement, the State must have presented evidence of the following:

> (1) Defendant was the agent of the complainant; (2) pursuant to the terms of his employment he was to receive property of his principal; (3) he received such property in the course of his employment; and (4) knowing it was not his, he either converted it to his own use or fraudulently misapplied it.

State v. Tedder, 62 N.C. App. 12, 17, 302 S.E.2d 318, 322, *disc. rev. denied*, 309 N.C 324, 305 S.E.2d 561 (1983) (citing *State v. Ellis*, 33 N.C. App. 667, 236 S.E.2d 299 (1977)). The term "agent" is defined as "one who is authorized to act for or in place of another; a representative." BLACK'S LAW DICTIONARY 68 (8th ed. 2004).

In the present case, the evidence establishes that defendant was an agent of TJ Maxx. Gooding and Taylor testified that TJ Maxx authorized defendant to sell its merchandise to customers. As a merchandise associate or sales clerk authorized to conduct sales transactions on behalf of the company, defendant was an agent of TJ Maxx. Thus, the first element of embezzlement analysis is satisfied.

The evidence also tends to show that pursuant to the terms of defendant's employment, she was to receive, and did receive, property belonging to TJ Maxx. Gooding and Taylor testified that all store employees, including defendant, are entrusted with the merchandise in the store. Thus, the second and third elements of embezzlement analysis are satisfied.

The evidence further demonstrates that defendant knew that the merchandise was not hers, converted it to her own use or fraudulently sold some of the merchandise. In defendant's handwritten confession, as read into evidence by Gooding, defendant confesses the following: "Since my employment at TJ Maxx I have been involved in underringing, free bagging, and markdown fraud;" "I intentionally gave away merchandise about 300 times over a 4 to 5 month period;" "I knew this was wrong and against company policy and against the law." Thus, the fourth element of embezzlement analysis is satisfied.

Because the State provided substantial evidence of each offense charged, we conclude that the trial court properly denied defendant's motion to dismiss.

NO ERROR.

Chief Judge MARTIN and Judge HUDSON concur.

CHARLOTTE EASTLAND MALL, LLC, F/K/A EASTLAND MALL LIMITED PARTNERSHIP, PLAINTIFF v. SOLE SURVIVOR, INC. D/B/A HEEL SEW QUIK, MICHAEL R. JOHNSON, AND SARAH A. JOHNSON, DEFENDANTS

No. COA03-1422

(Filed 19 October 2004)

1. Landlord and Tenant— mall security—no duty under lease

The terms of the parties' lease contradicted defendants' claim that plaintiff owed defendants a duty to provide adequate mall security, and summary judgment was correctly granted for plaintiff on an action alleging default on a lease.

2. Landlord and Tenant— implied covenant of quiet enjoyment—criminal acts by third parties

The implied covenant of quiet enjoyment does not extend to the acts of trespassers and wrongdoers and does not impose

upon the landlord the duty to prevent criminal acts by third parties. Summary judgment was correctly granted for plaintiff-landlord in an action alleging that defendants defaulted under their lease.

3. Landlord and Tenant— constructive eviction—lack of security

Constructive eviction occurs when a landlord's breach of duty under the lease renders the premises untenable; here, the lease did not require plaintiff to provide mall security, defendants did not present any statutory or common law basis upon which to impose that duty, and summary judgment was correctly granted for plaintiff in an action for alleging that defendants defaulted under their lease.

Appeal by defendants from judgment entered 30 July 2003 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 August 2004.

Shuford, Hunter & Brown, P.A., by G. Martin Hunter, for plaintiff-appellee.

Andresen, Vann & Butler, by Christopher M. Vann, for defendant-appellants.

LEVINSON, Judge.

Defendants, Sole Survivor, Inc., Michael Johnson, and Sarah Johnson, appeal from an order of summary judgment entered in favor of plaintiff, Charlotte Eastland Mall (Eastland). We affirm.

The pertinent facts may be summarized as follows: Eastland is a shopping mall in Charlotte, North Carolina. On 14 February 1994 defendant Sole Survivor signed a ten year lease with Eastland for the operation of a tailoring and shoe repair business at the mall. The lease required Sole Survivor to pay monthly rent in a set amount, as well as additional rent in an amount calculated as a percentage of Sole Survivor's gross sales. Defendants Michael and Sarah Johnson also signed a separate agreement to act as sureties on the lease. In February 2002, after eight years of the ten year lease had elapsed, the defendants vacated the leased premises at Eastland, and thereafter ceased to pay rent.

On 29 October 2002 plaintiff filed suit against defendants, alleging that they had defaulted on the lease. Plaintiff sought $96,275.48 in

rent owed, as well as late charges, interest, attorney's fees, and court costs. In their answer, defendants asserted as an affirmative defense that plaintiff "failed to maintain a safe environment for the corporate defendant and its customers thereby rendering the terms of the lease and any guaranty executed in this matter null and void." On 11 June 2003 plaintiff moved for summary judgment. Following a hearing, the trial court on 30 July 2003 granted summary judgment in favor of plaintiff. From this order, defendants appeal.

Standard of Review

Defendants appeal from an order for summary judgment. 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.G.S. § 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." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). "[T]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). Also, "evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). Thus, on appeal:

> It is well established that the standard of review of the grant of a motion for summary judgment requires a two-part analysis of whether, '(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.'

Von Viczay v. Thoms, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000)).

Defendants argue that the trial court erred by granting summary judgment for plaintiffs on the grounds that "[t]here was a material issue of fact regarding whether Plaintiff's failure to provide adequate security negated Defendants' obligation to pay rent[.]" Defendants

argue that criminal incidents occurring at Eastland discouraged defendants' customers, gave the mall a bad reputation, and led to the departure of major "anchor" stores. They assert that plaintiff's failure to provide adequate security made their continued occupancy untenable, resulting in their "constructive eviction." Defendants further contend that plaintiff's failure to provide security was a breach of its duty to provide a "safe environment", an explicit breach of plaintiff's duties under the lease, and a breach of the implied covenant of "quiet enjoyment." On this basis, defendants assert that plaintiff's alleged breach of duty served to relieve defendants of their obligations under the lease, including their obligation to pay rent. We disagree.

In support of their argument, defendants submitted affidavits and exhibits tending to show that: (1) in July 1994 Sole Survivor was the victim of an armed robbery; (2) during the eight years defendants leased space at Eastland, the police received many reports of criminal activity at Eastland; (3) during the same time period, several businesses vacated Eastland; and (4) Eastland had been made aware of the problem of criminal activity occurring at the mall. However, the relevance of this evidence is predicated upon defendants' assertion that plaintiff owes a duty to defendants to "provide adequate security." Accordingly, we next consider defendants' various arguments on this issue.

[1] Defendants argue first that plaintiff is required by the terms of the lease to provide security for the common areas of Eastland mall. "[T]he provisions of a lease are interpreted according to general principles of contract law." *Wal-Mart Stores, Inc. v. Ingles Mkts., Inc.*, 158 N.C. App. 414, 418, 581 S.E.2d 111, 115 (2003) (citing *Martin v. Ray Lackey Enterprises*, 100 N.C. App. 349, 354, 396 S.E.2d 327, 330 (1990)). "Where the language of a contract is clear, the contract must be interpreted as written. As with contracts, the rule of interpretation for leases is that a word in a lease 'should be given its natural and ordinary meaning.' " *Southpark Mall Ltd. Part. v. CLT Food Mgmt., Inc.*, 142 N.C. App. 675, 678, 544 S.E.2d 14, 16 (2001) (citing *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 120, 516 S.E.2d 879, 882 (1999), and quoting *Charlotte Housing Authority v. Fleming*, 123 N.C. App. 511, 514, 473 S.E.2d 373, 375 (1996)). In the instant case, the section of the lease upon which defendants rely states that:

> 9.(d) Security. **Landlord may**, from time to time and to the extent it deems appropriate **in its sole discretion**, determine whether to **supply security services** in the Common Areas and additional traffic control for the Shopping Center.

> Notwithstanding any other provision of this Lease, **Landlord shall not be liable for any loss** or damages **suffered by** Tenant . . . by **failure to supply such services**[.] . . . It is specifically understood and agreed that, by supplying such services, **Landlord shall not be deemed to relieve Tenant** of its duty to maintain security within the Demised Premises nor **of its performance of the terms, covenants and conditions of this lease.**

(emphasis added). We conclude that the pertinent terms of the lease **contradict** defendants' argument. The lease clearly states, **not** that plaintiff is *obligated* to provide security, but that plaintiff *may* provide security *in its sole discretion.* Indeed, the lease expressly states that plaintiff "shall not be liable for any loss or damages suffered by Tenant" caused by plaintiff's "failure to supply such services." Moreover, this paragraph explicitly provides that plaintiff's provision of security services "shall not be deemed to relieve Tenant of its duty to maintain security within the Demised Premises nor of its performance of the terms, covenants, and conditions of this lease." We conclude that the terms of the lease fail to support defendants' claim that plaintiff owed defendants a duty to provide "adequate security."

[2] Defendants also argue that plaintiff's failure to provide more security at Eastland was a breach of the implied covenant of "quiet enjoyment." "Under North Carolina law, . . . a lease carries an implied warranty that the tenant will have quiet and peaceable possession of the leased premises during the term of the lease[,] . . . stand[ing] for the principle that a landlord breaches the implied covenant of quiet enjoyment when he constructively evicts the tenant." *K & S Enters. v. Kennedy Office Supply Co.*, 135 N.C. App. 260, 267, 520 S.E.2d 122, 126-27 (1999) (citations omitted). However, it is long-settled that "[t]he covenant of quiet enjoyment . . . does not extend to the acts of trespassers and wrongdoers[.]" *Huggins v. Waters*, 167 N.C. 197, 198, 83 S.E. 334, 334 (1914). Defendants do not cite any cases in support of the proposition that the implied covenant of quiet enjoyment imposes upon plaintiff-landlord the duty to a commercial tenant to prevent criminal acts by third parties, and we find none.

[3] Defendants also argue that the plaintiff's failure to take measures to reduce crime at Eastland led to their "constructive eviction." This argument has no merit.

> Constructive eviction occurs when an act of a landlord deprives his tenant of 'that beneficial enjoyment of the premises to which

> he is entitled under his lease,' causing his tenant to abandon them. In other words, constructive eviction takes place when a **landlord's breach of duty under the lease renders the premises untenable**.

K & S Enters., 135 N.C. App. at 266, 520 S.E.2d at 126 (quoting *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 100 N.C. App. 82, 92, 394 S.E.2d 824, 830 (1990)) (emphasis added). In the instant case, defendants have failed to show that plaintiff breached any duty under the lease.

We conclude that the terms of the lease do not require plaintiff to provide "adequate security." Nor have defendants presented any statutory or common law basis upon which to impose upon defendant landlord a duty to provide "adequate security" for the benefit of its commercial tenants. This assignment of error is overruled.

Defendants also argue that the trial court erred in its calculation of the amount of damages. However, defendants did not assign this as error, and thus have not properly preserved this issue for appellate review. "[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal[.]" N.C R. App. P. 10(a). This argument is dismissed.

For the reasons discussed above we conclude that the trial court's order for summary judgment should be

Affirmed.

Judges GEER and THORNBURG concur.

CHRISTOPHER PRIVETT, PLAINTIFF v. MARY BULLOCK YARBOROUGH, DEFENDANT

No. COA03-1655

(Filed 19 October 2004)

Motor Vehicles— automobile accident—negligence—last clear chance instruction

The trial court did not err in a negligence action arising out of a motor vehicle-pedestrian accident by submitting the issue of last clear chance to the jury and by entering judgment in favor

of plaintiff, because the evidence when viewed in the light most favorable to plaintiff supports a reasonable inference of each essential element of the doctrine including that: (1) plaintiff testified that he never saw defendant's car approaching him; (2) regardless of whether defendant saw plaintiff or the other two men in the roadway, the lighted vehicles stopped in the road were an indication that the drivers of those vehicles might be nearby; (3) a jury might reasonably conclude that defendant had the time and means to avoid striking plaintiff by exercising reasonable care; and (4) it can reasonably be inferred that had defendant maintained a proper lookout as she drove along she could have discovered the peril in ample time to stop her car before colliding with defendant.

Appeal by defendant from judgment entered 12 June 2003 by Judge Ronald Stephens in the Superior Court in Warren County. Heard in the Court of Appeals 15 September 2004.

Jones, Martin, Parris & Tessener Law Offices, P.L.L.C., by Sean A. B. Cole, for plaintiff-appellee.

Baker, Jenkins, Jones, Murray, Askew & Carter, P.A., by Kevin N. Lewis, for defendant-appellant Mary Bullock Yarborough.

Broughton, Wilkins, Sugg & Thompson, P.L.L.C., by R. Palmer Sugg and Benjamin E. Thompson, III, for unnamed defendant-appellant N.C. Farm Bureau Mutual Insurance Company.

HUDSON, Judge.

On 17 May 2002, plaintiff Christopher Privett filed a complaint against defendant Mary Bullock Yarborough, seeking damages for personal injuries resulting from a car crash. On 10 June 2002, defendant answered, raising the defense of contributory negligence. On 12 June 2002, plaintiff replied alleging that defendant had the last clear chance to avoid the wreck. On 14 May 2002, the parties stipulated that only three issues could potentially be submitted to the jury: negligence of defendant, contributory negligence of plaintiff, and last clear chance by defendant. The parties reserved the right to object to submission to the jury of any issue if not supported by the evidence. The jury returned a verdict finding that; yes, plaintiff was injured by defendant's negligence; yes, plaintiff's negligence contributed to his injuries; and yes, defendant had the last clear chance to avoid plain-

tiff's injuries. Defendant appeals. For the reasons discussed below, we affirm.

The evidence tended to show that on 26 January 2002, near sunset, plaintiff and Cornell Hendricks were transporting a large wardrobe in the back of plaintiff's pickup truck. On a straight stretch of road, the wardrobe fell off the truck and into the road. Plaintiff stopped his truck in the middle of his lane, with the front wheels approximately one foot from the centerline, and the back wheels about six inches closer to the centerline. Plaintiff turned on his headlights and flashing hazard lights. As plaintiff and Mr. Hendricks began picking up pieces of the wardrobe, another car came up behind plaintiff's vehicle, stopped, and turned on its headlights and flashing hazard lights. The passenger in that car, Charlie Jones, began to help pick up the wardrobe debris. The three men picked up a large part of the wardrobe and carried it to plaintiff's truck. As they lifted the wardrobe into the truck, plaintiff stood at the rear centerline side of his truck. Moments later, defendant's car approached from the opposite direction and struck plaintiff as he retrieved a piece of debris from defendant's lane. Plaintiff never saw defendant's car and remembered nothing until he regained consciousness as an ambulance approached.

Defendant assigns error to the court's submission of the issue of last clear chance to the jury, arguing that plaintiff failed to establish the elements of that doctrine. We disagree.

The issue of last clear chance:

> must be submitted to the jury if the evidence, when viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the doctrine. To obtain an instruction on the doctrine of last clear chance, the plaintiff must show the following essential elements:
>
> 1) The plaintiff, by her own negligence put herself into a position of helpless peril;
>
> 2) Defendant discovered, or should have discovered, the position of the plaintiff;
>
> 3) Defendant had the time and ability to avoid the injury;
>
> 4) Defendant negligently failed to do so; and
>
> 5) Plaintiff was injured as a result of the defendant's failure to avoid the injury.

Kenan v. Bass, 132 N.C. App. 30, 32-33, 511 S.E.2d 6,7-8 (1999) (citations and quotation marks omitted).

"[E]vidence tending to show the injured pedestrian either was not facing oncoming traffic or did not see the approaching vehicle has been found sufficient to satisfy the first element, our courts reasoning that the pedestrian who did not apprehend imminent danger could not reasonably have been expected to act to avoid injury." *Nealy v. Green*, 139 N.C. App. 500, 505-06, 534 S.E.2d 240, 244 (quotation marks omitted). Here, plaintiff testified that he never saw defendant's car approaching him.

Regarding the second element, "a motorist upon the highway . . . does owe a duty to all other persons using the highway . . . to maintain a lookout in the direction in which the motorist is traveling." *Exum v. Boyles*, 272 N.C. 567, 576, 158 S.E.2d 845, 852-53 (1968). Where "[i]t can reasonably be inferred . . . that had defendant maintained a proper lookout as she drove along she could have discovered the peril in ample time to stop her car before colliding with either the men or the vehicles," the second element is established. *Shaw v. Burton*, 104 N.C. App. 113, 118, 408 S.E.2d 199, 202, *disc. review denied*, 330 N.C. 442, 412 S.E.2d 75 (1991). In *Shaw*, we held that "it is not essential to the application of the doctrine that defendant saw or in the exercise of reasonable care could have seen the imperiled men as she drove along; it is enough that she could see the lighted vehicles blocking the highway . . . and the lighted vehicles in the highway were an indication to defendant not only that they would be damaged if she did not stop, but also that some dismounted passengers might be near." *Id.* (citation omitted) Here, the evidence tended to show that plaintiff's and Mr. Jones's vehicles were parked in the middle of their lane, with headlights on and hazard lights flashing. Regardless of whether defendant saw plaintiff or the other two men in the roadway, the lighted vehicles stopped in the road were an indication that the drivers of those vehicles might be nearby.

Third, the evidence must show that defendant had the time and means to avoid injuring plaintiff. This Court has held the time sufficient even when the defendant failed to see the plaintiff until within ten feet of him, a split second before impact. *Nealy*, 139 N.C. App. at 509, 534 S.E.2d at 246.

> Given defendant's duty to maintain a proper lookout and the circumstances that the area was well-lighted, the weather was clear, the road was straight, there were no obstructions in the road, and

> that defendant himself testified that his visibility and vision had not been affected by the passing of two trucks traveling in the opposite direction, a jury might reasonably conclude that defendant had the time . . . to avoid the injury to the plaintiff by the exercise of reasonable care after [he] . . . should have discovered plaintiff's perilous position.

Id. (quotation omitted) Here, the evidence showed that defendant traveled along a straight section of road for approximately one-half mile approaching the flashing lights of two vehicles stopped in the road before striking plaintiff. Thus, a jury might reasonably conclude that defendant had the time and means to avoid striking plaintiff by exercising reasonable care.

Finally, the " 'original negligence' of the defendant is sufficient to bring the doctrine of the last clear chance into play if the other elements of that doctrine are proved." *Exum*, 272 N.C. at 576-7, 158 S.E.2d at 853. "The only negligence of the defendant may have occurred after he discovered the perilous position of the plaintiff." *Id.* Here, "[i]t can reasonably be inferred . . . that had defendant maintained a proper lookout as she drove along she could have discovered the peril in ample time to stop her car before colliding with" defendant. *Shaw*, 104 N.C. App. at 118, 408 S.E.2d at 202.

Because the evidence, when viewed in the light most favorable to the plaintiff, supports a reasonable inference of each essential element of the doctrine, the court properly submitted the issue to the jury. In turn, because the issue was properly submitted to the jury, as discussed above, the court did not err in entering judgment in favor of plaintiff.

Affirmed.

Judges TYSON and BRYANT concur.

STATE OF NORTH CAROLINA v. JACKIE LEE ROBERTSON

No. COA03-1618

(Filed 19 October 2004)

Bail and Pretrial Release— bond forfeiture—motion to set aside—county jail not a unit of Department of Correction

The trial court erred by granting respondent surety's motion to set aside a bond forfeiture under N.C.G.S. § 15A-544.5(b)(6), because: (1) on the date of defendant's failure to appear, defendant was not incarcerated in a unit of the Department of Correction (DOC) although he was being held in a county jail on an extradition warrant from Virginia since the jail is a local confinement facility which is not a unit of the DOC; and (2) defendant was not serving a judicially imposed sentence.

Appeal by the Winston-Salem/Forsyth County Board of Education from order entered 18 September 2003 by Judge Lisa V. Menefee in Forsyth County District Court. Heard in the Court of Appeals 1 September 2004.

Steven A. McCloskey for the Winston-Salem/Forsyth County Board of Education.

Morrow Alexander Tash Kurtz & Porter, P.L.L.C., by Benjamin D. Porter and Charles J. Alexander, II, for Howard H. Davis.

LEVINSON, Judge.

The Board of Education, Winston-Salem/Forsyth County Schools appeals from a district court order granting respondent surety's motion to set aside a bond forfeiture. We reverse.

Jackie Lee Robertson (Robertson) was arrested in Forsyth County, North Carolina, on 4 January 2003 for driving while impaired (DWI) and driving while license revoked (DWLR). Howard H. Davis (Davis) signed as surety on Robertson's appearance bond for pre-trial release; the bond was in the amount of $5,000. Robertson was released and ordered to appear in Forsyth County District Court on the morning of 17 April 2003.

On 16 April 2003, Robertson was detained by the Surry County, North Carolina, Sheriff's Department on an extradition warrant for charges outstanding in Carroll County, Virginia. Robertson was booked in the Surry County Jail at 12:39 a.m. on the morning

of 17 April 2003, and bond was set in the amount of $75,000. Robertson waived extradition, and the record indicates he was remanded to Virginia law enforcement authorities on or about 21 April 2003.

Meanwhile, upon Robertson's failure to appear in Forsyth County District Court on 17 April 2003 on the DWI and DWLR charges, the Forsyth County Clerk of Court issued an Order for Arrest for Robertson, and his $5,000 bond was ordered forfeited pursuant to N.C.G.S. § 15A-544.3 (2003). On 28 August 2003, Davis filed a Motion to Set Aside Forfeiture. Davis argued he was entitled to have the forfeiture set aside pursuant to N.C.G.S. § 15A-544.5(b)(6) (2003), which provides relief from forfeiture where the defendant is incarcerated in a unit of the Department of Corrections (DOC) and serving a sentence at the time of the failure to appear.

The Forsyth County Board of Education objected to the motion, and a hearing was held on 18 September 2003. At the hearing, Davis argued he was entitled to the set-aside because on 17 April 2003 Robertson was being held in Surry County on the extradition warrant relating to the Virginia charges, preventing Robertson from appearing on that date in Forsyth County on the DWI and DWLR charges. The School Board contended that the surety had not satisfied the requirements of G.S. § 15A-544.5(b)(6), in that: 1) Robertson was not incarcerated in a unit of the Department of Corrections (but was, instead, in the Surry County Jail); and 2) Robertson was not serving a sentence. The district court granted the surety's Motion to Set Aside Forfeiture, and the School Board now appeals.

The sole issue before this Court is whether the district court erred in granting Davis' motion to set aside the bond forfeiture under G.S. § 15A-544.5(b)(6). The School Board contends Davis failed to present a legally sufficient reason to set aside the forfeiture under this specific provision. We agree.

In North Carolina, forfeiture of an appearance bond is controlled by statute. "If a defendant who was released . . . upon execution of a bail bond fails on any occasion to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond." G.S. § 15A-544.3(a). Notice of the forfeiture is given to the defendant and to his or her surety pursuant to G.S. § 15A-544.4. The exclusive avenue for relief from forfeiture of an appearance bond (where the forfeiture has not yet become a final judgment) is pro-

vided in G.S. § 15A-544.5. The reasons for setting aside a forfeiture are those specified in subsection (b):

> Reasons for Set Aside.—A forfeiture shall be set aside for any one of the following reasons, **and none other**:
>
> (1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that failure to appear has been recalled, as evidenced by a copy of an official court record. . . .
>
> (2) All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave, as evidenced by a copy of an official court record. . . .
>
> (3) The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's receipt provided for in that section.
>
> (4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question.
>
> (5) The defendant died before or within the period between the forfeiture and the final judgment as demonstrated by the presentation of a death certificate.
>
> (6) The defendant was **incarcerated in a unit of the Department of Correction and is serving a sentence** or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear.

G.S. § 15A-544.5(b) (emphasis added).

Because incarceration in a unit of the Federal Bureau of Prisons is not implicated here, subparagraph (6) has two requirements: (i) that the defendant be "incarcerated in a unit of the Department of Correction," **and** (ii) that he be serving a sentence. *Id.* Neither of these two prongs is satisfied. On the date of Robertson's failure to appear in Forsyth County District Court, Robertson was not incarcerated in a unit of the Department of Correction. A county jail is a "local confinement facility" and not a unit of the DOC. *See* Opinion of the Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 OP. ATT'Y GEN. N.C. 21 (1985) ("misdemeanants with sentences of 180 days or less are not to be sent to the

Department of Correction, but must be jailed in a 'local confinement facility' . . . [as] defined in G.S. § 153A-217(5).") (construing N.C.G.S. §§ 15-6 and 15A-1352(a)). As to the second prong of the statute, Robertson was not serving a judicially imposed sentence.

The surety concedes he has failed to satisfy the statutory requirements for relief from forfeiture under the only statute he relies upon, G.S. § 15A-544.5(b)(6), but nonetheless argues that he is entitled to a set-aside because Robertson's confinement in the Surry County Jail is functionally equivalent to incarceration in a unit of the DOC. This argument, however, is for the General Assembly to address. We are bound by the statute. The order of the trial court is

Reversed.

Judges GEER and THORNBURG concur.

A.H. BECK FOUNDATION COMPANY, INC., PLAINTIFF v. JONES BROS., INC., AND AMERICAN HOME ASSURANCE CO., DEFENDANTS, JONES BROS., INC., THIRD-PARTY PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, THIRD-PARTY DEFENDANT

No. COA03-1431

(Filed 2 November 2004)

Highways and Streets— highway construction contract—subject matter jurisdiction—motion to dismiss third-party complaint—equitable estoppel

A de novo review revealed that the trial court erred in an action arising out of highway construction by denying third-party defendant North Carolina Department of Transportation's (NC DOT) motion to dismiss based on lack of subject matter jurisdiction third-party plaintiff company's complaint to recover damages in the amount of $7,973,528.14 or an amount not less than plaintiff subcontractor may be awarded as a result of its complaint against defendant/third-party plaintiff, because: (1) third-party plaintiffs failed to follow the statutory procedures under N.C.G.S. § 136-29 which are required to file a complaint against NC DOT; (2) notwithstanding the requirement that the final statement for work performed under the construction con-

tract be entitled "The Final Estimate," no provision contained within Section 107-25 of the NC DOT standard specifications for roads and structures or N.C.G.S. Ch. 136 requires that the final statement follow a particular framework, and in the instant case the phrase "final estimate" was written five times within the 19 October 2001 cover letter with its accompanying documents thus satisfying the pertinent requirements; (3) no provision of the standard specifications or N.C.G.S. Ch. 136 required that the retainage payment accompany the final estimate; and (4) NC DOT did not waive its right to contend that third-party plaintiff received the final estimate in the instant case on 24 October 2001, and NC DOT's failure to respond to the pertinent email did not constitute an affirmative act or misrepresentation giving rise to the doctrine of equitable estoppel.

Appeal by the North Carolina Department of Transportation from order entered 21 February 2003 by Judge Larry G. Ford in Rowan County Superior Court. Heard in the Court of Appeals 11 October 2004.

Klutzz, Reamer, Blankenship, Hayes & Randolph, LLP, by Roman C. Pibl, for defendant-appellee American Home Assurance Co.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., Sean E. Andrussier, Timothy Barber, and Mark Henriques, and Lewis & McKenna, by Paul Z. Lewis, pro hac vice, for defendant/third-party plaintiff-appellee Jones Brothers, Inc.

Attorney General Roy Cooper, by Assistant Attorney General Joseph E. Herrin, for third-party defendant-appellant North Carolina Department of Transportation.

TIMMONS-GOODSON, Judge.

The North Carolina Department of Transportation ("NCDOT") appeals the trial court order denying its motion to dismiss the third-party complaint of Jones Brothers, Inc. ("Jones"). For the reasons discussed herein, we reverse.

The facts and procedural history pertinent to the instant appeal are as follows: In 1996, NCDOT began receiving bids for Highway Project No. 8.1631701 ("the project"), which involved the construction of a new bridge on Highway 49 over the Yadkin River at

Tuckertown Lake. On 17 December 1996, Jones submitted the lowest bid for the project, and on 5 February 1997, NCDOT awarded Jones a contract to perform the work on the project. Jones subsequently received bids from subcontractors for separate portions of the work required by the project. On 13 February 1997, Jones entered into a subcontract with A.H. Beck Foundation Company, Inc. ("Beck"), whereby Beck would drill vertical subsurface shafts and install casings therein, in order to stabilize and retain the hillside slopes above and adjacent to the roadway approaching the bridge.

In June 1997, Beck began drilling the slope-stabilization shafts and immediately encountered hard, dense rock below the surface. On 6 August 1997, Beck advised Jones that it was encountering significant problems related to the subsurface conditions, and that it would require additional compensation and a time extension in order to complete the work. In response, Jones submitted a claim to NCDOT on Beck's behalf on 11 August 1997. On 20 August 1997, NCDOT Resident Engineer K.E. Raulston ("Raulston") replied by letter as follows:

> I have received your letter dated August 11, 1997, which contained notification of intent to file a claim. The claim is filed on behalf of [Beck] who claim that they are encountering conditions different than that shown in the subsurface plans.
>
> I refer you to Section 102-07 on the North Carolina Standard Specifications "subsurface information." The department does not warrant or guarantee the accuracy of the subsurface information. The contractor shall have no claim for additional compensation or for an extension of time for any reason resulting from the actual conditions encountered at the site differing from those indicated in the subsurface information. Therefore any claim regarding subsurface conditions is denied.

Beck continued to encounter dense rock at the drill sites, and as a result was unable to finish the slope-stabilization portion of the work until 17 April 1998. Beck thereafter submitted to Jones a "Claim for Adjustment in Compensation Relative to Slope Stabilization Piles," which detailed Beck's "unanticipated delays, disruptions, denials, interference, [and] altered and/or extra work" in the form of "force account records." Jones forwarded Beck's claim to NCDOT on 12 August 1998, but subsequently requested return of the claim. On 15 October 1998, Raulston advised Jones that "initial review of the claim indicates that it would have been denied for the same reason it was

denied the first time." Subsequent claims were filed by Jones on behalf of Beck; however, each claim was denied by NCDOT.

On 23 April 2000, Beck filed a complaint against Jones, alleging, *inter alia*, breach of subcontract, breach of implied warranty, unfair and deceptive trade practices, wrongful termination, and mutual mistake. The complaint requested "at least" $7,973,528.14 in damages. On 10 October 2000, Jones filed an answer, counterclaim, and third-party complaint against NCDOT. In its third-party complaint, Jones alleged that its contract with NCDOT "contained terms and conditions providing for the preparation of Supplemental Agreements and change orders to compensate the contractor for modifications to the contract and any alterations in the plans or the details of construction for extra work, for suspensions of work, and for quantity adjustments." Jones further alleged that "supplemental agreements should have been issued by NCDOT," and that "[t]o the extent that the [project] conditions differ from those represented by NCDOT in its plans and specifications and amount to an alteration of the plans or the details of construction," Jones was entitled to "indemnity and reimbursement from NCDOT in full payment of any and all damages that may be due to Beck."

On 29 January 2001, NCDOT filed a motion to dismiss in lieu of answer. On 2 May 2001, the trial court granted NCDOT's motion to dismiss, concluding that Jones "ha[d] not yet exhausted the administrative remedies provided under N.C.G.S. § 136-29." The trial court granted the motion to dismiss without prejudice to Jones' right to reassert its third-party complaint against NCDOT, "in the event the administrative process does not fully resolve the disputes between the parties."

Jones and NCDOT continued to correspond regarding the resolution of their dispute. On 22 June 2001, R.C. Martin ("Martin"), Jones' Chief Operating Officer, sent to NCDOT "the three completed documents required for the closeout and the release of retainage" on the project, including an affidavit delineating Jones' third-party claim. On 24 September 2001, Martin wrote NCDOT again, whereby he advised NCDOT as follows:

> [W]e are submitting, in accordance with Section 109-10 of the NCDOT Standard Specifications, our intent to continue to pursue the claims filed on behalf of our subcontractor, [Beck]. Their request for additional compensation and time has been filed and received by NCDOT. Upon receipt of our Final Estimate, it is our

intent to file a verified claim for the areas in dispute in accordance with section 107-25.

On 19 October 2001, NCDOT State Construction Engineer Steven D. DeWitt ("DeWitt") sent Jones a letter regarding Jones' claim. The letter was sent via certified mail and its subject line read "Payment of Final Estimate." The letter stated as follows:

> Attached is final estimate warrant number 1212064 in the amount of $5,299.81 which represents the final payment of the contract. Also attached for your files is a copy of the final estimate which is your final statement.

As stated, attached to the letter was a check in the amount of $5,299.81 ("final pay warrant") and a copy of estimate number 40 ("Estimate 40"). Estimate 40 was entitled "Contract Final Estimate." Next to the "Remarks" section of Estimate 40 was the phrase "The Final Estimate." Next to the "Percent Complete" section of Estimate 40 was the number 100, and next to the "% Complete By Progress Chart" section of Estimate 40 was the number 100. Estimate 40 further indicated that the "Amount Transferred To Trust Account This Estimate" was $149,420.58.

On 30 October 2001, NCDOT received confirmation through a certified return receipt that the 19 October letter was delivered to Jones on 24 October 2001. On 25 October 2001, Jones tendered the final pay warrant. On 21 December 2001, Martin sent NCDOT Construction Estimates & Claims Engineer Phil Watts ("Watts") an email which stated:

> When you have a spare moment, could you please check on the status of Final Quantities and Retainage for the above referenced project, your NCDOT PROJECT 8.1631701. A couple of the subs on the project have contacted us and asked about their retainage. . . . If this reaches you at a bad time with the holidays and year end coming up, when you get a chance after the new year . . . would be appreciated. Otherwise, have a nice Holiday Season and we'll see you next year.

(emphasis in original).

On 3 January 2002, Watts responded via an email which stated:

> Yesterday was my first day back to work since Christmas. . . . Regarding the final payment, there was little money coming from DOT but that was sent two months ago. We authorized the trustee

> to release the retainage that was in the trust account. If that money has not been received, I recommend you contact the trustee . . . . If they have not received our letter authorizing release of the money, let me know.

On 8 January 2002, Jones sent NCDOT a Verified Claim requesting additional compensation and time and alleging that Beck is "entitled to either an increase in the Subcontract amount by at least $7,973,528.14 or damages for breach of the subcontract in a similar amount." On 11 January 2002, State Highway Administrator Len A. Sanderson ("Sanderson") replied as follows:

> This is [in] response to your claim received by my office on January 10, 2002. Unfortunately, the submission cannot be accepted as a verified claim. North Carolina General Statute 136-29 and the contract documents are very stringent that verified claims must be presented to the Highway Administrator within sixty (60) days after receipt of the final estimate payment.
>
> The records reflect the final payment was made to the Jones Bros., Inc. on October 24, 2001, a period of seventy-eight (78) days before the claim was received on January 10, 2002. Thus, Jones Bros., Inc has failed to timely submit the claim. Therefore, I can only return your submission herein without action.

On 4 February 2002, Martin sent NCDOT a letter requesting that NCDOT reconsider its decision in light of "the circumstances surrounding transmission of The Final Estimate[.]" Martin stated that "[o]n further investigation," Jones had "determined that the retainage which was released by your directive was carried by the Escrow Agent as a NCDOT Surry County project which, by coincidence, was closed out roughly at the same time." Martin recounted the email sent to Watts on 21 December 2001 and noted that "NCDOT attorneys did not notify our counsel of [the transmission of the Final Estimate] which also contributed to the confusion." Nevertheless, on 6 February 2002, Sanderson returned Jones' claim and referred Jones to his 11 January 2002 letter.

On 29 April 2002, Jones filed a second third-party complaint against NCDOT. On 30 May 2002, Jones filed an amended third-party complaint against NCDOT, requesting, *inter alia*, that the trial court award Jones damages in the amount of $7,973,528.14, or, in the alternative, no amount less than the amount Beck may be awarded as a result of its complaint against Jones. On 17 July 2002, NCDOT filed a

motion to dismiss in lieu of answer, requesting that the trial court dismiss Jones' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 4, N.C. Gen. Stat. § 1A-1, Rule 14, and N.C. Gen. Stat. § 1A-1, Rule 12(a)(1), (b)(1), (b)(2), (b)(6), and (h)(3).

On 21 February 2003, the trial court denied NCDOT's motion to dismiss, concluding that "[b]ecause a properly titled and executed final estimate was not received by [Jones], the time for [Jones] to file a verified claim under N.C.G.S. § 136-29 has not run." The trial court also concluded that "[a]lternatively, to the extent the document submitted on October 19, 2001 did constitute a final estimate . . . the failure of NCDOT to respond to [Martin's] December 21, 2001 e-mail equitably tolled the running of the statute of limitation[,]" and "NCDOT's conduct in improperly titling the final estimate, not executing the final estimate, not including documentation of release of retainage, not including notice regarding the 60-day period, not notifying [Jones'] counsel and not responding to [Martin's] e-mail g[a]ve rise to equitable estoppel." NCDOT appeals.

The dispositive issue on appeal is whether the trial court erred in denying NCDOT's motion to dismiss. NCDOT argues that Jones' complaint should have been dismissed for lack of subject matter jurisdiction because Jones failed to follow the statutory procedures required to file a complaint against NCDOT. We agree.

N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2003) allows a defendant to raise in a motion to dismiss the affirmative defense of lack of subject matter jurisdiction. "An appellate court's review of an order of the trial court denying or allowing a Rule 12(b)(1) motion is *de novo*, except to the extent the trial court resolves issues of fact and those findings are binding on the appellate court if supported by competent evidence in the record." *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397, *appeal dismissed*, 348 N.C. 284, 501 S.E.2d 913 (1998). The instant case involves the determination of a question of law, that is, whether the trial court had subject matter jurisdiction over plaintiff's third-party complaint against NCDOT, and thus we review the trial court's decision *de novo*.

"It is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from suit." *Battle Ridge Cos. v. N.C. Dep't of Transp.*, 161 N.C. App. 156, 157, 587 S.E.2d 426, 427

(2003), *disc. review denied*, 358 N.C. 233, 594 S.E.2d 191 (2004). In *Smith v. State*, 289 N.C. 303, 310, 222 S.E.2d 412, 418 (1976), our Supreme Court held that, where the state enters into a contract, it implicitly consents to suit for damages resulting from breach of the contract.

N.C. Gen. Stat. § 136-29 was enacted to provide a statutory ground under which contractors may sue NCDOT, and the statute is made a part of every contract for highway construction entered into by NCDOT. *Battle Ridge Cos.*, 161 N.C. App. at 157-58, 587 S.E.2d at 427. This Court has held that "to satisfy G.S. 136-29 the contractor must submit a claim, accompanied by evidence of verification, within the statutory time limit." *E.F. Blankenship Co. v. N.C. Dept. of Transportation*, 79 N.C. App. 462, 464, 339 S.E.2d 439, 441 (1986), *aff'd per curiam*, 318 N.C. 685, 351 S.E.2d 293 (1987). Thus, "[b]efore a party may pursue a judicial action against the state for money claimed to be due under a highway construction contract, it must first pursue its administrative remedies." *In re Huyck Corp. v. Mangum, Inc.*, 309 N.C. 788, 792, 309 S.E.2d 183, 186 (1983).

N.C. Gen. Stat. § 136-29(a) (2003) provides as follows:

> A contractor who has completed a contract with the Department of Transportation to construct a State highway and who has not received the amount he claims is due under the contract may submit a verified written claim to the State Highway Administrator for the amount the contractor claims is due. The claim shall be submitted within 60 days after the contractor receives his final statement from the Department[.]

Section 107-25 of the North Carolina Department Of Transportation Standard Specifications For Roads And Structures (2002) ("the Standard Specifications") mirrors the provisions of N.C. Gen. Stat. § 136-29, stating that the verified claim "shall be submitted to the State Highway Administrator within 60 days from the time the Contractor receives the final estimate[.]" Section 101-38 of the Standard Specifications defines a "final estimate" as follows:

> The document which contains a final statement of all quantities and total dollar amount for each item of work performed during the life of the contract including any adjustments to those amounts made under the terms of the contract. The final statement will be titled The Final Estimate and will be the document utilized to document final payment to the Contractor. Receipt of

> this document by the Contractor will begin the time frame for filing of a verified claim with the Department as provided for in G.S. 136-29 of the General Statutes of North Carolina.

In the instant case, the trial court determined that the 19 October 2001 letter and its accompanying documents were insufficient to be a final estimate. The trial court found that

> Because of the improper heading, lack of signature or verification and small size of the check enclosed, Jones Bros.' regular procedures for handling final estimates were not initiated.

The trial court thereafter concluded that "[t]he document NCDOT sent to Jones Bros. on October 19, 2001 did not constitute the final estimate because it was improperly titled and was not signed or certified," and that "[b]ecause a properly titled and executed final estimate was not received by Jones Bros., the time for Jones Bros. to file a verified claim under N.C.G.S. § 136-29 has not run." We conclude that the trial court erred.

As indicated by the return of the certified mail receipt, Jones received NCDOT's 19 October 2001 letter on 24 October 2001. As detailed above, the letter was sent to Jones following an inquiry by Martin regarding the issuance of the final estimate. The subject line of the letter read "Payment of Final Estimate," and the letter stated that the "final estimate warrant" was attached and that the final estimate warrant represented the "final payment of the contract." The letter also stated that a copy of the "final estimate" was attached.

Estimate 40 was attached to the letter and was entitled "Contract Final Estimate." Estimate 40 stated that it was "The Final Estimate," and it indicated that the project was one hundred percent complete. Estimate 40 further indicated that $149,420.58 had been "Transferred to [Jones'] Trust Account" by the estimate.

Following receipt of the 19 October 2001 letter, Jones tendered the final pay warrant on 25 October 2001, and the Department of the State Treasurer paid the warrant. However, Jones failed to file a verified claim against NCDOT until 8 January 2002, seventy-six days after its receipt of the final estimate.

In his affidavit, Martin stated that "Janet Gibbs, the Jones Bros.' clerk responsible for the opening and directing of the mail at that time . . . processed [the final estimate warrant] as just another partial pay estimate because it was virtually identical to the previous

partial Project pay estimates." However, notwithstanding the requirement that the final statement be entitled "The Final Estimate," no provision contained within the Standard Specifications or Chapter 136 of the North Carolina General Statutes requires that the final statement follow a particular framework. In the instant case, Estimate 40 was entitled "Contract Final Estimate" and stated plainly that it was "The Final Estimate." The phrase "final estimate" was written five times within the cover letter and its accompanying documents. The documents were sent via certified mail and followed an inquiry from Jones regarding the status of the final estimate. We conclude that these documents satisfy the requirements of N.C. Gen. Stat. § 136-29 as well as the Standard Specifications, and thus qualify as a final estimate.

As noted above, the trial court considered the amount of the final pay warrant as a basis for its finding that Jones had not yet received a final estimate. The trial court agreed with Jones, who argued that the final estimate also should have included a check for $149,420.58, the amount due to Jones in retainage. However, this argument ignores the plain language of Estimate 40, which stated that the "Amount Transferred To Trust Account This Estimate" was $149,420.58. Contained within the record is the 1 October 2001 letter from NCDOT which authorized the trustee bank to transfer the remaining retainage to Jones. The letter specified the project number, stated that "[t]his project has been completed and the final estimate is being processed," and granted the bank the "authority to release to the Contractor the remaining amount in trust, which is $149,420.58." The following information appeared at the end of the letter:

> cc-
> Mr. Wayne Stallings
> Jones Brothers, Incorporated

Although Jones contends that it did not receive a copy of this letter, Jones does not dispute that it received the funds authorized for release by the letter. In a letter to NCDOT dated 4 February 2002, Martin stated that "[o]n further investigation by our office we determined that the retainage which was released by your directive was carried by the Escrow Agent as a NCDOT Surry County project which, by coincidence, was closed out at roughly the same time." Although Jones contends that "[t]he fact that the retainage did not accompany Estimate 40 . . . added to the understanding that this was simply another estimate," as discussed above, no provision of the

Standard Specifications or Chapter 136 requires that the retainage payment accompany the final estimate. Estimate 40 was attached to a cover letter entitled "Payment of Final Estimate" and a pay warrant deemed the "final payment of the contract." Estimate 40 was entitled "Contract Final Estimate" and stated that the project was one hundred percent complete, while the other estimates stated different percentages of completion and were entitled "Contract Monthly Estimate." Thus, in light of the foregoing evidence, we conclude that the 19 October 2001 letter and its accompanying documents were sufficient to constitute a final estimate.

The trial court concluded in the alternative that "to the extent the document submitted on October 19, 2001 did constitute a final estimate . . . the failure of NCDOT to respond to Mr. Martin's December 21, 2001 e-mail equitably tolled the running of the statute of limitation[.]" In support of this conclusion, both the trial court and Jones cite *Reynolds Co. v. State Highway Commission*, 271 N.C. 40, 155 S.E.2d 473 (1967). We conclude that *Reynolds Co.* is distinguishable from the instant case.

In *Reynolds Co.*, the State Highway Commission first mailed to the plaintiff a final estimate and warrant, together with an accompanying letter characterizing the payment as "final payment of this contract." 271 N.C. at 42, 155 S.E.2d at 476. The plaintiff was concerned that acceptance of the payment would constitute a bar to liquidated damages claims, and therefore the plaintiff wrote the State Highway Commission a letter asking to modify the wording of the final estimate. In a response letter mailed several days later, the State Highway Commission complied with the plaintiff's requests. However, when the plaintiff filed suit following rejection of its verified complaint, the State Highway Commission moved to dismiss the suit for lack of subject matter jurisdiction, arguing that its first letter to the plaintiff triggered the sixty-day notice period and therefore the plaintiff's verified complaint was ten days late. On appeal from the trial court's order denying the motion to dismiss, this Court concluded that "[c]onsidering the facts in this particular case, it seems to us clear that defendant, by its letter written on 24 January 1964, voluntarily waived its rights to contend that plaintiff received its final estimate on 14 January 1964 when it received defendant's letter of 13 January 1964." *Id.* at 46, 155 S.E.2d at 478.

We conclude NCDOT did not waive its right to contend that Jones received the final estimate in the instant case on 24 October 2001. "Equitable estoppel arises when a party has been induced by

another's acts to believe that certain facts exist, and that party 'rightfully relies and acts upon that belief to his detriment.' " *Jordan v. Crew*, 125 N.C. App. 712, 720, 482 S.E.2d 735, 739 (quoting *Thompson v. Soles*, 299 N.C. 484, 487, 263 S.E.2d 599, 602 (1980)), *disc. review denied*, 346 N.C. 279, 487 S.E.2d 548 (1997). "In order for equitable estoppel to bar application of the statute of limitations, a plaintiff must have been induced to delay filing of the action by the misrepresentations of the defendant." *Id.* (citing *Duke University v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 693 (1987)).

In the instant case, Jones has failed to demonstrate that NCDOT engaged in any affirmative acts requiring equitable relief. As discussed above, NCDOT's 19 October 2001 letter satisfied the requirements of N.C. Gen. Stat. § 136-29 and the Standard Specifications. Jones tendered the final pay warrant and admitted in affidavits that it failed to notice the release of the retainage. Although we recognize that NCDOT did not respond to Martin's email, we find no support for the conclusion that NCDOT's failure to respond to the email constituted an affirmative act or misrepresentation giving rise to an equitable defense. In his own email, Martin acknowledges that the message could reach NCDOT "at a bad time with the holidays and year end closing coming up[.]" Watts, the intended recipient of the email, stated in an affidavit that he "worked 2 hours and took 6 hours vacation" on 21 December 2001, and did not "recall receiving or reading any E-mail from Jones Brothers or its personnel[.]" Watts did not acknowledge receipt of the email or comment on its request prior to the running of the sixty-day notice period, and there is no indication that he acted in bad faith in connection with Jones' claim. Thus, we conclude that the doctrine of equitable estoppel does not apply in the instant case, and therefore the trial court should not have utilized equitable estoppel as an alternative ground to deny NCDOT's motion.

In light of the foregoing conclusions, we hold that the trial court erred in denying NCDOT's motion to dismiss Jones' complaint. The decision of the trial court is therefore reversed.

Reversed.

Chief Judge MARTIN and Judge HUDSON concur.

TINYA CHERNEY, PLAINTIFF v. NORTH CAROLINA ZOOLOGICAL PARK, DEFENDANT

No. COA03-1615

(Filed 2 November 2004)

1. Tort Claims Act— tree falling on state property—standard applied—reasonable care

The Industrial Commission utilized the proper legal standard in its review of a deputy commissioner's award in a Tort Claims case that began when a tree fell on a patron of the State Zoo. Although the case cited by the Commission for its standard as to the duty owed members of the public by landowners predated *Nelson v. Freeland*, 349 N.C. 615, it is consistent with the *Nelson* standard (reasonable care).

2. Tort Claims Act; Premises Liability— care of tree at zoo—findings supported by evidence

The findings of the Industrial Commission in a Tort Claims case were supported by the evidence, and the findings supported its conclusion that plaintiff had not proven negligence, where plaintiff was injured by a falling tree at the state Zoo, the tree had been monitored for over 10 years and appeared healthy, the care provided the tree exceeded industry standards, and the tree was supported by double the recommended number of cables.

Judge TIMMONS-GOODSON dissenting

Appeal by plaintiff from opinion and award entered 28 July 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 September 2004.

Knott, Clark, Berger & Whitehurst, L.L.P., by Joe Thomas Knott, III, Michael W. Clark, and Bruce W. Berger, for plaintiff appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General William H. Borden, for defendant appellee.

McCULLOUGH, Judge.

Tinya Cherney ("plaintiff") appeals the opinion and award entered 28 July 2003 by the North Carolina Industrial Commission.

The facts and procedural history pertinent to the instant appeal are as follows: On 18 July 1998, plaintiff visited the North Carolina Zoological Park ("the Zoo") in Asheboro as a business invitee. While plaintiff was inside the Zoo's African Pavilion, a thirty-four-foot-tall *ficus benjamina* tree ("ficus tree") broke from its support cables and fell onto a nearby thirty-eight-foot-tall Traveler's tree, a portion of which broke off and struck plaintiff. Plaintiff sustained multiple injuries, including a fractured right femur, fractured vertebrae, and fractured ribs. She subsequently underwent surgery and incurred medical expenses exceeding $80,000.00.

On 7 September 1999, plaintiff filed a claim for damages against the Zoo pursuant to the Tort Claims Act, N.C. Gen. Stat. § 143-291, *et seq.* In the affidavit in support of her claim ("the affidavit"), plaintiff alleged her injuries and damages resulted from the negligence of Zoo employees Ron Ferguson ("Ferguson") and Virginia Wall ("Wall"). Ferguson served as Chief Gardener for the Zoo and Wall was the Curator of Horticulture for the Zoo. Plaintiff's affidavit contained the following allegations:

> That the injury or property damage occurred in the following manner: Mrs. Cherney was in the enclosed African Pavilion near the center when a large ficus tree fell hitting a palm tree. Both trees then fell on her pinning her to the floor of the walkway in the African Pavilion. The impact caused vertigo, broke her right femur, cracked three ribs, caused compression fractures to three vertebra[e] and wrenched her knee. The injury occurred because the ficus tree which was indoors had been permitted to grow too large for its roots or alternatively had not been properly maintained to prevent it from becoming unsafe. The ficus tree was under the exclusive control of the Zoo personnel and not subject to wind or any natural force.

On 21 December 1999, defendant filed an answer denying the allegations of the affidavit. Defendant asserted that plaintiff failed to properly "allege a negligent act or omission on the part of the alleged employees of defendant" and failed to properly "state a claim over which there is jurisdiction over the person and subject matter and . . . upon which relief may be granted."

On 13 August 2001, Deputy Commissioner Richard Ford ("Deputy Commissioner Ford") heard arguments and received evidence from both parties. In an order filed 30 October 2001, Deputy Commissioner

Ford ordered that defendant pay plaintiff $500,000.00 in compensatory damages.

Defendant appealed Deputy Commissioner Ford's opinion and award, and on 29 April 2002, the matter came before the Full Commission for review. In an opinion and award filed 28 July 2003, a majority of the Full Commission reversed Deputy Commissioner Ford's prior opinion and award. The majority made the following pertinent findings of fact:

> 3. There was no evidence that the first of the two named employees, Ron Ferguson had any involvement with the tree that fell on plaintiff.
>
> . . . .
>
> 18. The greater weight of the evidence indicates that Ms. Wall neither knew or should have known that the *ficus* tree was likely to fall. There is no showing that Ms. Wall violated any applicable standard of care in her management of the horticulture department and supervision of the horticulture staff.

Based upon these findings of fact, the majority made the following pertinent conclusions of law:

> 2. Pursuant to N.C. Gen. Stat. § 143-291, plaintiff must show that the injuries sustained were the proximate result of a negligent act of a named state employee acting within the course and scope of his employment.
>
> . . . .
>
> 4. The greater weight of the evidence shows that Ms. Wall's practices and management of her staff in the care of the *ficus benjamina* were reasonable and met or exceeded the standards for monitoring, record keeping, pruning, watering, fertilizing, cabling, syringing and soil mixture in her field. Plaintiff has failed to prove that either of the named employees of defendant, Ron Ferguson and Virginia Wall breached any applicable standard of care. Therefore, plaintiff has failed to prove negligence and is not entitled to recovery.

Commissioner Bernadine S. Ballance ("Commissioner Ballance") dissented from the Full Commission's decision and order. Plaintiff appeals.

The issues on appeal are: (I) whether the Full Commission applied the correct legal standards in its decision; and (II) whether the Full Commission's findings of fact support its conclusions of law.

[1] Under the Tort Claims Act, "jurisdiction is vested in the Industrial Commission to hear claims against the State of North Carolina for personal injuries sustained by any person as a result of the negligence of a State employee while acting within the scope of his employment." *Guthrie v. State Ports Authority*, 307 N.C. 522, 536, 299 S.E.2d 618, 626 (1983). On appeal from a decision by the Full Commission, this Court reviews the decision for errors of law "only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (2003).

N.C. Gen. Stat. § 143-297(2) (2003) requires that a plaintiff filing suit against a state agency provide by affidavit "[t]he name of the department, institution or agency of the State against which the claim is asserted, and the name of the State employee upon whose alleged negligence the claim is based[.]" This Court has previously noted that "[t]he purpose of requiring a claimant to name the negligent employee of the State agency is to enable the agency to investigate the employee involved and not all employees." *Davis v. N.C. Dept. of Human Resources*, 121 N.C. App. 105, 111, 465 S.E.2d 2, 6 (1995), *disc. review denied*, 343 N.C. 750, 473 S.E.2d 612 (1996).

Here, plaintiff alleged that Ferguson and Wall were negligent both individually and in their supervision of staff maintaining the ficus tree which fell on plaintiff.

In the case *sub judice*, a review of the record shows that the Commission examined Ms. Wall's supervision of her department and all its personnel in the performance of their duties. During her deposition, Ms. Wall identified the staff members who performed the various tasks associated with this ficus tree. The plaintiff never moved to amend her complaint to identify any other employee as negligent even though the failure to do so may be fatal to her case. *Laughinghouse v. State ex rel. Ports Railway Comm.*, 101 N.C. App. 375, 376-77, 399 S.E.2d 587, 589, *disc. review denied*, 328 N.C. 732, 404 S.E.2d 871 (1991), *cert. denied*, 502 U.S. 1029, 116 L. Ed. 2d 772 (1992).

Here plaintiff had to establish that the State as a landowner breached its duty to exercise reasonable care in the maintenance

of its premises, the Zoo. *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998), *reh'g denied*, 350 N.C. 108, 533 S.E.2d 467 (1999).

The duty of care depended upon the procedures for monitoring the ficus tree in question. There is no evidence that any of the staff members deviated from the guidelines Ms. Wall set to accomplish these goals.

The Commission made the following finding of fact:

> 18. The greater weight of the evidence indicates that Ms. Wall neither knew or should have known that the *ficus* tree was likely to fall. There is no showing that Ms. Wall violated any applicable standard of care in her *management* of the *horticulture department* and *supervision* of the *horticulture staff.*

(Emphasis added.)

It then made the following conclusion of law:

> 4. The greater weight of the evidence shows that *Ms. Wall's practices and management of her staff* in the care of the *ficus benjamina* were reasonable and met or exceeded the standards for monitoring, record keeping, pruning, watering, fertilizing, cabling, syringing and soil mixture in her field. Plaintiff has failed to prove that either of the named employees of defendant, Ron Ferguson and Virginia Wall breached any applicable standard of care. Therefore, plaintiff has failed to prove negligence and is not entitled to recovery. *Bolkhir*, 321 N.C. at 709, 365 S.E.2d at 900, N.C. Gen. Stat. § 143-291.

(Emphasis added.) In each, the actions of the staff are necessarily encompassed in the applicable finding and conclusion. The Commission concluded that Ms. Wall's actions were not negligent and that plaintiff failed to prove that her procedures, policies or staff management breached any standard of care. There is no evidence that any of her staff failed to follow any of her procedures. Thus it is clear that the Commission considered the actions of the unnamed staff in concluding that Ms. Wall was not negligent and properly applied the standard of review required by *Davis*.

The *Nelson* case properly sets forth the duty of care owed to members of the public by landowners where our Supreme Court stated:

> In so holding, we note that we do not hold that owners and occupiers of land are now insurers of their premises. Moreover, we do not intend for owners and occupiers of land to undergo unwarranted burdens in maintaining their premises. Rather, we impose upon them only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.

Nelson, 349 N.C. at 632, 507 S.E.2d at 892. The *Bolkhir* case cited by the Commission, although it predates *Nelson*, is consistent with the standard set forth therein.

We thus hold that the Commission utilized the proper legal standards in its review of the Deputy Commissioner's award.

[2] We must next consider whether the findings of fact are supported by competent evidence and whether the Commission's findings of fact justify its conclusions of law. *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405, 496 S.E.2d 790, 793 (1998).

Competent evidence in the record shows that the ficus tree had been monitored under the existing protocol for over 10 years without incident, that the tree appeared healthy, that the number of cables supporting the tree was double the recommended minimum, and that the care provided exceeded industry standards for monitoring, record keeping, pruning, watering, cabling and the like.

Given the evidence as briefly summarized above, these facts do support the Commission's conclusion of law that Ms. Wall was not negligent as stated in Conclusion of Law No. 4, although there was evidence to the contrary.

As *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 710, 365 S.E.2d 898, 900-01 (1988), cited by the Commission states:

> With regard to the second element, this Court has defined proximate cause as
>
> > "a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed."

Hairston v. Alexander Tank & Equipment Co., 310 N.C. at 233, 311 S.E.2d at 565 (citations omitted). Foreseeability is thus a requisite of proximate cause. *Id.* To establish foreseeability, the plaintiff must prove that defendant, in the exercise of reasonable care, might have foreseen that its actions would cause some injury. *Id.* at 234, 311 S.E.2d at 565. The defendant must exercise "reasonable prevision" in order to avoid liability. *Id.* The law does not require a defendant to anticipate events which are merely possible but only those which are reasonably foreseeable. *Id.*

Having concluded that plaintiff failed to prove that Ms. Wall's procedures or staff management was negligent in any manner and it was unforeseeable that this ficus tree would fall, the Commission denied recovery. Based on the evidence supporting this determination, we cannot substitute a different judgment. Therefore, the decision of the Commission is affirmed.

Affirmed.

Judge HUNTER concurs.

Judge TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge, dissenting.

Because I conclude that the Industrial Commission erred in its opinion and award, I respectfully dissent.

"Under the Tort Claims Act, jurisdiction is vested in the Industrial Commission to hear claims against the State of North Carolina for personal injuries sustained by any person as a result of the negligence of a State employee while acting within the scope of his employment." *Guthrie v. State Ports Authority*, 307 N.C. 522, 536, 299 S.E.2d 618, 626 (1983). On appeal from a decision by the Full Commission, this Court reviews the decision for errors of law "only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (2003). Nevertheless, "[i]f the [F]ull Commission applied an incorrect standard of review to the deputy commissioner's findings, this Court could reject the [F]ull Commission's findings and conclusions as errors of law." *Hummel v. University of N.C.*, 156 N.C. App. 108, 112-13, 576 S.E.2d 124, 127, *disc. review granted*, 357 N.C. 459, 585

S.E.2d 757 (2003), *disc. review improvidently granted*, 358 N.C. 130, 591 S.E.2d 518 (2004).

This Court has previously noted that "[t]he purpose of requiring a claimant to name the negligent employee of the State agency is to enable the agency to investigate the employee involved and not all employees." *Davis v. North Carolina Dept. of Human Resources*, 121 N.C. App. 105, 111, 465 S.E.2d 2, 6 (1995), *disc. review denied*, 343 N.C. 750, 473 S.E.2d 612 (1996). However, "although the Tort Claims Act is strictly construed, the rule of strict construction should not be replaced by one of 'technical stringency.' " *Id.* (quoting *Distributors, Inc. v. Dept. of Transp.*, 41 N.C. App. 548, 550, 255 S.E.2d 203, 205, *cert. denied*, 298 N.C. 567, 261 S.E.2d 123 (1979)).

In *Davis*, this Court concluded that the plaintiff's affidavit "gave sufficient notice to defendant to allow it to narrow its investigation to those involved[,]" in that the affidavit "named the correct state agency, as required by section 143-297, the specific division of that agency, as well as the [location] where the alleged negligence took place." 121 N.C. App. at 111, 465 S.E.2d at 6. Despite the affidavit's failure to name the specific employee found negligent by the Full Commission, we affirmed the Full Commission's ruling, noting that "the objective of section 143-297 was achieved." *Id.*

Our decision in *Davis* was consistent with previous determinations by this Court, including *Distributors, Inc.* In *Distributors, Inc.*, plaintiff's affidavit named only one of the two employees whose "negligence combined and concurred" to injure plaintiff. 41 N.C. App. at 552, 255 S.E.2d at 206. However, we determined that "[t]he name of Joe Bill Moxley, the driver of the truck, and other information in plaintiff's affidavit gave to defendant sufficient notice of which employee or employees were involved so that defendant could properly confine its investigation." *Id.* Similarly, in *Smith v. N.C. Dep't of Transp.*, 156 N.C. App. 92, 576 S.E.2d 345 (2003), the plaintiff named the Secretary of Transportation, two division managers, and "unknown employees" as the individuals directly responsible for the safety of a particular railroad crossing. This Court determined that the "names and information [provided in plaintiff's affidavit] gave defendant sufficient information to 'enable the agency to investigate the employee actually involved rather than all employees.' " *Id.* at 100, 576 S.E.2d at 351 (quoting *Distributors, Inc.*, 41 N.C. App. at 551, 255 S.E.2d at 206). We thus concluded that the plaintiff was not required to name the specific employee responsible for placing a sign at the railroad crossing.

In the instant case, the Full Commission's decision reversed the opinion and award of Deputy Commissioner Ford, who had previously found that defendant's employees had been negligent in their duties with respect to plaintiff's injuries. Deputy Commissioner Ford had concluded that both Wall *and* the personnel under her supervision were negligent in their care and maintenance of the tree. However, on appeal, the Full Commission based its denial of plaintiff's claim upon its determination that plaintiff had failed to demonstrate that either of the two employees named in the affidavit were negligent. Specifically, the Full Commission found that "[t]here was no evidence that . . . Ron Ferguson had any involvement with the tree that fell on plaintiff," and that "[t]here is no showing that Ms. Wall violated any applicable standard of care in her management of the horticulture department and supervision of the horticulture staff." Thus, because the Full Commission determined that "[plaintiff] failed to prove that either of the named employees of defendant, Ron Ferguson and Virginia Wall[,] breached any applicable standard of care," the Full Commission concluded that "plaintiff has failed to prove negligence and is not entitled to recovery." I conclude that the Full Commission erred.

Plaintiff's affidavit contains a detailed depiction of how her injuries occurred and specifically states that the injuries occurred inside the African Pavilion. The affidavit names Ferguson and Wall as negligent employees and contains reference to their supervisory titles. The affidavit alleges that "[t]he injury occurred because the ficus tree which was indoors had been permitted to grow too large for its roots or alternatively had not been properly maintained to prevent it from becoming unsafe[,]" and it states that "[t]he ficus tree was under the exclusive control of the Zoo personnel." I conclude that plaintiff's affidavit provides "sufficient notice to defendant to allow it to narrow its investigation to those involved" in the maintenance of the ficus tree, including the personnel supervised by Wall. *Davis*, 121 N.C. App. at 111, 465 S.E.2d at 6.

However, there is no indication that the Full Commission considered whether any of Wall's personnel were negligent in their duties. The Full Commission's own findings of fact and conclusions of law indicate that it confined its review to the two employees named in the affidavit. By placing emphasis on the words "management" and "supervision" contained within the Full Commission's finding of fact number eighteen and conclusion of law number four, the majority concludes that the Full Commission considered the actions of Wall's staff in its opinion and award. I would not make such a leap. Although

I recognize that the Full Commission serves as an appellate committee and is given the authority to reverse the decision of a Deputy Commissioner, I conclude that the Full Commission's decision in the instant case involved the application of a "technical stringency," and thus runs counter to the legislative purpose of the Tort Claims Act. I would therefore hold that the Full Commission erred in failing to consider the negligence of the personnel supervised by Wall, and, accordingly, I would reverse and remand the case.

IN RE: M.R.D.C.

No. COA04-2

(Filed 2 November 2004)

1. Child Abuse and Neglect— permanency planning order—findings of fact—placement with relative

The trial court erred in a child neglect case by entering a permanency planning order that does not comply with the statutory requirements of N.C.G.S. § 7B-907, because: (1) the issue of the child's possible placement with her paternal grandmother was relevant and thus N.C.G.S. § 7B-907(b)(2) required the trial court to make findings of fact on the subject; and (2) the permanency planning order does not demonstrate the trial court's processes of logical reasoning from the evidentiary facts.

2. Child Abuse and Neglect— reunification efforts—findings of fact—conclusions of law—sufficiency of evidence

On remand, the trial court in a child neglect case must reexamine the issue of whether there were sufficient findings of fact and conclusions of law to satisfy the provisions of N.C.G.S. §§ 7B-907(c) and 7B-507 so that petitioner Department of Social Services could be relieved from efforts to reunify respondent father with his daughter.

3. Child Abuse and Neglect— responsibilities and procedures for permanency plan—timing of filing petition for termination of parental rights

The trial court was required in a child neglect case to comply with N.C.G.S. § 7B-907(b) and (c) even though the minor child was in DSS custody for more than 12 of the 22 months before the

hearing and the trial court's order stated that none of the circumstances set forth in N.C.G.S. § 7B-907(d) which would obviate the need for a termination of parental rights proceeding being filed are present, because: (1) contrary to petitioner Department of Social Services' (DSS) assertion, *In re Dula*, 143 N.C. App. 15 (2001), does not stand for the proposition that a child's placement in DSS custody for a year automatically relieve DSS from further reunification efforts or relieves the trial court of the obligation to make findings of fact to establish a permanency plan consistent with the legislative goal of achieving a safe permanent home for the juvenile within a reasonable period of time; (2) although N.C.G.S. § 7B-907(d) includes among the exceptions to the requirement that DSS initiate termination of parental rights proceedings a finding that the permanent plan for the juvenile is guardianship or custody with a relative or some other suitable person, the trial court entered a deficient permanency planning order in the instant case, and without a valid permanency planning order the trial court was necessarily unable to make a valid N.C.G.S. § 7B-907(d)(1) finding regarding the nature of the permanency plan; and (3) N.C.G.S. § 7B-907(d) does not operate as a substitute for the trial court's failure to satisfy the requirements of N.C.G.S. § 7B-907(b) and (c) when N.C.G.S. § 7B-907(d) addresses, in large measure, the timing of when DSS must file a petition for termination of parental rights whereas N.C.G.S. § 7B-907(b) governs the trial court's responsibilities and required procedures for establishing a permanent plan for the juvenile.

Appeal by respondent from order entered 28 July 2003 by Judge David V. Byrd in Wilkes County District Court. Heard in the Court of Appeals 15 September 2004.

Marjorie S. Canaday for respondent-appellant.

Paul W. Freeman, Jr., for petitioner Wilkes County DSS.

LEVINSON, Judge.

Respondent, Michael Conley, appeals from a permanency planning order relieving petitioner, Wilkes County Department of Social Services (DSS), from efforts to reunify him with his daughter Mary.[1]

1. To protect the identity of the minor child, this Court will refer to her by the pseudonym "Mary."

The procedural history of this case is summarized as follows: On 26 July 2001 petitioner filed a petition alleging that Mary was neglected, in that respondent and Mary's mother, Latosha Triplett (Triplett), had failed to provide proper care, supervision, or discipline for Mary. A nonsecure custody order was issued on 6 August 2001, and Mary was placed in DSS custody. On 22 October 2001 respondent signed a consent order which adjudicated Mary neglected and continued her in DSS custody. An initial permanency planning hearing was conducted beginning on 14 October 2002, and continuing on 9 December 2002, 30 January 2003, and 10 March 2003. In July 2003 the trial court entered a permanency planning order continuing Mary's custody with DSS, relieving DSS from any further efforts to reunify Mary with respondent, and directing DSS to initiate proceedings for termination of respondent's parental rights. From this order, respondent appeals.

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[1] Respondent argues first that the trial court erred by entering a permanency planning order that does not comply with the statutory requirements of N.C.G.S. § 7B-907 (2003). We agree.

The goal of the permanency planning hearing is "to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C.G.S. § 7B-907(a) (2003). In so doing, " '[o]ne of the essential aims, if not the essential aim, of . . . [the hearing] is to reunite the parent(s) and the child, after the child has been taken from the custody of the parent(s).' " *In re Eckard*, 144 N.C. App. 187, 196, 547 S.E.2d 835, 841 (2001) (quoting *In re Shue*, 311 N.C. 586, 596, 319 S.E.2d 567, 573 (1984)). Accordingly, G.S. § 7B-907 requires that, if a juvenile is not returned home at the conclusion of a permanency planning hearing, the trial court must consider certain specified criteria and "make written findings regarding those that are relevant." N.C.G.S. § 7B-907(b) (2003). These factors include, in pertinent part:

> (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[.]

N.C.G.S. § 7B-907(b)(1) and (2) (2003). It is reversible error for the trial court to enter a permanency planning order that continues cus-

tody with DSS without making proper findings as to the relevant statutory criteria. *See, e.g., In re J.S.*, 165 N.C. App. 509, 598 S.E.2d 658 (2004) (reversing and remanding permanency planning order that failed to make findings of fact required by G.S. § 7B-907(b)). This rule applies even if "the evidence and reports in this case might have supported the determination of the trial court." *In re Ledbetter*, 158 N.C. App. 281, 286, 580 S.E.2d 392, 395 (2003) (reversing on the grounds that "our statute requires the court to consider the G.S. § 7B-907(b) factors and make relevant findings").

A permanency planning order need not "contain a formal listing of the G.S. § 7B-907(b) (1)-(6) factors, expressly denominated as such . . . as long as the trial court makes findings of fact on the relevant G.S. § 7B-907(b) factors[.]" *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004). However, in its order:

> 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." 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."

In re J.S., 165 N.C. App. at 511, 598 S.E.2d at 660 (quoting *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003), and *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982)).

In the instant case, respondent argues that the trial court erred by failing to make the findings of fact required by G.S. § 7B-907(b)(2), regarding whether Mary might be placed with her paternal grandmother, Ms. Rachel Conley (Rachel). The uncontradicted evidence before the trial court tended to show the following: Rachel testified that she had told DSS "from day one" that she would like to have custody of Mary if the child could not be placed with respondent. She is a 53 year old Certified Nursing Assistant, employed full time at Broughton Hospital. Rachel owns her own home located a few miles from respondent, which she shares with her disabled 27 year old son. Triplett had previously left Mary with Rachel on many occasions, for periods as long as two weeks. Rachel's older son and other relatives live within a few miles of Rachel's house, and could provide back-up day care for Mary as needed. In addition to this uncontradicted evidence, conflicting testimony was offered regarding whether Rachel had made statements indicating she was frightened of respondent, and whether she had been uncooperative with DSS efforts to locate

respondent. During the hearing, the trial court questioned petitioner as to why greater consideration had not been given to placement with Rachel. In response, DSS social worker Sonya Freeman testified that one phone message had been left with Burke County DSS about setting up a home study, but that when the phone call was not returned DSS had failed to follow up. We conclude that the issue of Mary's possible placement with Rachel was relevant and thus that G.S. § 7B-907(b)(2) required the trial court to make findings of fact on the subject.

We next consider the sufficiency of the trial court's findings of fact on this issue. Only one of the trial court's findings of fact makes any reference to Mary's grandmothers:

> 23. Due to the maternal grandmother's history of being involved in abusive relationships and continuing to surround herself with convicted sex offenders and physically abusive persons, and neither grandmother is a suitable placement for the child [sic]. There are no other relatives who are willing and able to provide proper care and supervision of the child in a safe home.

This finding is generally concerned with Mary's **maternal** grandmother, and does not discuss Rachel. The finding does include a cursory statement that "neither grandmother is a suitable placement for the child." However, although this statement is included in one of the trial court's findings of fact, it is actually a conclusion of law:

> Matters of judgment are not factual; they are conclusory and based ultimately on various factual considerations. Facts are things in space and time that can be objectively ascertained by one or more of the five senses or by mathematical calculation. Facts, in turn, provide the bases for conclusions.

State ex rel. Utils. Comm. v. Public Staff, 322 N.C. 689, 693, 370 S.E.2d 567, 570 (1988). "We note that, '[i]f [a] finding of fact is essentially a conclusion of law . . . it will be treated as a conclusion of law which is reviewable on appeal.' " *Smith v. Beaufort County Hosp. Ass'n*, 141 N.C. App. 203, 214, 540 S.E.2d 775, 782 (2000) (quoting *Bowles Distributing Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686 (1984)).

We conclude that Finding of Fact number 23 does not contain any factual findings pertaining to Rachel. However, petitioner argues that the trial court's conclusion that "neither grandmother is a suitable placement for the child" is supported by finding of fact number 1:

> 1. The status of the above-named juvenile is accurately described in those certain Court Summaries prepared by the Social Worker and the Guardian Ad Litem, the same having been admitted into evidence and being incorporated herein as Findings of Fact.

Petitioner contends that the effect of Finding number 1 is that any statement in these Summaries constitutes a "finding of fact" made by the trial court. "At any permanency planning review, the court shall consider information from the parent, the juvenile, the guardian, any foster parent, relative[,] . . . the custodian or agency with custody, the guardian ad litem, and any other person or agency which will aid it in the court's review. The court may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." G.S. § 7B-907(b). Moreover, "it is permissible for trial courts to consider all written reports and materials submitted in connection with [juvenile] proceedings." *In re J.S.*, 165 N.C. App. at 511, 598 S.E.2d at 660 (citing *In re Ivey*, 156 N.C. App. 398, 402, 576 S.E.2d 386, 390 (2003)). However, "[d]espite this authority, the trial court may not delegate its fact finding duty." *Id.* (citing *In re Harton*, 156 N.C. App. at 660, 577 S.E.2d at 337). Accordingly, "the trial court should not broadly incorporate these written reports from outside sources as its findings of fact." *Id.* Thus, although the trial court may properly incorporate various reports into its order, it may not use these as a substitute for its own independent review.

We also note that neither the record on appeal, nor the transcript of court proceedings, indicates which, if any, Court Summaries were offered as evidence. Further, Court Summaries are prepared for every review hearing, and the finding of fact does not identify which Court Summaries are referred to. Nonetheless, because the record on appeal includes two Court summaries prepared by the Guardian *ad litem* and one Summary prepared by DSS, we presume that the trial court intended to treat these three Summaries as the ones referenced in its order. But assuming, *arguendo*, that these unmarked Summaries were the ones described as "having been admitted into evidence," and that they are "incorporated herein as Findings of Fact," the Summaries nonetheless fail to address the issue of whether Mary might appropriately be placed with Rachel.

The DSS Court Summary does not discuss Rachel at all. The GAL Summaries each include the following paragraph referencing Rachel:

> Rachel Conley is the paternal grandmother of [Mary]. She does not want [Mary] to be "adopted out." She would like to have custody of the child. However, past information indicates that Mrs. Conley did not cooperate with Wilkes County DSS when they tried to locate Mr. Conley. Mrs. Conley was present at recent visit with [Mary] and her father, Allen Conley. I did not observe any particular interaction between [Mary] and Mrs. Conley at that time. Mrs. Conley has not directly stated to me that she would like to see [Mary] placed with her father.

The GAL testified that her contact with Rachel was limited to a single occasion, when Rachel accompanied respondent to a scheduled visit with Mary. It is apparent from the above paragraph that nothing of note occurred at this sole meeting. Nothing in the paragraph addresses the suitability of Rachel's home or her abilities to care for Mary.

Further, the statement that "past information indicates that Mrs. Conley did not cooperate with Wilkes County DSS when they tried to locate Mr. Conley" is nothing more than the GAL's recitation of information obtained from others. Therefore, even if it is adopted as a "finding of fact" the only "fact" thus referenced is that at some point the GAL received "past information" concerning Rachel's lack of cooperation with DSS efforts to locate respondent. This was directly contradicted by Rachel's testimony at the hearing. "Recitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *Moore v. Moore*, 160 N.C. App. 569, 571-72, 587 S.E.2d 74, 75 (2003) (quoting *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984)). "Where there is directly conflicting evidence on key issues, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 366 (2000).

" 'When a trial court is required to make findings of fact, it must make the findings of fact specially.' Additionally, '[t]he trial court may not simply 'recite allegations,' but must through 'processes of logical reasoning from the evidentiary facts' find the ultimate facts essential to support the conclusions of law.' " *In re Weiler*, 158 N.C. App. 473, 478, 581 S.E.2d 134, 137 (2003) (quoting *In re Harton*, 156 N.C. App.

at 660, 577 S.E.2d at 337). In the instant case the permanency planning order does not demonstrate the trial court's "processes of logical reasoning from the evidentiary facts," *id.*, with regards to the possibility of placing Mary with Rachel. Accordingly, the permanency planning order fails to comply with G.S. § 7B-907(b).

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[2] Respondent next argues that the trial court erred by ordering that DSS be relieved of further efforts to eliminate the need for placement of the juvenile. Respondent argues that this order was not supported by the findings of fact required under N.C.G.S. §§ 7B-907(c) and 7B-507(b) (2003). G.S. § 7B-907(c) provides that "[i]f the court continues the juvenile's placement in the custody or placement responsibility of a county department of social services, the provisions of G.S. § 7B-507 shall apply to any order entered under this section." G.S. § 7B-507(b) provides in relevant part that in "any order placing a juvenile in the custody or placement responsibility of a county department of social services . . . the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes [certain required] written findings of fact." Respondent contends that the only finding to address the issue of reasonable efforts is the following:

> 16. The Wilkes County Department of Social Services has utilized reasonable efforts to eliminate the need for placement of the child, as more particularly appears from the aforesaid Court Summaries.

DSS, on the other hand, relies not only on this finding but additional ones to argue that the trial court's order complies with G.S. §§ 7B-907(c) and 7B-507. Because we have already determined that this case must be remanded for entry of findings on the issue of whether Mary could be placed with Rachel, we need not address the sufficiency of the findings and conclusions as to whether these provisions are satisfied. Nonetheless, we urge the trial court to reexamine this issue on remand.

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[3] We next address petitioner's argument that, even if the trial court's order fails to satisfy the requirements of G.S. § 7B-907(b) and (c), its findings related to N.C.G.S. § 7B-907(d) (2003) operate as a substitute for this failure. G.S. § 7B-907(d) provides:

> (d) In the case of a juvenile who is in the custody or placement responsibility of a county department of social services, and has

been in placement outside the home for 12 of the most recent 22 months . . . the director of the department of social services shall initiate a proceeding to terminate the parental rights of the parent unless the court finds:

(1) The permanent plan for the juvenile is guardianship or custody with a relative or some other suitable person;

(2) The court makes specific findings why the filing of a petition for termination of parental rights is not in the best interests of the child; or

(3) The department of social services has not provided the juvenile's family with such services as the department deems necessary, when reasonable efforts are still required to enable the juvenile's return to a safe home.

Petitioner contends that the trial court was not required to comply with G.S. § 7B-907(b) and (c) under the circumstances herein, inasmuch as (1) Mary was in DSS custody for more than 12 of the 22 months before the hearing, and (2) the trial court's order stated that none "of the circumstances set forth in N.C.G.S. § 7B-907(d) which would obviate the need for a termination of parental rights proceeding being filed are present." In support of this argument, petitioner cites *In re Dula*, 143 N.C. App. 16, 19, 544 S.E.2d 591, 593 (2001), which held that DSS "can also be relieved of the obligation of making reasonable efforts if a child has been in placement outside the home for the period of time and under the conditions referenced in section 7B-907(d)." However, *Dula* **does not** stand for the proposition that a child's placement in DSS custody for a year automatically relieves DSS from further reunification efforts, or relieves the trial court of the obligation to make findings of fact to establish a permanency plan consistent with the legislative goal of "achiev[ing] a safe permanent home for the juvenile within a reasonable period of time." G.S. § 7B-907(a). Rather, *Dula* held:

> If the department of social services has made unsuccessful reasonable efforts during the [12] months the child has been in placement outside the home, **pursuant to section 7B-907(b)**, the efforts of the department of social services and the courts must be redirected to developing a permanent placement for that child outside the home[.] . . . T]he trial court made numerous findings in its orders entered prior to [the hearing at issue] that DSS had made 'reasonable efforts to prevent or eliminate the need for

> placement of the juvenile' outside the home. Respondent does not assign error to those findings. Thus, the trial court, . . . had no obligation to further attempt to reunify the parent and child and, indeed, had the obligation to locate permanent placement for the child outside of Respondent's home.

Id. at 19, 544 S.E.2d at 593-94 (emphasis added). The opinion in *Dula* thus makes clear that the trial court had addressed the issue of DSS efforts to reunify the minor child with her parents in earlier orders, which orders were included in the record, and to which findings respondent did not assign error. It was this earlier documentation, rather than the mere passage of 12 months in DSS custody, that determined the result in *Dula*.

Moreover, G.S. § 7B-907(d)(1) includes among the exceptions to the requirement that DSS initiate termination of parental rights proceedings a finding that "[t]he **permanent plan** for the juvenile is guardianship or custody with a relative or some other suitable person." (emphasis added). But, in the instant case, the trial court entered a **deficient** permanency planning order. Accordingly, without a valid permanency planning order, the trial court was **necessarily unable** to make a valid G.S. § 7B-907(d)(1) finding regarding the nature of the permanent plan. Finally, petitioner's argument fails to recognize that G.S. § 7B-907(d) addresses, in large measure, the **timing** of when the department of social services must file a petition for termination of parental rights, whereas G.S. § 7B-907(b) governs the trial court's responsibilities and required procedures for **establishing** a permanent plan for the juvenile. We conclude, therefore, that the trial court's conclusion that none "of the circumstances set forth in N.C.G.S. § 7B-907(d) which would obviate the need for a termination of parental rights proceeding being filed are present[]" does not substitute for the court's obligation to fulfill its obligations pursuant to G.S. § 7B-907(b) and (c).

Given our decision to reverse and remand this matter, it is unnecessary to address the remaining assignments of error.

"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." *In re J.S.*, 165 N.C. App. at 514, 598 S.E.2d at 662 (citing *In re Anderson*, 151 N.C. App. 94, 564 S.E.2d 599 (2002)).

Reversed and Remanded.

Judges GEER and THORNBURG concur.

KENT A. CHATFIELD AND CHRISTIANNA E. NOE, PLAINTIFFS V. WILMINGTON HOUSING FINANCE AND DEVELOPMENT, INC., DEFENDANT

No. COA04-44

(Filed 2 November 2004)

1. Public Records— access to meetings and records of nonprofit corporation—private corporation

The trial court did not err by granting summary judgment in favor of defendant nonprofit corporation on plaintiffs' action seeking to obtain access to meetings and records of defendant pursuant to the North Carolina public records law under N.C.G.S. § 132-1 et seq., because defendant is not subject to the public records law since: (1) neither our legislature nor our appellate courts have indicated that a corporate entity that has previously been subject to the public records law must remain subject to it; (2) there is no rule making the public records law applicable to an entity that was founded by governmental actors but has subsequently evolved into a private corporation; and (3) an entity's stated purpose of performing a function that is of use to the general public, without more, is insufficient to make the public records law applicable.

2. Open Meetings— access to meetings and records of nonprofit corporation—elected body—public good

The trial court did not err by granting summary judgment in favor of defendant nonprofit corporation on plaintiffs' action seeking to obtain access to meetings and records of defendant pursuant to the North Carolina open meetings law under N.C.G.S. § 143-318.9 et seq., because defendant is not subject to the open meetings law since: (1) defendant is not an elected body, and the record is devoid of any indication that defendant is currently an appointed body of the county, the city, or the housing authority; (2) even assuming without deciding that the factors from *News & Observer Pub. Co.*, 55 N.C. App. 1 (1981), are germane to determine whether an entity is a public body under the open meetings

law, they do not counsel in favor of concluding that the law applies to defendant as none of the nine factors are currently present in the instant case; and (3) there is no basis in law for the proposition that an entity is a public body subject to the open meetings law where, without more, it furthers the public good and was previously, but no longer is, an agent or instrumentality of a local government.

Appeal by plaintiffs from judgment entered 21 August 2003 by Judge Russell J. Lanier, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 15 September 2004.

Legal Aid of North Carolina, Inc., by James J. Wall and Marco P. Locco, Jr., for plaintiffs.

Wessell & Raney, L.L.P., by John C. Wessell, III, for defendant.

LEVINSON, Judge.

The present appeal arises from an action by plaintiffs (Kent A. Chatfield and Christianna E. Noe) to obtain access to meetings and records of defendant Wilmington Housing Finance and Development, Inc. (WHFD) pursuant to the North Carolina Open Meeting and Public Records Laws. Plaintiffs appeal from the entry of summary judgment in WHFD's favor. We affirm the ruling of the trial court.

On 17 June 1982, Wilmington Housing Authority Development (WHAD) was incorporated as a nonprofit corporation. The incorporator of WHAD was the long-term executive director of the City of Wilmington's Housing Authority (WHA). The stated purpose in WHAD's articles of incorporation was to augment, benefit, and enhance the function and purposes of the WHA in providing funds for the purchase, development, lease, and operation of low and moderate income housing. Pursuant to its articles of incorporation, WHAD's accounting practices and finances were subject to annual review by the board of the WHA, its net earnings inured to the benefit of the WHA, and its assets were to be transferred to the WHA upon dissolution. In addition, approval of the WHA was required for amendment of WHAD's articles of incorporation.

On 18 August 1987, the charter of WHAD was amended to include, *inter alia*, the following: The name of the company was changed from Wilmington Housing Authority Development, Inc., (WHAD) to Wilmington Housing Finance and Development, Inc. (WHFD). Any references to WHFD being an instrumentality of WHA

were deleted. The provision requiring approval of the WHA to amend the articles of incorporation was deleted, and a provision was added stating that only the approval of the board of WHFD was required for amendment of the articles. Provisions requiring net earnings to inure to the benefit of WHA and assets to be transferred to WHA upon dissolution were eliminated. The stated purpose of WHFD was expanded to include the performance of "such other functions as are authorized or are requested by [the WHA] by and through its Board of Commissioners and/or the City of Wilmington by and through its City Council."

Pursuant to the 1987 charter amendments, WHFD enacted new by-laws. These by-laws gave the City of Wilmington, New Hanover County, and the WHA the authority to each appoint two individuals to WHFD's board and required that the remaining three directors be appointed by WHFD's board. Since this amendment to the bylaws, several members of WHFD's board have been governmental officials of the County of New Hanover and the City of Wilmington. The 1987 by-laws also gave the WHA and the City the authority to review the activities and inspect the books and records of WHFD. At the time of the 1987 by-laws and amendments, WHFD's principal office was located in an office building belonging to the City of Wilmington. As recently as 1998, WHFD listed its principal office as being located in an office building belonging to the City.

In 1999, plaintiffs were hired by WHFD and Cape Fear Community College to participate in the renovation of a school. According to plaintiffs, they felt that something was "amiss" at the job site in that, *inter alia*, there were several people present at the job site who were being paid despite the fact that utilities were not in place for these people to begin work, cash was being paid out, and student-workers were being transferred to other WHFD and WHA projects. Plaintiffs wished to make a complaint about their observations to the WHFD board. Plaintiffs made several requests to attend a WHFD board meeting. All of these requests were denied. In addition, plaintiffs allegedly made several attempts to obtain records from WHFD and repeatedly experienced difficulty doing so.

In 2001, WHFD moved its principal office to a space it leased from a private company. By a March 2002 amendment to its bylaws, WHFD placed all authority to appoint new board members in its own board. On 13 August 2002, WHFD adopted restated articles of incorporation that eliminated the authority of the WHA and the City of Wilmington to inspect its books and records, eliminated the provi-

sions authorizing WHFD to perform functions authorized or requested by the WHA or the City, and eliminated the provisions subjecting the activities and finances of WHFD to annual review by the WHA and the City. As of July 2003, three of the nine positions of WHFD's board of directors were vacant, and the remaining six positions were filled by members appointed by WHFD's board. One member of WHFD's board was also a member of WHA's board of directors. None of the remaining members were employees of New Hanover County, the City of Wilmington, or the WHA.

The financial statements for the fiscal years ending in 2000, 2001, and 2002 do not report any funds given to WHFD by the WHA, New Hanover County, or the City of Wilmington. WHFD did receive $15,000 in revenue from the WHA in 2001 as payment for supervision fees related to the selling of houses by the WHA.

On 20 May 2002, Chatfield and Noe filed a complaint in superior court seeking, *inter alia*, a declaration that WHFD was subject to the North Carolina Open Meetings Law, contained in Chapter 143 of the General Statutes, and the Public Records Laws, contained in Chapter 132 of the General Statutes, and an injunction prohibiting alleged violations of these laws. On 16 July 2002, the superior court entered a preliminary injunction ordering WHFD to fully comply with the Open Meetings and Public Records laws and to allow Chatfield and Noe to attend meetings and obtain records. Subsequently, the plaintiffs and WHFD both moved for summary judgment. On 21 August 2003, the superior court entered a judgment and order granting defendant's motion for summary judgment and denying plaintiff's motion.

From the superior court's order and judgment, plaintiffs now appeal, contending that the trial court erred in denying its motion for summary judgment and entering summary judgment in WHFD's favor. WHFD also made a cross assignment of error, which it expressly withdrew during oral argument. As such, we will only address plaintiff's arguments on appeal.

The standard of review on appeal from a summary judgment ruling is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. *Moore v. Coachmen Indus., Inc.*, 129 N.C. App. 389, 393-94, 499 S.E.2d 772, 775 (1998). In the instant case, the facts are not disputed, and the only issues are whether as a matter of

law (1) WHFD is subject to the Open Meetings Law of North Carolina, N.C.G.S. § 143-318.9, *et seq.*, and (2) WHFD is subject to the Public Records Law of North Carolina, N.C.G.S. § 132-1, *et seq.*

[1] We first address plaintiffs' argument that WHFD is subject to the Public Records Law of North Carolina. We hold that, on the record presented in the instant case, WHFD is not subject to the North Carolina Public Records Law.

The North Carolina General Statutes contain the following mandate:

> The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law.

N.C.G.S. § 132-1(b) (2003). The term "public record" is statutorily defined to mean

> all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.

N.C.G.S. § 132-1(a) (2003). Under the statute, a governmental agency is defined to include "every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government." *Id.*

A corporate entity also may be considered an agency of local government for the purposes of our State's public records statute; however, "[t]he unavoidable fact is that each new arrangement must be examined anew and in its own context." *News & Observer Pub. Co. v. Wake County Hospital Sys., Inc.*, 55 N.C. App. 1, 11, 284 S.E.2d 542, 548 (1981), *disc. review denied*, 305 N.C. 302, 291 S.E.2d 151, *appeal dismissed, cert. denied*, 459 U.S. 803, 74 L. Ed. 2d 42 (1982) (hereinafter *News & Observer*). The nature of the relationship

between a corporate entity and the government is the dispositive factor in determining whether the corporate entity is governed by the Public Records Law. *Id.* In *News & Observer*, this Court held that the entity was subject to the Public Records Law based on the following nine factors:

> The . . . articles of incorporation provide (1) that upon its dissolution, the [corporation] would transfer its assets to the county; and (2) that all vacancies on the board of directors would be subject to the [County's] approval. The lease agreement provided (3) that the [corporation] occupy premises owned by the county under a lease for $1.00 a year; (4) that the [County] Commissioners review and approve the [corporation]'s annual budget; (5) that the county conduct a supervisory audit of the [corporation]'s books; and (6) that the [corporation] report its charges and rates to the county. The operating agreements also provide (7) that the [corporation] be financed by county bond orders; (8) that revenue collected pursuant to the bond orders be revenue of the county; and (9) that the [corporation] would not change its corporate existence nor amend its articles of incorporation without the [C]ounty's written consent.

Id. at 11-12, 284 S.E.2d at 548-49. In addition, the Court considered the fact that the entity involved was performing an important "public and governmental" function. *Id.*

In the instant case, WHFD concedes that, in the past, several of the factors enumerated by this Court in *News & Observer* counseled in favor of finding that it was subject to the Public Records Law. However, plaintiffs do not dispute that, as of August 2002, none of these nine factors was present. The present non-existence of these factors is attributable to structural changes made by WHFD, the lawfulness of which has not been questioned and is not at issue on this appeal. Notwithstanding the inapplicability of the *News & Observer* factors, plaintiffs contend that WHFD must be subject to the Public Records Law because WHFD "was founded by the [WHA] and the City of Wilmington as an agency of government, and its fundamental purpose has not changed since the time of its founding." We are unpersuaded by this argument.

Our Public Record Laws are only applicable to government agencies. Pursuant to this Court's decision in *News & Observer*, the government must exercise "supervisory responsibilities and control" over a corporate entity for such an entity to qualify as a government

agency and fall within the ambit of the Public Records Law. *Id.* Neither our Legislature nor our appellate courts have indicated that a corporate entity that has previously been subject to the Public Records Law must remain subject to it. Likewise, we are aware of no rule making the Public Records Law applicable to an entity that was founded by governmental actors but subsequently has evolved into a private corporation. Moreover, we conclude that an entity's stated purpose of performing a function that is of use to the general public, without more, is insufficient to make the Public Records Law applicable.[1]

This assignment of error is overruled.

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[2] We next address plaintiff's argument that WHFD is subject to the North Carolina Open Meetings Law. We hold that, on the record presented in the instant case, WHFD is not subject to the Open Meetings Law.

The North Carolina General Statutes include the following policy statement:

> Whereas 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.G.S. § 143-318.9 (2003). Pursuant to this policy, the Legislature has provided that "[e]xcept as [otherwise] provided . . ., each official meeting of a public body shall be open to the public and any person is entitled to attend such a meeting." N.C.G.S. § 143-318.10(a) (2003). The term "public body" is defined to mean

> any elected or appointed authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, constituent institutions of The University of North Carolina, or other political subdivisions or public corporations in the State that (i) is composed of two or more members and (ii) exercises or is authorized to exercise a

1. Indeed, if the Public Records Law was construed to be applicable whenever an organization's stated purpose was the performance of a socially helpful function, then the law might be applicable to virtually all charitable non-profit corporations. We discern no intent by the General Assembly to bring about this result.

legislative, policy-making, quasi-judicial, administrative, or advisory function.

N.C.G.S. § 143-318.10(b) (2003).

Significantly, the phrase "elected or appointed" was added to the definition of "public body" in 1994. *See* 1994 N.C. Sess. Laws ch. 570, § 1; *DTH Publ'g Corp. v. Univ. of N.C.*, 128 N.C. App. 534, 538, 496 S.E.2d 8, 11 (1998). This Court has held that for a body to be appointed within the meaning of the Open Meetings Law "the person or body doing the appointing must be one authorized to do so." *DTH Publ'g Corp.*, 128 N.C. App. at 539, 496 S.E.2d at 11.

In the instant case, WHFD is not an elected body, and the record is devoid of any indication that WHFD is currently an appointed body of New Hanover County, the City of Wilmington, or the WHA. Pursuant to its current bylaws, only WHFD's board may appoint new WHFD board members. As of August 2003, all non-vacant WHFD directorships had been filled by WHFD's board. Thus, WHFD does not qualify as a "public body" as the term is defined in the Open Meetings Law.

The parties argue that the nine *News & Observer* factors are relevant to determining whether an entity is a public body under the Open Meetings Law. However, even assuming without deciding that the *News & Observer* factors are germane, they do not counsel in favor of concluding that the Open Meetings Law applies to WHFD, as none of the nine factors are currently present in the instant case.

As in their argument with respect to the Public Records Law, plaintiffs insist that WHFD is a public body under the Open Meetings Law because it "was founded by the [WHA] and the City of Wilmington as an agency of government, and its fundamental purpose has not changed since the time of its founding." However, we find no basis in law for the proposition that an entity is a public body subject to the Open Meetings Law where, without more, it furthers the public good and was previously, but no longer is, an agent or instrumentality of a local government.

This assignment of error is overruled.

Affirmed.

Judges HUNTER and GEER concur.

STATE OF NORTH CAROLINA v. SHAWN DENEIL LEACH, DEFENDANT

No. COA03-1308

(Filed 2 November 2004)

1. Search and Seizure— motion to suppress—probable cause—reasonable suspicion—confidential informant

The trial court did not commit plain error in a trafficking in cocaine by possession and transportation, possession of a firearm by a felon, and felony speeding to elude arrest case by denying defendant's motion to suppress evidence of cocaine that defendant abandoned while running from the police after a high speed chase, because: (1) the police were alerted to a drug sale by an informant who had previously given information that led to an arrest and the confiscation of multiple kilograms of cocaine, and the officers reasonably relied on information provided by the informant which provided probable cause to stop and search defendant; and (2) the officers did not seize defendant until they actually detained him at the conclusion of a high speed chase since no seizure occurs until defendant is physically restrained.

2. Evidence— prior crimes or bad acts—cocaine trafficking

The trial court did not err in a trafficking in cocaine by possession and transportation, possession of a firearm by a felon, and felony speeding to elude arrest case by admitting evidence of defendant's prior convictions of cocaine trafficking, because N.C.G.S. § 14-415.1b provides that when a person is charged under the possession of a firearm by a felon statute, records of prior convictions of any offense shall be admissible in evidence for proving a violation of that section.

3. Firearms and Other Weapons— possession of firearm by felon—cocaine possession a felony

The trial court did not err by using defendant's prior cocaine possession convictions to charge him with possession of a firearm by a felon, because cocaine possession is a felony despite statutory references under N.C.G.S. § 90-95(d)(2) to it as a misdemeanor.

4. Firearms and Other Weapons— possession of firearm by felon—sufficiency of evidence

The trial court did not err in a possession of a firearm by a felon case by concluding that the evidence was sufficient to show

that defendant possessed a firearm, because: (1) the State's evidence tended to show that an officer saw an object coming out of the van which was controlled solely by defendant, and that sparks flew when the object hit the ground; and (2) a firearm was recovered within minutes from a nearby roadside.

5. Drugs— trafficking in cocaine—failure to instruct on lesser-included offense

The trial court did not err in a trafficking in cocaine by possession and by transportation case by failing to instruct the jury on the lesser-included offense of trafficking in 200-400 grams of cocaine, because the only forensic expert testified that 438.1 grams of cocaine was recovered by officers and there is no reasonable inference from this evidence that the quantity was as defendant argues.

6. Criminal Law— instruction—reasonable doubt

The trial court did not commit plain error in a trafficking in cocaine by possession and by transportation, possession of a firearm by a felon, and felony speeding to elude arrest case by its instruction on reasonable doubt, because the record reflected that the instruction accurately defined reasonable doubt.

7. Constitutional Law— cruel and unusual punishment—consecutive sentences

The trial court did not violate the Eighth Amendment prohibition against cruel and unusual punishment in a trafficking in cocaine by possession and by transportation, possession of a firearm by a felon, and felony speeding to elude arrest case by imposing consecutive sentences, because imposition of consecutive sentences standing alone does not constitute cruel and unusual punishment when all punishments were within the General Assembly's prescribed limits.

Appeal by defendant from judgment entered 21 November 2002 by Judge Peter M. McHugh in the Superior Court in Guilford County. Heard in the Court of Appeals 10 June 2004.

Attorney General Roy Cooper, by Assistant Attorney General David N. Kirkman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders Daniel R. Pollitt and Matthew D. Wunsche, for the defendant.

HUDSON, Judge.

On 3 September 2002, the Grand Jury indicted the defendant on one count each of trafficking in cocaine by possession and by transportation, possession of a firearm by a felon, and felony speeding to elude arrest. Before trial, defendant moved to suppress evidence seized by police officers, which motion the trial court denied. The jury found defendant guilty on all charges. The trial court sentenced defendant to 17 to 21 months imprisonment on the firearm conviction, 12 to 15 months imprisonment on the eluding arrest conviction, and 175 to 219 months imprisonment on each of the trafficking convictions. Defendant appeals, and for the reasons set forth below, we find no error.

BACKGROUND

On 8 July 2002, High Point Police Officers arrested a man ("the informant") on drug charges. The informant provided information about a drug deal that was to take place that evening, involving defendant. Based on this information, Greensboro and High Point police officers devised a plan to arrest defendant at one of two possible locations. The informant had previously given information to High Point police, which led to the seizure of multiple kilograms of cocaine.

After several telephone conversations between defendant and the informant, it was finally determined that the delivery of the cocaine would take place at 9:30 p.m. in the parking lot of Coliseum Billiards in Greensboro. The informant used both a wire and a cell phone to signal the police when defendant drove into the parking lot. Police officers quickly surrounded defendant's minivan, which the informant identified as one of three possible cars that defendant used, and identified themselves as police officers.

Defendant immediately backed away over a curb and led the police on a high speed chase for nearly thirty miles into Randolph County. While pursuing the defendant, police officers recovered a firearm in a residential neighborhood in the same area where an unknown object was thrown from the minivan that produced sparks when it hit the pavement.

Defendant attempted to flee on foot after he drove into a ditch at a rural intersection. Nearing a pond, defendant fell and threw a white plastic bag toward the water. Police apprehended the defendant and recovered the plastic bag, which was determined to contain cocaine.

Analysis

I.

[1] Defendant first argues that the trial court erred by denying his motion to suppress certain evidence, contending that the items were seized without probable cause or reasonable suspicion, and thus in violation of his Fourth Amendment rights. For the following reasons, we disagree and overrule this assignment of error.

Our Courts have consistently held that "[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995)).[1] Rulings on motions *in limine* are preliminary in nature and subject to change at trial, depending on the evidence offered, and "thus an objection to an order granting or denying the motion 'is insufficient to preserve for appeal the question of the admissibility of evidence.' " *T&T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 349, *disc. review denied*, 346 N.C. 185, 486 S.E.2d 219 (1997) (*quoting Conaway*, 339 N.C. at 521, 453 S.E.2d at 845).

Here, defendant assigned error and plain error to the denial of his motion to suppress, but failed to object to the admission of any of the items of evidence when offered at trial. Thus, we review only for plain error.

Our Courts have consistently held that:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is

1. This rule was changed by the legislature in 2003: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." N.C. Gen. Stat. § 8C-1, Rule 103 (2) (2003). However, the amendment applies only to rulings on evidence made on or after 1 October 2003. Session Laws 2003-101, s.1. Thus, it does not apply to this case.

> such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

Our standard of review in evaluating a trial court's ruling on a suppression motion is well settled:

> the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' This Court must not disturb the trial court's conclusions if they are supported by the court's factual findings. However, the trial court's conclusions of law are fully reviewable on appeal. At a suppression hearing, conflicts in the evidence are to be resolved by the trial court. The trial court must make findings of fact resolving any material conflict in the evidence.

State v. McArn, 159 N.C. App. 209, 211-12, 582 S.E.2d 371 373-74 (2003) (internal citations omitted). However, where there is no material conflict in the evidence presented at the suppression hearing, specific findings of fact are not required. *State v. Parks*, 77 N.C. App. 778, 336 S.E.2d 424 (1985). In that event, the necessary findings are implied from the admission of the challenged evidence. *State v. Norman*, 100 N.C. App. 660, 397 S.E.2d 647 (1990).

Here, the trial court found that the evidence at the hearing was uncontroverted, and thus made no findings of fact. Based upon the evidence at the suppression hearing, the trial court ruled: (1) that police officers had reasonable suspicion based upon information obtained from a confidential informant to conduct an investigatory stop of defendant, and, alternatively,(2) that despite attempts, police officers did not stop, seize, arrest or search defendant or his property "until defendant attempted to elude attempts of law enforcement officers to approach him, by committing in the presence of the officers at least one felony offense."

"Probable cause exists when there is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *State v. Joyner*, 301 N.C. 18, 21, 269 S.E.2d 125, 128 (1980) (quotations omitted). In cases involving confidential informants, "probable cause

is determined using a totality-of-the-circumstances analysis which permits a balanced assessment of the relative weights of all the various indicia of reliability . . . attending an informant's tip." *State v. Holmes*, 142 N.C. App. 614, 621, 544 S.E.2d 18, 22 (2001) (quotations omitted). A known informant's information may establish probable cause based upon a reliable track record in assisting the police. *Alabama v. White*, 496 U.S. 325, 332, 110 L. Ed. 2d 301, 310 (1990); *see also State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991).

Here, the police were alerted to a drug sale by an informant who had previously given information that led to an arrest and the confiscation of multiple kilograms of cocaine. The drug sale was to be between the informant and defendant. The informant described the defendant and his vehicle, accurately described when and where the defendant would arrive to deliver the cocaine to the informant, and made a contemporaneous identification as defendant pulled into the parking lot. The police officers reasonably relied on information provided them by the informant, which provided probable cause to stop and search defendant.

The trial court also concluded that officers did not seize defendant until they actually detained him at the conclusion of the high speed chase. Defendant, on the other hand, contends that the officers seized him in the Coliseum Billiards parking lot. Both rely on the United States Supreme Court's decision in *California v. Hodari*, 499 U.S. 621, 113 L. Ed. 2d 690 (1991).

In *Hodari*, the defendant fled as officers approached him, and warned him to stop. The officers chased the defendant on foot for several blocks, during which time he tossed away a substance later determined to be cocaine. The defendant was not physically detained until police officers ultimately caught and tackled him. The United States Supreme Court, in affirming the denial of the defendant's motion to suppress evidence, held that "assuming that [the officer's] pursuit in the present case constituted a 'show of authority' enjoining [the defendant] to halt, since [the defendant] did not comply with that injunction he was not seized until he was tackled. The cocaine abandoned while he was running was in this case not the fruit of a seizure . . . ." *Id.* at, 629, 113 L. Ed. 2d at 699.

Here, the facts are very similar to those in *Hodari*. When the defendant arrived for the drug sale, police officers, properly identifying themselves, attempted to stop him while he was in his vehicle.

Seeing the police surround his vehicle, defendant drove backwards over a curb and fled, leading police on a high speed police chase for over twenty-eight miles before he was ultimately detained. Here, as in *Hodari*, we conclude that "[t]he cocaine abandoned while [defendant] was running was in this case not the fruit of a seizure, and his motion to exclude evidence of it was properly denied." *Id.* The police had probable cause to initiate a stop but no seizure occurred until defendant was physically restrained. The trial court did not err in denying defendant's motion to suppress this evidence.

II.

[2] Defendant next contends that the trial court erred in admitting evidence of defendant's prior convictions of cocaine trafficking. We disagree.

N.C. Gen. Stat. § 14-415.1b provides that "[w]hen a person is charged under this section, records of prior convictions of any offense, whether in the courts of this State, or in the courts of any other state of the United States, shall be admissible in evidence for the purpose of proving a violation of this section." Here, the plain language of the statute controls and the trial court properly admitted the prior convictions for proving possession of a firearm by a felon.

III.

[3] Defendant next argues that his prior cocaine possession convictions could not be used to charge him with possession of a firearm by a felon. Defendant contends that possession of cocaine is a misdemeanor under N.C. Gen. Stat. § 90-95(d)(2), and thus does not support a conviction under N.C. Gen. Stat. 14-415.1(a). However, our Supreme Court has held that cocaine possession is a felony despite statutory references to it as a misdemeanor. *See State v. Jones*, 358 N.C. 473, 598 S.E.2d 125 (2004). Thus, defendant's prior possession convictions are sufficient to support his conviction, and we overrule this assignment of error.

[4] Defendant also contends that the evidence was insufficient to show that he possessed a firearm. However, the State's evidence did tend to show that one officer saw an object coming out of the van which was controlled solely by defendant, and that sparks flew when the object hit the ground. A firearm was recovered within minutes from a nearby roadside. In the light most favorable to the State, this evidence supports an inference that defendant possessed the firearm.

State v. Patterson, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994). This assignment of error has no merit.

IV.

[5] Defendant next argues that the trial court erred by not instructing the jury on the lesser included offense of trafficking in 200-400 grams of cocaine. We disagree.

A defendant "is entitled to an instruction on a lesser included offenses 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) (internal quotation marks and citations omitted). However, "a lesser offense should not be submitted to the jury if the evidence is sufficient to support a finding of all the elements of the greater offense, and there is no evidence to support a finding of the lesser offense." *State v. Nelson*, 341 N.C. 695, 697, 462 S.E.2d 225, 226 (1995).

Here, defendant contends that the bag containing the cocaine seized by police officers could have contained dirt or other debris, thus lessening the amount of actual cocaine in the bag and warranting the requested instruction. However, the only forensic expert testified that 438.1 grams of cocaine was recovered by police officers; we see no reasonable inference from this evidence that the quantity was as defendant argues. Thus, the trial court did not err in refusing to give the requested instruction. We overrule this assignment of error.

V.

[6] Defendant also contends that the trial court committed plain error in its instruction to the jury defining reasonable doubt. Although shorter and approved definitions are encouraged, our Supreme Court has held that a judge did not mislead or confuse the jury by giving instructions that began with ten things reasonable doubt was not, since he gave equal time to what did constitute reasonable doubt. *State v. Ward*, 286 N.C. 304, 310, 210 S.E.2d 407, 412 (1974), *death penalty vacated*, *Ward v. North Carolina*, 428 U.S. 903, 49 L. Ed. 2d 1207 (1976). Here, the record reflects that the instruction accurately defined reasonable doubt, if not in the clearest terms. We hold that there was no error.

VI.

[7] Finally, defendant argues that the consecutive sentences imposed here constitute cruel and unusual punishment despite the precedents

indicating otherwise. We are bound to follow the case law which specifically states the following:

> We first note our Supreme Court has held that the [Eighth Amendment's] prohibition against cruel and unusual punishment 'does not require strict proportionality between the crime and sentence . . . [but] forbids only extreme sentences that are 'grossly disproportionate' to the crime.' Indeed, the sentences imposed upon defendant, albeit consecutive, were within the presumptive statutory range authorized for her drug trafficking offenses under the Structured Sentencing Act.

State v. Parker, 137 N.C. App. 590, 603-04, 530 S.E.2d 297, 306 (2000) (internal citations omitted). *See also State v. Barts*, 316 N.C. 666, 697, 343 S.E.2d 828, 848 (1986) (concluding that "imposition of consecutive sentences, standing alone, does not constitute cruel and unusual punishment" as all punishments were within the General Assembly's prescribed limits). The trial judge, therefore, did not err or violate the Eighth Amendment in imposing these consecutive sentences.

No error.

Judges GEER and THORNBURG concur.

JERRY WAYNE WHISNANT, JR., PLAINTIFF v. ROBERTO CARLOS HERRERA, DEFENDANT

No. COA03-1607

(Filed 2 November 2004)

1. Motor Vehicles— contributory—negligence—automobile collision—speeding

There was sufficient evidence to submit contributory negligence to the jury where a collision occurred as defendant pulled around a stopped car on a narrow street on Halloween night, and plaintiff's speed (estimated by an officer after the accident) was five miles an hour over the speed limit even though children were leaving the parked car. Plaintiff could have foreseen that some generally injurious consequence might occur.

2. Civil Procedure— motion for j.n.o.v. and new trial—underlying motion for directed verdict denied

There was no error in the denial of a motion for a judgment notwithstanding the verdict where the underlying motion for a directed verdict was properly denied. Furthermore, none of the grounds for a new trial listed in N.C.G.S. § 1A-1, Rule 59 were present.

Appeal by plaintiff from judgment entered 30 April 2003 and order entered 24 June 2003 by Judge John R. Mull in Catawba County District Court. Heard in the Court of Appeals 14 September 2004.

Campbell & Taylor, P.C., by Robyn M. Lacy, for plaintiff-appellant.

Morris, York, Williams, Surles & Barringer, L.L.P., by John P. Barringer and Heather G. Connor, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Jerry Wayne Whisnant, Jr. ("plaintiff") appeals the trial court judgment denying plaintiff any recovery from Roberto Carlos Herrera ("defendant") and the trial court order denying plaintiff's motion for judgment notwithstanding the verdict and motion for a new trial. For the reasons discussed herein, we affirm the trial court's judgment.

The facts and procedural history pertinent to the instant appeal are as follows: On 31 October 2000, plaintiff was traveling in his vehicle in the northbound lane of North Main Street Parallel ("Main Street") in Granite Falls. As plaintiff proceeded along Main Street, defendant was stopped in his vehicle behind a third vehicle parked in the southbound lane of Main Street. As plaintiff's vehicle approached, defendant drove his vehicle from the southbound lane of Main Street into the northbound lane of Main Street, in an attempt to maneuver his vehicle around the vehicle blocking the southbound lane. When plaintiff saw defendant's vehicle enter plaintiff's lane of travel, plaintiff applied his vehicle's brakes. The two vehicles nevertheless collided "head-on" in the northbound lane of Main Street.

Granite Falls Police Department Officer Chris Robinson ("Officer Robinson") investigated the accident. After examining the scene of the accident, Officer Robinson determined that defendant's vehicle had not left any skid marks and that plaintiff's vehicle had left skid marks measuring thirty-two feet in length. Officer Robinson then esti-

mated that plaintiff's vehicle was traveling forty miles per hour at the moment plaintiff first applied the brakes, and thirty miles per hour at the moment the two vehicles collided. Following his investigation, Officer Robinson cited defendant for driving left of center.

As a result of the accident, plaintiff received injuries to his neck and lower back. On 31 August 2001, plaintiff filed a complaint against defendant, alleging that defendant's negligent operation of his vehicle was the proximate cause of the accident. On 2 January 2002, defendant filed an answer denying plaintiff's allegations and asserting the affirmative defense of contributory negligence.

The case proceeded to trial the week of 15 January 2003. At trial, plaintiff testified that, as his vehicle approached the vehicle parked in the southbound lane, plaintiff maneuvered his vehicle toward the shoulder of the northbound lane. Plaintiff further testified that he was unsure of his exact speed prior to applying his vehicle's brakes, but he did not believe that he was speeding. Plaintiff also testified that, because it was Halloween and he was aware there were children in the area, he was paying careful attention prior to the accident.

Defendant testified that Main Street was narrow and barely wide enough for two cars to pass. He further testified that as he maneuvered his vehicle around the vehicle parked in the southbound lane of travel, he did not see plaintiff's vehicle approaching. Defendant testified that there were children entering and exiting the parked vehicle at the time of the accident, and he admitted that in order to maneuver his vehicle around the parked vehicle, he was forced to enter the northbound lane of Main Street.

At the close of all the evidence, both parties moved for a directed verdict on the issues of negligence and contributory negligence. The trial court denied both motions and subsequently submitted both issues to the jury. On 16 January 2003, the jury found defendant negligent and plaintiff contributorily negligent, thereby denying plaintiff any recovery for damages. On 30 April 2003, the trial court entered judgment in the case and ordered that plaintiff have and recover nothing from defendant. On 9 May 2003, plaintiff moved the trial court for judgment notwithstanding the verdict, or, in the alternative, a new trial. On 24 June 2003, the trial court denied plaintiff's motion. Plaintiff appeals.

The issues on appeal are whether the trial court erred by: (I) denying plaintiff's motion for directed verdict; and (II) denying plain-

tiff's motion for judgment notwithstanding the verdict, or, in the alternative, new trial.

[1] Plaintiff first argues that the trial court erred in denying his motion for directed verdict. Plaintiff asserts that there was insufficient evidence to submit the issue of contributory negligence to the jury. We disagree.

The purpose of a motion for directed verdict is "to test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for plaintiffs[.]" *Wallace v. Evans*, 60 N.C. App. 145, 146, 298 S.E.2d 193, 194 (1982). The evidence should be considered in the light most favorable to the nonmovant, and the nonmovant is to be given the benefit of all reasonable inferences from the evidence. *Id.* "If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict should be denied." *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991). Thus, where a defendant pleads an affirmative defense such as contributory negligence, "a motion for directed verdict is properly granted against the defendant where the defendant fails to present more than a scintilla of evidence in support of each element of his defense." *Id.*

Contributory negligence is "negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant . . . to produce the injury of which the plaintiff complains." *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967). Our Supreme Court has previously stated that "two elements, at least, are necessary to constitute contributory negligence[.]" *Construction Co. v. R.R.*, 184 N.C. 179, 180, 113 S.E. 672, 673 (1922). The defendant must demonstrate: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury. *Id.* "There must be not only negligence on the part of the plaintiff, but *contributory* negligence, a real causal connection between the plaintiff's negligent act and the injury, or it is no defense to the action." *Id.* (emphasis in original).

"If the evidence raises only a 'mere conjecture' of contributory negligence, the issue should not be submitted to the jury." *Brown v. Wilkins*, 102 N.C. App. 555, 557, 402 S.E.2d 883, 884 (1991) (citing *Radford v. Norris*, 74 N.C. App. 87, 88, 327 S.E.2d 620, 621, *disc. review denied*, 314 N.C. 117, 332 S.E.2d 483 (1985)). "However, since negligence usually involves issues of due care and reasonableness of actions under the circumstances, it is especially appropriate for

determination by the jury." *Radford*, 74 N.C. App. at 88-89, 327 S.E.2d at 621-22. "In 'borderline cases,' fairness and judicial economy suggest that courts should decide in favor of submitting issues to the jury." *Id.* at 89, 327 S.E.2d at 622 (citation omitted).

When considered in the light most favorable to defendant, the evidence in the instant case tends to show the following: (1) Main Street is a narrow road that is barely wide enough for two cars to pass; (2) as plaintiff was traveling northbound on Main Street, defendant maneuvered his vehicle around a vehicle parked in the southbound lane of Main Street; (3) there were children entering and exiting the parked vehicle at the time of the accident; (4) although plaintiff applied his brakes, plaintiff's vehicle and defendant's vehicle nevertheless collided in the northbound lane of Main Street; (5) prior to the accident, plaintiff's vehicle was traveling at approximately forty miles per hour. We conclude that this evidence does more than raise "mere conjecture" on the issue of contributory negligence.

We recognize that our Supreme Court has previously stated that "[o]rdinarily a person has no duty to anticipate negligence on the part of others. . . . [H]e has the right to assume and to act on the assumption that others will observe the rules of the road and obey the law." *Penland v. Green*, 289 N.C. 281, 283, 221 S.E.2d 365, 368 (1976). However, in *Penland*, the Court further stated that "the right to rely on this assumption is not absolute." *Id.* Thus, where "circumstances existing at the time are such as reasonably to put a person on notice that he cannot rely on the assumption, he is under a duty to exercise that care which a reasonably careful and prudent person would exercise under all the circumstances then existing." *Id.*

In the instant case, the evidence presented at trial tends to show that as plaintiff approached the scene of the accident, plaintiff was aware it was Halloween and that children might be in the area. Nevertheless, plaintiff continued to exceed the speed limit of Main Street, even though, according to defendant, children were exiting the vehicle parked in the southbound lane. We conclude that this evidence was sufficient to extinguish the presumption in plaintiff's favor and is sufficient to support the trial court's decision to submit the issue of contributory negligence to the jury.

Plaintiff maintains that defendant's evidence failed to establish a proximate causal connection between plaintiff's allegedly negligent actions and the accident. In support of this assertion, plaintiff cites *Ellis v. Whitaker*, 156 N.C. App. 192, 576 S.E.2d 138 (2003). The plain-

tiff in *Ellis* appealed the trial court's judgment finding her contributorily negligent for an accident involving defendant and denying her motions for judgment notwithstanding the verdict. This Court reversed, concluding that because "the evidence failed to establish a proximate connection between plaintiff's speed and the accident[,]" the trial court erred in submitting the issue of contributory negligence to the jury. 156 N.C. App. at 196, 576 S.E.2d at 141. We conclude that the instant case is distinguishable from *Ellis*.

In *Ellis*, the defendant-driver admitted that he did not see plaintiff's vehicle prior to impact, but nevertheless testified that he thought that the plaintiff was speeding. According to the defendant-driver, the plaintiff was traveling "approximately forty-five to fifty-five miles per hour" prior to impact, an estimate that the defendant-driver " 'arrived at . . . based upon the severity of the impact of [plaintiff's] car into [defendants'] car and what [plaintiff's] car did to [defendants'] car as a result of the impact.' " *Id.* at 194, 576 S.E.2d at 140. On appeal, this Court recognized that "[d]efendants' evidence regarding plaintiff's speed suggested negligence on her part[.]" *Id.* at 196, 576 S.E.2d at 141. However, we concluded that "whether or not she was speeding, 'plaintiff was not required to anticipate that the defendant would be negligent.' " *Id.* (quoting *Cicogna v. Holder*, 345 N.C. 488, 489, 480 S.E.2d 636, 637 (1997)). Thus, we held that "[w]ithout more, defendants failed to establish the 'real causal connection' between plaintiff's negligence and the accident necessary to prove plaintiff was contributorily negligent." *Ellis*, 156 N.C. App. at 196, 576 S.E.2d at 141.

In the instant case, the evidence presented at trial is not so speculative as to warrant a similar disposition. Officer Robinson investigated the scene and measured the visible skid marks immediately after the accident. Officer Robinson testified that although he "didn't result [it] as being a contributing factor," he estimated plaintiff's speed prior to the accident to be "approximately forty" miles per hour, or five miles over the speed limit. Officer Robinson also testified that he measured the skid marks of plaintiff's vehicle and found them to be thirty-two feet long. Defendant testified that the roadway upon which the accident occurred was "very narrow" and "barely wide enough for two cars to pass." Although plaintiff testified that at the time of the accident he was "unsure" of his speed, he further testified that he did not believe he was speeding because "I kind of have a feel for how I'm traveling as to what the vehicle is going to do." Plaintiff also testified that he saw the van parked in front of defend-

ant's vehicle, but "[f]rom the time I seen the defendant, I was right there. There was nothing else I could do."

We conclude the evidence presented at trial is sufficient to support the causal element of a contributory negligence defense. "Proximate cause is an inference of fact to be drawn from other facts and circumstances. Only when the facts are all admitted and only one inference may be drawn from them will the court declare whether an act was the proximate cause of an injury or not." *Adams v. Mills*, 312 N.C. 181, 193, 322 S.E.2d 164, 172 (1984). Unlike the facts of *Ellis*, the facts and circumstances of the instant case suggest a "real causal connection" exists between plaintiff's actions and the accident. Viewed in the light most favorable to defendant, the evidence produced at trial tends to show that plaintiff was exceeding the speed limit on a narrow road while approaching a vehicle stopped in the opposite lane of travel. Plaintiff was driving on Halloween night, and in an area where children were exiting and entering vehicles on the roadway.

"[W]hen the principles of proximate causation are applied to the instant case, the issue becomes whether a person of ordinary prudence in the plaintiff's position would have foreseen that an accident, or some generally injurious consequence would occur under the facts as they existed." *Adams*, 312 N.C. at 194, 322 S.E.2d at 172. In light of the evidence produced at trial, the jury could have found that, in the exercise of reasonable and ordinary prudence, plaintiff could have foreseen that some generally injurious consequence might occur were he to continue speeding on a narrow road toward a vehicle stopped in the opposing lane and from which children were exiting. Therefore, we conclude that the trial court did not err in denying plaintiff's motion for directed verdict on the issue of contributory negligence.

[2] Plaintiff next argues that the trial court erred in denying his post-trial motion for judgment notwithstanding the verdict, or, in the alternative, new trial. We note initially that a motion for judgment notwithstanding the verdict "is simply a renewal of a party's earlier motion for directed verdict[.]" *Kearns v. Horsley*, 144 N.C. App. 200, 207, 552 S.E.2d 1, 6, *disc. review denied*, 354 N.C. 573, 559 S.E.2d 179 (2001). Thus, " 'on appeal the standard of review for a [judgment notwithstanding the verdict] is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury.' " *Id.* at 207, 552 S.E.2d at 6 (citation omitted). Therefore, because we conclude *supra* that the trial court did not err in denying plaintiff's

motion for directed verdict, we also conclude that the trial court did not err in denying plaintiff's post-trial motion for judgment notwithstanding the verdict.

Furthermore, after reviewing the record in the instant case, we have determined that none of the causes or grounds listed under N.C. Gen. Stat. § 1A-1, Rule 59 (2003) exist in the instant case, and thus a new trial was not required. Therefore, we hold that the trial court did not err in denying defendant's post-trial motion, and accordingly, we affirm the trial court's judgment.

Affirmed.

Judges HUNTER and McCULLOUGH concur.

ROBERT M. WARD, EMPLOYEE, PLAINTIFF v. WAKE CO. BOARD OF EDUCATION, AND CAROLINA SUNROCK CORPORATION, EMPLOYERS, DEFENDANT, NORTH CAROLINA SCHOOL BOARDS INSURANCE TRUST AND ITT HARTFORD; CARRIER, DEFENDANTS

No. COA03-1578

(Filed 2 November 2004)

Appeal and Error; Workers' Compensation— appealability— modification of deputy commissioner's order

An Industrial Commission order deeming an earlier dismissal of plaintiff's workers' compensation claim to be without prejudice and allowing plaintiff one year to refile was interlocutory and not immediately appealable where the order did not resolve the issue between the parties and did not jeopardize a substantial right of defendants.

Appeal by defendants from order entered 11 July 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 September 2004.

Law Offices of James Scott Farrin, by J. Michael Mackay, for plaintiff-appellee.

Lewis & Roberts, P.L.L.C., by Bryant D. Parris, III, for defendant-appellant Sunrock/ITT.

Attorney General Roy Cooper, by Assistant Attorney General Patrick S. Wooten, for defendant-appellant Wake County Board of Education.

LEVINSON, Judge.

Defendants appeal from an order of the North Carolina Industrial Commission deeming an earlier dismissal of plaintiff's claims to be without prejudice.

The relevant factual and procedural history of this case is summarized as follows: Plaintiff suffered a compensable workplace injury on 25 August 1994. On 26 September 1995 deputy commissioner Shuping issued an opinion awarding plaintiff workers' compensation benefits, which was substantially upheld in an opinion of the Full Commission, issued on 4 April 1996, in I.C. file no. 423957. Defendant Carolina Sunrock and plaintiff Robert Ward appealed to this Court, which affirmed the Industrial Commission in an unpublished opinion filed 1 July 1997.

On 8 August 1997, while plaintiff was employed by defendant Wake County Board of Education, he allegedly suffered another workplace injury. Defendants Wake Co. Bd. of Educ. and N.C. School Boards Insurance Trust denied plaintiff's claim, and the case was heard before deputy commissioner Glenn. On 25 March 1998 Glenn ruled from the bench that defendants Sunrock and ITT be added as "potential defendant[s] in this matter" and that he would "have to combine" the files for both the earlier claim (file no. 466695, award upheld by this Court July 1997) with the claim then being heard (I.C. file no. 435240). He directed the parties to draft an order adding Sunrock and ITT as defendants. Although this order does not appear in the record, a second hearing was held before Glenn in July 1998, attended by both sets of defendants. The next order in the record is dated 16 October 2000, more than two years later. In this order Glenn directed the parties to submit a proposed opinion and award by 12 November 2000, after which date "the Opinion and Award will be written without [a submission of a proposed opinion and award]."

The record contains only one order directing plaintiff to provide discovery. In this order, filed 12 January 2001, Glenn ordered plaintiff to provide defendants, no later than 1 February 2001, with copies of "medical records, rehabilitation report[s] and employment records in their possession since July 1, 1998." Thereafter, defendants apparently moved for dismissal of plaintiff's claims, although this motion

does not appear in the record. Without conducting a hearing, Glenn issued an order on 21 May 2001 stating that:

> Upon motion of the counsel for both defendants for an Order dismissing plaintiff's claim for his failure to respond to discovery as ordered; and, not receiving any response from plaintiff as to defendants' motion to dismiss; it appears that defendants' motion should be allowed.
>
> IT IS THEREFORE ORDERED that this action shall be and is hereby dismissed as to both defendants.

Plaintiff subsequently obtained different counsel. On 21 February 2002 he filed a new Form 33 request for a hearing, which was scheduled for 26 August 2002. On 10 September 2002 Glenn entered an order removing plaintiff's claims from the hearing docket and stating:

> . . . [D]efendants moved that this matter be dismissed because the Industrial Commission did not have jurisdiction of this matter in that an Order had been entered . . . on May 21 2001, dismissing this claim pursuant to defendants' motion; plaintiff did not appeal the dismissal nor did plaintiff ask that the Order be reconsidered, therefore the Order . . . is still valid and outstanding; . . . . IT IS THEREFORE ORDERED that this case is hereby removed from the hearing docket in that it has been previously dismissed.

On 12 September 2002 plaintiff appealed the Commissioner's order. In another motion, plaintiff sought to have the dismissal of 21 May 2001 either vacated, interpreted as having been entered without prejudice, or "remanded on an interlocutory basis for full hearing on the merits." On 11 July 2003, the Industrial Commission entered an order denying plaintiff's appeal from Glenn's order removing his new claim from the docket, but ordering that Glenn's earlier dismissal of plaintiff's claims "is deemed to be WITHOUT PREJUDICE." From this order, defendants appeal.

On 22 August 2003 plaintiff filed a motion for dismissal of defendants' appeal, on the grounds that defendants have appealed from an interlocutory order not subject to immediate review.

"Interlocutory orders and judgments are those 'made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court to settle and determine the entire controversy.' Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Sharpe v. Worland*, 351

N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (quoting *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999)).

Defendants herein appeal from an order deeming the earlier dismissal of plaintiff's claims to be without prejudice, and allowing plaintiff a year from the date of the order to refile. This Court has previously held similar orders to be interlocutory. In *Johnson v. N.C. Dept. of Transportation*, 70 N.C. App. 784, 321 S.E.2d 20 (1984), a deputy commissioner of the Industrial Commission dismissed the plaintiff's claim, which had been filed under the Tort Claims Act. The plaintiff appealed to the Full Commission, which "amended [the Deputy Commissioner's] order to provide that the claim be dismissed without prejudice so that the plaintiff could file a new action based on the same claim within one year of the Commission's order." *Id.* at 785, 321 S.E.2d at 20. On appeal, defendant argued that the Commission's order, deeming the earlier dismissal to be without prejudice, constituted a final judgment because "[t]he case was not remanded to the deputy commissioner and any further proceedings must be brought with new pleadings and a new docket number." *Id.* On this basis, the defendants sought immediate review. This Court held:

> We believe that to hold that any claim brought on the same facts as were alleged in this case is a different case would be to exalt form over substance. If the plaintiff brings another action based on the same facts as those on which this case is based it will be a continuation of this case. That being so, the order of the Industrial Commission is not a final judgment disposing of the case.

Id. Although the decision was made in the context of the Tort Claims Act, we find the reasoning of *Johnson* also applicable as to workers' compensation cases. Notwithstanding that as a technical matter plaintiff may have to file a new claim form, we conclude that defendants appeal is from an interlocutory order that does not resolve the issues between the parties.

Although ordinarily a party may not appeal an interlocutory order, appeal is allowed where denial of immediate review would jeopardize a "substantial right" of the appellant. N.C.G.S. § 7A-27 (d)(1) (2003) (allowing appeal of right to this Court from "any interlocutory order or judgment" that "[a]ffects a substantial right[.]"). " 'Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must poten-

tially 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, 726, 392 S.E.2d 735, 736 (1990)).

"Our Supreme Court has stated that the possibility of having to retry an issue already litigated can be a substantial right. Accordingly, '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.' " *Naddeo v. Allstate Ins. Co.*, 139 N.C. App. 311, 317, 533 S.E.2d 501, 505 (2000) (citing *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982), and quoting *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993)). "The doctrine of *res judicata* precludes relitigation of final orders of the Full Commission and orders of a deputy commissioner which have not been appealed to the Full Commission." *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 138, 502 S.E.2d 58, 61 (1998) (citing *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 135-36, 337 S.E.2d 477, 482 (1985), *rev'd on other grounds*, 326 N.C. 476, 390 S.E.2d 136 (1990)). Defendants herein argue that the Commission's order violated principles of *res judicata*, and is, therefore, immediately appealable. We disagree.

Commissioner Glenn's order of dismissal did not specify whether it was with or without prejudice. Accordingly, it is held to be a dismissal with prejudice. *Harvey v. Cedar Creek BP*, 149 N.C. App. 873, 875, 562 S.E.2d 80, 82 (2002) ("[T]he involuntary dismissal of Plaintiff's claim entered by the deputy commissioner . . . which does not mention whether it was entered with or without prejudice, must be construed as having been entered with prejudice.").

As a dismissal with prejudice, it constitutes a final judgment on the merits. *See Hogan*, 315 N.C. at 136, 337 S.E.2d at 482 ("[An] order of dismissal granted at the instance of a party's opponent . . . was a final dismissal of [plaintiff's] claim on the merits."). In *Hogan*, as in the instant case, the plaintiff failed to appeal from a dismissal with prejudice. Several years later, he filed a new claim, and was awarded benefits. On appeal, this Court held that the dismissal of his first claim was *res judicata* with respect to the second claim. The North Carolina Supreme Court agreed that as long as the dismissal stood, a second claim was barred. However, the Court also held that the Industrial Commission possessed the "inherent power to set aside one of its former judgments" which authority is "analogous to that conferred upon the courts by N.C.R. Civ. P. 60(b)(6)." *Id.* at 137, 337 S.E.2d at 483. The Court explained that this authority:

> to provide relief against the operation of a former judgment . . . is a remedy fashioned by courts to relieve hardships which from time to time arise from a fast and hard adherence to the usual rule that judgments should not be disturbed once entered. The remedy has been characterized by a flexibility which enables it to be applied in new situations to avoid the particular injustices inherent in them. . . . [W]e believe the legislature impliedly vested such power in the Commission[.]

Id. at 139-40, 337 S.E.2d at 484.

Significantly, the *Hogan* Court held further that, if the Industrial Commission chose to exercise its authority to set aside the earlier dismissal, ***res judicata* would no longer bar plaintiff from bringing a new claim**:

> The decision whether to set aside the judgment rests, in the first instance, within the judgment of the Commission. If the Commission refuses to set aside the former judgment, Hogan's claim will be barred by *res judicata*. If, on the other hand, the Commission does set aside the former judgment, no final judgment on the merits will exist to bar this action[.]

Id. at 142, 337 S.E.2d at 477.

Thus, the "Full Commission has the inherent power, 'analogous to that conferred on courts by Rule 60(b)(6),' to set aside or modify its own orders, including final orders of the deputy commissioners[.]" *Bryant*, 130 N.C. App. at 138, 502 S.E.2d at 61 (citing *Hogan*, 315 N.C. at 129, 337 S.E.2d at 478).

In the instant case, the Commission exercised its inherent power to modify or set aside an order. The issue addressed by Commissioner Glenn was whether to grant defendants' motion for dismissal. The Full Commission did **not** "relitigate" the issue of the merits of defendants' motion for dismissal. Nor did the Commission conclude as a matter of law that the order had been entered without prejudice. Rather, the Commission **modified** the dismissal order by ordering that it be "deemed to have been entered without prejudice." The definition of the word "deemed" in the legal context is "considered" or "treated as if." BLACK'S LAW DICTIONARY 415 (6th ed. 1990); Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 254 (2d ed. 1995). Thus, the Commission modified the dismissal by ordering that it be "treated as if" it had been entered without prejudice. We conclude that the Commission's order neither implicates defend-

ants' right to avoid relitigation of a final order, nor presents other issues of *res judicata*.

We next consider whether the Commissioner's order is subject to immediate appellate review. "While 'the Rules of Civil Procedure are not strictly applicable to proceedings under the Workers' Compensation Act,' they may provide guidance in the absence of an applicable rule under the Workers' Compensation Act." *Harvey*, 149 N.C. App. at 875, 562 S.E.2d at 81 (quoting *Hogan*, 315 N.C. at 137, 337 S.E.2d at 483). In this case, the Commission exercised its inherent authority to grant relief from judgment, which the North Carolina Supreme Court has held is "analogous to" a civil court's authority under N.C.G.S. § 1A-1, Rule 60(b) (2003). Accordingly, we find it relevant that there is no general right of immediate appeal from an interlocutory order entered pursuant to Rule 60(b). *See Bailey v. Gooding*, 301 N.C. 205, 270 S.E.2d 431 (1980) (dismissing appeal from interlocutory order allowing motion to set aside default judgment). Nor is there a general right of immediate appeal from an order setting aside a prior dismissal. *See, e.g., Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978) (holding no substantial right implicated by appeal from order setting aside earlier order for summary judgment); *Yang v. Three Springs Inc.*, 142 N.C. App. 328, 542 S.E.2d 666 (2001) (dismissing as interlocutory an appeal from order rescinding earlier dismissal). We conclude that there is no general right to immediate review of the Commission's order setting aside or modifying an earlier order of a deputy Commissioner. We also conclude that no substantial right will be lost by delaying appeal until final resolution of plaintiff's claims. Defendants argue that, if their appeal is dismissed, they will "be required to incur significant litigation costs." However, "the mere avoidance of a rehearing on a motion or the avoidance of a trial when summary judgment is denied is not a 'substantial right.' " *LaFalce v. Wolcott*, 76 N.C. App. 565, 568, 334 S.E.2d 236, 238 (1985). We conclude that dismissal of the present interlocutory appeal will not jeopardize a substantial right.

Defendants Sunrock and ITT also argue that the Commission's authority to modify or set aside an earlier order of dismissal "assumes a timely appeal." Defendants cite no authority for this statement, and *Hogan* indicates otherwise. Indeed, the plaintiff therein did not appeal the involuntary dismissal of his claims, and his subsequent claim was filed after a much longer time interval than in the instant case. Defendant Wake County Board of Education makes a similar argument that, absent an appeal from the dismissal, the Commission

lacks authority to modify or set it aside. Again, *Hogan* indicates otherwise. *See also Jenkins v. Piedmont Aviation Servs.*, 147 N.C. App. 419, 557 S.E.2d 104 (2001) (holding that Commission has the authority, analogous to court's authority under Rule 60(b), to review earlier order of deputy Commissioner, even in the absence of an appeal or motion for review), *disc. review denied*, 356 N.C. 303, 570 S.E.2d 724 (2002).

We conclude that plaintiff's motion for dismissal should be granted and defendants' appeal

Dismissed.

Judges GEER and THORNBURG concur.

STATE OF NORTH CAROLINA v. VINCENT PERCY QUINN, JR.

No. COA03-1319

(Filed 2 November 2004)

1. Sexual Offenses— short-form indictments—constitutional

Short-form indictments for first-degree statutory sexual offenses meet constitutional standards.

2. Evidence— sexually explicit images—not admitted—testimony about images admitted

Testimony that defendant viewed sexually explicit photographs on his home computer was admissible in a prosecution for kidnapping and statutory sexual offense to establish defendant's motive, preparation and plan. The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice where the judge did not admit the images, the State was cautioned that the images were inflammatory, and the court took the precaution of placing them in an envelope to avoid their being shown to the jury.

3. Kidnapping— indictment alleging "and"—instruction using "or"—variance—not plain error

A variance between a kidnapping indictment alleging unlawful confinement, restraint "and" removal and the court's instruc-

tion on unlawful confinement, restraint "or" removal did not constitute plain error.

4. Kidnapping— facilitation of statutory rape—instruction on sexual offense—no plain error

There was no plain error where the indictment alleged first-degree kidnapping for the purpose of facilitating a felony, statutory rape, and the court instructed the jury on kidnapping to facilitate first-degree sexual offense, even though the jury could not reach a verdict on the statutory rape charge, because the statute requires only that the kidnapping facilitate the commission of any felony, and there was ample evidence to support the theory given in the instructions.

5. Kidnapping— of child—lack of parental consent—evidence sufficient

There was sufficient evidence of a lack of parental consent in the kidnapping of a thirteen-year-old girl. The girl testified that she did not have her parent's permission to go with defendant and did not know of defendant asking her parents about taking her to North Carolina, and the child's mother testified that she had given her permission to walk to a friend's home, but had become anxious and ultimately called the police when she did not return.

6. Sentencing— kidnapping and underlying sexual offenses—error

The trial court erred by sentencing defendant for first-degree kidnapping and for two sex offenses. Defendant cannot be punished for both the kidnapping and the underlying sexual assault.

Appeal by defendant from judgments entered 7 November 2002 by Judge A. Leon Stanback in Durham County Superior Court. Heard in the Court of Appeals 13 September 2004.

Roy A. Cooper, III, Attorney General, by Jennie Wilhelm Mau, Assistant Attorney General, for the State.

Paul Pooley, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was indicted for first degree kidnapping "for the purpose of facilitating the commission of a felony, Statutory Rape," and for two counts of first degree statutory sexual offense of a child

thirteen years old. Evidence presented at trial tended to show the following: Defendant met 13 year old "D.B." in an Internet chat room during the summer of 2001. After interacting by computer several times a week, they exchanged photos and telephone numbers. D.B. phoned defendant using either her calling card or with a calling card number provided by defendant. In July 2001, D.B. wanted to run away from her Marmaduke, Arkansas, home and made plans for defendant to pick her up near there, but defendant did not arrive. On 15 September 2001, D.B. packed a backpack and went to a park near her mother's home, where she had agreed to meet defendant, but he was not there and D.B. abandoned her plan to run away. Later that afternoon, D.B. recognized defendant from his photograph and the out-of-state license plates on his automobile, which was parked at a stop sign near her house, and "at the last second . . . decided to go with him anyway."

Defendant and D.B. traveled to North Carolina and defendant rented a motel room in Durham, where they remained from 16 September 2001 until 20 September 2001. D.B. testified that defendant fondled her breasts, penetrated her vagina with his penis and with his fingers, and that they performed oral sex on one another. Defendant left the motel to go to work each day and D.B. stepped outside only when the maids cleaned the room.

When D.B. failed to return home on 15 September 2001, her older sister revealed the Internet profile of defendant to their mother, who contacted the police. Local police notified the state police and the FBI. With the owners' consent, the FBI confiscated both D.B.'s family computer and the computer used by defendant, which was owned by his former girlfriend. The computers revealed the interaction between D.B. and defendant. On 21 September 2001, FBI agents went to the motel in Durham and spoke with D.B.; while they were there the defendant phoned and asked her to meet him at a nearby McDonald's. D.B. informed the agents and they proceeded there to arrest defendant. After having been given his *Miranda* warnings, defendant made a statement to investigators regarding the events of 15-20 September 2001.

The trial court granted the State's motion to consolidate these charges with a charge of statutory rape of the same victim by defendant in the same transaction. The jury convicted defendant of two counts of first degree sexual offense and one count of first degree kidnapping, but was unable to reach a verdict on the statutory rape charge. Defendant was sentenced to consecutive sentences of 336

months to 413 months for each first degree sexual offense charge and a consecutive sentence of 116 months to 149 months for first degree kidnapping. Defendant appeals.

Defendant brings forward eight assignments of error in five separate arguments. Defendant has not presented arguments in support of the remaining thirteen assignments of error contained in the record on appeal. Therefore, they are deemed abandoned. N.C. R. App. P. 28(b)(5).

[1] Defendant first argues that the short-form indictments for first degree statutory sexual offense fail to meet constitutional standards. In his brief he acknowledges that our courts have upheld the constitutionality of the short-form indictment; however, defendant contends that these prior holdings should be overruled in light of *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002). This argument was rejected by our Supreme Court in *State v. Hunt*, 357 N.C. 257, 270, 582 S.E.2d 593, 602, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003), which specifically cited *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982) as upholding short-form indictments charging sex offenses. Accordingly, this assignment of error is overruled.

[2] Second, defendant maintains the trial court erred and abused its discretion when it admitted testimony that defendant viewed sexually explicit photos on his home computer. We disagree. Our Supreme Court "has been liberal in allowing evidence of similar offenses in trials on sexual crime charges." *State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 300, (1996); *see also State v. Coffey*, 326 N.C. 268, 280, 389 S.E.2d 48, 55 (1990), *cert. denied* 421 S.E.2d 360 (1992) (admitting testimony concerning prior sexual act in front of a child admissible to show motive); *State v. Rael*, 321 N.C. 528, 534, 364 S.E.2d 125, 129 (1988) (permitting evidence of possession of pornography as relevant to corroborate victim's testimony). The photographs at issue here were displayed to testifying witnesses for the permissible purposes of establishing defendant's use of his girlfriend's computer and defendant's motive, preparation, and plan.

Defendant argues that even if this evidence was relevant under G. S. § 8C-1, Rule 404 (b), the trial judge abused his discretion when weighing its probative value and prejudicial effect. N.C. Gen. Stat. § 8C-1, Rule 403 (2003). "Necessarily, evidence which is probative in

the State's case will have a prejudicial effect on the defendant." *State v. Mercer*, 317 N.C. 87, 93-94, 343 S.E.2d 885, 889 (1986). The exclusion of evidence under this rule is a matter within the trial court's discretion and will only be reversed on appeal with a showing that its decision was manifestly unsupported by reason. *State v. Womble*, 343 N.C. 667, 690, 473 S.E.2d 291, 304 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d. 719 (1997). Here, the judge did not admit the images, only testimony by other users of the computer that they were not familiar with the images. The State was allowed to lay its foundation but was cautioned that the pictures were inflammatory. The trial court took the additional precaution of placing them in an envelope to avoid the images being shown to the jury. The decision to allow the testimony is not unsupported by reason and this argument is overruled.

[3,4] Third, defendant contends the trial court erred by instructing the jury on kidnapping theories not set forth in the indictment. The State concedes error, but argues it was harmless. Defendant argues that the variance between the first degree kidnapping indictment and the judge's instructions to the jury allowed conviction on theories not included in the indictment. The first degree kidnapping indictment charged that defendant

> unlawfully, willfully, and feloniously did kidnap [D.B.], a person under the age of sixteen years, by unlawfully *confining her, restraining her and removing* her from one place to another, without her consent, and for the *purpose of facilitating the commission of a felony, Statutory Rape*, and the victim was not released by the defendant in a safe place.

(Emphasis added). Defendant argues that the judge erred when he instructed the jury:

> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged dates of September 16 through September 20, 2001, the defendant unlawfully *confined, restrained or removed* [D.B.] from one place to another, and that [D.B.] had not reached her sixteenth birthday, and her parent did not consent to this confinement, restraint, or removal and that this was done for the *purpose of facilitating the defendant's commission of first degree sexual offense*, and that this confinement, restraint, or removal, was a separate and complete act independent of and apart from the felony of first degree sexual offense, and that [D.B.] had been sexually assaulted or not

released in a safe place, it would be your duty to return a verdict of first degree kidnapping.

(Emphasis added). Defendant did not object to this variance at trial, so we apply the plain error standard of review. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (adopting plain error standard of review). Plain error is error that "probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). Defendant bears the burden of showing that without the erroneous instruction, the jury would not have found him guilty. *State v. Raynor*, 128 N.C. App. 244, 247, 495 S.E.2d 176, 178 (1998).

We have previously held that a variance between an indictment charging unlawful confinement, restraint *and* removal and instructions on unlawful confinement, restraint *or* removal is not reversible error. *State v. Lancaster*, 137 N.C. App. 37, 47, 527 S.E.2d 61, 68, *disc. review denied*, 352 N.C. 680, 545 S.E.2d 723 (2000) (emphasis added). Additionally, the indictment charged defendant with kidnapping under the enumerated purpose of facilitating statutory rape. Defendant argues that because the jury could not reach a verdict on the statutory rape charge, the variance constitutes plain error. We disagree. The statute "requires only that the kidnapping facilitate the commission of any felony," *State v. Moore*, 77 N.C. App. 553, 558, 335 S.E.2d 535, 538 (1985), and it is concerned with defendant's intent, which "may be inferred from the circumstances surrounding the event and must be determined by the jury." *Id.* There was ample evidence in the record to support the theories given in the jury instructions, and to "permit the jury to find all of the elements of kidnapping present." *Id.* Accordingly, this assignment of error is overruled.

[5] Fourth, defendant claims the trial court erred in denying his motion to dismiss at the conclusion of all the evidence due to insufficiency of the evidence. Defendant argues that the State did not present legally sufficient evidence on the lack of parental consent. "The dispositive issue in reviewing a motion to dismiss on the ground of sufficiency of the evidence is whether substantial evidence exists as to each essential element of the offense charged and of the defendant being the perpetrator of that offense." *State v. Glover*, 156 N.C. App. 139, 142, 575 S.E.2d 835, 837 (2003). Substantial evidence is relevant evidence "that a reasonable mind might accept as adequate to support a conclusion." *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981). The evidence can be "direct, circumstantial, or both." *State v.*

Locklear, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). The trial court must consider the evidence "in the light most favorable to the State," and the State is entitled to every reasonable inference to be drawn from it. *State v. Bright*, 301 N.C. 243, 257, 271 S.E.2d 368, 377 (1980).

Defendant argues that D.B. did not know if she had parental permission to travel with him and her parents' failure to testify regarding their consent means the State failed to prove each element of section 14-39 of the North Carolina General Statutes. Defendant's argument is without merit.

D.B. testified that she did not have permission from her parents to go with defendant, and that to her knowledge defendant had not asked her parents to take her with him to North Carolina. Furthermore, D.B.'s mother testified that while she gave D.B. permission to walk a friend home, she told her to come back "in just a little bit." When D.B. failed to return, she got anxious, questioned D.B.'s friend and then called her husband and the police. Viewed in the light most favorable to the State, the jury could infer from this testimony a lack of parental consent. *State v. Gross*, 104 N.C. App. 97, 104, 408 S.E.2d 531, 535, *disc. review denied*, 330 N.C. 444, 412 S.E.2d 78 (1991).

[6] Finally, defendant argues the trial court committed error when sentencing defendant on both first degree kidnapping and the two sex offenses. The State concedes error. The defendant cannot be punished for both the kidnapping and the underlying sexual assault, which raised the kidnapping to the first degree. *State v. Freeland*, 316 N.C. 13, 23, 340 S.E.2d 35, 40-41 (1986). The jury returned guilty verdicts for both first degree kidnapping and the two sexual offenses, but did not specify which elements resulted in the first degree kidnapping. As a result, the ambiguous verdict must be construed in favor of the defendant. *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 706 (1986). Since we cannot determine if the same sexual acts were used by the jury to convict the defendant of first degree kidnapping, *State v. Stinson*, 127 N.C. App. 252, 257, 489 S.E.2d 182, 185-86 (1997), we remand the case to the trial court for re-sentencing for second degree kidnapping.

No error, remanded for resentencing.

Judges WYNN and McGEE concur.

MEDFORD L. AUSTIN, ADMINISTRATOR OF THE ESTATE OF MEDFORD JEROME AUSTIN, DECEASED, PLAINTIFF v. RICHARD AARON MIDGETT AND THEODORE STOCKTON MIDGETT, JR., DEFENDANTS

No. COA02-1127-2

(Filed 2 November 2004)

Insurance— uninsured motorist—determining amount due—credits for payment from other carriers

There are two determinations to be made in determining the amount due a plaintiff from an uninsured motorist policy: the limit of UIM coverage applicable to the motor vehicle and the amount plaintiff is entitled to recover under the statute. This case was remanded for a determination of the amount of loss suffered by plaintiff, which is necessary to the second determination (the parties had stipulated only that the loss was in excess of $200,000). Finally, Integon, the unnamed defendant, is not entitled to any credit by virtue of an overpayment to plaintiff by State Farm, another UIM carrier.

Appeal by unnamed defendant Integon National Insurance Company from judgment entered 21 March 2002 by Judge J. Richard Parker in Dare County Superior Court. Heard in the Court of Appeals 14 May 2003; opinion at *Austin v. Midgett*, 159 N.C. App. 416, 583 S.E.2d 405 (2003). Petition for rehearing granted on 23 September 2003.

Law Offices of Johnny S. Gaskins, by Johnny S. Gaskins, for plaintiff-appellee.

Bennett & Guthrie, P.L.L.C., by Rodney A. Guthrie, for unnamed defendant-appellant, Integon National Insurance Company.

STEELMAN, Judge.

This matter was previously heard by the Court of Appeals on 14 May 2003, and a decision was rendered in *Austin v. Midgett*, 159 N.C. App. 416, 583 S.E.2d 405 (2003). On 23 September 2003, pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure, this Court granted the petition of the unnamed defendant, Integon National Insurance Company (Integon), for rehearing. This Court granted the petition to rehear on the limited issue of the proper appli-

cation of a credit arising out of a $50,000.00 payment made by Farm Bureau in this matter.

The facts in this matter are set forth in this Court's previous opinion, *Austin v. Midgett*, 159 N.C. App. 416, 583 S.E.2d 405 (2003).

Integon contends that this Court erred in the application of the credits due to Integon as an underinsured motorist (UIM) carrier for the payments made by the primary liability insurance carrier. We agree and remand this matter to the trial court for further findings.

This issue requires the construction of N.C. Gen. Stat. § 20-279.21(b)(4), which defines the limit of underinsured motorist coverage:

> Underinsured motorist coverage is deemed to apply to the *first dollar* of an underinsured motorist coverage claim beyond amounts paid to the claimant under the exhausted liability policy. In any event, the *limit* of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the *limit* of underinsured motorist coverage applicable to the motor vehicle involved in the accident.

N.C. Gen. Stat. § 20-279.21(b)(4) (2003) (emphasis added).

In our original decision we held that the payments made under the exhausted liability policy reduced the limit of liability of the UIM carrier. While this holding was correct in terms of the total potential exposure of the UIM carrier, it resulted in an incorrect computation of the amount that the appellant Integon was required to pay to plaintiff. We now hold that there are two determinations that must be made in determining the amount due to a plaintiff from an underinsured motorist coverage policy.

First, we must determine the "limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident." N.C. Gen. Stat. § 20-279.21(b)(4). This is determined by taking Integon's policy limits for underinsured motorist coverage of $100,000.00 and subtracting the portion of the credit for the Farm Bureau policy to which Integon is entitled of $25,000.00.[1] This leaves

1. "Plaintiff accepted payment from Farm Bureau in the amount of $50,000.00, thereby exhausting the amount of recovery under Midgett's liability insurance coverage. The sum tendered by Farm Bureau was credited against any amounts paid to plaintiff by Integon and State Farm, [the two UIM carriers]. Integon and State Farm agreed to divide the credit equally, with each receiving a credit of $25,000.00." *Austin*, 159 N.C. App. at 418, 583 S.E.2d at 407.

a total of $75,000.00 of underinsured motorist coverage available to plaintiff under Integon's policy. This is the limit of Integon's exposure in this case.

Second, we must determine the amount that plaintiff is entitled to recover under the provisions of N.C. Gen. Stat. § 20-279.21(b)(4) and 20-279.21(e). Our previous opinion held that plaintiff was entitled to recover from Integon, the sum of $66,573.51 under the UIM coverage, together with any accrued prejudgment interest up to its limit of liability of $75,000.00. However, ths calculation failed to take into account the fact that plaintiff had already received $25,000.00 towards the Integon portion of the UIM claim from Farm Bureau. As Integon correctly points out, this computation results in a $25,000.00 windfall to the plaintiff.

In this matter, the parties entered into a number of stipulations. Two of these stipulations are relevant to our resolution of this case:

> 4. The amount of damages sustained by the Estate of Medford Jerome Austin exceeds the sum of two hundred thousand dollars ($200,000.00).
>
> 11. In exchange for plaintiff's covenant recited above, State Farm and Integon will consent to a Judgment in this action in favor of the plaintiff in the amount of $200,000.00.

N.C. Gen. Stat. § 20-279.21(e) provides that:

> Uninsured or underinsured motorist coverage that is provided as part of a motor vehicle liability policy shall insure that portion of a loss uncompensated by any workers' compensation law and the amount of an employer's lien determined pursuant to G.S. 97-10.2(h) or (j). In no event shall this subsection be construed to require that coverage exceed the applicable uninsured or underinsured coverage limits of the motor vehicle policy or allow a recovery for damages already paid by workers' compensation.

N.C. Gen. Stat. § 20-279.21(e) (2003). The parties stipulated the loss suffered by the estate "exceeds the sum of two hundred thousand dollars." N.C. Gen. Stat. § 20-279.21(e) provides that uninsured or underinsured motorist coverage "shall insure that portion of a loss uncompensated by any workers' compensation law[.]" In this case, we do not know the exact amount of the loss plaintiff suffered, only that it is in excess of $200,000.00. Even though the parties stipulated as to

the amount of the judgment to be entered, we cannot use this amount as a substitute for the total loss incurred. This is so because this stipulation only serves to cap the overall liability of the individual defendants and the underinsured motorist carriers, not the total loss suffered. We therefore remand this matter to the trial court to determine the amount of the total loss suffered by plaintiff. Once the trial court determines this amount, it shall compute the amount due to plaintiff from the underinsured motorist carrier, Integon, in accordance with the remainder of this opinion.

The total amount of the loss shall be reduced by the amount of workers' compensation payments received by plaintiff of $100,278.98. To this amount, there shall be added the amount of the workers' compensation lien of $33,426.00. (Under the provisions of N.C. Gen. Stat. § 20-279.21(e) the uninsured and underinsured motorist carriers are liable for the amount of this lien.) This sum shall then be reduced by the $50,000.00 payment made by the primary carrier, Farm Bureau. The figure determined shall then be divided in half because Integon and State Farm each had a $100,000.00 UIM policy. Integon shall be liable for that amount, plus any prejudgment interest applicable under the provisions of Chapter 24 of the North Carolina General Statutes, up to the limit of its underinsured motorist coverage of $75,000.00, as computed above.

Integon further argues that it is entitled to a credit for the amount that State Farm paid under its UIM policy over and above the amounts due under the above computation. The judgment of the trial court established liability of the two UIM carriers separately. State Farm elected not to appeal Judge Parker's judgment. The only matter before this Court is the appeal of Integon, and we find that Integon is not entitled to any credit by virtue of any overpayment that might possibly have been made to plaintiff by State Farm.

This matter is remanded to the Superior Court of Dare County for a determination of the total loss incurred by plaintiff as required under N.C. Gen. Stat. § 20-279.21(e) and the computation of the amount owed by Integon to plaintiff in accordance with this opinion.

Judges TIMMONS-GOODSON and HUDSON concur.

IN THE MATTER OF: APPEAL OF SCHWARTZ & SCHWARTZ, INC. FROM THE DECISION OF THE CALDWELL COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING REAL PROPERTY TAXATION FOR TAX YEAR 2002

No. COA03-1560

(Filed 2 November 2004)

Taxation— ad valorem—property valuation challenge—not a general appraisal year—incomplete record

A taxpayer challenging the valuation of an abandoned furniture factory (in a year without a general reappraisal) did not meet its burden under N.C.G.S. § 105-287.

Appeal by taxpayer from decision entered 9 May 2003 by the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 20 September 2004.

Isaacson Isaacson & Sheridan, LLP, by Desmond G. Sheridan and Jennifer N. Fountain, for taxpayer Schwartz & Schwartz, Inc.

Wilson, Lackey & Rohr, P.C., by David S. Lackey, for Caldwell County.

MARTIN, Chief Judge.

Schwartz & Schwartz, Inc. ("taxpayer") appeals from a decision of the North Carolina Property Tax Commission ("Commission") confirming the Caldwell County Board of Equalization and Review's valuation of taxpayer's property at $5,735,300.

The property subject to this appeal is an abandoned furniture plant located in the city of Lenoir, Caldwell County, North Carolina. The property contains 1,141,491 square feet of building area on approximately 43.5 acres. Caldwell County conducted a general reappraisal of all property within its jurisdiction effective 1 January 2001, and it valued the subject property at $7,871,700.

Taxpayer purchased the property on 19 July 2001 for $1,100,000. Taxpayer appealed the 2001 assessment to the 2002 Caldwell County Board of Equalization and Review ("Board"). After a hearing, the Board decreased the assessment to $5,735,300, effective 1 January 2002. Taxpayer appealed the Board's decision to the North Carolina

Property Tax Commission, arguing, *inter alia,* that the Caldwell County tax administrator used an incorrect valuation method in reaching the 2001 figure.

At the Commission hearing, the Caldwell County tax administrator testified that he used the cost valuation method to appraise the property. The cost method values property at its replacement cost less depreciation. He did not use the income method, which values property by its ability to generate income, because the property had been vacant for seven years and had little income history to consider. He did not use the comparable sales method, which looks at recent sales of similar properties, because he could not find sales that were sufficiently similar to this particular property.

Taxpayer put on evidence of similar sales the county could have considered and argued that the comparable sales approach would have provided a more accurate picture of the property's fair market value. Because much of the factory was functionally obsolete and would not be rebuilt, taxpayer claimed, replacement cost greatly overvalued its true worth. Therefore, use of the cost method constituted "an appraisal error resulting from a misapplication of the schedules, standards, and rules used in the county's most recent general reappraisal," violating G.S. § 105-287. N.C. Gen. Stat. § 105-287(a)(2).

The Property Tax Commission found, *inter alia,* that Caldwell County properly applied its schedule of values, standards, and rules to Taxpayer's property consistent with the County's appraisal of similar properties. Based on its findings, the Commission concluded that Taxpayer failed to show by competent, material, and substantial evidence that it was entitled to a change in the appraised value of the subject property under the conditions of G.S. § 105-287(a).

Caldwell County conducts general reappraisals of real property within its jurisdiction every four years. The most recent reappraisal took place in 2001; this appeal, however, involves property taxes for tax year 2002, a non-general reappraisal year. N.C. Gen. Stat. § 105-287 limits valuation adjustments between general reappraisal years, and the North Carolina Supreme Court has held that the Property Tax Commission's appellate authority is limited by this statute. *In re Allred,* 351 N.C. 1, 8, 519 S.E.2d 52, 56 (1999). N.C. Gen. Stat. § 105-287(a) states, in pertinent part:

> (a) In a year in which a general reappraisal or horizontal adjustment of real property in the county is not made, the assessor shall

increase or decrease the appraised value of real property, as determined under G.S. 105-286, to recognize a change in the property's value resulting from one or more of the reasons listed in this subsection. . . .

(1) Correct a clerical or mathematical error.

(2) Correct an appraisal error resulting from a misapplication of the schedules, standards, and rules used in the county's most recent general reappraisal or horizontal adjustment.

. . .

(3) Recognize an increase or decrease in the value of the property resulting from a factor other than one listed in subsection (b).

(b) In a year in which a general reappraisal or horizontal adjustment of real property in the county is not made, the assessor may not increase or decrease the appraised value of real property, as determined under G.S. 105-286, to recognize a change in value caused by:

(1) Normal, physical depreciation of improvements;

(2) Inflation, deflation, or other economic changes affecting the county in general; or

(3) Betterments to the property . . . .

N.C. Gen. Stat. § 105-287.

Taxpayer presented little evidence as to Caldwell County's "schedules, standards, and rules." *Id.* They were not included in the record on appeal, and the testimonial evidence regarding these schedules and standards was sparse. Our review is limited to "the record on appeal and the verbatim transcript of the proceedings." N.C. R. App. P. 9(a). Without these schedules, standards, and rules in the record before us, we cannot determine whether using the cost method of valuation instead of the comparable sales method violated the county's approved 2001 appraisal methods.

Taxpayer did present expert testimony to the Commission on the property's value using the comparable sales approach. However, our Supreme Court has held that, "the Commission's reliance upon an independent appraiser's collateral determination of the petitioners' property value, without challenge or correlation to the County's

schedules of value or the application of those schedules to the property, was in violation of the statutory requirement of section 105-287." *In re Allred*, 351 N.C. at 10, 519 S.E.2d at 57.

For this Court to reverse the Commission's decision, appellant must show that the Commission's findings were:

(1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the Commission; or

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b). Without record evidence as to the county's 2001 appraisal schedules, we are unable to determine that appellant taxpayer has met its statutory burden.

Taxpayer has also argued that a decrease in the value of similar properties combined with a purchase price at 80% less than the appraised value constituted a non-prohibited change in value under section 105-287(a)(3). We disagree. Declining property values have been found to be "economic changes affecting the county in general," which is a prohibited reason for revaluing property in a non-general reappraisal year under section 105-287(b)(2). N.C. Gen. Stat. § 105-287(b)(2); *In re Hotel L'Europe*, 116 N.C. App. 651, 654, 448 S.E.2d 865, 866 (1994), *cert. denied*, 339 N.C. 612, 454 S.E.2d 252 (1995). A purchase price of the subject property at less than the appraised value alone is not " 'a factor' from which an increase or decrease in value results within the meaning of section 105-287(a)(3)." *In re Allred*, 351 N.C. 1, 13, 519 S.E.2d 52, 59 (1999) (quoting N.C. Gen. Stat. § 105-287(a)(3)).

Because we find that taxpayer has not met its burden under G.S. § 105-287, we do not address taxpayer's further arguments.

For the reasons stated, the order of the Property Tax Commission confirming the decision of the 2002 Caldwell County Board of Equalization and Review is affirmed.

Affirmed.

Judges TIMMONS-GOODSON and HUDSON concur.

IN THE MATTER OF: MICHAEL GRAVES, PETITIONER V. CULP, INCORPORATED, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS

No. COA03-1309

(Filed 2 November 2004)

Unemployment Compensation— disqualification from unemployment benefits—improper standard of review

The trial court erred by using an improper standard of review when it set aside respondent Employment Security Commission's (ESC) disqualification of petitioner-appellee from receiving unemployment insurance benefits based on petitioner's refusal to work overtime, because: (1) the superior court should first determine if ESC's findings of fact are supported by competent evidence and if those findings sustain ESC's conclusions of law, without any need to conduct an evidentiary hearing, and the trial court may only affirm ESC's dismissal of the appeal or remand the case for consideration of the substantive issues by ESC; (2) in the instant case, the trial court received evidence, made findings concerning the completeness of the record and inadequacy of ESC procedures, and concluded that procedural omissions by ESC violated claimant's due process rights and that ESC's findings of fact were supported by negligently false or misleading testimony; and (3) claimant made no exceptions to the ESC's findings in his petition for review, nor did he allege any fraud or procedural irregularity, and thus, claimant did not preserve those issues for review by the superior court meaning the court lacked jurisdiction to address them.

Appeal by respondent from order entered 1 July 2003 by Judge Wade Barber in Alamance County Superior Court. Heard in the Court of Appeals 13 September 2004.

No brief filed by petitioner-appellee.

Deputy Chief Counsel Charles E. Monteith, Jr., for respondent-appellant Employment Security Commission of North Carolina.

No brief filed by employer-appellant.

MARTIN, Chief Judge.

Respondent-appellant Employment Security Commission of North Carolina (ESC) appeals from an order of the Alamance County Superior Court setting aside ESC's disqualification of petitioner-appellee from receiving unemployment insurance benefits and remanding the matter to the ESC.

On 19 May 2002, petitioner-appellee Michael Graves filed a claim for unemployment insurance benefits upon being terminated from his job. The matter was referred to an adjudicator who issued a determination that petitioner-appellee was discharged for misconduct connected with work and thus, was disqualified from receiving benefits pursuant to G.S. § 96-14(2). The matter was appealed to an appeals referee who made the following findings of fact pertinent to this appeal:

> 2. Claimant was discharged from this job for refusing to work overtime.
>
> 3. Claimant worked for the employer upholstery manufacturer as a laborer from August 3, 1989 until his discharge on May 13, 2002. Claimant was discharged because he failed to report to work when scheduled for three days without explanation. Those days were March 1, 9 and May 14, 2002.
>
> 4. During peak production times employees were scheduled for 12-hour work shifts as needed. Employees expected to report to work early [sic] than normal were informed of this in advance. Claimant refused to work the overtime. Claimant was allowed to have another employee take claimant's place. Claimant did this a number of times. The replacements always informed management when they were scheduled to work instead of claimant. Neither of the replacements promised to work on the dates in question.
>
> 5. When claimant could not get someone to take his place claimant informed the employer that claimant would be there when "he was supposed to be there." The employer took this to mean as scheduled but claimant meant for his regular hours.
>
> 6. Claimant was informed that his continued failure to report to work would result in his discharge. Claimant believed that the employer did not have the legal right to require him to work overtime.

Based on these findings, the appeals referee agreed with the adjudicator that petitioner-appellee was disqualified from receiving benefits pursuant to G.S. § 96-14(2) due to his refusal to work overtime. On 27 November 2002, the ESC, by and through its Chairman, adopted the findings of the appeals referee (with one minor spelling modification) and affirmed her decision. Petitioner-appellee appealed the ESC's decision to the superior court.

On 30 June 2003, the superior court issued an order finding, *inter alia*, (1) that petitioner-appellee was deprived of due process because the ESC failed to comply with its own procedures and regulations regarding the gathering of evidence and the building of a record on appeal, (2) that the ESC's findings of fact were in part based on testimony, or omitted evidence, that was either intentionally or negligently false or misleading, (3) that, as a matter of law, the record does not establish that petitioner-appellee engaged in misconduct, and (4) that the record is insufficient to enable the court to finally determine the rights of the parties. The superior court ordered petitioner-appellee's disqualification from receiving unemployment benefits to be set aside, along with all findings of fact associated with the disqualification, and remanded the matter to the ESC for reprocessing of the petitioner-appellee's claim from initiation in accordance with ESC procedures and regulations.

The ESC argues the superior court erred by utilizing an incorrect standard of review. We agree. When reviewing an ESC decision, "the findings of fact by the Commission, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." N.C. Gen. Stat. § 96-15(i) (2003). The superior court should first determine if the Commission's findings of facts are supported by competent evidence and if those facts sustain the Commission's conclusions of law. *In re Enoch*, 36 N.C. App. 255, 256, 243 S.E.2d 388, 389-90 (1978). "If the court properly confines its review to those two questions, there is no reason to conduct an evidentiary hearing." *Id.* at 257, 243 S.E.2d at 390. The trial court may only "affirm the Commission's dismissal of the appeal or remand the case for consideration of the substantive issues by the Commission." *Gilliam v. Employment Security Comm. of N.C.*, 110 N.C. App. 796, 801, 431 S.E.2d 772, 775 (1993), *disc. review denied*, 334 N.C. 620, 435 S.E.2d 334 (1993). The Commission will be upheld if there is any competent evidence to support its findings. *Celis v. Employment Security Comm.*, 97 N.C. App. 636, 640, 389 S.E.2d 434, 436 (1990).

N.C. Gen. Stat. § 96-15(h) requires that "[t]he petition for review shall explicitly state what exceptions are taken to the decision or procedure of the Commission." N.C. Gen. Stat. § 96-15(h) (2003). *Nadeau v. Employment Security Commission*, 97 N.C. App. 272, 277, 388 S.E.2d 145, 148 (1990); *In re Hagan v. Peden Steel Co.*, 57 N.C. App. 363, 364, 291 S.E.2d 308, 309 (1982).

In the present case, the trial court received evidence, made findings concerning the completeness of the record and inadequacy of the ESC procedures, and concluded that procedural omissions by the ESC violated claimant's due process rights and that the ESC's findings of fact were supported by negligently false or misleading testimony. However, claimant made no exceptions to the ESC's findings in his petition for review nor did he allege any fraud or procedural irregularity. Therefore, claimant did not preserve those issues for review by the superior court and the court lacked jurisdiction to address them. Its order setting aside the ESC's decision must be vacated and this cause remanded to the superior court for review utilizing the correct standard of review.

Vacated and remanded.

Judges WYNN and McGEE concur.

STATE OF NORTH CAROLINA v. ROGER DALE HOWELL, DEFENDANT

No. COA03-1570

(Filed 2 November 2004)

Bail and Pretrial Release— probationary sentence—appeal—conditions of release

The superior court could set conditions of release pending defendant's appeal pursuant to N.C.G.S. § 15A-536 where defendant's sentence from his conviction had been stayed pending appeal and he is not in custody. The language of the statute that defendant may be ordered "released" upon conditions means to set or make free from the supervision and control of the court as well as from imprisonment.

Appeal by defendant from order entered 27 June 2003 by Judge Timothy L. Patti in the Superior Court in Gaston County. Heard in the Court of Appeals 1 September 2004.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Leslie C. Rawls, for defendant-appellant.

HUDSON, Judge.

On 25 November 2002, a jury convicted defendant on forty-three counts of third-degree sexual exploitation of a minor. The superior court sentenced defendant to probation on 3 January 2003 and defendant appealed. While the appeal was ongoing, the State filed a Motion to Review Conditions of Release on 25 June 2003. On 27 June 2003, the trial court held a hearing and entered an order setting conditions of release pending appeal. Defendant appeals the release order, and for the reasons below, we affirm.

In June 2000, police seized defendant's computer pursuant to a search warrant and the SBI found nude or pornographic visual depictions of children on the hard drive. A grand jury indicted defendant on 7 August 2000 of multiple counts of sexual exploitation of a minor. On 10 August 2000, the superior court entered an order setting pretrial release conditions, including *inter alia*, that defendant not use or possess a computer pending trial.

After the jury found defendant guilty of forty-three counts of third-degree sexual exploitation of a minor, the superior court sentenced defendant on 3 January 2003. The court sentenced defendant to suspended terms of imprisonment and placed him on supervised probation for sixty months. Among the conditions of probation, the court required that defendant not possess a computer. Defendant appealed and because his sentence was probationary, it was stayed on appeal, pursuant to N.C. Gen. Stat. § 15A-1451 (a) (4) (2002).

During defendant's appeal, the State received information that defendant possessed a computer, whereupon officers executed a search pursuant to a warrant on 13 June 2003, and found a computer in defendant's residence. On 25 June 2003, the State filed a Motion to Review Conditions of Release, asking the court to determine if defendant had violated his conditions of release, or if none had been set, to determine and set such conditions. On 27 June 2003, the court conducted a hearing to set post-conviction release conditions pend-

ing appeal, rather than as a review of any existing conditions. The court imposed a new bond and set conditions, including the condition that defendant not possess a computer or reside in or visit any home where a computer was present.

Defendant contends that the trial court lacked authority to impose conditions of release pending his appeal. He contends that the superior court may not set conditions of release pending appeal where a defendant's probationary sentence from his conviction at trial has been stayed pending appeal and he is not in custody. We do not agree.

At the hearing on the Motion to Review Conditions, the court set conditions pursuant to N.C. Gen. Stat. § 15A-536 (2002), entitled "[r]elease after conviction in the superior court." In pertinent part, this statute provides that: "A defendant whose guilt has been established in the superior court and is either awaiting sentence or has filed an appeal from the judgment entered may be ordered released upon conditions in accordance with the provisions of this Article." N.C.G.S. § 15A-536 (a). Defendant argues that, applying its plain meaning, "release" refers only to release from incarceration and that this statute may only apply to a defendant in custody, or facing custody. Here, it is undisputed that defendant was not in custody and that his probation was stayed pending appeal.

Defendant correctly asserts that this Court must look first to the plain language of the statute to determine its meaning. *State v. Bates*, 348 N.C. 29, 34, 497 S.E.2d 276, 279 (1998). "Release" is not defined in the North Carolina statutes and defendant suggests that the Court should adopt the common usage meaning: "to set or make free." Defendant argues that, post-conviction, he cannot be set free unless he has first been incarcerated or subject to incarceration. Defendant cites no cases adopting his interpretation and we disagree.

We conclude that the plain language of N.C.G.S. § 15A-536 indicates that "release" means "to set or make free" from the supervision and control of the court, as well as from imprisonment. It is well-settled that the intent of the legislature controls statutory construction. *State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998), *cert denied* 525 U.S. 1111, 142 L. Ed. 2d 783 (1999). Here, we believe that the statute itself reveals the legislative intent to "reasonably assure the presence of the defendant when required and provide adequate protection to persons and the community." N.C.G.S. § 15A-536 (b). Defendant's proposed reading is inconsistent with this intent.

After we consider the plain language of the statute, we may look at other indications of legislative intent, including "statutes *in pari materia*" (relating to the same subject matter). *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 389 (citing *State v. Partlow*, 91 N.C. 550 (1884)). The court is authorized to set conditions pre-trial, including restrictions on travel, associations, conduct, or place of abode. N.C.G.S. § 15A-534 (a) (2002). The court's authority is not limited to persons arrested for crimes for which imprisonment may be imposed. The provision at issue here, N.C.G.S. § 15A-536, parallels and incorporates the provisions of § 15A-534, and specifically allows the court to extend through the appeal any safeguards originally implemented under § 15A-534. We do not believe the legislature would have authorized the court to set pre-trial release conditions, before conviction, but not to set conditions after conviction. This interpretation, as the State points out, is illogical.

Additionally, the term "release" is used in at least one other statute in the same article to mean release other than from imprisonment. For example, when a grand jury returns a bill of indictment as not a true bill, the court must order "release from custody, exoneration, or *release from the conditions of pretrial release*, as the case may be." N.C.G.S. § 15A-629 (emphasis added).

Although a criminal statute must be strictly construed, "the courts must nevertheless construe it with regard to the evil which it is intended to suppress." *In re Banks*, 295 N.C. at 239, 244 S.E.2d at 388 (internal citations omitted). Here, the legislature intended to address possible flight by the defendant and/or danger to the community. Strict construction of criminal statutes does not require a reviewing court to "override common sense and evident statutory purpose" or to give a statute its " 'narrowest meaning.' " *United States v. Brown*, 333 U.S. 18, 25-26, 92 L. Ed. 442, 448 (1948). Where possible, "the language of a statute will be interpreted so as to avoid an absurd consequence. . . ." *Hobbs v. Moore County*, 267 N.C. 665, 671, 149 S.E. 2d 1, 5 (1966). We conclude that to apply N.C.G.S. § 15A-536 only where the defendant is in or facing custody would lead to the absurd result that the court would have no oversight over defendants with probationary sentences on appeal. We reject this argument.

Affirmed.

Judges TYSON and GEER concur.

DOROTHY ZELLARS, PLAINTIFF v. APRIL N. MCNAIR AND TRANSIT MANAGEMENT OF CHARLOTTE, INC., DEFENDANTS

No. COA03-1429

(Filed 2 November 2004)

Jurisdiction— motion for additional time to set aside default—not a general appearance

Defendant's "motion to continue" seeking additional time to file a motion to set aside an entry of default was not a general appearance that waived service of process and vested the court with personal jurisdiction. Defendant's motion did not invoke the adjudicatory powers of the court.

Appeal by plaintiff from order entered 20 May 2003 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 October 2004.

Bollinger & Piemonte, P.C., by George C. Piemonte, for plaintiff-appellant.

Caudle & Spears, P.A., by C. Grainger Pierce, Jr. and Eric A. Rogers, for defendant-appellee April N. McNair.

Robert D. McDonnell, for defendant Transit Management of Charlotte, Inc.

MARTIN, Chief Judge.

Plaintiff filed her complaint in this action on 20 September 2001 seeking damages for injuries which she allegedly sustained when she was struck by a vehicle owned and operated by defendant April McNair on 21 September 1998. Plaintiff alleged negligence on the part of defendant McNair, as well as on the part of defendant Transit Management of Charlotte, Inc. Summons were also issued to both defendants on 20 September 2001.

On 1 October 2001, an affidavit of service was filed by plaintiff's counsel attesting to service by certified mail on defendant McNair on 22 September 2001. The affidavit and exhibit thereto showed that the summons was mailed to Defendant McNair at: 412 W. Craighead Road, Apt. B, Charlotte, NC 28206, and that it was received by an individual named Kirt Crews. No answer was filed on behalf of defendant McNair and her default was entered on 25 February 2002. Defendant

Transit Management of Charlotte, Inc. filed an answer, asserting plaintiff's contributory negligence as a defense and also seeking contribution and indemnity from defendant McNair. On 7 March 2002, the trial court administrator entered a scheduling order setting the trial of the case for 3 February 2003.

On 15 January 2003, defendant McNair, through counsel, filed a document entitled "Motion to Continue" in which she recited that she was "making a special appearance without waiving any jurisdictional defenses," asserted that she had never been served with process and lived at a different address from that to which the summons had been directed, and sought "additional time to file a motion to set aside Entry of Default already in place against her . . . ." The trial court administrator entered an order continuing the action until a later trial session.

On 31 January 2003, defendant McNair filed motions to set aside the entry of default and to dismiss the action pursuant to G.S. § 1A-1, Rules 12 (b)(2), (4) and (5) for lack of jurisdiction, insufficiency of process, and insufficiency of service of process. In her motions and an affidavit attached thereto, defendant McNair averred that at the time of the event complained of she had resided at 412 W. Craighead Road, Apt. C, rather than Apt. B, to which the summons and complaint had been mailed; that she was no relation to Kirt Crews, the person who resided at Apt. B and had signed the certified mail return receipt, and that Mr. Crews had never informed her of the civil action; and that at the time of the issuance of the summons, she had resided at 4329 Cinderella Road, Apt. 4, Charlotte, N.C. and no attempt had been made to serve her at her correct address.

By order dated 28 February 2003, the entry of default against defendant McNair was set aside. Thereafter, on 20 May 2003, the trial court granted defendant McNair's motion to dismiss. Plaintiff appeals.

Apparently conceding that no valid service of process was obtained upon defendant McNair, plaintiff-appellant argues on appeal that defendant McNair's 15 January 2003 "Motion to Continue" constituted a general appearance in the action, thereby waiving service of process and vesting the court with personal jurisdiction. After careful consideration, we reject her argument.

N.C. Gen. Stat. § 1-75.7 provides, in pertinent part:

> A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:
>
> (1) Who makes a general appearance in an action; provided, that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance.
>
> . . .

N.C. Gen. Stat. § 1-75.7 (2003). Thus, the statute provides that a court having subject matter jurisdiction may exercise personal jurisdiction over a person who has made a general appearance in the case, even though he or she has not been served with process. The determination of whether an individual has made a "general appearance" depends upon whether he or she has invoked the adjudicatory powers of the court.

> For the purposes of G.S. 1-75.7, a motion for extension of time in which to [answer] or otherwise [plead] will not constitute a general appearance; however, if the defendant by motion or otherwise invokes the adjudicatory powers of the court in any other matter not directly related to the questions of jurisdiction, he has made a general appearance and has submitted himself to the jurisdiction of the court whether he intended to or not.

Swenson v. Thibaut, 39 N.C. App. 77, 89, 250 S.E.2d 279, 288 (1978) (citations omitted).

Defendant's 15 January 2003 motion did not invoke the adjudicatory powers of the court. Though styled a "Motion to Continue," the relief sought by the motion was, in effect, no more than a request for additional time within which to "plead or otherwise answer," expressly questioning the validity of the entry of default against defendant McNair based upon invalid service of process, and preserving her jurisdictional defenses. Thus, because the purpose of the motion was clearly to obtain an extension of time to plead, pursuant to G.S. § 1-75.7, defendant's motion cannot be considered a general appearance and she did not thereby waive service of process.

No service of process was had upon defendant McNair within the times specified by G.S. § 1A-1, Rule 4(c); the action was therefore discontinued as to her. N.C. Gen. Stat. § 1A-1, Rule 4(e) (2003). Upon the issuance of additional process or endorsement of the original

process, the action would be deemed commenced on the date of such issuance or endorsement, at which time the statute of limitations would have expired. *See id.; City of Charlotte v. Noles*, 143 N.C. App. 181, 183, 544 S.E.2d 585, 587 (2001). The order dismissing plaintiff's claim against defendant McNair must therefore be affirmed.

Affirmed.

Judges TIMMONS-GOODSON and HUDSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 19 OCTOBER 2004

AMERICAN TIRE DISTRIBS., INC. v. RAMEY No. 04-336	Wilson (03CVD376)	Affirmed
BROWN v. WILKES CTY. SHERIFF'S DEP'T No. 03-1659	Ind. Comm. (I.C. 801090) (I.C. 828950)	Affirmed
BRYSON v. COOPER No. 03-1484	Haywood (03CVS552)	Affirmed
IN RE A.D.H. No. 04-430	Mecklenburg (03J778)	Reversed and remanded
IN RE D.M.R. No. 04-253	Mecklenburg (03J355)	Dismissed
IN RE M.H. No. 03-1217	Cumberland (94J767)	Affirmed
IN RE P.R.G. No. 04-126	Alamance (01J84)	Vacated
IN RE R.A.C. No. 03-1463	Buncombe (03J1)	Affirmed
IN RE S.C.S. No. 04-12	Alamance (03J58)	Affirmed
MUELLER v. BRANTLEY No. 03-1714	Pitt (02CVS3034)	Dismissed
SHERRILL v. CAROLINA CABLE CONTR'RS, INC. No. 03-1375	Ind. Comm. (I.C. 737180)	Affirmed
STATE v. ANDRADE No. 03-1703	Wilkes (03CRS2952) (03CRS2968)	Affirmed
STATE v. BELTRAN No. 04-136	Surry (01CRS51241) (01CRS51243) (01CRS51244) (01CRS51246) (01CRS51247) (01CRS51248)	Reversed and remanded
STATE v. BOSWELL No. 03-1460	Onslow (02CRS58831) (02CRS58832)	No error

STATE v. BRANDON No. 03-1132	Gaston (02CRS60315)	No error
STATE v. BROOKS No. 04-98	Mecklenburg (02CRS254023) (02CRS254024)	No error
STATE v. BROWN No. 04-395	Wake (99CRS78143)	No error
STATE v. BYERS No. 04-84	Guilford (03CRS24189) (03CRS73501)	No error
STATE v. CABRERA No. 04-46	Wake (02CRS42468) (02CRS42469) (02CRS42470) (02CRS42472)	No error in part; reversed and remanded in part
STATE v. CLARK No. 03-1610	Guilford (02CRS87132)	No error
STATE v. CLARK No. 03-1678	Onslow (02CRS56365) (02CRS56366) (02CRS56367) (02CRS56470)	No error
STATE v. DAWSON No. 03-1199	Wayne (02CRS8953) (02CRS55893)	No error
STATE v. DELK No. 04-306	Randolph (99CRS130) (99CRS131)	In case number 99CRS130, defendant's conviction of common law robbery, we find no error. In case number 99CRS131, defendant's conviction of habitual felon is reversed and remanded.
STATE v. DOCKERY No. 03-1666	Union (01CRS55566) (01CRS55571) (01CRS55574) (02CRS6462)	No error
STATE v. DORMAN No. 04-141	Orange (03CRS50720) (03CRS51197) (03CRS51200)	Affirmed

STATE v. FINCH No. 04-81	Beaufort (01CRS53111) (03CRS639)	No error in part; arrest judgment in part; and remand for resentencing
STATE v. HERNDON No. 04-274	Beaufort (02CRS51732) (02CRS51737) (02CRS51738)	Remanded for re-sentencing in part; remanded for correction of a clerical error in part
STATE v. HINES No. 03-1637	Rutherford (99CRS2126)	No error
STATE v. HOLLAND No. 03-1512	Gaston (02CRS12228) (02CRS60314)	No error
STATE v. JAMES No. 03-1432	Cleveland (02CRS55196)	Dismissed
STATE v. JOHNSON No. 04-158	Craven (02CRS57660)	No error
STATE v. JONES No. 03-951	Orange (02CRS52506)	No error
STATE v. LANE No. 04-75	Wayne (01CRS58651) (02CRS621)	No error
STATE v. LEWIS No. 03-1537	Beaufort (00CRS6153)	Affirmed
STATE v. MAYNARD No. 03-1645	Guilford (02CRS95669) (02CRS95670)	No error
STATE v. MITCHELL No. 03-1563	Mecklenburg (02CRS251843) (02CRS251844)	No error
STATE v. NINAN No. 04-122	Mecklenburg (02CRS206910) (02CRS206911) (02CRS207683) (02CRS207684)	No error
STATE v. NIXON No. 04-28	New Hanover (02CRS15408) (02CRS15409) (02CRS15411)	No error
STATE v. ODOM No. 03-600	Robeson (99CRS201)	No error

STATE v. PETTY No. 04-432	Cleveland (02CRS55098)	No error
STATE v. REID No. 04-389	Mecklenburg (01CRS25268)	Affirmed
STATE v. RICHARDS No. 04-47	Wake (01CRS56561)	Dismissed
STATE v. ROGERS No. 03-769	Wake (02CRS74191)	No error
STATE v. ROWE No. 04-80	Davidson (03CRS3417)	No error
STATE v. SANDERS No. 03-1662	Gaston (03CRS5607)	Affirmed
STATE v. SMITH No. 04-232	Richmond (01CRS53392)	Affirmed
STATE v. STEELE No. 04-173	Mecklenburg (02CRS66138) (02CRS66600)	No error; remanded for correction of clerical error in judgment
STATE v. STUART No. 04-180	Chatham (00CRS50783)	No error
STATE v. STYRON No. 04-159	Wake (00CRS8311) (00CRS8312) (00CRS77668) (00CRS8715) (00CRS8716)	No error
STATE v. TILLMAN No. 03-1427	Mecklenburg (01CRS34925) (01CRS36757) (02CRS22667)	No error
STATE v. TOSTER No. 04-169	New Hanover (02CRS10769)	No error
STATE FARM MUT. AUTO. INS. CO. v. LOCKWOOD No. 03-1534	Johnston (02CVS506)	Reversed and remanded
VT, INC. v. DODGE No. 03-1690	Mecklenburg (03CVD2296)	Affirmed

FILED 2 NOVEMBER 2004

ADAMS v. OVERCASH No. 04-109	Rowan (03CVD1569)	Affirmed
DANIELS-LESLIE v. LASTER No. 03-1580	Mecklenburg (02CVS3348)	Affirmed
IN RE T.B. No. 03-1530	Lee (02J63)	Affirmed
LOAR v. CHAVEZ No. 03-1212	Catawba (00CVD3645)	Appeal dismissed
McLEAN v. McLEAN No. 03-1154	Watauga (99CVD134)	Reversed and remanded
MITCHELL v. BROADWAY No. 04-211	Craven (02CVS223)	Dismissed
STATE v. DAVIS No. 03-881	Johnston (02CRS58914) (02CRS58915)	No error
STATE v. FAULKNER No. 04-77	Union (03CRS4349) (03CRS50552)	No error
WHITEHEAD v. PILLOWTEX No. 03-1536	Ind. Comm. (I.C. 157051)	Affirmed

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APPEAL AND ERROR—Continued

tiff's appeal under N.C.G.S. § 6-21.5. Application of that statute is confined to the trial division; Rule 34 of the North Carolina Rules of Appellate Procedure is the only proper basis for awarding expenses, including attorney fees, incurred due to an appeal. **Hill v. Hill, 63.**

Attorney fees on appeal—not a Rule 11 sanction—Attorney fees and costs in defending an appeal may only be awarded under N.C.R. App. P. 34 by an appellate court, and not by the trial court under N.C.G.S. § 1A-1, Rule 11. **Hill v. Hill, 63.**

Constitutional claim—not raised at trial—A claim of double jeopardy in a prosecution for first-degree statutory rape and second-degree forcible rape was not considered on appeal because it was not raised at trial. **State v. Fuller, 548.**

Cross-assignment of error—cross-appeal—waiver—Petitioners' failure to properly cross-appeal any error regarding the denial of their motion for attorney fees incurred in developing their takings claim pursuant to N.C.G.S. § 113A-123 waived consideration of the matter on appeal. **Williams v. N.C. Dep't of Env't & Natural Res., 86.**

Delinquency adjudication—disposition not appealed—jurisdiction—An appeal from a delinquency adjudication was dismissed for lack of jurisdiction where the notice of appeal was filed after the disposition hearing but referred only to the adjudication. Under N.C.G.S. § 7B-2602 (2003), appealable final orders in juvenile matters include orders of disposition after an adjudication, but the statute does not authorize appeals following the adjudicatory portion of the case. Nothing here indicates that the disposition order was appealed. **In re A.L., 276.**

Notice of appeal—failure of service—waiver—DSS's participation in respondents' appeal waived any objection to failure of service of the notice of appeal. DSS does not argue that it never received service of appellate entries, the notice of the appointment of appellate counsel, or the proposed record on appeal, and does not contend that it was prejudiced by any failure by respondents to properly serve the notice of appeal. **In re D.L., A.L., 574.**

Preservation of issues—double jeopardy—robbery with a dangerous weapon—taking same property from different victims—failure to object—Although defendant contends the trial court violated his double jeopardy rights by submitting both counts of robbery with a dangerous weapon to the jury where both indictments reference a taking of the same property but name different victims, this assignment of error is overruled because defendant did not object at trial on constitutional grounds. **State v. Stafford, 118.**

Preservation of issues—excluded evidence—no offer of proof—other evidence admitted—The exclusion of evidence of conduct by a murder victim was not properly preserved for appeal where defendant made no showing of what the answer would have been. Moreover, there would have been no prejudice because there was other evidence of the victim's penchant for violence. **State v. Dewberry, 177.**

Preservation of issues—failure to argue in brief—Petitioners' remaining cross-assignments of error are deemed abandoned because petitioners presented no arguments. **Williams v. N.C. Dep't of Env't & Natural Res., 86.**

CONTEMPT—Continued

willful contempt of court for failing to repay a $5,000 promissory note as required by a 1996 court order. **Meehan v. Lawrance, 369.**

Civil—failure to pay child support—The trial court did not err in a civil contempt and child support case by failing to find defendant father in contempt for his failure to pay $1,200 in child support as required in the 1996 order even though defendant paid $1,000 per month because the parties agreed to modify defendant's child support obligation and defendant did not act willfully in failing to pay the amount required by the 1996 order. **Meehan v. Lawrance, 369.**

Civil—failure to provide health insurance for minor children—The trial court did not err in a child custody and child support case by concluding that defendant father was in contempt of court for failing to provide health insurance for his minor children as required by a 1996 court order. **Meehan v. Lawrance, 369.**

CONTRACTS

Business sale—multiple documents and parties—standing to sue—The trial court erred by granting a dismissal for failure to state a claim for breach of contract in an action arising from the sale of an automobile dealership. The sale was effected with multiple documents and multiple parties and defendant argued that plaintiff lacked standing because he was not a party to two of those documents. However, plaintiff alleged that the entire agreement was fashioned from all of the documents and, moreover, showed that he is a third party beneficiary of the two documents. **Woolard v. Davenport, 129.**

CORPORATIONS

Action by minority shareholders—breach of fiduciary duty—The trial court erred by granting a dismissal for failure to state a claim for breach of fiduciary duty and unfair and deceptive trade practices arising from the sale of an automobile dealership. No facts on the face of the complaint and attached exhibits necessarily defeated those claims; the Court of Appeals has stated that minority shareholders in a closely held corporation who allege wrongful conduct and corruption by the majority shareholders may bring an individual action against those shareholders as well as a derivative action. **Woolard v. Davenport, 129.**

Apparent authority—corporate loans and guarantees—personal loan—president's signature—The trial court erred by granting summary judgment in favor of plaintiff bank on the bank's claims to recover money from defendant company after a default on a 1999 guaranty based on defendant company president's signature on the guaranty because a guaranty of a personal loan is not necessarily outside the apparent authority of an officer of a closely held corporation. **First Union Nat'l Bank v. Brown, 519.**

Piercing the corporate veil—summary judgment for individual defendant—The trial court correctly granted summary judgment for the individual defendant on a piercing the corporate veil claim in a restaurant slip and fall case. Although the individual defendant formed all of the involved corporations, the corporate formalities were observed with care, each corporation has some insurance coverage, and defendant gave clear notice of the corporation he believed was the proper defendant from his first answer. **Wood v. McDonald's Corp., 48.**

EVIDENCE

Cause of child's injuries—testimony by physician's assistant—The testimony of a physician's assistant who treated a child abuse victim about the cause of the child's injuries was properly admitted based upon the witness's 27 years of experience. Moreover, there is no record that defendant requested voir dire and no authority mandating voir dire without such a request. **State v. Allen, 139.**

Child abuse—baby bottle—A baby bottle was correctly admitted in a prosecution for felonious child abuse where there was testimony that the child's burns were round and inconsistent with the curling iron which defendant contended was the accidental cause of the injuries. Defendant did not show that the probative value was substantially outweighed by the danger of unfair prejudice. **State v. Allen, 139.**

Client's statements to attorney—hearsay—The trial court did not err by refusing to compel a witness's attorney to answer questions in a first-degree murder and assault prosecution where the statements that defendant was seeking had already been correctly excluded as hearsay. **State v. Dewberry, 177.**

Consumption of alcohol by driver—observations of officer—An officer's testimony that a DWI and second-degree murder defendant had consumed sufficient alcohol to be impaired was admissible because the officer detected the odor of alcohol in the car and on defendant's breath, observed the scene of the collision and its severity, interviewed four or five witnesses, and had been on a traffic enforcement unit for five years. **State v. Speight, 106.**

Hearsay—declaration against interest—excluded—The exclusion of hearsay in a prosecution for first-degree murder and assault was not an abuse of discretion where defendant, who was claiming self-defense, wanted to introduce testimony that a gun had been removed from the victim's car after the shooting. Defendant contended that the statements should have been admitted as a declaration against interest under N.C.G.S. § 8C-1, Rule 804 (b)(3), but the court determined that the statement was not sufficiently against the declarant's interest and that there were insufficient independent, nonhearsay indications of trustworthiness. **State v. Dewberry, 177.**

Hearsay—medical treatment or diagnosis exception—excited utterance—Statements made by defendant at a hospital that were noted by an emergency room nurse at the time defendant was being examined by a physician regarding the gun going off accidentally during a fight was not admissible under the medical diagnosis or treatment exception to the hearsay rule, and statements defendant made to his child's mother were not excited utterances where they established only the undisputed facts that defendant and the victim had an argument, that both were shot, and that defendant was bleeding. **State v. Gattis, 1.**

Hearsay—not offered for truth of matter asserted—corroboration—The trial court did not err in a possession with intent to sell and deliver marijuana case by allowing three officers to testify regarding statements made to them by another officer describing the activities of defendant and others witnessed by that officer during a surveillance operation because the testimony was not offered to prove the truth of the matters asserted therein but rather to explain the officers' conduct after they arrived on the scene. **State v. Young, 401.**

PLEADINGS—*Continued*

direct liability of the board, but instead attempted to spin the existing factual allegations to state a direct theory against the board which was not in the original complaint. **Draughon v. Harnett Cty. Bd. of Educ., 464.**

Rule 11 sanctions—amount—basis—The trial court did not abuse its discretion in the amount of Rule 11 sanctions it awarded where the court reviewed extensive affidavits itemizing defense expenses. Furthermore, while plaintiff's unsubstantiated allegation of ex parte communication between defense counsel and judges may be a matter for judicial discipline, it has no bearing on the award of reasonable attorney fees as a Rule 11 sanction. **Hill v. Hill, 63.**

Rule 11 sanctions—amount—motions to dismiss included—The trial court did not abuse its discretion by taxing plaintiff with fees and costs for defendants' motions to dismiss as a Rule 11 sanction. Plaintiff violated Rule 11 the moment he signed the complaint and expenses incurred during a motion to dismiss, whether granted or denied, are reasonable expenses incurred due to plaintiff signing and filing a frivolous complaint. **Hill v. Hill, 63.**

Rule 11 sanctions—attorney fees—findings insufficient—objective reasonableness present—The award of attorney fees against plaintiffs under N.C.G.S. § 1A-1, Rule 11 was error where the trial court did not support its conclusion that plaintiffs had violated Rule 11 with any findings, further failed to indicate which prong of the Rule 11 test plaintiffs violated, and a de novo review of the pleading does not indicate that plaintiffs or their attorneys acted without objective reasonableness when they signed the pleading. **Lincoln v. Bueche, 150.**

Rule 11 sanctions—discovery—The trial court did not abuse its discretion by awarding attorney fees as a Rule 11 sanction for discovery items and a letter that carried the file number of both this suit and an earlier, related action. **Hill v. Hill, 63.**

Rule 11 sanctions—discovery costs—Attorney fees and costs incurred during discovery as a result of plaintiff's complaint are a proper basis for an award of attorney fees and costs under Rule 11. N.C.G.S. § 1A-1, Rule 26(g) requires an attorney or unrepresented party to sign each discovery request, response, or objection, and the signature constitutes a certification parallel to that required by Rule 11. **Hill v. Hill, 63.**

Rule 11 sanctions—factual certification requirement—sufficiency of evidence—There was sufficient evidence to support the trial court's finding that plaintiff violated the factual certification requirement of Rule 11. Although plaintiff argues that the only evidence was his testimony, Rule 11 motions are based on the entire record of the case and not just the testimony and evidence presented during the hearing. **Hill v. Hill, 63.**

Rule 11 sanctions—retroactive—The trial court did not abuse its discretion by awarding Rule 11 sanctions for discovery retroactively rather than at the time of the behavior. The frivolous nature of the complaint was not discernible until after the evidence had been entered and the summary judgment granted. **Hill v. Hill, 63.**

SEXUAL OFFENSES

First-degree statutory sexual offense—instruction on attempt denied—evidence not sufficient—The trial court did not err in a prosecution for first-degree statutory sexual offense by not giving an instruction on the lesser-included offense of attempted first-degree sexual offense. Although defendant testified that he attempted vaginal intercourse (but failed due to a back spasm), no evidence was presented that defendant attempted to engage in the sexual acts required for first-degree sexual offense. **State v. Fuller, 548.**

Short-form indictments—constitutional—Short-form indictments for first-degree statutory sexual offenses meet constitutional standards. **State v. Quinn, 733.**

With child—evidence sufficient—The denial of a motion to dismiss a prosecution for first-degree sexual offense with a child was not error where the child testified that defendant forced fellatio. **State v. Fuller, 548.**

STATUTES OF LIMITATION AND REPOSE

Construction of home—fraud—willful or wanton negligence—equitable estoppel—The trial court did not err by granting defendants' motion to dismiss claims for breach of warranties, breach of implied warranty, negligence, negligent misrepresentation, breach of contract, and unfair and deceptive trade practices in the construction of a home based on expiration of the statute of repose under N.C.G.S. § 1-50(a)(5). **Wood v. BD&A Constr., L.L.C., 216.**

Conversion—withdrawal of funds without permission—The trial court did not err by concluding that plaintiff customer's conversion claim against defendant financial planning company was barred by the statute of limitations based on the fact that plaintiff did not file suit until more than three years after the pertinent transactions occurred because a discovery rule did not apply. **White v. Consolidated Planning, Inc., 283.**

Expiration of summons—summary judgment—The trial court appropriately granted summary judgment for defendant Honeycutt, a high school football coach, in an action that arose from the heatstroke death of one of his players. Although a number of alias and pluries summonses were issued, all expired without service and any subsequent action would be outside the statute of limitations. **Draughon v. Harnett Cty. Bd. of Educ., 449.**

Fraud—reasonable diligence—fiduciary—discovery rule—The trial court erred by concluding that plaintiff customer's fraud claim against defendant financial planning company was barred by the statute of limitations based on the fact that plaintiff did not file suit until more than three years after the transactions occurred because plaintiff's evidence would permit the jury to find that, as a result of defendant employee's acts of concealment, plaintiff did not fail to exercise reasonable diligence in discovering the fraud. **White v. Consolidated Planning, Inc., 283.**

Negligence—pecuniary loss—The trial court did not err by concluding that plaintiff customer's negligence claim against defendant financial planning company was barred by the statute of limitations based on the fact that plaintiff did not file suit until August 2001 which was more than three years after all but two of the pertinent transactions occurred, subject only to its claim of equitable

STATUTES OF LIMITATION AND REPOSE—Continued

estoppel. However, the two loan transactions occurring on 15 December 1998 and 22 February 1999 are not time-barred under N.C.G.S. § 1-52(5). **White v. Consolidated Planning, Inc., 283.**

Raised in supplemental answer—after summons had run—The trial court did not abuse its discretion by granting defendant Honeycutt's motion to supplement his answer to assert the statute of limitations. Honeycutt was never served, all of the defendants filed a collective answer before the statute of limitations ran, the last alias and pluries summons directed to Honeycutt expired after the statute of limitations expired, and he filed this motion. **Draughon v. Harnett Cty. Bd. of Educ., 449.**

Rescission—fraud—mistake—The trial court did not err by denying defendant's motion to dismiss plaintiff's claims seeking rescission of the execution of mortgage and loan documents based on expiration of the three-year statute of limitations under N.C.G.S. § 1-52. **Brown v. King, 267.**

Wrongful death—uninsured motorist carrier—The trial court did not err by granting summary judgment in favor of the unnamed defendant uninsured motorist carrier based on expiration of the two-year statute of limitations applicable to wrongful death actions under N.C.G.S. § 1-53(4). **Eckard v. Smith, 312.**

TAXATION

Action in superior court—time limits—jurisdiction—The trial court properly granted summary judgment for defendant Secretary of Revenue in an action to recover taxes assessed on moonshine because the time limit for filing in the courts after an unsuccessful administrative action had expired. The Court of Appeals could not use certiorari to invoke a jurisdiction which the superior court could not itself invoke. **Lee v. Tolson, 256.**

Ad valorem—exemption for charitable purposes—The Property Tax Commission did not err by determining that a Michigan nonprofit corporation that operated a residential treatment center in North Carolina for individuals with addictions, disorders, and life crises was exempt from ad valorem taxation pursuant to N.C.G.S. § 105-278.7. **In re Appeal of Pavillon Int'l, 194.**

Ad valorem—exemption for portion of property—Although Polk County contends that only the portion of a Michigan nonprofit corporation's property used wholly and exclusively for charitable purposes should be exempt from taxation based on the percentages of indigent care and need-based scholarship funds, the Court of Appeals already rejected this argument. **In re Appeal of Pavillon Int'l, 194.**

Ad valorem—ownership by charitable association or institution—The Property Tax Commission did not err by determining that a Michigan nonprofit corporation that operated a residential treatment center in North Carolina for individuals with addictions, disorders, and life crises was exempt from ad valorem taxation even though Polk County asserts the company's property was not wholly owned by a charitable association or institution. **In re Appeal of Pavillon Int'l, 194.**

Ad valorem—property valuation challenge—not a general appraisal year—incomplete record—A taxpayer challenging the valuation of an aban-

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