NORTH CAROLINA COURT OF APPEALS REPORTS

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OF
NORTH CAROLINA

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1. Appointed and sworn in 17 February 2006 to replace Evelyn W. Hill who retired 31 January 2006.
2. Appointed and sworn in 24 February 2006 to replace Wade Barber who retired 1 January 2006.
3. Reappointed and sworn in 28 January 2006.
4. Reappointed and sworn in 31 January 2006.
5. Reappointed and sworn in 9 February 2006.

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SAMUEL M. TATE	Morganton
JOHN L. WHITLEY	Wilson

1. Appointed and sworn in 15 February 2006.
2. Appointed and sworn in 24 February 2006 to replace Alice Stubbs who resigned 2 January 2006.
3. Appointed and sworn in 2 March 2006 to replace Marcia K. Stewart who resigned 31 December 2005.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF T.E.F., JUVENILE

No. COA03-1128

(Filed 16 November 2004)

Juveniles— admission—informed choice—failure to ask about satisfaction with representation

The trial court erred in a robbery with a dangerous weapon and assault with a deadly weapon case by accepting juvenile defendant's admission without conducting the full inquiry required under N.C.G.S. § 7B-2407(a), because: (1) the trial court omitted asking the question whether the juvenile was satisfied with his representation as required by N.C.G.S. § 7B-2407(a)(5), and this failure precluded the trial court from determining that the admission was the product of informed choice; (2) there is a greater burden on the State to protect children's rights in juvenile proceedings as compared to the rights of adults in criminal prosecutions; (3) the juvenile in the instant case did not sign a transcript of admission serving as evidence that the juvenile was made aware of his rights under N.C.G.S. § 7B-2407, and thus, the totality of circumstances test under *State v. Hendricks*, 138 N.C. App. 668 (2000), was not warranted; and (4) it is the duty of the trial court to make the required inquiries rather than the duty of the child to make the appropriate assertions.

Judge LEVINSON dissenting.

Appeal by juvenile from orders entered 5 May 2003 by Judge John M. Britt in Edgecombe County District Court. Heard in the Court of Appeals 25 May 2004.

Attorney General Roy Cooper, by Assistant Attorney General Judith Tillman, for the State.

Adrian M. Lapas, for juvenile-appellant.

CALABRIA, Judge.

T.E.F. (the "juvenile") seeks review of his adjudication on three counts of robbery with a dangerous weapon and one count of assault with a deadly weapon. We reverse and remand.

On 28 March 2003, the juvenile, age 14, and an adult identified as "Powell" approached three victims. The juvenile pushed one of them against a wall, removed a "hooked" knife from his pocket, placed the knife against the left side of the victim's neck and demanded money. The second victim voluntarily handed the juvenile one dollar. The juvenile then took money from the pocket of the first victim. When the juvenile demanded money from the other two victims, they gave him the rest of the money they had, and the juvenile fled with a total of twelve dollars. The juvenile was subsequently located and stated to the police he had taken the money to buy new clothes and shoes. The juvenile was charged with three counts of robbery with a dangerous weapon and one count of assault with a deadly weapon.

On 22 April 2003, during the Juvenile Delinquency Session of the District Court of Edgecombe County, the juvenile, through counsel, indicated he would admit the offenses charged. The trial court then personally addressed the juvenile with eight questions, and the juvenile answered the trial court's questions. After the trial court was informed there were no plea arrangements or discussions, the State recited a factual basis for the juvenile's admission, and the trial court adjudicated the juvenile delinquent on all counts. The juvenile was committed to the Office of Juvenile Justice for placement in a training school for a minimum of six months and a maximum not to exceed his nineteenth birthday.

On appeal, the juvenile asserts the trial court erred in accepting his admission without conducting the full inquiry required under N.C. Gen. Stat. § 7B-2407(a) (2003). Under N.C. Gen. Stat. § 7B-2407(a), the trial court must address the juvenile personally on the following required inquiries and statements:

(1) Informing the juvenile that the juvenile has a right to remain silent and that any statement the juvenile makes may be used against the juvenile;

(2) Determining that the juvenile understands the nature of the charge;

(3) Informing the juvenile that the juvenile has a right to deny the allegations;

(4) Informing the juvenile that by the juvenile's admissions the juvenile waives the juvenile's right to be confronted by the witnesses against the juvenile;

(5) *Determining that the juvenile is satisfied with the juvenile's representation*; and

(6) Informing the juvenile of the most restrictive disposition on the charge.

(Emphasis added). Pursuant to N.C. Gen. Stat. § 7B-2407(b) (2003), the trial court "may accept an admission from a juvenile only after determining that the admission is a product of informed choice." This Court has stated that the function of N.C. Gen. Stat. § 7B-2407(a) is to ensure "the trial court . . . determine[s] that the admission is a product of the juvenile's informed choice[,]" a pre-requisite under N.C. Gen. Stat. § 7B-2407(b) to the trial court's acceptance of a juvenile's admission. *In re Kenyon N.*, 110 N.C. App. 294, 297, 429 S.E.2d 447, 449 (1993) (citing N.C. Gen. Stat. § 7A-633 (1989), repealed by Act of Oct. 27, 1998, ch. 202, sec. 6, 1998 N.C. Sess. Laws 695, 742-869, and recodified with no substantive change as N.C. Gen. Stat. § 7B-2407). Accordingly, if the required "inquiries and statements [do not] . . . affirmatively appear in the record of the proceeding, . . . the adjudication of delinquency based on the admission *must be set aside*[,]" *Id.* (citation omitted) (emphasis added), and the juvenile must be permitted to replead. *In re Chavis and In re Curry and In re Outlaw*, 31 N.C. App. 579, 581, 230 S.E.2d 198, 200 (1976).

In the instant case, the trial court asked only five of the six questions required by N.C. Gen. Stat. § 7B-2407(a), omitting whether the juvenile was satisfied with his representation as required by N.C. Gen. Stat. § 7B-2407(a)(5). This failure precluded the trial court from properly determining the admission to be the product of informed choice as required by N.C. Gen. Stat. § 7B-2407(b) and this Court's

holding in *Kenyon N. Kenyon N.*, 110 N.C. App. at 298, 429 S.E.2d at 449. *See also In re Register*, 84 N.C. App. 336, 348, 352 S.E.2d 889, 895-96 (1987) (holding the trial court was precluded from accepting six juveniles' admissions of vandalizing a home because the required inquiries were incomplete; the trial court addressed the juveniles as a group on some of the required inquiries, addressed them individually on others, and failed to address any of the juveniles on two inquiries) (citing N.C. Gen. Stat. § 7A-633). Accordingly, we hold the trial court erred by accepting the juvenile's admission, and "the adjudication . . . based on the admission must be set aside." *Kenyon N.*, 110 N.C. App. at 297, 429 S.E.2d at 449.

Nonetheless, the State argues any error should be deemed harmless for two reasons. First, although the trial court failed to ask the juvenile one of the six required questions, the trial court's inquiry was sufficient to establish the juvenile's admission was the product of informed choice. Second, the juvenile's brief failed to allege prejudice or that he would have pled differently had the error not occurred. In support, the State directs our attention to two cases, *State v. Hendricks*, 138 N.C. App. 668, 531 S.E.2d 896 (2000) (finding no prejudicial error in accepting a guilty plea where the trial court failed to comply with all N.C. Gen. Stat. § 15A-1022 inquiries because the defendant signed a transcript of plea covering all the areas omitted by the trial court) and *State v. Williams*, 65 N.C. App. 472, 310 S.E.2d 83 (1983) (finding no prejudicial error in accepting a guilty plea where the trial court failed to make the required N.C. Gen. Stat. § 15A-1022 inquiries because the defendant failed to allege prejudice or that he would have pled differently).

We find the State's reliance on the cited adult criminal cases misplaced. While we note "an 'admission' in a juvenile hearing is equivalent to a guilty plea in a criminal case," *Chavis*, 31 N.C. App. at 581, 230 S.E.2d at 200; *In re Johnson*, 32 N.C. App. 492, 493, 232 S.E.2d 486, 487-88 (1977), we also recognize "there are . . . significant differences between criminal trials and juvenile proceedings." *Chavis*, 31 N.C. App. at 581, 230 S.E.2d at 200. *See also In re Burrus*, 275 N.C. 517, 529-33, 169 S.E.2d 879, 886-89 (1969) (stating "[w]hatever may be their proper classification, [juvenile proceedings] certainly are not 'criminal prosecutions' " and noting "[t]here are . . . many valid distinctions between a criminal trial and a juvenile proceeding"). This Court has long recognized that in a juvenile proceeding, as opposed to an adult criminal proceeding, "the burden upon the State to see that the child's rights [are] protected" is increased rather than

decreased. *In re Meyers*, 25 N.C. App. 555, 558, 214 S.E.2d 268, 270 (1975); *Chavis*, 31 N.C. App. at 581, 230 S.E.2d at 200. *See also State v. Fincher*, 309 N.C. 1, 24, 305 S.E.2d 685, 699 (1983) (Martin, J., concurring) (stating "[t]he state has a *greater* duty to protect the rights of a respondent in a juvenile proceeding"). *Cf. State v. Tucker*, 154 N.C. App. 653, 657, 573 S.E.2d 197, 200 (2002) (stating "[t]he juvenile system is designed to protect both the welfare of the delinquent child as well as the best interest of the State"). Given the greater burden placed on the State in a juvenile proceeding and guided by our precedent in *Kenyon N.* and *Register*, we find the State's arguments unavailing.

We feel it prudent to address the resulting consequences of the dissent's proposed analysis. First, under the dissent's analysis, we would contradict the General Assembly's clear mandate granting greater rights to children in juvenile proceedings than those guaranteed under the Due Process Clause. The dissent would have us interpret *Johnson* as standing for the proposition that our courts need not comply with the legislation passed after *Johnson* was decided. *See* An Act to Provide a Unified Juvenile Code, ch. 815, 1979 N.C. Sess. Laws 966 (effective Jan. 1, 1980). Yet, the General Assembly's post-*Johnson* legislation follows, in statutory form, the distinction between criminal and juvenile proceedings noted in *Burrus* and *Chavis*, two pre-*Johnson* decisions, by providing greater rights to children in juvenile proceedings than those guaranteed to adults in criminal prosecutions. It is well established that the General Assembly may pass legislation governing the people's rights so long as that legislation does not violate the federal or state constitutions, *Lanier, Comr. of Insurance v. Vines*, 274 N.C. 486, 495, 164 S.E.2d 161, 166 (1968); *Baker v. Martin*, 330 N.C. 331, 338-39, 410 S.E.2d 887, 891-92 (1991), and it follows that the General Assembly may mandate that a child facing juvenile adjudication be granted greater protections than those guaranteed by the federal and state constitutions to an adult facing criminal conviction. We are not persuaded that such a mandate may be ignored.

Second, the dissent's holding would import a "totality of the circumstances" test from *Hendricks* for purposes of analyzing the trial court's adherence to N.C. Gen. Stat. § 7B-2407 in taking juvenile admissions. However, we note the circumstances under which this Court applied the test in *Hendrick*s were distinct from those of the instant case because the defendant in *Hendrick*s signed a transcript of plea, which covered all the inquiries required under N.C. Gen. Stat.

§ 15A-1022. The juvenile in the instant case did not sign a transcript of admission. It is true if the juvenile had signed a transcript of admission we would have some evidence that the juvenile was made aware of his rights set out under N.C. Gen. Stat. § 7B-2407, and this evidence might then warrant following the "totality of the circumstances" test applied to the adult criminal defendant in *Hendricks*. However, application of the *Hendricks* test here, as the dissent urges, would not only apply the test for adult criminal pleas to juvenile admissions where a transcript of admission was signed, but also extend the test's application to juvenile admissions where *no* transcript of admission was signed and where the juvenile was clearly *not* presented with all the required statutory inquiries and statements.

Moreover, we respectfully disagree with the dissent's assertion that our holding rejects a "totality of the circumstances" test and "might eliminate a juvenile's opportunity to argue on appeal that although the trial court complied with the statute, the juvenile was nevertheless not competent to render a valid admission—truly an absurd result." The dissent misapprehends our holding and equates the limited statutory consideration at issue in this case with every conceivable alternative argument that might otherwise be raised by a juvenile. To clarify, our decision is concerned exclusively with those situations involving a record that affirmatively discloses noncompliance by the trial court with N.C. Gen. Stat. § 7B-2407. We do not comment on other claims a juvenile may otherwise have; nor does our holding stand for the proposition that a juvenile is limited to only those six matters required by N.C. Gen. Stat. § 7B-2407.

Third, under the dissent's holding, we would contradict this Court's binding precedent, which places a greater burden on the State to protect children's rights in juvenile proceedings, by treating a juvenile admission as if it were an adult plea of guilty. The dissent would, in essence, have us interpret this Court's holding in *Kenyon N.* as having applied a "totality of the circumstances" test and "requir[ing] reversal because 'it does not affirmatively appear from the record that [any of] the provisions of [the statute] were complied with . . . .' " More accurately, however, this Court reversed and remanded the adjudication because

> the only record evidence . . . reveals that the trial court failed to inquire of the juvenile whether he understood the nature of the charge against him and *whether he was satisfied with his representation.* The trial court also failed to inform the juvenile that he had a right to remain silent, a right to deny the charges against

> him, that by his admission he waived his right to confront the witnesses against him, and what constituted the most restrictive disposition possible on the charge against him. Thus, it does not affirmatively appear from the record *that the provisions* of [the statute] were complied with, and we are therefore unable to say that the juvenile's admission was the product of an informed choice.

Kenyon N., 110 N.C. App. at 297-98, 429 S.E.2d at 449 (emphasis added). Thus, in *Kenyon N.*, the critical inquiry was whether the trial court complied with the provisions of the statute. Upon determining the trial court had not complied, this Court reversed and remanded the adjudication without further analysis in light of the "totality of the circumstances." Moreover, unlike *Kenyon N.*, in this case, we are not confronted with a silent record where there is a lack of an affirmative showing concerning compliance with the provisions of the relevant statute. Rather, we can say with absolute certainty the trial court failed to comply with the statute. It seems anomalous to be able to reverse a judgment based upon a juvenile admission lacking an affirmative showing of statutory compliance, yet be constrained from reversing a judgment where there is an affirmative showing of statutory non-compliance.

Fourth, the dissent's holding would place the burden of protecting the child's rights during entry of a juvenile admission on the child, instead of the trial court maintaining the burden, as required by N.C. Gen. Stat. § 7B-2407. The dissent's analysis of the voluntariness of the juvenile's admission attempts to equate a trial court's *partial* compliance with the statutory requirements with *actual* compliance because the child, during the proceeding, was asked, in part, "whether he understood 'what's going on[]'. . . ." As troubling as that aspect is, the dissent goes on to imply that, because the child "was asked whether he had any further questions for his attorney or for the court[,]" his rights had been vindicated. This effectively converts the duty of the trial court to make the required inquiries into a duty on the part of the child to make the appropriate assertions, of which, presumably, he is supposed to be aware.

Similarly, the dissent would have us conclude that the juvenile's "hypothetical 'may haves[,]' [concerning disagreements about how to proceed or whether he felt he could choose not to make the admission,] do not amount to prejudice." Initially, we note that neither *Kenyon N.* nor *Register* grafted a review for prejudice into their analyses after determining statutory non-compliance. Rather, statu-

tory non-compliance *alone* made it "*impossible* for the judge to determine 'that the admission [was] a product of informed choice[,]' " *Register*, 84 N.C. App. at 348, 352 S.E.2d at 896 (emphasis added), and thus necessary to set aside the adjudication of delinquency. *Kenyon N.*, 110 N.C. App. at 297, 429 S.E.2d at 449. Moreover, it is impossible to tell from the sixteen-page transcript whether the juvenile was prejudiced as a result of the failure of the trial court to adhere to the mandates of N.C. Gen. Stat. § 7B-2407. We do know the child never unilaterally volunteered dissatisfaction with his representation, and the dissent evidently considers that sufficient. However, we cannot be certain of his satisfaction, because no one bothered to ask him. Nor do we deem it the better rule of law to impose on a child the heavy burden of maintaining his rights under the statute, when the General Assembly placed this responsibility on the trial court and mandated that the six statutory inquiries be addressed to the child in substance and on the record.

For the foregoing reasons, we hold the trial court's acceptance of the juvenile's admission, without determining the juvenile's satisfaction with his representation as required by N.C. Gen. Stat. § 7B-2407(a)(5), constituted reversible error, which necessitates setting aside the juvenile's adjudication. Accordingly, the trial court's orders are reversed, and the case is remanded for a new hearing. Having so held, we need not address the juvenile's remaining assignments of error.

Reversed and remanded.

Judge WYNN concurs.

Judge LEVINSON dissents.

LEVINSON, Judge, dissenting.

The majority unreasonably elevates form over substance when it holds that the General Assembly, in enacting N.C.G.S. § 7B-2407(a)(5) (2003), intended to grant juveniles in delinquency adjudications an inalienable right to be satisfied with counsel. As I cannot agree with the majority's novel proposition that a trial court's failure to ascertain a juvenile's satisfaction with representation while accepting an admission to a delinquency petition constitutes reversible error as a matter of law, I must dissent.

The juvenile complains that because he was not asked by the trial judge whether he was satisfied with his representation, as required by G.S. § 7B-2407(a)(5), his plea must be set aside. Although the standards of appellate review for juvenile adjudications are not spelled out by statute, I discern no reason why the standards for adult criminal cases should not guide us by analogy. The admission of a juvenile is the equivalent to a plea of guilty by an adult in a criminal prosecution. *In re Johnson*, 32 N.C. App. 492, 493, 232 S.E.2d 486, 487-88 (1977). Therefore, the analysis that pertains in adult cases for determining whether a guilty plea must be set aside is relevant here.

A juvenile admission of guilt, like a guilty plea, constitutes a waiver of the Sixth Amendment right to confront one's accusers and of the Fifth Amendment privilege against self-incrimination. *See McCarthy v. United States*, 394 U.S. 459, 466, 22 L. Ed. 2d 418, 424 (1969). For this reason, it is beyond dispute that a juvenile's admission, like a guilty plea, must be made intelligently and voluntarily. *See Boykin v. Alabama*, 395 U.S. 238, 242, 23 L. Ed. 2d 274, 279 (1969) ("It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."). "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31, 27 L. Ed. 2d 162, 168 (1970) (citations omitted).

In a juvenile adjudication for delinquency, which places the juvenile in danger of confinement, the proceedings are treated as criminal proceedings inasmuch as they must be conducted with due process in accord with the constitutional safeguards of the Fifth and Sixth Amendments. *See, e.g., In re Chavis*, 31 N.C. App. 579, 580, 230 S.E.2d 198, 199-200 (1976). These constitutional guarantees may, as in an adult proceeding, be waived in a juvenile adjudication only if done so intelligently and voluntarily; "the record must therefore affirmatively show on its face that the [juvenile's] admission was entered knowingly and voluntarily." *Id.* at 581, 230 S.E.2d at 200. Where the record is deficient in this regard, "the juvenile will be allowed to replead." *Id.* The Juvenile Code, in G.S. § 7B-2407, reflects the *Chavis* requirement that the trial court must ensure the admission is entered intelligently and voluntarily before the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right of confrontation may be validly waived.

The error in the instant case is not one of constitutional dimension. Neither the Due Process Clause nor the Sixth Amendment right to effective assistance of counsel guarantees a right that a criminal defendant be satisfied with his representation. *See Morris v. Slappy*, 461 U.S. 1, 75 L. Ed. 2d 610 (1983) (rejecting claim that the Sixth Amendment right to counsel includes "the right to a meaningful attorney-client relationship"); *United States v. Frazier-El*, 204 F.3d 553 (4th Cir. 2000). The same must be true in juvenile court, absent a clear mandate to the contrary from the General Assembly. I find no such mandate in the language of G.S. § 7B-2407, nor does the majority point to any such authority elsewhere in the Juvenile Code. Thus, "[s]o long as proceedings in the juvenile court meet the requirements of due process, they are constitutionally sound and must be upheld." *In re Burrus*, 275 N.C. 517, 529-30, 169 S.E.2d 879, 887 (1969).

In the instant case, the juvenile argues that the error is a violation not of a constitutional guarantee, but of a statutory mandate. Nevertheless, he asks this Court to find the trial court's error is reversible as a matter of law. The gravamen of his argument is that the failure to ascertain whether he was satisfied with his trial counsel undermines the trial court's finding that his admission was based on an informed and voluntary choice. In support of this contention he refers us to *United States v. Boone*, 543 F.2d 1090 (4th Cir. 1976), in which the Fourth Circuit Court of Appeals, following *McCarthy*, applied a *per se* reversal standard for violations of Rule 11 of the Federal Rules of Criminal Procedure, the federal courts' equivalent to our G.S. § 7B-2407(a). By analogy, he asks us to find the trial court's error reversible *per se*. However, this line of reasoning should be rejected for two reasons. First, Rule 11, unlike G.S. § 7B-2407(a), does not require the trial court to ask the defendant whether he was satisfied with counsel. Thus, no meaningful comparison to Rule 11 error can be made in this case. Second, the *per se* reversal standard for Rule 11 violations was superceded by a "harmless error" standard in the 1983 amendments to the rule. *See* F. R. Crim. P. 11(h) (2003) ("A variance from the requirements of this rule is harmless error if it does not affect substantial rights."). Thus, the federal courts' *per se* reversal rule of *McCarthy* is no longer good law.[1]

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1. "The one clearly expressed objective of Rule 11(h) was to end the practice, then commonly followed, of reversing automatically for any Rule 11 error, and that practice stemmed from an expansive reading of *McCarthy*." *United States v. Vonn*, 535 U.S. 55, 66, 152 L. Ed. 2d 90, 104 (2002).

Our Juvenile Code is silent on the question of the standard of review for trial court error in the application of G.S. § 7B-2407(a). However, I find no support for the argument that a failure to ask whether a juvenile is satisfied with counsel renders his admission *per se* invalid. On the contrary, the Criminal Procedure Act provides that, where an error arises not under the Constitution but by violation of statute, the standard of review is whether, had the error not been committed, a reasonable possibility exists that a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (2003). The burden of proving the error was prejudicial is on the defendant. *Id.*

I agree with the majority that the trial court's direct questioning of the juvenile as required under G.S. § 7B-2407(a) is intended to ensure that an admission is a product of the juvenile's informed choice, in compliance with the constitutional "knowing and voluntary" standard articulated in *Boykin* and its progeny. However, a juvenile's admission can be determined constitutionally sound without an inquiry into whether the juvenile was satisfied with counsel. We have never engaged in a hypertechnical application of the corresponding adult statute, N.C.G.S. § 15A-1022(a) (2003), to undermine the validity of an adult's plea of guilty entered intelligently and voluntarily under the constitutional standard of *Boykin*. Review of the entering of a guilty plea has never involved a "technical, ritualistic approach" to the trial court's compliance with statutory language, but instead, requires an examination of "the totality of the circumstances [to] determine whether non-compliance with the statute either affected defendant's decision to plead or undermined the plea's validity." *State v. Hendricks*, 138 N.C. App. 668, 670, 531 S.E.2d 896, 898 (2000) (construing G.S. § 15A-1022) (citations omitted). Even where a violation of the statute occurs, appellant must show prejudice before a plea will be set aside. *State v. McNeill*, 158 N.C. App. 96, 103, 580 S.E.2d 27, 31 (2003) (citation omitted). Indeed, in reviewing sentencing procedures for prejudicial error, our Supreme Court has observed, "[j]ustice may be served more by the substance than the form of the process. We prefer to consider each case in the light of its circumstances." *State v. Pope*, 257 N.C. 326, 334, 126 S.E.2d 126, 132 (1962).

A "totality of the circumstances" inquiry necessarily includes due consideration of the age, maturity and understanding of the juvenile. See *In re Meyers*, 25 N.C. App. 555, 558, 214 S.E.2d 268, 270 (1975) ("Although a confession is not inadmissible merely because the person making it is a minor, to be admissible it must have been voluntary,

and the age of the person confessing is an additional factor to be considered in determining voluntariness.") (citation omitted).

The juvenile cases cited by the majority apply a "totality of the circumstances" test for determining whether the record affirmatively shows that a juvenile admission was intelligent and voluntary. The majority in the instant case relies on a misreading of *In re Kenyon N.*, 110 N.C. App. 294, 429 S.E.2d 447 (1993), a case that involved a lost stenographic record of the adjudication at which the admission was entered. "The dispositive issue" was "whether the district court which initially adjudged the juvenile to be delinquent erred in accepting the juvenile's admission." *Id.* at 298, 429 S.E.2d at 449. Because no transcript could be produced of the district court hearing at which the admission was accepted, the record in *Kenyon N.* failed to show affirmatively that the juvenile had been informed that, among other things, he had a right to remain silent, that he had a right to deny the charges against him, and that by his admission he waived his right to confront the witnesses against him. There was no affirmative showing that the juvenile understood the nature of the charge, nor that he was satisfied with his representation. Thus, after reviewing all of the circumstances, we concluded the adjudication required reversal because "it does not affirmatively appear from the record that [any of] the provisions of [the statute] were complied with, and we are therefore unable to say that the juvenile's admission was the product of an informed choice. Accordingly, the order adjudicating delinquency based on the admission is vacated." *Id.* at 296, 429 S.E.2d at 449.

Likewise, in the cases consolidated as *In re Chavis*, reversal of the juveniles' pleas was required because, under the circumstances of that case, the record was deficient. 31 N.C. App. at 581, 230 S.E.2d 198 at 200 ("At a juvenile hearing an admission by a juvenile must be made knowingly and voluntarily, and this fact must affirmatively appear on the face of the record, or the juvenile will be allowed to replead.").

Applying the totality of circumstances test, the record in the instant case amply shows that T.E.F.'s admission was the result of his informed choice, satisfying the constitutional standard of *Boykin*. T.E.F., age fourteen, answered affirmatively that he understood his right to remain silent, his right to deny the allegations in the petition, and his right to confront the witnesses against him. He answered affirmatively that he understood the allegations, and that he knew he could be sent to a training school as a result of his admission. He was

asked whether he understood "what's going on," and he was asked whether he had any further questions for his attorney or for the court. The State supplied a factual basis for the allegations. T.E.F.'s counsel and his mother were both present with him in court. The record indicates the juvenile had "prior court involvement." Undoubtedly, use of a "Transcript of Admission by Juvenile," form AOC-J-410, in addition to the allocution required by G.S. § 7B-2407(a), is the better practice. But the trial court's failure to ask whether T.E.F. was satisfied with his representation, under the circumstances of this case, does not render T.E.F.'s admission constitutionally or statutorily infirm such that the adjudication must be cast aside.

The majority's rejection of a totality of circumstances test for review of the voluntariness of a juvenile admission is unsupported in law. Moreover, it undermines the majority's stated objective, as well as the constitutional mandate, of protecting the rights of juveniles. Instead of considering all the relevant factors, the majority would merely look to whether the trial court adhered to the letter of the statute. As a result, rather than enhancing protection of a juvenile's rights by ensuring appellate review of all relevant circumstances to verify the intelligent and voluntary nature of a juvenile admission, a strict reading of the majority opinion could narrow the scope of appellate review. For example, if the test for whether a juvenile admission is intelligent and voluntary is **statutory compliance** rather than **totality of the circumstances**, perhaps we need not consider the juvenile's age, maturity, or level of understanding. Strict application of the majority's approach might eliminate a juvenile's opportunity to argue on appeal that although the trial court complied with the statute, the juvenile was nevertheless not competent to render a valid admission—truly an absurd result.

Just as a trial court's strict compliance with G.S. § 7B-2407(a) cannot preclude later inquiry into the voluntariness of a juvenile admission, a failure to comply rigidly with the statute cannot, in and of itself, render the admission invalid. "[There is] no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen." *Schneckloth v. Bustamonte*, 412 U.S. 218, 224, 36 L. Ed. 2d 854, 861 (1973); *see also Wade v. Coiner*, 468 F.2d 1059, 1061 (4th Cir. 1972) (holding that due process does not require "[a] catechism of the constitutional rights that are waived by entry of a guilty plea").

The juvenile in the instant case does not argue, nor does the record suggest, that he was actually prejudiced by the error. On

appeal, he does not state that he was dissatisfied with his appointed counsel. Moreover, he does not claim that an inquiry on that point by the trial court would have affected his decision to enter an admission. In T.E.F.'s brief, it is claimed that the juvenile and his trial counsel "*may have* had severe disagreements about how to proceed or [the juvenile] *may have* felt that his lawyer *may not have* fully investigated the case so that he really felt that he had no choice but to [admit the allegations]." (emphasis added). Such hypothetical "may haves" do not amount to prejudice. The trial court's failure to ask T.E.F. whether he was satisfied with his representation, under these circumstances, does not remotely undermine the validity of his admission.

The majority, in holding that a trial court's failure to follow the language of G.S. § 7B-2407(a) to the letter results in reversible error as a matter of law, opens the door to automatic reversal of any juvenile delinquency adjudication where the trial court fails to perform a verbatim recitation of the allocution in the statute. Instead, the proper inquiry is whether, under the totality of the circumstances, the admission was entered knowingly and voluntarily. Because the record fully supports the finding that the admission was made knowingly and voluntarily, and because the facts in the instant case reveal no hint of actual prejudice, the juvenile's admission is completely valid. I vote to affirm.

IN THE MATTER OF: THE PETITION OF CENTRAL TELEPHONE COMPANY CONCERNING THE ALLOCATION FORMULA FOR CORPORATE INCOME TAX PURPOSES FOR THE YEAR ENDED DECEMBER 31, 1991

No. COA03-1313

(Filed 16 November 2004)

1. Taxation— Augmented Tax Review Board—no administrative appeal—de novo action in superior court

There is no administrative appeal process from decisions made by the Augmented Tax Review Board (ATRB). As directed by statute, the corporate tax must be paid and recovery sued for in superior court, with such challenges being heard de novo in superior court pursuant to that court's original jurisdiction. N.C.G.S. §§ 105-130.4(t)(6), 105-241.4, 105-267.

2. Taxation— no appeal from Augmented Tax Review Board— de novo action in superior court—constitutional

A corporate taxpayer challenging the apportionment formula for taxable income from the sale of businesses was afforded a fair appeal from the Augmented Tax Review Board by way of a de novo action in superior court. Petitioner's constitutional challenges would have merit only if it was left completely without redress.

3. Taxation— review of Augmented Tax Review Board denied—day in court—civil action for refund

Petitioner was not denied its day in court to contest a tax liability where the trial court dismissed for lack of subject matter jurisdiction its appeal from the ruling of the Augmented Tax Review Board. There is no right to judicial review of a decision by the ATRB, but petitioner's day in court is available through bringing a civil action for refund of the paid tax.

Appeal by petitioner Central Telephone Company from order entered 26 June 2003 by Judge A. Leon Stanback in Wake County Superior Court. Heard in the Court of Appeals 16 June 2004.

Morrison & Foerster, L.L.P., by Paul H. Frankel and Craig B. Fields, (both admitted pro hac vice); and Alston & Bird, L.L.P., by Jasper L. Cummings, Jr., for Central Telephone Company petitioner appellant.

Attorney General Roy Cooper, by Assistant Attorney General Kay Linn Miller Hobart, for defendant appellee.

McCULLOUGH, Judge.

Central Telephone Company ("petitioner") appeals from an order by the superior court dismissing, based on lack of subject matter jurisdiction, its petition for judicial review from a decision of the Augmented Tax Review Board ("ATRB"). *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2003) of the North Carolina Rules of Civil Procedure. The petitioner's appeal arises from the following undisputed facts: During the tax year ending 31 December 1991, petitioner sold two of its extraterritorial telephone companies, one located in Iowa and one in Minnesota. By following the normal apportionment formula (the "apportionment formula") for corporate North Carolina telephone operators, petitioner believed the sale of these two extraterritorial

telephone companies was improperly attributed as income for its business activities in North Carolina for the 1991 tax year. *See* N.C. Gen. Stat. § 105-130.4(n) (2003).[1] Specifically, petitioner contended:

> Under § 105-130.4(n), income of a telephone company is apportioned on the *basis of gross operating revenue.* Using the 12-31-91 Income Statement, the percentage of total income apportionable to North Carolina is 31.52%. Under normal apportionment calculation, this would result in an amount of income attributable to North Carolina of $59,602,186. North Carolina net income as reflected on the 12-31-91 income statement is $22,304,876. By following the normal apportionment formula, over two and one half times the recognized income would be attributable to business within North Carolina. The increase is directly due to the income from the sale of the Iowa and Minnesota divisions.

(Emphasis added.)

On 13 April 1992, petitioner filed a petition with the ATRB pursuant to N.C. Gen. Stat. § 105-130.4(t)(1), seeking relief from the statutory formula. The ATRB acknowledged the petition on 15 April 1992, and granted a hearing date for sometime "in the near future." Having been granted an extension for filing, petitioner filed its taxes in conformance with the apportionment formula on 16 September 1992. Petitioner made a tax payment to the Department of Revenue in the amount of $4,646,872.00.

The record shows that a hearing before the ATRB was to be set for some time between 28 December 1993 and June of 1994. Counsel for petitioner changed during this time period. The hearing date was scheduled for 9 November 1994. Centel Corporation, the parent corporation of petitioner, was then acquired by Sprint Corporation ("Sprint"), and counsel for Sprint requested the ATRB hearing be continued until "at least" January 1995. The request was granted, and on 18 April 1995, petitioner was given notice of a 9 May 1995 hearing date. After a hearing was held on this date, the ATRB rendered Administrative Decision Number 444 dated 16 June 1995, denying the

1. Apportionment formulas are designed to meet both of the following: the due process requirement that a state show a sufficient nexus between the corporate tax and the transaction within a state for which the tax is an exaction; and the proscriptions of the Commerce Clause of the Federal Constitution which permit a state to tax only that part of a corporation's net income from multistate operations which is attributable to earnings within the taxing state. *Oil Corp. v. Clayton, Comr. of Revenue*, 267 N.C. 15, 20, 147 S.E.2d 522, 526 (1966).

use of a separate accounting method or a bifurcated apportionment formula for computing petitioner's North Carolina taxable income for the tax year of 1991. The ATRB concluded petitioner failed to overcome the presumption, as set forth in N.C. Gen. Stat. § 105-130.4(t)(4) (2003), that the statutory apportionment formula reasonably attributes to North Carolina that portion of the corporation's income earned in this State.

On 17 July 1995, petitioner filed a petition for judicial review of the ATRB decision. Petitioner based the Wake County Superior Court's jurisdiction on N.C. Gen. Stat. § 105-130.4(t)(6), N.C. Gen. Stat. § 150B-43, *et seq.* (2003), and "other applicable law." The State filed a motion to dismiss this petition pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), stating the court lacked subject matter jurisdiction for such review.

As set out in the findings of fact for the Final Decision of the Secretary of Revenue denying petitioner's corporate refund which petitioner sought using alternative apportionment calculations (which the ATRB had already denied the use of), the record shows the following: On 17 July 1995, petitioner filed an amended North Carolina Corporate Income Tax Return for the tax year of 1991 using the alternative bifurcated apportionment formula presented to and rejected by the ATRB. In this, petitioner sought a refund of $4,148,422 pursuant to N.C. Gen. Stat. § 105-266.1. By letter dated 17 July 1995, petitioner sought a refund of this amount pursuant to N.C. Gen. Stat. § 105-267 (2003). By letter dated 6 July 1996, the Department of Revenue denied petitioner's request for refund pursuant to N.C. Gen. Stat. § 105-267 as untimely. However, on 21 July 2000, petitioner was allowed an administrative tax hearing under N.C. Gen. Stat. § 105-266.1 which was then held on 16 August 2000 before the Secretary of Revenue. The Secretary's Final Decision pursuant to the administrative hearing, dated 29 December 2000, denied petitioner any refund on taxes paid for the year of 1991.

Concerning its request for judicial review of the ATRB decision, at issue in this case, petitioner filed a motion for a continuance on 31 January 2001. The motion was based on the following:

> To the extent that the Tax Review Board reverses the Final Decision dated December 29, 2000 and excludes the gain from the Iowa and Minnesota Divisions from Petitioner's North Carolina apportionable tax base on any ground, this proceeding would be mooted in its entirety. If, however, the Tax Review Board declines

> to reverse the Final Decision, Petitioner would *seek judicial review of that decision pursuant to N.C. Gen. Stat. § 150B-43.*
>
> In an effort to preserve the resources of the Court and the litigants and to simplify and streamline the issues for judicial review pursuant to N.C. Gen. Stat. § 150B-43, Petitioner therefore respectfully requests a continuance of this matter from the February 12, 2001 trial calender pending resolution by the Tax Review Board of the Request for Refund pursuant to N.C. Gen. Stat. § 266.1.

This motion was granted in an order filed 7 February 2001, and the future date was not rescheduled until notice was given for the Tax Review Board's ruling on the refund request pursuant to N.C. Gen. Stat. § 105-266.1. The record does not reflect the Tax Review Board's disposition in that matter. Finally, in an order filed 26 June 2003, the State's motion to dismiss the petition for judicial review of the ATRB decision was granted.

Petitioner now raises three issues in its appeal from the trial court's dismissal. First, petitioner alleges that North Carolina General Statutes and accompanying regulations authorize an appeal to superior court from a decision of the ATRB. Second, petitioner alleges that if there is not statutory authority for judicial review of a decision by the ATRB, then petitioner's rights to an ensured system of checks and balances under the North Carolina Constitution's, and the United States Constitution's guarantees of due process, equal protection, and rights under the commerce clause have been violated. Lastly, petitioner contends affirming the trial court's dismissal will deny petitioner its day in court because the parallel case seeking refund pursuant to an alternative statutory route has also been dismissed. We now address these issues in turn.

Judicial Review of an ATRB Decision

[1] Petitioner contends there is statutory authority conferring jurisdiction for judicial review of a decision from the ATRB under the following: N.C. Gen. Stat. § 105-130.4(t)(6), N.C. Gen. Stat. § 105-241.4 (2003) as directed by N.C. Admin. Code tit. 20, r. 4.0310 (June 2004), and N.C. Gen. Stat. § 150B-43 of the Administrative Procedure Act ("APA"). We do not agree that any of these statutes provide for judicial review of a decision from the ATRB.

Before addressing the merits of the issue presented, it is helpful to understand the difference between the regular Tax Review Board

and the ATRB. The composition of the "Tax Review Board" is set out in N.C. Gen. Stat. § 105-269.2 (2003):

> The Tax Review Board shall be composed of the following members: (i) the State Treasurer, ex officio, who shall be chairman of the board; (ii) the chairman of the Utilities Commission, ex officio; (iii) a member appointed by the Governor; and (iv) the Secretary of Revenue, ex officio, who shall be a member *only for the purposes stated in G.S. 105-122 and 105-130.4.* The member whom the Governor shall appoint shall serve for a term of four years and until his successor is appointed and qualified. The first such appointment shall be made for a term beginning on July 1, 1975.

(Emphasis added.) This composition is more clearly laid out in N.C. Admin. Code tit. 20, r. 4.0103 (June 2004):

> The title "Tax Review Board" actually refers to two boards, the regular Tax Review Board and the augmented Tax Review Board. The regular Tax Review Board is composed of the following members: the State Treasurer, ex officio, who shall be the Chairman of the Tax Review Board; the Chairman of the Utilities Commission, ex officio; and a member appointed by the Governor. The augmented Tax Review Board [ATRB] includes the Secretary of Revenue in addition to the other members of the regular Tax Review Board.

The relevant purpose of the regular Tax Review Board is to hear appeals from decisions of the Secretary of Revenue as an "appellate administrative agency having quasi-judicial authority" and holding such hearings strictly on the record of appeal from the Secretary. N.C. Admin. Code tit. 20, r. 4.0201 (June 2004). The relevant purpose of the ATRB is to "consider petitions from corporate taxpayers for use of alternate allocation formulas in determining tax bases for" income taxes. N.C. Admin. Code tit. 20, r. 4.0301 (June 2004). Concerning the ATRB, there is no reference to it as an appellate administrative agency.

The ATRB composition of the Tax Review Board (with the Secretary of Revenue as one of the decision makers for the Board) is used only in specific instances as required in N.C. Gen. Stat. §§ 105-122 and 105-130.4. Therefore, as used throughout N.C. Gen. Stat. § 105-130.4(t), the "Tax Review Board" refers to the ATRB. However, because the ATRB initially reviews a corporate peti-

tioner's claim for relief from its apportionment formula, not as an "appellate administrative agency," the function of ATRB is quite different, as are the implications of its decisions. The Secretary is actually a member of the ATRB, voting in the decision, and not a party by way of appeal before the regular Tax Review Board.

Turning now to the merits of petitioner's claim. N.C. Gen. Stat. § 105-130.4(t)(1) states in relevant part:

> If any corporation believes that the method of allocation or apportionment as administered by the Secretary has operated or will so operate as to subject it to taxation on a greater portion of its income than is reasonably attributable to business or earnings within the State, it may file with the Tax Review Board a *petition* setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. . . . At least three members of the Tax Review Board shall attend any hearing pursuant to such petition. In such cases, the Tax Review Board's membership shall be augmented by the addition of the Secretary, who shall sit as a member of the Board with full power to participate in its deliberations and decisions with respect to petitions filed under the provisions of this subsection. An informal record containing in substance the evidence, contentions and arguments presented at the hearing shall be made. All members of the *augmented Tax Review Board* shall consider such evidence, contentions and arguments and the decisions thereon shall be made by a majority vote of the *augmented Board.*

(Emphasis added.) When a corporation makes such a petition, N.C. Gen. Stat. § 105-130.4(t)(2) & (3) allows for the petitioner to have the ATRB consider the following: instances where a detailed accounting "of receipts and expenditures [] reflects more clearly than the applicable allocation formula prescribed by this section the income attributable to the business within this State," N.C. Gen. Stat. § 105-130.4(t)(2); or "the corporation shows any other method of allocation than the applicable allocation formula prescribed by this section reflects more clearly the income attributable to the business within this State." N.C. Gen. Stat. § 105-130.4(t)(3). To seek redress from an adverse decision from the ATRB, N.C. Gen. Stat. § 105-130.4(t)(6) provides:

> When the Secretary asserts liability under the formula adjustment decision of the [Augmented] Tax Review Board, an aggrieved cor-

> poration *may pay the tax and bring a civil action for recovery under the provisions of Article 9.*

(Emphasis added.)

In the case at bar, in lieu of application of the apportionment formula, petitioner petitioned the ATRB to consider both a separate accounting pursuant to N.C. Gen. Stat. § 105-130.4(t)(2), or in the alternative, a bifurcated apportionment formula pursuant to N.C. Gen. Stat. § 105-130.4(t)(3). The ATRB denied the petitioner's request, finding petitioner had not overcome the statutory presumption that the appropriate apportionment formula reasonably attributes the corporation's income earned in the state. N.C. Gen. Stat. § 105-130.4(t)(4). Petitioner contends that N.C. Gen. Stat. § 105-130.4(t)(6) creates jurisdiction in the superior court to give appellate review of the ATRB's decision. We do not agree.

N.C. Gen. Stat. § 105-130.4(t)(6) directs the aggrieved taxpayer to pay any tax liability, and bring a civil action under Article 9 of North Carolina's Tax Code. Following the language of that statute, petitioner was directed to the provision of Article 9 of the tax code for an "Action to recover tax paid." N.C. Gen. Stat. § 105-241.4; *see also*, N.C. Admin. Code tit. 20, r. 4.0310.[2] In relevant part, this statute states:

> 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.

N.C. Gen. Stat. § 105-241.4. Following the language of this statute, a petitioner is directed to N.C. Gen. Stat. § 105-267 (2003) which, in relevant part, states:

> 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

2. We note that the State argued in its brief that N.C. Gen. Stat. § 105-241.4 does not apply at all to this case because it is limited to when taxpayers have received administrative review. This is not correct. We read the plain language of N.C. Gen. Stat. § 105-241.4 as a clear and alternate route of recovery that allows a taxpayer to bypass, or cut short, administrative review under N.C. Gen. Stat. § 105-241.2 and N.C. Gen. Stat. § 105-241.3, and proceed to litigate the tax liability in superior court.

> 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 all other taxes is three years after payment.
>
> The suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it is determined that all or part of the tax was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the judgment shall be collected as in other cases. The amount of taxes for which judgment is rendered in such an action shall be refunded by the State. G.S. 105-241.2 provides an alternate procedure for a taxpayer to contest a tax and is not in conflict with or superseded by this section.

Therefore, ultimately N.C. Gen. Stat. § 105-267 is the relevant "blueprint" for a petitioner's relief from an adverse decision by the ATRB. Additionally, a corporation is not required to first petition the ATRB before pursuing redress under N.C. Gen. Stat. § 105-267. *Oil Corp.*, 267 N.C. at 19, 147 S.E.2d at 526. The plain, unambiguous language of that statute requires the petitioner to pay the tax and file a civil action in superior court against the Secretary. Pursuant thereto, a "trial" is held to determine whether the Secretary's tax assessment was correct. Therefore, the superior court determines this issue pursuant to its original jurisdiction. *Duke v. Shaw, Commissioner of Revenue*, 247 N.C. 236, 240, 100 S.E.2d 506, 508-09 (1957) (where our Supreme Court explained that the only time the superior court has appellate jurisdiction in reviewing the Secretary's tax assessment is when the regular Tax Review Board, upon its review of the Secretary's final decision, renders a decision pursuant to N.C. Gen. Stat. § 105-241.2 and N.C. Gen. Stat. § 105-241.3.).

The tax regulation for "Appeals from the Decision" of the ATRB, relied on heavily by petitioner, at first blush purports to grant appellate jurisdiction in the superior court to review a decision by the ATRB. It states:

> When the Secretary of Revenue asserts liability under the formula adjustment decision of the board, an aggrieved corporation may pay the tax and bring a civil action for recovery under the provi-

> sions of G.S. 105-241.4. On appeal the superior court will view the hearing record of the augmented board. This record will consist of claimant's petition, brief, evidence, documents, and papers and the final decision of the board.

N.C. Admin. Code tit. 20, r. 4.0310. However, a close reading of this regulation reveals that it is inconsistent. The first half of the regulation requires the aggrieved corporation to pay its tax and bring a civil action pursuant to N.C. Gen. Stat. § 105-241.4. As set out above, this civil action is to be filed in accord with N.C. Gen. Stat. § 105-267 and is therefore before the superior court pursuant to its original jurisdiction. However, the last two sentences of N.C. Admin. Code tit. 20, r. 4.0310 seem to confer appellate jurisdiction upon the superior court, where the court will consider only the record of the ATRB hearing. We can find no statutory authority for the creation of this appellate jurisdiction, and it conflicts with the regulation's direction to N.C. Gen. Stat. § 105-241.4 and ultimately N.C. Gen. Stat. § 105-267. *See* N.C. Gen. Stat. § 150B-21.9(a)(1) (Regulations must be "within the authority delegated to the agency by the General Assembly."). To the extent this regulation is inconsistent with its statutory authority, we hold it to be invalid and without legal effect.

Additionally, petitioner argues that N.C. Gen. Stat. § 150B-43 of the APA provides appellate jurisdiction in the superior court over decisions by the ATRB. However, in light of the direction of N.C. Gen. Stat. § 105-130.4(t)(6) to N.C. Gen. Stat. § 105-241.4 after paying the tax liability, we do not agree. Generally, a taxpayer contesting liability has two routes in seeking relief. The first is by way of administrative review: without paying the contested tax liability, a taxpayer must obtain a hearing before the Secretary of Revenue, and assuming the party is aggrieved, the regular Tax Review Board will review the Secretary's final decision. *See* N.C. Gen. Stat. § 105-241.2. If an adverse decision from the regular Board is received, then the taxpayer may pay the tax and penalties, and appeal to the superior court for *appellate review* of the regular Board's decision pursuant to Article 4 of N.C. Gen. Stat. § 150B. N.C. Gen. Stat. § 105-241.3. This is also explained in the regulations for the regular Tax Review Board:

> Any taxpayer aggrieved by the decision of the *regular board* may either pay the tax, penalties and interest asserted to be due or may file with the Secretary of Revenue a bond in the amount due and then appeal the decision of the board to the superior court under the provisions of Article 4 of Chapter 150B of the General Statutes.

N.C. Admin. Code tit. 20, r. 4.0208 (June 2004) (emphasis added). The second route in which a taxpayer may seek relief is to bypass administrative review, pay the tax liability immediately, and bring a civil action for its recovery pursuant to N.C. Gen. Stat. § 105-267. N.C. Gen. Stat. § 105-241.4. There is also a hybrid of these two routes, such that, in lieu of appealing for superior court review of the regular Tax Review Board's decision made pursuant to N.C. Gen. Stat. § 105-241.2, the taxpayer can pay the tax and file a civil action for recovery under N.C. Gen. Stat. § 105-241.4 in the superior court's original jurisdiction.

In sum, administrative review is a process invoked by receiving a final decision from the Secretary, and appealing that decision to the regular Tax Review Board which then renders a final decision. *See Duke*, 247 N.C. at 240, 100 S.E.2d at 508-09. The administrative review route is not an option for corporations contesting the applicable apportionment formula before the ATRB, as the plain language of N.C. Gen. Stat. § 105-130.4(t)(6) requires aggrieved corporations to "pay the tax and *bring* a civil action," thus directing them to N.C. Gen. Stat. § 241.4 (emphasis added).[3] Additionally, the APA provides for a right of judicial review under its provisions when

> [a]ny person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule . . . unless adequate procedure for judicial review is provided by another statute in which case the review shall be under such other statute.

N.C. Gen. Stat. § 150B-43. Therefore, we cannot find appellate jurisdiction in the superior court for the ATRB's decision, which is allowed only in the route statutorily foreclosed to these contesting corporations and an alternative route of judicial review is available.

We find support not only in the plain language of N.C. Gen. Stat. § 105-130.4(t)(6), N.C. Gen. Stat. § 105-241.4, and N.C. Gen. Stat. § 105-267, all directing an aggrieved corporation to file a civil action, but additionally in the statutory language setting the parameters of the regular Tax Review Board when conducting hearings:

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3. This is logical when considering that it is the Secretary that augments the Tax Review Board for petitions under N.C. Gen. Stat. § 105-130.4(t). Because both the members of the regular Tax Review Board and the Secretary consider the corporation's petition before the ATRB, it would be superfluous to revert their decision back into the administrative process and before the same decision makers.

> The chairman or any two members, upon five days' notice, may call a meeting of the Board; provided, any member of the Board may waive notice of a meeting and the presence of a member of the Board at any meeting shall constitute a waiver of the notice of said meeting. A majority of the members of the Board shall constitute a quorum, and *any act or decision of a majority of the members shall constitute an act or decision of the Board, except for the purposes and under the conditions of the provisions of G.S. 105-122 and 105-130.4.*

N.C. Gen. Stat. § 105-269.2 (emphasis added). The language of this statute suggests that decisions by the ATRB pursuant to petitions brought under N.C. Gen. Stat. § 105-130.4(t), do not "constitute an act or a decision by the [Tax Review] Board." *Id.* This is consistent with the fact that aggrieved corporations are not directed to the administrative appeal route as laid out above, because as this statutory language suggests, they have not been rendered an administrative "decision" by the regular Tax Review Board which would be capable of administrative review. Once the ATRB decision to deny variation of a corporate statutory apportionment formula has been rendered, petitioner must pay its liability under the presumptive formula, though it believes such payment may be unconstitutional. Our Supreme Court has long held that N.C. Gen. Stat. § 105-267 is the appropriate procedure under which to challenge an income tax not attributable to North Carolina and which the State may not constitutionally tax. *Oil Corp.*, 267 N.C. at 20, 147 S.E.2d at 526. "The law does not contemplate that administrative boards shall pass upon constitutional questions." *Id.; see Johnston v. Gaston County*, 71 N.C. App. 707, 713, 323 S.E.2d 381, 384 (1984), *disc. review denied*, 313 N.C. 508, 329 S.E.2d 392 (1985); *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 669-70, 509 S.E.2d 165, 174 (1998). Therefore, we hold such challenges must be heard *de novo* in superior court pursuant to that court's original jurisdiction.

In conclusion, we hold that there is no administrative appeal process from decisions made by the ATRB, but, as directed by N.C. Gen. Stat. § 105-130.4(t)(6), N.C. Gen. Stat. § 105-241.4, and N.C. Gen. Stat. § 105-267, the corporate tax must be paid and recovery sued for in superior court.

All assignments of error raised by this issue are overruled.

State and Federal Constitutional Claims

[2] Next, petitioner contends that if decisions from the ATRB pursuant to N.C. Gen. Stat. § 105-130.4(t) are unreviewable by the superior court, then the statute violates petitioner's state and federal constitutional rights of due process. Petitioner is correct in its assertion that a taxpayer must be given both a fair opportunity to challenge the tax and a clear and certain remedy for any erroneous and unlawful tax collection. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 51-52, 110 L. Ed. 2d 17, 45 (1990). However, pursuant to the analysis below, we hold that petitioner has been afforded both a fair opportunity to challenge the tax and a clear and certain remedy.

"The taxpayer asserting nonliability may be afforded constitutional protection by *either* administrative or judicial review." *Kirkpatrick v. Currie, Comr. of Revenue*, 250 N.C. 213, 215, 108 S.E.2d 209, 210 (1959). There is no requirement the taxpayer be afforded both. As held above, we have determined that an aggrieved party from the ATRB decision is ultimately directed to the exclusive redress as provided in N.C. Gen. Stat. § 105-267. In *Kirkpatrick*, our Supreme Court held that "[t]his statute permitting payment to be made under protest with a right to bring an action to recover the monies so paid is constitutional and accords the taxpayer due process." *Id.*

When an aggrieved corporation petitions the ATRB to review an alleged unconstitutional application of the relevant apportionment formula, as occurred in the case at bar, they are challenging the lawfulness of the statutory apportionment formula either generally, or as applied to them. In *Coca-Cola Co. v. Coble, Sec. of Revenue*, 293 N.C. 565, 568, 238 S.E.2d 780, 783 (1977), the Supreme Court held that, where a tax is challenged as unlawful rather than excessive or incorrect, the appropriate remedy is to bring suit under N.C. Gen. Stat. § 105-267; *see also Oil Corp.*, 267 N.C. at 20, 147 S.E.2d at 526 (where the Court held N.C. Gen. Stat. § 105-267 is the appropriate statute to test the constitutionality of an income tax statute or its application). Therefore, when choosing to petition the ATRB to challenge the legality of the statutory apportionment formula for a specific tax year, an aggrieved petitioner is afforded due process in seeking relief from an adverse decision by way of a *de novo* action in superior court brought pursuant to its original jurisdiction. Petitioner's constitutional challenges would have merit only if, after

a decision by the ATRB was rendered, they were completely left without some redress.

All assignments of error raised by this issue are overruled.

Petitioner's Day in Court

[3] Petitioner contends that, in affirming the trial court's dismissal based on lack of subject matter jurisdiction, we have denied the corporation its day in court to contest the constitutionality of the tax liability asserted against them for the year of 1991. We do not agree.

Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act. *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question. *Id.* Appellate jurisdiction of the superior court is derivative from an independent tribunal of original jurisdiction. *See, e.g., In re Will of Hine*, 228 N.C. 405, 411, 45 S.E.2d 526, 530 (1947) (superior court has appellate jurisdiction derived from the clerk of the superior court in the exercise of probate jurisdiction); *In re Simmons*, 266 N.C. 702, 706-07, 147 S.E.2d 231, 234 (1966) (For the appointment and removal of guardians, the appellate jurisdiction of the superior court is derivative and appeals present for review only errors of law committed by the clerk); and *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 649, 334 S.E.2d 103, 105 (1985) (Under N.C. Gen. Stat. § 160A-388(e), the superior court, and this Court, through our derivative appellate jurisdiction, had the statutory power to review only the issue of whether a variance was properly denied. The constitutionality of the zoning ordinance from which the variance was sought was not properly part of the proceedings since the denial of the variance never addressed the validity of the zoning ordinance.).

We have held in this opinion that there is no right to judicial review of a decision by the ATRB. As provided in the analysis above, the superior court lacks any derivative appellate jurisdiction from the ATRB. Therefore, the trial court is without jurisdiction to review an appeal from the ATRB, and the petition for such review was properly dismissed. Petitioner's day in court was available pursuant to N.C. Gen. Stat. § 105-267, in the superior court's original jurisdiction, by bringing a civil action against the Secretary for a refund of the paid income tax. The record indicates that petitioner has initiated such a claim. Issues related to that action, specifically as to whether or not

it was timely filed, are not before this Court, and we have no jurisdiction to review them in this appeal. Petitioner's day in court on those issues should be raised in a *de novo* hearing in superior court, or on appeal from any final decision from that court.

After careful consideration of the issues raised by petitioner properly before our Court, we affirm the trial court's dismissal of this case based on its lack of subject matter jurisdiction to review a decision by the ATRB.

Affirmed.

Judges McGEE and ELMORE concur.

JACOB E. MILES, ET AL., PLAINTIFFS v. CAROLINA FOREST ASSOCIATION, DEFENDANT

No. COA03-1329

(Filed 16 November 2004)

Contracts; Deeds— implied in fact contract—assessments for maintenance of common areas and roads in subdivision

The trial court did not err by directing verdict (more properly a motion to involuntarily dismiss under N.C.G.S. § 1A-1, Rule 41(b) for a nonjury trial) in favor of defendant subdivision association based on its conclusion that an implied in fact contract existed between defendant and plaintiffs, the owners of undeveloped subdivision lots, for plaintiffs to pay fees and assessments for maintenance, upkeep and operation of the roads, common areas, and recreational facilities within the subdivision, because: (1) contrary to plaintiffs' assertion, an implied contract does not breathe new life into the pertinent expired covenant, but instead the terms of the expired covenant evidence the terms of an implied contract; (2) the statute of frauds was not implicated in this instance as no interest in land was at issue since the implied contract claim is one for services rendered pursuant to an agreement with these plaintiffs; (3) plaintiffs' conduct was consistent with the existence of a contract implied in fact when plaintiffs were assessed specific fees for benefits to their unimproved properties, these benefits protected both the access to and the value of their properties, plaintiffs were on clear notice that these

benefits were being incurred and approximately half of the plaintiffs actually voted for the amendments which included consent to pay the assessment fees for the exact benefits at issue in this case, and plaintiffs' attempt to stop payment on these known benefits without more is tantamount to breach of that contract; and (4) any issue concerning whether the value of the services rendered as damages was adequately assessed and attributed to plaintiffs was not before the Court of Appeals for review.

Appeal by plaintiffs from judgment entered 2 June 2003 by Judge Russell G. Walker, Jr., in Montgomery County Superior Court. Heard in the Court of Appeals 16 June 2004.

Fisher Clinard & Cornwell, P.L.L.C., by Shane T. Stutts, for plaintiff appellants.

Hill, Evans, Duncan, Jordan, & Beatty, P.L.L.C., by Karl N. Hill, Jr., for defendant appellee.

McCULLOUGH, Judge.

This case arose out of a dispute between a subdivision association, Carolina Forest Association ("CFA"), and owners of undeveloped property in the subdivision ("plaintiffs"). CFA, by way of counterclaim, sought payments of certain fees and assessments they contended were agreed to by plaintiffs, and which were to be used for improvements to common areas and roads in the subdivision. Plaintiffs objected to paying such fees and assessments, believing themselves neither bound to do so under the law or in equity. The parties waived trial by jury.

The underlying facts are these: On 1 June 1970, the land development company Russwood, Incorporated ("Russwood") prepared covenants and restrictions (the "declarations") to run with Carolina Forest Subdivision, a gated community developed in Montgomery County. These declarations were recorded on 8 July 1970 and included the requirement that each lot owner maintain membership in and abide by the rules of Carolina Forest Association, Inc. The declarations contain the following paragraph which limited the duration of the covenants and restrictions to 1 January 1990:

10. These restrictions and covenants run with the land, and shall bind the PURCHASERS, their heirs, executors, administrators, personal representatives and assigns, and if any of them shall vio-

> late or attempt to violate any of the covenants or restrictions herein contained, it shall be lawful for any person(s) or corporation(s) owning any such lots in the sub-division to prosecute any proceedings at law or in equity against those violating or attempting to violate any such covenants or restrictions and either to prevent him, them or it from doing so, or to recover damages for such violation. All of the restrictions, conditions, covenants and agreements contained herein shall continue until January 1, 1990, except that they may be changed, altered, amended or revoked in whole or in part by the record owners of the lots in the subdivision whenever the individual and corporate record owners of at least 2/3 of the said platted lots so agree in writing. Provided, however, that no changes shall be made which might violate the purposes set forth in Restrictions No. 1 [limiting lots to residential purposes generally] and No. 8 [providing a perpetual easement and rights of ingress and egress for utility lines]. Any invalidation of any one of these covenants and restrictions shall in no way affect any other of the provisions thereof which shall hereafter remain in full force and effect.

Russwood then conveyed certain land, rights and obligations to CFA by deed which was recorded on 16 August 1973. CFA then sold Carolina Forest lots under these declarations to plaintiffs at various times.

As 1 January 1990 approached, CFA requested plaintiffs' consent in writing to amend declaration No. 10 to extend beyond its expiration. Of the 906 lots in the subdivision, 618 of the Carolina Forest lot owners agreed to the amendments. Approximately half of plaintiffs voted in favor of the amendment to extend the declarations. In 1997 and 1998, because some of the lot owners did not pay assessments, CFA voided some of the plaintiffs' gate cards which prevented access to the subdivision. Plaintiffs initiated this action against CFA seeking (1) declaratory judgment regarding their rights and obligations as lot owners; and (2) an injunction to prohibit levying fees and assessments and to allow access to the subdivision and common areas. CFA moved to dismiss these claims under the theory that plaintiffs were bound by the declarations as amended.

The first judgment rendered in the case, certified for appellate review, granted partial summary judgment in favor of plaintiffs. In that order, the trial court divided plaintiffs into two categories. In the first category were those plaintiffs to whom the amendments applied and against whom fees and assessments could be enforced. This cat-

egory of plaintiffs was comprised of two subsets: in the first subset were those plaintiffs who voluntarily consented in writing to declaration No. 10 as amended and extended, as these parties were estopped from claiming otherwise; and in the second subset were those plaintiffs who purchased their lots at a point in time after which their deeds expressly referred to the covenants and restrictions. The claims of these two subsets of plaintiffs were dismissed.

In the second category of plaintiffs were lot owners who did not consent to the amendments to declaration No. 10, and did not receive deeds which placed them on notice of the covenants and restrictions. The court allowed the claims of these plaintiffs to go forward. However, the court found that this second category of plaintiffs was bound by an implied in fact contract with CFA, which required them to pay fees for maintenance, repair, and upkeep of all roadways for three years preceding the filing of CFA's answer.

This order, as certified by the trial court, was then appealed to our Court. In reviewing the order, we held that the first category of plaintiffs was not bound by declaration No. 10 as amended. *See Miles v. Carolina Forest Ass'n*, 141 N.C. App. 707, 541 S.E.2d 739 (2001) (*Miles I*). Applying strict construction to negative covenants, we found that there was no authority under the original declarations to extend them beyond 1 January 1990 and reversed the trial court's conclusion of law. *Miles I*, 141 N.C. App. at 712-13, 541 S.E.2d at 742. Concerning the second category of plaintiffs, we did *not* affirm the trial court's conclusion of law that they were bound by an implied contract in fact, but remanded the case, as to *all* plaintiffs, for the trial court to determine the following:

> [For] the trial court to address whether all of the plaintiffs have impliedly agreed to pay for maintenance, upkeep and operation of the roads, common areas and recreational facilities with the subdivision, and if so, in what amount.

Id. at 714, 541 S.E.2d at 742.

Now for our review is the trial court's judgment issued pursuant to the mandate of *Miles I*. In that judgment, the trial court granted CFA a directed verdict at the close of all evidence, concluding, as a matter of law, that an implied contract existed between CFA and all plaintiffs. The trial court ordered plaintiffs to pay these fees for benefits they received by way of maintenance and upkeep of the roads, common areas, and recreational facilities within the subdivision.

In their only assignment of error, plaintiffs contend that the trial court erred in granting CFA's motion for directed verdict finding an implied contract as to all plaintiffs, and denying plaintiffs' same motion. Their issue is based on three alternative arguments: The first is that the covenants under declaration No. 10 are void as a matter of law, and the doctrine of implied contracts cannot breathe new life into them. The second is that the Statute of Frauds (SOF) requires any of the alleged implied agreements between plaintiff and defendants be in writing, and are otherwise unenforceable. And lastly, that the scope of an implied contract is limited to unjust enrichment and plaintiffs have been in no way so enriched. We do not agree with the arguments put forth by plaintiffs, and affirm the trial court pursuant to the following analysis.

Plaintiffs first contend, as a matter of law, that an implied contract cannot be used to breathe new life into null and void restrictive covenants. They do so, citing as their principal authority *Allen v. Sea Gate Assn.*, 119 N.C. App. 761, 460 S.E.2d 197 (1995).

In *Allen*, we found that covenants imposing affirmative obligations could not be amended to allow them to extend into the future, unless they were clearly authorized to do so within the covenants. We held that the language of the covenant in that case, "except that they may be changed, altered, amended or revoked in whole or in part[,]" did not grant such authority. *Id.* at 765, 460 S.E.2d at 200. This is the exact same language found in declaration No. 10 in the case at bar. Therefore, we based our reversal as to the first category of plaintiffs in *Miles I* on the decision in *Allen*. *Miles I*, 141 N.C. App. at 712-13, 541 S.E.2d at 742.

However, nothing in *Allen* supports plaintiffs' contention that an implied contract on these facts is precluded as a matter of law. In reading the *Allen* decision, it appears the defendants in that case did not raise the implied contract theory in any claim. In *Brown v. Woodrun Ass'n*, 157 N.C. App. 121, 577 S.E.2d 708, *disc. review denied*, 357 N.C. 457, 585 S.E.2d 384 (2003), a case comparing *Miles I* and *Allen*, the *Brown* Court stated:

> In *Miles*, a declaration containing a provision with language similar to that in Paragraph 11 in this case was at issue. By relying on *Allen*, the *Miles* Court held the declaration was unenforceable because the ambiguous provision did not clearly authorize an extension. However, unlike *Allen*, the trial court in *Miles* had found that an implied contract existed between the

> defendant and several of the plaintiffs, which required those plaintiffs to contribute to the maintenance, repair, and upkeep of their subdivision for a specific period of time. Thus, on appeal, this Court remanded the case to the trial court for a determination as to whether all plaintiffs had impliedly agreed to pay for maintenance, repair, and upkeep of the subdivision, and if so, in what amount.
>
> Unlike *Miles*, the trial court in the case *sub judice* never found that an implied contract existed. This theory of relief was never raised by defendant at the trial level as a counterclaim even though defendant had raised two other counterclaims which it later voluntarily dismissed. Therefore, defendant's failure to raise an implied contract theory as a counterclaim limits our review on appeal to whether defendant had the ability to enforce restrictions and dues based on the 1991 Restatement. Nevertheless, as plaintiffs' counsel stated in oral arguments, *the possible existence of an implied contract between the parties raises a separate issue that can be determined in a separate action.*

Id. at 125-26, 577 S.E.2d at 712-13 (citations omitted) (emphasis added). Therefore, though the underlying covenant as written has been held to have expired by its own terms, it is clear under *Brown* and *Miles I* that an implied contract is a cognizable claim in this instance. Thus, the implied contract does not breathe new life into the expired covenant; rather, it is the terms of the expired covenant that evidences the terms of the implied contract.

In the case at bar, CFA brought a counterclaim under both theories of implied contracts, implied in fact and in law. These are cognizable claims and were properly before the court to consider.

Plaintiff next argues, as a matter of law, that the SOF is applicable in this case. Plaintiffs claim that if a contract exists that otherwise meets the elements of an implied contract, it fails as not having been put in writing and signed by plaintiffs thus violating SOF. North Carolina's SOF states:

> All contracts to sell or convey any lands . . . or any interest in or concerning them . . . exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

N.C. Gen. Stat. § 22-2 (2003). Plaintiffs assert that an agreement to pay for maintenance, upkeep and operation of the roads, common areas and recreational facilities within a subdivision concerns an interest in land, as it acts as a restrictive covenant, or a negative easement. *Hege v. Sellers*, 241 N.C. 240, 248, 84 S.E.2d 892, 898 (1954). However, to be a restrictive covenant or negative easement such that it is binding against subsequent purchasers of land, restrictive covenants must not only be in writing, *Cummings v. Dosam, Inc.*, 273 N.C. 28, 32, 159 S.E.2d 513, 517 (1968), but also must be duly recorded. *Hege*, 241 N.C. at 248, 84 S.E.2d at 898.

At issue is an alleged implied agreement between plaintiffs and CFA for the years of 1998 through 2003. Pursuant to CFA's implied contract theory, they do not argue a duty exists to pay for the benefits conferred which would run with the land to subsequent purchasers of Carolina Forest property. Rather, CFA's implied contract claim is one for services rendered pursuant to an agreement with these plaintiffs. With the exception of restrictive covenants, we can find no case that evokes the SOF in instances where services such as maintenance and upkeep to common areas and roads in a subdivision require the signature by the party to be charged. The SOF is not implicated in this instance, as no interest in land is at issue.

Turning to plaintiffs' final argument, they allege there is insufficient evidence of unjust enrichment for the court to grant a directed verdict in favor of defendant under the theory of an implied contract. We do not agree.

In applying our relevant standard of review to the trial court's findings supporting its order granting a directed verdict in favor of defendant, we note that directed verdicts are appropriate only in jury cases. *Bryant v. Kelly*, 279 N.C. 123, 129, 181 S.E.2d 438, 441 (1971); N.C. Gen. Stat. § 1A-1, Rule 50(a) (2003). This case was tried without a jury. Therefore, we shall treat these motions as having been a motion for involuntary dismissal under Rule 41(b) and shall apply our correct standard of review under that rule. N.C. Gen. Stat. § 1A-1, Rule 41(b) (2003); *Higgins v. Builders and Finance, Inc.*, 20 N.C. App. 1, 7, 200 S.E.2d 397, 402 (1973), *cert. denied*, 284 N.C. 616, 201 S.E.2d 689 (1974). When a motion to dismiss pursuant to Rule 41(b) is made, the judge becomes both the judge and the jury; he must consider and weigh all competent evidence before him; and he passes upon the credibility of the witnesses and the weight to be given to their testimony. *Dealers Specialties, Inc. v. Housing Services*, 305 N.C. 633, 636, 291 S.E.2d 137, 139 (1982). In the absence of a valid

objection, the court's findings of fact are presumed to be supported by competent evidence, and are binding on appeal. *Id.* A general exception to the judgment and an assignment of error that the court erred in entering the findings of fact and signing the judgment is a broadside assignment of error and does not bring up for review the findings of fact or the evidence on which they are based. *Sweet v. Martin*, 13 N.C. App. 495, 495, 186 S.E.2d 205, 206 (1972); *Merrell v. Jenkins*, 242 N.C. 636, 637, 89 S.E.2d 242, 243 (1955). Where the assignments of error are insufficient to present the findings of fact for review, the appeal presents the question of whether the findings support the court's inferences, conclusions of law, judgment, and whether error appears on the face of the record. *Taney v. Brown*, 262 N.C. 438, 443, 137 S.E.2d 827, 830 (1964).

In the case at bar, plaintiffs' only assignment of error states that CFA's motion for directed verdict should have been denied and plaintiffs' motion for directed verdict should have been granted. Plaintiffs offered no evidence in this case for the trial court to consider because their basis for directed verdict was pursuant to issues of law as set out above. Furthermore, they have made no exceptions to and have not assigned as error any of the trial court's findings of fact. Therefore, in our review, we look to the record to determine whether the findings of fact support the trial court's conclusion of law that an implied contract existed between plaintiffs and CFA.

The trial court, in the order now on appeal, did not specifically set out which theory of implied contract it used in granting defendant a directed verdict, whether it was a contract implied in law or in fact. The trial court cited *Miles I* for its conclusion that an implied contract existed, and in *Miles I* we considered that an implied contract existed pursuant to the initial summary judgment order in this matter. In that initial summary judgment order, the trial court found a contract implied in fact existed as to one subset of plaintiffs. It is clear that the trial court's later directed verdict judgment, on remand to determine whether an implied contract existed as to all plaintiffs, was made pursuant to the conclusion that a contract implied in fact existed. *Miles I*, 141 N.C. App. at 713, 541 S.E.2d 739, 742; *see* Summary Judgment Order.

Concerning an implied in fact contract, this Court has held that:

> An implied in fact contract is a genuine agreement between parties; its terms may not be expressed in words, or at least not fully in words. The term, implied in fact contract, only means that the

> parties had a contract that can be seen in their conduct rather than in any explicit set of words.

Ellis Jones, Inc. v. Western Waterproofing Co., 66 N.C. App. 641, 646, 312 S.E.2d 215, 218 (1984) (where the fact that defendant's representatives observed plaintiff doing the work and did not tell plaintiff to stop the job was conduct consistent with the existence of a contract). Although the terms of an implied in fact contract may not be expressed in words, or at least not fully in words, the legal effect of an implied in fact contract is the same as that of an express contract in that it too is considered a "real" contract or genuine agreement between the parties. *Kiousis v. Kiousis*, 130 N.C. App. 569, 573, 503 S.E.2d 437, 440 (1998), *disc. review denied*, 350 N.C. 96, 528 S.E.2d 363 (1999). Under such an implied in fact contract, damages are based on the reasonable value of the services " 'rendered pursuant to request and agreement to pay therefor (sic).' " *Ellis Jones, Inc.*, 66 N.C. App. at 646, 312 S.E.2d at 218 (quoting *Turner v. Marsh Furniture Co.*, 217 N.C. 695, 697, 9 S.E.2d 379, 380 (1940)). [1]

We need not look far beyond the trial court's unchallenged findings of fact to determine whether they support the conclusion of law that:

> There is an implied contract between all of the plaintiffs and the defendant in which the plaintiffs *impliedly agreed* to pay for the maintenance, upkeep and operation of the roads, common areas and recreational facilities within the subdivision.

(Emphasis added.) This conclusion was based on the following:

> 1. Each lot owner is obligated to pay dues in the amount of $50.00 per year. Payments were due from the plaintiffs beginning in 1998 and continuing to 2003, a total of six payments.
>
> 2. Each unimproved lot owner was assessed an amount for maintenance of common areas and recreational facilities. For the years 1998 and 1999, the assessment was $145.00 per year. For the year 2000, the assessment was $150.00. For the years 2001, 2002 and 2003, the assessment was $170.00 per year.

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1. Plaintiffs have not assigned as error the damages found by the court as to each plaintiff, and we therefore do not review whether the damages were properly assessed under the contract implied in fact theory. To the extent that plaintiffs challenge the damages in their brief concerning their use of the common areas, we deem those issues abandoned under the N.C. Gen. Stat. § 1A-1, Rule 10(a).

3. Each unimproved lot owner was assessed an amount primarily for the purpose of resurfacing the roadways in Carolina Forest and the Lake in the Pines. The amount of the assessment was $45.00 in 1998, $50.00 in 1999, and $60.00 thereafter for the years 2000, 2001, 2002 and 2003.

4. Each unimproved lot owner was assessed an amount for road repairs, including but not limited to repair of pot holes and necessary patching or work on the road shoulders. This amount was $20.00 for 2002 and $20.00 for 2003, a total of $40.00.

5. In the year 2001, there was a severe ice storm which left fallen trees, limbs, and other debris blocking the roadways and requiring road cleanup. In order that property owners could have access to and from their property, Carolina Forest Association made an assessment for storm damage cleanup. This assessment was made in 2001 as $80.00 and is listed as "Special Road Cleanup Assessment."

6. None of the road maintenance fund has been used by the defendant for non-road matters.

These uncontested findings of fact support the trial court's conclusion that a contract implied in fact existed between plaintiffs and CFA, and these findings are supported by competent, unchallenged evidence. Plaintiffs were assessed specific fees for benefits to their unimproved properties. These benefits protected both the access to and the value of their properties, by way of maintaining private roads, recreational facilities, a pool, a guard station, and an administrative office. The record shows that plaintiffs were on clear notice that these benefits were being incurred: Approximately half of them actually voted for the amendments to declaration No. 10 as recorded in 1990, which included consent to pay the assessment fees for the exact benefits at issue in this case. All of the plaintiffs had paid some or all of the fees and assessments up until 1997 and 1998, and were incurring the benefit from the improvements funded by such payments. This conduct is consistent with the existence of a contract implied in fact, and plaintiffs' attempt to stop payment on these known benefits, without more, is tantamount to breach of that contract.

Having thoroughly reviewed the record, transcript, and briefs, we find the record sufficient for the trial court's determination that an implied in fact contract existed between defendant and all plaintiffs.

As noted, any issue concerning whether the value of the services rendered, as damages, was adequately assessed and attributed to plaintiffs was not before us on review. Thus, plaintiffs' assignment of error is overruled, and we uphold the trial court's directed verdict (motion to involuntarily dismiss) in favor of defendant.

Affirmed.

Judges McGEE and ELMORE concur.

IN RE: D.Q.W., T.A.W., Q.K.T., Q.M.T., & J.K.M.T.

No. COA04-412

(Filed 16 November 2004)

1. Trials— motion for continuance—failure to support motion

The trial court did not abuse its discretion in a termination of parental rights proceeding by denying respondent father's motion for a continuance, because: (1) respondent failed to explain why his counsel had inadequate time to prepare for the hearing, what specifically his counsel hoped to accomplish during the continuance, or even how much additional time was requested; and (2) the record does not include the trial transcript or the continuance motion, and therefore, the Court of Appeals was unable to determine the nature of the reasons proffered at the hearing in support of respondent's continuance motion.

2. Termination of Parental Rights— motion to dismiss appeal—failure to serve copy of affidavit of indigency

The trial court did not err in a termination of parental rights case by denying cross-appellant Department of Human Service's motion to dismiss respondent father's appeal based on respondent's failure to serve a copy of the affidavit of indigency executed by respondent for determination of his eligibility for appointed counsel, because: (1) an affidavit of indigency submitted to determine eligibility for appointed counsel in termination of parental rights proceedings is generally executed pursuant to N.C.G.S. § 7A-450 et seq. instead of N.C.G.S. § 1-288; (2) neither N.C.G.S. § 7A-450 nor our Rules of Appellate Procedure require a respondent to serve an affidavit of indigency on opposing coun-

sel; (3) unless pertinent to an issue in the case, the affidavit of indigency need not be included in the record on appeal; and (4) failure to comply with the service requirements of N.C. R. App. P. 26 does not deprive the Court of Appeals of jurisdiction or require automatic dismissal of a respondent's appeal.

Appeal by respondent from order entered 18 September 2003 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 23 September 2004.

Wake County Attorney's Office, by Juanita B. Hart and Corinne G. Russell, for appellee.

Michael J. Reece for appellant.

Gregory Ramage, Guardian Ad Litem.

LEVINSON, Judge.

Respondent (Quillon Thorpe) appeals from an order terminating his parental rights in his daughters, Q.K.T., Q.M.T., and J.M.T. Cross-appellant Wake County Department of Human Services appeals from the denial of its motion to dismiss respondent's appeal.

The minor children were born July 1998, February 2000, and February 2001. On 24 May 2002 petitioner Wake County Department of Human Services (Wake County) filed a petition alleging that the children were neglected and dependent as defined by N.C.G.S. § 7B-101(9) and (15). A nonsecure custody order was entered on 28 May 2002, and the children were placed in the custody of Wake County. On 5 September 2002 an order was entered adjudicating the children neglected and dependent and continuing custody with Wake County. The minor children's mother identified respondent as their father; however, as of the time of the hearing on the petition alleging neglect and dependency, paternity had not been determined. DNA testing subsequently established that respondent is the biological father of the girls. After paternity was established, respondent initially requested visitation with the children, but then refused to cooperate with the random drug screen tests that were a condition of visitation. The record shows that respondent neither visited, nor provided financial or other support, during the time his children were in Wake County's custody. A permanency planning hearing was conducted on 15 April 2003, when the minor children had been in foster care almost a year. At the permanency planning hearing, the trial

court determined that further efforts at reunification would be futile, and directed Wake County to initiate proceedings for termination of parental rights.

On 18 June 2003 Wake County filed a petition for termination of respondent's parental rights. Respondent was served with a copy of this petition at his last known address, and again by publication. In August 2003 Wake County learned that respondent was incarcerated in the Wake County jail, and he was served personally with the petition on 5 August 2004. On the same date respondent executed an affidavit of indigency (form AOC-CR-226 (Rev. 6/97)), and counsel was appointed on the same day. On 6 August 2003 his trial counsel was notified by mail that the termination of parental rights hearing was scheduled for three weeks later, on 27 August 2003. The termination hearing was held on that date, as scheduled. On 18 September 2003 the trial court issued an order terminating respondent's parental rights in the minor children. From this order respondent appeals.

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[1] Respondent presents a single argument on appeal, in which he asserts that the trial court committed reversible error by denying his motion for a continuance. We disagree.

In the introduction to its order the trial court states:

> [Defense counsel] made a motion to continue the hearing on behalf of [respondent] to allow additional time for preparation. After hearing arguments from the parties, the motion to continue was denied.

Defendant failed to include in the record either his motion to continue or a transcript of the proceedings. Accordingly, our review of the court's ruling is based on the trial court's statement and on other record evidence.

"Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001) (citing *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981)). " 'Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice.' " *In re Humphrey*, 156 N.C. App. 533, 538, 577 S.E.2d 421, 425 (2003) (quoting *Doby v. Lowder*, 72 N.C. App. 22, 24, 324 S.E.2d 26, 28 (1984)). "However, if

'a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal.' " *State v. Jones*, 342 N.C. 523, 530-31, 467 S.E.2d 12, 17 (1996) (quoting *State v. Covington*, 317 N.C. 127, 129, 343 S.E.2d 524, 526 (1986)).

Although respondent argues on appeal that the trial court's denial of his continuance motion implicates his due process right to effective assistance of counsel, his continuance motion is not in the record, so there is no way to know if the original motion was based on constitutional grounds. However, even assuming, *arguendo*, that respondent's continuance motion was based on a constitutional right, respondent nonetheless failed to show prejudice:

> To establish that the trial court's failure to give additional time to prepare constituted a constitutional violation, defendant must show "how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." "[A] motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance." " '[A] postponement is proper if there is a belief that material evidence will come to light and such belief is reasonably grounded on known facts."

State v. McCullers, 341 N.C. 19, 31-32, 460 S.E.2d 163, 170 (1995) (quoting *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986); *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986); and *State v. Tolley*, 290 N.C. 349, 357, 226 S.E.2d 353, 362 (1976) (other citation omitted)).

Respondent has cited general authority for his right to due process and the effective assistance of counsel, guaranteed under the United States and North Carolina Constitutions. However, he does not explain why his counsel had inadequate time to prepare for the hearing; what specifically his counsel hoped to accomplish during the continuance; or even how much additional time was requested. For example, although respondent asserts that he was unable to meet with counsel until the night before the hearing, the record is uncontradicted that counsel was appointed three weeks before the hearing. Respondent offers no explanation for his counsel's failure to interview him in the Wake County jail until the day before the hearing. Nor does he indicate with any specificity in what way his preparation would have been more complete had the continuance motion been granted. Instead, respondent concedes that "there is no way of know-

ing how Respondent Thorpe's counsel might have performed had he had adequate time."

Moreover, "numerous factors . . . are weighed to determine whether the failure to grant a continuance rises to constitutional dimensions. Of particular importance are the reasons for the requested continuance presented to the trial judge at the time the request is denied." *State v. Roper*, 328 N.C. 337, 349, 402 S.E.2d 600, 607 (1991) (citing *Ungar v. Sarafite*, 376 U.S. 575, 589, 11 L. Ed. 2d 921, 931 (1964)). As noted above, the record does not include the trial transcript or the continuance motion. We are, therefore, unable to determine the nature of the reasons proffered at the hearing in support of his continuance motion.

On this record we are unable to conclude that the trial court abused its discretion in denying respondent's motion to continue, or that the denial of respondent's continuance motion resulted in a denial of respondent's constitutional rights. This assignment of error is overruled.

Appellee's Cross Appeal

[2] The cross-appellant, Wake County Human Services, appeals the trial court's denial of its motion to dismiss respondent's appeal. Cross-appellant argues that respondent was required to serve on it a copy of the affidavit of indigency executed by respondent for determination of his eligibility for appointed counsel. Cross-appellant does not argue that it was prejudiced by the failure of respondent to serve a copy of the affidavit. Instead, cross-appellant contends that respondent's failure to serve a copy of the affidavit of indigency deprives this Court of jurisdiction, and requires dismissal of respondent's appeal. We disagree for several reasons.

First, cross-appellant's argument is based on the erroneous premise that "entitlement of [respondent] to appeal as an indigent is controlled by N.C.G.S. § 1-288[.]" We conclude that, on the facts of this case, respondent's status as an indigent was not determined or governed by this statute. N.C.G.S. § 1-288 (2003) provides in part that:

> When any party to a civil action . . . desires an appeal from the judgment rendered in the action to the Appellate Division, and is unable, by reason of poverty, to make the deposit or to give the security required by law for the appeal . . . [t]he party desiring to appeal . . . shall, within 30 days after the entry of the judgment or

> order, make affidavit that he or she is unable by reason of poverty to give the security required by law. . . .

G.S. § 1-288 is a broad statute addressing the general right of "any party to a civil action" to pursue an appeal as an indigent. Thus the statute could theoretically, in appropriate factual circumstances, apply to an appellant from a termination of parental rights proceeding.

However, in the instant case, as in the vast majority of termination of parental rights appeals, respondent sought appointed counsel at the hearing and on appeal. Accordingly, the determination of his indigency was governed by N.C.G.S. § 7A-450 (2003), *et seq.* Section 7A-450 (a) states that an "indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this Subchapter." G.S. § 7A-450, *et seq.* deals specifically with the determination of indigency of a termination of parental rights respondent seeking appointed counsel, while G.S. § 1-288 addresses general procedures for indigent appeals in civil cases. "Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985) (citations omitted). We conclude that where, as in the instant case, the respondent seeks appointed counsel, procedures for determining indigency are governed by G.S. § 7A-450, *et seq.* This conclusion is further bolstered by N.C.R. App. P. 12, which acknowledges that certain indigent appeals are governed by G.S. § 7A-450, *et seq.* *See* N.C.R. App. P. 12(b) ("If an appellant is authorized to appeal *in forma pauperis* as provided in G.S. 1-288 or 7A-450 *et seq.*, . . .").

Secondly, the record does not indicate any reason why this respondent would be required to execute, in addition to the original affidavit of indigency executed 5 August 2003, another affidavit subsequent to the conclusion of the termination of parental rights hearing to satisfy the terms of G.S. § 7A-450, *et seq.* Under N.C.G.S. § 7A-451(a)(14) (2003), "[a]n indigent person is entitled to services of counsel in the following actions and proceedings . . . (14) [a] proceeding to terminate parental rights[.]" Further, N.C.G.S. § 7A-451(b)(6) (2003) provides that

> (b) In each of the actions and proceedings enumerated in subsection (a) . . . entitlement to the services of counsel begins as

> soon as feasible after . . . service is made upon [the indigent] of the . . . petition, notice or other initiating process. **Entitlement continues** through any critical stage of the action or proceeding, including, if applicable: . . .
>
> > (6) Review of any judgment or decree pursuant to G.S. 7A-27[.]

(emphasis added). Thus, N.C.G.S. § 7A-451(6) (2003) expressly states that entitlement to counsel **continues** during appeal, and does not require execution of a new affidavit of indigency on appeal in every case. Of course, the "question of indigency may be . . . redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation." N.C.G.S. § 7A-450(c) (2003). Accordingly, the court always has authority to re-examine the issue of a respondent's entitlement to appellate counsel if it becomes appropriate to do so. However, in a termination of parental rights proceeding, determination of a respondent's indigency is made before the hearing when counsel is appointed. Absent a determination by the court that the issue of indigency should be redetermined, the respondent's entitlement to counsel continues on appeal, without the necessity of a new affidavit of indigency.

We also disagree with cross-appellant's assertion that N.C.R. App. P. 26 required respondent to serve his affidavit of indigency on all parties. N.C.R. App. P. 26 provides in relevant part that:

> [(a)] Papers **required or permitted by these rules** to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. . . .
>
> [(b)] Service of all papers required. Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

N.C.R. App. P. 26(a) and (b) (emphasis added). Rule 26 is clearly intended to address papers filed during appeal—documents "required or permitted" by the North Carolina Rules of Appellate Procedure to be filed. An affidavit of indigency, executed pursuant to G.S. § 7A-450 and used by the trial court to determine a respondent's right to appointed counsel at a termination of parental rights hearing, is not a document filed pursuant to the Rules of Appellate Procedure. Therefore, such an affidavit of indigency is not within the purview of Rule 26.

In addition, the North Carolina Rules of Appellate Procedure do not even require this respondent to include the affidavit of indigency in his record on appeal. N.C.R. App. P. 9(a), "Function; Composition of Record," provides, in pertinent part, that the record on appeal must contain:

> i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, [and] of any order finding a party to the appeal to be a civil pauper[.]
>
> j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned[.]

N.C.R. App. P. 9(a)(i) and (j). Thus, where the facts in a specific case render the affidavit of indigency "necessary to an understanding of all errors assigned," it should be included in the record, pursuant to Rule 9(a)(j). However, Rule 9 does not include a general requirement that every record on appeal include the affidavit of indigency. Indeed, N.C.R. App. P. 9(b)(2) emphasizes that "[i]t shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned[.]"

Finally, we disagree with cross-appellant that the failure to serve the affidavit of indigency deprives this Court of jurisdiction. As discussed above, we conclude respondent is not required to serve copies of an affidavit of indigency that is executed pursuant to G.S. § 7A-450, *et seq.* Moreover, even assuming, *arguendo*, that respondent were required to serve a copy of the G.S. § 7A-450 affidavit of indigency, the failure to do so would not be jurisdictional. *See* N.C.R. App. P. 1(b) ("These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.").

Nor are the cases cited by cross-appellant controlling on this issue. In *In re Shields*, 68 N.C. App. 561, 315 S.E.2d 797 (1984), the respondent's appeal was dismissed for failure to **file**, not serve, an affidavit of indigency, which affidavit was executed pursuant to G.S. § 1-288, not G.S. § 7A-450. The opinion in *In re Caldwell*, 75 N.C. App. 299, 330 S.E.2d 513 (1985), addresses the effect of **late** filing of an affidavit of indigency that also was filed under G.S. § 1-288, rather than G.S. § 7A-450. Neither of these cases involve an affidavit of indigency executed in conjunction with the right to appointed counsel;

nor do they address the failure to serve a properly filed affidavit of indigency on an opposing party. Moreover, in *Henlajon, Inc. v. Branch Highways, Inc.*, 149 N.C. App. 329, 560 S.E.2d 598 (2002), this Court expressly **rejected** the argument that the requirements of Rule 26 are jurisdictional:

> Failure to serve the notice of appeal on or before the date of filing pursuant to Rule 26(b) does not automatically mandate dismissal. . . . Any suggestion [in an earlier case] that Rule 26(b) or (c) [requirements are] jurisdictional was unnecessary to decide that case [and is obiter dicta]. . . .
>
> We hold that . . . failure to serve the notice of appeal "at or before the time of filing" is not a jurisdictional requirement that automatically requires dismissal.

Id. at 333-34, 560 S.E.2d at 602.

In sum, we conclude that (1) an affidavit of indigency submitted to determine eligibility for appointed counsel in termination of parental rights proceedings is generally executed pursuant to N.C.G.S. § 7A-450, *et seq.*, and not G.S. § 1-288; (2) neither G.S. § 7A-450 nor our Rules of Appellate Procedure require a respondent to serve an affidavit of indigency on opposing counsel; (3) unless pertinent to an issue in the case, the affidavit of indigency need not be included in the record on appeal; and (4) failure to comply with the service requirements of Rule 26 does not deprive this Court of jurisdiction, nor require automatic dismissal of a respondent's appeal. This assignment of error is overruled.

For the reasons set out above, we affirm both the trial court's order for termination of parental rights and its denial of cross-appellant's motion for dismissal of respondent's appeal.

Affirmed.

Judges TYSON and BRYANT concur.

SCHENK v. HNA HOLDINGS, INC.

[167 N.C. App. 47 (2004)]

GARY RAY SCHENK, SR., PLAINTIFF v. HNA HOLDINGS, INC., ALSO KNOWN AS TREVIRA, INC. FORMERLY HOECHST CELANESE, INC. AND FIBER INDUSTRIES, INC., DEFENDANT

DONALD LEE BELL, PLAINTIFF v. HNA HOLDINGS, INC., ALSO KNOWN AS TREVIRA, INC. FORMERLY HOECHST CELANESE, INC. AND FIBER INDUSTRIES, INC., DEFENDANT

No. COA03-1094

No. COA03-1095

(Filed 16 November 2004)

1. Damages and Remedies— punitive—asbestos—destruction of memo about improper handling

The trial court did not err by granting a directed verdict for defendant on punitive damages in an asbestos case. The destruction of a memo about improper handling of asbestos did not demonstrate willful disregard for the safety of others because defendant's resident engineer told the expert who wrote the memo that he wanted to be informed, but not in writing. Moreover, there was no evidence that the engineer was an officer, director, or manager, as required for punitive damages, and there was no evidence that the destruction of the memo was related to plaintiff's injuries.

2. Damages and Remedies— punitive—asbestos removal—rejection of recommended method

The rejection of an asbestos expert's recommendation of a method of asbestos removal does not demonstrate willful and wanton behavior, and a directed verdict was correctly granted for defendant on punitive damages. The expert admitted that no state or federal regulation required his recommended method, and that the removal was done properly within the regulations.

3. Damages and Remedies— punitive—asbestos—violation of OSHA standards

Violation of OSHA standards goes to negligence but is not by itself sufficient to take willful and wanton negligence to the jury, and a directed verdict was correctly granted for defendant on the issue of punitive damages in an asbestos case.

4. Damages and Remedies— punitive—concealment of asbestos risk

Plaintiffs' contention that punitive damages should have been submitted to the jury in an asbestos case because defendant will-

fully concealed risks of asbestos exposure was not supported by the evidence.

5. Damages and Remedies— prior settlements—set-off

The defendant in an asbestos case was entitled to a set-off for prior workers' compensation settlements. The compensatory damages in this trial and the prior settlements were for the same injuries and the same damages.

Appeal by plaintiffs from judgments entered 3 January 2003 by Judge Charles C. Lamm in Rowan County Superior Court. Heard in the Court of Appeals 30 August 2004.

Wallace and Graham, P.A., by Mona Lisa Wallace, and Mauriello Law Offices, by Christopher D. Mauriello, for plaintiffs-appellants.

Kasowitz, Benson, Torres & Friedman, by Michael E. Hutchins, and Parker Poe Adams & Bernstein, LLP, by Josephine H. Hicks, for defendants-appellees.

MARTIN, Chief Judge.

Plaintiffs' appeals in these cases present to this Court identical questions of law; therefore, we have consolidated the appeals pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. Rule 40 (2004). The appeals arise from lawsuits in which plaintiffs sought compensatory and punitive damages from defendant, HNA Holdings, Inc., for alleged occupational exposure to asbestos dust and fibers at defendant's Salisbury polyester manufacturing plant.

Summarized only to the extent necessary for an understanding of the issues raised on appeal, the evidence at trial tended to show that defendant, HNA Holdings, Inc., or its predecessors in interest, owned the Celanese Fiber Plant (Celanese), located in Salisbury, N.C., since operations began in 1966. Like many industrial plants built in the 1960's and 1970's, the Celanese plant was constructed with insulation containing asbestos.

Daniel Construction Company built the Celanese plant and then provided maintenance for the company in specialty areas such as welding, pipe fitting, rigging and insulation. Daniel and its successor in interest, Fluor Daniel (Daniel), employed plaintiff Schenk as a pipe fitter/welder beginning in 1975. Plaintiff Schenk worked for Daniel off and on until 1992 when Becon Construction Company

(Becon) took over Daniel's maintenance contract. He continued to work for Becon at Celanese until 1995. As a pipe fitter/welder plaintiff Schenk was exposed to insulation containing asbestos both through his work handling pipes and from being around people working with the insulation.

Daniel employed plaintiff Bell as an insulator for Celanese intermittently between 1973 and 1981, and then from 1988 until 1992. In 1992, when Daniel lost the overall maintenance contract to Becon, plaintiff Bell began working as an insulator for Becon and continued until 1995. At trial, plaintiff Bell testified he was exposed to asbestos dust in his work insulating pipes at Celanese while cutting the insulation on a band saw, "rasping" or smoothing the rough edges of the insulation, and while removing asbestos "in every facet of the plant."

Plaintiffs offered the testimony of James Whitlock (Whitlock), an asbestos handling and removal specialist who worked for SOS, a subsidiary of Daniel. Whitlock, who was hired to oversee the removal of asbestos material at Celanese, testified at trial that prior to his arrival in 1990, insulators for Daniel were removing asbestos from the Celanese plant. During his first walk-through of the plant after he was hired, Whitlock observed areas where the asbestos insulation was in a "dilapidated condition and was hanging from the pipes," areas where insulation was on the floor, and areas where insulation was "in piles." He also saw non-authorized individuals "handling and removing asbestos."

Whitlock testified that in a memorandum to the plant industrial hygienist, Dave Smith, the resident engineer, John Winter (Winter) and others, he informed them that "there was a lot of maintenance people that were doing removal of asbestos-containing insulation and that they were leaving the insulation lying around in the areas, and this was cause for concern because it was causing exposure." The next day, Winter asked Whitlock to "collect those letters and rip them up, take the letter out of [his] computer, off [his] hard drive, get it off floppy disk, and do away with it."

For asbestos removal, Whitlock recommended Celanese use a "global abatement procedure." In this procedure, a large area is contained and asbestos is totally removed from the entire area without other workers present. However, Whitlock's recommendation was rejected in favor of a "glove bagging" technique where only a small area is contained for removal of a small bit or piece of pipe insulation rather than abatement of the whole area. Other workers were often present during the glove bagging method.

Prior to trial, the court denied defendant's motion to strike the punitive damages claim but allowed an alternative motion to exclude any reference to punitive damages or defendant's financial worth until the court determined that plaintiffs had presented sufficient evidence to submit an issue of punitive damages to the jury. At the close of plaintiffs' evidence, after hearing arguments, the trial court granted defendant's motion for directed verdict on the issue of striking the punitive damages claim.

The jury returned verdicts in favor of plaintiffs, finding the maintenance and construction work performed by plaintiffs was an inherently dangerous activity. The jury also found plaintiffs were injured as a direct result of defendant's negligence. Plaintiffs were awarded compensatory damages for personal injuries. The trial court then conducted a "set-off" hearing and reduced the awards by the amount each plaintiff had recovered as a result of prior settlements from other sources.

I.

[1] Plaintiffs first assign error to the trial court's granting of defendant's motion for directed verdict on the issue of punitive damages. They argue there was sufficient evidence that defendant acted recklessly, willfully or intentionally to withstand defendant's motion. "The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991).

Our North Carolina statutes establish the requirements for punitive damages as follows:

> Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
>
> (2) Malice.
>
> (3) Willful or wanton conduct.

N.C. Gen. Stat. § 1D-15(a) (2003). The existence of the aggravating factor must be proved by clear and convincing evidence. N.C. Gen.

Stat. § 1D-15(b) (2003). Willful and wanton conduct is defined by statute as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7) (2003). To award punitive damages against a corporation, "the officers, directors, or managers of the corporation [must have] participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." N.C. Gen. Stat. § 1D-15(c) (2003). The jury awarded plaintiffs compensatory damages; therefore, the issue on appeal is whether there was sufficient evidence that the officers, directors, or managers of defendant, HNA Holdings, Inc., participated in or condoned willful or wanton conduct. *See* N.C. Gen. Stat. § 1D-15(c) (2003).

Plaintiffs first contend Winter's order to destroy Whitlock's memo constituted willful and wanton conduct by defendant. However, plaintiffs have not proved by clear and convincing evidence that destruction of the memo constituted "conscious and intentional disregard of and indifference to the rights and safety of others." N.C. Gen. Stat. § 1D-5(7). Whitlock testified Winter told him "he wanted to know about these things, to never put anything like that in writing again." Asking to be advised of improper handling of asbestos verbally rather than in writing does not demonstrate an intentional disregard to the safety of others. Furthermore, Winter was a resident engineer for Celanese; plaintiffs did not offer evidence that he was an officer, director or manager as required to award punitive damages against the defendant.

In addition, there is no evidence that the destruction of the memo was related to the injuries suffered by plaintiffs since the underlying conduct alleged in the memo was not necessarily connected to asbestos. *See Paris v. Kreitz*, 75 N.C. App. 365, 376-77, 331 S.E.2d 234, 243, *disc. review denied*, 315 N.C. 185, 337 S.E.2d 858 (1985). Whitlock admitted at trial that in each instance where he pointed out loose insulation on the floor, "it was taken care of." He also admitted the loose insulation was never tested so he was unsure if any or all of this insulation contained asbestos. Although Whitlock observed non-authorized workers removing insulation, he had no knowledge that they were actually removing insulation that contained asbestos. When asked if he could remember specific occasions when plaintiffs were near loose insulation, Whitlock replied, "I'd say probably . . . ."

The clear and convincing evidence standard is greater than a preponderance of the evidence standard required in most civil cases, *In*

re Montgomery, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984), and requires "evidence which should 'fully convince.' " *In re Smith*, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001) (citation omitted). Plaintiffs did not present clear and convincing evidence of the connection between the destruction of the memo and plaintiffs' alleged harm.

[2] Next, plaintiffs allege defendant's express rejection of Whitlock's recommendation to use the global method of asbestos removal demonstrates willful and wanton behavior. However, Whitlock admitted at trial that no state or federal regulation requires use of the global method. Furthermore, he agreed that the asbestos removal was "done properly and within the regulations."

[3] Plaintiffs also argue defendant's violation of Occupational Safety and Health Act (OSHA) standards was sufficient evidence of willful and wanton conduct to allow the question of punitive damages to go to the jury. OSHA regulations are evidence of custom and can be used to establish the standard of care required in the industry. *Cowan v. Laughridge Construction Co.*, 57 N.C. App. 321, 325, 291 S.E.2d 287, 290 (1982), *Sawyer v. Food Lion, Inc.*, 144 N.C. App. 398, 401, 549 S.E.2d 867, 869 (2001). However, "a violation of OSHA regulations is not negligence *per se* under North Carolina law." *Geiger v. Guilford College Comm. Volunteer Firemen's*, 668 F. Supp. 492, 497 (M.D.N.C. 1987); *See Cowan*, 57 N.C. App. at 324-25, 291 S.E.2d at 289-90. Therefore, assuming *arguendo* that defendant violated OSHA standards, this evidence goes only to the issue of defendant's negligence. Violation of OSHA standards does not, by itself, provide sufficient evidence of willful and wanton conduct to present the issue to the jury.

[4] Relying on *Rowan County Bd. of Education v. U.S. Gypsum*, 103 N.C. App. 288, 407 S.E.2d 860 (1991), *aff'd in part and review improvidently granted in part*, 332 N.C. 1, 418 S.E.2d 648 (1992), plaintiffs argue that defendant willfully concealed the risks of asbestos exposure rendering punitive damages appropriate. In *Rowan*, this Court affirmed the trial court's denial of defendant's motion for directed verdict and judgment notwithstanding the verdict on the issue of punitive damages because defendant defrauded Rowan by concealing the hazards of asbestos. *Id.* at 299, 407 S.E.2d at 866. Although this case is similar in that it involves third party asbestos claims in the premises liability context, the evidence at trial does not support a finding that Celanese willfully concealed informa-

tion about the risks of asbestos exposure. The evidence tended to show that OSHA regulations were posted on a bulletin board in the main hall at the entrance into Celanese. Clyde Miller, assistant to the safety superintendent from 1969 to 1980 testified that neither he, nor anyone in his department, ever deliberately withheld any information that impacted workers' safety.

According to the testimony of Dow Perry (Perry), Environmental Health and Safety Superintendent for Celanese from 1978 to 1990, the corporate office specified asbestos-free insulation for all their locations in 1973. He also testified that dust masks were available to maintenance workers in the 1970's. Celanese issued a standard practice document entitled "Control and Disposal of Asbestos Material" beginning in 1976 requiring, among other things, that asbestos be thoroughly wet before removed. Although Perry updated written procedures when he arrived in the department in 1978, the proper methods of removal were already in use.

The 1979 revision of "Control and Disposal of Asbestos Material" contained a section that required workers to "treat insulation as if it contained asbestos." Perry testified this meant workers were to prepare the work area, use personal protection and use work methods based on the OSHA regulations for asbestos removal regardless of whether it actually did contain asbestos. At least by 1979, air monitoring was implemented in Celanese including air sampling and monitoring Celanese and Daniel workers. Celanese had annual asbestos training sessions which were presented to all maintenance supervisors and mechanics.

In addition, Celanese shared information with Daniel, and Daniel developed its own asbestos training program for its workers. To make certain the established procedures were followed, Celanese had weekly safety inspections where a supervisor made certain the mechanics complied with procedures. These policies and procedures do not demonstrate a "conscious and intentional disregard of and indifference to the rights and safety of others" by Celanese as required by statute to award punitive damages. N.C. Gen. Stat. § 1D-5(7).

Plaintiffs also attempt to argue, in their appellants' briefs, that it was error for the trial court to prevent counsel from questioning prospective jurors on the issue of punitive damages during voir dire. However, there were no assignments of error in the record to support plaintiffs' arguments and the issue is not properly before us. N.C.

Rule App. P. 10(c)(1) (2004). Although defendant argues the issue in his brief, he failed to preserve the issue for appellate review by assigning error to the issue. N.C. R. App. P. 10(a) (2004).

II.

[5] In their second assignment of error, plaintiffs argue the trial court erred by allowing defendant a full set-off for prior workers' compensation claim settlements and prior third-party settlement amounts paid to plaintiffs from other sources. Plaintiffs argue only that the workers' compensation claim settlements, which compensated plaintiffs for their inability to earn wages, were for a different injury, i.e. impairment to wage earning capacity, than the jury award at trial which compensated plaintiffs for their pain and suffering, future medical expenses and permanent injury.

"The purpose of the North Carolina Workers' Compensation Act is not only to provide a swift and certain remedy to an injured worker, but also to ensure a limited and determinate liability for employers." *Radzisz v. Harley Davidson*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997). The act, however, was "never intended to provide the employee with a windfall of a recovery from both the employer and the third-party tort-feasor." *Id.*

Workers' compensation benefits provide for the employee's inability to earn wages and do not provide for "physical pain or discomfort." *Branham v. Panel Co.*, 223 N.C. 233, 236, 25 S.E.2d 865, 867 (1943). Nevertheless,

> [t]he weight of both authority and reason is to the effect that any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage should be held for a credit on the *total recovery* in any action for the *same injury or damage.*

Holland v. Utilities Co., 208 N.C. 289, 292, 180 S.E. 592, 593-94 (1935) (emphasis added); *See Baity v. Brewer*, 122 N.C. App. 645, 647, 470 S.E.2d 836, 838 (1996).

Each plaintiff sued defendant to recover for one injury, i.e., asbestos damage to his lungs. "Where '[t]here is one injury, [there is] still only one recovery.' " *Radzisz*, 346 N.C. at 89, 484 S.E.2d at 569 (citation omitted). Plaintiffs cannot recover workers' compensation benefits and damages from defendant for the same injury.

The final judgment determined plaintiffs were entitled to recover for their asbestos related injuries as compensatory damages. Compensatory damages provide recovery for, *inter alia*, mental or physical pain and suffering, lost wages and medical expenses. 22 Am Jur 2d Damages § 42. Set-offs, therefore, were appropriate as plaintiffs were compensated at trial for the same injury and the same damages as their previous settlements.

Affirmed.

Judges WYNN and McGEE concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. HAYWOOD COUNTY, DEFENDANT

No. COA03-1479

(Filed 16 November 2004)

1. Eminent Domain— proximity damages to remaining land—expert opinion

The trial court erred by granting plaintiff-DOT a directed verdict on proximity damages in the condemnation of part of a tract of land. Defendant offered a reasonable valuation based on an expert witness's professional experience; its weight is a matter properly reserved for the jury.

2. Eminent Domain— rental value of remaining land—expert opinion

The trial court erred by granting plaintiff-DOT a directed verdict on the rental value of property remaining after the condemnation of part of the tract. Expert testimony reasonably demonstrated the impact of the taking and a temporary construction easement on the rental income generated by the property.

Appeal by defendant from judgment entered 11 July 2003 by Judge Albert Diaz in Haywood County Superior Court. Heard in the Court of Appeals 31 August 2004.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for plaintiff-appellee.

Jeffrey W. Norris & Associates, P.L.L.C., by Jeffrey W. Norris, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Haywood County ("defendant") appeals a directed verdict in condemnation proceedings involving property in Waynesville, North Carolina. For the reasons stated herein, we reverse the judgment of the trial court and remand this case for a new trial.

On 22 January 2001, the Department of Transportation ("plaintiff") filed a condemnation action against defendant to take a portion of a tract of land located at the intersection of U.S. Highway 23 Business and Sims Circle Road in Waynesville. The Haywood County Planning Building is located on the property. The Planning Building houses several county agencies and Haywood County rents space in the building to several non-profit organizations. Prior to the taking, the property measured 26,060 square feet, and the Planning Building was located forty-four feet from Highway 23. Plaintiff took 2,861 square feet of the property adjacent to Highway 23, including a portion of the Planning Building's paved parking lot, and extended Highway 23 from two lanes to four lanes. The taking extends the right-of-way to thirty-three feet from the northwest corner of the Planning Building, and two and one-half feet from the southwest corner of the building. Plaintiff also acquired a temporary construction easement on the property in a strip parallel to Highway 23, which would expire upon completion of the highway expansion project.

The condemnation action alleged that plaintiff and defendant were unable to agree on a purchase price for the property. Plaintiff "estimated the sum of $10,125.00 to be just compensation," and placed the sum of money in escrow with the Haywood County Superior Court. On 22 January 2001, defendant filed an Answer and Counterclaim alleging that "[p]laintiff has not offered fair and reasonable value for the property taken," and "[a]s a result of plaintiff's taking defendant's property, the value of defendant's remaining property has been significantly depreciated."

This matter went to trial before a jury on 2 June 2003. Defendant presented its case first, calling to the witness stand three experts on land value to testify about the effect that the highway expansion would have on the value of the building. The witnesses testified that based on their experience, the value of the building would decrease 30% to 35% because of its proximity to the highway. Each witness further testified that the rental value of the building would decrease due to the temporary construction easement. At the close of defendant's evidence, plaintiff moved for a directed verdict on the issues of (1)

whether the building depreciated in value as a result of its distance from the highway ("proximity damages"), and (2) the rental value of the building as effected by plaintiff's temporary construction easement on the property. The trial court found that defendant's evidence was inadequate on both issues, and granted plaintiff's motion for directed verdict. In so doing, the trial court remarked from the bench as follows:

> First of all, the court recognizes that expert testimony that is helpful to the jury in carrying out its role in determining the truth is admissible based on proper foundation, but the court does have a duty to act as a gatekeeper and to insure that expert opinion is properly founded on some reliable methodology.
>
> The court did allow the evidence to come in so that it could consider it on its merits with regard to the proximity damage and rental value, but after considering that evidence, the court's conclusion that even taking the evidence in the light most favorable to the defendant, that that expert opinion is not based on any reliable methodology that the court could ascertain, that it was simply based on subjective hunches and speculation, and therefore it's the court's judgment that the plaintiff is entitled to a directed verdict as to the components of damages having to do with proximity damage and the rental damage for the temporary easement.

The trial proceeded on the issues of damages incurred by the taking of a section of the parking lot and the value of the land. At the close of all evidence, the jury rendered a verdict whereby it awarded defendant $21,000. Defendant appeals the directed verdict.

The issues presented on appeal are whether the trial court erred by (I) granting plaintiff's motion for directed verdict on the issue of proximity damage; and (II) granting plaintiff's motion for directed verdict on the issue of the rental value of the property.

[1] Defendant first argues that the trial court erred by granting plaintiff's motion for directed verdict on the issue of proximity damages. We agree.

A motion for a directed verdict presents the question of "whether the evidence presented is sufficient to carry the case to the jury." *Satterfield v. Pappas*, 67 N.C. App. 28, 30, 312 S.E.2d 511, 513, *disc. rev. denied*, 311 N.C. 403, 319 S.E.2d 274 (1984). The question of the sufficiency of the evidence to go to the jury is a question of law,

always to be decided by the court. *McFalls v. Smith*, 249 N.C. 123, 124, 105 S.E.2d 297, 297 (1958). "[U]nder our law, close cases, dubious cases, questionable cases, and even weak cases are still cases for the jury; but cases in which the evidence fails to establish one or more of their essential elements are not." *Millikan v. Guilford Mills, Inc.*, 70 N.C. App. 705, 710, 320 S.E.2d 909, 913 (1984), *cert. denied*, 312 N.C. 798, 325 S.E.2d 631 (1985). "If there is any evidence, more than a scintilla, the judge should allow the case to go to the jury, since he is not to consider the weight of the evidence, but whether there is any evidence sufficient for the jury to consider." *Gwyn v. Motors, Inc.*, 252 N.C. 123, 127, 113 S.E.2d 302, 305 (1960) (citations and quotations omitted).

Our standard of review for a directed verdict is "whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991), *citing Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971). Our Supreme Court has held that in land condemnation cases, "mere conjecture, speculation, or surmise is not allowed by the law to be a basis of proof in respect of damages or compensation. The testimony offered should tend to prove the fact in question with reasonable certainty." *R.R. v. Manufacturing Co.*, 169 N.C. 156, 160, 85 S.E. 390, 392 (1915), *see also Manufacturing Co. v. R.R.*, 233 N.C. 661, 670, 65 S.E.2d 379, 386 (1951) ("The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than material for a mere conjecture, the court will not leave the issue to be passed on by the jury." (citations omitted)).

An expert's reliability need not be "proven conclusively reliable or indisputably valid before it can be admitted into evidence." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 460, 597 S.E.2d 674, 687 (2004). There is in fact an important difference between the admissibility of evidence and the weight that is assigned the evidence following admission. Traditionally, it is the jury that determines the weight. *Id.*

In land condemnation cases, expert real estate appraisers are not restricted to "any particular method of determining the fair market value of property either before or after condemnation." *Board of Transportation v. Jones*, 297 N.C. 436, 438, 255 S.E.2d 185, 187 (1979) (citing *Highway Commission v. Conrad*, 263 N.C. 394, 139 S.E.2d

553 (1965) (Expert witnesses given wide latitude regarding permissible bases for opinions on value.)). "A witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific real property." 263 N.C. at 399, 139 S.E.2d at 557 (citations and quotations omitted).

In the present case, defendant presented three expert witnesses to testify about proximity damage to the building and the rental value of the property. For our analysis of the proximity damage issue, we focus particularly on the testimony of James Deitz. Deitz testified on direct examination as follows:

Q: Why have you depreciated the value of that building?

A: Because of the proximity damage we were just discussing.

Q: Did you use any percentage or how did you arrive at that?

A: I used a 35 percent depreciation factor.

. . . .

Q: So why did you put 35 percent depreciation on the building, sir?

A: That was my opinion after I had gave [sic] other properties some consideration, and based on my experience of the thousands of properties I have evaluated over the years and the hundreds that I have sold, that's exactly why I gave it that figure.

On cross-examination, Deitz testified as follows:

Q: Do you have any similar sales or comparable sales that corroborate your opinion that the building has been diminished in value 35 percent by relocating the right-of-way?

A: That is my personal opinion based on experience.

Q: Sure, but you can't point to a sale here in Haywood County to establish that?

A: The depreciation I placed on the building was placed there for proximity purposes. That in itself is something that is only used by condemnation-type situations, which there's nothing out there that you can find that's available to a real estate broker or office that could be used that even applies to that situation.

Q: So it's your testimony that there's not a sale out there where you can show a building sold for one price, the road was moved closer to it and it sold for 35 percent less?

A: I'm not saying that. That's possible because the road moved over in the situation—if you had one that was 300 feet from the road, that's a whole different story than one that's 44 feet from the road.

Q: Well, if there is a sale, if there is a sale for the road—

A: There is no sale pertaining to proximity that can be used by me. In other words, that is strictly a condemning authority's priority.

Q: So your opinion that the building has been diminished in value 35 percent—

A: That is correct.

Q: —isn't based on comparable sales or similar—

A: It's based on my knowledge of sales I have made and evaluations that I have made.

Guided by the principles of *Jones* and *Conrad*, we conclude that Deitz's testimony is sufficient evidence of proximity damages such that the trial court should not have directed a verdict on the issue. The testimony offers more than a merely speculative valuation of the property. The testimony offers a reasonable valuation based on the witness's professional experience. The weight to be attributed to the testimony is a matter properly reserved for the jury. For these reasons, we reverse the directed verdict on the issue of proximity damages.

[2] Defendant also argues that the trial court erred by granting plaintiff's motion for directed verdict on the issue of the rental value of the property. We agree.

"When rental property is condemned the owner may not recover for lost rents, but rental value of property is competent upon the question of the fair market value of the property at the time of the taking." *Kirkman v. Highway Commission*, 257 N.C. 428, 432, 126 S.E.2d 107, 110 (1962). The facts of *City of Fayetteville v. M. M. Fowler, Inc.*, are similar to the case at bar. 122 N.C. App. 478, 470 S.E.2d 343, *disc. rev. denied*, 344 N.C. 435, 476 S.E.2d 113 (1996). In *Fowler*, the City of Fayetteville condemned 287 square feet of prop-

erty owned by the defendant and leased to a third party for operation of a gasoline service station. The proposed taking involved a temporary construction easement, a permanent utility easement, and the closing of one of four driveways providing access to the business located on the property. At trial, the president of the defendant company testified on direct examination that as a result of closing one of the four driveways, gasoline sales would be reduced by twenty-five percent. 122 N.C. App. at 479-80, 470 S.E.2d at 345. He further testified as follows:

Q: Does the fact that this property is now going to have as few as 25 percent fewer customers for the sales of gasoline, does that have an impact on the amount of rental that you can charge for this property?

A: Yes, it will, because less people will come in and purchase gas, the fuel rent, the variable fuel rent will be less, and because there will be less customers coming into the location, I'll be able to—have to charge less rent for the building. *So that impact will make the property worth less after the taking.*

122 N.C. App. at 480, 470 S.E.2d at 345. This Court held that the witness's testimony was permissible to demonstrate that "the value of the remaining property would be diminished because of the impact of the taking on the rental income generated by the property." *Id.* Although the witness's testimony was not scientific, it informed the trial court of the factors that the witness considered when determining the loss in rental value, i.e. the reduced volume of customers, and the correlating reduced volume of gasoline sales.

In the present case, expert witness Carroll Mease testified on direct examination about the rental value of the Planning Building as follows:

Q: Mr. Mease, in your opinion as a broker and a realtor, would this property lease for as much with a 36-month [construction easement] in front of it as it would without that [construction easement]?

A: No, sir.

Q: Why do you say that?

A: . . . If I was showing that building as a real estate broker to a possible client and I took them down there and said okay, you know here's a nice building, you can rent it for this, this or

this, but I've got to tell you there is a three-year construction easement across here that means that you can't use this for three years.

. . . .

Q: [The building] has this construction easement in front of it . . . in your opinion in the lease of the building, would they pay as much or more because of this construction easement for 36 months?

A: They would pay less and most of the time they would walk away. They would not even consider it with that construction easement in there.

Expert witness Bobby Joe McClure testified on direct examination about the rental value of the Planning Building as follows:

Q: In your experience as a businessman, a builder and developer, what effect does [the temporary construction easement] have on this property?

A: It has a tremendous amount of effect on it because you are very limited for parking space to start with, and then when this property is being used for a construction easement, it's going to interfere with your people using the—

. . . .

The use of this property is going to prohibit the tenants who are County employees from using this property properly until after the construction easement is turned back to them.

Q: As a businessman and developer in this county, do you have an opinion satisfactory to yourself as to whether or not granting such an easement across the entire front of the property as shown in orange would increase or decrease the value of the remaining property during the period of that lease?

A: It would decrease the value of the property.

Q: And why would you say that, sir?

A: Well, they can park equipment on it, they can—

. . . .

They can store drainage pipes, they can store manholes that they would use in putting in drainage. They virtually would

have the complete use of that for the three years that they have the construction easement.

Q: In your opinion, what effect would that have on the value of this building as business and commercial property during that 36 months?

A: It would have a considerable amount of effect on it.

Q: And how much did you place on that for that—for a lease for that construction easement?

. . . .

A: I put a price of $700 per month at 36 months.

We conclude that the testimony of Mease and McClure is sufficient evidence of the rental value to carry the issue to the jury. Thus, the trial court erred by directing a verdict on the rental value issue. The testimony of Mease and McClure reasonably demonstrates the impact of the taking on the rental income generated by the property based on the witnesses' professional experience. For these reasons, we reverse the directed verdict on the issue of rental value.

We remand this case to the trial court for a new trial.

REVERSED and REMANDED.

Judges HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER PEOPLES, DEFENDANT

No. COA03-931

(Filed 16 November 2004)

1. Drugs— possession with intent to sell—drugs found on companion

A motion to dismiss a prosecution for possession of crack cocaine with intent to sell was correctly denied where the cocaine was not found on defendant's person when he was arrested. Testimony established an unbroken chain of possession from defendant to his girlfriend, from whom the cocaine was recovered.

2. Evidence— officer's testimony—defendant as drug dealer

The trial court acted within its discretion to deny defendant's motion to strike an officer's testimony explaining that defendant was arrested rather than those buying cocaine from him because the operation was targeting drug dealers. The statement was general and did not seem purposefully calculated to prejudice the jury against defendant.

3. Appeal and Error— mistrial—defendant in handcuffs—no plain error analysis

The question of whether the trial judge should have declared a mistrial after a report that some jurors may have seen defendant in handcuffs in a hallway was not preserved for appeal because defendant did not object or seek a mistrial. Plain error does not apply to mistrial rulings; moreover, none of the jurors raised their hand when the court asked whether they had seen defendant in the hallway.

4. Criminal Law— interested witness instruction—no error

The trial court did not err by giving an interested witness instruction about defendant's main witness, his girlfriend and the mother of his child, who was a nonjoined codefendant. She probably was an interested witness; moreover, the interested witness instruction was not so much a part of the entire instructions as to have prejudiced the jury against defendant or his witnesses.

5. Sentencing— habitual felon—arraignment

The failure of the trial court to arraign defendant as an habitual felon before the close of the State's evidence was not prejudicial where defendant pled guilty to the habitual felon charge, the court conducted a full inquiry into the plea, defendant was fully aware of the consequences, and defendant was notified that he was being tried as a recidivist before the trial.

6. Sentencing— habitual felon—indictment

Defendant was validly indicted for being an habitual felon where he was charged in one bill with felonious possession of cocaine and in another with being an habitual felon. All the information required to charge defendant was included; the statute does not require that the indictment charging the underlying felony also charge habitual felon status.

Appeal by defendant from judgment entered 14 January 2003 by Judge Jerry Cash Martin in Forsyth County Superior Court. Heard in the Court of Appeals 21 April 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance for the State.

Hall & Hall Attorneys at Law, P.C., by Susan P. Hall for the defendant-appellant.

ELMORE, Judge.

Christopher Peoples (defendant) was watched by Officer B. D. Moyer (Officer Moyer) who was conducting a surveillance operation of a known open-air drug market. Defendant was approached by a man and three women individually. When the first woman approached, defendant produced a plastic bag containing an off-white substance. Officer Moyer testified that defendant handed something out of the bag to each of the women and they handed him something in return. A woman who would later be identified as Monica Speas (Speas), the defendant's girlfriend, was seen observing the activity. Another man approached defendant and received something from the plastic bag, and handed defendant something in return. Speas then approached defendant, who tied a knot in the top of the plastic bag and handed it to Speas along with some money. Speas placed the bag down her shirt.

At that point, officers moved in to arrest defendant and Speas. Officer Candace Peck was called to the scene to search Speas. Officer Peck asked Speas if she had anything on her, at which point Speas began to cry and produced the plastic bag containing a white rock-like substance from her bra area. The substance weighed 2.5 grams. The officer also found a total of $17 in cash on Speas' person. A single $100.00 bill was found on defendant's person. Speas and defendant were transported to the jail where both were advised of their Miranda rights and Speas waived her right to remain silent. Her signed waiver was admitted into evidence at trial. She then made a statement to police.

Speas, as a witness at trial, denied ever being advised of her rights or waiving them, although she remembers signing the form. She contradicted her prior statements to police while on the witness stand.

Defendant was found guilty in a jury trial of possession of cocaine with intent to sell and deliver, and pled guilty to habitual felon status. Defendant now brings this appeal.

I.

[1] Defendant first assigns error to the trial court's denial of defendant's motion to dismiss at the close of the evidence, arguing that the evidence was not sufficient to send the case to the jury.

The statute that governs motions for dismissal, which the trial court referenced in deciding the motion, is N.C. Gen. Stat. § 15A-1227(a)(3), and provides in pertinent part as follows:

> (a) A motion for dismissal for insufficiency of the evidence to sustain a conviction may be made at the following times:
>
> (1) Upon close of the State's evidence.
>
> (2) Upon close of all the evidence.
>
> (3) After return of a verdict of guilty and before entry of judgment.
>
> (4) After discharge of the jury without a verdict and before the end of the session.
>
> (b) Failure to make the motion at the close of the State's evidence or after all the evidence is not a bar to making the motion at a later time as provided in subsection (a).
>
> (c) The judge must rule on a motion to dismiss for insufficiency of the evidence before the trial may proceed.
>
> . . .

N.C. Gen. Stat. § 15A-1227 (2003).

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion

should be allowed." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (quoting *Powell*, 299 N.C. at 98, 261 S.E.2d at 117).

In reviewing challenges to the sufficiency of evidence, "we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. *Id.* The defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. *See State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781, *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). With these holdings as our guide, we now review the sufficiency of the evidence in this case. *See generally Scott*, 356 N.C. 591 at 594-97, 573 S.E.2d 866 at 868-69.

The elements of possession with intent to sell and deliver are: 1) possession, 2) of a controlled substance, and 3) with intent to sell or deliver, which may be inferred from the amount or packaging. *See State v. Baxter*, 285 N.C. 735, 737, 208 S.E.2d 696, 697-98 (1974). "The crime of possession requires that the contraband be in the custody and control of the defendant and subject to his disposition." *State v. Keeter*, 42 N.C. App. 642, 645, 257 S.E.2d 480, 482 (1979).

The evidence, taken in a light most favorable to the State, showed that defendant was making exchanges from a small plastic bag. The testimony showed that he then tied a knot in the bag and handed it to Speas, who in turn put it in her bra area. The bag which was recovered from Speas contained a large rock of 2.5 grams of crack cocaine. The only direct evidence of defendant possessing and selling cocaine is from Officer Moyer, who observed defendant. The physical evidence of the recovered cocaine supports Officer Moyer's testimony. Although the cocaine was not on defendant's person when he was arrested, the testimony established an unbroken chain of possession from defendant to Speas. Officer Moyer observed what later was confirmed as cocaine in defendant's possession.

Although this evidence is not overwhelming, it is sufficient to persuade a rational juror to accept the conclusion that defendant possessed the cocaine recovered from Speas. We discern no error in the trial court's denial of the motion to dismiss.

II.

[2] Defendant next assigns error to the trial court's denial of defendant's motion to strike Officer Moyer's testimony, which he argues characterized the defendant as a "drug dealer."

The testimony which defendant argues should have been stricken was as follows:

> Q. [by Ms. Behan, for the State] Officer Moyer, can you tell the jury based on your training how the decision you made came to be to arrest these two individuals as opposed to individuals who appeared to be buying cocaine on this particular night?
>
> A. [Officer Moyer] Yes. The whole reason for our operation was to target drug dealers.
>
> MR. BOYCE: [counsel for defendant] Objection . . .

Defendant cites the case of *State v. Brooks*, 113 N.C. App. 451, 439 S.E.2d 234 (1994) as controlling. *Brooks* notes that "[i]n general, arguments of counsel are within the domain of the trial judge's discretion," but that in a case in which "the State's characterization of defendant appears to have been calculated to prejudice and to inflame the jury," a new trial is appropriate. *Brooks*, 113 N.C. App. at 458, 439 S.E.2d at 238-39.

Brooks did involve the issue of counsel arguments painting the defendant in a negative light, and resulted in a new trial, but the facts of that case are distinguishable from those of the instant case. In *Brooks* the prosecutor repeatedly asked questions about specific instances of violence in the defendant's past, and during arguments characterized defendant as a "liquor-drinking, dope-smoking, defendant." *Id.* In the present case, defense counsel had asked Officer Moyer on cross examination about all the people who had engaged in transactions with defendant and yet had not been arrested. On redirect examination, Officer Moyer was merely explaining why defendant was targeted when several people had been involved in the transactions he had witnessed. *See State v. Taylor*, 344 N.C. 31, 44, 473 S.E.2d 596, 603 (1996) ("The State, during redirect examination, is entitled to clarify and rebut issues raised during cross-examination."). Officer Moyer made a general statement which could be indirectly inferred to defendant. He was not calling defendant a name, nor was the prosecutor slandering defendant in argument. The statement did not seem purposefully calculated to prejudice the jury against the defendant.

We hold that the trial court acted within its discretion to deny the motion to strike the testimony in question.

III.

[3] Defendant next assigns plain error to the trial court's failure to declare a mistrial on the grounds that there were reports from another judge and a bailiff that some of the jurors were in a position to see defendant in the hallway in handcuffs.

Defendant's counsel did not seek a mistrial, and did not object at trial to the trial court's ruling. Plain error review does not apply to a ruling on a motion for mistrial, but only to issues relating to jury instructions and to the admissibility of evidence. *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230-31 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305, 121 (2001). This issue is not preserved for appellate review. N.C.R. App. P. 10(c) (2004).

In this case, none of the jurors raised their hand in response to the trial court's question as to whether they saw defendant in the hallway. This is not a situation where "there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law" and as such does not require a mistrial. *State v. Hardison*, 326 N.C. 646, 657-58, 392 S.E.2d 364 (1990) (quoting *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982)).

IV.

[4] Next, the defendant argues that the trial court erred in including in the jury charge the instructions regarding "interested witness." Defendant argues that this instruction prejudiced the jury against his main witness, Monica Speas.

> In reviewing a trial court's ruling on requests for jury instructions, [since the defendant properly objected at trial,] we are 'required to consider and review [the] jury instructions in their entirety.' *Estate of Hendrickson ex rel. Hendrickson v. Genesis*, 151 N.C. App. 139, 150, 565 S.E.2d 254, 262 (2002) (citation omitted). The burden is on the party assigning error to show 'that the jury was misled or that the verdict was affected by an omitted instruction.' *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002) (citation omitted). 'The charge will be held to be sufficient if "it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.]' " *Id.* (citation omitted). After reviewing the jury

instructions in their entirety, we find that the instructions were sufficient and not likely to mislead the jury.

Davis v. Balser, 155 N.C. App. 431, 433, 574 S.E.2d 177, 179 (2002).

In this case, the trial court instructed the jury in relevant part:

> You may find that a witness is interested in the outcome of this trial. In deciding whether to believe such a witness, you may take the interest of the witness into account. If after doing so you believe the testimony of the witness in whole or in part, you will treat what you believe the same as any other believable evidence.

Monica Speas was defendant's main witness. Evidence showed that she had lived with him and had a child with him. She was also charged with possession with intent to sell and deliver for the same incident for which the defendant was on trial. As a non-joined co-defendant, she was most likely an interested witness.

Even if she was not an interested witness, an interested witness instruction relates only to a subordinate feature of the case. *See State v. Vick*, 287 N.C. 37, 43, 213 S.E.2d 335, 339 (1975). The instruction was not so influential a part of the whole jury instructions as to have potentially prejudiced the jury against the defendant or his witnesses.

V.

[5] Defendant also assigns error to the trial court's failure to arraign the defendant as to the habitual felon indictment prior to the close of the State's evidence.

In a habitual felon situation, "[w]here there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding." *State v. Smith*, 300 N.C. 71, 73, 265 S.E.2d 164, 166 (1980) (quoted with approval in *State v. Griffin*, 136 N.C. App. 531, 552, 525 S.E.2d 793, 807 (2000)).

In this case, the defendant pled guilty to the habitual felon charge. The trial court conducted a full inquiry into the defendant's plea, including informing him of the maximum possible sentence and the other consequences of a habitual felon conviction. The defendant was fully aware of the charges against him and the consequences of a conviction. We also note that he was notified that he was being tried as a recidivist before the trial on the possession charge. We

hold that the omission of an arraignment in this case did not prejudice the defendant.

VI.

[6] Lastly, defendant assigns error to the indictment for the principal felony, arguing that it cannot support sentencing as a habitual felon, as the indictment does not meet statutory requirements.

Section 14-7.3 of our General Statutes provides:

> An indictment which charges a person who is an habitual felon within the meaning of G.S. 14-7.1 with the commission of any felony under the laws of the State of North Carolina must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony. An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place. . . .

N.C. Gen. Stat. § 14-7.3 (2003).

In this case, one valid indictment charged defendant with possession of cocaine with intent to sell and deliver, and a separate indictment, including all the information required by the statute, charged defendant with habitual felon status. Both true bills of indictment were returned on the same day.

This Court has previously held, as defendant recognizes on appeal, that this section does not require the indictment charging defendant with the underlying felony must also charge that defendant as an habitual felon. *State v. Hodge*, 112 N.C. App. 462, 466-67, 436 S.E.2d 251, 254 (1993) (relying on *State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985) and *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977)). Where defendant was charged in one bill of indictment with felonious possession of cocaine, and in a separate bill of indictment with being an habitual felon, the indictments were not invalid. *Id.* We likewise conclude that the indictments in the case at bar were sufficient.

We hold that defendant received a fair trial free from prejudice.

No error.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA v. WILLIAM DUGGIE BRICE, DEFENDANT

No. COA03-588

(Filed 16 November 2004)

1. **Evidence— officer giving payments to informant for bills after cooperation and prior to trial—credibility**

The trial court did not err in a trafficking in cocaine by possession and transportation case by denying defendant's motion to dismiss the charges based on a police officert's payments totaling $350.00 to the State's material witness for her bills several weeks after the witness cooperated in the operation that led to defendant's arrest and prior to his trial, because: (1) both the witness and the officer were subjected to vigorous cross-examination on the issue of the payments, and it is the province of the jury to assess and determine witness credibility; and (2) the evidence does not support defendant's characterization of the two payments as a quid pro quo payment for her testimony since they were not made to secure either her cooperation in defendant's arrest or her testimony at trial.

2. **Appeal and Error— preservation of issues—failure to object—inaudible audiotape**

Although defendant contends the trial court erred in a trafficking in cocaine by possession and transportation case by allowing the State to play for the jury during its case-in-chief an audiotape recorded by an informant during her 9 July 2002 trip to and from Charlotte with defendant even though defendant contends the tape was inaudible, defendant failed to preserve this issue for review because although defendant objected to admission of the tape into evidence prior to a proper foundation being laid, defendant did not object to the State playing the tape for the jury after the trial court ruled that it had been properly authenticated.

3. Evidence— audiotape—different machine used to play tape

The trial court did not abuse its discretion in a trafficking in cocaine by possession and transportation case by allowing the jury during its deliberations to listen to portions of an audiotape, recorded by an informant during her 9 July 2002 trip to and from Charlotte with defendant, on a machine different from the one used to play the same tape during the State's case-in-chief, because: (1) defendant does not allege that the tape itself was enhanced or altered in any way between the time it was played during the State's case-in-chief and during the jury's deliberations, and nothing in the record suggested that such was the case; and (2) the very fact that the jury asked to listen to portions of the tape three separate times during its deliberations, and to change seats within the jury box in order to give each juror a chance to sit as close as possible to the tape player, indicates that the second machine did nothing to enhance the tape's clarity.

Appeal by defendant from judgment entered 30 January 2003 by Judge Richard D. Boner in Catawba County Superior Court. Heard in the Court of Appeals 5 February 2004.

Attorney General Roy Cooper, by Assistant Attorney General James C. Holloway, for the State.

Sigmon Sigmon & Isenhower, by Gene Sigmon for defendant-appellant.

ELMORE, Judge.

William Duggie Brice (defendant) appeals from judgment entered upon jury verdicts finding him guilty of one count each of trafficking in cocaine by possession and trafficking in cocaine by transportation. For the reasons stated herein, we conclude that defendant received a fair trial, free of prejudicial error.

The evidence presented by the State at trial tended to show that in early July 2002 Beverly Jobe contacted Lieutenant Tracy Ledford of the Maiden Police Department and informed him that she had a problem using crack cocaine and wanted to stop. Jobe told Lieutenant Ledford that she "needed away from [defendant]" because defendant regularly provided her with crack cocaine. Lieutenant Ledford in turn contacted Sergeant Robert Curtis Moore of the Maiden Police Department and related to Sergeant Moore what Jobe had told him regarding Jobe's use of crack cocaine provided by defendant.

On 8 July 2002, Sergeant Moore and Investigator Bart Lowdermilk of the Catawba County Sheriff's Department met with Jobe at her apartment, where she reiterated both her desire to stop using crack cocaine and her claim that defendant often provided her with drugs. Sergeant Moore asked Jobe "if she could assist in setting up a situation where the narcotics division was aware that controlled substances were going to be transported or brought back to [defendant's] residence." Jobe informed Sergeant Moore that defendant was going to drive her to Charlotte on 9 July 2002, where defendant intended to buy drugs and after which they would return to defendant's home in Maiden. According to Jobe, she had previously accompanied defendant on eight or nine similar trips.

On 9 July 2002, Sergeant Moore provided Jobe with a small tape recorder, which Jobe agreed to carry in her purse in order to record any conversation during the drive to and from Charlotte. Defendant picked up Jobe from her apartment and they drove in defendant's car to Charlotte, where Jobe testified that defendant purchased rock and powder cocaine. Jobe testified that, per defendant's instruction, she placed the drugs between her legs while seated in the front passenger seat of defendant's car, and they returned to Maiden. Maiden police officers resumed their surveillance of defendant's car as it re-entered Catawba County, and as defendant and Jobe neared defendant's home, Maiden Police Sergeant Michael Eaker pulled behind defendant's car and activated his blue lights. Jobe testified that defendant "kept yelling to [her] to put the dope in [her] pants" before pulling over.

Sergeant Eaker was quickly joined at the scene by other officers, including Sergeant Moore and Investigator Lowdermilk, and both defendant and Jobe were asked to step out of the car. Sergeant Moore and Investigator Lowdermilk each testified that they then observed the drugs in plain view on the passenger seat. Both defendant and Jobe were then arrested. Defendant was charged with, and subsequently indicted for, trafficking in cocaine by possession, trafficking in cocaine by transportation, and maintaining a vehicle for keeping or selling a controlled substance. Sergeant Moore testified that Jobe was taken into custody at the scene "[f]or safety reasons" because he feared that defendant might threaten or attempt to harm Jobe if defendant became aware that Jobe had cooperated with the police. Jobe was charged with trafficking in cocaine by possession, but the charge was subsequently dropped. While still at the scene, Jobe gave Sergeant Moore the recording device and audio-

tape she had used to record conversation between herself and defendant during the trip.

At trial, Jobe testified on direct examination that about a month after defendant's arrest, she got behind on her bills and called Sergeant Moore and "asked him if he would help me . . . keep my bills caught up so I wouldn't lose my apartment." Sergeant Moore testified that he gave her $100.00 on that occasion and another $250.00 after she called approximately two months later and asked for additional help with her bills. Sergeant Moore testified that the funds came from the Catawba County Sheriff's Department.

The audiotape which Jobe recorded by leaving the tape recorder running in her purse during her 9 July 2002 trip to Charlotte with defendant was admitted into evidence. Sergeant Moore testified that he was able to identify the voices of defendant and Jobe on the tape, and that the quality of the recording was "[o]n a scale of zero or one to ten . . . three to four maybe[.]" Sergeant Moore testified that music from the car's radio was also audible on the tape. The tape was then played in its entirety for the jury. Thereafter, the State rested, and defendant presented no evidence. Defendant renewed his earlier motion to dismiss on the grounds that Jobe, the State's witness, had been paid by the State, and also moved to dismiss for insufficiency of the evidence. The trial court denied both motions and, following the evening recess, the jury was instructed and began its deliberations the next morning.

During deliberations, the jury asked to hear the first and last ten minutes of the tape again. Because the device which had been used to play the tape during the State's case-in-chief was no longer available, the prosecutor arranged to have another tape player brought to the courtroom. The trial court overruled defendant's objection to the use of a tape player different from the one used during the State's evidence, and the requested portions of the tape were played for the jury. After the first ten minutes were played, the jury foreman noted that some of the jurors were having trouble hearing and asked if the jurors could switch seats and hear a portion of the first ten minutes again. The trial court allowed the jurors in the back row of the jury box to switch with the jurors in the front row and played the requested portion again, followed by the tape's last ten minutes. Defense counsel then moved for a mistrial, which the trial court denied. After further deliberations, the jury asked to hear the tape's first ten minutes again. The trial court, over defense counsel's objection, allowed the jury's request.

The jury thereafter completed its deliberations and returned guilty verdicts on the trafficking in cocaine by possession and trafficking in cocaine by transportation charges, and a not guilty verdict on the maintaining a vehicle for keeping or selling a controlled substance charge. The trial court sentenced defendant to between 35 and 42 months imprisonment on each conviction, with the sentences to run concurrently. Defendant appeals.

[1] By his first assignment of error, defendant contends the trial court erred by denying his motion to dismiss based on Sergeant Moore's payment of $350.00 to the State's material witness, Jobe, several weeks after Jobe cooperated in the operation that led to defendant's arrest and prior to his trial. Defendant notes that this is an issue of first impression in North Carolina and urges this Court to fashion a rule whereby "[a] witness cannot be paid for testimony in a civil or criminal trial[.]" The only authority defendant cites in support of this argument is dicta from a Ninth Circuit Court of Appeals decision stating that "[a] prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system." *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1992). However, we find it significant that the *Bernal-Obeso* court, after acknowledging that "our criminal justice system could not adequately function without information provided by informants and without their sworn testimony in certain cases[,]" *Bernal-Obeso*, at 334, further stated as follows:

> [t]hus, we have decided on balance not to prohibit, as some have suggested, the practice of rewarding self-confessed criminals for their cooperation, or to outlaw the testimony in court of those who receive something in return for their testimony. Instead, we have chosen to rely on (1) the integrity of government agents and prosecutors not to introduce untrustworthy evidence into the system, *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935), *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976); (2) trial judges and stringent discovery rules to subject the process to close scrutiny, *United States v. Heath*, 260 F.2d 623, 626 (9th Cir. 1958); (3) defense counsel to test such evidence with vigorous cross examination, *Davis v. Alaska*, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974) ("Cross examination is the principle means by which the believability of a witness and the truth of his testimony are tested."), *United States v. Butler*, 567 F.2d 885, 890 (9th Cir. 1978); and (4)

> the wisdom of a properly instructed jury whose duty it is to assess each witness's credibility and not to convict unless persuaded beyond a reasonable doubt of the accused's guilt.

Bernal-Obeso, 989 F.2d at 335.

In the present case, defendant appears to argue that Jobe's request and receipt of money from Sergeant Moore after her cooperation in defendant's arrest but before trial rendered her testimony so inherently unreliable that the court erred in denying defendant's motion to dismiss. We are not persuaded. Our Rules of Evidence provide that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2003). Our review of the trial transcript indicates that both Jobe and Sergeant Moore were subjected to vigorous cross-examination on the issue of Sergeant Moore's payments to Jobe. Our Supreme Court has stated that it is a "long-standing principle in our jurisprudence . . . that it is the province of the jury, not the court, to assess and determine witness credibility." *State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002), *cert denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003).

We also find it significant that the evidence does not support defendant's characterization of Sergeant Moore's two payments totaling $350.00 to Jobe as a *quid pro quo* payment for her testimony. Jobe testified that "[she] was already going to testify against [defendant]" when she "asked [Sergeant Moore] for some money to help [her] pay [her] bills . . . [Sergeant Moore] didn't ask [her] to do anything." Jobe testified that at the time she asked Sergeant Moore for money, she was separated from her husband and her drug dependency kept her from working. Jobe also testified that prior to defendant's arrest, she relied on him to periodically give her money for, among other things, groceries. Sergeant Moore testified that he gave money to Jobe because approximately a month after defendant's arrest, Jobe "contacted [him], advised she was behind in some bills, and asked if there was anything we could possibly do." Sergeant Moore further testified that he received a bill from the City of Maiden stating that Jobe was behind on her power bill and threatening to discontinue service if it was not paid, and that upon Jobe's payment of the bill he received a receipt from the city. This testimony supports the State's contention that Sergeant Moore's payments to Jobe were not made to secure either her cooperation in defendant's arrest or her testimony at trial.

We conclude that defendant's first assignment of error is without merit.

By his second assignment of error, defendant contends the trial court erred by (1) allowing the State, during its case-in-chief, to play for the jury the audiotape recorded by Jobe during her 9 July 2002 trip to and from Charlotte with defendant, on the grounds that the tape was inaudible; and (2) allowing the jurors to hear portions of the same tape again during their deliberations, on the grounds that the tape was played using a machine different from the one used during the State's evidence. At the outset we note that because defendant has improperly raised multiple issues of law in this single assignment of error, this assignment of error is subject to dismissal. N.C.R. App. P. 10(c)(1); *State v. Williams*, 350 N.C. 1, 9, 510 S.E.2d 626, 633, *cert. denied*, 528 U.S. 880, 145 L. Ed. 2d 162 (1999). However, we elect to use our discretion pursuant to Rule 2 of our Rules of Appellate Procedure and consider both issues of law raised by this assignment of error.

[2] Defendant first argues that the trial court erred by allowing the State to play the tape during its case-in-chief, on the grounds that the tape was inaudible. Defendant objected to admission of the tape into evidence prior to a proper foundation being laid; however, after the trial court ruled that it had been properly authenticated defendant did not object to the State playing the tape for the jury. Defendant has therefore failed to preserve this issue for appellate review. N.C.R. App. P. 10(b)(1); *State v. Scott*, 343 N.C. 313, 332, 471 S.E.2d 605, 616-17 (1996).

[3] Defendant next asserts that the trial court erred by twice allowing the jury, during its deliberations, to listen to portions of the tape on a machine different from the one used to play the same tape during the State's case-in-chief. In his brief, defendant argues that playing the tape on a different machine during deliberations constituted the improper introduction of "new evidence" by the State, apparently on the grounds that the tape was more audible when played on the second machine, and that defendant should have been given the opportunity to rebut this "new evidence" pursuant to N.C. Gen. Stat. § 15A-1226(a) (2003).

In North Carolina, "[t]he manner of the presentation of evidence is largely in the discretion of the trial judge. His control of the case will not be disturbed absent a manifest abuse of discretion." *State v. Harris*, 308 N.C. 159, 168, 301 S.E.2d 91, 97 (1983). In denying defend-

ant's motion for a mistrial after the tape was played on the different machine for the jury during its deliberations, the trial judge stated that he "couldn't personally tell any difference between what [he] heard today and what [he] heard yesterday." Defendant does not allege that the tape itself was enhanced or altered in any way between the time it was played during the State's case-in-chief and during the jury's deliberations, and we discern nothing in the record suggesting that such was the case. The very fact that the jury asked to listen to portions of the tape three separate times during their deliberations, and to change seats within the jury box in order to give each juror a chance to sit as close as possible to the tape player, indicates that the second machine did nothing to enhance the tape's clarity. We are unable to say on these facts that the trial court abused its discretion in allowing the jury, during its deliberations, to hear the tape played on a machine different from the one used during the State's case-in-chief. Accordingly, this assignment of error is overruled.

No error.

Judges TIMMONS-GOODSON and BRYANT concur.

STATE OF NORTH CAROLINA v. JAMES DONNELL ALEXANDER

No. COA04-259

(Filed 16 November 2004)

Sentencing— prior record level—agreement—Structured Sentencing requirements

The trial court erred when sentencing defendant for assault by relying on a record level worksheet submitted by the State showing a prior misdemeanor assault (with no other documentary evidence) along with defendant's stipulation to a sentence range and defense counsel's statement that defendant had no prior felonies. A worksheet is not sufficient without more to meet the State's burden, defense counsel did not agree with the item listed on the worksheet, and the stipulation to a minimum and maximum term of imprisonment is not a stipulation that the requirements established by the Legislature for sentencing have been met. The defendant and the prosecution may not, under

these circumstances, stipulate to a specific term of imprisonment irrespective of what might be permitted by the Structured Sentencing Act.

Judge TIMMONS-GOODSON dissenting.

Appeal by defendant from judgment entered 8 September 2003 by Judge Jerry R. Tillett in Pasquotank County Superior Court. Heard in the Court of Appeals 18 October 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert O. Crawford, III, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Kelly D. Miller, for defendant-appellant.

LEVINSON, Judge.

Defendant pled guilty on 8 September 2003 to assault with a deadly weapon with intent to kill inflicting serious injury pursuant to a plea agreement providing that "the State will agree that the defendant be sentenced to a minimum of 80 months and a maximum of 105 months." The trial court sentenced defendant within the presumptive range at prior record level II to the above term of imprisonment. The court also recommended that defendant pay restitution in the amount of $16,822.26 as a condition of work release. Defendant now appeals from the judgment contending: (1) the court erred by sentencing him at prior record level II because the State failed to prove his prior convictions, (2) the court erred by recommending the payment of restitution based upon a restitution worksheet defendant's counsel had not seen, and (3) defendant was denied effective assistance of counsel because his counsel stipulated to the restitution worksheet without having first seen it. On appeal, defendant seeks a new sentencing hearing.

We first address defendant's argument that the trial court erred in sentencing him at a Level II prior record level. We conclude that the sentence imposed by the trial court is unsupported by the evidence such that defendant is entitled to a new sentencing hearing.

During defendant's sentencing hearing, the State submitted a prior record level worksheet assigning one point to defendant for previously having been convicted of misdemeanor assault inflicting serious injury. The record reveals that the court did not rely on any documentary evidence to prove this prior offense. The State con-

tends that its burden of proof with respect to the existence and classification of defendant's prior conviction was satisfied by defendant's stipulation. The alleged stipulation is said to result from defense counsel's statement to the trial court that "until this particular case [defendant] had no felony convictions, as you can see from his worksheet."

"There is no question that a worksheet, prepared and submitted by the State, purporting to list a defendant's prior convictions is, without more, insufficient to satisfy the State's burden in establishing proof of prior convictions." *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002). A prior conviction may, however, be proved by a stipulation between the parties. N.C.G.S. § 15A-1340.14(f)(1) (2003). An affirmative statement by counsel expressing agreement with the convictions listed on the prior record level worksheet is a stipulation sufficient to prove the prior conviction or record level. *Eubanks*, 151 N.C. App. at 506, 565 S.E.2d at 743; *State v. Hanton*, 140 N.C. App. 679, 689, 540 S.E.2d 376, 382 (2000). Clear and unequivocal statements expressing agreement with, or the lack of an objection to, the items listed on a sentencing worksheet have been held to be stipulations. *See State v. Morgan*, 164 N.C. App. 298, 307, 595 S.E.2d 804, 810-11 (2004) (holding defendant had stipulated to record level where defense counsel "conceded the existence of the convictions by arguing that defendant should be sentenced at a level III on the basis of her prior record" and "made no objection to the prior record level worksheet except to the number of points [that a] third degree homicide conviction from New Jersey should receive"). A stipulation may also be found to exist where defense counsel makes a statement indicating that he has reviewed the worksheet and at least partially agrees with it. *See State v. Cunningham*, 108 N.C. App. 185, 198, 423 S.E.2d 802, 810 (1992) (holding that, when prosecutor stated at sentencing hearing that defendant had prior convictions of loitering and resisting a public officer, defense counsel's statement that the defense would object to the loitering as not carrying a sixty-day sentence amounted to an admission or stipulation that defendant had the prior convictions asserted by the prosecutor); *State v. Brewer*, 89 N.C. App. 431, 436, 366 S.E.2d 580, 583 (1988) (holding that, when prosecutor stated that defendant had 1974 and 1977 convictions, defense counsel's response that defendant's record indicated no convictions for almost ten years constituted an admission that defendant did have these two older convictions).

In the instant case, defense counsel relied on the worksheet only to the extent he agreed with the State that defendant had no prior felony convictions. Defense counsel did not expressly or tacitly agree with the item listed thereon. His representations to the court went no further. The State would have us equate "the worksheet shows no felonies" with "my client was convicted of the misdemeanor on the worksheet." This is not, in our view, a fair or practical interpretation of defense counsel's statement. Any ambiguity in defense counsel's statement should militate against holding that there was a stipulation. We therefore conclude that the circumstances of the present case are not analogous to those circumstances in which it has been held that a defendant stipulated to the State's assertion concerning the convictions listed on the worksheet.

Relying on *State v. Hamby*, 129 N.C. App. 366, 499 S.E.2d 195 (1998), the State contends that, even if the defendant's prior record level was not supported by evidence presented at the sentencing hearing, this issue has been mooted by defendant's express agreement to serve 80 to 105 months imprisonment. In *Hamby*, the defendant entered a guilty plea pursuant to a transcript of plea that expressly included the following: "Charge is Class E felony and defendant has a record level of II. The defendant will receive a sentence of 29 mos. min.—44 mos. max." *Hamby*, 129 N.C. App. at 367, 499 S.E.2d at 195. This Court held that by admitting that her prior record level was Level II and agreeing to the specified sentencing range, "defendant mooted the issues of whether her prior record level was correctly determined . . . and whether the duration of her prison sentence was authorized." *Id.* at 369-70, 499 S.E.2d at 197. Accordingly, defendant had no right to appeal on these issues, and her appeal was dismissed. *Id.*

Unlike the defendant in *Hamby*, the present defendant did not stipulate to his prior record level, but instead stipulated only to a minimum and maximum term of imprisonment. This difference is significant because a stipulation to a prior record level is a stipulation that the requirements established by the Legislature for defendant to be sentenced pursuant to a particular level of the sentencing grid (*e.g.*, prior conviction points, offense committed while on probation, parole, or post-release supervision, etc.) have been met. On the contrary, a stipulation to a minimum and maximum term of imprisonment, without more, does not ensure that the sentence imposed comports with the sentencing scheme imposed by the General Assembly.

Allowing offenders to stipulate to prior record level and therefore waive an argument on appeal that the prosecutor did not prove such is very different than the rule advanced by the State here. To permit defendant's sentence to stand, irrespective of whether the General Statutes authorize such a sentence to be imposed, would be tantamount to permitting our courts to sentence defendants to terms of imprisonment based not on the collective agreement of our Legislature, but instead on counsels' individualized notions of appropriate punishment.

Moreover, such a rule would be contrary to our sentencing scheme, which contemplates an examination of prior record points to determine a prior record level which, in turn, controls the range of a sentence. *See* N.C.G.S. § 15A-1340.14 (2003); N.C.G.S. § 15A-1340.17 (2003). The General Statutes are explicit in their requirement that "[b]efore imposing a sentence, the court **shall** determine the prior record level for the offender. . . ." N.C.G.S. § 15A-134.13(a) (2003) (emphasis added). This is, of course, an important ministerial exercise on the part of the sentencing court, the object of which is to ensure that offenders are sentenced in accordance with the law of this State.

The present defendant was convicted of a class C felony and agreed to serve a sentence of 80 to 105 months imprisonment. Such a sentence could be imposed lawfully as a presumptive sentence for a defendant with a prior record level II, a mitigated sentence for a defendant with a prior record level III, or an aggravated sentence for a defendant with a prior record level I. *See* G.S. § 15A-1340.17. However, the trial court did not require that the State prove defendant's prior record level, but instead permitted defendant to agree to a particular sentence. Therefore, it is possible that defendant is a Level V offender, such that 80 months as a mandatory minimum is not even authorized. Without proof of defendant's prior record level, we cannot know at this point. Likewise, it is possible that defendant is a Level I offender and has received an aggravated sentence without the trial court making any findings in aggravation. Again, without proof of defendant's prior record level, we cannot know at this point. Applying the dissent's rationale, defendant's agreement to serve 80 mandatory months, standing alone, would be sufficient without regard to whether such a sentence may be lawfully imposed in light of defendant's prior record. We easily reject the suggestion that we can, under these circumstances, permit the prosecutor and defendant to stipulate to a specific term of imprisonment irrespective of what might be permitted by the Structured Sentencing Act.

In sum, we hold that defense counsel did not stipulate to the misdemeanor conviction such that *Eubanks* would control the outcome here. Furthermore, defendant's stipulation to an 80-105 month sentence, standing alone, does not render the issue of whether the State proved defendant's prior conviction moot. Thus, the differing results in *Hamby* and the present case are entirely logical.

Because we grant relief pursuant to defendant's first argument on appeal, we need not address his remaining assignments of error.

New sentencing hearing.

Judge CALABRIA concurs.

Judge TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge, dissenting.

Because I conclude that the trial court did not err in sentencing defendant, I respectfully dissent.

As the majority correctly notes, defendant and the State entered into a plea agreement whereby defendant would be sentenced to eighty to 105 months imprisonment in exchange for his plea of guilty to the charge of assault with a deadly weapon with intent to kill inflicting serious injury. On appeal, defendant argues that the trial court erred in sentencing him to the agreed upon term because he failed to stipulate to the prior record level used by the trial court during sentencing. I disagree.

I recognize that "[t]here is no question that a worksheet, prepared and submitted by the State, purporting to list a defendant's prior convictions is, without more, insufficient to satisfy the State's burden in establishing proof of prior convictions." *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002). However, I also note that "[a] prior conviction shall be proved by . . . [s]tipulation of the parties . . . [or] [a]ny other method found by the court to be reliable." N.C. Gen. Stat. § 15A-1340.14(f)(1), (4) (2003). In the instant case, when asked by the trial court whether there was "anything" he wanted to say "as to sentencing," defendant's counsel stated that defendant "is a single man and up until this particular case he had no felony convictions, *as you can see from his*

worksheet." (emphasis added). I conclude that this statement "may reasonably be construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet." *Eubanks*, 151 N.C. App. at 506, 565 S.E.2d at 742.

Furthermore, I note that this Court has previously stated that "if during plea negotiations the defendant essentially stipulated to matters that moot the issues he could have raised under [N.C. Gen. Stat. § 15A-1444](a2), his appeal should be dismissed." *State v. Hamby*, 129 N.C. App. 366, 369, 499 S.E.2d 195, 196 (1998). In *Hamby*, we held that by admitting "that her prior record level was II, that punishment for the offense could be either intermediate or active in the trial court's discretion and that the trial court was authorized to sentence her to a maximum of forty-four months in prison," the defendant "mooted the issues of whether her prior record level was correctly determined, whether the type of sentence disposition was authorized and whether the duration of her prison sentence was authorized." *Id.* at 369-70, 499 S.E.2d at 197. In the instant case, while defendant did not explicitly admit to being a prior record level II offender in his guilty plea, the plea agreement nevertheless authorizes the State to impose upon him a punishment consistent with that of a prior record level II offender. Under the Structured Sentencing Act, an individual found guilty of a Class C felony with a prior record level II may be sentenced in the presumptive range to a term of eighty to 105 months imprisonment, the exact sentence imposed upon and consented to by defendant in his plea agreement. N.C. Gen. Stat. § 15A-1340.17 (2003).

Defendant does not challenge the existence of any of the prior convictions listed in the worksheet, choosing rather to challenge the sufficiency of the stipulation relied upon by the trial court at sentencing. Because I conclude that defendant stipulated to his prior record level, I would hold that the trial court did not err in sentencing defendant to eighty to 105 months imprisonment. Furthermore, because I have examined defendant's other assignments of error and have determined that they are without merit, I would also hold that defendant received a trial free of prejudicial error.

DENNIS JOHNSON AND WIFE, JANICE JOHNSON, PLAINTIFFS v. THE NEWS AND OBSERVER PUBLISHING COMPANY, THE MCCLATCHY COMPANY, & MCCLATCHY NEWSPAPERS, INC., D/B/A THE SMITHFIELD HERALD AND JACK ROBERTS, DEFENDANTS

No. COA03-1386

(Filed 16 November 2004)

Negligence— vicarious liability—newspaper carrier—independent contractor—summary judgment

Summary judgment should not have been granted for defendant-newspapers on the issue of vicarious liability in an action arising from a newspaper carrier's automobile accident. It cannot be concluded, as a matter of law, that the carrier was an independent contractor: he was not exercising an independent business or occupation, there were no skill or education requirements, the variations in the time and manner of delivery which the carrier could choose were considerably limited, and the carrier's contract could be terminated if he breached any of its provisions, while few duties were placed on the newspaper.

Appeal by plaintiffs from judgment entered 18 August 2003 by Judge Knox V. Jenkins, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 17 June 2004.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for plaintiff-appellants.

Yates, McLamb & Weyher, L.L.P., by Erin D. McNeil, for defendant-appellees The News & Observer Publishing Company, The McClatchy Company, & McClatchy Newspapers, Inc. d/b/a The Smithfield Herald.

THORNBURG, Judge.

Plaintiffs appeal the trial court's grant of summary judgment for defendant-newspaper publishers and the denial of their motion for summary judgment on the issue of vicarious liability.

Plaintiffs' personal injury claims arise out of an automobile accident involving plaintiffs and defendant Jack Roberts. Roberts worked as a newspaper carrier for the Smithfield Herald and was delivering newspapers when the accident occurred. Plaintiffs sought recovery from Roberts for negligence and from the Smithfield

Herald, its affiliate, and its parent company (collectively "the Herald") on the basis of respondeat superior. The Herald denied liability for plaintiffs' accident based on its contention that Roberts was an independent contractor rather than an employee. Plaintiffs and the Herald filed cross motions for summary judgment on the issue of vicarious liability. After holding that Roberts was an independent contractor as a matter of law, the trial court ruled that the Herald had no vicarious liability in this case. The trial court granted summary judgment in favor of the Herald and denied plaintiffs' motion for summary judgment.

In support of summary judgment, the parties relied on the employment contract and transcripts from the depositions of Jack Roberts and the publisher of the Smithfield Herald. The record shows that when the accident occurred in 1999, Roberts had been delivering newspapers for the Herald for about ten years. In the employment contract, the Herald assigned Roberts a delivery route and permitted him to purchase newspapers from the Herald at a wholesale rate. However, the Herald reserved the right to renegotiate this wholesale rate upon thirty days notice to the carrier.

Roberts received as payment for his work the difference between the wholesale rate at which he bought the newspapers and the retail rate at which they were sold to customers. The Herald agreed to bill customers who prepaid by mail, but any amount a customer failed to pay would be deducted from Roberts's paycheck. The contract provided that Roberts could bill the other customers in any manner he chose.

The Herald authorized Roberts to use his own judgment and discretion as to whether and in what manner to do business with customers. The contract only required that he "exert his best efforts to increase the number of customers for The Smithfield Herald . . . and to keep those customers satisfied." Roberts could determine the means and manner in which he delivered newspapers to customers "without control or supervision" from the Herald. But the contract also provided that Roberts was responsible for "the prompt and satisfactory delivery" of the newspaper to customers on his route and required Roberts to deliver the papers "in a dry and readable condition . . . with delivery completed by 5:00 p.m."

Pursuant to the contract, Roberts used his own vehicle to complete his route and purchased his own liability insurance. He was designated as an "independent contractor" and had authority to hire

assistants to help him, but those assistants were considered his employees and he was responsible for compensating them. The contract specifically assigned sole liability to Roberts for any third party claims arising out of tortious acts committed by him or his assistants.

The Herald did not withhold taxes from his paycheck or provide him with employee benefits. Either party could terminate this agreement for any reason with thirty days notice or could terminate it instantly for a breach of contract by the other party.

Under the doctrine of respondeat superior, an employer can be held vicariously liable for a worker's negligence when an employer-employee relationship exists. *Gordon v. Garner*, 127 N.C. App. 649, 658, 493 S.E.2d 58, 63 (1997), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 86 (1998). Generally, an employer is not liable for the negligent acts of an independent contractor. *Id.*

Whether a party is an independent contractor is a mixed question of law and fact. *Yelverton v. Lamm*, 94 N.C. App. 536, 538, 380 S.E.2d 621, 623 (1989). Determining the terms of the agreement between the parties is a question of fact. *Id.* Once the factual disputes are resolved, deciding whether that agreement establishes an independent contractor relationship is a matter of law. *Id.* "[W]here the facts are undisputed or the evidence is susceptible of only a single inference and a single conclusion, the court must determine whether a party is an employee or an independent contractor as a matter of law." 41 Am. Jur. 2d *Independent Contractors* § 79 (2000); *see also Little v. Poole*, 11 N.C. App. 597, 600, 182 S.E.2d 206, 208 (1971).

Pursuant to N.C.R. Civ. P. 56(c), summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). The party moving for summary judgment bears the burden of showing that no material issue of fact exists and the trial court must construe all inferences of fact in the light most favorable to the non-moving party. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

Essentially, the issue for this Court is whether the facts, considered in the light most favorable to plaintiffs, support the trial court's conclusion that Roberts was an independent contractor. The Herald contends that the employment contract fully reflects the

conditions of Roberts's employment and establishes that he was an independent contractor. Plaintiffs argue that the surrounding circumstances and the parties' actions demonstrate the actual relationship between the Herald and Roberts was that of employer-employee. As we conclude that the evidence is susceptible to more than one inference, we hold that summary judgment was not appropriate for either party on the issue of whether Roberts was an independent contractor. We reverse and remand.

Under North Carolina law, an independent contractor is defined as 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 results of his work. *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 384, 364 S.E.2d 433, 437 (1988). Although the contract with the Herald designates Roberts as an "independent contractor" and assigns to him sole liability for any third party claims against him, these types of contractual declarations are not determinative of the relationship or the rights of the parties. *Yelverton*, 94 N.C. App. at 540, 380 S.E.2d at 624. An employer cannot exonerate himself from his legally imposed liability to a third party for injury resulting from the tortious acts of his employee simply by contracting with the employee that he is to be free from the employer's control. *Id.*

In *Hayes v. Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944), our Supreme Court identified several factors to consider in determining whether a person is an independent contractor. These factors include whether the person:

> (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Id. at 16, 29 S.E.2d at 140. However, none of these factors are determinative, nor is the presence of all required to indicate an independent contractor relationship. *Id.* The *Hayes* factors are considered along with the other circumstances of the employment relationship to determine whether the one employed possesses that degree of inde-

pendence necessary to require his classification as an independent contractor rather than an employee. *Id.*

Applying the *Hayes* factors, our Supreme Court has found that newspaper carriers typically do not exercise a sufficient degree of control over their work to be considered independent contractors as a matter of law. *Cooper v. Publishing Co.*, 258 N.C. 578, 589, 129 S.E.2d 107, 115 (1963). The Court stated that "[o]rdinarily, the day by day sale and delivery of newspapers under a cancellable agreement of indefinite duration may not be considered 'a specific job under contract' within the meaning of that phrase when used in defining an independent contractor." *Id.* Considering several of the factors raised in the *Hayes* and *Cooper* cases under the facts of the present case, we cannot conclude that Roberts was an independent contractor as a matter of law.

Roberts was not exercising "an independent business, calling, or occupation" by delivering newspapers for the Herald. The prompt delivery and circulation of newspapers is essential to the newspaper's success and is part of the regular business of the publisher. *Id.* at 587-88, 129 S.E.2d at 114. Newspaper carriers "are just as much an integral part of the newspaper industry as are the typesetters and pressmen or the editorial staff." *Id.* at 588, 129 S.E.2d at 114 (citation omitted).

While independent contractors usually have a special skill or knowledge, the duties performed by newspaper carriers are generally "routine in nature, requiring diligence and responsibility rather than discretion and skill." *Id.* at 589, 129 S.E.2d at 115. The parties agree that the Herald had no real skill or education requirements for its carriers and that Roberts received little or no training when he started working for the Herald.

Also, the potential variations in time and manner in which a newspaper carrier could choose to deliver newspapers to customers on his route are considerably limited. *Id.* Roberts had little discretion in how to complete his route since he was required to deliver the papers "in a dry and readable condition promptly upon receipt by him" and in a manner satisfactory to customers. Although the contract states that he could choose whether and in what manner to do business with any customer, if Roberts forgot or chose not to deliver to a customer, the Herald could opt to deliver the paper for him and penalize him with a fee of $3.00 per paper.

If Roberts breached any of the contract provisions, the Herald has the option of terminating his contract. Our courts have recognized that "the 'right to fire' is one of the most effective methods of control." *Id.* (quoting *Lassiter v. Cline*, 222 N.C. 271, 274, 22 S.E.2d 558, 560 (1942)). Under the terms of the contract, Roberts was subject to discharge if he did not deliver the newspapers in a "prompt and satisfactory" manner. Although Roberts could hire assistants, his ability to hire employees has little significance since the Herald retained the right to fire Roberts at will for a broad range of reasons. It is worth noting that while Roberts could terminate the contract for a breach by the Herald, the contract contained very few provisions that placed any kind of duty on the Herald.

However, while not dispositive, the contract in the case is still evidence of the relationship between Roberts and the Herald. In addition, defendants presented evidence that would permit a jury to find that Roberts engaged in an independent business over which the newspaper did not exercise the requisite degree of control necessary to transform him into an employee. Thus, we hold that the entry of summary judgment should be reversed and the matter remanded to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

Judges HUDSON and GEER concur.

JOHNNY THURMOND MILLER, II, PLAINTIFF v. ROCA & SON, INC. AND MOREJON NICANDRO, DEFENDANTS

No. COA03-1018

(Filed 16 November 2004)

Arbitration and Mediation— arbitration—uninsured motorist coverage—waiver of issues

The trial court did not err in an action arising out of an automobile accident by confirming an arbitration award of $80,000 in favor of plaintiff and against unnamed defendant insurance company based on its uninsured motorist coverage endorsement, because: (1) unnamed defendant waived any right to object to the arbitration award based on a lack of coverage since the policy

provided that arbitration will only occur if there was an uninsured motor vehicle and the parties consented to arbitration; (2) by not objecting to arbitration of the coverage issue prior to the arbitration hearing, unnamed defendant failed to assert its objection in a timely manner and, through its consent to and active participation in the arbitration proceedings, has engaged in conduct inconsistent with a purpose of insisting upon determination of coverage by the trial court; (3) unnamed defendant failed to demonstrate that any grounds existed under N.C.G.S. § 1-567.13 warranting vacation of the award; (4) unnamed defendant waived the issue of the trial court confirming the award prior to the expiration of the 90-day period in which unnamed defendant was allowed to move to vacate or modify the award by failing to include an assignment of error addressing this issue, and in any event this argument has already been expressly rejected by the Court of Appeals; and (5) unnamed defendant failed to preserve the issue of plaintiff's receipt of workers' compensation benefits.

Appeal by unnamed defendant Insura Property & Casualty Insurance Company from order entered 30 April 2003 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 April 2004.

Charles G. Monnett, III & Associates, by Craig O. Asbill, for plaintiff-appellee.

Garlitz & Williamson, P.L.L.C., by Thomas D. Garlitz, for defendant-appellant Insura Property & Casualty Insurance Company.

GEER, Judge.

The unnamed defendant uninsured motorist carrier, Insura Property & Casualty Insurance Company ("Insura") appeals from an order confirming an arbitration award in favor of plaintiff Johnny Thurmond Miller, II. Because Insura has failed to demonstrate that any grounds exist under N.C. Gen. Stat. § 1-567.13 (2001) warranting vacation of the award, we affirm.

On 13 January 1997, plaintiff Miller collided with a truck that had been abandoned on the side of the interstate. Plaintiff was driving a truck owned by his employer, Anderson Heating and Cooling, Inc., and insured by Insura. Insura's policy included an endorsement providing for uninsured motorist benefits.

On 30 December 1999, plaintiff filed suit against Roca & Son, Inc., and Morejon Nicandro, the alleged owners of the abandoned truck. Plaintiff also alleged that he had been unable to locate any insurance policy providing coverage for that truck and asserted a cause of action against Insura based on its uninsured motorist coverage endorsement.

On 15 May 2001, after Insura answered, plaintiff moved to compel arbitration pursuant to the endorsement's arbitration clause:

> If we and an insured disagree whether the insured is legally entitled to recover damages from the owner or driver of an uninsured motor vehicle or do not agree as to the amount of damages that are recoverable by that insured, then the matter may be arbitrated. However, disputes concerning coverage under this endorsement may not be arbitrated. The insured may make a written demand for arbitration.

The parties subsequently entered into a consent order on 2 July 2001 that stated: "[T]he parties have agreed that the case should be arbitrated and that an order staying this matter be entered until the completion of the arbitration . . . ."

The arbitration occurred on 27 January 2002 before a three-member panel. On 5 February 2003, the panel made an arbitration award in plaintiff's favor in the amount of $80,000.00. Plaintiff filed a motion to confirm the arbitration award on 17 March 2003. The superior court entered an order confirming the award on 30 April 2003. Insura has appealed from the order of confirmation.

On appeal, Insura first argues that the trial court erred in confirming the arbitration award because neither the trial court nor the arbitrators had determined that the truck owned by Roca & Son or Nicandro was uninsured, a prerequisite to uninsured motorist coverage. We hold that Insura has waived any right to object to the arbitration award based on a lack of coverage.

Insura's policy provides that "disputes concerning coverage under this endorsement may not be arbitrated." If, however, Insura "and an insured disagree whether the insured is legally entitled to recover damages from the owner or driver of an uninsured motor vehicle or do not agree as to the amount of damages that are recoverable by that insured, then the matter may be arbitrated." Under this language, arbitration will only occur if there is "an uninsured motor vehicle."

As the consent order staying the action pending arbitration reflects, Insura agreed with plaintiff "that the case should be arbitrated." The record does not indicate any attempt by Insura to have the court determine, prior to compelling arbitration, the preliminary question of coverage. Insura never filed a declaratory judgment action or asserted a counterclaim on the issue. Nor does the record reveal any effort by Insura, prior to the arbitration hearing, to limit the scope of the arbitration to exclude questions of coverage. There is no objection at all to the scope of the arbitration until the hearing on the motion to confirm the arbitration award.

Given the language of the arbitration agreement, Insura, by consenting to arbitration, either was (1) admitting that there was an uninsured motor vehicle involved in the accident; or (2) consenting to have the issue of coverage decided by the arbitrator. The record contains no reservation of a right to proceed later on the coverage issue in superior court. Insura waited until after the arbitrator ruled adversely to it to attempt to litigate the question whether defendants' vehicle was uninsured.

Under these circumstances, Insura waived any right to object to the award on the grounds of non-coverage. In *McNeal v. Black*, 61 N.C. App. 305, 300 S.E.2d 575 (1983), the defendant similarly waited until after an adverse arbitration decision and the plaintiff's filing of a motion to compel arbitration to argue that the arbitration agreement was unenforceable as to him. This Court observed that the defendant could have sought to stay the arbitration in order to have the preliminary issues decided or, theoretically, could have moved to vacate the award once it was entered. *Id.* at 307, 300 S.E.2d at 577.[1] The Court then 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.* Relying upon this principle, the Court affirmed the trial court's confirmation of the arbitration award:

> If [defendant] had prevailed at the arbitration hearing, it is clear that he would not be challenging the procedure at this time. He cannot be allowed to participate in arbitration, raising no objections, and then refuse to be bound by an adverse award. This type of conduct would serve to defeat the purpose of arbitration.

1. The Court acknowledged, however, that the defendant's failure to raise an objection to arbitration at the time of the arbitration hearing would have barred the motion to vacate. *Id.*

> . . . [Defendant] failed to assert his objections in a timely manner and also, by his active participation in the arbitration hearing, indicated conduct inconsistent with a purpose to insist upon a jury trial.

Id. at 308, 300 S.E.2d at 577-78.

McNeal applies with full force to this case. As with constitutional and statutory rights, a party may waive contractual rights. *Brendle v. Shenandoah Life Ins. Co.*, 76 N.C. App. 271, 276, 332 S.E.2d 515, 518 (1985) ("An insurer may be found to have waived a provision or condition in an insurance policy which is for its own benefit."). By not objecting to arbitration of the coverage issue prior to the arbitration hearing, Insura failed to assert its objection in a timely manner and, through its consent to and active participation in the arbitration proceedings, has engaged in conduct inconsistent with a purpose of insisting upon determination of coverage by the trial court.

Significantly, N.C. Gen. Stat. § 1-567.13(a)(5) (2001) only requires a court to vacate an award for lack of an arbitration agreement if "the party did not participate in the arbitration hearing without raising the objection . . . ."[2] Since Insura participated in the arbitration hearing with no objection, it cannot seek vacation of the award for lack of an arbitration agreement on the coverage issue. *See also In re Grover*, 80 N.J. 221, 230, 403 A.2d 448, 452-53 (1979) (when defendant did not (1) institute a declaratory judgment action and request a stay of arbitration pending a determination of coverage, or (2) object to arbitration on the ground of no coverage and participate in the arbitration subject to its objection, defendant failed to preserve the issue of coverage for the court).

To the extent Insura argues that the award must be vacated because plaintiff offered insufficient evidence at the arbitration hearing to prove defendants' lack of insurance and the arbitrator failed to make an express ruling on the issue, these are not proper bases for overturning an arbitration award. It has long been established in North Carolina:

> If an arbitrator makes a mistake, either as to law or fact, it is the misfortune of the party, and there is no help for it. There is no

2. Although the General Assembly has repealed N.C. Gen. Stat. § 1-567.1 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.

> 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 a 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 the object of references would be defeated and arbitration instead of ending would tend to increase litigation.

Patton v. Garrett, 116 N.C. 848, 858, 21 S.E. 679, 682-83 (1895). *See also Sholar Bus. Assocs., Inc. v. Davis*, 138 N.C. App. 298, 303, 531 S.E.2d 236, 240 (2000) (award would not be vacated on the ground that the arbitrator failed to rule on all the issues). An award may be vacated only for the reasons specified in N.C. Gen. Stat. § 1-567.13(a) and Insura has not demonstrated that any of those reasons apply here.

Insura has also argued in its brief that the superior court erred in confirming the award prior to the expiration of the 90-day period in which Insura was allowed to move to vacate or modify the award. Because Insura did not include any assignment of error addressing this issue, it has not preserved it for appellate review. N.C.R. App. P. 10(a) ("Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10."). We note also that this argument was expressly rejected in *Ruffin Woody & Assocs., Inc. v. Person County*, 92 N.C. App. 129, 138, 374 S.E.2d 165, 170-71 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989). In *Ruffin*, plaintiff filed a motion to vacate the award after defendant filed a motion to confirm the award. The trial court granted the motion to confirm prior to a ruling being made on the motion to vacate:

> Plaintiff next contends that the trial court erred in granting defendant's motion to confirm the arbitration award prior to the expiration of the ninety-day period prescribed in G.S. 1-567.13(b). This contention is without merit.
>
> . . . Plaintiff would have us rule that the statute requires the trial court to defer its ruling for the entire ninety-day period even though a motion to vacate has already been filed. There is no support in statutory or case law for plaintiff's position.

Id. Once plaintiff filed a motion to confirm the arbitration award, Insura could have filed a motion to vacate. It chose not to do so. If a trial court does not err in confirming an award while a motion to vacate is pending, then it certainly does not err in granting a motion to confirm when a party has not even filed a motion to vacate.

Finally, Insura contends that the trial court should not have confirmed the arbitration award when neither the trial court nor the arbitrators had addressed plaintiff's receipt of workers' compensation benefits. Plaintiff asserts that Insura never raised this issue with the trial court. Since the record before this Court contains no indication that Insura presented this issue to the trial court, the issue is not properly preserved for review by this Court. N.C.R. App. P. 10(b). We therefore overrule this assignment of error.

Affirmed.

Judges BRYANT and ELMORE concur.

AMERICAN NATIONAL ELECTRIC CORPORATION, PLAINTIFF v. POYTHRESS COMMERCIAL CONTRACTORS, INC. AND BROWN & JONES ARCHITECTS, INC., DEFENDANTS

No. COA03-794

(Filed 16 November 2004)

Construction Claims— breach of contract—failure to comply with notice of delay provisions

The trial court did not err in a breach of contract action arising out of a construction project for a fire station by granting summary judgment in favor of defendant general contractor, because: (1) plaintiff electrical subcontractor could not surmount defendant's affirmative defense that plaintiff's claims were barred by its failure to comply with the notice provisions of the General Contract which were incorporated into the subcontract; and (2) although the "pay when paid" clause of the contract was unenforceable, it was severable from the rest of the contract and does not defeat the other portions of the contract such as the notice of delay provision when they are in no way dependent on the illegal provision.

Appeal by plaintiff from amended order entered 21 April 2003 by Judge Ripley E. Rand in Wake County Superior Court. Heard in the Court of Appeals 17 March 2004.

Moore & Van Allen, P.L.L.C., by Kevin M. Capalbo for the plaintiff-appellant.

Robert A. Brady for the defendant-appellee.

ELMORE, Judge.

Poythress Commercial Contractors, Inc. (Poythress) was the general contractor on the Cary Fire Station No. 6 project (project), and American National Electric Corporation (ANE) was an electrical subcontractor. In September 1999, Poythress and ANE executed a subcontract (subcontract) by which ANE would supply all material and labor to perform certain electrical work on the project. Pursuant to the subcontract, Poythress prepared and delivered to ANE a Project CPM Schedule which provided that ANE would have 144 days in which to perform its electrical work under the subcontract. ANE agreed to perform its work pursuant to the Project CPM Schedule prepared by Poythress. Article 5 of the subcontract's Terms and Conditions provided that Poythress was obligated to direct both the timing and sequence of ANE's work. During the course of ANE's work on the project, Poythress made certain alterations to the schedule and sequence of ANE's work. ANE asserted that as a result, ANE was denied sufficient access to the project to perform the work it intended to perform, in the sequence in which ANE had agreed to perform it, such that ANE ended up being on the project for over 200 days.

In April 2000, ANE's president, Ron Thoreson (Thoreson), gave verbal notice to Poythress's project superintendent, Tom Seymour (Seymour), that ANE's work was being adversely impacted due to schedule and sequence changes. As soon as ANE's work on the project was completed, ANE provided Poythress with written notice of the amount of ANE's claim for damages, the basis for the claim, and documentation supporting the claim. ANE claims Poythress's changes to the scheduling and sequencing of ANE's work on the project caused "labor inefficiencies and loss of productivity" which damaged ANE in an amount not less than $52,025.00.

ANE filed a complaint against Poythress and Brown & Jones Architects, Inc., seeking damages for breach of contract.

Poythress moved for summary judgment as to all counts in ANE's complaint against it. The trial court granted summary judgment in favor of Poythress. ANE appeals from that order granting summary judgment.

I.

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

> A defendant who moves for summary judgment assumes the burden of positively and clearly showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. 'A defendant may meet this burden 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 which would bar the claim.'

James v. Clark, 118 N.C. App. 178, 180-81, 454 S.E.2d 826, 828 (1995) (quoting *Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 6, 330 S.E.2d 242, 247 (1985), *reversed on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986)). In the present case, it appears the trial court granted summary judgment in Poythress's favor because it concluded ANE could not surmount Poythress's affirmative defense that ANE's claims were barred by ANE's failure to comply with the notice provisions of the General Contract, which provisions were incorporated into the subcontract by Articles 7 and 23 of the subcontract.

Article 7 of the subcontract states, in relevant part, as follows:

> The Subcontractor agrees to be bound to the Contractor by the terms of the General Contract to the extent that it is applicable to this Contract and to assume toward the Contract all of

> the obligations and responsibilities that the Contractor by that document assumes toward the Owner insofar as applicable to this Contract.
>
> Article 23 of the subcontract states, in relevant part, as follows:
>
> Claims for extra or altered work, changes, modifications, changed conditions, subsurface conditions or obstructions at the site, any Act of God, the elements, delays, equitable adjustments, and the damages resulting from requirements, acts or omission of the Owner or any third party, or from any cause beyond the control of the Contractor shall be governed by the provisions of the General Contract and the Contractor shall make payments to the Subcontractor on account of such claims only to the extent that the Contractor is paid thereof by the Owner.

Poythress contends that Articles 7 and 23 incorporate into the subcontract the notice provisions of Paragraph 8.3.2 of the general conditions of the General Contract between Poythress and the project's owner, the Town of Cary. Paragraph 8.3.2 in turn requires that claims for delay compensation must be made in accordance with Paragraph 4.3 of the General Contract. Paragraph 4.3 states that claims for delay must be made, in writing, to the project architect and owner within 21 days after the occurrence of any event giving rise to the claim or within 21 days after the claimant first recognizes the condition giving rise to the claim. ANE's president, Thoreson, admitted in his deposition testimony that ANE was aware that its work was being delayed in April 2000, but did not notify Poythress of its delay claim in writing until a letter dated 20 September 2000. Poythress therefore contends that ANE's failure to comply with these notice provisions of the General Contract necessarily defeats its claims. We agree.

"[T]he most fundamental principle of contract construction—[is] that the courts must give effect to the plain and unambiguous language of a contract." *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 95, 414 S.E.2d 30, 34 (1992). The plain language of the contract in this case provides that the Subcontractor is bound to the Contractor under the same obligations as the Contractor is bound to the Owner. Those obligations bind the parties to a time certain during which notice of delay for compensation must be given. That time was not observed by ANE here, and thus ANE's complaint is defeated.

Poythress also contends that pursuant to Article 23 of the subcontract, Poythress shall only be liable to pay ANE for delay to the

extent that Poythress is paid for said delay by the project owner. ANE's president, Thoreson, admitted in his deposition testimony that Poythress was never paid for these delays by the owner.

Our General Statutes state that "[p]ayment by the owner to a contractor is not a condition precedent for payment to a subcontractor and payment by a contractor to a subcontractor is not a condition precedent for payment to any other subcontractor, and an agreement to the contrary is unenforceable." N.C. Gen. Stat. § 22C-2 (2003). "When a contract contains provisions which are severable from an illegal provision and are in no way dependent upon the enforcement of the illegal provision for their validity, such provisions may be enforced." *Rose v. Materials Co.*, 282 N.C. 643, 658, 194 S.E.2d 521, 532 (1973). We therefore conclude that the "pay when paid" clause of the contract is indeed unenforceable, but that it is severable from the rest of the contract and does not defeat the other portions of the contract, such as the notice of delay provision, which are in no way dependent on the illegal provision.

We agree with Poythress's argument that Articles 7 and 23 of the subcontract create an affirmative defense which ANE cannot surmount and which operates to bar ANE's claims, such that summary judgment was properly entered in favor of Poythress.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

J.S.W., A MINOR, D.W. AND G.W., PETITIONERS V. LEE COUNTY BOARD OF EDUCATION, RESPONDENT

No. COA03-1619

(Filed 16 November 2004)

Appeal and Error; Schools and Education— mootness—school suspension

Respondent board of education's appeal from the trial court's order reversing the board's imposition of a long-term suspension of petitioner from high school for drug possession is dismissed as moot, because: (1) petitioner's suspension was for the remainder

of the 2002-2003 school year and that school year has now ended; (2) even if the Court of Appeals were to reverse the decision of the court, the board would have no authority to resuspend petitioner when N.C.G.S. § 115C-391(c) provides that schools in our state are authorized to suspend students for periods of times in excess of ten school days not exceeding the time remaining in the school year; and (3) respondent failed to show an exception to the mootness doctrine when the issues concern evidence particular to this case and are thus not capable of repetition.

Appeal by respondent from order entered 17 July 2003 by Judge Ripley E. Rand in the Superior Court in Lee County. Heard in the Court of Appeals 15 September 2004.

Staton, Perkinson, Doster, Post & Silverman, by Norman C. Post, for petitioner-appellees.

Love & Love, P.A., by Jimmy L. Love, Sr., for respondent-appellant.

HUDSON, Judge.

On 18 October 2002, superintendent Dr. Barry L. Aycock ("Dr. Aycock") suspended petitioner J.S.W. from Lee County Senior High School for the remainder of the 2002-2003 school year. On 25 November 2002, respondent Lee County Board of Education ("the Board") affirmed the superintendent's decision to impose a long-term suspension. Petitioners filed a petition for judicial review, and on 17 July 2003, Superior Court Judge Ripley E. Rand entered an order reversing the order of the Board and remanding the matter to the Board for further action. The Board appeals. For the reasons discussed below, we dismiss this appeal as moot.

On 11 October 2002, J.S.W. was a sophomore at Lee County Senior High School in Sanford, North Carolina. Teachers discovered two bags of white powder in J.S.W.'s possession, which the State Bureau of Investigation later determined contained some amount of cocaine. Assistant Principal Gregory D. Batten ("Batten") imposed a ten-day out-of-school suspension and recommended that J.S.W. be considered for suspension for the remainder of the school year. That same day, J.S.W. and his mother, along with Batten, signed an agreement indicating their intention to enroll in an approved program, the Saving Families Through Education ("SAFTE") program.

On 18 October 2002, Dr. Aycock notified J.S.W. and his parents by letter that J.S.W. would be suspended for the remainder of the school year. On 24 October 2002, petitioners notified the Board that they planned to appeal J.S.W.'s suspension, and asked Dr. Aycock to reconsider his decision. On 29 October 2002, Dr. Aycock responded by letter, reaffirming his decision. On 13 November 2002, petitioners requested a hearing before the Board. At a 22 November 2002 hearing, petitioners gave testimony and presented evidence. On 25 November 2002, the Board affirmed Dr. Aycock's decision to suspend J.S.W. for the remainder of the school year.

On 3 December 2002, petitioners filed a petition for judicial review of the Board's decision. Following a hearing, the court entered an order reversing the Board's imposition of the long-term suspension on J.S.W.

Two documents set out the disciplinary options here. First, pursuant to the Lee County Schools Code of Conduct, first-time offenders, like J.S.W., can avoid long-term suspension by agreeing to participate in an approved alternative drug education program. Rule 11 of the Code of Conduct states that:

> Violation of this rule shall result in school disciplinary action, which shall be, at a minimum, long-term suspension and may result in expulsion. However, a student and parent or guardian agreement to participate in an alternative drug education program shall result in modification of the disciplinary action. Satisfactory completion of an administratively approved education program shall result in a reduction of the suspension for the first offense

Also, the Lee County Senior High School Handbook section on Level II Disciplinary Action Severe Infractions provides:

> If the student, with the parent or guardian, agree to participate in an alternative drug/alcohol education program, the principal may modify disciplinary action. Satisfactory completion of an administratively approved education program will result in a 10 day suspension for the first offense, and a subsequent offense will result in long term suspension.

J.S.W. and his parents first argue that this issue is moot and that appellate review is not appropriate. Our Supreme Court has held that:

> [w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

In re Peoples, 296 N.C. 109, 147, 250 S.E.2d 890, 912, *cert. denied*, *Peoples v. Judicial Standards Comm.*, 442 U.S. 929, 61 L. Ed. 2d 297, 99 S. Ct. 2859 (1979) (citations omitted). Here, J.S.W.'s suspension was for the remainder of the 2002-2003 school year, and that school year has now ended. Schools in our state are authorized to suspend students "for periods of times in excess of 10 school days but not exceeding the time remaining in the school year. . . ." N.C. Gen. Stat. § 115C-391(c) (2001). Thus, even were we to reverse the decision of the court below, the Board would have no authority to re-suspend J.S.W.

However, even when an issue is moot, we will consider the merits if the issue is "capable of repetition yet evading review." *In Re Jackson*, 84 N.C. App. 167, 171, 352 S.E.2d 449, 452 (1987) (holding that N.C. Gen. Stat. § 115C-391 did not limit a school board's right to suspend students who were under the juvenile court's jurisdiction and that the Juvenile Code contained no legislatively granted authority to interfere with a school's disciplinary procedures). To apply this exception to the mootness doctrine, petitioners must show that the challenged action is "in its duration too short to be fully litigated prior to its cessation or expiration" and that there is a reasonable expectation that the same issue would arise again. *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (citation omitted), *disc. review denied*, 324 N.C. 543, 380 S.E.2d 770 (1989). We conclude that this exception does not apply here.

In its first two arguments, respondent contends that the court erred (1) in concluding that J.S.W.'s suspension was not supported by substantial evidence, and (2) in finding that the suspension was arbitrary and capricious. These two issues concern only the evidence peculiar to this case, and thus are not "capable of repetition."

Respondent next argues that the court erred as a matter of law in imposing a long-term suspension on J.S.W. despite his completion of the SAFTE program. Respondent contends that the Lee County Senior High School Handbook provision quoted above gives the principal and Board discretion to modify or not modify a first-

time offender's long-term suspension following completion of the SAFTE program, while the Code of Conduct does not. As we have concluded that this appeal is moot, we decline to address the merits of this argument.

Dismissed.

Judges TYSON and BRYANT concur.

JOSEPHINE WILLIAMS, ADMINISTRATRIX OF THE ESTATE OF TIFFANY KEYETTA JORDAN, PLAINTIFF v. SCOTLAND COUNTY AND THE CITY OF LAURINBURG ACTING BY AND THROUGH THEIR EMPLOYEES AND AGENTS, DEFENDANTS

No. COA03-1624

(Filed 16 November 2004)

Immunity— fire protection services—additional role of dispatcher

Defendant city's motion for summary judgment was properly denied in an action arising from decedent's death in a wrecked and burning automobile while waiting for someone trained to operate equipment used to free people trapped in cars. While there is specific statutory immunity for firefighters, there is an issue of fact as to whether the city was acting solely as a provider of fire protection services or in the additional role of dispatcher.

Appeal by defendant City of Laurinburg from order entered 3 September 2003 by Judge B. Craig Ellis in the Superior Court in Scotland County. Heard in the Court of Appeals 11 October 2004.

W. Edward Musselwhite, Jr., for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Jeffery H. Blackwell and Shelley W. Coleman, for defendant-appellant.

HUDSON, Judge.

On 19 May 2002, plaintiff Josephine Williams, Administratrix of the Estate of Tiffany Jordan, filed a wrongful death complaint

against defendants Scotland County ("the county") and the City of Laurinburg ("the city"). The city answered, pleading immunity as a complete bar to plaintiff's claim. The plaintiff later voluntarily dismissed the county. On 8 May 2003, the city moved for summary judgment, which motion the court denied on 3 September 2003. The city appeals. For the reasons discussed below, we affirm the court's denial of the city's motion for summary judgment.

According to the pleadings and forecast of evidence, on 18 May 2000, a car driven by Tiffany Jordan ("Tiffany"), a nineteen-year-old college student, left the road and struck a tree in Scotland County. Tiffany was trapped in the car, which caught fire. Witnesses to the accident called 911 Emergency Services in Scotland County, telling the 911 dispatcher that Tiffany was trapped in a burning car. The 911 dispatcher sent an ambulance and a rescue truck to the accident scene. The EMS attendants in the ambulance arrived first, but could not free Tiffany from the car. Firefighter David Laviner arrived in the rescue unit, which contained equipment used to free people trapped in cars. Laviner, however, was not trained to operate the equipment. Instead, Laviner used fire extinguishers to try to control the car fire, and when those were emptied, he and others carried water from a nearby ditch to dump on the fire. Eventually, a fire truck arrived at the scene and extinguished the fire, but by that time, Tiffany had died from burns and smoke inhalation.

Because this is an appeal from the denial of summary judgment, it is interlocutory. However, under N.C. Gen. Stat. § 7A-27(d)(1) interlocutory appeals affecting a substantial right are immediately appealable. "Where the appeal from an interlocutory order raises issues of sovereign immunity, such appeals affect a substantial right sufficient to warrant immediate appellate review." *Satorre v. New Hanover County Bd. of Comm'rs*, 165 N.C. App. 173, 175, 598 S.E.2d 142, 144 (2004).

Defendant argues that the court erred in denying its motion for summary judgment. "[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). "[T]he evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Id.*

The city argues that the court's denial of summary judgment was erroneous because it is entitled to complete immunity under N.C. Gen. Stat. § 160A-293(b), which reads, in pertinent part:

> No city or any officer or employee thereof shall be held to answer in any civil action or proceeding for failure or delay in answering calls for fire protection outside the corporate limits, nor shall any city be held to answer in any civil action or proceeding for the acts or omissions of its officers or employees in rendering fire protection services outside its corporate limits.

This statute provides immunity specifically to firefighters as they respond to calls for fire protection services and render those services outside a city's corporate limits.

Here, the pleadings, affidavits, and depositions raise factual issues about whether the city fire department was acting solely as a fire fighting agency or whether the department also took on the role of dispatcher in the instant case. In Scotland County, the 911 Emergency Telecommunications System dispatcher is to notify the city fire department of any request for fire protection anywhere in the county. The city fire department then determines and dispatches the appropriate fire-fighting department and equipment. The deposition of the city fire department dispatcher clearly sets forth these dual roles for the city fire department:

> Q: Now, is it correct that the way the system is set up in Scotland County is that the fire department has basically two separate roles. The first role is involved with a 9-1-1 system where they have the responsibility of determining which fire department needs to be called to a particular incident?
>
> A: Correct.
>
> Q: And the second role or responsibility is that if it's in the Laurinburg Fire District, to actually go to a fire and fight the fire?
>
> A: Correct.
>
> Q: Do you agree that these are two different functions that you're performing there at the fire station?
>
> A: Correct.

Because the evidence presented by the parties, viewed in the light most favorable to plaintiff, presents a genuine issue of material fact as to whether the city fire department was acting solely as a provider of fire protection services or in additional capacities as a dispatcher, defendant's motion for summary judgment was properly denied.

Affirmed.

Chief Judge MARTIN and Judge TIMMONS-GOODSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 16 NOVEMBER 2004

DUNGAN & MITCHELL, P.A. v. DILLINGHAM CONSTR. CO. No. 03-1411	Buncombe (01CVD1930)	No error
GULF INS. CO. v. POLLUTION TECH., INC. No. 04-110	Cumberland (00CVS8241)	Affirmed
HARVEY FERTILIZER & GAS CO. v. COASTAL PLAINS RESTS., LLC No. 03-900	Lenoir (02CVS1255)	Affirmed
IN RE CKM, SM No. 03-1508	Orange (03J45) (03J46)	Reversed
IN RE H.A.T., C.A.T., C.W.T. No. 03-1103	Buncombe (02J179) (02J180) (02J181)	Affirmed
LESTEP, INC. v. SMITH No. 03-1316	Durham (02CVD2898)	Affirmed
OAKLEY v. BARKLEY No. 04-67	Pasquotank (02CVS138)	Dismissed
REYNOLDS v. M&M CONTR'G No. 03-1015	Ind. Comm. (I.D. 150434)	Affirmed
STATE v. BYLER No. 03-453	Guilford (00CRS101246) (00CRS101248)	Affirmed
STATE v. HAIRSTON No. 04-181	Forsyth (02CRS61996) (02CRS61908)	No error
STATE v. WHITTENBURG No. 03-1267	Buncombe (02CRS63537) (03CRS54) (03CRS1144) (03CRS1145)	No error
TILLEY v. N.C. DEP'T OF ENV'T & NATURAL RES. No. 04-301	Wake (01CVS2899)	Affirmed

STATE OF NORTH CAROLINA v. JASON CHRISTOPHER WALKER & EMIL E. BROWNING, JR. & JAVIER A. HERNANDEZ, JR.

No. COA03-1426

(Filed 7 December 2004)

1. **Robbery— armed—failure to instruct on lesser-included offense of common law robbery—invited error**

The trial court did not commit plain error by failing to instruct the jury on the charge of common law robbery as a lesser-included offense of armed robbery, because: (1) a defendant may not decline an opportunity for instructions on a lesser-included offense and then claim on appeal that failure to instruct on the lesser-included offense was error; and (2) in the instant case two of the defendants foreclosed appeal of this issue when neither of their attorneys objected to the trial court's instructions nor requested additional instructions even after the trial court specifically stated it would not instruct on any lesser-included offense for robbery with a dangerous weapon, and a third defendant waived his right to appeal this issue since he did not object during the jury charge conference and did not cite error or plain error as to this issue.

2. **Constitutional Law— effective assistance of counsel—failure to request instruction**

Defendants were not denied effective assistance of counsel based on their attorneys' failure to ask the trial court to submit the lesser-included offense of common law robbery to the jury in regard to the robbery with a dangerous weapon charge, because: (1) defense counsel's decision was not an unreasonable trial strategy since it was used in an effort to save their clients' military careers, and the fact that the trial strategy failed does not mean that defendants were deprived of effective assistance of counsel; and (2) defendants failed to show their counsels' actions fell below an objective standard of reasonableness.

3. **Evidence— cross-examination—letters from defendant to district attorney—plea discussions**

The trial court erred in a robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury case by allowing the State to cross-examine defendant Walker with letters he wrote to the district attorney in which he offered to plead guilty, and defendant is entitled to a new trial, because the letters

constituted a plea discussion within the meaning of N.C.G.S. § 15A-1025 and N.C.G.S. § 8C-1, Rule 410 when: (1) the letters stated defendant was willing to confess and help in any way in order to get probation, which articulated the plea arrangement defendant sought; (2) even though the prosecutor did not initially respond to defendant's letters, the letters ultimately led to the prosecutor entering into plea discussions with defendant that resulted in defendant entering a guilty plea which was subsequently withdrawn; and (3) the admission of evidence that defendant was considering pleading guilty to the charges against him were highly prejudicial to his case and potentially influenced the jury's decision.

4. Confessions and Incriminating Statements— custody— Miranda warnings—statement to a superior officer in the armed forces

The trial court did not err in a robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury case by admitting evidence of defendant Walker's statement made to a superior officer in the armed forces without Miranda warnings, because: (1) the evidence does not indicate that defendant was in custody at the time he was discussing the incidents of 7 April 2004 with his superior; (2) there was no testimony that defendant felt he could not leave or that he had to answer his superior's questions; (3) the superior was simply inquiring into why defendant was being questioned; and (4) even assuming arguendo that defendant's statements to his superior were made during a custodial investigation, the admission of defendant's statements were harmless beyond a reasonable doubt when the statement was substantially identical to defendant's own testimony at trial.

5. Robbery— armed—instruction—failure to specify type of weapon—plain error review

The trial court did not commit plain error by its instruction to the jury on the charge of armed robbery even though defendant Browning contends the trial court failed to specify the type of weapon used, because: (1) considering the warrant, indictment, evidence, and jury charge given, it appears that the jury found defendant guilty of the charge based on the use of a bat as the dangerous weapon; (2) nowhere in the trial court's instructions is there a mention of a gun; (3) the evidence presented at trial showed that the victim was beaten with a bat; and (4) there was

nothing in the record to suggest that the jury was misled as to what instrument constituted the dangerous weapon.

6. Sentencing— mitigating factor—good character

The trial court did not err in a robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury case by failing to find the mitigating factor of good character for defendant Browning, because: (1) character evidence may still fail to establish by a preponderance of the evidence any given factor in aggravation or mitigation even if it is uncontradicted, quantitatively substantial, and credible; (2) the statements in the letters from various persons stating that defendant had displayed a high level of respect and honesty toward his family, friends, and community, that he was a caring young man who was generous and thoughtful, and that he was a dependable individual with a superior work ethic, were general statements as to defendant's character rather than specific; (3) the trial court did not have an opportunity to examine the individuals writing the letters to determine the extent of their relationship with defendant, assess their credibility, or determine what they knew about defendant's activities; (4) one letter did not describe recent knowledge of defendant's character and in fact inferred bad character; and (5) defendant's character evidence, although not contradicted, was not the type of evidence which demonstrated defendant's good character by a preponderance of the evidence.

7. Appeal and Error— motion for appropriate relief—aggravated sentences

The Court of Appeals deferred ruling on defendant Browning's motion for appropriate relief based on *Blakely v. Washington*, 159 L. Ed. 2d 403 (2004), pending guidance of this issue from our Supreme Court, who on 29 September 2004 stayed the Court of Appeals decision in *State v. Allen*, 166 N.C. App. 139 (2004), which addressed the applicability of *Blakely* to the imposition of aggravated sentences.

8. Constitutional Law— right to remain silent—mention of post-arrest silence—plain error analysis

The trial court did not commit plain error in a robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury case by admitting an investigator's testimony concerning defendant Hernandez's exercise of his right to remain silent and to have counsel present, because: (1) the investi-

gator was attempting to describe the circumstances under which he questioned defendant and defendant revealed that he accepted $600 from a codefendant to remain silent about the robbery; (2) the testimony was offered to show the chronology of the interview and for the purpose of showing that defendant's admission came after he received his Miranda warnings, but before he invoked his right to have counsel present; (3) the brief testimony appeared to be the only place in the record referencing defendant's silence; (4) the prosecutor did not attempt to emphasize defendant's silence or his request for counsel as indicators of defendant's guilt; and (5) the evidence against defendant was substantial.

9. Constitutional Law— right to remain silence—privilege against self-incrimination

The trial court did not abuse its discretion by denying defendant Hernandez's motion for a mistrial based on the prosecutor's comments made after he finished his cross-examination of codefendant Walker that he reserved the right to recall Walker after the testimony of the other defendants, because: (1) the trial court removed the jurors from the courtroom after the prosecutor made the comment, the trial court gave a curative instruction immediately following the jurors' return to the courtroom, and it is presumed that jurors will comply with the trial court's instructions; and (2) defendant failed to show the trial court's instruction was insufficient to cure any potential prejudice resulting from the comment.

10. Robbery— dangerous weapon—motion to dismiss—sufficiency of evidence—aiding and abetting

The trial court did not err by denying defendant Hernandez's motion to dismiss the charge of robbery with a dangerous weapon under the theory of aiding and abetting, because the evidence demonstrated that: (1) defendant intended to assist a codefendant in robbing the bar; (2) defendant in fact assisted his codefendants; and (3) two codefendants knew of and relied on defendant's support and aid.

11. Appeal and Error— appealability—joinder—plain error analysis inapplicable

Although defendant contends the trial court committed plain error by granting the State's motion to join the three codefendants' cases for trial, this assignment of error is overruled

because our Supreme Court has declined to extend plain error analysis beyond issues concerning jury instructions and evidentiary rulings.

12. Appeal and Error— appealability—use of uncertified interpreter—plain error analysis inapplicable

Although defendant contends the trial court committed plain error by permitting an uncertified Spanish interpreter to interpret the testimony of three witnesses during the State's case-in-chief, this assignment of error is overruled because the Court of Appeals has already specifically declined to extend the application of the plain error doctrine to this very issue.

Appeal by defendants from judgments entered 15 November 2002 by Judge Thomas D. Haigwood in Beaufort County Superior Court. Heard in the Court of Appeals 9 June 2004.

Roy Cooper, Attorney General, by Philip A. Lehman, Assistant Attorney General, for the State. (Jason Christopher Walker)

Roy Cooper, Attorney General, by Kristine L. Lanning, Assistant Attorney General, for the State. (Emil E. Browning, Jr.)

Roy Cooper, Attorney General, by Barbara A. Shaw, Assistant Attorney General, for the State. (Javier A. Hernandez, Jr.)

Staples Hughes, Appellate Defender, by Kelly D. Miller, Assistant Appellate Defender, for defendant-appellant Walker.

Brian Michael Aus for defendant-appellant Browning.

Geoffrey W. Hosford for defendant-appellant Hernandez.

STEELMAN, Judge.

Each of the defendants were indicted on charges of robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. The cases were joined for trial pursuant to N.C. Gen. Stat. § 15A-926.

The evidence at trial tended to show that in the early morning hours of 7 April 2002, defendants Walker, Browning, and Hernandez, together with Justo Aguillon, robbed a bar and nightclub in Beaufort County known as "Desperado's." Both Browning and Aguillon had previously worked as bouncers at the bar before being fired. At the

time of the robbery, Hernandez worked at Desperado's part-time as a bouncer. Walker had no prior connection to the bar. All four of the men were on active duty with the United States Marine Corps, stationed at Camp Lejeune.

The bar closed around two in the morning, with five bouncers remaining to help clean up, including Hernandez. At approximately 3 a.m., three men arrived at Desperado's with their faces covered, wearing dark clothing, and carrying weapons. Aguillon carried a small baseball bat, Walker carried a gun and a pool stick, and Browning also carried a gun. The bouncers were outside when the robbers arrived. Two of the bouncers ran away when they saw the men were carrying weapons, and the third bouncer ran away after being assaulted. A fourth bouncer, Hector Ramos, testified that two of the robbers pointed guns at him and forced him to stay against the wall outside of the bar. Defendants questioned Ramos about how many bouncers were inside, the location of the owner, whether the owner's boyfriend was inside, and whether the main entrance to the club was locked. When defendant Hernandez, the fifth bouncer working that night, walked by, one of the other defendants told him to sit down with Ramos against the wall. Defendants asked Hernandez the same questions about the security of the club. While Walker remained outside to guard the bouncers, Browning and Aguillon went inside. Only the owner of the bar, Cynthia Lee Perez (Perez) and her boyfriend, Omar Marque (Marque), were inside the bar. Perez was standing behind the bar and Marque was in front of the bar. Once inside, Browning put one of the guns to Marque's head and pushed him to the floor. Aguillon assaulted Perez with the bat, striking her several times in the head and back, until the bat broke. Perez then pretended to fall to the floor dead. Aguillon grabbed the money from behind the bar, and he and Browning ran outside where defendants got into Walker's car and fled. Defendants' drove to a rest stop where they had parked a second car, belonging to Aguillon. They then proceeded to Walker's home and divided the money. Walker and Browning each received between $1,400.00 and $1,500.00 each, Hernandez received $600.00 for "keeping quiet," and Aguillon kept the remainder of the money.

Even though Ramos could not see the defendants' faces since they were wearing masks, he recognized Aguillon's voice. Perez was unable to visually identify any of the robbers, but recognized the voice of one of the robbers as belonging to one of her former bouncers. Perez suffered serious injuries and required thirty-three

stitches to close the wounds to her head. Perez testified that the robbers stole between $8,000.00 and $10,000.00.

Before the trial of his co-defendants, Aguillon pled guilty pursuant to a plea agreement to robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. As part of his plea agreement, Aguillon agreed to testify against the other defendants and in exchange the charges against him would be consolidated and he would receive a sentence in the presumptive range. Aguillon knew both Browning and Hernandez from the Marine Corps, although he did not meet Walker until the night of 6 April 2002. Aguillon testified that about a week and a half before the robbery Browning approached him with a plan to rob Desperado's and asked if he was interested in participating. Aguillon agreed to help Browning rob the bar. Aguillon visited Hernandez on two occasions because he knew Hernandez worked at Desperado's and would have knowledge about security at the bar and where the owner kept the money. Hernandez answered all of Aguillon's questions. On the second visit, Browning accompanied Aguillon and informed Hernandez of his plan to rob the bar.

On the night of 6 April 2002, Aguillon testified he picked Browning up and they drove to Walker's home, where they hung-out until around 1:00 a.m. on the morning of 7 April 2002. Aguillon stated that they discussed their plan with Walker and got their gear together. He also stated that while they were at Walker's home Browning painted pellet guns so they would look like real guns. Defendants waited to leave so that they would arrive at the bar around closing time.

Investigator Wayne Melton of the Beaufort County Sheriff's Office investigated the robbery, assisted by two agents from the U.S. Department of Defense. When Detective Melton interviewed Perez, she stated she believed Browning and Aguillon were involved in the robbery. As a result of Perez's statements, Detective Melton interviewed each of the defendants and Aguillon. Walker, Browning, and Aguillon each provided a signed written statement to Detective Melton. In Walker's written statement, he claimed he only went to Desperado's to provide back-up for two of the men who wanted to settle scores with some of the bar's employees, and he knew nothing about a planned robbery. At trial, Walker testified that Browning told him he had a problem with someone named "Pablo," who was Perez's boyfriend, and wanted to go to Desperado's to confront "Pablo."

Walker agreed to go with him to provide back-up. Walker denied dividing the money, stating that Aguillon just left some of it at his house to keep him quiet. In rebuttal of Walker's testimony, Michael Paschall (Paschall) testified for the State. Paschall shared a cell with Walker while Walker awaited his trial. Paschall testified that while they were in jail, Walker discussed the robbery with him and Walker admitted he "knew what they were going there for . . . ."

The jury found Walker and Browning guilty of robbery with a dangerous weapon and assault inflicting serious injury. The jury found Hernandez guilty of robbery with a dangerous weapon, but he was acquitted on the assault charge. The trial court sentenced Walker to an active sentence from the presumptive range of 70 to 93 months; sentenced Browning to an active sentence from the aggravated range of 80 to 105 months; and sentenced Hernandez to an active sentence from the presumptive range of 51 to 71 months. Defendants appeal.

There are three defendants with three separate appeals. We first address common assignments of error and then address their separate assignments of error.

I. Common Assignments of Error—Walker and Browning

A. Jury Instruction Regarding Common Law Robbery

[1] In their first assignment of error, defendants Walker and Browning contend the trial court committed plain error by failing to instruct the jury on the charge of common law robbery as a lesser included offense of armed robbery. We disagree.

Since defendants failed to raise this issue before the trial court our review is limited to plain error. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983) (noting our Supreme Court has held plain error review to be appropriate regarding situations involving jury instructions). The plain error rule only applies in truly exceptional cases. *Id.* at 661, 300 S.E.2d at 379. To constitute plain error the appellate court must be convinced that absent the error, the jury probably would have reached a different verdict. *Id.*

Defendants must also overcome the bar of invited error. Under the doctrine of invited error, "a defendant is not prejudiced by . . . error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2003). "[A] defendant may not decline an opportunity for instructions on a lesser included offense and then claim on appeal that failure to instruct on the lesser included offense was error." *State v. Gay*,

334 N.C. 467, 489, 434 S.E.2d 840, 852 (1993). In *Gay*, our Supreme Court refused to grant defendant a new trial where the trial court specifically asked defense counsel if there were any lesser included offenses he wanted the judge to instruct the jury on, to which defense counsel replied in the negative. *Id. See also State v. Williams*, 333 N.C. 719, 728, 430 S.E.2d 888, 893 (1993); *State v. Blue*, 115 N.C. App. 108, 112, 443 S.E.2d 748, 750 (1994) (holding a defendant cannot decline to object to an instruction at trial and then use this deliberate choice to claim error on appeal.)

In this case, during the charge conference, the trial judge initially proposed submission of separate verdict sheets for each defendant with the following possible verdicts: (1) guilty of robbery with a dangerous weapon or not guilty; and (2) guilty of assault with a deadly weapon inflicting serious injury or not guilty. Walker's attorney requested the jury also be instructed on the lesser included offense of assault inflicting serious injury. Neither Browning nor Hernandez wanted such an instruction. The trial judge then attempted to clarify defense counsel's position when he stated: "[Y]ou're saying that you agree that the verdict sheets should charge your client—*should be up or down as it relates to robbery with a dangerous weapon* and up or down as it relates to assault with a deadly weapon inflicting serious injury" (emphasis added). When asked this, both Browning's and Hernandez's attorneys agreed with the judge's statements that they wished to keep the charge to the jury just as the trial judge initially proposed and did not request any lesser included offenses be submitted to the jury. The trial judge ruled that the lesser included offense of assault inflicting serious injury would be submitted to the jury as to all three defendants. Following this discussion, the trial judge stated:

> Now with regard to the Court's charge to the jury, gentleman, I propose to charge in accordance with North Carolina pattern instructions . . . assault with a deadly weapon inflicting serious injury; 208.60, assault inflicting serious injury; 217.30, robbery with a dangerous weapon other than with a firearm *but not including any lesser offenses* and incorporating within each of those charges 202.10, acting in concert . . .

(emphasis added). None of the defendant's counsel objected to these instructions or requested additional instructions, even after the trial court specifically stated it would not instruct on any lesser included offenses for robbery with a dangerous weapon. Therefore, Walker and Browning "foreclosed any inclination of the trial court

to instruct on the lesser-included offense of [common-law robbery]" and are not entitled to any relief on appeal. *Williams*, 333 N.C. at 728, 430 S.E.2d at 893.

Defendant Hernandez did not object during the jury charge conference and does not now cite error or plain error to this issue. Therefore, he has waived his right to appellate review under N.C. R. App. P. 10(b)(2) and 10(c)(4) (2004). During oral arguments before this Court, Hernandez's attorney requested we exercise our authority under Rule 2 of the Rules of Appellate Procedure and consider this issue as to Hernandez. We decline to do so.

B. Ineffective Assistance of Counsel

[2] In defendants Walker and Browning's second assignment of error, they contend they were denied effective assistance of counsel and are therefore, entitled to a new trial on the robbery with a dangerous weapon charge. They assert that their respective attorneys failed to ask the trial court to submit the lesser included offense of common law robbery to the jury. We disagree.

In order for a defendant to demonstrate he was denied effective assistance of counsel he must satisfy a two-prong test: (1) his counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) his attorney's deficient performance prejudiced him. *State v. Fletcher*, 354 N.C. 455, 481, 555 S.E.2d 534, 550 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002) (applying the test set out in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)). Counsel's errors must be considered " 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' " *Id.* (citations omitted).

"Counsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *Id.* at 482, 555 S.E.2d at 551. It is presumed that "trial counsel's representation is within the boundaries of acceptable professional conduct." *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004).

In analyzing the reasonableness of the attorney's actions under the first prong of the test, "the material inquiry is whether the actions were reasonable considering the totality of the circumstances at the time of performance." *State v. Gainey*, 355 N.C. 73, 112-13, 558 S.E.2d 463, 488, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). In this case, defense counsel's decision not to request an instruction on

the lesser included offense of common law robbery was not an unreasonable trial strategy. The record indicates defendants' counsel were employing an "all or nothing" strategy, hoping the jury might find one element of the crime charged to be missing, that is, that the bat was not a dangerous weapon and thus, find their clients not guilty. It can reasonably be inferred from the record that defense counsel made a tactical decision in an attempt to save their clients' military careers. The strategy failed. The fact that it failed does not mean that defendants were deprived of effective assistance of counsel. Walker and Browning have not shown their counsel's actions fell below an objective standard of reasonableness. Defendants have failed to satisfy the first prong of the test demonstrating they were denied effective assistance of counsel. This assignment of error is without merit.

II. Defendant Walker's Remaining Assignments of Error

[3] In Walker's third assignment of error, he contends he is entitled to a new trial as to both charges, because the trial court erred in allowing the State to cross-examine him with letters he wrote to the district attorney in which he offered to plead guilty. We agree.

Walker asserts that N.C. Gen. Stat. § 15A-1025 and Rule 410 of the Rules of Evidence expressly make plea discussions inadmissible. N.C. Gen. Stat. § 15A-1025 provides: "[t]he fact that the defendant or his counsel and the prosecutor engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal or civil action . . . ." N.C. Gen. Stat. § 15A-1025 (2003). Rule 410 provides that "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn" is inadmissible in any criminal proceeding. N.C. Gen. Stat. § 8C-1, Rule 410 (2003).

In deciding whether the trial court erred in allowing the State to cross-examine Walker as to these letters, we must apply a two-part test. First, we must determine whether the letters constituted a "plea discussion." *See State v. Flowers*, 347 N.C. 1, 25-26, 489 S.E.2d 391, 405 (1997). If we conclude the letters constituted a plea discussion, and were therefore inadmissible, we must then determine whether the State's cross-examination of Walker with the letters resulted in prejudice to Walker, entitling him to a new trial. *See State v. Wooten*, 86 N.C. App. 481, 482, 358 S.E.2d 78, 79 (1987) (noting the admission of inadmissible testimony alone does not automatically require a new trial).

We address the first prong of the test to determine whether Walker's letters to the prosecutor constituted a plea discussion. Walker wrote a total of seven letters to the prosecutor. However, none of those letters are included in the record. The only evidence we have of their content are the portions which the prosecutor read to Walker during cross-examination. Our analysis is thus limited to the testimony preserved in the record, which is as follows:

> [Prosecutor, Mr. Schmidlin] Q: In the several letters that you wrote to the District Attorney's office, do you remember writing "I would like to plead guilty to these charges so I can get my case over with. This is my first offense ever, and I don't know where I stand with it. I just want to get everything over with."?
>
> [Defense Counsel] Mr. Johnston: Objection.
>
> . . . .
>
> A: Yes, I wrote that letter. Yes, I wrote that letter, Mr. Schmidlin.
>
> Q: Do you remember also in that letter writing, "I made a terrible mistake."?
>
> A: Yes, sir, should have been at home.
>
> Q: Do you remember writing another letter that said, "This case is about the Desperado's Nightclub robbery, I'm the one who was outside."?
>
> A: Yes, sir.
>
> Q: Do you remember writing in another letter, "I want to plead guilty.", and then later in that letter, "I told my lawyer that I wanted to plead guilty. I don't know what he's doing, but I want to plead guilty."?
>
> A: Sir, I asked for lesser charges also and a 1096 plea agreement in those letters.
>
> Q: Do you remember saying those words?
>
> A: Yes, sir.
>
> Q: Do you remember writing in another letter, "I am trying to plead guilty, and I would highly appreciate it if you would call me to superior court the week of June 10th, 2002 to plead guilty."?
>
> A: Yes, sir to lesser charges.

Q: And later in that letter do you remember writing, "I've made a big mistake, and I've realized how much of an effect this has been on my family and my life and career."?

A: Yes, sir.

Q: Do you remember later in another letter writing, "I'm willing to confess what I've did and who planned the robbery and help you in any way to get probation, no matter how long or how much the restitution fee."?

. . . .

Q: Did you write that?

A: Yes, sir.

Defendant properly preserved this question for our review, by objecting at trial. *See* N.C. R. App. P. 10(a) (2003).

In *State v. Flowers*, our Supreme Court found that a defendant's letter to a prosecutor did not constitute a "plea discussion" within the meaning of N.C. Gen. Stat. § 15A-1025, but was rather an admission of guilt where: (1) the letter expressed the defendant's desire to dismiss his attorney and claimed his co-defendants were innocent; (2) the letter did not state the plea defendant had in mind or other specifics, but only mentioned the possibility of a plea bargain; (3) the prosecutor never responded to defendant's letter, nor did he engage in plea discussions with the defendant; and (4) the prosecutor did not enter into a plea arrangement with the defendant. 347 N.C. at 26, 489 S.E.2d at 405.

The instant case is distinguishable from the facts in *Flowers*. While Walker's letters do indicate an admission of guilt, " 'plea bargaining implies an offer to plead guilty upon condition.' " *State v. Curry*, 153 N.C. App. 260, 264, 569 S.E.2d 691, 694 (2002) (citations omitted). The letters state he was willing to confess and help in any way in order to get probation, which articulates the plea arrangement defendant sought. Even though the prosecutor did not initially respond to defendant's letters, the letters ultimately lead to the prosecutor entering into plea discussions with Walker. This resulted in Walker entering a guilty plea, which was subsequently withdrawn. As a result, we hold that these letters constituted a "plea discussion" within the intent and meaning of N.C. Gen. Stat. § 15A-1025 and Rule 410 of the Rules of Evidence, and it was impermissible for the State to cross-examine Walker concerning those plea negotiations.

We now proceed to the second prong of the analysis, to determine whether the reading of the letters by the prosecutor at trial prejudiced defendant from receiving a fair trial. The purpose of N.C. Gen. Stat. § 15A-1025 is to "facilitate plea discussions and agreements by protecting both defendants and prosecuting officials from being 'penalized for engaging in practices which are consistent with the objectives of the criminal justice system.' " *Wooten*, 86 N.C. App. at 482, 358 S.E.2d at 78. In the portions of the letters read by the prosecutor, Walker offered to plead guilty to the charges in several of the letters, stated he had made a big mistake, and was willing to confess what he had done and who planned the robbery. The prosecutor brought this to the juries' attention repeatedly during his cross-examination. The admission of evidence that defendant was considering pleading guilty to the charges against him was highly prejudicial to his case and potentially influenced the jury's decision. *See Wooten*, 86 N.C. App. at 482, 358 S.E.2d at 79 (holding the admission of evidence that the defendant was considering pleading guilty to the charge against him and accepting a six year prison term was highly prejudicial and potentially influenced the jury's decision). Therefore, we vacate the judgments of the trial court entered against defendant Walker and remand for a new trial on the charges of robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury.

[4] Even though we have remanded these matters for a new trial, we address Walker's fourth and final assignment of error because there is a substantial likelihood that this issue could arise again during the new trial. Walker contends the trial court erred by admitting evidence of his statement to a superior officer. He asserts that the statement was the product of a custodial interrogation, without *Miranda* warnings, and thus violated his constitutional rights.

"[T]he initial inquiry in determining whether *Miranda* warnings were required is whether an individual was 'in custody.' " *State v. Buchanan*, 353 N.C. 332, 337, 543 S.E.2d 823, 826 (2001). In *Miranda v. Arizona*, the Supreme Court defined " 'custodial interrogation' as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966)). When dealing with a defendant who is a member of the armed forces and whose statement is given to a superior officer, the inquiry becomes whether a reasonable Marine in defendant Walker's situation would believe his free-

dom of movement was limited to the same extent as if were under formal arrest. *State v. Davis*, 158 N.C. App. 1, 9, 582 S.E.2d 289, 295 (2003). We acknowledge that interrogation by a superior officer in the military raises a significant risk of inherent compulsion, which is of the type *Miranda* was designed to prevent. *Id.* at 6, 582 S.E.2d at 293.

In the instant case, the evidence does not indicate Walker was "in custody" at the time he was discussing the incidents of 7 April 2004 with his superior, Master Gunnery Sergeant Dean (Dean). The record shows that on 8 April 2002, Walker was questioned by First Sergeant Nylon, of the Naval Criminal Investigative Services, and Investigator Melton, and at each questioning he received *Miranda* warnings. Dean did not see Walker until the next day. Dean testified that when Walker came in the next morning "we started talking in my office, and basically he explained to me what the agent wanted . . . ." Dean then asked Walker if "he had anything to do with this mess" and whether he was carrying a weapon of any kind. Walker told Dean he was at Desperado's that night, but he had only gone to watch Browning's back because Browning was having some kind of dispute with the owner's boyfriend. Walker also told Dean that he carried a baseball bat of some type and he remained outside watching the bouncers. There was no testimony that Walker felt he could not leave or that he had to answer Dean's questions. Instead, it appears that Dean was simply inquiring into why Walker was being questioned. Since Dean's questioning of Walker did not constitute a "custodial interrogation," Dean was not required to administer *Miranda* warnings prior to their conversation.

Even assuming *arguendo* that Walker's statements to Dean were made during a custodial interrogation, we nevertheless find that the admission of Walker's statements were harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b) (2003) (finding a violation of a defendant's constitutional rights is prejudicial unless the State can demonstrate the violation was "harmless beyond a reasonable doubt"). Walker's statement to Dean was substantially identical to Walker's own testimony at trial, that he only went to the bar to provide back-up for Browning over a dispute Browning had with the owner's boyfriend, and that he stayed outside the entire time watching the bouncers. As Dean's testimony was duplicative of other trial testimony, we hold that even if this statement was the product of a custodial interrogation and inadmissible, the admission of the statements was harmless beyond a reasonable doubt.

III. Defendant Browning's Remaining Assignments of Error

[5] In Browning's second assignment of error, he contends the trial court erred or committed plain error when instructing the jury on the charge of armed robbery, when the judge failed to specify the type of weapon used. We disagree.

Browning was indicted for robbery with a dangerous weapon. The indictment charging Browning specified the dangerous weapon was a bat. The trial court's instruction to the jury regarding the armed robbery charge did not specifically identify the weapon. Browning contends that since evidence was presented that a bat and guns were used in connection with the robbery, it cannot be determined which weapon the jury determined was dangerous, and thus the jury verdict is ambiguous, requiring that he receive a new trial.

In order to preserve an issue regarding jury instructions for appeal, a party must object to the jury charge or omission thereto before the jury retires to consider its verdict. N.C. R. App. P. 10(b)(2) (2003). The objecting party must state specifically the objection and the grounds for the objection. *Id.* Following the judge's instructions to the jury, the judge asked defense counsel if they had any objections or any requests for corrections to the court's instructions. Browning's attorney replied: "Nothing, Your Honor."

If a defendant were not required to object to a jury instruction that is possibly "ambiguous," this would contravene the express purpose of Rule 10(b)(2). The purpose of Rule 10(b)(2) is to bring possible errors to the attention of the trial court, so that the judge has the opportunity to correct them, thus preventing the need for a new trial. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Browning was afforded ample opportunity to request that the judge specify the bat as the dangerous weapon during the charge conference and again following the trial court's charge to the jury. Since Browning did not object at trial, our review is limited to plain error. *Id.* at 661, 300 S.E.2d at 378-79.

Browning cites *State v. Ashe*, for the proposition that even though defense counsel did not object, since the trial court's alleged error violated his "right to a trial by a jury of twelve" he did not waive his right to raise the matter on appeal. *Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). We find this case distinguishable. *Ashe* did not deal with jury instructions. Rather, in *Ashe*, after the jury had begun deliberations, the jury foreman asked the trial judge to clarify a legal term, and the judge responded to the request outside the presence of the other jurors. *Id.* at 38-39, 331 S.E.2d at 658-59. In this case, all

jurors were present during the instructions and counsel was given an opportunity to object to the charge as provided in Rule 21 of the General Rules of Practice for the Superior and District Courts.

If we were to take Browning's argument to its logical conclusion, anytime counsel contends an instruction is "ambiguous," then defendant would be entitled to have the matter reviewed under an "error" standard rather than a "plain error standard." This is clearly contrary to Rule 21 of the General Rules of Practice, Rule 10(b)(2) of the Rules of Appellate Procedure, and a long line of cases requiring "plain error" review in the absence of an objection to a jury instruction. *See, e.g., State v. Sexton*, 357 N.C. 235, 238, 581 S.E.2d 57, 59 (2003); *State v. Lucas*, 353 N.C. 568, 588, 548 S.E.2d 712, 726 (2001); *State v. Locklear*, 331 N.C. 720, 724, 417 S.E.2d 445, 447(1992); *State v. Tucker*, 317 N.C. 532, 539, 346 S.E.2d 417, 421 (1986). *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

As we have stated previously, to constitute plain error the appellate court must be convinced that absent the error, the jury probably would have reached a different verdict. *Odom*, 307 N.C. at 661, 300 S.E.2d at 379. After careful review, we do not find that the trial court's failure to specify the type of dangerous weapon used when instructing on the charge of robbery with a dangerous weapon rose to the level of plain error.

A verdict, which may appear ambiguous, " 'may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court.' " *State v. Thompson*, 257 N.C. 452, 457, (1962) (citations omitted). The verdict should also be reviewed in conjunction with the charge given by the trial judge, as well as the evidence in the case. *Id.* In the instant case, when we consider the warrant, the indictment, the evidence, and the jury charge given, it clearly appears the jury, by their verdict, found defendant guilty of robbery with a dangerous weapon, and the dangerous weapon used was indeed the bat.

Several reasons support this conclusion. First, the indictment specifically listed the dangerous implement as being the bat. Second, when instructing the jury on the robbery charge, the trial judge did not use the pattern jury instruction for robbery with a firearm (N.C.P.I—217.20 (2003)). Rather, the trial judge charged the jury using the pattern jury instruction for robbery with a dangerous weapon, other than a firearm (N.C.P.I—217.30 (2003)), and specifically told counsel he was using that instruction. Had the judge been referring to the gun used in the robbery as being the dangerous weapon, he could

have instructed the jury that it was a dangerous weapon *per se* or used the pattern jury instruction for robbery with a firearm. However, nowhere in the trial judge's instructions does he mention the use of a firearm. In fact, the entire instruction is devoid of any indication that the judge was referring to a gun.

Finally, the evidence presented at trial showed that Perez was beaten with a bat. She was struck repeatedly in the head and back with the bat, and required thirty-three stitches to close the wounds to her head. Therefore, there was sufficient evidence for the jury to find the bat was a dangerous weapon.

There is nothing in the record to suggest that the jury was misled as to what instrument constituted the dangerous weapon. Browning has failed meet his burden under plain error review, that is, Browning has failed to demonstrate that had the trial judge specifically stated he was referring to the bat as the dangerous weapon when giving the instruction, the jury probably would have reached a different verdict. This assignment of error is overruled.

[6] In Browning's final assignment of error he contends the trial court erred in failing to find the mitigating factor of good character. We disagree.

A defendant's sentence may be mitigated by evidence that he has been a person of good character. N.C. Gen. Stat. § 15A-1340.16(e)(12) (2003). During sentencing, the judge must find a statutory mitigating factor if it is supported by a "preponderance of the evidence." *State v. Kemp*, 153 N.C. App. 231, 241, 569 S.E.2d 717, 723, *disc. review denied*, 356 N.C. 441, 573 S.E.2d 158 (2002). However, the burden is on the defendant to show the evidence clearly establishes the mitigating factor, such that no reasonable inference to the contrary can be drawn, and that the evidence is patently credible. *State v. Butler*, 341 N.C. 686, 693, 462 S.E.2d 485, 489 (1995). The sentencing judge's failure to find a statutory mitigating factor will be deemed error where the evidence of the mitigating factor is "both uncontradicted and manifestly credible." *Id.* at 694, 306 S.E.2d at 489. Good character may be proven by specific acts as well as by the opinions of others as to the defendant's reputation in the community. *State v. Benbow*, 309 N.C. 538, 547, 308 S.E.2d 647, 652-53 (1983).

Browning submitted six written letters including: one from a former sergeant in the Marine Corps, a retired assistant superintendent of schools, and his godmother, in support of his good character. The

State offered no evidence in rebuttal. However, it should be noted that just because defendant's evidence is "uncontradicted, quantitatively substantial, and credible" it may still "fail to establish, by a preponderance of the evidence, any given factor in aggravation or mitigation." *State v. Blackwelder*, 309 N.C. 410, 419, 306 S.E.2d 783, 789 (1983). The trial judge may also consider the relationship of the defendant to the individuals who wrote the character letters in assessing the credibility of those individuals. *State v. Taylor*, 309 N.C. 570, 578, 308 S.E.2d 302, 308 (1983).

In *State v. Smallwood*, this Court found that even though defendant presented numerous letters stating "defendant was 'a very respectable person all his life,' that 'he has had some misfortune,' that he was known as 'a very good boy,' that 'he got caught up with the wrong people,' and so on[,]" those statements did not really go to defendant's good character. 112 N.C. App. 76, 83, 434 S.E.2d 615, 620 (1993) (citations omitted).

We find this reasoning to be applicable in the instant case. Defendant presented letters from various persons stating defendant had "displayed a high level of respect and honesty toward his family, friends and community," that he was "a caring young man who is generous and thoughtful," that he was "a dependable individual, with a superior work ethic." These statements are not specific, but instead are general statements as to defendant's character. In addition, the trial court did not have an opportunity to examine these individuals to determine the extent of their relationship with Browning, assess their credibility, or determine what they knew about Browning's activities. *See id.* Furthermore, the letter from the retired assistant superintendent does not describe recent knowledge of defendant's character. In fact, the letter infers bad character, stating that defendant's lack of positive support and direction is "no doubt [what] caused him to make some very bad decisions and, needless to say, poor choices in acquaintances from among others also serving in the Marines."

Defendant's character evidence, although not contradicted, was not the type of evidence which demonstrated defendant's good character by a preponderance of the evidence. Accordingly, we find no error.

IV. Defendant Browning's Motion for Appropriate Relief

[7] Defendant Browning has filed a Motion for Appropriate Relief based upon the recent holding of the United States Supreme Court in

Blakely v. Washington, — U.S. —, 159 L. Ed. 2d 403 (2004). In *State v. Allen*, this Court addressed the applicability of *Blakely* to the imposition of aggravated sentences, holding that aggravating factors must be found by a jury and not by the trial court. 166 N.C. App. 139, — S.E.2d — (2004). Our Supreme Court stayed the Court of Appeals decision in *Allen* on 29 September 2004. *State v. Allen*, 2004 N.C. LEXIS 1112. We defer ruling on Browning's motion for appropriate relief pending guidance on this issue from our Supreme Court.

V. Defendant Hernandez's Assignments of Error

[8] In Hernandez's first assignment of error, he contends the trial court committed plain error and violated his constitutional rights when it admitted testimony concerning defendant's exercise of his right to remain silent and to have counsel present. We disagree.

During the prosecution's direct-examination of Investigator Melton, he testified that he gave Hernandez his *Miranda* warnings prior to questioning him. The following exchange then took place:

> Q: [Prosecutor questioning Investigator Melton:] What did he tell you in the course or your interview?
>
> A: I explained to Mr. Hernandez why I wished to speak with him or what it pertained to. We chatted for several minutes. I asked him about his involvement in this incident. He did not deny any involvement in it, but at one point during our conversation, which was very brief, probably three or four minutes, he said that he felt that he needed an attorney.
>
> . . . .
>
> Q: Investigator Melton, prior to Mr. Hernandez requesting an attorney, did he make any statements to you regarding a meeting he had with Mr. Aguillon?
>
> A: He did.
>
> Q: What did he tell you?
>
> A: I'm referring to my notes. He stated that he had no part in the robbery. He claims that after the robbery, he went to Augillon's residence to tell him he was a suspect. Hernandez said Aguillon said that he did rob Desperado's but would give him $600 not to tell. Hernandez said he got greedy and took the money and that he still has some of the money. I asked Hernandez if he wanted to make a formal statement in which he responded that he thought

he had better check with an attorney. I immediately terminated our conversation.

It is impermissible for the trial court to admit testimony relating to a defendant's exercise of his right to remain silent and to request counsel. *State v. Elmore*, 337 N.C. 789, 792, 448 S.E.2d 501, 502 (1994). Such an error requires the defendant be granted a new trial unless it can be shown the error was harmless beyond a reasonable doubt. *Id.* (citing N.C. Gen. Stat. § 15A-1443(b)). However, in the instant case defense counsel failed to object to this testimony at trial and our review is limited to plain error. *State v. Walker*, 316 N.C. 33, 38, 340 S.E.2d 80, 83 (1986). *See also State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983) (holding plain error review to be appropriate regarding situations involving evidentiary rulings by the trial court). As we have stated previously, to constitute plain error the appellate court must be convinced that absent the error, the jury probably would have reached a different verdict. *Odom*, 307 N.C. at 661, 300 S.E.2d at 379.

Defendant relies on *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976) in support of his argument. Our Supreme Court has applied the principles enunciated in *Doyle* in a number of cases, including *State v. Alexander*, 337 N.C. 182, 446 S.E.2d 83 (1994). We hold this case is controlled by *Alexander*, which relied on the earlier cases of *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986) and *State v. Freeland*, 316 N.C. 13, 340 S.E.2d 35 (1986). *Id.* at 195, 446 S.E.2d at 91.

In *State v. Alexander*, our Supreme Court held the admission of testimony regarding the defendant's post-arrest silence did not constitute plain error because (1) the comments regarding the defendant's silence were relatively benign; (2) the prosecutor did not attempt to emphasize the defendant's silence; and (3) the evidence of the defendant's guilt was substantial. 337 N.C. at 196, 446 S.E.2d at 91.

After reviewing the record and transcript in this trial, we hold the admission of this testimony does not rise to the level of plain error. Investigator Melton was attempting to describe the circumstances under which he questioned Hernandez and Hernandez revealed that he accepted $600.00 from Auguillon to remain silent about the robbery. The testimony was also offered to show the chronology of the interview, and for the purpose of showing that Hernandez's admission came after he received his *Miranda* warnings, but before he invoked his right to have counsel present. This brief testimony of Investigator

Melton appears to be the only place in the record referencing Hernandez's silence. Additionally, the prosecutor did not attempt to emphasize Hernandez's silence or his request for counsel as indicators of defendant's guilt, and the evidence against Hernandez was substantial. For these reasons, we hold that Hernandez has failed to establish that, but for the admission of this evidence the jury probably would have reached a different verdict. This assignment of error is overruled.

[9] In Hernandez's second assignment of error, he contends the trial court committed reversible error in denying his motion for a mistrial. This contention is based on the prosecutor's comments made after he finished his cross-examination of Walker. The prosecutor stated in pertinent part: "I would like to reserve my right to recall [Walker] after the testimony of the other defendants." Hernandez asserts the prosecutor's statement was an improper comment on Hernandez's silence and privilege against self-incrimination, and that the statement effectively forced Hernandez to testify or risk appearing as though he had something to hide.

A motion for mistrial is addressed to the sound discretion of the trial court and we will not reverse such a ruling on appeal unless it appears the trial judge abused that discretion. *State v. Steen*, 352 N.C. 227, 279, 536 S.E.2d 1, 31 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). A mistrial is appropriate only when such serious improprieties occur that it becomes impossible for the defendant to obtain a fair and impartial verdict. *Id.*

In the instant case, the trial court removed the jurors from the courtroom after the prosecutor made the above referenced comment. The trial judge denied defense counsel's motion for a mistrial, but did give a curative instruction immediately following the jurors' return to the courtroom. It has long been presumed that jurors will comply with the trial court's instructions. *Id.* at 280, 536 S.E.2d at 32. Here, defendant has failed to show the trial court's instruction was insufficient to cure any potential prejudice resulting from the comment. Consequently, the trial court did not abuse its discretion by denying defendant's motion for a mistrial. This assignment of error is overruled.

[10] In his third assignment of error, Hernandez contends the trial court erred in denying his motion to dismiss as there was insufficient evidence to support the verdict of robbery with a dangerous weapon. We disagree.

In considering a motion to dismiss, the only issue for the trial court is whether the essential elements of the offense are supported by substantial evidence and that such evidence supports the contention that the defendant was the perpetrator. *State v. Lucas*, 353 N.C. 568, 580, 548 S.E.2d 712, 721 (2001). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 580-81, 548 S.E.2d at 721. The court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. *Id.* at 581, 548 S.E.2d at 721. Unless favorable to the State, the defendant's evidence is not to be considered, and any contradictions or discrepancies in the evidence are to be resolved in favor of the State. *Id.*

Under the theory of aiding and abetting, an accused is guilty of a crime if: "(i) the crime was committed by some other person; (ii) the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime; and (iii) the defendant's actions or statements caused or contributed to the commission of the crime by that other person." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999).

As a general rule, an accused must aid or actively encourage the person committing the crime or communicate in some way his intent to help the principal, as a person's mere presence at the scene of a crime is insufficient to establish his guilt. *Lucas*, 353 N.C. at 590-91, 548 S.E.2d at 727. In ruling on a motion to dismiss in the context of aiding and abetting, the court may also (1) infer a defendant's communication of his intent to aid from his actions and from his relationship to the actual perpetrators; (2) consider his motives to assist in the crime; and (3) consider the defendant's conduct before and after the crime. *State v. Little*, 278 N.C. 484, 488, 180 S.E.2d 17, 19 (1971).

The evidence, taken in the light most favorable to the State tends to show: (1) Hernandez, by his own admission was friends with Aguillon and the two had worked together as bouncers at Desperado's; (2) Aguillion and Browning visited Hernandez on the afternoon of 6 April 2002 and Browning told Hernandez of their plan to rob the bar that night; (3) Hernandez provided them with inside information as to the number of bouncers that would be there that night, that Perez carried a gun on her person, and that the weekend of the robbery was supposed to be busy because a raffle was being held; (4) prior to the robbery Hernandez agreed to accept a portion of

the proceeds of the robbery in exchange for keeping quiet; (5) Hernandez was present at the time of the robbery; (6) he did nothing to stop the robbery even though he was working as a bouncer; (7) he provided aid to the robbers by answering their questions about the bar's security; and (8) following the robbery, Hernandez admitted he accepted $600.00 of the robbery money to keep quiet.

This evidence demonstrates that Hernandez intended to assist Aguillon in robbing the bar, that he in fact assisted his co-defendants, and that Aguillon and Browning knew of and relied on Hernandez's support and aid. Consequently, we hold that the trial court did not err in denying Hernandez's motion to dismiss the charge of robbery with a dangerous weapon under the theory of aiding and abetting. This assignment of error is without merit.

[11] In Hernandez's fourth assignment of error he contends the trial court committed plain error by granting the State's motion to join the three co-defendants' cases for trial. We disagree.

Our Supreme Court has declined to extend plain error analysis beyond issues concerning jury instructions and evidentiary rulings. *State v. Wiley*, 355 N.C. 592, 616, 565 S.E.2d 22, 39-40 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003); *State v. Diaz*, 155 N.C. App. 307, 318, 575 S.E.2d 523, 530-31 (2002), *cert. denied*, 357 N.C. 464, 586 S.E.2d 271 (2003). Since Hernandez's contentions do not concern jury instructions or evidentiary matters, we decline to extend plain error analysis to his argument, and do not reach it. This assignment of error is without merit.

[12] In his fifth and final assignment of error, Hernandez contends it was plain error for the trial court to permit an uncertified Spanish interpreter to interpret the testimony of three witnesses during the State's case-in-chief. We disagree.

In *State v. Diaz* this Court specifically declined to extend the application of the plain error doctrine to this very issue. 155 N.C. App. at 318, 575 S.E.2d at 530-31. As a result, plain error analysis does not apply to this argument and we do not reach it. This assignment of error is without merit.

NEW TRIAL AS TO DEFENDANT WALKER. NO PREJUDICIAL ERROR AS TO DEFENDANTS BROWNING AND HERNANDEZ.

Judges TYSON and BRYANT concur.

ROY C. HYMAN, ON BEHALF OF HIMSELF AND ALL OTHER SIMILARLY SITUATED PERSONS, PLAINTIFF v. EFFICIENCY, INC., D/B/A TROJAN LABOR, DEFENDANT

No. COA04-246

(Filed 7 December 2004)

1. Employer and Employee— wage withholding—transportation deduction—specific authorization

A de novo review revealed that the trial court did not err by granting summary judgment in favor of defendant temporary employment agency after the trial court found no violations of the North Carolina Wage and Hour Act under N.C.G.S. § 95-25.8 and N.C. Admin. Code tit. 13, r. 12.0305 based on defendant withholding class members' wages to pay for an optional transportation service to and from job sites, because: (1) defendant's daily log complies with the requirements of N.C.G.S. § 95-25.8(2)(a) as a specific authorization since the log provides class members with advance notice of the specific deduction amount, and the deductions for transportation expenses are not automatic and are conditioned upon the class members specifically requesting use of the van pool each morning; (2) defendant's daily log specific authorization form satisfied the formatting and content requirements under N.C. Admin. Code tit. 13, r. 12.0305(b) since the daily log is written, signed by the class members on or before the payday for the pay period for which the deduction is made, includes the date signed, and states the reason for the deduction; (3) while administrative opinion letters from the North Carolina Department of Labor are not binding on the Court of Appeals, they are recognized as evidence of defendant's good faith to comply with the statute; and (4) the optional transportation service offered to the class members is neither an incident of nor necessary to the employment, and it is not primarily for the benefit of defendant who hired from its locale even though the trip the class members pay for is between defendant's home office and the job sites.

2. Employer and Employee— wage withholding—waiting and traveling to work

A de novo review revealed that the trial court did not err by granting summary judgment in favor of defendant temporary employment agency based on class members not being entitled to compensation under N.C.G.S. § 95-25.6 for time spent waiting for

and traveling on defendant's optional transportation service, because: (1) plaintiff testified that defendant never told him that hours worked included wait time or travel time to and from the job site, and the employment contract does not provide for the compensation the class members seek; (2) the class members' wait or travel time is not a principal activity requiring compensation, but instead is preliminary and postliminary activity since the class members' idle time either before or after the workday is personal; and (3) the receipt of general protective equipment does not make travel time compensable under 29 C.F.R. § 785.38.

Appeal by plaintiff from order entered 21 November 2003 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 14 October 2004.

Law Offices of Robert J. Willis, by Robert J. Willis, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by M. Robin Davis and Alycia S. Levy, for defendant-appellee.

TYSON, Judge.

Roy C. Hyman ("plaintiff"), on behalf of those similarly situated (collectively, "the class members") appeal entry of summary judgment in favor of Efficiency, Inc., d/b/a Trojan Labor ("defendant") after the trial court found no violations of the North Carolina Wage and Hour Act ("the NCWHA"), N.C. Gen. Stat. § 95-25.1 *et seq.* We affirm.

I. Background

Defendant is a temporary employment agency that hires individuals on a daily basis for casual labor. Defendant markets and provides the temporary labor to businesses that periodically need additional workers.

Defendant's hiring policy is structured on a first come first serve basis. The class members arrive at defendant's office early in the morning to receive available employment. Upon arrival, the class members receive a time ticket indicating their place in line for job assignments. The time between receiving a number in line and departure to job sites is considered unpaid personal time.

After receiving assignments, the class members may either transport themselves to the job sites or participate in defendant's van pool.

Defendant deducts $2.00 each way from a participant's paycheck for optional van transportation. With their initial employment application, all the class members sign authorization forms that disclose the optional transportation program and related expenses. Each morning, the class members interested in using the van pool sign an additional form authorizing a wage deduction from their paycheck. The class members are not paid while waiting for the van pool at either defendant's office or for return from the job site.

Plaintiff filed a complaint in state court on 26 April 2002. Defendant removed the case to federal court alleging federal question subject matter jurisdiction under the Federal Fair Labor Standards Act ("the FLSA"), 29 U.S.C. § 201 *et seq.* On 25 September 2002, the federal court granted plaintiff's motion to remand to state court as the claims were based solely under substantive state law.

On 24 February 2003, the trial court granted plaintiff's uncontested motion to file an amended complaint. This complaint alleged two class action claims under the NCWHA. First, plaintiff alleged defendant withheld illegal wage deductions. Second, defendant failed to honor an express agreement to pay plaintiff for all daily wages due. On 11 April 2003 and 3 June 2003, plaintiff moved for and was granted class certification of two classes of plaintiffs: (1) the transportation deduction class; and (2) the waiting to work class. Defendant answered on 16 June 2003.

Defendant moved for summary judgment, or in the alternative for partial summary judgment, on 28 August 2003. The motion alleged: (1) plaintiff failed to state a claim upon which relief could be granted under the NCWHA and N.C. Gen. Stat. § 95-25.1 *et seq.*; (2) plaintiff's claims under the NCWHA and N.C. Gen. Stat. § 95-25.1 *et seq.* are preempted by the FLSA; (3) plaintiff was paid the agreed upon wage for "hours worked" under the FLSA; and (4) defendant's wage deduction authorization forms fully complied with the NCWHA, specifically N.C. Gen. Stat. § 95-28.8(2).

On 21 November 2003, the trial court found the "material facts regarding these claims are not in significant dispute [and] [t]he issue . . . is whether or not the undisputed material facts of record establish a violation of the Wage and Hour Act." The trial court found plaintiff failed to show a violation of the NCWHA and granted defendant's motion for summary judgment. Plaintiff appeals.

II. Issues

The issues on appeal are whether the trial court properly granted: (1) summary judgment in favor of defendant on plaintiff's transportation deduction claim; and (2) summary judgment in favor of defendant on plaintiff's waiting to work claim.

III. Federal Statutes, Regulations, and Cases as Guidance

The issues before us arise from Employment and Labor Law, an area substantively monopolized by federal law. Plaintiff's claims are based on the NCWHA, N.C. Gen. Stat. § 95-25.1 *et. seq.* The NCWHA is modeled after the FLSA. *Laborers' Int'l Union of North America, AFL-CIO v. Case Farms, Inc.*, 127 N.C. App. 312, 314, 488 S.E.2d 632, 634 (1997). The North Carolina Administrative Code ("the Code") provides that "judicial and administrative interpretations and rulings established under [] federal law" may guide us when interpreting North Carolina laws that are identical to provisions of the FLSA. N.C. Admin. Code tit. 13, r. 12.0103 (June 2004).

We are not bound by decisions of Federal circuit courts other than those of the United States Court of Appeals for the Fourth Circuit arising from North Carolina law. *Haynes v. State*, 16 N.C. App. 407, 409-10, 192 S.E.2d 95, 97 (1972) (citing *State v. Barber*, 278 N.C. 268, 179 S.E.2d 404 (1971)).

IV. Standard of Review

We review a trial court's entry of summary judgment *de novo*. *Shroyer v. County of Mecklenburg*, 154 N.C. App. 163, 167, 571 S.E.2d 849, 851 (2002) (citing *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999)). Under *de novo* review, a reviewing court considers the matter anew, and it may substitute its own judgment for that of the trial court. *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citation omitted).

Summary judgment is proper when: "(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) (quotation omitted), *aff'd per curiam*, 353 N.C. 445, 545 S.E.2d 210 (2001). The moving party has the burden of showing there is no 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). 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.*

After reviewing the record and considering the parties' oral arguments, we conclude no genuine issues of material fact exist. We review the trial court's conclusions of law.

V. Transportation Deduction Claim

[1] Plaintiff asserts defendant failed to comply with the North Carolina statutes and the Code, which provide when and how employers may deduct wages from employees' paychecks. We disagree.

A. Blanket and Specific Authorizations of Wage Withholding

N.C. Gen. Stat. § 95-25.1 *et seq.* comprise the NCWHA. N.C. Gen. Stat. § 95-25.8 (2003) addresses wage withholding, which states:

> An employer may withhold or divert any portion of an employee's wages when:
>
> (1) The employer is required or empowered to do so by State or federal law, or
>
> (2) The employer has a written authorization from the employee which is signed on or before the payday for the pay period from which the deduction is to be made indicating the reason for the deduction. Two types of authorization are permitted:
>
> (a) When the amount or rate of the proposed deduction is known and agreed upon in advance, the authorization shall specify the dollar amount or percentage of wages which shall be deducted from one or more paychecks, provided that if the deduction is for the convenience of the employee, the employee shall be given a reasonable opportunity to withdraw the authorization;
>
> (b) When the amount of the proposed deduction is not known and agreed upon in advance, the authorization need not specify a dollar amount which can be deducted from one or more paychecks, provided that the employee receives advance notice of the specific amount of any

> proposed deduction and is given a reasonable opportunity to withdraw the authorization before the deduction is made.

The statute offers employers two options of written authorization to deduct wages. First, N.C. Gen. Stat. § 95-25.8(2)(a) addresses deductions of a "known" sum of money, a specific authorization. N.C. Admin. Code tit. 13, r. 12.0305 (June 2004). Employees who agree to specific authorizations must receive from their employers an opportunity to withdraw the authorization before the deduction is made, "if the deduction is for the convenience of the employee . . . ." N.C. Gen. Stat. § 95-25.8(2)(a). Second, N.C. Gen. Stat. § 95-25.8(2)(b) refers to a blanket authorization, one made for an unknown amount of money. N.C. Admin. Code tit. 13, r. 12.0305. Before a deduction may be completed under a blanket authorization, the employee must receive notice of the specific amount and a reasonable opportunity to withdraw the authorization. N.C. Gen. Stat. § 95-25.8(2)(b).

The Code requires wage deduction authorizations to be: (1) written; (2) signed by the employee on or before the payday for the pay period for which the deduction is made; (3) show the date of signing by the employee; and (4) state the reason for the deduction. N.C. Admin. Code tit. 13, r. 12.0305(b). A specific authorization must provide the exact dollar amount or percentage of wages withheld. *Id.* Before wages may be deducted under a blanket authorization, the employee must be provided: (1) advance notice of the specific amount of the proposed deduction; and (2) a reasonable opportunity of at least three calendar days from the employer's notice of the amount to withdraw the authorization. N.C. Admin. Code tit. 13, r. 12.0305(d).

Defendant's policy requires each individual hired to read and sign an employment contract that includes a provision entitled, "Acknowledgment of Transportation Expense and Request to Deduct Transportation Expenses from Wages," which states:

> I HEREBY ACKNOWLEDGE that to be eligible for employment with THE COMPANY that I provide my own transportation to a job site. If I am unable to provide my own transportation to a job site, I request THE COMPANY to arrange such transportation for me. I acknowledge that such transportation is for my benefit, and that without THE COMPANY arranging the transportation to the job site, I would not be able to accept employment with THE COMPANY. If THE COMPANY or another employee provides

> transportation for me, or if I am advanced funds to provide for my own transportation, I hereby request and authorize THE COMPANY to deduct the actual and reasonable cost, not to exceed specific state law, of that transportation from my wages.

This provision authorizes defendant to withhold wages for the class members use of the van pool. It does not specify a dollar amount for the van pool service and is a blanket authorization under N.C. Gen. Stat. § 95-25.8(2)(b). If this were the only wage deduction authorization form, defendant must provide the class members: (1) advance notice of the specific amount of the proposed deduction; and (2) a reasonable opportunity of at least three calendar days from the employer's notice of the amount to withdraw the authorization. N.C. Admin. Code tit. 13, r. 12.0305(d).

In addition to the employment contract blanket authorization, defendant presents another form to the class members every day. Each work morning, defendant offers the class members transportation to the job sites. Those interested sign a daily log which includes the following language:

> I HEREBY ACKNOWLEDGE that I am accepting transportation from a co-employee in order to report to my assigned work site. If I did not accept such transportation, I would be unable to report to the job site assigned, or I would have to use public transportation, if available. I further acknowledge that my share of the cost of transportation shall be $4.00 per round trip, and I agree that this amount is reasonable. Trojan Labor does not set this fee and will not receive any part of the $4.00 cost of transportation. I acknowledge that the cost of transportation reimbursement amount will be credited in full to the co-employee who provides transportation for me to the job site. For each day that I accept as described herein, I agree that Trojan Labor provided transportation to me. I acknowledge and agree that this deduction of the transportation reimbursement from my paycheck by Trojan Labor is reasonable and is an accommodation to me.
>
> I ACKNOWLEDGE AND AGREE that I have a choice to accept the transportation from my co-employee and pay to him/her as explained herein the cost of transportation fee of $4.00 or travel to the job site on public transportation. With full knowledge that I have such a choice, I have elected to accept transportation from my co-employee and to reimburse him/her the cost of transportation as described herein. As a result of this election, I WAIVE any

right to bring any action against Trojan Labor under State or Federal law relating to the cost of transportation to a job site.

This daily log authorizes defendant to withhold wages for the class members use of the van pool. Unlike the blanket authorization above, the daily log provides the class members advance notice of the specific deduction amount, $2.00 each way, and qualifies as a specific authorization under N.C. Gen. Stat. § 95-25.8(2)(a). We further note the deductions for transportation expenses are not automatic. They are conditioned upon the class members specifically requesting use of the van pool each morning. Only then are wages withheld. The class members receive frequent and sufficient notice of the cost to use defendant's van pool. We hold the daily log complies with the requirements of N.C. Gen. Stat. § 95-25.8(2)(a) as a specific authorization.

Defendant's daily log specific authorization form satisfies the Code's formatting and content requirements. The daily log is written, signed by the class members on or before the payday for the pay period for which the deduction is made, includes the date signed, and states the reason for the deduction. N.C. Admin. Code tit. 13, r. 12.0305(b).

On 3 July 2003, defense counsel requested and received an opinion letter from the North Carolina Department of Labor ("the NCDOL") concerning defendant's two authorization forms. In that opinion letter, the NCDOL concluded defendant's daily log form satisfied the statutory and regulatory guidelines concerning wage withholding under a specific authorization. It also determined defendant's employment contract was a blanket authorization under N.C. Gen. Stat. § 95-25.8(2)(b). Accordingly, defendant would need to provide the class members both advance notice of the specific deduction amount and at least three calendar days from the date of the notice of the deduction to withdraw the authorization. N.C. Gen. Stat. § 95-25.8(2)(b); N.C. Admin. Code tit. 13, r. 12.0305(d). The opinion letter also reiterated that defendant need not provide both a specific and blanket authorization form.

While administrative opinion letters are not binding on this Court, we recognize it as evidence of defendant's good faith to comply with the statute. *Brooks, Comr. of Labor v. Grading Co.*, 303 N.C. 573, 581, 281 S.E.2d 24, 29 (1981) (although not binding, interpretations of a statute by the agency created to administer that statute are provided some deference by appellate courts) (citing *In re Appeal of North*

Carolina Savings and Loan League, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981)).

Defendant's daily log satisfies the requirements of both N.C. Gen. Stat. § 95-25.8(2)(a) and N.C. Admin. Code tit. 13, r. 12.0305(b) as a specific authorization. We decline to consider whether defendant's employment contract meets the statutory and Code requirements as a blanket authorization.

This portion of plaintiff's assignment of error is overruled.

B. Incident of and Necessary to Employment

Plaintiff contends the optional transportation services offered by defendant to the class members are a benefit to defendant and thus are considered neither wages nor deductible. We disagree.

"An employer is allowed to count as wages the reasonable cost 'of furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.' " *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1236 (2002) (quoting 29 U.S.C. § 203(m)). The employer may then deduct the reasonable cost from the employee's paycheck, even if the net sum is below the minimum wage. 29 C.F.R. § 531.27 (2004). The United States Department of Labor ("the USDOL") defines "other facilities" as

> [m]eals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel (including coal, kerosene, firewood, and lumber slabs), electricity, water, and gas furnished for the noncommercial personal use of the employee; transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not *an incident of and necessary to the employment.*

29 C.F.R. § 531.32(a) (2004) (emphasis supplied). If the "facilities" provided are primarily for the benefit of the employer, the cost may not be included in computing wages and the employer must "reimburse the expense up to the point the FLSA minimum wage provi-

sions have been met." *Arriaga*, 305 F.3d at 1241-42; 29 C.F.R. § 531.3(d)(1) (2004). We must decide whether the optional transportation service offered to the class members is "an incident of and necessary to the employment" and primarily for the benefit of defendant. 29 C.F.R. § 531.32(a).

Plaintiff cites *Arriaga* as authority to show the transportation service was "an incident of and necessary to" defendant's business and primarily for defendant's own benefit. 305 F.3d at 1228. There, domestic agricultural employers hired nonimmigrant aliens from Mexico as farm laborers to work on a seasonal basis. *Id.* at 1232. Laborers who passed the interview process paid their own passage to the United States, visa costs, and various recruiting fees. *Id.* at 1234. After deducting these expenses from wages earned, the net income fell below the minimum wage. *Id.* at 1231-32.

The Eleventh Circuit held the transportation costs were "an incident of and necessary to the employment" and the employers must reimburse the laborers for expenses paid in coming to the employment. *Id.* at 1242. The court noted the key factor was transportation costs that were "an inevitable and inescapable consequence of having foreign . . . workers employed in the United States. *Id.* The court carefully distinguished that situation from one where an employer "hires from its locale." *Id.* Further, the court distinguished between costs "arising from the employment itself and those that would arise in the course of ordinary life" by interpreting "other facilities" as meaning "employment-related costs . . . that would arise as a normal living expense." *Id.* at 1242-43.

We find *Arriaga* persuasive, but not as plaintiff argues. The paramount distinction between the case at bar and *Arriaga* is exactly what the court discussed. In *Arriaga*, transportation expenses were both inevitable under the program employers used to recruit and hire foreign workers and is substantially different from normal commuting costs. Here, defendant's transportation service is one of several options the class members may utilize in traveling to and from job sites after defendant "hired from its locale." *Id.* at 1242. The class members may use their own vehicle, ride public transportation, walk, car pool with another driver, or sign up for defendant's optional transportation service. The choices facing the class members are the same encountered by each worker every day and are not unique to defendant's business. It is immaterial that the trip the class members pay for is between defendant's home office and the job sites.

We find the optional transportation offered by defendant falls within the category of "other facilities." *Id.* at 1242-43. Defendant properly deducts the associated transportation cost from the class members' paychecks.

Plaintiff has failed to show and we find no evidence in the record that a genuine issue of material fact exists or defendant improperly withheld wages from the class members. Defendant's authorization form satisfies the requirements of both N.C. Gen. Stat. § 95-25.8 and N.C. Admin. Code tit. 13, r. 12.0305. The class members receive sufficient notice of the transportation option, its cost, the process of electing to use the van pool, and the subsequent wage withholding. This assignment of error is overruled.

VI. Time Spent Waiting and Traveling to and from Work

[2] Plaintiff contends that time spent waiting and traveling between defendant's office and the job sites is compensable under N.C. Gen. Stat. § 95-25.6 (2003), which states, "[e]very employer shall pay every employee all wages and tips accruing to the employee on the regular payday. Pay periods may be daily, weekly, bi-weekly, semi-monthly, or monthly. Wages based upon bonuses, commissions, or other forms of calculation may be paid as infrequently as annually if prescribed in advance." We disagree.

A. N.C. Gen. Stat. § 95-25.6

Plaintiff argues defendant is breaching "an express oral if not written contract" between the parties requiring defendant to pay the class members in accordance with the FLSA, which triggers the requirements of N.C. Gen. Stat. § 95-25.6. Plaintiff concedes defendant's employment contract specifically addresses this issue in defendant's favor. However, plaintiff requests this Court to "look[] beyond the language contained in the [contract]" to federal statutes, regulations, and case law, to find waiting and traveling time compensable under these circumstances.

The applicable provision of defendant's employment contract states, "Once you have been given a time ticket, you are completely relieved of duty and are free to use the time between being assigned a time ticket and the time the job starts effectively and for your own purposes."

The record indicates the class members are informed they will only be compensated for time spent working at the job site. A copy of

defendant's employment contract with plaintiff's signature is included in the record on appeal. Plaintiff also testified defendant never told him "hours worked" included wait time or travel time to and from the job site.

The employment contract does not provide for the compensation the class members seek. Plaintiff admitted that he agreed to and understood this policy. This agreement bears his signature. We find no violation of N.C. Gen. Stat. § 95-25.6. We now consider whether federal law requires defendant to compensate the class members for time spent waiting for and traveling to work.

B. The Portal to Portal Act

The Portal to Portal Act, 29 U.S.C. § 254, does not require employers to pay employees for the following activities:

> (1) walking, riding, or traveling to and from the actual place of performance of the *principal activity* or activities which such employee is employed to perform, and
>
> (2) activities which are *preliminary* to or *postliminary* to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a) (2003) (emphasis supplied). The issue before us is whether the class members' wait or travel time is a "principal activity" and compensable. We hold that it is not.

Employers must compensate employees for time spent waiting and traveling when "it is part of a principal activity of the employee, but not if it is a preliminary or postliminary activity." *Vega v. Gasper*, 36 F.3d 417, 425 (5th Cir. 1994) (citing The Portal to Portal Act, 29 U.S.C. § 254). "Principal activity" is integral and indispensable to the employer's business. *Karr v. City of Beaumont, Tex.*, 950 F. Supp. 1317, 1322 (E.D.Tex. 1997) (citing *Truslow v. Spotsylvania County Sheriff*, 783 F. Supp. 274, 277 (E.D. Va. 1992) (citing 29 U.S.C. § 254(a)(2), (b)), *aff'd per curiam*, 993 F.2d 1539 (4th Cir. 1993). They include duties " 'performed as part of the regular work of the employees in the ordinary course of business[,] work [that] is necessary to the business . . . . [and also] primarily for the benefit of the employer.' " *Vega*, 36 F.3d at 424 (quoting *Dunlop v. City Electric, Inc.*, 527 F.2d 394, 401 (5th Cir. 1976)).

Preliminary activities are those "engaged in by an employee before the commencement of his 'principal' activity or activities . . . ." 29 C.F.R. § 790.7(b) (2004). " '[P]ostliminary activity' means an activity engaged in by an employee after the completion of his 'principal' activity or activities . . . ." *Id.* Preliminary and postliminary activities are spent primarily for the employees' own interests, completed at the employees' convenience, and not necessary to the employer's business. *Jerzak v. City of South Bend*, 996 F. Supp. 840, 848 (N.D.Ind. 1998).

1. Waiting Time

Plaintiff asserts that he and the class members should be compensated for waiting time after receiving job assignments and physically commencing work at the job sites and after stopping work and returning to defendant's office. We consider two factors in determining whether plaintiff's waiting time is a "principal activity," compensable under The Portal to Portal Act. The first issue is whether the time spent is predominantly to benefit the employer and integral to the job. *Preston v. Settle Down Enterprises, Inc.*, 90 F. Supp. 2d 1267, 1278-79 (N.D.Ga. 2000) (citations omitted); *Vega*, 36 F.3d at 425 (citing *Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1411 (5th Cir. 1990)). The second issue is whether the employee is able to use the time for their own personal activities. *Vega*, 36 F.3d at 426 (citing *Mireles*, 899 F.2d at 1413.)

Defendant provides temporary labor to its customers on an as-needed basis. Customers request defendant's services when extra help is needed on any variety of construction projects. Defendant hires enough workers on a daily basis to satisfy customers' demands. Workers receive assignments only if work is available on that particular day, on a first come first serve basis. Defendant does not require individuals to wait for customers to request labor services.

After receiving a work assignment, the class members elect how to travel from defendant's office to the job site. They can use their own vehicle, ride public transportation, walk, car pool with another driver, or sign up for defendant's optional transportation service. Defendant neither restricts the class members' activities while they wait for the ride nor while in transit. They are free to do as they please. At the end of the work day, the class members have the option of either returning to the office to get their paycheck that night or at a later date.

Based on this evidence, we hold the class members' time spent waiting is preliminary and postliminary activity and noncompensable. The class members' principal activity, that which defendant hired them for, was to perform work at customers' job sites on a daily basis. Temporary labor is the entire scope of defendant's business. Customers pay for that service, which begins upon arrival at the job site and stops at the end of the work day. The class members' idle time either before or after the workday is personal. Many spend waiting time reading the newspaper, sleeping, drinking coffee, eating meals, watching television, or socializing with other waiting workers.

The amount of time the class members spend waiting directly correlates to their choice of transportation. They are free to spend that time as they wish. It is neither beneficial nor indispensable to defendant's business. We decline to extend "hours worked" to include the class members' waiting time prior to arrival at or after leaving the job site at the end of the day.

2. Travel Time

Travel time is only compensable under The Portal to Portal Act if it is a principal activity of the employee. 29 U.S.C. § 254. Normal commuting from home to work and back is considered ordinary travel and not a "principal activity" absent a contract stating otherwise. 29 U.S.C. § 254; 29 C.F.R. §§ 785.34, 785.35 (2004). Travel from an employer's campus to the "actual place of performance" is noncompensable. 29 C.F.R. § 790.7(e) (2004). However, travel between job sites *after* work has begun for the day is compensable. *Wirtz v. Sherman Enterprises, Inc.*, 229 F. Supp. 746, 753 (1964) (emphasis supplied); 29 C.F.R. § 785.38 (2004).

Plaintiff relies heavily on *Preston*, 90 F. Supp. 2d 1267, to support its argument that travel time to and from the job sites is compensable as a principal activity. In *Preston*, the defendant provided temporary labor to customers on a daily basis. 90 F. Supp. 2d at 1272. Laborers hired were furnished transportation from the defendant's office to the job sites. *Id.* at 1273. The court analyzed the issue by reviewing 29 C.F.R. § 785.38, which states in part:

> Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform

other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice.

Based on this regulation, the court considered three important factors: (1) whether workers were required to meet at the defendant's office before going to the job site; (2) whether workers performed labor before going to the job site; and (3) whether workers picked up and carried tools to the job site. *Preston*, 90 F. Supp. 2d at 1280-81. Factors two and three did not apply in *Preston*. *Id.* at 1280. However, the court ruled on factor one that "arriving at a business on one's own initiative seeking employment" is not the same as an employer requiring an employee to report at a meeting place. *Id.* at 1280-81. Thus, "hours worked" did not begin accruing until after arrival at the job site.

Applying the same analysis here, we find identical answers to factors one and two. First, defendant does not require employees to report at its office at a certain time. Rather, it established the policy for laborers to follow if they are interested in seeking employment from defendant on a daily basis. Second, the class members do not perform any work either at defendant's office, or while in transit to the job sites. Third, unlike *Preston*, the record indicates that the class members are provided personal protective equipment after receiving an assignment and before reporting to the job site. We address factor three, the picking up and carrying of tools to the job site.

In *Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345 (10th Cir. 1986) and *D A & S Oil Well Servicing, Inc. v. Mitchell*, 262 F.2d 552 (10th Cir. 1958), the courts found travel time compensable as an indispensable part of the employees' jobs. Employer-defendants in both cases required their employees to transport specialized equipment necessary to service oil wells. *Crenshaw*, 798 F.2d at 1346; *D A & S Oil Well Servicing, Inc.*, 262 F.2d at 553-54. In an unpublished opinion, the District Court for the Eastern District of Kentucky held that in situations where employees are transporting specialized equipment to the job site, "it can be concluded that the transportation of specialized equipment, provided by the employer, is work in and of itself." *Spencer v. Auditor of Public Accounts*, No. 88-54, 1990 U.S. Dist. Lexis 1076 (E.D.Ky. Jan. 30, 1990).

The USDOL addressed this issue in 29 C.F.R. § 790.7, its own expansive interpretation of "preliminary" and "postliminary" activi-

ties. The regulation distinguished between an employee transporting heavy equipment and ordinary hand tools. 29 C.F.R. § 790.7(d) (2004). In considering heavy equipment, the regulation states the employee's travel "is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) . . . ." and does not fall under the noncompensable travel outlined by The Portal to Portal Act. *Id.*

We agree with this distinction between the transportation of specialized and heavy equipment and the non-unique protective equipment issued to the class members by defendant. The record indicates the class members receive hard hats, boots, and gloves. These implements are not "specialized" and are used in a wide variety of manual labor jobs. It is a different situation from an employee transporting specialized vehicles, tools, or heavy equipment necessary to perform specialized work. The receipt of general protective equipment does not make travel time compensable under 29 C.F.R. § 785.38. If its issuance constituted the beginning of "hours worked," employers would wait until employees arrived at the job site before distributing the protective gear.

The Fifth Circuit encountered the issue of compensable travel time in *Vega*, 36 F.3d 417. The defendant, a farm laborer contractor, provided its employee-laborers transportation, for a fee, to and from the farm sites. *Id.* at 423. The court held the traveling time was preliminary and postliminary activity and not compensable. *Id.* at 425. It based its decision on factors present in the case at bar. First, the laborers performed no work prior to getting on the bus in the morning. *Id.* Second, the defendant offered the transportation as an option to the workers and did not require its usage. *Id.* Third, not all of the laborers elected to use the transportation. *Id.* The court concluded the travel from the defendant's office to the farm sites was an "an extended home-to-work-and-back commute." *Id.*

These factors, together with our analysis of *Preston*, compels us to hold that the class members' travel time is a preliminary and postliminary activity and is noncompensable. This assignment of error is overruled.

VII. Conclusion

Defendant complies with N.C. Gen. Stat. § 95-25.8 and N.C. Admin. Code tit. 13, r. 12.0305 in withholding the class members' wages to pay for an optional transportation service to and from job

sites. The class members are not due compensation for time spent waiting for and traveling on defendant's optional transportation service under N.C. Gen. Stat. § 95-25.6. The trial court's grant of summary judgment for defendant is affirmed.

Affirmed.

Judges BRYANT and LEVINSON concur.

A&F TRADEMARK, INC.; CACIQUECO, INC.; EXPRESSCO, INC.; LANCO, INC.; LERNCO, INC.; LIMCO INVESTMENTS, INC.; LIMTOO, INC.; STRUCTURECO, INC.; AND V. SECRET STORES, INC., PETITIONERS v. E. NORRIS TOLSON, SECRETARY OF REVENUE, STATE OF NORTH CAROLINA, AND HIS SUCCESSORS, RESPONDENTS

No. COA03-1203

(Filed 7 December 2004)

1. **Taxation— Delaware trademark holding company—income taxes**

The Court of Appeals rejected the argument that an administrative rule exceeded statutory provisions in the imposition of income tax liability on Delaware trademark holding companies whose related retail companies did business in North Carolina. The Legislature endorsed the Secretary of Revenue's interpretation of the statute (in the administrative rules) by not amending the statute.

2. **Taxation— Delaware trademark holding company—franchise taxes**

The Department of Revenue did not exceed its authority by imposing franchise taxes on Delaware trademark holding companies whose related retail companies did business in North Carolina. If, as the taxpayers contend, the heart of the franchise tax statute is the State's expectation of a return for what has been provided, the quid pro quo for which the State can expect a return is the provision of privileges and benefits that fostered and promoted the related retail companies, including an orderly society in which to do business.

3. Constitutional Law— Commerce Clause—trademark licensing—physical presence in NC

There is a substantial nexus sufficient to satisfy the Commerce Clause in a taxation case where a wholly-owned subsidiary licenses trademarks to a related retail company operating stores in North Carolina. The contention that physical presence is the sine quo non under the Commerce Clause for income and franchise taxes is rejected.

4. Taxation— trademark holding company—excluded corporations

Trademark holding companies were correctly classified as excluded corporations (companies which receive more than half their income from dealing in intangible property) and the appropriate tax apportionment formula was used. It does no violence to the plain meaning of "deal in" to hold that it encompasses these activities.

Appeal by petitioners from order entered 22 May 2003 by Judge A. Leon Stanback in Wake County Superior Court. Heard in the Court of Appeals 8 June 2004.

Womble, Carlyle, Sandridge & Rice, by Burley B. Mitchell, Jr. and Sean E. Andrussier; Morrison & Foerster, L.L.P., by Paul H. Frankel and Hollis L. Hyans; and Alston & Bird, L.L.P., by Jasper L. Cummings, Jr., for petitioners-appellants.

Attorney General Roy Cooper, by Assistant Attorney General Kay Linn Miller Hobart, for respondent-appellee.

Nelson, Mullins, Riley & Scarborough, L.L.P., by George M. Teague, on behalf of North Carolina Manufacturers Association, North Carolina Citizens for Business and Industry, North Carolina Biosciences Organization, and North Carolina Electronics and Information Technologies Association, amici curiae.

CALABRIA, Judge.

This appeal involves the assessment of corporate franchise and income taxes against A&F Trademark, Inc., Caciqueco, Inc., Expressco, Inc., Lanco, Inc., Lernco, Inc., Limco Investments, Inc., Limtoo, Inc., Structureco, Inc., and V. Secret Stores, Inc. (collectively, the "taxpayers"). Each of the taxpayers is a wholly-owned, nondomiciliary subsidiary corporation of the Limited, Inc. (the

"Limited"), an Ohio corporation. Since 1963, the Limited has been engaged in retail sales and is currently engaged in the nationwide retail sale of men's, women's, and children's clothing and accessories via separate retail operating subsidiaries (the "related retail companies"), nine of which operate in North Carolina.[1] These related retail companies have over 130 locations in North Carolina.

Since the beginning of operations, the Limited developed and cultivated intangible intellectual property including trademarks, trade names, service marks, and associated goodwill. In so doing, the Limited incurred substantial expenses, which were deducted from gross income and reduced federal and North Carolina income taxes. In addition, all of the Limited's intellectual property was registered, monitored, policed, and defended against infringement by the Limited's own in-house legal counsel. During the 1980's and early 1990's, however, the Limited properly incorporated the taxpayers in Delaware as trademark holding companies and properly assigned to each of the taxpayers certain trademarks in separate I.R.C. § 351 tax-free exchanges. Each related retail company that assigned its trademark and associated goodwill to the related trademark holding company received little or no consideration for the transfer and did not have the trademark valued by a third party for a determination of its actual worth. The record on appeal indicates the trademarks at issue in this case had a value of approximately $1.2 billion dollars.

After the trademarks were assigned to the taxpayers, the related retail companies and the taxpayers entered into licensing agreements whereby the related retail companies licensed the marks back from the taxpayers.[2] The net result of the assignment and licensing back was that there was no change in the day-to-day operations of the related retail companies. However, each licensing agreement required the related retail company to pay to the proper taxpayer, as licensor, a royalty payment for the use of the trademark in the amount of five to six percent of its retail operating gross sales. These payments were made by an accounting journal entry. No checks were written and no physical transfer of funds occurred. Subsequently, the

1. The nine retail companies are The Limited Stores, Inc., Cacique, Inc., Express, Inc., Lane Bryant, Inc., Lerner, Inc., Limited Too, Inc., Structure, Inc., Victoria's Secret, Inc., and Abercrombie & Fitch.

2. Limco Investments, Inc. ("Limco") licensed trademark rights to The Limited, Inc.; Caciqueco, Inc. to Cacique, Inc.; Expressco, Inc. to Express, Inc.; Lanco., Inc. to Lane Bryant, Inc.; Lernco, Inc. to Lerner, Inc.; Limtoo, Inc. to Limited Too, Inc.; Structureco, Inc. to Structure, Inc.; V. Secret Stores, Inc. to Victoria's Secret, Inc.; and A&F Trademark, Inc. to Abercrombie and Fitch, Inc.

taxpayers entered into agreements loaning any excess operating funds back to the related retail companies in the form of notes receivable bearing a market rate of interest.[3] No attempts were made to collect any outstanding notes, and they were marked "Do Not Collect." Under the licensing and loan agreements, the related retail companies collectively paid to the taxpayers $301,067,619 in royalties and $122,031,344 in interest in 1994, accounting for 100% of the taxpayers' income for that year. The related retail companies deducted these royalty and interest expenses for tax purposes. The taxpayers have no employees and share office space, equipment, and supplies; their listed primary office address is also the primary office address of approximately 670 other companies unrelated to the Limited or its wholly-owned subsidiaries.

The taxpayers did not file corporate franchise and income tax returns in North Carolina for their fiscal years ending 31 January 1994. North Carolina's Secretary of Revenue (the "Secretary" or "respondent") gave notice of proposed assessments of corporate franchise and income tax. The taxpayers protested and, after an administrative hearing, the Secretary issued a final decision on 19 September 2000 sustaining the proposed assessments against the taxpayers without penalties. The taxpayers appealed to the Tax Review Board, which affirmed the final decision. The taxpayers filed a petition in Wake County Superior Court, requesting that the decision be reversed or, in the alternative, modified. By order filed 22 May 2003, the trial court summarily determined that the "Administrative Decision of the Tax Review Board should be affirmed in its entirety." From that order, the taxpayers appeal to this Court.

On appeal, two primary issues are presented. First, we must determine whether the taxpayers were "doing business" in North Carolina under the relevant statutory provisions, and second, we must determine whether respondent's attempt to assess the taxes in the instant case offends the Commerce Clause of the United States Constitution. If we conclude the taxpayers were doing business and the tax imposed was constitutionally sound, we must further determine whether the taxpayers are "excluded corporations" under N.C. Gen. Stat. § 105-130.4(a)(4) (2003). Each issue involves either a question of statutory construction or the taxpayers' constitutional rights. Accordingly, our standard of review is *de novo*. *Piedmont Triad*

3. By way of example, the Tax Review Board found that, for the tax years 1992 through 1994, "Limco's total expenses . . . were $729,175, [or] 0.2% of its total accrued income of $311,952,574 during the same period."

Airport Auth. v. Urbine, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001); *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003).

I. Doing Business

The taxpayers first assert the Department of Revenue ("DOR") lacked statutory authority to tax them because they were not "doing business" in North Carolina. Specifically, the taxpayers assert "they did not transact business in this State and [neither sought nor] were required to seek . . . authorization to conduct business in this State." In addition, the taxpayers point out they had no offices, employees, tangible property, transactions with residents, or customer service in North Carolina.

A. Income Tax

[1] Under N.C. Gen. Stat. § 105-130.3 (2003), "[a] tax is imposed on the State net income of every C Corporation doing business in this State." In administering the duties under N.C. Gen. Stat. § 105-130.3, the Secretary adopted N.C. Admin. Code tit. 17, r. 5C.0102(a) (2004), defining "doing business in this State" as that phrase was used in the statute for income tax purposes. N.C. Admin. Code tit. 17, r. 5C.0102(a) provides, in pertinent part, as follows:

> For income tax purposes, the term "doing business" means the operation of any business enterprise or activity in North Carolina for economic gain, including . . . the owning, renting, or operating of business or income-producing property in North Carolina including . . . [t]rademarks [and] tradenames . . . .

According to our Supreme Court, " '[t]he construction adopted by the administrators who execute and administer a law in question is one consideration where an issue of statutory construction arises.' " *Polaroid Corp. v. Offerman*, 349 N.C. 290, 301, 507 S.E.2d 284, 293 (1998) (quoting *John R. Sexton & Co. v. Justus*, 342 N.C. 374, 380, 464 S.E.2d 268, 271 (1995)). "[S]uch construction is 'strongly persuasive' and . . . entitled to 'due consideration.' " *See id.*, 349 N.C. at 302, 507 S.E.2d at 293 (quoting *Shealy v. Associated Transp., Inc.*, 252 N.C. 738, 742, 114 S.E.2d 702, 705 (1960)). Indeed, under operation of N.C. Gen. Stat. § 105-264 (2003), the Secretary's interpretation of a statute he administers is "prima facie correct."

The taxpayers assert N.C. Admin. Code tit. 17, r. 5C.0102(a) "is of no consequence" because amendments to the income tax statute

occurring in 2001 (the "2001 amendments") indicates "that the agency's rule [improperly] expanded the income tax statute" instead of interpreting it. *See Duke Power Co. v. Clayton, Comr. of Revenue*, 274 N.C. 505, 511, 164 S.E.2d 289, 294 (1968) (holding an administrative interpretation "cannot change the meaning of a statute or control the Court's interpretation of it"). The taxpayers argue the only possible purpose for the 2001 amendments was to "cover the receipt of royalty income from the in-state use of licensed trademarks[;]" therefore, the administrative rule must be deemed an improper expansion of the statute prior to 2001.

During the 2001 session, the General Assembly amended "Part 1 of Article 4 of Chapter 105 of the General Statutes . . . by adding a new section." 2001 N.C. Sess. Laws 327, s. 1.(b). The bill amending the statute was entitled "An Act to Combat Tax Fraud, Enhance Corporate Compliance with Taxes on Trademark Income, [and] Assure that Franchise Tax Applies Equally to Corporate Assets[.]" 2001 N.C. Sess. Laws 327. The 2001 amendments added a royalty income reporting option with the stated purpose of "provid[ing] taxpayers with an option concerning the method by which . . . royalties [received for the use of trademarks in North Carolina as income derived from doing business in this State] can be reported for taxation when the recipient and the payer are related members."[4] *Id.*, s. 1.(a). The General Assembly expressed its intent in enacting the royalty reporting option as follows: "It is the intent of this section [N.C. Gen. Stat. § 105-130.7A] to reward taxpayers who comply [with the State tax on income generated from using trademarks in manufacturing and retailing activities]." 2001 N.C. Sess. Laws 327, s. 1.(a). Examining the title, purpose, and intent of the 2001 amendments, it is clear that the taxpayers' contention cannot be sustained.

First, the title of the bill clearly denotes that its function was to enhance compliance "with the State tax on income generated from using trademarks in [manufacturing and retailing] activities." *Id.* Though elementary in nature, we note such a function necessarily contemplates not only that current corporate practices were insufficiently compliant but also that there existed such enacted taxes on trademark income with which corporations were actually required to comply. Second, in a related manner, the title of the amendment des-

4. Royalty is defined as "[a]n amount charged that is for, related to, or in connection with the use in this State of a trademark. The term includes royalty and technical fees, licensing fees, and other similar charges." 2001 N.C. Sess. Laws 327, s. 1.(b). Our use of the term royalty or royalty income will apply to both the taxpayers' royalty and interest income.

ignates that its function, in part, was to combat tax fraud. It is difficult to determine how tax fraud could occur in the absence of laws or regulations requiring the payment of taxes. *See Black's Law Dictionary* 1474 (7th ed. 1999) (defining tax fraud and tax evasion as "[t]he willful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability"). Third, the stated purpose was merely to add a reporting option to the income tax statute, not to modify or change what constituted taxable income.[5] Fourth, the intent of the legislature is made clear on the face of the session law: to reward corporations complying with state income tax provisions imposing taxes on the use of trademarks in certain activities, including retailing. In summary, the language contained in the 2001 amendments supports the premise that N.C. Admin. Code tit. 17, r. 5C.0102(a) was consistent with N.C. Gen. Stat. § 105-130.3 rather than an expansion of it.

Our determination that the 2001 amendments endorsed rather than changed the scope of the income tax statute has fatal effects on the remaining arguments asserted by the taxpayers. The taxpayers' remaining arguments depend on the premise that the phrase "doing business in this State" in N.C. Gen. Stat. § 105-130.3 does not encompass their activities in North Carolina; therefore, DOR exceeded its statutory authority in imposing the income taxes at issue in the instant case. However, the taxpayers have proffered no other argument against the Secretary's interpretation and have thus failed to rebut the presumption that it is *prima facie* correct. This is especially true in light of our discussion concerning the 2001 amendments, which indicates that the administrative rule, at all times, has properly reflected the policy of the General Assembly for income taxation of trademark royalty payments.

"[T]he legislature is always presumed to act with full knowledge of prior and existing law . . . ." *Polaroid Corp.*, 349 N.C. at 303, 507 S.E.2d at 294. Thus, when a statute is interpreted, and the legislature acquiesces in that interpretation by failing to amend the statutory provision, our courts assume the legislature "is satisfied with that interpretation" and accord it " 'great weight in arriving at [the statute's] meaning.' " *Id.* (quoting *State v. Emery*, 224 N.C. 581, 587, 31 S.E.2d 858, 862 (1944)). The administrative rule as modified in 1992 is directly applicable for income tax purposes to the taxpayers' activ-

5. That the amendment was designed to permit corporations to change the method of reporting fully explains why it is to be applied prospectively. *See* 2001 N.C. Sess. Laws 327, s. 1.(f).

ities in North Carolina. In the following two years, the General Assembly did nothing to indicate its dissatisfaction with N.C. Admin. Code tit. 17, r. 5C.0102(a), and nine years later, it amended Article 4 of Chapter 105 of the General Statutes to add a royalty income reporting option *to reward and enhance compliance* with N.C. Admin. Code tit. 17, r. 5C.0102(a), the administrative rule the taxpayers assert is of "no consequence." Far from passively acquiescing in the Secretary's interpretation, the General Assembly endorsed it. Accordingly, we find unpersuasive any argument that the administrative rule exceeded the reach of the statutory income tax provisions as contemplated by the General Assembly.

B. Franchise Tax

[2] The taxpayers also assert the imposition of franchise taxes by DOR exceeded its statutory authority. North Carolina General Statutes § 105-122 (2003) imposes a franchise tax on "[e]very corporation . . . doing business in" North Carolina. For franchise tax purposes, "doing business" is defined as "[e]ach and every act, power, or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges granted by the laws of this State." N.C. Gen. Stat. § 105-114(b)(3) (2003).[6] Our Supreme Court has characterized this tax as one "imposed upon corporations for the opportunity and privilege of transacting business in this State. It is an annual tax which varies with the nature, extent and magnitude of the business conducted by the corporation in this State." *Realty Corp. v. Coble, Sec. of Revenue*, 291 N.C. 608, 611, 231 S.E.2d 656, 658 (1977). The taxpayers assert the franchise tax is a *quid pro quo* where the business compensates the State for the burden of protecting and fostering the endeavor, and such a *quid pro quo* is "utterly lacking here." We disagree.

It is beyond dispute that North Carolina has provided privileges and benefits that fostered and promoted the related retail companies. By affording these benefits to the related retail companies, additional benefits have inured to the taxpayers. If, as the taxpayers assert, the heart of the franchise tax statute is the legitimate expectation of the State to ask for something in return for that which it has provided, we fail to see how North Carolina has not promoted or fostered the taxpayers' endeavors. In addition, we agree with the broad rationale

6. We agree with the taxpayers that N.C. Admin. Code tit. 17, r. 5C.0102(a), which by its own terms is "[f]or income tax purposes," has no application to DOR's authority to impose a franchise tax in this case.

accepted by the Supreme Court of South Carolina that by providing an orderly society in which the related retail companies conduct business, North Carolina has made it possible for the taxpayers to earn income pursuant to the licensing agreements. *See Geoffrey, Inc. v. South Carolina Tax Commission*, 437 S.E.2d 13, 18 (S.C. 1993) (upholding a tax imposed on that portion of a non-domiciliary trademark holding company's income derived from the use of its trademarks and trade names within South Carolina by a related retail company). The protection of North Carolina's marketplace by the State provides the *quid pro quo* for which the State can expect a return. We hold the taxpayers were "doing business in this State;" therefore, the State did not exceed its authority by imposing franchise taxes.

II. Commerce Clause

[3] The taxpayers alternatively assert that, even if they were doing business within the contemplation of the applicable statutory provisions, the Commerce Clause of the United States Constitution forbids North Carolina from imposing the taxes at issue in this case. The taxpayers contend they have no "substantial nexus" with North Carolina on the grounds that they have no physical presence within the State.

The United States Constitution vests the United States Congress with the power "[t]o regulate commerce with foreign nations, and among the several states[.]" U.S. Const. art I, § 8, cl.3. "[T]he Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well. . . . '[B]y its own force' [it] prohibits certain state actions that interfere with interstate commerce." *Quill Corp. v. North Dakota*, 504 U.S. 298, 309, 119 L. Ed. 2d 91, 104 (1992) (quoting *South Carolina State Highway Dept. v. Barnwell Brothers, Inc.*, 303 U.S. 177, 185, 82 L. Ed. 734, 739 (1938)). This "negative sweep" is commonly referred to as the dormant Commerce Clause, which has been interpreted to limit a state's power to tax. *Id.*

Under current United State Supreme Court jurisprudence, a tax challenged on Commerce Clause grounds will be upheld where it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 51 L. Ed. 2d 326, 331 (1977). "The second and third parts of [the *Complete Auto*] analysis . . . prohibit taxes that pass an unfair share of the tax burden onto interstate commerce. The first and fourth

prongs . . . limit the reach of the state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." *Quill*, 504 U.S. at 313, 119 L. Ed. 2d at 107. Nonetheless, the Supreme Court has repeatedly reiterated that "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of [the] state tax burden even though it increases the cost of doing the business." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254, 82 L. Ed. 823, 827 (1938).

The taxpayers' assertion on appeal, that they did not have a substantial nexus with North Carolina because they have no physical presence in this State, is premised upon the first prong of the *Complete Auto* test. The taxpayers contend that the presence of their intangible property in North Carolina is irrelevant in light of the lack of physical presence of offices, facilities, employees, and real or tangible property, and that the Supreme Court's rulings in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 18 L. Ed. 2d 505 (1967) and *Quill* mandate that this Court find the tax sought to be imposed by the State violates the Commerce Clause. We disagree.

Both *Bellas Hess* and *Quill* involved attempts by a state to require out-of-state mail-order vendors to collect and pay use taxes on goods purchased within the state despite the fact that the vendors had no outlets or sales representatives in the state. The Supreme Court's decision in *Bellas Hess* "stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." *Quill*, 504 U.S. at 311, 119 L. Ed. 2d at 106. In 1992, *Quill* reaffirmed and clarified the holding in *Bellas Hess* and unequivocally divorced the respective nexus requirements of the Due Process Clause and the Commerce Clause. *Id.*, 504 U.S. at 312, 119 L. Ed. 2d at 106. In doing so, the Supreme Court cited the divergent aims of the two clauses: due process "centrally concerns the fundamental fairness of government activity" as against an "individual defendant" as opposed to the Commerce Clause's focus on the "structural concerns about the effects of state regulation on the national economy." *Id.* Crucial to the taxpayers' argument on appeal, the Supreme Court in *Quill* ultimately concluded that, for purposes of sales and use taxes assessed against vendors whose only contact with a state is by mail or common carrier, the substantial nexus prong of *Complete Auto* could appropriately be determined by application of a "bright-line, physical-presence requirement." *Id.*, 504 U.S. at 317, 119 L. Ed. 2d at 110. The taxpayers suggest this requirement applies to *all taxes*

employed by the states for Commerce Clause nexus analyses and, specifically, must be used in determining whether the taxes in the present case are constitutionally infirm. We decline to adopt the broad reading of *Quill* suggested by the taxpayers for numerous reasons.

First, the tone in the *Quill* opinion hardly indicates a sweeping endorsement of the bright-line test it preserved, and the Supreme Court's hesitancy to embrace the test certainly counsels against expansion of it. In its discussion of the Commerce Clause, the Supreme Court briefly summarized the numerous and shifting analyses endorsed since recognition of the dormant Commerce Clause. The Court went on to note that, while *Bellas Hess* did not conflict with recent Commerce Clause cases, "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today." *Quill*, 504 U.S. at 311, 119 L. Ed. 2d at 105. The Court stated that the evolution of its "recent Commerce Clause decisions . . . signaled a 'retreat from the formalistic constrictions of a stringent physical presence test in favor of a more flexible substantive approach[.]' " *Quill*, 504 U.S. at 314, 119 L. Ed. 2d at 107. The Court further observed the physical-presence test, though offset by the clarity of the rule, was "artificial at its edges." *Quill*, 504 U.S. at 315, 119 L. Ed. 2d at 108. In addition, the Court twice noted that in other types of taxes, it had never articulated the same physical-presence requirement adopted in *Bellas Hess*, *see Quill*, 504 U.S. at 314 and 317, 119 L. Ed. 2d at 108 and 110, but cautioned that the failure to expand the *Bellas Hess* rule established for sales and use taxes to other types of taxes did not imply that the *Bellas Hess* rule as applied to sales and use taxes was vestigial or disapproved. *Id.* Nonetheless, the Court's choice to abstain from rejecting the *Bellas Hess* rule for sales and use taxes fails to argue persuasively that the rule should, for lack of rejection, be augmented to cover other types of tax. While the Supreme Court may ultimately choose to expand the scope of the physical-presence test reaffirmed in *Quill* beyond sales and use taxes, its equivocal reaffirmation of that test does not readily make that choice self-evident.

Second, retention of the *Bellas Hess* test was grounded, in no small part, on the principle of *stare decisis* and the "substantial reliance" on the physical-presence test, which had "become part of the basic framework of a sizable industry." *Quill*, 504 U.S. at 317, 119 L. Ed. 2d at 110. Neither consideration advocates for the position adopted by the taxpayers in the present case. We need look no further

than the language in *Quill* to summarily dispense with the possibility that *stare decisis* plays an analogous role in the instant case: the Supreme Court, as noted before, twice expressed that the bright-line, physical-presence requirement of *Bellas Hess* had not been adopted in other forms of taxation. Moreover, since the physical-presence requirement has never been established by judicial precedent for other forms of taxation and since this form of tax reduction in the instant case is relatively new, we dismiss the possibility that analogous substantial reliance, as contemplated in *Quill*, exists in this case.

Third, there are important distinctions between sales and use taxes and income and franchise taxes "that makes the physical presence test of the vendor use tax collection cases inappropriate as a nexus test[.]" Jerome R. Hellerstein, Geoffrey *and the Physical Presence Nexus Requirement of* Quill, 8 State Tax Notes 671, 676 (1995). "[T]he use tax collection cases were based on the vendor's activities in the state, whereas" the income and franchise taxes in the instant case are based solely on "the use of [the taxpayer's] property in th[is] state by the licensee[s]" and not on any activity by the taxpayers in this State. *Id.* The "Supreme Court has made it clear that the presence of the recipient of income from intangible property in a state is not essential to the state's income tax on income of a nonresident." *Id.* (citing *International Harvester Co. v. Wisconsin Dept. of Taxation*, 322 U.S. 435, 441-42, 88 L. Ed. 1373, 1380 (1944) for the proposition that states are entitled to tax a non-resident's income to the extent it is "fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers").[7] Since the tax at issue in this case is not based on the taxpayers' activity in North Carolina, but rather on the taxpayers' receipt of income from the use of the taxpayers' property in this State by a commonly-owned third party, "it would [be] inappropriate and, indeed, anomalous . . . [to determine] nexus by [the taxpayers'] activities or [their] physical presence" in North Carolina. *Id.* Moreover, "[u]nlike an income tax, a sales and use tax can make the taxpayer an agent of the state, obligated to collect the tax from the consumer at the point of sale and then

7. Opponents of *Geoffrey's* rationale vigorously resist the use of *International Harvester* on the grounds that it concerned a Due Process challenge. We acknowledge the validity of the point; however, the central holding of *International Harvester* has been overwhelmingly endorsed: a State in which a corporation conducts business and earns income may impose a tax on that portion earned therein.

pay it over to the taxing entity." *Kmart Properties, Inc. v. Taxation and Revenue Dep't. of New Mexico*, No. 21,140, at 13 (N.M. Ct. App. Nov. 27, 2001) ("*Kmart*").[8] "[A] state income tax is usually paid only once a year, to one taxing jurisdiction and at one rate, [but] a sales and use tax can be due periodically to more than one taxing jurisdiction within a state and at varying rates." *Id.*, at 13.

Given these reasons, we reject the contention that physical presence is the *sine qua non* of a state's jurisdiction to tax under the Commerce Clause for purposes of income and franchise taxes. Rather, we hold that under facts such as these where a wholly-owned subsidiary licenses trademarks to a related retail company operating stores located within North Carolina, there exists a substantial nexus with the State sufficient to satisfy the Commerce Clause. *Accord Geoffrey*, 437 S.E.2d at 18 (holding that "by licensing intangibles [to Toys 'R Us, an affiliated operating store,] for use in [South Carolina] and deriving income from their use [t]here, Geoffrey ha[d] a 'substantial nexus' with South Carolina"); *Kmart*, at 15 (holding that "the use of KPI's [the wholly-owned trademark holding company licensor] marks within New Mexico's economic market, for the purpose of generating substantial income for KPI, establishe[d] a sufficient nexus between that income and the legitimate interests of the state and justifie[d] the imposition of a state income tax").

We are also cognizant of the holding of the New Jersey Tax Court in a case involving one of the taxpayers before this Court on the same issue. *Lanco, Inc. v. Dir., Div. of Tax'n.*, 21 N.J. Tax 200 (2003). In that case, the New Jersey Tax Court concluded "that the physical presence of the taxpayer or its employee(s), agent(s), or tangible property in a jurisdiction has been and remains a necessary element for a finding of substantial nexus under the Commerce Clause of the United States Constitution." *Id.*, 21 N.J. Tax at 214. We respectfully disagree. Summarizing the salient portions of that opinion, the New Jersey Tax Court (1) found it "illogical" to have a physical presence as a constitutional necessity for sales and use taxes but not for income tax, (2) opined physical presence, as a prerequisite to state taxation of income, was "fully consistent with and strongly suggested by the Commerce Clause cases decided before *Quill*" because the circumstances of those cases involved taxpayers who were physically

8. *Kmart* was an unpublished opinion. Accordingly, while citation is disfavored and it has no binding precedential authority, we nonetheless consider and find persuasive those portions of the opinion reproduced herein. References to *Kmart* will provide page numbers as appearing on the copy of the opinion filed with the Clerk of the New Mexico Court of Appeals.

present in the state attempting to impose the tax, and (3) stated "other state court cases decided since *Quill* do not follow the *Geoffrey* rule." *Id.*, 21 N.J. Tax at 208-09.[9]

Regarding the first reason given by the New Jersey Tax Court, the *Quill* opinion itself twice notes the singularity of its adoption and reaffirmation of the physical-presence test for Commerce Clause nexus in the arena of sales and use taxes. Moreover, as illustrated by our analysis herein, we disagree with the New Jersey Tax Court that there do not exist certain distinctions between the tax at issue in *Quill* and those considered in the instant case that justify divergent treatment. Regarding the second reason, we do not accord the same import to pre-*Quill* cases in which it was far more likely that a taxpayer would be required to be physically present (in the traditional commercial sense) in a state in order to earn income there. Lastly, the third reason espoused by the New Jersey Tax Court rings hollow. For example, in discussing *General Motors Corp. v. City of Seattle*, 25 P.3d 1022 (Wn. App. 2001), *cert. den.*, 535 U.S. 1056, 152 L. Ed. 2d 825 (2002), the New Jersey Tax Court dismisses the Washington appellate court's express declaration that it "decline[d] to extend *Quill's* physical presence requirement" to a business and occupation tax on the basis that the taxpayers in that case had a physical presence in that jurisdiction. The corporation's physical presence can hardly serve to obscure the Washington Court's unequivocal choice to stand with *Geoffrey's* containment of the *Quill* physical-presence test. More importantly, any assertion that *Geoffrey* has not been, by and large, approved of in subsequent cases cannot be sustained. *See* J. Hellerstein & W. Hellerstein, State Taxation, Para. 6.11[3] at 6-16 (Warren, Gorham & Lamont, 3d ed. Cum. Supp. 2004) (comprehensively analyzing judicial and administrative post-*Geoffrey* developments and summarizing that, although mixed, "judicial and administrative reaction to the opinion across the country has generally supported [*Geoffrey's*] position that *Quill's* physical-presence test of Commerce Clause nexus does not extend to income taxes").

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9. The taxpayers also argue, as persuasive authority, the holding of the Court of Appeals of Tennessee in *J.C. Penney National Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999). We are not persuaded. While the reasoning of *J.C. Penney* appears, at first blush, to extend *Quill's* physical presence test to income taxes, the Tennessee Court expressly abstained from determining "whether 'physical presence' is required under the Commerce Clause[,]" *see id.*, 19 S.W.3d at 842, and a subsequent unpublished opinion from that same Court casts considerable doubt on whether it adopted "a bright-line test of requiring an out-of-state company to have a 'physical presence' in [Tennessee] in order to have a substantial nexus with it." *America Online, Inc. v. Johnson*, No. M2001-00927-COA-R3-CV, Tenn. Ct. App., July 30, 2002, at 2.

III. Apportionment

[4] In their last assignment of error, the taxpayers assert the decisions below improperly concluded they were excluded corporations and improperly applied an unfavorable apportionment formula. In 1994, an "excluded corporation" was statutorily defined, in part, as "a corporation which receives more than fifty percent (50%) of its ordinary gross income from investments in and/or dealing in intangible property." N.C. Gen. Stat. § 105-130.4 (Cum. Supp. 1994). The taxpayers assert they "do not fit within that definition because they were not deriving their income from 'investments and/or dealing in' trademarks." Rather, taxpayers contend they earned revenue by "licensing, owning, managing and protecting trademarks," which lies outside of the plain meaning of "deal in" as set forth in *Chrysler Fin. Co. v. Offerman*, 138 N.C. App. 268, 273, 531 S.E.2d 223, 226 (2000) (defining "deal in" as "to engage in buying and selling some commodity" pursuant to *New Webster's Dictionary and Thesaurus of the English Language* 247 (1992)). While the definition used in *Chrysler* certainly constitutes one facet of the plain meaning of "deal" or "deal in," the recognition of that facet of the term's plain meaning does not and cannot obviate other commonly accepted definitions that provide the plain meaning of the term as used in the statute. For example, "deal" is defined as "to do business" by *The American Heritage College Dictionary* 356 (3rd ed. 1997). We do no violence to the plain meaning of "deal in" by holding that it encompasses the taxpayers' activities with respect to the trademarks. This assignment of error is overruled.

We have carefully considered the taxpayers' remaining arguments and find them to be without merit.

Affirmed.

Judges WYNN and LEVINSON concur.

DAVID B. MILLER, PLAINTIFF v. BARBER-SCOTIA COLLEGE, DEFENDANT

No. COA03-292

(Filed 7 December 2004)

1. **Civil Rights— dismissed college professor—burden of proof not carried**

The trial court erred by not dismissing a claim for racial discrimination under 42 U.S.C. § 1981 by a college professor who was dismissed after a dispute with the administration over changing a grade. Plaintiff did not meet his burden of showing that defendant's stated reason for its action was a pretext.

2. **Civil Rights— dismissed college professor—punitive damages—aggravated conduct—evidence insufficient**

Assuming that the trial court properly denied defendant's motions to dismiss (which it did not) in a claim of racial discrimination by a dismissed college professor, the trial court erred by not granting defendant's motions for a directed verdict and a j.n.o.v. on punitive damages. The jury made no finding of aggravated conduct and plaintiff's testimony standing alone is not sufficient, as its probative value is slight and it did not address whether defendant knew that its purported actions were illegal.

Judge HUDSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered 20 March 2001 by Judge Donna H. Johnson in Cabarrus County District Court. Heard in the Court of Appeals 20 November 2003.

U. Wilfred Nwauwa for plaintiff-appellee.

Plummer, Belo & Russell, PA, by Vernon A. Russell, for defendant-appellant.

STEELMAN, Judge.

Defendant, Barber-Scotia College, appeals a trial court order denying its motions for directed verdict and judgment notwithstanding the verdict. For the reasons discussed herein, we vacate the judgment of the trial court and reach only defendant's first two assignments of error.

Plaintiff, David B. Miller, was a professor at defendant Barber-Scotia College, teaching sociology, criminal justice, and anthropology. In February 1997, plaintiff requested that defendant's registrar change a grade of Mr. Jones, a student, who had taken a course taught by plaintiff.

Once a final grade for a student has been submitted by a professor to defendant, it can only be changed in accordance with a specific policy adopted by defendant. This policy allows for a grade to be changed in only four situations: (1) an incorrectly computed grade; (2) an incorrect transcription of a grade; (3) an unintentional omission of some component of a student's work; and (4) a successful grade appeal. Any request for a grade change must be in writing and must state the reason for the grade change. The grade change form must be approved by the professor's division chairperson and then by the dean for academic affairs before it is forwarded to the registrar of the college.

Plaintiff initially submitted a grade change request for Mr. Jones which did not state a reason for the grade change. This request was rejected by Mr. James Ramsey, dean of academic affairs for defendant. Plaintiff submitted the grade change request for Mr. Jones a second time without stating a reason for the requested change. Again, Mr. Ramsey denied the request. Mr. Jones's grade change request was submitted a third time. A reason was stated on the third request but was not one of the four situations set forth in defendant's grade change policy. This last grade change request was approved by plaintiff's division chairperson and immediate supervisor, Dr. Babafemi Elufiede, but was again rejected by Mr. Ramsey. The record does not indicate whether Dr. Elufiede approved the first two grade change requests.

Following a meeting with plaintiff to discuss the rejected grade change requests for Mr. Jones, Mr. Ramsey sent a memo to defendant's president recommending that plaintiff be given a one year terminal contract based upon his disregard of college policies on changing grades. This memo was dated 22 April 1997.

On 23 April 1997 defendant tendered an employment contract to plaintiff for the next school year. The contract contained a provision stating that it was a "terminal contract" which would not be renewed by defendant.

Plaintiff filed a complaint against defendant alleging breach of contract and racial discrimination under 42 U.S.C. § 1981 (2004).

Plaintiff alleged that his contract was not renewed because of his race (white). At trial, a jury returned a verdict finding that defendant discriminated against plaintiff based upon his race and awarded plaintiff $68,495.00 in compensatory damages plus interest and $7,500.00 in punitive damages. The jury found that there was no contract of employment between plaintiff and defendant beyond the 1997-1998 school year. Defendant appeals.

We note that due to a failure of the courtroom recording system, there is no transcript of the trial proceedings. This case is therefore reviewed based upon the parties' summation of the evidence contained in the record on appeal.

[1] In its first assignment of error, defendant argues that the trial court erred by failing to dismiss plaintiff's claim for racial discrimination under 42 U.S.C. § 1981 at the close of plaintiff's evidence and at the close of all the evidence, and by denying its motion for judgment notwithstanding the verdict. We agree.

The standard of review for the denial of motions for directed verdict and judgment notwithstanding the verdict is identical. *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498, 524 S.E.2d 591, 595 (2000). Therefore, we consider these arguments together. The evidence must be viewed in the light most favorable to the nonmovant, giving him the benefit of every reasonable inference, in determining whether the evidence was sufficient to go to the jury. *Hawley v. Cash*, 155 N.C. App. 580, 582, 574 S.E.2d 684, 686 (2002). A "directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356, 112 L. Ed. 2d 866, 111 S. Ct. 807 (1991). "To defeat an employer's motion for [judgment as a matter of law] as to liability in a discrimination suit, the plaintiff must present substantial evidence to support as a reasonable probability, rather than as a mere possibility, that her employer discriminated against her because of a protected characteristic." *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 298 (4th Cir. 1998). "While we are compelled to accord the utmost respect to jury verdicts and tread gingerly in reviewing them, we are not a rubber stamp convened merely to endorse the conclusions of the jury, but rather have a duty to reverse the [jury's verdict] if the evidence cannot support it." *Price v. City of Charlotte*, 93 F.3d 1241, 1250 (4th Cir. 1996).

Plaintiff's claim of racial discrimination was based solely upon the theory of disparate treatment. In order to prevail against a motion

for a directed verdict, or a judgment notwithstanding the verdict, plaintiff must meet its burden of persuasion as initially established in the Title VII context by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 677 (1973). *DeJarnette v. Corning, Inc.*, 133 F.3d 293 (4th Cir., 1998). The test is the same under Title VII and 42 U.S.C. § 1981. *Love-Lane v. Martin*, 355 F.3d 766, 786 (4th Cir., 2004). In order to satisfy his burden under the *McDonnell Douglas* test "plaintiff must first establish a *prima facie* case of discrimination, the defendant may respond by producing evidence that it acted with a legitimate, nondiscriminatory reason, and then the plaintiff may adduce evidence showing that the defendant's proffered reason was mere pretext and that race was the real reason for the defendant's less favorable treatment of the plaintiff." *Williams v. Staples, Inc.*, 372 F.3d 662, 667 (4th Cir., 2004) (citation omitted).

Assuming *arguendo* that plaintiff proved a *prima facie* case of racial discrimination, defendant then had a burden of production under the *McDonnell Douglas* line of cases to show a legitimate, nondiscriminatory reason for the adverse action against the employee. *Williams*, 372 F.3d 662, 668. If the employer satisfies its burden, the "presumption of discrimination raised by the prima facie case is rebutted and drops from the case." *Williams*, 372 F.3d at 669. The "sole remaining issue for our consideration becomes whether [plaintiff] can prove by a preponderance of the evidence" that defendant's stated reason for its action was a pretext to hide racial discrimination. *Id.*; *Mereish v. Walker*, 359 F.3d 330, 336 (4th Cir., 2004). Appellant can meet its burden of proving pretext "either by showing that [defendant's] explanation is 'unworthy of credence' or by offering other forms of circumstantial evidence sufficiently probative of . . . discrimination." *Id.* " 'The ultimate question is whether the employer intentionally discriminated, and proof that the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that [plaintiff's] proffered reason . . . is correct.' It is not enough to disbelieve the defendants here; the factfinder must believe [plaintiff's] explanation of intentional race discrimination." *Love-Lane*, 355 F.3d at 788. A plaintiff's own assertions of discrimination are insufficient to overcome an employer's legitimate, nondiscriminatory reason for discharge. *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 456 (4th Cir., 1989). This is because "It is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff." *King v. Rumsfeld*, 328 F.3d 145, 149 (4th Cir., 2003), *cert denied*, 157 L. Ed. 2d 742, 124 S. Ct. 922 (U.S. 2003) (*quoting Evans v. Technologies Applications & Serv. Co.*, 80

F.3d 954, 960-61 (4th Cir. 1996)). "At the end, the burden remains on [plaintiff] to demonstrate that the reasons offered by [defendant] are a pretext for discrimination, or stated differently, that the [defendant's] reason is unworthy of credence to the extent that it will permit the trier of fact to infer the ultimate fact of intentional discrimination." *Dugan v. Albemarle County Sch. Bd.*, 293 F.3d 716, 723 (4th Cir., 2002) (citation omitted).

In the instant case, defendant met its burden by proffering a legitimate, nondiscriminatory reason for plaintiff's discharge, namely that plaintiff failed to follow College policy when requesting the grade changes for Mr. Jones and did not meet the college's legitimate expectations by failing to understand the potential damage to students and the College for giving unearned grades. The record includes a memorandum from Mr. Ramsey to Dr. Sammie Potts, president of the College, describing plaintiff's conduct, action taken thus far, and future recommendations. In the memorandum, Ramsey indicated that plaintiff "disregarded College Policy as stated in the College Catalog on numerous occasions relative to the changing of grades." Mr. Ramsey further noted: "In discussions with [plaintiff], it is my feeling that he does not understand the [damage] that is being done to students who receive unearned grades and he does not understand the potential damages to the institution." Dr. Potts agreed with Mr. Ramsey's recommendation, and subsequently offered plaintiff the terminal contract.

While Mr. Ramsey had only been in employment with the College for a short time prior to plaintiff's termination, he was hired out of retirement as Academic Dean to strengthen the academic integrity of the College and to effectuate changes in college policy. Therefore, it was proper for Mr. Ramsey to observe and conclude that plaintiff did not conform to the legitimate academic expectations of the College.

Because defendant met its burden of production in articulating a non-discriminatory reason for its actions, the presumption of discrimination created by plaintiff's *prima facie* case dissolved and plaintiff was required to meet his burden of persuasion that defendant's proffered reason was mere pretext. *Williams*, 372 F.3d at 669. Plaintiff offered his own allegations that Mr. Ramsey acted with discriminatory intent (stating that he felt he was fired because of his race). This evidence, coming as it does from plaintiff, is "close to irrelevant." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 280 (4th Cir., 2000).

The only other evidence presented by plaintiff pertinent to the issue was the testimony of plaintiff's immediate supervisor, Dr. Elufiede. Dr. Elufiede, who is black, testified that if plaintiff violated defendant's policies by recommending the grade change then he also violated it by approving the request. Plaintiff submitted a grade change request form for Mr. Jones on three separate occasions. Mr. Ramsey declined to approve each of the requests. It is unclear from the record whether Dr. Elufiede approved the first two grade change requests. However, it is clear that Dr. Elufiede approved the third grade change request and forwarded it to Mr. Ramsey, his direct supervisor. Dr. Elufiede was not given a terminal contract.

Plaintiff and Dr. Elufiede were not similarly situated, and thus any disparate treatment between Dr. Elufiede and plaintiff does not tend to prove discrimination by defendant. *See Disher v. Weaver*, 308 F. Supp. 2d 614, 620 (M.D.N.C., 2004). Foremost, Dr. Elufiede was plaintiff's immediate supervisor. He was the chair of the social sciences department, and plaintiff was only a professor in that department. They did not share the same immediate supervisor, did not have the same job responsibilities or job description, and did not have equivalent experience. *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir., 2002). Furthermore, it was not Dr. Elufiede who initiated the grade change requests on three separate occasions without valid reasons. Rather, he merely reviewed and approved one of them as plaintiff's supervisor. The conduct with respect to the grade change request by plaintiff and Dr. Elufiede was not substantially similar. These differences in Dr. Elufiede's and plaintiff's job duties and conduct are such that any difference in the treatment of the two does not support an assertion of discrimination. This circumstantial evidence is simply too weak and speculative to establish that defendant's stated legitimate reasons for offering plaintiff a terminal contract were pretextual. Thus, defendant was entitled to a directed verdict dismissing plaintiff's claim for discrimination. *Reeves*, 530 U.S. at 148-49, 147 L. Ed. 2d at 120.

In its second assignment of error, defendant argues that the trial court erred in denying its motion to dismiss plaintiff's claims for punitive damages. We agree.

Plaintiff's claim for punitive damages was based solely upon the alleged racial discrimination by defendant. As discussed above, this claim should have been dismissed by the trial court and as a result we hold that the plaintiff's claim for punitive damages, too, should have been dismissed.

[2] Further, assuming *arguendo* that the trial court properly denied defendant's motions on the issue of liability, we hold that the trial court erred in failing to grant defendant's motions for directed verdict and judgment notwithstanding the verdict with respect to the issue of punitive damages. After determining that defendant had discriminated against plaintiff, the jury awarded plaintiff $7,500.00 in punitive damages. In order for a plaintiff to sustain an award of punitive damages pursuant to § 1981 he must prove some aggravating conduct beyond that needed to sustain a claim of discrimination under the statute. *Smith v. Wade*, 461 U.S. 30, 51, 75 L. Ed. 2d 632, 648 (1983); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 441 (4th Cir., 2000); *Rowlett v. Anheuser-Busch*, 832 F.2d 194 (1st Cir. 1987); *Caperci v. Huntoon*, 397 F.2d 799, 801 (1st Cir., 1968) (federal common law applies); *Tillman v. Wheaton-Haven Recreation Ass'n*, 367 F. Supp. 860, 864 (D. Md., 1973). "[M]ere proof of a violation of the statute is not enough to recover punitive damages. There must also be proof that the defendant, in violating the letter of section 1981, exhibited oppression, malice, gross negligence, willful or wanton misconduct, or reckless disregard of the plaintiff's civil rights." James D. Ghiardi et al., *Punitive Damages L. & Prac.* § 15.07 (1999). In the case of *Kolstad v. ADA*, 527 U.S. 526, 144 L. Ed. 2d 494 (1999), the United States Supreme Court analyzed what aggravated conduct plaintiff must prove under Title VII to entitle it to punitive damages pursuant to 42 U.S.C. § 1981a (2004). The Fourth Circuit has determined that the *Kolstad* test is applicable to cases brought under 42 U.S.C. § 1981 as well as those brought under Title VII. *Lowery*, 206 F.3d at 441 ("Thus, any case law construing the punitive damages standard set forth in § 1981a, for example *Kolstad*, is equally applicable to clarify the common law punitive damages standard with respect to a § 1981 claim."). Following *Kolstad*, the *Lowery* Court held that in order to recover punitive damages under 42 U.S.C. § 1981, the plaintiff must prove that defendant " 'engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to [plaintiff's] federally protected rights,' 42 U.S.C. § 1981a(b)(1)," *Lowery*, 206 F.3d at 441. In order for plaintiff to prove this aggravated conduct, he must not only prove that defendant discriminated, but that it discriminated " 'in the face of a perceived risk that its actions will violate federal law.' " *Id.* at 442 (*quoting Kolstad*, 527 U.S. at 536).

The jury in the instant case made no finding of aggravated conduct on the part of defendant. Our review of the record fails to uncover any evidence, beyond two sentences summarizing plaintiff's

personal feelings on the matter ("Mr. Miller thinks that he was single [sic] out for dismissal because of his race (white). He feels the only explanation for his dismissal is that Mr. Ramsey (black) had innate feelings toward whites."), that would support a finding of the required aggravated conduct. Plaintiff fails in meeting his burden because, even assuming *arguendo* that plaintiff has proved discrimination, he has not offered any evidence that defendant acted with the knowledge that its conduct was in violation of federal law. Plaintiff's testimony standing alone is not sufficient, as its probative weight is slight (*see King v. Rumsfeld*, 328 F.3d 145, 150 (4th Cir., 2003); *Gairola v. Virginia Dep't of General Services*, 753 F.2d 1281, 1288 n.4 (4th Cir., 1985)), and it does not address the issue of defendant's knowledge that its purported actions were illegal. Thus, even assuming *arguendo* that plaintiff proved his case of discrimination under 42 U.S.C. § 1981, having offered no evidence of aggravated conduct, defendant's motion for directed verdict on the issue of punitive damages should have been granted.

VACATED AND REMANDED.

Judge TYSON concurs.

Judge HUDSON dissents in part, concurs in part.

HUDSON, Judge, concurring in part and dissenting in part.

Defendant appeals from the denial of a motion for judgment not withstanding the verdict (JNOV), following a jury verdict in plaintiff's favor. Because I believe the majority has misapplied the legal precedents and imposed burdens on plaintiff that the law does not require, I dissent with respect to the primary claim of employment discrimination. I concur, however, with the disposition of the issue of punitive damages.

"In considering a motion for JNOV, the trial court is to consider all evidence in the light most favorable to the party opposing the motion; the nonmovant is to be given the benefit of every reasonable inference that legitimately may be drawn from the evidence; and contradictions must be resolved in the nonmovant's favor." *Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God*, 136 N.C. App. 493, 498, 524 S.E.2d 591, 595 (2000). The standard of review for the denial of a JNOV is whether the evidence was sufficient to go to the jury. *Id.* "The hurdle is high for the moving party as the

motion should be denied if there is more than a scintilla of evidence to support the plaintiff's *prima facie* case." *Id.* Thus, if there is more than a scintilla of evidence to support plaintiff's *prima facie* claim of discrimination, we must affirm the trial court's denial of defendant's motions.

"The burden of establishing a *prima facie* case of discrimination is not onerous." *North Carolina Dep't of Correction v. Gibson*, 308 N.C. 131, 137, 301 S.E.2d 78, 82 (1983). "[A] *prima facie* case of discrimination may be made out by showing that (1) a claimant is a member of a minority group, (2) he was qualified for the position, (3) he was discharged, and (4) the employer replaced him with a person who was not a member of a minority group." *Id.* The precise requirements of a *prima facie* case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 57 L. Ed. 2d 957, 967 (1978). "A *prima facie* case of discrimination may . . . be made out by showing the discharge of [a minority employee] and the retention of [a majority employee] under apparently similar circumstances." *Gibson*, 308 N.C. at 137, 301 S.E.2d at 83. More recently, the United States Supreme Court has evidenced an intent to ease the burden of proving discrimination. *Desert Palace v. Costa*, 539 U.S. 90, 101, 156 L. Ed. 2d 84, 95 (2003) (holding that discrimination is unlawful even if only one of several motives for adverse employment action).

Making a *prima facie* case is not the same as proving discrimination. *Gibson*, 308 N.C. at 138, 301 S.E.2d at 84. "Rather, it is proof of actions taken by the employer from which a court may infer discriminatory intent or design because experience has proven that in the absence of an explanation, it is more likely than not that the employer's actions were based upon discriminatory considerations." *Id.* at 138, 301 S.E.2d at 84. This Court has held that the "plaintiff met his burden of establishing a *prima facie* case of discrimination [by presenting] evidence satisfying *three of the four elements* recited in *Gibson*: plaintiff was an African-American discharged from his position at CPI and replaced by a white worker." *Brewer v. Cabarrus Plastics, Inc.*, 130 N.C. App. 681, 688, 504 S.E.2d 580, 584 (1998) (internal citation omitted) (emphasis added). Once a plaintiff has established a *prima facie* case, the burden shifts to the employer to articulate some legitimate nondiscriminatory reason for its actions. *Id.*

In reviewing the denial of defendant's motions for directed verdict and for JNOV then, we consider whether, taking all evidence in

the light most favorable to plaintiff, there is more than a scintilla of evidence to support plaintiff's *prima facie* claim of discrimination. Because the evidence is undisputed that plaintiff, who is white, was qualified for his position at the historically black college, was fired by defendant, and was replaced by a non-white employee, on this basis alone plaintiff has met the requirements of a *prima facie* case as articulated by this Court in *Brewer*.

Here, plaintiff alleges he was fired because of his race. Defendant's evidence tended to show that he was fired for violating policy regarding a student's grade change. Under defendant's policies, such a request would be initiated by a professor (plaintiff), then passed on to the department head (Babfemi Elufiede), and if approved by the department head, would be passed on again to Mr. Ramsey, the academic dean, for final approval and implementation. Plaintiff asserts that Mr. Ramsey, his and Elufiede's supervisor regarding grade changes and contract matters, acted in a racially discriminatory manner when he recommended that plaintiff be terminated. The evidence tended to show that Mr. Ramsey is the supervisor of both plaintiff and Mr. Elufiede in the matter of grade changes, and that both plaintiff and Mr. Elufiede approved the grade change in question. As special assistant to the president for academic affairs, Mr. Ramsey was responsible for making recommendations to the college president about termination of faculty. Mr. Ramsey treated plaintiff and Mr. Elufiede differently, despite essentially identical actions in this regard. Defendant offered no explanation for the disparate treatment of plaintiff and Mr. Elufiede, and in fact presented no evidence at the trial.

Although under *Brewer*, it may not be necessary to prove such, the majority focuses on the "similarly situated" prong, as articulated in *McDonnell Douglas Corp. v. Green*. 411 U.S. 792, 802, 36 L. Ed. 2d 668, 677 (1973). The only possibly disputed issue between the parties is whether plaintiff was treated differently than a similarly situated non-white employee, Mr. Elufiede. If the evidence, in the light most favorable to the plaintiff, supports that inference, the trial court acted properly sending plaintiff's case to the jury. I conclude that, even if plaintiff's burden included presenting a *prima facie* case of disparate treatment of similarly situated employees, the evidence does support that inference and that the trial court properly denied the motions to dismiss and for JNOV.

A long line of cases have explored the definition of "similarly situated." The majority's opinion frames the issue as solely controlled

by whether the plaintiff and the comparator employee had the same supervisor. "However, the 'same supervisor' criterium has never been read as an inflexible requirement." *Seay v. TVA*, 339 F.3d 454, 479 (6th Cir. 2003). Courts have rejected "the proposition that whenever two different supervisors are involved in administering the disciplinary actions, the comparators cannot as a matter of law be similarly situated for Title VII purposes." *Anderson v. WBMG-42*, 253 F.3d 561, 565 (11th Cir. 2001). "[M]aking an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of the non-protected employee is crucial." *Id.* Indeed, one of the cases cited by the majority makes clear that the determination of whether a comparator employee is similarly situated must be based on "all material respects" of the case. *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 618 (7th Cir. 2000). "[A] court must look at all *relevant* factors, the number of which depends on the context of the case." *Radue*, 219 F.3d at 617 (emphasis added). In *Gibson*, as here, one of the comparator employees in the trial court's analysis was plaintiff's immediate supervisor. *Gibson*, 308 N.C. at 142, 301 S.E.2d at 85. The majority opinion, holding that the same supervisor requirement bars this plaintiff as a matter of law from making a *prima facie* case is inconsistent with these cases, and overlooks the crucial and undisputed fact that the plaintiff and his comparator (Elufiede) actually reported to the *same* supervisor (Ramsey) regarding the matter at issue.

Here, both plaintiff and Mr. Elufiede were faculty members working for defendant; both were under the supervision of Mr. Ramsey with regard to final decisions on grade changes; both were subject to the same policies and procedures regarding grade changes; and both approved the same proposed grade change for the same student in the same course. Although the majority states that the actions of the two were not similar because "plaintiff initiated the grade change" but Mr. Elufiede "merely approved it," no evidence suggests that defendant used this purported difference to justify treating the two differently. To the contrary, the evidence indicates strong similarity in their actions, that "[b]ecause Mr. Elufiede felt that [plaintiff's grade change] request was legitimate, Mr. Elufiede signed the request." The stipulated summary of the evidence reveals the following from Mr. Elufiede's narrated testimony:

> If Mr. Miller broke the policy by recommending the grade change, then Mr. Elufiede broke the policy by approving it, but he was he not fired. Mr. Rainey (black) was hired to replace Mr. Miller. . . .

> Because Mr. Elufiede felt that Mr. Miller [sic] [grade change] request was legitimate, Mr. Elufiede signed the request.

In light of this evidence of "relevant factors," I am unable to conclude, as a matter of law, that plaintiff and Mr. Elufiede are not similarly situated under the applicable case law. *Radue*, 219 F.3d at 617. Thus, considering the evidence in the light most favorable to the plaintiff, as the law requires, this issue was properly for the jury to decide.

Further, because "the ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination," the identity and actions of the decision-maker are relevant factors. *See Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 286 (4th Cir. 2004) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153, 147 L. Ed. 2d 105, 123 (2000)). In adverse employment actions, an employer is liable for the improper motivations of the "person who in reality makes the decision." *Id.* 354 F.3d at 31. The U.S. Supreme Court, in *Reeves*, held that the employer was not entitled to judgment as a matter of law under the *McDonnell Douglas* framework where one of petitioner's superiors in the chain of authority, "was motivated by [discriminatory] animus and was principally responsible for petitioner's firing." *Reeves*, 530 U.S. at 151, 147 L. Ed. 2d at 122. Thus, when the alleged discrimination was committed by someone other than the plaintiff's direct supervisor, the identity and motivations of the decision-maker, rather than the direct supervisor, are the proper points of focus in establishing the *prima facie* case. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 104 L. Ed. 2d 268, 305 (1989) (O'Connor, J., concurring) (holding that statements by nondecision-makers are not relevant to satisfying the plaintiff's burden of proving discrimination); *Koski v. Standex Int'l Corp.*, 307 F.3d 672, 678 (7th Cir. 2002) (noting that the pertinent inquiry is whether the decision-maker, as opposed to other managers or subordinates, evaluated the aggrieved employee based upon discriminatory criteria).

As a result of their essentially identical actions, plaintiff was fired and Mr. Elufiede was not. Plaintiff was replaced by an individual of the majority race in his employment situation. Plaintiff alleges racial discrimination accounts for this action, and the evidence constitutes more than a scintilla of evidence to support the plaintiff's *prima facie* case, based on both replacement theory under *Brewer*, and on disparate treatment theory by Ramsey of similarly situated employees (plaintiff and Elufiede). Under *McDonnell Douglas* and its progeny as

well, this evidence constitutes a *prima facie* case. *See Hill, supra.* Whether defendant's contentions about non-discriminatory reasons for plaintiff's termination were persuasive was a factual matter for the jury to decide. Thus, I conclude that the court's denial of defendant's motions for directed verdict and JNOV were proper, and that we should affirm those rulings.

It is important to note that the majority opinion would have the effect of heightening the plaintiff's proof requirements in race discrimination cases, and would push our State's law outside the national mainstream, to the detriment of those who seek redress for discrimination based on race. Although this case involves "reverse discrimination" against a white plaintiff, the primary impact of the decision will be on those individuals and groups who have historically suffered the most from discrimination in our State. The United States Supreme Court has continually cautioned lower courts against attempting to impose heightened burdens on plaintiffs in race discrimination cases. *See Desert Palace, Inc.*, 539 U.S. at 101, 156 L. Ed. 2d at 95 (holding that "no heightened showing is required"). I do not believe this Court should increase such burdens, contrary to precedent, as the majority here has done. Thus, I respectfully dissent.

However, with respect to the issue of punitive damages, I agree that plaintiff failed to meet his burden. "Punitive damages are limited, however, to cases in which the employer has engaged in intentional discrimination and has done so 'with malice or with reckless indifference to the federally protected rights of an aggrieved individual.' " *Kolstad v. Ada*, 527 U.S. 526, 530-31, 144 L. Ed. 2d 494, 502 (quoting 42 U.S.C. § 1981a(b)(1)). "Applying this standard in the context of § 1981a, an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id.* at 336, 144 L. Ed. 2d at 506. Plaintiff presented no evidence that defendant discriminated against him with the requisite intent, and the jury made no finding that defendant acted "with malice or with reckless indifference to the federally protected rights" of plaintiff. Thus, I agree that we must vacate the award of punitive damages.

In sum, for the reasons discussed above, I believe we should hold that the plaintiff presented sufficient evidence for his case to go to the jury. As a result, we should uphold the jury's verdict finding discrimination, and affirm the denial of the post-trial motions. However,

because the plaintiff presented no evidence to support the award of punitive damages, we should vacate that award and remand for the trial court to enter judgment on the underlying claim of discrimination. Therefore, I respectfully concur in part and dissent in part.

RICKY WHITEHEAD, ON BEHALF OF HIMSELF AND ALL OTHER SIMILARLY SITUATED PERSONS, PLAINTIFF v. SPARROW ENTERPRISE, INC., D/B/A LABOR FINDERS, DEFENDANT

No. COA04-208

(Filed 7 December 2004)

1. Jurisdiction— North Carolina Wage and Hour Act—no exemption for temporary employment agency

The trial court did not err by concluding that defendant temporary employment agency is not exempt from the jurisdiction of the North Carolina Wage and Hour Act, because plaintiff's claims arise from N.C.G.S. §§ 95-25.6 and 95-25.8 which address wage payment and withholding of wages respectively.

2. Employer and Employee— wage withholding—transportation deduction—specific authorization

A de novo review revealed that the trial court did not err by granting summary judgment in favor of defendant temporary employment agency based on defendant withholding class members' wages to pay for an optional transportation service to and from job sites, because: (1) defendant's house rules comply with the requirements of N.C.G.S. § 95-25.8(2)(a) as a specific authorization even though there is a range given for the dollar amount since it is sufficiently narrow to provide adequate notice to the class members, the deductions for transportation expenses are not automatic and are conditioned upon the class members specifically requesting use of the van pool each morning, and class members receive frequent and sufficient notice of the cost to use defendant's van pool; (2) defendant's house rules satisfy the formatting and content requirements under N.C. Admin. Code tit. 13, r. 12.0305(b) since the authorization form is written, signed by the class members on or before the payday for the pay period from which the deduction is made, includes the date signed, and states the reason for the deduction; and (3) the optional transportation service offered to the class

members is not an incident of nor is it necessary to the employment, and it does not matter that the trip is between defendant's home office and the job sites.

3. Employer and Employee— wage withholding—waiting and traveling to work

A de novo review revealed that the trial court did not err by granting summary judgment in favor of defendant temporary employment agency based on class members not being entitled to compensation under N.C.G.S. § 95-25.6 for time spent waiting for and traveling on defendant's optional transportation service, because: (1) plaintiff testified that defendant never told him that hours worked included wait time or travel time to and from the job site, and the employment contract does not provide for the compensation the class members seek; (2) the class members' wait or travel time is not a principal activity requiring compensation, but instead is preliminary and postliminary activity since the class members' idle time either before or after the workday is personal; and (3) the receipt of general protective equipment does not make travel time compensable under 29 C.F.R. § 785.38.

Appeal by plaintiff from order entered 21 November 2003 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 14 October 2004.

Law Offices of Robert J. Willis, by Robert J. Willis, for plaintiff-appellant.

Richardson, Patrick, Westbrook & Brickman, LLC, by James L. Ward, Jr., and Rogers Townsend & Thomas, P.C., by Paul M. Platte, for defendant-appellee.

TYSON, Judge.

Ricky Whitehead ("plaintiff") on behalf of those similarly situated (collectively, "the class members") appeal from entry of summary judgment in favor of Sparrow Enterprise, Inc. ("defendant") after the trial court found no violations of the North Carolina Wage and Hour Act ("the NCWHA"), N.C. Gen. Stat. § 95-25.1 *et seq.* (2003)). We affirm.

I. Background

Defendant is a temporary employment agency that hires individuals on a daily basis for casual labor. Defendant markets and

provides the temporary labor to businesses that periodically need additional workers.

Defendant's hiring policy is structured on a first come first serve basis. Individuals seeking work must arrive at defendant's office early in order to be considered available for employment. At their first hiring, the class members are required to sign the "House Rules." The "House Rules" discloses defendant's hiring process, the details and rules of employment, hours of operation, the hourly wage, hours worked, and standard deductions which include optional transportation expenses. Plaintiff signed the "House Rules" on 2 January 2001.

Upon arrival in the morning, the class members write their names on a sign-in sheet and wait for an assignment of available jobs. The "House Rules" specifically states such time is not compensable, "Hours worked and pay are determined from the time the worker starts working at the customer's establishment And (sic) ends when the work is completed at the customer's establishment." While waiting, the class members often eat breakfast, read a newspaper, watch television, talk, or sleep.

The class members who are offered work are called to the assignment desk and provided a description of the job and pay. If they accept the position, they are asked whether they have transportation available. If they do not, the class members will ride with either a fellow employee or in defendant's van. The cost to the class members is $1.00 each way. The "House Rules" explains the transportation program and cost to the participant.

After receiving work assignments, defendant provides general safety equipment like hard hats, boots, and gloves to those employees who would need them. The class members either wait for the van pool or secure their own transportation to the job site. They are allowed to do whatever they want during this period, so long as they arrive at the job site on time. Those who select defendant's van pool are not given any instructions about the job during the ride. Plaintiffs have the option to be paid at the end of the workday or at a later time.

On 12 June 2002, plaintiff, acting on behalf of himself and the class members, filed a class action complaint under Rule 23 of the North Carolina Rules of Civil Procedure asserting two claims. First, plaintiff argued the wage deductions for the communal transportation were illegal under N.C. Gen. Stat. § 95-25.8. Second, plaintiff argued employees who elect to use the optional transporta-

tion should be paid for time spent while both waiting for the van and riding to and from the job sites under N.C. Gen. Stat. § 95-25.6. Plaintiff sought redress solely under the NCWHA. Defendant answered on 16 January 2003.

Defendant filed a Motion for Summary Judgment on 16 September 2003. It asserted: (1) plaintiff agreed to both situations by signing enforceable contracts; (2) defendant is exempt from the jurisdiction of the NCWHA; and (3) plaintiff is not an adequate class representative to allow the class action to proceed.

On 21 November 2003, the trial court found the "material facts regarding these claims are not in significant dispute [and] [t]he issue . . . is whether or not the undisputed material facts of record establish a violation of the Wage and Hour Act." The trial court held plaintiff made no showing of a violation of the NCWHA and granted defendant's motion for summary judgment on both claims. Plaintiff appeals.

II. Issues

The issues on appeal are whether: (1) defendant is exempt from the jurisdiction of the NCWHA; (2) the trial court properly granted summary judgment in favor of defendant on the class members' transportation deduction claim; and (3) the trial court erred in granting summary judgment in favor of defendant on the class members' time spent both waiting and traveling claim.

III. Federal Statutes, Regulations, and Cases as Guidance

We note at the outset that the issues before us arise from employment and labor law, a substantive area monopolized by federal statutes, regulations, and case law. Plaintiff's claims are based on the NCWHA, N.C. Gen. Stat. § 95-25.1 *et. seq.* The NCWHA is modeled after the Federal Fair Labor Standards Act ("the FLSA"), 29 U.S.C. § 201 *et seq. Laborers' Int'l Union of North America, AFL-CIO v. Case Farms, Inc.*, 127 N.C. App. 312, 314, 488 S.E.2d 632, 634 (1997). The North Carolina Administrative Code ("the Code") states that "judicial and administrative interpretations and rulings established under [] federal law" may serve as a guide for interpreting North Carolina laws when our Legislature has adopted provisions of the FLSA. N.C. Admin. Code tit. 13, r. 12.0103 (June 2004).

We are not bound by decisions of Federal circuit courts other than those of the United States Court of Appeals for the Fourth

Circuit arising from North Carolina law. *Haynes v. State*, 16 N.C. App. 407, 409-10, 192 S.E.2d 95, 97 (1972) (citing *State v. Barber*, 278 N.C. 268, 179 S.E.2d 404 (1971)).

IV. Standard of Review

We review a trial court's entry of summary judgment *de novo*. *Shroyer v. County of Mecklenburg*, 154 N.C. App. 163, 167, 571 S.E.2d 849, 851 (2002) (citing *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999)). Under *de novo* review, a reviewing court considers the matter anew, and it may substitute its own judgment for that of the trial court. *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citation omitted).

A grant of summary judgment is proper when: "(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) (quotation omitted), *aff'd per curiam*, 353 N.C. 445, 545 S.E.2d 210 (2001). The moving party has the burden of showing there is no 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 this Court and the trial court must view the evidence 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.*

After a review of the record and hearing the parties' oral arguments, we conclude no genuine issues of material fact exist. We review the trial court's conclusions of law.

V. Exemption from the NCWHA

[1] Defendant asserts, as an enterprise engaged in interstate commerce, its relationships with the class members are covered by the FLSA and not within the jurisdiction of the NCWHA. We disagree.

N.C. Gen. Stat. § 95-25.14(a) (2003) provides exemptions to employers from the NCWHA in limited circumstances, which states:

> The provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), and G.S. 95-25.5 (Youth Employment), and the provi-

sions of G.S. 95-25.15(b) (Record Keeping) as they relate to these exemptions, do not apply to:

(1) Any person employed in an enterprise engaged in commerce or in the production of goods for commerce as defined in the Fair Labor Standards Act . . . .

Plaintiff's claims arise from N.C. Gen. Stat. §§ 95-25.6 and 95-25.8 which address Wage Payment and Withholding of Wages respectively. The statute defendant relies upon for exemption does not cover either section of the NCWHA. Defendant's argument is overruled.

VI. Transportation Deduction Claim

[2] Plaintiff asserts defendant failed to comply with the North Carolina statutes and the Code, which provide when and how employers may deduct wages from employees' paychecks. We disagree.

A. Specific Authorization of Wage Withholding

N.C. Gen. Stat. § 95-25.1 *et seq.* comprise the NCWHA. N.C. Gen. Stat. § 95-25.8 (2003) addresses wage withholding, which states:

An employer may withhold or divert any portion of an employee's wages when:

(1) The employer is required or empowered to do so by State or federal law, or

(2) The employer has a written authorization from the employee which is signed on or before the payday for the pay period from which the deduction is to be made indicating the reason for the deduction. Two types of authorization are permitted:

(a) When the amount or rate of the proposed deduction is known and agreed upon in advance, the authorization shall specify the dollar amount or percentage of wages which shall be deducted from one or more paychecks, provided that if the deduction is for the convenience of the employee, the employee shall be given a reasonable opportunity to withdraw the authorization;

(b) When the amount of the proposed deduction is not known and agreed upon in advance, the authorization need not specify a dollar amount which can be deducted from one or more paychecks, provided that the employee receives advance notice of the specific amount of any

> proposed deduction and is given a reasonable opportunity to withdraw the authorization before the deduction is made.

The statute offers employers two options of written authorization to deduct wages. First, N.C. Gen. Stat. § 95-25.8(2)(a) addresses deductions of a "known" sum of money, a specific authorization. N.C. Admin. Code tit. 13, r. 12.0305 (June 2004). Employees who agree to specific authorizations must receive from their employers an opportunity to withdraw the authorization before the deduction is made, "if the deduction is for the convenience of the employee . . . ." N.C. Gen. Stat. § 95-25.8(2)(a). Second, N.C. Gen. Stat. § 95-25.8(2)(b) refers to a blanket authorization, one made for an unknown amount of money. N.C. Admin. Code tit. 13, r. 12.0305. Before a deduction may be completed under a blanket authorization, the employee must receive notice of the specific amount and a reasonable opportunity to withdraw the authorization. N.C. Gen. Stat. § 95-25.8(2)(b).

The Code further requires valid wage deduction authorizations by employees to be: (1) written; (2) signed by the employee on or before the payday for the pay period for which the deduction is made; (3) show the date of signing by the employee; and (4) state the reason for the deduction. N.C. Admin. Code tit. 13, r. 12.0305(b). If the authorization is specific, the dollar amount or percentage of wages withheld must be provided. *Id.* Before an employer may deduct wages under a blanket authorization, it must first provide the employee: (1) advance notice of the specific amount of the proposed deduction; (2) a reasonable opportunity of at least three calendar days from the employer's notice of the amount to withdraw the authorization. N.C. Admin. Code tit. 13, r. 12.0305(d).

Each employee hired by defendant must read and sign defendant's form, the "House Rules." It includes the following language:

> Anyone choosing to accept transportation from Labor Finders, to one of our job sites, will be charged no less than .50 to and .50 from and no more than $1.00 to and $1.00 from the job site. Worker understands that this offer of transportation is for the worker's benefit and if worker chooses to accept transportation, worker authorizes Labor Finders to deduct the cost of that transportation in both overtime and non-overtime weeks.

This provision qualifies as a specific authorization under N.C. Gen. Stat. § 95-25.8(2)(a). The optional transportation service

offered by defendant and its associated cost is explained. Although a range is given for the dollar amount, we hold it is sufficiently narrow to provide adequate notice to the class members. We further note the deductions for transportation expenses are not automatic. They are conditioned upon the class members specifically requesting use of the van pool each morning. Only then are wages withheld. The class members receive frequent and sufficient notice of the cost to use defendant's van pool. We hold the "House Rules" complies with the requirements of N.C. Gen. Stat. § 95-25.8(2)(a) as a specific authorization.

Finally, the "House Rules" satisfies the Code's formatting and content requirements. The authorization form is written, signed by the class members on or before the payday for the pay period from which the deduction is made, includes the date signed, and states the reason for the deduction. N.C. Admin. Code tit. 13, r. 12.0305(b). We hold that defendant's "House Rules" form and wage deduction procedure complies with N.C. Gen. Stat. § 95-25.8 and N.C. Admin. Code tit. 13, r. 12.0305.

This portion of plaintiff's assignment of error is overruled.

B. Incident of and Necessary to Employment

Plaintiff contends the optional transportation services offered by defendant to its employees benefit defendant and are considered neither wages nor deductible. We disagree.

Employers may "count as wages the reasonable cost 'of furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.' " *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1236 (2002) (quoting 29 U.S.C. § 203(m)). The employer may deduct the reasonable cost from the employee's paycheck, even if the net amount falls below the minimum wage. 29 C.F.R. § 531.27 (2004).

The United States Department of Labor ("USDOL") defines "other facilities" as:

> Meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including

> articles of food, clothing, and household effects); fuel (including coal, kerosene, firewood, and lumber slabs), electricity, water, and gas furnished for the noncommercial personal use of the employee; transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not *an incident of and necessary to the employment.*

29 C.F.R. § 531.32(a) (2004) (emphasis supplied). If the "facilities" are primarily for the benefit of the employer, the cost may not be included in computing wages and the employer must "reimburse the expense up to the point the FLSA minimum wage provisions have been met." *Arriaga*, 305 F.3d at 1241-42; 29 C.F.R. § 531.3(d)(1) (2004). The issue here is whether the optional transportation service offered to the class members is "an incident of and necessary to the employment" and primarily for the benefit of defendant. 29 C.F.R. § 531.32(a).

Plaintiff cites *Arriaga* as persuasive authority to show the optional transportation service was "an incident of and necessary to" defendant's business and primarily for defendant's own benefit. 305 F.3d at 1228. There, domestic agricultural employers hired nonimmigrant aliens from Mexico as farm laborers to work on a seasonal basis. *Id.* at 1232. Laborers who passed the interview process paid for their own passage to the United States, visa costs, and various recruiting fees. *Id.* at 1234. After deducting these expenses from wages earned, the net income fell below the statutory minimum wage. *Id.* at 1231-32.

The Eleventh Circuit held the transportation costs were "an incident of and necessary to the employment" and the employers must reimburse the laborers for expenses paid in coming to the employment. *Id.* at 1242. The court noted the determining factor was the transportation costs were "an inevitable and inescapable consequence of having foreign . . . workers employed in the United States." *Id.* The court carefully distinguished that situation from one where an employer "hires from its locale." *Id.* Further, the court distinguished between costs "arising from the employment itself and those that would arise in the course of ordinary life" by interpreting "other facilities" as meaning "employment-related costs . . . that would arise as a normal living expense." *Id.* at 1242-43.

We find *Arriaga* persuasive, but not as plaintiff argues. The paramount distinction between the facts here and therein *Arriaga* is

exactly what the Court discussed. In *Arriaga*, transportation expenses were both inevitable under the program employers used to recruit and hire foreign workers, and is substantially different from normal commuting costs. Here, defendant's transportation service is one of several options available to the class members to travel to and from job sites. They are free to use their own vehicles, ride public transportation, walk, ride with a co-worker, or defendant's van. The choice facing the class members is the same encountered by every worker every day and is not unique to defendant's business. It matters not that the trip is between defendant's home office and the job sites. *Vega v. Gaspar*, 36 F.3d 417, 425 (5th Cir. 1994).

We find the optional transportation service offered by defendant falls within the category of "other facilities" and may be counted towards wages. Defendant properly deducts the associated transportation cost from the class members' paychecks in compliance with N.C. Gen. Stat. § 95-25.8 and N.C. Admin. Code tit. 13, r. 12.0305.

Plaintiff has failed to show and we find no evidence in the record that a genuine issue of material fact exists or defendant improperly withheld wages from the class members. Defendant's authorization form, the "House Rules," satisfies the requirements of both N.C. Gen. Stat. § 95-25.8 and N.C. Admin. Code tit. 13, r. 12.0305. The class members received sufficient notice of the transportation option, its cost, and the process of electing to use the van pool and the subsequent wage withholding. This assignment of error is overruled.

VII. Time Spent Waiting and Traveling to and from Work

[3] Plaintiff contends that time spent waiting and traveling between defendant's office and the job sites is compensable under N.C. Gen. Stat. § 95-25.6 (2003), which states, [e]very employer shall pay every employee all wages and tips accruing to the employee on the regular payday. Pay periods may be daily, weekly, bi-weekly, semi-monthly, or monthly. Wages based upon bonuses, commissions, or other forms of calculation may be paid as infrequently as annually if prescribed in advance. We disagree.

A. N.C. Gen. Stat. § 95-25.6

Plaintiff argues defendant is breaching "an express oral if not written contract" between the parties requiring defendant to pay the class members in accordance with the FLSA, which triggers the requirements of N.C. Gen. Stat. § 95-25.6. Plaintiff concedes the

"House Rules" specifically addresses this issue in defendant's favor. However, he requests this Court to "look[] beyond the language contained in the [House Rules]" to federal statutes, regulations, and case law, to find waiting and traveling time compensable under these circumstances.

The applicable provision of defendant's employment contract, the "House Rules," states:

> We open between 5:30 & 6:30 AM. To improve your chance of employment, you may choose to "show up" at the earliest possible time and no less than one hour before a repeat ticket's delivery time. This is entirely voluntary on the worker's part. During the waiting time in our lobby, the worker is waiting to be engaged rather than engaged to Wait (sic). Hours worked and pay are determined from the time the worker starts working at a customer's establishment And (sic) ends when the work is completed at the customer's establishment . . . . The worker understands that waiting time for assignments at Labor Finders, and travel time from Labor Finders to the customer's establishment and back, as well as waiting to be picked up from the job site, is not compensable work time.

The contract defines "hours worked" as beginning when "the worker starts working at a customer's establishment And (sic) ends when the work is completed at the customer's establishment."

The record on appeal indicates the class members will only be compensated for time spent working at the job sites. It includes a copy of the "House Rules" detailing the compensation process with plaintiff's signature. Plaintiff also testified that defendant never told him "hours worked" included wait time or travel time to and from the job site.

The employment contract does not provide for the compensation the class members seek. Plaintiff admitted he understood this policy and a copy of the agreement bears his signature. We find no violation of N.C. Gen. Stat. § 95-25.6. We now consider whether federal law requires defendant to compensate the class members for time spent waiting and traveling.

B. The Portal to Portal Act

The Portal to Portal Act, 29 U.S.C. § 254, does not require employers to pay employees for the following activities:

(1) walking, riding, or traveling to and from the actual place of performance of the *principal activity* or activities which such employee is employed to perform, and

(2) activities which are *preliminary* to or *postliminary* to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a) (2003) (emphasis supplied). The issue before us is whether the class members' wait and travel time are principal activities and thus compensable. We hold that they are not.

Employers must compensate employees for time spent waiting and traveling when "it is part of a principal activity of the employee, but not if it is a preliminary or postliminary activity." *Vega*, 36 F.3d at 424, 425 (citing The Portal to Portal Act, 29 U.S.C. § 254). Principal activities are those duties integral and indispensable to the employer's business. *Karr v. City of Beaumont, Tex.*, 950 F. Supp. 1317, 1322 (E.D.Tex. 1997) (citing *Truslow v. Spotsylvania County Sheriff*, 783 F. Supp. 274, 277 (E.D. Va. 1992) (citing 29 U.S.C. § 254(a)(2), (b)), *aff'd per curiam*, 993 F.2d 1539 (4th Cir. 1993). They include duties " 'performed as part of the regular work of the employees in the ordinary course of business[,] work [that] is necessary to the business . . . . [and also] primarily for the benefit of the employer.' " *Vega*, 36 F.3d at 424 (quoting *Dunlop v. City Electric, Inc.*, 527 F.2d 394, 401 (5th Cir. 1976)).

Preliminary activities are those "engaged in by an employee before the commencement of his 'principal' activity or activities." 29 C.F.R. § 790.7 (2004). " '[P]ostliminary activity' means an activity engaged in by an employee after the completion of his 'principal' activity or activities . . . ." *Id.* Preliminary and postliminary activities are spent primarily for the employees' own interests, completed at the employees' convenience, and not necessary to the employer's business. *Jerzak v. City of South Bend*, 996 F. Supp. 840, 848 (N.D.Ind. 1998).

1. Waiting Time

Plaintiff asserts he and the class members should be compensated for waiting time both between receiving job assignments and physically commencing work at the job sites and between stopping

work and returning to defendant's office. We consider two factors in determining whether plaintiff's waiting time is a principal activity and compensable under The Portal to Portal Act. The first issue is whether the time spent is predominantly to benefit the employer and integral to the job. *Preston v. Settle Down Enterprises, Inc.*, 90 F. Supp. 2d 1267, 1278-79 (N.D.Ga. 2000) (citations omitted); *Vega*, 36 F.3d at 425 (citing *Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1411 (5th Cir. 1990)). The second issue is whether the employee is able to use the time for their own personal activities. *Vega*, 36 F.3d at 426 (citing *Mireles*, 899 F.2d at 1413).

Defendant is in the business of providing temporary labor to its customers on an as-needed basis. Customers request defendant's services when extra help is needed on any variety of construction projects. Defendant hires enough workers on a daily basis to satisfy that demand. Workers receive assignments because work is available on that particular day. Defendant does not retain individuals to wait for customers to request labor services.

After receiving a work assignment, the class members elect how they will travel from defendant's office to the job site. They can use their own vehicle, ride public transportation, walk, car pool with another driver, or sign up for defendant's optional transportation service. Defendant does not restrict the mode, the class members' activities while they wait for the ride, or their activities in transit. The class members are free to do as they please. At the end of the day, defendant gives the class members the option whether to return to the office to get their paycheck at that time or at a later date.

Based on this evidence, we hold the class members' time spent waiting is a preliminary and postliminary activity and noncompensable. The class members' principal activity, that which defendant hired them for, is to work for customers on a daily basis. Temporary labor is the entire scope of defendant's business. Customers pay for that service, which begins upon arrival at the job site and stops at the end of the work day. The class members' idle time either before or after the workday is personal. Many spend waiting time reading the newspaper, sleeping, drinking coffee, eating meals, watching television, or socializing with other waiting workers.

The class members' time spent waiting directly correlates to their choice of transportation. They are free to spend that time as they wish. It is neither beneficial nor indispensable to defendant's business. We decline to extend "hours worked" to include the class

members' waiting time prior to arrival at the job site and at the end of the day.

2. Travel Time

Travel time is only compensable under The Portal to Portal Act if it is a principal activity of the employee. 29 U.S.C. § 254. Normal commuting from home to work and back is considered ordinary travel and not a "principal activity" absent a contract stating otherwise. 29 U.S.C. § 254; 29 C.F.R. §§ 785.34 and 785.35 (2004). Travel from an employer's campus to the "actual place of performance" is noncompensable. 29 C.F.R. § 790.7(e) (2004). However, travel between job sites *after* work has begun for the day is compensable. *Wirtz v. Sherman Enterprises, Inc.*, 229 F. Supp. 746, 753 (1964) (emphasis supplied); 29 C.F.R. § 785.38 (2004).

Plaintiff relies heavily on *Preston*, 90 F. Supp. 2d 1267, in arguing that travel time to and from the job sites is compensable as a principal activity. There, the court addressed this same issue. Similar to the present case, the defendant provided temporary labor to customers on a daily basis. *Id.* at 1272. Laborers hired were furnished transportation from the defendant's office to the job sites. *Id.* at 1273. The court analyzed the issue by reviewing 29 C.F.R. § 785.38, which states, in part:

> Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice.

Based on this regulation, the court considered three important factors: (1) whether workers were required to meet at the defendant's office before going to the job site; (2) whether workers performed labor before going to the job site; and (3) whether workers picked up and carried tools to the job site. *Preston*, 90 F. Supp. 2d at 1280-81. Factors two and three did not apply in *Preston*. *Id.* at 1280. However, the court ruled on factor one that "arriving at a business on one's own initiative seeking employment" is not the same as an employer requiring an employee to report at a meeting place. *Id.* at 1280-81. Thus, "hours worked" did not accrue until after arrival at the job site.

Applying the same analysis here, we find identical answers to factors one and two. First, defendant does not require employees to report at its office at a certain time. Rather, it established the policy for laborers to follow if they were interested in seeking employment from defendant on a daily basis. Second, the class members do not perform any work either at defendant's office, or in transit to the job sites. Third, unlike *Preston*, the record indicates that the class members are provided personal protective equipment after receiving an assignment and before reporting to the job site. We address factor three, the picking up and carrying of tools to the job site.

In *Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345 (10th Cir. 1986) and *D A & S Oil Well Servicing, Inc. v. Mitchell*, 262 F.2d 552 (10th Cir. 1958), the courts found travel time compensable as an indispensable part of the employees' jobs. Employer-defendants in both cases required their employees to transport specialized equipment necessary to service oil wells. *Crenshaw*, 798 F.2d at 1346; *D A & S Oil Well Servicing, Inc.*, 262 F.2d at 553-54. In an unpublished opinion, the District Court for the Eastern District of Kentucky held that in situations where employees are transporting specialized equipment to the job site, "it can be concluded that the transportation of specialized equipment, provided by the employer, is work in and of itself." *Spencer v. Auditor of Public Accounts*, No. 88-54, 1990 U.S. Dist. Lexis 1076 (E.D.Ky. Jan. 30, 1990).

The USDOL addressed this issue in 29 C.F.R. § 790.7, its own expansive interpretation of "preliminary" and "postliminary" activities. The regulation distinguished between an employee transporting heavy equipment and ordinary hand tools. 29 C.F.R. § 790.7(d) (2004). In considering heavy equipment, the regulation states the employee's travel "is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) . . . ." and does not fall under the noncompensable travel outlined by The Portal to Portal Act. *Id.*

We agree with this distinction between the transportation of specialized and heavy equipment and the non-unique protective equipment issued the class members by defendant. The record indicates the class members receive hard hats, boots, and gloves. These implements are not specialized and are used in a breadth of manual labor jobs. It is a different situation from an employee transporting specialized vehicles, tools, or heavy equipment necessary to perform highly sophisticated work. The receipt of nonspecialized protec-

tive equipment does not make travel time compensable under 29 C.F.R. § 785.38. If its issuance constituted the beginning of "hours worked," employers could just wait until employees were at the job site before passing them out to save money.

We note further that the Fifth Circuit encountered the issue of compensable travel time in *Vega*, 36 F.3d 417. The defendant, a farm laborer contractor, provided its employee-laborers transportation, for a fee, to and from the farm sites. *Id.* at 423. The court held the traveling time was preliminary and postliminary activity and not compensable. *Id.* at 425. It based its decision on factors present in the case at bar. First, the laborers performed no work prior to getting on the bus in the morning. *Id.* Second, the defendant offered the transportation as an option to the workers and did not require its usage. *Id.* Third, not all of the laborers elected to use the transportation. *Id.* The court concluded the travel from the defendant's office to the farm sites was "an extended home-to-work-and-back commute." *Id.*

These factors, together with our analysis of *Preston*, compels us to hold that class members' travel time is a preliminary and postliminary activity and is noncompensable. This assignment of error is overruled.

VIII. Conclusion

Defendant complies with N.C. Gen. Stat. § 95-25.8 and N.C. Admin. Code tit. 13, r. 12.0305 in withholding the class members' wages to pay for an optional transportation service to and from job sites. The class members are not due compensation for time spent waiting for and traveling on defendant's optional transportation service under N.C. Gen. Stat. § 95-25.6. The trial court's grant of summary judgment is affirmed.

Affirmed.

Judges BRYANT and LEVINSON concur.

JENNIFER L. PITTS, ADMINISTRATRIX OF THE ESTATE OF FELICIA HOPE LYNCH, PLAINTIFF v. NASH DAY HOSPITAL, INC., ENGLEWOOD OB-GYN ASSOCIATES, INC., TOMMY R. HARRIS, AND MOSES E. WILSON, DEFENDANTS

No. COA03-558

(Filed 7 December 2004)

Medical Malpractice— expert testimony excluded—standard of care—similar community

The trial court erred by excluding a doctor's expert testimony from a medical malpractice trial based on the conclusion that the witness was articulating a national standard of care. Although the doctor testified that the standard of care for the surgery in question is national, the issue is whether his testimony as a whole meets the requirements of N.C.G.S. § 90-21.12. He established his knowledge of the standard of care in a similar community in light of his equivalent skill and training, familiarity with the equipment and techniques used in the surgery at issue, his first-hand investigation of the town where the surgery was performed (Rocky Mount) and its hospital, and his testimony about the similarity of Rocky Mount to the communities where he had practiced.

Judge STEELMAN dissenting.

Appeal by plaintiff from order entered 19 December 2002 by Judge Milton F. Fitch, Jr. in Nash County Superior Court. Heard in the Court of Appeals 18 March 2004.

Rountree & Boyette, L.L.P., by Charles S. Rountree, for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by Barry S. Cobb, for defendants-appellees.

CALABRIA, Judge.

Jennifer L. Pitts ("plaintiff"), administratrix of the estate of Felicia Hope Lynch, appeals from order of the trial court excluding the testimony of plaintiff's expert witness and directing a verdict in favor of defendants, Englewood OB-GYN Associates, Inc. ("Englewood"), Tommy R. Harris ("Dr. Harris"), and Moses E. Wilson ("Dr. Wilson").[1] For the reasons stated herein, we reverse.

1. Plaintiff previously took a voluntary dismissal of all claims against Nash Day Hospital, Inc. with prejudice.

This lawsuit arose out of allegations of negligence surrounding laparoscopic surgery performed on Felicia Hope Lynch ("Ms. Lynch") by Dr. Harris on 13 January 1998. Due to chronic pelvic pain and an adnexa cyst, Ms. Lynch's physician referred her to Dr. Harris, a board-eligible but not board-certified specialist in obstetrics and gynecology with operative privileges at Nash Day Hospital. Ms. Lynch's sonogram revealed an ovarian cyst measuring five centimeters. Dr. Harris scheduled Ms. Lynch for surgery to remove the cyst.

On 13 January 1998 at Nash Day Hospital after Ms. Lynch was placed under anesthesia and examined, Dr. Harris commenced the laparoscopic surgery for removal of the cyst and possibly an ovary. During the surgery, Dr. Harris discovered the cyst was much smaller than originally anticipated but multiple adhesions in Ms. Lynch's pelvic region connected her organs to her abdominal wall. Dr. Harris changed his surgical plan and attempted to cut and release the adhesions but stopped when he deemed it was no longer safe and saw that he could not remove all the adhesions. Upon completion of the surgery, Dr. Harris placed a clear fluid in the abdominal cavity to ensure there was no remaining internal bleeding and found no indication of any bleeding. After surgery, Ms. Lynch was taken to the Nash Day Hospital recovery room, where it was noted that her blood pressure had dropped. Nevertheless, Dr. Harris never examined or observed Ms. Lynch after the surgery. He testified that Ms. Lynch was not yet awake, "so there was nothing for me to say to her." Dr. Harris also testified that, after surgery, it was standard practice for the anesthesiologist, rather than the operating surgeon, to manage the care of the patient in the recovery room.

Following discharge, Ms. Lynch experienced nausea, vomiting, abdominal cramps, and was also lethargic and pale. James Lee Williams ("Mr. Williams"), Ms. Lynch's boyfriend, called Dr. Harris' office, Englewood, multiple times reporting the problems Ms. Lynch was experiencing. The office staff, on behalf of Dr. Harris' partner, Dr. Wilson, told Mr. Williams the symptoms were normal. On the night of 14 January 1998, Ms. Lynch stopped breathing and efforts to resuscitate her were unsuccessful. She was pronounced dead in the emergency room at Halifax Memorial Hospital. The medical examiner determined the cause of her death was "exsanguination from the left ovarian artery." Stated another way, Ms. Lynch bled to death internally from a cut to her left ovarian artery, either by "scalpel or trochar injury" or while the "adhesions were being lysed." At the time of her death, Ms. Lynch was twenty-eight years old.

Plaintiff brought suit for wrongful death and medical malpractice. Plaintiff alleges Dr. Harris was negligent in his surgical performance and administration of post-operative care. Plaintiff also contends Dr. Wilson failed to properly respond to the telephone calls from Mr. Williams alerting him and his staff of Ms. Lynch's failing condition.

At trial, plaintiff tendered one expert witness, Daniel M. Strickland ("Dr. Strickland"), as an "expert in the standards of practice in this case." Three separate times, plaintiff attempted to tender Dr. Strickland as an expert witness. Defendants objected each time, contending plaintiff had failed to establish Dr. Strickland was familiar with the standard of care in Rocky Mount or a similar community, as required by N.C. Gen. Stat. § 90-21.12 (2003). The trial court allowed plaintiff to reopen Dr. Strickland's testimony in order to make a further showing on the issue of "similar community." After finding that plaintiff failed to present competent medical testimony establishing the relevant standard of care, the trial court granted defendants' motion for directed verdict. Plaintiff appeals.

Plaintiff assigns error to the trial court's finding of fact that Dr. Strickland was not familiar with "the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act." Plaintiff also assigns error to the trial court's conclusions of law that Dr. Strickland's testimony was irrelevant, immaterial, and inadmissible. We agree with plaintiff and reverse the trial court.

The trial court directed a verdict in the case *sub judice* after determining that Dr. Strickland could not show personal knowledge of the standard of care for laparoscopic surgery in Rocky Mount or a similar community. We initially note that "[t]he competency of a witness to testify as an expert is addressed to the sound discretion of the trial court and the trial court's determination will not be disturbed by the reviewing court in the absence of an abuse of discretion." *Barham v. Hawk*, 165 N.C. App. 708, 711-12, 600 S.E.2d 1, 4 (2004). In determining whether the trial court abused its discretion, we consider N.C. Gen. Stat § 90-21.12, which sets forth the standard of care in medical malpractice cases:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless

> the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

In analyzing N.C. Gen. Stat. § 90-21.12, the trial court opined that the legislature "intended in every way to say as strongly as they could say it that North Carolina wishes to avoid a national standard of care." The court concluded that "Dr. Strickland has articulated a national standard rather than the local standard of Rocky Mount."

Although Dr. Strickland testified that the standard of care for laparoscopic surgery is a national standard, we are not of the opinion that such testimony inexorably requires that his testimony be excluded. Rather, the critical inquiry is whether the doctor's testimony, taken as a whole, meets the requirements of N.C. Gen. Stat. § 90-21.12. In making such a determination, a court should consider whether an expert is familiar with a community that is similar to a defendant's community in regard to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of a particular medical community.[2] *See Henry v. Southeastern OB-GYN Assocs., P.A.*, 145 N.C. App. 208, 211, 550 S.E.2d 245, 247 (2001); *Tucker v. Meis*, 127 N.C. App. 197, 198-99, 487 S.E.2d 827, 829 (1997).

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2. There appears to be some conflict concerning what testimony sufficiently obviates the need to show an expert's familiarity with a defendant's community under N.C. Gen. Stat. § 90-21.12. This Court has previously held that "while 'it was the intent of the General Assembly to avoid the adoption of a national or regional standard of care for health care providers,' if the standard of care for a given procedure is 'the same across the country, an expert witness familiar with that standard may testify *despite his lack of familiarity with the defendant's community*[.]' " *Marley v. Graper*, 135 N.C. App. 423, 428, 521 S.E.2d 129, 133-34 (1999) (internal citations omitted) (emphasis added). *See also Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 656-57, 535 S.E.2d 55, 67 (2000); *Haney v. Alexander*, 71 N.C. App. 731, 736, 323 S.E.2d 430, 434 (1984). Subsequent opinions of this Court more stringently focused on the intent of the General Assembly to avoid a national standard of care. *See Henry*, 145 N.C. App. at 210-11, 550 S.E.2d at 246 (2001) (noting the "similar community" standard "encompasses more than mere physician skill and training" and includes variations in facilities, equipment, funding, and also "the physical and financial environment"); *Tucker v. Meis*, 127 N.C. App. 197, 198, 487 S.E.2d 827, 829 (1997). As such, *Henry* requires some level of familiarity with a defendant's community even if an expert testifies the standard is the same across the country. Yet, a recent opinion has questioned whether *Henry* constitutes controlling authority, *see Cox v. Steffes*, 161 N.C. App. 237, 245 n.1, 587 S.E.2d 908, 914 n.1 (2003), *disc. rev. denied*, 358 N.C. 233, 595 S.E.2d 148 (2004), and distinguished *Henry*. *Id.*

In the case *sub judice*, the evidence showed that Dr. Strickland's skill, training, and experience in obstetrics and gynecology are comparable to Dr. Harris' skill, training, and experience. Regarding the respective physician skill and training, the evidence showed that Dr. Harris is a board-eligible specialist in obstetrics and gynecology. Dr. Strickland is a board-certified specialist in obstetrics and gynecology. Dr. Harris and Dr. Strickland were trained outside of North Carolina but practiced medicine in multiple communities within the State. Dr. Harris undergoes continuing medical education including 150 hours of required credits every three years and also takes numerous courses in Maryland and Georgia. Dr. Strickland is a Fellow with the American College of Obstetricians and Gynecologists.

The evidence was also sufficient to show that facilities, equipment, funding, and the physical and financial environment of both the communities in which Dr. Strickland practiced obstetrics and gynecology and in Rocky Mount are similar. Dr. Strickland is licensed in five states, currently practices in West Jefferson, North Carolina, and has also practiced extensively in other locations throughout North Carolina including Albemarle, Boone, Elkin, Lenoir/Hickory, Mount Airy, and Wilkesboro. At trial, Dr. Strickland specifically cited the population and median income of Rocky Mount and testified that Rocky Mount is similar to communities in which he has practiced in terms of population served, rural nature, depressed economy, and limitations on resources. Additionally, prior to testifying, Dr. Strickland not only observed the community of Rocky Mount but also noted the size of Nash Day Hospital. Dr. Strickland also testified that he deduced from medical records and Dr. Harris' deposition the type of equipment and techniques Dr. Harris used in Ms. Lynch's surgery. Dr. Strickland was familiar with the equipment because he used similar to equipment in other communities in his medical practice.

Dr. Strickland's testimony falls within the scope of testimony that this Court has held to be permissible under N.C. Gen. Stat. § 90-21.12. In *Cox v. Steffes*, this Court summarized some of the relevant cases:

> In *Coffman v. W. Earl Roberson, M.D., P.A.*, 153 N.C. App. 618, 624-25, 571 S.E.2d 255, 259 (2002), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 111 (2003), this Court held that a doctor's testimony regarding standard of care was sufficient when the doctor testified generally that he was familiar with the standard of care in communities similar to Wilmington, that he based his opinion on Internet research regarding the hospital, and that he knew the hospital was a sophisticated training hospital. *See also*

Leatherwood v. Ehlinger, 151 N.C. App. 15, 22-23, 564 S.E.2d 883, 888 (2002) (reversing directed verdict when plaintiffs' expert specifically testified that he had knowledge of the standards of care in Asheville and similar communities because of his practice in *communities of similar size to Asheville* and because he had attended rounds as a medical student in the Asheville hospital at issue), *disc. review denied*, 357 N.C. 164, 580 S.E.2d 368 (2003).

Cox, 161 N.C. App. at 244-45, 587 S.E.2d at 913 (emphasis added). This Court went on to find the expert had sufficiently acquainted himself with the relevant community standards when he reviewed written information from the plaintiff's counsel prior to testifying. *Id.* Dr. Strickland's familiarity with Rocky Mount exceeds that previously deemed sufficient by this Court in reviewing the propriety of and reversing a directed verdict. Accordingly, we hold that Dr. Strickland established his knowledge of the standard of care in a "similar community" in light of his equivalent skill and training, familiarity with the equipment and techniques used by Dr. Harris, first-hand investigation of Rocky Mount and its hospital, and his testimony as to the similarity in the communities where he has practiced and Rocky Mount.

Because we hold that Dr. Strickland established that he had knowledge of a similar community and the trial court abused its discretion in excluding his testimony, we do not reach plaintiff's other assignments of error.

Reversed.

Judge McGEE concurs.

Judge STEELMAN dissents in a separate opinion.

STEELMAN, Judge, dissenting.

I respectfully dissent from the majority's holding that the expert witness which plaintiff tendered sufficiently met the "same or similar community" standard as required by N.C. Gen. Stat. § 90-21.12.

I. Standard of Review

As noted by the majority opinion, our standard of review for the trial court's exclusion of plaintiff's expert witness is abuse of discretion. An abuse of discretion occurs only where the trial court's ruling

is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision. *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). Plaintiff's burden to show an abuse of discretion is a heavy one indeed. I do not believe plaintiff has met this burden and therefore, the ruling of the trial court should be affirmed.

II. Similar Community Standard

The trial judge afforded plaintiff not one, not two, but three opportunities to present testimony that met the standard of "similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action." N.C. Gen. Stat. § 90-21.12 (2003). In order to determine whether the trial judge abused his discretion, it is necessary to review in detail the proffered testimony.

Dr. Strickland testified he was familiar with the standards of practice for the performance of laprascopic surgery and follow-up care in Rocky Mount, North Carolina and similar communities. When asked the basis of this familiarity, Dr. Strickland stated:

> First of all, I believe that the standard is national, but more than that, if you consider the broad depth of American education, physicians in any area are trained from all over the country. Different medical schools from all over the country, different residencies from all over the country. We generally belong to the same professional organizations. We generally attend the same meetings. We read the same journals. Therefore there's an integration of medical practice in the United States, in my opinion, and I don't believe the standard is any different for Rocky Mount than it is for Elkin or Albemarle or West Jefferson.

During plaintiff's second tender, Dr. Strickland testified he had practiced in Elkin, Albemarle, Lenoir, Mount Airy and Wilkesboro, and that certain of those communities were similar in population to Rocky Mount. He further stated the records used at Nash General Hospital were similar to those he had used elsewhere, but was "not sure what [he could] directly deduce" from them. Following a forty-five minute recess, plaintiff made a third tender. Dr. Strickland testified he had: (1) determined the median income and population of Rocky Mount from the telephone book; (2) deduced the surgical resources available in the Rocky Mount community from the types of equipment listed in the operative report; and (3) driven by the hos-

pital and through Rocky Mount to get an impression of its economic base. He then formed an opinion that Rocky Mount was similar to some of the areas where he had practiced. At the conclusion of the third tender, Dr. Strickland was asked the following questions:

> [Defense counsel:] So, to summarize, what you know about the standard of care for OB-GYN surgeons practicing in Rocky Mount is that you've practiced in other small towns in North Carolina, you have driven past the hospital here, you have driven around enough to have knowledge in passing of what the industrial base was, and you've looked at the telephone book to see what the median income and population is. Is that basically what your basis is, Doctor?
>
> [Dr. Strickland:] My basis for concluding that they are similar?
>
> [Defense counsel:] Is that your basis—is that the basis of what you know about Rocky Mount, North Carolina and the standard of practice here?
>
> [Dr Strickland:] I suppose that's accurate.

It is not sufficient for an expert witness to merely make the assertion that the medical communities are similar, there must be a reasonable basis for this assertion. *Smith v. Whitmer*, 159 N.C. App. 192, 196-97, 582 S.E.2d 669, 672-3 (2003) (stating that even though the expert testified he was familiar with the standard of care in that medical community, he gave no basis for his conclusion, and thus his opinion was irrelevant). *See also Tucker v. Meis*, 127 N.C. App. 197, 198, 487 S.E.2d 827, 829 (1997) (finding the expert doctor "failed to make the statutorily required connection to the community in which the alleged malpractice took place or to a similarly situated community"). The "similar community" standard "encompasses more than mere physician skill and training[.]" *Henry v. Southeastern OB-GYN Assocs., P.A.*, 145 N.C. App. 208, 211, 550 S.E.2d 245, 247 (2001). It also encompasses variations in facilities, equipment, funding, and also the physical and financial environment of a particular medical community. *Id.*

The population and industrial base of a community are not relevant *per se* to meeting the "similar community" standard. It is not the size of a town or its economic resources that are to be considered, but rather how those resources are reflected in the "conditions, facilities and equipment available to a healthcare professional[.]" *Id.* at 213, 550 S.E.2d at 248 (Greene, J., concurring in the result).

In plaintiff's third attempt to tender Dr. Strickland as an expert, Dr. Strickland did testify about the surgical resources of the community based on his review of the operative report. However, this testimony appears to conflict with his testimony in the second tender, where he stated he was not sure what he could deduce from those reports.

The majority relies heavily on the case on *Cox v. Steffes*, 161 N.C. App. 237, 587 S.E.2d 908 (2003), *disc. review denied*, 358 N.C. 233, 595 S.E.2d 148 (2004). In *Cox*, the trial court granted defendant's motion for judgment notwithstanding the verdict and set aside a jury verdict in favor of the plaintiffs. *Id.* at 238, 587 S.E.2d at 909-10. The trial judge based his ruling on the fact that the plaintiff's expert witness was not familiar with the standard of care in a similar community. *Id.* at 239, 587 S.E.2d at 911-12. Dr. Donelly, plaintiff's expert, testified he, like the defendant doctor, was a board-certified surgeon, and that both his and the defendant's hospital were Level 2 hospitals. *Id.* at 244, 587 S.E.2d 913. In addition, "Dr. Donelly also more specifically expressed his view that Reading was similar to Fayetteville with respect to board-certified physicians, sophisticated lab services, x-ray departments, anesthesia services, hospital certification, and access to specialists." *Id.* Dr. Donelly thus testifed as to the similarity of specific resources available to the medical community where he and the defendant practiced. Central to the holding in *Cox* was the testimony that both hospitals in Reading, Pennsylvania and Fayetteville, North Carolina were Level 2 hospitals.

In contrast, Dr. Strickland did not testify concerning the level of any hospitals, nor did he equate the surgical resources available in Rocky Mount to those in any of the other areas where he had practiced medicine. Moreover, Dr. Strickland was a board-certified specialist in obstetrics and gynecology, while Dr. Harris was only board-eligible. Although Dr. Strickland testified he was familiar with the standard of care in North Carolina, "he failed to make the statutorily required connection to the community in which the alleged malpractice took place or to a similarly situated community." *Tucker*, 127 N.C. App. at 198, 487 S.E.2d at 829.

Given Dr. Strickland's testimony in this case, I fail to discern how the trial court's exclusion of this testimony was "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." I would thus affirm the trial court as to plaintiff's first assignment of error.

Since I would affirm the trial court on plaintiff's first assignment of error, it is necessary that I address plaintiff's remaining arguments.

III. National Standard of Care

Plaintiff asserts that laparoscopic surgery is a "revolutionary" and "cutting edge" medical technology requiring specialized training, and that such a technique should be subject to a national standard of care. Defendant, Dr. Harris, testified he had performed a thousand laparoscopies during his residency in the 1980's. Dr. Strickland testified he was familiar with "the standards of practice for the performance of laparoscopic surgery and follow-up care in Rocky Mount, North Carolina and similar communities." However, Dr. Strickland never testified that laparoscopic surgery was a "revolutionary" or "cutting edge" surgical technique or that he had even performed such surgery. Furthermore, he offered no testimony concerning the training necessary to perform laparoscopic surgery. The basis of his assertion that a "national standard of care" applied in this case was not the nature of the procedure. Rather, it was based upon a general characterization of "the broad depth of American education" of physicians. Dr. Strickland stated that "an integration" of the medical practice in the United States had occurred due to physicians in the area being trained at medical schools and performing their residencies all over the country, medical professionals belonging to the same professional organizations, attending the same meetings, and reading the same journals.

This Court has "recognized very few 'uniform procedures' to which a national standard may apply, and to which an expert may testify." *Henry*, 145 N.C. App. at 211, 550 S.E.2d at 247 (citations omitted). Dr. Strickland's testimony in this case fails to establish a "uniform procedure" or a "cutting edge" technology for which such a standard might possibly be appropriate. To apply a national standard of care in this case, based upon Dr. Strickland's testimony, would be to adopt a national standard of care for the practice of medicine in general. This is clearly contrary to the express provisions and intent of the General Assembly, which enacted a "same or similar community" standard in N.C. Gen. Stat. § 90-21.12.

While Dr. Strickland cogently and concisely set forth the case for a national standard of care, it is for this state's General Assembly, not the courts, to determine the appropriate standard of care in medical negligence cases.

IV. Who Is To Determine the Applicable Standard of Care

Plaintiff next contends that whether West Jefferson, Elkin, Albemarle, Boone, Lenoir/Hickory, Mount Airy and Wilkesboro are in fact similar communities is a matter for the jury to determine, not the trial judge. I disagree.

It is the duty of the trial judge to determine whether an expert medical witness can render an opinion under N.C. Gen. Stat. § 90-21.12 and Rule 702 of the Rules of Evidence. *Taylor v. Abernethy*, 149 N.C. App. 263, 272, 560 S.E.2d 233, 239 (2002), *disc. review denied*, 356 N.C. 695, 579 S.E.2d 102 (2003). Furthermore, in none of the cases in which this court considered N.C. Gen. Stat. § 90-21.12, was the issue of similar communities left to the jury to decide. *Smith v. Whitmer*, 159 N.C. App. 192, 582 S.E.2d 669 (2003); *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 564 S.E.2d 883 (2002); *Coffman v. Roberson*, 153 N.C. App. 618, 571 S.E.2d 255 (2002), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 111 (2003); *Tucker v. Meis*, 127 N.C. App. 197, 487 S.E.2d 827(1997); *Henry v. Southeastern OB-GYN Assocs., P.A.*, 145 N.C. App. 208, 550 S.E.2d 245 (2001). It was for the trial court to determine whether Dr. Strickland was qualified as an expert in the area of his testimony and whether his testimony was relevant. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004). In this case, without a showing of "same or similar communities," Dr. Strickland was not qualified as an expert, nor was his testimony relevant on the appropriate standard of care. I would find this argument to be without merit.

V. No Requirement of Expert Testimony

Finally, plaintiff contends it was improper for the court to direct verdict in favor of defendants because the alleged negligence in this case was of a type that the jury could determine without the testimony of an expert. I disagree.

To prevail in a medical malpractice case a plaintiff must show " '(1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff.' " *Smith*, 159 N.C. App. at 195, 582 S.E.2d at 671 (citations omitted). Generally, expert testimony is required when the standard of care and proximate cause are matters involving highly specialized knowledge beyond that of laymen. *Smithers v. Collins*, 52 N.C. App. 255, 260, 278 S.E.2d 286, 289 (1981). However, expert testi-

mony is not necessary in all medical malpractice cases to establish the standard of care or proximate cause. *Id.* This is true, especially where the jury, based on its common knowledge and experience, is able to understand and judge the actions of the doctor. *Id.* This rule has been applied in the case of taking and recording a patient's vital signs and the placement of bedpans. *Henry*, 145 N.C. App. 208, 211, 550 S.E.2d 245, 247 (2001). This case now before us is not such a case, as it deals with laparoscopic surgery and the post-operative treatment of a surgery patient. This is beyond the "ken of laymen." I would find this assignment of error to be without merit.

VI. Summary

Appellant has failed to demonstrate that the trial judge abused his discretion in excluding the testimony of Dr. Strickland. Plaintiff's remaining arguments are also equally unavailing. I would affirm the trial court.

ALLSTATE INSURANCE COMPANY, PLAINTIFF v. MICHAEL LAHOUD, R.L.J., A MINOR, AND S.J. AS GUARDIAN AD LITEM FOR R.L.J., A MINOR, DEFENDANTS

No. COA03-964

(Filed 7 December 2004)

Insurance— duty to defend and provide coverage—exclusion for intentionally harmful act—indecent liberties with a child—insured pled guilty in criminal case

The trial court did not err by granting summary judgment in favor of plaintiff insurance company declaring that it had no duty to defend defendant in a civil suit and no obligation to provide insurance coverage for him based on an exclusion in the policy indicating that it would not apply to intentionally harmful acts or omissions even though defendant attempted to explain why he pled guilty to one count of taking indecent liberties with a child in the criminal case arising out of a car trip defendant took on 31 May 2001 with the minor victim and another child, because: (1) defendant's guilty plea established conclusively that he committed an intentionally harmful act; (2) an assertion that defendant entered a plea of guilty to avoid the possibility of an active prison sentence is not sufficient to rebut the effect on his guilty plea; and (3) defendant cannot create a genuine issue of material

fact simply by submitting his own affidavit contradicting his own prior sworn testimony and cannot now argue that the act may have been unintentional or negligent since the affidavit is self-serving.

Judge HUDSON concurring in part and dissenting in part.

Appeal by defendant Michael Lahoud from order entered 27 March 2003, by Judge W. Osmond Smith, III, in Wake County Superior Court. Heard in the Court of Appeals 22 April 2004.

Wallace, Morris, Barwick, Landis, Braswell & Stroud, P.A., by P.C. Barwick, Jr., and Kimberly A. Connor, for plaintiff appellee.

George B. Currin; and Rudolf, Maher, Widenhouse, & Fialko, by M. Gordon Widenhouse, Jr., for Michael Lahoud defendant appellant.

McCULLOUGH, Judge.

Defendant Michael Lahoud appeals the trial court's order which granted summary judgment for plaintiff Allstate Insurance Company. A brief summary of the facts follows.

Michael Lahoud went to Virginia on 31 May 2001 to examine a parcel of real estate that he was considering buying. Lahoud took R.L.J. and J.V. with him. R.L.J. was nine years old at the time. At some point during the drive, R.L.J. sat in the front passenger area of the vehicle. During this time, Lahoud allegedly fondled R.L.J.'s penis and buttocks.

Lahoud was charged with one count of taking indecent liberties with a child. The State allowed Lahoud to plead guilty to this charge in exchange for a suspended sentence, an apology to R.L.J., and payment of restitution for R.L.J.'s therapy. Lahoud feared that if he did not take the offer, he would be prosecuted in federal court and would be facing more severe charges and active prison time. In open court, he entered a plea of guilty to the charge of taking indecent liberties with a child.

On 25 February 2002, S.J. filed a civil complaint against Michael Lahoud for assault and battery and intentional infliction of emotional distress. The complaint alleged that Lahoud sexually assaulted R.L.J. while on the trip to Virginia. Subsequently, the

complaint was amended to include a claim for negligent infliction of emotional distress.

On 29 July 2002, plaintiff Allstate Insurance Company sought a declaratory judgment action to determine its rights, duties, and obligations to defendant. Previously, plaintiff had issued a personal umbrella policy to defendant that was in effect from 20 October 2000 until 20 October 2001. The issues were whether Allstate had a duty to defend Lahoud in the civil suit and whether it had to provide insurance coverage for him.

On 30 December 2002, plaintiff filed a motion for summary judgment. The trial court granted plaintiff's motion for summary judgment. It determined that the policy provided no coverage for any of the matters alleged in the underlying complaint, and plaintiff Allstate had no duty to defend Lahoud in that action. Defendant appeals.

On appeal, defendant argues that the trial court erred by granting the motion for summary judgment because there were genuine issues of material fact regarding Allstate's duty to defend Lahoud and its obligation to provide insurance coverage for him. We disagree and affirm the decision of the trial court.

I. Standard of Review

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 Industries, Inc.*, 129 N.C. App. 389, 393-94, 499 S.E.2d 772, 775 (1998). "The moving party bears the burden of showing the lack of [a] triable issue of fact." *Id.* at 394, 499 S.E.2d at 775. "The evidence is to be viewed in the light most favorable to the nonmoving party." *Id.*

II. Issue on Appeal

The issue on appeal is whether Allstate has a duty to defend Lahoud and whether the insurance policy provides coverage under the circumstances of this case. Lahoud contends that there is a genuine issue of material fact regarding whether his acts were intentionally harmful. Allstate argues that defendant's guilty plea in the criminal case establishes conclusively that he committed an intentional act. We agree that the outcome of this case hinges on the applicability of the exclusion section of the policy.

Provisions in an insurance policy which extend coverage to the insured must be construed liberally to allow coverage whenever possible. *Erie Ins. Exch. v. St. Stephen's Episcopal Church*, 153 N.C. App. 709, 712, 570 S.E.2d 763, 765 (2002). However, exclusionary provisions are disfavored, and if ambiguous, they will be construed against the insurer and in favor of the insured. *Id.* The cases which have interpreted insurance coverage exclusions are varied, and the individual facts of each case often determine the outcome. *Id.* at 712, 570 S.E.2d at 766. The insurer bears the burden of proving that an exclusion is applicable. *Insurance Co. v. McAbee*, 268 N.C. 326, 328, 150 S.E.2d 496, 497 (1966).

In the section "General Exclusions-When This Policy Does Not Apply," Allstate excludes from coverage "any intentionally harmful act or omission of an **insured**[.]" Thus, in order for the exclusion to apply, Allstate had to prove that defendant's acts were *intentionally harmful.*

Our appellate courts have considered cases in which insurance policies excluded coverage for bodily injury that was "expected or intended" from the standpoint of the insured. In *Nationwide Mutual Ins. Co. v. Abernethy*, 115 N.C. App. 534, 536, 445 S.E.2d 618, 619 (1994), this Court considered the "expected or intended" language in the context of a child molestation charge. There, Robert Abernethy, a music teacher, was accused of sexually abusing one of his students. *Id.* at 535, 445 S.E.2d at 618. Abernethy pled guilty to the charge of taking indecent liberties with children. *Id.* at 535, 445 S.E.2d at 618-19. In a subsequent civil trial, the issue was whether Nationwide was required to provide coverage for Abernethy. *Id.* at 535, 445 S.E.2d at 619. Abernethy's position was that "he did not intend or expect to cause injury . . . when committing the acts of sexual abuse." *Id.* at 537, 445 S.E.2d at 619.

The *Abernethy* Court rejected this argument because "Abernethy's deeds and subsequent admission that he wilfully sexually abused Lowery establish that, at the very least, Lowery's injuries were 'expected' by Abernethy as that term is used in the policy." *Id.* at 540, 445 S.E.2d at 621. The Court noted that Abernethy pled guilty to the charge of taking indecent liberties with children in violation of N.C. Gen. Stat. § 14-202.1. *Id.* at 538, 445 S.E.2d at 620. The Court further explained:

> The statute prescribes as an element of the offense that the defendant's acts be "willful." "Willful" has been defined *inter alia*

> as "done deliberately: not accidental or without purpose: intentional, self-determined." Webster's Third New International Dictionary 2617 (1968). In summary, defendant has admitted he *intentionally* committed acts of *sexual abuse*. *See State v. Thompson*, 314 N.C. 618, 624, 336 S.E.2d 78, 81 (1985) (a guilty plea is an admission that defendant committed each element of the crime). In light of this acknowledgment, we conclude he "knew it was probable" that Lowery's injuries would ensue and thus "expected or intended" those injuries.

Id. at 538, 445 S.E.2d at 620. The *Abernethy* Court therefore noted that the guilty plea and admission of intentional acts of sexual abuse were sufficient to show that Abernethy knew it was probable that injury would ensue.

Although *Abernethy* is instructive, it is important to recognize how it is different from the present case. The exclusionary language in *Abernethy* was broader because it denied coverage for injuries that were "expected or intended." In contrast, the exclusionary language in the present case is more narrow. Here, Allstate must show that Lahoud's acts were "intentionally harmful."

This case turns on whether Lahoud's guilty plea established conclusively that he committed an intentionally harmful act. In *Commercial Union Ins. Co. v. Mauldin*, 62 N.C. App. 461, 463, 303 S.E.2d 214, 216 (1983), this Court considered the same exclusionary language as it did in *Abernethy*: whether the injury was expected or intended. However, the majority opinion interpreted this language broadly:

> There is no ambiguity in the sentence "[This policy does not apply] to bodily injury or property damage which is either expected or intended from the standpoint of the insured." The sentence obviously means that the policy is excluding from coverage bodily injury caused by the insured's intentional acts, determining whether the act is intentional from the insured's point of view.

Id.

In *Mauldin*, an insured intended to shoot his wife, but inadvertently killed another person. *Id.* at 461, 303 S.E.2d at 215. This Court held that the insured's guilty plea to second degree murder "was an admission that he had the general intent to do the act, and it excluded him from coverage under the insurance policy." *Id.* at 464, 303 S.E.2d

at 217. The Court also alluded that the injury was "expected" from the standpoint of the insured because the insured "obviously knew it was probable that he would hit [the victim] when he fired four or five shots into her moving car." *Id.* Thus, the majority opinion indicates that coverage was not available, and it cites both the intentional and expected prongs of the exclusion clause.

Judge Becton wrote a concurring opinion in *Mauldin* because he disagreed that the guilty plea conclusively established intent to commit bodily injury. *Id.* at 465, 303 S.E.2d at 217. Although he agreed with the final result, Judge Becton believed that the decision should be based solely on the "expected" prong of the policy exclusion. *Id.* More importantly, Judge Becton forecasted the dilemma we face in the present case:

> Although it is true that a guilty plea in a criminal action may properly be admitted into evidence in a related civil proceeding as an admission against interest, such a plea is not, in my view, determinative of the ultimate factual question in a civil suit. Experienced members of both the bench and bar are aware that pleas are entered for many different reasons. The most common is the most pragmatic: the sobering realization that in many criminal cases a plea of not guilty is a game of chance. The defendant has no control over the dice, and the stakes comprise his freedom.

Id.

Although we admire Judge Becton's foresight in identifying this issue, we are mindful that Judge Becton's concurrence is not the law in North Carolina. Rather, the majority opinion is controlling because it has not been reversed or overruled. That decision determined that defendant's guilty plea "was an admission that he had the general intent to do the act, and it excluded him from coverage[.]" *Id.* at 464, 303 S.E.2d at 217.

In the present case, defendant articulates a position that mirrors the rationale cited in Judge Becton's concurring opinion. Defendant states that he agreed to plead guilty to one count of taking indecent liberties with a child because he was afraid that he would be prosecuted in federal court and would face more severe charges, including active prison time.

This argument is not persuasive because a federal case upon which the majority in *Mauldin* relied rejected a similar argument. In

Stout v. Grain Dealers Mutual Insurance Company, 307 F.2d 521 (4th Cir. 1962), the Court noted that "[i]n this action [defendant insured] asserted that he entered such a plea not because of guilt but to avoid the possibility of an active prison sentence." *Id.* at 525. "Such an assertion is not sufficient to rebut the effect of his plea of guilty[.]" *Id.*

In the present case, we believe that the exclusion applies because plaintiff presented sufficient evidence showing that defendant's actions were intentionally harmful. Defendant was accused of taking indecent liberties with a minor. He pled guilty to the charge, accepted responsibility, and made the following statement: "I would like to apologize to the young man who is the victim and his family. He has done nothing wrong. I am completely responsible and I am sorry." As was the case in *Mauldin*, the guilty plea established that defendant had the intent to commit the act.

Furthermore, defendant cannot create a genuine issue of material fact simply because he submitted his own affidavit now arguing that the act may have been unintentional or negligent. Like his other actions throughout these proceedings, defendant's submission of this affidavit is self-serving. When he feared prosecution in federal court and active prison time, defendant pled guilty in the criminal trial and took responsibility for his actions. However, in a subsequent civil proceeding in which the victim sought over $10,000.00 in compensatory damages and over $10,000.00 in punitive damages, defendant denied committing an intentional act of sexual abuse. Defendant's motive is clear; he hopes to trigger coverage by recasting his admitted intentional acts as accidental. However, we will not allow this defendant to take advantage of our legal system by claiming different things to different courts.

It is well settled that a nonmovant may not generate a conflict simply by filing an affidavit contradicting his own sworn testimony where the only issue raised is credibility. The issue is not whether the underlying facts as testified to by Lahoud might have supported a jury verdict that he was merely negligent, but whether his affidavit and deposition contradicting earlier testimony in court is sufficient to create an issue of fact. We conclude that although Lahoud's account of the underlying fact situation might, in other circumstances, be enough to defeat summary judgment, once Allstate supported its summary judgment motion with Lahoud's sworn testimony, Lahoud can only defeat summary judgment on the issue of his intentional acts

by producing evidence *other than his own affidavit or deposition contradicting his own testimony.*

This rule was followed recently in *Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 86, 590 S.E.2d 15, 19 (2004):

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

In the leading case cited above, this Court explained:

> The question thus presented for our review is whether a party opposing a motion for summary judgment by filing an affidavit contradicting his prior sworn testimony has "set forth specific facts showing that there is a genuine issue for trial" as required by G.S. § 1A-1, Rule 56(e). We think a party should not be allowed to create an issue of fact in this manner and thus hold that *contradictory testimony contained in an affidavit of the nonmovant may not be used by him to defeat a summary judgment motion* where the only issue of fact raised by the affidavit is the credibility of the affiant.

Mortgage Co. v. Real Estate, Inc., 39 N.C. App. 1, 9, 249 S.E.2d 727, 732 (1978) (emphasis added).

We are unable to distinguish the present case from the cited cases. Here, the movant (Allstate) supported its summary judgment motion with sworn testimony, and Lahoud produced only his affidavit and deposition refuting his earlier plea testimony that he did, in fact, act willfully. Lahoud, the nonmovant, may not generate a conflict simply by filing an affidavit contradicting his earlier sworn testimony.

As was the case in *Abernethy*, we recognize that it is the victim who suffers the most from this entire ordeal. *Abernethy*, 115 N.C. App. at 540, 445 S.E.2d at 621. While we are sympathetic to the victim's situation, we must conclude that the exclusion to the insurance policy applies to the present case. The language of the exclusion is unambiguous, and through his intentional actions, defendant placed

himself outside the area of coverage. Because there is no genuine issue of material fact, the trial court acted appropriately in granting summary judgment for Allstate. The decision is

Affirmed.

Judge LEVINSON concurs.

Judge HUDSON concurring in part and dissenting in part.

HUDSON, Judge, concurring in part and dissenting in part.

The majority here affirms the grant of summary judgment to the plaintiff insurer. I agree with the majority's analysis of the policy language, and the distinction drawn between this case and *Abernethy*, to the effect that the allegations of the complaint include claims which are potentially covered by the policy. However, I conclude that the defendants have presented a forecast of evidence raising genuine issues of material fact as to whether those claims are covered. I do not agree that either *Commercial Union Ins. Co. v. Mauldin*, 62 N.C. App. 461, 463, 303 S.E.2d 214, 216 (1983) or *Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 590 S.E.2d 15 (2004), applies here. Instead, I believe we are bound by the three cases cited by defendants, which hold that one may explain a previous guilty plea in a related civil case. Thus, I dissent on this issue, and vote to reverse and remand for trial.

As the majority notes, Paragraph 8 of the Exclusion provisions of the policy indicates that it will not apply to "intentionally harmful" acts or omissions. Thus, if Lahoud's conduct was accidental or negligent, but he intended no harm, the policy could provide coverage. The depositions and affidavits explicitly contend that the disputed conduct was "negligent or unintentional," and that he "did not intend or expect to cause harm or injury."

Lahoud's deposition and affidavit create the issue of fact, when viewed with the other documents, including the prior guilty plea, in the light most favorable to Lahoud. The cases cited by defendant, which are not mentioned by the plaintiff in its brief, or by the majority, clearly establish that, while a guilty plea is admissible in a civil proceeding involving a related matter, it is not conclusive. In support of this proposition, defendant cites three cases: *Boone v. Fuller*, 30 N.C. App. 107, 226 S.E.2d 191 (1976); *Teachey v. Woolard*, 16 N.C. App. 249, 191 S.E.2d 903, *cert. denied*, 282 N.C. 430, 192 S.E.2d 840

(1972); *Grant v. Shadrick*, 260 N.C. 674, 133 S.E.2d 457 (1963). Plaintiff cites no authority to the contrary, and, indeed does not attempt to distinguish these cases, which do clearly hold as defendant contends. For example, this Court stated, relying on *Grant*, that "evidence that a defendant entered a plea of guilty to a criminal charge arising out of [an incident] . . . is generally admissible in a civil trial for damages arising out of the same [incident], although it is not conclusive and may be explained." *Teachey*, 16 N.C. App. at 252, 191 S.E.2d at 906. None of these cases have been overruled or reversed, and as such are binding on this Court. Applying these cases here, I conclude that the deposition testimony and affidavits explaining the plea are sufficient to create genuine issues of material fact as to whether Lahoud committed any acts or omissions affecting the minor, and, if so, whether such conduct was accidental or negligent.

The majority relies upon *Commercial Union*, which relied on a case from the Fourth Circuit. The federal case, *Stout v. Grain Dealers Mutual Insurance Company*, 307 F.2d 521 (4th Cir. 1962), is not binding on this Court in light of the more recent decisions of this Court and the North Carolina Supreme Court, cited above.

More important, however, is that *Commercial Union* is clearly distinguishable from the case here. As the majority notes, the issue there was whether an insurance policy covered conduct by a Mr. Wilmoth, or whether the conduct was excluded as "intended" bodily injury. Wilmoth previously pled guilty to second-degree murder for the shooting at issue. This is where the similarity ends. Here, the issue arises because Lahoud explained his prior guilty plea in his affidavit and deposition, as the cases hold that he may, thus creating a factual issue as to whether his conduct was accidental. On the contrary, in *Commercial Union*, Wilmoth made no attempt to explain his prior guilty plea, and in fact *stipulated that he intended to shoot* a victim. Thus, the issue was not whether intent was an issue of fact, but simply whether the policy language on its face could be construed to cover the stipulated conduct.

The *Belcher* case, also relied upon by the majority, is clearly distinguishable as well. Mr. Belcher was a plaintiff in a civil case alleging unfair trade practices. In his deposition in the case, he admitted he suffered no damages, thus establishing the absence of an element of his claim. Later, in an affidavit opposing summary judgment *in the same case*, he contradicted himself on this point in an attempt to

create an issue of fact on this element. This Court held, consistent with earlier decisions, that the plaintiff in a civil case may not defeat summary judgment by simply contradicting himself in an attempt to create a genuine issue of fact.

Here, unlike in either *Commercial Union* or *Belcher*, Lahoud presented testimony and an affidavit to explain his prior guilty plea, as our appellate Courts have held he may do. He did not stipulate to intentional conduct, as in *Commercial Union*, nor did he contradict his own previous sworn statements in the same civil case, as in *Belcher*. Because I believe that these cases do not apply and that we are bound to follow *Boone*, *Teachey*, and *Grant*, I respectfully dissent.

Accordingly, I would reverse the grant of summary judgment and remand for trial.

STATE OF NORTH CAROLINA v. GERRICK LAMONT BETHEA

No. COA03-1108

(Filed 7 December 2004)

1. Homicide— second-degree murder—officer's death during high speed chase—malice

The trial court correctly denied defendant's motion to dismiss a second-degree murder charge for insufficient evidence of malice in the death of an officer in an automobile accident while he was chasing defendant at high speed. While prior second-degree murders from automobile accidents have involved impaired driving, defendant's conduct here was equally reckless and wanton.

2. Homicide— second-degree murder—officer's death in high speed chase—proximate cause

There was sufficient evidence of proximate cause in a second-degree murder case arising from the death of an officer in an automobile accident while he was chasing defendant at high speed. A reasonable mind might conclude that defendant's reckless flight and wanton violation of the traffic laws caused or directly contributed to the victim's death.

3. Homicide— second-degree murder—death of officer in car chase—requested instructions—insulating negligence

The court gave in substance all but one of the instructions on proximate cause requested by a second-degree murder defendant prosecuted for the death of an officer who was chasing defendant at high speed. There was no error in not giving an instruction on insulating negligence because contributory negligence has no place in criminal law and no reasonable person could conclude that the officers' actions intervened to be the cause of death.

4. Evidence— emergency room photographs of deceased—illustrative of testimony—not excessive or repetitive

The trial court did not err in a second-degree murder prosecution by admitting emergency room photographs of the deceased, a law enforcement officer who died while chasing defendant at high-speed. The photographs were admitted to illustrate another officer's testimony and they were not used excessively or repetitiously to arouse the passions of the jury.

5. Witnesses— redirect examination—scope of cross-examination not exceeded

A redirect examination about recorded law enforcement radio transmissions in a second-degree murder prosecution did not exceed the scope of the cross-examination where defendant had used the transcript in extensively cross-examining an officer.

Appeal by defendant from judgment entered 24 February 2003 by Judge Robert F. Floyd in Bladen County Superior Court. Heard in the Court of Appeals 15 June 2004.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Curran, for the State.

The McGougan Law Firm, by Paul J. Ekster and Kevin J. Bullard, for defendant-appellant.

CALABRIA, Judge.

Gerrick Lamont Bethea ("defendant") appeals from a conviction of second-degree murder for the death of a law enforcement officer during a high speed pursuit of defendant. We find no error.

At approximately one o'clock a.m. on 26 September 2001, Officer William Howell ("Officer Howell") of the Elizabethtown Police

Department was on patrol and observed a man he suspected was defendant getting into a vehicle and driving out of a convenience store parking lot. Officer Howell knew defendant's license had been revoked. He followed defendant, and after confirming the vehicle's registration had expired, activated his patrol car's blue light to stop defendant. Defendant responded by driving through a red light and increasing his speed to seventy-five miles per hour in a thirty-five mile per hour zone. Officer Howell pursued defendant out of the Elizabethtown city limits into the surrounding rural area.

Approximately two minutes after initiating pursuit, Officer Howell made radio contact with Clarkton Police Chief Joey Blackburn ("Chief Blackburn") and Bladen County Deputy Sheriff Jamie Collins ("Deputy Collins" or the "victim") (collectively the "two officers"), who were patrolling Clarkton in Chief Blackburn's patrol car. Upon learning the pursuit was heading toward Clarkton, the two officers joined the pursuit. Chief Blackburn passed Officer Howell to lead the pursuit, pulled alongside defendant's vehicle, and positively identified him.

After defendant braked heavily and turned sharply onto a road with which Chief Blackburn was unfamiliar, the two officers discussed the possibility that defendant would stop his car and try to run. Chief Blackburn handed Deputy Collins a flashlight and noticed the deputy moving his hand toward his seatbelt latch in preparation to exit the patrol car. Chief Blackburn closed to within a car length of defendant in preparation for defendant abandoning his car. As the two officers and defendant approached a curve, of which Chief Blackburn was not aware, defendant slowed very quickly. In response, Chief Blackburn braked heavily, but the brakes had heated during the pursuit and were not working effectively. Chief Blackburn's driver-side bumper struck the defendant's passenger-side bumper. Chief Blackburn reacted by quickly steering right in an attempt to avoid further colliding with defendant. While defendant missed the curve and went straight into a ditch, Chief Blackburn's car slid sideways and impacted a concrete marker and a tree. On impact, Deputy Collins was thrown from the car and subsequently died of his injuries in the emergency room. An accident reconstruction report stated that the speeds of defendant's car and Chief Blackburn's car were too great to navigate the curve and that Deputy Collins did not have his seatbelt fastened at the moment of impact.

Officer Howell arrested defendant at the scene. During the pursuit, defendant reached speeds of approximately one hundred miles

per hour, sped through a traffic light and several stop signs without slowing, crossed into the oncoming traffic lane several times, and turned his car lights off several times while traveling at speeds between ninety and ninety-five miles per hour, making his car difficult to see. Defendant pled guilty to felony speeding to elude arrest, speeding, driving left of center, driving with an expired registration, driving while license revoked, reckless driving to endanger persons or property, and violation of a traffic control device.

I. Motion to Dismiss

[1] Defendant asserts the trial court erred by denying his motion to dismiss the charge of second-degree murder because the State failed to produce sufficient evidence of malice and of proximate cause. We disagree.

The issue in a defendant's motion to dismiss for insufficiency of the evidence is whether, taking the evidence in the light most favorable to the State, "there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. . . . Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996) (citation omitted). "Second-degree murder is an unlawful killing with malice, but without premeditation and deliberation." *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991). The elements of second-degree murder are: "1. defendant killed the victim; 2. defendant acted intentionally and with malice; and 3. defendant's act was a proximate cause of the victim's death." *State v. Bostic*, 121 N.C. App. 90, 98, 465 S.E.2d 20, 24 (1995).

Defendant argues that, because he was not driving under the influence, he could not have exhibited the requisite malice for a conviction of second-degree murder. Essentially, defendant argues evidence that a defendant was driving under the influence is the *only* evidence sufficient to prove malice in a second-degree murder case involving an automobile accident. However, our jurisdiction has long held that malice may be inferred " 'when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.' " *State v. McBride*, 109 N.C. App. 64, 67-68, 425 S.E.2d 731, 733 (1993) (quoting *State v. Reynolds*, 307 N.C. 184, 297 S.E.2d 532 (1982)). *Accord State v. Snyder*, 311 N.C. 391, 394, 317 S.E.2d 394, 396 (1984). Moreover, to prove malice in second-

degree murder prosecutions involving automobile accidents, "it [is] necessary for the State to prove only that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind." *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000). Further, "[w]hat constitutes proof of malice will vary depending on the factual circumstances in each case." *McBride*, 109 N.C. App. at 67, 425 S.E.2d at 733.

Defendant correctly points out that every North Carolina appellate decision involving an automobile accident, where the court found sufficient evidence to prove malice for a second-degree murder conviction, involved a defendant driving under the influence of alcohol or some other impairing substance at the time of the accident. While driving under the influence is certainly evidence sufficient to prove malice, defendant's actions in the instant case, motivated by an attempt to elude law enforcement by driving in an extremely dangerous manner, is an equally reckless and wanton act, which evidences " 'a mind utterly without regard for human life and social duty and deliberately bent on mischief.' " *Id.* at 67-68, 425 S.E.2d at 733 (citation omitted). Moreover, our courts have not found driving under the influence to be the only evidence capable of proving malice. *See, e.g.*, *Rich*, 351 N.C. 386, 527 S.E.2d 299; *State v. Byers*, 105 N.C. App. 377, 413 S.E.2d 586 (1992). In *Byers*, this Court analyzed the relevance and admissibility of certain evidence and found that

> the evidence presented at trial tending to show defendant knew his license was revoked and proceeded to drive regardless of this knowledge indicates defendant acted with "a mind regardless of social duty" and with "recklessness of consequences." We further find the evidence tending to show defendant took the car without permission and displayed fictitious tags in order to drive indicates a mind "bent on mischief."

Byers, 105 N.C. App. at 382, 413 S.E.2d at 589.

In the instant case, the evidence, taken in the light most favorable to the State, shows that defendant was driving with a revoked license, fled to elude law enforcement officers, sped through a red light and several stop signs, drove at speeds up to one hundred miles per hour, crossed into the oncoming traffic lane several times, and turned his car lights off on dark rural roads, decreasing his own visibility and making his car extremely difficult to see, while traveling at speeds between ninety and ninety-five miles per hour. Defendant's clear mind

unclouded by intoxicating substances that might have hindered his ability to appreciate the danger of his actions, does not negate the presence of malice, but rather, tends to more clearly show an "intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind." *Rich*, 351 N.C. at 395, 527 S.E.2d at 304. Accordingly, we hold the evidence here was sufficient to allow a reasonable jury to infer malice from defendant's reckless and wanton attempt to elude law enforcement. *Cf. State v. Wade*, 161 N.C. App. 686, 690, 589 S.E.2d 379, 383 (2003), *disc. rev. denied*, 358 N.C. 241, 594 S.E.2d 33 (2004) (holding even "in the absence of impairment by alcohol" the "operation of a vehicle could rise to the level of culpable negligence" for the purposes of convictions of involuntary manslaughter and assault with a deadly weapon inflicting serious injury); *State v. Nugent*, 66 N.C. App. 310, 311-13, 311 S.E.2d 376, 377-78 (1984) (upholding an involuntary manslaughter conviction where no evidence of impaired driving was present).

[2] Defendant further argues there was insufficient evidence of proximate cause because he did not actually collide with the other vehicle and kill the victim with his impact. Proximate cause is defined

> as a cause: (1) which, in a natural and continuous sequence and unbroken by any new and independent cause, produces an injury; (2) without which the injury would not have occurred; and (3) from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed.

State v. Hall, 60 N.C. App. 450, 454-55, 299 S.E.2d 680, 683 (1983). Accordingly, "[a] defendant will be held criminally responsible for second-degree murder if his act caused or directly contributed to the victim's death." *State v. Welch*, 135 N.C. App. 499, 502-03, 521 S.E.2d 266, 268 (1999). The evidence taken in the light most favorable to the State shows that the victim died after Chief Blackburn's patrol car collided with the rear of defendant's car due to defendant's sudden slowing and the patrol car careened out of control striking a concrete barrier then a tree at the end of a high-speed pursuit, which would not have occurred had defendant stopped when Officer Howell activated his blue light. A reasonable mind might conclude that defendant's reckless flight and wanton violation of the State's traffic laws "caused or directly contributed to" the collision between defendant's car and the patrol car, which resulted in the victim's

death. *Id.* Accordingly, we hold the trial court did not err in denying defendant's motion to dismiss.

Based on his above arguments, defendant also asserts the trial court erred in denying his motion to set aside the jury's verdict. "The decision whether to grant or deny a motion to set aside the verdict is vested in the sound discretion of the trial court . . . ." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985). "When the evidence at trial is sufficient to support the jury's verdict, there is no abuse of discretion in the trial court's denial of defendant's motion to set aside the verdict." *State v. Serzan*, 119 N.C. App. 557, 562, 459 S.E.2d 297, 301 (1995). As we have already held the evidence at trial was sufficient to support the jury's verdict, we hold the trial court did not abuse its discretion in denying defendant's motion to set aside the verdict.

II. Jury Instruction

[3] Defendant asserts the trial court erred by refusing to give four requested instructions on proximate cause: N.C.P.I.—Civ. 102.19 (gen. civ. vol. 2004) (multiple causes); N.C.P.I.—Civ. 102.27 (gen. civ. vol. 2004) (concurring acts of negligence); N.C.P.I.—Civ. 102.60 (gen. civ. vol. 2004) (concurring negligence); and N.C.P.I.—Civ. 102.28 (gen. civ. vol. 2004) (insulating acts of negligence). We disagree.

"It is well established that when a defendant requests a special instruction which is correct in law and supported by the evidence, the trial court must give the requested instruction, at least in substance." *State v. Tidwell*, 112 N.C. App. 770, 773, 436 S.E.2d 922, 924 (1993). "If a requested instruction is refused, defendant on appeal must show the proposed instruction was 'not given in substance, and that substantial evidence supported the omitted instruction.' " *State v. Thompson*, 118 N.C. App. 33, 36, 454 S.E.2d 271, 273 (1995) (quoting *State v. White*, 77 N.C. App. 45, 52, 334 S.E.2d 786, 792 (1985)).

Under the proximate cause element, the trial court instructed the jury that:

> A proximate cause is a real cause, without which the victim's death would not have occurred. The defendant's acts need not have been the last or nearest cause. It is sufficient if they concurred with some other cause, acting at the same time, which in combination with it proximately caused the victim's death.

The trial court's instruction gave in substance N.C.P.I.—Civ. 102.19 (multiple causes); N.C.P.I.—Civ. 102.27 (concurring acts of negli-

gence); and N.C.P.I.—Civ. 102.60 (concurring negligence), which each instruct that a jury may consider a defendant's actions to be a proximate cause even though there may have been other proximate causes. The trial court did not, however, give in substance N.C.P.I.—Civ. 102.28 (insulating acts of negligence). We must therefore review the record to determine whether substantial evidence supported an instruction under N.C.P.I.—Civ. 102.28. *Thompson*, 118 N.C. App. at 36, 454 S.E.2d at 273.

Defendant argues certain actions by the officers constituted one or more intervening or superseding causes that broke the causal chain of defendant's negligent actions. "To escape responsibility based on an intervening [or superseding] cause, the defendant must show that the intervening [or superseding] act was 'the sole cause of death.' " *Welch*, 135 N.C. App. at 503, 521 S.E.2d at 268 (quoting *State v. Holsclaw*, 42 N.C. App. 696, 699, 257 S.E.2d 650, 652 (1979)). An intervening or superseding cause is a cause that " 'so entirely [intervenes in or] supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury.' " *Cox v. Gallamore*, 267 N.C. 537, 544, 148 S.E.2d 616, 621 (1966) (quoting *Henderson v. Powell*, 221 N.C. 239, 19 S.E.2d 876 (1942)).

Defendant contends several actions and decisions by the officers were intervening or superseding causes. First, Officer Howell and the two officers pursued him outside their respective jurisdictions and despite the safer option of arresting him the next day at his residence. Second, they pursued him at unsafe speeds on unfamiliar roads even after the brakes of Chief Blackburn's patrol car showed signs of wear due to the pursuit. Third, Chief Blackburn steered right in an attempt to avoid further colliding with defendant. Fourth, evidence at trial tended to show that the victim was not wearing his seat belt at the time of the accident.

Our Supreme Court has long held that "[c]ontributory negligence as such has no place in the law of crimes." *State v. Foust*, 258 N.C. 453, 459, 128 S.E.2d 889, 894 (1963). Therefore, the probability that a reasonable person might conclude that the two officers' decisions and actions contributed to the victim's death is of no moment. Moreover, no reasonable person could conclude that the two officers' decisions and actions, viewed separately or together, so entirely intervened in or superseded the operation of defendant's reckless flight and wanton traffic violations as to constitute the sole cause of the victim's death. Accordingly, the evidence was not sufficient to

support an instruction on insulating acts of negligence, and the trial court did not err by declining to give the instruction.

III. Introduction of Photographs to the Jury

[4] Defendant asserts the trial court erred by allowing the introduction of two color photographs from different angles of the deceased victim in the emergency room. Specifically, defendant argues that, because the defendant did not dispute that the victim died as a result of the car accident, the pictures were not probative of any issue in dispute. He also argues the pictures were gruesome and were introduced solely to arouse the juror's passions. We disagree.

Our Supreme Court has long "held that a stipulation as to the cause of death does not preclude the State from proving all essential elements of its case." *State v. Elkerson*, 304 N.C. 658, 665, 285 S.E.2d 784, 789 (1982). Under N.C. Gen. Stat. § 8C-1, Rule 401 and Rule 402, "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" is admissible. " 'Photographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words.' " *State v. Watson*, 310 N.C. 384, 397, 312 S.E.2d 448, 457 (1984) (quoting *State v. Cutshall*, 278 N.C. 334, 347, 180 S.E.2d 745, 753 (1971)). Moreover, "[p]hotographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988).

The two photographs were introduced during Chief Blackburn's testimony to provide a chain of causation between the accident and the victim's death and to illustrate Blackburn's observations of the state of the victim's body. Thus, the two photographs, although somewhat graphic, were not introduced in an excessive or repetitious manner in order to arouse the passions of the jury but, rather, were introduced to allow the State to prove chain of causation, an essential element of its case, and to illustrate Blackburn's testimony. Accordingly, the trial court did not err in admitting the two photographs.

Defendant also asserts that any probative value of the two photographs was substantially outweighed by their prejudicial effect. "[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." N.C. Gen. Stat.

§ 8C-1, Rule 403. Whether to exclude relevant evidence under Rule 403 is a determination left to " 'the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was 'manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). Having determined above that the two photographs were probative, admissible, and not used excessively or repetitiously to arouse the passions of the jury, we conclude the trial court did not abuse its discretion in finding that the two photographs' probative value outweighed the danger of unfair prejudice.

IV. Redirect Examination

[5] Defendant asserts the trial court abused its discretion by allowing the State on redirect examination to question a witness concerning matters not covered in cross-examination. "The purpose of redirect examination is to clarify any questions raised on cross-examination concerning the subject matter of direct examination and to confront any new matters which arose during cross-examination." *State v. Baymon*, 336 N.C. 748, 754, 446 S.E.2d 1, 4 (1994). Defendant directs our attention to the redirect examination concerning portions of the recorded law enforcement radio transmissions occurring while Chief Blackburn and the victim were driving to join the pursuit and argues this line of questioning was outside the scope of the cross-examination. However, defense counsel cross-examined Blackburn extensively on this period of time using a transcript of the radio transmissions, which "opened the door" to a redirect on these matters. Accordingly, the redirect examination was not outside the scope of the cross-examination, and the defendant's assertion is without merit.

Defendant also asserts the trial court erred in denying his motion for appropriate relief after the trial. Having determined defendant received a fair trial free from error, we find this assertion to be without merit. Finally, defendant asserts that the trial court abused its discretion under N.C. Gen. Stat. § 8C-1, Rule 403, by admitting certain statements into evidence. Defendant however sets forth no argument in support of this assertion. Therefore, pursuant to N.C. R. App. P. 28(b)(6), we decline to address it.

No error.

Judges WYNN and LEVINSON concur.

STATE OF NORTH CAROLINA v. ANDY CECIL SHELTON

No. COA04-33

(Filed 7 December 2004)

1. Sexual Offenses— incest—motion to dismiss—no requirement of one count of incest per victim

The trial court did not err by denying defendant's motion to dismiss all but one incest charge per victim, because: (1) N.C.G.S. § 14-178 does not reveal any legislative intent to prohibit prosecuting a defendant for more than one count of incest per victim; and (2) neither statutory provisions nor relevant case law suggest that incest is a continuing offense.

2. Criminal Law— guilty plea—no acceptance by court—clerical error

The trial court did not err by allegedly accepting defendant's plea of guilty to two counts of incest but then submitting these same counts to the jury for their determination of his guilt or innocence, and the case is remanded solely for correction of the clerical errors in 02 CRS 1192 and 03 CRS 180 where the box marked "pled guilty" is erroneously checked, because: (1) defendant never asked to execute a plea transcript and never followed up on his initial offer to plead guilty; (2) without engaging in the plea colloquies required by N.C.G.S. §§ 15A-1022 and 1026, the trial court cannot and does not accept an offered plea of guilty; and (3) defendant failed to object to evidence of the charges to which he offered to plead guilty and thus failed to preserve this issue for appellate review.

3. Sentencing— mitigating factor—acknowledged wrongdoing prior to arrest

The trial court did not abuse its discretion in a multiple felony incest, double first-degree rape, and triple second-degree rape case by failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing prior to arrest and at an early stage of the criminal process, because: (1) defense counsel's statement to the court that defendant "admitted some of this" did not constitute a request for the court to find the statutory mitigating factor at issue; and (2) assuming arguendo that defense counsel's statement at sentencing was such a request, defendant never acknowledged the pain and suffering he caused the victims,

the closest defendant came to admitting any wrongdoing was a grudging acknowledgment that having sex with his daughters had been a mistake, and defendant's statements did not prove by a preponderance of evidence that he acknowledged wrongdoing in connection with the offense.

4. Sentencing— restitution—genetic testing—incompetent evidence

The trial court erred in a multiple felony incest, double first-degree rape, and triple second-degree rape case by recommending an amount of restitution to reimburse the $2,250 expense for genetic testing, because: (1) while defendant did not specifically object to the trial court's entry of an award of restitution, this issue is deemed preserved for appellate review under N.C.G.S. § 15A-1446(d)(18); and (2) the record does not include any evidence supporting the prosecutor's statement during sentencing as to the amount charged for the genetic testing.

Appeal by defendant from judgments entered 4 June 2003 by Judge Zoro J. Guice, Jr., in Yancey County Superior Court. Heard in the Court of Appeals 14 October 2004.

Attorney General Roy Cooper, by Assistant Attorney General Jennie Wilhelm Mau, for the State.

Paul Pooley for defendant-appellant.

LEVINSON, Judge.

Defendant (Andy Shelton) appeals from judgments entered upon his convictions of seven counts of felony incest, two counts of first degree rape, and three counts of second degree rape. The evidence at trial is summarized in relevant part as follows: The defendant's daughter, K.,[1] testified that she was born in 1971 and that as a child she experienced severe beatings and "whippings" from her father. In 1981, when she was ten years old, the defendant told her that "he wanted to teach [her] what boys wanted" and engaged her in forcible sexual intercourse. For the following seven years, defendant forced K. to have intercourse about once a week. In October 1988 he forced her to have sex with him at gunpoint, resulting in her becoming pregnant with her daughter, M.L. K. also testified she never initiated sexual relations with her father, and never consented to sex with him.

1. To preserve their privacy, the names of the victims in this case, and of their children, are referred to by their initials.

K.'s sister, M.A., testified that she was born in 1969 and that the defendant is her father. The defendant beat her frequently when she was a child, leaving bruises and marks on her face. When M.A. was about fourteen years old, the defendant raped her after telling her that the "safest" way to have sex was "at home." Despite her refusal, defendant forced her to engage in sexual intercourse repeatedly over the next few years. In 1989 the defendant raped her and she became pregnant with her son A., who was born in 1990. M.A. testified that she never consented to sexual relations with the defendant.

Yancey County Deputy Sheriff Thomas Farmer testified to corroborative statements taken from K. and M.A., and to genetic testing confirming defendant's paternity of his daughters and of their children A. and M.L. He also testified concerning three statements he obtained from the defendant. In the first statement, taken in November 2002, the defendant told Farmer the following: He admitted having sexual relations with K. at least four times and with his third daughter, "M", at least once. However, he claimed that K. had initiated their sexual encounters, and denied forcing K. or pointing a gun at her. He also apologized for the "mistake" of having sex with his daughters. After his arrest in December 2002, defendant made a second statement, in which he claimed that K. initiated their sexual activity because she "wanted him" sexually, and that she "used sex to get her way." In February 2003 defendant made a third statement admitting to having sex with M.A. on one occasion and to fathering her child. Each of these statements was reduced to writing and signed by the defendant. The State also introduced a stipulation by the defendant admitting that he was the natural father of K. and M.A., and was also the father of their children A. and M.L.

Following the presentation of evidence, the jury convicted the defendant of all charges. He was sentenced to consecutive prison terms totaling 186½ years for the charges of second degree rape and incest, and to consecutive life sentences for the charges of first degree rape. From these judgments and convictions the defendant appeals.

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[1] The defendant was convicted of four counts of incest with K. and three counts of incest with M.A. He argues first that the trial court erred by denying his motion to dismiss all but one incest charge per victim. He contends "that a pattern of recurrent incestuous behaviors constitutes one offense," and thus that he could not be convicted of two or more counts of incest with the same victim. We disagree.

"The crime of incest is purely statutory," *State v. Rogers*, 260 N.C. 406, 409, 133 S.E.2d 1, 3 (1963), and is defined by N.C.G.S. § 14-178 (2003), which provides in pertinent part that a "person commits the offense of incest if the person engages in carnal intercourse with the person's . . . child[.]" The statutory language does not reveal any legislative intent to prohibit prosecuting a defendant for more than one count of incest per victim. Thus, defendant's argument is not supported by the relevant statutory provisions.

Defendant asserts that incest is a continuing offense for which only a single prosecution is authorized. A continuing offense "is a breach of the criminal law not terminated by a single act or fact, but which subsists for a definite period and is intended to cover or apply to successive similar obligations or occurrences." *State v. Grady*, 136 N.C. App. 394, 399, 524 S.E.2d 75, 79 (2000) (because offense of maintaining dwelling for use of controlled substances is a continuing offense, convictions of two counts of the offense violated constitutional prohibition against double jeopardy) (citation omitted). We conclude that neither statutory provisions nor relevant case law suggests that incest is a continuing offense.

Defendant also argues that certain North Carolina appellate cases are properly interpreted as barring more than one conviction for incest between a defendant and a particular victim. He bases this argument upon language found in several older cases, including *State v. Vincent*, 278 N.C. 63, 64, 178 S.E.2d 608, 609 (1971), stating that a father "is guilty of the statutory felony of incest if he has sexual intercourse, either habitual or in a single instance, with a woman or girl whom he knows to be his daughter." Defendant would have us interpret the phrase "either habitual or in a single instance" as imposing a prohibition on prosecution of a defendant for more than one count of incest where there is evidence of "habitual" incest. However, neither *Vincent* nor the other cases cited by defendant draw such a conclusion. Indeed, the cases cited by defendant do not address the issue of multiple indictments.

Moreover, evidence presented in incest cases often shows a pattern of ongoing sexual relations over a period of time between a defendant and a single victim. In this factual context, our appellate courts have not hesitated to uphold multiple convictions of incest by a defendant committed against a given child. *See, e.g., State v. Weathers*, 322 N.C. 97, 366 S.E.2d 471 (1988) (defendant convicted of two counts of incest with his daughter); *State v. Etheridge*, 319 N.C. 34, 352 S.E.2d 673 (1987) (defendant convicted of four counts of

incest with his daughter occurring over a ten month period); *State v. Wade*, 155 N.C. App. 1, 5, 573 S.E.2d 643, 647 (2002) (defendant convicted of three counts of incest with his daughter that occurred when victim visited defendant "every weekend" between the ages of twelve and seventeen and had intercourse with defendant "every single time" she visited), *disc. review denied*, 357 N.C. 169, 581 S.E.2d 444 (2003).

This assignment of error is overruled.

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[2] Defendant argues next that the trial court erred by accepting defendant's plea of guilty but then submitting these same counts to the jury for their determination of his guilt or innocence. We disagree.

The transcript indicates that at the start of trial the defendant informed the court, in the presence of the jury, that he wished to plead guilty to two counts of incest, and that the trial court noted this for the record. The defendant neither asked to execute a transcript of plea, nor requested the court to limit or exclude any evidence on the basis of his offer to plead guilty. During trial, all of the State's witnesses testified regarding the incidents that formed the basis of the charges to which defendant had offered to plead guilty. The defendant neither objected to the introduction of such evidence, nor asked the court to accept his plea of guilty at the close of the evidence. Moreover, the trial court informed the parties during the charge conference of its intention to instruct the jury that, although defendant had tendered a plea of guilty, the court was nonetheless submitting these charges to the jury for their determination. The defendant voiced no objections, either during the charge conference or when the trial court instructed the jury as follows:

> Now, members of the jury, you will recall that during or following the Court's opening instructions prior to the opening statements of the lawyers that the defendant stated that he was pleading guilty to two charges. These are Case Numbers 03 CRS 180 and 02 CRS 1192. However, during the arraignment the defendant pled not guilty to the said charges. Members of the jury, the Court is submitting to you these cases for your determination of the guilt or innocence of the defendant. It is your duty to find the facts in these cases as it is in all of the cases and to determine whether the defendant is guilty beyond a reasonable doubt in these two cases and in all of the cases.

The defendant never asked to execute a plea transcript, or otherwise followed up on his initial offer to plead guilty.

On this record, defendant asserts that he tendered pleas of guilty to two counts of incest, and that "[w]ithout engaging in the plea colloquies required by G.S. § 15A-1022 and 1026, the trial court accepted and recorded the plea." However, defendant's argument is premised upon a legal impossibility, because without engaging in the plea colloquies required by statute, the trial court cannot and does not accept an offered plea of guilty. *See State v. Glover*, 156 N.C. App. 139, 145-46, 575 S.E.2d 835, 839-40 (2003); *see also State v. Marlow*, 334 N.C. 273, 280-81, 432 S.E.2d 275, 279 (1993) (no "actual entry of the guilty plea" took place where "defendant tendered a guilty plea which was not accepted and approved by the trial judge"). We conclude that, notwithstanding defendant's offer to plead guilty, no plea was accepted or entered by the trial court.

Defendant also argues that the court erred by admitting evidence of the charges to which he had offered to plead guilty. By not objecting to such evidence, defendant failed to preserve this issue for appellate review. N.C. R. App. Proc. 10(b)(1) (2003) ("to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make"). Nor do we agree with defendant that the jury "was improperly privy to counsel's admission of his client's guilt." The record is clear that it was defendant who chose to proffer a plea of guilty in front of the jury.

We conclude that, notwithstanding defendant's strategic decision to admit his guilt of two of the charged offenses in the jury's presence, no plea of guilty was accepted or entered by the court. The charges were instead submitted for the jury's determination. Defendant's argument on this issue is rejected. However, we note that on the judgment forms for the two cases at issue, 02 CRS 1192 and 03 CRS 180, the box marked "pled guilty" is erroneously checked. Accordingly, we remand solely for correction of this clerical error.

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[3] Defendant's next two arguments pertain to sentencing. He argues first that the trial court abused its discretion by failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing prior to arrest and at an early stage of the criminal process. We disagree.

"Under the Fair Sentencing Act, 'the sentencing judge must find and weigh aggravating and mitigating factors before imposing a sen-

tence greater than the presumptive sentence set by the statute.' " *State v. Mickey*, 347 N.C. 508, 513, 495 S.E.2d 669, 672 (1998) (quoting *State v. Flowers*, 347 N.C. 1, 41, 489 S.E.2d 391, 414 (1997)). Under former N.C.G.S. § 15A-1340.4(a)(2)(l) (repealed effective 1 October 1994), one such statutory mitigating factor is that "prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer." The trial court errs by failing to find this mitigating factor when the defendant has made a full confession to the charged offense before arrest. *State v. Daniel*, 319 N.C. 308, 354 S.E.2d 216 (1987). "A defendant 'acknowledges wrongdoing' when he admits 'culpability, responsibility or remorse, as well as guilt.' " *State v. Godley*, 140 N.C. App. 15, 28, 535 S.E.2d 566, 575 (2000) (quoting *State v. Rathbone*, 78 N.C. App. 58, 67, 336 S.E.2d 702, 707 (1985)). Thus, where defendant admits committing certain acts, but does not acknowledge wrongdoing or culpability, the trial court does not err by failing to find this mitigating factor. *See, e.g., State v. Clark*, 314 N.C. 638, 643, 336 S.E.2d 83, 86 (1985) (defendant not entitled to finding in mitigation where he admitted that "he killed the victim but denied culpability by contending that the shooting was justified by self-defense"); *State v. Michael*, 311 N.C. 214, 316 S.E.2d 276 (1984) (defendant does not admit wrongdoing where he admits killing victim but contends it was accidental).

"Under the Fair Sentencing Act, a trial court must find a statutory mitigating factor if that factor is supported by uncontradicted, substantial, and manifestly credible evidence. In order to show that the trial court erred in failing to find a mitigating factor, the defendant has the burden of showing that no other reasonable inferences can be drawn from the evidence." *State v. Brewington*, 343 N.C. 448, 456-57, 471 S.E.2d 398, 403 (1996) (citing *State v. Jones*, 309 N.C. 214, 218-20, 306 S.E.2d 451, 454-55 (1983)).

Defendant first argues that the record "shows that the defendant specifically requested the trial court to find this mitigating factor." Defendant misstates the record in this regard. In fact, the record shows only one oblique reference to this issue:

> DEFENSE COUNSEL: So I'd offer to you as a mitigating factor, Your Honor, that his mental abilities are diminished. I think that's 4B on the list of factors. That **he admitted some of this and was candid with Officer Farmer** as Lieutenant Farmer said; that he's got a support system here in the community.

We do not agree that counsel's statement to the court that defendant "admitted some of this" constitutes a request for the court to find the statutory mitigating factor at issue. However, even construing defendant's statements at sentencing as a request for the trial court to find the mitigating factor, we conclude that the trial court did not err by failing to do so.

In his statements to Officer Farmer, the defendant conceded that he had engaged in several acts of intercourse with his daughters. However, the defendant admitted to only a few of the numerous incidents to which the victims testified, and he never acknowledged forcing or pressuring them to engage in sexual activities. In his first statement he admitted having sex with a third daughter and with K. on four occasions, although insisting that the sexual activity was "agreed on between [them]." In his second statement, defendant denied having intercourse with K. when she was ten years old, as she testified. He also claimed K. had "wanted him" sexually, and had enticed him by wearing "mini skirts [and] small shirts." He stated that K. "causes problems for everyone," and that she "initiated the sexual intercourse between the two of them." He also claimed that he could not understand why charges were being brought against him. Further, he did not admit to any acts of intercourse with M.A. until his third statement, after being confronted by DNA evidence proving that he had fathered her child. In that statement defendant explained having intercourse with M.A. partly on the basis that his wife "was going thorough the change of life and she and I were not having sex very often" and also that on the one occasion he acknowledged having sex with M.A. she had been "wearing tight jeans." Finally, defendant never acknowledged the pain and suffering he caused his victims; the closest he came to admitting any wrongdoing was a grudging acknowledgment in his first statement that having sex with his daughters had been a "mistake."

We conclude the trial court did not abuse its discretion by failing to find this mitigating factor. Although defendant made certain statements to Officer Farmer, his statements did not prove by a preponderance of uncontradicted and manifestly credible evidence that "prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer." *See State v. Brewington*, 343 N.C. 448, 457-58, 471 S.E.2d 398, 404 (1996) (trial court did not err by failing to find early acknowledgment of wrongdoing where defendant "trie[d] to minimize his culpability" and had "attempt[ed] to shift

responsibility" for the commission of the offense at issue). This assignment of error is overruled.

[4] Defendant also argues that the trial court recommended an amount of restitution that was not supported by competent evidence. We agree.

Evidence was adduced at trial that during its investigation of these offenses the State secured nontestimonial identification orders. These were used to obtain the genetic DNA testing that established that defendant was, to an overwhelming degree of certainty, the father of his daughters K. and M.A., and of their children A. and M.L. During sentencing, the State asked that in the event defendant was granted work release he be required to reimburse the $2,250.00 expense for genetic testing. The issue was addressed in the judgment for Case Number 02 CRS 1197, in which the defendant was sentenced to life in prison for the offense of first degree rape. On the judgment for this offense, the court ordered that if defendant were ever paroled he be required to pay restitution of $2,250.00. Restitution was not ordered in any of the other judgments.

Preliminarily, we reject the State's argument that defendant has not properly preserved this issue for appellate review. While defendant did not specifically object to the trial court's entry of an award of restitution, this issue is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18). *State v. Reynolds*, 161 N.C. App. 144, 149, 587 S.E.2d 456, 460 (2003).

"[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995) (citing *State v. Daye*, 78 N.C. App. 753, 756, 338 S.E.2d 557, 560 (1986)). The unsworn statement of the prosecutor is insufficient to support the amount of restitution ordered. *State v. Buchanan*, 108 N.C. App. 338, 423 S.E.2d 819 (1992). In the instant case, the record does not include any evidence supporting the prosecutor's statement during sentencing as to the amount charged for the genetic testing. Consequently, this portion of the judgment in Case Number 02 CRS 1197 is vacated.

We have considered defendant's other assignments of error and find them to be without merit. In summary, we find no error in defendant's convictions and sentences with the exception of the restitution recommended in 02 CRS 1197. Additionally, we remand for the limited purpose of allowing the trial court, in the absence of the

defendant, to make a clerical correction in the judgment forms for 02 CRS 1192 and 03 CRS 180 to reflect that defendant was found guilty by a jury.

No error in part, remanded in part, vacated in part.

Judges TYSON and BRYANT concur.

CATHERINE P. JARRETT, EMPLOYEE, PLAINTIFF v. McCREARY MODERN, INC., SELF-INSURED, EMPLOYER, AND THE PHOENIX FUND/NATIONAL BENEFITS GROUP, INC., SERVICING AGENT, DEFENDANTS

No. COA03-1328

(Filed 7 December 2004)

Workers' Compensation— carpel tunnel—causation—evidence sufficient

There was competent evidence to support the Industrial Commissions' findings and conclusions that plaintiff's bilateral carpel tunnel syndrome was caused by her employment. Although defendant characterized the testimony of plaintiff's expert as speculative, the witness responded with an unequivocal "yes" when asked if plaintiff's employment could or might have caused her injury; "could" or "might" testimony is probative of causation where there is no other evidence showing the opinion to be mere guess or speculation.

Appeal by defendants from opinion and award entered 15 May 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 June 2004.

McGuire Woods, by John J. Cacheris, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Thomas W. Page and Terry L. Wallace, for defendant-appellants.

ELMORE, Judge.

McCreary Modern, Inc. and National Benefits Group (collectively, defendants) appeal from an opinion and award of the North Carolina Industrial Commission awarding Catherine P. Jarrett (plaintiff) work-

ers' compensation disability and medical benefits for bilateral carpal tunnel syndrome. For the reasons stated herein, we affirm.

An opinion and award was entered on 16 August 2002 by a deputy commissioner denying plaintiff's claim because plaintiff "failed to establish that her condition was characteristic of and peculiar to her employment, that she was at an increased risk of developing the condition, or that her condition was caused by her employment." The deputy commissioner specifically concluded that the testimony of one of plaintiff's treating physicians, Dr. Anthony DeFranzo, that plaintiff's job could or might have caused her bilateral carpal tunnel syndrome was based "on speculation and false assumptions such as [sic] that his testimony was not competent to be considered."

Plaintiff thereafter appealed to the Full Commission. The Commission found as a fact that plaintiff was 55 years old at the time of the hearing before the deputy commissioner and that she began working for defendant McCreary Modern in April 1995. Plaintiff worked as an attach skirt sewer, operating a sewing machine to sew skirts onto furniture covers. Plaintiff worked between seven and eight hours per shift, five or six days per week, with a ten-minute morning break, a thirty-minute lunch break, and a ten-minute afternoon break. A videotape of plaintiff performing her job duties was stipulated into evidence, which plaintiff agreed accurately depicted her job. The process of sewing a skirt onto a furniture cover involved plaintiff picking up the furniture cover, which typically weighed between two and seven pounds; laying the cover and the skirt on the sewing machine, under the needle arm; guiding the cover and skirt through the machine; stapling a ticket to the cover; and throwing the completed product into a bin. Plaintiff spent approximately eight minutes sewing one sofa skirt, and she sewed between 50 and 60 covers per shift.

The Commission further found that on 29 May 2000 plaintiff sought treatment from Dr. Mark McGinnis, complaining of a two-year history of pain in her right hand, wrist, and forearm. Plaintiff also complained of numbness in her right hand but did not then report any left-hand symptoms, and plaintiff did not notify defendants at that time that she needed medical care for a work-related condition. Plaintiff returned to Dr. McGinnis on 13 June 2000, at which time Dr. McGinnis found no muscle atrophy, indicating plaintiff was using her hands normally. Dr. McGinnis released plaintiff to return to work, without restrictions.

The Commission further found that plaintiff returned to Dr. McGinnis on 23 March 2001, this time complaining of pain, numbness, and tingling in both her right and left hands and arms. Dr. McGinnis diagnosed bilateral carpal tunnel syndrome and thereafter performed a right carpal tunnel release on 29 March 2001, followed by a left carpal tunnel release on 26 April 2001. Post-surgery, plaintiff's right-hand symptoms almost completely resolved, but plaintiff continued to experience pain in her left hand, and nerve conduction tests on her left hand yielded abnormal results. Nevertheless, on 27 July 2001 Dr. McGinnis released plaintiff without restrictions. Plaintiff returned to work with defendant McCreary Modern on 6 August 2001, after her job was specifically modified to eliminate any lifting over 10 pounds.

The Commission further found that Dr. McGinnis continued to treat plaintiff through 31 January 2002 for complaints of right arm pain and pain in the fingers of her left hand. After reviewing the videotape of plaintiff performing her job duties, Dr. McGinnis opined that plaintiff's job was not highly repetitive; that it placed plaintiff at a mild risk for developing carpal tunnel syndrome compared with the general public; and that it may have contributed to or exacerbated the development of plaintiff's carpal tunnel syndrome.

The Commission further found that on 13 December 2001 plaintiff sought treatment from a second physician, Dr. DeFranzo, for complaints of pain and numbness in her left arm and hand, for which plaintiff received a cortisone injection. Plaintiff returned to Dr. DeFranzo on 24 January 2002 and reported no significant improvement in her left-hand symptoms. Dr. DeFranzo recommended that plaintiff undergo another nerve conduction study and ultrasound on her left hand, but defendants did not authorize this additional testing. Dr. DeFranzo found plaintiff's right hand to be at maximum medical improvement and assigned an 11% permanent partial impairment rating for her right hand, as well as a 10% permanent partial impairment rating to her right upper extremity, under the American Medical Association (AMA) guidelines. Dr. DeFranzo found plaintiff's left hand not to be at maximum medical improvement but nevertheless assigned a 17% permanent partial impairment rating to her left hand, as well as a 15% permanent partial impairment rating to her left upper extremity.

The Commission further found that Dr. DeFranzo assigned plaintiff permanent work restrictions of light duty, non-repetitive work with a 20-pound lifting restriction when lifting with both hands. By

letter dated 28 January 2002, defendant McCreary Modern informed plaintiff it could accommodate these restrictions. However, by a subsequent letter dated 12 February 2002, defendant McCreary Modern informed plaintiff it had received additional information from Dr. DeFranzo which caused it to conclude that plaintiff's work restrictions could not be accommodated. Dr. DeFranzo did not believe that plaintiff could return to her position as an attach skirt sewer, and plaintiff did not work for defendant McCreary Modern in any capacity after 25 January 2002.

The Commission further found that after reviewing the videotape of plaintiff performing her job duties, Dr. DeFranzo opined that plaintiff's job was highly repetitive, that it exposed her to a higher risk of developing carpal tunnel syndrome than the general public, and that it could have caused her bilateral carpal tunnel syndrome. At his deposition, Dr. DeFranzo testified that he determined from viewing the videotape that plaintiff's job required more than 2,000 hand motions per hour, and that several of these motions were indicated in the development of carpal tunnel syndrome. Dr. DeFranzo testified that in making this determination, he did not actually count the number of hand motions plaintiff made in one full hour.

The Commission determined that the greater weight of the credible record evidence supports a finding that plaintiff's employment was a significant contributing factor in the development of her carpal tunnel syndrome, which the Commission concluded was a compensable occupational disease. The Commission further determined that "[a]s the result of plaintiff's repetitive use of her hands in her work with defendant [McCreary Modern], plaintiff contracted carpal tunnel syndrome[,]" and that as a result of plaintiff's bilateral carpal tunnel syndrome, she was "disabled and was unable to earn wages in her regular employment or any employment for the periods March 23, 2001 through July 27, 2001 and January 25, 2002 and continuing." Accordingly, on 15 May 2003, the Commission entered its opinion and award reversing the deputy commissioner and awarding plaintiff temporary total disability and medical benefits. From the opinion and award of the Commission, defendants appeal.

By their sole assignment of error, defendants contend that there is insufficient competent record evidence to support the Commission's findings and conclusion that plaintiff's employment was a significant contributing factor to the development of her bilateral carpal tunnel syndrome. After a careful review of the record, particularly the deposition transcripts of plaintiff's two treating

physicians, Dr. McGinnis and Dr. DeFranzo, we disagree with defendants' assertion.

It is well settled that this Court's review of an opinion and award of the Industrial Commission is limited to two questions: "(1) whether there is any competent evidence of record to support the Commission's findings of fact; and (2) whether the Commission's findings of fact support its conclusions of law." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371, *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." *Id.*

Section 97-57 of our General Statutes provides that a defendant employer is liable to an employee for onset of an occupational disease if the employee demonstrates that he (1) suffers from a compensable occupational disease, and (2) was last injuriously exposed to the hazards of the disease while employed by the defendant employer. N.C. Gen. Stat. § 97-57 (2003); *see also Hardin*, 136 N.C. App. at 354, 524 S.E.2d at 371. While carpal tunnel syndrome is not among the compensable occupational diseases listed in N.C. Gen. Stat. § 97-53, under N.C. Gen. Stat. § 97-53(13), a disease or condition not specifically enumerated in the statute may nonetheless qualify as a compensable occupational disease if the plaintiff shows that:

> (1) [the disease is] characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) [the disease is] not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there [is] 'a causal connection between the disease and the [claimant's] employment.'

Rutledge v. Tultex Corp., 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981)); N.C. Gen. Stat. § 97-53(13) (2003). The burden of proving each element of compensability is upon the employee seeking workers' compensation benefits. *Moore v. J.P. Stevens & Co.*, 47 N.C. App. 744, 750, 269 S.E.2d 159, 163, *disc. review denied*, 301 N.C. 401, 274 S.E.2d 226 (1980).

This Court has previously stated that "[t]he first two elements of the *Rutledge* test are satisfied where the claimant can show that 'the employment exposed the worker to a greater risk of contracting the disease than the public generally.' " *Robbins v. Wake Cty. Bd. of*

Educ., 151 N.C. App. 518, 521, 566 S.E.2d 139, 142 (2002) (quoting *Rutledge*, 308 N.C. at 94, 301 S.E.2d at 369-70). In the present case, the Commission made the following pertinent findings regarding plaintiff's employment and her risk, relative to that of the general public, of developing carpal tunnel syndrome:

> 14. Dr. McGinnis felt that plaintiff's job placed her at a mild increased risk compared to the general public and that her position may have contributed to or exacerbated the development of carpal tunnel syndrome.
>
> . . .
>
> 20. Dr. DeFranzo testified plaintiff was "without question" exposed to a greater risk of developing carpal tunnel syndrome through her employment than members of the general public.

Our examination of the record reveals that findings of fact numbers 14 and 20 are supported by competent record evidence, specifically the deposition testimony of plaintiff's two treating physicians. Dr. McGinnis testified at his deposition that "[i]n my estimation, this particular job may place [plaintiff] at a mildly increased risk [of developing carpal tunnel syndrome] compared to the general population." Moreover, Dr. DeFranzo testified at his deposition that in his opinion, plaintiff's job "without question" exposed her to a higher risk of developing carpal tunnel syndrome than the general public. Since findings of fact numbers 14 and 20 are supported by competent record evidence, they are conclusive on appeal. *Hardin*, 136 N.C. App. at 353, 524 S.E.2d at 371. Because we conclude that these findings in turn support the Commission's conclusion that "[p]laintiff's bilateral carpal tunnel syndrome is not an ordinary disease of life to which the general public . . . not so employed is equally exposed[,]" plaintiff has carried her burden of proving the first two elements of the *Rutledge* test. *Robbins*, 151 N.C. App. at 521, 566 S.E.2d at 142.

Defendants therefore correctly assert in their brief that "this case hinges primarily on the issue of whether there is competent evidence to support the findings and conclusions that Plaintiff's job as a sewer caused her bilateral carpal tunnel syndrome[,]" i.e., the third element of the *Rutledge* test.

An employee seeking workers' compensation benefits can establish the third element of the *Rutledge* test by showing that the job was a *significant* causal factor in, or *significantly* contributed to, the development of the occupational disease. *Locklear v. Stedman Corp.*,

131 N.C. App. 389, 393, 508 S.E.2d 795, 798 (1998). In the context of determining the relationship between workplace exposure and development of an occupational disease, our Supreme Court has stated as follows:

> *Significant* means "having or likely to have influence or effect: deserving to be considered: important, weighty, notable." . . . *Significant* is to be contrasted with *negligible*, *unimportant*, *present but not worthy of note*, *miniscule*, or *of little moment.* The factual inquiry, in other words, should be whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work.

Rutledge, 308 N.C. at 101-02, 301 S.E.2d at 370. "Although it is not necessary for doctors to use the exact wording of 'significantly contribut[ing],' there must be some indication of the degree of contribution such as 'more likely than not' to meet the *Rutledge* test." *Hardin*, 136 N.C. App. at 355, 524 S.E.2d at 372.

Here, the Commission made the following finding of fact regarding the degree to which plaintiff's employment contributed to plaintiff's development of bilateral carpal tunnel syndrome:

> 26. The Full Commission finds the greater weight of competent credible evidence in the record supports a finding that plaintiff's employment was a significant contributing factor the development of plaintiff's carpal tunnel syndrome.

Once again, our examination of the record reveals that finding of fact number 26 is supported by competent evidence, specifically the deposition testimony of Dr. DeFranzo. At his deposition, Dr. DeFranzo testified as follows:

> Q. Dr. Defranzo, I'm going to be asking you some opinion questions. And, in forming your opinions, I understand that you had a chance to review, at some point, all [plaintiff's] medical records, the job description and videotape?
>
> A. . . . I have reviewed the pertinent records in regard to this problem. And, yes, I reviewed a videotape of her job. And I have kind of a written summary what was in the tape . . .
>
> . . .

Q. . . . To a reasonable degree of medical certainty, did [plaintiff's] job—could it or might it have caused her bilateral carpal tunnel syndrome?

A. Yes.

. . .

Q. You—did she work—you mentioned a high incidence of carpal tunnel syndrome being repetitive workplaces [sic]. In your opinion, was [plaintiff] working in a repetitive work environment?

A. Yes.

MS. NEEL: Objection.

A. There's no question about that.

Q. And why—

A. By any criterion, this patient had more than 2,000 separate motions an hour. And all the motions that are the worst motions for causing carpal tunnel syndrome were clearly demonstrated repetitively on that videotape.

Dr. DeFranzo clearly answered in the affirmative when questioned by plaintiff's counsel as to whether plaintiff's job "could" or "might" have caused plaintiff's bilateral carpal tunnel syndrome. Our Supreme Court has stated that "could" or "might" expert testimony is probative and competent evidence to prove causation, where there is no additional evidence showing the expert's opinion to be a guess or mere speculation. *Holley v. ACTS, Inc.*, 357 N.C. 228, 233, 581 S.E.2d 750, 753 (2003); *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000).

We are not persuaded by defendants' characterization of Dr. DeFranzo's opinion testimony as being based on mere guesswork or speculation. When asked whether plaintiff's employment "could" or "might" have caused her bilateral carpal tunnel syndrome, Dr. DeFranzo unequivocally responded "Yes." Moreover, after reviewing plaintiff's job duties, Dr. DeFranzo definitively characterized her job as involving repetitive hand motions, including several of the motions most closely associated with the development of carpal tunnel syndrome, and testified that plaintiff's employment "without question" exposed her to a greater risk of developing the disease than members of the general public not so employed. Finally, Dr. DeFranzo

considered other potential causes of carpal tunnel syndrome and discounted them as possibilities in the present case. *Cf. Young*, 353 N.C. at 231-32, 538 S.E.2d at 915-16 (evidence insufficient to support Commission's findings and conclusions that employee's work-related back injury significantly contributed to her fibromyalgia where treating physician testified that he was frequently unable to ascribe a cause for fibromylagia in his patients, that he was aware from employee's medical history of at least three potential causes for her fibromyalgia other than her work-related injury, and that tests to rule out these other potential causes had not been conducted); *Holley*, 357 N.C. at 233, 581 S.E.2d at 753-54 (same, where employee's first treating physician testified that he could not say to a reasonable degree of medical certainty that employee's work-related accident led to her development of deep vein thrombosis and that "a galaxy of possibilities" could have led to her DVT, and employee's second treating physician testified that she "was unable to say with any degree of certainty" whether employee's work-related injury led to her development of DVT).

We therefore conclude that the Commission's findings and conclusions that plaintiff's bilateral carpal tunnel syndrome was caused by the conditions of her employment were supported by competent evidence.

Affirmed.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. JAMES EDWIN SUTTON, DEFENDANT

No. COA03-1351

(Filed 7 December 2004)

1. Appeal and Error— assignments of error—failure to properly assign error

A single assignment of error generally challenging the sufficiency of the evidence to support numerous findings of fact is broadside and ineffective, and thus, the findings of fact are deemed supported by competent evidence and are binding on appeal.

2. Search and Seizure— investigatory stop—motion to suppress evidence—trafficking in OxyContin

The trial court did not err in a trafficking by sale or delivery of OxyContin case by denying defendant's motion to suppress evidence obtained during an investigatory stop of defendant's motorcycle in the parking lot of a drug store, because: (1) the stop was based on the tip of a pharmacist as well as the officer's own observations; and (2) the pharmacist's information combined with the officer's own observations provided reasonable suspicion that criminal activity was afoot justifying a *Terry* stop.

3. Confessions and Incriminating Statements— motion to suppress—custody

The trial court did not err in a trafficking by sale or delivery of OxyContin case by denying defendant's motion to suppress statements he made to an officer even though defendant was not read Miranda warnings before he was questioned, because: (1) no reasonable person in defendant's position at the time defendant made the inculpatory statement would have thought that they were in custody for purposes of Miranda; and (2) the mere fact that an officer performed an investigative stop of defendant and then patted him down did not result in defendant being in custody, and the officer's questions were brief and directly related to the suspicion that gave rise to the stop.

4. Criminal Law— fruit of poisonous tree doctrine—applicability

The fruit of the poisonous tree doctrine was inapplicable in a trafficking by sale or delivery of OxyContin case, because: (1) the trial court properly denied defendant's motion to suppress the evidence; and (2) the record contained substantial evidence of each element of the crime and showed that defendant was the perpetrator.

Appeal by defendant from judgment entered 26 March 2003 by Judge James L. Baker, Jr. in Haywood County Superior Court. Heard in the Court of Appeals 10 June 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Gary R. Govert, for the State.

James N. Freeman, Jr., for defendant-appellant.

GEER, Judge.

Defendant James Edwin Sutton appeals from the denial of his motion to suppress evidence presented during his jury trial on charges of trafficking in OxyContin, a prescription opiate painkiller. Defendant contends the evidence should have been suppressed because it was obtained following a stop that violated his Fourth Amendment rights and an interrogation that violated his *Miranda* rights. Because the totality of the circumstances prior to the stop gave rise to a reasonable, articulable suspicion that criminal activity was afoot, we affirm the trial court's conclusion that the stop did not violate defendant's Fourth Amendment rights. As to defendant's contention that his *Miranda* rights were violated by the officer's interrogation, we agree with the trial court that defendant was not "in custody" and accordingly that *Miranda* warnings were not necessary prior to the officer's inquiry. We therefore affirm the trial court's denial of defendant's motion to suppress.

Standard of Review

Review of a trial court's denial of a motion to suppress is limited to a determination whether the trial court's findings of fact are supported by competent evidence and whether those findings support the trial court's ultimate conclusions of law. *State v. Thompson*, 154 N.C. App. 194, 196, 571 S.E.2d 673, 675 (2002). The trial court's findings are conclusive if supported by competent evidence, even if the evidence is conflicting. *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001).

[1] We note at the outset that defendant assigned error to only one specific finding of fact; he did not, however, address that particular finding in his brief. With respect to the remaining findings of fact, defendant stated only:

> That the trial court erred in finding all the facts contained in its Order given in open court denying Defendant's Motion to Suppress because there was no competent evidence presented to the Court by which these findings of fact could be made in violation of the Fourth and Fourteenth Amendments to the United States Constitution; Article I, Sections 19, 20, 23, 35 and 36 of the North Carolina Constitution[;] and other applicable North Carolina law.

It is well-established that "[a] single assignment generally challenging the sufficiency of the evidence to support numerous findings of fact,

as here, is broadside and ineffective." *Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 266, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). *See also State v. Kirby*, 276 N.C. 123, 131, 171 S.E.2d 416, 422 (1970) ("This assignment—like a hoopskirt—covers everything and touches nothing. It is based on numerous exceptions and attempts to present several separate questions of law—none of which are set out in the assignment itself—thus leaving it broadside and ineffective."). Because defendant has failed to properly assign error to the trial court's findings of fact, they are deemed supported by competent evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Facts

The trial court made the following findings following the suppression hearing. On 2 October 2002, Officer Sean Sojack of the Waynesville Police Department was paged by the Village Pharmacy. When Officer Sojack returned the call, he spoke with a pharmacist with whom he had worked on prior occasions in connection with forged prescriptions. The pharmacist reported that a man who had arrived on a motorcycle—defendant James Edwin Sutton—had come into the drugstore with a prescription for OxyContin, had asked how much the prescription would cost, and then had said he would "get the money together." The pharmacist told Officer Sojack that defendant went to a truck in the pharmacy parking lot, returned to the store with money, and was waiting for his prescription to be filled.

Based on this information, Officer Sojack and other officers drove to the pharmacy parking lot. Officer Sojack parked his unmarked car about 200 feet away from the lot and, using binoculars, set up surveillance on the lot. After Officer Sojack notified the pharmacist that he was at the parking lot, the pharmacist told him the prescription was valid and asked what he should do. Officer Sojack advised him to fill it. The pharmacist also gave Officer Sojack a description of defendant's physical appearance and his clothes.

Officer Sojack observed defendant emerge from the pharmacy and approach a Ford pickup truck in the parking lot. Defendant climbed into the driver's side of the truck; another person was already sitting in the passenger seat. A third person came up to the driver's side and leaned on the window.

Officer Sojack, who testified that he could see inside the truck with his binoculars, saw defendant pour something into his own hand

and then transfer it into the outstretched hand of the person in the passenger seat. Based on his training and experience, Officer Sojack believed he had observed a drug transaction.

Defendant then exited the truck and got on his motorcycle. The person who had been standing on the driver's side of the truck climbed into the truck's driver's seat. Officer Sojack signaled other officers to block the pickup truck's exit from the parking lot and drove toward defendant's motorcycle with his blue lights on. Defendant had started the motorcycle, but he had not yet moved. Officer Sojack got out of his car, approached defendant, and asked if he could speak with him. Defendant agreed, and Officer Sojack then asked if he could pat defendant down. Defendant consented and told Officer Sojack that he had two knives. Officer Sojack found two pocket knives, but no contraband during the pat-down. When he asked if defendant had any narcotics, defendant said he had just filled a prescription. Officer Sojack took a pill bottle containing tablets from defendant.

Officer Sojack examined the bottle and asked how many tablets were inside the bottle. Defendant said he had filled a prescription for 180 tablets. Officer Sojack testified that he again asked defendant how many pills were in the bottle, and defendant responded that he had given 45 tablets to a person in the truck. Officer Sojack placed defendant under arrest. The passenger in the truck was also charged as a result of the transaction observed by Officer Sojack.

Defendant was indicted with trafficking by possession, by sale or delivery, and by transportation of OxyContin. Defendant filed a motion to suppress with respect to the statements he made and evidence recovered on 2 October 2002, arguing that he had been stopped in violation of his Fourth Amendment rights and that he had been questioned in violation of his *Miranda* rights. The trial court denied the motion, and the jury returned a verdict finding defendant guilty of trafficking by sale or delivery of OxyContin. The trial court sentenced defendant to a term of 70 months to 84 months imprisonment.

I

[2] Defendant contends that the trial court erred in not concluding that he was subjected to an unreasonable search and seizure in violation of the Fourth Amendment. "*Terry v. Ohio* and its progeny have taught us that in order to conduct a warrantless, investigatory stop, an officer must have reasonable and articulable suspicion of criminal activity." *State v. Hughes*, 353 N.C. 200, 206-07, 539 S.E.2d 625, 630

(2000). "A court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion to make an investigatory stop exists." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629, 101 S. Ct. 690, 695 (1981)). "Reasonable suspicion" requires that the stop be based on specific, articulable facts—as well as the rational inferences from those facts—as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. *Id.* "The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " *Id.* at 442, 446 S.E.2d at 70 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10, 109 S. Ct. 1581, 1585 (1989)). This Court reviews *de novo* the trial court's conclusion of law that a reasonable, articulable suspicion existed to justify the stop. *State v. Jacobs*, 162 N.C. App. 251, 255, 590 S.E.2d 437, 440 (2004).

Defendant contends the stop was unconstitutional because it was based on a tip that lacked sufficient indicia of reliability. The stop was not, however, based solely on the tip of the pharmacist, but rather arose out of Officer Sojack's own observations as well. The trial court properly considered those observations, together with the pharmacist's information, in reviewing the "totality of the circumstances" existing prior to the *Terry* stop.

Here, the officer was notified by a pharmacist—with whom he had been working on an ongoing basis to uncover illegal activity involving prescriptions—of information suggesting that defendant might be unlawfully purchasing OxyContin for another person. The fact that defendant, who had arrived on a motorcycle, went to a truck to "get the money together" for his prescription did not necessarily mean that defendant was engaging in illegal activity, but it did raise a suspicion. Following up on this information, Officer Sojack personally observed defendant leave the pharmacy, climb into the truck, and engage in what Officer Sojack believed, based on his training and experience, was an illegal drug transaction.

The pharmacist's information combined with the officer's own observations provided reasonable suspicion that criminal activity was afoot, justifying a *Terry* stop. *See State v. Carmon*, 156 N.C. App. 235, 240-41, 576 S.E.2d 730, 735 (officer's observation, at night time, of defendant receiving a package and his belief, based on experience, that he had seen a drug transaction was sufficient to raise a reasonable suspicion), *aff'd per curiam*, 357 N.C. 500, 586 S.E.2d 90 (2003);

State v. Sanchez, 147 N.C. App. 619, 624-25, 556 S.E.2d 602, 607 (2001) (reasonable suspicion supported investigatory stop based on information supplied in person to officer followed by officer's own investigation and observation), *disc. review denied*, 355 N.C. 220, 560 S.E.2d 358 (2002). The trial court, therefore, properly concluded that defendant's Fourth Amendment rights were not violated when Officer Sojack stopped him.

II

[3] Defendant next contends his statements to Officer Sojack should have been suppressed because he was not read *Miranda* warnings before he was questioned. Our Supreme Court has held "that failure to administer *Miranda* warnings in 'custodial situations' creates a presumption of compulsion which would exclude statements of a defendant. Therefore, the initial inquiry in determining whether *Miranda* warnings were required is whether an individual was 'in custody.' " *State v. Buchanan*, 353 N.C. 332, 336-37, 543 S.E.2d 823, 826 (2001) (internal citations omitted). That question is answered by determining, "based on the totality of the circumstances, whether there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.' " *Id.* at 339, 543 S.E.2d at 828 (quoting *State v. Daughtry*, 340 N.C. 488, 506-07, 459 S.E.2d 747, 755 (1995)). *See also State v. Benjamin*, 124 N.C. App. 734, 737-38, 478 S.E.2d 651, 653 (1996) ("The test to determine if defendant is in custody is whether a reasonable person in defendant's position would believe that he was under arrest or the functional equivalent of arrest.").

We find this case to be indistinguishable from *Benjamin*. In *Benjamin*, after a police officer conducted a *Terry* stop of the defendant's van, the officer asked the defendant to place his hands on the patrol car so that he could be patted down for weapons. *Id.* at 736, 478 S.E.2d at 651. During the pat-down, the officer felt two hard, plastic containers in the defendant's pocket that he recognized, based on his training and experience, as the type used to hold cocaine. He asked the defendant, "What is that?" The defendant immediately responded that it was "crack." *Id.*

In considering these facts, the *Benjamin* Court first explained:

> In *Berkemer v. McCarty*, 468 U.S. 420, 439-40, 82 L. Ed. 2d 317, 334-35 (1984) the United States Supreme Court held that a motorist subject to a traffic stop who is asked to leave his car

> is not in custody for purposes of *Miranda* and roadside questioning under those circumstances is permissible. . . . The Supreme Court also found that the noncoercive aspect of ordinary traffic stops prompted it to hold that a pat-down search pursuant to *Terry v. Ohio* does not invoke the *Miranda* rule even though the person may be detained and questioned concerning an officer's suspicions in a manner that may amount to a seizure under the Fourth Amendment.

Id. at 738, 478 S.E.2d at 653. In response to the defendant's contention that when stopped, he was not free to leave, the Court observed:

> [T]he fact that a defendant is not free to leave does not necessarily constitute custody for purposes of *Miranda*. After all, no one is free to leave when they are stopped by a law enforcement officer for a traffic violation. Any investigative action that the police must take at traffic stops in order to evaluate their safety and the circumstances surrounding the traffic violation, and that does not rise to the level of custodial interrogation, should not require *Miranda* warnings.

Id. Based on the facts in the record, indistinguishable from those present in this case, this Court held that "no reasonable person in defendant's position at the time defendant made the inculpatory statement would have thought that they were in custody for purposes of *Miranda*." *Id.*

If *Benjamin* did not involve a custodial interrogation, then the facts of this case cannot give rise to a finding that defendant was in custody. The mere fact that Officer Sojack performed an investigative stop of defendant and then patted him down did not result in defendant being "in custody" for purposes of *Miranda*. Further, his questions were brief and directly related to the suspicion that gave rise to the stop. Our Supreme Court has held that "[a]fter a lawful stop, an officer may ask the detainee questions in order to obtain information confirming or dispelling the officer's suspicions." *State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999). *See also State v. Martinez*, 158 N.C. App. 105, 110, 580 S.E.2d 54, 58 ("We additionally conclude, in following our holding in *Benjamin*, that the officer's brief inquiry as to the contents of the object in defendant's right pocket was not improper. Upon defendant's response that his right pocket contained 'dope,' the officer properly seized the currency and cocaine resulting in defendant's arrest."), *appeal dismissed and disc. review denied*, 357 N.C. 466, 586 S.E.2d 773 (2003); *Benjamin*, 124

N.C. App. at 741, 478 S.E.2d at 655 ("[The officer's] brief verbal inquiry . . . did not exceed the permissible bounds of a *Terry* search."). The trial court correctly concluded that *Miranda* did not apply to the brief investigatory detention in this case and in denying defendant's motion to suppress.

III

[4] Defendant asserts two additional arguments contingent on his argument that the trial court erred in denying his motion to suppress: (1) that the trial court should have excluded all statements and exhibits obtained during the stop and interrogation as fruit of the poisonous tree, *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); and (2) that the trial court should have granted his motion to dismiss because in the absence of the evidence obtained during the stop, the evidence was insufficient to support a conviction. As we have held that the trial court properly denied the motion to suppress, the fruit of the poisonous tree doctrine is inapplicable. Since the evidence was properly admissible, the record contains substantial evidence of each element of the crime and that defendant was the perpetrator. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

Affirmed.

Judges HUDSON and THORNBURG concur.

EDNA BARFIELD LEE, PLAINTIFF v. LINWOOD EARL LEE SR., DEFENDANT

No. COA04-6

(Filed 7 December 2004)

1. Divorce— equitable distribution—retirement plan—fees and penalties for transfer—correction of omission

The trial court did not err by ordering a divorce plaintiff to pay all of the fees and penalties associated with a lump sum transfer of funds from defendant's retirement account. There were three qualified domestic relations orders concerning division of the parties' retirement plans, with taxes or fees assigned in the last two but not the first. This suggests that the

failure to assign taxes and fees in the first was an oversight; moreover, the amount at stake stems from incidental fees or penalties, not from the underlying substantive matter. The court's conclusion was supported by the findings and was a proper correction under Rule 60(a).

2. Divorce— equitable distribution—retirement plan—formula for share of benefit—unclear

There was credible evidence before the court in a divorce proceeding to support a finding about the calculation of additional pension payments from plaintiff to defendant. An order in the matter provided evidence of a telephone conversation with the company administrator in which the actuarial formula was set out.

3. Divorce— equitable distribution—early retirement benefit—calculation—evidence insufficient

Findings in an equitable distribution order regarding a pension benefit were not supported by the evidence where plaintiff retired at an earlier date than anticipated due to a disability. The correct value of defendant's share of plaintiff's pension as of the separation date is unclear from the evidence in the record.

4. Divorce— equitable distribution—retirement distribution—change in stock market

The trial court did not abuse its discretion in a divorce proceeding by denying a Rule 60(b) motion to set aside a judgment regarding a pension distribution. A change in the value of the stock market over the course of 5 years does not amount to an extraordinary or even unforeseeable circumstance.

Appeal by plaintiff and defendant from an order entered 20 May 2003 by Judge Lonnie Carraway in Lenoir County District Court. Heard in the Court of Appeals 21 September 2004.

Mills & Economos, L.L.P., by Larry C. Economos, for plaintiff-appellant.

W. Gregory Duke for defendant-appellant.

HUNTER, Judge.

Edna Barfield Lee ("plaintiff") appeals from an order entered 20 May 2003 pursuant to a hearing on a Rule 60(b)(6) motion. On appeal,

plaintiff contends error in the trial court's order that plaintiff pay all fees and penalties associated with the lump sum transfer of funds from Linwood Earl Lee Sr.'s ("defendant") retirement account, and that plaintiff pay defendant an additional sum of money monthly from her pension benefits. Defendant appeals from the same order, contending the trial court abused its discretion in denying defendant's Motion to Set Aside Judgment pursuant to Rule 60. As we find insufficient evidence to support the trial court's conclusion as to the additional payments by plaintiff, we reverse the order in part and remand for additional findings.

On 11 June 1998, plaintiff and defendant entered into a consent order to settle all outstanding claims between the parties pursuant to their separation and divorce. This consent order included settlement of all equitable distribution claims and specified that "[t]he parties' respective retirement plans shall be divided pursuant to qualified domestic relations order (QDRO) as outlined and detailed in the Findings of Fact contained in this Order."

The relevant findings of fact specified preparation of three QDROs, the first and third of which were contested by defendant in this action. The first ("QDRO 1"), divided defendant's retirement account. Plaintiff, on the five-year anniversary of the account, 1 January 2003, was to receive the greater of $402,393.00 (hereinafter "lump sum payment") or one-half of whatever monies were in the account on that date. The third QDRO ("QDRO 3") provided defendant with thirty-six percent of the plaintiff's monthly pension upon her retirement. After review and consent of the respective parties of each order, QDRO 1 was entered on 27 June 1998 and QDRO 3 was entered on 27 June 2001. QDRO 2 was not contested by either party.

On 10 March 2003, defendant filed a Motion in the Cause for Rehearing, and in the alternative, a Rule 60 Motion to Set Aside the terms of the equitable distribution settlement. Plaintiff responded with a motion for contempt. The trial court heard the respective motions on 23 April 2003 and entered an order on 20 May 2003 which: (1) denied defendant's request for judgment pursuant to his Rule 60(b) motion; (2) granted plaintiff's motion for contempt for failure to sign the necessary forms to effectuate the distribution of the lump-sum payment; (3) ordered all fees and penalties associated with the transfer of the lump sum payment to be paid by plaintiff; and (4) ordered plaintiff to pay defendant the difference between the actual amount received from plaintiff's pension plan and thirty-six percent

of her current monthly benefit, a sum of $326.96 per month. Both parties appeal from this order.

I.

We first address plaintiff's two assignments of error, that the trial court erred in (1) ordering plaintiff to pay all fees and penalties associated with the lump sum transfer of funds from defendant's retirement account, and (2) entering an order of additional payments to defendant from plaintiff's pension.

1. Order of Payment of Fees and Penalties by Plaintiff

[1] Plaintiff contends in her first assignment of error that the trial court erred in ordering plaintiff to pay all fees and penalties associated with the lump sum transfer of funds from defendant's retirement account. Plaintiff argues that the trial court's conclusion of law was not supported by the evidence and findings of fact. We disagree.

"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 Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*. *Id.*

Here, plaintiff contends there was no competent evidence to support the trial court's findings of fact No. 8 and 9. The trial court found in No. 8 that: "[t]he QDRO which provides for the distribution of $402,393.00 to Plaintiff does not specify who will be assessed any taxes and/or surrender penalties." A review of QDRO 1 supports such a finding, as the order contains no mention of taxes or penalties. Plaintiff also contends there is no evidence to support Finding No. 9: "[t]here will be no tax consequences as a result of the transfer, but there will be a surrender fee of approximately $10,000.00." Here, after a careful review by this Court of both the record on appeal and the trial transcript, it appears that there is no competent evidence to support Finding No. 9. None of the evidence before the trial court addressed the issue of surrender fees, nor established the lack of tax consequences.

However, this Court concludes upon *de novo* review that Finding No. 8 supports the trial court's correction of the order in concluding

that "any fees, penalties, etc[.] associated with the transfer of the $402,393.00 to Plaintiff shall be paid by Plaintiff."

> " '[T]he 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.' "

Snell v. Board of Education, 29 N.C. App. 31, 32, 222 S.E.2d 756, 757 (1976) (quoting *Shaver v. Shaver*, 248 N.C. 113, 118, 102 S.E.2d 791, 795 (1958)). "Although Rule 60(a) clearly grants the authority to the trial court to make clerical corrections, our appellate courts have consistently rejected attempts to change substantive provisions under the guise of making clerical changes." *Buncombe County ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784 (1993). "A change in an order is considered substantive and outside the boundaries of Rule 60(a) when it alters the effect of the original order." *Id.*

In *Ice v. Ice*, this Court found that an award of interest on a distributive award was not a substantive change, as "[t]he subject of the litigation . . . was the amount of the distributive award; interest was only incidental and tangential[.]" *Ice*, 136 N.C. App. 787, 792, 525 S.E.2d 843, 847 (2000). The *Ice* Court found the situation analogous to that in *Ward v. Taylor*, 68 N.C. App. 74, 314 S.E.2d 814 (1984), where a previous order was amended to allow a surveyor to recover costs associated with the surveying work done for trial, on the grounds that the " '[initial] failure to allow and tax costs may be considered an "oversight or omission" in an order.' " *Ice*, 136 N.C. App. at 792, 525 S.E.2d at 846 (quoting *Ward*, 68 N.C. App. at 80, 314 S.E.2d at 819-20).

Here, fees and penalties arising from the transfer of the lump sum payment were not assigned to either party or addressed in QDRO 1. However, such an assignment of taxes was made in both QDROs 2 and 3. The failure to include such an assignment in QDRO 1, while including it in QDROs 2 and 3, suggests that such an exclusion was an "oversight or omission." Additionally, as in *Ice*, the issue of fees or taxes related to the distribution do not affect the substance of the award itself. "[T]he amount of money involved is not what creates a substantive right; rather, it is the source from which this money is derived." *Ice*, 136 N.C. App. at 792, 525 S.E.2d at 847. Here, any amount at stake would stem from the incidental fees or penalties,

not from the underlying substantive matter of the distributive award. Accordingly, the trial court's conclusion of law was supported by the findings of fact and was a proper correction effectuated through Rule 60(a).

2. Order of Additional Pension Payments to Defendant

[2] Plaintiff contends in her second assignment of error that the trial court's order of additional pension payments by plaintiff to defendant was not properly supported by evidence and findings of fact, and that the trial court lacked authority to make such an order. The trial court ordered that:

> 4. Plaintiff shall pay to Defendant the difference between the $118.00 per month Defendant currently receives and 36% of her current monthly benefit, which is $1,236.00. In other words, $1,236.00 x 36% = $444.96-118.00 = $326.96. Plaintiff shall pay the sum of $326.96 per month commencing June 1, 2003.

Plaintiff argues that the evidence recited in Finding No. 4, regarding the formula used by the plan's administrators in calculation of the amount sent to defendant was not properly before the trial court. She therefore contends it was not competent evidence to support Finding No. 4 or, by extension, Findings No. 15 and 16, which rely upon it. Finding No. 4 states:

> 4. That DuPont determined Plaintiff's accrued retirement benefits as of December 31, 1997 to be $1,051.98 per month. Plaintiff subsequently left the employment of DuPont on disability as of November 30, 2001. DuPont subsequently determined that Defendant's thirty-six percent (36%) of the monthly benefit was $118.00 per month. DuPont's Benefits Department arrived at this figure by multiplying the monthly benefit of $1,051.98 by the lesser of the Plaint's [sic] conversion factor for determining actuarial equivalence (32.99042%) or the Plan's early retirement reduction factor (100%) = $1,501.98 [sic] x 32.99042% = $347.05. This amount was then multiplied by the 36% specified in the Order; #347.05 x 36% = $124.94. This amount is payable over the Defendant's lifetime. The plan's conversion factor for converting a payment from the Plaintiff/participant's lifetime to the Defendant/alternate payee's lifetime (based on the birthdates of participant and alternate payee) is 93.81626%. The resulting benefit payable to Defendant is $124.94 x 93.81626% = $117.21. This amount was rounded up to $118.00 per month.

"A trial court may take judicial notice of earlier proceedings in the same cause." *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991). Here, an order filed 22 October 2002 in this matter provided evidence of a telephone conversation with a DuPont administrator, in which the actuarial formula used by DuPont for calculating defendant's share of the benefit was set out. As there was credible evidence properly before the trial court to support Finding No. 4, it is therefore deemed conclusive.

[3] Findings No. 15 and 16, both of which are mixed findings of fact and conclusions of law, are not supported by credible evidence, however. The trial court found in No. 15 that:

> 15. In regard[s] to Defendant's motion regarding the payment of thirty-six percent (36%) of Plaintiff's monthly retirement benefit to Defendant, the Court finds that DuPont's benefits administrator's calculations do not reflect 36% of the monthly benefit of $1,051.98.

QDRO 3 awarded defendant thirty-six percent of plaintiff's accrued pension benefit as follows:

> 1. Defendant/Alternate Payee is awarded thirty-six (36%) of the Participant's accrued benefit as of December 31, 1997, that being the parties' date of separation.
>
> 2. The Defendant/alternate payee shall receive his benefit payable in the form of a monthly annuity over the alternate payee's lifetime. The alternate payee shall begin receiving his share of the accrued benefit upon the Participant's retirement date.

The evidence submitted showed that as of the parties' separation date, plaintiff's pension was valued at $1,051.98 per month, however plaintiff took early retirement for health reasons and was granted incapability pension benefits by her employer, DuPont, on 31 November 2001. The value of defendant's monthly annuity, as calculated by the plan administrator at that time, was $118.00 per month. Defendant moved for a contempt motion on 9 October 2002 for plaintiff's failure to pay a full thirty-six percent of the pension amount. An order on the matter was issued on 22 October 2002, finding the parties had not yet received a satisfactory explanation from the plan administrator as to the calculation of plaintiff's retirement benefits and defendant's monthly share under QDRO 3, and demanding a detailed and written explanation as to the calculation be submitted to the trial court by the plan administrator by November of 2002. The

record on appeal does not reflect that any such satisfactory explanation was submitted to the trial court on this matter.

QDRO 3 specified that defendant's share was limited to the value of the pension as of the retirement date, but that defendant was not eligible to receive the share until plaintiff's retirement. Plaintiff's retirement at a date earlier than anticipated by the parties due to disability therefore raises an unanswered question as to the correct valuation of the pension amount under the terms of QDRO 3. In light of plaintiff's early retirement, the correct value of defendant's share of plaintiff's pension as of the separation date is unclear based on the evidence of record. We therefore find that Finding No. 15 is not supported by competent evidence.

In Finding No. 16, the trial court stated:

> 16. Further the Court finds that the 36% amount should be paid from Plaintiff's current monthly benefit which is $1,236.00 per month rather than the $1,051.98 per month as specified in the Qualified Domestic Relations Order.

QDRO 3 expressly specified that defendant's share of plaintiff's accrued benefit was to be determined as of the date of the parties' separation, although distributed upon retirement. An increase in value which occurred after the date of separation due to plaintiff's disability would therefore not be properly considered in determining defendant's share of the pension. As competent evidence does not exist to support this finding, the trial court's conclusion that the benefit calculated was not equitable and was inconsistent with QDRO 3 is in error.

As we find a lack of competent evidence in the record to support Findings No. 15 and 16 and the resulting conclusions of law, we reverse this portion of the order and remand for the trial court to receive additional evidence and make further findings as to the value of defendant's thirty-six percent share of plaintiff's retirement benefits as of 31 December 1997.

II.

[4] We next address defendant's assignment of error. Defendant contends the trial court abused its discretion in denying defendant's Motion to Set Aside Judgment pursuant to Rule 60(b) of the Rules of Civil Procedure with regards to review and reconsideration of the lump sum distribution required by QDRO 1.

QDRO 1 ordered:

> 1. Entitlement: As part of the equitable distribution of the parties marital property, Plaintiff is entitled to an assignment of a part of the Defendant's Profit Sharing Trust and ESOP . . . more specifically as follows: that the Plaintiff, Edna B. Lee, shall receive the greater sum of either $402,393.00 or one-half (½) of whatever monies are in the Defendant's Profit Sharing Trust and ESOP . . . as of January 1, 2003.

The sum of $402,393.00 was equal to $337.878.28, one-half of the date of separation value of the account of $675,756.56, multiplied times the annual interest rate of three and one-half percent for five years, until the date of distribution. The value of defendant's retirement account significantly decreased to $498,000.00 by 1 January 2003. Defendant argues that as the decrease was due to the poor economy and no fault of his own, he is entitled to review and reconsideration of the order under Rule 60(b)(6). We disagree.

"Although section (6) of Rule 60(b) has often been termed 'a vast reservoir of equitable power,' a court cannot set aside a judgment pursuant to this rule without a showing (1) that extraordinary circumstances exist and (2) that justice demands relief." *Thacker v. Thacker*, 107 N.C. App. 479, 481, 420 S.E.2d 479, 480 (1992) (quoting *Anderson Trucking Service v. Key Way Transport*, 94 N.C. App. 36, 40, 379 S.E.2d 665, 667 (1989)) (citation omitted). "Further, the remedy provided by Rule 60(b)(6) is equitable in nature and is directed to the discretion of the trial judge. This Court will not disturb such a discretionary ruling without a showing of an abuse of that discretion." *Id.* at 482, 420 S.E.2d at 480-81 (citation omitted).

Here, defendant alleged that the economic downturn in the stock market provided extraordinary circumstances sufficient to invoke an equitable remedy under Rule 60(b). However, as the North Carolina Supreme Court has previously noted, "[s]tock market prices, as even the most casual observer knows, change constantly and the market price at the end of a thirty-day period would almost always be different from that announced thirty days before." *Sheffield v. Consolidated Foods*, 302 N.C. 403, 422, 276 S.E.2d 422, 435 (1981). A change in the value of the stock market over the course of five years does not amount to an extraordinary or even unforseeable circumstance. There was therefore no abuse of discretion by the trial court in its denial of defendant's Rule 60(b) motion to revise the lump sum distribution portion of the equitable distribution order.

In summary, as there was sufficient evidence to support the trial court's order for plaintiff to pay taxes and fees associated with distribution of defendant's retirement account, and as there was no abuse of discretion by the trial court in denying defendant's Rule 60(b) motion for review and reconsideration of the lump sum distribution, the order is affirmed in part. As there was insufficient evidence to support the conclusion that defendant was entitled to additional payments by plaintiff under the equitable distribution agreement, the order is reversed in part and remanded for further findings.

Affirmed in part, reversed in part, and remanded in part.

Judges WYNN and THORNBURG concur.

DAVID A. BONDURANT, EMPLOYEE, PLAINTIFF v. ESTES EXPRESS LINES, INC., EMPLOYER, SELF-INSURED, DEFENDANT

No. COA04-244

(Filed 7 December 2004)

1. **Workers' Compensation— hernias—not a continuation of earlier, repaired injury**

In a workers' compensation case involving multiple hernias, some suffered after plaintiff left defendant's employ, competent evidence supported findings by the Industrial Commission that plaintiff had healed and did not have a hernia after an earlier repair (so that the subsequent hernias were new injuries rather than a continuation of the earlier injuries, which were admittedly compensable).

2. **Workers' Compensation— subsequent hernias—compensability—standard**

The Industrial Commission used the correct standard in determining that plaintiff's subsequent hernias, suffered after leaving defendant's employ, were not compensable as natural and direct results of his earlier compensable hernias. There was medical testimony that a person will not necessarily have another hernia following a repair and plaintiff cannot therefore show that the subsequent hernias were the natural and direct result of the earlier hernias.

Appeal by plaintiff from opinion and award filed 1 October 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 October 2004.

Joseph V. Dipierro for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by James B. Black, IV, for defendant-appellee.

BRYANT, Judge.

David Bondurant (plaintiff) appeals a decision of the Industrial Commission filed 1 October 2003, denying compensability for three hernias.

Procedural History

Plaintiff sustained a compensable hernia in the course and scope of his employment with defendant on 15 May 1995. This claim was accepted as compensable by Form 21. This hernia was repaired and plaintiff returned to work with defendant.

Plaintiff sustained another hernia on 30 August 1996. Defendant denied this claim by Form 61. A hearing was held before a deputy commissioner on 28 April 1999. By opinion and award filed on 30 June 2000, the deputy commissioner concluded the hernia was compensable as plaintiff "sustained an umbilical hernia as a result of a specific traumatic incident of his assigned work." Neither party appealed the award.

On 3 August 2001, plaintiff filed a Form 18M seeking compensation for a third hernia. The executive secretary of the Industrial Commission denied plaintiff's Form 18M by administrative order dated 11 October 2001. Plaintiff subsequently filed a Form 33 request for hearing, and defendant responded with a Form 33R denying liability.

This matter came for hearing before a deputy commissioner on 22 March 2002. By opinion and award filed 6 December 2002, the deputy commissioner found that plaintiff suffered at least three subsequent hernias in 1999, 2000, and 2001, all of which were a direct and natural result of plaintiff's earlier compensable hernias. Defendant appealed to the Full Commission.

This matter came for hearing before the Full Commission on 10 July 2003. By opinion and award filed 1 October 2003, the Full Commission reversed the opinion and award of the deputy commis-

sioner, concluding that plaintiff's three subsequent hernias were not compensable. Plaintiff filed timely notice of appeal with this Court on 30 October 2003.

Facts

Plaintiff was 53 years of age, having completed his GED and a trucking course, at the time of the 22 March 2002 hearing before the deputy commissioner. Plaintiff became employed with defendant in 1992 and remained in its employ through February 1998. Prior to his employment with defendant, plaintiff had not sustained any hernias. On the date of the deputy commissioner hearing, he was employed as a truck driver for a company in Virginia. It is undisputed that plaintiff voluntarily ceased employment with defendant.

Plaintiff's first compensable hernia occurred on or about 15 May 1995, and was surgically repaired by Dr. Stuart Harris on 9 June 1995 in Lynchburg, Virginia. This injury was accepted as compensable on a Form 21 on 11 January 1996. The second hernia occurred on 30 August 1996, and was repaired by Dr. David Hill on 17 February 1998, in Lynchburg, Virginia. This injury was found compensable pursuant to N.C. Gen. Stat. § 97-2(18), as a "new" hernia by opinion and award filed 30 June 2000.

Both of the two compensable hernias were umbilical, meaning that these hernias were located at the navel. Drs. Harris and Hill characterized the second hernia as a recurrence of the first compensable hernia.

In May 1999, plaintiff went to work with DMR Builders, a home-building business. Sometime in the summer of 1999, plaintiff suffered a third hernia. There was no known incident giving rise to the third hernia. Plaintiff continued working with DMR Builders after sustaining the hernia.

Plaintiff sought treatment from Dr. T. Scott Garrett—located in Lynchburg, Virginia—who performed a ventral herniorrhaphy on 20 December 1999. Dr. Garrett opined that this was a recurrent ventral incisional hernia in the same area as the previous two hernias. Plaintiff returned for a followup appointment on 17 January 2000, and Dr. Garrett determined that plaintiff no longer had a hernia.

Plaintiff was released to work without restrictions on 12 February 2000. He next worked for three months in Virginia, building and packing telephones on an assembly line, and five-and-

a-half months loading and driving trucks for a temporary agency in Virginia.

In the summer of 2000, plaintiff—who was on holiday break—was standing in the ocean when he was struck by a wave and immediately felt a burning in his stomach. Thereafter, plaintiff continued working until such time as he was laid off and began collecting unemployment benefits. Plaintiff returned to Dr. Garrett on 30 January 2001 complaining of another hernia. Dr. Garrett performed another ventral herniorrhaphy on 28 February 2001, this time with a non-absorbable mesh. Dr. Garrett again noted that the hernia was in the same area as plaintiff's two compensable hernias. Upon plaintiff's follow-up examination on 19 March 2001, Dr. Garrett determined that plaintiff was doing well and no longer had a hernia. Plaintiff's healing process was slightly complicated by an infection at the incision site, but nevertheless, he was released to return to work without restrictions as of 12 April 2001.

In the summer of 2001, plaintiff was lifting and carrying a door at his home when he again felt the symptoms of a hernia. He was seen again by Dr. Garrett on 7 March 2002, who noted plaintiff had two hernias, both in the same area as his three earlier hernias, with one hernia on the left side of his midline and the other on the right side of his midline. At the time of the most recent hearing of this case, Dr. Garrett had recommended that plaintiff undergo either a laproscopic operation or a procedure that he called an "Israeli repair." This surgical repair, which would be plaintiff's fifth repair, was pending at the time of the hearing.

Depositions were taken from the three surgeons who repaired the various hernias. Drs. Harris, Hill and Garrett all agreed that a single occurrence of an umbilical hernia predisposes a person to an increased risk of other hernias occurring at the same site. Drs. Hill and Garrett in particular described the mechanisms by which a hernia might recur, both generally and in plaintiff's case. The doctors described a hernia as essentially a tear in connective tissue and possibly muscle tissue as well, and when the hernia is repaired, the torn tissue is rejoined by scar tissue. Scar tissue has less resiliency, elasticity, and tensile strength than normal connective tissue. Therefore, the scar tissue is prone to rupture more easily than ordinary tissue.

Dr. Garrett testified that plaintiff did not have a hernia after the 20 December 1999 hernia repair, nor after the 28 February 2001 hernia repair. Further, Dr. Garrett conceded that just because a person

had undergone a hernia repair, it did not mean that person would have another hernia. According to Dr. Garrett, some precipitating event would be necessary to cause another hernia.

Dr. Garrett also testified that he knew Dr. Hill and after having reviewed Dr. Hill's note which stated plaintiff could return to work without restrictions following Dr. Hill's hernia repair of February 1998, Dr. Garrett could make the inference that plaintiff did not have a hernia following that surgical repair.

The Full Commission found that in Dr. Garrett's opinion there is a greater than fifty percent chance that all of plaintiff's subsequent hernias in the same area have been due, in part, to the earlier hernias and resulting surgical repairs that weakened the tissue. The Full Commission, however, also found relying on Dr. Garrett's testimony, "[a] hernia is not going to simply recur just by nature of the fact that he had a previous hernia repair."

The issues on appeal are whether: (I) the Commission's finding of fact numbers 4 and 10 are supported by competent evidence; and (II) the Commission employed the correct standard to determine the cause of plaintiff's three subsequent hernias.

Standard of Review

Opinions and awards of the Commission are reviewed to determine whether competent evidence exists to support the Commission's findings of fact, and whether the findings of fact support the Commission's conclusions of law. *See Deese v. Champion Int'l Corp.*, 352 N.C. 109, 114, 530 S.E.2d 549, 552 (2000). If supported by competent evidence, the Commission's findings are binding on appeal even when there exists evidence to support findings to the contrary. *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001). The Commission's conclusions of law are reviewed *de novo*. *Allen*, 143 N.C. App. at 63, 546 S.E.2d at 139.

I

[1] First, plaintiff argues that the Commission's finding of fact numbers 4 and 10 are not supported by competent evidence in the record.

Specifically, plaintiff challenges the portion of finding of fact number 4 which reads: "While plaintiff's recovery from his second surgery in February 1998 was slow, he ultimately did heal from that surgery[;]" and, the portion of finding of fact number 10 which

reads: "Absent some new strain, the hernias were repaired subsequent to the surgery and did not continue after that surgery. The subsequent hernias are new injuries and are not a continuation of the same hernia. Therefore, the Commission finds that the 1996 hernia ended with the recovery from the successful surgery and plaintiff's subsequent hernias are not the direct and natural result of the prior injury or injuries."

The record reveals the following evidence: Dr. Hill repaired plaintiff's 20 August 1996 hernia on 17 February 1998. Dr. Hill noted on 6 May 1998 that plaintiff "[h]as finally healed and is ready to go." Dr. Hill released plaintiff to return to work on 11 May 1998 without restrictions after the hernia repair. Dr. Garrett testified that he knew Dr. Hill and had reviewed Dr. Hill's note, and if Dr. Hill released plaintiff to return to work without restrictions, Dr. Garrett could make the inference that plaintiff did not have a hernia following the February 1998 surgical repair. Plaintiff admitted that his doctors released him to return to full duty work without restrictions after each hernia repair.

Therefore, competent evidence supports the Commission's finding of fact numbers 4 and 10. Moreover, plaintiff failed to assign as error finding of fact number 11 which reads:

> The greater weight of the competent evidence establishes that plaintiff sustained a compensable hernia in 1995 that was successfully repaired and he was permitted to return to work without restriction. Also, plaintiff sustained a subsequent, recurrent hernia in 1996 that was successfully repaired in 1998, which did not exist after the repair, and plaintiff was permitted to return to work without restriction. As previously found by the Commission in this case, the 1996 hernia was a new injury, and not a continuation of his 1996 injury.

Finding of fact number 11 reads essentially the same as finding of fact numbers 4 and 10, which plaintiff assigned as error. As plaintiff failed to assign as error finding of fact number 11, this finding of fact is binding on appeal. *Robertson v. Hagood Homes, Inc.*, 160 N.C. App. 137, 140, 584 S.E.2d 871, 873 (2003). Accordingly, this assignment of error is overruled.

II

[2] Second, plaintiff argues that the Commission failed to utilize the proper standard for determining causation when the Commission

concluded that plaintiff's three hernias, sustained after leaving defendant's employ, were not compensable as natural and direct results of earlier compensable hernias sustained by plaintiff while employed by defendant.

The threefold conditions precedent to the right to compensation pursuant to the Workers' Compensation Act are that: (1) the claimant suffered a personal injury by accident; (2) such injury arose in the course of the employment; and (3) such injury arose out of the employment. *Barham v. Food World, Inc.*, 300 N.C. 329, 332, 266 S.E.2d 676, 678 (1980). The social policy behind the Workers' Compensation Act seeks to provide employees swift and certain compensation for the loss of earning capacity from accident or occupational disease arising in the course of employment; and to insure limited liability for employers. "Although the Act should be liberally construed to effectuate its intent, the courts cannot judicially expand the employer's liability beyond the statutory parameters." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 190, 345 S.E.2d 374, 381 (1986).

N.C. Gen. Stat. § 97-2(18), provides in pertinent part:

> In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:
>
> a. That there was an injury resulting in hernia or rupture.
>
> b. That the hernia or rupture appeared suddenly.
>
> c. Repealed by Session Laws 1987, c. 729, s. 2.
>
> d. That the hernia or rupture immediately followed an accident. Provided, however, a hernia shall be compensable under this Article if it arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned.
>
> e. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.
>
> All hernia or rupture, inguinal, femoral or otherwise, so proven to be the result of an injury by accident arising out of and in the course of employment, shall be treated in a surgical manner by a radical operation. If death results from such operation, the death shall be considered as a result of the injury, and com-

> pensation paid in accordance with the provisions of G.S. 97-38. In nonfatal cases, if it is shown by special examination, as provided in G.S. 97-27, that the injured employee has a disability resulting after the operation, compensation for such disability shall be paid in accordance with the provisions of this Article.

N.C.G.S. § 97-2(18) (2003). To establish a *prima facie* case for compensation for a hernia pursuant to the Act, a claimant must prove: "(1) an injury resulting in a hernia or rupture, (2) which appeared suddenly, (3) immediately following a work-related accident, and (4) did not exist prior to the accident." *Pernell v. Piedmont Circuits*, 104 N.C. App. 289, 292, 409 S.E.2d 618, 619 (1991).

The evidence reveals that plaintiff did not work for defendant after February 1998; therefore, plaintiff's subsequent hernia could not have arisen immediately following a work-related accident or specific traumatic incident of the work assigned by defendant. Moreover, following the 20 December 1999 hernia repair, Dr. Garrett testified that plaintiff did not have a hernia. Additionally, Dr. Garrett testified that plaintiff did not have a hernia after the 28 February 2001 repair.

Plaintiff concedes in his brief that his subsequent hernias do not meet the standards as delineated pursuant to N.C. Gen. Stat. § 97-2(18). Plaintiff instead advances the argument that compensability of the subsequent hernias are governed by *Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 323 S.E.2d 29 (1984).

In *Heatherly*, this Court stated:

> The law in this state is that the aggravation of an injury or a distinct new injury is compensable "[w]hen the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct."

Heatherly, 71 N.C. App. at 379, 323 S.E.2d at 30 (citation omitted). Even if this Court were to conclude that *Heatherly* controls, plaintiff's argument nevertheless fails as both Drs. Hill and Garrett testified that just because a person has undergone a hernia repair, it does not necessarily follow that the person will have another hernia. Therefore, plaintiff cannot show that the subsequent hernias were the natural and direct result of the earlier hernias.

Moreover, *Heatherly* involved a leg fracture that had not completely healed when the claimant was involved in a motor vehicle accident. The compensability of a leg fracture is not governed by the statutory test as enumerated in N.C. Gen. Stat. § 97-2(18).

Plaintiff testified that the third hernia occurred due to being hit by a wave at the beach, and the last two hernias occurred while carrying a door down a set of steps at his home. In addition, subsequent to his employment with defendant, plaintiff was employed in several positions with various employers that involved heavy manual labor.

No competent evidence supports plaintiff's contention that the three subsequent hernias were caused by incidents related to his employment with defendant. Moreover, plaintiff failed to assign as error conclusion of law number 2 which reads in pertinent part: "Plaintiff's 1995 and 1996 hernias had resolved and plaintiff did not have a hernia prior to his injuries in 1999, 2000, and 2001." Accordingly, this assignment of error is overruled.

The opinion and award of the Full Commission is affirmed.

Affirmed.

Judges TYSON and LEVINSON concur.

MOSES H. CONE MEMORIAL HEALTH SERVICES CORP. D/B/A LEBAUER HEALTH CARE, PLAINTIFF v. PATRICIA F. TRIPLETT, M.D., DEFENDANT

No. COA03-1604

(Filed 7 December 2004)

1. Employer and Employee— wages—change in bonus formula

The trial court did not err by failing to award liquidated damages to defendant doctor based on plaintiff healthcare provider's alleged violation of the North Carolina Wage and Hour Act under N.C.G.S. § 95-25.13(3) resulting from a change in plaintiff's bonus formula, because: (1) defendant's bonus had not accrued at the time of the change when under the pertinent contract, the amount to which any member of the primary care provision was entitled to as a bonus was not calculable until the end of the plan year;

and (2) defendant's changes only affected those benefits accruing after written notice was given the employee or notice was posted in a place accessible to the employees.

2. Damages and Remedies— breach of covenant not to compete—measure of damages—lost profits

The trial court erred by awarding plaintiff healthcare provider $53,340.16 in damages and restitution for defendant doctor's violation of the parties' contract involving a covenant not to compete which was the amount plaintiff paid defendant over the course of defendant's employment as covenant payments and by alternatively granting summary judgment on plaintiff's unjust enrichment claim when there was in fact a breach of contract, and the case is remanded for further proceedings on the issue of damages, because: (1) the amount was an improper measure of damages since plaintiff would not have been entitled to receive back any money paid for the covenant not to compete if the contract had been performed; and (2) in breach of covenant not to compete claims, the usual measure of damages is lost profits.

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

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

Appeal by plaintiff and defendant from judgment entered 23 June 2003 by Judge John O. Craig, III, in Guilford County Superior Court. Heard in the Court of Appeals 21 September 2004.

Smith Moore LLP, by Julie C. Theall and Alexander L. Maultsby, for plaintiff-appellant and -appellee.

John J. Korzen for defendant-appellant and -appellee.

THORNBURG, Judge.

Defendant was hired by LeBauer Health Care, P.A., in August 1996. On 1 February 1999, Moses H. Cone Health Services Corp. (the "System") acquired LeBauer Health Care and formed plaintiff ("LeBauer") in this action. Defendant entered into an employment contract with LeBauer on that date for a term of ten years. Defendant worked in the Primary Care division of LeBauer. However, defendant spent most of her time in the hospital caring for LeBauer's patients

that were receiving hospital care, as opposed to caring for patients at LeBauer's offices.

The employment contract consisted of three main documents: the Employment Agreement (the "agreement") and two exhibits, the Physician Compensation Plan (the "compensation plan") and the Allocation Model (the "allocation model"), along with several other exhibits. The agreement set forth the details of the employment and included a covenant not to compete. The compensation plan detailed how LeBauer would receive compensation from the System. The allocation model described how compensation would be allocated among the divisions of LeBauer and how the divisions would compensate the individual physicians. Further details of the contract will be discussed herein as necessary.

On or about 6 August 2001, defendant resigned from her employment with LeBauer. On 4 September 2001, defendant began working for Cornerstone Health Care in High Point, North Carolina. On 15 October 2001, LeBauer filed a complaint alleging that defendant was engaged in the practice of medicine in direct competition with LeBauer in the restricted area during the restricted period contained in the covenant not to compete of defendant's contract with LeBauer. LeBauer alleged: (1) breach of contract, asking for damages, specific performance and/or injunctive relief; (2) misrepresentation by defendant as to her intent to perform under the contract; (3) unjust enrichment for accepting compensation for the covenant; and (4) rescission of the contract. On 19 November 2001, defendant answered LeBauer's complaint and counterclaimed alleging breach of contract and a violation of the North Carolina Wage and Hour Act ("Wage and Hour Act"), N.C. Gen. Stat. § 95-25.1 *et seq.* (2003).

Both parties moved for summary judgment in January 2003. On 23 June 2003, the trial court ordered that each party's motion should be allowed in part and denied in part. The trial court granted summary judgment to LeBauer as to its claims for breach of contract, misrepresentation and, alternatively, as to unjust enrichment. The trial court awarded LeBauer $53,340.16, the amount paid by LeBauer to defendant in exchange for the covenant not to compete, in damages or, alternatively, as restitution. The trial court denied LeBauer's motion as to its claim for injunctive relief. Defendant's motion on her counterclaim pursuant to the Wage and Hour Act was allowed, though the trial court chose not to award liquidated damages for the violation. All of defendant's remaining claims were dismissed pursuant to summary judgment.

Both parties appeal from this judgment. Defendant argues on appeal: (1) that the trial court erred in failing to award liquidated damages for the violation of the Wage and Hour Act and (2) that the trial court erred in awarding LeBauer $53,340.16 in damages or restitution. LeBauer argues on appeal that the trial court erred in finding a violation of the Wage and Hour Act.

North Carolina Wage and Hour Act claim

[1] Defendant's Wage and Hour Act claim is based upon a change to the allocation model that occurred in December 1999 during her first year of employment under the contract.

Compensation was addressed in section eight (8) of the agreement. The agreement provides:

> For all services rendered by Physician during the term hereof, Physician shall receive compensation and fringe benefits in accordance with the Physicians' Compensation Plan (the "Compensation Plan"), a copy of which is attached hereto as Exhibit B, and the Allocation Model adopted pursuant to the Compensation Plan.

The allocation model:

> [S]ets forth the procedure by which payments to the Group [LeBauer] by the System pursuant to the Physicians Compensation Plan (the "Compensation Plan") are allocated to the specialty practice areas within the Group (individually, a "Division" and collectively, the "Divisions") and paid to the individual physicians and other professional staff within the Divisions.

Article II of the compensation plan provides that compensation is to be divided into divisional compensation pools, special allocations and the compensation incentive pool, with each division allocated a set amount for base compensation. The Primary Care division allocated base compensation for its physicians according to professional productivity for the immediately preceding year and also established a Primary Care Bonus Pool ("bonus pool"). The bonus pool was to be "[t]he excess, if any, of the Divisional Compensation Pool over aggregate Base Compensation" and would be divided among the primary care physicians in part based on professional productivity.

The initial divisional compensation pool for each division was established and detailed in an exhibit to the compensation plan. The

initial divisional compensation pool provided the Primary Care division with a compensation pool of $3,120,000, including $203,375 labeled as "Incentive Pool." We first note that included in the compensation plan was a provision for "Incentive Compensation." Incentive Compensation was defined as "fifteen percent (15%) of the amount by which actual Gross Revenue for such year exceeds the Target Gross Revenue for such year." As the allocation model provides that Incentive Compensation, at least initially, would be allocated among the divisions, we conclude that though labeled "Incentive Pool," the $203,375 was in fact for the bonus pool. Accordingly, although by definition whether there is a bonus pool would generally be speculative, it appears that for the initial year there was a set sum established for the bonus pool.

The original allocation model provides that twenty-five percent (25%) of the bonus pool was to be allocated to members of the division who performed administrative duties that did not generate professional charges. The remaining seventy-five percent (75%) was to be allocated among the full-time members of the division. The original allocation model set forth the following formula for calculating the amount each member would receive:

> a. Multiply Professional Productivity for each member by 0.4, and then subtract therefrom the Base Compensation allocated to such member;
>
> b. Aggregate the result in step 'a' for all members for whom the result in step 'a' is greater than zero (the "Bonus Recipients");
>
> c. For each Bonus Recipient, divide the result in step 'a' by the aggregate amount determined in step 'b';
>
> d. Allocate to each Bonus Recipient an amount equal to the percentage result in step 'c' multiplied by the Primary Care Bonus Pool.

Basically, the bonus pool was to be distributed based on a member's comparative Professional Productivity. Professional Productivity is defined in the allocation model as "the professional services component of charges for services rendered by a physician based on CPT Codes as utilized from time to time by the Health Care Financing Administration ("HCFA")." The contract goes on to say that Professional Productivity is calculated on the last day of the sixth month and the last day of the twelfth month of each Plan year, in the "Semi-Annual Allocation Periods." However, the bonus pool alloca-

tions are exempted from the semi-annual allocation periods, leaving professional productivity for the purposes of the bonus pool to be calculated at the end of each plan year. Thus, the final amount that defendant might be entitled to as a bonus was not calculable until the end of the plan year.

Sometime in the fall of 1999, it was discovered that, due to the fact that hospital charges were higher than charges for similar services performed in the office, defendant was projected to earn a disproportionately large share of the bonus pool. After negotiating with defendant and discussing the issue with other members of the Primary Care division, the allocation model was amended by reducing all hospital charges by fifteen percent (15%) and paying defendant a one-time raise in base compensation. The net result of these changes was that defendant received in total compensation a smaller amount than she would have received under the original allocation model's formula.

N.C. Gen. Stat. § 95-25.13, a provision of the Wage and Hour Act, provides in pertinent part:

> Every employer shall:
>
> . . . .
>
> (3) Notify its employees, in writing or through a posted notice maintained in a place accessible to its employees, of any changes in promised wages prior to the time of such changes except that wages may be retroactively increased without the prior notice required by this subsection . . . .

N.C. Gen. Stat. § 95-25.13(3) (2003).

The Wage and Hour Act defines the term "wage" to include such wage-related benefits as "sick pay, vacation pay, severance pay, commissions, *bonuses*, and other amounts promised when the employer has a policy or a practice of making such payments." N.C. Gen. Stat. § 95-25.2(16) (2003) (emphasis added).

In interpreting N.C. Gen. Stat. § 95-25.13(3), this Court has said:

> Once the employee has earned the wages and benefits under this statutory scheme, the employer is prevented from rescinding them, with the exception that for certain benefits such as commissions, bonuses and vacation pay, an employer can cause a loss or forfeiture of such pay if he has notified the employee of

the conditions for loss or forfeiture in advance of the time when the pay is earned.

Narron v. Hardee's Food Systems, Inc., 75 N.C. App. 579, 583, 331 S.E.2d 205, 208, *disc. review denied*, 314 N.C. 542, 335 S.E.2d 316 (1985). Thus, "[w]e have construed this statute to permit an employer to make changes in an employee's benefits, but the change applies only to those benefits *accruing* after written notice is given the employee or notice is posted in a place accessible to the employees." *McCullough v. Branch Banking & Tr. Co.*, 136 N.C. App. 340, 349, 524 S.E.2d 569, 575 (2000) (citing *Narron*, 75 N.C. App. at 583, 331 S.E.2d at 207-08) (emphasis added). Accordingly, whether LeBauer's change to the bonus formula constitutes a violation of N.C. Gen. Stat. § 95-25.13 depends upon whether defendant's bonus had accrued at the time of the change.

We conclude that defendant's bonus had not accrued at the time of the change and, thus, there was no violation of N.C. Gen. Stat. § 95-25.13(3). Under this contract, the amount to which any member of the Primary Care division was entitled to as a bonus was not calculable until the end of the plan year. Thus, no definite sum had accrued to defendant at the time the change was made.

Defendant argues that *Murphy v. First Union Capital Mkts. Corp.*, 152 N.C. App. 205, 567 S.E.2d 189 (2002), and *McCullough*, each of which address N.C. Gen. Stat. § 95-25.13(3), control in this matter and establish a violation of the Wage and Hour Act in this case. However, *Murphy* decided that a bonus consisting partly of nonvested stock was a wage and that there had been no violation of the Wage and Hour Act because the employee had been properly notified. *Murphy*, 152 N.C. App. at 208-09, 567 S.E.2d at 192-93. *McCullough* only concluded that a bonus was a wage and that, as the employee's contract did not address the forfeiting of a bonus upon termination, requiring forfeiture was not a change to the employee's wage. *McCullough*, 136 N.C. App. at 350, 524 S.E.2d at 575. Neither case discussed whether a bonus that could not be quantified at the time of the change had accrued at the time the change was made.

In the instant case, a quantifiable bonus had not accrued at the time that LeBauer implemented the change to the bonus plan. In accordance with *Murphy*, *McCullough* and *Narron*, we conclude that, as defendant's bonus was not quantifiable, it had not accrued at the time of the change and, thus, there was no violation of N.C. Gen. Stat. § 95-25.13(3). LeBauer's change only affected those "benefits *accru-*

ing after written notice is given the employee or notice is posted in a place accessible to the employees." *McCullough*, 136 N.C. App. at 349, 524 S.E.2d at 575 (emphasis added).

We reverse and remand this issue to the trial court. Due to our conclusion on this issue, we do not address defendant's argument that she should have been awarded liquidated damages for a Wage and Hour Act violation pursuant to N.C. Gen. Stat. § 95-25.22(a1).

Damages for the Breach of the Covenant Not to Compete

[2] Defendant's contract with LeBauer included a covenant not to compete. Defendant was paid bi-weekly a discrete sum in return for her agreement to the covenant. Over the course of defendant's employment with LeBauer she was paid $53,340.16 as covenant payments. The covenant restricted defendant from practicing medicine while employed by LeBauer, and for two years after her termination, if terminated within the first five years of the contract, in Alamance, Forsyth (excepting the city of Winston-Salem), Guilford, Randolph and Rockingham Counties. The trial court ordered defendant to pay LeBauer "damages in the amount of $53,340.16, which the Court concludes, based on the uncontroverted evidence, was the amount paid by [LeBauer] to defendant in exchange for the covenant." The same amount was alternatively awarded as restitution.

Restrictive covenants between an employer and employee are valid and enforceable if they are (1) in writing, (2) made part of a contract of employment, (3) based on valuable consideration, (4) reasonable both as to time and territory, and (5) not against public policy. *See A.E.P. Industries v. McClure*, 308 N.C. 393, 402-03, 302 S.E.2d 754, 760 (1983); *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 649-50, 370 S.E.2d 375, 380 (1988). The parties do not argue that the covenant not to compete was invalid. Further, as defendant practiced medicine in Guilford County during the restricted period, the trial court was correct to conclude that the covenant not to compete had been violated and that defendant breached the employment contract. As we conclude that there was in fact a breach of contract, it was improper for the trial court to alternatively grant summary judgment on LeBauer's unjust enrichment claim.

Defendant argues that the damages awarded LeBauer were inappropriate. We agree as to the amount awarded, but find disingenuous defendant's argument that LeBauer is not entitled to money damages because her breach did not occur while she was employed by

LeBauer. Certainly, any breach that has already occurred, whether while defendant was employed or after she was terminated, would necessarily be in the past when the suit was filed.

The agreement provides in paragraph 23:

> In the event of a breach or threatened breach of the provisions of the covenants against competition set forth herein, the LeBauer Practice shall have the cumulative right to seek monetary damages for any past breach and equitable relief, including specific performance by means of an injunction against Physician or against Physician's partners, agents, representatives, servants, corporations, employees, and/or any persons acting directly or indirectly by or with Physician, to prevent or restrain any such breach.

Clearly, the parties anticipated the possibility of money damages in the event of a breach of the covenant not to compete, though they chose not to include a liquidated damages clause.

In determining damages for a breach of contract, this Court has said:

> For a breach of contract the injured party is entitled as compensation therefore to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed. Additionally, nominal damages are allowed where a legal right has been invaded but there has been no substantial loss or injury to be compensated.

Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc., 143 N.C. App. 1, 9-10, 545 S.E.2d 745, 750 (2001) (internal citations omitted). As LeBauer would not have been entitled to receive back any money paid for the covenant not to compete if the contract had been performed, we conclude that this was an improper measure of damages. In breach of covenant not to compete claims, the usual measure of damages is lost profits. *See Keith v. Day*, 81 N.C. App. 185, 195-97, 343 S.E.2d 562, 568-69 (1986). Accordingly, we reverse the trial court's award of damages and remand to the trial court for further proceedings on the issue of damages.

[3] Defendant presented six assignments of error on appeal. However, defendant has only presented four of those assignments in her brief. Defendant failed to set out her remaining assignments of error in her brief. Because she has neither cited any authority nor

stated any reason or argument in support of those assignments of error, they are deemed abandoned. N.C. R. App. P. 28(b)(6).

Reversed and remanded.

Judges WYNN and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. ERNEST ELLIS, DEFENDANT

No. COA03-1065

(Filed 7 December 2004)

1. **Sentencing— trial court's authority over DOC—motion for appropriate relief**

The court's authority to order the Department of Correction to change its records to reflect the trial court's entry of a sentence is not affected by the defendant's use of a motion for appropriate relief rather than a civil suit naming DOC as a party. While DOC is not a formal party to criminal proceedings, the statutory scheme established by the Legislature relies upon DOC to carry out the punishment imposed by the court.

2. **Sentencing— erroneous sentence—correction by DOC—separation of powers**

An erroneous criminal sentence is voidable, not void, and the Department of Correction usurped the power of the judiciary and violated separation of powers by ignoring the court's directive to show this defendant's armed robbery sentence as concurrent rather than consecutive.

Appeal by petitioner North Carolina Department of Corrections from order entered 10 July 2003 by Judge William C. Gore in Bladen County Superior Court. Heard in the Court of Appeals 28 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parson, for petitioner-appellant North Carolina Department of Corrections.

North Carolina Prisoner Legal Services, Inc., by Winifred H. Dillon and Susan H. Pollitt, for respondent-appellee.

ELMORE, Judge.

The relevant facts and procedural history of this appeal are as follows: On 21 May 1991, Ernest Ellis entered a plea of guilty in Wilson County Superior Court to one count of attempted armed robbery and was sentenced to a term of eighteen years imprisonment. Also on that date, Ellis' probation for two counts of breaking and entering, and larceny was revoked and his ten-year prison sentence activated, which the Judgment and Commitment specified was to run concurrently with his eighteen-year sentence for attempted armed robbery.

Thereafter, on 15 January 1992, Ellis entered a plea of guilty in Bladen County Superior Court to one count of armed robbery and received a sentence of fourteen years imprisonment. Ellis was already serving his sentences from the aforementioned Wilson County plea arrangements at the time he entered the Bladen County plea agreement. The Bladen County Superior Court's judgment, as reflected by both the court's pronouncement of judgment at the plea hearing and the subsequently-entered judgment and commitment form, did not specify whether the fourteen-year sentence imposed by the Bladen County judgment was to run consecutively or concurrently to the eighteen-year sentence imposed by the Wilson County judgments.

On 13 March 1997, Ellis filed a *pro se* Motion for Appropriate Relief with respect to the Bladen County judgment, asserting, among other things, that petitioner North Carolina Department of Corrections' (DOC) records reflected his sentence on the Bladen County judgment as running consecutively with his sentence on the Wilson County judgments, despite his expectation upon entering the Bladen County plea agreement that the sentences were to run concurrently. By order entered 15 April 1997, the trial court found "the commitment does not require that the sentence is to run consecutive to any other sentence," concluded "as a matter of law[] that the sentence . . . was to run concurrently," and ordered DOC to "show this sentence running concurrently with any other sentence the defendant was presently serving at the time of January 15th, 1992." By letter dated 10 September 1997, an assistant North Carolina Attorney General, as counsel for DOC, requested information about the circumstances of the 15 April 1997 order from the district attorney for the Thirteenth Prosecutorial District, which includes Bladen County. Meanwhile, DOC failed to comply with the trial court's order to change its records to show Ellis's sentences as running concurrently.

The record reflects no further action was taken by any party in this matter until July 2002, when counsel for DOC and counsel for Ellis exchanged letters arguing the validity of the trial court's 15 April 1997 order. Thereafter, on 26 September 2002, Ellis filed a "Motion to Vacate Order Denying Motion for Appropriate Relief and Motion for Reconsideration," requesting therein that the trial court reconsider Ellis's sentence on the Bladen County judgment. On 28 April 2003, the trial court entered a "Notice of Hearing" stating its intent to "hear argument from all interested parties regarding the Motion for Appropriate Relief and the April 15, 1997, ORDER entered thereupon" on 8 May 2003. The Notice of Hearing did not direct that a copy be served on DOC or the Attorney General's office.

At the 8 May 2003 hearing, Ellis was represented by counsel and the State was represented by an assistant district attorney. DOC was not represented at the hearing, although the assistant district attorney advised the trial court that a copy of the Notice of Hearing and the case file had been faxed to the Attorney General's office. Following the hearing, the trial court made oral findings of fact and conclusions of law, which were reduced to writing in an order dated 15 May 2003 and entered 10 July 2003. This order provided, in pertinent part, as follows:

> 3. From the record, the motion, and affidavits submitted by the defendant, which are uncontested by the State of North Carolina, through the office of the District Attorney of the 13th Judicial District, the Court finds that it was the intent of all the parties that the judgment should run concurrently with the sentence previously imposed and which the defendant was then serving.
>
> . . .
>
> 5. The Court therefore finds and concludes as it has previously noted, with concurrence by the District Attorney's office of the 13th Judicial District, that the defendant Ernest Ellis did in fact enter the plea arrangement in this case with the expectation and understanding that his sentence in Bladen County would run concurrently with the sentence imposed previously, and the Court finds he is entitled to the benefit of his plea arrangement.
>
> 6. As noted, this Court . . . on April 15, 1997, ordered the [DOC] to show this sentence as running concurrently with any other sentence defendant was serving on January 15, 1992. The State of North Carolina has not given notice of appeal of the Court's

> April 15, 1997, ORDER requiring the [DOC] to treat these as concurrent sentences.
>
> 7. The Court concludes as a matter of law that the [DOC] must honor the judgments as imposed by the judicial branch of government . . . and that any failure to obey this Court's order in regard to the same is not authorized under existing state law.

The trial court then "once again ordered the [DOC to] correct its records to reflect that the judgment imposed in Bladen County . . . run concurrently with the judgment imposed . . . in Wilson County[.]" DOC petitioned this Court for a writ of certiorari to review this order, which this Court granted on 10 June 2003. The order dated 15 May 2003 is now properly before this Court for review.

[1] DOC first argues that the trial court could not properly order DOC to change Ellis' record to show his sentences as concurrent because "[t]he legislature did not intend a motion for appropriate relief to be a proceeding in which a defendant in a criminal case could obtain relief as against DOC." Specifically, DOC contends that because DOC is not mentioned in Article 89 of Chapter 15A of our General Statutes, which governs motions for appropriate relief, a trial court may not issue orders requiring DOC to take any action resulting from a motion for appropriate relief. We disagree.

Article 89 provides that upon granting a defendant's motion for appropriate relief, the trial court may order a new trial, dismissal of charges, or "[a]ny other appropriate relief[,]" including entry of an "appropriate sentence." N.C. Gen. Stat. § 15A-1417 (2003). While DOC is not a formal party to criminal proceedings, the statutory scheme established by our Legislature to sentence and imprison criminal defendants upon conviction nevertheless relies upon DOC to effectuate the punishment imposed by the court's order. Section 148-4 of our General Statutes provides that "[a]ny sentence to imprisonment in any unit of the State prison system[] . . . shall be construed as a commitment, *for such terms of imprisonment as the court may direct*, to the custody of the Secretary of Correction . . ." N.C. Gen. Stat. § 148-4 (2003) (emphasis added). It is imperative that DOC's records accurately reflect a prisoner's "terms of imprisonment" in order for DOC to fulfill its statutory mandate to confine prisoners for such periods "as the court may direct." It stands to reason that where a trial court enters an "appropriate sentence" pursuant to a criminal defendant's motion for appropriate relief, the trial court's authority to order DOC to change its records to reflect the trial court's entry of the

"appropriate sentence" is unaffected by the criminal defendant's choice of a motion for appropriate relief, rather than a civil suit naming DOC as a party defendant, to achieve this outcome. DOC's argument to the contrary is without merit.

[2] DOC next argues that the trial court lacked the authority to order DOC to change Ellis's combined record to reflect a concurrent sentence on the Bladen County judgment, regardless of whether the order was entered pursuant to a motion for appropriate relief or a civil action, because North Carolina law as it existed upon entry of the Bladen County judgment prohibited Ellis from receiving a concurrent sentence for armed robbery.

Section 15A-1354 of our General Statutes provides as follows regarding concurrent and consecutive terms of imprisonment:

> (a) Authority of Court.—When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. *If not specified or not required by statute to run consecutively, sentences shall run concurrently.*

N.C. Gen. Stat. § 15A-1354(a) (2003) (emphasis added). Thus, if a judgment imposed upon a defendant who is already serving another sentence does not specify whether the sentence is to be consecutive or concurrent, the sentences run concurrently unless consecutive sentences are required by statute.

Under the version of N.C. Gen. Stat. § 14-87 in effect in 1992, when Ellis entered his plea of guilty to armed robbery, that offense was punishable by a term of imprisonment which the statute required "shall run consecutively with and shall commence at the expiration of" any other sentence then being served by the offender. N.C. Gen. Stat. § 14-87(d) (1992) (effective until 1 October 1994). Thus, when Ellis pled guilty to armed robbery in 1992 while already serving another sentence, the fourteen-year sentence he received pursuant to the plea arrangement was required by then-existing law to run consecutively with the eighteen-year sentence Ellis was already serving, notwithstanding the 1992 judgment's failure to specify whether the sentences were to be consecutive or concurrent. DOC contends the trial court erred by directing DOC to change Ellis's combined inmate

record to reflect a concurrent sentence for the armed robbery judgment, since a concurrent sentence violates state law as it existed when Ellis's plea was entered.

Our Supreme Court addressed this issue, presented on almost identical relevant facts, in *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998). In *Wall*, the defendant entered a plea arrangement whereby he consolidated his burglary and breaking and entering cases and received a twenty-five-year sentence, while already serving a prison sentence for a previous offense. Although the defendant, defense counsel, and the assistant district attorney agreed that the twenty-five-year sentence would be served concurrently, neither the plea agreement nor the resulting judgment specified whether the sentence was to be served concurrently or consecutively. DOC thereafter recorded the defendant's sentence as providing consecutive terms of imprisonment, and upon the defendant's inquiry, informed him that he was statutorily required to serve a consecutive sentence for the offense to which he pled guilty. After the defendant filed a motion for appropriate relief, the trial court concluded that, based on the terms of his plea arrangement, the defendant was entitled to serve concurrent rather than consecutive sentences. Our Supreme Court then reviewed the trial court's order pursuant to DOC's petition for writ of certiorari and vacated the order, concluding that because the defendant was required by statute to serve consecutive sentences, the trial court lacked authority to order otherwise. The *Wall* Court then stated as follows:

> In the instant case, defendant's plea of guilty was consideration given for the prosecutor's promise. He was entitled to receive the benefit of his bargain. However, defendant is not entitled to specific performance in this case because such action would violate the laws of this state. Nevertheless, defendant may avail himself of other remedies. He may withdraw his guilty plea and proceed to trial on the criminal charges. He may also withdraw his plea and attempt to negotiate another plea agreement that does not violate [the relevant statute].

Wall, 348 N.C. at 676, 502 S.E.2d at 588.

In the present case we conclude, as did our Supreme Court in *Wall*, that because defendant was statutorily required to serve a consecutive sentence for armed robbery, the trial court's order directing that Ellis serve a concurrent sentence on the Bladen County judgment was erroneous. *Wall*, 348 N.C. at 675-76, 502 S.E.2d at 588. However,

this does not resolve the central question presented by the present appeal, that being whether the trial court erred by *ordering DOC to change its records* to show concurrent rather than consecutive sentences for Ellis.

In *Hamilton v. Freeman*, 147 N.C. App. 195, 204, 554 S.E.2d 856, 861 (2001), *disc. review denied*, 355 N.C. 285, 560 S.E.2d 803 (2002), this Court held that the trial court did not err by ordering DOC to record the defendants' sentences as concurrent where they were so indicated on the face of the judgments, despite the fact that the defendants were statutorily ineligible for concurrent sentences. In so holding, the *Hamilton* Court reasoned as follows:

> "The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division . . . ." N.C. Gen. Stat. § 7A-271(a) (1999). It is well established that a judgment of a Superior Court must be honored unless the judgment is void. Where a court has authority to hear and determine the questions in dispute and has control over the parties to the controversy, a judgment issued by the court is not void, even if contrary to law. Such a judgment is voidable, but not void *ab initio*, and is binding until vacated or corrected. Defendants do not argue that the trial courts that originally sentenced plaintiffs lacked jurisdiction. Because the sentencing courts had authority over the disputes and control over the parties, the resulting judgments were not void and must be honored as received by DOC.
>
> Furthermore, we note that "[t]he legislative, executive, and supreme judicial powers of the State government [are] . . . separate and distinct from each other." N.C. Const. art. I, § 6. The Department of Correction is a part of the executive branch of North Carolina. *By independently amending judgments to reflect compliance with DOC's interpretation of statutory authority, DOC has usurped the power of the judiciary, thereby violating separation of powers.*

Hamilton, 147 N.C. App. at 204, 554 S.E.2d at 861 (citations omitted) (emphasis added).

We find *Hamilton* instructive in the present case. Here, as there, the superior court had authority to hear and determine the questions in dispute and had control over the parties, such that the trial court's judgment, although contrary to then-existing law, was not void. Moreover, we conclude that by ignoring the trial court's

directive to show Ellis's sentences as concurrent rather than consecutive, "DOC has usurped the power of the judiciary, thereby violating separation of powers." *Id.*; *see also State v. Bowes*, 159 N.C. App. 18, 25, 583 S.E.2d 294, 299 (2003) ("The North Carolina Constitution, specifically Article IV, section 3, does not permit an administrative agency of the executive branch to exercise appellate review of decisions of the General Court of Justice"), *disc. review denied*, 358 N.C. 156, 592 S.E.2d 699 (2004). Accordingly, we hold that the trial court did not err in ordering DOC to change its records to show Ellis's sentences as concurrent, as this order is binding upon DOC until it is vacated or corrected.

Affirmed.

Judges BRYANT and GEER concur.

BARBARA THOMAS, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR HAILEY THOMAS, A MINOR CHILD, PLAINTIFFS v. TIFFANY WEDDLE, SONER BILGIN AND CAPA IMPORTS, INC., DEFENDANTS

No. COA04-230

(Filed 7 December 2004)

1. Animals— reasonable foreseeability of vicious propensity—domestic cat—kitten

The trial court did not err by granting summary judgment in favor of defendants on the claims of negligence per se, negligent keeping of an animal, and negligent failure to supervise a kitten in an action arising out of an incident where a stray kitten that was brought to work by defendant employee attacked plaintiff customers, because: (1) domestic cats are traditionally considered to be generally harmless, and plaintiffs presented no evidence that this particular cat was of a species or breed known to be dangerous; (2) defendants had no advance warning that the cat might attack someone, and without such knowledge, it was not reasonably foreseeable that the kitten would injure plaintiffs; (3) in the absence of reasonable foreseeability, plaintiffs cannot show proximate cause or negligence on the part of defendants; and (4) plaintiffs cite no authority that would support liability of a pet

owner for injuries inflicted by a previously gentle animal of a breed or species not known to be inherently dangerous by virtue of size, behavior, or temperament.

2. Premises Liability— failure to warn of hidden danger—reasonable foreseeability

The trial court did not err by granting summary judgment in favor of defendants on the claims of failing to warn plaintiffs of a hidden danger and premises liability arising out of an incident where a stray kitten that was brought to work by defendant employee attacked plaintiff customers, because plaintiffs presented no evidence that it was reasonably foreseeable that the kitten would attack plaintiffs.

3. Negligence— negligence per se—failure to get rabies vaccination for kitten

The trial court did not err by granting summary judgment in favor of defendants on a claim of negligence per se arising out of an incident where a stray kitten that was brought to work by defendant employee attacked plaintiff customers even though plaintiffs contend defendant's failure to get a rabies vaccination for the kitten was a direct and proximate cause of plaintiffs' injuries, because plaintiffs failed to produce evidence in support of its assertion.

4. Emotional Distress— negligent infliction—sufficiency of evidence

The trial court did not err by granting summary judgment in favor of defendants on a claim of negligence infliction of emotional distress arising out of an incident where a stray kitten that was brought to work by defendant employee attacked plaintiff customers, because: (1) this claim depends upon evidence that defendants acted negligently; and (2) plaintiffs failed to forecast evidence of negligence.

5. Negligence— negligent supervision—respondeat superior

The Court of Appeals' determination that the trial court properly granted summary judgment in favor of defendant employee, arising out of an incident where a stray kitten that was brought to work by defendant employee attacked plaintiff customers, necessarily defeated plaintiffs' derivative claims based on allegations of negligent supervision of the employee and liability based on respondeat superior.

Appeal by plaintiffs from judgment entered 10 December 2003 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 21 October 2004.

Womble Carlyle Sandridge & Rice, by Douglas R. Vreeland for plaintiff-appellants.

Burton & Sue, L.L.P., by Gary K. Sue and Stephanie W. Anderson for defendant-appellees.

LEVINSON, Judge.

Plaintiffs (Barbara Thomas and her daughter, Hailey Thomas) appeal from the entry of summary judgment in favor of defendants Tiffany Weddle, Soner Bilgin, and Capa Imports. We affirm.

Defendant Capa Imports is a corporation operating a retail furniture store in High Point, North Carolina. Defendant Soner Bilgin is the CEO of Capa, and also owns the building housing the store. Defendant Weddle is an employee of the store. In February 2002 Weddle was caring for a stray kitten about eight weeks old. She brought the kitten to work with her during the day, and he spent several days at the store without incident. On 12 February 2002 plaintiffs were at the store, viewing furniture on display in the store's downstairs area. When plaintiffs returned to the store's main area, they were distraught and claimed that the kitten had jumped on them and inflicted serious injuries on plaintiff Hailey Thomas. The kitten was later euthanized and it was determined that he did not have rabies.

On 28 March 2003 plaintiffs filed suit and asserted claims for negligence *per se*, negligent keeping of an animal, failure to warn of hidden danger, failure to supervise the kitten, negligent infliction of emotional distress, premises liability, *respondeat superior* liability of Bilgin and Capa, and negligent supervision of Weddle by Bilgin and Capa. Defendants answered, denying all material allegations in the complaint. On 29 October 2003 defendants moved for summary judgment, asserting that "there is no genuine issue as to any material fact with regards to whether the defendants knew or should have known whether or not the animal in question had a vicious propensity." On 9 December 2003 the trial court granted summary judgment in favor of defendants on all counts. From this order, plaintiffs appeal.

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2003). "[T]he movant must meet the burden of proving an essential element of plaintiff's claim does not exist, cannot be proven at trial or would be barred by an affirmative defense." *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 21, 423 S.E.2d 444, 454 (1992). "In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) (2003), and must be viewed in a light most favorable to the non-moving party." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (citing *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975)). "On appeal, this Court's task is to determine whether, on the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *RD&J Props. v. Lauralea-Dilton*, 165 N.C. App. 737, 742, 600 S.E.2d 492, 497 (2004) (citation omitted).

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[1] Plaintiffs' claims for negligence *per se*, negligent keeping of an animal, negligent failure to warn of a hidden danger, negligent failure to supervise the kitten, negligent infliction of emotional distress, and premises liability, are all based upon allegations of negligence. Therefore, we first review applicable common law principles of negligence. "It is well established that . . . the essential elements of negligence [are] duty, breach of duty, proximate cause, and damages." *Camalier v. Jeffries*, 340 N.C. 699, 706, 460 S.E.2d 133, 136 (1995) (citation omitted). In the instant case, we find the issue of proximate cause to be dispositive:

> Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence **could have reasonably foreseen** that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed. **Foreseeability is thus a requisite of proximate cause**, which is, in turn, a requisite for actionable negligence.

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 233, 311 S.E.2d 559, 564 (1984) (citation omitted) (emphasis added). Thus, " 'the test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the rea-

sonable foresight of the defendant.' " *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 479, 562 S.E.2d 887, 896 (2002) (quoting *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979)). Accordingly, summary judgment is upheld when plaintiff fails to produce evidence that injury was reasonably foreseeable by the defendant. *Sink v. Moore and Hall v. Moore*, 267 N.C. 344, 350-51, 148 S.E.2d 265, 270 (1966) (affirming entry of summary judgment where evidence was "not sufficient to support a finding of a 'vicious propensity' on the part of the dog" and thus defendant could not reasonably "foresee that an injury to the person or property of another would be likely to result" from allowing dog to run loose).

In the context of injuries caused by animals, the parameters of reasonable foreseeability will vary according to the breed, species, or known individual temperament of the animal. Knowledge of the dangerous tendencies of certain wild animals is generally imputed to their owners or keepers. "Owners of wild beasts, or beasts that are in their nature vicious, are liable under all or most all circumstances for injuries done by them; and in actions for injuries by such beasts it is not necessary to allege that the owner knew them to be mischievous, for he is presumed to have such knowledge, from which it follows that he is guilty of negligence in permitting the same to be at large." *State v. Smith*, 156 N.C. 628, 632, 72 S.E. 321, 323 (1911). Also, with regards to large domestic animals or certain domestic animals of known danger, the owner or keeper will also be charged with knowledge of the general nature of the species or breed. *See Griner v. Smith*, 43 N.C. App. 400, 407, 259 S.E.2d 383, 388 (1979) ("owner of a domestic animal is chargeable with knowledge of the general propensities of certain animals"). Such rulings are reasonable as, for example, "by virtue of their size alone, horses in their normal activities pose a distinct type of threat to small children . . . distinguishable in kind from the dangers presented by house pets such as dogs and cats." *Schwartz v. Erpf Estate*, 255 A.D.2d 35, 39, 688 N.Y.S.2d 55, 59 (1999). Accordingly, this Court has held that defendants in a negligence action were " 'chargeable with the knowledge of the general propensities' of the Rottweiler animal" where evidence showed the breed to be "very strong, aggressive and temperamental, suspicious of strangers, protective of its space and unpredictable." *Hill v. Williams*, 144 N.C. App. 45, 55, 547 S.E.2d 472, 478 (2001) (quoting *Williams v. Tysinger*, 328 N.C. 55, 60, 399 S.E.2d 108, 111 (1991)). In these cases knowledge of the danger posed by the breed or the species is imputed to the defendant, regardless of the character or temperament of the individual animal.

However, with regards to injuries inflicted by normally gentle or tame domestic animals, the law is clear that "the test for liability is whether the owner knew or should have known from the animal's past conduct, including acts evidencing a vicious propensity . . . 'that [the animal] is likely, if not restrained, to do an act from which a reasonable person, in the position of the owner, could foresee that an injury to the person or property of another would be likely to result.' " *Slade v. Stadler*, 150 N.C. App. 677, 678, 564 S.E.2d 298, 299 (2002) (quoting *Hunnicutt v. Lundberg*, 94 N.C. App. 210, 211, 379 S.E.2d 710, 711-12 (1989)), *aff'd*, 356 N.C. 659, 576 S.E.2d 328 (2003).

In the instant case, plaintiffs allege injuries caused by a domestic cat, a species traditionally considered to be generally harmless. "The domestic cat is by nature ordinarily harmless and docile." *Goodwin v. E. B. Nelson Grocery Co.*, 239 Mass. 232, 235, 132 N.E. 51, 53 (1921). Further, plaintiffs presented no evidence that this particular cat was of a species or breed known to be dangerous.

The standard for liability in negligence cases alleging injury from a cat was recently reviewed by this Court in *Ray v. Young*, 154 N.C. App. 492, 572 S.E.2d 216 (2002). In *Ray*, plaintiff alleged he was seriously injured by defendant's cat and sought damages for negligence. This Court affirmed an order granting summary judgment for defendant, holding that to recover for his injuries "plaintiff must show '(1) that the animal was dangerous, vicious, . . . or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper knew or should have known of the animal's vicious propensity, character, and habits.' " *Id.* at 494, 572 S.E.2d at 218 (quoting *Sellers v. Morris*, 233 N.C. 560, 561, 64 S.E.2d 662, 663 (1951)). The Court noted that even "[i]f the plaintiff establishes that an animal is in fact vicious, the plaintiff must then demonstrate that the owner knew or should have known of the animal's dangerous propensities." *Id.* at 494, 572 S.E.2d at 219. Finally, the Court held that:

> The test of the liability of the owner of the [animal] is . . . not the motive of the [animal] but whether the owner should know from the [animal's] past conduct that he is likely, if not restrained, to do an act from which a reasonable person, in the position of the owner, could foresee that an injury to the person or property of another would be likely to result.

Id. at 494-95, 572 S.E.2d at 219 (citing *Sink*, 267 N.C. at 350, 148 S.E.2d at 270). We find *Ray* controlling on the issue of foreseeability of

injuries inflicted by a domestic cat, in the absence of evidence that the particular breed or species of cat was inherently dangerous.

Accordingly, the issue of foreseeability must shift focus to the known temperament of this particular kitten. In that regard, it is undisputed that defendants had no advance warning that the cat might attack someone. Indeed, plaintiffs concede that "[i]t is not disputed . . . that the plaintiffs are not aware of evidence tending to show Weddle's knowledge of the vicious propensities of the cat[.]" Without such knowledge, it was not reasonably foreseeable that the kitten would injure plaintiffs. And, in the absence of reasonable foreseeability, plaintiffs cannot show proximate cause or negligence on the part of defendants. Accordingly, we conclude that the trial court properly granted summary judgment for defendants.

Plaintiffs, however, assert that summary judgment was improper as to their claims of "negligent keeping of the cat" and failure to "supervise the cat" and argue that liability does **not** depend on defendants' knowledge of the cat's "vicious propensity." In support of this argument, plaintiffs cite cases wherein injury was inflicted by a species or breed of animal whose known size, temperament, or behavior made injury reasonably foreseeable in certain circumstances. For example, in *Williams v. Tysinger*, 328 N.C. 55, 399 S.E.2d 108 (1991), young children were injured while playing with a horse without any supervision. In *Lloyd v. Bowen*, 170 N.C. 216, 86 S.E. 797 (1915), the plaintiff was injured by a "runaway horse." The plaintiff in *Griner v. Smith*, 43 N.C. App. 400, 259 S.E.2d 383 (1979), sought recovery for the loss of a mare who was injured by another horse while in defendant's care. In each of these cases the defendant was charged with advance knowledge of the dangers presented by the particular breed or species. Finally, in *Sanders v. Davis*, 25 N.C. App. 186, 189, 212 S.E.2d 554, 556 (1975), this Court concluded that there was a "genuine issue of fact as to whether the defendant knew or should have known that his German shepherd . . . would rush at the plaintiff with every indication of imminent attack[.]" Plaintiffs cite no authority that would support liability of a pet owner for injuries inflicted by a previously gentle animal of a breed or species not known to be inherently dangerous by virtue of size, behavior, or temperament. This assignment of error is overruled.

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[2] Plaintiffs next argue that summary judgment was improperly granted as to their claims for "failing to warn plaintiffs of a hidden danger and premises liability." We disagree.

A premises liability claim requires evidence that a landowner breached his "duty to exercise reasonable care in the maintenance of [his] premises for the protection of lawful visitors." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998). " 'Reasonable care' requires that the landowner not unnecessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge." *Bolick v. Bon Worth, Inc.*, 150 N.C. App. 428, 430, 562 S.E.2d 602, 604 (citing *Nelson*, 349 N.C. at 632, 507 S.E.2d at 892), *disc. review denied*, 356 N.C. 297, 570 S.E.2d 498 (2002). This duty includes an obligation to exercise reasonable care with regards to reasonably foreseeable injury by an animal. *Holcomb v. Colonial Assocs., L.L.C.*, 358 N.C. 501, 597 S.E.2d 710 (2004). However, premises liability and failure to warn of hidden dangers are claims based on "a true negligence standard . . . which focuses the jury's attention upon the pertinent issue of whether the landowner acted as a reasonable person would under the circumstances." *Nelson*, 349 N.C. at 632, 507 S.E.2d at 892. In the instant case, plaintiffs presented no evidence that it was reasonably foreseeable that the kitten would attack plaintiffs. Accordingly, summary judgment was properly granted as to these claims. This assignment of error is overruled.

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[3] We next consider plaintiffs' remaining claims. Regarding plaintiffs' claim of negligence *per se*, plaintiffs allege that defendant Weddle's failure to get a rabies vaccination for the cat was a "direct and proximate cause" of plaintiffs' injuries. Plaintiffs produced no evidence in support of this assertion, and we discern none. Accordingly, the trial court properly granted summary judgment on this count.

[4] A claim for negligent infliction of emotional distress also depends upon evidence that the defendants acted negligently. *McAllister v. Ha*, 347 N.C. 638, 645, 496 S.E.2d 577, 583 (1998). Thus, this claim fails for the same reasons as plaintiffs' other negligence claims.

[5] Finally, our determination that the trial court properly granted summary judgment in favor of defendant Weddle necessarily defeats plaintiffs' derivative claims based on allegations of negligent supervision of Weddle and liability based on *respondeat superior*. *Denning-Boyles v. WCES, Inc.*, 123 N.C. App. 409, 413, 473 S.E.2d 38, 41 (1996) ("liability of [employee] is essential if [employer] is to be held responsible under a theory of *respondeat superior*").

For the reasons discussed above, we conclude that the trial court did not err by granting summary judgment in favor of defendants. Accordingly, the trial court's order is

Affirmed.

Judges TYSON and BRYANT concur.

TERRANCE LEE STILWELL, PLAINTIFF v. GENERAL RAILWAY SERVICES, INCORPORATED, DEFENDANT

No. COA04-107

(Filed 7 December 2004)

Negligence; Products Liability— failure to warn—directed verdict—contributory negligence—military contractor defense

The trial court erred in a negligence, product liability, inadequate formulation, and failure to warn case by directing verdict in favor of defendant and a new trial is required in an action arising out of an accident where plaintiff's neck was injured while working as a brakeman on a rail car operated by the U.S. Army, because: (1) the issue of contributory negligence should have been submitted to the jury when plaintiff's supervisor ordered plaintiff to use the pertinent chair in the train's caboose and the chair was used for over a year without incident; and (2) defendant did not fully establish the applicability of the military contractor's defense since there was no evidence that defendant warned the Department of Transportation that these chairs were not for use on interchange.

Appeal by plaintiff from judgment entered 10 February 2003 and order entered 5 September 2003 by Judge R. F. Floyd, Jr., in Brunswick County Superior Court. Heard in the Court of Appeals 13 October 2004.

Crossley McIntosh Prior & Collier, by Andrew Hanley, for plaintiff appellant.

Johnson Lambeth & Brown by Robert W. Johnson and Anna Johnson Averitt, for defendant appellee.

McCULLOUGH, Judge.

Plaintiff appeals from the trial court's granting of a directed verdict on 10 February 2003 and a denial of a new trial motion on 5 September 2003. The action arose out of an injury to plaintiff's neck and subsequent surgery caused by an accident while plaintiff was working as a brakeman on a rail car operated by the U.S. Army between Leland, North Carolina, and Military Ocean Terminal at Sunny Point, a distance of approximately 30 miles. The railroad hauled munitions and military equipment for the Army and on occasion serviced some of the private industries located along the route, such as Archer, Daniels and Midland. On the date of the accident, 22 October 1997, the rail line was carrying chloride, acid or hydrogen peroxide for this company.

Defendant successfully bid on a contract issued by the United States Department of Transportation (DOT) to refurbish a caboose in use on this train on that date. While refurbishing this caboose, defendant substituted boat seats with no neck support instead of the high-backed chairs called for in the original specifications.

In October 1994, DOT issued a contract to defendant to refurbish this caboose. The contract stated in pertinent part:

> The caboose will be used by the Military for special service in Southport, North Carolina. All brakes and valves will be reconditioned or replaced if needed to meet the FRA and the Association of American Railroads (AAR) Interchanged rules. Couplers (both ends of caboose) shall be of type to be compatible for freight service. G. Interior will be stripped out entirely and replaced as shown by the attached sheet. H. . . . extra equipment to be installed and supplied by the contractor. . . . (2) caboose side chairs of cushion captain style.

During the renovation of this caboose, defendant provided boat-type chairs with no neck support instead of the captain's-type high-backed railroad chairs called for in specifications. Mr. Rich Copeland, defendant's former vice president, testified that a DOT employee had permitted this modification as his company could not locate chairs of the type specified. Mr. Copeland acknowledged that the type of chair provided would not be safe for normal use on interchange, but thought the caboose was to be used as a mobile office despite the contract language.

Plaintiff is a Department of Defense civil servant and had been working on this train line since 1994. As brakeman he would ride in the caboose, sitting in one of the chairs positioned to observe the train, monitoring for sparks to prevent fires, open doors and any other irregularity.

Plaintiff first used the chair in June 1996 at which time he reported the chair as unsafe. At safety meetings plaintiff continued to call attention to the unsafe chair. At trial plaintiff testified that he felt at risk when using the chair and admitted that under Sunny Point's safety rules he should not have performed any unsafe act. While promising to fix the problem and replace the chair, plaintiff's supervisor directed plaintiff to continue using the chair despite his objections, stating that plaintiff could either "like it, lump it or quit."

On 22 October 1997, while on a run from Leland to the Archer, Daniels facility, plaintiff's neck was injured when the slack went out of his train and he suffered a severe jolt. Upon the train's return to Sunny Point, plaintiff complained of neck pain and was taken to the hospital. He eventually had a three-level fusion operation by Dr. Melin, who testified that the jolt on that date was the likely cause of the injury and resulting surgery.

After the accident plaintiff filed suit alleging claims against defendant which included general negligence, product liability, inadequate formulation and failure to warn. In its answer defendant admitted the rail car was being used for its intended purpose.

At the conclusion of all the evidence, which included that set forth previously, as well as a rail car expert who testified for plaintiff that a seat of this type was unsafe, the trial court granted defendant's motion for a directed verdict and subsequently denied plaintiff's motion for a new trial. In its motion defendant argued that plaintiff was guilty of contributory negligence as a matter of law and that defendant was protected from suit by the military contractor defense.

Plaintiff appeals these two rulings and further argues that certain evidence introduced by defendant was inadmissible hearsay. For the reasons set forth, we reverse the trial court's grant of a directed verdict and order a new trial as we believe the issue of contributory negligence should have been submitted to the jury and that defendant did not fully establish the applicability of the military contractor's defense.

DIRECTED VERDICT

The test for determining whether a motion for a directed verdict is supported by the evidence is the same as that for ruling on a motion for judgment notwithstanding the verdict. *Garrett v. Smith*, 163 N.C. App. 760, 594 S.E.2d 232 (2004). The Court must consider the evidence in the light most favorable to the non-moving party, giving the nonmovant the benefit of all reasonable inferences and resolving all conflicting evidence in his favor. *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 562 S.E.2d 887 (2002); *Abels v. Renfro Corp.*, 335 N.C. 209, 436 S.E.2d 822 (1993). With this standard in mind, we turn to the issues before this Court.

CONTRIBUTORY NEGLIGENCE

Normally issues such as negligence and contributory negligence are questions for the jury and are seldom appropriate for summary judgment or directed verdict. *Nicholson v. American Safety Utility Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997). We recognize that a person has a duty to avoid an open and obvious danger, *Gibbs v. Light Co.*, 268 N.C. 186, 150 S.E.2d 207 (1966); however, there are other factors present in this case that bear on this issue.

First, plaintiff had utilized this chair in the caboose for over a year without incident. This long use at least raises a question of the reasonableness of his actions, which is an issue for a jury. *Maulden v. Chair Company*, 196 N.C. 122, 144 S.E. 557 (1928).

Secondly, when a superior orders an employee to undertake an obviously risky job, a finding of contributory negligence depends on whether a reasonably prudent person under similar circumstances would comply with the order. *Noble v. Lumber Co.*, 151 N.C. 76, 78, 65 S.E. 622, 623 (1909). This principle is applicable even though defendant did not issue the order in question. In *Swaney v. Steel Co.*, 259 N.C. 531, 131 S.E.2d 601 (1963), the employee of a contractor sued the steel company that supplied a latently defective truss which the plaintiff was required to use. There our Supreme Court noted that a plea of contributory negligence cannot prevail: "A plea of contributory negligence would not have availed Newton unless the order plaintiff obeyed was so obviously dangerous that a reasonably prudent man under similar conditions would have disobeyed it and quit the employment rather than incur the hazard." *Noble*, 151 N.C. 76, 65 S.E. 622; *West v. Mining Corporation*, 198 N.C. 150, 150 S.E. 884 (1930).

A situation similar to the case *sub judice* is that of *Smith v. Selco Products, Inc.*, 96 N.C. App. 151, 385 S.E.2d 173 (1989), *disc. review denied*, 326 N.C. 598, 393 S.E.2d 883 (1990), where our Court stated:

> [T]he claimant's behavior "under the circumstances" must be considered in determining contributory negligence. Reaching into the bale chamber to push in boxes and grab objects inappropriate for baling was clearly the custom among the Food Lion workers. Food Lion management was aware of this practice by its workers. In North Carolina, a servant's conduct "which otherwise might be pronounced contributory negligence as a matter of law is deprived of its character as such if done at the direction or order of defendant [employer]." *Cook v. Tobacco Co.*, 50 N.C. App. 89, 96, 272 S.E.2d 883, 888, *disc. rev. denied*, 302 N.C. 396, 279 S.E.2d 350 (1981). "[I]f a rule has been habitually violated to the employer's knowledge, or violated so frequently and openly for such a length of time that in the exercise of ordinary care he should have ascertained its nonobservance, the rule is waived or abrogated." *Swaney*, [259 N.C.] at 543, 131 S.E.2d at 610.

Id. at 159, 385 S.E.2d at 177.

As plaintiff's supervisor ordered plaintiff to use the chair at issue, telling plaintiff to "like it, lump it or quit" and the chair was used for over a year without incident, it is clear that this issue should have been submitted to the jury. *See also Cook v. Tobacco Co.*, 50 N.C. App. 89, 272 S.E.2d 883 (1988), *disc. review denied*, 302 N.C. 396, 279 S.E.2d 350 (1981).

MILITARY CONTRACTOR DEFENSE

At trial, defendant argued that as a military contractor, it was immune from suit. As the trial court did not specify on which ground it granted the directed verdict, we will next discuss this issue.

This defense was formally recognized by the U.S. Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 101 L. Ed. 2d 442 (1988), where the Court agreed with the Fourth Circuit and held that:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned

> the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id. at 512, 101 L. Ed. 2d at 458.

Boyle involved the design of an escape hatch on a military helicopter. In explanation of the rationale for this policy, Justice Scalia stated:

> It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments, see United States v. Varig Airlines, 467 U.S. 797, 814, 81 L. Ed. 2d 660, 104 S. Ct. 2755 (1984), through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production. In sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced.

Id. at 511-12, 101 L. Ed. 2d at 457-58.

Defendant argues that the caboose (with the chair at issue) is an item of military equipment, as it was owned by the U.S. Army for use on a rail line that handled munitions, even though it was being used on a normal commercial run on the date of the incident.

While most of the cases arising since *Boyle* have involved unique military equipment, *e.g.*, *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989) (ejection seat on jet aircraft), there has been a split in the federal circuits over whether the defense is available to all contractors. The following courts have held the defense applicable to all federal contractors: *Boruski v. United States*, 803 F.2d 1421-30 (7th Cir. 1986); *Burgess v. Colorado Serum Co.*, 772 F.2d 844, 846

(11th Cir. 1985); *Johnson v. Grumman Corp.*, 806 F. Supp. 212, 217 (W.D. Wis. 1992); *Vermeulen v. Superior Court of Alamada County*, 204 Cal. App. 3d 1192, 251 Cal. Rptr. 805, 809-10 (Cal. App. 1st Dist. 1988); *Carley v. Wheeled Coach*, 991 F.2d 1117, *cert. denied*, 510 U.S. 868, 126 L. Ed. 2d 150 (1993); *Yeroshefsky v. Unisys Corp.*, 962 F. Supp. 710 (1997); while other courts have held the defense is only available to military contractors: *e.g.*, *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 810-12 (9th Cir. 1992); *In re: Chateaugay Corp.*, 146 B.R. 339 (S.D.N.Y. 1992); *Johnston v. United States*, 568 F. Supp. 351 (D. Kan. 1983); *Jenkins v. Whittaker Corp.*, 551 F. Supp. 110 (D. Haw. 1982).

While reserving any position on this issue until it can clearly be discerned that the trial court has in fact applied the military contractor defense, assuming arguendo the defense is applicable in this instance and was applied, we would find error. Our review of the record reveals an issue of fact as to at least one of the prongs of the defense.

The first prong of the defense requires proof that the Government (here the U.S. Department of Transportation) approved the specifications and design. As was stated in *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233, 101 L. Ed. 2d 931 (1988), this approval must be by more than a "mere rubber stamp." This test was set forth in the *Ramey* case as well.

In the case at bar, the vice president of defendant corporation testified concerning the changes in the specifications made pursuant to telephone conversations he had with the responsible DOT employee, Tim Newfell. Their recorded conversations, while admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(6) (2003), *see Allen v. Simmons*, 99 N.C. App. 636, 394 S.E.2d 478 (1990), do not mean that the jury is required to accept the conclusion that the DOT employee was not merely "rubberstamping" the defendant's supposed lack of ability to supply the chairs required in the original specification.

In fact, the trial court erroneously prohibited the plaintiff's expert from testifying about a conversation he had with the same official where Newfell allegedly denied he had approved the changes. The trial judge excluded the expert's testimony on the basis that the denial could not form a basis for the expert's opinion. Nonetheless, the denial of approval could have been allowed as this was an admission of a party opponent. *See* N.C. Gen. Stat. § 8C-1, Rule 801(d) (2003). Even though the U.S. Government was not a named defend-

ant, the denial casts doubt on defendant's assertion that the chairs submitted were properly approved.

We also believe defendant cannot rely on this defense as there was no evidence that defendant warned DOT that these chairs were not for use on interchange. For this point defendant merely asserts that plaintiff immediately recognized the danger, thus relieving defendant of this duty. The contract was admitted into evidence and was never changed to reflect use as a caboose for some purpose other than an interchange. Furthermore, defendant acknowledges the caboose was being so used at the time of the accident. This judicial admission supports the requirement that defendant had to warn the Government of the consequences of deviating from the type of chair specified. In light of our ruling that the issue of contributory negligence is an issue for the jury in this case, defendant cannot rely on plaintiff's initial belief that the chair may be dangerous to avoid a duty defendant had prior to delivery.

For the reasons set forth in this opinion, we reverse the order of the trial court directing a verdict in favor of defendant and order a new trial.

New trial.

Judges McGEE and ELMORE concur.

IN RE: T.L.B., A MINOR JUVENILE

No. COA03-62

(Filed 7 December 2004)

1. Termination of Parental Rights— grounds—failure to establish paternity or support

The trial court's findings support its conclusion that grounds existed for termination of respondent's parental rights under N.C.G.S. § 7B-1111(a)(5) (failure to establish paternity, legitimate the child, or provide support or care). Although respondent claims that he could not take the steps set out in the statute because he did not know of the child's existence prior to receiving a letter asking for child support, the child's future welfare is

not dependent on whether the putative father knows of the child's existence when the petition is filed. Moreover, this respondent knew three and a half years before the petition that the mother was pregnant and was claiming that he was the father, but expressed no interest until he was contacted about child support.

2. Termination of Paternal Rights— best interests of child— no support or contact with child

The trial court did not abuse its discretion by determining that it was in the best interests of a child to terminate respondent's parental rights where the court stated that there was no evidence that termination would not be in the child's best interests and found that petitioner had never seen the child or paid support, and that neither petitioner nor the child had heard from respondent until petitioner sent a letter requesting child support.

Appeal by respondent from order entered 20 August 2002 by Judge Lynn Gullett in Iredell County District Court. Heard in the Court of Appeals 21 August 2003.

Beth R. Setzer, for petitioner-appellee.

Carlton, Rhodes & Carlton, by Gary C. Rhodes, for respondent-appellant.

No brief filed on behalf of Guardian ad Litem.

GEER, Judge.

Respondent Allen Johnson appeals from an order terminating his parental rights. We hold that the trial court's findings of fact properly support its conclusion that grounds for termination existed under N.C. Gen. Stat. § 7B-1111(a)(5) (2003) (failure to establish paternity or legitimate child born out of wedlock) and that the trial court did not abuse its discretion in terminating respondent's parental rights. We, therefore, affirm.

Factual Background

Petitioner Joy Lynn Blohm, T.L.B.'s mother, and respondent Johnson engaged in a sexual relationship between June and November 1997. Both were employed by a restaurant in Iredell County where Blohm worked as a waitress and Johnson was a manager. Johnson was then and still is married and the father of two children apart from T.L.B.

In late November 1997, Blohm learned she was pregnant and told Johnson of her pregnancy. Blohm testified that the two were together on the day before Thanksgiving when she took a pregnancy test and the result was positive. Johnson, however, testified that he did not believe Blohm was pregnant, but rather thought she was lying about her pregnancy as a ploy to persuade him to leave his wife.

Shortly after Blohm learned she was pregnant, Johnson's superiors at the restaurant met with him to discuss his relationship with Blohm. After that meeting, Johnson turned in his keys to the restaurant and left without speaking to Blohm. On 8 December 1997, Blohm went to the apartment where Johnson and his family lived, knocked on the door, and told Johnson she wanted to speak with him. This was the last time Blohm saw Johnson prior to the termination of parental rights proceedings. Johnson moved out of state, and Blohm testified she did not know where he had gone.

Blohm gave birth to T.L.B. on 26 July 1998. In the spring of 2001, Blohm sought information from the Iredell County Department of Social Services about obtaining child support from Johnson. The department provided her with an address for Johnson's father. On 8 May 2001, Blohm sent a letter to Johnson by way of his father asking Johnson to assist her by paying child support. Johnson responded in a letter dated 17 May 2001. He requested a paternity test, but stated, "If I am indeed his father I will want to do what is right. But you also have to realize, that if I am helping financially support him, I will want joint custody."

Without any further communications, on 18 June 2001, Blohm filed a petition seeking to terminate Johnson's parental rights. Johnson filed an answer on 27 July 2001 together with a motion requesting a paternity test. The paternity test established that Johnson is T.L.B.'s father. The Court assigned a guardian ad litem to represent the child's interests, and a hearing was held in June and July 2002.

On 20 August 2002, the trial court entered an order terminating Johnson's parental rights. The court concluded first that petitioner had met her burden of proving grounds to terminate Johnson's rights, including (1) willful abandonment of the minor child for at least six consecutive months immediately preceding the filing of the petition; and (2) a failure to legitimate or establish paternity of the child prior to the filing of the petition. The court next found that "[t]he minor

child's home with the Petitioner is a secure, stable, and loving environment, and it is in the child's best interest to remain in this environment." The trial court, therefore, ordered that the parental rights of Johnson be terminated.

Discussion

A termination of parental rights proceeding involves two separate analytical phases: an adjudicatory stage and a dispositional stage. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). A different standard of review applies to each step.

At the adjudicatory stage, the petitioner must prove by clear, cogent, and convincing evidence at least one of the statutory grounds for termination listed in N.C. Gen. Stat. § 7B-1111 (2003). *Id.* This Court's task is to review the trial court's findings of fact to determine whether they are supported by "clear, cogent, and convincing evidence" and whether the findings support the trial court's conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

If the petitioner meets its burden of proving at least one ground for termination, the trial court proceeds to the dispositional phase and considers whether termination is in the best interests of the child. N.C. Gen. Stat. § 7B-1110(a) (2003); *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. This Court reviews the trial court's dispositional decision for abuse of discretion. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

Because respondent did not specifically assign error to any of the trial court's findings of fact supporting its order, those findings are deemed to be supported by competent evidence and are conclusive on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal."). As a result, the sole question properly before this Court as to the adjudicatory phase is whether the trial court's conclusions of law are supported by its findings of fact.

[1] Although the trial court did not refer to specific statutory grounds, it appears that the trial court terminated respondent's rights based on N.C. Gen. Stat. § 7B-1111(a)(5) (failure to establish paternity, legitimate child, or provide support or care) and § 7B-1111(a)(7)

(willful abandonment). On appeal, if this Court determines that there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds. *In re Clark*, 159 N.C. App. 75, 84, 582 S.E.2d 657, 663 (2003).

Under N.C. Gen. Stat. § 7B-1111(a)(5), the court may terminate parental rights upon a finding that:

> The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights:
>
> a. Established paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Health and Human Services; provided, the court shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or
>
> b. Legitimated the juvenile pursuant to provisions of G.S. 49-10 or filed a petition for this specific purpose; or
>
> c. Legitimated the juvenile by marriage to the mother of the juvenile; or
>
> d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

The trial court's findings establish—and respondent does not dispute—that respondent failed to take any of these steps prior to the filing of the petition. In addition to the lack of any effort to establish paternity through judicial process, affidavit, or marriage, respondent paid no child support and gave no care to the child and Blohm. "Upon a finding that the putative father has not attempted any of the four possible ways to legitimate his child, the trial court may terminate parental rights." *In re Hunt*, 127 N.C. App. 370, 373, 489 S.E.2d 428, 430 (1997).

Respondent claims, however, that he was unable to take the steps set out in N.C. Gen. Stat. § 7B-1111(a)(5) because he did not know of T.L.B.'s existence prior to receiving the letter of 8 May 2001. This argument has already been rejected by this Court in *In re Clark*, 95 N.C. App. 1, 381 S.E.2d 835 (1989), *rev'd on other grounds*, 327 N.C. 61, 393 S.E.2d 791 (1990). This Court in *Clark* construed N.C. Gen. Stat. § 7A-289.32(6), the identically worded predecessor statute to § 7B-1111(a)(5), and N.C. Gen. Stat. § 48-6(a)(3), an adoption statute

also identically worded. The Court held: "Section 48-6(a)(3) reflects the same legislative choices evident in the termination of a putative father's rights under Section 7A-289.32(6): under neither statute is the illegitimate child's future welfare dependent on whether or not the putative father knows of the child's existence at the time the petition is filed." *Clark,* 95 N.C. App. at 8, 381 S.E.2d at 839. The Court reasoned that "[w]hile the Legislature could have reasonably set the bar date at another point in time, it is certainly not unreasonable to charge putative fathers with the responsibility to discover the birth of their illegitimate children." *Id.* at 9, 381 S.E.2d at 840.

We point out that the putative father in *Clark* was never informed that the mother was pregnant and did not learn that she had given birth until after an adoption order had been entered. By contrast, respondent in this case had been informed three and a half years before the petition was filed that Blohm was pregnant and that she claimed he was the father. Until Blohm contacted him about child support, respondent expressed no interest in discovering whether Blohm had given birth, in determining whether the child was his, or in taking responsibility for the child. *See In re Baby Boy Dixon*, 112 N.C. App. 248, 251, 435 S.E.2d 352, 354 (1993) ("In this case, the father, having the responsibility to 'discover the birth of [his] . . . illegitimate [child],' failed, although he had ample opportunity to do so, to take any of the statutory steps to demonstrate his commitment to the child." (quoting *Clark*, 95 N.C. App. at 9, 381 S.E.2d at 840)).

Since the trial court's findings support its conclusion that grounds existed for termination of respondent's parental rights under N.C. Gen. Stat. § 7B-1111(a)(5), we need not address the trial court's conclusion regarding N.C. Gen. Stat. § 7B-1111(a)(7). We accordingly affirm the trial court's decision in the adjudicatory phase.

[2] Respondent next contends that the trial court abused its discretion at the dispositional phase in determining it was in the best interests of the child to terminate respondent's parental rights. The termination of parental rights statute provides:

> Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated.

N.C. Gen. Stat. § 7B-1110(a). Although the statute is couched in mandatory language, our appellate courts have construed the language of the statute to vest discretion in the trial court to decide to terminate parental rights when in the best interests of the child. *Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910. In making this decision, "[e]vidence heard or introduced throughout the adjudicatory stage, as well as any additional evidence, may be considered by the court during the dispositional stage." *Id.*

In arguing that the trial court abused its discretion in terminating his parental rights, respondent relies exclusively on *Bost v. Van Nortwick*, 117 N.C. App. 1, 8, 449 S.E.2d 911, 915 (1994), *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995), in which then Judge Orr concluded, based on a review of the evidence, that the trial court abused its discretion in terminating the father's parental rights. In particular, respondent relies on the portion of the opinion stating that a finding that one parent could provide "a more stable environment and better financial situation" than another does not support termination of the latter parent's rights in the absence of any other findings. *Id.* at 8-9, 449 S.E.2d at 915. We first note that it is not clear that a majority of the Court agreed with this portion of the *Bost* decision. Judge Wynn wrote a separate concurring opinion based only on the trial court's error in concluding that the plaintiff had established the existence of grounds for termination. He did not reach the question whether the reasons given by the trial court at the dispositional phase were sufficient. The third member of the panel, Judge Johnson, dissented. In addition, since Judge Orr and Judge Wynn both agreed that the evidence failed to establish grounds for termination in the first instance, the discussion relied upon by respondent in this case is *dicta*.

Nevertheless, *Bost* was based on a review of the entire evidence, with the opinion concluding that the evidence demonstrated that the trial court had abused its discretion. Here, the trial court stated that it had "heard no evidence which would determine that termination would not be in the child's best interests." In addition, the court found that neither the petitioner nor the child had ever heard from respondent until petitioner sent a letter requesting child support at which point respondent requested a paternity test. The trial court further found that "prior to the filing of the petition, the Respondent had never seen the child, had never paid any child support, and had not taken steps to legitimate the child. To this day, he has never paid any child support nor has he even seen the child." Our review of the

record reveals that these findings are supported by the evidence. In light of these findings, we cannot conclude that the trial court abused its discretion in terminating respondent's parental rights.

Affirmed.

Judges McGEE and BRYANT concur.

IN THE MATTER OF: N.B.

No. COA03-1653

(Filed 7 December 2004)

1. **Juveniles— misdemeanor assault with a deadly weapon— felonious assault with a deadly weapon inflicting serious injury—issuance of subsequent felony petition**

The trial court did not violate a juvenile's due process rights by allowing the State to prosecute her for felonious assault with a deadly weapon inflicting serious injury even though she had been previously charged with misdemeanor assault with a deadly weapon and the misdemeanor petition had not been dismissed at the time of the felonious assault hearing, because: (1) regardless of whether the juvenile formally denied the allegations contained in the initial misdemeanor petition, the issuance of the subsequent felony petition did not violate the juvenile's constitutional rights; (2) the second petition alleging felony assault was served on the juvenile two months before the adjudicatory hearing; (3) the juvenile was in no way prejudiced since there was no hearing on the merits of the first petition; and (4) the record is void of any evidence that would suggest the filing of the second petition was for retaliatory purposes.

2. **Sentencing— juveniles—assault with a deadly weapon inflicting serious injury—Level 3 disposition—abuse of discretion standard**

The trial court did not err by imposing a Level 3 disposition on a juvenile for committing the offense of assault with a deadly weapon inflicting serious injury even though the juvenile had no prior delinquency history, had a low risk of re-offending, and an assessment of her needs was low as well, because: (1) the court

had the authority under N.C.G.S. § 7B-2508(f) to impose either a Level 2 or Level 3 disposition, and it was within the court's discretion to determine which dispositional alternative to impose; and (2) there was no evidence that the court abused its discretion by imposing Level 3 when the court considered evidence that the juvenile failed to return to school at the end of her five-day suspension and had been absent from school for more than one hundred days.

Appeal by respondent juvenile from order dated 9 September 2003 by Judge Robert A. Evans in Nash County District Court. Heard in the Court of Appeals 15 September 2004.

Attorney General Roy Cooper, by Assistant Attorney General Bertha L. Fields, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for respondent-appellant.

BRYANT, Judge.

N.B. (juvenile) appeals an order adjudicating her as a delinquent juvenile for having committed the offense of assault with a deadly weapon inflicting serious injury and a disposition order committing the juvenile to the Youth Development Center of the North Carolina Department of Juvenile Justice and Delinquency Prevention for a minimum period of six months and for a maximum period not to exceed her eighteenth birthday.

On 17 April 2003, N.B. (born 1 August 1987) was charged in a juvenile petition with misdemeanor assault with a deadly weapon in violation of N.C. Gen. Stat. § 14-33(c)(1). A subsequent petition was filed on 23 June 2003, charging N.B. with felonious assault with a deadly weapon inflicting serious injury in violation of N.C. Gen. Stat. § 14-32(b). The second petition came on for hearing on 9 September 2003.

The State's evidence tended to show the following: On 10 March 2003, a fight ensued between 15-year-old N.B., another juvenile (N.B.'s associate), and the victim in Economic, Legal and Political Systems class at Rocky Mount Senior High School. The victim was seated at the back of the classroom when N.B.'s associate approached the victim and stated she heard the victim wanted to fight her. After a verbal exchange between the victim and N.B.'s associate, N.B. approached

the victim from behind and hit her in the face with a white ballpoint pen. The three parties began to fight and the fight continued until the classroom teacher subdued the parties. After the fight, the victim discovered she was bleeding and there were scratch marks on and a hole in her face, in addition to ink marks all over her face and arm. The victim was hospitalized for three days as a result of the injuries.

The victim's mother testified for the State that when she picked her daughter up from school, she noticed puncture wounds on her daughter's face. She accompanied her daughter to the hospital where her daughter was treated for injury to the outer layer of her eyeball. She also testified that as of the date of the hearing, her daughter was still receiving medical care for her injuries.

Both N.B. and her associate, testifying on N.B.'s behalf, admitted that they participated in a fight with the victim, but denied starting the fight. Both also denied stabbing the victim in the face with a white ballpoint pen, denied having a white ballpoint pen in their possession during the fight, and further denied seeing a white ballpoint pen in the classroom during the fight.

On rebuttal, the State called a fourth student to testify. This student stated that while in the hallway before class, he overhead N.B. and her associate saying they were going to jump on the victim. This student, however, did not witness the fight.

The juvenile court adjudicated N.B. delinquent for having committed the offense of assault with a deadly weapon inflicting serious injury and immediately moved to disposition. The juvenile court accepted the pre-disposition report prepared by the court counselor into evidence, which contained an assessment of the juvenile's risk of future offending. The report total scores indicated N.B. had a low risk of future offending and had a low need. Because N.B. had been adjudicated delinquent for having committed a violent felony, the juvenile court had a choice of imposing a Level 2 or Level 3 disposition.[1]

The juvenile court, expressing concern about the number of days the juvenile had been absent from school since the fight, questioned why N.B. could not account for why she had not attended school since the fight. The juvenile court went on to impose a Level 3 dispo-

1. In accordance with N.C. Gen. Stat. § 7B-2508(f), the juvenile court has the authority to impose either a Level 2 or Level 3 disposition when the juvenile has a low risk factor but has been adjudicated for having committed a violent offense. N.C.G.S. § 7B-2508(f) (2003).

sition and ordered N.B. to be committed to the Youth Development Center of the North Carolina Department of Juvenile Justice and Delinquency Prevention for a minimum period of six months and for a maximum period not to exceed her eighteenth birthday.

N.B. gave timely notice of appeal.

The issues on appeal are whether: (I) the juvenile's due process rights were violated when she was prosecuted for felonious assault with a deadly weapon inflicting serious injury after she had already been charged with misdemeanor assault with a deadly weapon; and (II) the juvenile court erred in imposing a Level 3 disposition.

I

[1] The juvenile first argues that her due process rights were violated when the juvenile court allowed the State to prosecute her for felonious assault with a deadly weapon inflicting serious injury, when she had been previously charged with misdemeanor assault with a deadly weapon and the misdemeanor petition had not been dismissed at the time of the felonious assault hearing.

While juvenile proceedings in this State are not criminal prosecutions, a juvenile cited under a petition to appear for an inquiry into her alleged delinquency is entitled to the constitutional safeguards of due process and fairness. These safeguards include notice of the charge or charges upon which the petition is based. *See In re Burrus*, 275 N.C. 517, 529-30, 169 S.E.2d 879, 887 (1969); *In re Jones*, 11 N.C. App. 437, 438, 181 S.E.2d 162, 162 (1971); *In re Alexander*, 8 N.C. App. 517, 520, 174 S.E.2d 664, 666 (1970).

On 13 May 2003, a summons was issued requiring the juvenile to appear in Nash County Juvenile Court on 10 June 2002, to answer a petition alleging she had committed the offense of assault with a deadly weapon on 10 March 2003. The juvenile appeared in court on 10 June 2003, and denied the misdemeanor assault charge against her. This matter was continued until 1 July 2003.

Three days later, on 13 June 2003, a juvenile petition was sworn out against the juvenile alleging she had committed the offense of assault with a deadly weapon inflicting serious injury on 10 March 2003. This petition was filed on 16 June 2003, and the clerk of superior court issued a summons on 23 June 2003, requiring the juvenile to appear in juvenile court on 1 July 2003.

At the time of the 9 September 2003 hearing, the juvenile had both the misdemeanor and felonious assault charges pending. The juvenile court found the juvenile delinquent for having committed felonious assault but did not address the misdemeanor assault charge. The misdemeanor charge was subsequently dismissed sometime after the 9 September 2003 hearing.

In this assignment of error, the juvenile contends she was actually tried on duplicate misdemeanor and felony charges arising from the same course of conduct, and further that the State brought the felony charge in retaliation for her denying the allegation in the misdemeanor petition. These arguments are without merit.

Regardless of whether the juvenile formally denied the allegations contained in the initial misdemeanor petition, the issuance of the subsequent felony petition did not violate the juvenile's constitutional rights. The second petition, alleging felony assault, was served on the juvenile two months before the adjudicatory hearing. At the 9 September 2003 hearing, the State read the charges contained in the second petition and requested a responsive plea to that charge. The record and transcript reveal that the juvenile denied the allegations of the second petition and the juvenile court proceeded solely on the matters contained in the second petition.

The juvenile argues that this Court's holding in *State v. Bissette*, 142 N.C. App. 669, 544 S.E.2d 266 (2001), precluded the State from indicting the juvenile and proceeding with prosecution on the felony charge while the misdemeanor charge remained pending. The juvenile's reliance on *Bissette*, however, is misguided. In *Bissette*, the defendant was arrested and charged with violating N.C. Gen. Stat. § 14-74 (felonious larceny by servants and other employees). The charge was subsequently reduced to misdemeanor larceny, and the defendant pled not guilty to the misdemeanor larceny charge. The defendant was tried and convicted in district court on the misdemeanor larceny charge and thereafter appealed for a trial *de novo* in superior court. After giving notice of appeal to superior court, the State then indicted defendant for felonious larceny by an employee. The State acknowledged both the felony and misdemeanor charges were still on the docket, and announced its intention to try the felony charge and informed the superior court it would dismiss the misdemeanor charge at the conclusion of trial *de novo*. The defendant was convicted of felony larceny in superior court and gave notice of appeal to this Court.

This Court held that a defendant who is convicted of a misdemeanor "is entitled to pursue [her] right to trial *de novo* in superior court without apprehension that the State will retaliate by substituting a felony charge for the original misdemeanor and thus subject her to a potentially greater period of incarceration." *Bissette*, 142 N.C. App. at 672, 544 S.E.2d at 267 (citing *Blackledge v. Perry*, 417 U.S. 21, 28, 40 L. Ed. 2d 628, 634-35). Relying on *Blackledge*, this Court concluded that the State's actions amounted to a violation of the defendant's due process rights. *Bissette*, 142 N.C. App. at 673, 544 S.E.2d at 268. This Court also "emphasized that this result did not depend upon a showing of actual retaliatory motive on the part of the prosecutor, since it was the mere potential for vindictiveness entering into the two-tiered appellate process which constituted a violation of the defendant's rights." *Bissette*, 142 N.C. App. at 672, 674-75, 544 S.E.2d at 267, 269 ("A prosecutor's pre-trial . . . election to seek conviction only for some of the offenses charged in the indictment 'becomes binding on the State and tantamount to acquittal of charges contained in the indictment . . . when jeopardy has attached as the result of a jury being impaneled and sworn to try the defendant.' " (citation omitted)).

In the instant case, the juvenile was in no way prejudiced since there was no hearing on the merits of the first petition. Therefore, the hearing on the second petition did not violate the juvenile's constitutional rights. Further, the record is void of any evidence that would suggest the filing of the second petition was in anyway retaliatory. This assignment of error is overruled.

II

[2] The juvenile next argues that the juvenile court erred by imposing a Level 3 disposition when she had no prior delinquency history, had a low risk of re-offending and an assessment of her needs was low as well.

Pursuant to the juvenile code, the juvenile court is required to select the "most appropriate disposition" calculated to both "protect the public and to meet the needs and best interests of the juvenile." N.C.G.S. § 7B-2501(c) (2003)[2]; *In re Robinson*, 151 N.C. App.

2. (c) In choosing among statutorily permissible dispositions, the court shall select the most appropriate disposition both in terms of kind and duration for the delinquent juvenile. Within the guidelines set forth in G.S. 7B-2508, the court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based upon:

733, 736-37, 567 S.E.2d 227, 229 (2002) ("The [district] court is now required to 'select the most appropriate disposition,' one that is designed to 'protect the public and to meet the needs and best interests of the juvenile' . . . rather than what had been interpreted as a mandate for the least restrictive alternative under the circumstances.") (citations omitted). In the instant case, the juvenile was adjudicated delinquent for having committed assault with a deadly weapon inflicting serious injury. The juvenile's delinquency history level was determined to be low. *See* N.C.G.S. § 7B-2507 (2003). Thus, in accordance with N.C. Gen. Stat. § 7B-2508(f), the juvenile court had the authority to impose either a Level 2 or Level 3 disposition. In addition, it was within the juvenile court's discretion to determine which dispostional alternative to impose. *See* N.C.G.S. § 7B-2506; *In re Hartsock*, 158 N.C. App. 287, 292, 580 S.E.2d 395, 399 (2003).

It is well settled that a decision vested in the discretion of the juvenile court will not be disturbed absent clear evidence that the decision was manifestly unsupported by reason. *Robinson*, 151 N.C. App. at 737, 567 S.E.2d at 229. Here, there is no evidence that the juvenile court abused its discretion in imposing a Level 3 disposition. The record reveals that the juvenile court considered evidence that the juvenile failed to return to school at the end of her five-day suspension, and that she had been absent from school for more than one hundred days. Further, the record reveals that the juvenile court had before it undisputed evidence that both the juvenile and her mother knew the juvenile was eligible to return to school after the five-day suspension, but were unable to offer an explanation for the juvenile's failure to return to school. The juvenile has not shown the juvenile court's decision to impose a Level 3 disposition amounted to an abuse of discretion. This assignment of error is overruled.

Affirmed.

Judges HUDSON and TYSON concur.

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(1) The seriousness of the offense;

(2) The need to hold the juvenile accountable;

(3) The importance of protecting the public safety;

(4) The degree of culpability indicated by the circumstances of the particular case; and

(5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C.G.S. § 7B-2501(c) (2003).

STATE OF NORTH CAROLINA v. CARLTON DALE WALL, DEFENDANT

No. COA03-1276

(Filed 7 December 2004)

Sentencing— motion to withdraw guilty plea—second sentence different from plea arrangement

The trial court erred in an assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon while being an habitual felon case by denying defendant's motion to withdraw his guilty plea during a second sentencing hearing where the trial court stated the error in the first sentencing hearing was the result of a clerical error, miscommunication, or something else, because; (1) the error in the first sentencing hearing was not merely clerical or administrative, and thus, defendant's second sentencing invalidated his previous sentence and does in fact constitute a "sentencing" under N.C.G.S. § 15A-1024; and (2) N.C.G.S. § 15A-1024 applies whenever the judge at the time of sentencing determines that a sentence different from that provided for in the plea arrangement must be imposed even if defendant receives a lighter sentence.

Appeal by defendant from judgment filed 13 November 2001 but dated and entered *nunc pro tunc* 2 March 2000 by Judge Lester P. Martin in Guilford County Superior Court. Heard in the Court of Appeals 9 June 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert T. Hargett for the State.

Paul M. Green for the defendant-appellant.

ELMORE, Judge.

I.

Defendant Carlton Dale Wall (defendant) appeared in Guilford County Superior Court before Judge Catherine C. Eagles on 19 April 1999. In this hearing (hereinafter first sentencing hearing) defendant faced charges of (1) assault with a deadly weapon with intent to kill inflicting serious injury, and (2) possession of a firearm by a felon while being an habitual felon. The first charge arose from an incident in which defendant allegedly struck his sister's boyfriend with a pipe

on 14 July 1998. The second resulted from defendant's alleged possession of a pistol on 23 October 1998.

Defendant pled guilty to these charges pursuant to a plea agreement in which the State agreed to recommend consolidation of the charges such that defendant would receive a Class C sentence of 151 to 191 months imprisonment. The sentence was to begin running at the expiration of a previously imposed sentence. Defendant tendered an *Alford* plea, indicating that he was pleading guilty because he perceived it to be in his best interest but not admitting guilt. *See North Carolina v. Alford*, 40 U.S. 25, 27 L. Ed. 2d 162 (1970). The trial court accepted the plea and sentenced defendant to imprisonment for 151 to 191 months, which is the maximum allowable for a class C felony committed by a level V offender.

On 2 November 1999, the trial court granted defendant's *pro se* motion for appropriate relief (MAR), finding that defendant's prior record was level IV, not level V, and thus the agreed upon sentence was not allowed by law. The order also appointed defendant new counsel and ordered the case be placed on the calendar. The State asserts that this order was mistaken in finding defendant's prior record level to be IV rather than V.

In the subsequent hearing (hereinafter second sentencing hearing) before Judge Lester P. Martin in Guilford County Superior Court on 2 March 2000, defendant moved to withdraw his tendered guilty plea, arguing that his plea was no longer in effect. The State argued that defendant should simply be resentenced within the presumptive range for a level IV offender. The trial court denied defendant's motion, characterized the previous error as "clerical," and sentenced defendant to be imprisoned for 133 to 169 months, the maximum allowable for a level IV offender. Defendant gave notice of appeal at that time.

A series of other proceedings followed the second sentencing hearing. Both sides agree that the record of these proceedings contains various errors. During this time, defendant was appointed new counsel. For the reasons stated herein, we vacate the second sentence rendered and remand for further proceedings not inconsistent with this opinion.

II.

By his first assignment of error defendant contends that the trial court erred in denying his motion to withdraw his guilty plea.

Our standard of review for the right to withdraw a pre-sentence guilty plea is whether, after conducting an independent review of the record and considering the reasons given by the defendant and any prejudice to the State, it would be fair and just to allow the motion to withdraw. *State v. Handy*, 326 N.C. 532, 539, 391 S.E.2d 159, 163 (1990). However, when determining whether there was any proper reason for the trial court to have granted defendant's motion to withdraw his plea after a sentence is imposed, we look to the statutory provisions governing such a motion. Our General Assembly has created a clear right for a defendant to withdraw a plea at the time sentence is imposed if that sentence differs from that contained in the plea agreement:

> 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 a withdrawal, the defendant is entitled to a continuance until the next session of court.

N.C. Gen. Stat. § 15A-1024 (2003) (emphasis added).

Once a trial court decided to impose a different sentence, the trial court "should have (1) informed defendant of decision to impose a sentence other than that provided in the plea agreement, (2) informed him that he could withdraw his plea, and (3) if defendant chose to withdraw his plea, granted a continuance until the next session of court." *State v. Rhodes*, 163 N.C. App. 191, 195, 592 S.E.2d 731, 733 (2004).

In determining whether this statutory provision should have provided defendant relief in the case *sub judice*, we must determine (a.) whether the second sentencing hearing was in fact the "time of sentencing" described by the statute and (b.) whether the phrase "other than" applies to sentences that are less than that of the original plea bargain.

A. Time of Sentencing

Although the trial court in the second sentencing hearing stated that the error in the first sentencing was the result of "a clerical error, miscommunication, [or] something," it did not support this conclusion by any findings of fact or documentation of other competent evidence. Our independent review of the record indicates that the error

in the first sentencing was not merely clerical or administrative. As such, we conclude that defendant's second sentencing invalidating his previous sentence, does in fact constitute a "sentencing" under section 15A-1024.

This reading accords with the plain language of N.C. Gen. Stat. § 15A-1024 which affords the defendant certain rights "at the time of sentencing." To hold that this right did not apply in defendant's second sentencing hearing would require this Court to draw an unprecedented substantive distinction between a sentencing and a resentencing in the understanding of this statute.

This Court has recently held N.C. Gen. Stat. § 15A-1024 to apply when the trial court "reopened defendant's sentencing and *resentenced* him on the basis of information it received" after the first sentencing. *Rhodes*, 163 N.C. App. at 194, 592 S.E.2d 731 at 733 (2004) (emphasis added). While *Rhodes* involved an increase rather than a decrease in the defendant's sentence and the resentencing came from the trial court *sua sponte* rather than upon a motion from the defendant, it still makes clear that in the process of plea bargaining, a defendant retains the rights conferred under section 15A-1024 in a subsequent sentencing hearing.

The State cites *State v. Harris* to argue that the case *sub judice* involves mere administrative error, which would not enable a defendant to withdraw a plea after he has had the benefit of the bargain in negotiating his plea. *State v. Harris*, 115 N.C. App. 42, 444 S.E.2d 226 (1994). That decision does not control the case at bar. *Harris* addressed the consolidation of several offenses for the purposes of sentencing, and the Court's opinion does not mention N.C. Gen. Stat. § 15A-1024. In *Harris*, the defendant had received a 14 year sentence "for all of the consolidated offenses in one of the judgments." *Id.* at 46, 444 S.E.2d at 228. Subsequently, the trial court, upon defendant's motion, removed one of the judgments "from the consolidated offenses and imposed the same fourteen year sentence with one less offense." *Id.* The crime removed was habitual felon status, which itself would not have supported a criminal sentence, and its original inclusion was characterized by this court as merely an "administrative error." *Id.* at 50, 444 S.E.2d at 230. The essence of *Harris* is that a trial court is not statutorily prohibited under N.C. Gen. Stat. § 15A-1334 from "correcting the way in which it consolidated offenses during a sentencing hearing prior to remand." *Id.* at 46-47, 444 S.E.2d at 228.

The clerical nature of the mistake in *Harris* is emphasized by the fact that the sentence itself remained the same. Accordingly, *Harris* is inapplicable when the error is not clearly administrative or clerical but in fact speaks to a basic material term of the plea agreement or to "the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel." *Brady v. United States*, 397 U.S. 742, 755, 25 L. Ed. 2d 747, 760 (1970) (citations omitted).

Because the trial court in granting defendant's MAR had indicated that the first sentence imposed was not legally valid and the error that gave rise to granting that MAR was not merely clerical or administrative, we hold that the second sentencing hearing was in fact a "sentencing" covered by N.C. Gen. Stat. 15A-1024.

B. Other Than Provided for in the Plea Agreement

Underlying the State's argument appears to be the assumption that there is no right to withdraw a plea when it results in a sentence that is more beneficial to the defendant than what was provided for in the plea agreement. This argument, however, contradicts the plain language of N.C. Gen. Stat. § 15A-1024, which gives a defendant the right to withdraw his plea if the trial court "determines to impose a sentence *other than* provided for in the plea arrangement." N.C. Gen. Stat. § 15A-1024 (2003) (emphasis added). Quite simply, a sentence of 133 to 169 months imprisonment is "a sentence other than" 151 to 191 months imprisonment. Where a statute is clear and unambiguous, the court must give the statute its plain meaning free of any judicial limitation or other additional construction. *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754 (1974); *see also State v. Williams*, 291 N.C. 442, 230 S.E.2d 515 (1976).

To determine that there is no right to withdraw a plea when the sentence imposed is less strict than that pled for is to read "other than" as meaning "more punitive," "stricter," or "more severe than." Such is the type of judicial improvisation directly prohibited by the case of *State v. Camp*, 286 N.C. 148, 209 S.E.2d 754 (1974). Furthermore, the Official Commentary accompanying this section of the General Statutes actually indicates that a legislative committee considered and rejected the phrase "more severe than" and instead amended the statute "to apply if there is *any change at all* concerning the substance." N.C. Gen. Stat. § 15A-1024 (2003) (emphasis added).

There is no precedent for reading this statute to treat "other than" as meaning "more severe than." To the contrary, our Supreme Court has held that section 15A-1024 applies whenever the judge "at the time of sentencing determines that a sentence *different from* that provided for in the plea arrangement must be imposed." *Williams*, 291 N.C. at 446, 230 S.E.2d at 517-18 (1976) (emphasis added).

In *State v. Russell*, a case cited by the State, the defendant was not permitted to withdraw his plea because the defendant's sentence was "consistent with" his plea bargain. 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002). *Russell*, however, involved a defendant whose guilty plea contained an agreement that if he failed to testify against a co-defendant, the State could then declare the plea bargain null and void and pray for judgment on the guilty plea. Such facts are distinguishable from the case *sub judice* wherein the agreement was not contingent upon any further action by defendant, and it is therefore not appropriate here to employ a *Russell* inquiry into the "consistency" or "inconsistency" of the plea and the sentence in this case.

Although it is difficult to understand why a defendant would prefer to withdraw a guilty plea when he has received a lighter sentence than he bargained for, the statute does not remove the defendant's right to reconsider nevertheless. Defendants often make such decisions based upon the sentence which they are told they will receive, based upon the calculation of their prior record and the severity of the charge. When his or her prior record level is not in fact as high as a defendant is told at the time of the plea, it is not unreasonable that upon learning this, a defendant who claims innocence but pleads for self-interest may change his or her mind. Our General Statutes allow defendants that prerogative.

The record reveals that the trial court in this case, upon imposing a sentence other than the one agreed to in the plea agreement, did not inform defendant that he could withdraw his plea and that if he did withdraw that plea he could reschedule until the next court calendar. We remand for the trial court to do so in accord with the statute, and for further proceedings not inconsistent with this opinion.

III.

Because we find the first issue to be dispositive, we do not address defendant's other two assignments of error.

Vacated and remanded.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. KENNETH MICHAEL OAKLEY

No. COA03-1709

(Filed 7 December 2004)

1. **Evidence— prosecution for homosexual activity with minor—photographs of men—admissible**

The court did not err in a prosecution for sexual activity by a substitute parent in ruling that the probative value of photographs of men found in defendant's home outweighed the danger of unfair prejudice. The photographs were corroborative of the victim's testimony and other witnesses had testified to defendant's sexual orientation. *Lawrence v. Texas*, 539 U.S. 558, recognizes autonomy and personal choice within personal relationships, but does not offer constitutional protection to evidence presented in a charge of criminally prohibited activity with minors.

2. **Sexual Offenses— sexual activity by substitute parent—parental relationship—evidence sufficient**

There was sufficient evidence of the parental relationship in a prosecution for sexual activity by a substitute parent where defendant, who initially had a sexual relationship with the 17-year-old boy's mother, obtained permission from the victim's parole officer for the victim to live with him and provided clothes, food, shelter, bail, and other support, and was more than a babysitter.

Appeal by defendant from judgment entered 20 March 2003 by Judge Dennis J. Winner in Alamance County Superior Court. Heard in the Court of Appeals 21 September 2004.

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

Don Willey for defendant-appellant.

HUNTER, Judge.

Kenneth Michael Oakley ("defendant") appeals from a judgment dated 20 March 2003 entered consistent with a jury verdict finding him guilty of two counts of sexual activity by a substitute parent. For the reasons stated within, we find no error.

The evidence tends to show that at the time of the occurrence, defendant was a twenty-three-year-old police officer employed by the Mebane Police Department and later the Alamance County Sheriff's Office. Defendant met sixteen-year-old Kevin W. O'Dell ("O'Dell") in 2000 while responding to a call at the home of O'Dell's mother, Janie Rook ("Rook"). Defendant was involved in a sexual relationship with Rook for approximately one year. During that time, defendant also spent time with O'Dell, buying him clothing, taking him on a weekend trip to a North Carolina beach, and on occasion letting O'Dell stay with him at the home he shared with another officer while O'Dell was having difficulty with Rook. During this time, O'Dell was arrested on a number of charges and was on juvenile, and later adult, probation for breaking and entering and various drug and alcohol related crimes.

On 1 January 2002, Rook had O'Dell, seventeen-years-old at that time, arrested for underage drinking and asked family members not to post bail for him. Defendant posted O'Dell's bond, signed the release forms as his temporary custodian, and took O'Dell home to stay with him. Defendant also obtained permission from O'Dell's parole officer for O'Dell to live with him. During and prior to the time O'Dell resided with defendant in January of 2002, defendant provided him food, clothing, and shelter, as well as gave him gifts. Defendant also had O'Dell tested for drugs. After a confrontation between O'Dell and defendant, defendant called the police and had O'Dell arrested for underage drinking on 27 January 2002. Defendant then filed a petition to have O'Dell involuntarily committed on 30 January 2002 for substance abuse treatment, again representing himself as O'Dell's temporary custodian.

O'Dell testified that he engaged in sexual activities with defendant in exchange for money during and prior to the time he resided with defendant. Defendant testified that he engaged in oral and anal sex with O'Dell while he resided with defendant.

Defendant was charged with and convicted of two counts of sexual activity by a substitute parent. Defendant was given a sus-

pended sentence of a term of twenty-four to thirty-eight months, and placed on supervised probation for thirty-six months. Defendant appeals.

I.

[1] By his first assignment of error, defendant contends the trial court erred in admitting certain photographs found in deendant's home, as the evidence was irrelevant to the charge and improperly prejudiced defendant in placing his sexual orientation on trial. We disagree.

The State, over defendant's objection, admitted a series of fifteen photographs that depicted a number of unidentified white males. Several of the photographs were identified as DMV photographs which could be downloaded from the Internet, some were photographs of inmates from a police lineup, and others were unidentified young, white males. Some of the photographs depicted males shirtless, some showed males in uniform and others showed males handcuffed. Defendant contends that admission of these photographs was irrelevant, immaterial, and grossly prejudicial as it improperly put defendant's sexual orientation on trial in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 19 of the North Carolina Constitution.

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would without the evidence. N.C. Gen. Stat. § 8C-1, Rule 401 (2003). Relevant evidence is generally admissible except where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence. N.C. Gen. Stat. § 8C-1, Rule 403 (2003). "[E]ven though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991).

In *State v. Creech*, the defendant was charged with multiple counts of indecent liberties with a minor and one count of crimes against nature. *See Creech*, 128 N.C. App. 592, 595, 495 S.E.2d 752, 754, *disc. review denied*, 348 N.C. 285, 501 S.E.2d 921 (1998). The victims in *Creech* were adolescent males. *Id.* at 593-94, 495 S.E.2d at 753.

The State submitted evidence of photographs found in the defendant's possession of male models and men in brief clothing. *Id.* at 596, 495 S.E.2d at 755. The defendant contended such admissions were unfairly prejudicial and that he was convicted because the jury viewed him as a homosexual after seeing the photographs. *Id.* The *Creech* Court found no prejudicial error in the introduction of the photographs, however, as defendant testified at trial as to his sexual encounters with men. *Id.* The Court also noted in *Creech* that other witnesses had referred to the defendant's sexual orientation before the photographs were entered, and that the photographs served to corroborate the testimony of other witnesses. *Id.* As a result, the Court found the probative value of the photographs substantially outweighed the danger of unfair prejudice to defendant's case. *Id.*

As in *Creech*, the State here contends that the photographs were offered to corroborate O'Dell's testimony regarding the sexual nature of his relationship with defendant. Further, defendant admitted to engaging in sexual intercourse with O'Dell at trial and other State witnesses had referred to defendant's sexual orientation prior to the introduction of the photographs. Therefore, we find no error in the trial court's ruling that the probative value of the photographs outweighed the danger of unfair prejudice to defendant by introduction of such evidence.

Defendant contends that the United States Supreme Court's recent decision in *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508 (2003), overturning its prior holding in *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140 (1986), established constitutional protection for decisions of personal autonomy which extends to homosexual relationships, and therefore admission of evidence which showed defendant to be homosexual was grossly prejudicial. *See Lawrence*, 539 U.S. at 578, 156 L. Ed. 2d at 525-26.

However, a close review of *Lawrence* shows the decision specifically noted that, unlike more recent same-sex sodomy statutes, the historical record supports enforcement of sodomy statutes in situations involving adults and minors.

> Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of

> an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. Thus the model sodomy indictments presented in a 19th-century treatise addressed the predatory acts of an adult man against a minor girl or minor boy.

Lawrence, 539 U.S. at 569, 156 L. Ed. 2d at 519-20 (citation omitted). The Court further noted the narrow scope of its ruling by stating that, "[t]he present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused." *Id.* at 578, 156 L. Ed. 2d at 525. Thus, Lawrence's recognition of autonomy and personal choice within consensual adult relationships does not offer constitutional protection to evidence presented in a charge of criminally prohibited activity with minors, as is the case *sub judice*. *See State v. Clark*, 161 N.C. App. 316, 321, 588 S.E.2d 66, 68-69 (2003). Therefore, we find no prejudicial error in the trial court's admission of the photographs.

II.

[2] Defendant next contends the trial court erred in denying defendant's motions to dismiss and to set aside the verdict for insufficient evidence that defendant has assumed the position of a parent in the victim's home. We disagree.

When reviewing challenges to the sufficiency of the evidence in criminal trials, the evidence must be reviewed in the light most favorable to the State. *See State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The State receives the benefit of all reasonable inferences, and any contradictions or discrepancies are for the jury to resolve. *Id.*

Here, defendant was charged with the crime of sexual activity by a substitute parent. N.C. Gen. Stat. § 14-27.7(a) (2003). This crime requires a finding that the defendant had (1) assumed the position of a parent in the home, (2) of a minor victim, and (3) engaged in a sexual act with the victim residing in the home. *Id.*

In *State v. Bailey*, this Court recently held that in order to find a parental relationship for the purposes of § 14-27.7(a), "evidence of the relationship between the defendant and child-victim must provide support for the conclusion that the defendant functioned in

a parental role. Such a parental role will generally include evidence of emotional trust, disciplinary authority, and supervisory responsibility." *Bailey*, 163 N.C. App. 84, 93, 592 S.E.2d 738, 744 (2004).

Here, evidence presented at trial showed that defendant, a law enforcement officer, was a friend of the family and initially involved in a sexual relationship with O'Dell's mother. Defendant provided clothing for O'Dell, took him to court dates, and allowed O'Dell to stay with him on occasion. Following defendant's bailment of O'Dell in 2002, defendant represented himself as O'Dell's temporary custodian and obtained permission from O'Dell's parole officer for O'Dell to live with him. Defendant paid for all of O'Dell's support during this time, including food, shelter, gifts and spending money. Further, defendant had O'Dell tested for drugs and alcohol, had O'Dell arrested for underage drinking, and again represented himself as O'Dell's temporary custodian in seeking an evaluation of him for involuntary civil commitment for substance abuse. Unlike in *Bailey*, where the evidence tended to show that the defendant was merely a babysitter, 163 N.C. App. at 94, 592 S.E.2d at 745, the evidence in this case, when viewed in the light most favorable to the State, provides evidence of emotional trust, disciplinary authority, and supervisory responsibility by defendant towards O'Dell.

Defendant does not dispute the other elements of the offense, namely that O'Dell, seventeen-years-old, was a minor when the offenses occurred and that defendant, twenty-three years old, was an adult. Further, defendant himself testified as to the occurrence of sexual acts with O'Dell. Therefore, as sufficient evidence of all the elements was presented to reach the jury as to the charge of sexual offense of a person in a parental role, the trial court did not err in its denial of defendant's motions to dismiss and to set aside the verdict for insufficient evidence.

III.

Defendant raises three additional assignments of error in his brief in a section entitled Preservation Claims, but cites no authority in support of these claims. " 'Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.' " *State v. Lloyd*, 354 N.C. 76, 87, 552 S.E.2d 596, 607 (2001) (quoting N.C.R. App. P. 28(b)(6)). Defendant's additional assignments of error are therefore deemed abandoned.

For the above reasons, we find the trial court did not err in admitting the challenged State's evidence and properly concluded there was sufficient evidence to deny defendant's motion to dismiss.

No error.

Judges WYNN and THORNBURG concur.

JOHN TUBIOLO AND WIFE, VICKIE TUBIOLO, PLAINTIFFS v. ABUNDANT LIFE CHURCH, INC., DEFENDANT

No. COA03-471

(Filed 7 December 2004)

1. **Churches and Religion— termination of membership—core ecclesiastical matter—no judicial involvement**

The trial court should have dismissed an action against a church for terminating plaintiffs' membership on inaccurate grounds. Membership in a church is a matter in which the courts should not be involved whether the church is congregational or hierarchical, incorporated or unincorporated.

2. **Churches and Religion— adoption of bylaws—within court's jurisdiction**

The trial court correctly denied a motion to dismiss an action against a church claiming that the people terminating plaintiffs' membership were without authority to do so under bylaws which plaintiffs contest. Plaintiffs' membership in the church is in the nature of a property interest, that interest is directly implicated, and the narrow issue of whether the bylaws were properly adopted can be addressed without resolving ecclesiastical matters.

3. **Churches and Religion— termination of membership—nonprofit corporation statutes—constitutional provisions**

The trial court should have dismissed plaintiffs' action against a church asserting that their membership was terminated in violation of statutory provisions concerning nonprofit corporations. A church's criteria for membership and the manner in which membership is terminated are core ecclesiastical

matters protected by the constitutions of the United States and North Carolina.

4. Churches and Religion— request for inspection of records and annual meeting—standing as members—proper adoption of bylaws

On remand, plaintiffs' standing to pursue claims against their former church for orders allowing inspection of records and for an annual meeting are dependent on whether they were members at the time the suit was filed. If the court determines that disputed bylaws were properly adopted, then the courts have no jurisdiction over the termination of plaintiffs' membership and plaintiffs would lack standing to pursue these claims.

Appeal by defendant from order entered 3 February 2003 by Judge Kenneth C. Titus in Orange County Superior Court. Heard in the Court of Appeals 28 January 2004.

Harriss & Marion, P.L.L.C., by Joseph W. Marion, for plaintiff-appellees.

Crews & Klein, P.C., by Paul I. Klein and Katherine Freeman, for defendant-appellant.

STEELMAN, Judge.

Abundant Life Church, Inc. (defendant), is a corporation, organized and existing under the provisions of Chapter 55A of the North Carolina General Statutes (North Carolina Nonprofit Corporation Act). Defendant was incorporated on 8 September 1982. Both plaintiffs were founding members of the defendant. Plaintiff, John Tubiolo, was one of the incorporators and an initial director of the defendant. For a period of nearly two years prior to 5 September 2002, plaintiffs had disputes with the pastor and leadership of the church. Plaintiffs contend that the disputes arose out of the improper handling of finances by defendant. Defendant contends that plaintiffs were in "open rebellion" against the church leadership, and persistently engaged in conduct detrimental to the body of the church. On 22 August 2002, plaintiffs, through counsel, demanded copies of certain financial records of the church. By letter dated 5 September 2002, defendant's Church Council terminated plaintiffs' membership based upon scriptural discipline. The letter set forth six separate bases for the termination, and recited efforts made by the church leadership to reconcile with the plaintiffs.

Following receipt of the letter terminating their membership in defendant, plaintiffs filed this action on 8 October 2002. Their complaint sought the following relief: (1) a preliminary and permanent injunction enjoining defendant from terminating their membership; (2) a court order directing defendant to allow plaintiffs to inspect certain records of defendant; (3) a court order directing defendant to conduct an annual meeting after reasonable notice to all members.

Defendant moved to dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. In the alternative, defendant moved for summary judgment under Rule 56 of the Rules of Civil Procedure, and filed affidavits in support of this motion. Plaintiffs filed affidavits in opposition to the motion for summary judgment.

By order dated 3 February 2003, Judge Titus denied defendant's motion to dismiss and deferred ruling upon defendant's motion for summary judgment pending completion of discovery. The order specifically found that it "affects a substantial right of the Defendant and that there is no just reason to delay an appeal therefrom" pursuant to the provisions of Rule 54(b) of the Rules of Civil Procedure. From the entry of this order, defendant appeals.

In its first assignment of error, defendant asserts that the trial court erred in not granting its motion to dismiss. We agree, in part.

The gravamen of defendant's argument, made both before the trial court and this Court, is that the courts of this state should not become involved in matters of church membership and church discipline under the provisions of the First Amendment to the Constitution of the United States of America and section 13 of Article I of the Constitution of the State of North Carolina.

Based upon this theory, defendant's motion would have been more properly made under Rule 12(b)(1) as a motion to dismiss for lack of subject matter jurisdiction. See *Emory v. Jackson Chapel First Missionary Baptist Church*, 165 N.C. App. 489, 598 S.E.2d 667 (2004). "[Q]uestions of subject matter jurisdiction may properly be raised at any point, even in the Supreme Court." *Forsyth County Bd. of Social Services v. Division of Social Services*, 317 N.C. 689, 692, 346 S.E.2d 414, 416 (1986) (citations omitted). In *Williams v. New Hanover County Bd. of Educ.*, 104 N.C. App. 425, 428, 409 S.E.2d 753, 755 (1991) (*quoting Harrell v. Whisenant*, 53 N.C. App. 615, 617, 281 S.E.2d 453, 454 (1981)), this Court held that a "motion is prop-

erly treated according to its substance rather than its label," and treated defendant's motion as one under Rule 12(b)(1) rather than Rule 12(b)(6). In the instant case, we treat defendant's motion to dismiss as one made under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction.

The appropriate standard of review in this case is *de novo*. *Emory*, 165 N.C. App. at 491, 598 S.E.2d at 669. In considering a motion to dismiss for lack of subject matter jurisdiction, it is appropriate for the court to consider and weigh matters outside of the pleadings. *Tart v. Walker*, 38 N.C. App. 500, 502, 248 S.E.2d 736, 737 (1978).

Plaintiffs' complaint asserts three bases for their claim that defendant improperly terminated their membership: (1) the grounds stated in the termination letter were not accurate; (2) the persons purporting to terminate their membership were without authority to take that action; and (3) the termination was not conducted in a fair and reasonable manner and in good faith as required by N.C. Gen. Stat. § 55A-6-31(a).

[1] The courts cannot become entangled in ecclesiastical matters of a church.

> The courts of the State have no jurisdiction over and no concern with purely ecclesiastical questions and controversies. . . . [T]he courts do have jurisdiction as to civic, contract and property rights which are involved in or arise from a church controversy, including the right to determine the type organization of a particular church.

Braswell v. Purser, 282 N.C. 388, 393, 193 S.E.2d 90, 93 (1972). Our courts have defined an ecclesiastical matter as:

> "one which concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church; and all such matters are within the province of church courts and their decisions will be respected by civil tribunals."

Eastern Conference of Original Free Will Baptists v. Piner, 267 N.C. 74, 77, 147 S.E.2d 581, 583 (1966), *overruled in part on different*

grounds by Atkins v. Walker, 284 N.C. 306, 200 S.E.2d 641 (1973) (*quoting Western Conference of Original Free Will Baptists v. Miles*, 259 N.C. 1, 10-11, 129 S.E.2d 600, 606 (1963).

Membership in a church is a core ecclesiastical matter. The power to control church membership is ultimately the power to control the church. It is an area where the courts of this State should not become involved. This stricture applies regardless of whether the church is a congregational church, incorporated or unincorporated, or an hierarchical church.

> The prohibition on judicial cognizance of ecclesiastical disputes is founded upon both establishment and free exercise clause concerns. By adjudicating religious disputes, civil courts risk affecting associational conduct and thereby chilling the free exercise of religious beliefs. Moreover, by entering into a religious controversy and putting the enforcement power of the state behind a particular religious faction, a civil court risks "establishing" a religion.

Crowder v. Southern Baptist Convention, 828 F.2d 718, 721 (11th Cir. 1987).

As to the first basis for challenging the termination of their membership, that the grounds for termination are inaccurate, plaintiffs acknowledge in their brief that:

> Plaintiffs do not suggest that the trial court has the authority to examine or decide whether the *grounds* set forth in the purported termination letter were accurate or whether such grounds were legally sufficient to cause Plaintiffs' membership to be terminated. (emphasis in original).

The Courts will not become involved in determining whether grounds for termination of church membership are doctrinally or scripturally correct. The trial court erred, and should have dismissed this as a basis for plaintiffs' claim that their membership was improperly terminated.

[2] The second basis for plaintiffs' assertion that their membership was improperly terminated was that the persons purporting to terminate their membership were without authority to take that action. Attached to plaintiffs' complaint was a copy of what appears to be a portion of the defendant's bylaws. Article IV is entitled "Membership", and section 3 provides:

> The members shall seek to live exemplary Christian lives so as to bring honor to Christ and uphold the witness of the church. Should the need for church discipline arise among the membership, the Senior Pastor and the Church Council shall be responsible for administering such discipline, up to and including dismissal from membership.

The letter dismissing the plaintiffs from the membership of defendant, dated 5 September 2002, purports to be from the Church Council. Plaintiffs' complaint asserts that no bylaws were ever adopted by the defendant, and that the signatories of the 5 September 2002 letter were without authority to sign the letter. While the Courts can under no circumstance referee ecclesiastical disputes, they can adjudicate "property disputes", provided that this can be done without resolving underlying controversies over religious doctrine. *Atkins v. Walker*, 284 N.C. 306, 316-17, 200 S.E.2d 641, 648 (1973); *citing Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 21 L. Ed. 2d 658 (1969).

We hold that the plaintiffs' membership in the defendant is in the nature of a property interest, and that the courts do have jurisdiction over the very narrow issue of whether the bylaws were properly adopted by the defendant. *See Bouldin v. Alexander*, 82 U.S. 131, 139-140, 21 L. Ed. 69, 71-72 (1872) ("we cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off. . . . But we may inquire whether the resolution of expulsion was the act of the church, or of persons who were not the church and who consequently had no right to excommunicate others."). This inquiry can be made without resolving any ecclesiastical or doctrinal matters. In so holding we find the facts of this case to be distinguishable from those in our recent opinion of *Emory v. Jackson Chapel First Missionary Baptist Church*, 165 N.C. App. 489, 598 S.E.2d 667 (2004). In *Emory*, the issue was a change in the form of governance of the church, from an unincorporated association to a corporation. No membership rights were implicated in this change. Thus, in *Emory*, we held that the controversy only bore a "tangential relationship to property rights." In this case, we hold that the plaintiffs' membership rights were directly implicated. We thus affirm the trial court's denial of the defendant's motion to dismiss as to the second basis of plaintiffs' first claim.

[3] The third basis for plaintiffs' assertion that their membership was improperly terminated was that the purported termination was in vio-

lation of the provisions of N.C. Gen. Stat. § 55A-6-31(a). This provision deals with the termination, expulsion, and suspension of members of a nonprofit corporation existing under the provisions of Chapter 55A, and reads as follows:

> (a) No member of a corporation may be expelled or suspended, and no membership may be terminated or suspended, except in a manner that is fair and reasonable and is carried out in good faith.

The fact that defendant is a corporation under Chapter 55A does not alter our analysis of whether the courts of this state have jurisdiction in ecclesiastical disputes. Plaintiffs would have the courts direct that churches cannot terminate membership without following certain due process procedures including notice and an opportunity to be heard. This we refuse to do. A church's criteria for membership and the manner in which membership is terminated are core ecclesiastical matters protected by the First and Fourteenth Amendments of the United States Constitution and section 13 of Article I of the Constitution of the State of North Carolina. The trial court erred and should have dismissed this as a basis for plaintiffs' claim that their membership was improperly terminated.

[4] As to the plaintiffs' remaining claims seeking an order allowing plaintiffs to inspect certain records of defendant, and seeking an order directing defendant to conduct an annual meeting, these claims are dependent upon plaintiffs being members of defendant at the time of the filing of this lawsuit. If the trial court determines that the bylaws were duly adopted, then the courts have no jurisdiction over the termination of the plaintiffs' membership in defendant. Since the termination occurred prior to the filing of this action, plaintiffs would lack standing to pursue these two claims against the defendant, and the trial court should dismiss plaintiffs' action.

This matter is remanded to the trial court for further proceedings consistent herewith.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

Chief Judge MARTIN and Judge GEER concur.

MICHAEL D. ALLEN, EMPLOYEE, PLAINTIFF v. SOUTHAG MANUFACTURING, EMPLOYER, AND THE PHOENIX FUND, CARRIER, NATIONAL BENEFITS OF AMERICA, INC., ADMINISTRATOR, DEFENDANTS

No. COA03-1598

(Filed 7 December 2004)

1. Workers' Compensation— total disability—conflicting evidence—Commission's finding supported

There was competent evidence in a workers' compensation case to support the Industrial Commission's finding of ongoing total disability and the award of compensation and medical costs. Although there was some evidence that defendant continued to work after he left defendant's employ, there was substantial medical evidence that plaintiff's condition prevented his working. The Commission's findings are conclusive as long as they are supported by competent medical evidence.

2. Workers' Compensation— attorney fees—unreasonable denial and defense of claim

The Industrial Commission did not abuse its discretion by awarding plaintiff attorney fees in a workers' compensation case where defendant must have been aware of plaintiff's disability, but failed to pay even temporary or partial compensation until ordered to do so almost four years later. N.C.G.S. § 97-88.1.

Appeal by defendants from decision entered 16 July 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 September 2004.

Law Offices of George W. Lennon, by George W. Lennon, for plaintiff-appellee Michael D. Allen.

Brooks, Stevens & Pope, P.A., by Robert S. Welch and Jennifer S. Shapiro, for defendant-appellants SouthAg Manufacturing, The Phoenix Fund, and National Benefits of America, Inc.

MARTIN, Chief Judge.

Defendants appeal from an order of the North Carolina Industrial Commission ("Commission") awarding plaintiff (1) total disability compensation beginning on the date of his last employment with defendant-employer and continuing until further order of the

Commission, (2) medical treatment related to plaintiff's injury, and (3) attorneys' fees.

Beginning in February 1998, plaintiff was employed as a painter and general laborer at SouthAg Manufacturing, a manufacturer of heavy metal trailers. On 17 March 1999, a large piece of steel angle iron fell on plaintiff's left foot, fracturing his toes. The incident was reported to plaintiff's supervisor, and plaintiff was sent to MedFirst Urgent Care for treatment. Defendant-employer reimbursed plaintiff for the medical bills.

Plaintiff returned to work a week after the incident. He worked in a light duty capacity in the inventory building and wore orthopedic shoes. He returned to his former duties in the manufacturing building after a week or two, and he continued to wear the orthopedic shoes or tennis shoes since the required steel-toe boots hurt his foot. Plaintiff's pain, however, continued to increase, so he sought treatment at Knightdale Primary Care the following month. He was referred to podiatrist Carroll Kratzer at the Raleigh Orthopaedic Clinic, whom he saw 16 June 1999.

Dr. Kratzer found that plaintiff's fractures were beginning to heal, but that he had a limited range of motion in his left toes and walked with a severe limp on his left foot. Dr. Kratzer found that plaintiff's symptoms were consistent with Reflex Sympathetic Dystrophy (RSD), now called Complex Regional Pain Syndrome (CRPS), which is an injury to the sympathetic nervous system that causes significant pain beyond the level normally experienced with the particular injury. Dr. Kratzer did not find, however, conclusive radiographic evidence of CRPS. He recommended further testing, including neurological and muscle testing, as well as aggressive physical therapy to try to reestablish function in the foot.

On 8 October 1999, plaintiff saw neurologist David Konanc of Raleigh Neurology Associates. After testing, Dr. Konanc determined that plaintiff had CRPS. He recommended rest, pain medication, and elevation and cooling of the foot. He also recommended that plaintiff see Dr. Keith Kittelberger at Carolina Pain Consultants for evaluation and treatment of CRPS. Dr. Kittelberger specializes in anesthesiology and pain management.

Dr. Kittelberger treated plaintiff for the pain in his foot by prescribing several medications and injecting local anesthetics in plaintiff's leg, called lumbar sympathetic blocks. The blocks, how-

ever, did not decrease plaintiff's pain level. Over the next year, plaintiff saw several doctors at Carolina Pain Consultants and received a myriad of treatments, including sympathetic blocks, medication, physical therapy, and psychological counseling for coping with pain. Dr. Kittelberger stated at his deposition that plaintiff's condition was more likely than not permanent and that it would require long-term care.

Dr. Robert Jacobson, also at Carolina Pain Consultants, saw plaintiff on a more regular basis than Dr. Kittelberger and agreed that plaintiff's condition was permanent. He testified to the following: (1) it would be very difficult for plaintiff to return to his pre-injury work given his degree of pain; (2) plaintiff's pain affected his ability to concentrate and to work many hours at a stretch; (3) plaintiff would probably need to take frequent unscheduled breaks in any future employment; and (4) plaintiff could attempt a sedentary job, but it was not likely with his pain level that he could sustain his concentration and keep regular hours.

Plaintiff continued working at SouthAg Manufacturing for a year after the incident. During that year, he was frequently absent from work at the recommendation of his doctors and had to take extra breaks during the day to alleviate his pain. Plaintiff stopped working at SouthAg in March of 2000. Two employees of SouthAg testified that plaintiff said he was leaving for another job. Plaintiff, however, testified he left because of the pain in his foot and never said he had another job. He testified that he has not worked at all since leaving SouthAg.

Dr. Robert John Wilson, III, a physical medicine rehabilitation physician with the Triangle Orthopaedic Associates, saw the plaintiff in the summer of 2001, more than two years after the accident. At that time, Dr. Wilson observed that plaintiff had "extreme amounts of limping when he walked," "a scissoring gait," "significant calf atrophy," "skin changes," "very limited ankle motion," and "pain with pressure on his foot." Dr. Wilson stated that although CRPS typically lasts only six to twelve months, some patients develop chronic CRPS. The plaintiff appeared to have chronic CRPS given the continued pain, and Dr. Wilson believed the CRPS would probably last indefinitely.

After a hearing before a deputy commissioner, the deputy commissioner made the following factual findings: (1) the greater weight of the evidence showed plaintiff voluntarily quit work with defend-

ant-employer to pursue other employment; (2) there were numerous references to plaintiff's "work" in doctors' reports after the date plaintiff left SouthAg, which indicated plaintiff did work elsewhere even though he testified he did not; and (3) plaintiff had not reached maximum medical improvement since further treatments for his condition were available. The deputy commissioner therefore concluded that plaintiff lacked credibility and had failed to establish permanent disability. She awarded plaintiff only four weeks of temporary total disability because of a doctor's note excusing plaintiff from work for one month. She also ordered defendant to pay 25% of that amount as attorneys' fees and to continue to pay plaintiff's medical costs.

The full Industrial Commission reversed the holding of the deputy commissioner. It found, *inter alia*, that plaintiff suffered a compensable injury by accident arising in and out of the course of his employment on 17 March 1999, and that plaintiff met his burden of proving total disability. The Commission awarded plaintiff ongoing total disability compensation of $273.38 per week beginning on the date of his last employment with defendant-employer in March of 2000 and continuing until further order of the Commission. The Commission also ordered defendant-employer to pay plaintiff's medical treatment related to his compensable injury and awarded plaintiff attorneys' fees pursuant to G.S. § 97-90 and § 97-88.1.

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[1] The standard of review for this Court is whether the Commission's findings of fact are supported by any competent evidence:

> In reviewing an opinion and award from the Industrial Commission, the appellate courts are bound by the Commission's findings of fact when supported by any competent evidence; but the Commission's legal conclusions are fully reviewable. An appellate court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding."

Lanning v. Fieldcrest-Cannon, Inc., 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). Defendant-appellants argue that there is no competent evidence to support the Commission's finding of total disability since there was some evidence to indicate plaintiff continued to work after he left SouthAg Manufacturing in March 2000. Where the evidence is conflicting, the Commission's

findings of fact are conclusive on appeal as long as they are supported by competent evidence. *Adams v. AVX Corp.*, 349 N.C. 676, 682, 509 S.E.2d 411, 414 (1998). The record contains substantial medical evidence, discussed above, that plaintiff's condition prevented him from working in either active or sedentary jobs. We therefore find that there is competent evidence to support the Commission's finding of ongoing total disability and the award of compensation and medical costs.

[2] Defendant-appellants also argue that the Commission erred in awarding plaintiff attorneys' fees. The Commission's findings of fact included the following:

> 16. Defendants failed to properly investigate plaintiff's claim, denied his claim without reasonable grounds, and continued to deny and defend his claim after the evidence established compensability. Defendants also failed to comply with known statutes and Rules of the Industrial Commission regarding the reporting, payment, and filing of documents related to the acceptance or denial of benefits for injuries occurring to plaintiff in his workplace. Defendants' actions in this case constitute stubborn, unfounded litigiousness.

The record reflects that defendants objected to plaintiff receiving additional medical examinations and treatment, and they denied that his injury arose in and out of the course of his employment. Plaintiff testified he never received a copy of Form 19, which the law requires employers to provide to injured employees. After the injury, plaintiff had to take frequent breaks at work, had to leave work regularly for doctors' appointments, and had, according to doctors' reports, an extreme limp and abnormal gait. Defendant-employers must have been aware of his disability, yet they failed to pay even temporary or partial compensation until ordered to do so almost four years later. The Commission therefore concluded as a matter of law that defendants unreasonably denied and defended this claim and awarded plaintiff attorneys' fees pursuant to G.S. § 97-88.1, which states that "[i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1. We conclude that the Commission did not abuse its discretion in granting plaintiff attorneys' fees and affirm this award.

Affirmed.

Judges TIMMONS-GOODSON and HUDSON concur.

STATE OF NORTH CAROLINA v. ANTHONY JARRETT

No. COA03-1248

(Filed 7 December 2004)

1. Robbery— threatened use of gun—evidence sufficient

There was sufficient evidence of armed robbery where the victims of two robberies testified that defendant stated that he had a gun while demanding money and that they each complied with defendant's command and gave him money believing that he had a gun.

2. Robbery— instructions—threatened use of gun

The trial court did not err by instructing the jury that an armed robbery defendant could be found guilty without finding that he actually possessed a firearm. The clear language of N.C.G.S. § 14-87 makes clear that the threatened use of a firearm is sufficient, and the court's instruction here was substantially similar to the pattern jury instruction.

Appeal by defendant from judgment dated 26 March 2003 and from an amended judgment dated 10 June 2003 by Judge J. Gentry Caudill in Gaston County Superior Court. Heard in the Court of Appeals 25 August 2004.

Attorney General Roy Cooper, by Assistant Attorney General Spurgeon Fields, III, for the State.

Michael E. Casterline for defendant-appellant.

BRYANT, Judge.

Anthony Bernard Jarrett (defendant) appeals a judgment dated 26 March 2003 and an amended judgment dated 10 June 2003 entered consistent with jury verdicts finding him guilty of two counts of robbery with a firearm and two counts of having attained the status of habitual felon.

The State's evidence tended to show the following: At approximately 2:30 a.m. on the morning of 10 March 2002, Rebecca Sargent (Sargent) was working as a cashier at the Bi-Lo grocery store located at East Franklin Street in Gaston County. Defendant (whom Sargent later identified during a photo line-up and identified in open court) motioned to Sargent that he needed to make a purchase, and placed two candy bars on the conveyer belt. Sargent started to bag the candy bars when defendant told her he had a gun and asked "are you going to give me the money?" Sargent, believing that defendant had a gun, complied with defendant's demand and put the money from her register (approximately $100.00) into a bag and handed the bag to defendant. Defendant fled from the store, and Sargent and other store employees followed defendant to the parking lot. When outside, Sargent saw a red car leaving the parking lot.

At approximately 7:30 a.m. that same day (10 March 2004), James Elrod (Elrod) was working as cashier at the Bi-Lo grocery store located at Davis Road in Gaston County. Defendant (whom Elrod later identified at the scene of defendant's arrest and identified in open court) placed a pack of gum on the conveyer belt for purchase. Elrod accepted money for the purchase of the gum, and gave defendant a purchase receipt. Defendant then stated he had a gun and demanded the money from the register. Elrod, convinced that defendant possessed a gun, complied with defendant's demand and gave defendant the money from the register.

Officer John Terry of the Gastonia Police Department, was on routine patrol at 8:00 a.m. that same morning (10 March 2004) when he spotted a red car, matching the description of a red car used during the commission of the two Bi-Lo robberies. Officer Terry, who spotted the vehicle parked in front of a house, kept watch over the vehicle, and radioed for back-up. While awaiting back-up, Officer Terry observed three black males exiting the house where the car was parked, including one black male who matched the description of the suspect involved in both robberies. Officer Terry exited his patrol car and attempted to arrest defendant, however, defendant was able to escape. Officer Terry continued in pursuit, and again radioed for back-up. Officer Ashley Helms of the Gastonia Police Department arrived at the scene and assisted Officer Terry in apprehending defendant. Upon searching defendant, the officers found on defendant's possession rolled coins, different denominations of money, a package of gum, and a Bi-Lo receipt for gum. A gun was not found on defendant's body nor in the house from which Officer Terry saw defendant exit.

Defendant gave a statement to the police in which he confessed to having committed the robberies, but denied actually possessing a gun during commission of the robberies. At trial, defendant did not present any evidence.

The issues on appeal are whether: (I) the convictions must be vacated because the State failed to demonstrate defendant actually possessed a gun (firearm) during the commission of the robberies; and (II) the trial court erred by instructing the jury that defendant could be found guilty without finding he actually possessed a gun (firearm).

I

[1] First, defendant argues that the convictions must be vacated because the State failed to offer evidence that defendant actually possessed a firearm during the commission of the robberies.

Defendant was indicted for and found guilty of violating N.C. Gen. Stat. § 14-87 which provides:

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

N.C.G.S. § 14-87(a) (2003) (emphasis added).

Defendant argues that the State was required to prove beyond a reasonable doubt that defendant actually possessed a firearm during the commission of the robberies; however, defendant's argument clearly ignores the disjunctive construction of this statute. "To obtain a conviction for armed robbery, it is not necessary for the State to prove that the defendant displayed the firearm to the victim. . . . The State need only prove that the defendant represented he had a firearm and that circumstances led the victim reasonably to believe the defendant had a firearm and might use it." *State v. Lee*, 128 N.C. App. 506, 510, 495 S.E.2d 373, 376 (1998) ("The State need only prove that the defendant represented that he had a firearm and that circumstances led the victim reasonably to believe that the defendant

had a firearm and might use it."); *see State v. Williams*, 335 N.C. 518, 521, 438 S.E.2d 727, 728-29 (1994) (concluding that defendant's verbal representations that he had a firearm and would shoot the victims entitled the State to a presumption that the defendant used a firearm); *see also State v. Bartley*, 156 N.C. App. 490, 496, 577 S.E.2d 319, 323 (2003) ("Where the evidence tends to show that the 'victim reasonably believed that the defendant possessed, or used or threatened to use a firearm in the perpetration of the crime,' . . . the result should be the same whether a defendant verbally stated he had a firearm or . . . visually indicated he had a firearm, even when the victim did not actually see a firearm.") (citation omitted).

Defendant cites to *State v. Faulkner*, 5 N.C. App. 113, 119, 168 S.E.2d 9, 13 (1969), in support of his argument that N.C. Gen. Stat. § 14-87 requires that defendant must actually possess a firearm during the commission of a robbery, however, more recent case law articulated in *Lee* and *Bartley*, and N.C. Gen. Stat. § 14-87, make clear threatened use of a firearm is sufficient to sustain a conviction under the statute. In addition, this Court in *State v. Jarrett*, 137 N.C. App. 256, 527 S.E.2d 693 (2000), distinguished *Faulkner* as follows:

> Defendant cites *State v. Faulkner*, 5 N.C. App. 113, 168 S.E.2d 9 (1969) in support of her argument that the trial court erred in instructing the jury with respect to constructive possession. In *Faulkner*, this Court wrote that "actual possession and use or threatened use of firearms or other dangerous weapon is necessary to constitute the offense of robbery with firearms or other dangerous weapon." *Id.* at 119, 168 S.E.2d at 13. In *Faulkner*, however, the issue involved the nature of the alleged weapon, i.e., whether it was real or a toy, rather than the spatial relationship of the defendant to the weapon.

Jarrett, 137 N.C. App. at 265, 527 S.E.2d at 699. Thus, the issue presented in *Faulkner* concerned whether the alleged weapon was real or a toy, a different issue from the one presented in the instant case.

Here, both victims of the robberies (Sargent and Elrod) testified that defendant stated, while demanding money, that he had a gun and that each victim complied with defendant's command and gave him money believing that defendant possessed a gun. This Court has explicitly held:

> Proof of armed robbery requires that the victim reasonably believed that the defendant possessed, or used or threatened to

> use a firearm in the perpetration of the crime. *State v. Thompson*, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979). The State need only prove that the defendant represented that he had a firearm and that circumstances led the victim reasonably to believe that the defendant had a firearm and might use it. *State v. Williams*, 335 N.C. 518, 522, 438 S.E.2d 727, 729 (1994).

Lee, 128 N.C. App. at 510, 495 S.E.2d at 376. Accordingly, this assignment of error is overruled.

II

[2] Second, defendant argues that the trial court erred by instructing the jury that defendant could be found guilty without finding he actually possessed a firearm.

> The trial court instructed the jury as to the following:
>
> Now, I charge that for you to find the defendant guilty of robbery with a dangerous weapon, the State must prove seven things beyond a reasonable doubt:
>
> . . .
>
> Sixth, the defendant had a dangerous weapon in his possession at the time he obtained the property or that it reasonably appeared to the victim that a dangerous weapon was being used, in which case you may infer, but you are not required to infer, that said instrument was what the defendant's conduct represented it to be.

As stated in Issue I *supra*, the clear language of N.C. Gen. Stat. § 14-87, makes clear the threatened use of a firearm is sufficient to sustain a conviction under the statute. Moreover, the trial court's instruction is substantially similar to the pattern jury instruction for robbery with a firearm pursuant to N.C. Gen. Stat. § 14-87. The pattern jury instruction provides in pertinent part:

> The defendant has been charged with robbery with a firearm . . . .
>
> For you to find the defendant guilty of this offense, the State must prove seven things beyond a reasonable doubt:
>
> . . .
>
> Sixth, that the defendant had a firearm in his possession at the time he obtained the property (or that it reasonably appeared to

the victim that a firearm was being used, in which case you may infer that the said instrument was what the defendant's conduct represented it to be).

N.C.P.I.—Crim. 217.20 (2003). This assignment of error is overruled.

No error.

Judges HUDSON and TYSON concur.

ANSON COUNTY CITIZENS AGAINST CHEMICAL TOXINS IN UNDERGROUND STORAGE, BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, INC., MARY GADDY, BOBBY SMITH AND EMMA SMITH, PETITIONERS v. N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT, RESPONDENT, AND CHAMBERS DEVELOPMENT OF NORTH CAROLINA, INC., RESPONDENT-INTERVENOR

No. COA03-1346

(Filed 7 December 2004)

Environmental Law— solid waste landfill—compliance review

The trial court did not err by affirming an agency decision that upheld the North Carolina Department of Environment and Natural Resources Division of Waste Management's (DENR) issuance of a permit to a company to build a multistate solid waste landfill in Anson County, because: (1) although DENR could have reached other conclusions than it did, there was no violation under N.C.G.S. § 130A-294 in DENR's compliance review of the pertinent company; (2) DENR's decision to issue a permit was not arbitrary and capricious when DENR had broad discretion under N.C.G.S. § 130A-294(b2) in conducting the compliance review; and (3) while petitioners argue effectively that more thorough review or different weighing of factors would have been reasonable, it cannot be said that DENR's process failed to indicate any course of reasoning and the exercise of judgment.

Appeal by petitioners from order entered 1 July 2003 by Judge Henry W. Hight, Jr., in the Superior Court of Wake County. Heard in the Court of Appeals 25 August 2004.

Attorney General Roy Cooper, by Assistant Attorney General Nancy E. Scott, for respondent-appellee North Carolina Department of Environment and Natural Resources, Division of Waste Management.

John W. Runkle and Legal Aid of North Carolina, Inc., by Melany Earnhardt and Nicole Gooding-Ray, for petitioner-appellants.

Helms, Mulliss & Wicker, P.L.L.C., by Benne C. Hutson, and Smith Moore L.L.P., by Ramona Cunningham O'Bryant and William E. Burton, III, for respondent-appellee Chambers Development of North Carolina, Inc.

HUDSON, Judge.

On 1 June 2000, the North Carolina Department of Environment and Natural Resources Division of Waste Management ("DENR") issued a permit to Chambers Development of North Carolina, Inc. ("Chambers"), to build a multi-state solid waste landfill in Anson County. Anson County Citizens Against Chemical Toxins in Underground Storage, Blue Ridge Environmental Defense League, Inc., and Anson County residents Mary Gaddy, Bobby Smith, and Emma Smith ("petitioners") appealed the issuance of the permit, by filing a contested case petition on 30 June 2000. The Administrative Procedures Act was amended by the General Assembly, but the amendments apply only to contested cases filed after 1 January 2001. This case is governed by the previous statute and cases decided thereunder.

Following an evidentiary hearing, an administrative law judge (ALJ) issued a recommended decision filed 5 June 2001. The ALJ concluded that DENR had "acted erroneously, failed to follow proper procedure, acted arbitrarily or capriciously, and failed to act as required by law or rule" and that the permit was void. On review by DENR, all parties had the opportunity to file exceptions and briefs with the agency, which also heard oral arguments. On 5 January 2002, DENR filed its final agency decision, which declined to adopt the findings and conclusions of the recommended decision, and ruled against petitioners on all contentions. Petitioners filed a petition for judicial review of the final agency decision, and on 1 July 2003, the Superior Court in Wake County filed its order affirming that decision. Petitioners appeal. For the reasons discussed below, we affirm.

Our Supreme Court recently adopted a dissenting opinion of this Court, which clarified this Court's standard of review of a superior court order examining an agency decision. An appellate court's review "can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court." *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001), *rev'd per curiam*, 355 N.C. 269, 559 S.E.2d 547 (2002) (Greene, J., dissenting). "Thus, in reviewing a superior court order examining an agency decision, an appellate court must determine whether the agency decision (1) violated constitutional provisions; (2) was in excess of the statutory authority or jurisdiction of the agency; (3) was made upon unlawful procedure; (4) was affected by other error of law; (5) was unsupported by substantial admissible evidence in view of the entire record; or (6) was arbitrary, capricious, or an abuse of discretion." *Shackleford-Moten v. Lenoir County Dep't of Soc. Servs.*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002) (citing N.C. Gen. Stat. § 150B-51 (2001)). In our review, we consider only "those grounds for reversal or modification raised by the petitioner before the superior court and properly assigned as error and argued on appeal to this Court." *Id.*

Here, petitioners argue that DENR's compliance review of Chambers "was improperly conducted and that the agency's conclusion to grant the permit was arbitrary and capricious, and otherwise contrary to law." Specifically, petitioners first argue that DENR failed to properly review Chambers' environmental compliance record under the terms of N.C. Gen. Stat. §130A-294. That statute mandates, in pertinent part:

> (b2) The Department may require an applicant for a permit under this Article to satisfy the Department that the applicant, and any parent, subsidiary, or other affiliate of the applicant or parent:
>
> (1) Is financially qualified to carry out the activity for which the permit is required.
>
> (2) Has substantially complied with the requirements applicable to any solid waste management activity in which the applicant has previously engaged and has been in substantial compliance with federal and state laws, regulations, and rules for the protection of the environment.
>
> (b3) An applicant for a permit under this Article shall satisfy the Department that the applicant has met the requirements of sub-

> section (b2) of this section before the Department is required to otherwise review the application. In order to continue to hold a permit under this Article, a permittee must remain financially qualified and must provide any information requested by the Department to demonstrate that the permittee continues to be financially qualified.

N.C. Gen. Stat. §130A-294 (1999).

Petitioners raised this issue at a public hearing on 13 July 1999, and in written comments to DENR. Philip Prete, the head of the Field Operations Branch of DENR's Solid Waste section, conducted the review. Mr. Prete conducts three to four compliance reviews for solid waste landfills each year. In reviewing Chambers' compliance record, Prete did not contact any other states in which violations by Chambers or its affiliates occurred to obtain details or follow-up information. Mr. Prete stated that his agency's experience with an applicant in North Carolina carries much more weight than actions in other states, and that violations by Chambers or its affiliates in other states had little or no bearing on his decision. On 14 October 1999, following his review, Mr. Prete concluded that "there is nothing apparent that warrants any negative consideration for [Chambers'] facility permit."

N.C. Gen. Stat. §130A-294 requires that an applicant satisfy DENR that it "has substantially complied with the requirements applicable to any solid waste management activity in which the applicant has previously engaged and has been in substantial compliance with federal and state laws, regulations, and rules for the protection of the environment." The statute contains no list of factors which Mr. Prete was required to consider, but rather leaves the details and methods of conducting the compliance review to DENR's discretion. However, Mr. Prete testified that he considered at least seven specific criteria, such as DENR's experience with Chambers at its North Carolina facilities, whether and how any violations were resolved, whether out-of-state violations would have violated North Carolina regulations, as well as the nature and duration of any violations. In addition, the applicant need only show compliance to DENR's satisfaction. Thus, under this statute, the agency has broad discretion both to determine what factors to consider and how to weigh those factors. Although on this record, DENR could have reached other conclusions than it did, we see no violation of the statute here in DENR's compliance review of Chambers.

Petitioners next argue that DENR's decision to issue a permit to Chambers was arbitrary and capricious. We disagree.

In determining whether an agency decision is arbitrary or capricious:

> "the reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law. The 'arbitrary or capricious' standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are patently in bad faith, or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment . . . ."

Lewis v. N.C. Dep't of Human Resources, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (citations and internal quotation marks omitted). As discussed above, DENR had broad discretion under N.C. Gen. Stat. §130A-294(b2) in conducting Chambers compliance review. Petitioners do not suggest that DENR acted patently in bad faith, and we see no evidence that DENR's review process was whimsical. To the contrary, Mr. Prete articulated the factors he considered and how he weighed them relative to each other. While petitioners argue effectively that more thorough review or different weighing of factors would have been reasonable, we cannot say that DENR's process "fail[s] to indicate any course of reasoning and the exercise of judgment." The order of the superior court concluded as much, and we find insufficient justification to overturn it given the statutory standard as applied in the cases above.

Affirmed.

Judges TYSON and BRYANT concur.

STATE OF NORTH CAROLINA v. KRISTINA CONNOT RILEY, DEFENDANT

No. COA03-1577

(Filed 7 December 2004)

1. Appeal and Error— appellate rules—double spacing brief

Counsel for a defendant who did not double space defendant's brief was assessed printing costs as a sanction for violating the Rules of Appellate Procedure. N.C. R. App. P. 26(g).

2. Sentencing— restitution—findings and conclusions not required

The trial court is not required to make findings or conclusions on a defendant's ability to pay restitution, but is required to consider statutory factors.

3. Sentencing— restitution—ability to pay

There was no error in a sentence for embezzlement requiring restitution where defendant contended that she was unable to pay the amount ordered, but her earnings from her present job exceed the amount of her restitution payments, and she presented no evidence of her husband's income and contribution to the family finances. N.C.G.S. § 15A-1340.36.

4. Sentencing— restitution—amount—evidence sufficient

There was support in the record for the amount of restitution ordered as part of an embezzlement sentence where the court set the amount at the total amount embezzled less insurance proceeds.

Appeal by defendant from judgments entered 11 July 2003 by Judge W. Erwin Spainhour in the Superior Court in Rowan County. Heard in the Court of Appeals 11 October 2004.

Attorney General Roy Cooper, by Assistant Attorney General Lauren M. Clemmons, for the State.

Law Office of Michael S. Adkins, by Michael S. Adkins, for defendant-appellant.

HUDSON, Judge.

On 11 July 2002, defendant Kristina C. Riley pled guilty to six counts of embezzlement. The court imposed a sentence of six months

minimum and eight months maximum on each of the six counts to run consecutively, but suspended the sentence and placed defendant on supervised probation for sixty months. The sentence imposed included payment of costs in the amount of $211 and restitution in the amount of $78,081. Defendant appeals the amount of restitution. We affirm.

The evidence tended to show that defendant worked as office manager of the Salisbury License Tag Agency ("the agency") for seven years beginning in 1995. Nancy Liggins was the contract agent running the agency. One of defendant's duties was depositing the money received by the agency. In February 2002, when Liggins confronted defendant about missing money, and defendant admitted that she had taken money from the agency over a period of several years. Following her indictment on six charges of embezzlement, defendant pled guilty to all charges.

At the sentencing hearing, State Bureau of Investigation ("SBI") Agent Chris Cardwell testified that he had analyzed the records for incoming funds and deposits at the agency for a five-year period beginning in 1997. Based on his analysis, Agent Cardwell testified that the agency received $108,081.46 which was not deposited. Liggins testified that the Department of Motor Vehicles ("DMV") had notified her that $108,081.46 was missing from her payments to the DMV, and sought to recover those funds from Liggins. The DMV withheld five months of her volume commission of $12,400 from Liggins, and she borrowed money in order to repay the balance of the missing funds.

Defendant testified that she had stolen money from the agency, but contended that she took no more than $35,000, and argued that other employees must have been embezzling as well. Defendant also testified about her weekly net income of $325, and presented a spreadsheet showing her monthly expenses for car and truck payments, utilities and other costs, totaling $2,614.21. Defendant did not testify about her husband's income or about her home equity or any other assets.

[1] Before addressing defendant's arguments, we note that defendant's brief is single-spaced, contrary to the requirements of Appellate Rule 26(g). N.C. R. App. P. Rule 26(g) (2002). The Rules have contained this requirement since 1988. The Rules are mandatory, and serve particular purposes; this Rule facilitates the reading and comprehension of large numbers of legal documents by members of the

Court and staff. Because of this very obvious violation of Rule 26(g), we enter as a sanction that defendant's counsel pay the printing costs of this appeal, and instruct the Clerk of this Court to enter an order accordingly.

[2] Defendant first argues that the court erred in failing to make findings of fact about her ability to pay restitution and in ordering her to pay $78,081 in restitution when the evidence shows she lacks the ability to do so. As discussed below, we find no error.

Defendant contends that the court erred by failing to make findings of fact on the restitution worksheet. The applicable statute on determination of restitution requires that the court consider various factors in determining a defendant's ability to make restitution, but specifically states that "the court is not required to make findings of fact or conclusions of law on these matters." N.C. Gen. Stat. § 15A-1340.36 (a) (2003); *see also State v. Mucci*, 163 N.C. App. 615, 594 S.E.2d 411 (2004).

[3] Defendant also argues that the evidence presented showed that she was unable to pay the amount of restitution ordered. N.C. Gen. Stat. § 15A-1340.36 requires the court to consider a defendant's resources in setting restitution:

> (a) In determining the amount of restitution to be made, the court shall take into consideration the resources of the defendant *including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution*, but the court is not required to make findings of fact or conclusions of law on these matters. The amount of restitution must be limited to that supported by the record, and the court may order partial restitution when it appears that the damage or loss caused by the offense is greater than that which the defendant is able to pay. If the court orders partial restitution, the court shall state on the record the reasons for such an order.

N.C. Gen. Stat. § 15A-1340.36 (emphasis added).

The court ordered defendant to pay $78,081 to Ms. Liggins over the five-year period of defendant's probationary sentence. Divided into equal payments over the sixty-month period of her probation, defendant's monthly restitution payments would be $1,305.35 per

month. Defendant testified that she earned $325.33 a week after taxes, for a net total of $1,409.76 per month. Thus her earnings at her present job exceed the amount of the restitution payments. Defendant also testified that she had monthly bills of $2,614.21, which included her house and truck payments, child care, utilities, gas and insurance. However, defendant presented no evidence about her husband's income as a mechanic and owner of a car repair shop or about his contribution to their monthly expenses.

The cases cited by defendant are inapposite. In *State v. Smith*, we held that the court erred in requiring $500,000 in restitution from a defendant where the transcript of the sentencing hearing showed "that the trial court did not consider any evidence of defendant's financial condition." 90 N.C. App. 161, 168, 368 S.E.2d 33, 38 (1988), *affirmed*, 323 N.C. 703, 374 S.E.2d 866, *cert. denied*, 490 U.S. 1100 (1989). In that case, the judge did not even know whether the defendant was employed. *Id.* Similarly, in *State v. Hayes*, we found error in an order of restitution of $208,899 over five years, requiring payments of more than $3000 per month. 113 N.C. App. 172, 174, 437 S.E.2d 717, 719 (1993). In that case, "the defendant presented evidence which showed that he (1) earns approximately $800.00 a month bagging groceries and stocking food at Harris Teeter, (2) pays approximately $350.00 per month in child support, (3) lives with his mother and shares a car with her, (4) is deaf in one ear and hard of hearing in the other, (5) has recently completed bankruptcy proceedings, and (6) has substantial medical problems, including a recent brain tumor." *Id.* at 174-75, 437 S.E.2d at 719. Based on that evidence, we held that "common sense dictates that this defendant will be unable to pay this amount." *Id.* at 175, 437 S.E.2d at 719.

Here, in contrast, defendant earns enough each month to make the required restitution payments. Certainly she has other expenses, but although the record reflects that her husband had earnings, defendant did not present evidence about his income and contribution to the family finances. Because she failed to present evidence showing that she would not be able to make the required restitution payments, we find no error.

[4] Defendant next argues that the court erred in setting the amount of restitution and failed to make findings of fact in support the amount the restitution. We disagree.

This Court has held that "a recommendation of restitution must be supported by the evidence before the trial court. . . . [but] a trial

court need not make specific findings in support of its recommendation. . . ." *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986). "When . . . there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *Id.* Here, the court heard testimony from Agent Cardwell that the total amount of cash embezzled was $108,081.46 and that the victim had received $30,000 in insurance money. The court set the amount of restitution at $78,081, the total amount embezzled less the insurance proceeds. Because there is support in the evidence for the amount of restitution ordered, we find no error.

Affirmed; sanctions ordered.

Chief Judge MARTIN and Judge TIMMONS-GOODSON concur.

TONY E. LAMBETH AND BONNIE G. LAMBETH, PLAINTIFFS v. MEDIA GENERAL, INC. D/B/A WINSTON-SALEM JOURNAL AND JOHN O. BROWN AND JASON T. CRAVER AND MICHAEL S. BARBER, DEFENDANTS

No. COA04-401

(Filed 7 December 2004)

Negligence— newspaper stop-delivery notice not secured— home broken into—no duty or causation

The trial court properly dismissed a complaint against a newspaper owner for failure to state a claim where plaintiffs alleged that their home was broken into while they were away because defendant left the stop delivery notice with the newspapers at the drop-off, available to any passerby. Plaintiffs did not allege a legal duty owed by defendant or a causal connection between breach of such a duty and their injury.

Appeal by plaintiffs from order of dismissal entered 10 December 2003 by Judge William Graham in Forsyth County District Court. Heard in the Court of Appeals 22 October 2004.

Douglas K. Meyers, for plaintiff-appellant.

Enns & Archer, LLP, by Roderick J. Enns, for defendant-appellee.

MARTIN, Chief Judge.

Plaintiffs, Tony and Bonnie Lambeth, brought this action asserting a claim for conversion against defendants Brown, Craver and Barber and a claim of negligence against defendant Media General, Inc. (Media General). Plaintiffs' claims arise out of a break-in of their home on 16 September 2002 by the individual defendants, who stole guns, currency, coins, and electronic devices, and converted this property for their own use. With respect to defendant Media General, plaintiffs alleged that they were subscribers to one of its newspapers, *The Winston Salem Journal*, and contacted the newspaper in September 2002 to request that their home delivery be stopped while they were away from home in order to reduce the appearance that their home was vacant. Plaintiffs alleged that an employee of Media General conveyed the notice to stop delivery to its newspaper carrier by leaving it "with the newspaper carrier's daily newspapers at the carrier's drop off location . . .;" "that the stop notice . . . was not secured and that a passerby could obtain and read the notice and thereby obtain knowledge of the plaintiffs' request to stop newspaper delivery and their absence from home;" and that Brown, Craver, and Barber chose plaintiffs' residence as a target of their criminal activity after learning of plaintiffs' absence therefrom "by reading the stop notice issued to the newspaper carrier."

The complaint further alleged:

> 22. Employees and agents of defendant, Media General, knew or should have known that plaintiffs' disclosure . . . of their imminent absence from their home for a period of time could aid a third-party obtaining such information in committing a crime against plaintiffs' home by revealing plaintiffs' absence . . .

and alleged that defendant Medial General had breached its duty to plaintiffs by failing to protect the dissemination of the stop notice, carelessly disregarding the risks this failure posed to plaintiffs' property. The complaint alleged:

> 25. The acquisition and use of the sensitive information regarding plaintiffs' absence by a third party to exploit the disclosed vulnerability of plaintiffs' home and reduce the risk of entering their home without detection was a foreseeable consequence of defendant Media General's negligent treatment of that specific information . . . through the acts and omissions of its agents and employees.

and that defendant's lack of reasonable care "was a proximate cause of [plaintiffs'] home's selection for the break-in carried out by defendants Brown, Craver and Barber and plaintiffs' losses which derived from that break in."

Defendant Media General moved to dismiss plaintiffs' complaint against it pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). The trial court granted Media General's motion, dismissing plaintiffs' claim against it with prejudice. Plaintiffs appeal.

Plaintiffs' sole argument on appeal is that the allegations in the complaint were sufficient to state a claim for negligence. We disagree.

"A motion to dismiss made pursuant to G.S. 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). If no law to support the claim exists or if supporting facts are inadequate, a complaint may be dismissed. *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999). "To withstand a motion to dismiss, plaintiff's negligence complaint must allege the existence of a legal duty or standard of care owed to the plaintiff by the defendant, breach of that duty, and a causal relationship between the breach of duty and certain actual injury or loss sustained by the plaintiff." *Sterner v. Penn*, 159 N.C. App. 626, 629, 583 S.E.2d 670, 673 (2003) (internal citation omitted).

Plaintiffs argue their complaint sufficiently alleges that Media General had a duty of reasonable care regarding information about their absence from home. Plaintiffs maintain that Media General had a legal duty to guard their stop order to prevent the harm of a break-in because Media General rendered a service to them. Plaintiffs contend that when an active course of conduct is undertaken, it is negligent to violate the "positive duty to exercise ordinary care to protect others from harm." *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 666, 255 S.E.2d 580, 584, *disc. review denied*, 298 N.C. 295, 259 S.E.2d 911 (1979). We disagree.

The duty of ordinary care "arises whenever one person is by circumstances placed in such a position towards another that anyone of ordinary sense" recognizes the need to use ordinary care to prevent "injury to the person or property of the other." *Davidson*, 41 N.C. App. at 666, 255 S.E.2d at 584. Under this standard, we do not believe the allegations of the complaint are sufficient to show that Media

General breached any duty of ordinary care owed plaintiffs under the circumstances. The course of conduct undertaken by Media General was newspaper delivery and stopping that delivery while plaintiffs were on vacation. The complaint alleges no breach by Media General of its duty to use ordinary care in performing that course of conduct. Plaintiffs cite no authority for the proposition that Media General owed a further legal duty to plaintiffs to treat the "stop delivery" request in confidence, and we decline to invent one. Moreover, even if we were to decide that plaintiffs had sufficiently alleged that Media General had a legal duty to maintain the "stop delivery" request as confidential and breached that duty, plaintiffs' complaint is nevertheless insufficient to allege a causal relationship between any such breach and plaintiffs' loss.

Plaintiffs' complaint asserted that the stop order was left in the open for anyone to read and that the individual defendants read it and thereby selected plaintiffs' house as their target. They contend this adequately alleges a causal connection between Media General's negligent act and plaintiffs' loss. We cannot agree. To withstand a motion to dismiss, a plaintiff's complaint in negligence must allege facts demonstrating "that the defendants' negligence was a proximate cause of their injuries." *Ford v. Peaches Entertainment Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986), *disc. review denied*, 318 N.C. 694, 351 S.E.2d 746 (1987). "Foreseeability of some injury from an act or omission is a prerequisite to its being a proximate cause of the injury for which the plaintiff seeks to recover damages." *Ratliff v. Power Co.*, 268 N.C. 605, 614, 151 S.E.2d 641, 648 (1966). The break-in was not a foreseeable consequence of defendant's system of communicating the stop notices to its carrier. Here, the intervening acts of the other defendants caused the harm from which the plaintiffs seek recovery. *See Meyer v. McCarley and Co.*, 288 N.C. 62, 68, 215 S.E.2d 583, 587 (1975) (holding there is no liability for the loss where an unforeseeable intervening act was the cause of the harm). Because the plaintiffs alleged neither a legal duty owed them by Media General nor a causal connection between any breach of such duty and their injury, the trial court properly dismissed the plaintiffs' complaint.

Affirmed.

Judges McCULLOUGH and STEELMAN concur.

GILBERTO SEGOVIA, JR., EMPLOYEE, PLAINTIFF v. J.L. POWELL & COMPANY, EMPLOYER, AND AMERICAN INTERSTATE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA04-37

(Filed 7 December 2004)

Workers' Compensation— disability—laid off

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff is not currently disabled as a result of his prior injuries and by denying plaintiff further compensation, because: (1) plaintiff was physically able to perform his former job and would have returned to those duties if he had not been laid off due to an economic downturn; and (2) plaintiff's lack of employment was not due to his injuries.

Appeal by plaintiff from opinion and award entered 23 September 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 September 2004.

The McGougan Law Firm, by Paul J. Ekster and Dennis T. Worley, for plaintiff-appellant.

Young Moore and Henderson P.A., by Joe E. Austin, Jr. and Zachary C. Bolen, for defendant-appellees.

THORNBURG, Judge.

Gilberto A. Segovia, Jr. ("plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission (the "Commission") denying his claim for further compensation. For the reasons stated herein, we affirm the opinion and award of the Commission.

The relevant facts and procedural history are summarized as follows: Plaintiff suffered compensable injuries by accident to his back and ear while working for defendant J.L. Powell & Company ("defendant-employer") on 21 April 2000. Plaintiff missed work for medical reasons from 22 April 2000 until 18 June 2000. On 19 June 2000, plaintiff returned to work for defendant-employer doing light duty work. Plaintiff eventually resumed his former duties. Plaintiff was out of work for ear surgery from 13 September 2000 through 21 September 2000. Plaintiff returned to work for defendant-employer on 22 September 2000 until he was taken out of work for a second ear

surgery on 13 March 2001. Plaintiff's physician had indicated that plaintiff would be out of work for no more than a week. However, plaintiff was laid off by defendant-employer on 14 March 2001 along with eleven other employees.

Defendants admitted liability for benefits pursuant to a form 60 and paid temporary total disability benefits to plaintiff during all the periods plaintiff was out of work and continued to do so after laying him off. After plaintiff was laid off, defendants filed several form 24 requests to stop payment of compensation alleging that plaintiff was out of work due to the economy rather than due to a disability. These requests were denied by the Commission, and defendants requested a hearing on the matter. On 22 January 2003, a deputy commissioner entered an opinion and award concluding that plaintiff's loss of earnings was not due to any disability arising from the injury and denying further compensation. Plaintiff appealed to the full Commission, which in an order entered 23 September 2003, affirmed the decision of the deputy commissioner. Plaintiff appeals.

The dispositive issue on appeal is whether the full Commission's findings of fact are supported by the evidence and whether the findings of fact in turn support the conclusions of law. Specifically, plaintiff argues that the full Commission erred in terminating plaintiff's disability benefits when plaintiff is still disabled.

On appeal of a workers' compensation decision, we are "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). An appellate court reviewing a workers' compensation claim "does not have the right to weigh the evidence and decide the issue on the basis of its weight. 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. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

On appeal, plaintiff challenges the following findings of fact:

> 7. Plaintiff returned to work for defendant-employer on June 19 at light duty, where he just scanned wood for metal. He later gradually worked back into his regular job, which he performed satisfactorily without apparent difficulty. On September 13, 2000 he

went back out of work for his ear surgery and he returned to work on September 22, 2000. When he had his second ear operation on March 13, 2001, he again went out of work and was to be out for no more than a week. Although Dr. Kenyon released him to return to work on March 19, 2001 without restrictions, his employer had laid him off, along with 11 other employees, while he was out with his surgery. There had been a significant decline in business, which precipitated the layoff of employees. Consequently, plaintiff, who was physically capable of performing his regular job duties, was unable to return to work in his former position. The only other time plaintiff was kept out of work due to disability from his injury was on September 6, 2001 when he had the last operative procedure to his ear. Dr. Kenyon advised the caseworker that there would only be one day, the day of surgery, where plaintiff would be unable to work due to that procedure.

. . . .

10. Plaintiff has been physically capable of performing his regular job with defendant-employer since late September 2000, except for two very short periods associated with the outpatient ear procedures by Dr. Kenyon in March and September 2001. Had it not been for the reduction in business associated with the company-wide layoffs due to the economic downturn, he would have returned to work for defendant-employer after each of those procedures. The greater weight of the evidence establishes that the plaintiff's inability to earn wages since March 2001 was due to the layoff and plaintiff's lack of interest in returning to work, and not due to any disability associated with plaintiff's injury. In addition, despite plaintiff's lack of enthusiasm for obtaining another job, plaintiff could have been earning wages in at least one part-time job that was specifically offered to him by a local grocery store. The evidence establishes that work was available which was suitable for plaintiff, including positions as a bus boy, a kitchen helper, an office cleaner, and as a stocker at other grocery stores. Moreover, the evidence establishes that plaintiff appeared to be trying to sabotage efforts to find alternative employment. Finally, plaintiff had no driver's license due to his illegal status. This created an additional barrier to plaintiff's finding and attending work.

Competent evidence supports these findings of fact. The owner of defendant-employer, John Fisher, provided testimony at the hear-

ing that supports the finding that plaintiff performed his job satisfactorily and was laid off because of a decline in business. Plaintiff and defendants stipulated plaintiff had no restrictions due to his ear injury after 18 March 2001. The deposition of caseworker Carlos Encinas supports the findings pertinent to plaintiff's vocational rehabilitation and employment prospects.

Having concluded that the evidence supports the findings of fact challenged by plaintiff, we next address whether the findings were sufficient to support the Commission's conclusion of law that plaintiff is not currently disabled as a result of his prior injuries.

> [T]he term "disability" in the context of workers' compensation is defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. N.C.G.S. 97-2(9) (2003). Consequently, a determination of whether a worker is disabled focuses upon impairment to the injured employee's earning capacity rather than upon physical infirmity.

Johnson v. Southern Tire Sales & Serv., 358 N.C. 701, 707, 599 S.E.2d 508, 513 (2004). In the case at bar, the full Commission found that plaintiff was physically able to perform his former job and would have returned to those duties if he had not been laid off due to an economic downturn. Moreover, the full Commission found that plaintiff's lack of employment was not due to his injuries. These findings support the full Commission's conclusion that plaintiff's earning capacity is not currently affected by the injuries he suffered to his back and ear. Therefore, we conclude that the full Commission did not err in concluding that plaintiff is not currently disabled as a result of his injuries and thus, in denying plaintiff further compensation. As this issue is dispositive, we need not address plaintiff's remaining arguments.

Affirmed.

Judges GEER and LEVINSON concur.

PEARLEAN REVELS, PLAINTIFF v. ROBESON COUNTY BOARD OF ELECTIONS AND NORTH CAROLINA STATE BOARD OF ELECTIONS, DEFENDANTS

No. COA03-1687

(Filed 7 December 2004)

Public Officers and Employees— termination of employment— County Director of Elections

The trial court did not err by granting summary judgment in favor of defendants and by dismissing plaintiff's action alleging that the county and state boards of elections terminated plaintiff's employment as Director of Elections for Robeson County in violation of N.C.G.S. § 163-35, because: (1) plaintiff's application for retirement indicated that her last day of employment was 28 June 2002, plaintiff expressed her understanding that she had retired from her position and then was re-employed as a contract employee of the county, and plaintiff agreed that she was never re-employed by either the county or state board of elections; (2) as plaintiff retired from the position of Director of Elections for Robeson County and was never re-appointed to that position under the procedure mandated by N.C.G.S. § 163-35(a), the Boards of Elections were not required to follow the procedure provided for in N.C.G.S. § 163-35(b) in order to end plaintiff's employment; and (3) plaintiff failed to argue the theories of estoppel or ratification before the trial court, and thus these issues are waived.

Appeal by plaintiff from order entered 27 October 2003 by Judge E. Lynn Johnson in Robeson County Superior Court. Heard in the Court of Appeals 21 September 2004.

Barry Nakell for plaintiff-appellant.

Hedrick and Morton, by B. Danforth Morton, for defendant-appellee Robeson County Board of Elections.

Attorney General Roy Cooper, by Special Deputy Attorney General Susan K. Nichols, for North Carolina State Board of Elections, defendant-appellee.

THORNBURG, Judge.

This appeal arises from the grant of summary judgment in favor of defendants dismissing plaintiff's cause of action. For the reasons stated herein, we affirm.

Background

Plaintiff Pearlean Revels was appointed Supervisor of Elections for the Robeson County Board of Elections ("Robeson BOE") on 17 September 1991. Prior to that appointment, plaintiff had served as Assistant Supervisor for the Robeson BOE for twelve years. On 27 June 2002, plaintiff completed an application for service retirement from the position of Supervisor of Elections for Robeson County. The application indicated that plaintiff's last day of employment would be 28 June 2002 and that her retirement would be effective as of 1 July 2002. Also on 27 June 2002, plaintiff completed a form entitled "Robeson County Request for Post Retirement Employment." On that form, plaintiff indicated that her service would begin on 1 July 2002, and that she would work forty hours per week. Finally, on 1 July 2002, plaintiff and Robeson County Manager T.Y. Hester both signed a memorandum of agreement indicating that plaintiff would be a former employee of Robeson County, effective her retirement date of 30 June 2002, and that Robeson County would employ plaintiff as a temporary employee for an initial term of twelve months. Plaintiff then continued performing the duties of Supervisor of Elections and also started to receive retirement benefits as of 1 July 2002.

On 13 September 2002, the members of the Robeson BOE (the "board members") submitted a petition to the North Carolina Board of Elections (the "State BOE") with the heading "Petition to Terminate Employment of Director of Elections"[1]. According to the petition, on or about 5 September 2002 the board members became aware that plaintiff had retired from the position of Director of the Robeson BOE. The petition also recited the board members' opinion that plaintiff, by retiring, resigned as Director and had not been reappointed in accordance with N.C. Gen. Stat. § 163-35(a). In addition, the petition noted that plaintiff had been dismissed from her new contract with Robeson County. Accordingly, the board members requested that the State BOE allow the Robeson BOE to begin the process of filling the position of Director of Elections for Robeson County in accordance with N.C. Gen. Stat. § 163-35(a). The petition also contained a request in the alternative, which asked for the termination of plaintiff's employment as Director of Elections for failure to adequately perform her duties. On 17 September 2002, the State BOE met and determined that the employment contract between

1. The record on appeal refers to plaintiff's former position variously as Supervisor of Elections and Director of Elections. The language used herein reflects the term used in each pertinent part of the record.

plaintiff and Robeson County was not effective to re-employ plaintiff as Director of Elections after she had retired. Accordingly, the State BOE concluded that plaintiff had not been Director of the Robeson BOE since 30 June 2002 and ordered plaintiff not to appear at the Robeson BOE office without permission of the Robeson BOE.

Plaintiff filed a complaint alleging that the Robeson and State Boards of Elections terminated her employment in violation of N.C. Gen. Stat. § 163-35 and requesting compensatory and punitive damages. Plaintiff and defendants both moved for summary judgment. Plaintiff appeals from an order entered by Judge E. Lynn Johnson granting summary judgment in favor of defendants and dismissing the action.

Standard of Review

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). The purpose of the rule is to avoid a formal trial where only questions of law remain and where an unmistakable weakness in a party's claim or defense exists. *Dalton v. Camp*, 353 N.C. 647, 650, 548 S.E.2d 704, 707 (2001). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Id.* at 651, 548 S.E.2d at 707 (2001). "All inferences of fact must be drawn against the movant and in favor of the nonmovant." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992).

Analysis

Plaintiff brings forth two arguments for our review. First, plaintiff argues that the trial court erred in denying her motion for summary judgment and in granting summary judgment for defendants in that defendants failed to follow the procedure required by N.C. Gen. Stat. § 163-35(b) when terminating plaintiff's employment as Director of Elections for Robeson County. We disagree. Plaintiff's application for retirement indicates that her last day of employment was 28 June 2002. In her deposition, plaintiff expressed her understanding that she had retired from her position and then was re-employed as a contract employee of Robeson County. Plaintiff also agreed that she was never re-employed by either the Robeson County or North Carolina State Board of Elections.

Section 163-35(a) provides:

> In the event a vacancy occurs in the office of county director of elections in any of the county boards of elections in this State, the county board of elections shall submit the name of the person it recommends to fill the vacancy, in accordance with provisions specified in this section, to the Executive Director of the State Board of Elections who shall issue a letter of appointment.

N.C. Gen. Stat. § 163-35(a) (2003). As plaintiff retired from the position of Director of Elections for Robeson County and was never reappointed to that position under the procedure mandated by section 163-35(a), we conclude that the Board of Elections was not required to follow the procedure provided for in section 163-35(b) in order to end plaintiff's employment. *See Walker v. Bd. of Trustees of the N.C. Local Gov't Emp. Ret. Sys.*, 348 N.C. 63, 66, 499 S.E.2d 429, 431 (1998) ("Retirement ends employment."). Thus, the trial court correctly determined that defendants were entitled to judgment as a matter of law. This assignment of error is overruled.

Plaintiff's final argument is that defendants ratified and, thus, should be estopped from denying plaintiff's continued appointment as Director of Elections for Robeson County. A review of the record on appeal does not indicate that the theories of estoppel or ratification were before the trial court. "We are therefore left to assume, then, that plaintiff is asking us to pass on these theories . . . for the first time on appeal. This we cannot do." *Henderson v. LeBauer*, 101 N.C. App. 255, 264, 399 S.E.2d 142, 147 (1991), *disc. review denied*, 328 N.C. 731, 404 S.E.2d 868 (1991); N.C. R. App. P. 10(b)(1) (2003). This assignment of error is dismissed.

Affirmed.

Judges WYNN and McCULLOUGH concur.

IN RE S.L.L.

[167 N.C. App. 362 (2004)]

IN THE MATTER OF S.L.L., JUVENILE

No. COA03-1439

(Filed 7 December 2004)

Child Abuse and Neglect— parent's right to counsel—indigent's request for replacement counsel

The trial court erred in a child neglect proceeding by equating an indigent parent's second request for new counsel with a waiver of appointed counsel and then requiring the parent to proceed pro se. The trial court was not required to grant the parent's request to release counsel absent a substantial reason, but, having done so, the court was obligated to obtain a knowing waiver or to appoint substitute counsel.

Appeal by respondent from judgment entered 25 May 2003 by Judge Bradley B. Letts in Haywood County District Court. Heard in the Court of Appeals 20 September 2004.

Haywood County Department of Social Services, by Ira L. Dove and Mary G. Holliday.

Ann H. Davis for Guardian ad Litem.

Susan P. Hall for respondent-appellant.

TIMMONS-GOODSON, Judge.

Scott Lee Lewis, Sr.,[1] ("respondent") appeals an order of the trial court adjudicating his minor child, Scott Lee Lewis, Jr., ("Scott") a neglected child. For the reason stated herein, we reverse the order of the trial court and remand the case for a new hearing.

On 2 January 2003, the Haywood County Department of Social Services ("D.S.S.") filed a petition with the trial court alleging that Scott was a neglected child. Upon the case being called for trial on 15 May 2003, the following exchange took place between the trial court and respondent regarding respondent's attorney ("Mr. Cook"):

THE COURT: Mr. [Lewis], before we broke for lunch, Mr. Cook informed me that you wanted to address the Court about Mr. Cook.

1. To protect the identities of the parties in this case, this Court will refer to the respondent father by the pseudonym "Scott Lee Lewis, Sr.," and to his son by the pseudonym "Scott Lee Lewis, Jr."

MR. [LEWIS]: Yes.

THE COURT: Okay. Go ahead. That's fine.

MR. [LEWIS]: Due to the lack of his ability to (inaudible) withdraw (inaudible).

THE COURT: Okay. You're asking that Mr. Cook not be your attorney. Is that right?

MR. [LEWIS]: (Inaudible response)

THE COURT: Okay. You don't want him to represent you?

MR. [LEWIS]: No, sir.

THE COURT: Okay. All right. Mr. Cook, you're released.

. . . .

MS. HOLLIDAY: Your Honor, should a waiver be signed or (inaudible)?

THE COURT: I don't think so. It's on the record. Okay. . . .

MR. [LEWIS]: I want counsel.

THE COURT: I'm sorry.

MR. [LEWIS]: I want counsel. (Inaudible)

THE COURT: Okay. Well, this is the second attorney that you've let go, so we've appointed two attorneys to represent you. They've both been very competent. You've elected not to proceed with them. I can't continue the case ad infinitum until you find an attorney you're pleased with, so you're just going to have to represent yourself. Okay? . . .

MR. [LEWIS]: I'd like to object to it.

THE COURT: I'm sorry.

MR. [LEWIS]: I'd like to object to that.

THE COURT: Okay. I'll note your objection for the record. All right.

Upon consideration of the evidence, the trial court adjudicated Scott neglected. Respondent appeals.

The dispositive issue on appeal is whether the trial court erred by failing to obtain a written waiver of counsel from respondent.

The General Statutes of North Carolina provide that "[i]n cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right." N.C. Gen. Stat. § 7B-602(a) (2003). Our courts have yet to address the scope of an indigent parent's right to counsel in an abuse, neglect or dependency hearing. Because criminal matters are the only other legal matters wherein the accused has a right to counsel, we look to our criminal case law for guidance.

Generally, in the absence of some substantial reason for the appointment of replacement counsel, an indigent must accept counsel appointed by the court unless he wishes to waive counsel and represent himself. *State v. Robinson*, 330 N.C. 1, 12, 409 S.E.2d 288, 294 (1991) (citing *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981)). Mere dissatisfaction with one's counsel is not a substantial reason for the appointment of replacement counsel. Nevertheless, "[s]tatements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself." *Hutchins*, 303 N.C. at 339, 279 S.E.2d at 800 (citations omitted). Once a court allows an indigent's motion to withdraw his or her counsel, "[g]iven the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention." *Id.* Our Supreme Court in *State v. Thacker* further instructed on the issue of waiver of right to counsel as follows:

> Services of counsel cannot be forced upon an unwilling defendant. However, the waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will.

301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980) (quotations and citations omitted).

In the present case, respondent's request that Mr. Cook be removed as counsel did not amount to an expression of a waiver of court-appointed counsel, or an intention to represent himself. Our review of the transcript indicates that at no point did respondent expressly and voluntarily waive his right to counsel. On the contrary, respondent repeatedly requested new counsel. Although the trial court was not required to grant respondent's request to release coun-

sel absent a substantial reason, once the court decided to release Mr. Cook it had an obligation to either obtain a knowing waiver of counsel from respondent or appoint substitute counsel. We conclude that the trial court erred by equating respondent's request for new counsel with a waiver of court-appointed counsel, and requiring respondent to proceed to trial pro se. For these reasons, we reverse the order of the trial court, and remand the case for a new hearing.

REVERSED and REMANDED.

Chief Judge MARTIN and Judge HUDSON concur.

JAMIE MARTIN, PLAINTIFF v. STEVEN MARTIN, DEFENDANT

No. COA03-1303

(Filed 7 December 2004)

Child Support, Custody, and Visitation— prohibiting possession or ownership of firearms—failure to address safety of children

The trial court erred in a child custody and support case by ordering that defendant father cannot possess or own any firearms until the parties' children are emancipated or until further order, because: (1) the court's finding that defendant owns and keeps guns at his home and on his person, without any finding or conclusion that the children are endangered by those guns, does not support this order; and (2) the trial court failed to address whether the safety of the children is affected by the father's ownership of firearms as required by N.C.G.S. § 50-13.2(a).

Appeal by defendant from order entered 4 June 2003 by Judge Jane V. Harper in the District Court in Mecklenburg County. Heard in the Court of Appeals 25 August 2004.

Daniel J. Clifton, for defendant-appellant.

No brief filed for plaintiff-appellee.

HUDSON, Judge.

On 15 November 2002, plaintiff filed a complaint and motion for domestic violence protective order against defendant for their son's protection, and the court granted a ten-day order *ex parte.* Following a hearing on 25 November 2002, the court granted the domestic violence protective order for one year. The order prohibited anyone from using physical discipline on the son, and prohibited defendant from possessing firearms for the duration of the order.

Also on 25 November 2002, plaintiff filed a complaint seeking child custody and support. That matter was consolidated with the domestic violence case protective order. On 31 March 2003, after a hearing, the court entered an order setting temporary child support. A permanent child custody and child support order was filed on 4 June 2003. This order prohibited defendant from owning or possessing any firearms until the children are emancipated or until further order. Defendant appeals. Plaintiff did not file a brief in this Court. For the reasons discussed below, we reverse.

Defendant Steven Martin and plaintiff Jamie Martin married on 22 September 1995. They have two minor children, a son, C., born 2 January 1996, and a daughter, S., born 22 June 1998. After plaintiff and defendant separated in February 2000, defendant began living with Pam Whitty ("Ms. Whitty"). Plaintiff and defendant shared custody of the children, and Ms. Whitty sometimes cared for the children at defendant's home. These proceedings began after 14 November 2002, when Ms. Whitty spanked C. and injured him.

Defendant argues that the court exceeded its statutory authority in ordering that defendant not possess or own any firearms until the children are emancipated or until further order. We agree.

In the permanent custody and child support order filed 4 June 2003, the court made extensive findings of fact, only one of which pertains to defendant's possession of guns:

> 10. Father is a gun collector. When the DVPO was entered, eleven firearms were removed by the Sheriff's Department. When father had his guns, he kept them with him much of the time, including in his vehicle on errands with the children. Mother testified, and the court finds this more likely than not to be true, that he slept with a loaded handgun under his pillow (he denies this). He has continued to purchase gun parts, and knives, on Ebay. The DVPO

> will expire November 25, 2003 and unless it is renewed, father will have the opportunity to retrieve his firearms, upon filing a motion and getting a court order.

Although both defendant and Ms. Whitty testified that defendant never allowed a loaded gun to be "out in the open," and that he followed rules of gun safety, the court made no further findings about this matter. The court mentioned neither guns nor any threat or danger to the children's safety or well-being from defendant in its other findings and conclusions. Defendant contends that finding 10 alone does not support the court's order that:

> 9. Father shall not own or possess any firearms until the children are emancipated, or until further order. Should he file a motion for return of firearms in 02 CVD 20738, that motion shall be set for hearing before the undersigned.

We agree.

The standard of review of a child custody order is well-established:

> Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges. . . . In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, [an appellate court] must determine if the trial court's factual findings support its conclusions of law.

Shipman v. Shipman, 357 N.C. 471, 474-5, 586 S.E.2d 250, 253-4 (2003) (internal citations and quotation marks omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 52. By enacting N.C. Gen. Stat. § 50-13.2(a) the General Assembly has specifically required trial courts to take into account any history of domestic violence, as follows:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the

> safety of either party from domestic violence by the other party and *shall make findings accordingly.*

N.C. Gen. Stat. § 50-13.2(a) (2003) (emphasis added). Here, the court's finding that defendant owns and keeps guns at his home and on his person, without any finding or conclusion that the children are endangered by those guns, does not support its order barring defendant from owning or possessing guns until the children are emancipated or until further court order.

Further, in this custody order, the trial court has reached this conclusion without addressing whether the safety of the children is affected by the father's ownership of firearms, as the statute specifically requires. Because these findings are required by the statute, we conclude that in the absence of such findings, we must vacate the order and remand for further proceedings and a new order entered consistent with the statute and with this opinion.

Reversed and remanded.

Judges TYSON and BRYANT concur.

RANDY BROWN, PLAINTIFF v. COUNTY OF AVERY, DEFENDANT

No. COA03-805-2

(Filed 7 December 2004)

Appeal by Defendant from order entered 7 March 2003 by Judge William A. Leavell, III, District Court, Avery County. Heard in the Court of Appeals 30 March 2004.

Hall & Hall Attorneys At Law, P.C., by Douglas L. Hall, for Defendant.

Mr. Randy Brown, pro se.

PER CURIAM.

This matter was heard in the North Carolina Court of Appeals on 30 March 2004, and an opinion was filed on 1 June 2004. Thereafter,

this Court granted Defendant's Petition for Rehearing. Upon reconsideration, this Court now determines that the Petition for Rehearing was improvidently allowed.

Accordingly, the opinion filed 1 June 2004 is deemed filed as of the date of this opinion.

Petition for Rehearing Improvidently Allowed.

Panel consisting of:

WYNN, HUNTER, STEELMAN.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 7 DECEMBER 2004

BAGELMAN'S BEST, INC. v. NATIONWIDE MUT. INS. CO. No. 03-1413	Pitt (01CVS2307)	Affirmed
BARE v. KLUTTZ No. 04-87	Rowan (00CVS3160)	Affirmed
BB&T FACTORS CORP. v. GLOBAL AIRWAYS FREIGHT FORWARDING, INC. No. 03-1565	Guilford (01CVS848)	Affirmed
BEAU RIVAGE HOMEOWNERS ASS'N v. NEW HANOVER CTY. No. 03-1323	New Hanover (02CVS2482) (02CVS2483)	Affirmed
BENNETT v. NEWS & OBSERVER PUBL'G CO. No. 04-105	Wake (03CVS10195)	Dismissed
BRUST v. ICE VENTURES, INC. No. 04-182	Wake (02CVS5479)	Affirmed
CHILDERS v. CHILDERS No. 04-68	New Hanover (02CVD2819)	Affirmed in part, remanded in part
CHOATE CONSTR. CO. v. ENTERPRIZE PARK CORP. No. 04-205	Mecklenburg (02CVS3831)	Affirmed
DEPALMA v. ROMAN CATHOLIC DIOCESE OF RALEIGH No. 04-206	Wake (03CVS7487)	Affirmed
HEAD v. HEAD No. 03-1174	Rutherford (01CVD1282)	Affirmed
IN RE F.M.L.W. & F.J.S. No. 04-18	Wake (02J625)	Affirmed
IN RE J.G.M. No. 03-1402	Rowan (99J112)	Vacated and remanded
IN RE M.L.B. No. 04-186	Guilford (02J620)	Affirmed
IN RE N.A.B. No. 03-1707	Cumberland (98J886)	Affirmed
IN RE T.H. & T.H. No. 03-1388	Cabarrus (02J217) (02J218)	Affirmed

JORDAN v. OAKWOOD HOMES No. 03-1708	Ind. Comm. (I.C. 202577)	Vacated and remanded
JOYCE v. JOYCE No. 03-1314	Stokes (02CVD177)	Affirmed
MACFARLAND v. AMERICAN NAT'L CAN CO. No. 03-1568	Ind. Comm. (I.C. 820742)	Affirmed
MCLEAN v. COCA-COLA BOTTLING CO. CONSOL. No. 03-1196	Ind. Comm. (I.C. 054769)	Reversed and remanded
MOSS v. MINTER No. 03-1601	New Hanover (03CVD2360)	Affirmed
PIEDMONT INDUS. EQUIP., INC. v. GASTON CTY. No. 04-309	Gaston (02CVS3429)	Dismissed
SMITH v. BARBOUR No. 02-1396	Wake (01SP432)	Affirmed
SMITH v. UNC-HOSPITALS No. 02-1744	Orange (01CVS204)	Reversed
STATE v. BARROW No. 03-1290	Johnston (95CRS792) (95CRS794) (95CRS795) (95CRS796) (95CRS2854)	Judgment and sentence arrested as to 95CRS794, no error as to 95CRS792, 95CRS795, 95CRS796 and 95CRS2854
STATE v. BROOKS No. 04-112	Durham (02CRS7331) (02CRS44419) (02CRS44420)	No error
STATE v. BYRD No. 03-1614	Harnett (02CRS52697)	No error
STATE v. ENGLEBERT No. 03-1550	Alleghany (02CRS183) (02CRS184)	No error
STATE v. FISHER No. 04-123	Mecklenburg (02CRS229570)	No error
STATE v. FLOYD No. 03-1287	Robeson (01CRS15603)	No error
STATE v. GAUTIER No. 04-4	Lenoir (03CRS2300) (03CRS2301)	Reversed and remanded

	(03CRS2302) (03CRS2303) (03CRS2304) (03CRS2305) (03CRS2306) (03CRS2307)	
STATE v. GIBSON No. 04-66	Randolph (01CRS53187)	No error
STATE v. HEAD No. 03-1307	Buncombe (02CRS63612) (02CRS63614) (02CRS63615)	No error
STATE v. JOHNSON No. 04-282	Mecklenburg (02CRS244566) (02CRS244567) (02CRS244568) (02CRS244569) (02CRS244570) (02CRS244571)	No error
STATE v. MABE No. 04-178	Guilford (01CRS89186)	No error
STATE v. McDUFFIE No. 03-1611	Randolph (01CRS52723)	No error
STATE v. PERRY No. 03-1419	Caldwell (02CRS52123)	Reversed
STATE v. PITTS No. 03-1636	Edgecombe (00CRS52529)	No error in part; vacated in part
STATE v. SANTIAGO No. 03-1706	Onslow (01CRS54610)	No error
STATE v. STEELE No. 03-1481	Mecklenburg (03CRS4667) (03CRS4668) (03CRS4669)	No error
STATE v. STIMPSON No. 03-1300	Guilford (98CRS46022) (98CRS46023) (99CRS23501)	No error
STATE v. WILKERSON No. 03-1665	Durham (02CRS45890)	No error
STATE v. WILLIAMS No. 03-1691	Pitt (01CRS18273) (01CRS18274)	No error

STATE v. WORLEY No. 03-1467	Macon (02CRS50051)	No error
STATE v. XANONH No. 03-1583	Wake (94CRS26574) (94CRS26575) (94CRS26576) (94CRS26577)	No prejudicial error
WILLIAMS v. WILLIAMS No. 04-21	McDowell (99CVD620)	Affirmed with respect to Mrs. Williams' appeal; dismissed with respect to Mr. Williams' appeal

STATE OF NORTH CAROLINA v. KENNETH LEON SPELLMAN

No. COA03-1526

(Filed 21 December 2004)

1. Constitutional Law— double jeopardy—convictions for assault with a deadly weapon on a government official and assault with a deadly weapon

The trial court did not violate defendant's right against double jeopardy by sentencing him for both assault with a deadly weapon on a government official and assault with a deadly weapon, because: (1) the facts underlying defendant's indictment for assault with a deadly weapon with intent to kill are not the same facts used to indict defendant for assault with a deadly weapon on a government official; (2) the facts underlying the jury's verdict of guilty are not the same for both offenses since one occurred when defendant's vehicle struck an officer and ran over his leg whereas the second instance occurred after defendant reentered the vehicle and drove it toward the officer thereby placing the officer in fear of injury; and (3) the evidence tended to show that defendant employed his thought process prior to committing the second assault which occurred at a distinct and separate time after the first assault was complete.

2. Assault— deadly weapon—government official—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon on a government official even though defendant contends there was insufficient evidence to show that he intended to strike the officer with a truck, because: (1) the evidence was sufficient to allow a jury to reasonably infer that defendant operated the truck dangerously and with reckless disregard for the safety of the officer; and (2) the evidence was also sufficient to allow a jury to reasonably infer that defendant could have foreseen that death or bodily injury would be the probable result of his actions.

3. Evidence— BB gun—plain error analysis

The trial court did not commit plain error by allowing the State to refer to and present a BB gun in connection with the charges of armed robbery and second-degree kidnapping, because: (1) cast in the light most favorable to the State, the testi-

mony and evidence concerning the BB gun establishes only that, while holding this particular BB gun, the officer could fit his own hand inside the pocket of the jacket worn by defendant and he was unable to fit the entire BB gun inside the pocket of the jacket; (2) there was no indication at trial that a reliable chain of custody existed to link defendant to this particular BB gun; and (3) no fundamental right of defendant was violated nor would a different result have been reached had the BB gun not been marked by the State and referred to by both parties.

4. Criminal Law— failure to record opening and closing arguments—failure to reconstruct argument

A defendant's due process rights were not violated in a robbery with a dangerous weapon, second-degree kidnapping, assault with a deadly weapon on a government official, and assault with a deadly weapon case by the court reporter's failure to completely record the proceedings including the opening and closing arguments, because: (1) there is a presumption in favor of regularity at trial, and an appellate court cannot assume or speculate that there was prejudicial error when none appears on the record before it; and (2) defendant failed to undertake efforts necessary to secure the record pertaining to the issue since he did not attempt to reconstruct the State's opening and closing arguments, and he did not file a motion for appropriate relief or a motion to reconstruct pursuant to N.C. R. App. P. 9.

5. Robbery— armed—failure to instruct on common law

The trial court did not err in a robbery with a dangerous weapon case by failing to instruct to the jury on common law robbery, because: (1) although defendant sought to rebut the State's evidence regarding the use of a weapon by challenging the reasonableness of the witnesses' beliefs, defendant failed to show affirmatively that the instrument used by defendant was not a firearm or deadly weapon; and (2) the witnesses' testimony that they did not actually see or recover a weapon was insufficient to counter the mandatory presumption arising from the State's evidence that defendant possessed and used a weapon during the robbery.

6. Sentencing— prior record level—unilateral determination

The trial court erred in a robbery with a dangerous weapon, second-degree kidnapping, assault with a deadly weapon on a government official, and assault with a deadly weapon case by

sentencing defendant as a prior record level IV offender and the case is remanded for resentencing, because: (1) the trial court unilaterally determined that defendant had twelve prior record points; and (2) the record is devoid of any evidence of defendant's previous convictions or a stipulation by defendant regarding his prior record level.

7. Sentencing— aggravating factors—victim suffered serious injury that is permanent or debilitating—armed with deadly weapon during commission of assault

The trial court erred by applying the aggravating factor to defendant's sentence that the second-degree kidnapping victim suffered serious injury that is permanent or debilitating, but it did not err by finding that defendant was armed with a deadly weapon during the commission of the assault, because: (1) the record is devoid of any evidence that the victim of the second-degree kidnapping suffered any injury during the commission of the offense; and (2) the assault with a deadly weapon charge is a misdemeanor offense that was not subject to modification upon a finding of aggravating or mitigating factors, and the trial court did not enhance defendant's sentence for the assault by relying on facts used to satisfy an element of the assault.

Appeal by defendant from judgment entered 1 May 2003 by Judge Quentin T. Sumner in Nash County Superior Court.[1] Heard in the Court of Appeals 14 September 2004.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Curran, for the State.

Everett & Hite, L.L.P., by Stephen D. Kiess, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Kenneth Leon Spellman ("defendant") appeals his conviction for robbery with a dangerous weapon, second-degree kidnapping, assault with a deadly weapon on a government official, and assault with a deadly weapon. For the reasons discussed herein, we hold that defendant received a trial free of prejudicial error, but we remand the case for resentencing.

1. We note that the indictment and conviction sheets for the assault with a deadly weapon charge are contained within File No. 00 CRS 54073, while the judgment and commitment sheet for the charge is contained within File No. 00 CRS 54093.

The State's evidence presented at trial tended to show the following: On 30 October 2000, defendant entered the Bundles of Joy children's clothing store in Rocky Mount. Shortly after defendant entered the store, the store's owner, Deborah Collins ("Mrs. Collins"), approached defendant and asked if she could help him. Defendant was wearing sunglasses and a jacket. Defendant told Mrs. Collins that he was shopping for clothing for his family members, and the two had a "casual conversation." Defendant then proceeded to the cash register with approximately $700.00 in children's clothing.

Once at the cash register, defendant asked Mrs. Collins if she had change for a thousand-dollar bill. Mrs. Collins replied that she did not, and defendant then placed his hand inside the front pocket of his jacket. Defendant laid the pocket of his jacket on the counter and demanded that Mrs. Collins give him money. At trial, Mrs. Collins testified that she could not see a muzzle or handle sticking out of defendant's pocket, but she believed defendant had a gun. According to Mrs. Collins, defendant told her, "I know you are looking at me and if you identify me, I'm going to kill you."

After Mrs. Collins gave defendant the money in the cash register, defendant instructed Mrs. Collins to place the clothing items he had brought to the counter in a bag. Defendant then instructed Mrs. Collins to disconnect the phone lines in the store, enter the restroom, and stay inside the restroom for fifteen minutes. Mrs. Collins testified at trial that defendant threatened to kill her if she did not do as he instructed. According to Mrs. Collins, prior to leaving the store defendant said, "I'm going to pick up a few more things on my way out." Defendant then exited the store with approximately $1100.00 in merchandise and cash.

As defendant fled the store, Mrs. Collins' husband, North Carolina Highway Patrol Sergeant Ertle Frank Collins, Jr. ("Sergeant Collins"), arrived at the store. Mrs. Collins informed Sergeant Collins that she had been robbed. Sergeant Collins, who was on duty and wearing his uniform at the time, then proceeded to the parking lot and approached defendant, whom Sergeant Collins had seen exiting the store when he entered.

Defendant was sitting in a red pickup truck parked in the parking lot. Sergeant Collins ordered defendant to exit the vehicle. Defendant refused, telling Sergeant Collins, "Man, I ain't got time to mess with you." Sergeant Collins then approached the truck and again instructed defendant to exit. Sergeant Collins testified that

defendant then reached for something in a bag laying on the passenger seat of the truck, which caused Sergeant Collins to back away from the vehicle.

After defendant began backing the truck out of its parking space, Sergeant Collins attempted to approach the truck a second time. Sergeant Collins tried to open the driver-side door, but defendant continued to back the truck out of the parking space. Defendant then proceeded to drive the truck through the parking lot while Sergeant Collins held onto the driver-side door. According to Sergeant Collins, the two men then "got to fighting over the steering wheel and trying to cut the truck off." During the struggle, defendant struck Sergeant Collins with his elbow while continuing to drive the truck through the parking lot.

Sergeant Collins eventually pulled defendant out of the moving truck and onto the ground. As the two men landed on the ground, Sergeant Collins was struck by the driver-side door of the truck and was run over by one of the truck's tires. Defendant immediately returned to the truck and "started toward" Sergeant Collins, whose leg had been broken when the truck ran over it. Sergeant Collins drew his weapon and fired a shot at defendant from the ground. Following the shot from Sergeant Collins, defendant stopped the truck and "hesitated." Sergeant Collins fired another shot at defendant, who then drove the vehicle from the parking lot and onto a nearby street. As defendant fled the scene, Sergeant Collins wrote down the license plate number of the truck and reported it to a 9-1-1 dispatcher.

Defendant was subsequently apprehended and indicted for robbery with a dangerous weapon, second-degree kidnapping, assault with a deadly weapon on a government official, and assault with a deadly weapon with intent to kill. Defendant was tried before a jury the week of 28 April 2003. On 1 May 2003, the jury found defendant guilty of robbery with a dangerous weapon, second-degree kidnapping, assault with a deadly weapon on a government official, and assault with a deadly weapon. The trial court sentenced defendant to a total of seventeen to twenty-two years incarceration. Defendant appeals.

We note initially that defendant's brief contains arguments supporting only thirteen of the original thirty-one assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2004), the omitted assignments of error are deemed abandoned. Therefore, we limit our present review to those issues properly preserved by defendant for appeal.

The issues on appeal are: (I) whether defendant's conviction for both assault with a deadly weapon on a government official and assault with a deadly weapon violate his constitutional protection from double jeopardy; (II) whether the trial court erred by denying defendant's motion to dismiss the charge of assault with a deadly weapon on a government official; (III) whether the State's reference to and presentation of a BB gun constituted prosecutorial misconduct and violated defendant's right to due process; (IV) whether defendant was deprived of meaningful appellate review due to an incomplete recordation of the trial court proceedings; (V) whether the trial court erred by failing to instruct the jury on the lesser-included offense of common-law robbery; (VI) whether the trial court committed plain error by finding aggravating factors; and (VII) whether the State presented sufficient evidence to support the trial court's finding that defendant had twelve prior record level points and a prior record level IV.

I.

[1] Defendant first argues that his conviction for both assault with a deadly weapon on a government official and assault with a deadly weapon violate his constitutional protection from double jeopardy. Defendant contends that the trial court was required to arrest judgment on one of the two offenses. We disagree.

We note initially that the State contends that defendant waived this argument by not asserting it during his motion to dismiss. The record reflects that defendant moved to dismiss the charge of assault with a deadly weapon at the close of the State's evidence, arguing that defendant was not in control of the truck when it ran over Sergeant Collins' leg. Defendant did not raise the issue of double jeopardy at that time. However, the record also reflects that prior to trial, defendant raised a similar issue, arguing as follows:

> Another matter that I'd like to also bring up, and I realize that this may be more appropriate at the close of the State's evidence; however, I would like to do it now so that there won't be any possibility of a waiver. One of my concerns, Your Honor, is in this case two of the charges are assault with a deadly weapon with intent to kill inflicting serious injury and assault on a government official. Under these facts, Your Honor, it's anticipated that those two assault charges involve the same victim and it seems unfair to me in terms of [defendant] receiving a fair trial how the State, I understand the argument . . . . But it seems to me that in the

> interest of a fair trial, I think it prejudices or causes [defendant] harm that the State gets to do both of these assault charges when it involves the same victims. The person was either assaulted as a government official or the person was allegedly assaulted with a deadly weapon with the intent to kill inflicting serious injury. . . . Your Honor, I'd just like to raise that issue and preserve it.

To avoid waiving the right to argue the issue on appeal, "a defendant must properly raise the issue of double jeopardy before the trial court. Failure to raise this issue at the trial court level precludes reliance on the defense on appeal." *State v. White*, 134 N.C. App. 338, 342, 517 S.E.2d 664, 667 (1999) (citation omitted). "Simply put, 'double jeopardy protection may not be raised on appeal unless the defense and the facts underlying it are brought first to the attention of the trial court.' " *Id.* (quoting *State v. McKenzie*, 292 N.C. 170, 176, 232 S.E.2d 424, 428 (1977)). In light of defendant's actions in the instant case, we conclude that defendant sufficiently preserved the double jeopardy issue for appeal. Accordingly, we will address its merits *infra*.

"[T]he constitutional guaranty against double jeopardy protects a defendant from multiple *punishments* for the same offense." *State v. Partin*, 48 N.C. App. 274, 281, 269 S.E.2d 250, 255 (1980) (emphasis in original). In *Partin*, the defendants were convicted of assault with a deadly weapon under N.C. Gen. Stat. § 14-32 and assault on a law enforcement officer with a firearm. This Court arrested judgment on the defendants' convictions for assault with a deadly weapon, concluding that "[a]ssault and the use of a deadly weapon (in this case, a firearm) are necessarily included in the offense of assault on a law enforcement officer with a firearm[.]" 48 N.C. App. at 282, 269 S.E.2d at 255.

In the instant case, defendant was convicted of assault with a deadly weapon and assault with a deadly weapon on a government official. As defined by N.C. Gen. Stat. § 14-32 (2003), an individual is guilty of assault with a deadly weapon where the individual: (I) commits an assault; (II) with a deadly weapon. As defined by N.C. Gen. Stat. § 14-34.2 (2003), an individual is guilty of assault with a deadly weapon on a government official where the individual: (I) commits an assault; (II) with a firearm or other deadly weapon; (III) on a government official; (IV) who is performing a duty of the official's office. Thus, according to the definitions of the two offenses, the elements of assault with a deadly weapon are "necessarily included" in the

offense of assault with a deadly weapon on a government official. *Partin*, 48 N.C. App. at 282, 269 S.E.2d at 255.

We note that this Court reached its decision in *Partin* only after first "[c]onceding that the facts underlying defendants' indictment of assault with a deadly weapon under G.S. 14-32(a) and (c) are the same facts which underlie defendants' indictment for assault on a law enforcement officer under G.S. 14-34.2[.]" *Id.* at 279, 269 S.E.2d at 254. The necessity of such concession stemmed from our prior holding in *State v. Lewis*, 32 N.C. App. 298, 301, 231 S.E.2d 693, 694 (1977), where we concluded that "[f]or the plea of former jeopardy to be good, the plea must be grounded on the 'same offense' both in law and in fact. It is not sufficient that the two offenses arise out of the same transaction." In the instant case, we conclude that the facts underlying defendant's indictment for assault with a deadly weapon with intent to kill are not the same facts used to indict defendant for assault with a deadly weapon on a government official.

In the indictment for assault with a deadly weapon with intent to kill, the grand jury alleged that defendant "unlawfully, willfully and feloniously did assault Trooper E.F. Collins with a Ford pick-up truck, a deadly weapon, with the intent to kill him." In the indictment for assault with a deadly weapon on a government official, the grand jury alleged that defendant "unlawfully, willfully and feloniously did assault Trooper E.F. Collins with the North Carolina State Highway Patrol with a Ford pick-up truck, which is a deadly weapon[,] *by dragging him with the truck and running over the officer's leg.*" (emphasis added). Thus, although the same deadly weapon was allegedly used in both offenses, separate facts support the separate indictments.

Similarly, the facts underlying the jury's verdict of guilty of assault with a deadly weapon on a government official are not the same facts underlying the jury's verdict of guilty of assault with a deadly weapon. As the parties discussed at the charge conference, the first instance of assault with a deadly weapon occurred when defendant's vehicle struck Sergeant Collins and ran over Sergeant Collins' leg. The second instance of assault with a deadly weapon occurred after defendant reentered the vehicle and drove it toward Sergeant Collins, thereby placing Sergeant Collins in fear of injury. The evidence at trial tended to show that the second instance of assault occurred independent from the other, and the trial court instructed the jury accordingly. The jury charge contained the following pertinent instructions:

> The defendant Kenneth Leon Spellman in file number 00 CRS 54072 has been charged with assault with a deadly weapon upon an officer of the State while such officer was in the performance of his duties. Now I charge that for you to find the defendant guilty of this offense the State must prove four things beyond a reasonable doubt.
>
> First, that the defendant assaulted the victim by intentionally hitting him with a Ford pickup truck and running over his leg.
>
> . . . .
>
> If you do not find the defendant guilty of assault with a deadly weapon with intent to kill, you must determine whether he is guilty of assault with a deadly weapon. For you to find the defendant guilty of assault with a deadly weapon the State must prove two things beyond a reasonable doubt.
>
> First, that the defendant assaulted the victim . . . intentionally through a show of violence by use of a Ford pickup truck. And second, that the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. In determining whether a Ford pickup truck is a deadly weapon you should consider the nature of the Ford pickup truck, the manner in which it was used, and the size and strength of the defendant as compared to the victim.

"In order for a criminal defendant to be charged and convicted of two separate counts of assault stemming from one transaction, the evidence must establish 'a distinct interruption in the original assault followed by a second assault[,]' so that the subsequent assault may be deemed separate and distinct from the first." *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307 (quoting *State v. Brooks*, 138 N.C. App. 185, 189, 530 S.E.2d 849, 852 (2000)), *disc. review denied*, 357 N.C. 510, 588 S.E.2d 377 (2003). In *Littlejohn*, this Court found no error at trial where the defendant had been convicted for two assaults that were "distinct in time and inflicted wounds in different locations on the victim's body." 158 N.C. App. at 636, 582 S.E.2d at 307. After noting that the second assault "occurred only after the original assault had ceased and the victim had fallen to the floor[,]" we held that "the State's evidence was sufficient to show that there were indeed two separate assaults." *Id.* at 636-37, 582 S.E.2d at 307.

Similarly, in *State v. Rambert*, 341 N.C. 173, 177, 459 S.E.2d 510, 513 (1995), our Supreme Court rejected the defendant's claim that

double jeopardy protections prevented three separate convictions for discharging a firearm into occupied property. In *Rambert*, the defendant produced a gun following a verbal altercation with the victim. As the defendant fired through the victim's vehicle's windshield, the victim ducked down in a seat in the vehicle. After the victim drove his vehicle forward, the defendant fired at the victim through the passenger-side door of the victim's vehicle. As the victim continued to drive away, the defendant fired a third time into the rear of the victim's vehicle. The Court concluded that "defendant's actions were three distinct and, therefore, separate events[,]" *Id.* at 176, 459 S.E.2d at 513, noting that

> Each shot, fired from a pistol, as opposed to a machine gun or other automatic weapon, required that defendant employ his thought processes each time he fired the weapon. Each act was distinct in time, and each bullet hit the vehicle in a different place.

Id. at 176-77, 459 S.E.2d at 513.

The indictments in the instant case, coupled with the instructions provided to the jury, demonstrate that the two assault charges stem from separate and distinct facts. The evidence presented at trial tended to show that, after the truck had run over Sergeant Collins' leg, thereby completing the assault alleged in the indictment for assault with a deadly weapon on a government official, defendant and Sergeant Collins were laying on the ground. Defendant got up from the ground and ran approximately eighty feet across the parking lot toward the truck, which had come to rest at the curb of the parking lot. Once defendant reentered the truck, he "started toward" Sergeant Collins in the truck, then backed the truck away from Sergeant Collins and drove away from the parking lot. Thus, as in *Rambert*, the evidence in the instant case tends to show that defendant employed his thought process prior to committing the second assault, which occurred at a distinct and separate time after the first assault was completed.

"[N]either the Fourteenth Amendment to the Constitution of the United States nor Article I, § 19, of the Constitution of North Carolina forbids the prosecution and punishment of a defendant for two separate, distinct crimes[.]" *State v. Fulcher*, 294 N.C. 503, 525, 243 S.E.2d 338, 352-53 (1978). In the instant case, we conclude that two separate and distinct crimes were alleged and established, and thus the trial court did not err in imposing consecutive sentences. Accordingly, we

hold that defendant's conviction for both assault with a deadly weapon and assault with a deadly weapon on a government official did not violate defendant's constitutional protection from double jeopardy. Defendant's first argument is overruled.

II.

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of assault with a deadly weapon on a government official. Defendant asserts that the State failed to introduce sufficient evidence to support the charge. We disagree.

In ruling on a motion to dismiss, the trial court must consider whether there is substantial evidence of each essential element of the offense charged. *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993). Whether the State's evidence is sufficient is a question of law for the trial court. *State v. Lowe*, 154 N.C. App. 607, 609, 572 S.E.2d 850, 853 (2002). The motion to dismiss must be denied if the evidence, viewed in the light most favorable to the State, would allow a jury to reasonably infer that defendant is guilty. *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620-21 (2002).

This Court has defined an assault as " 'an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another . . . sufficient to put a [reasonable person] in fear of immediate bodily harm.' " *State v. Davis*, 68 N.C. App. 238, 244, 314 S.E.2d 828, 832 (1984) (quoting *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967)). While noting that "[i]ntent is an essential element of the crime of assault," this Court has recognized that "intent 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) (citations omitted).

In the instant case, defendant contends that the State failed to introduce sufficient evidence that he intended to strike Sergeant Collins with the truck. However, as detailed above, the evidence presented at trial tended to show that after Sergeant Collins ordered defendant to exit the truck, defendant backed the truck out its parking space and into the parking lot. Defendant continued to drive the truck through the parking lot while Sergeant Collins held onto the driver-side door, and defendant repeatedly struck Sergeant Collins

while he was holding onto the door of the moving vehicle. Sergeant Collins testified that defendant was "trying to push me out and he's slapping at me and hitting me with his elbow and so forth as that, trying to knock me back out." We conclude that the evidence introduced by the State was sufficient to allow a jury to reasonably infer that defendant operated the truck dangerously and with reckless disregard for the safety of Sergeant Collins. The evidence was also sufficient to allow a jury to reasonably infer that defendant "could have foreseen that death or bodily injury would be the probable result of his actions." *Id.* at 544, 259 S.E.2d at 358. Accordingly, we hold that the trial court did not err in denying defendant's motion to dismiss the charge of assault with a deadly weapon on a government official. Therefore, defendant's second argument is overruled.

III.

[3] Defendant next argues that the trial court committed plain error by allowing the State to refer to and present a BB gun in connection with the charges of armed robbery and second-degree kidnapping. Defendant asserts that the reference and presentation of the weapon constituted prosecutorial misconduct and violated defendant's right to due process. We disagree.

Our Supreme Court has previously held that

> "[T]he plain error rule is . . . always to be applied cautiously and only . . . where . . . the claimed error is a '*fundamental* error, . . . 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 . . . has ' "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" ' or . . . 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]' "

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.) (footnotes omitted) (emphasis in original), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). When reviewing a defendant's assignment of plain error, the defendant "is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

In the instant case, defendant contends that in its opening statement to the jury, the State asserted that it would present evidence

regarding a BB gun found in defendant's hotel room. During the State's direct examination of Rocky Mount Police Department Corporal Gary Wester ("Corporal Wester"), the State presented and marked State's Exhibit Number 57 ("Exhibit 57"), which, according to Corporal Wester, was "a BB gun that was turned into evidence by one of [the] officers at the Rocky Mount Police Department." Corporal Wester testified that the officer who turned the BB gun into the police department "did not list his name on the evidence sheet." Corporal Wester further testified that he believed he had "read a report that Officer Collins may have done it," but that he was "not sure."

The BB gun was then neither introduced into evidence nor referred to again by the parties until defendant cross-examined Corporal Wester. During the cross-examination of Corporal Wester, the following pertinent exchange occurred:

COUNSEL: Item number 57 is the BB gun that was found at the hotel room?

WITNESS: No, sir.

COUNSEL: You found that where?

WITNESS: I did not find it at all.

COUNSEL: Where did you collect it into evidence from?

WITNESS: It was turned into the evidence room by, I believe, Officer Collins, to the Rocky Mount Police Department.

COUNSEL: And based on your job as the evidence collector for your police department where did you believe this BB gun came from?

WITNESS: According to his evidence sheet, if I can refer to that—according to the evidence sheet it was found at the Super 8 Motel, Room 132, apparently by a person by the name of Wiley, W-I-L-E-Y, John, J-O-H-N.

COUNSEL: And who is Wiley, please?

WITNESS: I have no idea, sir.

COUNSEL: Now this item that you found, the BB gun, did you process that for any of these identifiable or latent or known fingerprints that you [had previously] talked about?

WITNESS: No, sir, I did not.

[Defendant's counsel then placed the BB gun inside the right pocket of the jacket allegedly worn by defendant during the commission of the robbery.]

COUNSEL: Do you see [the gun's] handle sticking out of [the jacket pocket]?

WITNESS: Yes, sir, I do.

COUNSEL: And if I take the handle and put it in first do you see the muzzle sticking out of it?

WITNESS: Yes, I do.

[Defendant's counsel then asked Corporal Wester to place the BB gun inside the right pocket of the jacket to see if the handle would stick out.]

WITNESS: In placing this particular BB gun in this pocket it will not go all the way in.

[Defendant's counsel then asked Corporal Wester to place the BB gun inside the right pocket of the jacket "handle-first" to see if the muzzle would stick out.]

WITNESS: Putting it in handle first and stuffing it all the way through it still will not fit completely in the pocket.

[Defendant's counsel then asked Corporal Wester to place the BB gun inside the right pocket with the sight of the BB gun in an upright position to see if any part of the BB gun was still visible.]

WITNESS: Yes, you can still see it sticking out.

[Defendant's counsel then asked Corporal Wester to place the BB gun inside the left pocket in the same manner as above.]

COUNSEL: —you do agree in terms of what you demonstrated for the jury that that gun does not fit in either of those pockets?

WITNESS: Yes, this gun does not fit in these pockets.

Following defendant's cross-examination of Corporal Wester, the State asked Corporal Wester to place the BB gun in his hand as if he were to fire it, place his hand inside the jacket pocket, and "[s]how the jury." Corporal Wester complied, and the State ended its ques-

tioning of the witness. On recross-examination, the following exchange occurred:

COUNSEL: Stand in front of that rail. As you hold that gun, just put it on top of that bannister as though you were placing it on that bannister?

[The witness complied.]

COUNSEL: Can it be distinctly seen?

WITNESS: Possibly, yes, sir.

Following the recross-examination of Corporal Wester, there was no mention of Exhibit 57 during the remaining witness examinations. When the State moved to introduce its exhibits into evidence, it specifically excluded Exhibit 57. The exhibit was not thereafter referred to again while the jury was in the courtroom.

Considering the record before us, we are unable to conclude that any plain error warranting a new trial occurred with respect to the presentation of the BB gun. Cast in the light most favorable to the State, the testimony and evidence concerning the BB gun establishes only that, while holding this particular BB gun, Corporal Wester could fit his own hand inside the pocket of the jacket worn by defendant. As the record reflects, Corporal Wester was unable to fit the entire BB gun inside the pocket of the jacket, and there was no indication at trial that a reliable chain of custody existed to link defendant to this particular BB gun. Thus, we are not convinced that a fundamental error occurred with respect to the BB gun. Furthermore, we are not convinced that a fundamental right of defendant was violated or that a different result would have been reached had the BB gun not been marked by the State and referred to by both parties. Accordingly, we hold that the reference to and presentation of the BB gun was not plain error. Defendant's third argument is therefore overruled.

IV.

[4] Defendant next argues that his due process rights were violated by the trial court reporter's failure to completely record the proceedings. The record reflects that prior to trial, defendant filed a written motion for full recordation of all proceedings in the instant case. On 28 April 2003, the trial court granted defendant's request. However, the trial court reporter failed to record the parties' opening and closing statements. Defendant asserts that he is entitled to a new trial as a result of the error. We disagree.

Our Supreme Court has previously recognized that there is "a presumption in favor of regularity" at trial. *State v. Duncan*, 270 N.C. 241, 247, 154 S.E.2d 53, 58 (1967). "Thus, where the matter complained of does not appear of record, [the] appellant has failed to make irregularity manifest." *Id.* Similarly, this Court has previously held that our "review on appeal is limited to what is in the record or in the designated verbatim transcript of proceedings." *State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254, *disc. review denied*, 315 N.C. 188, 337 S.E.2d 862 (1985); *see* N.C.R. App. P. 9(a) (2004). Our courts have recognized that "[i]t is the duty of an appellant to see that the record on appeal is properly made up and transmitted to the appellate court," *State v. Milby and State v. Boyd*, 302 N.C. 137, 141, 273 S.E.2d 716, 719 (1981), and we have concluded that "[a]n appellate court cannot assume or speculate that there was prejudicial error when none appears on the record before it." *Moore*, 75 N.C. App. at 548, 331 S.E.2d at 254.

In *Moore*, the defendant argued in a motion for appropriate relief that the State "made improper comments and referred to matters outside the trial record" during its closing arguments. *Id.* at 547, 331 S.E.2d at 254. The defendant also argued that he was denied the opportunity for appellate review because of the trial court's failure to record the State's closing argument. On appeal, we noted that the defendant had requested the trial court record the State's closing argument, but declined the trial court's post-trial invitation to reconstruct the argument. *Id.* at 548, 331 S.E.2d at 254. Thus, we held that "[b]ecause [the] defendant failed to cooperate with the trial court to provide this Court with a record of the State's closing argument, we are precluded from reviewing the argument on appeal." *Id.* at 548, 331 S.E.2d at 254-55.

As in *Moore*, defendant in the instant case contends that as a result of the trial court reporter's failure to record the State's opening and closing statements, defendant "is deprived of his statutory right to appeal and is deprived of . . . a full and effective appellate review." Specifically, defendant states that he "cannot determine what the prosecutor argued to the jury concerning the BB gun that is such a critical piece of this case." However, as discussed above, this Court is unable to assume or speculate that prejudicial error occurred where no error appears on the record before us, and we will decline review of an issue where the appellant does not undertake those efforts necessary to secure the record pertaining to the issue. In the instant case, the record contains no indication that defendant attempted to recon-

struct the State's opening and closing arguments, and we note that defendant failed to file a motion for appropriate relief or a motion to reconstruct pursuant to N.C.R. App. P. 9. Accordingly, we are precluded from reviewing this argument on appeal, and we therefore overrule defendant's fourth argument.

V.

[5] Defendant next argues that the trial court erred in instructing the jury. Specifically, defendant contends that he provided sufficient evidence at trial to require the trial court to instruct the jury on common-law robbery. We disagree.

"When a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, *the law presumes*, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be—an implement endangering or threatening the life of the person being robbed." *State v. Joyner*, 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985) (emphasis in original). "The mandatory presumption . . . is of the type which merely requires the 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[.]' " *Id.* at 783, 324 S.E.2d at 844 (quoting *State v. White*, 300 N.C. 494, 507, 268 S.E.2d 481, 489 (1980)) (emphasis in original). "[W]hen *any evidence* is introduced tending to show that the life of the victim was not endangered or threatened, 'the mandatory presumption disappears, leaving only a mere permissive inference' " that requires the trial court to instruct the jury on common-law robbery as well as armed robbery. *Joyner*, 312 N.C. at 783, 324 S.E.2d at 844 (quoting *White*, 300 N.C. at 507, 268 S.E.2d at 489) (emphasis in original). Therefore, in deciding whether it was proper for the trial court to instruct only on armed robbery, "the dispositive issue . . . is whether any substantial evidence was introduced at trial tending to show affirmatively that the instrument used by the defendant was not a firearm or deadly weapon[.]" *State v. Williams*, 335 N.C. 518, 523, 438 S.E.2d 727, 729 (1994).

In the instant case, Mrs. Collins testified at trial that she believed her life was in danger because she believed defendant had a firearm hidden inside his jacket pocket. On direct examination, Mrs. Collins testified as follows:

> It was an object like it was pointed at me. I did not see it, but he made me aware that he would hurt me if I didn't do what he said to do. . . . I thought he had a gun, sir.

However, on cross-examination, Mrs. Collins testified that "[o]nly when [defendant] put his hand on the counter, like I showed earlier, was something bulging out of the pocket [of his jacket]." Mrs. Collins also testified that she did not notice anything in defendant's jacket when he was talking to her while inside the store. Mrs. Collins further testified that she did not see a muzzle or handle of a gun sticking out of defendant's jacket pocket. Although Sergeant Collins testified on direct examination that he saw defendant "reach over up under the bags" laying in the passenger seat of defendant's vehicle, Sergeant Collins testified on cross-examination that he did not see anything after witnessing defendant reach toward the bags. Notwithstanding the BB gun discussed above, no weapon that could be linked to defendant was recovered following the robbery.

We conclude that the evidence in the instant case is insufficient to extinguish the mandatory presumption discussed in *Joyner*. Although defendant sought to rebut the State's evidence regarding the use of the weapon by challenging the reasonableness of the witnesses' beliefs, defendant failed to "show affirmatively that the instrument used by the defendant was not a firearm or deadly weapon[.]" *Williams*, 335 N.C. at 523, 438 S.E.2d at 729 (approving use of mandatory presumption where victim believed defendant possessed a gun after he pulled an object "wrapped in something" from his pocket, despite defendant's testimony that he did not own or "mess with guns"); *see State v. Lee*, 128 N.C. App. 506, 510-11, 495 S.E.2d 373, 376 (1998) (approving use of mandatory presumption where victim did not see a weapon but testified that defendant covered her head and threatened to shoot her if she resisted). The witnesses' testimony that they did not actually see or recover a weapon was insufficient to counter the mandatory presumption arising from the State's evidence that defendant possessed and used a weapon during the robbery. Accordingly, we hold that the trial court did not err in refusing to instruct the jury on common-law robbery, and we therefore overrule defendant's fifth argument.

VI.

[6] Defendant next presents two arguments regarding the sentencing phase of his trial. Defendant argues that the trial court erred by sentencing defendant as a prior record level IV offender and by applying

aggravating factors to defendant's sentence. We agree that the trial court erred in its assignment of defendant's prior record level, and we agree in part that the trial court erred in applying certain aggravating factors to defendant's sentence. Therefore, we remand the case to the trial court for resentencing in light of the following analysis.

N.C. Gen. Stat. § 15A-1340.14 (2003) requires that each of a felony offender's prior convictions be proven to determine the offender's prior record level. N.C. Gen. Stat. § 15A-1340.14(f) provides that the State bears the burden of proving any prior convictions by a preponderance of the evidence. Specifically, N.C. Gen. Stat. § 15A-1340.14(f) lists several methods the State may use to prove prior convictions, including the following:

(1) Stipulation of the parties.

(2) An original or copy of the court record of the prior conviction.

(3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.

(4) Any other method found by the court to be reliable.

In *State v. Riley*, 159 N.C. App. 546, 557, 583 S.E.2d 379, 387 (2003), although the State declared at trial that the defendant had seven prior record level points, the State nevertheless submitted "no records of conviction, no records from the agencies listed in N.C.G.S. § 15A-1340.14(f)(3), nor . . . any evidence of a stipulation by the parties as to a prior record level." On appeal, we held that "[a] statement by the State that an offender has seven points, and thus is a record level III, if only supported by a prior record level worksheet, is not sufficient to meet the catchall provision found in N.C.G.S. § 15A-1340.14(f)(4), even if uncontested by defendant." *Id.* (citing *State v. Mack*, 87 N.C. App. 24, 34, 359 S.E.2d 485, 491 (1987), *disc. review denied*, 321 N.C. 477, 364 S.E.2d 663 (1988), and *State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000)).

In the instant case, the State concedes that the trial court erred in unilaterally determining that defendant had twelve prior record level points and was therefore a prior record level IV offender. As in *Riley*, notwithstanding the judgment and commitment worksheet filed by the trial court, the record in the instant case is devoid of any evidence of defendant's previous convictions or a stipulation by defendant regarding his prior record level. Therefore, in light of our

previous decisions regarding prior record level assignment, we must remand the case for resentencing.

[7] Furthermore, we note that the judgment and commitment sheets indicate that the trial court made identical findings of aggravating and mitigating factors in sentencing defendant for the following three offenses: second-degree kidnapping, assault with a deadly weapon on a government official, and the consolidated multiple charges of common-law robbery, a felony, and assault with a deadly weapon, a misdemeanor. Specifically, the judgment and commitment sheet for each offense indicates that the trial court found the following aggravating factors: (i) defendant was armed with a deadly weapon at the time of the crime; (ii) the offense involved an attempted taking of property of great monetary value; and (iii) the victim of the offense suffered serious injury that is permanent and debilitating. After finding that the aggravating and mitigating factors balanced, the trial court sentenced defendant at the highest end of the presumptive range for the offenses of second-degree kidnapping and assault with a deadly weapon on a government official, and the lowest end of the presumptive range for the consolidated offenses of common-law robbery and assault with a deadly weapon.

While "[n]o appellate court in this State has ever held that the same factor may not be used to aggravate more than one conviction," *State v. McCullers*, 77 N.C. App. 433, 436, 335 S.E.2d 348, 350 (1985), the facts used to enhance a sentence must be supported by sufficient evidence in the record. *State v. Rose*, 327 N.C. 599, 606, 398 S.E.2d 314, 317 (1990). In the instant case, the record is devoid of any evidence that the victim of the second-degree kidnapping, Mrs. Collins, suffered any injury during the commission of the offense. Thus, the trial court's finding that the victim of the second-degree kidnapping offense suffered serious injury that is permanent or debilitating must be reversed. Although we conclude that the trial court did not err in applying the other aggravating factors to the offense, we note that the trial court sentenced defendant in the presumptive range for second-degree kidnapping after determining that a balance of aggravating and mitigating factors existed. Therefore, we remand the offense for resentencing following exclusion of the aggravating factor of serious injury from the trial court's consideration.

Defendant maintains that the trial court was prohibited from enhancing the assault sentences by finding that defendant was armed with a deadly weapon during the commission of the offenses. We disagree.

We note initially that defendant's argument regarding the application of the aggravating factor to the assault with a deadly weapon charge is without merit, as the crime is a misdemeanor offense and therefore not subject to modification upon a finding of aggravating or mitigating factors. *See* N.C. Gen. Stat. § 15A-1340.16 (2003) (listing factors for consideration of aggravated and mitigating sentences for felony convictions); N.C. Gen. Stat. § 15A-1340.20 (2003) (stating that a sentence "imposed for a misdemeanor shall contain a sentence disposition specified for the class of offense and prior conviction level[,]" and providing no consideration of aggravating and mitigating factors); *State v. Clark*, 107 N.C. App. 184, 190-91, 419 S.E.2d 188, 192 (1992) ("The trial court did not need to find an aggravating factor for the breaking and entering count since the defendant was convicted of a misdemeanor which is not subject to N.C. Gen. Stat. § 15A-1340.4(b). The finding of an aggravating factor for the misdemeanor conviction, therefore, was superfluous and non-prejudicial error."). In support of his assertion that the aggravating factor should not have been applied to the charge of assault with a deadly weapon on a government official, defendant cites *State v. Barbour*, 104 N.C. 793, 797, 411 S.E.2d 411, 413 (1991), in which this Court held that the trial court is prohibited from enhancing a defendant's sentence for assault with a deadly weapon with intent to kill inflicting serious injury by relying on the defendant's use of the deadly weapon to commit the crime. However, our decision in *Barbour* is inapplicable to the instant case, because here the trial court enhanced defendant's sentence by finding that defendant was *armed* with a deadly weapon during the commission of the assault rather than *used* a deadly weapon during the commission of the assault. Furthermore, the deadly weapon used during the commission of the assault (the Ford pickup truck) was not the same deadly weapon defendant was armed with during the commission of the assault (the gun Mrs. Collins testified that defendant possessed). Thus, because the trial court did not enhance defendant's sentence for the assault by relying on facts used to satisfy an element of the assault, we conclude that the trial court did not err in finding that defendant was armed with a deadly weapon during the commission of the offense.

VII.

Based upon the foregoing conclusions, we hold that defendant received a trial free of prejudicial error, but we remand the case to the trial court for resentencing. On remand, the trial court is instructed to hear and receive any evidence regarding defendant's

prior felony convictions necessary to satisfy the requirements of N.C. Gen. Stat. § 15A-1340.14, and to resentence defendant consistent with this opinion.

No error in part; remanded in part.

Judges HUNTER and McCULLOUGH concur.

BRENTON D. ADAMS, TRUSTEE OF BRENTON D. ADAMS, RETIREMENT PLAN, PLAINTIFF v. BANK UNITED OF TEXAS FSB, H. TERRY HUTCHENS, M. A. MANSOUR, AND WIFE, TAGHRID D. MANSOUR, ROBERT T. HEDRICK, WILLIAM M. GRIGGS, DEFENDANTS

No. COA03-1423

(Filed 21 December 2004)

1. Pleadings— Rule 11 motion—burden of proof

The trial court did not erroneously place the burden of proof and persuasion on the party against whom a motion for Rule 11 sanctions had been filed (the plaintiff in this case). Once the moveant establishes a prima facie case, as here, the burden shifts to the nonmovant.

2. Pleadings— Rule 11—quantum of proof

The preponderance of the evidence standard should be used in determining whether a Rule 11 sanction has occurred. This is the standard applicable to civil cases in North Carolina unless a change is made by the General Assembly, which has not happened here.

3. Pleadings— Rule 11 sanctions—unsuccessful underlying claim

For Rule 11 purposes, a decision that a plaintiff contesting a bankruptcy had been properly served with notice does not mean that his claim was inappropriate or unreasonable.

4. Pleadings— Rule 11 sanctions—reasonable inquiry

The trial court erroneously imposed Rule 11 sanctions against plaintiff for failing to conduct a reasonable inquiry into the law where plaintiff, who was contesting a foreclosure, presented plausible legal theories regarding notice of the foreclosure and service by publication.

5. Pleadings— Rule 11 sanctions—findings

The trial court erred by imposing Rule 11 sanctions without findings about the facts available to plaintiff when his complaint was filed or the kind of factual inquiry he made before filing the complaint. The case is remanded for consideration of plaintiff's conduct in investigating the case, as well as his continued prosecution of the case after discovering certain information (which may involve the improper purpose prong of Rule 11 analysis).

6. Appeal and Error— motion to modify record on appeal—denied—consideration on remand

Defendants' motion to modify the appellate record to include an affidavit was denied in an appeal from the imposition of sanctions against plaintiff. There is no indication that the affidavit was part of the trial court record; however, as the case is remanded on other grounds, the trial court may consider the issue.

Appeal by plaintiff from an order entered 26 June 2003 by Judge A. Leon Stanback in Wake County Superior Court. Heard in the Court of Appeals 24 August 2004.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene and Kathleen A. Naggs for plaintiff-appellant.

Robert T. Hedrick for defendants-appellees M. A. Mansour, Taghrid D. Mansour, Robert T. Hedrick and William M. Griggs.

HUNTER, Judge.

Plaintiff, Brenton D. Adams ("Adams"), presents the following four issues for our consideration: Whether the trial court erroneously (1) placed the burden of proof upon Adams, the nonmovant, by requiring Adams to prove his compliance with the requirements of N.C. Gen. Stat. § 1A-1, Rule 11; (2) utilized a preponderance of the evidence quantum of proof instead of a clear and convincing evidence quantum of proof; (3) imposed Rule 11 sanctions against Adams for failing to conduct a reasonable inquiry into the law and the facts regarding the claims set out in the complaint or bringing a claim not well grounded in fact and in law; and (4) sanctioned Adams for continued prosecution of this claim. After careful review, we reverse the trial court's order and remand for further proceedings.

The pertinent facts tend to indicate that Adams is the trustee of the Brenton D. Adams Retirement Plan which claimed ownership to

real property foreclosed upon by defendant, Bank United of Texas F.S.B. ("Bank"). Defendant Terry Hutchens ("Hutchens") was an attorney and a substitute trustee employed by the Bank to institute the foreclosure proceedings. After the Bank submitted the highest bid at the foreclosure sale on 15 July 1998, Defendants M. A. Mansour and his wife ("the Mansours") submitted a successful upset bid and ownership was transferred to the Mansours pursuant to a trustee's deed. To borrow the purchase price, the Mansours executed a deed of trust to defendant Robert Hedrick ("Hedrick"), as the trustee and grantee, and William Griggs ("Griggs") as the beneficiary.

On 3 January 2000, Adams filed a complaint against defendants seeking to have the foreclosure proceeding declared null and void, the Trustee's Deed and the Deed of Trust stricken, and to require the parties to execute a quitclaim deed on the property. In February 2001, summary judgment was entered in favor of defendants. This Court upheld the entry of summary judgment in a 4 June 2002 unpublished opinion. *See Adams v. Bank United of Tx. FSB*, 150 N.C. App. 713, 564 S.E.2d 320 (2002) (COA01-773) (unpublished).

Thereafter, the Mansours, Hedrick and Griggs moved for Rule 11 sanctions. Based upon their allegations that Adams received sufficient and adequate notice of the foreclosure proceedings, these defendants contended Adams' complaint was not well grounded in fact; was not warranted by existing law, nor by a good faith argument for the extension, modification or reversal of existing law; and was interposed for an improper purpose. Upon consideration of the motion, the trial court found Adams was properly served with notice and that Adams provided in discovery copies of three return receipts from certified mail sent by defendants. Therefore, the trial court concluded Adams' complaint was not well grounded in law and fact and that he did not conduct a reasonable inquiry into the law and facts prior to filing the complaint. Accordingly, the trial court ordered Adams, individually and as trustee, to pay $15,147.00 in attorney's fees and $296.75 in costs. From this order, Adams appeals.

> 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). In this case, although the Mansours, Hedrick, and Griggs moved for Rule 11 sanctions based upon an alleged violation of all three prongs, the trial court concluded Adams had only violated the legal and factual sufficiency prongs. Thus, any allegations that Adams violated Rule 11 because he had an improper purpose in filing his complaint were not ruled upon by the trial court and are not before us.[1]

A. Burden of Proof

[1] Adams first contends the trial court committed reversible error by placing the burdens of proof and persuasion on Adams. Specifically, Adams argues that "[w]here the issue of sanctions is raised by a motion, as it was in this case, the movant has the burdens of proof and persuasion to show a Rule 11 violation." As the parties do not contest that the burden of proof and persuasion is upon the movant, we only review whether the burden was erroneously placed upon Adams in this case.

In the order imposing Rule 11 sanctions against Adams, the trial court stated in its conclusions of law:

> 1. That Plaintiff was properly served and had sufficient and adequate legal notice of the foreclosure proceeding.
>
> 2. That the Plaintiff, both individually as an attorney at law, and as Trustee, by signing the complaint violated Rule 11.
>
> 3. That the Plaintiff in his capacity as attorney and Trustee failed to conduct a reasonable inquiry into the law and the facts regarding the claims set out in the complaint.
>
> 4. That it has been established that there was sufficient compliance with the statutory requirements for service of notice of foreclosure.
>
> 5. That the Plaintiff in his capacity as attorney and Trustee failed to demonstrate that the claims set out in the complaint were well-grounded in fact and in law.

Adams argues the phrase "failed to demonstrate" in Conclusion of Law 5 indicates the burden of proof was erroneously placed upon Adams. We disagree.

1. Although the movants alleged Adams had violated all three prongs of Rule 11, the trial court based its order of sanctions upon the first two prongs of Rule 11 only. The trial court did not make any findings of fact or conclusions of law regarding whether Adams violated the improper purpose prong of Rule 11.

When read in the context of the remaining conclusions of law, we conclude Conclusion of Law 5 does not indicate the burden of proof and persuasion was placed upon Adams. Indeed, in conclusions of law 1-4, the trial court determined Adams was properly served, had sufficient legal notice and had failed to conduct a reasonable inquiry into the law and facts. The trial court also concluded defendants had complied with the statutory requirements for service of notice of foreclosure. After making these conclusions, the trial court then stated Adams "failed to demonstrate that the claims set out in the complaint were well-grounded in fact and in law." As explained in *Bannon v. Joyce Beverages, Inc.*, 113 F.R.D. 669, 674 (N.D. Il. 1987), once the movant establishes a *prima facie* case, the burden shifts to the nonmovant to put forth evidence indicating Rule 11 was not violated.[2]

B. Quantum of Proof

[2] Adams also argues the trial court erroneously utilized a preponderance of the evidence quantum of proof. Adams contends the movant should be required to prove a Rule 11 violation by a clear and convincing evidence quantum of proof. First, our Supreme Court has indicated that "the standard under . . . Rule 11(a) is one of objective reasonableness under the circumstances." *Turner*, 325 N.C. at 164, 381 S.E.2d at 713. However, our review of the case law, and as Adams indicates in his brief, the North Carolina appellate cases are silent as to whether North Carolina applies a preponderance of the evidence standard or a clear and convincing evidence standard in determining whether an attorney's conduct was objectively reasonable under the circumstances.[3] As this is an issue of first impression before North Carolina's appellate courts, we look to the purpose behind Rule 11 for guidance.

> [T]he central purpose of Rule 11 is to deter baseless filings . . . , [and to] streamline the administration and procedure of [our] courts. . . . Rule 11 imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that

2. As explained in *Turner v. Duke University*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (citation omitted), "[t]he North Carolina Rules of Civil Procedure are, for the most part, verbatim recitations of the federal rules. Decisions under the federal rules are thus pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules."

3. Furthermore, our research has not revealed any cases from the federal circuits or other states holding a preponderance of the evidence or clear and convincing evidence standard applies in the Rule 11 context.

> any papers filed with the court are well grounded in fact, legally tenable, and "not interposed for any improper purpose." An attorney who signs the paper without such a substantiated belief "shall" be penalized by "an appropriate sanction."

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393, 110 L. Ed. 2d 359, 374 (1990). However, "the rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Rule 11 of Title 28, Federal Rules of Civil Procedure, 1983 Amendment Advisory Committee Notes. "Although the Rule must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy, . . . , any interpretation must give effect to the Rule's central goal of deterrence." *Cooter*, 496 U.S. at 393, 110 L. Ed. 2d at 374.

> Rule 11 sanctions have significant impact beyond the merits of the individual case. Concerns for the effect on both an attorney's reputation and for the vigor and creativity of advocacy by other members of the bar necessarily require that [appellate courts] exercise less than total deference to the [trial] court in its decision to impose Rule 11 sanctions. . . . "Despite the increased license to impose sanctions, judges should always seriously reflect upon the nuances of the particular case, and the implications the case has on the nature of the legal representation, before imposing sanctions."

In re Ronco, Inc., 838 F.2d 212, 217-18 (7th Cir. 1988) (citation omitted). As explained in *F.D.I.C. v. Tefken Const. and Installation Co.*, 847 F.2d 440, 444 (7th Cir. 1988):

> While the Rule 11 sanction serves an important purpose, it is a tool that must be used with utmost care and caution. Even where, as here, the monetary penalty is low, a Rule 11 violation carries intangible costs for the punished lawyer or firm. A lawyer's reputation for integrity, thoroughness and competence is his or her bread and butter. We may not impugn that reputation without carefully analyzing the legal and factual sufficiency of the arguments.

Thus, in deciding a Rule 11 motion, "many courts weigh the evidence in a manner suggesting the practical application of a higher, clear-and-convincing standard. . . ." Gregory Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 17(A)(5)(b), at 321 (3d ed. 2000 & Supp. 2004).

However, in North Carolina, "[i]n the superior court, except in extraordinary cases, the burden of proof is by the greater weight of the evidence." *In re Thomas*, 281 N.C. 598, 603, 189 S.E.2d 245, 248 (1972). In the context of attorney disbarment by a judge or judicial censure or removal, our Supreme Court has determined these proceedings warrant a clear and convincing evidence quantum of proof. In *In re Nowell*, 293 N.C. 235, 247, 237 S.E.2d 246, 254 (1977), our Supreme Court had to determine the appropriate quantum of proof applicable in a proceeding where a judge faced the serious consequences of censure or removal. In its holding, our Supreme Court "declare[d] the quantum of proof in proceedings before the Judicial Standards Commission of this State to be proof by clear and convincing evidence . . . ." *Id.* Similarly, in *In re Palmer*, 296 N.C. 638, 647-48, 252 S.E.2d 784, 789-90 (1979), our Supreme Court adopted the clear and convincing rule as the quantum of proof in proceedings where an attorney faced disbarment in a judicial proceeding.[4] In explaining its rationale, our Supreme Court referenced the following discussion by the Supreme Court of New Jersey:

> " 'Because of the dire consequences which may flow from an adverse finding . . . , we regard as necessary to sustain such a finding the production of a greater *quantum* of proof than is ordinarily required in a civil action, *i.e.*, a preponderance of the evidence, but less than that called for to sustain a criminal conviction, *i.e.*, proof of guilt beyond a reasonable doubt. Although the specific rule has not been articulated previously in [the State of New Jersey], we declare it to be that discipline or disbarment is warranted only where the evidence of unethical conduct or unfitness to continue in practice against an attorney is clear and convincing. . . .' "

Palmer, 296 N.C. at 648, 252 S.E.2d at 790 (quoting *In re Pennica*, 177 A.2d 721, 730 (N.J. 1962)).

However, in North Carolina, a preponderance of the evidence quantum of proof applies in civil cases unless a different standard has been adopted by our General Assembly or approved by our Supreme Court. *See In re Thomas*, 281 N.C. at 603, 189 S.E.2d at 248; N.C. Gen. Stat. § 7B-805 (2003) (indicating allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convinc-

4. The clear, cogent and convincing evidence quantum of proof has also been adopted by the North Carolina State Bar, with the approval of the Supreme Court of North Carolina, for attorney disciplinary hearings before the bar. *See* R. N.C. St. B. B.0114(u) (2004) Ann. R. (N.C.) 399, 444; N.C. Gen. Stat. § 84-21 (2003).

ing evidence). In those instances where a different standard has been adopted by case law, it was pursuant to an opinion by our Supreme Court. A different standard for Rule 11 motions has not been adopted and we have found no instances where this Court has imposed a different standard on its own. Therefore, while there may be valid and plausible reasons for adopting a clear, cogent and convincing evidence standard for determining Rule 11 sanctions, we adhere to the general rule that a preponderance of the evidence quantum of proof governs in civil cases unless changed by our General Assembly or Supreme Court. *See In re Thomas*, 281 N.C. at 603, 189 S.E.2d at 248. Thus, we conclude the preponderance of the evidence quantum of proof should be utilized in determining whether a Rule 11 violation has occurred. In light of this conclusion, we do not reach whether Rule 11 sanctions rise to the level of the dire consequences of disbarment and censure.

C. Imposition of Sanctions

[3] Adams argues the trial court erroneously concluded he violated the mandates of N.C. Gen. Stat. § 1A-1, Rule 11(a). As stated:

> 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, 330 N.C. at 655, 412 S.E.2d at 332. In the order imposing sanctions in this case, the trial court concluded Adams' complaint was not well grounded in fact or in law.

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Turner, 325 N.C. at 165, 381 S.E.2d at 714.

Adams contends the trial court erroneously concluded his complaint was not warranted by existing law or a good faith argument for the extension or modification of existing law.

> To determine whether a pleading is legally sufficient, the trial court should look "first to the facial plausibility of the pleading and only then, if the pleading is implausible under existing law, to the issue of 'whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law.' "

Golds v. Central Express, Inc., 142 N.C. App. 664, 668, 544 S.E.2d 23, 27 (citation omitted), *disc. review denied*, 353 N.C. 725, 550 S.E.2d 775 (2001). "[R]eference 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 are not to be considered." *Bryson*, 330 N.C. at 656, 412 S.E.2d at 333. Moreover, our Supreme Court has stated:

> [W]e hold that subsequently filed documents cannot impose a duty on counsel or a party under the legal sufficiency prong of the Rule to seek dismissal. However, once responsive pleadings or other papers are filed and the case has become meritless, failure to dismiss or further prosecution of the action may result in sanctions either under the improper purpose prong of the Rule, or under other rules, or pursuant to the inherent power of the court.

Id. at 658, 412 S.E.2d at 334. Furthermore, " '[c]ase law clearly supports the fact that just because a plaintiff is eventually unsuccessful in her claim, does not mean the claim was inappropriate or unreasonable.' " *Johnson v. Harris*, 149 N.C. App. 928, 937, 563 S.E.2d 224, 229 (2002) (citation omitted). Thus, this Court's decision in *Adams v. Bank United of Tx. FSB*, 150 N.C. App. 713, 564 S.E.2d 320, that plaintiff was properly served does not mean the claim was inappropriate or unreasonable.

Adams argues his complaint presented a facially plausible legal theory because (1) Hutchens failed to comply with the requirements of N.C. Gen. Stat. § 45-21.16(a), (2) Hutchens failed to file an affidavit with the clerk showing the circumstances warranting the use of service by posting and publication which is required by Rule 4(j1) and N.C. Gen. Stat. § 45-21.16(a), and (3) there was no justifiable basis for service of process by publication or by posting a notice on the property.

(1) Noncompliance with N.C. Gen. Stat. 45-21.16(a)

[4] In this case, Adams alleges he was the owner of the property foreclosed upon by Hutchens and, therefore, Hutchens was required to serve Adams with notice of the foreclosure proceedings pursuant to N.C. Gen. Stat. § 45-21.16(a). N.C. Gen. Stat. § 45-21.16(a) (2003) states in pertinent part:

> After the notice of hearing is filed, the notice of hearing shall be served upon each party entitled to notice under this section. . . . The notice shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure for service of summons, including service by registered mail or certified mail, return receipt requested. . . . In the event that the service is obtained by posting, an affidavit shall be filed with the clerk of court showing the circumstances warranting the use of service by posting.

In his complaint, Adams made the following relevant allegations:

> 19. That the Plaintiff, neither personally, or as Trustee of the Brenton D. Adams Retirement Plan ever received actual or constructive notice of the foreclosure proceeding referred to above, until sometime in 1999. The Plaintiff, Brenton D. Adams, never received actual or constructive notice of the purported foreclosure sale, never received actual or constructive notice of any hearing required by N.C.G.S. § 45-21.16 and was unaware of the purported foreclosure proceedings until long after a deed had been recorded in the name of the Defendant M. A. Mansour.
>
> . . .
>
> 22. That neither a Notice of the Foreclosure Hearing nor a Notice of the purported Sale of the real estate described above was served upon the Plaintiff in the manner specified in N.C.G.S. 45-21.16. Neither were these items served in any manner required by the Rules of Civil Procedure for service of Summons; and, the Plaintiff had neither actual nor constructive notice of the foreclosure proceedings or of the purported sale of real estate until long after a deed had been recorded in the name of the defendant Mansour.
>
> 23. That the Plaintiff never received actual or constructive service on delivery of any registered mail, certified mail, sheriff's service or any other manner of service whatsoever.

> 24. That the file of the foreclosure proceeding referred to above, contained special proceeding number 98 SP 714 on file of the office of the Clerk of Superior Court of Wake County does not show a purported service upon the Plaintiff and does not contain proof of service upon the Plaintiff in any manner whatsoever as is required in N.C.G.S. 45-21.16 and by the Rules of Civil Procedure and by basic Constitutional due process requirements.
>
> . . .
>
> 26. That there was no justifiable basis for service of process by publication or by posting a notice on the property described herein. Upon information and belief there was no service of process upon the Plaintiff by means of publication or posting; and, even if there had been such purported service, the facts of this case do not give rise to the posting or publishing of such notice and, if such notice was ever given, it is invalid as a matter of law.

A defect in service is sufficient to permit the foreclosure proceedings to be attacked in an independent action. *See Hassell v. Wilson*, 301 N.C. 307, 315, 272 S.E.2d 77, 82-83 (1980). However, if a property owner receives actual notice of the foreclosure hearing and could have taken advantage of the relief provided in N.C. Gen. Stat. § 45-21.34, assuming he had grounds, or he could have objected to the method of service, the property owner cannot later argue service on him was inadequate. *Fleet National Bank v. Raleigh Oaks Joint Venture*, 117 N.C. App. 387, 390, 451 S.E.2d 325, 328 (1994). Thus, Adams' allegations that defendants failed to comply with the requirements of N.C. Gen. Stat. § 45-21.16(a) and that he did not receive notice of the foreclosure proceedings presents a plausible legal theory.

Defendants argue, however, that Adams was given notice via certified mail and that Adams' personal file contained three original green receipts for certified articles which he disclosed to defendants in discovery. As such, Adams had actual notice of the foreclosure proceedings. These arguments, however, relate to whether a pleading is well grounded in fact (factual sufficiency), and not the legal sufficiency. When determining the legal sufficiency of a pleading, the focus is upon whether the legal theory is plausible under existing law or a good faith argument for a change in law. *See* N.C. Gen. Stat. § 1A-1, Rule 11(a); *see also Bryson v. Sullivan*, 102 N.C. App. 1, 12, 401 S.E.2d 645, 653-54 (1991), *aff'd in relevant part*

and reversed on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992) (indicating that when the legal sufficiency prong of Rule 11 is implicated, if the paper does not present a plausible legal theory, the trial court must then scrutinize the attorney's conduct in researching the law). Whether the facts of a particular case support a plausible legal theory is not part of the legal sufficiency analysis. Rather, it is part of the factual sufficiency analysis, which is discussed *infra*.

(2) Failure to File an Affidavit

Adams also contends his allegations that defendants failed to file an affidavit providing justification for service by publication or posting as required by N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2003) presented a plausible legal theory. Rule 4(j1) states in pertinent part:

> A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication. . . . Upon completion of such service there shall be filed with the court an affidavit showing the publication and the mailing in accordance with the requirements of G.S. 1-75.10(2), the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served.

As explained by this Court, "in order to utilize service of process by publication under this statute it is necessary that plaintiff file with the court an affidavit showing the 'circumstances warranting the use of service by publication.' " *Edwards v. Edwards*, 13 N.C. App. 166, 169, 185 S.E.2d 20, 22 (1971). Thus, in *Edwards*, this Court set aside the judgment entered because the plaintiff failed to file the affidavit showing the circumstances warranting the use of service by publication. *Id.* at 170, 185 S.E.2d at 22.

In this case, Adams alleged in his complaint that the court file "does not contain proof of service upon the Plaintiff in any manner whatsoever as is required in NCGS § 45-21.16 and by the Rules of Civil Procedure" and "[t]hat there was no justifiable basis for service of process by publication or by posting a notice on the property described herein." Adams further alleges upon information and belief that "the facts of this case do not give rise to the posting or publishing of such notice and, if such notice was ever given, it is invalid as a matter of law." Thus, Adams' allegations that the requirements for service by publication were not met in this case present a plausible legal theory.

(3) No Justifiable Basis for Service of Process by Publication or by Posting a Notice on the Property

N.C. Gen. Stat. § 45-21.16(a) allows for service by posting upon the property in those instances when service by publication is allowed. Service by publication is governed by N.C. Gen. Stat. § 1A-1, Rule 4(j1), which states in pertinent part: "A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication." As explained in *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980), "[a] defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void."

In his complaint Adams alleges that the "facts of this case do not give rise to the posting or publishing of such notice and, if such notice was ever given, it is invalid as a matter of law." Adams' complaint lists numerous ways in which Adams' contact information for purposes of service of process was readily available to defendants. Thus, Adams presented a plausible legal theory that service by publication was not justified in this case, even though this Court later held service was sufficient.

Accordingly, we conclude Adams' complaint was legally sufficient. As such, the trial court erroneously imposed Rule 11 sanctions for failing to conduct a reasonable inquiry into the law.

D. Factual Sufficiency

[5] Next, Adams contends the trial court erroneously concluded his complaint was not well grounded in fact. "In analyzing whether the complaint meets the factual certification requirement, the court must make the following determinations: (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). " '[I]n determining compliance with Rule 11, "courts should avoid hindsight and resolve all doubts in favor of the signer." ' " *Twaddell v. Anderson*, 136 N.C. App. 56, 70, 523 S.E.2d 710, 720 (1999) (citations omitted).

In the order imposing sanctions, the trial court made the following relevant findings of fact and conclusions of law:

FINDINGS OF FACT

. . .

2. That the evidence presented in this cause indicates that the Plaintiff was properly served with notice of the foreclosure proceeding.

3. That there was proper posting of notice on the property by the Sheriff of Wake County; that further notice of said foreclosure proceeding was sent to the office of Brenton D. Adams by certified mail and was in fact received.

4. That notice of the foreclosure was mailed to the Plaintiff by first class mail; that notice was properly published in a newspaper with general circulation in the county; and that notice of fourteen upset bids was sent by first class mail to the Plaintiff at his office.

5. That the action of the Plaintiff was dismissed on motion by the Defendants for summary judgment on February 21, 2001.

6. That the Plaintiff in discovery provided evidence of his receipt of certified mail sent by the Trustee in foreclosure of notice of the foreclosure action by sending to Defendants copies of three return receipts were contained in his files.

. . .

CONCLUSIONS OF LAW

1. That Plaintiff was properly served and had sufficient and adequate legal notice of the foreclosure proceeding.

. . .

3. That the Plaintiff in his capacity as attorney and Trustee failed to conduct a reasonable inquiry into the law and the facts regarding the claims set out in the complaint.

Adams first argues the order for sanctions should be reversed because the trial court failed to make any findings of fact regarding the facts available to Adams when the complaint was filed or what kind of factual inquiry Adams made before filing the complaint. We agree.

In *Davis v. Wrenn*, 121 N.C. App. 156, 464 S.E.2d 708 (1995), *cert. denied*, 343 N.C. 305, 471 S.E.2d 69 (1996), this Court reversed

an order for Rule 11 sanctions because the findings of fact failed to indicate how the attorney's conduct violated the mandates of Rule 11(a). *See Davis*, 121 N.C. App. at 160, 464 S.E.2d at 711. In this case, the trial court made several findings indicating several different methods of service in this case were proper and that summary judgment was entered in favor of defendants. However, the findings of fact neither address what information was known to Adams at the time the complaint was filed nor discuss the reasonableness of the steps Adams undertook or failed to undertake in investigating the facts of this case.

Adams argues he reviewed the foreclosure file to determine whether proof of valid service on him was contained in the file and Adams also states that he never received notice of the foreclosure proceedings from Hutchens. Defendants argue, however, that the copies of the three return receipts for certified articles provided by Adams in discovery and the fact that the court file contained the affidavit required by Rule 4(j1) of the Rules of Civil Procedure indicate Adams had knowledge at the time the complaint was filed that service was proper. Therefore, defendants argue Adams' complaint was not well grounded in fact.

(1) Copies of Return Receipts for Certified Mail

In discovery, Adams provided copies of three unsigned domestic return receipts for certified mail. Specifically, these unsigned return receipts stated:

Article Number	Article Addressed To	Service Type
P 968 048 539	Brenton D. Adams, Trustee of the Brenton D. Adams Retirement Plan, P.O. Box 1389 Dunn, N.C. 28335	Certified
P 968 048 541	Richard E. Barr, P.O. Box 1389 Dunn, N.C. 28335	Certified
P 968 048 542	Spouse of Richard E. Barr, P.O. Box 1389 Dunn, N.C. 28335	Certified

The return receipts were neither dated nor signed. In the order imposing sanctions, the trial court found "the Plaintiff in discovery provided evidence of his receipt of certified mail sent by the Trustee in foreclosure of notice of the foreclosure action by sending to Defendants copies of three return receipts were [sic] contained in his files." The trial court, however, did not find that Adams had knowledge of these return receipts at the time he filed the complaint or that a reasonable investigation would have disclosed these return receipts. As indicated by this Court in *Bryson v. Sullivan*, attorneys should be sanctioned for failure to take minimal steps to confirm facts when the facts could be verified easily by reference to public records or accessible documents. *Bryson*, 102 N.C. App. at 10, 401 S.E.2d at 652. However, as stated, " 'in determining compliance with Rule 11, "courts should avoid hindsight." ' " *Twaddell*, 136 N.C. App. at 70, 523 S.E.2d at 720 (citations omitted). Thus, the finding of fact that these return receipts were provided to defendants in discovery does not support the conclusion that Adams failed to undertake a reasonable inquiry into the facts. Therefore, the trial court must consider Adams' conduct in investigating the facts of this case and determine whether the investigation was reasonable or that a reasonable investigation would have revealed facts to Adams tending to indicate his position was not well grounded in fact. Moreover, the continued prosecution after the discovery of the certified mail return receipts may implicate the improper purpose prong of Rule 11. *See generally Bryson*, 330 N.C. at 658, 412 S.E.2d at 334. Accordingly, we remand this cause to the trial court for further proceedings to determine whether Adams' complaint was well grounded in fact or was brought for an improper purpose.

(2) Court file

[6] Adams contends he reviewed the court file and did not find any evidence establishing Hutchens had served Adams via certified mail. He contends the court file did not contain any return receipts for any certified articles addressed to Adams. Also, during oral argument, Adams argued the court file did not contain an affidavit providing the basis for service by publication or posting. However, defendants made an oral motion at oral argument of this case to supplement the record on appeal to include the affidavit. After oral argument, defendants filed a written motion to include the affidavit in the record on appeal. Defendants argued that a few days before oral argument they reviewed the court file and found the required affidavit with a date stamp of 24 June 1998 in the court file. Thus, defendants argue this

affidavit demonstrates Adams' allegations that service by publication or posting was improper were not well grounded in fact.

N.C.R. App. P. 9(b)(5) states in pertinent part: "On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal." There is no indication in the trial court's order imposing sanctions or in the record on appeal that this affidavit was part of the trial court record. Thus, we deny defendants' motion to supplement the record on appeal. However, as this case must be remanded for further proceedings, the trial court may consider whether this affidavit was in the court file at the time Adams filed his complaint and its relevance to whether a violation of Rule 11 occurred.

In sum, we conclude the burdens of proof and persuasion were not improperly placed upon Adams in this case. We also conclude the trial court properly utilized a preponderance of evidence quantum of proof. However, the trial court erroneously concluded Adams' complaint was not legally sufficient. Thus, we reverse that portion of the sanctions award. The trial court also did not render appropriate findings of fact to support its conclusions of law that Adams' complaint was not well grounded in fact. Moreover, the trial court did not address the movants' allegations that Adams brought the complaint for an improper purpose. Accordingly, we reverse the trial court's order imposing sanctions and remand for further proceedings to determine whether Adams' complaint was well grounded in fact or brought for an improper purpose.

Reversed and remanded for further proceedings.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

LISA K. DALGEWICZ (HEARTEN), PLAINTIFF v. EDWARD J. DALGEWICZ, DEFENDANT

No. COA03-1641

(Filed 21 December 2004)

1. Process and Service— trial date—service at known address

An equitable distribution defendant received adequate notice where he was duly served with a civil summons and complaint; plaintiff's counsel took every reasonable step to serve defendant properly, including sending correspondence by certified mail to an address that was provided by defendant's counsel, kept on record at the clerk's office, and used by defendant for other correspondence; and a court employee served defendant notice of the trial court calendar via approved methods.

2. Divorce— equitable distribution—classification and valuation of property

An equitable distribution judgment was remanded where the trial court did not properly classify and value a residence, a vehicle, and a contract. Whether the court's method of distribution was unreasonable or arbitrary could not be discerned without proper classification, valuation, and listing of all of the property owned by the parties.

3. Divorce— equitable distribution—attorney fees

The trial court did not abuse its discretion by awarding attorney fees to the plaintiff pursuant to N.C.G.S. § 50-21(e) in an equitable distribution case where the evidence supported the court's findings that defendant had refused to attend hearings, provide responses to discovery, or pay financial obligations as ordered.

Appeal by defendant from order entered 14 January 2003, judgment entered 31 March 2003, and order entered 29 September 2003, by Judge Marvin P. Pope, Jr., in Buncombe County District Court. Heard in the Court of Appeals 11 October 2004.

The McDonald Law Office, P.A., by Diane K. McDonald, for plaintiff-appellee.

James McElroy & Diehl, P.A., by William K. Diehl, Jr., and Preston O. Odom, III, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Edward J. Dalgewicz ("defendant") appeals from a judgment of equitable distribution and orders for sanctions and attorney's fees in favor of Lisa K. Dalgewicz ("plaintiff"). For the reasons discussed herein, we affirm in part and reverse and remand in part.

The facts and procedural history pertinent to the instant appeal are as follows: Defendant and plaintiff were married on 5 April 1985. The couple resided in Asheville, North Carolina, until their separation in the spring of 2001. Following their separation, defendant moved to Florida and plaintiff moved to California.

On 23 April 2001, plaintiff filed a complaint against defendant, requesting that the trial court award her custody of the couple's two children, child support, post-separation support, alimony, equitable distribution, a restraining order, and attorney's fees. On 13 June 2001, defendant filed an answer and counterclaim, as well as interrogatories and requests for production. In his answer and counterclaim, defendant requested that the trial court deny plaintiff equitable distribution, grant defendant custody of the children, and order plaintiff to pay child support.

On 12 July 2001, plaintiff and defendant entered into a consent order whereby the couple's Merrill Lynch account was assigned to plaintiff for the payment of marital debt. The consent order required that defendant pay plaintiff $2,107.00 in child support, and it continued a 10 May 2001 order preventing defendant's waste of his bonus payments.

On 1 August 2001, defendant's counsel filed a motion to withdraw, which the trial court granted in an order filed 23 August 2001. On 17 August 2001, defendant and plaintiff entered into a second consent order, whereby defendant agreed to "borrow the money to pay the deficiency produced by the forced sale of [the residence located at] 9 Hickory Ridge[,]" and to hold plaintiff "harmless for losses she may incur for his failure to make full payment of the loan." Following the dismissal of his counsel on 23 August 2001, defendant retained counsel in both North Carolina and Florida.

On 10 October 2001, plaintiff filed an equitable distribution affidavit, which she later amended on 10 December 2001 and 14 January 2003. On 30 October 2001, the trial court entered an order directing defendant to file an equitable distribution affidavit and directing both parties to attend a conference to resolve the issues of the case within

sixty days of the completion of discovery. On 8 November 2001, the trial court granted defendant's motion for extension of time to file his equitable distribution affidavit, and on 21 November 2001, defendant filed the equitable distribution affidavit.

On 4 December 2001, the trial court held a hearing to determine whether to award plaintiff post-separation support and attorney's fees. While defendant was not present at the hearing, he was represented by counsel. In an order filed 14 December 2001, the trial court found that plaintiff was a dependent spouse and that defendant earned a $250,000.00 base salary plus $500,000.00 in bonuses. The trial court also found that, pursuant to defendant's employment contract with Associated Packaging Enterprises, Inc. ("APEI"), defendant would receive $1.1 million to $1.3 million in non-reoccurring bonuses. The trial court concluded that plaintiff was entitled to a writ of possession to the home and property located at 268 Racquet Club Road,[1] and the trial court ordered defendant to "pay the monthly mortgage payment on the property and make any and all arrears current within sixty days." The trial court further ordered that defendant pay temporary post-separation support to plaintiff in the amount of $8,000.00 per month, as well as reasonable attorney's fees related to the action.

On 14 January 2002, the trial court ordered that the residence located at 268 Racquet Club Road be listed for sale within two weeks for "$1.1 million, the estimated value according to [plaintiff]," and that all outstanding discovery be produced within thirty days. On 24 January 2002, the trial court issued an order finding as fact that defendant had not made a spousal support payment required by the 14 December 2001 order, and that defendant had "neither made the mortgage current, nor made any mortgage payments as they c[a]me due." Based upon these findings of fact, the trial court concluded that defendant was in contempt of court, and the trial court ordered defendant to appear for sentencing in district court on 11 February 2002. The trial court further ordered that plaintiff was entitled to attachment of defendant's income from his contract with APEI, and the trial court directed defendant to be prepared at sentencing "to [s]how [c]ause why said remedy should not be instituted against him."

1. At the time of their separation, plaintiff and defendant also owned a residence located at 9 Hickory Ridge in Asheville and mentioned above. According to the trial court order, the 9 Hickory Ridge residence was sold in November 2001, and defendant was required to pay approximately $90,000.00 to satisfy the deficiency between the sale price and the existing mortgage on the residence.

On 8 March 2002, defendant's North Carolina counsel filed a motion to withdraw, citing defendant's refusal to compensate counsel for services rendered in the matter. The trial court granted counsel's motion on 25 April 2002. Following the motion to withdraw, defendant filed an emergency motion to continue depositions scheduled for 18 March 2002 and 19 March 2002, citing the requirement that defendant's Florida counsel associate with local counsel in the matter. On 18 March 2002, defendant gave notice of appearance for new North Carolina counsel, whose services were limited to "the sole purpose of assisting non-North Carolina licensed attorney[.]"

On 18 March 2002, the trial court held a hearing on all pending issues. Present at the hearing were plaintiff, her counsel, defendant's Florida counsel, and defendant's new North Carolina counsel. Following the hearing, the trial court issued an order for the arrest of defendant for failure to appear at the 18 March 2002 hearing. The trial court continued the previous requirement that defendant make current the mortgage on 268 Racquet Club Road and the previous attachments on defendant's APEI paycheck.

On 23 October 2002, both defendant's North Carolina counsel and Florida counsel moved the trial court to withdraw from representation. Defendant's Florida counsel requested that "all further pleadings, notices, and correspondence" be directed to defendant via the following address:

> EDWARD J. DALGEWICZ c/o APEI, 900 South US Highway One, Suite 207, Jupiter, FL 33477

On 30 October 2002, the trial court granted defendant's remaining counsel's motions to withdraw. The same day, plaintiff filed a motion for sanctions against defendant, alleging that defendant had "never appeared" for a hearing in the matter, had failed to appear at the court-ordered mediation, and had failed to appropriately respond to discovery. Plaintiff advised the trial court that defendant's counsel had recently moved the trial court to withdraw, and that "it is anticipated by [plaintiff] that [defendant] will fail to show for the equitable distribution trial." Plaintiff requested that the trial court award plaintiff costs and attorney's fees and dismiss defendant's claim for equitable distribution. Plaintiff's counsel certified that a copy of the motion was served upon defendant's counsel via facsimile.

On 14 January 2003, the trial court filed an "Order For Sanctions" in the case, in which the trial court found as fact that defendant failed

to participate in court-ordered mediation, failed to appear at any hearing in the matter, was thus held in contempt, and had several orders for his arrest issued against him. The trial court further found that an equitable distribution trial had been scheduled and defendant had failed to appear at the hearing regarding sanctions. Based upon these findings of fact, the trial court concluded that plaintiff "is entitled to be awarded the sanctions against [defendant] as set out in her Motion filed with this Court[,]" and the trial court ordered that defendant's equitable distribution claim be dismissed.

On 31 March 2003, the trial court entered judgment on plaintiff's equitable distribution claim. The trial court first noted that defendant was not present at the 14 January 2003 hearing, nor was an "attorney or other agent on his behalf." The trial court then entered the following pertinent findings of fact:

> 16. [T]hat the evidence and the facts of this matter are such that an equal division of the marital estate would not be equitable; that specifically:
>
> . . . .
>
> c. The Plaintiff actively negotiated the contract with APEI . . . which contains those benefits and rights that are marital assets[.]
>
> d. The Plaintiff was supportive and actively involved in the development of the career of the Defendant[.]
>
> e. Despite the entry of Orders requiring the Defendant to pay the mortgage on the marital home located at 268 Racquet Club Road . . . the Defendant refused and never despite being held in contempt of this Court made one mortgage payment; that as a consequence, the parties were notified of a foreclosure of said real estate [and] the Plaintiff worked very hard to find a buyer who ultimately acquired the property by paying off the mortgage held by BB&T in the amount of $730,000[.]
>
> 17. [T]hat the actions of the Defendant have caused the Plaintiff to expend a substantial amount of money; that the Defendant has refused to attend hearings, provide responses to discovery, [and] pay his financial obligations as ordered by the Court . . . that he has been inattentive to his obligations in this matter, causing a great deal of time for the Court and the

Plaintiff; that the actions of the Defendant constitute those acts prohibited by NCGS §50-21(e), and will entitle the Plaintiff herein to recover from the Defendant reasonable expenses and damages incurred because of these acts, including reasonable attorney's fees which shall be submitted to the Court.

Based upon its findings of fact, the trial court entered the following pertinent conclusions of law:

4. That the Plaintiff is entitled to an equitable distribution of the marital estate.

5. That the contract entered into by the Defendant with APEI . . . is a marital asset as are those benefits and monies flowing from it . . . [and] these rights of the Plaintiff shall survive any anticipated corporate changes in identity or organization . . . or conversion of Defendant's rights under the contract[.]

6. The Defendant is guilty of waste of a marital asset, to wit: [the residence located at] 268 Racquet Club Road[.]

Based in part on these findings of fact and conclusions of law, the trial court entered the following pertinent orders:

1. The Defendant shall pay to the Plaintiff . . . $470,000 for his waste of [the residence located at] 268 Racquet Club Road[.]

2. The Defendant shall pay to the Plaintiff . . . one-half all bonuses received by him or to be received by him for the years 2001, 2002, 2003, and 2004[.]

3. The Defendant shall pay to the Plaintiff . . . $55,000 which is one-half of the money used by the Defendant to pay credit card bills immediately following separation from the bonuses paid from the contract [with APEI.]

4. The Defendant shall pay to the Plaintiff . . . $35,000 for his waste of the vehicle, [the] Lincoln Navigator driven by the Plaintiff at the time of separation, and which is subject to repossession.

. . . .

7. The Defendant shall pay to the Plaintiff . . . $20,253.48 for his actions which violated NCGS §50-21(e).

On 10 April 2003, defendant filed a motion to set aside the 31 March 2003 judgment and the 14 January 2003 order pursuant to N.C. Gen. Stat. § 1A-1, Rules 59 and 60. Defendant contended that he had no notice of the equitable distribution hearing and was thus entitled to relief from the judgment because of the irregularities, mistake, inadvertence, surprise, and excusable neglect connected to the action. Defendant further asserted that he was entitled to relief from the order for sanctions because he had no notice of that proceeding either.

On 29 September 2003, the trial court issued an order denying defendant's Rule 59 and Rule 60 motions, concluding in pertinent part that defendant had been provided sufficient notice and was neglectful and inattentive to his case. Defendant appeals.

We note initially that defendant's brief contains arguments supporting only fifty-three of his original ninety-two assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2004), the thirty-nine omitted assignments of error are deemed abandoned. Therefore, we limit our present review to those assignments of error properly preserved by defendant for appeal.

The dispositive issue on appeal is whether the trial court erred in its equitable distribution judgment. Defendant argues that he did not receive sufficient notice of the equitable distribution hearing and that the equitable distribution judgment is not supported by sufficient findings of fact or conclusions of law. Although we conclude that defendant received proper notice of the equitable distribution hearing, we reverse and remand the case for a new trial because we also conclude that the trial court erred in its equitable distribution judgment.

I. Service of Process

[1] "Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, section 17, of the North Carolina Constitution." *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994). "Whether a party has adequate notice is a question of law." *Trivette v. Trivette*, 162 N.C. App. 55, 58, 590 S.E.2d 298, 302 (2004). "Adequate notice is defined as 'notice reasonably calculated, under all circumstances, to apprise interested

parties of the pendency of the action and afford them an opportunity to present their objections.' " *Id.* at 58-59, 590 S.E.2d at 302 (quoting *Randleman v. Hinshaw*, 267 N.C. 136, 140, 147 S.E.2d 902, 905 (1966) (citations omitted)).

In the instant case, the record indicates that defendant was properly served with a civil summons and complaint on 23 April 2001. Defendant does not deny that plaintiff's original and amended complaints were served upon him properly, nor does defendant deny that he was properly served with a civil summons as well as the trial court's 25 July 2002 order, which advised the parties that the matter was set for an equitable distribution trial on 4 November 2002. Instead, defendant asserts that because he did not receive actual notice of the equitable distribution trial scheduled for 14 January 2003, the trial court's order should be reversed. We disagree.

The record reflects that defendant was actively involved in the litigation of this matter until the withdrawal of his North Carolina and Florida counsel in October 2002. In his motion to withdraw, defendant's Florida counsel expressly requested that

> all further pleadings, notices, and correspondence in this matter be directed to the Defendant at the following address: EDWARD J. DALGEWICZ c/o APEI, 900 South US Highway One, Suite 207, Jupiter, FL 33477.

The Jupiter, Florida, address provided by defendant's Florida counsel was the same address listed as defendant's "current address" in a motion for admission *pro hac vice*, filed on behalf of defendant's Florida counsel on 31 August 2001, as well as the same address used by defendant to receive correspondence from financial banks and the Department of Motor Vehicles. Defendant never provided the trial court with another address, and plaintiff's counsel testified that her attempts to serve defendant at other addresses were returned as unclaimed.

Following defendant's Florida counsel's motion to withdraw, plaintiff's counsel sent the trial court a letter regarding the withdrawal of counsel and referring to the equitable distribution hearing that was then set for 4 November 2002. Defendant was sent a copy of the letter via certified mail, return receipt requested, at the Jupiter, Florida, address provided by defendant's Florida counsel. Upon receipt of the letter, defendant signed and returned the certified receipt to plaintiff, indicating that he had received the letter.

On 12 December 2002, the Office of the Clerk of the 28th Judicial District prepared the trial calendar for the week of court that included the parties' equitable distribution trial. Wanda Ingle ("Ingle"), Judicial Assistant for the 28th Judicial District, testified that she sent defendant a copy of the trial calendar at the Jupiter, Florida, address provided by defendant's Florida counsel. Although Ingle addressed the calendar "c/o API" rather than "c/o APEI," Ingle testified that nothing was returned to the trial court stating that the calendar was undeliverable, and that if an envelope had been returned it would have been placed in the case file. Furthermore, Ingle testified that she complied with the typical procedure of her office, and sent the trial court calendar notice to the last address provided to the trial court by defendant or his counsel. We note that other correspondence sent to and received by defendant at the Jupiter, Florida, address did not include the indication "c/o APEI" at all.

"[I]t has long been the practice in this State that when a party to an action does not have counsel, a copy of each calendar on which his action appears calendared for trial is mailed to him at the last address available to the Clerk." *Laroque v. Laroque*, 46 N.C. App. 578, 581, 265 S.E.2d 444, 446, *disc. review denied*, 300 N.C. 558, 270 S.E.2d 109 (1980). In *Thompson v. Thompson*, 21 N.C. App. 215, 217, 203 S.E.2d 663, 665, *cert. denied*, 285 N.C. 596, 205 S.E.2d 727 (1974), this Court stated the oft-cited rule that

> A party to a legal action, having been duly served with process, is bound to keep himself advised as to the time and date his cause is calendared for trial for hearing; and when a case is listed on the court calendar, he has notice of the time and date of the hearing.

In support of this assertion, we cited *Cahoon v. Brinkley*, 176 N.C. 5, 7-8, 96 S.E. 650, 651 (1918), where our Supreme Court noted as follows:

> This Court has held that "When a man has business in court, the best thing he can do is to attend it[,]" and this has been often quoted and reaffirmed. It has also been held that "A litigant must pay the same attention to a case in court that any one would give to business of importance." Even when he has employed counsel, he cannot abandon all attention to the case, and in this case the defendant well knew he had no counsel. It has also been held that one who has been made party to an action by summons is fixed with notice of all orders and proceedings taken in open court.

(citations omitted).

In the instant case, we conclude that defendant received adequate notice of all hearings in the matter. Defendant was duly served with a civil summons and complaint, and plaintiff's counsel took every reasonable step to serve defendant properly, including sending correspondence via certified mail to an address provided by defendant's counsel, kept on record at the Clerk's office, and used by defendant to receive other forms of correspondence. An employee of the 28th Judicial District served defendant notice of the trial court calendar via those methods approved by the Buncombe County Trial Court Administrator's office. This Court has previously concluded that "[a] [d]efendant will not be permitted to frustrate the trial of the case or avoid the duties imposed by orders entered by merely declining or refusing to attend trial." *Thompson*, 21 N.C. App. at 217, 203 S.E.2d at 665. Accordingly, defendant's first argument is overruled.

II. Equitable Distribution Judgment

[2] Defendant also argues that the trial court erred in the equitable distribution judgment. Defendant asserts that the trial court's findings of fact do not support its determinations regarding defendant's employment, the residence located at 268 Racquet Club Road, and plaintiff's vehicle. Defendant further asserts that the trial court's findings of fact do not support the conclusions of law regarding the unequal division of the marital estate and the imposition of attorney's fees.

The trial court is required to conduct a three-step process during an equitable distribution hearing. *Beightol v. Beightol*, 90 N.C. App. 58, 63, 367 S.E.2d 347, 350, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988). "These steps are: (1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner." *Id.* This Court has previously recognized that "[a]ttempts by one or both spouses to deplete the marital estate or dispose of marital property after the date of separation but before distribution may be considered by the court when making the division, and any conversion of marital property for individual purposes may be charged against the acting spouse's share." *Sharp v. Sharp*, 84 N.C. App. 128, 130, 351 S.E.2d 799, 800 (1987). However, in *Sharp*, we noted that N.C. Gen. Stat. § 50-20(a) "effectively provides for the 'freezing' of the marital estate as of the date of the parties' separation. Marital assets, distributed thereafter, are valued as of that date." *Id.* In determining the value of the property, the trial court must consider

the property's market value, if any, less the amount of any encumbrance serving to offset or reduce the market value. *Alexander v. Alexander*, 68 N.C. App. 548, 550-51, 315 S.E.2d 772, 775 (1984). The trial court is required to make specific findings regarding the net value of each item, determining the net market value as of the date the parties separated for each item distributed. *See* N.C. Gen. Stat. § 50-20(c), (j) (2003).

In the instant case, the trial court made the following findings of fact with respect to the residence located at 268 Racquet Club Road:

> 10. The Plaintiff testified that on the date of the separation, the Plaintiff and the Defendant lived in a home located at 268 Racquet Club Road . . . . That on December 14, 2001, an Order was entered . . . which found the Plaintiff to be a dependent spouse and ordered among other things that the Defendant pay the mortgage payments for 268 Racquet Club Road . . . . That the Defendant failed and refused to make the mortgage payments . . . . That following the hearing of the matter the Defendant was found in contempt . . . . Further, this Court has found that the nonpayment of the mortgage on the property located at 268 Racquet Club Road would constitute waste by the Defendant of a marital asset. That said real estate was sold just prior to the closing on the foreclosure; that in fact, the bank agreed to continue the foreclosure hearing to allow for the sale of the real estate; that said property was [sold] for $730,000 which resulted in a substantial loss to the Plaintiff; that the real-estate is currently re-listed for sale some four months later for $1,200,000 . . . that there was a loss of $470,000 which was caused by the Defendant's contempt of Court orders and his refusal to pay the mortgage.

Based upon this finding of fact, the trial court ordered that defendant pay plaintiff $470,000 "for his waste of a marital asset; that being the home at 268 Racquet Club Road[.]" We conclude that the trial court erred.

As discussed above, to enter a proper equitable distribution judgment, prior to distributing the assets the trial court must classify and value all property owned by the parties at the date of separation. "And in doing all these things the court must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness." *Carr v. Carr*, 92 N.C. App. 378, 379, 374

S.E.2d 426, 427 (1988). In the instant case, although the trial court classified the residence located at 268 Racquet Club Road as a "marital asset," the trial court's findings of fact demonstrate that the trial court failed to properly value the residence prior to distribution. Although we recognize that "[u]nless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value[,]" *Highway Comm. v. Helderman*, 285 N.C. 645, 652, 207 S.E.2d 720, 725 (1974), in the instant case, there is no indication in the record that plaintiff testified to the value of the residence on the date of the parties' separation. Instead, the trial court's findings reflect that the trial court was apprised of the value of the residence four months later, when the residence was being sold for the second time following the date of separation.

With respect to plaintiff's vehicle, the trial court made the following finding of fact:

> 14. That at the date of separation, the Plaintiff drove a vehicle, a Lincoln Navigator which is valued at the time of the trial at $35,000; that the Defendant refused to make the payments on said vehicle, despite the fact that the Plaintiff had no income; that said vehicle is subject to repossession.

Based upon this finding of fact, the trial court made the following order with respect to the vehicle:

> 4. The Defendant shall pay to the Plaintiff the sum of $35,000 for his waste of the vehicle, [the] Lincoln Navigator driven by the Plaintiff at the time of the separation, and which is subject to repossession.

We conclude that the trial court erred with respect to the Lincoln Navigator as well. Plaintiff and defendant concede that the Lincoln Navigator was leased property. Because the vehicle was leased, neither plaintiff nor defendant had any ownership or equity interest in it, and therefore the trial court was prohibited from classifying and valuing it as a marital asset. *Fox v. Fox*, 103 N.C. App. 13, 18, 404 S.E.2d 354, 356 (1991). Furthermore, as discussed above, to enter a proper equitable distribution judgment, the trial court must specifically and particularly classify and value all assets and debts maintained by the parties at the date of separation. However, the trial court in the instant case made no findings of fact regarding the classification of the Lincoln Navigator or its value on the date of separation.

We further conclude that the trial court erred with respect to defendant's contract with APEI. Although in its equitable distribution judgment the trial court classified the contract as a marital asset and detailed the provisions of the contract and the circumstances surrounding its formation, the trial court failed to value the contract at the date of separation and to make those ultimate findings necessary in an equitable distribution judgment.

Following proper classification and valuation of the parties' assets, the trial court is required to divide and distribute the marital property equally, "unless the court determines in the exercise of its discretion that such a distribution is inequitable." *Beightol*, 90 N.C. App. at 63, 367 S.E.2d at 350. In the instant case, the trial court determined that equal distribution was inequitable, and thus awarded plaintiff what appears to be a greater share of the marital estate. However, in light of our foregoing conclusions, we are unable to determine whether the trial court properly determined that equal distribution was inequitable in the instant case. Without the benefit of proper classification, valuation, and listing of all the property owned by the parties, we cannot discern whether the trial court's method of distribution was unreasonable or arbitrary. Although we recognize that "[t]his Court is hesitant to remand equitable distribution cases and even more hesitant to reverse an equitable distribution judgment and grant the appellant a new trial[,]" *Glaspy v. Glaspy*, 143 N.C. App. 435, 444, 545 S.E.2d 782, 788 (2001), because of the number and degree of errors committed by the trial court in the instant case, we conclude a new trial is required. Therefore, we reverse the trial court's equitable distribution judgment, and we instruct the trial court to hear arguments and receive evidence from both parties on remand, in order to address the errors discussed above and to properly identify, classify, and value the parties' property as required by statutory law and case law.

III. Attorney's Fees

[3] Independent of its equitable distribution of the parties' property, the trial court ordered that defendant pay plaintiff $20,253.48 for those actions which violated N.C. Gen. Stat. § 50-21(e). On appeal, defendant asserts that the trial court abused its discretion in awarding plaintiff attorney's fees. We disagree.

N.C. Gen. Stat. § 50-21(e)(1) (2003) allows the trial court to impose sanctions upon a party in the form of attorney's fees where

> The party has willfully obstructed or unreasonably delayed, or has attempted to obstruct or unreasonably delay, discovery proceedings, including failure to make discovery pursuant to G.S. 1A-1, Rule 37, or has willfully obstructed or unreasonably delayed or attempted to obstruct or unreasonably delay any pending equitable distribution proceeding[.]

This Court has previously held that "whether to impose sanctions and which sanctions to impose under G.S. § 50-21(e) are decisions vested in the trial court and reviewable on appeal for abuse of discretion." *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 195, 511 S.E.2d 31, 34 (1999). "In applying an abuse of discretion standard, this Court will uphold a trial court's order of sanctions under section 50-21(e) unless it is 'manifestly unsupported by reason.' " *Id.* (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

In the instant case, the trial court made the following pertinent findings of fact with regard to its imposition of sanctions:

> 15. That the parties were ordered to appear at a mediation of the financial matters on July 25, 2002; that the Plaintiff appeared with her attorney; that the Defendant did not appear[.]
>
> . . . .
>
> 17. That a review of the record of this matter shows that the actions of the Defendant have caused the Plaintiff to expend a substantial amount of money; that the Defendant has refused to attend hearings, provide responses to discovery, pay his financial obligations as ordered by the Court as evidenced by the Orders in the file holding . . . Defendant in contempt and the necessity of the Plaintiff to seek the attachment of the Defendant's income from APEI; that he has been inattentive to his obligations i[n] this matter, causing a great deal of time for the Court and the Plaintiff[.]

The trial court's findings of fact are supported by competent evidence in the record detailing plaintiff's efforts to seek attachment of defendant's wages and defendant's failure to appear at any hearing in the matter, including court-ordered mediation. In light of the trial court's findings of fact and the record before us, we are unable to conclude the trial court's determination was manifestly unsupported by reason. Therefore, we hold that the trial court did not err in awarding plaintiff attorney's fees.

IV. Conclusion

In light of the foregoing conclusions, we affirm the portion of the trial court's judgment awarding attorney's fees, but we reverse and remand for a new equitable distribution trial.

Affirmed in part; reversed and remanded.

Chief Judge MARTIN and Judge HUDSON concur.

KATHERINE T. LANGE, PLAINTIFF v. DAVID R. LANGE, DEFENDANT

No. COA02-567-2

(Filed 21 December 2004)

Judges— recusal—vacation house jointly owned with attorney

The recusal of a judge was remanded where defendant either did not assign error or did not argue assignments of error about findings; the evidence supported findings that contacts between the judge and defendant's counsel about jointly owned vacation property were not so frequent as to violate the Code of Judicial Conduct; and the findings supported the conclusion of no bias.

Judge CALABRIA dissenting.

Appeal by defendant from order entered 4 October 2001 by Judge William A. Christian in Mecklenburg County District Court. Heard in the Court of Appeals 12 February 2003. A divided panel of this Court dismissed as moot. *See Lange v. Lange*, 157 N.C. App. 310, 578 S.E.2d 677 (2003). The North Carolina Supreme Court vacated and, by opinion entered 5 December 2003, remanded to this Court for consideration of the appeal on its merits. *See Lange v. Lange*, 357 N.C. 645, 588 S.E.2d 877 (2003).

Casstevens, Hanner, Genter & Riopel, P.A., by Dorian H. Gunter and Reid, Lewis, Deese, Nace & Person, L.L.P., by Renny W. Deese, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., Katherine S. Holliday, Richard S. Wright, and Preston O. Odom, III, for defendant-appellant.

STEELMAN, Judge.

Our Supreme Court remanded this case to the Court of Appeals for consideration of the appeal on its merits. Accordingly, we review defendant's appeal to determine whether Judge Christian erred in granting plaintiff's motion to recuse Judge Jones. We reverse and remand this matter to the trial court for further proceedings under Rule 63 of the Rules of Civil Procedure.

A more detailed recitation of the facts can be found in our first opinion, *Lange v. Lange*, 157 N.C. App. 310, 578 S.E.2d 677 (2003), and the Supreme Court's opinion, *Lange v. Lange*, 357 N.C. 645, 588 S.E.2d 877 (2003). We review only those facts pertinent to this opinion.

Plaintiff, Katherine T. Lange, and defendant, David R. Lange, were married in 1989. Following their divorce in 1998, the court entered an order approving a parenting agreement that provided for the parties' two minor children to live in Mecklenburg County pursuant to a shared custody arrangement. In March 2000, plaintiff filed a motion to modify custody because she was engaged and wished to move her family to Southern Pines. Defendant responded to the motion asking the court to grant him primary physical custody of the children if his ex-wife moved from Mecklenburg County. A hearing on the parties' motion to modify custody was held before Judge William G. Jones in the District Court of Mecklenburg County during the week of 13 June 2000. By letter dated 30 June 2000, Judge Jones announced his decision in the matter, requiring the children to continue to reside in Mecklenburg County, and directing counsel for the defendant to submit a proposed order. Over the next several months, the parties discussed the precise language and provisions of the order. In November 2000, prior to Judge Jones signing the order, plaintiff's counsel moved for Judge Jones to recuse himself because Judge Jones and Katherine S. Holliday, counsel for the defendant, were among a group of people who jointly owned a vacation property located in the mountains.

Judge William Christian was assigned to hear plaintiff's recusal motion. On 14 October 2001, Judge Christian entered an order which concluded that Judge Jones had not violated any specific provisions of Cannons 2, 3, or 5 of the North Carolina Code of Judicial Conduct, and that there was no evidence of actual bias or partiality on the part of Judge Jones and his conduct in the case. However, Judge Christian concluded that it was not necessary for there to be a showing of actual bias or a violation of a specific provision of the Code of

Judicial Conduct for a judge to be required to be recused from a case. Holding the mere appearance of bias or prejudice was sufficient to require recusal, Judge Christian ordered that Judge Jones be recused from the case, and ordered a new trial in the matter. Defendant appealed. Plaintiff cross-appealed, asserting that Judge Christian erred in not finding that Judge Jones had violated specific provisions of the Code of Judicial Conduct.

I. Standard for Disqualification

Our Supreme Court directed that upon remand, our first inquiry shall be whether Judge Christian's findings of fact that Judge Jones did not violate the Code of Judicial Conduct are supported by the evidence. *Lange v. Lange*, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003). The proper standard by which we review the trial court's findings of fact is limited to a determination of (1) whether those " 'findings are supported by competent evidence, in which event they are conclusively binding on appeal[;]' " and (2) " 'whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 631 (2000) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)).

II. Analysis

Judge Christian made the following findings of fact, which are germane to this determination:

> IV: That since approximately 1986, the Honorable William G. Jones and Katherine S. Holliday, together with other persons, have been co-owners of a vacation property in Yancy County, North Carolina near Mount Mitchell; and that Katherine S. Holliday currently owns a 1/6th undivided interest and the Honorable William G. Jones and wife own a 1/2 undivided interest in the property.
>
> V. That in 1987 the Honorable William G. Jones gave public notice of the co-ownership in the vacation property by posting a notification in the courthouse and circulating a memorandum about the joint ownership to members of the bar regularly practicing in the local juvenile and domestic courts; that Judge Jones was also in the habit of disclosing the joint ownership to litigant in his Court; that this joint ownership was common knowledge in the domestic bar of Mecklenburg County; that at some later point, the disclosure ceased; that at the time of the hearing of this matter, the information had become stale and some members of the

bar, including Mr. Gunter, did not know of the co-ownership; and that Plaintiff did not know of the co-ownership.

VI. That at the hearing of this matter in June, 2000, no disclosure of the co-ownership was made by the Honorable William G. Jones, or Katherine S. Holliday, as Judge Jones erroneously assumed that Plaintiff's attorney knew of the joint ownership.

VII. That the owners of the vacation property, including the Honorable William G. Jones, and Katherine S. Holliday, occupy, maintain, and finance the property pursuant to an informal agreement based on mutual trust, communication, and friendship; that the property was designed, constructed, furnished, and financed by joint efforts and cooperation among the co-owners; and that the co-owners meet annually to provide for their occupancy of the property, make joint decisions on the maintenance and preservation of the property, and provide twelve (12) checks which are held by the Honorable William G. Jones, and deposited into an account he and his wife solely own, and from which he pays the mortgage debt service, and expenses of the property with no obligation to make an accounting to anyone.

VIII. That the Honorable William G. Jones did not violate any specifically enumerated canon of ethics set forth in the North Carolina Code of Judicial Conduct in terms of his relationship with Katherine S. Holliday, or any other party or counsel in this case; that the financial dealings between the Honorable William G. Jones, and other co-owners of the vacation property, including Katherine S. Holliday were not so "frequent" as to violate Canon 5 of the North Carolina Code of Judicial Conduct; and that the annual meeting in which the monthly checks are provided en masse for monthly deposit do not cause the frequent contact which the canon contemplates; and that similarly, the annual meetings that were held to divide the use of the property between the co-owners is so infrequent and perfunctory as to not constitute the frequent contact that the canon of judicial conduct contemplate[s].

IX. That the Plaintiff concedes and the Court finds that no evidence was presented that tended to show that at any time during the hearing of this matter, the Honorable William G. Jones displayed any actual bias, or partiality against Plaintiff by any ruling, decision or result in the case on account of his relationship with Katherine S. Holliday; that their prior public notification of their

co-ownership of the vacation property indicates no subterfuge or bad faith on the part of either Katherine S. Holliday or the Honorable William G. Jones in failing to make the disclosure of their co-ownership of the vacation property.

XII. That the Honorable William G. Jones does have a fiduciary responsibility to the owner's of the property, including, Katherine S. Holliday; that there is a continuing financial connection between the Honorable William G. Jones, and Katherine S. Holliday in relation to the vacation property especially as it relates to debt service, tax payments, and maintenance fees; and that a reasonable person would question the impartiality of the Honorable G. Jones based upon the facts found herein, although no actual bias nor specifically enumerated violation of the Canons of Judicial Conduct has been shown.

Defendant does not specifically assign as error any of the above findings of fact, but does assign as error that the trial court failed to make findings of fact based upon evidence presented at the hearing by defendant. Defendant does not argue these assignments of error (numbered 13 and 15 in the record on appeal) in his brief. As a result they are deemed abandoned. N.C. R. App. P. 28(b)(6). As findings of fact IV, V, VI, VII, and XII are unchallenged on appeal, they are presumed correct and binding on this Court. *See In re Beasley*, 147 N.C. App. 399, 405, 555 S.E.2d 643, 647 (2001). Furthermore, we hold that there is sufficient evidence in the record to support each of these findings.

Plaintiff cross-assigned as error finding of fact VIII in the record on appeal, and does bring forward, in her brief, this cross-assignment of error.

Plaintiff contends Judge Christian improperly failed to find a violation of North Carolina Code of Judicial Conduct Canon 5(C)(1), which provides "[a] judge should refrain from financial and business dealings that . . . involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves." Code of Judicial Conduct, Canon 5(C)(1) (2004). Judge Christian found as fact that the contact between Judge Jones and Holliday was "not so 'frequent' as to violate Canon 5 of the North Carolina Code of Judicial Conduct[.]" Judge Christian further found that the annual meetings at which the owners divided use of the property and provided checks to Judge Jones *en masse* for monthly deposit were "so infrequent and perfunctory as to not constitute the frequent contact that the canon

of judicial conduct contemplate[s]." There is substantial evidence to support this finding of fact.

The above recited findings of fact, in turn support Judge Christian's conclusion of law:

> II. That no specifically enumerated violation of Canons 2, 3, or 5 of the North Carolina Code of Judicial Conduct has been shown; and that no evidence of actual bias or partiality exists on the part of William G. Jones, and his conduct in [t]his case.

Having found that the findings of fact are supported by competent evidence, and that those findings in turn support the conclusions of law, we are mandated by the Supreme Court to find that "Judge Christian erred by ordering Judge Jones' recusal." *Lange*, 357 N.C. at 649, 588 S.E.2d at 880.

In light of this holding, we remand this matter to the trial court for further proceedings in accordance with Rule 63. *Id.* at 648, 588 S.E.2d at 879. The judge assigned to conduct these proceedings shall have the discretion either to enter Judge Jones' order or to hold a new custody modification hearing. *Id.*

III. Dissent

Our Supreme Court's ruling in this matter clearly and concisely set forth the standard of review this Court was to apply upon remand. It has long been established that " '[o]n the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure.' " *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 667, 554 S.E.2d 356, 363 (2001) (quoting *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962) (Parker, J., concurring in the result)). We, therefore, do not reach the issues set forth in the dissent.

REVERSED AND REMANDED.

Judge McCULLOUGH concurs.

Judge CALABRIA dissents.

CALABRIA, Judge, dissenting.

Because I cannot reconcile the majority's reading of our Supreme Court's opinion with the existing standard our Supreme Court asked

this Court to apply, I respectfully dissent. The Supreme Court, citing *State v. Scott* and *State v. Fie*, expressly stated "the Court of Appeals should apply the standard as it has been previously set out by this Court." *Lange v. Lange*, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003). Nothing in the Supreme Court's opinion remanding this case to this Court indicates that any portion of *Scott* or *Fie* has been overruled or improperly sets forth the standard, and both cases expressly support the proposition that the appearance of impropriety justifies recusal. Moreover, I am concerned with the clarity of the record in the instant case and how the standard applies to that record. Accordingly, I will set out my understanding of the standard for recusal previously set forth by our Supreme Court and analyze whether Judge Christian's order can be reconciled with that standard.

I. Standard for Disqualification

Our Code of Judicial Conduct states that "a judge should disqualify himself in a proceeding in which his impartiality may reasonably be questioned[.]" Code of Judicial Conduct, Canon 3(C)(1) (2004).[1] Canon 3(C)(1) then non-exhaustively enumerates the following instances warranting recusal:

> (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> (b) He served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (c) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (d) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;

1. This language was preserved despite the fact that the "appearance of impropriety" language in the title of Canon 2 was deleted from the Code in 2003. Code of Judicial Conduct, Canon 2 (2004).

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

Our Courts have repeatedly held, in accordance with the Code, "that a party has a right to be tried before a judge whose impartiality cannot reasonably be questioned." *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987) (citing Code of Judicial Conduct, Canon 3(C)(1) (1973)). *Accord State v. Scott*, 343 N.C. 313, 326, 471 S.E.2d 605, 613 (1996); *State v. Vick*, 341 N.C. 569, 576, 461 S.E.2d 655, 659 (1995) (both cases concluding there was no error in a judge's failure to recuse himself in a criminal proceeding where the defendant did not present "substantial evidence of partiality or evidence that there was an appearance of partiality"). Indeed, as our Supreme Court has instructed:

> It is not enough for a judge to be just in his judgment; he should strive to make the parties and the community feel that he is just; he owes this to himself, to the law and to the position he holds. . . . The purity and integrity of the judicial process ought to be protected against any taint of suspicion to the end that the public and litigants may have the highest confidence in the integrity and fairness of the courts.

Fie, 320 N.C. at 628, 359 S.E.2d at 775-76 (citations and internal quotation marks omitted).

Thus, our Courts have not traditionally limited orders of recusal to instances where actual partiality is shown but " 'go further, and say that it is also important that every man should know that he has had a fair and impartial trial; or, at least, that he should have no just ground for suspicion that he has not had such a trial.' " *Bank v. Gillespie*, 291 N.C. 303, 311, 230 S.E.2d 375, 380 (1976) (quoting *Ponder v. Davis*, 233 N.C. 699, 706, 65 S.E.2d 356, 361 (1951)). The standard as it has been previously set out by our Supreme Court calls for a determination as to whether there is substantial evidence of either partiality or an appearance of partiality. *Scott*, 343 N.C. at 326, 471 S.E.2d at 613; *Vick*, 341 N.C. at 576, 461 S.E.2d at 659. We note that, in answering this question, it is well established that the burden of proof rests squarely upon the party moving for disqualification of the judge " 'to demonstrate objectively that grounds for dis-

qualification actually exist.' "[2] *Fie*, 320 N.C. at 627, 359 S.E.2d at 775 (quoting *State v. Fie*, 80 N.C. App. 577, 584, 343 S.E.2d 248, 254 (1986) (Martin, J., concurring)). *Accord Scott*, 343 N.C. at 325, 471 S.E.2d at 612; *State v. Honaker*, 111 N.C. App. 216, 219, 431 S.E.2d 869, 871 (1993) ("a party moving for recusal must produce substantial evidence that the judge's impartiality may reasonably be questioned"); *State v. Kennedy*, 110 N.C. App. 302, 305, 429 S.E.2d 449, 451 (1993) ("[t]he moving party may carry this burden with a showing ' "of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially," ' . . . or a showing that the circumstances are such that a reasonable person would question whether the judge could rule impartially") (citations omitted).

II. Judge Christian's Order

In remanding this case to our Court, our Supreme Court twice stated recusal was proper when "grounds for disqualification actually exist." *Lange*, 357 N.C. at 649, 588 S.E.2d at 880.[3] Moreover, our

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2. The requirement upon the party moving for disqualification " 'to demonstrate objectively that grounds for disqualification actually exist' " has been repeated throughout our case law. However, I do not understand this statement as requiring a showing of actual bias. Indeed, our Supreme Court made clear in *Fie* that while they agreed with this statement from Judge Martin's concurring opinion, the Court "also agree[d] with Judge Wells [as expressed in his dissenting opinion] that a party has a right to be tried before a judge whose impartiality cannot reasonably be questioned." *Fie*, 320 N.C. at 627, 359 S.E.2d at 775. The Court concluded, "[t]he appearance [of bias] . . . is sufficient to require a new trial." *Id.*, 320 N.C. at 628-29, 359 S.E.2d at 776. Accordingly, while the burden rests upon the moving party to demonstrate the grounds for disqualification, such grounds include either actual partiality or the appearance of partiality.

3. Our Supreme Court, citing *Scott* and *Fie*, further stated that the party moving for disqualification can show these grounds with "substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially." *Lange*, 357 N.C. at 649, 588 S.E.2d at 880 (citation omitted). In both *Scott* and *Fie*, our Supreme Court set out the standards contained in Canon 3(C)(1) and N.C. Gen. Stat. § 15A-1223 (2003) (*requiring* recusal in criminal proceedings where a judge is actually "[p]rejudiced against the moving party or in favor of the adverse party"). *Fie* illustrates that the actual bias requirement codified in N.C. Gen. Stat. § 15A-1223 is a higher standard than that found in Canon 3(C)(1). It may very well be that our Supreme Court has indicated this higher standard of actual bias is appropriate in civil cases where, as here (1) the trial is concluded, (2) the trial court has orally given its ruling but has not yet reduced that ruling to writing, and (3) the party moving for recusal, which is also the non-prevailing party, could not reasonably have known the circumstances warranting recusal. Application of this higher standard might be preferred to prevent collateral attacks by the non-prevailing party on a ruling by impugning the impartiality of the judge rather than challenging the legal merits of the ruling. Nonetheless, Judge Christian's uncontested finding that neither plaintiff nor her

Supreme Court indicated that any such ground must be supported by findings of fact and such findings of fact must be supported by evidence in the record. *Id.*

A. Grounds for Disqualification

Regarding Judge Christian's order, our Supreme Court noted in passing:

> Judge Christian made specific findings of fact and conclusions of law that Judge Jones did not violate the Code of Judicial Conduct by his actions in this case and that there was no evidence of any bias by Judge Jones. Nevertheless, Judge Christian then went on to conclude that Judge Jones should be recused because a reasonable person could question his ability to rule impartially. Judge Christian's ruling was based on inferred perception and not the facts as they were found to exist.

Lange, 357 N.C. at 649, 588 S.E.2d at 880. *But see Stephenson v. Bartlett*, 358 N.C. 219, 229-30, 595 S.E.2d 112, 119-20 (2004) (upholding the requirement of N.C. Gen. Stat. § 1-267.1 that a former member of the General Assembly may not sit as a member of the three-judge panel in a re-districting case on the grounds that it was "sensible insurance against any appearance of conflict of interest" and noting that such a framework "reduces the appearance of improprieties"). Nonetheless, Judge Christian did find that "a reasonable person *would question* the impartiality" of Judge Jones and concluded, pursuant to the language of Canon 3(C)(1) that "a judge should disqualify himself in a proceeding in which his impartiality *might reasonably be* questioned, that Judge Jones should be recused. Thus, the order of recusal rests on application of Canon 3(C)(1) itself despite the fact that Judge Jones' situation did not fit neatly into any of the illustrative instances enumerated under subsections (a) through (d) of Canon 3(C)(1). Stated alternatively, Judge Christian's ruling seems to be functionally equivalent to the standard, but not the examples, embodied by Canon 3(C)(1).[4] The question remains, then, whether

attorney had notice of the facts upon which the recusal motion was based because that information had become stale would seem to warrant the traditional standard as opposed to the higher standard used to prevent a party who was dissatisfied with the result of the trial from obtaining a "second bite at the apple."

4. Some confusion is presented by the order, however, due to Judge Christian's repeated findings and conclusions that "no . . . specifically enumerated violation of the Canons of Judicial Conduct" was shown. Separate and apart from the similarity between Judge Christian's findings regarding whether a reasonable person would question Judge Jones' impartiality and the standard of Canon 3(C)(1), there is an additional

the findings of fact support a violation of Canon 3(C)(1) and whether those findings are supported by the record evidence.

B. Findings of Fact and Supporting Record Evidence

Judge Christian's conclusion that a reasonable person would question Judge Jones' impartiality was based on the following findings of fact: (1) Judge Jones and Ms. Holliday co-owned an interest in vacation property together, (2) "more recently, [Judge Jones and Ms. Holliday] had recurrent conversations regarding the sale of their respective interests to the other," (3) during the pendency of the action in which Ms. Holliday represented defendant, these discussions continued and Ms. Holliday "referenced selling her interest in the vacation property" to Judge Jones, and (4) Judge Jones had a fiduciary responsibility to and a continuing financial connection with Ms. Holliday. Defendant does not contest these facts, and I agree with Judge Christian's determination that, on these facts, a reasonable person would question a judge's impartiality. Furthermore, these facts are capable of giving rise to a " 'taint of suspicion' " from which we traditionally shield the judiciary. *Fie*, 320 N.C. at 628, 359 S.E.2d at 775 (quoting *Ponder*, 233 N.C. at 706, 65 S.E.2d at 360). In summary, based on the standard previously set out by our Supreme Court, it appears Judge Christian granted plaintiff's motion to recuse based upon the actual existence of a ground for disqualification, that such ground is supported by findings of fact as they were found to exist, and that such findings are not contested and, therefore, should be taken as true and supported by the evidence. I would hold Judge Christian correctly considered both actual partiality and the appearance thereof in determining the recusal issue.

Faced with the inability to find error in Judge Christian's order under our existing standard for recusal, I write separately for clarification regarding examining and reconciling the record with the standard our Supreme Court instructed this Court to apply. My understanding of that standard does not comport with the approach adopted by the majority in this case. I conclude there was no error in Judge Christian's order.

This conclusion does not imply wrongdoing on the part of Judge Jones. Judicial recusal does not always involve a disservice to the lit-

reason to read the scope of such portions of Judge Christian's order narrowly: if Judge Christian were referencing the entirety of the Canons in the Code of Judicial Conduct, it would be superfluous to additionally and specifically address whether there were violations of Canons 2, 3, or 5 as Judge Christian does in various portions of his order.

igants in the case or, here, an abuse concerning Judge Jones' administration of justice. Rather, our zealous guarding of the trust reposed in our judiciary by the public warrants, at times, our erring on the side of caution, and even extreme caution, lest the shadow of suspicion fall over its integrity. *Accord Fie*, 320 N.C. at 628-29, 359 S.E.2d at 776 (holding it was error for one judge not to recuse another judge despite noting that the holding did not "imply that Judge Burroughs was actually prejudiced against the defendants or that he was in fact unable to preside fairly over the trial. The appearance of a preconception of the validity of the charges against these defendants is sufficient to require a new trial").

GAIL PATRICIA KELLY, PLAINTIFF v. DANIEL JOSEPH KELLY, DEFENDANT

No. COA04-441

(Filed 21 December 2004)

1. Appeal and Error— preservation of issues—failure to object

Although plaintiff wife contends the trial court erred in an alimony case by finding the parties' net cash flow was $7,388 per month for the last few years of their marriage, this assignment of error is dismissed because: (1) plaintiff failed to object to the evidence at trial; and (2) plaintiff's argument that the trial court erred by determining that self-employment taxes did not offset defendant's pay is rejected.

2. Divorce— alimony—net income—marital portion of income

The trial court did not abuse its discretion in an alimony case by calculating defendant husband's net income and the marital portion of his income for the forty-day period between 1 September 1993 when defendant was promoted to partner, and 10 October 1993, the date of separation, because: (1) although defendant got a pay increase, he also became responsible for paying his own self-employment taxes from that period forward; (2) the trial court did not err by relying on another judge's findings, which were binding, in determining the amount defendant paid in income taxes; and (3) competent evidence supported the trial court's finding regarding defendant's required six-percent Keogh profit sharing contribution.

3. Divorce— alimony—net income—standard of living

The trial court did not abuse its discretion in an alimony case by finding defendant husband's net income did not increase significantly during the forty-day period prior to the parties' separation and that the parties' standard of living was not significantly increased, because: (1) plaintiff's reference to her prior argument regarding the trial court's error in calculating defendant's net income has already been overruled; and (2) N.C.G.S. § 50-16.5 states the trial court is to consider the parties' accustomed standard of living and not the potential standard of living.

4. Divorce— alimony—reasonableness of monthly expenses

The trial court did not err in an alimony case by finding plaintiff wife's current monthly expenses of $6,078 to be unreasonable and defendant husband's monthly expenses of $6,306 to be reasonable, because: (1) the trial court was bound by the Court of Appeals' prior decision on this issue that the prior trial court had not abused its discretion in finding that plaintiff's reasonable expenses were one-third of the amount since the total family expenses previously covered four other family members in addition to plaintiff; and (2) plaintiff had the opportunity in her first appeal to challenge the reasonableness of defendant's expenses, availed herself of this opportunity by objecting only to the inclusion of the children's expenses which were subsequently removed from the calculation, and now her new theory that was not raised in her first appeal is barred.

5. Divorce— alimony—amount

The trial court did not err by awarding plaintiff wife $550 per month in alimony, because: (1) it has already been determined that the trial court did not err by finding both parties' expenses to be reasonable; (2) the trial court awarded plaintiff seventy-five percent of the marital estate in its equitable distribution order; and (3) plaintiff failed to show the trial court abused its discretion when her net deficit is only $462 and defendant's excess income is only $894.

6. Costs— attorney fees—alimony

The trial court did not abuse its discretion by denying plaintiff wife's request for attorney fees incurred as a result of litigation regarding alimony, because: (1) a trial court's ruling to award subsistence pendente lite does not require the allowance of attorney fees; and (2) even though plaintiff was awarded permanent

alimony, nothing under N.C.G.S. § 50-16.4 requires the trial court to grant plaintiff's motion for attorney fees.

Appeal by plaintiff from order entered 18 December 2003 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 18 November 2004.

Lynne M. Garnett, for plaintiff-appellant.

Sokol & LeFante, P.A., by Lisa LeFante, for defendant-appellee.

TYSON, Judge.

Gail Patricia Kelly ("plaintiff") appeals from an order entered awarding her permanent alimony and denying her claim for attorney's fees. We affirm.

I. Background

Plaintiff and Daniel Joseph Kelly ("defendant") were married on 27 September 1974 and separated on or about 10 October 1993. The parties have three children born of the marriage, all of whom are now majority age. During the marriage, both parties worked and took courses toward obtaining college degrees. Defendant received his undergraduate degree in 1977, and plaintiff last took courses toward her degree in 1989. During the last few years of the marriage, plaintiff's average gross annual income was in the mid-$30,000.00 range, while defendant's average gross annual income was approximately $100,000.00. During the marriage, both parties committed adultery.

On 14 February 1994, plaintiff filed a complaint seeking a divorce, child custody and support, alimony, equitable distribution, and attorney's fees. On 7 October 1994, the trial court awarded plaintiff alimony *pendente lite*. On 29 November 2000, the trial court entered an equitable distribution order awarding plaintiff approximately seventy-five percent of the marital estate. The following day, the trial court entered an order finding plaintiff to be a dependent spouse. The trial court denied plaintiff's request for alimony and attorney's fees on the basis of plaintiff's disproportionate distributive award in the equitable distribution order and defendant's payment of spousal support since 7 October 1994. Plaintiff appealed.

In an unpublished opinion filed 2 August 2002, this Court reversed the trial court's order filed 30 November 2000 denying

plaintiff permanent alimony and attorney's fees. *Kelly v. Kelly*, 151 N.C. App. 748, 567 S.E.2d 468 (2002) (unpublished opinion). We held the trial court erred by: (1) attributing to plaintiff an estate based on its value at the date of separation instead of the date "before or after the commencement of an action seeking an award of permanent alimony;" (2) failing to find the parties' reasonable expenses relevant in its decision to deny alimony; (3) finding defendant's expenses for vehicles and rent payments for the parties' daughters to be "reasonable expenses" because they were "a voluntary assumption of legal obligations;" (4) finding plaintiff made no effort to complete her education or to advance in her career, or to change her employment; and (5) failing to make a finding regarding whether defendant's pay increase during the six weeks prior to the parties' separation was offset by his obligation to pay self-employment taxes. *Id.*

On remand, the trial court conducted a hearing on 27 January 2003. The trial court made additions to and changes in the findings from the 30 November 2000 order, some of which are now contested on appeal, and ordered defendant to: (1) pay plaintiff alimony commencing 28 November 2000 in the amount of $550.00 per month and terminating after four years or upon the parties' death or plaintiff's remarriage; and (2) pay plaintiff arrearage in alimony of $20,350.00 no later than 31 December 2003. The trial court denied plaintiff's request for attorney's fees. Plaintiff appeals.

II. Issues

The issues on appeal are whether the trial court erred by: (1) finding the parties' net cash flow was $7,388.00 per month for the last few years of their marriage; (2) calculating defendant's net income and the marital portion of his income for the forty-day period between 1 September 1993 and 10 October 1993, the date of separation; (3) finding defendant's net income did not increase significantly during this period and that the parties' standard of living was not significantly increased; (4) finding plaintiff's current monthly expenses of $6,078.00 to be unreasonable and defendant's monthly expenses of $6,306.00 to be reasonable; (5) calculating plaintiff's reasonable monthly expenses by dividing by three the total amount of net income available to the entire household prior to the parties' separation; (6) awarding plaintiff $550.00 per month in alimony; and (7) denying plaintiff's request for attorney's fees.

III. Alimony

A. Standard of Review

Plaintiff's first six assignments of error relate to the general issue of whether the trial court erred in its computation and award of alimony.

"Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion." *Bookholt v. Bookholt*, 136 N.C. App. 247, 249-50, 523 S.E.2d 729, 731 (1999) (citing *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982)). Our Supreme Court has cautioned this Court to apply our review "strictly" and has explained, "[A] manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing the heavy burden of proof." *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 484-85, 290 S.E.2d 599, 604 (1982).

> In determining the amount of alimony the trial judge must follow the requirements of the applicable statutes. Consideration must be given to the needs of the dependent spouse, but the estates and earnings of both spouses must be considered. "It is a question of fairness and justice to all parties."

Quick, 305 N.C. at 453, 290 S.E.2d at 658 (quoting *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E.2d 407, 410 (1976)). "The well-established rule is that findings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding." *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994) (citing *In re Estate of Trogdon*, 330 N.C. 143, 147, 409 S.E.2d 897, 900 (1991)). We address each assignment of error in turn.

B. Average Net Cash Flow

[1] Plaintiff contends the trial court erred in calculating the average net cash flow to be $7,388.00 per month for the last few years of the parties' marriage. We disagree.

This Court previously ruled on plaintiff's argument regarding this issue in our prior opinion and noted that because plaintiff failed to object to the evidence at trial, she could not sustain an appeal on the issue. *Kelly*, 151 N.C. App. 748, 567 S.E.2d 468 (original opinion page 6, n. 2) (citing N.C.R. App. P. 10(b)(1)). The only issue for the trial

court on remand was whether defendant's pay increase was offset by his self-employment taxes. In addressing that issue, the trial court determined that the self-employment taxes did not offset the pay increase and accordingly, increased the average net cash flow from $7,100.00 in the 30 November 2000 order to $7,388.00 in the 18 December 2003 order.

We reject plaintiff's argument below that the trial court erred in determining that the self-employment taxes did not offset defendant's pay. Her argument that the trial court erred in calculating the parties' average net cash flow is not properly before this Court. This assignment of error is dismissed.

C. Net Income

[2] Plaintiff contends no evidence supports the trial court's calculation of defendant's net income for the period between 1 September 1993, when he was promoted to partner, and 10 October 1993, when the parties separated. We disagree.

On 1 September 1993, defendant became a partner with Arthur Anderson. His annual income was $145,000.00. In the order entered 30 November 2000, the trial court "purposefully omitted consideration of Defendant's pay increase because it noted Defendant also became responsible for paying his own self-employment taxes from that point forward." *Kelly*, 151 N.C. App. 748, 567 S.E.2d 468 (original opinion page 7). On remand, the trial court found: (1) defendant's approximate net monthly income for 1993 prior to joining the partnership was $6,487.52; (2) defendant's net income for the period between 1 September 1993 and 10 October 1993 was $8,976.98 based on income taxes of $5,960.00 and a required Koegh payment of six percent; and (3) "defendant's net income does not appear to have increased significantly during this period and the parties' standard of living was not significantly increased."

1. Income Taxes

At trial, defendant claimed that he incurred a debt of $5,960.00 in income taxes based upon the partnership income he earned from 1 September 1993 through 10 October 1993.

On 29 November 2000, Judge Fred M. Morelock entered a judgment and order for equitable distribution that allowed defendant a credit for "$5,960.00" that he paid in income taxes for "9/1 to 10/10."

Neither party appealed this equitable distribution judgment and order. On 30 November 2000, Judge Morelock also entered an order denying plaintiff's claim for alimony and attorney's fees. Plaintiff entered notice of appeal only "from the final Order entered on November 30, 2000 . . . which denied permanent alimony and attorney's fees."

This Court reversed and remanded Judge Morelock's order for new findings based upon the record. On remand, Judge Monica M. Bousman conducted a hearing and entered further findings, including the finding that defendant paid $5,960.00 in income taxes for the period between 1 September 1993 and 10 October 1993. This figure is supported by the amount credited defendant in the equitable distribution judgment and order, which was entered by another district court judge and not appealed.

When an order is not appealed, it becomes:

> the law of the case, and other district judges were without authority to enter orders to the contrary. It is well established that no appeal lies from one superior court judge to another and that ordinarily one superior court judge may not modify, overrule or change the judgment of another superior court judge previously made in the same action.

Johnson v. Johnson, 7 N.C. App. 310, 313, 172 S.E.2d 264, 266 (1970). The trial court did not err by relying on another judge's findings, which were binding, in determining the amount defendant paid in income taxes. This assignment of error is overruled.

2. Keogh Contribution

Plaintiff next argues that defendant failed to fulfill the required six-percent Keogh contribution. At trial, plaintiff presented an Arthur Anderson U.S. Partners' Profit Sharing Report she had received from defendant's employer showing that defendant had a year-to-date "total" "contributions" of $42,457.33 to his "profit sharing (Keogh)" account for the period of "07-01-93 to -03-31-94." Plaintiff testified to the types of plans defendant had in his profit sharing plan and that defendant contributed approximately $45,500.00 to "both the Keogh and the 401(k)" between 1 July 1993 and 30 June 1994.

Defendant testified that he was *required* to make a six percent contribution to his Keogh upon becoming a partner at Arthur Anderson. During cross-examination, plaintiff's counsel asked, "in

1993, you were earning $145,000 and you were required to put 6 percent of the $145,000 into a Keogh; is that what you are saying?" Defendant replied, "That's basically the terms, although they—I don't know how they compute it. There was a time lag in that event, but that was [sic] the terms." In its equitable distribution order entered by Judge Morelock, the trial court credited defendant $45,379.00 for "Arthur Anderson—Keogh."

Competent evidence supports the trial court's finding, entered by Judge Bousman regarding defendant's contribution to the Keogh. *See Johnson*, 7 N.C. App. at 313, 172 S.E.2d at 266. This assignment of error is overruled.

D. Standard of Living Increase

[3] Plaintiff contends the trial court erred by finding that defendant's net income did not increase significantly during the period from 1 September 1993 to 10 October 1993 and that the parties' standard of living did not increase. We disagree.

In the case at bar, the former N.C. Gen. Stat. § 50-16.5 controls the determination of alimony, and the trial court was required to apply that statute. *Walker v. Walker*, 143 N.C. App. 414, 422, 546 S.E.2d 625, 630 (2001) (citing *Quick*, 305 N.C. at 453, 290 S.E.2d at 658).

> That statute provides that "alimony shall be in such amount as the circumstances render necessary, having due regard to the (1) estates, (2) earnings, (3) earning capacity, (4) condition, (5) accustomed standard of living of the parties, and (6) other facts of the particular case" . . . [.] In other words, the statute requires a conclusion of law that "circumstances render necessary" a designated amount of alimony. Our case law requires conclusions of law that the supporting spouse is able to pay the designated amount and that the amount is fair and just to all parties.

Walker, 143 N.C. App. at 422-23, 546 S.E.2d at 631 (quoting *Quick*, 305 N.C. at 453, 290 S.E.2d at 658-59; N.C. Gen. Stat. § 50-16.5).

The trial court found defendant's approximate net monthly income prior to becoming a partner in September 1993 was $6,487.52. Plaintiff has not assigned error to this portion of the trial court's findings. The trial court also found that defendant's net income for September 1993 was $6,732.73 and the marital portion of October's earnings that year was $2,244.25. In her brief, plaintiff references her prior argument regarding the trial court's error in calculating defend-

ant's net income, which we have already overruled. Accordingly, this portion of plaintiff's argument is also without merit.

Plaintiff also asserts the trial court erred in finding that the parties' standard of living did not increase. She argues that both she and defendant "were working hard together in order for both of them to share in the fruits of Defendant's increased income" and she "should be allowed to share in the higher standard of living which was possible with Defendant's higher income . . . ." This argument is without merit.

The statute clearly states that the trial court is to consider the parties' "*accustomed* standard of living," not the *potential* standard of living. N.C. Gen. Stat. § 50-16.5 (emphasis supplied) (repealed 1995 N.C. Sess. Laws, c. 319, s. 1). Plaintiff has failed to show "a manifest abuse of [the trial court's] discretion" in concluding that the parties' standard of living did not substantially increase as a result of defendant's net increase in salary of approximately $240.00 a month for the forty days prior to separation. *Bookholt*, 136 N.C. App. at 250, 523 S.E.2d at 731. This assignment of error is overruled.

E. Reasonable Expenses

[4] Plaintiff argues the trial court erred in determining the reasonableness of the parties' monthly expenses and in calculating her monthly expenses. We disagree.

" 'The determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves.' " *Id.* at 250, 523 S.E.2d at 731 (quoting *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32, *disc. rev. denied*, 306 N.C. 752, 295 S.E.2d 764 (1982)). It is well-settled in North Carolina that "[wlhere an appellate court decides questions and remands a case for further proceedings, its decisions on those questions become the law of the case, both in subsequent proceedings in the trial court and upon a later appeal, where the same facts and the same questions of law are involved." *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 41, 493 S.E.2d 460, 463 (1997) (citing *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E.2d 181 (1974)).

In her first appeal, plaintiff assigned error to the trial court's decision to set her reasonable monthly expenses at $2,366.00, one-third of the amount of the total family expenses while the family was still

together. Plaintiff contended that her monthly expenses were $6,078.00, as set out in her financial affidavit. In this Court's previous opinion, we affirmed the trial court's decision stating, "As the total family expenses previously covered four other family members in addition to Plaintiff, including the private school tuition of the parties' children, we cannot say that the trial court abused its discretion in finding Plaintiff's reasonable expenses to be one third of this amount." *Kelly*, 151 N.C. App. 748, 567 S.E.2d 468 (original opinion page 4).

On remand, the trial court determined that the total family expenses had increased slightly based on the increase in the average net cash flow. Accordingly, the trial court increased plaintiff's reasonable expenses to reflect that change. It did not disturb the methodology employed by the prior trial court on mandate from this Court's earlier decision. Judge Bousman was bound by our prior decision on this issue that the trial court had not abused its discretion in applying this method. *See Sloan*, 128 N.C. App. at 41, 493 S.E.2d at 463.

Plaintiff also assigns error to the trial court's determination of the reasonableness of defendant's monthly expenses. In her first appeal, plaintiff challenged defendant's expenses, including things he was providing for his children who had reached the age of majority and were no longer eligible for child support. This Court found that the trial court had abused its discretion by including the expenses related to the children's vehicle and rent payments in defendant's monthly expenses. We reversed and remanded for "new findings on the record." *Kelly*, 151 N.C. App. 748, 567 S.E.2d 468 (original opinion page 5-6).

On remand, the trial court, following the mandate of this Court, eliminated the children's expenses and concluded that defendant's reasonable monthly expenses were $6,306.00. The record does not reflect that the trial court made further changes in the calculation of defendant's reasonable monthly expenses, other than to find the expenses he was paying for his adult children to be "voluntary."

Plaintiff had the opportunity in her first appeal to challenge the reasonableness of defendant's expenses. She availed herself of this opportunity and objected only to the inclusion of the children's expenses. Plaintiff's argument that the trial court erred in calculating defendant's expenses is based upon a new theory that was not raised in her first appeal and is barred. *See Weil v. Herring*, 207 N.C. 6, 10,

175 S.E. 836, 838 (1934) (noting our Courts do not permit a new theory, not previously argued, because "the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]."). This assignment of error is overruled.

F. Alimony Award

[5] Plaintiff argues the trial court erred in awarding her $550.00 in alimony. Under the prior alimony statute, the trial court shall determine alimony "in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." N.C. Gen. Stat. § 50-16.5(a) (repealed 1995 N.C. Sess. Laws, c. 319, s. 1).

Plaintiff argues the trial court abused its discretion in leaving her without sufficient means to cover basic necessities while allowing defendant to maintain a substantially higher style of living." The trial court found plaintiff's reasonable monthly expenses to be $2,462.00 and her "current monthly cash flow from employment is approximately $2,000," thus leaving a net deficit of $462.00 per month. The trial court also found plaintiff's cash flow was supplemented by gifts from her long-time boyfriend. Although defendant's monthly cash flow is higher than plaintiff, the trial court found that defendant has "excess income of $894.00 per month."

We have already held the trial court did not err by finding both parties' expenses to be reasonable. Further, the trial court awarded plaintiff seventy-five percent of the marital estate in its equitable distribution judgment and order. Plaintiff has failed to show the trial court abused its discretion in awarding her $550.00 in alimony, when her net deficit is only $462.00 and defendant's excess income is only $894.00. This assignment of error is overruled.

IV. Attorney's Fees

[6] In her final assignment of error, plaintiff contends the trial court erred by failing to order defendant to pay the attorney's fees she incurred as a result of litigation regarding alimony. We disagree.

The former N.C. Gen. Stat. § 50-16.4, which was modified by the legislature in 1995 *after* plaintiff filed this action, provided:

> Counsel fees in actions for alimony.—At any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3, the court *may*, upon application of such spouse,

> enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony.

(emphasis supplied) (*modified* 1995 N.C. Sess. Laws, c. 319, s. 3). In explaining application of this statute in the trial courts, our Supreme Court has stated:

> The clear and unambiguous language of the statutes under consideration provide as prerequisites for determination of an award of counsel fees the following: (1) the spouse is entitled to the relief demanded; (2) the spouse is a dependent spouse; and (3) the dependent spouse has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof.

Rickert v. Rickert, 282 N.C. 373, 378, 193 S.E.2d 79, 82 (1972). The decision regarding whether to award attorney's fees "lies solely within the discretion of the trial judge, and that such allowance is reviewable only upon a showing of an abuse of the judge's discretion." *Id.*

A trial court's ruling to award subsistence *pendente lite* does not *require* the allowance of attorney's fees. *Id.* at 379, 193 S.E.2d at 83 (citation omitted). However, "when subsistence pendente lite or counsel fees is allowed pursuant to the statutory requirements, the *amount* of the allowance is in the trial judge's discretion, and is reviewable only upon showing an abuse of his discretion." *Id.* (citations omitted).

Plaintiff assigns error to the trial court's conclusion that:

> In this case, the Court shall exercise its discretion and deny Plaintiff's request for counsel fees on the grounds that Plaintiff is entitled to permanent alimony[,] but that she has, nevertheless, received temporary support for nearly seven years[,] and further, that the Defendant does not have the present ability to pay even his own counsel fees.

Plaintiff argues she "is entitled to the relief demanded because she was awarded permanent alimony." This argument is without merit. The trial court is afforded wide latitude in determining whether to award such fees. Further, nothing in the statute *requires* the trial court to grant plaintiff's motion for attorney's fees. *Id.* We hold the

trial court did not abuse its discretion in denying plaintiff's motion for attorney's fees. This assignment of error is overruled.

V. Conclusion

We dismiss plaintiff's assignment of error regarding the parties' average net cash flow because she failed to preserve it for appellate review. Additionally, plaintiff's assignment of error regarding the reasonableness of the parties' expenses was addressed in her first appeal and is not properly before this Court.

Plaintiff failed to show the trial court abused its discretion in: (1) calculating defendant's net income based on income tax payments of $5,906.00; (2) crediting defendant's net income for his required six-percent Keogh contribution; (3) its findings regarding the parties' standard of living; (4) awarding plaintiff $550.00 in alimony; and (5) denying plaintiff's request for attorney's fees. The trial court's order is affirmed.

Affirmed.

Judges TIMMONS-GOODSON and GEER concur.

TAMMY BARBOUR, EMPLOYEE, PLAINTIFF v. REGIS CORP., EMPLOYER; EMPLOYERS INSURANCE OF WAUSAU, CARRIER, DEFENDANTS

No. COA03-1134

(Filed 21 December 2004)

1. Workers' Compensation— causal connection between injury and condition—fall while styling hair

The evidence in a workers' compensation case supported the Industrial Commission's findings that plaintiff's cervical condition was causally related to her work-related fall. Even though one doctor testified that his opinion was based on speculation, there was other testimony that a causal connection existed to a reasonable degree of medical certainty; the Commission is the sole judge of the witnesses and the weight of their testimony.

2. Workers' Compensation— ongoing disability—evidence of suitable employment—not forthcoming

The Industrial Commission did not err by awarding ongoing disability benefits where competent evidence supported the finding of a compensable work-related injury, plaintiff presented evidence of ongoing disability, and defendants did not then carry their burden of showing that suitable jobs were available or that plaintiff had refused suitable employment.

Appeal by defendants from an opinion and award entered 30 April 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 August 2004.

Law Offices of George W. Lennon, by George W. Lennon and W. Bain Jones, Jr., for plaintiff-appellee.

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

HUNTER, Judge.

By this appeal, Regis Corporation and Employers Insurance of Wausau ("defendants"), challenge the Industrial Commission's opinion and award of temporary total disability compensation and medical expenses to Tammy Barbour ("plaintiff"). Specifically, defendants contend (I) plaintiff's cervical condition is not causally related to her original injury by accident and therefore not compensable; (II) plaintiff is not disabled under the North Carolina's Workers' Compensation Act and therefore she is not entitled to ongoing disability benefits; and (III) defendants are not estopped from denying plaintiff's cervical injury claim. After careful review, we affirm the Commission's opinion and award.

On 1 June 1998, plaintiff was a hair salon manager working for Smart Style Regis in Smithfield, North Carolina. Her duties included monitoring inventory, hiring personnel, making bank deposits and hair styling. On 1 June 1998, plaintiff was removing hair rollers from a customer's hair. After she finished one side of the customer's hair, she started walking around the chair to the other side of the customer to work on that side of the customer's hair. As she was walking, plaintiff's feet slid out from under her and she landed on her left shoulder and neck. After falling, she finished working on her customer and went home to rest because of pain.

Later that evening, plaintiff sought treatment with Johnston Memorial Hospital because the pain had not dissipated. She advised the hospital that she was suffering from neck and left shoulder pain. She was prescribed pain medication, ordered not to work for two days and was advised to follow up with Dr. Richard John Alioto.

On 5 June 1998, plaintiff had her initial visit with Dr. Alioto. She informed Dr. Alioto that she fell landing on her left shoulder and neck at work and that she was still experiencing pain and numbness in her left arm. Dr. Alioto diagnosed plaintiff with left AC joint sprain, probably grade 1 or 2. After a few follow-up visits, plaintiff did not receive any treatment from Dr. Alioto from 25 June 1998 until 7 January 1999.

After plaintiff returned to work at the end of June 1998, she continued to experience pain. However, she endured the pain because the salon was "short-staffed." At the beginning of the new year, she returned to Dr. Alioto complaining of pain radiating up into her neck, the shoulder area, and in her arm. Dr. Alioto diagnosed her with rotator cuff tendinitis and AC joint arthritis. After her follow-up visit on 26 January 1999, Dr. Alioto diagnosed her with a cervical strain. After several more visits, plaintiff underwent surgery on 15 March 1999.

Immediately after the surgery, plaintiff remained out of work for four weeks. During this time period, plaintiff returned to Dr. Alioto for a post-surgery visit on 25 March 1999. At that time, Dr. Alioto reported plaintiff was doing well. Thereafter, she returned to work on light duty which consisted of scheduling, greeting customers, ordering inventory, and making bank deposits. Approximately two months after the surgery, in May, plaintiff resumed hairstyling for four hours a day. After she resumed hairstyling, plaintiff felt pain in the left side of her neck, shoulder and arm. Plaintiff discussed her pain with Dr. Alioto during her doctor's visits at the end of April, in May and in June. On 1 July 1999, Dr. Alioto suspected that her cervical problems were aggravated by her fall. However, during his deposition, Dr. Alioto stated that his suspicions were speculative and could not state to a reasonable degree of medical certainty that plaintiff's work-related fall caused or aggravated her cervical condition.

On 1 July 1999, Dr. Alioto also gave plaintiff a referral for a neurosurgical evaluation. On 28 September 1999, plaintiff had her first appointment with Dr. William S. Lestini, an orthopaedic surgeon. During the course of his treatment, Dr. Lestini conducted several diagnostic tests, prescribed medications and physical therapy, and

performed a nerve root block in plaintiff's upper neck. Dr. Lestini testified to a reasonable degree of medical certainty that plaintiff's neck pain was either caused or aggravated by her 1 June 1998 injury.

Finally, plaintiff was referred to Dr. James S. Fulghum, III, a neurosurgeon for a review and assessment of plaintiff's condition. He agreed with the finding that plaintiff had degenerative disc disease in her cervical area and opined that falling as plaintiff did could have caused an acceleration of degenerative disc disease. Dr. Fulghum also stated to a reasonable degree of medical certainty that if plaintiff fell, suffered an injury, and experienced pain symptoms afterwards without having experienced pain prior to the fall, plaintiff's pain was caused by the fall. However, he also testified that if she had no complaints of neck pain for a year and then only complained of neck pain after her shoulder had been worked on, then it would be very unlikely that the injury had anything to do with the neck pain.

After plaintiff suffered her work-related injury on 1 June 1998, defendants filed a Form 60 on 16 June 1998, admitting plaintiff's right to compensation describing her injury as "MPRT," pain in multiple body parts, and began receiving temporary total disability benefits. After one year of treatment and surgery, plaintiff was terminated from her employment with Smart Style Regis in June 1999. The next year, Dr. Lestini opined that plaintiff was at maximum medical improvement for her neck and Dr. Alioto opined that plaintiff was at maximum medical improvement on 2 March 2000 and assigned a fourteen percent (14%) permanent partial impairment of the left upper extremity.

In July 2000, plaintiff was given work restrictions and began working with Benson Chiropractic as a receptionist. However, on 24 August 2000, plaintiff resigned from her employment due to severe neck pain. In November 2000, defendants filed a Form 33 request for hearing seeking to terminate benefits on the grounds that plaintiff was no longer disabled. On 28 February 2002, the deputy commissioner found and concluded plaintiff's "cervical stenosis, degenerative disc disease and accompanying pain were not caused by, aggravated by or accelerated by plaintiff's June 1, 1998 injury by accident." The deputy commissioner concluded plaintiff's "pain which prevented [her] from continuing her employment" was "not caused by or contributed to by her June 1, 1998 compensable injury." After appeal before the Full Commission, on 30 April 2003, the Commission reversed the deputy commissioner and determined that plaintiff's cervical condition and degenerative disc disease were aggravated or

accelerated by the 1 June 1998 fall, that plaintiff has not reached maximum medical improvement for her cervical neck condition, and that plaintiff was disabled and unable to earn wages in her regular employment or in any other employment after 24 August 2000. Accordingly, the Commission ordered defendants to pay all medical expenses incurred or to be incurred as a result of the injury by accident, including treatment of plaintiff's cervical condition. Defendants appeal.

[1] Defendants first contend the Commission's findings of fact determining plaintiff's cervical condition was causally related to her work-related fall on 1 June 1998 "completely lacked competent evidence to support them" and were "based on nothing more than mere speculation and conjecture in violation of the law." However, we do not reach defendants' contentions because they have admitted liability and compensability for plaintiff's neck injury.

On 16 June 1998, defendants filed a Form 60 "Employer's Admission of Employee's Right to Compensation Pursuant to N.C. Gen. Stat. § 97-18(b)" in which defendants describe plaintiff's injury as "Pain MPRT," or pain in multiple body parts, which resulted from an injury occurring on 1 June 1998. As explained in *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 159-60, 542 S.E.2d 277, 281-82 (2001), an employer who files a Form 60 pursuant to N.C. Gen. Stat. § 97-18(b) will be deemed to have admitted liability and compensability.[1]

Nonetheless, defendants argue they should be allowed to contest the compensability of plaintiff's cervical condition because the con-

1. "G.S. § 97-82(b) specifically states that payment pursuant to G.S. § 97-18(b) (a Form 60 Payment) 'shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury for which payment was made.' Moreover, Form 60 states only '[y]our employer admits your right to compensation for an injury by accident on (date) . . . .' Below this acknowledgment of liability is a section provided for a description of the accident, the average weekly wage and resulting compensation rate, and the date which disability begins and ends. The section is captioned, in bold print and capital letters: '**THE FOLLOWING IS PROVIDED FOR INFORMATIONAL PURPOSES ONLY AND DOES NOT CONSTITUTE AN AGREEMENT.**'

In contrast, the North Carolina Industrial Commission Form 21, which constitutes an award of the Commission as to both compensability and amount when properly approved states explicitly that the parties agree and stipulate not only as to compensability but also to the employee's average weekly wage. 'Once the Form 21 agreement [is] reached and approved "no party . . . [can] thereafter be heard to deny the truth of the matters therein set forth . . . ." ' " *Watts v. Hemlock Homes of the Highlands, Inc.*, 141 N.C. App. 725, 728, 544 S.E.2d 1,3 (2001) (citations omitted) (emphasis omitted).

dition was non-work related. Defendants contend that "[t]o hold otherwise would be unfair to the employer as a declaration against its interest even when the plaintiff does not have a valid claim." We decline to address defendants' contentions because the Commission correctly concluded plaintiff's cervical condition was either caused or aggravated by her 1 June 1998 work-related fall.

In its Opinion and Award, the Commission found: "34. Plaintiff's cervical stenosis and degenerative disc disease were aggravated or accelerated by the June 1, 1998 injury by accident." In challenging this finding, defendants reference the dissenting opinion of Commissioner Renee Riggsbee which stated a finding that a causal relationship exists between plaintiff's neck condition and the fall would result from a "strained reading of the totality of the medical depositions." Commissioner Riggsbee further stated "[m]edical causation should be based on competent medical opinion and not speculation and conjecture." After careful review of the transcript, depositions and the record below, we affirm the Commission's finding of a causal relationship between plaintiff's work-related injury and her cervical condition.

In reviewing an Opinion and Award from the Industrial Commission:

> "The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). Thus, on 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." *Anderson* [*v. Lincoln Constr. Co.*], 265 N.C. [431,] 434, 144 S.E.2d [272,] 274 [(1965)].
>
> N.C.G.S. § 97-86 provides that "an award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact." N.C.G.S. § 97-86 (1991). As we stated in *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 141 S.E.2d 632 (1965), "[t]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Id.* at 402, 141 S.E.2d at 633. The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every

reasonable inference to be drawn from the evidence. *Doggett v. South Atl. Warehouse Co.*, 212 N.C. 599, 194 S.E. 111 (1937).

Adams v. AVX Corp., 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

While in this case Dr. Alioto testified that his 1 July 1999 statement that plaintiff's cervical stenosis was aggravated by her 1 June 1998 work-related fall was speculative, Dr. Lestini testified to a reasonable degree of medical certainty that a causal connection existed between plaintiff's neck condition and her work-related injury. Specifically, Dr. Lestini testified as follows:

> [Q.] If you will, for just a moment, assume that Tammy Barbour experienced no neck pain—as we submit she's testified earlier live in a hearing in this cause—before her fall on 6-1-98; assuming further, if you will, that she had neck pain in the aftermath of her 6-1-98 work fall as she has said she did; assume further that she complained of neck pain throughout her medical appointments with Dr. Alioto, an initial treating physician who, in fact, did surgery on her shoulder.
>
> If you make those assumptions and based upon those assumptions, do you have an opinion satisfactory to yourself as to a reasonable degree of medical certainty as to whether her neck pain could have been proximally caused by the 6-1-98 fall?
>
> . . . .
>
> A. Given those assumptions, I have no reason to doubt that the current symptoms are not related to the initial injury as described.

Shortly thereafter, Dr. Lestini testified as follows:

> [Q.] I understand you to say that to a reasonable degree of medical certainty the injury then proximately caused the neck—the fall proximately caused the neck injury?
>
> . . . .
>
> A. I believe we're saying the same thing and once again I believe, yes, that's the—I agree with that.

Moreover, Dr. Lestini opined that the 1 June 1998 fall would have aggravated any preexisting neck condition.

> Q. Okay. Now, given the—if you make the same assumptions that I gave you earlier, would it not be fair to say also as to a rea-

> sonable degree of medical certainty that if there were preexisting degenerative diseases, that such a fall may have aggravated the condition of her neck and caused her neck pain?
>
> . . . .
>
> A. I believe that's true.

Dr. Fulghum also testified to a relationship between plaintiff's fall and an acceleration of plaintiff's degenerative disc condition.

> Q. . . . a fall such as was described to you, her falling on a floor and on her left side and on her neck could have caused an acceleration of a degeneration or disc disease; is that correct?
>
> A. Yes, sir.

In each of the hypotheticals, the doctors were told to assume plaintiff complained of neck pain after the fall. Our review of the record indicates plaintiff complained of neck pain immediately after the fall. Indeed, she stated she had left side neck pain when she reported to Johnston Memorial Hospital and, during her initial visit with Dr. Alioto, the doctor reported she appeared uncomfortable in the neck area. Thus, we conclude the Commission's finding that plaintiff's 1 June 1998 work-related fall aggravated or accelerated her cervical stenosis and degenerative disc disease was supported by competent evidence. Even though Dr. Alioto testified that his opinion that there was a causal relationship was based upon mere speculation, " 'the Commission is the fact finding body' " and " 'is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (citations omitted). As stated, "on 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.' " *Id.* at 681, 509 S.E.2d at 414 (citation omitted).

[2] Defendants next contend plaintiff is not entitled to ongoing disability benefits from 24 August 2000, the last date worked, because she is neither disabled as defined by the Workers' Compensation Act nor is her cervical condition compensable because it is a non-work related condition. As stated in *Sims*,

> admitting compensability and liability, whether through notification of the Commission by the use of a Form 60 or through paying benefits beyond the statutory period provided for in G.S.

> § 97-18(d), does not create a presumption of continuing disability as does a Form 21 agreement entered into between the employer and the employee.

Sims, 142 N.C. App. at 159-60, 542 S.E.2d at 281-82. Thus, "[t]he burden of proving disability . . . remains with plaintiff." *Id.* at 160, 542 S.E.2d at 282.

The Workers' Compensation Act compensates an employee for work related injuries which prevent him from making the equivalent amount of wages he made before the injury. *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 475, 374 S.E.2d 483, 485 (1988). In order to receive disability compensation under the Act, the mere fact of an on the job injury is not sufficient. The injury must have impaired the worker's earning capacity. *Id.*; *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 155 S.E.2d 755 (1967).

N.C. Gen. Stat. § 97-2(9) (2003) defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." In order to find a worker disabled under the Act, the Commission must find:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). Initially, the claimant must prove both the extent and the degree of his disability. *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. at 475, 374 S.E.2d at 485. However, once the disability is proven, "there is a presumption that it continues until 'the employee returns to work at wages equal to those he was receiving at the time his injury occurred.' " *Watson*, 92 N.C. App. at 476, 374 S.E.2d at 485 (quoting *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971)). That presumption of disability continues until the defendant offers evidence to rebut the presumption. At that point, the burden shifts to the employer to show that the worker is employable. *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994). An employer may rebut the continuing presumption of total disability either by showing the employee's capacity to earn the same wages as before the injury or by showing the employee's capacity to

earn lesser wages than before the injury. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 209, 472 S.E.2d 382, 388 (1996) (Walker, J., concurring). To rebut the presumption of continuing disability, the employer must produce evidence that:

> (1) suitable jobs are available for the employee;
>
> (2) that the employee is capable of getting said job taking into account the employee's physical and vocational limitations;
>
> (3) and that the job would enable the employee to earn some wages.

Id. At any time, the employer may rebut the presumption of disability by showing that the employee has unjustifiably refused suitable employment. N.C. Gen. Stat. § 97-32 (2003); *id.*

In this case, defendants' argument that plaintiff is not entitled to ongoing disability benefits is based upon their contention that plaintiff's cervical condition was non-work related and that plaintiff has not sought treatment for her left shoulder or left AC joint since 1 July 1999. However, as previously discussed, competent evidence supports the Commission's finding that plaintiff's cervical condition is compensable and work-related. Furthermore, defendants concede in their brief that "the only evidence Plaintiff has provided to support her claim of ongoing disability is in regards to her cervical condition." As plaintiff has presented evidence of ongoing disability, the burden shifted to defendants to show that plaintiff refused suitable employment or that suitable jobs were available to plaintiff which plaintiff was capable of acquiring given her physical and vocational limitations and would have paid her some wages. *See id.* On appeal, defendants do not argue suitable employment was available or that plaintiff refused suitable employment. Furthermore, defendants do not contend that the following conclusion of law was unsupported by sufficient findings of fact based upon competent evidence:

> 5. . . . Plaintiff met her burden of proving that she is physically, as a result of the work-related injury, incapable of any work. . . . Defendants have not shown that suitable jobs are available to plaintiff and that plaintiff is capable of obtaining a suitable job, taking into account both physical and vocation limitations.

Accordingly, we overrule this assignment of error.[2]

2. Defendants also reference plaintiff's failure to file a Form 28U after leaving her employment with Benson Chiropractic on 24 August 2000. The failure to complete a Form 28U, "Employee's Request that Compensation be Reinstated After Unsuccessful

Finally, defendants contend they are not estopped to deny plaintiff's unrelated and non-compensable cervical injury claim because they filed a Form 60, paid compensation and did not deny plaintiff's claim within ninety days of filing the Form 60. As we have affirmed the Commission's findings and conclusions determining plaintiff's cervical condition was work-related and that plaintiff is entitled to ongoing disability benefits, we decline to address this assignment of error.

Affirmed.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

MARY R. BRIDGES, WILLIAM D. BRIDGES, MAX G. OATES, BETTY M. PADGETT, J. GENE MAUNEY, AND MARY C. SIMS, PLAINTIFFS v. BOBBY GENE OATES, HOWARD LEWIS WEBBER AND DENORRIS BYERS, DEFENDANTS

No. COA03-1191

(Filed 21 December 2004)

1. Churches and Religion— necessary party—conversion of church property

The trial court erred by dismissing plaintiff church officers' claims for conspiracy to intentionally inflict emotional distress, conspiracy to negligently inflict emotional distress, and slander in an action against defendant church officers for allegedly converting church property, mishandling church funds, and acting contrary to the decisions made by the congregation, even though plaintiffs did not join the pertinent church as a defendant because: (1) these claims do not involve the church congregation as a whole, but are specific allegations against defendants regarding alleged torts committed against plaintiffs; and (2) the church is not a necessary party to the slander and conspiracy to intentionally or negligently inflict emotional distress claims.

Trial Return to Work," does not preclude plaintiff from receiving ongoing disability benefits. *See Jenkins v. Public Servive Co. of N.C.*, 134 N.C. App. 405, 412, 518 S.E.2d 6, 10 (1999), *reversed in part on other grounds by*, 351 N.C. 341, 524 S.E.2d 805 (2000) (indicating a Form 28U would merely reinstate compensation pending the Commission's determination on whether the return to work was a failed return to work due to a compensable work-related injury).

2. Churches and Religion— derivative action—incorporated church—necessary party

The trial court erred by dismissing plaintiff church officers' claims for civil conversion, conspiracy to breach constitution and bylaws, negligent misrepresentation, breach of bylaws and constitution, conspiracy to commit civil conversion, constructive fraud, and breach of fiduciary responsibilities based on an alleged failure to join the pertinent church as a necessary party, because: (1) plaintiffs have a right to maintain an action on behalf of the church against defendants, other church officers whom plaintiffs allege have converted church property, mishandled church funds, and have acted contrary to the decisions made by the congregation if the action is structured properly; (2) plaintiffs' complaint must be brought as a derivative action since plaintiffs allege the church is incorporated, and plaintiffs' suit could proceed if the church is not incorporated if the requirements of N.C.G.S. § 61-1 et seq. are met; and (3) plaintiffs' original complaint alleged a demand was made upon the officers, plaintiffs alleged they were acting on behalf of the church, and plaintiffs named the church as a defendant in the amended complaint within the time allowed by the trial court.

Appeal by plaintiffs from an order entered 2 May 2003 by Judge Forrest D. Bridges in Cleveland County Superior Court. Heard in the Court of Appeals 24 August 2004.

Pamela A. Hunter for plaintiff-appellants.

No brief for defendant-appellees.

HUNTER, Judge.

Mary R. Bridges, William D. Bridges, Max G. Oates, Betty M. Padgett, J. Gene Mauney and Mary C. Sims ("plaintiffs"), contend the trial court erroneously dismissed their complaint for failure to join Washington Missionary Baptist Church as a defendant. After careful review, we reverse the order below.

Plaintiffs and defendants are members of Washington Missionary Baptist Church. Plaintiffs Mary R. Bridges, William D. Bridges, and Betty M. Padgett are members of the Political Action Committee of which Padgett is the chairperson. Padgett is also a member of the bylaws committee and Mr. Bridges is a trustee. Defendants also serve as officers of the church. Denorris Byers is the pastor, Bobby Gene

Oates is the chairman of the trustee board and a member of the finance committee and Howard Lewis Webber is chairman of the finance committee and a trustee.

The church is an organized congregational church governed by a church constitution and by-laws. Decisions are made by a majority vote of the church congregation. Plaintiffs complain of two actions they contend are contrary to the church constitution and by-laws, the majority vote of the congregation, and constitute tortious conduct.

First, in November 1998, a Finance Committee report indicated that approximately $35,000.00 of church funds were missing. The Political Action Committee, the Finance Committee and the Trustee Board met with an attorney to determine potential solutions to the problems regarding the missing funds. After this meeting, representatives from these committees met with the Deacon Board and the interim pastor, Reverend Byers, to discuss the problems and potential solutions. At the meeting, Reverend Byers indicated a congregational meeting would not be held, no votes would be cast, and no minutes would be taken. According to the complaint, Defendants Bobby Oates, Trustee Board Chairman, and Webber, Finance Committee Chairman, supported and enforced the pastor's decision. Plaintiffs contend the missing funds were used by defendants for their personal use.

Second, plaintiffs complain that Bobby Oates and Webber have allowed Reverend Byers to continue as pastor and have paid him contrary to the majority vote of the congregation. In December 1997, the church congregation contracted with Reverend Byers to serve as interim pastor for one year. Near the end of the contractual year, the congregation by majority vote decided that Reverend Byers was a candidate for the position of minister at the church. Pursuant to church by-laws, following the expiration of the interim pastor contract and two consecutive morning services, a congregational meeting was held to determine whether Reverend Byers would become the church pastor. In January 1999, the members present voted by secret ballot and Reverend Byers did not receive the necessary two-thirds of the vote required by the by-laws for him to assume the role of pastor. According to the by-laws, Reverend Byers was to be excused as a candidate for pastor. However, Reverend Byers remained as "acting pastor" after the vote notwithstanding the congregational vote and the expiration of the interim pastor contract. Moreover, defendants Bobby Oates and Webber continued to pay

Reverend Byers a salary, including unapproved salary increases and benefits, out of church funds.

After plaintiffs expressed their dissatisfaction with these occurrences, plaintiffs allege defendants began encouraging the church congregation during several church services to excommunicate them from the church and made several comments indicating plaintiffs were "trying to destroy the Church," and had "engaged in acts . . . not Christian in nature."

In July 1999, plaintiffs filed a complaint against defendants asserting four claims arising out of the aforementioned occurrences. After taking a voluntary dismissal in December 2000, plaintiffs refiled their complaint in December 2001, which was amended in June 2001. In their amended complaint, plaintiffs asserted claims for civil conversion, conspiracy to intentionally inflict emotional distress, conspiracy to negligently inflict emotional distress, slander, conspiracy to breach constitution and by-laws, negligent misrepresentation, breach of by-laws and constitution, conspiracy to commit civil conversion, constructive fraud, and breach of fiduciary responsibility. Defendants moved to dismiss the complaint for failure to join Washington Missionary Baptist Church as a party and failure to state a claim upon which relief can be granted. After a 30 January 2003 hearing, the trial court filed a written order on 12 February 2003 stating defendants were entitled to relief in its motion for failure to join a necessary party and for failure to state a claim upon which relief can be granted as to the slander claim, but allowed plaintiffs ten days to amend the complaint. On 10 February 2003, plaintiffs filed a second amended complaint but did not serve defendants until 14 April 2003. The record contains two alias and pluries civil summons dated 10 February 2003 and 12 March 2003. Prior to being served, defendants renewed its motion to dismiss for failure to join a necessary party contending plaintiffs had not complied with the trial court's order given in open court on 30 January 2003 and filed on 13 February 2003. On 2 May 2003, the trial court granted defendants' motion. Plaintiffs appeal.

[1] As explained in *Insurance Co. v. Walker*, 33 N.C. App. 15, 234 S.E.2d 206 (1977):

> G.S. 1A-1, Rule 17(a) of the North Carolina Rules of Civil Procedure provides that "[e]very claim shall be prosecuted in the name of the real party in interest . . . [.]" Although Rule 17 by its terms applies only to parties plaintiff, the rule is applicable

> to parties defendant as well. A real party in interest is . . . a party who is benefited 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." The real party in interest is the party who by substantive law has the legal right to enforce the claim in question.

Id. at 18, 234 S.E.2d at 209 (citations omitted) (emphasis omitted). Applying these rules to this case, plaintiffs' claims for conspiracy to intentionally inflict emotional distress, conspiracy to negligently inflict emotional distress, and slander should not have been dismissed. Plaintiffs contend defendants committed these alleged torts against plaintiffs and the church was the forum in which plaintiffs contend defendants engaged in these allegedly tortious activities. Specifically, plaintiffs contend defendants conspired to intentionally or negligently inflict emotional distress by "proclaiming during various Church services that . . . Plaintiffs . . . be excommunicated from the Church" because plaintiffs made inquiries about the missing money. Plaintiffs also contend defendants made slanderous comments, such as:

> Plaintiffs are not working towards the mission of the Church; . . . [p]laintiffs have engaged in acts which are not Christian in nature; . . . [p]laintiffs deserve to be excommunicated because they are trying to destroy the Church; . . . [and] the Church would be in a better position to prosper if the Plaintiffs were not members.

These claims do not involve the church congregation as a whole but are specific allegations against defendants regarding alleged torts committed against plaintiffs. Washington Missionary Baptist Church is not a necessary party to the slander and conspiracy to intentionally or negligently inflict emotional distress claims. Therefore, the trial court erroneously dismissed these three claims.

[2] Plaintiffs also challenge the trial court's order dismissing the other claims in their complaint for failing to join a necessary party, Washington Missionary Baptist Church. The trial court based its decision upon three grounds:

(a) the designation of Washington Missionary Baptist Church as "as a corporation or as an unincorporated association or other entity" given the fact this lawsuit has been pending in

his [sic] present or predecessor form for almost four (4) years, the designation of the church under such vague description does not constitute any sort of reasonable effort to name the church as a party defendant.

(b) At this time no civil summons appears in the file, although plaintiffs counsel has offered what appears to be the original of an alias and pluries summons, issued by the clerk on March 12, 2003, directed to defendant 1 Denorris Byers, . . . defendant 2 Washington Missionary Baptist Church . . . . Plaintiffs' counsel also asserts to the Court that an original summons was issued on February 12, 2003.

(c) In plaintiffs second amended complaint no allegations against Washington Missionary Baptist Church are included so as state [sic] any claim whatsoever against Washington Missionary Baptist Church thereby making the addition of said party within the caption of the complaint a nullity.

We first address the trial court's finding that plaintiffs failed to make any allegations or assert any claims against Washington Missionary Baptist Church thereby making the church's inclusion in the caption a mere nullity.

Plaintiffs assert claims for civil conversion, conspiracy to breach constitution and by-laws, negligent misrepresentation, breach of by-laws and constitution, conspiracy to commit civil conversion, constructive fraud, and breach of fiduciary responsibilities. In each of these claims, plaintiffs contend they have "suffered actual, special and punitive damages, jointly and severally, in excess of $10,000.00" arising from defendants' conduct. A closer analysis of these claims reveals that any legally cognizable harm or damages arising from the defendants' alleged actions was experienced by the entire Washington Missionary Baptist Church congregation and not solely these individual plaintiffs. Indeed, each of these claims reference how defendants' actions constituted a breach of a duty owed to the church. For example, negligent misrepresentation:

These Defendants as officers of the religious organization maintain a duty to fully and accurately disclose the financial status and affairs of the religious organization.

These Defendants breached its duty in failing to disclose to Plaintiffs and other members of the religious organization that

financial resources of said organization have been utilized to secure personal debts and responsibilities of the Defendants.

Breach of By-laws and Constitution:

These Defendants, in the collection and distribution of monies paid by these Plaintiffs, for the benefit of the Church held themselves out as ready, willing and able to abide by the By-Laws and constitution of the regulations of the Church in carrying out their function.

These Defendants, jointly and severally are in breach under this Count, including, but not limited to the following ways . . . .

Breach of Fiduciary Responsibility:

The Defendants were placed in a fiduciary capacity to maintain the assets of the religious organization.

In accordance with said position of trust, these Plaintiffs have entrusted substantial monies to these Defendants which Plaintiffs paid on behalf of the religious organization.

These Defendants have breached their respective fiduciary responsibilities to these Plaintiffs by the acts complained of in all previous Counts, to the detriment of said religious organization.

Although plaintiffs contend they were individually harmed by defendants' actions because they made monetary donations to the church and are thereby entitled to monetary damages, North Carolina law indicates trustees are accountable to the church for any donations given to the church. *See* N.C. Gen. Stat. § 61-2 (2003) (stating that in regards to donations, real and personal property, trustees "shall be accountable to the churches, denominations, societies and congregations for the use and management of such property"). Thus, Washington Missionary Baptist Church suffered any harm in this case since defendants as Pastor, Chairman of the Trustee Board and Chairman of the Finance Committee owed a duty to the church. Accordingly, the trial court's determination that plaintiffs failed to make any allegations or assert any claims against the church making the addition of the church to the caption a nullity was erroneous. Rather, the action should have been prosecuted on behalf of the church.

The general rule seems to be that "(t)he right of action by or against religious societies and questions of parties and procedure

> in such actions are governed in the case of religious corporations by the rules governing actions by or against corporations generally, and in case of unincorporated ecclesiastical bodies, by the principles applicable in the case of other voluntary societies and associations."

Goard v. Branscom, 15 N.C. App. 34, 37, 189 S.E.2d 667, 669, *cert. denied*, 281 N.C. 756, 191 S.E.2d 354 (1972) (emphasis omitted). In their original complaint, which was incorporated by reference in their amended complaint, plaintiffs allege Washington Missionary Baptist Church was incorporated.

Under the North Carolina Business Corporation Act, N.C. Gen. Stat. §§ 55-7-40, 55-7-40.1, 55-7-41, and 55-7-42, plaintiffs have standing to bring a derivative proceeding. As explained in the official comments to N.C. Gen. Stat. § 55-7-40 (2003), "the derivative action has historically been the principal method of challenging allegedly improper, illegal, or unreasonable action by management." Thus, "a shareholder may bring a derivative proceeding in the superior court of this State." N.C. Gen. Stat. § 55-7-40.

In the context of churches, a church member may sue on behalf of the church. As early as 1891, our Supreme Court recognized that a member of a congregational church has standing to maintain an action on behalf of the congregation when a trustee has acted beyond the scope of his or her authority. *See Nash v. Sutton*, 109 N.C. 550, 14 S.E. 77 (1891). In *Nash v. Sutton*, our Supreme Court stated that

> where . . . there is no higher governing body in any denomination than the congregation, every member has such a beneficial interest as would enable him, in behalf of his brethren and associates, to maintain an action to restore a lost title deed for the church at which he worships, and for the removal of trustees who have attempted to defraud their beneficiaries, and for the substitution of others or the adjudication that the title is in the congregation at large.

Id. at 553, 14 S.E. at 78. This holding was based upon The Code of North Carolina § 185 (1883), of which the modern version, N.C. Gen. Stat. § 1-70, was repealed by 1967 N.C. Sess. Laws ch. 954, § 4. The 1883 Code provided:

> Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be

> obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or where the parties may be very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

Although this statutory provision has been repealed, comparable provisions exist in our current General Statutes, N.C. Gen. Stat. §§ 1A-1, Rules 19(a) and 23(a) (2003). These provisions provide in pertinent part:

> [Rule 19](a) *Necessary joinder.*—Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint . . . .
>
> [Rule 23](a) *Representation.*—If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

Thus, plaintiffs in the case *sub judice* are not precluded from prosecuting a complaint against defendants, whom they allege have derived an improper personal financial benefit from the transaction, committed gross negligence or willful or wanton misconduct that resulted in damage or injury, not acted within the scope of his official duties, or not acted in good faith. *See* N.C. Gen. Stat. § 61-1. Plaintiffs may maintain this action if it is structured properly.

In a derivative action, "[o]rdinarily, the right to sue officers of a corporation for mismanagement is in the corporation. Relief must be sought through the corporation or in an action to which it is a party." *Parrish v. Brantley*, 256 N.C. 541, 544, 124 S.E.2d 533, 536 (1962). "Procedurally, the . . . plaintiffs must first seek to obtain their remedy within the corporation itself, unless such demand would be futile." *Alford v. Shaw*, 72 N.C. App. 537, 539-40, 324 S.E.2d 878, 881 (1985), *modified and aff'd*, 320 N.C. 465, 358 S.E.2d 323 (1987); N.C. Gen. Stat. § 55-7-42 (2003).

> The demand requirement serves the obvious purpose of allowing the corporation the opportunity to remedy the alleged problem without resort to judicial action, or, if the problem cannot be

> remedied without judicial action, to allow the corporation, as the true beneficial party, the opportunity to bring suit first against the alleged wrongdoers.

Alford, 72 N.C. App. at 540, 324 S.E.2d at 881. North Carolina statutes do not require any demand to be made on shareholders. Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 17.03(3) (2002). According to plaintiffs' original complaint, incorporated by reference into each of the amended complaints, plaintiffs allege they made a demand upon defendants to cease the actions deemed contrary to the church by-laws and the decisions made by the congregation and plaintiffs allege they are acting on behalf of Washington Missionary Baptist Church.[1] Plaintiffs are also church officers seeking to redress the wrongs allegedly committed by other officers of the church.

The trial court also dismissed plaintiffs' complaint because:

> (a) the designation of Washington Missionary Baptist Church as "as a corporation or as an unincorporated association or other entity" given the fact this lawsuit has been pending in his [sic] present or predecessor form for almost four (4) years, the designation of the church under such vague description does not constitute any sort of reasonable effort to name the church as a party defendant.

In a derivative action, "the corporation itself . . . is a necessary party to the action and is normally joined as a nominal defendant." Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 17.05(2) (2002). In this case, although the caption vaguely described the church as either a corporation or unincorporated association, plaintiffs alleged the church was incorporated.

Finally, the trial court dismissed plaintiffs' action because:

> (b) At this time no civil summons appears in the file, although plaintiffs counsel has offered what appears to be the original of an alias and pluries summons, issued by the clerk on March 12, 2003, directed to defendant 1 Denorris Byers, . . . defendant 2, Washington Missionary Baptist Church . . . . Plaintiffs' counsel also asserts to the Court that an original summons was issued on February 10, 2003.

1. We note that in a 4 November 2002 hearing and the written order filed on 12 November 2002 regarding several defense motions, including failure to join a necessary party, the trial court denied plaintiffs' oral motion to make Washington Missionary Baptist Church a party.

According to the 12 February 2003 written order filed after the 30 January 2003 hearing, the trial court allowed plaintiffs ten days to amend its complaint to add Washington Missionary Baptist Church as a party. The record indicates an amended complaint adding Washington Missionary Baptist Church as a defendant was filed on 10 February 2003, which was within the time allowed by the trial court. Alias and pluries summons were issued to Howard Lewis Webber, Bobby Gene Oates, Denorris Boyd, and Washington Missionary Baptist Church on 10 February 2003 and 12 March 2003. Accordingly, we conclude the trial court erroneously determined plaintiffs failed to comply with the 12 February 2003 written order.

In sum, plaintiffs have a right to maintain an action on behalf of Washington Missionary Baptist Church against defendants, church officers whom plaintiffs allege have converted church property, mishandled church funds, and have acted contrary to the decisions made by the congregation. Since plaintiffs allege the church is incorporated, plaintiffs' complaint must be brought as a derivative action. If the church is not incorporated, plaintiffs suit could proceed if the requirements of N.C. Gen. Stat. § 61-1 *et seq.* are met. Nonetheless, plaintiffs' original complaint alleges a demand was made upon the officers, plaintiffs alleged they were acting on behalf of the church, and plaintiffs named the church as a defendant in the amended complaint. As such, the trial court's conclusion that they failed to add Washington Missionary Baptist Church as a party was erroneous.

Reversed and remanded for further proceedings in accordance with this opinion.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

TALLY EDDINGS, M.D., PLAINTIFF v. SOUTHERN ORTHOPAEDIC AND MUSCULOSKELETAL ASSOCIATES, P.A., DEFENDANT

No. COA03-1298

(Filed 21 December 2004)

1. Arbitration and Mediation— employment agreement— interstate commerce—Federal Arbitration Act

The trial court did not err by concluding that the employment agreements and transactions between the parties involved interstate commerce and therefore require the application of the

Federal Arbitration Act, because: (1) the trial court's findings of fact are sufficient to support its conclusion; and (2) defendant employer provided evidence to demonstrate that it treats patients who live in other states, receives payments from insurance carriers outside of North Carolina, and receives goods and services from out-of-state vendors.

2. Arbitration and Mediation— employment agreement—compelling arbitration of entire dispute

The trial court erred by failing to dismiss plaintiff's complaint and compel arbitration as to the entire dispute regarding the validity of an employment contract, because: (1) arbitration is the forum to which both plaintiff and defendant consented to hear any dispute surrounding the contract; and (2) claims such as rescission, no meeting of the minds, and quantum meruit directly challenge the validity of the contract, and therefore, such claims are within the jurisdiction of the arbitrator.

Appeal by plaintiff and defendant from judgment filed 23 June 2003 by Judge Philip Ginn in Buncombe County Superior Court. Heard in the Court of Appeals 16 June 2004.

Kelly & Rowe, P.A., by E. Glenn Kelly, for plaintiff-appellant.

McGuire, Wood & Bissette, P.A., by T. Douglas Wilson, Jr., for defendant-appellant.

BRYANT, Judge.

On 16 November 1997, Tally Eddings, M.D. (Dr. Eddings or plaintiff) and Southern Orthopaedic and Musculoskeletal Associates, P.A. (SOMA) entered into a contract of employment. On 1 January 1998, Dr. Eddings and SOMA subsequently entered into a non-shareholder physician employment agreement which replaced the earlier contract of employment. Plaintiff signed both SOMA agreements which contained the following arbitration provision:

(10) Dispute Resolution by Arbitration. Any controversy, dispute, or disagreement arising out of or relating to the Agreement, including the breach thereof, shall be settled exclusively by binding arbitration, which shall be conducted in a location to be mutually agreed upon by the parties, or at the principal office of the corporation, in accordance with the [American] Health Lawyers Association Alternative Dispute Resolution Service

> Rules of Procedure for Arbitration, and which to the extent of the subject matter of the arbitration, shall be binding not only on all parties to this Agreement, but on any other entity controlled by, in control of, or under common control with the party to the extent that such affiliate joins in the arbitration, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Any arbitrator so appointed shall have the express authority, but not the obligation, to award attorney's fees and expenses to the prevailing party in any such proceeding.

Dr. Eddings subsequently moved from Tennessee to Buncombe County, North Carolina. From 17 August 1998 until 4 January 2000 he worked as an orthopaedic surgeon for SOMA pursuant to the SOMA employment contract. The SOMA employment contract required a written six month notice of termination of employment by Dr. Eddings. Further, the agreement required Dr. Eddings to give preliminary notice of resignation twelve months prior to the effective date of termination. Dr. Eddings was also bound by a 'covenant not to compete' provision in his employment contract which prevented him from practicing orthopaedic medicine within a 50-mile radius of SOMA for five years after termination of employment.

With insufficient notice, Dr. Eddings terminated his employment effective immediately in a 4 January 2000 letter of resignation to SOMA, citing employment concerns. Following his resignation from SOMA, Dr. Eddings began practicing with another orthopaedic practice in Asheville in violation of the 'covenant not to compete' provision of the employment contract.

On 25 February 2000, SOMA requested arbitration through American Health Lawyers Association for plaintiff's alleged breach of the employment contract. On 9 March 2000, plaintiff filed a complaint in the Superior Court of Buncombe County alleging fraud, breach of fiduciary duty, and various other claims for relief seeking (1) rescission of his employment contract with SOMA, (2) an injunction enjoining SOMA's arbitration and (3) a declaratory judgment that no enforceable contract existed between plaintiff and SOMA. On 31 March 2000, plaintiff filed an amended complaint pursuant to Rule 15(a) of the North Carolina Rules of Civil Procedure, adding a tenth claim for relief seeking a declaratory judgment that plaintiff's non-shareholder physician employment contract with defendant was against public policy, unconscionable, and unenforceable.

On 28 March 2000, SOMA filed a motion to compel arbitration and dismiss the complaint, seeking to enforce the arbitration provision contained in plaintiff's employment agreement. On 31 March 2000, plaintiff filed a motion to stay the arbitration scheduled for 26 April 2000. On 30 July 2000, the trial court denied SOMA's motion to compel arbitration and granted plaintiff's motion to stay arbitration. SOMA appealed the 30 July 2000 order staying arbitration to this Court. On appeal, this Court reversed the decision of the trial court, holding that (1) a valid agreement to arbitrate exists between Dr. Eddings and SOMA; (2) the arbitration provision is governed by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (1999) and applicable federal law; and (3) Dr. Eddings' claims for rescission and declaratory relief based on fraud, unconscionability, and indefiniteness resulting in no meeting of the minds should be submitted to the arbitrator, pursuant to *Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395, 18 L. Ed. 2d 1270 (1967), because those claims were directed to the entire employment agreement and not just the arbitration provision itself. *Eddings v. S. Orthopedic & Musculoskeletal Assocs.*, 147 N.C. App. 375, 555 S.E.2d 649 (2001) (hereinafter *Eddings I*).

In a dissenting opinion in *Eddings I*, Judge Greene stated that while he agreed with the majority that under the FAA, the claims at issue should be referred to arbitration, the decision to apply the FAA was a matter for the trial court to initially determine. The North Carolina Supreme Court, agreeing with Judge Greene's dissent, held that the trial court, not the Court of Appeals, must first determine whether or not the FAA was applicable. *Eddings v. S. Orthopedic & Musculoskeletal Assocs.*, 356 N.C. 285, 569 S.E.2d 645 (2002) (per curiam).

On remand, the Superior Court of Buncombe County issued an order on 23 June 2003 which allowed in part and denied in part defendant's supplemental motion to compel arbitration. Further, some of plaintiff's claims were ordered to arbitration, while some claims were reserved for the trial court. The trial court made the following conclusions of law:

> 1. The transaction and Agreements between the parties involve interstate commerce and are, therefore, controlled by the Federal Arbitration Act.
>
> 2. Plaintiff's Prayers for Relief No. 1 (rescission of the contract), No. 2 (no meeting of the minds and unenforceable due to the

vagueness and uncertainty), and No. 9 (quantum meruit) are not arbitrable . . . .

3. Plaintiff's Prayers for Relief No. 3 (actual and punitive damages for alleged fraud), No. 4 (G.S. 75-1.1[attorney fees]), No. 7 (covenant not to compete), No. 8 (unconscionable as against public policy and praying for rescission) and No. 10 (unconscionable as against public policy and praying for declaration as null and void), are arbitrable . . . .

Also on remand, plaintiff was granted leave by the trial court to amend his complaint to add: (1) that the Rules of the American Health Lawyers Association Alternative Dispute Resolution Service violate constitutional rights by prohibiting the arbitrator's award of "consequential, exemplary, incidental, punitive or special damages" and; (2) that plaintiff will be deprived of access to the courts with respect to his claims for declaratory relief because arbitrators may not grant such relief.

On 22 July 2003 plaintiff and defendant respectively filed notices of appeal to this Court.

On appeal plaintiff and defendant raise two issues: whether the trial court erred in: (I) concluding that the agreements and transactions between Eddings and SOMA involved interstate commerce and therefore require the application of the Federal Arbitration Act and (II) compelling arbitration as to some, but not all the disputed issues.

I

[1] The first issue is whether the trial court erred in concluding that the agreements and transactions between Eddings and SOMA involved interstate commerce and therefore require the application of the Federal Arbitration Act.

In *Eddings I*, this Court applied the FAA to reach the conclusion that a valid arbitration agreement existed between Eddings and SOMA and that the issues before the Court were covered by the language of the arbitration agreement and must be submitted to an arbitrator for resolution. *Eddings v. S. Orthopedic & Musculoskeletal Assocs.*, 147 N.C. App. 375, 383, 555 S.E.2d 649, 654 (2001).

In summary, we hold that a valid agreement to arbitrate exists between plaintiff and SOMA and that the grounds relied upon

> by the trial court in refusing to enforce this arbitration agreement are issues which are covered by the language of the parties' agreement to arbitrate and must be submitted to an arbitrator . . . .

Id. at 384, 555 S.E.2d at 655.

The North Carolina Supreme Court in adopting the dissenting opinion in *Eddings I* did not specifically address the Court of Appeals' conclusions as to the validity of the agreement or the scope of the dispute. These conclusions, however, were dependant upon a determination that the transaction involved interstate commerce and therefore the FAA applied. In *Eddings I* the dissenting opinion as adopted by the North Carolina Supreme Court stated:

> Before the FAA applies to a contract, the contract must either relate to a maritime transaction or evidence "a transaction involving commerce." 9 U.S.C. §2 (2000). Whether a contract "evidenced 'a transaction involving commerce' within the meaning of §2 of the [FAA]" is a question of fact which an appellate court should not initially decide. *Merritt-Chapman & Scott Corp. v. Pennsylvania Turnpike Comm'n*, 387 F.2d 768, 772 (3d Cir. 1967).

Id. at 385, 555 S.E.2d at 656.

On remand, the trial court made the following findings of fact pertinent to evidencing interstate commerce and supporting the determination that the FAA applied to this controversy:

> 2. Plaintiff traveled from . . . Tennessee to . . . North Carolina to interview with . . . [and accept] the offer of employment with [SOMA]. . . .
>
> 3. SOMA treats patients that reside in a number of different states . . . .
>
> 4. While employed by SOMA, Dr. Eddings personally treated patients that reside in a number of different states . . . .
>
> 5. A large portion of SOMA's physician fees are paid on behalf of SOMA's patients by medical insurance companies, including out-of-state and multi-state insurance carriers . . . located in a number of different states . . . .
>
> 6. During the time that Dr. Eddings was employed by SOMA, he personally treated patients for whom SOMA received fee

> payments for out-of-state and multi-state insurance carriers. These insurance carriers are located in a number of different states . . . .
>
> 7. SOMA purchases supplies and services . . . from a variety of vendors located within and without the state of North Carolina . . . .
>
> 8. Dr. Eddings provided services and generated revenue that facilitated SOMA's various interstate activities . . . .
>
> 9. The American Health Lawyers Association Alternative Dispute Resolution Service (AHLAADRS) is the organization specified by the parties' contracts as the organization to arbitrate 'any dispute, controversy, or disagreement arising out of or relating to this Agreement, including the breach thereof . . . .' Section 6.06 of the AHLAADRS rules states that there is no claim available for and the arbitrator 'may not award consequential, exemplary, incidental, punitive or special damages . . . ,' while at the same time section 1.05 provides that the provisions within the rules and any exceptions thereto are subject to the applicable law, and if there is a difference in interpretation among the parties, the arbitrator shall interpret and apply the rules.

The trial court's findings of fact are sufficient to support its conclusion that the agreements and transactions between Dr. Eddings and SOMA involve interstate commerce, and therefore the FAA applied. *See also*, *Whitley v. Carolina Neurological Assocs., P.A.*, No. 1:01-CV-00105, 2002 WL 1009721, at *2 (M.D.N.C. Feb. 6, 2002) (the transaction in fact involves interstate commerce when a doctor from Louisiana moved to North Carolina and through the medical practice treats patients from other states, accepts payments from out-of-state and multi-state insurance carriers, and receives goods from out-of-state vendors); *Jones v. Tenet Health Network, Inc.*, U.S. Dist. LEXIS 5037, 6 Am. Disabilities Cas. (BNA) 1307(1997) (motion to stay discrimination action pending arbitration was granted in employer's favor pursuant to agreement to arbitrate when (1) employer was engaged in interstate commerce, (2) employee freely consented to agree to arbitrate, (3) employee did not lack the capacity to consent to arbitration, and (4) employee failed to show such agreement to arbitrate was for an unlawful purpose); *Crawford v. West Jersey Health Sys.*, 847 F. Supp. 1232, 1240, 1994 U.S. Dist. LEXIS 4181, at *21 (D.N.J. 1994) (employer's motion to stay the wrongful discharge action was granted in part, pending arbitration of doctor's employ-

ment agreement, and denied in part as to the doctor's motion for leave to amend the complaint).

SOMA's contract with Dr. Eddings involved interstate commerce. SOMA has provided evidence to demonstrate that it treats patients who live in other states, receives payments from insurance carriers outside North Carolina, and receives goods and services from out-of-state vendors. Therefore, the trial court did not err in determining Dr. Eddings and SOMA were engaged in interstate commerce and the FAA applied.

II

[2] The next issue is whether the trial court erred by failing to dismiss plaintiff's complaint and compel arbitration as to the entire dispute.

It is well settled under the FAA that a trial court has jurisdiction to stay arbitration proceedings pursuant to contract only upon grounds that "relate specifically to the arbitration clause and not just to the contract as a whole." *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 636 (4th Cir.) (quoting *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)), *cert. denied*, 537 U.S. 1087, 154 L. Ed. 2d 631 (2002). Where a party challenges the enforceability or validity of the contract containing the arbitration clause as a whole, it is within the exclusive jurisdiction of the arbitrator to determine those claims. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04, 18 L. Ed. 2d 1270, 1277 (1967) (holding pursuant to the FAA arbitration clauses are severable from the contracts in which they are included and thus, a broad arbitration clause encompasses arbitration of claims that the contract itself is not enforceable)); *See also Keel v. Private Bus., Inc.*, 163 N.C. App. 703, 708, 594 S.E.2d 796, 798 (2004). "The trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable de novo by the appellate court." *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001), citing *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990). Our Court has adopted the *PaineWebber* analysis with respect to whether a dispute is subject to arbitration. The determination of whether a dispute is subject to arbitration involves a two pronged analysis; the court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and (2) whether the specific dispute falls within the substantive scope of that agreement. *Raspet*, 147 N.C. App. at 137, 554 S.E.2d at 678.

The first prong of the analysis is satisfied as the parties clearly have an agreement to arbitrate pursuant to the SOMA employment contract. As to the second prong, we must determine whether the claims fall within the scope of the agreement. In reviewing plaintiff's complaint, the trial court compelled to arbitration the following claims: actual and punitive damages for alleged fraud; attorney's fees; covenant not to compete; the contract was unconscionable as against public policy and praying for rescission; the contract was unconscionable as against public policy and praying for declaration as null and void.

Plaintiff argues that because the trial court compelled to arbitration these disputes, he will be deprived of substantial rights such as due process because an arbitrator, rather than a court of law will adjudicate this dispute. However, in the agreement between plaintiff and defendant, both parties mutually consented to arbitration. Agreeing to arbitration does not, by itself, prejudice plaintiff or prevent plaintiff from being heard in the appropriate forum. In this case, arbitration is the forum to which both plaintiff and defendant consented to hear any dispute surrounding the contract. As stated in the parties' agreement: "Any controversy, dispute, or disagreement arising out of or relating to the Agreement . . . shall be settled **exclusively** by binding arbitration . . . ." (emphasis added). To that end, there is no indication as to how the arbitrator will resolve the substantive issues in controversy or whether the remedies that plaintiff seeks apply.

Despite the agreement to arbitrate, however, the trial court did not compel to arbitration plaintiff's prayers for relief: rescission of the contract; no meeting of the minds; and quantum meruit. Clearly the agreement to arbitrate the instant case is a broad one. Accordingly, based on *Prima Paint*, claims such as rescission, no meeting of the minds, and quantum meruit directly challenge the validity of the contract. Therefore such claims are within the jurisdiction of the arbitrator. This does not diminish the superior court's jurisdiction as to any claims unresolved through arbitration. *See Adams v. Nelson*, 313 N.C. 442, 446, 329 S.E.2d 322, 324 (1985) (holding an "agreement to arbitrate does not cut off a party's access to the courts and further [holding] that the court that compels arbitration does not lose jurisdiction."); *See also Henderson v. Herman*, 104 N.C. App. 482, 409 S.E.2d 739 (1991). Based on the trial court's determination that the agreement and transactions between plaintiff and defendant involve interstate commerce, failure to send all

issues in controversy to arbitration was error. Therefore the decision of the trial court as to those claims not sent to arbitration must be reversed.

We affirm in part and reverse in part.

Judges TYSON and STEELMAN concur.

JUDY SKINNER, PLAINTIFF v. QUINTILES TRANSNATIONAL CORP., DEFENDANT

No. COA04-15

(Filed 21 December 2004)

1. **Appeal and Error— appealability—interlocutory order—denial of motion for judgment on pleadings—res judicata—substantial right**

Although an order denying a N.C.G.S. § 1A-1, Rule 12(c) motion is interlocutory, the denial of a motion for judgment on the pleadings based on res judicata affects a substantial right and is immediately appealable. Although another panel of the Court of Appeals has limited such interlocutory appeals to situations where the prior decision involved a jury verdict, this panel did not need to attempt to resolve this apparent conflict since it exercised its discretion to hear the appeal under N.C. R. App. P. 2.

2. **Collateral Estoppel and Res Judicata— motion for judgment on the pleadings—new legal theory**

The trial court erred by denying defendant's motion for judgment on the pleadings based on the contention that the final judgment issued in a prior federal case based upon the Americans with Disabilities Act (ADA) barred plaintiff's state claims under the doctrine of res judicata in an action alleging that defendant violated North Carolina's Retaliatory Employment Discrimination Act (REDA) by discharging plaintiff in retaliation for a work injury and her attempt to secure workers' compensation benefits, because: (1) the instant action was a relevant and material matter within the scope of the proceeding which plaintiff, in the exercise of reasonable diligence, could and should have brought forward for determination in her federal action; (2) each of plaintiff's two claims are based upon her termination by defendant, and the

instant action merely presents a new legal theory as to why plaintiff was terminated by defendant; (3) although plaintiff did not receive a right-to-sue under REDA letter from the N.C. Commissioner of Labor until after she filed her federal ADA action, she had a right to request a right-to-sue letter before she filed her federal action and thus could have brought her REDA claim as part of her federal action; and (4) requiring plaintiff to request a right-to-sue letter from the North Carolina Department of Labor in order to bring all of her related claims in one action does not place an unnecessarily burdensome responsibility upon plaintiff.

Judge GEER concurring in a separate opinion.

Appeal by defendant from order entered 4 September 2003 by Judge Stafford G. Bullock in Durham County Superior Court. Heard in the Court of Appeals 15 September 2004.

Roger W. Rizk for plaintiff-appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Rosemary G. Kenyon, J. Mitchell Armbruster and Kathryn R. Valeika, for defendant-appellant.

THORNBURG, Judge.

Defendant appeals from an order denying their motion for judgment on the pleadings. Defendant moved for such a judgment based on the contention that the final judgment issued in the prior case *Judy Skinner v. Quintiles Transnational Corp.*, Case No. 1:01-CV-01123 (M.D.N.C.), entered on 19 March 2003, barred plaintiff's state claims under the doctrine of *res judicata*.

Plaintiff was employed by defendant for about six years, from April 1994 until October 2000, in various administrative positions, which required extensive amounts of typing. In early 1995, plaintiff began to experience pain in both of her arms. After a medical evaluation, plaintiff was diagnosed with bilateral ganglion cysts. Defendant provided plaintiff with a new mouse, a new chair with arm rests and occasional help from an assistant. Plaintiff's pain diminished.

In early 2000, plaintiff was promoted to the Information Technology Software Quality Control Department as the documentation processor. Plaintiff began to experience pain in her arms, hands and shoulders. After reporting this pain to defendant on 3 March

2000, plaintiff encountered problems with management in her department and eventually transferred to a different department. Despite repeated discussions with her managers, plaintiff was still given tasks that required extensive typing and computer work, which aggravated her condition. Plaintiff sought medical treatments and was diagnosed with ganglion cysts, torn ligaments in her right hand, tendinitis, bursitis and carpal tunnel syndrome. Plaintiff filed a workers' compensation claim for her condition in March 2000.

Plaintiff contacted defendant's human resources director in an attempt to find a position that would not require typing all day. Upon the director's recommendation, plaintiff sought training for an open Clinical Research Assistant position. On 19 October 2000, while in a training session, plaintiff was asked to attend a meeting with management. Plaintiff was informed that she was being laid off from her current position due to reduction in staff. Plaintiff was offered a new position as a Project Associate, which plaintiff felt she could not perform given the position's requirements and her medical condition. At the conclusion of the meeting, defendant told plaintiff that she had 24 hours to make a decision concerning the Project Associate position.

Plaintiff immediately went to the North Carolina Department of Labor to file an employment discrimination complaint under North Carolina's Retaliatory Employment Discrimination Act ("REDA"), N.C. Gen. Stat. § 95-240, *et seq.* (2003). An investigator for the Department of Labor contacted defendant's Human Resources Department to inquire about the status of plaintiff's employment. The investigator was told that plaintiff would not be required to accept or reject the new position within 24 hours and that plaintiff would, in fact, not have to respond until someone from defendant got in touch with plaintiff. Several weeks later, sometime in November 2000, plaintiff also filed a charge of discrimination with the United States Equal Employment Opportunity Commission, claiming that defendant had violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.* (2000). On 22 December 2000, plaintiff received her last paycheck from defendant. On 18 January 2001, defendant informed plaintiff that she had been terminated after she failed to accept the offered job position.

On 24 July 2001, plaintiff filed a complaint in the United States District Court for the Eastern District of North Carolina, alleging that defendant had violated provisions of the ADA in that defendant failed to provide reasonable accommodations for plaintiff's disability and

had discharged plaintiff without accommodating her disability. On 17 December 2001, the matter was transferred to the United States District Court for the Middle District of North Carolina, due to the fact that all matters giving rise to the action occurred in Durham County and Durham County is located in the Middle District. Defendant moved for summary judgment on all of plaintiff's claims. Summary judgment was granted and plaintiff's complaint was dismissed with prejudice on 19 March 2003.

Plaintiff commenced the instant action on 17 January 2003, alleging that defendant violated REDA in that defendant discharged plaintiff in retaliation for a work injury and her attempt to secure workers' compensation benefits. Defendant answered plaintiff's complaint and asserted as a defense that plaintiff's claim was barred by *res judicata* due to the final judgment of the District Court for the Middle District of North Carolina in the first case. Defendant then moved, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c), for a judgment on the pleadings based on the *res judicata* defense. This motion was denied on 4 September 2003. Defendant appeals.

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." N.C. Gen. Stat. § 1A-1, Rule 12(c) (2003). The function of this section of the rule is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). In determining whether the trial court erred in its ruling on a Rule 12(c) motion, this Court applies the following standard:

> A motion for judgment on the pleadings, or a Rule 12(c) motion, is proper when all the material allegations of fact are admitted on the pleadings and only questions of law remain. The movant must show, even when viewing the facts and permissible inferences in the light most favorable to the nonmoving party, that he is clearly entitled to judgment as a matter of law. Because judgment on the pleadings is a summary procedure and the judgment is final, the movant is held to a strict standard and must show that no material issue of fact exists.

DeTorre v. Shell Oil Co., 84 N.C. App. 501, 504, 353 S.E.2d 269, 271 (1987) (internal citations omitted).

Defendant argues on appeal that the trial court erred in concluding that plaintiff's claim was not barred by *res judicata* and, thus, erred in denying defendant's motion for a judgment on the pleadings.

[1] We first note that an order denying a Rule 12(c) motion is interlocutory and that there is generally no right to appeal an interlocutory order. There are two exceptions to this general rule:

> [F]irst, where there has been a final determination of at least one claim, and the trial court certifies there is no just reason to delay the appeal, [N.C. Gen. Stat. § 1A-1, Rule 54(b) (2003)]; and second, if delaying the appeal would prejudice a "substantial right."

Country Club of Johnston County, Inc. v. U.S. Fidelity and Guar. Co., 135 N.C. App. 159, 162, 519 S.E.2d 540, 543 (1999) (quoting *Liggett Group v. Sunas*, 113 N.C. App. 19, 23-24, 437 S.E.2d 674, 677 (1993)), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207-08 (2000). Defendant notes that this Court has held that the denial of a motion for judgment on the pleadings based on *res judicata* affects a substantial right and is immediately appealable. *Clancy v. Onslow Cty.*, 151 N.C. App. 269, 271, 564 S.E.2d 920, 922 (2002). However, another panel of this Court has limited such interlocutory appeals to situations where the prior decision involved a jury verdict. *Country Club*, 135 N.C. App. at 167, 519 S.E.2d at 546. We need not attempt to resolve this apparent conflict, because we choose to exercise our discretion to hear this appeal pursuant to Rule 2 of the Rules of Appellate Procedure.

[2] The doctrine of *res judicata* is intended to force parties to join all matters which might or should have been pleaded in one action. *Clancy*, 151 N.C. App. at 271-72, 564 S.E.2d at 922-23. *Res judicata* is a bar to subsequent action when there is a final judgment on the merits in a prior action, both actions involve the same parties and both actions involve the same cause of action. *Id.* at 271, 564 S.E.2d at 922. A final judgment bars not only all matters actually determined or litigated in the prior proceeding, but also all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination. *Rogers Builders v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986).

It is clear that there was a final judgment entered in plaintiff's federal claim and that plaintiff and defendant are the same parties as in the federal claim. However, the two actions do not involve exactly the same issue. Thus, the question becomes whether the instant action

was a "relevant and material [matter] within the scope of the proceeding which [plaintiff], in the exercise of reasonable diligence, could and should have brought forward for determination." *Id.* Plaintiff contends that the instant claim is separate and distinct from the claim brought in the federal action. Plaintiff argues: (1) that claims under the ADA and REDA require proof of different facts, thus making them different claims; and (2) that plaintiff had no REDA claim to assert in the federal action because she had not received a right-to-sue letter from the North Carolina Department of Labor at the time of filing the federal action.

Our courts have not adopted the "transactional approach" to *res judicata* in which all issues arising out of a single transaction or series of transactions must be tried together as one claim. *Bockweg v. Anderson*, 333 N.C. 486, 493-94, 428 S.E.2d 157, 162-63 (1993). In *Bockweg*, the Court determined that *res judicata* was inapplicable because plaintiffs sought separate remedies for distinct acts of negligence leading to separate and distinct injuries. *Id.* at 496, 428 S.E.2d at 164. However, "[t]he defense of *res judicata* may not be avoided by shifting legal theories or asserting a new or different ground for relief . . . ." *Rogers*, 76 N.C. App. at 30, 331 S.E.2d at 735. In the instant action, while plaintiff has brought claims under two different statutes, her claims stem from the same relevant conduct by defendant. In the first complaint, plaintiff specifically alleged that:

> 28. The Defendant has violated [the ADA] by retaliating against the Plaintiff for filing her initial charge of discrimination *by terminating the Plaintiff.*

(Emphasis added). In the instant action, plaintiff alleged:

> 16. The [REDA] prohibits the discharge of an employee in retaliation for a work injury and an attempt by the employee to recover workers [sic] compensation benefits. The Defendant has violated the provisions of such act *by terminating the Plaintiff* in retaliation for her work related injury and her attempt to secure workers [sic] compensation benefits.

(Emphasis added). Further, the United States Magistrate Judge, in an opinion fully adopted by United States District Judge Frank W. Bullock, Jr., spent several pages discussing the termination aspect of plaintiff's ADA claim. It is clear that each of plaintiff's two claims are based upon her termination by defendant and that the instant action

merely presents a new legal theory as to why plaintiff was terminated by defendant. *See Rogers*, 76 N.C. App. at 30, 331 S.E.2d at 735.

However, before *res judicata* can bar the instant action, this Court must also decide whether plaintiff, with reasonable diligence, could and should have brought the claims included in the instant action with the first action. Plaintiff argues that she could not have included her current claims in the first action because she had not yet received a right-to-sue letter from the North Carolina Department of Labor.

"An employee may only bring an action under this section when he has been issued a right-to-sue letter by the [North Carolina Labor] Commissioner." N.C. Gen. Stat. § 95-243(e) (2003). N.C. Gen. Stat. § 95-242(a) (2003) requires the Commissioner of Labor to make a determination on a complaint no later than 90 days after the filing of the complaint. However, this Court has concluded that the time limit is not mandatory because the statute fails to provide any ramifications in the event the Commissioner fails to take action. *Commissioner of Labor v. House of Raeford Farms*, 124 N.C. App. 349, 477 S.E.2d 230 (1996). "An employee may make a written request to the Commissioner for a right-to-sue letter after 180 days following the filing of a complaint if the Commissioner has not issued a notice of conciliation failure and has not commenced an action pursuant to G.S. 95-242." N.C. Gen. Stat. § 95-242(c) (2003).

The Commissioner did not issue plaintiff a right-to-sue letter until 23 October 2002. However, plaintiff filed her complaint on 21 October 2000, and was thus entitled to request a right-to-sue letter on or about 21 April 2001, before she filed the complaint in the original federal action. While the administrative investigation process set up under REDA is a valid and useful part of pursuing employment discrimination claims, plaintiff chose the path of litigation of her claims regarding her termination when she filed her original complaint. We do not believe, in this case, that requiring plaintiff to request a right-to-sue letter in order to bring all of her related claims in one action places an unnecessarily burdensome responsibility upon plaintiff. Thus, we conclude that, with reasonable diligence, plaintiff could and should have brought the claims that make up the instant action as part of her original federal action.

Defendant has shown that plaintiff's claims are barred by *res judicata*. Accordingly, we reverse and remand to the trial court to enter an order granting a judgment on the pleadings to defendant.

Reversed and remanded.

Judge GEER concurs in a separate opinion.

Judge LEVINSON concurs.

GEER, Judge concurring.

I concur with the foregoing opinion, but write separately to address further the fact that a right-to-sue letter had not yet been issued at the time plaintiff filed her ADA suit. Plaintiff's appeal places two policy considerations squarely in conflict.

On the one hand, dismissing this action based on *res judicata* would undermine the administrative scheme established by the General Assembly. By requiring the parties to proceed administratively before the Department of Labor prior to filing suit, the General Assembly—like Congress, before it, in enacting Title VII—recognized the value of having an administrative body investigate claims and, if appropriate, attempt to resolve them without the need for litigation.

On the other hand, the common law rule against claim-splitting is well-established in North Carolina and holds that "all damages incurred as the result of a single wrong must be recovered in one lawsuit." *Bockweg v. Anderson*, 333 N.C. 486, 492, 428 S.E.2d 157, 161 (1993) (emphasis omitted). To allow a person to seek damages for a termination of employment based on one theory and then, after an adverse decision on that theory, seek the same damages under another theory raises the specter of repetitive litigation, duplicative discovery, possibly inconsistent results, and no assurance of finality.

I believe the two policies must be reconciled. The question is whether the policy underlying REDA's administrative review process trumps traditional claim-splitting principles. In this case, as the majority opinion explains, plaintiff was permitted by state law to request a notice of right to sue in order to include the REDA claim in her federal lawsuit. If she preferred to continue the administrative process, she had the option, as defendant suggests, (a) to seek a stay of the pending action in order to allow completion of the administrative process or (b) to move to amend the complaint once the notice of right to sue was received. Plaintiff, however, took no steps at all to

try to include the REDA claim in the pending action. Significantly, the federal district court did not enter summary judgment on plaintiff's ADA claim until 19 March 2003, five months after plaintiff received her notice of right to sue with respect to the REDA claim.

I would also observe that while North Carolina courts have not previously addressed the issue before this Court, numerous other courts have considered closely analogous circumstances and overwhelmingly have reached the same conclusion as this Court. *See, e.g., Wilkes v. Wyo. Dep't of Employment Div. of Labor Standards*, 314 F.3d 501, 506 (10th Cir. 2002) (holding that a Title VII lawsuit was barred by *res judicata* since plaintiff could have requested a right-to-sue letter or sought to stay a prior Equal Pay Act lawsuit pending completion of the EEOC administrative process), *cert. denied*, 540 U.S. 826, 157 L. Ed. 2d 48, 124 S. Ct. 181 (2003); *Churchill v. Star Enters.*, 183 F.3d 184, 193-94 (3d Cir. 1999) (when a jury had rendered a verdict in a case alleging that plaintiff's termination violated the FMLA, plaintiff's second action challenging the discharge under the ADA was barred by *res judicata*; plaintiff should have requested a right-to-sue letter from the EEOC or sought a stay of the FMLA action pending receipt of the letter); *Hapgood v. City of Warren*, 127 F.3d 490, 494 (6th Cir. 1997) (wrongful discharge ADA claim was barred by *res judicata* because of entry of summary judgment in a state court action alleging discharge in retaliation for workers' compensation claim even though plaintiff did not have right-to-sue letter from the EEOC; holding that plaintiff should have sought to amend the state complaint upon obtaining the letter), *cert. denied*, 523 U.S. 1046, 140 L. Ed. 2d 511, 118 S. Ct. 1361 (1998).

Because I find these cases persuasive in balancing the conflicting policies, I join the majority opinion. I would, however, urge trial courts to view favorably motions to stay proceedings and motions to amend complaints in these circumstances. *See Churchill*, 183 F.3d at 194 ("We believe that district courts are likely to look favorably on applications for stays of FMLA proceedings while plaintiffs promptly pursue administrative remedies under Title VII and similar state laws and we urge them to do so.").

KAY C. SMITH, PLAINTIFF v. YOUNG MOVING AND STORAGE, INC., DEFENDANT

No. COA03-1593

(Filed 21 December 2004)

1. Arbitration and Mediation— arbitration—vacation of award—statutory grounds

The legal grounds for vacating an arbitration award under N.C.G.S. § 1-567.13 do not include arguments about whether a settlement letter constituted a binding agreement or whether there was mutual consent and consideration.

2. Compromise and Settlement— settlement agreement—valid and enforceable

Although the trial court lacked a statutory basis to review an arbitrator's award, it correctly concluded that the parties had entered into a valid and enforceable settlement agreement which was then enforced by the arbitrator.

Appeal by plaintiff from an order entered 7 July 2003 by Judge Knox V. Jenkins in Johnston County Superior Court. Heard in the Court of Appeals 14 September 2004.

Hinton, Hewett & Wood, P.A., by Alan B. Hewett, for plaintiff-appellant.

McGuire Woods, L.L.P., by J. Mark Langdon and Mark N. Hosmer, for defendant-appellee.

HUNTER, Judge.

By this appeal Kay C. Smith ("plaintiff"), contends the trial court erroneously confirmed the arbitration award and should have granted plaintiff's motion to vacate said award because the settlement agreement was not a binding and enforceable agreement. Specifically, plaintiff challenges the arbitration award based upon three grounds: (I) the 18 February 2002 letter did not constitute a binding and enforceable settlement agreement; (II) the arbitrator and trial court did not properly identify condition precedents and (III) North Carolina law mandates that arbitration is compellable and irrevocable except with the consent of all parties. We affirm the trial court's order.

In January 1991, plaintiff and Young Moving and Storage, Inc. ("defendant"), entered into a contract whereby defendant would store plaintiff's photographic equipment at its storage facility. Plaintiff filed a complaint against defendant after defendant could not locate plaintiff's property. After appeal to the Supreme Court of North Carolina, which affirmed the Court of Appeals' decision compelling arbitration, plaintiff filed a demand for arbitration on 22 January 2002.

On 18 February 2002, plaintiff's counsel sent a letter to defendant indicating plaintiff was willing to settle the dispute upon terms and conditions requiring the payment of $32,750.00 plus interest over a three year time period. According to the letter, defendant would prepare the settlement agreement and promissory note and the arbitration proceedings and lawsuit would be dismissed. Defendant contends the next day, his counsel sent an unexecuted settlement and mutual release agreement and an unexecuted promissory note to plaintiff's counsel. On 26 April 2002, plaintiff's counsel informed defendant's counsel that plaintiff refused to sign the settlement documents and wanted to proceed with arbitration.

On 12 August 2002, defendant filed a motion to enforce the settlement agreement. After plaintiff filed a response to deny the motion, an arbitrator was selected who reviewed the documents and conducted a telephone hearing with the parties' counsel. On 17 October 2002, the arbitrator filed an award in favor of defendant which indicated "[t]he settlement agreement reflected in the letter signed by Claimant's counsel, dated February 18, 2002, shall be enforced." Thereafter, plaintiff filed a motion to vacate the arbitration award on 15 January 2003 and defendant filed a motion to confirm the arbitration award the next month. On 7 June 2003, the trial court entered an order denying plaintiff's motion and confirming the arbitration award. Plaintiff appeals.

[1] Plaintiff first argues the 18 February 2002 letter was not a binding and enforceable settlement agreement. " '[J]udicial review of an arbitration award is confined to [a] determination of whether there exists one of the specific grounds for vacation of an award under the arbitration statute.' " *Semon v. Semon*, 161 N.C. App. 137, 141, 587 S.E.2d 460, 463 (2003) (quoting *Fashion Exhibitors v. Gunter*, 41 N.C. App. 407, 411, 255 S.E.2d 414, 418 (1979)); *see also Sholar Bus. Assocs. v. Davis*, 138 N.C. App. 298, 301, 531 S.E.2d 236, 239 (2000) (stating "[a]ppellate review of an arbitration award is

limited. A court may only vacate such an award for the reasons enumerated in North Carolina General Statutes section 1-567.13"[1]). N.C. Gen. Stat. § 1-567.13(a) (2001) provides:

> Upon application of a party, the court shall vacate an award where:
>
> (1) The award was procured by corruption, fraud or other undue means;
>
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> (3) The arbitrators exceeded their powers;
>
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of G.S. 1-567.6, as to prejudice substantially the rights of a party; or
>
> (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under G.S. 1-567.3 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

Plaintiff contends the arbitrator erroneously concluded the 18 February 2002 letter from plaintiff's counsel to defendant's counsel constituted a binding settlement agreement between the parties; rather, plaintiff contends the letter was an unaccepted offer. Plaintiff further argues that even if the offer was accepted, consideration was lacking, there was no mutual assent to all terms and the arbitrator failed to identify condition precedents. These legal arguments are not grounds for vacating an arbitration award under N.C. Gen. Stat. § 1-567.13. Indeed, "an arbitrator is not bound by substantive law or rules of evidence, [and] an award may not be vacated merely because the arbitrator erred as to law or fact. Where an arbitrator

1. N.C. Gen. Stat. § 1-567.13 (2001) has been repealed and replaced by N.C. Gen. Stat. § 1-569.23 (2003) effective 1 January 2004. In this case, the arbitration award was signed on 17 October 2002 and the confirmation order and judgment was filed on 7 June 2003. Accordingly, N.C. Gen. Stat. § 1-567.13 is applicable to this case.

makes such a mistake, 'it is the misfortune of the party.' " *Sholar*, 138 N.C. App. at 301, 531 S.E.2d at 239 (citations omitted).

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

Cyclone Roofing Co. v. LaFave Co., 312 N.C. 224, 236, 321 S.E.2d 872, 880 (1984) (citations omitted). Accordingly, we overrule this assignment of error.

[2] Finally, plaintiff contends the arbitrator exceeded his authority by enforcing an invalid settlement agreement and not conducting a full and fair hearing on the merits of her claim. Essentially, plaintiff argues an arbitrator should not be allowed to enforce a contract that does not exist.

An arbitrator exceeds his authority when he arbitrates additional claims and matters not properly before him. *See Howell v. Wilson*, 136 N.C. App. 827, 830, 526 S.E.2d 194, 196 (2000). Moreover, "[i]t is from the agreement that the arbitrators derive[] their authority." *Chair Co. v. Furniture Workers*, 233 N.C. 46, 48, 62 S.E.2d 535, 537 (1950). There have been

> only a few cases in which our courts have held that an arbitrator exceeded his powers. In *Wilson Building Co. v. Thorneburg Hosiery Co.*, 85 N.C. App. 684, 355 S.E.2d 815, *disc. review denied*, 320 N.C. 798, 361 S.E.2d 75 (1987), we concluded that, because the amount of attorney's fees for debts and obligations is set by statute, the arbitrator exceeded his authority by ordering fees in excess of that amount. *Id.* at 686-88, 355 S.E.2d at 817-18. . . . [In] *FCR Greensboro, Inc. v. C&M Investments*, 119

> N.C. App. 575, 459 S.E.2d 292, *cert. denied*, 341 N.C. 648, 462 S.E.2d 610 (1995) . . . , the parties submitted for arbitration the amount of liquidated damages caused by the defendant completing construction of a building after the agreed-upon date. *Id.* at 576, 459 S.E.2d at 293. The arbitrator awarded plaintiff these damages, but then also awarded plaintiff two other kinds of damages: (1) liquidated damages caused by delays in starting construction; and (2) reimbursement for certain changes plaintiff made to the sprinkler system that was installed. *Id.* at 577-78, 459 S.E.2d at 294-95. We held that the arbitrator exceeded his powers by making these additional awards. *Id.* at 578, 459 S.E.2d at 294-95.

Howell, 136 N.C. App. at 830, 526 S.E.2d at 196. In this case, the contract provided in pertinent part:

> 9. Arbitration: Any controversy or claim arising out of or relating to this contract, the breach thereof, or the goods affected thereby, whether such claims be found in tort or contract shall be settled by arbitration law of the Company's State and under the Rules of the American Arbitration Association, provided however, that upon such arbitration the arbitrator or arbitrators may not vary or modify any of the foregoing provisions.

Plaintiff alleged defendant breached its contract with plaintiff by losing her photographic equipment. Plaintiff filed a demand for arbitration and the parties began settlement discussions. According to defendant, the parties reached an oral settlement and plaintiff forwarded a 18 February 2002 letter to defendant confirming the settlement terms. The next day, defendant sent a settlement agreement, which included the terms in the 18 February 2002 letter, and release to plaintiff per plaintiff's request. The arbitration proceedings were dismissed in reliance upon the settlement. After plaintiff refused to sign the documents, defendant filed a motion with the American Arbitration Association requesting the assigned arbitrator to enforce the settlement agreement. After conducting a hearing via telephone, the arbitrator entered an award enforcing the settlement agreement on 17 October 2002. As the validity of the settlement agreement was related to a dispute arising out of the parties' contractual relationship, the arbitrator did not exceed his authority in concluding the settlement agreement was binding.

Notwithstanding the trial court finding the lack of statutory basis under N.C. Gen. Stat. § 1-567.13 (2001) for reviewing the arbitrator's award which determined the settlement agreement was binding and

enforceable, the trial court nevertheless considered the validity of the settlement agreement. In its order, the trial court stated: "11. . . . The Court also considered the February 18, 2002 letter between counsel and finds that it constitutes a valid and enforceable settlement agreement." This finding is supported by the parties' allegations in their complaint and answer. In her complaint, plaintiff alleged:

> 6. That on or about 18 February 2002, Plaintiff's counsel forwarded a letter to Defendant's counsel. A copy of the letter is attached hereto as "Exhibit A" and is fully incorporated herein by reference. That on or about 19 February 2002, Defendant's counsel forwarded an unexecuted Settlement and Mutual Release Agreement and unexecuted Promissory Note to Plaintiff's counsel.

The letter stated:

> Based upon the information that I have reviewed on your client, it has been determined that it is in Ms. Smith's best interest to settle the above referenced matter upon the following terms and conditions:
>
> 1. Payment of $10,000.00 to my office within thirty days of the execution of the settlement documents;
>
> 2. Payment of $22,750.00 within 3 years at 8% simple interest with 3 yearly payments of no less than one-third (⅓) of the principal and interest balance owed; with the following payment schedule: . . . . No prepayment penalty. In the event of prepayment only the accrued interest shall be paid.
>
> 3. As of the date of the execution of the settlement agreement by Young Moving that they are not in bankruptcy and that no bankruptcy petition is pending[.]
>
> 4. You will prepare the necessary settlement documents consisting of a settlement agreement and promissory note. A dismissal of the arbitration and lawsuit will be filed.
>
> I am faxing a copy of this settlement to Mr. Gary Jackson and Ms. Gail Zieky with the AAA [American Arbitration Association]. . . .

In its answer, defendant admitted plaintiff's allegations regarding the contents of the settlement letter were accurate.

"A compromise and settlement agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and

tested by established rules relating to contracts." *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000). A valid contract is formed when parties " 'assent to the same thing in the same sense, and their minds meet as to all terms.' " *Normile v. Miller and Segal v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985) (quoting *Goeckel v. Stokely*, 236 N.C. 604, 607, 73 S.E.2d 618, 620 (1952)). Moreover, "[t]here is no law requiring a compromise contract . . . to be put in writing." *Armstrong v. Polakavetz*, 191 N.C. 731, 735, 133 S.E. 16, 18 (1926).[2]

In this case, plaintiff made a settlement offer and defendant accepted. The terms of the settlement were memorialized in an 18 February 2002 letter sent by plaintiff's counsel to defense counsel. A copy of the letter was sent to the American Arbitration Association and the arbitration proceedings were canceled. Later, plaintiff refused to sign the final settlement documents. The facts indicate that plaintiff and defendant orally agreed to settle their dispute.

Moreover, plaintiff has not contended her attorney was without authority to bind her to the settlement agreement. *See The Currituck Associates-Residential Partnership v. Hollowell*, 166 N.C. App. at 28, 601 S.E.2d at 264. Although " 'special 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,' " " 'there is a presumption in North Carolina in favor of an attorney's authority to act for the client he professes to represent.' " *Id.* (quoting *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 655 (2000)). Thus, " 'one 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.* (citation omitted). As stated, plaintiff has not argued her attorney was without authority to settle her claim against defendants.

Finally, plaintiff contends the trial court and the arbitrator failed to properly identify conditions precedents. Specifically, plaintiff argues the execution of the settlement documents was a condition precedent to the formation of a contract. However, our review of the letter sent by plaintiff's counsel indicates the contract execution was not a condition precedent. In pertinent part, the letter stated:

2. However, if the statute of frauds is applicable to the case or controversy, we note the settlement agreement must meet the requirements of the statute of frauds. *See The Currituck Associates-Residential Partnership v. Hollowell*, 166 N.C. App. 17, 28, 601 S.E.2d 256, 264 (2004).

> Based upon the information that I have reviewed on your client, it has been determined that it is in Ms. Smith's best interest to settle the above referenced matter upon the following terms and conditions:
>
> 1. Payment of $10,000.00 to my office within thirty days of the execution of the settlement documents[.]

As the Court in *McClure Lumber Co. v. Helmsman Constr., Inc.* noted:

> It is a well-settled principle of contract law that "[a] condition precedent is an event which must occur before a contractual right arises . . . ." Stated another way, "[a] condition precedent is an act or event, other than a lapse of time, which [unless excused] must exist or occur before a duty to perform a promised performance arises." However, for a contract provision to be construed as a condition precedent, the provision must contain language which plainly requires such construction.

McClure Lumber Co., 160 N.C. App. 190, 197, 585 S.E.2d 234, 238 (2003) (citations omitted). The language focused upon by plaintiff is a contractual term regarding when payment is due by defendant. While the execution of settlement documents would trigger the thirty day time period within which defendant must pay $10,000.00 to plaintiff, the execution of settlement documents does not effect whether or not a valid and enforceable settlement agreement was entered into by the parties.

Relying upon *Chappell v. Roth*, 353 N.C. 690, 548 S.E.2d 499 (2001), plaintiff argues the letter from her attorney to defense counsel did not constitute a binding and enforceable settlement agreement. In *Chappell*, settlement was predicated upon a " 'full and complete release, mutually agreeable to both parties.' " *Id.* at 691, 548 S.E.2d at 500. After the settlement conference, the plaintiff in *Chappell* objected to a provision in the proposed release and suggested alternatives to the release language. Our Supreme Court held that "absent agreement by the parties concerning the terms of the release, the settlement agreement did not constitute an enforceable contract." *Id.* at 692, 548 S.E.2d at 500. Unlike the situation in *Chappell*, the parties agreed to the settlement terms outlined in the letter sent from plaintiff's counsel to defendant's counsel and the arbitration proceedings were dismissed. The fact that plaintiff later changed her mind does not render the settlement agreement unen-

forceable. Indeed, "[f]or an agreement to constitute a valid contract, the parties' " 'minds must meet as to all the terms.' " *Id.* (citation omitted). Plaintiff's counsel sent a letter to defendant's counsel on 18 February 2002 explaining the settlement terms. Defendant accepted these terms and a contract was formed.

In sum, we agree with the trial court that N.C. Gen. Stat. § 1-567.13(a) (2001) precludes review of the arbitrator's award determining the settlement agreement was binding and enforceable. Nonetheless, the trial court correctly concluded a valid and enforceable settlement agreement was entered into by the parties. Accordingly, we affirm the order below.

Affirmed.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. BENSON MAURICE MOORE

No. COA03-1421

(Filed 21 December 2004)

1. **Constitutional Law— effective assistance of counsel—failure to record jury selection**

A defendant did not receive ineffective assistance of counsel where his counsel did not record jury selection, which precluded appeal of a *Batson* issue. The case does not fall into the limited circumstances where prejudicial error may be assumed, and satisfactory, race-neutral reasons were presented for the peremptory challenges.

2. **Appeal and Error— preservation of issues—failure to raise argument at trial**

An equal protection argument to the statutory rape statute (based on the statute not applying to married couples) was barred because it was not raised at trial. There was no reason to invoke N.C.R. App. P. 2 in light of holdings from North Carolina and from the U.S. Supreme Court.

3. Rape— statutory—age of victim—birthday rule

There was sufficient evidence of statutory rape where the victim was 2 days older than 15. The plain language of N.C.G.S. § 14-27.7A(a) does not qualify the age of the victim and, under the "birthday rule" in North Carolina, people reach an age on their birthday and remain that age until their next birthday.

Judge WYNN concurs in the result.

Appeal by defendant from judgment dated 11 June 2003 by Judge Judson D. DeRamus, Jr. in Superior Court, Rockingham County. Heard in the Court of Appeals 30 August 2004.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

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

McGEE, Judge.

Benson Maurice Moore (defendant) was convicted of statutory rape in violation of N.C. Gen. Stat. § 14-27.7A(a) and was sentenced to 300-369 months in prison on 11 June 2003. Defendant appeals.

The State's evidence at trial tended to show that on 27 June 2001, defendant came to S.R.'s home to have her braid his hair. Defendant asked S.R. how old she was and S.R. replied that she had just turned fifteen. Defendant did not believe that S.R. was only fifteen. He also asked S.R. whether she was a virgin and S.R. replied that she was. Both defendant and S.R. agreed they would have sex that night and that defendant would call S.R. to make arrangements to get together.

Defendant called S.R. later that day and said that he would meet her "down the street" at 1:30 a.m. S.R. had to sneak out of her house to meet defendant. Defendant picked S.R. up and drove her to his house. Defendant and S.R. had vaginal intercourse in defendant's bedroom, during which he ejaculated into her. Defendant then drove S.R. home. Defendant and S.R. subsequently saw each other in the neighborhood occasionally and had a few conversations, but they never again had sexual intercourse.

S.R. discovered she was pregnant and delivered a baby on 16 March 2002. The State's evidence also showed that defendant visited

S.R. in the hospital and acknowledged in the presence of others that he thought he was the baby's father. Defendant also submitted to paternity testing, which showed a 99.97 percent probability that defendant was the baby's father. S.R. did not initiate any paternity action against defendant and admitted that she had wanted to have sex with him on 27 June 2001. S.R.'s grandmother, with whom S.R. lived, reported defendant to police.

The State also presented evidence showing that in 1997, when defendant was nineteen, he had sex with a thirteen-year-old girl, M.H., whom he knew to be thirteen at the time. In that case, defendant had admitted to having sex with M.H. and had pled guilty.

In the present case, defendant testified that he never had sex with S.R. and the only time that he could have had sex with her was during a party at her house in July 2001. Defendant testified that he had a lot to drink at that party and did not remember what happened that night. He further testified that he never told anyone or otherwise acknowledged that he was the father of S.R.'s baby.

In his appeal, defendant has only presented arguments in support of assignments of error twenty, thirty-two, thirty-three, and thirty-four. All other assignments of error are deemed to be abandoned pursuant to N.C.R. App. P. 28(b)(6).

I.

[1] Defendant first argues that his attorney rendered ineffective assistance of counsel for failing to request that the jury selection be recorded. Under *Strickland v. Washington*, assistance of counsel is deemed ineffective when both "counsel's performance was deficient" and "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). The first part of this standard requires that a defendant show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* In other words, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 80 L. Ed. 2d at 693. The second part of the standard "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 80 L. Ed. 2d at 693. The *Strickland* Court elaborated on this point, holding that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 80 L. Ed. 2d at 698.

Defendant argues that his counsel's performance at trial fell below an objective standard of reasonableness because a reasonable attorney would have recorded the entire jury selection process, knowing that many issues might arise during the selection process that would be appealable. Specifically, defendant asserts that his trial counsel's failure to request that the proceedings be recorded precluded defendant from being able to appeal his *Batson* claim. Relying on *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), defendant's counsel took exception to two of the State's peremptory challenges that were used to excuse two African American jurors. While the discussion between the attorneys and the trial court occurred out of the jury's presence and was recorded, the remainder of the selection process was not recorded. Defendant argues that a reasonable attorney would have known that the *Batson* issue could only effectively be reviewed on appeal if the record included specific information. For instance, this Court has held that for a *Batson* claim to be reviewed on appeal, the record should include evidence, such as the following: "the total number of potential jurors questioned by the prosecutor; their race or gender; the number or percent accepted; whether similarly situated prospective jurors received disparate treatment on the basis of race or gender; whether the remarks to prospective jurors suggested any bias." *State v. Shelman*, 159 N.C. App. 300, 310, 584 S.E.2d 88, 96, *disc. review denied*, 357 N.C. 581, 589 S.E.2d 363 (2003). While this failure to request that the selection process be recorded may amount to a deficient performance, we do not agree that it rises to the level of depriving defendant of his Sixth Amendment right to counsel. *See Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693.

Furthermore, defendant does not show that defense counsel's performance at trial prejudiced his defense. Rather than arguing that his defense was prejudiced, defendant merely argues that prejudice should be presumed. Defendant directs us to *United States v. Cronic*, 466 U.S. 648, 80 L. Ed. 2d 657 (1984), which was decided the same day as *Strickland* and held that there were some cases where the deficiency of the defense counsel's performance was so great that prejudice need not be litigated. *Cronic*, 466 U.S. at 658, 80 L. Ed. 2d at 667. Defendant asserts that prejudice can be presumed in the present case by analogizing his case to *Roe v. Flores-Ortega*, 528 U.S. 470, 145 L. Ed. 2d 985 (2000). In *Flores-Ortega*, the United States

Supreme Court held that "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Id.* at 484, 145 L. Ed. 2d at 1000. Defendant argues that "but for counsel's deficient performance, [defendant] would have appealed" the *Batson* issue, and thus defendant was deprived of an appeal that he would otherwise have taken.

In making this argument, however, defendant disregards the way in which the Supreme Court qualified its holding in *Cronic*. The Supreme Court continued to lay out instances when prejudice might be presumed, and limited the instances to where there is "complete denial of counsel," no "meaningful adversarial testing," or where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 U.S. at 659-60, 80 L. Ed. 2d at 668. The Supreme Court has since reiterated that these three situations are the few times where prejudice may be presumed rather than proven. *See Bell v. Cone*, 535 U.S. 685, 695-96, 152 L. Ed. 2d 914, 927 (2002).

In *Flores-Ortega*, the Supreme Court held that the defendant was constitutionally deprived of counsel when his counsel failed to file a notice of appeal. *Flores-Ortega*, 528 U.S. at 477, 145 L. Ed. 2d at 994-95. The Supreme Court held that the failure to file a notice of appeal was more than a denial of counsel at a critical stage in the trial; rather, it was a "more serious denial of the entire judicial proceeding itself." *Id.* at 483, 145 L. Ed. 2d at 999. Defendant in our case wants us to consider the failure to record the jury selection to be on par with the failure to file notice of appeal. However, unlike in *Flores-Ortega*, defendant is not deprived of an entire judicial proceeding, only an issue on appeal. Defendant is not deprived of counsel at any critical stage of the proceedings; nor does he fall into any of the other limited circumstances in which prejudice might be presumed. Defendant must thus show that "there is a reasonable probability that, but for [his] counsel's unprofessional errors, the result of the proceeding would have been different." *See Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698.

As mentioned before, defendant does not argue that his defense was prejudiced and we do not find anything in the record on appeal to indicate that the failure to record the jury selection process denied defendant a fair trial. To make a *Batson* claim, a defendant must

establish a prima facie case of purposeful racial discrimination. *Batson*, 476 U.S. at 93, 90 L. Ed. 2d at 85. In the present case, the trial court ruled that defendant had not made a prima facie case on the *Batson* issue. On appeal, we will only overturn such a determination by the trial court if it is clearly erroneous. *State v. White*, 349 N.C. 535, 549, 508 S.E.2d 253, 262 (1998) (citing *State v. Fletcher*, 348 N.C. 292, 313, 500 S.E.2d 668, 680 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999)), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). In the present case, we find no error.

When determining whether a defendant has made a prima facie case of discrimination, a trial court should consider all relevant circumstances, including "defendant's race, the victim's race, the race of key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, a pattern of strikes against minorities, or the State's acceptance rate of prospective minority jurors." *White*, 349 N.C. at 548, 508 S.E.2d at 262. Even though defendant argues that most of this information is absent from the record because defense counsel did not request that the jury selection be recorded, there is sufficient evidence in the transcript to show that the trial court's decision was not clearly erroneous. Defendant was African American, as was S.R. and S.R.'s grandmother, the State's prosecuting witness. There were four African American jurors in the potential pool of jurors and only two were dismissed peremptorily. Moreover, the State voluntarily provided race-neutral explanations for excusing two African American jurors, even though it was not required to do so. *See Purkett v. Elem*, 514 U.S. 765, 767, 131 L. Ed. 2d 834, 839 (1995) (explaining that if the defendant makes a prima facie *Batson* claim, the burden shifts to the state to give a race-neutral justification for dismissing the juror). Specifically, the State said that one of the jurors excused was "the only juror of the 13 potential jurors that indicated that she knew the defendant," and the other "was the only juror of the 13 questioned who indicated that he had a prior criminal history." Both of these reasons are satisfactory race-neutral explanations for excusing jurors peremptorily. *See State v. Porter*, 326 N.C. 489, 499, 391 S.E.2d 144, 151 (1990) (stating that courts have properly allowed venire persons to be dismissed when they have criminal records or where they have known the defendant, counsel, or a relative of either). These explanations are facially based on something other than race and as the Supreme Court has held, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360, 114 L. Ed. 2d 395, 406 (1991). Thus,

there is nothing in the record that suggests that defendant was harmed by any deficiency in his defense counsel's performance at trial, and we hold that defendant's assignment of error on this issue is without merit.

II.

[2] Defendant next argues that he was denied equal protection of the law because N.C. Gen. Stat. § 14-27.7A[1] arbitrarily distinguishes between married and unmarried persons and is thus unconstitutional. N.C. Gen. Stat. § 14-27.7A(a) (2003) states:

> [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.

Defendant argues that he, a twenty-three-year-old, was punished for allegedly having sexual intercourse with fifteen-year-old S.R., because he and S.R. were not married, and that had they been married, he would have been exempt from this law. This argument, however, is procedurally barred because the statutory rape charge was not challenged on equal protection grounds at trial. *See* N.C.R. App. P. 10(b)(1). Defendant acknowledges that defense counsel did not present this issue to the trial court. Nevertheless, he argues that we should review this claim pursuant to N.C.R. App. P. 2, which states that:

> [t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court in the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

In support of his argument that this constitutional question "is a significant issue in the public interest," defendant makes some of the same arguments previously addressed in this Court. Specifically, defendant argues that the United States Supreme Court's decision in *Lawrence v. Texas* provided that sexual relations between married

1. Defendant's brief occasionally refers to N.C.G.S. § 14-27A, but no such statute exists. Since defendant was convicted under N.C.G.S. § 14-27.7A and since error was assigned under this statute, we assume that defendant intended to refer to § 14-27.7A.

persons are not entitled to greater protection than relations between unmarried persons. *See Lawrence*, 539 U.S. 558, 156 L. Ed. 2d 508 (2003) (extending the privacy right set forth in *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510 (1965), to unmarried persons). Defendant argues that *Lawrence* thus nullifies our decision in *State v. Howard* in which we held that the marriage exception from criminal liability in our statutory rape statute, N.C.G.S. § 14-27.7A, was constitutional. *Howard*, 158 N.C. App. 226, 232, 580 S.E.2d 725, 730, *disc. review denied*, 357 N.C. 465, 586 S.E.2d 460 (2003). We considered this same argument in *State v. Clark* and held that *Lawrence* did not affect *Howard*, because the *Lawrence* Court expressly held that it was not applying its decision to minors. *Clark*, 161 N.C. App. 316, 320-21, 588 S.E.2d 66, 68-69 (2003) (citing *Lawrence*, 539 U.S. at 578, 156 L. Ed. 2d at 525), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 81 (2004). *Clark* controls our present case.

Defendant, however, urges us to examine the issues addressed in *Clark* in light of *Limon v. Kansas*, 539 U.S. 955, .156 L. Ed. 2d 652 (2003). *Limon* involved greater punishment for same-sex statutory rape offenses than for similar offenses between members of the opposite sex. The United States Supreme Court remanded *Limon* the day after *Lawrence* was decided. Defendant argues that by remanding *Limon*, the Supreme Court indicated its willingness to extend *Lawrence* to minors. We disagree.

We first note, however, that even were we to find that *Clark* was no longer controlling, we cannot overrule other decisions of our Court. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989) (holding that once a panel of the Court of Appeals has ruled on an issue, another panel is bound by that decision until the issue is overturned by a higher court).

Moreover, we do not see how *Limon* changes our decision in *Clark*. As the State points out, *Limon* was remanded because it was based on *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140 (1986), which was overturned by *Lawrence*. *See Lawrence*, 539 U.S. at 578, 156 L. Ed. 2d at 525. On remand, the Kansas Court of Appeals decided that, in light of *Lawrence*, disparate punishment for the same crime (statutory rape) between same-sex offenders and different sex offenders was constitutional precisely because minors were involved. *See State v. Limon*, 32 Kan. App. 2d 369, 375, 83 P.3d 229, 235, *cert. granted*, —— Kan. ——, —— P.3d —— (2004). This underlying rationale of the Kansas court's decision is consistent with the rationale under-

lying our statutory rape law, which has the purpose of protecting minors who are not capable of effectively consenting. *See State v. Anthony*, 351 N.C. 611, 618, 528 S.E.2d 321, 324 (2000). We thus do not see a reason to suspend N.C.R. App. P. 10(b)(1) to consider defendant's argument regarding the constitutionality of N.C.G.S. § 14-27.7A. Accordingly, we dismiss this assignment of error.

III.

[3] Finally, in a supplemental brief allowed by this Court, defendant contends that the trial court erred when it denied defendant's motion to dismiss for insufficient evidence where the evidence showed that S.R. was two days older than fifteen years old. Defendant cites *State v. McGaha*, 306 N.C. 699, 295 S.E.2d 449 (1982), which arrested the judgment of a defendant who was indicted under N.C. Gen. Stat. § 14-27.4 because the victim, who was 12 years and eight months old, was not "12 years or less" as required by the statute. *McGaha*, 306 N.C. at 701, 295 S.E.2d at 450. Defendant thus argues that "[b]ecause [S.R.] was fifteen years and two days old at the time she and [defendant] allegedly had sexual intercourse, she was 'something more than' fifteen years old at the time of the offense." Defendant continues that "[u]nder *McGaha*, the language of G.S. § 14-27.7A[(a)] must be construed so as not to include victims who are even one day beyond their [fifteenth] birthdays." Defendant argues that for these reasons his conviction should be vacated. We disagree and reject this argument.

We recently addressed a similar argument pertaining to the language of N.C.G.S. § 14-27.7A(a), and held that "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 have reached their sixteenth birthday." *State v. Roberts*, 166 N.C. App. 649, 651, 603 S.E.2d 373, 375 (2004). We reiterate that in interpreting a statute, we first look to understand the legislative intent behind the statute by examining the plain language of the statute. *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). Here, the plain language of the statute is clear and unambiguous. Unlike the instances cited by defendant, N.C.G.S. § 14-27.7A(a) specifically refers to a "person who *is* 13, 14, or 15 years old[.]" (emphasis added). It does not qualify the age of the person with any of the following phrases: "older," "younger," "more," or "less." *See Roberts*, 166 N.C. App. at 652, 603 S.E.2d at 375 (stating that the "language adopted by the legislature in N.C. Gen.

Stat. § 14-27.7A lacks [the] modifiers" that appear in N.C.G.S. § 14-27.4). In other words, the minor described in N.C.G.S. § 14-27.7A must be the age of thirteen, fourteen or fifteen—not be more or less than these ages.

Moreover, as we wrote in *Roberts*, our interpretation of N.C.G.S. § 14-27.7A is consistent with our method for determining how old someone *is*, namely the "birthday rule." *Roberts*, 166 N.C. App. at 652, 603 S.E.2d at 375 (citing *In re Robinson*, 120 N.C. App. 874, 876-77, 464 S.E.2d 86, 88 (1995)). Under the "birthday rule," a person reaches a certain age on her birthday and remains that age until her next birthday. *Robinson*, 120 N.C. App. at 877, 464 S.E.2d at 88. Applying this rule, S.R. reached the age of fifteen on 25 June 2001, which was her birthday (anniversary of her birth) and remained fifteen until 25 June 2002. Thus, she was fifteen for the purposes of N.C.G.S. § 14-27.7A on 27 June 2001 when she and defendant had sexual intercourse. We hold that the trial court properly denied defendant's motion to dismiss on this issue.

No error.

Chief Judge MARTIN concurs.

Judge WYNN concurs in result.

VISIONAIR, INC., PLAINTIFF v. DOUGLAS S. JAMES AND COLOSSUS INCORPORATED D/B/A INTERACT PUBLIC SAFETY SYSTEMS, DEFENDANTS

No. COA03-1453

(Filed 21 December 2004)

1. **Injunctions— preliminary—likelihood of success—non-compete agreement—overbroad**

A plaintiff seeking a preliminary injunction to enforce a non-compete agreement did not demonstrate a likelihood of success on the merits where the agreement was overbroad and not enforceable.

2. Injunctions— preliminary—likelihood of success—breach of agreement—conclusory allegations

A plaintiff seeking a preliminary injunction to enforce a non-compete agreement did not demonstrate a likelihood of success on the merits where plaintiff alleged that defendant would immediately breach the agreement, but did not allege supporting facts.

3. Injunctions— preliminary—likelihood of success—misappropriation of trade secrets—allegations too general

A plaintiff seeking a preliminary injunction to enforce a non-compete agreement did not demonstrate a likelihood of success on the merits on a claim for misappropriation of trade secrets. Plaintiff's allegations were general and did not identify with specificity the trade secrets allegedly misappropriated.

Appeal by Plaintiff from order entered 3 April 2003 by the Honorable Ernest B. Fullwood, in Superior Court, New Hanover County. Heard in the Court of Appeals 30 August 2004.

Wyrick Robbins Yates & Ponton L.L.P., by K. Edward Greene and Kathleen A. Naggs, for plaintiff-appellant.

Wessel & Raney, L.L.P., by W. A. Raney, Jr., and McGuire, Wood & Bissette, P.A., by Joseph P. McGuire, for defendant-appellees.

WYNN, Judge.

Plaintiff VisionAIR, Inc. appeals from an order of the trial court denying its motion for a preliminary injunction in an action filed against Defendants Douglas James and Colossus Incorporated d/b/a/ InterACT Public Safety Systems (collectively "Defendants"). VisionAIR contends the trial court erred in denying its motion for a preliminary injunction because VisionAIR is likely to succeed on the merits of its claims that James violated employment and non-disclosure agreements, that InterACT tortiously interfered with contract, and that Defendants misappropriated VisionAIR's trade secrets and engaged in unfair trade practices, unfair competition, and civil conspiracy. VisionAIR further contends it will suffer irreparable harm unless an injunction is issued. For the reasons set forth herein, we affirm the trial court's denial of a preliminary injunction.

The procedural and factual history of the instant appeal is as follows: VisionAIR is a software company that develops support products for public safety agencies. From September 1996 through March

2003, VisionAIR employed James, by the end of his tenure, as a software architect. On 26 September 1996, VisionAIR and James executed an Employment Agreement that included a restrictive covenant prohibiting James from "sell[ing] or develop[ing] any software products which will directly or indirectly compete with any of the Employer's software products" and "own[ing], manag[ing], be[ing] employed by or otherwise participat[ing] in, directly or indirectly, any business similar to Employer's . . . within the Southeast" during James's employ with VisionAIR and for two years thereafter. The Employment Agreement also included provisions prohibiting the disclosure of VisionAIR's trade secrets and mandating the surrender of VisionAIR's trade secrets upon the termination of James's employment. On 21 August 2002, VisionAIR and James executed a Non-Disclosure Agreement preventing James from disclosing VisionAIR's "confidential information." Under the Non-Disclosure Agreement, "confidential information" included "all information about Employer and its business, products, and services, furnished to the Employee[.]"

In March 2003, James left VisionAIR to become a senior software engineer at InterACT, another software company active in providing products to law enforcement agencies. On 20 March 2003, VisionAIR filed a complaint and motion for a temporary restraining order, preliminary injunction, permanent injunction, damages, and expedited discovery, claiming breach of the Employment Agreement, breach of the Non-Disclosure Agreement, tortious interference with contract, misappropriation of trade secrets, unfair trade practices, common law unfair competition, civil conspiracy, and injunctive relief. On 20 March 2003, the trial court granted VisionAIR's motion for a temporary restraining order prohibiting James from performing services and developing products at InterACT or any other VisionAIR competitor and disclosing or using VisionAIR's trade secrets to the benefit of InterACT or any other VisionAIR competitor. However, on 3 April 2004, the trial court ordered the temporary restraining order dissolved and denied VisionAIR's motion for a preliminary injunction because VisionAIR had failed to make a sufficient showing of likelihood of success on the merits of its claims. Plaintiff appealed from this order.

VisionAIR argues on appeal that the trial court erred in denying its motion for preliminary injunction because VisionAIR is likely to succeed on the merits of its claims and because VisionAIR will suffer irreparable harm unless an injunction is issued. For the reasons stated below, we affirm the decision of the trial court.

A preliminary injunction is interlocutory and thus generally not immediately reviewable. *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983); *N.C. Farm P'ship v. Pig Improvement Co.*, 163 N.C. App. 318, 321, 593 S.E.2d 126, 129 (2004). An appeal may be proper, however, in cases, including those involving trade secrets and non-compete agreements, where the denial of the injunction "deprives the appellant of a substantial right which he would lose absent review prior to final determination." *A.E.P. Indus., Inc.*, 308 N.C. at 400, 302 S.E.2d at 759; *see also, e.g., Hopper v. Mason*, 71 N.C. App. 448, 450, 322 S.E.2d 193, 194 (1984) ("no appeal lies from an interlocutory order unless such ruling or order deprives an appellant of a 'substantial right' which may be lost if appellate review is disallowed").

Accordingly, in this case, we review the trial court's denial of a preliminary injunction only as to VisionAIR's claims for breach of the Employment Agreement, and specifically the non-compete provisions therein, breach of the Non-Disclosure Agreement, and misappropriation of trade secrets, as these arguably encompass substantial rights that might be lost absent immediate review. *A.E.P. Indus., Inc.*, 308 N.C. at 406-08, 302 S.E.2d at 762-63; *Kennedy v. Kennedy*, 160 N.C. App. 1, 5-6, 584 S.E.2d 328, 331 (2003); *Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 594, 424 S.E.2d 226, 228-29 (1993). VisionAIR's claims for tortious interference with contract, unfair trade practices, unfair competition, and civil conspiracy, and Assignments of Error Nos. 1, 5, 6, and 7, and Cross Assignment of Error No. 7 as they relate to those claims, will not escape review but for interlocutory appeal and thus are not addressed here. *C.f. A.E.P. Indus., Inc.*, 308 N.C. at 406, 302 S.E.2d at 762 (order denying injunction generally proper where adequate remedy at law is available); *Bd. of Light and Water Comm'rs of the City of Concord v. Parkwood Sanitary Dist.*, 49 N.C. App. 421, 423, 271 S.E.2d 402, 404 (1980) ("Where there is a full, complete and adequate remedy at law, the equitable remedy of injunction will not lie.").

The standard of review from a preliminary injunction is "essentially *de novo*." *Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696 (1984). Nevertheless "a trial court's ruling on a motion for a preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 465, 579 S.E.2d 449, 452 (2003); *see also DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 578, 561 S.E.2d 276, 281-82 (2002) (trial court deci-

sion to issue or deny an injunction will be upheld where there is "competent evidence" to support the decision).

Because a preliminary injunction is "an extraordinary measure," it will issue only upon the movant's showing that: (1) there is a "*likelihood* of success on the merits of his case;" and (2) the movant will likely suffer "irreparable loss unless the injunction is issued[.]" *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977); *A.E.P. Indus., Inc.*, 308 N.C. at 401, 302 S.E.2d at 759.

In this case, the order being challenged denied VisionAIR's motion for a preliminary injunction based on VisionAIR's failure to establish the likelihood of success on the merits. We therefore review VisionAIR's likelihood of success on the merits.

A. Breach of the Employment Contract's Non-Compete Covenant

(Assignments of Error Nos. 1, 2, 4, 5, and 7; Cross Assignments of Error Nos. 1 and 7)

[1] We first determine whether VisionAIR has demonstrated a likelihood of success on its claim for breach of the Employment Agreement's non-compete covenant. "Covenants not to compete between an employer and employee are 'not viewed favorably in modern law.' " *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 279, 530 S.E.2d 878, 881 (2000) (quoting *Hartman v. W. H. Odell and Assocs., Inc.*, 117 N.C. App. 307, 311, 450 S.E.2d 912, 916 (1994)). To be valid, the restrictions on the employee's future employability by others "must be no wider in scope than is necessary to protect the business of the employer." *Manpower of Guilford County, Inc. v. Hedgecock*, 42 N.C. App. 515, 521, 257 S.E.2d 109, 114 (1979) (citations omitted). If a non-compete covenant "is too broad to be a reasonable protection to the employer's business it will not be enforced. The courts will not rewrite a contract if it is too broad but will simply not enforce it." *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989) (citations omitted).

Here, the non-compete covenant in the Employment Agreement is overbroad and therefore not enforceable. Notably, the covenant states that James may not "own, manage, be employed by or otherwise participate in, directly or indirectly, any business similar to Employer's . . . within the Southeast" for two years after the termination of his employ with VisionAIR. Under this covenant James would not merely be prevented from engaging in work similar to that which he did for VisionAIR at VisionAIR competitors; James would

be prevented from doing even wholly unrelated work at any firm similar to VisionAIR.[1] Further, by preventing James from even "indirectly" owning any similar firm, James may, for example, even be prohibited from holding interest in a mutual fund invested in part in a firm engaged in business similar to VisionAIR. Such vast restrictions on James cannot be enforced. *See, e.g., Henley Paper Co.*, 253 N.C. at 534-35, 117 S.E.2d at 434 (non-compete covenant may not restrict too many activities).

Moreover, the non-compete covenant also prohibits James from "sell[ing] or develop[ing] any software products which will directly or indirectly compete with any of the Employer's software products" for two years after the termination of his employ with VisionAIR. This broad restriction would prevent James from engaging in sales, work unrelated to that which he did for VisionAIR, as well as from developing products that, while competitive with VisionAIR's, may, for example, be based on technology wholly unrelated to that upon which VisionAIR's products are based. Again, these broad restrictions cannot be enforced. *See, e.g., Hartman*, 117 N.C. App. at 317, 450 S.E.2d at 920 (non-compete agreement may not restrict a party from unrelated work for a potential competitor).

Because the non-compete covenant in the Employment Agreement is overbroad and thus unenforceable, VisionAIR has not demonstrated likely success on the merits as to its claim for breach of that covenant. *See Elec. S., Inc. v. Lewis*, 96 N.C. App. 160, 165, 385 S.E.2d 352, 355 (1989) (to show likelihood of success on the merits, party must show that the non-compete covenant is enforceable).

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1. We recognize that in *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 638, 568 S.E.2d 267, 273 (2002), this Court held that a non-compete covenant may restrict an employee from all employment with competitors. However, the *Precision Walls, Inc.* opinion also states that "we conclude that it is within plaintiff's legitimate business interest to prohibit defendant from working in an ***identical position*** with a competing business." *Id.* (emphasis added). Moreover, the restrictions on the employee in *Precision Walls, Inc.* were for only one year and in only two states, as opposed to two years and an entire region here. *Id.* Notably, in other cases, such as *Hartman*, 117 N.C. App. at 317, 450 S.E.2d at 920, this Court recognized the problem with such all-encompassing restrictions and held that an employee could not be prohibited from working in an unrelated capacity for another business in the same field. *Hartman*, 117 N.C. App. at 317, 450 S.E.2d at 920 (non-compete covenant is "overly broad in that, rather than attempting to prevent plaintiff from competing for [] business, it requires plaintiff to have no association whatsoever with any business that provides [similar] services. . . . Such a covenant would appear to prevent plaintiff from working as a custodian for any 'entity' " providing such services); *see also Henley Paper Co. v. McAllister*, 253 N.C. 529, 534-35, 117 S.E.2d 431, 434 (1960) (non-compete covenant overbroad and unenforceable where it "excludes the defendant from too much territory and from too many activities").

B. Breach of the Non-Disclosure Agreement

(Assignments of Error Nos. 1, 2, 4, 5, and 7; Cross Assignment of Error No. 1)

[2] We next determine whether VisionAIR has demonstrated likely success on its claim for breach of the Non-Disclosure Agreement. To state a claim for breach of the Non-Disclosure Agreement, "as in any other contract case—the complaint must allege . . . *the facts constituting the breach*[.]" *RGK, Inc. v. U.S. Fid. & Guar. Co.*, 292 N.C. 668, 675, 235 S.E.2d 234, 238 (1977); *see also, e.g., Claggett v. Wake Forest Univ.*, 126 N.C. App. 602, 608, 486 S.E.2d 443, 446 (1997) (plaintiff must allege "the facts constituting the breach").

In its complaint, VisionAIR alleged that James had breached, or would immediately breach, the Non-Disclosure Agreement in the course of his employment with InterACT. VisionAIR has, however, neither alleged facts supporting the alleged breach, nor specified confidential information James shared with InterACT or any other party. VisionAIR's conclusory statements are insufficient to state a claim for breach of the Non-Disclosure Agreement. *See FMC Corp. v. Cyprus Foote Mineral Co.*, 899 F. Supp. 1477, 1484 (W.D.N.C. 1995) (likelihood of success on the merits of breach of confidentiality contract not shown where plaintiff described confidential information and alleged breach only in general terms).

Because VisionAIR has failed to state facts supporting the alleged breach of the Non-Disclosure Agreement, VisionAIR has not demonstrated likely success on the merits as to its claim for breach of that agreement.

C. Misappropriation of Trade Secrets

(Assignments of Error Nos. 1, 3, and 5; Cross Assignment of Error No. 2)

[3] We next determine whether VisionAIR has demonstrated likelihood of success on its claim for misappropriation of trade secrets. The North Carolina Trade Secrets Protection Act provides that "actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation." N.C. Gen. Stat. § 66-154(a) (2003). To plead misappropriation of trade secrets, "a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether mis-

appropriation has or is threatened to occur." *Analog Devices, Inc.*, 157 N.C. App. at 468, 579 S.E.2d at 453 (citations omitted); *see also FMC Corp.*, 899 F. Supp. at 1484 (preliminary injunction inappropriate where trade secret described only in general terms and where evidence of blatant misappropriation not shown).

In its complaint, VisionAIR made general allegations that James's employment at InterACT has or will immediately engender misappropriation of trade secrets. VisionAIR has failed to identify with any specificity the trade secrets allegedly misappropriated, mentioning only broad product and technology categories. VisionAIR's sweeping and conclusory statements are insufficient to state a claim for misappropriation of trade secrets. *See Analog Devices, Inc.*, 157 N.C. App. at 469-70, 579 S.E.2d at 454 (injunction properly denied where only general areas of research were identified as trade secrets and an absolute bar to activity in those areas was sought).

Because VisionAIR has failed to identify specific trade secrets allegedly misappropriated, VisionAIR has not demonstrated likely success on the merits as to its claim for misappropriation of trade secrets.

Because VisionAIR has failed to show its likely success on the merits of its claims subject to interlocutory review—a required element for a preliminary injunction—we do not reach the question of whether VisionAIR established irreparable harm (Cross Assignment of Error Number 4). *See, e.g., Redlee/SCS, Inc. v. Pieper*, 153 N.C. App. 421, 423, 571 S.E.2d 8, 11 (2002) (plaintiff must show likelihood of success on the merits for preliminary injunction to issue); *Ridge Cmty. Investors, Inc.*, 293 N.C. at 701, 239 S.E.2d at 574 (same); *A.E.P. Indus., Inc.*, 308 N.C. at 401, 302 S.E.2d at 759 (same).

In sum, we affirm the trial court's denial of the preliminary injunction. We therefore do not address James's and InterACT's Cross-Assignments of Error Numbers 3 (that VisionAIR materially breached the Employment Agreement, thereby excusing James's alleged breach), 5 (that James would suffer extreme hardship if a preliminary injunction were issued), and 6 (that issuing a preliminary injunction would hamper improvements for law enforcement and homeland security).[2]

2. We note that our affirming the trial court's decision moots Defendants' motion to strike VisionAIR's Reply Brief.

Affirmed.

Chief Judge MARTIN and Judge McGEE concur.

STATE OF NORTH CAROLINA v. LAQUEZ EUGENE SIMMONS, DEFENDANT

No. COA03-1272

(Filed 21 December 2004)

1. Criminal Law— motion for joinder of offenses—first-degree murder—common law robbery

The trial court did not abuse its discretion in a first-degree murder and common law robbery case by granting the State's motion for joinder even though the two offenses were separated in time by several days and involved different victims, because: (1) the offenses both involved defendant striking another person during an argument, the offenses involved the same dispute between defendant and the victim's female friends, and the time lapse between the offenses was only 5 days; (2) the fact that the victim was not present at the scene of the 3 April 2001 event is not a crucial factor in the analysis since the nature of the consolidated offenses is only one factor to be considered; (3) the events of 3 April constituted a critical point in the ongoing dispute between the victim and defendant, which resulted in the argument and struggle on 8 April 2001; and (4) defendant did not show that the joinder deprived him of a fair hearing on the murder charge since the evidence of the 3 April incident would have been admissible at the trial of first-degree murder pursuant to N.C.G.S. § 8C-1, Rule 404(b) for the purpose of showing intent and the chain of events explaining the context, motive and set-up of the crime.

2. Evidence— testimony—threats—incidents sufficiently similar

Evidence of a defendant's actions and statements leading up to a common law robbery with which a first-degree murder charge was consolidated for trial was properly admitted because: (1) defendant's statements and actions were admissible under N.C.G.S. § 8C-1, Rules 401 and 402 since evidence of defendant's

threatening motions and statements directed at the robbery victim tended to show that defendant put her in fear and the testimony was probative of an essential element of common law robbery; (2) the evidence would have been admissible at a separate trial on the first-degree murder charge pursuant to N.C.G.S. § 8C-1, Rule 404(b); and (3) only 5 days separated the two incidents, and on both occasions defendant threatened the victim's guests with violence.

3. Criminal Law— self-defense—denial of instruction

The trial court did not err in a first-degree murder case by denying defendant's request for a jury instruction on self-defense, because: (1) the trial court determined that defendant was the aggressor and thus was not entitled to a jury instruction on perfect self-defense; (2) all the evidence showed that defendant declined the victim's invitation to fight one-on-one, went inside a mobile home, and then returned to the scene with a loaded weapon; (3) the trial court determined that defendant did not intentionally discharge the weapon under the belief that it was necessary in order to save himself from death or great bodily harm; and (4) even if the evidence supported an instruction on imperfect self-defense, the trial court's failure to give one was harmless when the jury returned a verdict of guilty on the charge of first-degree murder.

4. Robbery— common law—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of common law robbery even though defendant contends there was insufficient evidence that he took the victim's phone with the intent to permanently deprive her of it, because: (1) viewed in the light most favorable to the State, the evidence showed that defendant slapped the phone out of the victim's hand, declared that it was his new phone, and began dialing on it immediately after he stepped outside the house; (2) although evidence that defendant returned the phone within a few days tends to contradict the circumstantial evidence of defendant's intent at the time of the taking, evidence supporting a contradictory inference is not determinative on a motion to dismiss since defendant's intent at the time of the taking is an issue for the jury to resolve; and (3) a jury could reasonably find that defendant had the intent to permanently deprive the victim of the phone at the time of the taking, and the trial court explained that an intent

to temporarily deprive the victim of the property was not sufficient under the law.

Appeal by defendant from judgment entered 15 May 2003 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 26 August 2004.

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

Massengale & Ozer, by Marilyn G. Ozer for the defendant-appellant.

ELMORE, Judge.

Laquez Simmons (defendant) was indicted on 15 October 2001 for first degree murder, common law robbery, and possession with intent to manufacture, sell, or deliver cocaine. The State moved to join the offenses for trial, and defendant moved to sever. The trial court granted the State's motion for joinder.

The State's evidence tended to show that defendant and Reginald Lee Edwards (the victim) had an ongoing dispute about defendant's treatment of the victim's female companions. The State offered eyewitness testimony of two incidents involving defendant, the 8 April 2001 shooting of the victim and the 3 April 2001 argument giving rise to the robbery charge. Izetta Young, a guest in the victim's home on 3 April while the victim was away at work, testified that defendant entered the home and threatened to punch her in the face. Lynette Smith, the victim's girlfriend, requested that defendant leave. Clifford Moore, another guest present at the time, brought defendant outside to speak with him. Defendant came back inside and attempted to slap Izetta Young across the face. When Ms. Young raised her hands to protect her face, defendant's contact knocked her cellular phone out of her hand. Defendant picked the phone up off the floor and stated that he had a new phone. Lynette Smith again requested that defendant leave the home, and defendant stated in response that he was going to slap her too. Defendant walked out of the home carrying Ms. Young's phone and began dialing on the phone after he stepped outside. When Clifford Moore demanded that defendant return the phone to Ms. Young, defendant exclaimed, "No . . . I'm going to shoot everybody out here." The next day, defendant spoke briefly with John Cooley, a cousin of the victim and the person who had purchased Ms. Young's cell phone. Mr. Cooley asked defendant why he took the

phone, and defendant stated that he would return the phone. Defendant did in fact bring the phone back to Mr. Cooley, although not the same day as this conversation. Mr. Cooley testified that defendant returned the phone to him a "[c]ouple days before" the date of the shooting.

Regarding the events of 8 April, the State's evidence tended to show that the victim and several acquaintances approached defendant while he was standing outside of a friend's home located in the same mobile home park as the victim's home. The victim asked defendant to apologize to Lynette Smith for the 3 April incident. Defendant refused, whereupon the victim suggested that he and defendant fight right there on the grass. Defendant declined to fight but stated that he was going inside to get a gun. Defendant threatened, "I'm going to shoot everybody." When he arrived back outside, defendant announced that he was "strapped" and lifted his shirt to reveal a gun in his waistband. The victim stated that he did not have a gun and asked defendant to put his gun down. Defendant pulled his gun out and struck the victim in the forehead with the gun's muzzle. The victim struggled to remove the gun from defendant's hands. John Cooley testified that defendant held the gun on the victim's head and shot him. After firing the shot, defendant pushed the gun against the victim's head, causing the victim to fall on his back. Defendant waved the gun around at the onlookers and then fled the scene in a car. Police detectives arriving on the scene interviewed the witnesses, including Clifford Moore. Mr. Moore told the detectives that there had been an argument between the victim and defendant going "back several days," and that this was the dispute over which the victim offered to fight defendant.

Defendant's girlfriend, Denise Hart, gave a statement about the 8 April incident to Detective Jeff Houston on 30 August 2001. On direct examination by defense counsel, Detective Houston testified to this statement given by Ms. Hart. This testimony tended to show that during the events leading up to the shooting, defendant came inside his friend's home and found a gun. In the presence of Ms. Hart, defendant checked that the gun was loaded. Shortly after defendant went back outside, Ms. Hart heard a shot and then looked outside and saw a body lying on the ground. According to Ms. Hart, defendant later told her that the gun had gone off by accident. On cross-examination by the State, Detective Houston testified that on the two previous occasions when he interviewed Ms. Hart, she made no mention of the shooting being an accident.

Defendant's 10 May 2001 statement given to Detective Jeff Houston was admitted at trial without any objection from defendant. This statement contained defendant's account of the two incidents, including his slapping Ms. Young during the phone incident on 3 April. The jury found defendant guilty of first degree murder and common law robbery and not guilty of possession with intent to manufacture, sell, or distribute cocaine. Defendant appeals from judgments entered on the verdicts.

I.

[1] Defendant's first assignment of error relates to the trial court's joinder of the common law robbery charge with the first degree murder charge. Defendant contends that joining these two offenses, separated in time by several days and involving different victims, was prejudicial error. We disagree.

Two or more offenses may properly be joined for trial if the offenses are "based on the same act or transaction or on a *series of acts or transactions connected together* or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2003) (emphasis added). This Court has held that in ruling upon a motion for joinder, a trial judge must utilize a two-step analysis: (1) a determination of whether the offenses have a transactional connection and (2) if there is a connection, a consideration of whether the accused can receive a fair hearing on the consolidated offenses at trial. *State v. Montford*, 137 N.C. App. 495, 498, 529 S.E.2d 247, 250, *cert. denied*, 353 N.C. 275, 546 S.E.2d 386 (2000). The motion to join is within the sound discretion of the trial judge, and the trial judge's ruling will not be disturbed absent an abuse of discretion. *State v. Perry*, 142 N.C. App. 177, 181, 541 S.E.2d 746, 749 (2001). However, if there is "no transactional connection, then the consolidation is improper as a matter of law." *Id.* (quoting *State v. Owens*, 135 N.C. App. 456, 458, 520 S.E.2d 590, 592 (1999)).

We cannot say that joinder of the two offenses was improper as a matter of law. In determining whether offenses are part of the same series of transactions, the following factors must guide the court: "(1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case." *Montford*, 137 N.C. App. at 498-99, 529 S.E.2d at 250. No single factor is dispositive. *Id.* Here, the offenses both involved defendant striking another person during an argument; the offenses involved the same dispute between defend-

ant and the victim's female friends; and the time lapse between the offenses was only 5 days. The fact that the victim was not present at the scene of the 3 April events is not a crucial factor in the analysis because the nature of the consolidated offenses is only *one* factor to be considered.

At the pre-trial hearing on the State's motion for joinder, the trial judge considered several factors, including the factual connection between the two offenses and the time lapse of 5 days. The trial judge found that the confrontation between defendant and the victim on 8 April arose out of defendant's treatment of Ms. Young and Ms. Smith over the past few weeks. The trial judge stated his observations that the two incidents shared the same underlying dispute between the parties and that this dispute "culminated in the acts of [April] 8th." The record indicates that the events of 3 April constituted a critical point in the ongoing dispute between the victim and defendant, which resulted in the argument and struggle on 8 April. As such, we hold that the trial judge did not err in finding a transactional connection between the two offenses.

We must next address whether defendant has shown that the joinder deprived him of a fair hearing on the murder charge. In making this determination, we are mindful that "the question posed is whether the offenses are *so separate in time and place* and *so distinct in circumstances* as to render a consolidation unjust and prejudicial to an accused." *State v. Bowen*, 139 N.C. App. 18, 28, 533 S.E.2d 248, 254 (2000). In the context of joinder of charges, this Court has explained that "[w]hile the admissibility of [the] evidence pursuant to Rule 404(b) is not conclusive evidence of the absence of prejudice, it is a factor that we may consider." *Bowen*, 139 N.C. App. at 29, 533 S.E.2d at 255. If the offenses had not been joined, then evidence of the 3 April incident would have been admissible at the trial of the first degree murder charge pursuant to N.C.R. Evid. 404(b) for the purpose of showing intent. Rule 404(b) provides that while evidence of a person's prior bad acts is not admissible to show propensity, this evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8-C1, Rule 404(b) (2003). Our Supreme Court has held that Rule 404(b) is a general rule of *inclusion* of other bad acts of the defendant, "subject to the single exception that such evidence must be excluded if its *only* probative value is to show that defendant has the propensity or disposition to commit an offense of the nature of the crime charged."

State v. Berry, 356 N.C. 490, 505, 573 S.E.2d 132, 143 (2002). Here, testimony concerning Ms. Smith's requests that defendant leave the victim's home while defendant was engaged in an argument with Ms. Young was probative of defendant's mental state when the victim requested an apology from defendant. In addition, the 3 April incident was part of the chain of events explaining defendant's motive and the immediate context of the shooting. Although not expressly stated in Rule 404(b) itself, evidence of prior acts may be admitted if such evidence "pertain[s] to the chain of events explaining the context, motive and set-up of the crime" and "forms an integral and natural part of an account of the crime . . . necessary to complete the story of the crime for the jury." *State v. Smith*, 152 N.C. App. 29, 35, 566 S.E.2d 793, 798 (quoting *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990)), *cert. denied*, 356 N.C. 311, 571 S.E.2d 208 (2002). Defendant's slapping of Ms. Young and his statement that he would slap Ms. Smith after she requested that he leave the victim's home are an essential part of the chain of events explaining defendant's motive. As there is no indication that joinder unfairly deprived defendant of a fair hearing, we hold that the trial judge's decision to consolidate the offenses in one trial was not an abuse of discretion.

II.

[2] By a number of assignments of error, defendant next challenges the admission of testimony describing the events of 3 April. Defendant argues that this testimony was irrelevant and unfairly prejudicial. We disagree.

First, defendant's statements and actions on 3 April were admissible under N.C.R. Evid. 401 and 402. Evidence of defendant's threatening motions and statements directed at Ms. Young tended to show that defendant put Ms. Young in fear. Because this testimony was probative of an essential element of common law robbery, it was admissible at trial where the robbery offense was properly joined. Second, as discussed *supra*, the 3 April evidence would have been admissible at a separate trial on the first degree murder charge pursuant to Rule 404(b).

Defendant argues, however, that the 3 April testimony was unfairly prejudicial and should have been excluded under N.C.R. Evid. 403. "When prior incidents are offered for a proper purpose, the ultimate test for admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." *State v. West*,

103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991). Only 5 days separated the two incidents, and on both occasions defendant threatened the victim's company with violence. We hold that the trial court did not abuse its discretion in admitting the 3 April testimony.

III.

[3] In his next assignment of error, defendant contends that the trial court improperly denied his request for a jury instruction on self-defense. A defendant is entitled to an instruction on self-defense if there is any evidence from which the jury could reasonably find that the defendant believed it necessary to kill in order to protect himself from death or great bodily harm. *State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982). If, however, there is no evidence that the defendant in fact formed such a reasonable belief, then the issue of self-defense should not be submitted to the jury. *Id.*

Here, defendant requested that the trial court give an instruction on self-defense. At the charge conference, the defense counsel presented a theory of imperfect self-defense:

> THE COURT: Okay. What's your contention on the issue of self-defense?
>
> MR. COOPER: I would submit to the Court the issue of imperfect self-defense.

The trial court considered the applicability of both perfect and imperfect self-defense. A defendant has the defense of perfect self-defense if the following four elements existed at the time of the killing:

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

be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981). If the defendant was the aggressor or used excessive force, he has lost the benefit of perfect self-defense but may be entitled to the defense of imperfect self-defense. *Id.*

The trial court determined that defendant was the aggressor and thus not entitled to a jury instruction on perfect self-defense. All of the evidence showed that defendant declined the victim's invitation to fight one-on-one, went inside the mobile home, and then returned to the scene with a loaded weapon. The trial court also determined that defendant did not intentionally discharge the weapon under the belief that it was necessary in order to save himself from death or great bodily harm. Rather, defendant's evidence supported a theory of accidental discharge of the weapon. Defendant's argument at the trial court's charge conference was that he raised the gun to the victim's head in order to protect himself. However, the evidence shows that the victim was unarmed. We note that even if the evidence supported an instruction on imperfect self-defense, the trial court's failure to give one was harmless. *See State v. Mays*, 158 N.C. App. 563, 577, 582 S.E.2d 360, 369 (when trial court submits to jury possible verdicts of first degree murder based upon premeditation and deliberation, second degree murder, and not guilty, a verdict of first degree murder renders trial court's failure to give imperfect self-defense instruction harmless), *cert. denied*, — N.C. —, — S.E.2d — (2004). The trial court submitted to the jury the possible verdicts of first degree murder based on premeditation and deliberation, second degree murder, involuntary manslaughter, and not guilty. As the jury returned a guilty verdict on the charge of first degree murder, any error by the trial judge in refusing to give an imperfect self-defense charge was not prejudicial.

IV.

[4] In his final assignment of error, defendant contends that the State's robbery charge was not supported by sufficient evidence. Specifically, defendant argues that there was insufficient evidence that he took Ms. Young's phone with the intent to permanently deprive her of it. In ruling on a motion to dismiss for insufficiency of the evidence, the trial judge must view the evidence in the light most favorable to the State, giving the State the benefit of all rea-

sonable inferences. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. *Id.* If the trial judge determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, the judge must deny the defendant's motion. *State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994).

Here, the State did not present direct evidence that defendant formed the intent to permanently deprive Ms. Young of her phone. "However, '[i]ntent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred.' " *State v. Herring*, 322 N.C. 733, 740, 370 S.E.2d 363, 368 (1988) (quoting *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974)). Viewed in the light most favorable to the State, the evidence shows that defendant slapped the phone out of Ms. Young's hand, declared that it was his new phone, and began dialing on it immediately after he stepped outside the home. The evidence that defendant returned the phone within a few days tends to contradict the circumstantial evidence of defendant's intent at the time of the taking. However, this evidence supporting a contradictory inference is not determinative on a motion to dismiss because defendant's intent at the time of the taking is an issue for the jury to resolve. *State v. Scott*, 356 N.C. 591, 598, 573 S.E.2d 866, 870 (2002) ("Evidence in the record supporting a contrary inference is not determinative on a motion to dismiss."). A jury could reasonably find that defendant had the intent to permanently deprive Ms. Young of the phone at the time of the taking. Further, when instructing the jury on intent to permanently deprive, the trial judge explained that "an intent to temporarily deprive Izetta Young of the property is not sufficient under the law." We overrule defendant's assignment of error.

No error.

Judges CALABRIA and STEELMAN concur.

WILLIAM A. HAYES, LANNESS K. McKEE AND WIFE, ANN McKEE, JIMMY SMITH AND WIFE, RUBY SMITH, JO ANN SMITH, AMY SMITH, SAM TEDDER AND WIFE, ANN TEDDER, FRAN J. COLEMAN, ROBERT CAPPS AND WIFE, BEVERLY CAPPS, THOMAS LEWIS AND WIFE, SHIRLEY LEWIS, C.M. IVEY AND WIFE, GLADYS IVEY, ALLEN FOWLER, III, ROBERT FLOYD, III AND WIFE, BETH FLOYD, BARBARA SMITH, CHARLES CALLAHAN, A.B. STUBBS AND WIFE, REBECCA STUBBS, FAIRMONT GOLF CLUB, INC., PETITIONERS v. TOWN OF FAIRMONT, RESPONDENT

No. COA03-1562

(Filed 21 December 2004)

1. **Cities and Towns— annexation—subdivision test—reliance on survey**

The trial court did not err by concluding that certain property consisted of separate lots for purposes of the subdivision test for annexation. Petitioners did not show that the town was unreasonable in relying upon an actual survey, as allowed by statute.

2. **Cities and Towns— annexation—undeveloped property—insignificant portion of golf course**

A golf course was properly designated as commercial by a town for annexation purposes and the entire acreage, including an undeveloped portion, should have been included as commercial acreage under the use test. The disputed portion was only about 15% of the total area of the tract.

3. **Cities and Towns— annexation—subdivision test**

An annexation ordinance met the subdivision test even after a golf course with vacant land was reclassified as commercial.

Appeal by petitioners from order entered 23 June 2003 by Judge Gary L. Locklear in Robeson County Superior Court. Heard in the Court of Appeals 1 September 2004.

C. Wes Hodges, II, P.L.L.C., by C. Wes Hodges, II, for petitioner-appellants.

Charles E. Floyd for respondent-appellee.

THORNBURG, Judge.

This is an appeal brought pursuant to N.C. Gen. Stat. § 160A-38 (2003) for judicial review of an ordinance of the Town of Fairmont ("Town") to annex into its corporate limits the Golf Course Road area.

The facts pertinent to this appeal are as follows: The Town Council of Fairmont, a municipal corporation with a population of less than 5,000, identified an area known as the Golf Course Road area for annexation by adopting a resolution of intent to annex on 13 July 2000. A public hearing on the matter was conducted on 15 August 2000.

The Town adopted an ordinance annexing the Golf Course Road area on 10 October 2000. The annexation ordinance incorporated a specific finding that the annexation area met the use and subdivision tests of N.C. Gen. Stat. § 160A-36 (2003). The annexation ordinance established an effective date of 31 October 2001. On 8 December 2000, petitioners filed their petition challenging the action of the Town in adopting its annexation ordinance.

Petitioners specifically challenged the classifications assigned by the Town to three plots within the annexation area: the Fowler lots, the Brice lots and the Fairmont Golf Club parcel. The trial court first concluded that the statutory procedures and requirements of N.C. Gen. Stat. § 160A-35 had been met. The trial court further concluded: (1) that the Fowler lots were inappropriately classified as three residential lots, and instead were only one common residential lot; (2) that the Brice lots were appropriately classified as two lots, one residential and one vacant; and (3) that 26.44 acres of the Fairmont Golf Club parcel were incorrectly classified as commercial and, instead, 19.44 acres should have been classified as vacant and 7 acres as governmental or institutional. Despite the errors in classification, the trial court concluded that the area proposed for annexation met the statutory requirements of N.C. Gen. Stat. § 160A-36 and affirmed without change the Town's annexation ordinance. Petitioners appeal from this judgment.

Petitioners argue on appeal: (1) that the trial court erred in concluding that the Brice lots were two separate lots three acres or less in size; (2) that the trial court erred in concluding that seven acres of the Fairmont Golf Club parcel should have been classified as governmental or institutional; and (3) that due to these errors, the trial court erred in concluding that the Golf Course Road area met the requirements of N.C. Gen. Stat. § 160A-36.

The superior court's review of an annexation ordinance is limited to deciding (1) whether the annexing municipality complied with the statutory procedures; (2) if not, whether the petitioners will suffer

material injury as a result of any alleged procedural irregularities; and (3) whether the area to be annexed meets the applicable statutory requirements. *In re Annexation Ordinance*, 278 N.C. 641, 647, 180 S.E.2d 851, 855 (1971); *Trask v. City of Wilmington*, 64 N.C. App. 17, 28, 306 S.E.2d 832, 838 (1983), *disc. review denied*, 310 N.C. 630, 315 S.E.2d 697 (1984); N.C. Gen. Stat. § 160A-38 (2003). Where the annexation proceedings show *prima facie* that the municipality has substantially complied with the requirements and provisions of the annexation statutes, the burden shifts to the petitioners to show by competent evidence a failure on the part of the municipality to comply with the statutory requirements or an irregularity in the proceedings that materially prejudices the substantive rights of the petitioners. *In re Annexation Ordinance*, 278 N.C. at 647, 180 S.E.2d at 855-56.

I.

[1] Petitioners contend that the trial court erred by finding and concluding that the Brice lots were in fact two separate lots, thus causing inaccurate results in the subdivision test for purposes of meeting the requirements of N.C. Gen. Stat. § 160A-36. We disagree.

N.C. Gen. Stat. § 160A-36(c) states in pertinent part:

> The area to be annexed must be developed for urban purposes at the time of approval of the report provided for in G.S. 160A-35 . . . . An area developed for urban purposes is defined as:
>
> > (1) Any area which is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts three acres or less in size.

N.C. Gen. Stat. § 160A-36(c)(1) (2003).

The Town found the Brice property to be comprised of two lots, described as 1.90 acres more or less and 2.68 acres more or less, by relying on a plat recorded in Book of Maps 36, page 148, Robeson County Registry on 15 February 1999. The trial court made the following findings regarding the Brice property:

13. Petitioners contend Respondent erred in its classification of the lands owned by L.B. Brice and wife, Mildred Brice as two separate lots three acres or less in size. Petitioners contend these lands should have been classified as one lot of 4.59 acres.

14. Said Brice lands are more particularly described according to a map entitled "Boundary Survey and Proposed Division for Bridget B. Bass" by Phillip B. Culbreth, R.L.S. dated 19 December 1998 and filed in Map Book 36, page 148, Robeson County Register of Deeds. Said map is Petitioners Exhibit 20.

15. Said recorded map shows three lots; Lot 1 being 1.90 acres, more or less; Lot 2 being 2.68 acres, more or less; and Lot 3 being 0.73 acre, more or less.

16. Said recorded map contains certifications by the Robeson County Health Officer, the owners, L.B. and Mildred Brice, the Mayor of the Town of Fairmont, the Chairman of the Fairmont Planning Board, the surveyor and the Robeson County Review Officer that said map creates a subdivision and meets the Town and County subdivision requirements.

17. Lot 3 on said recorded map was conveyed to Bridgett Brice Bass by deed dated February 25, 1999 and recorded in Deed Book 1046, page 802.

18. Lots 1 and 2 on said recorded map are treated as one parcel of 4.59 acres owned by L.B. and Mildred Bass by the Robeson County Tax Office and have one tax parcel identification number.

19. Said recorded map is a subdivision of the Brice tract into two tracts as shown on said recorded map as Lot 1, 1.90 acres, more or less, and Lot 2, 2.68 acres, more or less, each 3 acres or less in size and were properly so classified by Respondent at the time of annexation.

We note that finding number 19 is more properly a conclusion of law and thus will be treated as such. *See In re Weiler*, 158 N.C. App. 473, 478-79, 581 S.E.2d 134, 137 (2003). Findings of fact made below are binding on the appellate court if supported by the evidence, even where there may be evidence to the contrary. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

Where an appeal is taken from adoption of an ordinance and the proceedings show *prima facie* that there has been substantial compliance with the statute, the burden is on the petitioners challenging

the ordinance to show competent evidence that the city in fact failed to meet the statutory requirements. *In re Annexation Ordinance*, 278 N.C. at 647, 180 S.E.2d at 855-56. N.C. Gen. Stat. § 160A-42 (2003) provides that municipalities must "use methods calculated to provide reasonably accurate results" in determining the degree of land subdivision for purposes of meeting the requirements of N.C. Gen. Stat. § 160A-36. In reviewing whether the standards of N.C. Gen. Stat. § 160A-36 have been met, the court must accept the estimate made by the municipality as to the degree of land subdivision:

> [I]f the estimates are based on an actual survey, or on county tax maps or records, or on aerial photographs, or on some other reasonably reliable source, unless the petitioners on appeal show that such estimates are in error in the amount of five percent (5%) or more.

N.C. Gen. Stat. § 160A-42(2) (2003).

In addition, the North Carolina Supreme Court in *Thrash v. City of Asheville*, 327 N.C. 251, 393 S.E.2d 842 (1990), held that the accuracy of a subdivision test must reflect actual urbanization of the proposed area, not just reliance on some artificial means of making an annexation appear urbanized. *Id.* at 257, 393 S.E.2d at 846.

In the instant case, the Town relied upon an actual survey prepared by the Brices when they subdivided their lot into three lots and conveyed one of the newly created lots to Bridget Brice Bass. The burden was on the petitioners to show that the use of this survey caused the Town to miscalculate the actual percentage of subdivision. Petitioners argue that the remaining two lots of the Brice property should be treated as one lot for classification purposes. Multiple lots are properly treated as a single tract for the purposes of classification where the several lots are under common ownership and are used for a common purpose. *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 265 S.E.2d 123 (1980); *Arquilla v. City of Salisbury*, 136 N.C. App. 24, 523 S.E.2d 155 (1999), *disc. review denied*, 351 N.C. 350, 543 S.E.2d 122 (2000). Petitioners argue that the common ownership and residential use of the two lots requires that they be treated as one lot for classification purposes; thus, petitioners argue that they met their burden of showing that the Town was unreasonable in relying upon the survey to classify the Brice lots.

In *Asheville Industries, Inc. v. City of Asheville*, 112 N.C. App. 713, 436 S.E.2d 873 (1993), this Court found that the city was unrea-

The disputed 26.44 acres is only approximately 15% of the total area of the tract. Thus, under *Hook*, *Scovill* and *Asheville Industries*, it was error for the trial court to conclude that the usage of the disputed 26.44 acres affected the classification of the golf course tract as a whole. We conclude that the golf course tract was properly designated as commercial by the Town in its original calculations and the entire 166 acres should have been included as commercial acreage for purposes of calculations under the use test.

III.

[3] Petitioners have contended that any change in the use classification of the Brice lots or the golf course tract necessarily causes the ordinance to fail the subdivision test of N.C. Gen. Stat. § 160A-36(c)(1), thus making the Golf Course Road area ineligible for annexation. We now consider whether the subdivision test has been met. The trial court found that the total vacant and residential acreage in the Golf Course Road area was 95.35 acres by allowing that 19.44 acres of the golf course tract was vacant. Of the total 95.35 vacant and residential acres, the trial court found that 59.40 acres was comprised of lots and tracts three acres or less in size. Based thereon, the trial court determined the percentage of subdivision to be 62.29%. The trial court then concluded that both tests in N.C. Gen. Stat. § 160A-36(c)(1) had been met and that the Town had substantially complied with the requirements of the statute.

However, when the golf course tract is treated as a whole tract in use for commercial purposes as we instruct, 19.44 acres should be removed from the vacant and residential acreage total. Thus, 75.91 acres is the total amount of vacant and residential acreage. Of that 75.91 acres, 59.40 acres are comprised of lots and tracts three acres or less in size. Based on the new calculations, we determine the percentage of subdivision to be 78.25%. Thus, the Golf Course Road area meets the 60% minimum required under the subdivision test of N.C. Gen. Stat. § 160A-36(c)(1).

Given that the Town has substantially complied with the provisions of N.C. Gen. Stat. § 160A-36, we affirm the trial court's conclusion that the ordinance be affirmed without amendment pursuant to N.C. Gen. Stat. § 160A-38.

Affirmed.

Judges GEER and LEVINSON concur.

tract should have been classified as governmental or institutional use and 19.44 acres should have been classified as vacant.

N.C. Gen. Stat. § 160A-36(c)(1)'s definition of an area developed for urban purposes includes two tests, the use test and the subdivision test, that must be met in order for the proposed annexation area to be considered developed for urban purposes. In order to meet the use test portion of the urban purposes definition, the area proposed for annexation must be so developed "that at least sixty percent (60%) of the total number of *lots and tracts* in the area at the time of annexation are *used* for residential, commercial, industrial, institutional or governmental purposes . . . ." N.C. Gen. Stat. § 160A-36(c)(1) (emphasis added). "When compliance with the statutory requirements is in doubt, the determination of whether an area is used for a purpose qualifying it for annexation will depend upon the particular facts of each case." *Scovill Mfg. Co. v. Town of Wake Forest*, 58 N.C. App. 15, 19, 293 S.E.2d 240, 244, *disc. review denied*, 306 N.C. 559, 294 S.E.2d 371 (1982).

The statute requires the municipality to classify the usage of *lots and tracts* for the purposes of the use test, not the usage of each individual acre in the proposed annexation area. In *R.R. v. Hook*, 261 N.C. 517, 135 S.E.2d 562 (1964), the Court found that it was error for the trial court to uphold the classification of a lot as being in industrial use where only approximately 10% of the tract was being used as a parking lot by the industrial owner of the tract. *Id.* at 520, 135 S.E.2d at 565 ("This user does not determine the character of the other 90% of the tract, which is undeveloped and serving no active industrial purpose"). In *Scovill*, this Court upheld the trial court's conclusion that an entire tract was properly classified as industrial where "[t]here has been no showing that the extent of industrial use was insignificant as compared to any nonindustrial use." *Scovill*, 58 N.C. App. at 20, 293 S.E.2d at 244. *See also Asheville Industries*, 112 N.C. App. at 721, 436 S.E.2d at 878 (finding that the industrial usage of a .79 acre easement was insignificant compared to the nonindustrial use of the entire 36.22 acre tract and that the property was incorrectly classified as industrial in use).

This Court has found that a golf course is a commercial purpose for classification purposes under former Chapter 160 [now Chapter 160A]. *Thompson v. City of Salisbury*, 24 N.C. App. 616, 619, 211 S.E.2d 856, 858, *cert. denied*, 287 N.C. 264, 214 S.E.2d 437 (1975). In the instant case, it is undisputed that approximately 140 acres of the approximately 166 acre golf course tract is in use as a golf course.

shaded in yellow on Petitioners' Exhibit #17 was not developed nor used for any commercial purpose at the time of annexation.

35. Sherwin Cribb, a professional land surveyor, testified on behalf of Petitioners that said portion as shaded in yellow consists of 26.44 acres.

36. Petitioners contend that this 26.44 acre portion should have been classified as vacant and undeveloped by Respondent and that the remainder of the Fairmont Golf Club, Inc. tract was proper to be classified as commercial.

37. Johnny W. Nobles, a professional land surveyor, testified on behalf of Respondent that he agreed with Surveyor Cribb's estimate of 26.44 acres as shaded in yellow on Petitioners' Exhibit #17 and further testified that 7 acres of the 26.44 acres were part of a perpetual drainage easement to the Town of Fairmont which is 200 feet in width and said drainage easement is recorded in Deed Book 16-0, page 1, Robeson County Register of Deeds. Said easement deed is one of Respondent's Exhibit [sic][.]

38. At the time of annexation Respondent should have classified this 7 acres of the 26.44 acres shaded in yellow in Petitioners Exhibit 17 as governmental or institutional use.

39. The Fairmont Golf Club, Inc. tract is one contiguous tract, not divided by any road or highway, which contains along its northern border a strip of land area on which no building, fairway, tee, green or other golf course use is found other than as drainage.

40. At the time of annexation 19.44 acres of the 26.44 acres shaded in yellow in Petitioners Exhibit 17 of the Fairmont Golf Club, Inc. property should have been classified as vacant and undeveloped by Respondent.

We again note that findings numbers 38 and 40 are more properly conclusions of law and thus will be treated as such. *See In re Weiler*, 158 N.C. App. at 478-79, 581 S.E.2d at 137. Findings of fact made below are binding on the appellate court if supported by the evidence, even where there may be evidence to the contrary. *Humphries*, 300 N.C. at 187, 265 S.E.2d at 190.

In our review of the record, there is competent evidence to support the trial court's findings about the golf course tract. However, we determine that the trial court erred in concluding that 7 acres of the

sonable in relying upon a map that showed the subdivision of the tract in question given that the petitioners had shown common ownership and a single use. *Id.* at 720, 436 S.E.2d at 877. In *Asheville Industries*, the landowner testified as to his actual usage of the property in question. *Id.* Here, the only evidence offered by the petitioners to support common ownership and usage is the county tax records, which listed one tax identification number for the Brice property. The Brices did not testify as to the lots' actual use and in fact are not parties to this action. We conclude that petitioners did not show that the Town was unreasonable in relying upon an actual survey, as allowed by statute. Thus, the trial court did not err in concluding that the Brice property consisted of two separate lots for the purposes of the subdivision test. Petitioners' assignment of error fails.

II.

[2] Petitioners next contend that the trial court erred by finding and concluding that 7 acres of the contested 26.44 acre area of the golf course parcel was used for governmental or institutional purposes, thus causing inaccurate results in the subdivision test for purposes of meeting the requirements of N.C. Gen. Stat. § 160A-36. In regards to the golf course tract, the trial court found:

> 31. Petitioners contend Respondent erred in its classification of the lands of Fairmont Golf Club, Inc. as one commercial lot. Petitioners contend that part of the Fairmont Golf Club tract is vacant and undeveloped and should be classified as such.
>
> 32. The Fairmont Golf Club lands consist of approximately 166 acres all in one contiguous tract of land which is treated as a single tract by the Robeson County Tax Office with one tax parcel identification number.
>
> 33. The Fairmont Golf Club, Inc. lands are subject to an "Option To Purchase Contract and Agreement For Right Of First Refusal" dated January 27, 1997 and recorded in Book 940, page 688, Robeson County Registry and are subject to a "First Amendment To Lease With Option To Purchase And Agreement For Right Of First Refusal" dated December 14, 1999 and recorded in Book 1090, page 230, Robeson County Registry.
>
> 34. William A. Hayes, one of the Petitioners, testified that he is President of Fairmont Golf Club, Inc. and that part of the Fairmont Golf Club, Inc. tract along the northern edge and as

RICHARD H. ROBERTSON AND BARBARA G. ROBERTSON, PETITIONERS v. ZONING BOARD OF ADJUSTMENT FOR THE CITY OF CHARLOTTE, RESPONDENT

No. COA04-166

(Filed 21 December 2004)

1. Zoning— variance denied—whole record considered—decision not arbitrary

The trial court properly considered the whole record when reviewing a board of adjustment's denial of a variance, and the conclusion that the board's decision was based on competent, material, and substantial evidence is not arbitrary and capricious.

2. Zoning— variance—fence violating set-back—undue hardship

The trial court properly determined that a board of adjustment's decision to deny a variance for a fence violating a set-back was supported by the whole record and was not arbitrary where the board considered exhibits and testimony about safety issues, made findings regarding the portion of the variance that was granted and denied, and concluded that petitioners' alleged undue hardship was personal.

Appeal by petitioners from judgment entered 5 December 2003 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 October 2004.

Bledsoe & Bledsoe, P.L.L.C., by Louis A. Bledsoe, Jr., for petitioners-appellants.

Office of the Charlotte City Attorney, by Assistant City Attorney Terrie V. Hagler-Gray, for respondent-appellee.

TYSON, Judge.

Richard H. Robertson and Barbara G. Robertson (collectively, "petitioners") appeal from a judgment and order entered affirming the decision of the Charlotte Zoning Board of Adjustment ("the Board") denying petitioners' application for a variance. We affirm.

I. Background

Petitioners own property located at 7113 Signer Road in Charlotte, North Carolina. In February and March 2002, petitioners

constructed a fence near Signer Road, in front of their home. The fence extends through the required twenty-foot setback and continues through the petitioners' side yard to the rear of their property. The fence also runs along the property line of petitioners' neighbor, Bratton Epps ("Epps").

According to petitioners' survey, the fence begins near Signer Road at a height of four and one-half (4.5) feet above grade and rises to eight feet above grade at the twenty-foot front setback line. The height remains at eight feet above grade for the entire remaining length of the fence. The fence breaks beyond the required setback to allow for a sixteen-foot driveway that cuts across Epps's property to access petitioners' residence.

On 24 May 2002, petitioners submitted a letter to the Mecklenburg County Engineering and Building Standards Department complaining of zoning violations by their neighbor, Epps. Mecklenburg County Zoning Inspector Donald Moore ("Inspector Moore") responded to petitioners' complaint. When Inspector Moore visited Epps's property, he noticed that petitioners' fence violated Section 12.406(1) of the Charlotte Zoning Ordinance ("the Ordinance"). The Ordinance provides: "Any fence or wall located in the required setback shall not be built to a height greater than 5 feet above grade, unless it is part of a zero lot line subdivision, then it maybe [sic] 6 feet in height."

On 15 July 2002, petitioners received a notice of violation regarding their fence. The notice instructed petitioners to reduce the height of their fence from eight feet to five feet. On 14 August 2002, petitioners filed an application for a three-foot variance from Section 12.406(1) in order to allow their existing fence to remain. After a hearing on 24 September 2002, the Board: (1) granted petitioners a three-foot variance for the portion of the fence located from the opening of the driveway to the end of the fence; and (2) denied a three-foot variance for the portion of the fence from Signer Road to the driveway opening.

Petitioners appealed the Board's decision to the Mecklenburg County Superior Court. The trial court concluded the Board failed to make "sufficiently detailed and clear findings of fact from which [the trial court] can determine whether the decision should be affirmed or reversed" and remanded the case to the Board. The Board "considered the whole record [of] the September 24, 2002 Board hearing . . . ," made additional findings of fact, and upheld its earlier decision to deny petitioners' request for a variance.

Petitioners again appealed the Board's decision to the Superior Court. The trial court affirmed the Board's decision. Petitioners appeal.

II. Issues

The issues on appeal are whether: (1) the trial court applied the proper standard of review; and (2) the Board's decision was arbitrary and capricious and unsupported by competent, material, and substantial evidence in the whole record.

III. Standard of Review

"On review of a superior court order regarding a board's decision, this Court examines the trial court's order for errors of law by determining whether the superior court: (1) exercised the proper scope of review, and (2) correctly applied this scope of review." *Tucker v. Mecklenburg County Zoning Bd. of Adjustment*, 148 N.C. App. 52, 55, 557 S.E.2d, 631, 634 (citing *In re Appeal of Willis*, 129 N.C. App. 499, 501, 500 S.E.2d 723, 725 (1998)), *disc. rev. granted*, 355 N.C. 758, 566 S.E.2d 483 (2002), *aff'd in part*, 356 N.C. 658, 576 S.E.2d 324 (2003).

IV. Trial Court's Review

Petitioners argued before the trial court that the Board's decision was arbitrary and capricious, not supported by the record, and contained errors of law.

> The proper standard of review for the superior court depends on the particular nature of the issues presented on appeal. When the petitioner correctly contends that the agency's decision was either unsupported by the evidence or arbitrary and capricious, the appropriate standard of review for the initial reviewing court is "whole record" review. If, however, petitioner properly alleges that the agency's decision was based on error of law, *de novo* review is required.

Tucker, 148 N.C. App. at 55, 557 S.E.2d at 634 (internal citations omitted). "The 'whole record' test requires the reviewing court to examine all competent evidence (the "whole record") to determine whether the Board's decision is supported by substantial evidence." *Id.* (quotation omitted).

On 8 April 2003, the trial court remanded this matter to the Board with instructions to make further findings of fact regarding the "denied variance portion of the Board's decision. . . . " On remand, the

Board made additional findings of fact and upheld its decision to deny petitioners' request for a variance. On 4 December 2003, the trial court determined that the Board's "additional findings of fact are supported by the evidence in the record;" the Board's decision is "supported by competent, material, and substantial evidence in the whole record" and is not arbitrary and capricious; and petitioners' "rights were protected, including the right to offer evidence, cross-examine witnesses, and inspect documents."

V. The Whole Record Test

Our review is whether the trial court, in applying the "whole record test," properly determined that the Board made sufficient findings of fact which were supported by the evidence in an effort to prevent decisions from being arbitrary and capricious. *Crist v. City of Jacksonville*, 131 N.C. App. 404, 405, 507 S.E.2d 899, 900 (1998) (citing *Shoney's v. Bd. of Adjustment for City of Asheville*, 119 N.C. App. 420, 421, 458 S.E.2d 510, 511 (1995)).

A. Arbitrary and Capricious

[1] The trial court's decision may be reversed as arbitrary and capricious if petitioners establish that the Board's decision was "whimsical, made patently in bad faith, indicate[d] a lack of fair and careful consideration, or ' "fail[s] to indicate 'any course of reasoning and the exercise of judgment. . . .' " ' " *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.*, 132 N.C. App. 465, 468-69, 513 S.E.2d 70, 73 (1999) (quoting *Adams v. N.C. State Bd. of Registration for Professional Engineers and Land Surveyors*, 129 N.C. App. 292, 297, 501 S.E.2d 660, 663, (1998) (citation omitted)). Petitioners bear the burden of proving their case and must show what type of variance they need and why the variance is needed. *Craver v. Board of Adjustment*, 267 N.C. 40, 43, 147 S.E.2d 599, 601 (1966). Relying on *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974), petitioners contend that the Board's conclusions are speculative, unsupported by any factual data or background, and incompetent and insufficient to support a finding that public safety would be adversely affected. Petitioners argue: (1) the Board did not follow the trial court's instruction on remand; (2) the Board made determinations unsupported by additional findings of fact; and (3) the Board's findings are not supported by law or evidence.

Petitioners argue that the Board did not address the trial court's concerns on remand as required by the order dated 8 April 2003.

Petitioners assert the record lacks any evidence to indicate where the fence is located, how traffic may be hindered because of the fence, and how a safety issue arises because of the fence. Petitioners also assert that the Board cannot deny their variance request simply because it "would adversely affect the public interest." *Triple E Associates v. Town of Matthews*, 105 N.C. App. 354, 361, 413 S.E.2d 305, 309 (*citing In re Application of Ellis*, 277 N.C. 419, 425, 178 S.E.2d 77, 81 (1970)), *disc. rev. denied*, 332 N.C. 150, 419 S.E.2d 578 (1992).

On remand, the Board made additional findings of fact to support its denial of petitioners' variance request. These additional findings of fact were: (1) petitioners created their own hardship by not applying for a variance before building a fence outside the Ordinance requirements; (2) petitioners' hardship is "personal in nature" in that petitioners built this fence because of an argument with their neighbors; (3) petitioners' eight-foot fence would require a three-foot or sixty-percent variance in the front setback and a two-foot or thirty-three-percent variance in the side yard; (4) petitioners' property slopes more steeply the closer it gets to the lake, and the slope nearest to Signer Road is not proportionate to and does not justify petitioners' large variance request; (5) the portion of the fence in the front setback and side yard has more of an impact on adjoining property owners than the portion of the fence in the rear yard; and (6) the fence height in the setback is close to the severe curve on Signer Road and creates safety concerns. The Board found that if it granted petitioners' variance request, it would "not promote the public safety and welfare of individuals traveling Signer Road."

Sufficient evidence in the record supports the Board's findings of fact. Petitioner Richard Robertson and other witnesses testified regarding the location of the fence.

COUNSEL: . . . the fence that you built, did it start on the—all the way over to the margin of the setback line?

ROBERTSON: No. . . . it's about four feet back from the corner of our property from the margin of the right-of-way. In other words, we . . . set it back about four feet. And then the fence was about five feet high . . . the fence from that point runs for about sixteen feet horizontally with the property lines . . . And so if it is five feet at the very beginning, when it gets back to the next sixteen feet to the twenty-foot setback . . . , then the

fence is violating slightly for the whole—practically the whole sixteen feet.

COUNSEL: In other words, you're saying it's above five feet for that period and then it slopes up until it gets to eight feet?

ROBERTSON: Right. And it gets to eight feet, I believe the engineering report will indicate, about two feet before it gets to the twenty-foot setback.

In addition to an engineering report submitted, the physical survey of petitioners' property shows the measurements and locations where the fence violated the ordinance. Thomas Mussoni, a Board member, summarized that "it is a sixty percent variance from the—within the front setback . . . [a]nd as far as the side yard goes, we looked at it as being a thirty-three percent variance . . . ." Additional findings of fact regarding the "steepness of the slope" and the elevation drop in petitioners' back yard are supported by the evidence.

On remand from the trial court, the Board recognized that the neighbors brought the traffic visibility problem to the Board's attention.

CITY ATTORNEY: I guess the judge . . . was saying it looked as if y'all were relying solely on the testimony of those witnesses, Foster and Brown and I think also Mr. Epps . . . as to the safety concerns, in making a determination that there was a safety concern.

BOARD MEMBER: Well, they brought it to our attention and then we evaluated the registered survey of the property that illustrates the drive curving around the end of the fence, so that the sight distance across the end of the fence was fairly short and restricted.

CITY ATTORNEY: So you—so, in addition to the testimony of the witnesses you are looking at what?

BOARD MEMBER: A survey of the property.

CITY ATTORNEY: . . . if you look at the physical survey . . . you interpret [the survey] to show the existence of some sight—-

BOARD MEMBER: A severe curve around the corner at the end of the fence that inhibits being able to see oncoming traffic.

The trial court's conclusion that the Board made a decision based on "competent, material, and substantial evidence in the whole record" is supported by the Board's findings of fact and is not arbitrary and capricious. We conclude the reviewing court properly considered the whole record.

B. Errors of Law

[2] In the trial court, petitioners challenged the Board's conclusions on safety and argued their due process rights were violated. The trial court reviewed the evidence and found, "the record of the proceedings before the [Board did] not reveal errors of law." According to the Ordinance, variances are only granted to those applicants whose "difficulty of hardship is peculiar to the property in question and is not generally shared by other properties in the same neighborhood and/or used for the same purposes." The trial court determined that the Board's decision was not arbitrary or capricious, and that its findings of fact were supported by the evidence in the record. The trial court concluded, "The appropriate due process rights of the petitioners were protected, including the right to offer evidence, cross-examine witnesses, and inspect documents." Petitioners had "ample opportunity to cross-examine adverse witnesses and to offer evidence in [their] behalf." *Burton v. Zoning Board of Adjustment*, 49 N.C. App. 439, 443, 271 S.E.2d 550, 552 (1980), *cert. denied*, 302 N.C. 217, 276 S.E.2d 914 (1981).

Petitioners assert that the Board determined the fence was a safety issue without any evidence to support its decision. We have already held the trial court did not err in concluding the Board's decision regarding safety concerns was supported by the whole record. The record indicates that, on remand, the Board considered the exhibits and witnesses' testimony. It made sufficient additional findings of fact to support the record regarding what portion of the variance was granted or denied.

On remand from the trial court, the Board discussed the sixty-percent variance within the front setback and the thirty-three-percent variance for the side yard sought by petitioners as being "large in scale for the protection that it offered, the increase in protection and privacy that it offered was not proportional to the—to the variance

requested." Petitioners argue undue hardship to their property because the variance petition was denied. The Board considered the evidence received at the hearing and summarized:

> The topography is illustrated in the photographs that were exhibits at the time that have children standing next to it and it gives you a very clear idea of what the topography was like and it is apparent the fence is sloping fairly severely down in the ground and then back up to follow the topography.

The Board concluded that the petitioners' alleged undue hardship was personal in nature and a nuisance issue.

The Board's authority to grant a variance arises only when its decision is within the meaning and intent of the zoning ordinance. The Board is prohibited from authorizing a structure that conflicts with the general purpose of the ordinance, "for to do so would be an amendment of the law and not a variance of its regulations." *Lee v. Board of Adjustment*, 226 N.C. 107, 112, 37 S.E.2d 128, 132 (1946). "The requested variance [by petitioners] would be directly contrary to the zoning ordinance . . . and in the absence of evidence to support the petition, the Board had no authority to grant petitioners request." *Donnelly v. Bd. of Adjustment of the Village of Pinehurst*, 99 N.C. App. 702, 708, 394 S.E.2d 246, 250 (1990) (citing *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 648, 334 S.E.2d 103, 104 (1985)).

Relying on *Williams v. N.C. Dep't of Env't & Natural Res.*, 144 N.C. App. 479, 548 S.E.2d 793 (2001), petitioners contend the Board improperly determined whether an unnecessary hardship existed, and argue this factor was irrelevant and not supported by the law. Petitioners misinterpret the law in *Williams*. This Court did not hold that "unnecessary hardship" was an irrelevant factor when determining whether to grant or deny a variance. Rather, in *Williams*, this Court held that "to determine whether a parcel of property suffers from unnecessary hardship due to strict application of CAMA, the CRC must make findings of fact and conclusions of law as to the impact of the act on the landowner's ability to make reasonable use of his property." *Id.* at 487, 548 S.E.2d at 798. The trial court properly determined that the Board's decision was supported by the whole record and its decision was not arbitrary and capricious. This assignment of error is overruled.

VI. Conclusion

The trial court properly reviewed the whole record and sufficiently concluded the Board's decision was free of errors of law. The trial court correctly found the Board's decision was based on competent, material, and substantial evidence and that the Board's findings were not arbitrary and capricious. The trial court's order is affirmed.

Affirmed.

Judges BRYANT and STEELMAN concur.

RUTH HOLROYD, PLAINTIFF v. MONTGOMERY COUNTY; THE MONTGOMERY COUNTY DEPARTMENT OF SOCIAL SERVICES; BRADY DICKSON; TED BLAKE; R. C. BOSTIC; RICK HARRIS; FAIRLEY McCALLUM; AND LOIS RAY, DEFENDANTS

No. COA03-1472

(Filed 21 December 2004)

1. **Mandamus— delay in compliance—denial of monetary damages**

The trial court did not err by denying monetary damages as a matter of law for a delay in compliance of a writ of mandamus, because: (1) the purpose of a writ of mandamus remains a limited and extraordinary remedy to provide a swift enforcement of a party's already established legal rights, and plaintiff's only remedy to enforce the legal right created by order of the administrative law judge awarding reinstatement of plaintiff without back pay was through a writ of mandamus; and (2) an award of damages for delay in compliance with the legal duty is not authorized in North Carolina in an action for the writ of mandamus, nor does it exist in other jurisdictions which also lack specific statutory authority for award of damages in a mandamus action.

2. **Employer and Employee— blacklisting—solicited inquiry from prospective employer**

The trial court did not err by granting defendant's motion for summary judgment with regard to the claim of blacklisting, because: (1) statements to a prospective employer would have to be unsolicited to violate N.C.G.S. § 14-355; and (2) defendants'

comments regarding plaintiff were made in response to inquiries by prospective employers, and such truthful statements made by defendant in the course of such inquiries were privileged under N.C.G.S. § 14-355.

3. Appeal and Error; Wrongful Interference— preservation of issues—failure to raise issue at trial—interference with contract

Although plaintiff contends the trial court erred by granting summary judgment in favor of defendants on the claim of interference with contract, this assignment of error is dismissed because: (1) plaintiff's complaint specified that plaintiff sought relief for blacklisting under N.C.G.S. § 14-355, but failed to plead with the required particularity a claim for interference with contract; (2) plaintiff did not allege the existence of any contractual relationship in her complaint; (3) plaintiff failed to allege the existence of a contract which would have ensued but for defendant's interference; and (4) plaintiff did not raise this issue before the trial court nor did she move to amend her complaint to include such allegations.

Appeal by plaintiff from an order entered 1 March 2002 by Judge Peter M. McHugh in Montgomery County Superior Court and an order entered 13 June 2003 by Judge Russell G. Walker, Jr. in Montgomery County Superior Court. Heard in the Court of Appeals 31 August 2004.

Allen and Pinnix, P.A., by M. Jackson Nichols and Angela Long Carter, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by James R. Morgan, Jr., Robert D. Mason, Jr. and Alison R. Bost, for defendant-appellees.

HUNTER, Judge.

Ruth Holroyd ("plaintiff") appeals from an order entered 1 March 2002 granting summary judgment to Montgomery County, et. al. ("defendant") as to plaintiff's claim for blacklisting, and an order entered 13 June 2003 denying monetary damages as a matter of law. For the reasons stated herein, we affirm the trial court's orders.

On 19 February 1997, plaintiff was hired as a probationary employee for a Social Worker III position by Montgomery County Department of Social Services. Plaintiff was injured in a car accident

on the job in March of that year. Plaintiff was unable to come to an agreement with her supervisor concerning revised working conditions as a result of the accident and took Worker's Compensation leave on 29 May 1997. Defendant terminated plaintiff's employment on 31 August 1997.

Plaintiff filed a grievance for the dismissal with the Office of Administrative Hearings on 4 December 1997. Defendant failed to respond in a timely manner to plaintiff's discovery requests and a default judgment was entered as a sanction against defendant on 27 May 1998. The judgment ordered defendant to reinstate plaintiff into a comparable position to the one from which she had been terminated, and to pay appropriate attorney fees. The order specifically denied plaintiff's request for further damages of back pay and reinstatement of lost benefits, however.

Defendant failed to appeal the order and initially believed it to be an advisory opinion, rather than a final order. After confirmation from the administrative law judge that the order was final, defendant sent a letter to plaintiff regarding compliance with the order on 15 January 1999.

Plaintiff filed a complaint on 21 August 2000 against defendant, (1) requesting a writ of mandamus to enforce the order of the administrative law judge and award damages for the delay in compliance, and (2) alleging a cause of action for blacklisting by defendant. The trial court granted defendant's motion for summary judgment as to the blacklisting cause of action on 26 February 2002. On 22 October 2002, the trial court issued a writ of mandamus for enforcement of the prior order, but denied damages for delay in compliance as a matter of law in an order issued 13 June 2003. Plaintiff now appeals from the denial of damages and the grant of summary judgment in the respective orders.

The issues in this case are whether: (I) the trial court erred in concluding as a matter of law that plaintiff was not entitled to recover monetary damages for a delay in compliance in this action for a writ of mandamus, and (II) the trial court erred in granting defendant's motion for summary judgment for the second cause of action of blacklisting and interference with contract. As we find no error by the trial court, we do not reach plaintiff's additional assignments of error as to the trial court's alternative findings denying damages.

I.

[1] Plaintiff first contends that the trial court's denial as a matter of law of an award of monetary damages for delay in compliance in an action for a writ of mandamus was in error. We disagree.

The issue of whether damages may be awarded to a successful plaintiff in an action for mandamus is one of first impression before this Court and we therefore carefully review the development of this extraordinary remedy in reaching this conclusion.

The writ of mandamus originated as a common law action. *See Tucker v. Justices of Iredell*, 46 N.C. 451, 459 (1854). At common law, the petitioner was not permitted to deny facts alleged in the return to a writ of mandamus, and if the return was sufficient in law, the matter was resolved without further proceedings. *See Tucker*, 46 N.C. at 459 (holding "a writ of *mandamus* could not be traversed; and if the matters set forth were sufficient in law, the defendant ha[s] judgment to go without day"). As the aggrieved party could not contradict the writ, they were permitted to recover damages and costs from the defendant when a false return was made by bringing a separate action on the case. *Id.* In 1836, the North Carolina General Assembly codified the writ of mandamus using language similar to that of the English Statute of 9 Anne, ch. 20, which had abolished the common law rule prohibiting traverse to the writ. *See State v. King*, 23 N.C. 22, 23 (1840), North Carolina Code ch. 97, *Quo Warranto*, § 5 (1836). The statute eliminated the need for a separate action, and permitted an aggrieved party to recover damages and costs in a case where the party could show a traverse of any of the material facts in a return to the writ. North Carolina Code ch. 97, *Quo Warranto*, § 5, *see Tucker*, 46 N.C. at 459.

The mandamus statute was amended significantly in 1872, eliminating the early language which provided limited grounds for damages in cases of false returns, but ensuring an expeditious determination by the court. *See* 1872 N.C. Sess. Laws ch. 1234, § 3. The revised statute specified that where the plaintiff sought relief other than enforcement of payment of a money demand, the summons was to be made returnable, heard, and determined within ten days by the trial court as to matters of both law and fact. *Id.* The revised statute provided that the matter could be held over to the next term of court only for jury determination of factual discrepancies. *Id.* The new amendments eliminated the possibility of recovery of damages for a false return, or any other grounds. *Id.*

The statute remained unchanged with regards to a writ of mandamus for relief other than enforcement of a money judgment until all statutory authority for the special remedy of mandamus was repealed, effective 1 January 1970. *See Fleming v. Mann*, 23 N.C. App. 418, 420, 209 S.E.2d 366, 368 (1974), 1967 N.C. Sess. Laws ch. 954, § 4. The legislation further specified that the repeal did not constitute a reenactment of the common law. 1967 N.C. Sess. Laws ch. 954, § 7.

In 1971, the North Carolina Supreme Court held there was no "practical difference in the results to be obtained by the common-law remedy of mandamus and the equitable remedy of mandatory injunction[,]" and the writ of mandamus therefore remains available as an extraordinary remedy issued by a court of competent jurisdiction to command the performance of a specified official duty issued by law. *See Sutton v. Figgatt*, 280 N.C. 89, 92, 185 S.E.2d 97, 99 (1971).

The writ may therefore still be issued by our courts, "and the substantive grounds for granting the remedy as developed under our former practice still control." *Fleming*, 23 N.C. App. at 420, 209 S.E.2d at 368. The purpose of a writ of mandamus remains, however, a limited and extraordinary remedy to provide a swift enforcement of a party's already established legal rights. "*Mandamus* will not lie unless the party seeking the writ has a clear legal right to the performance of the act sought to be enforced, and the party to be coerced is under a positive legal obligation to do what he is asked to be made to do." *See Steele v. Cotton Mills*, 231 N.C. 636, 639, 58 S.E.2d 620, 623 (1950). " ' "The function of [a] writ [of mandamus] is to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established." ' " *Moody v. Transylvania County*, 271 N.C. 384, 390, 156 S.E.2d 716, 720 (1967) (citations omitted).

Here, plaintiff's only remedy to enforce the legal right created by order of the administrative law judge awarding reinstatement of plaintiff without back pay was through a writ of mandamus. *See N.C. Dept. of Transporation v. Davenport*, 334 N.C. 428, 432 S.E.2d 303 (1993) (holding that an administrative agency is not subject to a contempt proceeding for failure to comply with an order).

Our courts have not, however, revived a right to damages on any grounds since the repeal of the statutory authority for the writ.[1] As

1. Pursuant to N.C.R. App. P. 30(e)(3), plaintiff cites the unpublished opinion in *Caves v. N.C. Dept. of Correction* (No. COA01-681 filed 2 April 2002), as authority for an award of damages in addition to enforcement of the existing legal right. We find an

our own Rules of Appellate Procedure indicate, mandamus is intended as a swift remedy, "filed without unreasonable delay" by the party seeking relief. N.C.R. App. P. 22(b). As the underlying history of the writ demonstrates, the remedy should be promptly sought for enforcement of the improperly denied legal right. An award of damages for delay in compliance with the legal duty is therefore not authorized in North Carolina in an action for the writ of mandamus.

Further, although not controlling authority, decisions of our sister jurisdictions provide guidance on this question of first impression. We find that other jurisdictions which, like North Carolina, lack specific statutory authority for award of damages in a mandamus action have similarly determined such a right does not exist as a matter of law.[2] *See Hayes v. Civ. Ser. Com'n of Metro Gov.*, 907 S.W.2d 826 (Tenn. App. 1995) (holding when the state statute did not abrogate the common law rule, the only available damage remedy in a mandamus action was one for making a false return, and damages for the delay in doing the thing the mandamus sought to command could not be sought in the mandamus action), *see also Smith v. Berryman*, 199 S.W. 165 (Mo. 1917) (holding that, absent a false return, no damages could be recovered in an action for mandamus).

Therefore, we find that the trial court properly concluded damages are not recoverable in an action for an award of a writ of mandamus as a matter of law. As a result, we do not reach plaintiff's remaining assignments of error with regards to denial of damages.

II.

[2] Plaintiff next contends the trial court erred in granting summary judgment to defendant with regards to the second cause of action in the complaint for blacklisting and interference with contract.

"Summary judgment is properly granted only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as

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interpretation of *Caves* as precedent in this matter to be erroneous, as the Court in *Caves* issued a writ of mandamus only to enforce the terms on an underlying order to which plaintiff had already established a legal right, but awarded no new damages to plaintiff for the delay in compliance.

2. A number of jurisdictions permit an award of damages in a writ of mandamus, but such damages are solely authorized by state statutory codes. *See* R.P. Davis, Annotation, *Allowance of Damages to Successful Plaintiff or Relator in Mandamus*, 73 A.L.R.2d 903 1960.

a matter of law.' " *Kent v. Humphries*, 303 N.C. 675, 677, 281 S.E.2d 43, 45 (1981) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c); *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975)).

Blacklisting is governed by N.C. Gen. Stat. § 14-355 (2003) which defines both the offense and an affirmative defense to the charge:

> If any person, agent, company or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company or corporation, such person, agent or corporation shall be guilty of a . . . misdemeanor and . . . punished by a fine . . . and . . . shall be liable in penal damages to such discharged person, to be recovered by civil action. This section shall not be construed as prohibiting any person or agent of any company or corporation from furnishing in writing, upon request, any other person, company or corporation to whom such discharged person or employee has applied for employment, a truthful statement of the reason for such discharge.

The purpose of the blacklisting statute is not to prohibit employers from communicating truthful information as to the nature and character of former employees. *See Goins v. Sargent*, 196 N.C. 478, 483, 146 S.E. 131, 133 (1929). In *Friel v. Angell Care Inc.*, 113 N.C. App. 505, 440 S.E.2d 111 (1994), this Court interpreted § 14-355, holding that "[f]or the statute to be violated . . . statements to the prospective employer would have [to be] unsolicited." *Friel*, 113 N.C. App. at 511, 440 S.E.2d at 115. When truthful oral statements were made by the defendant in response to an inquiry from a prospective employer as to whether they would rehire a former employee, the *Friel* Court held that § 14-355 did not apply as a matter of law. *Id.*

Here, a careful review of the record shows that defendant's comments regarding plaintiff were made in response to inquiries by prospective employers. Depositions submitted by plaintiff indicate that prospective employers contacted defendant concerning plaintiff's job applications, including a neighboring county's department of social services. During these solicited conversations, plaintiff alleges that defendant revealed the pending worker's compensation claim and lawsuit. Such truthful statements made by defendant in the course of such inquires were privileged under § 14-355. Therefore the trial court's grant of summary judgment was appropriate.

[3] Plaintiff next contends the trial court erred in granting summary judgment on the claim of interference with contract. This argument is not properly before the Court. " '[A] defendant is entitled to know from the complaint the character of the injury for which he must answer.' " *Walker v. Sloan*, 137 N.C. App. 387, 394-95, 529 S.E.2d 236, 242 (2000) (quoting *Thacker v. Ward*, 263 N.C. 594, 599, 140 S.E.2d 23, 28 (1965)). "Failure to plead or argue a theory of recovery before the trial court precludes the assertion of that theory on appeal." *Broyhill v. Aycock & Spence*, 102 N.C. App. 382, 391, 402 S.E.2d 167, 173 (1991).

Plaintiff's complaint specified that plaintiff sought relief for blacklisting under § 14-355, but failed to plead with the required particularity a claim for interference with contract. The elements of a tortious interference with contract action are:

> "(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff."

Beck v. City of Durham, 154 N.C. App. 221, 232, 573 S.E.2d 183, 191 (2002) (quoting *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988)). Plaintiff did not allege the existence of any contractual relationship in her complaint. For a claim of tortious interference with prospective advantage, " '[p]laintiff must show that Defendants induced a third party to refrain from entering into a contract with Plaintiff without justification. Additionally, Plaintiff must show that the contract would have ensued but for Defendants' interference.' " *Id.* (citation omitted). Plaintiff fails to allege the existence of a contract which would have ensued but for defendant's interference. Nor do we find that plaintiff raised this issue before the trial court or moved to amend her complaint to include such allegations. As plaintiff failed to properly plead an action for tortious interference with contract in her complaint, plaintiff's second claim on this assignment of error is not properly before the Court for review.

As the trial court committed no error in denying damages as a matter of law in a writ of mandamus and in granting defendant's motion for summary judgment as to the claim of blacklisting, we therefore affirm both appealed orders.

Affirmed.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. TEDDY LYNN RANDLE

No. COA03-1531

(Filed 21 December 2004)

1. **Constitutional Law— per se ineffective assistance of counsel—concession of lesser-included offenses**

Defendant did not receive per se ineffective assistance of counsel in a first-degree rape and first-degree sexual offense case based on his counsel's closing argument that allegedly conceded defendant's guilt to lesser-included offenses without first obtaining defendant's consent, because: (1) counsel in the instant case never actually admitted the guilt of defendant to any charge, nor did counsel claim that defendant should be found guilty of some offense; (2) defense counsel advocated for defendant's innocence by arguing that there was no penetration of the victim; (3) defense counsel argued that there was reasonable doubt since there are factors that need to be considered in either of the rape charges as to whether penetration actually occurred; (4) defense counsel argued that defendant should not be charged with first-degree rape or first-degree sexual offense since there was no serious injury to the victim; and (5) the trial court asked defendant numerous times whether he consented to defense counsel admitting guilt to any offense, including lesser-included offenses, and defendant stated he did not authorize it but stated he did not desire a mistrial.

2. **Rape; Sexual Offenses— short—form indictments—first-degree rape—first-degree sex offense**

The short-form indictments used to charge defendant with first-degree rape and first-degree sex offense do not violate the United States or North Carolina Constitutions even though the indictments fail to include the element of serious personal injury.

Appeal by defendant from judgments entered 4 April 2003 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 14 September 2004.

Attorney General Roy A. Cooper, III, by Assistant Attorney General William W. Stewart, Jr., for the State.

Adrian M. Lapas for defendant-appellant.

HUNTER, Judge.

Teddy Lynn Randle ("defendant") appeals from judgments entered 4 April 2003 consistent with a jury verdict finding him guilty of attempted first degree burglary, first degree burglary, first degree rape, and first degree sex offense. For the reasons stated herein, we find no error.

The State's evidence presented at trial tended to show that on 17 April 2002, defendant broke into the house of his 81 year-old neighbor, Sue Harris ("Harris"). Defendant raped and sodomized Harris in her bed. After defendant left the house, Harris called 911. Upon arrival, police officers found two damaged doors and a broken window pane in the house. Harris was taken to a hospital where she was examined in the emergency room. Harris had two broken vertebrae in her back, bruising on one eyelid and her left forehead, ruptured blood vessels on the sides of her face and neck, bruised upper and lower extremities, and vaginal and rectal injuries. Upon examination, Harris was admitted to the hospital. Harris begged for pain relief and was given an intravenous narcotic for her back pain. Harris is still in pain most of the time, cannot bend over, has difficulty walking or standing for long periods of time, and has frequent nightmares.

Upon investigation, police found sperm on the crotch of Harris' panties and DNA from the sperm matched defendant's DNA profile. Pubic hairs found on Harris and a head hair found on one of Harris' pillows were microscopically consistent with defendant's hairs.

A week after the attack on Harris, defendant attempted to break into the Rodgers' house, located on the same street as Harris' house. On the night of 24 April 2002, Mrs. Rodgers ("Rodgers") noticed someone standing outside her sliding glass door and called the police. Upon arrival, police officers found that the screen door had been cut open and Rodgers noticed that an outside chair had been moved. The police took finger and palm prints from the chair. The prints matched those of defendant. Later that evening, Rodgers saw someone walk

past her bedroom window and, in the morning, someone tried to open her sliding glass door. The finger prints on the glass door matched those of defendant. In January 2003, Rodgers found a pair of underwear in her closet and gave them to the police. Test results revealed defendant's sperm on the underwear.

After being taken into police custody and advised of his Miranda rights, defendant stated that he had "fooled with the lady," referring to his attack on Harris. Defendant said he pulled down his pants and got into bed with Harris. Defendant, however, stated that he did not penetrate Harris but rather ejaculated on himself. Defendant also told police that he sat in the chair outside Rodgers' back door, looked in, and then tried to enter through the back door. Defendant stated that he ejaculated on himself behind the house when he was unable to get into the house. Defendant was charged with attempted first degree burglary, first degree burglary, first degree rape, and first degree sex offense. The case then proceeded to trial. During closing arguments, defense counsel told jury members that they must be entirely convinced of each and every element of the crimes. As serious injury is the essential difference between first and second degree rape, defense counsel then attempted to cast doubt on the seriousness of the mental and physical injuries to Harris by arguing Harris did not suffer serious injury. Counsel then emphasized the lack of penetration of the victim, pointing out that defendant ejaculated on himself. In counsel's final plea to the jury, defense counsel argued, "Teddy Randle is not guilty of first degree rape. Teddy Randle is not guilty of first degree sexual offense."

Upon conclusion of defense counsel's closing argument, the trial court expressed concern that counsel had implicitly conceded defendant's guilt to the lesser-included offenses of second degree rape and second degree sex offense. Defense counsel did not believe he had made any such concessions. The trial judge conducted a hearing outside the presence of the jury, asking defendant whether he had authorized defense counsel to concede guilt to the lesser-included offenses. Defendant stated that he did not authorize such concessions. The trial judge then asked defendant whether he desired a mistrial. After consultation with defense counsel, defendant said he did not desire a mistrial.

Defendant was convicted of all charges. Defendant was sentenced to a term of 288 to 355 months in prison for first degree rape and first degree burglary. Additionally, defendant was sentenced to a term of 230 to 285 months in prison for first degree sex offense and

attempted first degree burglary, to be served at the expiration of the preceding sentence. Defendant appeals.

I.

[1] By his first assignment of error, defendant contends that defense counsel's closing arguments at trial implicitly conceded defendant's guilt to lesser-included offenses without first obtaining defendant's consent, thereby constituting ineffective assistance of counsel *per se*. We disagree.

Defendant argues that defense counsel implicitly admitted defendant's guilt to the lesser-included offenses of second degree rape and second degree sex offense, without first obtaining defendant's consent, by (1) arguing that defendant was not guilty of first degree rape and sex offense, (2) focusing prominently on the difference between first degree and second degree rape and sex offense (i.e. the element of serious injury), and (3) by failing to focus on lack of penetration, a necessary element in both first and second degree rape and sex offense. Defendant argues that when defense counsel implicitly concedes guilt to a lesser-included offense, the court should look beyond the words to the practical effect of such an argument and find ineffective assistance of counsel *per se*. Defendant further argues that the failure of defendant to move for a mistrial does not cure *per se* ineffective assistance of counsel.

The Supreme Court of North Carolina has held that *per se* ineffective assistance of counsel "has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent."[1] *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). During closing arguments in *State v. Harbison*, defense counsel stated, without defendant's consent, that " 'I don't feel that William should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree.' " *Id.* at 178, 337 S.E.2d at 506. Consequently, the Court found ineffective assistance of counsel *per se* and remanded the case for a new trial. *Id.* at 180-81, 337 S.E.2d at 507.

1. We note that the United States Supreme Court has recently discussed whether a concession of guilt by defense counsel constitutes ineffective assistance of counsel *per se*. *See Florida v. Nixon*, — U.S. —, 160 L. Ed. 2d 565 (No. 03-931 filed 13 December 2004).

The Supreme Court of North Carolina recently applied the *Harbison* rule in *State v. Matthews*, 358 N.C. 102, 591 S.E.2d 535 (2004). In *Matthews*, the Court found *per se* ineffective assistance of counsel where defense counsel conceded defendant's guilt to second degree murder, a lesser-included offense, without defendant's permission. *See id.* at 109, 591 S.E.2d at 540. In closing arguments to the jury, defense counsel in *Matthews* said " 'I'm telling you in this case you ought not to find him not guilty because he is guilty of something.' " " 'When you look at the evidence . . . you're going to find that he's guilty of second-degree murder.' " *Id.* at 106, 591 S.E.2d at 539. The Supreme Court ordered a new trial. *Id.* at 109, 591 S.E.2d at 540-41.

However, our Supreme Court has found no *Harbison* violation where defense counsel did not expressly admit the defendant's guilt. *See, e.g., State v. Gainey*, 355 N.C. 73, 93, 558 S.E.2d 463, 476 (2002) (finding no *Harbison* violation where defense counsel did not admit guilt of murder, but rather stated that " 'if he's guilty of anything, he's guilty of accessory after the fact' "); *State v. Hinson*, 341 N.C. 66, 78, 459 S.E.2d 261, 268 (1995) (finding no *Harbison* violation where defense counsel did not concede that defendant himself committed any crime); *State v. Fisher*, 318 N.C. 512, 532-33, 350 S.E.2d 334, 346 (1986) (finding no *Harbison* violation where defense counsel conceded malice but did not clearly admit guilt, and told the jury it could find defendant not guilty).

In *State v. Greene*, 332 N.C. 565, 422 S.E.2d 730 (1992), the Supreme Court of North Carolina held that an argument by counsel that defendant is innocent of all charges, but if found guilty of any charge it should be of a lesser crime because the evidence comes closer to proving the lesser crime than any of the greater crimes charged, is not an admission of defendant's guilt to the lesser charge and, therefore, the rule of *Harbison* does not apply. *Greene*, 332 N.C. at 572, 422 S.E.2d at 733-34. In *State v. Harvell*, 334 N.C. 356, 432 S.E.2d 125 (1993), the Supreme Court reiterated its holding in *Greene*, finding that defense counsel's statement that if the evidence tended to establish the commission of any crime then it would be a lesser-included offense was not the equivalent of admitting the defendant was guilty of any crime. *Harvell*, 334 N.C. at 361, 432 S.E.2d at 128.

The case at bar is factually distinguishable from *Harbison* and *Matthews* and is analogous to the line of cases finding no *per se* ineffective assistance of counsel. Unlike in *Harbison* and *Matthews*,

counsel in the case at bar never actually admitted the guilt of defendant to any charge, nor did counsel claim that defendant should be found guilty of some offense. As a result, no *Harbison* violation occurred. Instead, this case falls within the line of cases where the *Harbison* rule does not apply and no *per se* ineffective assistance of counsel is found. Like in *Greene* and *Harvell*, defense counsel in this case advocated for defendant's innocence by arguing that there was no penetration of the victim. Specifically, counsel told jury members that they must "weigh the evidence and make a decision, but in both of those cases, first degree rape, second degree rape, there's got to be penetration." Counsel attempted to cast doubt on the existence of penetration, arguing that defendant ejaculated on himself. Finally, defense counsel argued "there's reasonable doubt here because there are factors that need to be considered in either of the rape charges as to whether or not penetration actually occurred."

Furthermore, defense counsel argued that defendant should not be charged with first degree rape or first degree sex offense because there was no "serious injury" to the victim. Specifically, defense counsel stated that "the judge is going to instruct you that the difference between first degree rape and second degree rape is the serious injury and if there is reasonable doubt, if you're not fully satisfied and entirely convinced of the serious physical injury, then you're to consider second degree rape." Defense counsel then attempted to cast doubt on the seriousness of Harris' injuries and told the jury that, after considering the doubt as to penetration, "then when you're considering the others, the difference between first degree rape and second degree rape is whether or not there was serious physical injury. Ladies and gentlemen, there's contradicting evidence to that."

Finally, we note that in the case at bar, the trial court asked defendant numerous times whether he consented to defense counsel admitting guilt to any offense, including lesser offenses. In response, defendant stated that he did not authorize counsel to admit guilt to any offense. The trial court then asked defendant whether he desired to move for a mistrial. After consulting with defense counsel, defendant stated that he did not desire a mistrial. Since we have concluded no *Harbison* violation occurred in this case, we do not reach the issue of whether defendant waived any *Harbison* violation by declining to accept the trial court's offer of a mistrial.

For the foregoing reasons, we find no ineffective assistance of counsel *per se*. Accordingly, this assignment of error is without merit.

II.

[2] In his next assignment of error, defendant argues that the North Carolina short-form indictments for first degree rape and first degree sex offense violate both the United States and North Carolina Constitutions. We disagree.

Defendant contends that the North Carolina short-form indictments for first degree rape and first degree sex offense violate the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, §§ 19, 22 and 23 of the North Carolina Constitution because such indictments fail to include the first degree rape and sex offense element of "serious personal injury." Defendant urges this Court to reexamine prior holdings and declare these short-form indictments unconstitutional in light of the United States Supreme Court decisions of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000) and *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999).

Defendant was indicted for first degree rape and first degree sex offense under short-form indictments provided by N.C. Gen. Stat. §§ 15-144.1 and 15-144.2 (2001). North Carolina courts have consistently held, post-*Jones*, that short-form indictments for first degree rape and first degree sex offense comport with the requirements of both the United States and North Carolina Constitutions. *See State v. Shepherd*, 156 N.C. App. 69, 72, 575 S.E.2d 776, 778 (2003); *State v. Harris*, 140 N.C. App. 208, 215-16, 535 S.E.2d 614, 619 (2000). Similarly, the Supreme Court of North Carolina has also reaffirmed the constitutionality of short-form indictments charging sex offenses post-*Apprendi*. *See State v. Quinn*, 166 N.C. App. 733, 603 S.E.2d 886 (2004) (discussing *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)).

In light of North Carolina case law consistently upholding the constitutionality of the short-form indictments for first degree rape and first degree sex offense post-*Jones* and post-*Apprendi*, we conclude that the North Carolina short-form indictments for first degree rape and sex offense are constitutional. Accordingly, defendant's assignment of error is overruled.

No error.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

FAWZIA H. ABOAGWA, EMPLOYEE, PLAINTIFF v. RALEIGH LIONS CLINIC FOR THE BLIND, INC., EMPLOYER, UNITED PACIFIC INSURANCE COMPANY (INSOLVENT)/N.C. INSURANCE GUARANTY ASSOCIATION, CARRIERS, DEFENDANTS

No. COA03-1677

(Filed 21 December 2004)

1. **Workers' Compensation— aggravation of condition—competent testimony**

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's 23 and 26 October 2000 falls at work caused or aggravated her spine condition, because the evidence including plaintiff's testimony, the testimony of her daughter, and also the testimony of several medical doctors support the Commission's finding.

2. **Workers' Compensation— findings—burden of proof—totality of evidence**

The Industrial Commission did not err in a workers' compensation case by finding that no physician testified to a reasonable degree of medical certainty that plaintiff's back injuries were likely caused solely by something other than plaintiff's fall at work even though defendants contend the Commission mistakenly required defendants to prove that plaintiff's falls had not aggravated a preexisting condition and also did not consider the totality of evidence, because: (1) defendants failed to notice that the Commission explicitly stated in another finding that plaintiff has proven by the greater weight of the evidence that she incurred injuries by accident on 23 and 26 October 2000 that caused or aggravated a preexisting condition of her neck and back that has rendered her disabled from working; (2) the Commission properly placed the burden of proof on plaintiff and not defendants; (3) the finding was relevant as to whether plaintiff's injuries arose from her employment; and (4) the Commission explicitly stated that it had considered the totality of the medical and lay evidence.

3. **Workers' Compensation— disability—temporary total disability benefits**

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff was disabled as defined by N.C.G.S. § 97-2 and by awarding ongoing temporary total disability benefits, because: (1) plaintiff produced some medical evi-

dence that she was physically incapable of work due to her workplace falls; and (2) there was some medical evidence supporting the Commission's finding.

Appeal by Defendants from Opinion and Award of the North Carolina Industrial Commission entered 28 July 2003. Heard in the Court of Appeals 21 September 2004.

George W. Lennon, for plaintiff-appellee.

Brooks, Stevens, & Pope, P.A., by Daniel C. Pope, Jr. and Dana C. Moody, for defendant-appellants.

WYNN, Judge.

Defendants Raleigh Lions Clinic for the Blind, Inc. (the "Clinic"), United Pacific Insurance Company, and N.C. Insurance Guaranty Association (collectively "Defendants") appeal from an Opinion and Award of the North Carolina Industrial Commission, contending that the Industrial Commission erred in: (1) concluding that Plaintiff Fawzia Aboagwa's ("Aboagwa") 23 and 26 October 2000 falls at work caused or aggravated her spine condition; (2) applying the incorrect legal standard and failing to consider the totality of the evidence; and (3) concluding that Aboagwa was disabled as defined by North Carolina General Statute section 97-2 and awarding ongoing temporary total disability benefits. For the reasons stated herein, we disagree and affirm the Industrial Commission's Opinion and Award.

The procedural and factual history of the instant appeal is as follows: Aboagwa worked as a sewing machine operator for the Raleigh Lions Clinic for the Blind from November 1999 until December 2000. Aboagwa had no notable problems with her back or neck prior to October 2000. However, in October 2000, Aboagwa fell twice at her workplace. On 23 October 2000, she slipped and fell on her back in the company cafeteria. Aboagwa did not seek treatment for the fall, but took Tylenol for pain. On 26 October 2000, Aboagwa fell yet again, this time while pushing a large cart of sewing materials to her workstation. The fall was witnessed by another employee, as well as by Aboagwa's supervisor, who urged Aboagwa to see the plant nurse. Aboagwa insisted on returning to her workstation but sought medical treatment the following morning. She first saw M. Hisham Mohamed, M.D., though was uncomfortable with him, found him to be "not good [at] listen[ing]," and felt he did "not understand [her]." She therefore

switched to Mohammad Delbahar Hossain, M.D. and has been treated by him ever since.

Aboagwa experienced pain and dizziness but nevertheless worked through October and November 2000. An MRI revealed that Aboagwa had a herniated disc, for which she received treatment from Charles Joseph Matthews, M.D. and Michael M. Haglund, M.D. Because conservative treatments were unsuccessful, Aboagwa underwent cervical fusion surgery at Duke University Medical Center.

Dr. Hossain found Aboagwa to be disabled from performing her job. Dr. Matthews also found Aboagwa to be disabled and ordered her out of work until further notice on 2 January 2001. Again, on 8 May 2001, Dr. Matthews found Aboagwa "completely disabled." Dr. Haglund also found it likely that Aboagwa was temporarily totally disabled from the falls, which "either caused or aggravated a preexisting condition that led to her eventually needing the treatment and the surgery she underwent."

On 1 April 2002, Aboagwa's workers' compensation claim was heard by Deputy Commissioner Morgan S. Chapman. Deputy Commissioner Chapman denied Aboagwa's claim; Aboagwa appealed. On 14 May 2003, Aboagwa's appeal was heard by the full Industrial Commission, which, in its Opinion and Award filed 28 July 2003, reversed Deputy Commissioner Chapman's Opinion and Award. Defendants appealed.

In reviewing a decision of the Industrial Commission, this Court is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000); *Skillin v. Magna Corp./Greene's Tree Service, Inc.*, 152 N.C. App. 41, 47, 566 S.E.2d 717, 721 (2002) (same). An appellate court reviewing a workers' compensation claim "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quotation omitted). Rather, the Court's duty goes no further than to determine "whether the record contains any evidence tending to support the finding." *Id.* (quotation omitted). If there is any evidence at all, taken in the light most favorable to the plaintiff, the finding of fact stands, even if there was substantial evidence going the other way. *Id.*

[1] Defendants, citing their Assignments of Error 5, 7, 9, 11, 13, 18-27, contend the Industrial Commission erred in concluding that Aboagwa's 23 and 26 October 2000 falls at work caused or aggravated her spine condition. Here, evidence, including not only Aboagwa's own testimony or that of her daughter, but also the testimony of several medical doctors, support the Industrial Commission's finding. Dr. Matthews testified that he believed Aboagwa's injuries to be "within a reasonable degree of medical certainty consistent with [] the work-related injury that she described." Dr. Haglund testified that he believed "[t]hat [Aboagwa's] falls either caused or aggravated a pre-existing condition that led to her eventually needing the treatment and the surgery she underwent." Dr. Hossain testified that Aboagwa's falls may have "aggravate[d]" or "worsen[ed]" a preexisting back condition. The Industrial Commission's finding that Aboagwa's 23 and 26 October 2000 falls at work caused or aggravated her spinal condition is supported by some competent evidence. We therefore must affirm the Opinion and Award.

[2] Next, Defendants take issue with Finding of Fact 15, in which the Industrial Commission found that "no physician testified to a reasonable degree of medical certainty that plaintiff's back injuries were likely caused solely by something other than plaintiff's falls at work." Defendants assert that the Industrial Commission mistakenly required Defendants to prove that Aboagwa's falls had not aggravated a preexisting condition. We disagree.

Defendants are correct that a "claimant has the burden of proving that his [workers' compensation] claim is compensable[.]" *Henry v. A. C. Lawrence Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950) (citing *Bolling v. Belk-White Co.*, 228 N.C. 749, 46 S.E.2d 838 (1948); *Hayes v. Bd. of Trs. of Elon Coll.*, 224 N.C. 11, 29 S.E.2d 137 (1944); *Gassaway v. Gassaway & Owen, Inc.*, 220 N.C. 694, 18 S.E.2d 120 (1942); *McGill v. Town of Lumberton*, 215 N.C. 752, 3 S.E.2d 324 (1939)). Defendants, however, apparently failed to notice that in Finding of Fact 20, the Industrial Commission explicitly stated that "plaintiff has proven by the greater weight of the evidence that she incurred injuries by accident on October 23 and 26, 2000 that caused or aggravated a preexisting condition of her neck and back that have rendered her disabled from working[.]" The Industrial Commission properly placed the burden of proof on Aboagwa, not Defendants. Finding of Fact 15, stating that "no physician testified to a reasonable degree of medical certainty that plaintiff's back injuries were likely caused solely by something other than plaintiff's falls at work[,]" did

not place the burden of proof on Defendants, but rather was relevant as to whether Aboagwa's injuries arose from her employment. *See, e.g., Mills v. City of New Bern*, 122 N.C. App. 283, 285, 468 S.E.2d 587, 589 (1996) ("When the employee's [] condition is the sole cause of the injury, the injury does not arise out of the employment.") (citation omitted)). We therefore find no error.

Defendants further cite to their Assignments of Error 1-2, 11-12, and 16-27 and argue that the Industrial Commission erred by "wholly disregarding and ignoring competent evidence before it." Defendants ground this charge in Findings of Fact 6 and 7, in which the Industrial Commission noted that Dr. Mohamed saw Aboagwa, but that Aboagwa felt that he "was 'not good at listening' and 'he did not understand me.' " Defendants contend Dr. Mohamed's testimony that he felt he understood Aboagwa and that he and Aboagwa spoke Arabic together, as well as the Opinion and Award's failure to address Aboagwa's "changed doctors and [] story," demonstrate the Industrial Commission failed to consider all the evidence. We disagree.

Contrary to Defendants' contention, the Industrial Commission explicitly stated that it had considered "the totality of the medical and lay evidence[.]" That the Industrial Commission viewed this evidence in a light different than that preferred by Defendants is not an issue properly reviewed by this Court. "Clearly, it is not the function of any appellate court to retry the facts found by the Commission or weigh the evidence received by it and decide anew the issue of compensability of an employee's claim." *Buck v. Procter & Gamble Mfg. Co.*, 52 N.C. App. 88, 92, 278 S.E.2d 268, 271 (1981) (citing *Inscoe v. DeRose Indus., Inc.*, 292 N.C. 210, 232 S.E.2d 449 (1977); *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 144 S.E.2d 272 (1965)).

[3] Lastly, Defendants, citing Assignments of Error 18, 21, 23-24, and 26, argue that the Industrial Commission erred by concluding that Aboagwa was disabled as defined by North Carolina General Statute section 97-2 and awarding ongoing temporary total disability benefits. North Carolina General Statute section 97-2 defines disability as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2003). An employee may show such disability through:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that

> he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, *i.e.*, age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Dist., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted).

Here, Aboagwa produced some medical evidence that she was physically incapable of work due to her workplace falls. For example, Dr. Haglund testified that Aboagwa was likely temporarily totally disabled. Dr. Matthews also noted in each of Aboagwa's visits that she was likely disabled. The Industrial Commission noted in its Opinion and Award that Dr. Haglund "gave [Aboagwa] a [] permanent partial disability rating for her spine" and found that Aboagwa was "rendered [] disabled from working" and entitled to receive temporary disability benefits. Because there was some medical evidence supporting the Industrial Commission's finding that Aboagwa was disabled and thus entitled to disability benefits, we affirm the Opinion and Award. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553 (reviewing court need only find that "competent evidence supports the Commission's findings of fact and [that] the findings of fact support the Commission's conclusions of law").

For the foregoing reasons, we find that the Industrial Commission did not: (1) err in concluding that Aboagwa's 23 and 26 October 2000 falls at work caused or aggravated her spine condition; (2) apply an incorrect legal standard; (3) fail to consider the totality of the evidence; or (4) err in concluding that plaintiff was disabled as defined by North Carolina General Statute section 97-2 and in awarding ongoing temporary total disability benefits. Accordingly, we affirm the Industrial Commission's Opinion and Award.

Affirmed.

Judges HUNTER and THORNBURG concur.

JAMES J. LEWIS, EMPLOYEE, PLAINTIFF-APPELLEE v. NORTH CAROLINA DEPARTMENT OF CORRECTION, EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT SERVICES, ADMINISTRATOR), DEFENDANTS-APPELLANTS

No. COA03-1447

(Filed 21 December 2004)

1. **Workers' Compensation— posttraumatic stress disorder— aggravation of diabetes—credibility of witnesses**

The Industrial Commission did not err in a workers' compensation case by concluding that competent medical evidence established that plaintiff's posttraumatic stress disorder (PTSD) arising from his employment as a probation officer aggravated his diabetes, because: (1) each testifying physician agreed that stress could aggravate or exacerbate diabetes; (2) all of plaintiff's treating physicians agreed that plaintiff's PTSD aggravated his diabetes; and (3) although defendants' witnesses ultimately came to the conclusion that the aggravation of plaintiff's diabetes was not caused by his PTSD, the Commission found the testimony of plaintiff's treating physicians more persuasive and the credibility of witnesses is for the Commission.

2. **Workers' Compensation— causation testimony—psychiatrists versus endocrinologists—posttraumatic stress disorder—aggravation of diabetes**

The Industrial Commission did not err in a workers' compensation case by relying on the causation testimony of psychiatrists rather than on the causation testimony of endocrinologists regarding the aggravation of plaintiff's diabetes, because: (1) the doctor defendants contend was in the best position to determine whether plaintiff's posttraumatic stress disorder (PTSD) exacerbated his diabetes testified that he knew nothing about PTSD; (2) even if the Commission had relied solely on the testimony of endocrinologists, competent evidence existed to support the Commission's findings when all of the testifying endocrinologists, including defendant's witnesses, averred that PTSD could have an effect on diabetes; and (3) each of plaintiff's three treating endocrinologists stated that plaintiff's PTSD did in fact cause the aggravation of plaintiff's diabetes.

Appeal by defendants from opinion and award entered 10 July 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 August 2004.

Law Offices of George W. Lennon, by George W. Lennon and S. Neal Camak, for plaintiff-appellee.

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

McGEE, Judge.

The North Carolina Industrial Commission (Commission) entered an opinion and award on 13 November 1995 awarding compensation to James J. Lewis (plaintiff) arising from plaintiff's posttraumatic stress disorder acquired during plaintiff's employment with the North Carolina Department of Correction (defendant Department of Correction). The Commission found as fact and concluded as a matter of law that plaintiff's posttraumatic stress disorder was a compensable injury in that it was "due to causes and conditions which are characteristic of and peculiar to plaintiff's employment with [defendant Department of Correction] and is not an ordinary disease of life to which the general public is equally exposed outside of employment." Pursuant to an amended opinion and award of 26 March 1996, plaintiff was awarded salary continuation during the first two years of his disability, from 10 September 1992 to 10 September 1994; thereafter plaintiff was awarded temporary total disability compensation at the rate of $293.14 per week from 11 September 1994 until he returned to work or until further order of the Commission. Plaintiff was also awarded payment for all past and future medical expenses he incurred as a result of his compensable occupational disease.

Plaintiff filed a motion to compel payment and for other relief on 30 September 1996, stating in part that:

> 11. Plaintiff has submitted to Defendant medical bills for treatment for exacerbation of his diabetes related to the stress full [sic] conditions of his employment. . . . Plaintiff has obtained a medical opinion letter from Dr. Gianturco . . . indicating that these bills are related to the post-traumatic stress disorder. The Commission's order unequivocally states that Defendant shall pay medical costs incurred as a result of the covered occupational disease. Therefore these bills must be paid by Defendant.

The medical bills included treatment for exacerbation of plaintiff's diabetes, periodontal treatment, and bills for prescription medications.

Subsequently, a deputy commissioner found as fact and concluded as a matter of law on 24 November 1997 that the issue regarding plaintiff's diabetes was *res judicata* and would not be addressed. Both plaintiff and defendants appealed to the Commission. The Commission affirmed the deputy commissioner's finding of *res judicata* on 12 October 1998.

Defendants appealed to this Court, assigning as error the Commission's conclusion that plaintiff's diabetes claim was *res judicata*. *Lewis v. N.C. Dep't of Corr.*, 138 N.C. App. 526, 528, 531 S.E.2d 468, 470 (2000). Plaintiff filed a cross-assignment of error arguing that the Commission failed to find and conclude that the record established that the compensable posttraumatic stress disorder caused an aggravation of his diabetes. *Id.* at 528, 531 S.E.2d at 470. This Court held that the Commission incorrectly applied the doctrine of *res judicata*, in that the deputy commissioner's conclusion of law regarding plaintiff's diabetes was not a final decision due to the subsequent application for review to the Commission. *Id.* at 528-29, 531 S.E.2d at 470. This Court also found that defendant Department of Correction was " 'entitled to have the full Commission respond to the questions directly raised by [its] appeal.' " *Id.* at 529, 531 S.E.2d at 470 (alteration in original) (quoting *Vieregge v. N.C. State Univ.*, 105 N.C. App. 633, 639, 414 S.E.2d 771, 774 (1992)). As a result, this Court remanded the case to the Commission to " 'conduct a hearing, make its own findings of fact and conclusions of law and enter an order resolving' the issue of whether plaintiff's post-traumatic stress disorder aggravated his diabetes." *Id.* at 529, 531 S.E.2d at 470 (quoting *Vieregge*, 105 N.C. App. at 641, 414 S.E.2d at 776).

On remand, the Commission entered an opinion and award on 10 July 2003, finding as fact and concluding as a matter of law that plaintiff's posttraumatic stress disorder exacerbated his diabetic condition, "which in turn caused or aggravated plaintiff's periodontal condition." The Commission also made the following pertinent findings of fact:

> 13. . . .[T]he Full Commission finds that the evidence of record shows a causal link between plaintiff's post-traumatic stress [disorder] and the exacerbation of his diabetic condition.
>
> . . . .
>
> 15. The Full Commission finds that the record is replete with competent expert medical testimony as to the effect of anxiety and stress upon diabetes. . . .

16. Defendants have contended that both Dr. Warner Burch and Dr. Dennis [sic] Becker opined that plaintiff's work related post-traumatic stress disorder had no effect on plaintiff's diabetic condition or symptoms. However, Dr. Burch and Dr. Becker each saw plaintiff merely for an evaluation and were not plaintiff's treating physicians. Therefore, Drs. Burch and Becker were not in a position to witness firsthand and note the effects of plaintiff's psychiatric disorder on his diabetes throughout plaintiff's experience with both illnesses. Thus, the Full Commission affords greater weight to the testimony of plaintiff's treating physicians, Drs. Gainturco [sic], Johnson, Handelsman, and Spratt, who were in a better position to witness the effects of plaintiff's work related post-traumatic stress disorder on his diabetes.

17. . . . Based on Dr. Schroer's [plaintiff's periodontist] opinion, the Full Commission finds that plaintiff's original compensable injury exacerbated or aggravated plaintiff's diabetic condition, which in turn caused or aggravated plaintiff's periodontal condition. Therefore, defendants are responsible for plaintiff's periodontal and diabetic treatment.

Based upon its findings of fact, the Commission made the following conclusions of law:

1. Plaintiff's original compensable injury, post-traumatic stress disorder, exacerbated and aggravated plaintiff's pre-existing diabetes and, thus, plaintiff is entitled to compensation.

. . . .

4. Since plaintiff's periodontal condition was caused or aggravated by his diabetic condition, which has been found to have been caused or aggravated by plaintiff's original compensable injury, defendants shall provide medical treatment as may be reasonably required to effect a cure, give relief, or lessen plaintiff's disability for both plaintiff's diabetic condition and his periodontal condition. Defendant is responsible for payment for all of plaintiff's treatment at Duke. Defendant is also responsible for payment for plaintiff's treatment by plaintiff's treating physicians, including Dr. Charles Johnson, Dr. Leonard Handelsman, and Dr. Susan E. Spratt.

(citations omitted). Defendants appeal.

This Court's standard of review in workers' compensation cases is "quite narrow." *Calloway v. Mem'l Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000). We are limited to the consideration of only two issues: (1) whether the Commission's findings of fact are supported by competent evidence; and (2) whether the conclusions of law are supported by the findings of fact. *Barham v. Food World, Inc.*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980). Findings of fact are supported by competent evidence, and therefore conclusive on appeal, " '[if] the record contains any evidence tending to support the finding.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

It is the role of the Commission, not this Court, to weigh the evidence in a workers' compensation case. *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980). "In weighing the evidence, the Commission is the sole judge of the credibility of witnesses and the weight to be given their testimony, and may reject entirely the testimony of a witness if warranted by disbelief of the witness." *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). Moreover, " '[t]he evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.' " *Lewis v. Orkand Corp.*, 147 N.C. App. 742, 744, 556 S.E.2d 685, 687-88 (2001) (quoting *Adams*, 349 N.C. at 681, 509 S.E.2d at 414).

[1] Defendants assign as error the Commission's determination that competent medical evidence established that plaintiff's posttraumatic stress disorder aggravated his diabetes. Specifically, defendants argue that the evidence showed plaintiff's diabetes was never under control, even prior to the onset of plaintiff's posttraumatic stress disorder, and such was the real cause of the aggravation of plaintiff's diabetes.

The record in this case is replete with competent evidence and therefore the Commission's findings of fact are conclusive on appeal. Each testifying physician agreed that stress could aggravate or exacerbate diabetes. Dr. Leslie Domalik, expert in endocrinology, explained

> [A]ny time that there are stressors[,] whether they be psychological or physical stressors, that tends to increase hormones such as catacholyamines [sic] and corticols which directly counter the

> effect of insulin. As a result of that[,] insulin resistance is increased making it more difficult to control blood sugars; so in fact, yes, it's harder to control blood sugars in very stressful situations particularly if they are long-term. . . . [I]t's very clear at [times of high stress] that those blood sugars increase *despite anything that we do with regard to diet or exercise*. . . . [I]t's not speculation that blood sugars go up with stress.

(emphasis added).

Defendants' own witnesses similarly agreed that posttraumatic stress disorder could exacerbate a diabetic condition. Dr. Robert Rollins conceded that "[s]tress can impair control of blood sugar and the behaviors needed to control blood sugar." Dr. Denis Becker stated "[s]tress invokes hormones that raise blood sugar and make one resistant to the activity of insulin. And in losing one's sensitivity to insulin, blood sugars rise. . . . If blood sugars rise, one has a risk or worsening of complications of diabetes." Finally, Dr. Warner Burch (Dr. Burch) testified that "stress can accentuate diabetes and make control worse."

All of plaintiff's treating physicians agreed that plaintiff's posttraumatic stress disorder exacerbated his diabetes. Dr. Leonard Handelsman, plaintiff's treating psychiatrist, stated: "[Plaintiff] has posttraumatic stress disorder arising from his employment as a probation officer for North Carolina and . . . this posttraumatic stress disorder and the anxiety arising from it exacerbate his diabetes and reduce his ability to manage this diabetic condition optimally." Dr. Charles Johnson, plaintiff's original treating endocrinologist, stated: "In my professional judgment, [plaintiff's] diabetes was out of control as a consequence [of his posttraumatic stress disorder]."

Although defendants' witnesses ultimately came to the conclusion that the aggravation of plaintiff's diabetes was not caused by his posttraumatic stress disorder, the Commission found the testimony of plaintiff's treating physicians more persuasive: "[T]he Full Commission affords greater weight to the testimony of plaintiff's treating physicians . . . who were in a better position [than defendants' experts] to witness the effects of plaintiff's work related post-traumatic stress disorder on his diabetes." The credibility of the witnesses is "for the Commission, not the courts, to determine." *Click*, 300 N.C. at 167, 265 S.E.2d at 391. Despite the varying testimony as to the cause of the aggravation of plaintiff's diabetes, we find

that there is competent evidence to support the Commission's findings of fact and conclusions of law.

[2] Defendants next assign as error the Commission's reliance on the causation testimony of psychiatrists rather than on the causation testimony of endocrinologists. Defendants argue that endocrinologists were in a better position to render a medical opinion as to the causation of the aggravation of plaintiff's diabetes. Defendants further argue that the Commission erred in not giving greater weight to Dr. Burch's testimony, since Dr. Burch was an endocrinologist who had reviewed all of plaintiff's medical records.

We find that defendants' argument is without merit. Dr. Burch, the doctor defendants contend was in the best position to determine whether plaintiff's posttraumatic stress disorder exacerbated his diabetes, testified, "I know nothing about post-traumatic stress [disorder]."

The evidence also shows that defendants' emphasis on the opinions of endocrinologists is misplaced. Dr. Burch, defendants' witness, testified that *both* endocrinologists and psychiatrists had a role in determining whether plaintiff's diabetes was aggravated by posttraumatic stress disorder. Dr. Susan Spratt, endocrinologist, testified that, in her opinion, a psychiatrist would be better qualified than an endocrinologist to render a medical opinion on whether plaintiff's diabetes was aggravated by posttraumatic stress disorder.

Even if the Commission had relied solely on the testimony of endocrinologists, competent evidence exists to support the Commission's findings. As previously discussed, all of the testifying endocrinologists, including defendants' witnesses, averred that posttraumatic stress disorder could have an effect on diabetes. Furthermore, each of plaintiff's three treating endocrinologists stated that plaintiff's posttraumatic stress disorder did in fact cause the aggravation of plaintiff's diabetes.

Again, it is not this Court's role to weigh the credibility of the various witnesses. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. The Commission engaged in a thorough analysis and carefully determined the witnesses to whom it would give the most credence. This Court is bound by this determination due to the overwhelming amount of competent evidence in the record. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

Defendants also assign as error the Commission's finding that defendants were responsible for the treatment of plaintiff's periodontal disease because there was no evidence that plaintiff's posttraumatic stress disorder aggravated his diabetes. As we have determined that competent evidence established that plaintiff's posttraumatic stress disorder did in fact aggravate his diabetes, we need not address this assignment of error.

Defendants have failed to present an argument regarding their remaining assignments of error. Therefore, pursuant to N.C.R. App. P. 28(b)(6), these assignments of error are deemed abandoned.

Since the Commission's findings of fact were supported by evidence from the record, and its conclusions of law were supported by the findings, we affirm the order of the Commission.

Affirmed.

Judges WYNN and THORNBURG concur.

DONNA ROBERTSON, PLAINTIFF v. CHARLES RONALD ROBERTSON, DEFENDANT

No. COA03-1372

(Filed 21 December 2004)

1. Divorce— equitable distribution—payment of distributive award—finding of sufficient liquid assets required

The trial court erred in an equitable distribution case by ordering defendant to pay a distributive award of $52,100.07 without finding that he had sufficient liquid assets with which to pay the award, because: (1) although the trial court found defendant could liquidate his assets to pay the award, the only liquid assets readily available to pay the award were two bank accounts totaling $5,929.38; (2) although defendant may in fact be able to pay the distributive award, defendant's evidence is sufficient to raise the question of whether adjusting the award from defendant to plaintiff is necessary to offset any adverse financial consequences of using the non-liquid assets; and (3) the trial court's finding that defendant earned $93,000 was insufficient under

N.C.G.S. § 50-20(c)(1) absent consideration of the evidence of defendant's liabilities.

2. Divorce— equitable distribution—valuation—application of coverture fraction—marital portion of pension plan

The trial court did not err in an equitable distribution case by applying a coverture fraction to determine the marital portion of defendant's defined contribution pension plan because: (1) nothing in N.C.G.S. § 50-20.1 or 20.1(d) indicates that the coverture fraction is to be applied only to defined benefit pension plans; and (2) the plain language of N.C.G.S. § 50-20.1(d) requires application of a coverture fraction to determine the marital portion of all vested and novested pension, retirement, or deferred compensation benefits.

3. Divorce— equitable distribution—valuation—pension plan—number of years of participation

The trial court's determination in an equitable distribution case that defendant had participated in his pension plan for thirteen years prior to the date of separation was supported by competent evidence.

4. Divorce— equitable distribution—divisible property—postseparation diminution in fair market value of marital home

The trial court erred in an equitable distribution case by concluding that a $7,000 postseparation diminution in the fair market value of the marital home was not divisible property, because: (1) competent evidence supported the trial court's finding that both parties contributed to the diminution in value, and a diminution in value is not divisible property when caused by only one party after the date of separation; and (2) the exception clause of N.C.G.S. § 50-20(b)(4)a does not apply under these facts.

Appeal by defendant from judgment entered 6 May 2003 by Judge Lawrence Dale Graham in Davie County District Court. Heard in the Court of Appeals 26 August 2004.

No brief filed for plaintiff-appellee.

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

CALABRIA, Judge.

Charles Ronald Robertson ("defendant") appeals an equitable distribution judgment providing for an equal division of marital assets and ordering him to pay a distributive award to Donna Robertson ("plaintiff"). We reverse in part and remand.

The parties were married 3 June 1995, separated 11 June 2001, and divorced 4 November 2002. From 1978 until the date of separation, defendant was employed as a sales manager for Performance Specialties, Inc., ("PSI") formerly known as Bob Robertson, Inc. ("BRI").

The trial court valued the marital estate at $158,630.61 as of the date of separation. The principal assets in the marital estate included defendant's PSI vested pension plan, also referred to as a profit-sharing plan, valued at $95,763.35 and defendant's stock in PSI valued at $37,336.00, both of which were distributed to defendant. The trial court arrived at the marital value of the PSI pension plan by applying a coverture fraction of six/thirteenths to the plan's $207,487.28 date of trial value. The trial court also distributed to defendant two bank accounts totaling $5,929.38, an automobile and other personal property valued at $13,829.68, an unencumbered one-half acre lot adjacent to the marital home valued at $8,920.00, and the marital home valued at -23,387.82. The trial court determined the marital home's value by subtracting the payoff of the two mortgages on the property as of the date of separation, $125,930.84 and $23,456.98 respectively, from its $126,000.00 fair market value as of the date of separation. Accordingly, the net assets distributed to defendant totaled $138,390.59. Plaintiff's net assets totaled $20,240.02.

The trial court determined that an equal division of the marital assets was equitable. Accordingly, each party was entitled to one-half the value of the marital estate, $79,315.30. However, the trial court found an in-kind distribution was not equitable because the largest assets of the estate were the PSI pension plan and the PSI stock. The trial court ordered defendant to pay plaintiff a distributive award of $52,100.07 within ninety days of the date of the judgment. In requiring the distributive award, the trial court considered defendant's income at PSI, which was approximately $93,000.00, plus defendant's PSI pension and stock as well as the real and personal property including the bank accounts. Defendant appeals.

I. Finding of Sufficient Liquid Assets

[1] Defendant first asserts the trial court erred by ordering him to pay the distributive award without finding that he had sufficient liquid assets with which to pay the award. We agree.

"The division of marital property is a matter within the sound discretion of the trial court[,] . . . and [the trial court's ruling] will be disturbed only if it is 'so arbitrary that [it] could not have been the result of a reasoned decision.' " *Gagnon v. Gagnon*, 149 N.C. App. 194, 197, 560 S.E.2d 229, 231 (2002) (quoting *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986)). Nevertheless, under N.C. Gen. Stat. § 50-20(c) (2003), the trial court must consider certain factors and "must make findings as to each factor for which evidence was presented." *Rosario v. Rosario*, 139 N.C. App. 258, 261, 533 S.E.2d 274, 276 (2000).

The pertinent factors under N.C. Gen. Stat. § 50-20(c) require that the trial court consider:

> (1) The income, property, and liabilities of each party at the time the division of property is to become effective.
>
> . . . .
>
> (9) The liquid or nonliquid character of all marital property and divisible property.
>
> . . . .
>
> (11) The tax consequences to each party.

With respect to N.C. Gen. Stat. § 50-20(c)(9) and (11), where defendant is required "to pay the distributive award from a non-liquid asset or by obtaining a loan, the equitable distribution award must be recalculated to take into account any adverse financial ramifications such as adverse tax consequences." *Embler v. Embler*, 159 N.C. App. 186, 188-89, 582 S.E.2d 628, 630 (2003). Under N.C. Gen. Stat. § 50-20(c)(1), "the court is required to consider the liabilities of each party when making an equitable distribution." *Geer v. Geer*, 84 N.C. App. 471, 475, 353 S.E.2d 427, 429 (1987).

The trial court made the following findings of fact pertinent to the distributional award:

> 28. . . . . The presumption of an in-kind distribution is further rebutted because the pension plan is the single largest,

unencumbered asset of the marriage but is difficult to liquidate and may cause unfavorable tax consequences. The fact that the stock of PSI, a closely held corporation with Defendant's father as the controlling stockholder, is another major marital asset makes an in-kind division very difficult and not equitable.

. . . .

30. The Court considered the following in making a distributional award from Defendant to Plaintiff as set forth hereinafter:

(a) Defendant is being awarded numerous assets in the form of PSI stock, an unencumbered real estate lot, and assorted personal property and bank accounts that he can liquidate, if necessary, to make a distributional award.

. . . .

(e) Defendant has an annual income from his employment of at least $93,000.00 as well as an annual profit sharing contribution made solely by his employer.

Although the trial court found defendant could liquidate the above assets to pay the $52,100.07 distributive award, the only liquid assets readily available to pay the award were two bank accounts totaling $5,929.38. Defendant's other assets included stock in PSI valued at $37,336.00, the unencumbered one-half acre lot valued at $8,920.00, and the personal property valued at $13,829.68. With the exception of the pension plan, which the trial court found would be "difficult to liquidate and [might] cause unfavorable tax consequences," the trial court failed to make findings concerning the difficulty and possible financial and tax consequences of borrowing money against or liquidating the PSI stock, the one-half acre lot, and the personal property in order to pay the amount of the judgment lien within ninety days. Accordingly, "[a]lthough defendant may in fact be able to pay the distributive award, defendant's evidence is sufficient to raise the question of . . . [whether] adjust[ing] the award from defendant to plaintiff [is necessary] to offset any adverse financial consequences of using the non-liquid assets." *Embler*, 159 N.C. App. at 188-89, 582 S.E.2d at 630-31. Furthermore, the trial court's finding that defendant earned $93,000.00 was insufficient under N.C. Gen. Stat. § 50-20(c)(1) absent consideration of the evidence of defendant's liabilities.

II. Application of a Coverture Fraction

[2] Defendant asserts the trial court erred in applying a coverture fraction to determine the marital portion of his PSI pension plan. Specifically, defendant notes that the only appellate decisions discussing the use of a coverture fraction involve defined benefit pension plans, which are more complicated to value than defendant's type of plan, a defined contribution pension plan. Defendant proceeds to argue that because valuation of a defined contribution plan is easier, use of a coverture fraction is not appropriate. We disagree.

North Carolina General Statute § 50-20.1 (2003) provides the process for "[t]he award of vested [and nonvested] pension, retirement, or other deferred compensation benefits . . . ." N.C. Gen. Stat. § 50-20.1(a), (b). Under N.C. Gen. Stat. § 50-20.1(d) (2003),

> The award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested and nonvested pension, retirement, or deferred compensation benefit, to the total amount of time of employment. . . .

The numerator of this fraction, termed a coverture fraction, "represents the total number of years of marriage, up to the date of separation, which occurred 'simultaneously with the employment which earned the vested [and nonvested] pension.' The denominator represents the total years of employment during which the pension accrued." *Bishop v. Bishop*, 113 N.C. App. 725, 729-30, 440 S.E.2d 591, 595 (1994) (citation omitted).

Nothing in N.C. Gen. Stat. § 50-20.1 or 20.1(d) indicates that the coverture fraction is to be applied only to defined benefit pension plans. Rather, the plain language of N.C. Gen. Stat. § 50-20.1(d) requires application of a coverture fraction to determine the marital portion of all "vested and nonvested pension, retirement, or deferred compensation benefit[s]." Accordingly, the trial court did not err by applying a coverture fraction to defendant's pension plan.

III. The Denominator of the Coverture Fraction

[3] Defendant asserts competent evidence did not support the trial court's finding that he participated in the pension plan for thirteen years. Specifically, defendant argues his pension plan extends back to the beginning of his employment with BRI in 1978. In the alternative,

defendant contends his participation in the PSI pension plan started nine years prior to his marriage. Where an appellant challenges the trial court's findings of fact, our review is limited to "whether the trial court's findings of fact are supported by any competent evidence, regardless of the existence of evidence which may support a contrary finding." *Stewart v. Stewart*, 141 N.C. App. 236, 247, 541 S.E.2d 209, 217 (2000).

In pertinent part, the trial court's findings of fact state:

> 9. . . . . The Court finds that [defendant] was employed by [PSI] for a period of 13 years from 1988 to the date of separation in June, 2001. . . .
>
> . . . .
>
> 12. The Court finds, based on the evidence presented, that PSI was incorporated in 1988 and was a business started by Defendant's father and formerly known as [BRI]. Defendant came to work for [BRI] in 1978 and was working there when the company merged into PSI in 1988. The Court finds by the greater weight of the evidence that all the contributions made to Defendant's profit sharing plan were made while he was employed at PSI beginning in 1988.

Defendant testified that contributions to his pension plan started nine years prior to his marriage when PSI was formed, which according to him was in 1987. Defendant's father testified that contributions for defendant under the BRI pension plan started in 1978 and continued after PSI was formed. When asked, defendant's father first testified PSI was formed about 1988 or 1989 then later believed it was formed around 1987 or 1988.

With regard to when contributions started, defendant's testimony constitutes competent evidence that his pension plan started when PSI was formed. Furthermore, although defendant's father was somewhat imprecise when testifying about the formation date of PSI, his father's two references to 1988 constituted competent evidence that PSI was formed in 1988. Moreover, we note defendant's contention that his pension plan started with PSI's formation nine years before his marriage, meaning in 1986, conflicts with his testimony that PSI's formation occurred in 1987. Accordingly, the trial court's finding that defendant had participated in the pension plan for thirteen years prior to the date of separation was supported by competent evidence.

IV. The Marital Home

[4] Defendant asserts the trial court erred in concluding that a $7,000.00 post-separation diminution in the fair market value of the marital home was not divisible property. It is well established that a trial court's conclusions of law must be supported by its findings of fact. *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986). Under N.C. Gen. Stat. § 50-20(b)(4),

> "Divisible property" means all real and personal property as set forth below:
>
> a. All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

Therefore, "under the plain language of N.C. Gen. Stat. § 50-20(b)(4)a, appreciation [and diminution in value] that results from the activities or actions of *one spouse* is not treated as divisible property." *Hay v. Hay*, 148 N.C. App. 649, 655, 559 S.E.2d 268, 272 (2002) (emphasis added).

In pertinent part, the trial court's findings and conclusion with respect to the diminution in value of the marital home state:

> Defendant presented expert testimony that the marital residence had depreciated in value from $126,000.00 at the time of separation to $119,000.00 when it was appraised in October 2002. Defendant contends this decrease of $7000.00 is divisible property. . . . The Court finds that any decrease in value occurred as a direct result of the lack of maintenance done on the property after the date of separation. *Both parties'* actions and inactions contributed to this lack of maintenance and, as a result, any decrease in value is not divisible property and is assigned no value.

Competent evidence supports the trial court's finding that *both parties* contributed to the diminution in value. However, this finding does not support the trial court's conclusion that the decrease in value is not divisible property. As discussed above, a diminution in value is not divisible property when caused by *one party* after the date of separation. However, here we are faced with a diminution

caused by *both parties* after the date of separation. Therefore, the exception clause of N.C. Gen. Stat. § 50-20(b)(4)a does not apply under these facts, and the parties must share the consequent diminution in value occasioned by their joint "actions and inactions."

For the foregoing reasons, we reverse in part and remand the judgment to the trial court for: (1) additional findings of fact regarding whether an adjustment is needed to offset any adverse financial consequences to defendant for liquidating assets to pay the distributive award and defendant's liabilities as compared to his income and property and (2) a valuation of the marital home's diminution in value and the distribution of that diminution between the parties. "On remand, the trial court shall rely upon the existing record, but may in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the instant opinion." *Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999).

Reversed in part and remanded.

Judges ELMORE and STEELMAN concur.

STATE OF NORTH CAROLINA v. RONALD JEFFERY

No. COA03-1364

(Filed 21 December 2004)

1. Appeal and Error— *Alford* plea—bills of information—outside scope of review

An issue concerning the bills of information for an indecent liberties defendant was not considered where defendant entered an *Alford* plea. Moreover, defendant did not challenge the bills of information at trial, and plain error review applies only to jury instructions or the admissibility of evidence.

2. Appeal and Error— failure to object—sentencing issue—not waived

Appellate review of a sentencing issue was not waived by failure to object; an error at sentencing is not an error at trial and no objection is required to preserve the issue for review.

3. Sentencing— prior record level—worksheet alone insufficient—plea agreement not an implied stipulation

Defendant's sentence for indecent liberties was remanded where the State submitted only the prior record level worksheet without supporting documents or other statutorily authorized means of proof. Defendant's plea agreement did not provide an implied stipulation to a prior record level because there was no reference to the record level or the worksheet in defense counsel's discussion with the judge. Furthermore, defendant's plea agreement was not sufficiently specific to rise to the level of a stipulation.

Appeal by defendant from judgments dated 16 April 2003 by Judge B. Craig Ellis in Superior Court, Scotland County. Heard in the Court of Appeals 30 August 2004.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

George E. Kelly, III for defendant-appellant.

McGEE, Judge.

Ronald Jeffery (defendant) pled guilty on 16 April 2003 to six counts of taking indecent liberties with a child, Class F felonies. The plea was entered pursuant to *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970). The six bills of information to which defendant pled guilty alleged that defendant took indecent liberties with B.L.L., defendant's minor stepdaughter, during the following six time periods: between 7 May 2000 and 7 July 2000; between 7 August 2000 and 6 October 2000; between 7 November 2000 and 7 January 2001; between 7 February 2001 and 7 April 2001; between 7 May 2001 and 7 July 2001; and between 7 August 2001 and 7 October 2001. The trial court sentenced defendant to six consecutive sentences of twenty to twenty-four months in prison. In exchange for his plea, the State dismissed rape and sex offense charges against defendant. Defendant appeals.

The State's factual basis for entry of defendant's plea tended to show that B.L.L. resided with her mother and defendant. Beginning in May 2000, when B.L.L. was eleven years old, defendant engaged in various sex acts with B.L.L. On the first occasion, defendant put a knife to B.L.L.'s throat and put his penis inside her. Defendant threatened to kill B.L.L. and her mother if B.L.L. told anyone. On other occa-

sions, defendant would wake B.L.L. up and "have sex with [her] on the [living room] floor." On two occasions, defendant made B.L.L. "suck his penis." Defendant had sex with B.L.L. for the last time "one or two weeks before [defendant] was sent to prison" on other charges on 15 January 2002. In her statement, B.L.L. indicated that she did not know exactly how many times defendant had sex with her but she stated that "it has been a lot."

After defendant was sent to prison, B.L.L. told her mother that defendant had been having sex with her. B.L.L. had medical evaluations at both the Apex Center and the Purcell Clinic. Both evaluations led to the conclusion that B.L.L.'s hymen had been broken and that there were "clear signs that she had had sexual intercourse."

B.L.L.'s natural father had previously been convicted of sex crimes against children. Although B.L.L. had seen her natural father after his release from prison, B.L.L. was adamant that her natural father had never abused her. According to the State, B.L.L. was consistent and specific in her claims that defendant committed these crimes against her.

I.

[1] Defendant argues in his first assignment of error that the six bills of information upon which defendant was convicted were unconstitutionally vague. Specifically, defendant argues that the bills of information, by leaving open five one-month gaps during the overall time period in which the State contends the offenses occurred, unreasonably expose defendant to future charges, violating his constitutional right against double jeopardy. Defendant also contends that the bills of information were not supported by the State's factual basis for the plea, since there was evidence that B.L.L. was in fact sexually assaulted by her natural father. In response, the State argues that defendant has no right to appeal this issue. We agree with the State.

Under N.C. Gen. Stat. § 15A-1444 (2003), a defendant who pleads guilty has a right to appeal only the following issues: (1) whether a defendant's sentence is supported by evidence introduced at the trial and sentencing hearing, but only if the minimum sentence for imprisonment does not fall within the presumptive range; (2) whether the sentence imposed resulted from an incorrect record level finding or was not of a type or duration authorized for a defendant's class of offense or record level; or (3) when a motion to withdraw a plea of guilty or a motion to suppress evidence is denied.

Defendant entered an *Alford* plea, yet this assignment of error does not concern his sentencing, a motion to withdraw a guilty plea, or a motion to suppress evidence. This assignment of error therefore falls outside the scope of the matters that defendant is statutorily entitled to appeal and is not properly before this Court. *See, e.g., State v. Jamerson,* 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 546-47 (2003) (finding a defendant who pled guilty did not have an "appeal of right" regarding the issue of whether his indictment was proper).

We also note that defendant did not challenge the constitutionality of the bills of information before the trial court. Our Supreme Court has stated that "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd,* 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001); *see also State v. Williams,* 355 N.C. 501, 528, 565 S.E.2d 609, 625 (2002), *cert. denied,* 537 U.S. 1125, 154 L. Ed. 808 (2003). Defendant acknowledges that he failed to object to the indictments at trial, yet urges us to apply plain error review. However, we may only apply plain error review to issues involving jury instructions or rulings on the admissibility of evidence. *State v. Gregory,* 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). As a result, we do not review this assignment of error.

II.

Defendant argues in his remaining assignment of error that the State did not meet its burden of proving defendant's prior record level at sentencing because the State did not produce any evidence of defendant's prior record other than the prior record level worksheet. In reviewing this assignment of error, "our standard of review is 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.' " *State v. Deese,* 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (alteration in original) (quoting N.C. Gen. Stat. § 15A-1444 (a1) (Cum. Supp. 1996)). The State bears the burden of proving a prior conviction by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.14(f) (2003). Prior convictions may be proven by any one of the following methods:

(1) Stipulation of the parties.

(2) An original or copy of the court record of the prior conviction.

(3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.

(4) Any other method found by the court to be reliable.

Id.

[2] The State contends that defendant has waived this argument by failing to object as required by N.C.R. App. P. 10(b)(1). However, "[o]ur Supreme Court has held that an error at sentencing is not considered an error at trial for the purpose of N.C. Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure" and therefore no objection is required to preserve the issue for appellate review. *State v. Hargett*, 157 N.C. App. 90, 92, 577 S.E.2d 703, 705 (2003) (citing *State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991)); *see also State v. Mack*, 87 N.C. App. 24, 33, 359 S.E.2d 485, 491 (1987), *disc. review denied*, 321 N.C. 477, 364 S.E.2d 663 (1998) (holding that the "defendant was not required to object at the sentencing hearing in order to assert the insufficiency of the [State's] remarks as a matter of law to prove his prior convictions by a preponderance of the evidence.") Therefore, this assignment of error is properly before this Court.

[3] The State does not satisfy its burden of proving defendant's prior record level merely by submitting a prior record level worksheet to the trial court. *See State v. Miller*, 159 N.C. App. 608, 614-15, 583 S.E.2d 620, 624 (2003), *aff'd per curiam*, 358 N.C. 133, 591 S.E.2d 520 (2004); *State v. Bartley*, 156 N.C. App. 490, 501-02, 577 S.E.2d 319, 326 (2003); *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002). "[T]he law requires more than the State's unverified assertion that a defendant was convicted of the prior crimes listed on a prior record level worksheet." *State v. Goodman*, 149 N.C. App. 57, 72, 560 S.E.2d 196, 205 (2002), *rev'd on other grounds per curiam*, 357 N.C. 43, 577 S.E.2d 619 (2003).

In *State v. Riley*, 159 N.C. App. 546, 556-57, 583 S.E.2d 379, 386-87 (2003), the State submitted only a prior record level worksheet to the trial court as evidence of the defendant's prior record level. This Court held that absent any records of the defendant's prior convictions, either from the trial court or an agency listed in N.C. Gen. Stat. § 15A-1340.14(f)(3), the worksheet was an insufficient means for the State to prove the defendant's prior convictions by a preponderance of the evidence. *Riley*, 159 N.C. App. at 557, 583 S.E.2d at 387; *accord Miller*, 159 N.C. App. at 615, 583 S.E.2d at 624; *see also Bartley*, 156 N.C. App. at 502, 577 S.E.2d at 326.

In this case, the State has similarly failed to prove defendant's prior record level by a preponderance of the evidence. The State sub-

mitted only the prior record level worksheet listing the purported convictions of defendant, which established his prior record at level III. The State never tendered to the trial court or entered into evidence any supporting court documents or other statutorily authorized means of proof of defendant's prior convictions. An otherwise unsupported worksheet tendered by the State establishing a defendant's prior record level is not even "sufficient to meet the catchall provision found in [N.C. Gen. Stat.] § 15A-1340.14(f)(4), even if uncontested by defendant." *Riley*, 159 N.C. App. at 556-57, 583 S.E.2d at 387; *see also Bartley*, 156 N.C. App. at 502, 577 S.E.2d at 326.

The State contends that defendant "impliedly stipulated" to a prior record level III by entering into a plea agreement that established defendant's sentence at twenty to twenty-four months in prison for each charge, a sentence within the presumptive range for Class F felonies committed by a record level III felon. We recently rejected a similar argument in *State v. Alexander*, 167 N.C. App. 79, 604 S.E.2d 361 (2004).

This Court has held that a defendant can stipulate to a prior record level through a colloquy between defense counsel and the trial court. In *Eubanks*, we held that such statements made by defense counsel could "reasonably be construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet." *Eubanks*, 151 N.C. App. at 506, 565 S.E.2d at 743. In *Eubanks*, the following exchange occurred at the trial court:

> THE COURT: Evidence for the State?
>
> [THE PROSECUTOR]: If Your Honor please, under the Structured Sentencing Act of North Carolina, the defendant has a prior record level of four in this case, Your Honor.
>
> THE COURT: Do you have a prior record level worksheet?
>
> [THE PROSECUTOR]: Yes, sir, I do.
>
> THE COURT: All right. Have you seen that, Mr. Prelipp [attorney for defendant]?
>
> MR. PRELIPP: I have, sir.
>
> THE COURT: Any objections to that?
>
> MR. PRELIPP: No, sir.

Id. at 504-05, 565 S.E.2d at 742.

Similarly, in *State v. Johnson*, 164 N.C. App. 1, 24, 595 S.E.2d 176, 189 (2004), we held that when defense counsel "answered in the affirmative" in response to the trial court's statement that the defendant had a prior record level III, the exchange was a stipulation to the prior convictions listed on the worksheet.

Johnson and *Eubanks* are distinguishable from the case before us. In both *Johnson* and *Eubanks*, defense counsel engaged in a colloquy with the trial court that specifically mentioned the defendants' prior record levels and elicited admissions by defense counsel as to the validity of the worksheets upon which the record levels were based. *See Johnson*, 164 N.C. App. at 22-23, 595 S.E.2d at 188-89; *Eubanks*, 151 N.C. App. at 504-05, 565 S.E.2d at 742. Such a colloquy is lacking in our present case. Defense counsel makes no reference to the worksheet in his discussion with the trial court. In fact, the only mention of defendant's prior record level is the trial court's statement that defendant has "seven prior record points" and has a "prior record level three."

Furthermore, defendant's plea agreement, in which defendant agreed to six consecutive sentences of twenty to twenty-four months in prison, is of insufficient specificity to rise to the level of a stipulation. Our Supreme Court has held that

> "[w]hile a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them. . . ."
>
> . . . Silence will not be construed as assent thereto unless the solicitor specifies that assent has been given.

State v. Powell, 254 N.C. 231, 234-35, 118 S.E.2d 617, 619-20 (1961), *overruled on other grounds by State v. Denning*, 316 N.C. 523, 342 S.E.2d 855 (1986) (quoting 83 C.J.S., Stipulations, s.3, p.3); *see also State v. Mullican*, 95 N.C. App. 27, 29, 381 S.E.2d 847, 848 (1989), *aff'd*, 329 N.C. 683, 406 S.E.2d 854 (1991). Defendant's agreement to six presumptive range sentences is not a "definite and certain" indication that defendant has a prior record level III. It is merely indicative of the bargain into which he entered with the State. Additionally, under *Powell*, defendant's failure to object at the sentencing hearing to a prior record level III cannot be interpreted as a stipulation. *Powell*, 254 N.C. at 235, 118 S.E.2d at 620.

Therefore, since the State introduced no evidence of defendant's prior record level other than the worksheet, and defendant did not stipulate to a prior record level III, defendant is entitled to a new sentencing hearing for a determination of his prior record points and level.

We find no error in the six bills of information to which defendant pled guilty; we remand defendant's case for resentencing.

Affirmed; remanded for resentencing.

Chief Judge MARTIN and Judge WYNN concur.

STATE OF NORTH CAROLINA v. CARL DUNCAN CARTER, JR., DEFENDANT

No. COA03-1353

(Filed 21 December 2004)

1. **Appeal and Error— guilty plea—certiorari—motion for appropriate relief**

The appeal of a defendant who had pled guilty was heard in the Court of Appeals even though it did not fall within the statutory categories for appeals after pleading guilty where defendant filed a petition for certiorari; certiorari was granted on the first assignment of error (whether the plea was voluntary), as may be done when a defendant challenges the procedure employed in accepting a guilty plea; and the second assignment of error (sentencing for both larceny and possession of the stolen property) was heard on the court's own motion for appropriate relief since the petition for certiorari was properly pending.

2. **Criminal Law— guilty plea—knowing and voluntary**

A guilty plea was knowing and voluntary where the transcript revealed a brief misunderstanding but no further indication of any lack of comprehension by defendant.

3. **Sentencing— breaking and entering and possession of stolen property—double sentence**

The trial court erred by sentencing defendant for both breaking and entering and for possession of stolen property.

Judge THORNBURG concurring in the result only.

Appeal by defendant from judgments entered 11 June 2003 by Judge Kevin Eddinger in Rowan County District Court. Heard in the Court of Appeals 10 June 2004.

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

Leslie C. Rawls, for defendant-appellant.

GEER, Judge.

On appeal, defendant Carl Duncan Carter, Jr. contends, citing *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982), that the trial court should not have imposed sentences for both felony larceny of property and possession of that stolen property. We agree and, therefore, arrest judgment on the charge of possession of stolen goods or property. We otherwise affirm.

Defendant was charged in a single indictment with (1) breaking and/or entering a residence with the intent of committing felony larceny, (2) felony larceny of personal property valued at $1035.00, and (3) possession of stolen goods or property. Defendant pled guilty to all three counts in Rowan County District Court. At the hearing on defendant's guilty plea, the prosecutor offered the following unsworn summary by a lieutenant deputy as the factual basis for the charges:

> LIEUTENANT DEPUTY: Your Honor, we were called out to the residence the 23rd day of May, about 10:00 p.m. On our arrival to that residence, we talked to another co-defendant, which was Avery Bradley. He took us to the residence where all the stolen goods were at. All the stolen goods were recovered, all but one .22 calibre [sic] handgun. Arrested him at the time—which we've already done him; he's gone—and he give me the names of everybody else that was involved.
>
> Mr. Carter was confronted by the homeowners the last time they made entry to the residence. He took off on foot. After everybody cleared the scene, Mr. Carter and the female suspect had come back to the residence. They called, we come out there, they met us out there, we took Mr. Carter into custody and he wrote me, basically, a written statement, confessing that he had been in the residence and helped them take the items and store them over at the next-door-neighbor's house, next door to where the property was recovered.

The trial judge accepted defendant's plea and proceeded with sentencing. He found that defendant had 17 prior record points and, as a result, had a prior record level of V (five). He consolidated the charges of breaking and/or entering and felony larceny and imposed a sentence of 12 to 15 months. He then imposed a consecutive sentence of 12 to 15 months on the possession of stolen goods or property charge. Immediately after sentencing, defendant gave oral notice of appeal.

Defendant has made two assignments of error: (1) that the trial court failed to properly determine that defendant's guilty plea was made voluntarily, intelligently, and understandingly and (2) that the trial court, by sentencing him for both larceny of property and possession of that stolen property, violated *Perry*. The preliminary issue is whether this Court has the authority to hear defendant's appeal given that he entered a plea of guilty.

[1] "In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). Under N.C. Gen. Stat. § 15A-1444 (2003), a defendant who has pled guilty has only the right to appeal the following issues: (1) whether the sentence is supported by the evidence (if the minimum term of imprisonment does not fall within the presumptive range); (2) whether the sentence results from an incorrect finding of the defendant's prior record level under N.C. Gen. Stat. § 15A-1340.14 or the defendant's prior conviction level under N.C. Gen. Stat. § 15A-1340.21; (3) whether the sentence constitutes a type of sentence not authorized by N.C. Gen. Stat. § 15A-1340.17 or § 15A-1340.23 for the defendant's class of offense and prior record or conviction level; (4) whether the trial court improperly denied the defendant's motion to suppress; and (5) whether the trial court improperly denied the defendant's motion to withdraw his guilty plea. *State v. Jamerson*, 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 546-47 (2003). Defendant's appeal in this case does not fall within any of these categories.

Recognizing this fact, defendant filed a petition for writ of certiorari on 8 December 2003. The State contends that this Court, under Rule 21 of the Rules of Appellate Procedure, does not have authority to review defendant's arguments pursuant to a grant of certiorari. *See Pimental*, 153 N.C. App. at 77, 568 S.E.2d at 872 (when defendant did not fail to take timely action, is not attempting to appeal from an interlocutory order, and is not seeking review of a denial of a motion

for appropriate relief, "this Court does not have the authority to issue a writ of certiorari"). This Court, however, held in *State v. Rhodes*, 163 N.C. App. 191, 193, 592 S.E.2d 731, 732 (2004), following *State v. Bolinger*, 320 N.C. 596, 602-03, 359 S.E.2d 459, 462 (1987), that a defendant may petition for writ of certiorari when he is challenging the procedures employed in accepting a guilty plea. Defendant is, therefore, entitled to petition for writ of certiorari for review of his first assignment of error. In our discretion, we allow defendant's petition to the extent that it seeks review of defendant's first assignment of error. *See also State v. Barnett*, 113 N.C. App. 69, 76, 437 S.E.2d 711, 715 (1993) (allowing petition for writ of certiorari to challenge the trial court's acceptance of his guilty pleas; also reversing sentence under *Perry*).

With respect to defendant's second assignment of error, since a petition for writ of certiorari is properly pending before this Court, we may consider defendant's arguments through a motion for appropriate relief. *Jamerson*, 161 N.C. App. at 530, 588 S.E.2d at 547 (noting that appellate courts may rule on a motion for appropriate relief "only when the defendant has either an appeal of right or a properly pending petition for writ of certiorari"). Although defendant has not filed a motion for appropriate relief with this Court, we may treat his petition for writ of certiorari as such a motion or we may grant the relief on our own motion. *See* N.C. Gen. Stat. § 15A-1420(d) (2003) ("At any time that a defendant would be entitled to relief by motion for appropriate relief, the court may grant such relief upon its own motion."). *See also State v. Jones*, 161 N.C. App. 60, 64 n.1, 588 S.E.2d 5, 9 n.1 (2003) ("[S]ince defendant has an appeal of his motion to suppress properly pending, this Court could address the jurisdictional defect on its own motion for appropriate relief."), *rev'd on other grounds*, 358 N.C. 473, 598 S.E.2d 125 (2004). We choose to address defendant's second assignment of error upon our own motion for appropriate relief.

[2] As for defendant's challenge to the procedures in accepting his guilty plea, a court may accept a guilty plea only if it is made knowingly and voluntarily. *State v. Russell*, 153 N.C. App. 508, 511, 570 S.E.2d 245, 248 (2002). Here, the trial court conducted the inquiry set out in N.C. Gen. Stat. § 15A-1022 (2003), and defendant subsequently signed a transcript of plea under oath, stating that he was entering into the plea of his own free will, fully understanding what he was doing. This Court has previously held that "if the defendant signed a Transcript of Plea and the record reveals the trial court made 'a care-

ful inquiry' of the defendant, it is sufficient to show the defendant's plea was knowingly and voluntarily made, with full awareness of the direct consequences." *Russell*, 153 N.C. App. at 511, 570 S.E.2d at 248 (quoting *State v. Wilkins*, 131 N.C. App. 220, 224, 506 S.E.2d 274, 277 (1998)). Defendant points to a single portion of the transcript as suggesting that defendant "had trouble following the judge's inquiries." The transcript, however, reveals only a brief misunderstanding and contains no further indication of any lack of comprehension by defendant. We, therefore, affirm the trial court's acceptance of the guilty plea.

[3] As for defendant's second assignment of error, the trial court sentenced defendant to two consecutive sentences: (1) 12 to 15 months for the consolidated charges of breaking and/or entering and felony larceny; and (2) 12 to 15 months for possession of stolen property. *State v. Perry*, 305 N.C. 225, 236-37, 287 S.E.2d 810, 817 (1982) precludes this double sentence: "[W]e hold that, though a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses." *See also State v. Owens*, 160 N.C. App. 494, 498-99, 586 S.E.2d 519, 522-23 (2003) (although defendant did not raise the issue on appeal, the Court, exercising discretion under N.C.R. App. P. 2, ordered judgment arrested as to possession and remanded for resentencing on larceny conviction); *State v. Hargett*, 157 N.C. App. 90, 92, 577 S.E.2d 703, 705 (2003) (after holding that N.C.R. App. P. 10(b) does not apply to errors in sentencing, court arrested judgment as to possession charge and remanded for a new sentencing hearing).

Based on *Perry*, we arrest judgment on the charge of possession of stolen goods or property. Because that charge was not consolidated with any others, there is no need to remand for resentencing.

No. 03 CR 54017, Count 1, Breaking and or Entering—Affirmed.

No. 03 CR 54017, Count 2, Felony Larceny—Affirmed.

No. 03 CR 54017, Count 3, Possession of Stolen Goods/Property—Judgment arrested.

Judge HUDSON concurs.

Judge THORNBURG concurs in result only.

THORNBURG, Judge, concurring in the result only.

Although I concur in the result ultimately reached by the majority, I cannot agree with the majority's reasoning for granting defendant's petition for writ of certiorari. Defendant's appeal is not based on any of the six errors for which N.C. Gen. Stat. § 15A-1444 allows an appeal as a matter of right to defendants who plead guilty. Nor does defendant's appeal, or petition for writ of certiorari, fall into one of the three situations in which we are allowed to grant certiorari under N.C. R. App. P. 21. In the vast majority of cases with similar facts, this Court has refused to grant a writ of certiorari and dismissed the appeal. *See State v. Jamerson*, 161 N.C. App. 527, 588 S.E.2d 545 (2003); *State v. Nance*, 155 N.C. App. 773, 574 S.E.2d 692 (2003); *State v. Pimental*, 153 N.C. App. 69, 568 S.E.2d 867, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002); *State v. Dickson*, 151 N.C. App. 136, 564 S.E.2d 640 (2002).

Here, the majority relies on *State v. Rhodes*, 163 N.C. App. 191, 592 S.E.2d 731 (2004), for authority to grant a writ of certiorari to address defendant's argument that the trial court failed to properly determine whether defendant's guilty plea was made voluntarily, intelligently and understandingly. In *Rhodes*, this Court relied upon the Official Commentary to Article 58, N.C. Gen. Stat. § 15A-1021 *et seq.* (2003), and *State v. Bolinger*, 320 N.C. 596, 359 S.E.2d 459 (1987), to conclude that defendants may petition this Court for review pursuant to a petition for writ of certiorari during the appeal period to claim that the procedural requirements of Article 58 were violated. *Rhodes*, 163 N.C. App. at 194, 592 S.E.2d at 733. However, the Supreme Court in *Bolinger* did not address the applicability of N.C. R. App. P. 21. The Court, after concluding that the defendant was not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his plea and that the defendant failed to petition the Court for a writ of certiorari, stated: "Neither party to this appeal appears to have recognized the limited bases for appellate review of judgments entered upon pleas of guilty. For this reason we nevertheless choose to review the merits of defendant's contentions." *Bolinger*, 320 N.C. at 601-02, 359 S.E.2d at 462. Thus, it does not appear that the Court in *Bolinger* intended to sanction a general exception to our appellate rules.

However, I agree with the majority that the acceptance of defendant's guilty plea was without error and that defendant was sentenced in violation of *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982). As defendant was clearly sentenced in violation of *Perry*, I believe it

would be an appropriate exercise of this Court's discretion under N.C. R. App. P. 2 to suspend the appellate rules and grant defendant's petition for writ of certiorari in order to review the sentencing issue. Thus, I concur in the result only.

STATE OF NORTH CAROLINA v. WILLIAM LESTER McVAY, JR.

No. COA03-1457

(Filed 21 December 2004)

Evidence— glass comparison—expert testimony—admissible

The trial court did not abuse its discretion in a breaking and entering prosecution by admitting expert testimony comparing glass fragments from the scene with fragments found in the sole of defendant's boot. The trial court did not have precedent to determine the reliability of the testing procedure, but there was extensive voir dire testimony supporting reliability, the witness had an extensive background in trace evidence and experience in glass analysis, and defendant made no argument about the relevancy of the evidence.

Appeal by defendant from judgment entered 3 April 2003 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 August 2004.

Attorney General Roy Cooper, by Assistant Attorney General Margaret P. Eagles, for the State.

J. Clark Fischer for defendant appellant.

McCULLOUGH, Judge.

Defendant was tried by a jury on the charges of felonious breaking and entering, resisting or obstructing a public officer, and having the status of an habitual felon. The State's evidence tended to show the following: On or about 12 December 2001, defendant entered a Circle K convenience mart and stole two bottles of alcohol by placing them in his jacket. When the Circle K employee asked him to return the bottles, defendant refused and gave one to a white male that was with him. When the two men left the Circle K, they headed in the direction of Morningside Alternative School ("Morningside"). On the

night in question, Paul Agee ("Mr. Agee") stepped outside to have a cigarette after finishing a band rehearsal. After hearing a loud crash coming from Morningside, he observed two men crossing Independence Boulevard ("Independence") coming from the direction of the noise at the school. After losing sight of the two men, Mr. Agee observed the same two men running back across Independence, one wearing a white shirt and the other wearing a dark shirt or jacket. He observed one of the men enter Morningside. The police arrived less than a minute later.

Officer W.C. Hastings ("Officer Hastings") of the Charlotte Police Department responded to a silent alarm at Morningside. When he arrived, he observed a black male wearing dark clothing and a white male in a t-shirt near a broken door or window. The two men fled from the door and began running around the school building. Officer Hastings yelled at the two men to stop, and when they did not, he chased them into a small gully which led into a creek. The creek led into a tunnel that ran underneath Independence.

Officers C.A. Scaccia ("Officer Scaccia") and K.V. Swaney ("Officer Swaney") of the same department also responded to the alarm, and were advised by Officer Hastings that two male suspects were fleeing from Morningside in the direction of the creek and Independence. Officers Scaccia and Swaney set up a perimeter in order to apprehend the fleeing suspects whose description they had been given by Officer Hastings. Officer Swaney positioned himself in the adjacent apartment complex; Officer Scaccia positioned himself on the side of Independence opposite Morningside and was standing over the drainage tunnel. Defendant exited the tunnel in which the fleeing suspects had last been seen entering. Defendant, a black male wearing dark clothing, matched the description given by Officer Hastings.

Defendant did not comply with Officer Scaccia's instruction to remove his hands from his pockets, and was detained at gunpoint until the other officers arrived. When taken into custody and put in the rear of Officer Swaney's squad car, defendant became verbally and physically aggressive. After attempting to kick out the window of the squad car, he had to be restrained.

Investigator Timothy A. French ("Investigator French"), a criminalist with the Charlotte Mecklenburg crime lab, testified at the trial concerning analysis of glass fragments found at the scene of the crime, and glass fragments found in the sole of defendant's boot. He

compared samples taken from both the interior and exterior panes at the school with those found in defendant's boot sole, by way of visual, density, and refractive comparisons.

Defendant was found guilty of felonious breaking or entering, resisting arrest or obstructing a public officer, and as having the status of an habitual felon. He was acquitted of the charge of felonious larceny.

Defendant's single issue raised in this appeal alleges the trial court erred in allowing the State to present, as an expert, the testimony of Investigator French concerning the glass fragments found at the scene of the crime and in defendant's boot. Investigator French testified that the glass found at the point of broken entry at Morningside was "consistent" with that found in defendant's boot. For the reasons set forth below, we find this expert testimony was properly admitted by the court.

Defendant cites this Court's opinion in *Howerton v. Arai Helmet, Ltd.*, 158 N.C. App. 316, 581 S.E.2d 816, *disc. review allowed*, 357 N.C. 459, 585 S.E.2d 757 (2003), for his contention that North Carolina has adopted the federal standard for a trial court's discretionary ruling on the admissibility of expert testimony under N.C. Gen. Stat. § 8C-1, Rule 702 (2003) of the North Carolina Rules of Evidence ("Rule 702"). In setting the federal standard, the Supreme Court articulated a five-step inquiry a district court must consider to measure the reliability of scientific expert testimony. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594-95, 125 L. Ed. 2d 469, 483-84 (1993). However, in its review of *Howerton*, our Supreme Court overruled this Court's blanket adoption of *Daubert*, holding that admissibility under Rule 702 has proven to be more liberal in North Carolina than that of the federal standard. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 463, 597 S.E.2d 674, 689 (2004). Instead, our Supreme Court held that admissibility of expert testimony under North Carolina's Rule 702 is governed by the factors set out in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995). *Howerton*, 358 N.C. at 458, 461 S.E.2d at 686-87.

Under Rule 702(a), in order for expert testimony to be admitted, the expert must be qualified by "knowledge, skill, experience, training, or education[.]"

The Supreme Court in *Howerton* reaffirmed the principle that "trial courts are afforded 'wide latitude of discretion when making a

determination about the admissibility of expert testimony.' " *Id.* at 458, 597 S.E.2d at 687 (quoting *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984)). Thus, "a trial court's ruling on . . . the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Id.* An abuse of discretion occurs where a " 'ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Miller*, 142 N.C. App. 435, 444, 543 S.E.2d 201, 207 (2001) (citations omitted). The Supreme Court in *Howerton* held that the standard framing the discretion of the trial court's admission of expert testimony is composed of the following three-step inquiry as established in *Goode*:

> (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?

Howerton, 358 N.C. at 458, 597 S.E.2d at 686 (citations omitted); *see Goode*, 341 N.C. at 527-29, 461 S.E.2d at 640-41.

With respect to the first step of *Goode*, "[i]nitially, the trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable." *Howerton*, 358 N.C. at 459, 597 S.E.2d at 686. *Howerton* goes on to set out that if "the trial court is without precedential guidance or faced with novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques," the trial court must look to other " 'indices of reliability' to determine whether the expert's proffered scientific or technical method of proof is sufficiently reliable[.]" *Id.* at 460, 597 S.E.2d at 687 (quoting *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 853 (1990)). Such indices may include "the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked 'to sacrifice its independence by accepting [the] scientific hypotheses on faith,' and independent research conducted by the expert." *Id.* (citations omitted).

In the case at bar, the trial court conducted *voir dire* examination to determine whether Investigator French was an expert and whether the substance of his testimony would be admissible. The trial court did not have any precedent before it to determine the reliability of the testing procedure conducted by Investigator French. Thus, the court

heard evidence on indicia of the evidence's reliability. Investigator French's testimony revealed in detail his testing methods as performed under controlled circumstances. The standard for the tests was the broken glass samples taken from Morningside, and the unknown was the glass removed from defendant's boot. He first conducted a visual test comparing the glass samples for the following: any color coating or tinted sheet on the glass, if the glass was colored when it was made, the thickness of the glass, and if there was any texture to it. An ultraviolet test was taken for any fluoresces. He then tested the density of the glass in a test tube by varying the density of a solution in which the samples were placed. He then observed whether the standard and the unknown stayed suspended at the same level as each other in the varying densities of solution. And lastly, under a microscope, he tested and graphed the refractive indexes of the standard and the unknown by heating the samples separately at various temperatures in an oil for which the refractive indexes at varying temperatures were known. Using the known index of the oil, Investigator French was able to compare the indexes of the standard and the unknown at different heats. Finding the standard and the unknown to be consistent, he stated that "[he] [could] not rule out that the particle did not come from that source."

We believe the extensive *voir dire* testimony of Investigator French was sufficient to support the trial court's discretionary determination to admit the evidence of the consistency of the glass samples pursuant to the reliability of the tests. This is true especially in light of Investigator French's professional qualifications, a factor supporting both the indicia of reliability of his tests *and* qualifying him as an expert for purposes of his testimony. *See below.* Finally, we find support in our determination in a previous decision of this Court, and decisions of other jurisdictions. In *State v. Bell*, 22 N.C. App. 348, 206 S.E.2d 356 (1974), the defendant contended that there was no evidence from which the jury could infer that defendant wrongfully broke or entered the building in question. *Id.* at 349, 206 S.E.2d at 357. We held the evidence was sufficient to survive a nonsuit of defendant's charges where, among other evidence, an expert "analysis of glass particles removed from defendant's clothing revealed they had the same refractive and density qualities as the glass found inside Little Hardware." *Id.* at 349, 206 S.E.2d at 357. Other jurisdictions have allowed similar testimony. *See also Wheeler v. State*, 255 Ind. 395, 400 (1970) (where the court allowed expert testimony to establish a strong likelihood that the sliver of glass found in defendant's shoe sole came from the broken eyeglasses belonging to

the victim); *State v. Wright*, 619 S.W.2d 822, 823 (Mo. Ct. App. 1981) (where a glass shard found in defendant's trousers matched the refractive indexes and density of a piece of broken glass from the broken door, and could be used to show there was a reasonable possibility that the glass shard came from the same source as the glass from the scene).

In applying "the second step of analysis under *Goode*, the trial court must determine whether the witness is qualified as an expert in the subject area about which that individual intends to testify." *Howerton*, 358 N.C. at 461, 597 S.E.2d at 688. Relied on by the Court in *Howerton*, our Supreme Court set out the following standard for this determination in *State v. Goodwin*, 320 N.C. 157, 357 S.E.2d 639 (1987):

> Whether a witness has the requisite skill to qualify as an expert in a given area is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial court. Under N.C.G.S. § 8C-1, Rule 702 a witness may be qualified as an expert if the trial court finds that through "knowledge, skill, experience, training, or education" the witness has acquired such skill that he or she is better qualified than the jury to form an opinion on the particular subject.

Id. at 150-51, 357 S.E.2d at 641.

At the time of trial, Investigator French had an extensive background in trace evidence. He had been employed by the Charlotte Mecklenburg Police Department as a criminalist for approximately five years, and prior to that by the Syracuse, New York Police Department crime lab as a forensic chemist for nine years. His duties as a criminalist included testing and analyzing trace evidence such as hair, fiber, paint, glass, gunshot residue, tape, cordage, and match filaments. He received a bachelor's degree in chemistry and biology. Relating to trace evidence, he received internal training at two police departments and external training at the FBI Academy at Quantico and Brunswick College. Relating specifically to glass, he has performed several hundred tests for glass analysis during his career; he conducted a research project and made a presentation concerning conventional glass analysis versus elemental analysis to the American Academy of Forensic Scientists. In light of Investigator French's clear expertise in the area of trace evidence, and his experience in glass analysis, we cannot say the trial court abused its discretion in finding Investigator French to be more qualified to formulate an opinion on

trace glass evidence than the jury. Additionally, we note that during the *voir dire* examination, defendant stated the following:

> I believe that—I mean, it sounds that—from what Mr. French testified, this is a commonly used process to compare glass. I don't know if I have much argument about whether or not he is an expert. I think I do have a good argument about whether this evidence is more prejudicial than probative of the defendant's guilt.[1]

Finally, pursuant to the third step in *Goode*, defendant made no argument as to whether this evidence, if otherwise admissible, was relevant. We hold that it was.

After close review of the record and the briefs, we conclude defendant received a trial free from reversible error.

No error.

Judges TIMMONS-GOODSON and HUNTER concur.

FRANCES C. MOSELY v. WAM, INC., DAVID J. WILSON, BETH H. WILSON, EDWIN L. YANCEY, JILL J. YANCEY, KENNETH B. MEYER, AND ELIZABETH B. MEYER, JOINTLY AND SEVERALLY; J.M. N.C. STATE, INC., SUCCESSOR IN INTEREST TO WAM, INC., EDWIN L. YANCEY, JILL J. YANCEY, KENNETH B. MEYER, AND ELIZABETH B. MEYER v. AMERICAN FOOD CORPORATION, MARCUS K. GURGANUS, CHRYSANTHE GEORGES F/K/A CHRYSANTHE GURGANUS, ERNEST T. GURGANUS, AND MARIA M. GURGANUS

No. COA03-1554

(Filed 21 December 2004)

1. Landlord and Tenant— assignment of lease—signature of lessor—not necessary

There was a valid assignment of a lease, and the trial court correctly granted summary judgment against the third-party defendant, where the assignment stated that the original lessee "requested" that the lessor join in the assignment, with a blank signature block. If the lessor's signature had been necessary for the assignment to be effective, the lease would have used compulsory language.

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1. No such argument was offered in defendant's brief.

2. Landlord and Tenant— assignment of lease—no signature by lessor—binding

A lease assignment agreement was binding on the third-party defendant, American Food Corporation, and summary judgment was correctly granted against American Food, where American Food twice agreed to assume the lease in the agreement, signed the agreement, moved into the premises and paid the monthly rent, although it argued that it had intended to be bound by the assignment only if it was signed by the original lessor, which never happened.

3. Landlord and Tenant— assignment of lease—no condition precedent

There was no condition precedent to a lease assignment where the agreement "requested" the signature of the lessor. Conditions precedent are not favored, and will not be read into a contract where they are not clearly indicated.

4. Landlord and Tenant— action for unpaid rent—affirmative defenses—facts not set out—summary judgment

The trial court did not err by granting summary judgment for the third-party plaintiff on affirmative defenses where the third-party defendant failed to set out facts in dispute concerning those defenses.

Appeal by Third-Party Defendants from judgment entered 28 March 2003 by Judge Ripley E. Rand in Superior Court, Wake County. Heard in the Court of Appeals 13 September 2004.

Younce Hopper Vtipil & Bradford, by Kevin P. Hopper, and Nicholls & Crampton, by Kevin Sink, for Third-Party Defendants-Appellants.

Faison & Gillespie, by Michael R. Ortiz and John-Paul Schick, for Third-Party Plaintiffs-Appellees.

WYNN, Judge.

Third-Party Defendants (American Food Corporation, Marcus K. Gurganus, Chrysanthe Georges f/k/a/ Chrysanthe Gurganus, Ernest T. Gurganus, and Maria M. Gurganus) (hereinafter collectively referred to as "American Food Corporation"), appeal from an order granting summary judgment in favor of Third-Party Plaintiffs (J.M. N.C. State, Inc., successor in interest to WAM, Inc., David J. Wilson, Beth H.

Wilson, Edwin L. Yancey, Jill L. Yancey, Kenneth B. Meyer, and Elizabeth B. Meyer) (hereinafter collectively referred to as "J.M. N.C. State"). After careful review, we affirm.

In 1997, pursuant to an assignment, J.M. N.C. State operated a Jersey Mike's submarine sandwich shop on premises leased under a commercial contract with Plaintiff Frances C. Mosely. During that year, J.M N.C State began negotiations with American Food Corporation, for the sale of the Jersey Mike's franchise. As a result, on 2 January 1998, the parties signed and entered into a Purchase and Sale Agreement which set forth the terms and conditions of the sale. Additionally, American Food Corporation paid a purchase price of $255,000 to assume the disputed lease and purchase the Jersey Mike's franchise, as well as all of the inventory, furniture, fixtures, and equipment at the store. To facilitate the agreement, the parties entered into an Assignment, Modification, and Assumption of Lease ("Assignment Agreement").

Although the Assignment Agreement had a signature block for Mosely (the landlord) to sign, this never occurred. In fact, Mosely indicated that she only became aware of the written Assignment ten months after it was executed. In the meantime, American Food Corporation occupied the premises, operated the Jersey Mike's franchise, and paid all monthly rent payments directly to Mosely, who made no objection to the payments during this time.

In 1999, American Food Corporation sold the Jersey Mike's franchise to Jeffrey A. Warren. This sale was for the same assets and purchase price as the transaction between J.M. N.C. State and American Foods Corporation. Although the record fails to show that Mosely approved this transaction and assignment, it does show that she accepted, without objection, monthly rent payments from Warren. Warren stated in his affidavit that American Food Corporation affirmatively represented at the time of the sale that he would be getting a four-year lease, not a month-to-month tenancy. Warren operated the store until 2001, when he closed it prompting Mosely to bring this action for the unpaid rent due under the lease against J.M. N.C. State who thereafter, filed an Amended Answer, Motions, and Third-Party Complaint, which impleaded and sought indemnification from American Food Corporation.

On 1 February 2002, Moseley voluntarily dismissed, with prejudice, three of the Plaintiffs—WAM, Inc., David Wilson, and Beth Wilson. On 10 September 2002, the trial court awarded an entry of

default judgment against two of the Third-Party Defendants—Ernest and Maria Gurganus. On 28 March 2003, the trial court granted summary judgment against American Food Corporation. From that judgment, American Food Corporation appealed.

"[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). Also, the evidence presented by the parties must be viewed in the light most favorable to the non-movant. *Id.* The court should grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003).

The initial burden of establishing that there is no issue of material fact lies with the movant, but once this burden is satisfied, the burden then switches to the non-movant to show a genuine issue of material fact. *Thompson v. First Citizens Bank & Trust Co.*, 151 N.C. App. 704, 706, 567 S.E.2d 184, 187 (2002). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). Once the movant meets this burden, the non-movant must "produce a forecast of evidence" demonstrating specific facts, as opposed to allegations, establishing at least a prima facie case at trial. *Thompson*, 151 N.C. App. at 706, 567 S.E.2d at 187.

In this appeal, American Food Corporation argues that the trial court erred in granting summary judgment for J.M. N.C. State, and contends that the evidence raised a genuine issue of material fact regarding the assignment of the lease from J.M. N.C. State to American Food Corporation. We disagree.

Under the general rules of contract construction, where an agreement is clear and unambiguous, no genuine issue of material fact exists and summary judgment is appropriate. *Corbin v. Langdon*, 23 N.C. App. 21, 27, 208 S.E.2d 251, 255 (1974). In contrast, an ambiguity exists in a contract if the " 'language of the [contract] is fairly and reasonably susceptible to either of the constructions asserted by the

parties.' " *Taha v. Thompson*, 120 N.C. App. 697, 701, 463 S.E.2d 553, 556 (1995) (citation omitted). Also, all contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken. *Yates v. Brown*, 275 N.C. 634, 640, 170 S.E.2d 477, 482 (1969).

[1] American Food Corporation argues that the Assignment Agreement is ambiguous as to whether it requested or required Mosely to sign the Assignment. The Assignment Agreement states, "WHEREAS, J.M. N.C. State, Inc. has requested that Frances C. Moseley join in this assignment to express her consent to the same . . . I Consent. [Blank signature block of Frances C. Moseley]." In construing a contract neither party can obtain an interpretation contrary to the express language of a contract by the assertion that it does not truly express his intent. *Fidelity & Cas. Co. of N.Y. v. Nello L. Teer Co.*, 250 N.C. 547, 550, 109 S.E.2d 171, 173 (1959). The Assignment Agreement provision states that J.M. N.C. State "requested" Mosely's signature. "Requested" is defined as "[t]o express a desire for; ask for." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1160 (3d ed. 1997). If Mosely's signature was necessary for the Assignment Agreement to be effective, the Assignment Agreement could have contained the term "required," "necessitate," or "mandatory." Since the Assignment Agreement is unambiguous on the face of the document, this Court must interpret the document as written. *Martin v. Vance*, 133 N.C. App. 116, 121, 514 S.E.2d 306, 309 (1999). We hold that the Assignment Agreement did not require Mosely's signature to be effective. Therefore, we conclude there was a valid assignment.

[2] American Food Corporation also argues that while it and the other parties signed the Assignment Agreement, they did not intend to be bound by the Assignment Agreement on 2 January 1998, but only on a later date if Mosely signed it. American Food Corporation argues that their lack of assent to the Assignment Agreement makes it not binding on them. We disagree.

Before a valid contract can exist, there must be mutual agreement between the parties as to the terms of the contract. *Walker v. Goodson Farms, Inc.*, 90 N.C. App. 478, 486, 369 S.E.2d 122, 126 (1988). Where there is no mutual agreement, there is no contract. If a question arises concerning a party's assent to a written instrument, the court must first examine the written instrument to ascertain the

intention of the parties. *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 273, 423 S.E.2d 791, 795 (1992).

Here, the Assignment Agreement provides:

> American Food Corporation agrees to assume all the obligations of J.M. N.C. State, Inc. as the same were guaranteed by Edwin L. Yancey, Jr. and Jill J. Yancey, and, Kenneth D. Meyer and Elizabeth B. Meyer. The obligations of American Food Corporation, including obligations related to payment of attorney fees, are hereby guaranteed jointly and severally by Marcus K. Gurganus and wife, Chrysanthe Gurganus, and Ernest T. Gurganus and wife, Maria M. Gurganus. This is a guarantee of payment, not of collection. It is understood and agreed, however, that said 'Real Estate Lease' and 'Assignment, Modification, and Assumption of Lease' will be assumed in its entirety by American Food Corporation.

Twice in this paragraph American Food Corporation agrees to assume the lease. Also, American Food Corporation signed at the end of the Assignment Agreement, Marcus K. Gurganus as President of American Food Corporation, and Marcus K. Gurganus, Chrysanthe Gurganus, Ernest T. Gurganus, and Maria M. Gurganus as new guarantors. When a party affixes his signature to a contract, he is manifesting his assent to the contract. *Branch Banking & Trust Co. v. Creasy*, 301 N.C. 44, 53, 269 S.E.2d 117, 123 (1980). "The object of a signature to a contract is to show assent." *Burden Pallet Co., Inc. v. Ryder Truck Rental, Inc.*, 49 N.C. App. 286, 289, 271 S.E.2d 96, 97 (1980). Here, American Food Corporation signed the Assignment Agreement manifesting assent to its terms on 2 January 1998.[1]

Since the Assignment Agreement was unambiguous and all parties manifested their assent to the Assignment Agreement by affixing their signature at the end, there was no material fact in dispute making summary judgment in favor of the J.M. N.C. State proper. *Corbin*, 23 N.C. App. at 27, 208 S.E.2d at 255.

[3] American Food Corporation also argues that the trial court erred in granting summary judgment in favor of J.M. N.C. State on the affirmative defense of "failure of conditions precedent," as the Purchase

1. Alternatively, American Foods Corporation also assented to the terms of the Assignment Agreement when it moved into the premises and paid the monthly rent to Mosely. American Food Corporation accepted the benefits of the Assignment Agreement, therefore, it would be unconscionable for it to avoid its obligations. *Burden Pallet Co., Inc.*, 49 N.C. App. at 290, 271 S.E.2d at 98.

and Sale Agreement made Mosely's approval of the Assignment Agreement a condition precedent. We disagree.

A condition precedent is a fact or event that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty. *Cox v. Funk*, 42 N.C. App. 32, 34, 255 S.E.2d 600, 601 (1979). Conditions precedent are not favored by the law. *Craftique, Inc. v. Stevens & Co., Inc.*, 321 N.C. 564, 566, 364 S.E.2d 129, 131 (1988). Thus, the provisions of a contract will not be construed as conditions precedent in the absence of language clearly requiring such construction. *In re Foreclosure of Goforth Props., Inc.*, 334 N.C. 369, 375-76, 432 S.E.2d 855, 859 (1993). " 'The weight of authority is to the effect that the use of such words as 'when,' 'after,' 'as soon as,' and the like, gives clear indication that a promise is not to be performed except upon the happening of a stated event." *Id.* at 376, 432 S.E.2d at 859 (citation omitted).

Here, the Assignment Agreement does not use any words indicating a condition precedent. The Assignment Agreement uses the term "requested" not "as soon as" or the like. This does not clearly indicate a condition precedent, and since condition precedents are not favored by the law one will not be read into this contract where the parties did not clearly indicate one. *Id.* at 375-76, 432 S.E.2d at 859. American Food Corporation argues that there is a condition precedent in the Assignment Agreement that was not fulfilled. However, the affirmative defense related only to the Assignment Agreement, not the Purchase and Sale Agreement. Since the Assignment Agreement was not dependent on or subject to the Purchase and Sale Agreement, this is a nonissue.

[4] American Food Corporation also argues that the trial court erred in granting summary judgment in favor of J.M. N.C. State on the alternative affirmative defenses of estoppel, failure to mitigate damages, and lack of consideration. We disagree.

When the moving party presents an adequately supported motion for summary judgment, the opposing party must come forward with facts, not mere allegations, which rebut the facts set forth in the moving party's case, or otherwise suffer a summary judgment. *Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd.*, 294 N.C. 661, 675, 242 S.E.2d 785, 793 (1978). In this case, American Food Corporation had to assert the affirmative defenses and support them with facts. *Id.* Aside from American Food Corporation's answer, the only responsive affidavit, of Marcus Gurganus, did not address estoppel, mitigation of

damages, or lack of consideration. J.M. N.C. State's supporting papers sufficiently demonstrated its entitlement to indemnification. The burden then shifted to American Food Corporation under section 1A-1, Rule 56(c) of the North Carolina General Statutes to show that there is a genuine issue for trial or provide an excuse for not doing so under Rule 56(f). *Brooks v. Smith*, 27 N.C. App. 223, 218 S.E.2d 489 (1975). American Food Corporation failed to do either. "If the party moving for summary judgment successfully carries his burden of proof, the opposing party must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial and he cannot rest upon the bare allegations or denials of his pleading." *Hillman v. U.S. Liab. Ins. Co.*, 59 N.C. App. 145, 154, 296 S.E.2d 302, 308 (1982). Since American Food Corporation failed to set forth facts in dispute with regard to the alternative affirmative defenses, summary judgment was appropriate.

J.M. N.C. State also brought a motion for sanctions due to a substantial disregard for appellate rules in American Food Corporation's brief. As American Food Corporation's amended brief did not substantially violate the appellate rules, that motion is denied.

Affirmed.

Chief Judge MARTIN and Judge McGEE concur.

PRODUCTION SYSTEMS, INC., PLAINTIFF v. AMERISURE INSURANCE COMPANY AND UNION INSURANCE COMPANY A/K/A THE CHESAPEAKE BAY PROPERTY & CASUALTY INSURANCE COMPANY, DEFENDANTS

No. COA04-580

(Filed 21 December 2004)

Insurance— liability of insurance company—duty to defend and indemnify—property damage

The trial court did not err in a declaratory judgment action by granting summary judgment in favor of defendant insurance companies based on the conclusion that defendants were not obligated to defend or indemnify plaintiff under the terms of the pertinent commercial general liability policies for a counterclaim brought by another company, because: (1) both policies restrict

coverage to property damage that is caused by an occurrence and both policies exclude coverage for property damage expected or intended from the standpoint of the insured; (2) the term "property damage" in an insurance policy has been interpreted to mean damage to property that was previously undamaged, and not the expense of repairing property or completing a project that was not done correctly or according to contract in the first instance; and (3) property damage does not refer to repairs to property necessitated by an insured's failure to properly construct the property to begin with, and thus, there was no property damage to the oven feed line systems in this case since the only damage was repair of defects in, or caused by, the faulty workmanship in the initial construction.

Appeal by plaintiff from summary judgment entered 12 December 2003 and 22 December 2003 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 17 November 2004.

Wyatt Early Harris Wheeler, L.L.P., by Scott F. Wyatt, for plaintiff-appellant.

Dean and Gibson, L.L.P., by Susan L. Hofer, for defendant-appellee Union Insurance Co.

Carruthers & Roth, P.A., by Kenneth R. Keller, for defendant-appellee Amerisure Insurance Co.

LEVINSON, Judge.

Plaintiff Production Systems, Inc. (PSI) appeals from an order granting summary judgment in favor of defendants Amerisure Insurance Company and Union Insurance Company. We affirm.

The record evidence is summarized, in pertinent part, as follows: PSI is a corporation based in High Point, North Carolina, and is engaged in the design and manufacture of industrial machinery. Rubatex, Inc., is a corporation doing business in Conover, North Carolina, and is engaged in the manufacture of rubber products. In 1996 PSI entered into a contract with Rubatex to design, construct, and install two "foam rubber sheet line systems" at Rubatex's Conover plant—one with a hot feed ensolite oven and the other with a cold feed ensolite oven. Each line system was to consist of an oven, nine conveyor belts, and associated components, including safety

and electrical controls, fans, combustion equipment, temperature controls, smoke hood, cooling chambers, and belted conveyor sections. The agreement between PSI and Rubatex further specified that PSI was responsible for designing, building, and installing the two line systems.

PSI began work on the oven line systems in early 1996, using its own employees for some of the contractually required tasks, and hiring subcontractors to perform certain other operations, including installation of the conveyor belts. The oven feed line systems were turned over to Rubatex in the fall of 1996; the cold feed oven line system in October, 1996; and the hot feed oven line system in December, 1996. Rubatex experienced problems with each of the lines almost immediately after they were put into operation. Investigation revealed that certain components of each of the conveyor belts were improperly installed, were misaligned, and would not "track" properly. As a result, neither of the two oven feed line systems operated properly; the defective conveyor belt assemblies caused damage to other parts of the oven line system; and Rubatex had to shut down the line systems repeatedly until repairs were made.

Because of the defects in the oven line systems, Rubatex refused to pay the sums owed to PSI under their contract. PSI filed suit in 1998, seeking recovery of almost $200,000.00 that PSI claimed it was owed. On 15 June 1998 Rubatex filed its answer and counterclaim. Rubatex's counterclaim alleged that PSI had failed to "design, construct and install proper line systems" or to "cure the multiple problems with the line systems[.]" Rubatex brought claims for breach of contract, and for breach of express warranties, implied warranty of fitness, and warranty of merchantability. The counterclaim sought damages for the cost of repairing the two line systems, and for the loss of use of the line systems. The present appeal arises from PSI's attempt to obtain insurance coverage for Rubatex's counterclaim.

In September, 1995, PSI bought a Commercial General Liability (CGL) insurance policy from defendant Amerisure Insurance Company. PSI purchased another CGL policy in September, 1997, from defendant Union Insurance Company. The relevant provisions of the two policies are substantially identical. PSI notified Amerisure and Union after Rubatex filed its answer and counterclaim, and asked each to defend and indemnify PSI with respect to the counterclaim. Both companies contended that there was no coverage under their respective CGL policies, and each refused to defend or indemnify

PSI. Rubatex and PSI reached a settlement of their lawsuits in December, 1999, under the terms of which PSI paid Rubatex $500,000.00. On 22 August 2000 PSI filed suit against Amerisure and Union, seeking, *inter alia*, a declaratory judgment that the companies were obligated to defend and indemnify PSI under the terms of the CGL policies. In November, 2003, PSI, Union, and Amerisure each filed motions for summary judgment. Following a hearing on the summary judgment motions, the trial court on 12 December 2003, and 22 December 2003, entered orders of summary judgment in favor of Amerisure and Union. From these orders PSI appeals.

Standard of Review

PSI appeals the court's order for summary judgment in favor of defendant insurance companies in the declaratory judgment action filed by PSI. "Questions involving the liability of an insurance company under its policy . . . are a proper subject for a declaratory judgment." *Insurance Co. v. Surety Co.*, 1 N.C. App. 9, 12, 159 S.E.2d 268, 271 (1968). "Summary judgment may be granted in a declaratory judgment proceeding 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.G.S. § 1A-1, Rule 56(c) [(2003)]." *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 178, 581 S.E.2d 415, 422 (2003) (citations and internal quotation marks omitted). "On appeal, this Court's standard of review involves a two-step determination of whether (1) the relevant evidence establishes the absence of a genuine issue as to any material fact, and (2) either party is entitled to judgment as a matter of law." *Guthrie v. Conroy*, 152 N.C. App. 15, 21, 567 S.E.2d 403, 408 (2002) (citations omitted). In the instant case:

> neither party challenges the accuracy or authenticity of the subject insurance polic[ies], or the existence of any relevant facts. Rather, the parties' arguments are based on their respective interpretations of the terms of the insurance polic[ies]. Consequently, the record does not present a genuine issue as to any material fact. We next consider whether either party was entitled to judgment as a matter of law.

Hobbs Realty & Constr. Co. v. Scottsdale Ins. Co, 163 N.C. App. 285, 289, 593 S.E.2d 103, 106, *cert. denied*, 358 N.C. 543, 599 S.E.2d 47 (2004).

The issue raised in this appeal is whether the defendant insurance companies had a duty to defend or indemnify PSI in the counterclaim brought by Rubatex.

In North Carolina, the insured "has the burden of bringing itself within the insuring language of the policy. Once it has been determined that the insuring language embraces the particular claim or injury, the burden then shifts to the insurer to prove that a policy exclusion excepts the particular injury from coverage." *Hobson Construction Co., Inc. v. Great American Ins. Co.*, 71 N.C. App. 586, 590, 322 S.E.2d 632, 635 (1984) (citing *Nationwide Mut. Fire Ins. Co. v. Allen*, 68 N.C. App. 184, 314 S.E.2d 552 (1984)).

"Insurance policies are contracts and as such, their provisions govern the rights and duties of the parties thereto. Where a policy defines a term, this Court must use that definition. If the meaning of the policy is clear on its face, the policy must be enforced as written." *Auto Owners Ins. Co. v. Grier*, 163 N.C. App. 560, 562, 593 S.E.2d 804, 806 (2004) (citation omitted). "An insurer has a duty to defend when the pleadings state facts demonstrating that the alleged injury is covered by the policy[.]" *Penn. Nat'l Mut. Cas. Ins. Co. v. Associated Scaffolders & Equip. Co.*, 157 N.C. App. 555, 558, 579 S.E.2d 404, 407 (2003). Thus, to determine if coverage exists, the Court "compare[s] the complaint with the policy to see whether the allegations describe facts which appear to fall within the insurance coverage." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 72 N.C. App. 80, 84, 323 S.E.2d 726, 730 (1984), *reversed on other grounds*, 315 N.C. 688, 340 S.E.2d 374 (1986) (citation omitted).

In the case *sub judice*, the CGL policies issued to PSI by Amerisure and Union are substantially the same. Each states, in relevant part, that it provides coverage for "sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage.' " Both policies restrict coverage to 'property damage' that "is caused by an 'occurrence' " and both policies exclude coverage for " 'property damage' expected or intended from the standpoint of the insured." We conclude that the dispositive issue in the instant case is whether the facts alleged in Rubatex's counterclaim describe "property damage." The relevant policy definition follows:

> 15. "Property damage" means: a. Physical injury to tangible property, including all resulting loss of use of that property. . . .

In the instant case, it is undisputed that: (1) PSI contracted with Rubatex to design, construct, and install two oven feed line systems

for Rubatex, each of which included an oven, nine conveyor belts, and associated equipment; (2) PSI, acting alone or through its subcontractor, failed to properly install certain components of the conveyor belts that were part of the completed line systems; (3) as a result this faulty workmanship, Rubatex suffered damages arising from the cost of repairing the line systems and from its loss of use of the line systems while they were disabled; and (4) Rubatex's counterclaim alleged no damages other than the cost of repairing the line systems and the loss of use of the line systems. On these facts, PSI contends that the mistracking of the conveyor belts and damage to other parts of the oven feed line systems, caused by the negligence of its subcontractors, constituted "property damage" arising from an "occurrence." We disagree.

The term "property damage" in an insurance policy has been interpreted to mean damage to property that was **previously undamaged**, and **not** the expense of repairing property or completing a project that was not done correctly or according to contract in the first instance. *Hobson*, 71 N.C. App. 586, 322 S.E.2d 632. In *Hobson*, this Court interpreted a CGL policy containing a functionally identical definition of 'property damage' and held there was no 'property damage' on these facts: The insureds contracted to build a concrete arch dam; within a month of its completion it became apparent that the dam would not hold water. The insureds were sued on their contract for the costs of repairing and completing the dam. The Court noted that the complaint alleged the insureds failed to "construct the concrete arch dam in a workmanlike manner" and that "due to the breach of contract by [insureds, the plaintiffs] incurred damage 'in the nature of repair and cost of completion of the project.' " On this basis, the Court concluded the insureds had "failed to bring their particular injury within the insuring language of the policy." *Id.* at 587, 590-91, 322 S.E.2d at 633, 635.

Relying on *Hobson*, a federal district court in North Carolina recently interpreted a similar CGL policy as follows:

> Under the clear language of the policies, property damage requires . . . that the property allegedly damaged has to have been undamaged or uninjured at some previous point in time. This is inconsistent with allegations that the subject property was never constructed properly in the first place. . . . Not only does the plain language of the policies at issue in the instant case suggest that no 'property damage' has taken place, the clear holding in *Hobson* further compels this court to reach the same conclu-

sion. *Hobson* indicates that damages based solely on shoddy workmanship (i.e., damages seeking repair costs and/or completion costs) are not 'property damage' within the meaning of a standard form CGL policy[.]

Wm. C. Vick Constr. Co. v. Pennsylvania Nat. Mut., 52 F. Supp. 2d 569, 582 (E.D.N.C. 1999). We conclude that under the precedent of *Hobson*, "property damage" does not refer to repairs to property necessitated by an insured's failure to properly construct the property to begin with.

We conclude that there was no "property damage" to the oven feed line systems because the only "damage" was repair of defects in, or caused by, the faulty workmanship in the initial construction. Consequently, we need not address the remaining arguments on appeal. Accordingly, the damage to the oven feed line systems was not covered under either of the policies at issue. The trial court's summary judgment order is

Affirmed.

Judges HUNTER and CALABRIA concur.

SANDRA O. WILKERSON, ANCILLARY ADMINISTRATRIX OF THE ESTATE OF JOHNNIE ALAN WILKERSON AND SANDRA O. WILKERSON, INDIVIDUALLY, PLAINTIFFS V. NORFOLK SOUTHERN RAILWAY COMPANY, DEFENDANT

No. COA04-7

(Filed 21 December 2004)

Workers' Compensation— elimination of lien—settlement not final

The superior court's order eliminating unnamed defendant insurance carrier's workers' compensation lien is vacated, because: (1) the mediated settlement entered into by defendant employer and plaintiff that was subject to a satisfactory resolution of the lien on those funds was not final and does not constitute a settlement for the purposes of N.C.G.S. § 97-10.2(j); and (2) the superior court does not have jurisdiction to adjust the amount of the lien when the terms of the settlement agreement are contingent upon such adjustment.

Appeal by Unnamed Party from an order entered 15 April 2003 by Judge J.B. Allen, Jr. in Durham County Superior Court. Heard in the Court of Appeals 22 September 2004.

The Law Offices of William Frank Maready, P.L.L.C., by William F. Maready and George D. Humphrey, for plaintiff-appellee Sandra O. Wilkerson, et. al.

Millberg, Gordon & Stewart, P.L.L.C., by John Millberg, for defendant Norfolk Southern Railway Co.

Cranfill, Sumner & Hartzog, L.L.P., by Edward C. LeCarpentier, III and F. Marshall Wall, for unnamed defendant-appellant workers' compensation carrier Liberty Mutual Insurance Co.

ELMORE, Judge.

This appeal is by the unnamed defendant insurance carrier alleging that the Durham County Superior Court did not have jurisdiction to enter an order eliminating the carrier's workers' compensation lien; erred in determining that a settlement had been reached in the underlying case; and lacked jurisdiction to order that workers' compensation payments continue until exhausted. For the reasons stated herein, we vacate the order of the trial court.

This appeal is rooted in the fatal accident of plaintiff's husband. Johnnie Alan Wilkerson, decedent, was transporting cement for his employer, Giant Cement of South Boston, Virginia (Giant), when he was struck by an Amtrak train while crossing the tracks on Plum Street in Durham, North Carolina. Since decedent was a resident of Virginia, and acting within the scope of his employment at the time of the accident, his wife, the administratrix of his estate, filed for workers' compensation benefits under the Workers' Compensation Act of the Commonwealth of Virginia. She also filed suit in Durham County Superior Court against Norfolk Southern Railway Company (Norfolk) alleging that the company was negligent in maintaining the rail crossing at Plum Street.

As the workers' compensation insurance carrier for Giant, Liberty Mutual (Liberty) began making payments consistent with Virginia's workers' compensation laws. Pursuant to Virginia statutory and case law entitling a carrier to reimbursement for payments, Liberty filed and maintained a lien against any proceeds from a recovery in plaintiff's action against Norfolk. Plaintiff tentatively accepted

a mediated settlement from Norfolk for $400,000.00 subject to a satisfactory resolution of Liberty's lien on those funds. Essentially plaintiff wanted to maximize the amount of recovery from the settlement flowing directly to her and have as few dollars as possible paid to Liberty via the reimbursement lien. As such, plaintiff filed a motion in Durham County Superior Court to have the lien either reduced or eliminated. The trial court determined that it had proper jurisdiction to handle the matter and entered an order eliminating the lien. It is from this order that Liberty appeals.

Liberty argues that the "settlement" entered into by Norfolk and plaintiff is not final and does not constitute a settlement for the purposes of N.C. Gen. Stat. § 97-10.2(j). We agree, and therefore vacate the trial court's order eliminating the lien.

N.C. Gen. Stat. § 97-10.2(j) (2003) provides in part that:

> Notwithstanding any other subsection in this section, . . . in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose, where the injured employee resides or the presiding judge before whom the cause of action is pending, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer.

Id. Liberty cites *Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 593 S.E.2d 453 (2004), in support of its position. The *Ales* court construed N.C. Gen. Stat. § 97-10.2(j) such that reaching a final settlement between a third party and an employee is a jurisdictional prerequisite to the judge being able to determine whether an employer's lien should be modified or eliminated. *Id.*

In *Ales*, the third party and employee had reached a settlement agreement, "contingent upon a waiver of the workers' compensation lien." *Id.* at 351, 593 S.E.2d at 454. The employee then made a motion for elimination of the lien that was granted by the trial court. On appeal, the employer argued that the settlement was not final and deprived the trial court of jurisdiction to eliminate the lien. This

Court framed the issue as: "whether N.C. Gen. Stat. § 97-10.2(j) provides the superior court with jurisdiction to adjust the amount of a worker's compensation lien when the terms of the settlement agreement are contingent upon such adjustment." *Id.* at 352, 593 S.E.2d 454-55. The Court went on to hold that it does not, since under contract law, the adjustment would be a condition precedent to the settlement.

> We interpret N.C. Gen. Stat. § 97-10.2(j) as permitting the superior court to adjust the amount of a subrogation lien if the agreement between the parties has been finalized so that only performance of the agreement is necessary to bind the parties. An agreement containing a condition precedent which must be fulfilled before either party is bound to the contract terms does not give the trial court jurisdiction under N.C. Gen. Stat. § 97-10.2(j).

Id. at 353, 593 S.E.2d at 455.

Although plaintiff maintains that *Ales* and the present case are distinguishable, we cannot agree. Plaintiff and Norfolk did reach a settlement, but it too was not final. Plaintiff's motion to the superior court requesting that it extinguish the lien noted, "[a]t the mediation, Plaintiff tentatively agreed to a settlement of $400,000, expressly dependent upon an agreeable solution to the Workers' Compensation subrogation." Plaintiff also orally argued to the superior court that "[a]fter a day of mediation we were able to resolve the case tentatively, subject to a resolution of—satisfactory resolution of the workers' compensation lien." In its order, the superior court determined as a finding of fact that "[t]his settlement was made subject to resolution of the workers' compensation lien that the carrier has asserted," and the concluded that "plaintiff and the Third Party settled this case at the above-mentioned mediation for the sum of $400,000.00 . ... subject to the resolution of the claim of subrogation and lien by the carrier." All of this language suggests that had the judge not extinguished the lien, there would be no settlement for $400,000.00 between plaintiff and Norfolk, and the parties would return to the negotiating table or trial; hence, a condition precedent.

Ales and this case are indistinguishable, and as such, *Ales* controls our decision here. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). This

Court's holding on the basis of *Ales*, however, perhaps presents an unrecognized conflict.

On the one hand, as plaintiff argues, it is common practice for employees and third parties to come to tentative settlement agreements in which the only contingency is that of satisfactory resolution of the workers' compensation lien. Yet, it is precisely this contingency that *Ales* proscribes. Parties must be bound by the superior court's decision, so long as it is not arbitrary. *See Wood v. Weldon*, 160 N.C. App. 697, 586 S.E.2d 801 (2003) (employer's insurance carrier, employee, and third party bound by an employee—third party settlement that placed a portion of the proceeds in escrow to be paid either to carrier or employee according to a subsequent superior court's modification or elimination of the workers' compensation lien). Allowing otherwise would permit employees to compromise judicial efficiency by proceeding to discount a superior court's decision if it goes against them and renegotiating a settlement that provides the same effect that they originally sought.

On the other hand, our decision may have an unintended statutory effect. If, as the *Ales* court determined, a final settlement is a prerequisite to petitioning a judge under subsection (j), then the requirements of N.C. Gen. Stat. § 97-10.2(h) still should govern the settlement. N.C. Gen. Stat. § 97-10.2(h) (2003) reads, in pertinent part:

> [i]n any . . . settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest under (f) hereof upon any payment made by the third party by reason of such injury or death, whether paid in settlement, . . . and such lien may be enforced against any person receiving such funds. Neither the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party without the written consent of the other and *no release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal representative join therein; provided, that this sentence shall not apply:*
>
> . . .
>
> (2) If either party follows the provisions of subsection (j) of this section.

Id. (emphasis added). Section 97-10.2(h) is the statutory authority for the lien. And, it is clear that no release or settlement is binding unless

the employee, the employer, and the third party all consent. So by its very nature, subsection (h) prevents a settlement from occurring without the consent of everyone involved. The only way to settle a claim without the consent of all the parties is to proceed under subsection (j), which with the *Ales* decision is inapplicable absent a final settlement *before* invoking the provision.

Interpreting the *Ales* decision, along with subsection (h), seems to render litigants unable to get to (j) without a final settlement and unable to settle without the consent of all parties. It is clear from subsection (j) that the legislature did not intend this cause and effect since subsection (j) makes the consent of the employer (and hence the carrier, whose rights are subrogated from the employer, *see* N.C. Gen. Stat. § 97-10.2(g)) irrelevant to a decision by the judge to modify a lien that arises from a settlement. N.C. Gen. Stat. § 97-10.2(j) (2003).

Thus, making "settlement" a jurisdictional issue and determining that a settlement must leave nothing to chance, the *Ales* decision has possibly added an unintended complication to subsection (j). Nonetheless, this panel of the Court is bound by our previous panel, and we accordingly vacate the superior court's order eliminating the workers' compensation lien. As such, we do not reach Liberty's other assignments of error.

Vacated and remanded.

Judges McGEE and McCULLOUGH concur.

KATHY DIANNE CRAVEN, EMPLOYEE, PLAINTIFF v. VF CORPORATION D/B/A THE LEE APPAREL COMPANY, INC., D/B/A VF JEANSWEAR LIMITED PARTNERSHIP, EMPLOYER, SELF-INSURED, GALLAGHER BASSETT SERVICES, INC., ADMINSTRATOR, DEFENDANTS

No. COA03-1688

(Filed 21 December 2004)

1. Workers' Compensation— causal relationship—back injury and mental condition

The Industrial Commission's determination in a workers' compensation case that a causal relationship existed between plaintiff's back injury and mental condition was supported by

competent evidence, and plaintiff is entitled to have her medical expenses paid for her back and mental conditions.

2. Workers' Compensation— right to direct medical treatment—acceptance of compensable claim

The Industrial Commission did not err in a workers' compensation case by failing to find as a fact that plaintiff did not offer evidence that medical treatment rendered by various doctors and facilities were necessary to effect a cure, to give relief, or to lessen plaintiff's period of disability, because: (1) defendant did not accept the claim as compensable and therefore was not entitled to select or limit plaintiff's physicians or treatment; and (2) while the Industrial Commission previously required a finding that a plaintiff's chosen physician was reasonably required to effect a cure or give relief in order for the care to be compensable, the 1991 amendment to N.C.G.S. § 97-25 deleted the language supporting such a requirement.

Appeal by Defendants from Opinion and Award of the North Carolina Industrial Commission filed 29 May 2003. Heard in the Court of Appeals 19 October 2004..

Walden & Walden, by Daniel S. Walden, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by W. Scott Fuller, for Defendant-Appellants.

WYNN, Judge.

Defendants VF Corporation ("VF") d/b/a The Lee Apparel Company, Inc. d/b/a VF Jeans-Wear Limited Partnership and Gallagher Bassett Services, Inc. ("GBS") appeal from an Opinion and Award of the North Carolina Industrial Commission, contending that: (1) the Industrial Commission's Finding of Fact No. 21, to the extent it suggests a causal relationship between Craven's back injury and mental condition, is not supported by competent evidence; (2) the Industrial Commission's Conclusion of Law No. 3, insofar as it relates to Craven's mental condition, is not supported by competent findings of fact; (3) the Industrial Commission's Award No. 2, insofar as it relates to Craven's mental condition, is not supported by the Findings of Fact and Conclusions of Law; (4) the Industrial Commission erred in failing to find as a fact that Craven did not offer evidence that the medical treatment rendered by Drs. Bell and Holthusen, Forsyth Medical Center, and Maplewood Family Practice was necessary to

effect a cure, to give relief, or to lessen Craven's period of disability; and (5) the Industrial Commission erred in failing to conclude as a matter of law that the medical treatment rendered by Drs. Bell and Holthusen, Forsyth Medical Center, and Maplewood Family Practice was not necessary to effect a cure, to give relief, or to lessen Craven's period of disability. For the reasons stated herein, we disagree and affirm the Industrial Commission's Opinion and Award.

The procedural and factual history of the instant appeal is as follows: Craven worked as a jeans inspector at VF in Winston-Salem, North Carolina, where she was responsible for identifying and sorting irregular jeans. Craven's job, which she worked four days per week, ten hours per shift, involved lifting boxes of jeans weighing up to thirty pounds. While Craven was injured once before on the job when a bag of jeans hit her head and neck, she did not file a workers' compensation claim. Craven had no difficulty performing her duties until 28 March 2000.

The record further shows that when Craven arrived at work on 28 March 2000, her workstation was "a mess." Boxes of irregular jeans were everywhere because the employee who usually worked the shift prior to Craven did not show up to work. Craven reported to her manager that she needed assistance to process the backlog. Help was promised but never delivered. In picking up a box of jeans from the floor, Craven felt her back pop, then burn. Pain radiated to her hip and leg and she nearly passed out. At her break, Craven reported the injury to supervisors. On 29 March 2000, Craven was incapable of performing the lifting required at her job. Management arranged for medical care at PrimeCare, VF's health care provider. PrimeCare returned Craven to light duty work that could be performed standing or sitting and that involved less lifting.

On 10 April 2000, Craven visited her family physician, Dr. Keith Van Zandt, who noted that Craven had no history of back trouble. Dr. Van Zandt found tenderness and a strain and later diagnosed Craven with, *inter alia*, "very diffuse tenderness and muscle tightness in her upper and lower back" and "fairly marked spasms[.]" On 12 April 2004, Craven was evaluated by Novant Health; Craven was ordered to receive physical therapy twice a week for four weeks. Craven was seen again by Dr. Van Zandt's office, put on prescription medication for her condition, and temporarily taken out of work. On 15 May 2000, Craven was also seen by Dr. Greg Holthusen, an orthopedist for whose services Defendants refused to pay. Dr. Holthusen believed Craven to have a musculo-ligamentous injury. On 28 May 2000,

Craven was treated at the Forsyth Medical Center for severe spasms in her lower back and referred to an orthopedist. Craven was last able to work on 11 May 2000.

In May 2000, Defendants arranged for Craven to see Dr. Philips J. Carter, who diagnosed Craven with "back sprain" and "spinal stenosis." Dr. Carter believed Craven's pain to be real and prescribed medical and physical therapy treatment. Dr. Carter's prescriptions were, however, not being followed because "the insurance company wasn't paying for this or that [and was] sending [Craven] back to keep seeing me without doing my treatment." Carter believed "one of the things that, perhaps, prolonged [Craven's conditions] was just failure to get her into a good combination of medicine and therapy." As the Industrial Commission noted, Dr. Carter wrote on or around 12 July 2000, "I have requested further PT, but the insurance company has failed to do that. I am not sure why they are willing to pay my bill . . . and yet are not willing to do the treatment that I recommend." Indeed, on 13 July 2000, VF executed a Form 61 Denial of Workers' Compensation Claim. Again, on 3 August 2000, in its Response to Request That Claim Be Assigned For Hearing, VF denied the compensability of Craven's claim.

On 21 June 2000, Dr. Van Zandt noted that Craven was "having increasing [] difficulties as well as chronic pain." Dr. Van Zandt further noted that Craven was developing signs of depression. On 27 July 2000, Dr. Van Zandt noted that Craven "has had increasing depressive symptoms largely related to her ongoing back pain." Moreover, Dr. Carter, Defendants' requested physician, testified that he believed that it was reasonable for Craven to seek psychological treatment if she suffered from depression secondary to her back pain.

Deputy Commissioner W. Bain Jones, Jr. filed an Opinion and Award on 24 July 2001, concluding that Craven sustained injury due to a workplace accident, that Craven was entitled to medical treatment of the injury, and that Craven had failed to prove she remained disabled from the accident. Craven appealed to the full Industrial Commission, which found in its Opinion and Award dated 5 August 2002 and filed 29 May 2003, *inter alia*, that Craven had indeed remained totally disabled from her accident and was entitled to temporary total disability benefits. Defendants appealed.

In reviewing a decision of 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); *Skillin v. Magna Corp./Greene's Tree Serv., Inc.*, 152 N.C. App. 41, 47, 566 S.E.2d 717, 721 (2002) (same). An appellate court reviewing a workers' compensation claim "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quotation omitted). Rather, the Court's duty goes no further than determining "whether the record contains any evidence tending to support the finding." *Id.* (quotation omitted). If there is any evidence at all, taken in the light most favorable to the plaintiff, the finding of fact stands, even if there was substantial evidence going the other way. *Id.*

[1] Defendants contend the Industrial Commission's Finding of Fact No. 21, to the extent it suggests a causal relationship between Craven's back injury and mental condition, is not supported by competent evidence. Finding of Fact No. 21 itself includes a recantation of evidence provided by Craven's physician, Dr. Van Zandt, regarding, *inter alia*, her back and psychological conditions. The Industrial Commission directly quotes Van Zandt's report, noting Craven's "chronic pain" and "developing symptoms of depression." Additional evidence, including Van Zandt's 27 July 2000 report states that Craven "has had increasing depressive symptoms largely related to her ongoing back pain." The Industrial Commission's Finding of Fact No. 21 is supported by some competent evidence. We therefore affirm.

Because we find some competent evidence to support the Industrial Commission's Finding of Fact No. 21, we find that Conclusion of Law No. 3, entitling Craven to have her medical expenses paid for her back and mental conditions was supported by the Findings of Fact. Consequently, we also find the Industrial Commission's Award No. 2, insofar as it relates to Craven's mental condition, to be supported by the Findings of Fact and Conclusions of Law.

[2] Defendants contend that the Industrial Commission erred in failing to find as a fact that Craven did not offer evidence that the medical treatment rendered by Drs. Bell and Holthusen, Forsyth Medical Center, and Maplewood Family Practice was necessary to effect a cure, to give relief, or to lessen Craven's period of disability. We disagree. Generally, an employer has the right to direct the medical treatment for a compensable work injury. *Kanipe v. Lane Upholstery, Hickory Tavern Furniture Co.*, 141 N.C. App. 620, 623-24, 540 S.E.2d

785, 788 (2000). However, "an employer's right to direct medical treatment (including the right to select the treating physician) attaches [only] once the employer accepts the claim as compensable." *Id.* at 624, 540 S.E.2d at 788; *see also Bailey v. W. Staff Servs.*, 151 N.C. App. 356, 363, 566 S.E.2d 509, 514 (2002) (same). Here, VF did not accept the claim as compensable, but rather denied the alleged accident and injury. VF and its carrier therefore did not have the right to select, *i.e.*, limit Craven's physicians or treatment.

Moreover, this Court indicated in *Franklin v. Broyhill Furniture Indus.*, 123 N.C. App. 200, 472 S.E.2d 382 (1996), that, while the Industrial Commission had previously been required to find that a plaintiff's chosen physician was reasonably required to effect a cure or give relief in order for the care to be compensable, the 1991 amendment to section 97-25 of the North Carolina General Statutes deleted the language supporting such a requirement. The Court therefore indicated that a finding that medical care by a plaintiff's chosen physician was reasonably required to effect a cure or give relief may not be required in cases, including the instant one, post-dating the 1991 amendment. *Id.* at 207-08, 472 S.E.2d 387.

For the foregoing reasons, we hold that the Industrial Commission did not err in failing to find as a fact that Craven did not offer evidence that the medical treatment rendered by Drs. Bell and Holthusen, the Forsyth Medical Center, and the Maplewood Family Practice was necessary to effect a cure, to give relief, or to lessen Craven's period of disability. Further, we find that the Industrial Commission did not err in failing to conclude as a matter of law that the medical treatment rendered by Drs. Bell and Holthusen, Forsyth Medical Center, and Maplewood Family Practice was not necessary to effect a cure, to give relief, or to lessen Craven's period of disability.

For the reasons stated above, we affirm the Industrial Commission's Opinion and Award.

Affirmed.

Judges HUNTER and THORNBURG concur.

JAMES THOMAS GOFORTH v. K-MART CORPORATION

No. COA03-1475

(Filed 21 December 2004)

1. **Workers' Compensation— accident—aggravation of preexisting back condition—specific traumatic incident**

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's back condition was causally related to the May 2000 work accident and not to a preexisting back condition, because: (1) aggravation of a preexisting condition which results in loss of wage earning capacity is compensable; (2) the work-related injury need not be the sole cause of the problems to render an injury compensable; and (3) although plaintiff had a preexisting back condition due to prior injuries and surgeries, there was evidence showing that he experienced a specific traumatic incident when he attempted to load a bag of peat moss into a customer's car in early May 2000.

2. **Workers' Compensation— disability—permanent and total**

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff was permanently and totally disabled as a result of the May 2000 injury, because: (1) a doctor testified that he wrote a letter verifying that plaintiff should be considered disabled from working as of 24 August 2000 even though there was no updated report at the time of the hearing since plaintiff was no longer his patient; (2) at the time of the hearing, plaintiff continued to wear a leg brace; and (3) there was evidence of plaintiff's lack of prior work experience and limited education.

3. **Workers' Compensation— attorney fees—abuse of discretion standard**

The Industrial Commission did not abuse its discretion by awarding attorney fees to plaintiff under N.C.G.S. § 97-88.1, because: (1) neither the facts nor North Carolina law supported defendant's causation contention that plaintiff's preexisting back condition caused the injury; and (2) while defendant claimed that plaintiff lacked credibility, the Commission reviews the credibility of witnesses.

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

Although defendant contends that plaintiff's injury in a workers' compensation case did not impair his wage earning capacity, defendant failed to properly present this argument in an assignment of error as required by N.C. R. App. P. 10(a).

Appeal by Defendant from Opinion and Award entered 16 June 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 September 2004.

Lyndon R. Helton and Scudder & Hedrick, by Samuel A. Scudder, for plaintiff-appellee.

Gene Thomas Leicht, for defendant-appellant.

WYNN, Judge.

James Thomas Goforth, working in the garden department of K-Mart since April 2000, brought this worker's compensation claim alleging that he injured his back in early May 2000 when he attempted to load two bags of peat moss into a customer's car. Initially, a deputy commissioner denied benefits to Goforth for his work-related back injury claim. But following his successful appeal to the full Commission awarding him total disability from 27 August 2000 continuing until further order of the Commission, K-Mart appealed to this Court. After careful review, we affirm.

The standard of review for this Court in reviewing an appeal from the Commission is limited to determining "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). Our review " '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) (citation omitted). The Commission's findings of fact "are conclusive on appeal when supported by competent evidence," even if there is evidence to support a contrary finding, *Morrison v. Burlington Indus.*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981), and may be set aside on appeal only "when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). Further, all evidence must be taken in the light

most favorable to the plaintiff, and the plaintiff "is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Deese*, 352 N.C. at 115, 530 S.E.2d at 553.

In this appeal, K-Mart assigns error to the following paragraphs in the Opinion and Award:

> Findings of Fact
>
> ***
>
> 13. His back injury, which occurred at a judicially cognizable period of time, was a compensable specific traumatic incident of the work assigned.
>
> ***
>
> 16. The uncontroverted medical evidence in this case establishes that plaintiff is permanently and totally disabled as a result of the injury he suffered working at K-Mart in early May 2000.
>
> 17. Defendant's contention and supporting evidence that plaintiff was not credible because his Form 18 stated that the injury occurred "approx. May 10, 2000," and defendant's records showed that plaintiff did not work on May 10, 2000, is without merit.
>
> 18. Defendant's contention and supporting evidence that plaintiff's back condition following the peat moss bag incident of early May 2000 was a natural progression of an earlier workers' compensation injury is also without merit.
>
> 19. Defendant has defended this matter without reasonable cause. At the conclusion of the hearing of this claim before the Deputy Commissioner, plaintiff's counsel of record gave notice that sanctions would be requested. Nevertheless, defendant proceeded to further delay the administration of justice in this claim by forcing the deposition of Dr. Chewning not once, but twice. The gravamen of defendant's position was that because Mr. Goforth had a history of multiple back surgeries, he was negligent in taking work in K-Mart's garden department. What the record discloses is that while Mr. Goforth had eight cervical and lumbar spinal surgeries prior to the injury of May 10, 2000, his last surgery had been over two years prior to the date of injury. He had not undergone a lumbar surgery since 1991. Further, the record establishes that Dr. Chewning had advised Mr. Goforth

that he could attempt a return to work. In an attempt to remove himself from the rolls of Social Security disability, Mr. Goforth came to work for K-Mart. Never did he fail to disclose his medical history. Mr. Goforth's efforts should be applauded, not derided.

***

Conclusions of Law

1. Sometime around May 10, 2000, plaintiff sustained a compensable injury to his back arising out of and in the course and scope of his employment with defendant-employer by way of a specific traumatic incident of the work assigned. N.C. Gen. Stat. § 97-2(6).

2. As a result of plaintiff's compensable injury, plaintiff is entitled to receive ongoing weekly benefits from August 27, 2000, at the compensation rate of $226.67 per week and continuing until further order of the Commission. N.C. Gen. Stat. § 97-29.

3. Plaintiff is entitled to have defendant provide all medical treatment arising out of plaintiff's compensable injury to the extent it tends to affect a cure, give relief or lessen plaintiff's period of disability. This will include all care directed by Dr. Samuel J. Chewning. N.C. Gen. Stat. § 97-25.

4. Defendant has defended this claim without a good faith basis for doing so. This defense constitutes unreasonable defense of this claim and defendant shall pay plaintiff's attorney's fees, which shall be taxed as costs. N.C. Gen. Stat. § 97-88.1.

[1] Defendant argues that the Commission erred in concluding that Goforth's back condition was causally related to the May 2000 work accident and not to the preexisting back condition. To support the contention that the May 2000 injury was a direct and natural result of Goforth's original injury, Defendant cites *Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 381, 323 S.E.2d 29, 31 (1984) (refracture of a bone in the same place as an earlier compensable fracture was the direct and natural result of the original injury).

But in the more recent case of *Ruffin v. Compass Group USA*, 150 N.C. App. 480, 481, 563 S.E.2d 633, 635 (2002), the plaintiff injured her back when she pulled a forty-pound box from a truck. *Id.* A MRI revealed that the plaintiff had preexisting problems including "an unusual curvature of the spine and disc herniations." *Id.* at 482, 563

S.E.2d at 635. The plaintiff's medical provider concluded that the injury aggravated the preexisting condition. *Id.* This Court, in *Ruffin*, held that aggravation of a preexisting condition which results in loss of wage earning capacity is compensable. *Id.* at 484, 563 S.E.2d at 637. *See also Smith v. Champion Int'l.*, 134 N.C. App. 180, 182, 517 S.E.2d 164, 166 (1999) (plaintiff had compensable injury when work related specific traumatic incident aggravated severe preexisting back problems).

Moreover, the "work-related injury need not be the sole cause of the problems to render an injury compensable." *Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 465, 470 S.E.2d 357, 359 (1996). "If the work-related accident 'contributed in some reasonable degree' to plaintiff's disability, she is entitled to compensation." *Id.* at 466, 470 S.E.2d at 359 (citing *Kendrick v. City of Greensboro*, 80 N.C. App. 183, 187, 341 S.E.2d 122, 124, *disc. review denied*, 317 N.C. 335, 346 S.E.2d 500 (1986)).

> When a pre-existing, *nondisabling, non-job-related* condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment or by an occupational disease so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent.

Morrison, 304 N.C. at 18, 282 S.E.2d at 470 (emphasis original).

Here, the record shows that Goforth had a preexisting back condition due to prior injuries and surgeries. But there is evidence showing that Goforth experienced a specific traumatic incident when he attempted to load a bag of peat moss into a customer's car in early May 2000.

Under the specific traumatic incident provision of section 97-2(6) of the North Carolina General Statutes, a plaintiff must prove an injury at a judicially cognizable point in time. N.C. Gen. Stat. § 97-2(6) (2003). The term "judicially cognizable" requires " 'a showing by plaintiff which enables the Industrial Commission to determine when, within a reasonable period, the specific injury occurred.' " *Ruffin*, 150 N.C. App. at 484, 563 S.E.2d at 636 (citation omitted). In this case, there was evidence showing that the peat moss incident occurred in early May 2000, which was a judicially cognizable period of time. Goforth's testimony and Dr. Chewning's deposition supported this time period. While a person with no preexisting back problems might

not have sustained Goforth's level of injury, the evidence supports the Commission's determination that the aggravation of his preexisting condition by the May 2000 specific traumatic incident is a compensable injury.

[2] K-Mart next argues that the Commission erred in finding Goforth permanently and totally disabled as a result of the May 2000 injury. We disagree.

> The Commission found in Finding of Fact 16 that,
>
> The uncontroverted medical evidence in this case establishes that plaintiff is permanently and totally disabled as a result of the injury he suffered working at K-Mart in early May 2000.

Dr. Chewning testified that he wrote a letter verifying that Goforth should be considered disabled from working as of 24 August 2000. At the time of the hearing, Dr. Chewning could not give an updated report because Goforth was no longer his patient. But at the time of the hearing, Goforth continued to wear a leg brace. Also, there was evidence of Goforth's lack of prior work experience and limited education.

> If preexisting conditions such as the employee's age, education and work experience are such that an injury causes the employee a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the actual incapacity he or she suffers, and not for the degree of disability which would be suffered by someone younger or who possesses superior education or work experience.

Peoples v. Cone Mills Corp., 316 N.C. 426, 441, 342 S.E.2d 798, 808 (1986). We hold that there is competent evidence supporting the Commission's finding of fact of permanent and total disability. *Morrison*, 304 N.C. at 6, 282 S.E.2d at 463.

[3] Defendant further contends the Commission abused its discretion in awarding attorney fees to Goforth under section 97-88.1 of the North Carolina General Statutes. N.C. Gen. Stat. § 97-88.1 (2003). We disagree.

"The decision of whether to make such an award, and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion." *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54-55,

464 S.E.2d 481, 486 (1995). An abuse of discretion results only where a decision is " 'manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision.' " *Long v. Harris*, 137 N.C. App. 461, 465, 528 S.E.2d 633, 636 (2000) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). This requirement ensures that defendants do not bring hearings out of stubborn, unfounded litigiousness. *Troutman*, 121 N.C. App. at 51, 464 S.E.2d at 484. Attorney fees can be awarded, "[i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable [attorney] fees . . . upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1.

Here, K-Mart argued that Goforth's preexisting back condition caused the injury, and Goforth lacked credibility. But as we pointed our earlier, neither the facts nor North Carolina law support K-Mart's causation contention. Moreover, while K-Mart's claim that Goforth lacked credibility might have some merit[1], this Court does not review the credibility of witnesses, that is the role of the Commission. *Adams*, 349 N.C. at 680, 509 S.E.2d at 413. Therefore, we find no abuse of discretion by the Commission.

[4] K-Mart also argues that Goforth's injury did not impair his wage earning capacity; however, K-Mart did not properly present this in an assignment of error. This Court's review on appeal is limited to issues presented by assignment of error. N.C. R. App. P. 10(a).

Affirmed.

Chief Judge MARTIN and Judge McGEE concur.

1. In the Opinion and Award by the Deputy Commissioner, a finding of fact was made that Goforth had a long history of substance abuse of prescription pain killers. However, the Commission declined to adopt this finding of fact. Also, Goforth did not file a worker's compensation claim until eight months after the injury.

PARKER v. WILLIS

[167 N.C. App. 625 (2004)]

SINCLAIR A. PARKER, JR., PLAINTIFF v. MICHAEL WILLIS, DEFENDANT

No. COA03-1711

(Filed 21 December 2004)

1. Appeal and Error— preservation of issues—failure to make motion for directed verdict—contributory negligence

Although plaintiff contends the trial court erred by submitting to the jury the question of whether plaintiff was contributorily negligent with respect to a motor vehicle accident between the parties, this assignment of error is dismissed because by failing to make a motion for a directed verdict on the affirmative defense of contributory negligence, plaintiff did not properly preserve the issue of the sufficiency of defendant's evidence for appellate review.

2. Negligence— doctrine of last clear chance—instruction

The trial court erred in a negligence case arising out of a motor vehicle accident by refusing to instruct the jury on the doctrine of last clear chance and plaintiff is entitled to a new trial, because: (1) viewed in the light most favorable to plaintiff, the evidence supported a reasonable inference that plaintiff, by the exercise of reasonable care, could not have escaped the position of peril in which he negligently placed himself; (2) the jury could have inferred that if defendant had been keeping a proper lookout, as was his duty with the exercise of reasonable care, defendant should have seen plaintiff before backing into the road and should have waited for plaintiff to pass before suddenly blocking his path; (3) defendant testified that he had an unobstructed view of and was familiar with the road on which plaintiff was traveling when defendant backed out; and (4) defendant does not argue that he would have been unable to wait for plaintiff to pass had he seen plaintiff.

Appeal by plaintiff from judgment entered 10 June 2003 by Judge Jerry Braswell in Pender County Superior Court. Heard in the Court of Appeals 21 September 2004.

Brumbaugh, Mu & King, P.A., by Richard A. Mu, for plaintiff-appellant.

Johnson, Lambeth & Brown, by Maynard M. Brown, for defendant-appellee Michael Willis.

Ennis, Newton & Baynard, P.A., by Stephen C. Baynard, for defendant-appellee North Carolina Farm Bureau Mutual Insurance Company.

THORNBURG, Judge.

Sinclair A. Parker, Jr. ("plaintiff") appeals a judgment finding him contributorily negligent with respect to a motor vehicle accident between plaintiff and Michael Willis ("defendant").

The underlying facts involve a motor vehicle accident that occurred on 29 May 2000 on Carter Road in Bladen County, North Carolina. Plaintiff was driving a motorcycle eastward on Carter Road. Defendant had pulled his car to the side of the road, but backed into plaintiff's lane in an attempt to turn around. Plaintiff's motorcycle hit the back of defendant's car, causing plaintiff to be thrown from the motorcycle and into a ditch. Plaintiff suffered multiple injuries as a result of the collision.

Plaintiff filed a complaint alleging that defendant's negligence caused plaintiff's injuries and resulting medical expenses and lost earnings. Defendant's answer denied any negligence by defendant but also alleged that, if defendant were actionably negligent, plaintiff's contributory negligence barred any recovery by plaintiff. The case was called for trial by jury on 19 May 2003 in Pender County Superior Court. The jury returned a verdict indicating that plaintiff was injured by defendant's negligence. However, the jury also found that plaintiff contributed to his injury by his own negligence. Plaintiff appeals.

[1] Plaintiff first argues that the trial court erred by submitting to the jury the question of whether plaintiff was contributorily negligent. We first consider defendant's contention that this Court may not address this issue because plaintiff did not make a motion at trial for a directed verdict on the issue of contributory negligence. As support for this argument, defendant cites the North Carolina Supreme Court decision *Word v. Jones*, 350 N.C. 557, 516 S.E.2d 144 (1999). There, the Court stated, "[submitting an affirmative defense to the jury] is particularly appropriate where, as here, plaintiff failed to make a motion for directed verdict at the close of evidence." *Id.* at 566, 516 S.E.2d at 149. The Court then cited the following language from *Creasman v. Savings & Loan Assoc.*, 279 N.C. 361, 183 S.E.2d 115 (1971), *cert. denied*, 405 U.S. 977, 31 L. Ed. 2d 252 (1972): "[A] 'motion for a directed verdict is . . . the only procedure by which a party can challenge the sufficiency of his adversary's evidence to go to the

jury[.]' " *Word*, 350 N.C. at 566, 516 S.E.2d at 149 (quoting *Creasman*, 279 N.C. at 366, 183 S.E.2d at 118).

Plaintiff's request that the trial judge not instruct the jury on contributory negligence was based on an argument that the evidence was insufficient to go to the jury. Accordingly, we must decline to review plaintiff's argument due to his failure to make a motion for a directed verdict. *See Word v. Jones*, 130 N.C. App. 100, 103, 502 S.E.2d 376, 378 (1998) (holding that, by failing to make a motion for a directed verdict on the affirmative defense of sudden incapacitation, plaintiff did not properly preserve the issue of the sufficiency of the defendant's evidence for appellate review), *aff'd and modified on other grounds*, 350 N.C. 557, 516 S.E.2d 144 (1999); *cf. Enns v. Zayre Corp.*, 116 N.C. App. 687, 690-91, 449 S.E.2d 478, 480 (1994) (reviewing whether the trial court erred by instructing the jury on contributory negligence where the plaintiff did not make a motion for a directed verdict on the issue, but not discussing or deciding as a matter of law the question of whether the failure to make a motion for a directed verdict rendered the issue of the sufficiency of the evidence unpreserved for appellate review), *disc. review denied and cert. denied*, 339 N.C. 737, 454 S.E.2d 649-50 (1995), *aff'd per curium*, 342 N.C. 406, 464 S.E.2d 298-99 (1995). Thus, we do not reach the substantive issue of whether the trial court erred by submitting the question of whether plaintiff was contributorily negligent to the jury. This assignment of error is dismissed.

[2] Plaintiff's next argument is that the trial court erred by refusing to instruct the jury on the doctrine of last clear chance. The elements of this doctrine are as follows: (1) that the plaintiff negligently placed himself in a position of helpless peril; (2) that the defendant knew or, by the exercise of reasonable care, should have discovered the plaintiff's perilous position and his incapacity to escape from it; (3) that the defendant had the time and ability to avoid the injury by the exercise of reasonable care; (4) that the defendant negligently failed to use available time and means to avoid injury to the plaintiff and (5) as a result, the plaintiff was injured. *Kenan v. Bass*, 132 N.C. App. 30, 32-33, 511 S.E.2d 6, 7-8 (1999). "Failure to submit the issue of last clear chance when supported by substantial evidence is error and requires a new trial." *Hales v. Thompson*, 111 N.C. App. 350, 356, 432 S.E.2d 388, 392-93 (1993).

Defendant's primary contention in support of the trial court's decision not to instruct the jury on last clear chance is that defendant's opportunity to avoid the collision was negated by defendant's

lack of time to see plaintiff in peril and react to it. This argument fails. In *Exum v. Boyles*, 272 N.C. 567, 158 S.E.2d 845 (1968), the North Carolina Supreme Court stated the following in reference to the doctrine of last clear chance:

> The only negligence of the defendant may have occurred after he discovered the perilous position of the plaintiff. Such "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. Thus, in *Wanner v. Alsup*, *supra*, and in *Wade v. Sausage Co.*, *supra*, the defendants were not shown to have been negligent in the operation of their vehicles except in their respective failures to turn aside from their straight lines of travel in order to avoid striking the respective plaintiffs, one a pedestrian crossing the street, the other a man lying in the highway.

Id. at 576-77, 158 S.E.2d at 853. Thus, the Court specifically rejected defendant's argument in the case at bar that evidence must be presented tending to show that defendant committed a second negligent act after his "original negligence" of failing to maintain a lookout in the direction of his travel. *Id.* at 577, 158 S.E.2d at 853 (noting that operators of motor vehicles owe a duty to maintain a lookout in the direction of travel to all other persons using the highway and holding that evidence showing that

> had the defendant maintained such a lookout, he could have observed [the plaintiff], stooping down beside the station wagon in the act of changing the tire, at a time when it should have been apparent to the defendant that [the plaintiff] could not save himself, but at which time the defendant could have avoided striking [the plaintiff] by merely turning slightly to his left . . . [was] sufficient to bring the doctrine of the last clear chance into operation).

A review of the record in the instant case indicates that sufficient evidence was presented to support an instruction on this doctrine. Defendant's theory at trial of plaintiff's contributory negligence was that plaintiff failed to keep a proper lookout and was traveling too quickly to safely avoid a collision. Evidence presented in support of this theory tended to show that plaintiff was traveling fifteen miles above the speed limit, his view of the road ahead was unobstructed, the road was straight, plaintiff did not swerve to avoid defendant's vehicle and plaintiff did not see defendant's vehicle until it was too

late to avoid the collision. Viewed in the light most favorable to plaintiff, this evidence supports a reasonable inference that plaintiff, by the exercise of reasonable care, could not have escaped the position of peril in which he negligently placed himself.

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." *Id.* at 576, 158 S.E.2d at 852-53. Thus, the jury could have inferred that if defendant had been keeping a proper lookout, as was his duty with the exercise of reasonable care, defendant should have seen plaintiff before backing into the road and should have waited for plaintiff to pass before suddenly blocking his path.

The remaining elements of the last clear chance doctrine are also supported by the evidence. Defendant testified that he had an unobstructed view of and was familiar with the road on which plaintiff was traveling when defendant backed out. Moreover, defendant does not argue that he would have been unable to wait for plaintiff to pass had he seen plaintiff. This evidence would support an inference that defendant had the time and means to avoid the collision by simply keeping a proper lookout and waiting to back out until plaintiff had passed. Accordingly, the jury could have inferred that defendant, having the duty to keep a proper lookout, negligently failed to keep that lookout, thus causing the collision and plaintiff's injuries. Therefore, the issue of last clear chance should have been submitted to the jury and plaintiff is entitled to a new trial based on this assignment of error. *See Hales*, 111 N.C. App. at 356-57, 432 S.E.2d at 392-93 (granting a new trial because the trial court erred by failing to instruct the jury on last clear chance where the evidence supported "a reasonable inference that [the] defendant had the time and means, by staying in his own lane of travel, to avoid the accident . . . [and that the] defendant's failure to stay in his own lane was a failure to use every reasonable means to avoid the injury [to the plaintiff]"). Accordingly, we need not address plaintiff's remaining assignments of error.

Reversed.

Judges WYNN and HUNTER concur.

ADVANCED WALL SYSTEMS, INC. v. HIGHLANDE BUILDERS, LLC

No. COA04-1

(Filed 21 December 2004)

1. Appeal and Error— writ of certiorari—timeliness of notice of appeal

Plaintiff's motion to dismiss defendant's appeal is denied and defendant's petition for writ of certiorari under N.C. R. App. P. 21 is granted even though notice of appeal was filed with the trial court outside the thirty-day time period within which an appeal from a judgment in a civil action must be taken under N.C. R. App. P. 3, because notice was timely filed with the Court of Appeals.

2. Process and Service— substitute service—limited liability company—personal jurisdiction

The trial court did not err in an action to recover money owed on an account by refusing to set aside a default judgment in favor of plaintiff even though defendant limited liability company contends the judgment was void for lack of personal jurisdiction based on improper service, because: (1) defendant failed to properly maintain a registered agent in the State of North Carolina as required by N.C.G.S. § 55-30(a)(2) since its registered agent left the State and defendant failed to appoint a new agent; (2) alternate service on the Secretary of State was proper under N.C.G.S. § 57C-2-43; and (3) where the Secretary of State mailed the summons is immaterial since service was effective when plaintiff served the Secretary of State.

3. Judgments— default judgment—motion to set aside

The trial court did not abuse its discretion in an action to recover money owed on an account by failing to grant defendant limited liability company relief under N.C.G.S. § 1A-1, Rule 60(b) from entry of default judgment and by finding that defendant's neglect was inexcusable, because: (1) the registered agent refused service and changed addresses; and (2) the trial court's decision was not manifestly unsupported by reason when defendant failed to properly maintain a registered agent in the State of North Carolina.

Appeal by Defendant from judgment entered 1 October 2003 by Judge Penn Dameron in Superior Court, Watauga County. Heard in the Court of Appeals 12 October 2004.

Turner & Yates, P.A., by David W. Yates for plaintiff-appellee.

McElwee Firm, PLLC, by R. Tyson Ferrell for defendant-appellant.

WYNN, Judge.

Defendant Highlande Builders, LLC, appeals from a default judgment entered 1 October 2003. Defendant contends that the trial court: (1) erred in denying its motion to set aside the default judgment because the judgment was void for lack of personal jurisdiction; and (2) abused its discretion in failing to grant Defendant relief under Rule 60(b) of the North Carolina Rules of Civil Procedure. For the reasons stated herein, we affirm.

Plaintiff filed a complaint on 16 January 2002 to recover $15,140.82 owed on an account. Defendant's registered agent in North Carolina was D. Michael Little. In December 2001, Mr. Little went to Florida on an extended vacation. On 17 January 2002 Plaintiff filed service with the North Carolina Secretary of State. The Secretary of State attempted to send notice to the registered agent at the principal place of business address of record, but notice was returned "unclaimed." On 11 February 2002, Plaintiff sent service to Defendant at its registered address by certified mail; this came back "unclaimed." On 11 February 2002, Plaintiff sent a letter to Ashe County Sheriff's Department for service upon Defendant at both the mailing address and the physical address, however, the Sheriff was unable to locate the registered agent or other company official. Upon discovering the registered agent had gone to Florida for the winter, on 28 February 2002 Plaintiff sent a letter to the Sheriff's Department in Naples, Florida for service, however, the sheriff was unable to locate anyone at the forwarded address.

Default judgment was entered 4 March 2002. Following Defendant's motion to set aside the default judgment, the trial court entered final judgment on 1 October 2003, denying the motion to set aside the default judgment. Defendant appealed.

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[1] We first note that notice of appeal was not filed with the trial court until 5 November 2003, outside the thirty-day time period within

which an appeal from a judgment order in a civil action must be taken pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, although notice was timely filed with this Court. However, we deny Plaintiff's motion to dismiss and grant Defendant's Petition for Writ of Certiorari pursuant to Rule 21 of the Rules of Appellate Procedure.

[2] On appeal, Defendant contends that the trial court erred in denying its motion to set aside the default judgment because the judgment was void for lack of personal jurisdiction due to improper service. We disagree.

Section 57C-2-43 of the North Carolina General Statutes provides rules for substituted service of process on limited liability companies.

> Whenever a limited liability company shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with due diligence be found at the registered office, then the Secretary of State shall be an agent of the limited liability company upon whom any process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with the Secretary of State or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process, notice, or demand and the fee required by G.S. 57C-1-22(b). In the event any such process, notice, or demand is served on the Secretary of State in the manner provided for in this section, the Secretary of State shall immediately mail one of the copies thereof, by registered or certified mail, return receipt requested, to the limited liability company at its principal office or, if there is no mailing address for the principal office on file, to the limited liability company at its registered office. Service on a limited liability company under this subsection *shall be effective for all purposes from and after the date of the service on the Secretary of State.*

N.C. Gen. Stat. § 57C-2-43(b) (2003) (emphasis added). It is the duty of limited liability companies to maintain a registered agent in the State of North Carolina. N.C. Gen. Stat. § 55D-30(a)(2) (2003). Since Defendant's registered agent left the State and Defendant failed to appoint a new agent, alternative service on the Secretary of State was proper. N.C. Gen. Stat. § 57C-2-43.

Defendant contends that service was improper because the Secretary of State mailed the summons to the principal address instead of the registered office mailing address. Where the Secretary of State mailed the summons is immaterial because service was effective when Plaintiff served the Secretary of State. N.C. Gen. Stat. § 57C-2-43; *see Royal Bus. Funds Corp. v. S. E. Dev. Corp.*, 32 N.C. App. 362, 366, 232 S.E.2d 215, 217 (1977) (where statute had similar language service on foreign corporation complete when Secretary of State served). "[T]here is nothing in [the statute's] language to indicate that the registered mail *must* be either accepted or rejected in order for service to be complete. Such an interpretation would be contrary to the clear legislative intent . . . that service is complete when the Secretary of State is served." *Id.*, 232 S.E.2d at 218.

As Defendant's registered agent had left the state, service was effective when served upon the Secretary of State. Therefore, the trial court had personal jurisdiction and entry of default judgment was proper.

[3] On appeal, Defendant also contends that the trial court abused its discretion in failing to grant Defendant relief under Rule 60(b) of the North Carolina Rules of Civil Procedure and finding that Defendant's neglect was inexcusable. We disagree.

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) [m]istake, inadvertence, surprise, or excusable neglect; . . . or; (6) [a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2003). The decision whether to set aside a default judgment under Rule 60(b) is left to the sound discretion of the trial judge, and will not be overturned on appeal absent a clear showing of abuse of discretion. *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 425, 349 S.E.2d 552, 554 (1986).

Whether neglect is "excusable" or "inexcusable" is a question of law which "depends upon what, under all the surrounding circumstances, may be reasonably expected of a party" to litigation. *Id.*, 349 S.E.2d at 555. The trial judge's conclusion in this regard will not be disturbed on appeal if competent evidence supports the judge's findings, and those findings support the conclusion. *In re Hall*, 89 N.C. App. 685, 687, 366 S.E.2d 882, 884, *disc. review denied*, 322 N.C. 835, 371 S.E.2d 277 (1988). Once excusable neglect has been shown as a

matter of law, "whether the judge shall then set aside the judgment or not rests 'in his discretion . . . .' " *Morris v. Liverpool, London & Globe Ins. Co.*, 131 N.C. 212, 213, 42 S.E. 577, 578 (1902); *accord McInnis*, 318 N.C. at 425, 349 S.E.2d at 554.

In the case before us, the trial court found that the registered agent refused service and changed addresses, also that service upon the Secretary of State was proper. The trial court concluded that the Defendant's neglect was inexcusable. We hold that the evidence and findings support that conclusion.

A default judgment may be set aside under Rule 60(b)(6) only upon a showing that: (1) extraordinary circumstances were responsible for the failure to appear, and (2) justice demands that relief. *See Huggins v. Hallmark Enters., Inc.*, 84 N.C. App. 15, 24-25, 351 S.E.2d 779, 785 (1987). The decision to grant this rule's exceptional relief is within the trial court's discretion. *Id.* at 25, 351 S.E.2d at 785. Because this court "cannot substitute 'what it consider[s] to be its own better judgment' for a discretionary ruling of a trial court," we may not overturn the judge's ruling unless it was " 'manifestly unsupported by reason.' " *Id.* (citations omitted).

While the law does not favor default, preferring instead that controversies be resolved on their merits, "it is also true that rules which require responsive pleadings within a limited time serve important social goals, and a party should not be permitted to flout them with impunity." *Howell v. Haliburton*, 22 N.C. App. 40, 42, 205 S.E.2d 617, 619 (1974). Likewise, courts justifiably disapprove of a limited liability company's failure to properly maintain a registered agent because that requirement is "designed to inform potential litigants of necessary information," *Huggins*, 84 N.C. App. at 25, 351 S.E.2d at 785, thereby protecting the company's interests and guarding against judgment by default, as well as reducing the chance that the company will avoid paying a judgment by evading service of process. *See Anderson Trucking Serv., Inc. v. Key Way Transp., Inc.*, 94 N.C. App. 36, 43, 379 S.E.2d 665, 669 (1989).

As Defendant failed to properly maintain a registered agent in the State of North Carolina, the trial court's decision was not "manifestly unsupported by reason." *Huggins*, 84 N.C. App. at 25, 351 S.E.2d 785. The trial court committed no error in refusing to set aside the default judgment under Rule 60(b)(6).

Affirmed.

Judges HUNTER and THORNBURG concur.

STATE OF NORTH CAROLINA v. MARVIN EVERETTE JOYNER, DEFENDANT

No. COA03-1689

(Filed 21 December 2004)

1. **Evidence— mug shot of defendant—not prejudicial**

There was no prejudicial error in the admission of a mug shot of a narcotics defendant showing him in police custody where there were multiple live identifications by an undercover officer trained in identifying people. Moreover, the jury was instructed that the photograph was to be used solely to illustrate and explain the officer's testimony.

2. **Appeal and Error— preservation of issues—failure to object**

The question of whether the identity of a confidential informant should have been revealed was not preserved for appellate review where defendant did not object to the trial court's refusal to force disclosure.

3. **Sentencing— prior record level—convictions stipulated**

Defendant was properly sentenced at a Record Level III where his counsel stipulated to his prior convictions.

Appeal by Defendant from convictions entered 25 June 2003 by Judge W. Erwin Spainhour in Superior Court, Iredell County. Heard in the Court of Appeals 2 November 2004.

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

Parish & Cooke, by James R. Parish, for defendant-appellant.

WYNN, Judge.

Defendant Marvin Everette Joyner appeals from his conviction of two counts of sale of a controlled substance and argues that the trial court erred by: (1) introducing over objection a "mug shot" photograph of Defendant tending to show Defendant was in police custody

at the time of the photograph; (2) failing to require the State to reveal the confidential informant present in the vehicle with the undercover officer at the time of the alleged drug deal; and (3) sentencing Defendant as a Record Level III where the State failed to prove Defendant's record level or receive a stipulation from Defendant's counsel. After careful review, we find no prejudicial error.

Briefly, the record shows that on the evening of 9 April 2000, Officer Marla Wood, an undercover officer working with the Narcotics Division of the Statesville Police Department, drove down Wilson Lee Boulevard, a location known for drug trade. In the vehicle with Officer Wood was a criminal informant. Officer Wood and the informant were flagged down by Defendant in front of a house on Wilson Lee Boulevard. Defendant approached the passenger's side of the vehicle, where Officer Wood was seated, and asked her what she needed. Officer Wood told Defendant she wanted a "twenty," the street word for a crack-cocaine rock. Defendant walked back toward the house, where several people were situated on the front porch, did something in the doorway, and returned to Officer Wood's vehicle with a crack-cocaine rock. After the sale was completed, Defendant and Officer Wood conversed for several minutes.

While it was getting dark at the time of the first undercover drug sale, Officer Wood saw—and memorized—Defendant's face. Indeed, Officer Wood was trained to identify people by looking at, *inter alia*, the forehead, shape of eyes, cheekbones, chin, hair, and body shape.

Immediately following the first drug sale, Officer Wood met with a surveillance team stationed one street away from the site of the sale. The team tested the rock, which was indeed cocaine. Officer Wood then returned to Wilson Lee Boulevard, where Defendant again approached her vehicle and asked what she needed. Officer Wood again requested a "twenty," which Defendant had in his hand. The area where the sale took place was lit, and Officer Wood identified Defendant as the same person who had previously sold her drugs. As an additional means of identification, the next day, Officer Wood rode back through the area where she had purchased the crack cocaine and saw Defendant in the same location. Also on 10 April 2002, Officer Wood was shown a photograph of Defendant, whom she positively identified as the person who had sold her the drugs.

To protect the undercover nature of the operation, Defendant was not arrested until November 2002. Defendant was tried in June 2003 for two counts of sale of a controlled substance. At trial, Defendant's

estranged wife testified that Defendant was with her in South Carolina at the time of the drug sales. Defendant's sister also testified that Defendant was in South Carolina at the time of the drug sales and that another man who resembles Defendant had sold drugs near her home before.

On 25 June 2003, a jury convicted Defendant of two counts of sale of a controlled substance. Defendant appealed.

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[1] Defendant contends that the trial court erred by introducing over objection a "mug shot" photograph of Defendant tending to show Defendant was in police custody at the time of the photograph. "A trial court's ruling on an evidentiary point will be presumed to be correct unless the complaining party can demonstrate that the particular ruling was in fact incorrect." *State v. Herring*, 322 N.C. 733, 749, 370 S.E.2d 363, 373 (1988) (citing *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981)). Moreover, even where an appellant shows error, "relief ordinarily will not be granted absent a showing of prejudice." *Id.* (citation omitted).

This Court has held that admitting into evidence a "mug shot" photograph indicating that a defendant had previously been in police custody may indeed be error. *State v. Segarra*, 26 N.C. App. 399, 402-03, 216 S.E.2d 399, 402-03 (1975). However, where a defendant was positively identified as the perpetrator of the crimes through other means such as detailed testimony, the error has been held to be harmless. *Id.* (where defendant was identified by two persons and detailed testimony of defendant's participation in the crime were provided, admitting mug shot into evidence was harmless error). Moreover, prejudice to a defendant is minimized where the trial court gives a limiting instruction as to the photograph. *State v. Cauthen*, 18 N.C. App. 591, 595, 197 S.E.2d 567, 569 (1973) (trial court's limiting instruction regarding a mug shot "minimized the possibility of any prejudice to defendant[]").

Here, Officer Wood, who was trained in identifying people, saw and memorized Defendant's face during the first drug sale and attendant conversation. Officer Wood then returned to the scene shortly after the first sale and purchased more crack cocaine from Defendant. The area where the sales took place was lit, and Officer Wood identified Defendant as the same person who had previously sold her drugs. As an additional means of identification, the next day, Officer Wood rode back through the area where she had purchased the crack cocaine and saw Defendant in the same location. Given

these multiple live identifications by a trained undercover police officer and that officer's detailed testimony thereof, any error in admitting the photograph of Defendant would have been non-prejudicial. Moreover, the trial court instructed the jury that the photograph was to be used solely "to illustrate and explain the testimony of [Officer Wood] and for no other purpose." The trial court's instruction strictly limiting the purpose for which the jury could consider the photograph minimized the possibility of any prejudice to Defendant. This assignment of error is therefore overruled.

[2] Next, Defendant contends that the trial court erred by failing to require the State to reveal the confidential informant present in the vehicle with Officer Wood at the time of the alleged drug deal. It is axiomatic that "[t]his Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) (citing *State v. Smith*, 50 N.C. App. 188, 272 S.E.2d 621 (1980)). To preserve issues for appellate review, a party must make a timely objection or motion, specifically stating the grounds therefor, at trial. N.C. R. App. P. 10(b).

Here, Defendant failed to raise any objection to the trial court's refusal to force the disclosure of the confidential informant. Indeed, after defense counsel requested that the informant be identified and the prosecutor's objection was sustained, defense counsel not only failed to object but actually agreed to the ruling, stating, "Okay. I won't ask." Because Defendant failed to preserve this issue for appellate review, this assignment of error is overruled.

[3] Finally, Defendant contends the trial court erred by sentencing Defendant as Record Level III where the State failed to prove Defendant's record level or receive a stipulation from Defendant's counsel. North Carolina General Statute section 15-1340.14(f) allows proof of prior convictions by stipulation, court record of prior convictions, records from the Division of Criminal Information, the Division of Motor Vehicles, or the Administrative Office of the Courts, or by "[a]ny other method found by the court to be reliable." N.C. Gen. Stat. § 15A-1340.14(f) (2003). A defendant's agreeing to a worksheet submitted by the State may constitute reliable proof of prior convictions. *State v. Eubanks*, 151 N.C. App. 499, 504-06, 565 S.E.2d 738, 742-43 (2002) (statements by defense counsel that he had seen the State's worksheet and had no objection to it could "reasonably be construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet[]"); *cf. State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000) (defense counsel's statement

that there was no disagreement about the defendant's prior convictions "might reasonably be construed as an admission by defendant that he had been convicted of the other charges appearing on the prosecutor's work sheet[]").

In the case *sub judice*, Defendant's counsel stipulated as to Defendant's prior convictions. The State gave the trial court a worksheet listing Defendant's prior convictions. Defense counsel clearly stated that he had no questions about the worksheet except regarding a larceny by trick charge. When probed by the trial court, however, defense counsel did not desire a closer look at that case file and agreed to the length of time for which Defendant had been imprisoned for that charge. Because defense counsel stipulated as to Defendant's prior convictions and such a stipulation is considered reliable proof of prior convictions, we find no error.

For the reasons stated herein, we uphold Defendant's convictions.

No prejudicial error. Affirmed.

Judges HUDSON and ELMORE concur.

BEECH MOUNTAIN VACATIONS, INC., PLAINTIFF v. NEW YORK FINANCIAL, INC., BEECH MOUNTAIN DEVELOPMENT CONSTRUCTION CORPORATION, DEFENDANTS v. GARY P. EIDELSTEIN, BEECH MOUNTAIN VACATIONS, INC., THIRD-PARTY DEFENDANTS

No. COA03-1444

(Filed 21 December 2004)

Real Property— action to quiet title—statute of limitations—equitable estoppel—summary judgment

Summary judgment should not have been granted for plaintiff and for the third-party defendant in an action to quiet title. There were divergent claims about material facts, including the date the last partial payment was made on a note to defendant and the date the last promises of payment were made. Furthermore, defendant has invoked equitable estoppel, which raises a jury question.

Appeal by Defendant from judgment entered 21 August 2003 by Judge Dennis J. Winner in Superior Court, Watauga County. Heard in the Court of Appeals 30 August 2004.

Di Santi Watson Capua & Wilson, by Anthony S. di Santi, for plaintiff-appellee.

Chad F. Brown, for defendant-appellant.

WYNN, Judge.

Defendant New York Financial, Inc. ("NY Financial") appeals from an order of the trial court granting summary judgment for Plaintiff Beech Mountain Vacations, Inc. ("Beech Mountain") and Third Party Defendant Gary P. Eidelstein ("Eidelstein") in Beech Mountain's action to quiet title to certain properties. NY Financial argues the trial court erred in concluding (1) that no material dispute of fact existed, and (2) that judgment as a matter of law was therefore warranted. For the reasons set forth herein, we reverse the trial court's order granting summary judgment and remand the case to the trial court for further proceedings not inconsistent with this Court's opinion.

The procedural and factual history of the instant appeal is as follows: Beech Mountain is the record owner of timeshare properties known as the Cherokee Condominiums located in Watauga County, North Carolina. NY Financial assisted in the development of the Cherokee Condominiums through monetary investment; in exchange, Beech Mountain conveyed to NY Financial numerous deeds of trust and promissory notes on the Cherokee Condominiums. These deeds of trust and promissory notes were granted in 1981 and 1982.

NY Financial contends that, from 1985 through May 1999, Eidelstein, Beech Mountain's president, told Aaron Goldman ("Goldman"), agent and authorized representative of NY Financial, with whom Eidelstein maintained a business relationship preceding NY Financial's 1981 investment in the Cherokee Condominiums, that Beech Mountain had cash flow problems. NY Financial further contends Eidelstein proposed that NY Financial advance monies to cover Cherokee Condominium maintenance expenses such as taxes and utilities to enable Beech Mountain to repay its deeds of trust and promissory notes to NY Financial. Eidelstein promised fully to repay the maintenance and debt monies, plus any interest accumulated thereon, and requested that NY Financial therefore refrain from filing a lawsuit to recover the funds. NY Financial states that "[i]mplicit in

these promises that he would pay . . . was the promise that [Eidelstein] would not invoke the statute of limitations against these debts." Further, NY Financial alleges that Beech Mountain's May 1999 payment of $2,250 constituted "consideration for agreement by NY Financial, Inc. to not immediately pursue the debts in court[.]"

Beech Mountain contends that the May 1999 payment of $2,250 to NY Financial was unrelated to the subject of this action. Beech Mountain asserts that any promises regarding payment of the promissory notes and deeds of trust "were made in '87, '88, the last one was made in April of 1992" and that "there comes a point in time that equitable estoppel has got to stop."

On 20 August 2001, Beech Mountain filed an action to quiet title on Cherokee Condominium properties subject to promissory notes and deeds of trust held by NY Financial. Beech Mountain requested the removal of adverse claims held by NY Financial and title in fee simple to the Cherokee Condominium properties. In its answer, NY Financial alleged that its right to proceed with an action for foreclosure on the properties was not barred by the statute of limitations due to, *inter alia*, Beech Mountain's and Eidelstein's promises of repayment and partial payment. NY Financial further moved to add Eidelstein as a third-party defendant to the action; that motion was granted on 26 July 2002. On or around 21 August 2002, NY Financial filed an amended counterclaim/counter-complaint. On or around 26 June 2003, Beech Mountain and Eidelstein filed a motion for summary judgment pursuant to N.C. Gen. Stat. § 1-A1, Rule 56. The trial court granted the motion for summary judgment and NY Financial appeals.

The dispositive issues on appeal are whether the trial court erred in concluding (1) that no material dispute of fact existed (Assignment of Error No. 1) and (2) that judgment as a matter of law through summary judgment was therefore warranted (Assignments of Error Nos. 1 and 2). For the reasons set forth below, we find that material disputes of fact exist and that the trial court erred in granting summary judgment.

"[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact," *i.e.*, "whether the moving party is entitled to a judgment as a matter of law." *Pompano Masonry Corp. v. HDR Architecture, Inc.*, 165 N.C. App. 401, 405, 598 S.E.2d 608, 611 (2004) (quoting *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998)). Summary

judgment is appropriate only when, viewed in the light most favorable to the non-movant, "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); *Pompano Masonry Corp.*, 165 N.C. App. at 405, 598 S.E.2d at 611. The party moving for summary judgment must establish that no triable issue of material fact exists " 'by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.' " *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (quoting *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

In this case, Beech Mountain and Eidelstein have asserted that any action on the promissory notes and deeds of trust to the Cherokee Condominiums are time barred. Beech Mountain and Eidelstein contend payments on the Cherokee Condominiums had not been made in the past ten to thirteen years, that the 1999 payment made to NY Financial was unrelated to this action, and that Eidelstein's last promises of repayment occurred in 1992—nine years prior to Beech Mountain's filing the action to quiet title.

NY Financial, on the other hand, has asserted, first, that Beech Mountain made payment toward its debt to NY Financial as recently as 1999, and, second, that, in response to NY Financial's continuing attempts to obtain payment, Beech Mountain and Eidelstein made repeated promises, including as recently as 1999, to repay the debt as soon as possible. NY Financial alleges that the partial payments and repeated promises of later repayment were made, *inter alia*, explicitly in order to forestall NY Financial's "going to court to enforce payment of the debts[.]" NY Financial claims that Beech Mountain and Eidelstein are therefore equitably estopped from relying on statute of limitations defenses.

The doctrine of equitable estoppel prevents a party from benefitting where that party "intentionally or through culpable negligence, induces another to believe that certain facts exist and that other person rightfully relies on those facts to his detriment." *Miller v. Talton*, 112 N.C. App. 484, 488, 435 S.E.2d 793, 797 (1993); *Thompson v. Soles*, 299 N.C. 484, 487, 263 S.E.2d 599, 602 (1980) (same). Courts have applied equitable estoppel in the creditor/debtor context. For example, in *Duke Univ. v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690,

692-93 (1987), the Supreme Court held that the plaintiff had been induced by the defendant's conduct to reasonably believe it would be paid for medical services once the defendant's lawsuit against his insurance carrier was concluded, thereby foregoing pursuit of its legal remedy. The Supreme Court stated that "[i]f 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." *Id.* Moreover, it is "the established rule of law that estoppel, or the existence thereof, is a question of fact for determination by the jury." *Troy's Stereo Ctr., Inc. v. Hodson*, 39 N.C. App. 591, 597, 251 S.E.2d 673, 677 (1979) (citation omitted).

In this case, Beech Mountain and NY Financial have made divergent claims as to material facts, including the date the last partial payment was made to NY Financial and the date the last promises of repayment were made to NY Financial. Further, NY Financial has invoked the doctrine of equitable estoppel, the application of which raises a jury question. Therefore, viewing the case in the light most favorable to the non-moving party, NY Financial, the trial court erred in determining that no material dispute of fact existed and in granting as a matter of law summary judgment for Beech Mountain and Eidelstein.

For the foregoing reasons, we reverse the trial court's order granting summary judgment and remand the case to the trial court for further proceedings not inconsistent with this Court's opinion.

Reversed.

Chief Judge MARTIN and Judge HUDSON concur.

WALTER MILLER, PLAINTIFF v. TERENCE RAY LILLICH AND CYNTHIA JANE LILLICH, INDIVIDUALLY AND AS GUARDIAN FOR R.L., A MINOR, DEFENDANTS

No. COA04-185

(Filed 21 December 2004)

1. Adoption— consent—statute—disjunctive

The three parts of N.C.G.S. § 48-3-601(2)(b)(4) (concerning consent to adoption) are to be read disjunctively, each being an alternative to the other. While the statute is complexly written,

the coordinating conjunction between the phrases falls properly before the last in the list, and the absence of "or" between the first two sub-parts does not mean that the two are read together.

2. Adoption— reasonableness of putative father's support— child support guidelines

It was within the trial court's discretion in an adoption case to calculate the putative father's probable support requirements under the statutory guidelines to use as a baseline for determining the reasonableness and consistency of the putative father's support payments. A child support order or written agreement is not the sole measure of reasonableness and consistency for this determination.

3. Adoption— support provided by putative father—consent of putative father needed

There was no error in the trial court's conclusion that the consent of the putative father was needed for adoption of a child where defendants did not assign error to the court's findings regarding support provided by the father, and those findings supported the conclusion that his payments were reasonable and consistent.

Appeal by defendants from an order entered 17 October 2003 by Judge Robert J. Stiehl, III in Cumberland County District Court. Heard in the Court of Appeals 19 October 2004.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendants-appellants Terence and Cynthia Lillich.

Hedahl & Radtke, by Debra J. Radtke, for plaintiff-appellee Walter Miller.

ELMORE, Judge.

Defendants appeal from an order determining that plaintiff's consent was necessary before defendants could adopt their daughter's child. After careful review, we affirm the order of the district court requiring plaintiff's consent before adoption proceedings could go forth.

The evidence presented before the trial court tended to show that while defendants' daughter, R.L., was still a minor, she and Walter Miller (plaintiff) began having a consensual sexual relationship. After

plaintiff and R.L. had been in a monogamous sexual relationship for approximately six months, the two conceived a child in May 2001. Although plaintiff and R.L. were "both really scared," plaintiff later assured R.L. that "it would be okay."

Defendants, Terence and Cynthia Lillith, R.L.'s parents, brought an action in district court to determine whether plaintiff's consent was necessary for their adoption of the child. The district court initially determined that it was, but later granted defendants' motion for a new trial on the basis of newly discovered evidence regarding plaintiff's wages and payments. At the new trial, Judge Stiehl determined that plaintiff's consent was necessary under N.C. Gen. Stat. § 48-3-601 and entered an order consistent with that determination. Defendants appeal from that order.

Both parties agree that (1) N.C. Gen. Stat. § 48-3-601 is the controlling statute; (2) this adoption is a direct placement; (3) the minor's consent is not required since the child is under the age of 12; and (4) the mother's consent is necessary. The only dispute regards the consent of the father, plaintiff. The controlling statute on determining whether the consent of a putative father is necessary to an adoption, N.C. Gen. Stat. § 48-3-601 (2003) states in pertinent part:

> [A] petition to adopt a minor may be granted only if consent to the adoption has been executed by:
>
> (1) . . .
>
> (2) . . .
>
> a. . . .
>
> b. Any man who may or may not be the biological father of the minor but who:
>
> 1. . . .
>
> 2. . . .
>
> 3. . . .
>
> 4. Before the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206, has acknowledged his paternity of the minor **and**
>
> I. Is obligated to support the minor under written agreement or by court order;

II. Has provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both; **or**

III. After the minor's birth but before the minor's placement for adoption or the mother's relinquishment, has married or attempted to marry the mother of the minor by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid; or

5. . . .

Id. (emphasis added)

[1] Defendants first argue that the three sub-parts of N.C. Gen. Stat. § 48-3-601(2)(b)(4) are to be read conjunctively and not disjunctively; specifically they argue that the first two sub-parts must be read together as if connected by the word "and," leaving subpart three as an alternative to one and two together. The trial court determined that plaintiff met the requirements of N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) and ordered his consent necessary. Defendants argue that while plaintiff *may* have met sub section (2)(b)(4)(II), he clearly did not meet sub-part (I) of the same, i.e., he is not "obligated to support the minor under written agreement or by court order[.]" N.C. Gen. Stat. § 48-3-601(2)(b)(4)(I) (2003). Defendants would read sub-parts (I) and (II) together, and since plaintiff was not bound by an order or agreement then his consent to the adoption was not required under the statute.

We cannot agree with this interpretation of the statute. This is admittedly a complexly written statute, but nonetheless, the subparts of subsection (2)(b)(4) by their plain language suggest that they should be read disjunctively, each being an alternative to the other. *See, e.g., In re Adoption of Byrd*, 354 N.C. 188, 552 S.E.2d 142 (2001); *In re Adoption of Shuler*, 162 N.C. App. 328, 590 S.E.2d 458 (2004). The absence of "or" between sub-parts (I) and (II) does not mean the two are read together. To the contrary, when listing more than two

phrases, the coordinating conjunction between them all falls properly before the last phrase in the list; so that it is "1 . . . ; 2 . . .; *or* 3 . . . ." A man who has acknowledged paternity does not need to be both "obligated to support the minor under written agreement or by court order" *and* to make reasonable and consistent payments, just one *or* the other. This is the plain language of the statute.

[2] Defendants next argue that without having a written agreement or child support order the trial court could not determine whether plaintiff's payments were sporadic or consistent, nor could it determine whether they were frivolous or reasonable. This argument is without merit as well. It is not necessary to determine whether plaintiff "has provided, in accordance with his financial means, reasonable and consistent payments" of support, as required by N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) (2003), solely by looking at a child support order or agreement. Nonetheless, the trial court did attempt to calculate plaintiff's probable support requirements under our statutory guidelines as a baseline for determining whether the payments made were reasonable and consistent. Although such a measure is not required by the statute, it was within the trial court's discretion to make its determination of reasonableness based on the comparison.

[3] Finally, defendants argue that the trial court erred by determining that the actual support payments made by plaintiff were "reasonable and consistent." Yet, defendants do not assign error or take exception to any findings of fact in the trial court's order. Accordingly, the court's findings are deemed conclusive and binding on this Court. *See Shuler*, 162 N.C. App. at 331, 590 S.E.2d at 460. Considering that, the trial court made numerous findings that are sufficient to support its conclusions of law, particularly findings number 10 and 11.

> 10. The Plaintiff provided financial support for R.L. during the term of her pregnancy, to include payment of doctor's bills for the pregnancy testing and the purchase of necessary items for the child's future use. He purchased those items for the child separately from his family, who provided their own gifts to the child at two showers hosted by them for the Defendant mother prior to the child's birth.
>
> 11. Plaintiff has continued to provide support for both R.L. and the child after the child's birth through both the payment of cash in the amount of at least $100.00 per month since the child's birth, and the continuing provision of items such as diapers and medi-

cine for the child. This financial support, in light of the Plaintiff's limited financial means, is reasonable and consistent and has been in excess of that which would be required by the child support guidelines. If Plaintiff were employed full time earning minimum wage, his child support obligation under the statutory guidelines would be $57.00 per month. R.L. acknowledged in this hearing that she had previously testified that Walter Miller had provided everything she had indicated the child needed, with the exception of some bibs.

We cannot find error in the trial court's conclusion that plaintiff's payments were reasonable and consistent, and as such his consent was necessary to the child's adoption by defendants.

We find no error in the trial court's determination and affirm its order requiring plaintiff's consent to adoption.

Affirmed.

Judges MARTIN and McCULLOUGH concur.

INDIAN ROCK ASSOCIATION, INC., A NORTH CAROLINA NON-PROFIT CORPORATION, PLAINTIFF v. MARVIN L. BALL, JR., AND WIFE, IRENE F. BALL, DEFENDANTS

No. COA04-175

(Filed 21 December 2004)

1. Associations— maintenance of subdivision common areas and facilities—standing—authority to collect assessments

The trial court did not err by granting plaintiff association's motion for summary judgment even though defendant subdivision property owners assert that plaintiff does not have legal authority to collect assessments from defendants and consequently no standing to assert a claim for those assessments, because: (1) the subdivision developer conveyed subdivision streets and parks to plaintiff; (2) plaintiff maintains the subdivision common grounds and facilities and enforces compliance with covenants and restrictions placed on all lots within the subdivision; (3) in order to fulfill its obligation, plaintiff was sanctioned to, and did, collect funds from all subdivision property owners; and (4) plaintiff's inability to collect assessments from

property owners injures the association in its ability to carry out these duties.

2. Appeal and Error— preservation of issues—failure to raise at trial

Although defendant subdivision property owners contend the trial court erred by allowing plaintiff association's motion for summary judgment even though defendants contend the covenants based on which plaintiff sought to collect assessments are too vague to be enforceable, this assignment of error is dismissed because: (1) defendants failed to raise this issue before the trial court; and (2) nothing in defendants' assignments of error nor anything else in the record raises this issue.

Appeal by Defendants from orders entered 6 November 2003 by Judge Alfred W. Kwasikpui in District Court, Northhampton County. Heard in the Court of Appeals 2 November 2004.

William T. Skinner, IV, for plaintiff-appellee.

Hux, Livermon & Armstrong, L.L.P., by H. Lawrence Armstrong, Jr., for defendant-appellants.

WYNN, Judge.

Defendants Marvin L. Ball, Jr. and Irene F. Ball appeal from orders entered 6 November 2003 allowing Plaintiff Indian Rock Association, Inc.'s motion for summary judgment and denying the Balls' motion to dismiss. After careful review, we affirm the trial court's orders.

The procedural and factual history of the instant appeal is as follows: Indian Rock Association is a non-profit corporation organized and chartered in May 1971 for the purposes of maintaining the Indian Rock Subdivision's common grounds and facilities and enforcing compliance with covenants and restrictions placed on all lots within the subdivision. These covenants and restrictions were imposed by Lakeside Realty Company, Inc., which developed the Indian Rock Subdivision. As Indian Rock Association and the Balls stipulated and agreed in their pretrial conference on 9 June 2003, a 1968 affidavit executed by Lakeside Realty stated that "the buyer [of any Indian Rock Subdivision lot] shall promptly pay $10.00 to the Indian Rock Association and all other assessments which become due after the date of sales contract." Moreover, the affidavit stated that a buyer "is

entitled to full enjoyment of the Association's common properties subject to" certain recorded restrictions and covenants. The parties further stipulated and agreed that all Indian Rock Subdivision lots, including those owned by the Balls, are subject to those covenants, restrictions, and assessments.

In December 1971, Lakeside Realty recorded a deed conveying certain streets and parks to Indian Rock Association. Indian Rock Association owns no subdivision lots or property other than those streets and parks. In May 1976, an amendment to the Indian Rock bylaws was recorded; attached thereto was a Lakeside Realty resolution transferring all of its rights, title, and privileges in the restrictive covenants previously held by Lakeside Realty to Indian Rock Association.

Mr. Ball participated in Indian Rock Association's corporate activities from 1982 until at least 1984 as a member of Indian Rock Association's Board of Directors and at least one committee. Moreover, the Balls paid assessments on their lots until at least 1987. The Balls have since refused to pay dues and assessments to Indian Rock Association despite numerous demands. Indian Rock Association therefore filed an action similar to the case at bar on or around 27 July 1990. After a ruling in favor of Mr. Ball, Indian Rock Association voluntarily dismissed the case.

Indian Rock Association filed the instant action on 5 November 1998, seeking monetary assessments against the Balls. The Balls filed motions to dismiss. Indian Rock Association and the Balls entered into a pretrial conference order including substantial fact stipulations. Following a hearing on 25 August 2003, the trial court denied the Balls' motion to dismiss and granted summary judgment in favor of Indian Rock Association. The Balls appealed.

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[1] The Balls first contend that the trial court committed reversible error in allowing Indian Rock Association's motion for summary judgment because Indian Rock Association did not have legal authority to collect assessments from the Balls and consequently no standing to assert a claim for those assessments. We disagree.

Whether Indian Rock Association has standing is a question of law and thus reviewed *de novo* by this Court. *Lee Ray Bergman Real Estate Rentals v. N.C. Fair Hous. Ctr.*, 153 N.C. App. 176, 179, 568 S.E.2d 883, 885 (2002). "To bring suit on its own behalf, an association need only meet the 'irreducible constitutional minimum' of a suffi-

cient stake in a justiciable case or controversy." *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 168, 552 S.E.2d 220, 227 (2001) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L. Ed. 2d 351 (1992) (the "irreducible constitutional minimum" of Article III of the U.S. Constitution requires plaintiff who wishes to pursue claim in federal court to demonstrate (1) injury in fact, (2) causal relationship between injury and conduct complained of, and (3) likelihood that injury would be redressed by favorable verdict); *Transcon. Gas Pipe Line Corp. v. Calco Enter.*, 132 N.C. App. 237, 511 S.E.2d 671 (1999)).

Here, Lakeside Realty, the subdivision developer, conveyed subdivision streets and parks to Indian Rock Association. Indian Rock Association maintains the subdivision common grounds and facilities and enforces compliance with covenants and restrictions placed on all lots within the subdivision. In order to fulfill its obligations, Indian Rock Association was sanctioned to, and did, collect funds from all subdivision property owners, including, for numerous years, the Balls. Clearly, Indian Rock Association's inability to collect assessments from property owners

> injures the association in its ability to carry out th[ese] dut[ies]. The injury is causally connected to the defendant[s'] alleged behavior, and likely would be redressed by a favorable verdict in this action. Therefore, we hold that on the facts of this case, the association had standing to bring this suit[.]

Creek Pointe Homeowner's Ass'n, 146 N.C. App. at 168-69, 552 S.E.2d at 227.[1]

[2] The Balls next argue that the trial court committed reversible error in allowing Indian Rock Association's motion for summary judgment because the covenants based on which Indian Rock Association sought to collect assessments are too vague to be enforceable. However, "Defendant[s] 'cannot assert this on appeal because [they] failed to raise this issue before the trial court[.]' " *Crist v. Crist*, 145 N.C. App. 418, 423, 550 S.E.2d 260, 264 (2001) (quoting *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 650, 535 S.E.2d 55, 64 (2000),

1. The Balls rely heavily on *Beech Mountain Property Owners' Assoc. v. Current*, 35 N.C. App. 135, 240 S.E.2d 503 (1978) in arguing that Indian Rock lacks standing. This reliance is, however, misplaced. In contrast with the case *sub judice*, the Beech Mountain Property Owners' Association owned no subdivision property and was not authorized to enforce restrictions on lot owners.

disc. review denied, 353 N.C. 370, 547 S.E.2d 2 (2001)); N.C. R. App. P. 10. While the Balls cite to their Assignments of Error Nos. 1 and 2 for this proposition, nothing in their Assignments of Error nor anything else in the record before this Court raises this issue. Whether the covenants based on which Indian Rock Association sought to collect assessments are too vague to be enforceable is therefore not properly presented for our consideration.

In sum, we affirm the trial court's order granting Indian Rock Association's motion for summary judgment.

Affirmed.

Judges HUDSON and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 21 DECEMBER 2004

BLACK v. HAMRICK No. 04-428	Buncombe (03CVS2210)	Vacated
BURT v. N.C. DEP'T OF CORR. No. 04-60	Ind. Comm. (TA-17293)	Affirmed
C.F. LITTLE DEV. CORP. v. N.C. NATURAL GAS CORP. No. 03-1383	Cabarrus (01CVS2068)	Affirmed
CITY OF GASTONIA v. HAYES No. 04-440	Gaston (01CVS2343)	Reversed
COOK v. COFFEY No. 03-1528	Madison (02CVS170)	Affirmed
CUNNINGHAM v. SAMS No. 03-1719	Davidson (01CVD3362)	Affirmed
ELLIOTT v. FOOD LION, L.L.C. No. 03-1705	New Hanover (01CVS3706)	Affirmed
ESTATE OF ANDERSON v. DANA CORP. No. 04-96	Ind. Comm. (I.C.016368)	Affirmed
GALLIS v. M&R INVESTORS No. 03-1683	Mecklenburg (01SP3391) (02SP1197)	Reversed
GODWIN v. BARNES No. 04-257	Wilson (02CVS1224)	No error
IN RE C.D.M. & J.A.F.D. No. 03-1701	Buncombe (03J27) (03J28)	Affirmed
IN RE D.C. & M.L. No. 04-569	Buncombe (02J77)	Affirmed
IN RE D.W. No. 04-222	Mecklenburg (00J1022)	Appeal dismissed
IN RE E.L. No. 04-13	Buncombe (02J291)	Affirmed
IN RE H.D. & J.B. No. 03-1492	Cumberland (02J255) (02J256)	Reversed and vacated in part; affirmed in part
IN RE J.M.H. No. 03-1533	Person (02J31)	Affirmed

IN RE L.G. No. 04-456	Harnett (01J61)	Affirmed
IN RE M.K. No. 03-1605	Brunswick (02J136)	Affirmed
IN RE P.S. No. 03-1510	Johnston (01J182)	Affirmed
IN RE R.H. No. 04-486	Mecklenburg (01J1173)	Affirmed
IN RE R.P., P.P. & M.P. No. 04-38	Pitt (00J206) (00J207) (00J208)	Vacated and remanded
IN RE T.D.C. No. 03-1564	Brunswick (02J210)	Affirmed
IN RE T.H. & T.H. No. 04-405	Cabarrus (02J217) (02J218)	Affirmed in part; reversed and remanded in part
JIMMY LEWIS CONTR'G, INC. v. PEARMAN No. 03-1643	Person (99CVD342)	Affirmed in part, reversed in part
KING v. POPKINS & ASSOCS. No. 03-1405	Onslow (01CVS3960)	Affirmed
LAIRD v. CARROLL No. 03-1225	Buncombe (00CVD6405)	Affirmed
LANIER v. LANIER No. 04-99	Duplin (01SP42)	Affirmed
MEHRIZI v. ROMERO-BAEZA No. 04-20	Mecklenburg (03CVD9934)	Remanded for new trial
NORFOLK S. RY. CO. v. DAVID WILSON PAINT & BODY SHOP, INC. No. 03-1394	Gaston (99CVS1538)	Affirmed
O'BEID v. EASTWOOD No. 04-457	Pitt (01CVS2655)	Affirmed
SEABOARD CONTAINER CLEANING, LLC. v. FOUR SEASONS ENVTL., INC. No. 03-1367	Guilford (02CVS10097)	Affirmed in part, dismissed in part
SHAFMAN v. DONALD LARSON, INC. No. 03-1214	Orange (00CVS1735)	Affirmed in part; no error in part; remanded in part

SHERWIN v. CAPE FEAR VALLEY HEALTH SYS., INC. No. 04-513	Ind. Comm. (I.C.123003)	Dismissed
SIDBURY v. JACOBS No. 03-1473	Pender (01CVD17)	Reversed and remanded
SMITH v. MURRELL No. 03-1373	New Hanover (01CVS3559)	Affirmed
SOUTHERN INV. PROPS., LLC v. WATSON No. 04-49	Burke (02CVS1538)	Affirmed
SPERNOCK v. TS HENSON BUILDERS, INC. No. 03-1243	Union (01CVS1318)	Reversed and remanded
SPICER v. NEW HANOVER REG'L MED. CTR. No. 04-91	Ind. Comm. (I.C.558162) (I.C.721983)	Affirmed
STATE v. ANDERSON No. 03-1524	Alamance (02CRS55447)	No error
STATE v. ARNOLD No. 04-460	Harnett (02CRS57048)	No error
STATE v. BAKER No. 04-153	Iredell (98CRS8538) (98CRS8539) (98CRS8540) (98CRS13466)	No error
STATE v. BECOATS No. 04-235	Buncombe (03CRS6965) (03CRS6966) (03CRS6967) (03CRS53456) (03CRS53457) (03CRS53458) (03IFS6079)	No error
STATE v. BEDFORD No. 04-493	Wayne (03CRS51040)	No error in part; reversed in part, and remanded
STATE v. CHANCE No. 04-606	Cumberland (02CRS54074)	No error
STATE v. CHAPMAN No. 04-242	Guilford (02CRS91696) (02CRS91697) (02CRS91698)	No error

	(02CRS91699) (02CRS23712) (02CRS23713) (02CRS93444)	
STATE v. CLAYTON No. 03-1585	Durham (02CRS40671)	No error
STATE v. COLEMAN No. 04-490	Guilford (02CRS102742) (02CRS102747)	No error
STATE v. CONWAY No. 04-349	Wake (03CRS57101)	No error
STATE v. CORNETT No. 04-85	Catawba (01CRS51928)	No error
STATE v. CUNNINGHAM No. 03-1713	Wake (02CRS47332) (02CRS47333)	No error in part; vacated in part
STATE v. GARZA No. 03-1330	Wake (02CRS31079) (02CRS38982)	Affirmed
STATE v. HACKER No. 04-212	Craven (03CRS53131)	No prejudicial error; remanded for correction of clerical error in judgment
STATE v. HAWKINS No. 03-1587	Mecklenburg (02CRS215147)	No error
STATE v. HILTON No. 04-512	Mecklenburg (02CRS81539)	Affirmed
STATE v. HOBBS No. 04-507	Wayne (02CRS060641)	No error
STATE v. JOHNSON No. 03-1694	Cumberland (02CRS53465)	Affirmed
STATE v. KEITT No. 04-9	Montgomery (00CRS50499)	No error in defendant's trial; vacated and remanded as to attorney's fees
STATE v. MANNING No. 03-1674	Forsyth (02CRS26859) (02CRS58703) (02CRS58759)	No error
STATE v. MYERS No. 04-437	Forsyth (02CRS62914)	No error

STATE v. PATRICK No. 03-1320	Forsyth (01CRS40375) (01CRS62182) (02CRS20683)	New trial in part, no no error in part, and remand for resentencing
STATE v. SANTA-MARIA No. 04-19	Wake (02CRS49345)	No error
STATE v. SNEED No. 02-1746-2	New Hanover (02CRS3556) (02CRS4649)	Affirmed
STATE v. TINSLEY No. 04-400	Rockingham (03CRS50885)	No error
STATE v. WILLIAMS No. 03-1452	Guilford (01CRS103482) (01CRS103483) (01CRS103484) (01CRS103485) (01CRS103486) (01CRS103487) (01CRS103488) (01CRS103489) (01CRS103490) (01CRS103492)	No error
WESTERHOLD v. DESIGNER'S WAY, INC. No. 04-262	Wake (02CVS12706)	Affirmed

JAMES W. WHITE, EMPLOYEE, PLAINTIFF v. WEYERHAEUSER COMPANY, EMPLOYER, SELF-INSURED, DEFENDANT

No. COA03-1337

(Filed 4 January 2005)

1. Appeal and Error— preservation of issues—failure to raise sufficiency of evidence—findings of fact binding

Defendant employer failed under both the former and current Rules of Appellate Procedure to raise on appeal the sufficiency of the evidence to support the Commission's findings of fact, and therefore, the findings of fact are binding on appeal. N.C. R. App. P. 10(c)(1).

2. Workers' Compensation— refusal of suitable employment—involuntary resignation

The Industrial Commission did not err in a workers' compensation case by failing to conclude that plaintiff employee refused suitable employment pursuant to N.C.G.S. § 97-32 based on plaintiff's tendering his resignation, because: (1) plaintiff's conduct did not constitute constructive refusal of employment when the Commission found that plaintiff did not voluntarily resign from his employment, and thus his termination from employment must be analyzed pursuant to *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228 (1996); (2) when an employee resigns in the face of imminent termination of his employment, the Commission may conclude that the employee's employment ended involuntarily but it does not have to do so if it does not believe that the resignation was in fact forced by the employer's termination decision; (3) evidence supports plaintiff's assertion that he was going to be fired since defendant failed to properly assign error to the Commission's findings of fact; and (4) the evidence does not show that plaintiff was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee ordinarily would have been terminated.

3. Workers' Compensation— temporary total disability—partial disability

The Industrial Commission did not err by awarding plaintiff worker temporary total disability benefits from 26 July 2001 through 7 January 2002 and partial disability benefits beginning 8 January 2002, because: (1) the fact that an employee is capable of performing employment tendered by the employer is not, as a

matter of law, an indication of plaintiff's ability to earn wages; (2) any claim that there is no disability if the employee is receiving the same wages in the same or other employment is correct only so long as the employment reflects the employee's ability to earn wages in the competitive market; (3) absence of medical evidence does not preclude a finding of disability; and (4) there was competent evidence in the record to support the Commission's finding that plaintiff had demonstrated a reduced wage earning capacity.

Appeal by defendant from Opinion and Award filed 14 July 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 May 2004.

Kellum Law Firm, by J. Kevin Jones, for plaintiff-appellee.

Ward and Smith, P.A., by S. McKinley Gray, III and James R. Cummings, for defendant-appellant.

GEER, Judge.

Defendant Weyerhaeuser Company appeals from the Full Commission's Opinion and Award awarding temporary disability benefits to plaintiff James W. White. Weyerhaeuser argues primarily that White's resignation of his position with Weyerhaeuser precluded any award of disability benefits. Because the Commission found that White's resignation was not voluntary, but rather was in response to Weyerhaeuser's expressed intent to terminate his employment, we hold that the Commission properly analyzed this case under *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996).

Standard of Review

In reviewing a decision by the Commission, this Court's role "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). Under N.C.R. App. P. 10(a), our review is further limited to those findings of fact and conclusions of law properly assigned as error.

[1] In this case, apparently operating based on an outdated version of our Appellate Rules, Weyerhaeuser has assigned error only to certain conclusions of law, but under each of the assignments of error has

listed "Defendant's Exception[s]," referring to "exception[s]" typed onto a copy of the Commission's Opinion and Award. Nowhere in Weyerhaeuser's assignments of error or in the typewritten exceptions does the company state any specific reason that the findings of fact are in error.

The former version of Rule 10 of our Rules of Appellate Procedure "require[d] that all assignments of error should be followed by a listing of the exceptions on which they are based, and that these exceptions should be identified by the pages of the record at which they appear." *Peoples Serv. Drug Stores, Inc. v. Mayfair, N. V. (Micora, N. V.)*, 50 N.C. App. 442, 446, 274 S.E.2d 365, 368 (1981). It appears that Weyerhaeuser has adhered to the procedure set forth in this older version of the Rule.

In 1988, Rule 10 was amended "to put an end to the formality of marking exceptions in the transcript of the proceedings as formerly required by Rule 10(b)(2). Accordingly, the language of the former Rule 10(b)(2), requiring that the record on appeal reflect a separate exception for each finding of fact assigned as error, was deleted from the current version of Rule 10(b)(2)." *State v. Canady*, 330 N.C. 398, 404-05, 410 S.E.2d 875, 879 (1991) (Meyer, J., dissenting). The current Rule 10 provides:

> A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal, in short form without argument, and shall be separately numbered. Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references. Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

N.C.R. App. P. 10(c)(1).

Under this rule, an appellant is required to specifically assign error to each finding of fact that it contends is not supported by competent evidence. "[F]indings of fact to which [an appellant] has not assigned error and argued in his brief are conclusively established on appeal." *Static Control Components, Inc. v. Vogler*, 152 N.C. App.

599, 603, 568 S.E.2d 305, 308 (2002). Thus, "[a] single assignment [of error] generally challenging the sufficiency of the evidence to support numerous findings of fact . . . is broadside and ineffective" under N.C.R. App. P. 10. *Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 266, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). Since Weyerhaeuser has failed to challenge the sufficiency of the evidence to support the Commission's specific findings of fact, they are binding on appeal under the current rules.

In any event, a review of older cases applying the former rules reveals that, even under those rules, Weyerhaeuser has failed to properly present for appellate review the adequacy of the evidence to support the Commission's findings of fact. Under the former procedure, when, as here, assignments of error challenged only a conclusion of law, but listed under those assignments of error exceptions to specific findings of fact, the assignments of error "raise[d] only the question whether the facts found support the judgment, or whether error of law appears on the face of the record." *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 662, 158 S.E.2d 840, 842 (1968). *See also Dobias v. White*, 240 N.C. 680, 689, 83 S.E.2d 785, 791 (1954) (appellant required to list a separate assignment of error for each finding of fact that appellant contends was not supported by evidence).

Weyerhaeuser has thus failed under both the former and current rules to raise on appeal the sufficiency of the evidence to support the Commission's findings of fact. The Commission's findings of fact are, therefore, binding on appeal.

Facts

White began working for Weyerhaeuser as a utility person on 15 August 1988. He received several promotions and in December 2000 held the position of night shift lead maintenance technician at Weyerhaeuser's New Bern sawmill plant. On 12 December 2000, White was working on a ladder when the ladder shook underneath him and he fell. He twisted his body and reached behind him with his right arm in an attempt to catch himself as he hit the floor. The safety incident investigation report stated that the cause of the accident was an insecure grip or hold and defective or unsafe equipment; it also noted that the floor had rain, oil, and grease on it.

Immediately after his fall, White's right thumb was bleeding and his right arm was numb. Since the plant nurse did not work during the

night shift, White's shift supervisor, Don O'Neal, wrapped the thumb to stop the bleeding and had White sit in the office for the remaining three hours and 45 minutes of the shift. The Commission found that O'Neal filled out an incident report, but denied White's request for immediate medical treatment for his shoulder and thumb.

After White's shift ended at 6:00 or 7:00 a.m., he went home and slept. When he awoke at 1:00 p.m., his thumb was still bleeding and his shoulder was sore. White went to Eastern Carolina Internal Medicine Urgent Care, the medical facility designated by Weyerhaeuser in its policy handbook for treatment of work-related injuries. White received stitches in his thumb and pain medication for his shoulder.

On 13 December 2000, White received a letter of reprimand, labeled as a "Group II" violation, from his supervisor Buddy Taylor for "failure to obey written or oral instructions" and for engaging in horseplay. White testified he received the reprimand because he did not notify Taylor or Jean Matthews, a human resources employee, of the accident and because he went to the doctor without first going to the company nurse.

The New Bern sawmill plant rules divide rule violations into two types—Group I or Group II—based on the seriousness of the offense. Group I violations are subject to progressive discipline, including: (1) an oral warning, (2) a written reprimand, (3) a three-day layoff and final warning, and (4) a suspension followed by further disciplinary action, up to and including discharge. Group II violations are subject only to step 4.

White returned to work at Weyerhaeuser on light duty, but his shoulder continued to hurt. In early February 2001, he was referred to Dr. Mark Wertman, an orthopedic surgeon, who ordered an MRI on White's shoulder. The MRI revealed that White had a torn rotator cuff. On 30 March 2001, Dr. Wertman performed successful surgery on White's shoulder to repair the torn rotator cuff.

Weyerhaeuser admitted compensability of White's injury by filing a Form 60 ("Employer's Admission of Employee's Right to Compensation Pursuant to NC Gen. Stat. § 97-18(b)") on 11 April 2001.

After the surgery, White initially was unable to work and received temporary total disability benefits. Weyerhaeuser wrote Dr. Wertman correspondence within one week of the surgery requesting that White be returned to light duty work. White returned to work on 9 April

2001, again on a light duty basis, with restrictions on driving, lifting, and using his right arm. On 14 June 2001, Dr. Wertman advised White to do no overhead lifting and to lift a maximum of 15 pounds at waist level.

In June 2001, White received a second reprimand for a Group II violation for failure to obey written or oral instructions. White testified that he received the reprimand for leaving a message with his supervisor, Buddy Taylor, rather than speaking with him personally to request time off to take care of affairs related to the death of his father. White received approved leave to be with his father in the week preceding his father's death. Upon his father's death, he spoke with his unit leader at the plant, seeking additional time. White testified that he believed a unit leader had the authority to grant such leave and that the leave had been granted. The Commission found (1) that Weyerhaeuser presented no evidence to show that White's beliefs in this regard were incorrect and (2) that the agreement between Weyerhaeuser and the union does not specify notification requirements for funeral leave apart from requiring proof of a relationship with the deceased. When White returned to work, he presented Taylor with his father's obituary, but Taylor required that he obtain his father's hospital records in order to be paid for the leave.

As White's shoulder continued to improve, he was allowed to use it more at work, and his hours gradually increased. White's restrictions were changed to permit lifting of 25 pounds at waist level by 10 July 2001. The Commission found that in July 2001, White was able to resume his normal work hours and earn his former wages. Weyerhaeuser, however, continued to provide him with a helper to assist him with tasks he was unable to perform.

On 25 July 2001, White was performing maintenance on a sawdust conveyer along with two other maintenance technicians, Steve Roper and Felicia James. Weyerhaeuser had a "lockout" safety procedure that required each employee performing maintenance on equipment to place his or her personal padlock on the power control device for the equipment in order to prevent the equipment from being turned on. After White and the other technicians had finished tightening the chains on the conveyor, a lead person, Milton Craft, approached and asked them to remove their locks from the conveyor's power control device. White and Roper removed their locks and were waiting for James to return and remove her lock. While they were waiting, Taylor approached White and asked what they were doing. When White told him that they had been tightening the conveyor chains, Taylor asked

how tight the chain was. White reached into the machine and shook the chain to demonstrate. White testified that the machine could not have been operated at the time because James' lock, which was in full view of White and Taylor, was still on the power control device.

Although Taylor made no objection at the time, he returned an hour later and informed White that when he reached into the machine without his lock being on the machine, he had committed a "lockout violation." White, who was a member of Local 1325 of the Paper, Allied-Industrial, Chemical and Energy Workers International Union AFL-CIO, filed a grievance with the union.

The day after the "lockout violation," White was called in to talk to his union president and shop steward. They notified him that Weyerhaeuser was going to send him home and terminate him for having received three Group II violations. Under the issue resolution procedure clause of the agreement between Weyerhaeuser and the union, the union shop steward was involved in negotiating grievances and received copies of all reprimands. The union representatives advised White that it would be in his interest to resign rather than have a termination on his record. Based on this advice, White tendered a letter of resignation to Weyerhaeuser on the same day.

White had been employed at Weyerhaeuser for 12 years prior to his injury, and in that time, he had received only one reprimand. In the seven months following his injury, White received two Group II reprimands and anticipated a third Group II reprimand on the day he resigned. The Commission found that no evidence was presented to show that a nondisabled employee would have been reprimanded for similar violations.

After he resigned, White began looking for other work. For approximately five months, White applied for various jobs, both directly and through the Employment Security Commission. Some of the companies informed him that they did not have any work for him because he was still on light-duty restrictions.

Dr. Wertman released White from his care on 22 October 2001, concluding that he had reached maximum medical improvement with a five percent impairment of his right arm and no impairment of his thumb as a result of the accident. White was unable to find employment until 8 January 2002, when he began working for Kopeland Construction Company at $8.00 per hour as a general laborer. White left Kopeland for a permanent job with E & J Automotive, also at

$8.00 per hour, where he remained employed as of the hearing before the Deputy Commissioner. The Commission found that "[b]oth jobs paid considerably lower wages than he had earned while working for defendant."

After White's resignation, Weyerhaeuser refused to pay temporary total disability benefits, and White requested that his claim be assigned for hearing. On 29 August 2002, Deputy Commissioner Morgan S. Chapman filed an Opinion and Award denying White's claim for additional compensation. White appealed to the Full Commission. In an Opinion and Award filed on 14 July 2003, the Commission concluded that as a result of his compensable injury by accident, White was disabled and was entitled to compensation for total disability benefits for the period between 26 July 2001 and 7 January 2002 and for partial disability benefits beginning 8 January 2002 and continuing for 300 weeks from the date of injury or until White began earning the same wage as he made on 12 December 2000. Weyerhaeuser filed timely notice of appeal to this Court.

I

[2] Weyerhaeuser contends that the Full Commission erred in failing to conclude that by tendering his resignation, White refused suitable employment pursuant to N.C. Gen. Stat. § 97-32 (2003). That section provides:

> If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified.

N.C. Gen. Stat. § 97-32. "The burden is on the employer to show that plaintiff refused suitable employment." *Gordon v. City of Durham*, 153 N.C. App. 782, 787, 571 S.E.2d 48, 51 (2002).

In applying the statute, the first question is whether the plaintiff's employment was voluntarily or involuntarily terminated. If the termination is voluntary and the "employer meets its burden of showing that a plaintiff unjustifiably refused suitable employment, then the employee is not entitled to any further benefits under N.C. Gen. Stat. §§ 97-29 or 97-30." *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 354-55, 581 S.E.2d 778, 787 (2003). If the departure is determined to be involuntary, the question becomes whether the termination amounted to a constructive refusal of suitable work

under *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996).[1]

As this Court explained in *Seagraves*:

> [W]here an employee, who has sustained a compensable injury and has been provided light duty or rehabilitative employment, is terminated from such employment for misconduct or other fault on the part of the employee, such termination does not automatically constitute a constructive refusal to accept employment so as to bar the employee from receiving benefits for temporary partial or total disability. Rather, the test is whether the employee's loss of, or diminution in, wages is attributable to the wrongful act resulting in loss of employment, in which case benefits will be barred, or whether such loss or diminution in earning capacity is due to the employee's work-related disability, in which case the employee will be entitled to benefits for such disability.

123 N.C. App. at 233-34, 472 S.E.2d at 401. In cases involving an involuntary termination, "the employer must first show that the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated." *Id.* at 234, 472 S.E.2d at 401. If the employer meets its burden, "the employee's misconduct will be deemed to constitute a constructive refusal to perform the work provided and consequent forfeiture of benefits for lost earnings, unless the employee is then able to show that his or her inability to find or hold other employment of any kind, or other employment at a wage comparable to that earned prior to the injury, is due to the work-related disability." *Id.*

Weyerhaeuser argues that *Seagraves* is inapplicable in this case because White was not terminated, but rather voluntarily resigned. Because Weyerhaeuser bore the burden of proving that White refused suitable employment, it bore the burden of proving that White rejected his job by voluntarily resigning. Weyerhaeuser chose not to offer any evidence on this issue, but rather to rely only on cross-examination of White. After reviewing the evidence, the Commission rejected Weyerhaeuser's factual contentions and found that White's termination of employment was not voluntary:

> 29. Plaintiff reported for work on July 26, 2001 and was approached by the union president and union shop steward who

1. The Supreme Court has expressly approved the *Seagraves* analysis. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 495, 597 S.E.2d 695, 700 (2004).

informed plaintiff that he was to be sent home and then terminated for having received three Group II violations. Under the Issue Resolution Procedure Clause of the Agreement between Weyerhaeuser New Bern Sawmill and AFL-CIO, the shop steward was involved in negotiating disputes and copies of reprimands were provided to the union.

30. Plaintiff testified that he was advised by his union president and the shop steward that in lieu of having a termination on his record, it would be preferable for plaintiff to resign.

. . . .

32. On July 26, 2001, plaintiff submitted a written resignation to defendant. Plaintiff testified that he resigned based upon what his union representatives advised him to do.

. . . .

42. Plaintiff reasonably believed that he was to be terminated based upon the information he was given by the union president and union shop steward and he reasonably relied on that information as the bases for his resignation. Plaintiff's belief that termination was imminent was not rebutted by defendant at the hearing before Deputy Commissioner Chapman. The Full Commission finds that plaintiff's termination of employment was not voluntary, but rather was predicated on information from his union officials, as well as the witness report filed by his supervisor and his previous reprimands.

Since Weyerhaeuser did not properly assign error to these findings, they are binding on appeal. The question remains whether these findings support the Commission's conclusion that "[p]laintiff did not voluntarily resign from his employment on July 26, 2001, and thus his termination from employment must be analyzed pursuant to *Seagraves v. Austin Co. of Greensboro* . . . ."

Weyerhaeuser urges this Court to hold that *Seagraves* cannot ever apply when an employee has resigned. To do so would be to exalt form over substance in a manner inconsistent with the underlying purpose of the Workers' Compensation Act to "provide compensation to workers whose earning capacity is diminished or destroyed by injury arising from their employment." *Seagraves*, 123 N.C. App. at 233, 472 S.E.2d at 401. We hold that when an employee resigns

in the face of imminent termination of his or her employment, the Commission may conclude that the employee's employment ended involuntarily.

While our appellate courts have not previously addressed this issue in the workers' compensation context, we find guidance in opinions construing our unemployment statutes. Under the Employment Security Act, an employee is disqualified from receiving unemployment benefits if he or she leaves work voluntarily without good cause attributable to the employer. N.C. Gen. Stat. § 96-14(1) (2003). In *In re Werner*, 44 N.C. App. 723, 727, 263 S.E.2d 4, 7 (1980), this Court held that an employee's departure was not voluntary when she chose to resign rather than be terminated. Similarly, in *Bunn v. N.C. State Univ.*, 70 N.C. App. 699, 704, 321 S.E.2d 32, 35 (1984), *disc. review denied*, 313 N.C. 173, 326 S.E.2d 31 (1985), this Court held that a resignation was not voluntary when the plaintiff resigned in the face of the employer's decision to terminate her at a later date because of her inability to perform the job. This Court reasoned:

> Although [plaintiff] did have to make the ultimate choice not to return to work, still we cannot say that her decision was entirely free, or spontaneous. We agree with the court in *Dept. of Labor and Industry v. Unemployment Compensation Board of Review (In Re John Priest)*, 133 Pa. Super. 518, 3 A. 2d 211 (1938), that an individual's decision to leave work when informed of an imminent discharge or layoff is a consequence of the employer's decision to discharge and is not wholly voluntary.

Bunn, 70 N.C. App. at 702, 321 S.E.2d at 34. *See also In re Poteat*, 319 N.C. 201, 205, 353 S.E.2d 219, 222 (1987) (" '[A]n employee has not left his job voluntarily when events beyond the employee's control or the wishes of the employer cause the termination.' " (quoting *Eason v. Gould, Inc.*, 66 N.C. App. 260, 262, 311 S.E.2d 372, 373 (1984), *aff'd by equally divided court*, 312 N.C. 618, 324 S.E.2d 223 (1985))).

We believe that this analysis is equally appropriate in the workers' compensation context. If an employee resigns his job in the face of an imminent dismissal, then the Commission *may* reasonably find that the resignation is involuntary, as it did here. It is not, however, required to do so if it does not believe that the resignation was in fact forced by the employer's termination decision.

This approach is consistent with the policies underlying the Workers' Compensation Act. There is no question that had White

waited until Weyerhaeuser actually fired him, then the Commission could still have awarded benefits under the *Seagraves* test even if the termination was justified by misconduct. *McRae*, 358 N.C. at 495, 597 S.E.2d at 700. An employee may, however, wish to resign and preserve an otherwise positive work record rather than wait for an inevitable firing that could make it much more difficult to find other employment. *See Thomas v. D.C. Dep't of Labor*, 409 A.2d 164, 170 (D.C. 1979) (noting "[i]t is unquestionably true" that an employee, facing an imminent termination, reaps a benefit by quitting and "hav[ing] a less-than-perfect work record erased"). Weyerhaeuser would have us hold that by choosing to resign in order to enhance his employability, White should be completely blocked from receiving benefits, even though had he waited for the inevitable firing, he would still be eligible for benefits. We cannot see how making this distinction is consistent with the policies underlying the Workers' Compensation Act. *Cf. Werner*, 44 N.C. App. at 727, 263 S.E.2d at 7 ("Perceiving that well-intentioned employers may prefer to allow the unsuitable employee the dignity of resignation, we believe that there are strong public policy reasons for not discouraging employers from exercising this option.").

Weyerhaeuser also argues that there was no evidence in the record to support a finding that it was going to terminate White's employment. Since Weyerhaeuser did not object to White's testimony regarding what the union officials told him Weyerhaeuser had decided, that evidence supports White's assertion that he was going to be fired. Weyerhaeuser offered no contrary evidence even though the relevant decisionmaker was present and could have testified.[2] Instead, Weyerhaeuser asked the Commission to infer that White's resignation was premature from White's general testimony regarding company policies. This inference necessitated a leap that the Commission was not required to make. *Norman v. N.C. Dep't of Transp.*, 161 N.C. App. 211, 224, 588 S.E.2d 42, 51 (2003) ("The decision regarding which inference to draw was for the Commission and may not be overturned on appeal."), *disc. review denied*, 358 N.C. 235, 595 S.E.2d 153, *cert. denied*, 358 N.C. 545, 599 S.E.2d 404 (2004). In any event, since Weyerhaeuser failed to properly assign error to the Commission's findings of fact, this issue is not before us.

2. The Commission found that the record reflected that Taylor, White's supervisor, was present in the courtroom during the hearing before the Deputy Commissioner, but did not testify.

Since the Commission found White's resignation to be involuntary, it properly analyzed the case under *Seagraves*. When applying the *Seagraves* test:

> the Commission must determine first if the employer has met its burden of showing that the employee was terminated for misconduct, that such misconduct would have resulted in the termination of a nondisabled employee, and that the termination was unrelated to the employee's compensable injury. Assuming the employer has satisfied such burden, the Commission must then determine if the employee has demonstrated that her inability to perform work assignments for the employer, or to procure commensurate work from other prospective employers, is a consequence of her work-related injury.

McRae, 358 N.C. at 496-97, 597 S.E.2d at 701. The Commission concluded here that "[t]he evidence in this case does not show that plaintiff was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee ordinarly [sic] would have been terminated. . . . Therefore, plaintiff's conduct does not constitute a constructive refusal of employment." Since Weyerhaeuser has not challenged this conclusion in its brief or assigned error to the underlying findings of fact, we affirm the Commission's determination that plaintiff did not constructively refuse employment under N.C. Gen. Stat. § 97-32.

II

[3] Weyerhaeuser also contends that the Full Commission erred in granting White temporary total disability benefits from 26 July 2001 through 7 January 2002 and partial disability benefits beginning 8 January 2002. The determination that an employee is disabled is a conclusion of law that must be based upon findings of fact supported by competent evidence. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

In order to support a conclusion of disability, the Commission must find:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Id. Under this test, "[t]he burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

Weyerhaeuser argues first that the Commission's finding that "in July 2001, Plaintiff was able to resume his normal work hours and earn his former wages," compelled the conclusion that White is no longer disabled. This argument was, however, expressly rejected in *Saums v. Raleigh Cmty. Hosp.*, 346 N.C. 760, 764, 487 S.E.2d 746, 750 (1997), where our Supreme Court held that "the fact that an employee is capable of performing employment tendered by the employer is not, as a matter of law, an indication of plaintiff's ability to earn wages." *See also Peoples v. Cone Mills Corp.*, 316 N.C. 426, 438, 342 S.E.2d 798, 806 (1986) ("Proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level."). The Supreme Court has clarified that any claim "that there is no disability if the employee is receiving the same wages in the same or other employment is correct only so long as the employment reflects the employee's ability to earn wages in the competitive market." *Id.* at 440, 342 S.E.2d at 807. Under *Saums* and *Peoples*, therefore, the Commission's finding that White had returned to his normal hours and wages did not require denial of White's claim.

In *Russell*, this Court held that an employee may meet his burden of proving disability in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

108 N.C. App. at 765, 425 S.E.2d at 457 (internal citations omitted). In finding that White was disabled, the Commission concluded that

White had established disability under both the second and fourth tests articulated in *Russell*.[3]

Weyerhaeuser argues, however, that "the undisputed medical evidence establishes that Plaintiff was and is capable of working in a full-duty capacity in the same type of employment as he performed for Weyerhaeuser." Medical evidence may be dispositive of only the first *Russell* test: "the production of medical evidence that [the worker] is physically or mentally, as a consequence of the work related injury, incapable of work in any employment[.]" *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. The absence of medical evidence does not preclude a finding of disability under one of the other three tests. *Bridwell v. Golden Corral Steak House*, 149 N.C. App. 338, 342, 561 S.E.2d 298, 302 ("While we agree that plaintiff's medical evidence is insufficient to show disability, we conclude that plaintiff has met his initial burden of production through other evidence."), *disc. review denied*, 355 N.C. 747, 565 S.E.2d 193 (2002).

White was permitted to meet his burden of proving disability by producing, as he did, "evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment" and "evidence that he has obtained other employment at a wage less than that earned prior to the injury." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. The Commission found that White satisfied his burden under both options:

> 45. Plaintiff made reasonable efforts to find suitable employment after his termination from defendant's employment but none was available to him within his physical restrictions until he returned to employment at reduced wages on January 8, 2002.
>
> 46. Plaintiff's wages since January 8, 2002 are less than he was making at the time of his injury by accident and plaintiff's decreased ability to earn is due to his disability result-

3. Weyerhaeuser contends that the *Russell* tests only apply to the second prong of *Hilliard*. This contention is contrary to this Court's opinion in *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (holding that the four tests provide the means by which an employee may show "that he is unable to earn the same wages he had earned before the injury, either in the same employment [*Hilliard* prong one] or in other employment [*Hilliard* prong two]"). Although Weyerhaeuser cites *Grantham v. R. G. Barry Corp.*, 115 N.C. App. 293, 444 S.E.2d 659 (1994), that opinion does not necessarily support its position and, in any event, *Grantham* could not overrule *Russell*. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

ing from the admittedly compensable injury by accident on December 12, 2000.

These findings are binding on appeal and are sufficient to support the Commission's decision. *Whitfield*, 158 N.C. App. at 354, 581 S.E.2d at 787 ("Thus, there is competent evidence in the record to support the Commission's finding that plaintiff had demonstrated a reduced wage earning capacity under the fourth option. This finding, based on the competent evidence in the record, was a proper basis for the Commission to award plaintiff partial disability benefits.").

Finally, Weyerhaeuser argues that White failed to meet his burden of proving causation, the third prong of *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683. The Commission found that "plaintiff's decreased ability to earn is due to his disability resulting from the admittedly compensable injury by accident on December 12, 2000." Weyerhaeuser argues primarily that White's loss of wage-earning capacity was caused by his resignation and not his injury. We have already addressed this issue, as discussed above. In any event, the record contains competent evidence of causation, including White's testimony that he was informed by prospective employers that they did not have a position for him while he was on light-duty work restrictions. Weyerhaeuser's argument that the Commission should have weighed and viewed the evidence differently is not an argument that this Court may consider. *See Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (appellate court may not re-weigh the evidence or assess credibility).

In sum, we hold that the findings of fact properly supported the Commission's decision to analyze this case under *Seagraves* and that the Commission's findings support the Commission's conclusion that White was totally disabled from 26 July 2001 through 7 January 2002, at which point White became partially disabled.

Affirmed.

Judges HUDSON and THORNBURG concur.

Judge THORNBURG concurred prior to 31 December 2004.

TONYA LANNETTE WILLIAMS, ET AL., PLAINTIFFS v. ALVIN E. BELL, INDIVIDUALLY AND, AMERICAN BASS FISHING CLUB, INC., DEFENDANTS

No. COA03-1538

(Filed 4 January 2005)

1. Appeal and Error— existence of insurance—irrelevant to agency—not argued in brief—abandoned

In an action arising from a boat collision at a fishing tournament, the issue of the exclusion of plaintiffs' proffer regarding defendants' insurance was deemed abandoned because it was not argued in their brief. Even if it had been properly argued, insurance is irrelevant to the issue at hand (whether defendant Bell was defendant American's agent) and could induce the jury to decide the case on improper grounds.

2. Evidence— agency—insurance policy—irrelevant

In an action arising from a boat collision at a fishing tournament, plaintiff's proffer of an insurance policy was properly excluded because the issue to be decided was whether defendant Bell was acting as a director or agent of defendant American at the time of collision. Neither the existence of the policy nor its terms make the existence of agency more or less probable.

3. Agency— fishing tournament—agency not found—evidence sufficient

There was no error in denying plaintiffs' motion for a j.n.o.v. on the issue of agency in an action arising from a boat collision at a fishing tournament in which the jury found that defendant Bell (the organizer of the tournament) was not the agent of defendant American Bass Fishing Club. There was more than a scintilla of evidence from which the jury could have concluded that Bell was not American's agent, including that Bell was not in charge of the tournament and that his activities were personal at the time of the accident.

Judge ELMORE concurring.

Appeal by plaintiffs from judgment entered 10 April 2003 by Judge Lindsay R. Davis, Jr. in Rowan County Superior Court. Heard in the Court of Appeals 16 September 2004.

Wallace and Graham, P.A., by Christopher D. Mauriello, and Homesley Jones Gaines Homesley & Dudley, P.L.L.C., by Edmund L. Gaines and Mitchell P. Johnson, for plaintiffs-appellants.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by Hatcher B. Kincheloe and Harmony Whalen Taylor, for defendant-appellee, American Bass Fishing Club, Inc.

STEELMAN, Judge.

Plaintiffs appeal the trial court's ruling excluding evidence of an insurance policy of defendant, American Bass Fishing Club, Inc. (American). Plaintiffs also appeal the trial court's denial of their motion for judgment notwithstanding the verdict, in which they requested the trial court hold as a matter of law that an agency relationship existed between defendants Bell and American. For the reason discussed herein, we hold there was no error committed in the trial of this case.

On 20 June 2001, the Williams family went to High Rock Lake in Davidson County for a family outing. Shortly after arriving, sisters Tiffany and Candace Williams went on a boat ride with their mother's boyfriend, John Long. The three were on High Rock Lake, leaving the Buddle Creek access area, as Bell's boat approached the access area. Bell's boat collided with Long's boat, throwing both girls into the water. Long was able to rescue Tiffany, who was injured, but Candace drowned as a result of the accident.

The personal representatives of the Estate of Candace Williams brought this action pursuant to N.C. Gen. Stat. § 28A-18-2, seeking damages for wrongful death. Tonya Williams also sought damages for personal injuries suffered by the minor child, Tiffany Williams. Each of these claims was based on the negligence of defendant Bell. Plaintiffs also asserted that at the time of the accident, Bell was acting as an agent of American.

Since 2000, Bell was American's director for the Western District of North Carolina. As the district director, Bell oversaw the administration of local tournaments in his district. However, Bell was not an employee of American, he received no salary, and had no full-time duties as district director.

The accident took place during American's national championship tournament, which was held at High Rock Lake, starting on

17 June and ending three days later on 20 June 2001. Bell was the principal organizer of the tournament. He arranged for sponsorships, as well as for food and lodging for the contestants. However, once the tournament began, Bell participated in the tournament as a contestant and paid a registration fee. He had no duties related to tournament registration, received no compensation, and did not participate as an official of American during the weighing of the fish caught at the end of each day of the tournament. Furthermore, he was not authorized to answer any questions that arose during the contest concerning the rules and procedures of the tournament. Dan Jackson, American's national director, was in charge of the tournament.

On the day of the accident, Bell arrived at the tournament towing his personal boat. There were at least two boat access areas for High Rock Lake; Southmont, where the main tournament activities took place, and Buddle Creek. Bell put his boat into the lake at Buddle Creek to avoid the crowds at the Southmont access. The tournament began at approximately 5:30 a.m. Bell fished until around 3:30 p.m., when he returned to the Southmont dock to weigh the fish he had caught that day. In this tournament, at the conclusion of each day's fishing, the fish were released back into the lake following the weigh-in. Dan Jackson asked Bell and a volunteer, Max Neal, to return the fish to the lake. Around 4:15 p.m., Bell and Neal took a pontoon boat out onto High Rock Lake and released the fish. Bell then returned to the Southmont dock, where his wife was waiting. At about 5:00 p.m. Bell and his wife got into Bell's personal boat, and proceeded from the Southmont access to the Buddle Creek access, where Bell's boat trailer was located. It was while Bell was going to the Buddle Creek access that the collision with the boat containing Candace and Tiffany Williams occurred.

The trial court submitted six issues to the jury, including the issue of whether Bell was acting as an agent of American at the time of the accident. At the conclusion of a ten-day trial, the jury: (1) found that Bell's negligence was the sole cause of the accident, (2) found that at the time of the accident Bell was not acting as the agent of American; and (3) awarded substantial damages to plaintiffs. Plaintiffs appeal.

[1] In plaintiffs' first assignment of error, they contend the trial court erred in sustaining the objection of American to two separate proffers made by plaintiffs. In order to discuss this assignment of error, it is necessary to review the proffers made by plaintiffs.

During Bell's testimony, plaintiffs made a proffer outside of the presence of the jury that: (1) Bell had no personal insurance applicable to the accident; and (2) Bell saw on the Internet the amount of insurance coverage that American had in effect. Later in the trial, plaintiffs sought to introduce answers to interrogatories identifying American's insurance coverage, and to also introduce a copy of the insurance policy. Before the trial court, plaintiffs argued that the existence of the insurance policy "goes to the issue of whether this gentleman [Bell] was in fact his agent . . . ." On appeal, plaintiffs contend the "mere fact the alleged principal obtained insurance which covered 'executive officers and directors', was evidence enough to weigh and influence the jury's decision on this issue[,]" based on the following language contained in the insurance policy (emphasis in original).

> Section II:—WHO IS AN INSURED
>
> d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers and directors.

Rule 401 of the Rules of Evidence provides the general test for relevant evidence. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2004).

Rule 404 and the rules that follow in Article 4 of Chapter 8C, deal with situations that occur with sufficient frequency to justify a specific rule. N.C. Gen. Stat. § 8C-1, Rule 401 official commentary (2004). Rule 411 is such a rule, dealing with the admissibility of evidence of liability insurance. N.C. Gen. Stat. § 8C-1, Rule 411 (2004). The general rule is that the existence of liability insurance is not admissible to show a party acted negligently or wrongfully. *Id.* However, the rule does not require the exclusion of evidence of insurance for other purposes, such as proof of agency. *Id.* The official commentary to Rule 411 states that "[a]t best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds." N.C. Gen. Stat. § 8C-1, Rule 411

official commentary (citing *McCormick on Evidence* § 168 (John W. Strong gen. Ed., 5th ed. 1999)). While Rule 411 does not prohibit the admission of evidence of liability insurance to establish agency, the evidence must still meet the relevancy requirements of Rule 401 to be admissible.

In deciding whether evidence of insurance should be received under Rule 411, a trial court should engage in the following analysis: (1) Is the insurance coverage offered for a purpose other than to show that a person acted negligently or otherwise wrongfully (Rule 411); (2) If so, is the evidence relevant to show that other purpose (Rule 401); and (3) If so, is the probative value of the relevant evidence substantially outweighed by the factors set forth in Rule 403.

While plaintiffs' first proffer is encompassed in their first assignment of error, it is not argued in their brief, and is therefore deemed abandoned. N.C. R. App. P. 28(b)(6). Even had plaintiffs properly argued this matter, whether defendant Bell had insurance is irrelevant to the issue of agency. Furthermore, the amount of coverage provided by the insurance policy, standing alone, in no way establishes that defendant Bell was an agent for American. Such evidence could only serve to induce the jury to decide the case on improper grounds. This evidence was not relevant to the issue of agency and was properly excluded by the trial court.

[2] Plaintiffs' second proffer was of the insurance policy. On appeal, our review is limited to whether the trial court abused its discretion in excluding the evidence. *Carrier v. Starnes*, 120 N.C. App. 513, 519, 463 S.E.2d 393, 397 (1995). In order for this Court to conclude that the trial court abused its discretion, we must find that the judge's decision " 'lacked any basis in reason,' " or " 'was so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* at 520, 463 S.E.2d at 397 (citations omitted). The issue presented to the jury was not whether Bell was a director of American. The evidence was uncontradicted that he was a director. Rather, the issue to be decided by the jury was whether Bell was acting as a director or agent of American at the time of the collision. Neither the existence of the insurance policy, nor the terms of that policy make the existence of agency more or less probable. In this case, the insurance policy was not relevant to the issue of agency under Rule 401, and therefore, the trial court properly excluded this evidence. While the policy does state that directors are insured, it is subject to the express limitation: "but only with respect to their duties as your officers and directors."

This limitation eliminates any possible relevance of the insurance policy to the issue of agency. Instead, this provision merely restates the issue to be decided by the jury.

The evidence of insurance, as presented to the trial court in the context of the particular facts of this case, was not relevant to the issue of agency. The evidence not being relevant, it was unnecessary for the trial court to perform the balancing test under Rule 403.

The trial court did not err in sustaining American's objection to this evidence, as this ruling did not lack for any basis in reason, nor was it "so arbitrary that it could not have been the result of a reasoned decision." *Carrier*, 120 N.C. App. at 520, 463 S.E.2d at 397.

[3] In plaintiffs' second assignment of error, plaintiffs contend the trial court erred in denying their motion for judgment notwithstanding the verdict and for a new trial. We disagree.

Initially, we note that plaintiffs failed to argue in their brief that the trial court erred in denying their motion for a new trial, and that contention is deemed abandoned. N.C. R. App. P. 28(b)(6).

In reviewing the denial of a judgment notwithstanding the verdict, our review is limited to whether, upon examination of all the evidence in the light most favorable to the non-moving party, and giving the non-moving party the benefit of every reasonable inference, the evidence is sufficient to be submitted to the jury. *Monin v. Peerless Ins. Co.*, 159 N.C. App. 334, 340, 583 S.E.2d 393, 397 (2003). If there is more than a scintilla of evidence to support the non-movant's position, the court should deny a motion for judgment notwithstanding the verdict. *Id.* at 340, 583 S.E.2d 398. Stated another way, if there was conflicting evidence as to whether defendant Bell was acting as an agent of American at the time of the accident, then the trial court was required to submit this issue to the jury for resolution. *See McLamb v. Beasley*, 218 N.C. 308, 320, 11 S.E.2d 283, 291 (1940).

It is undisputed that Bell was a director for American and was one of the primary organizers of the National Tournament held in 2001 at High Rock Lake. However, Bell was not in charge of the tournament, and in fact played no part in the tournament other than as a contestant. The only assistance Bell provided was to return the fish caught that day back into the lake, at the request of the national tournament director. After Bell and a volunteer finished this task, they returned to the Southmont dock. Bell and his wife then got into Bell's

personal boat and proceeded to the Buddle Creek access, where Bell had left his boat trailer. It was while returning to the Buddle Creek access area that the collision with the Williams boat occurred.

Bell's activities on 20 June 2001 were of a personal nature, as a contestant in the tournament, with the exception of the time that he returned the fish to the lake on behalf of American. There was ample evidence from which the jury could have found that Bell's activities on behalf of American had terminated once he returned to the Southmont access area, got into his personal boat with his wife, and proceeded to the Buddle Creek access area. *See McIlroy v. Motor Lines*, 229 N.C. 509, 512-13, 50 S.E.2d 530, 530-31 (1948) (reversing the jury's verdict against the employer because the evidence showed the employee was acting solely for his own purpose where the employee was driving the company truck to visit his aunt when the accident occurred, thus there was a total departure from the employer's business).

The evidence reveals that Bell had completed the task of returning the fish to the lake for American and had resumed his own personal activities at the time of the accident. As a result, there was more than a scintilla of evidence from which the jury could have concluded that Bell was not acting as the agent of American at the time of the collision. The trial court properly denied plaintiff's motion for judgment not withstanding the verdict.

Plaintiffs cite the case of *Keziah v. Monarch Hosiery Mills*, 71 N.C. App. 793, 323 S.E.2d 356 (1984) in support of the proposition that Bell was acting as an agent of American at the time of the accident. In *Keziah*, the plaintiff's deceased husband attended a golf tournament for the stated purposes of promoting golf socks sold by his employer, making future business contacts, and to play golf. On his way home from the tournament, the employee died in a plane crash and the deceased's widow filed a workers' compensation claim. The issue presented was whether the employee died while on a business trip or a personal trip. The employer filed a workers' compensation form, which stated the employee died on a "business trip." Although the employer pointed to evidence tending to show it was a personal trip, this Court held there was competent evidence to support the Industrial Commission's finding that the employee died in the course and scope of his employment. There is no holding in *Keziah* that is controlling on the issues presented in this case. Rather, this Court reached its decision in *Keziah* based upon the application of

the appropriate standard of review for appellate courts regarding decisions of the Industrial Commission. This assignment of error is without merit.

NO ERROR.

Judge CALABRIA concurs.

Judge ELMORE concurs in result with separate opinion.

ELMORE, Judge concurring.

While I concur in the result reached by the majority, I write separately to express my opinion that plaintiffs' proffered evidence of insurance was indeed relevant and admissible. However, as pointed out by the majority, our standard of review on a trial court's exclusion of evidence is abuse of discretion and despite my disagreement with the trial's court's decision to exclude, I do not believe it was an abuse of discretion. *See Carrier v. Starnes*, 120 N.C. App. 513, 519, 463 S.E.2d 393, 397 (1995).

The majority and I characterize the evidence presented at trial differently, and as a result end up with a different outcome on the question of relevancy. The majority's opinion seems to state that the evidence regarding Bell's agency with American was uncontradicted. I would argue otherwise.

One of the dispositive issues before the jury in this case was whether Bell was acting within the course and scope of his duties as an agent of American at the time of the accident. I would characterize the evidence at trial as displaying a decision by American to, in part, deny that Bell could possibly even be their agent, while also in part arguing that if he was their agent, then he had exceeded the course and scope of his duties at the time of the accident. It is American's first theory of the case, the denial of agency, that I think makes the insurance policy admissible; admittedly, the policy does nothing to resolve the issue of agency *at the time of the accident.*

Defendants had portions of deposition testimony by Dan Jackson, the National Tournament Director for American, read into the record at trial. These portions were relevant to the issue of whether Bell was American's agent.

> Question: Do local tournament directors, are they in charge of the national tournament?
>
> Answer: Not at all. If they are there they are there as competitors.

It is undisputed that Bell was a local tournament director and that the fishing tournament on High Rock Lake was a national tournament, not a local tournament. It was also undisputed that Bell was a participant in the tournament; what was in dispute was whether he had other duties as an agent of American on top of participating in the tournament. Jackson's deposition testimony went further:

> Question: All right, so local tournament directors can participate in the nationals tournament, correct?
>
> Answer: Correct.
>
> Question: And they can volunteer also to assist with the nationals tournament?
>
> Answer: Correct.
>
> Question: But there is no official duties of a local tournament, duties related to a national tournament?
>
> Answer: That is correct.

From this testimony it is evident that American, through its national director, was denying that Bell had any duty to perform for them.

Indeed, from the beginning of the majority's opinion they cast doubt as to whether Bell could even be in an agency relationship with American. The opinion points out Bell was "not an employee[,] . . . received no salary, and had no full-time duties as district director." Further they note that:

> Bell participated in the tournament as a contestant[,] paid a registration fee[,] . . . had no duties related to tournament registration, received no compensation, and did not participate as an official of American during the weighing of the fish caught at the end of each day of the tournament. Furthermore, [Bell] was not authorized to answer any questions that arose during the contest concerning the rules and procedures of the tournament. Dan Jackson, American's national director, was in charge of the tournament.

While the proffered evidence of insurance may not be highly probative of whether Bell was American's agent at the time of the

accident, it does, however, have a tendency to show that Bell might actually be an agent of American, a point I see as hardly "uncontradicted" by the record. *But see* N.C. Gen. Stat. § 8C-1, Rule 401 (evidence may still be relevant even if it is offered to prove an undisputed point). It would be difficult to convince a jury that a person was within the course and scope of his duties if the alleged principal denies that agency ever existed; you cannot exceed, complete, or go beyond the scope of an authorized relationship that never existed.[1] *See Davis v. North Carolina Shipbuilding Co.*, 180 N.C. 74, 76-7, 104 S.E. 82, 83 (1920) (evidence admissible to refute defendant's claim that a workman was not its employee); *Clarke v. Vandermeer*, 740 P.2d 921, 922-25 (Wyo. 1987) (evidence of employer's insurance policy covering drivers was admissible to show whether driver was an agent of employer); *Jacobini v. Hall*, 719 S.W.2d 396, 401 (Tex. Ct. App. 1986) (insurance evidence admissible to show ownership where ownership is denied).

Plaintiffs' evidence countered this position by showing that just before the accident Bell had released the fish that were caught during the tournament; returned the official tournament boat to the dock, which was actually his boat; and then got in his personal boat, the boat that he had fished in. American's tournament rules, as introduced through Bell's testimony, do not permit "participants" on the lake unless it is during the tournament. As ordered by National Director Jackson, Bell was on the lake after the tournament releasing the fish that were caught during the first day of the tournament.

Plaintiffs' evidence also showed that prior to the day of the incident, Bell was responsible for setting up the tournament, including securing sponsors, accommodations, and other incidental tasks necessary to a fishing tournament. He also had American logos on his personal truck, which he had driven both before and during the tournament. Further, after the boating accident had occurred and Bell returned to the hotel, he, Dan Jackson, and another local director met to discuss whether the tournament should even continue.

Plaintiffs had evidence linking the "agent" to the alleged principal, but in the face of the principal's denial of agency, were seeking evidence that would counteract that denial and establish a connection from the principal to the agent. Plaintiffs were seeking to use evidence of the insurance agreement taken out by American to cover the

1. At trial, when arguing on *voir dire* outside the presence of the jury, and again here on oral argument, counsel for American conceded that Bell was an agent of the organization, but from reviewing the record, he never offered that to the jury.

actions of its "directors" in order to refute American's denial of agency. *See Davis*, 180 N.C. at 76-7, 104 S.E. at 83; *Charter v. Chleborad*, 551 F.2d 246, 248-49 (8th Cir. 1977) (where credibility of expert is a key issue, it was reversible error to deny evidence of insurance to show bias); *Royal Oil Co. v. Wells*, 500 So. 2d 439, 448 (Miss. 1986) (where agency was "hotly contested," mention of insurance was relevant to agency, and its introduction would not violate Rule 411); *Clarke*, 740 P.2d at 922-25; *Jacobini*, 719 S.W.2d at 401; N.C. Gen. Stat. § 8C-1, Rule 401 and Rule 411 (2003).

Using the majority's analysis, I would determine that plaintiffs' evidence was indeed relevant, even if not sufficient or highly probative of the ultimate issue. Although reversing slightly the order of analysis, I would also determine that Rule 411 does not prohibit the exclusion of this otherwise relevant evidence.

North Carolina Rule of Evidence 411 states:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. *This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency*, ownership, or control, or bias or prejudice of a witness.

N.C. Gen. Stat. § 8C-1, Rule 411 (2003) (emphasis added). The key to application of this relevance rule is to understand the purpose for which evidence of insurance is being offered: if the purpose is to show liability then the evidence is inadmissible, but if the purpose of introduction is otherwise, then Rule 411 will not prohibit its use. *Williams v. McCoy*, 145 N.C. App. 111, 116-17, 550 S.E.2d 796, 801 (2001); *Warren v. Jackson*, 125 N.C. App. 96, 98, 479 S.E.2d 278, 279-80 (1997); *see generally* 1 Kenneth S. Broun, Brandis & Broun on North Carolina Evidence, § 108, p. 333 (5th ed. 1998).

Agency was a contested issue at trial and also the sole manner in which plaintiffs could prove American liable. Any introduction of insurance taken out by American over its directors could only be offered to further an agency relationship; plaintiffs were not presenting evidence American was directly negligent or liable in any fashion. Since evidence of insurance was offered to show a purpose other than liability, specifically, agency, then Rule 411 is not a bar to its admission.[2]

2. A trial court must be diligent about determining if the asserted purpose for offering evidence of insurance is merely pretextual or too attenuated, for then the gen-

Finally, I do not think that the probative value of the proffered evidence is substantially outweighed by its prejudicial effect. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2003). But, Rule 411 does not offer free reign over the use of an insurance policy. In particular, the amount of coverage, as solicited on *voir dire* in this case, is clearly prejudicial and serves no basis in determining agency. *See Reed v. Gen. Motors Corp.*, 773 F.2d 660, 663-64 (5th Cir. 1985) (Rule 411 does not generally permit the amount of coverage to be introduced); Broun, *supra*, at 334-35. Also, defendants can request a limiting instruction to the jury regarding the fact that evidence of insurance should only be considered for the purposes of determining whether an agency relationship exists.

Based on the foregoing, I would hold that the trial court erred in excluding the proffered evidence. However, I must agree with the majority that the trial court's exclusion was not an abuse of its discretion. Indeed, this panel, while agreeing on the analysis required by defendants' objection and plaintiffs' proffer of evidence cannot agree on the admissibility of the policy. It can hardly be said then that the trial court abused its discretion in choosing one reasoned avenue over another.

RITA BOYD HUGHART, ADMINISTRATOR AND GUARDIAN *AD LITEM* FOR JAMES DAKOTA LEVI BOYD, MINOR SON, AND KRISTIN NICOLE BOYD, MINOR DAUGHTER, OF JAMES D. BOYD, DECEASED EMPLOYEE, PLAINTIFF v. DASCO TRANSPORTATION, INC., EMPLOYER, AND/OR STRATEGIC OUTSOURCING, INC., EMPLOYER, CONTINENTAL CASUALTY COMPANY, CARRIER, DEFENDANTS

No. COA03-1295

(Filed 4 January 2005)

1. Workers' Compensation— joint employment—estoppel

The Industrial Commission erred in a workers' compensation case by concluding that decedent worker who died in a motor vehicle accident while delivering furniture for defendant Dasco was a joint employee of defendant SOI and by concluding that SOI was estopped from denying an employment relationship, because: (1) there was no contractual relationship, implied or

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eral rule would be exclusion. *See, e.g., Smith v. Starnes*, 88 N.C. App. 609, 364 S.E.2d 442 (1988) (evidence that a car was insured 2 months prior to accident does not show agency, ownership, or control on the date of the accident).

otherwise, between decedent and SOI and receipt of an application by defendant Dasco was not enough to create an employee relationship under the service agreement between defendant companies; (2) SOI had to approve the application and receive payroll information before the individual became an SOI employee, and SOI offered uncontroverted evidence that SOI received neither an application nor any payroll information regarding decedent, and SOI was not even aware of decedent's hiring; (3) there is no evidence that either SOI or its workers' compensation carrier accepted insurance premiums on behalf of decedent; and (4) the record contains no evidence suggesting that decedent had any knowledge that SOI existed or that it had granted any authority at all to Dasco.

2. Workers' Compensation— employee—independent contractor

The Industrial Commission did not err in a workers' compensation case by concluding that decedent worker who died in a motor vehicle accident while delivering furniture for defendant Dasco was an employee of Dasco, rather than an independent contractor or an assigned employee of defendant SOI, because: (1) the service agreement between defendant companies contemplates that Dasco could have employees who were either not intended to ever be assigned employees or who had not yet qualified as assigned employees, and in either event, Dasco was responsible for the individual's workers' compensation insurance; (2) decedent was not designated as an assigned employee; (3) decedent was not engaged in an independent business, calling, or occupation; (4) the record contains no evidence that decedent's experience in carrying furniture and driving a 35-foot furniture truck involved specialized skill, knowledge, or training; (5) decedent did not have a commercial driver's license and his position was as a helper to the lead driver who did not allow decedent to exercise independent judgment in applying his experience; (6) decedent was not free to control his own time on the furniture delivery trips; (7) there was no evidence that Dasco required decedent to have workers' compensation insurance as it did for independent contractors; (8) Dasco had decedent complete an employment application; (9) Dasco entrusted decedent with its furniture delivery truck; and (10) although decedent was doing a specified piece of work at a fixed price or for a lump sum, no single factor under *Hayes v. Bd. of Trustees of Elon College*, 224 N.C. 11 (1944), is controlling.

Appeal by defendants from Opinion and Award filed 6 June 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 June 2004.

Randy L. Cranford, for plaintiff-appellee.

Wyatt, Early, Harris & Wheeler, L.L.P., by Kim R. Bauman, for defendant-appellant Dasco Transportation, Inc.

Robinson & Lawing, L.L.P., by Jolinda J. Babcock and Rebecca Miller, for defendants-appellants Strategic Outsourcing, Inc. and Continental Casualty Company.

GEER, Judge.

Defendants Dasco Transportation, Inc. ("Dasco"), Strategic Outsourcing, Inc. ("SOI"), and SOI's carrier, Continental Casualty Co., appeal from the Full Commission's Opinion and Award requiring them to pay, in equal portions, workers' compensation death benefits as a result of James D. Boyd's death in a motor vehicle accident while delivering furniture for Dasco. Both defendants contend that Boyd was not their employee and that the Commission, therefore, did not have jurisdiction to award benefits. After reviewing the record *de novo*, as we are required to do with workers' compensation jurisdictional questions, we hold that Boyd was an employee of Dasco at the time of his accidental death, but that he was not an employee of SOI. Accordingly, we reverse that part of the Opinion and Award imposing liability on SOI.

Facts

Defendant Dasco is a North Carolina corporation, specializing in home furniture delivery throughout the southeastern United States. This workers' compensation case involves the death of James Boyd, who was driving a Dasco furniture delivery truck on a delivery trip when he was killed in a motor vehicle accident on 25 June 1999.

Defendant SOI provides administrative services to small and medium-sized companies. Dasco and SOI entered into a service agreement under which SOI, in return for a fee, approved prospective Dasco employees and then handled payroll services and insurance, including workers' compensation insurance, for those employees, called "assigned employees." Dasco was exclusively responsible for managing and supervising the assigned employees. In order to meet its staffing needs, Dasco relied not only on the assigned em-

ployees, but also on employees of another trucking company and independent contractors.

On Dasco furniture delivery trips, there would be a "lead driver" and a "helper." In June 1999, Dasco needed a replacement worker to assist lead driver Adam Epperson, an assigned employee, because his regular helper, also an assigned employee, was sick. Scott Shipley, the president of Dasco, asked Mark Hughart, an independent contractor driver for Dasco and Boyd's stepfather, if he knew anyone who could go out on a truck as a helper. After Hughart suggested Boyd, Shipley asked Hughart to bring Boyd in to fill out an application. Although Boyd did not have a commercial driver's license, he had previously worked as a helper and a driver in the in-home furniture delivery business.

Hughart brought Boyd to meet with Shipley. The evidence is disputed as to whether Boyd completed an application for employment. Although Shipley testified that Boyd did not complete an application, Hughart testified—without objection—that Boyd told him that he had filled out an application and Shipley let Epperson, as lead driver, look it over. Epperson said that the application was fine and he would take Boyd. Shipley testified that Boyd was to be paid a flat fee of $350.00 per trip.

Boyd ultimately made two trips with Epperson as Epperson's helper. The role of a "helper" in the home furniture delivery business is to assist the lead driver by helping with the driving and carrying the furniture into the home. Boyd and Epperson made one furniture delivery trip during the week of 14 June 1999 and returned to High Point later the same week. The following week, the two made a second trip, during which the fatal accident occurred.

After Boyd's workers' compensation claim was denied, the case was heard before Deputy Commissioner Bradley W. Houser, who entered an Opinion and Award on 7 January 2002, concluding that Boyd was a joint employee of Dasco and SOI and awarding benefits. Both defendants appealed to the Full Commission. After argument before the Full Commission, defendants were ordered to produce a copy of the agreement between Dasco and SOI and, over SOI's objection, Dasco produced the agreement. On 6 June 2003, the Full Commission affirmed the Deputy Commissioner's Opinion and Award with certain modifications. Defendants gave timely notice of appeal to this Court.

Discussion

"To be entitled to maintain a proceeding for workers' compensation, the claimant must be, in fact and in law, an employee of the party from whom compensation is claimed." *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988). An independent contractor is not covered by the Workers' Compensation Act and does not come within the jurisdiction of the Industrial Commission. *Id.* The claimant has the burden of proving that an employer-employee relationship existed at the time that the injury by accident occurred. *Lucas v. Li'l General Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976).

The question whether an employer-employee relationship existed is a jurisdictional one, and "the finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding." *Id.* Thus, "[t]he reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record." *Id.*

I

[1] Defendant SOI argues that the Commission erred when it found that Boyd was a joint employee of SOI and Dasco and when it concluded that SOI was estopped from denying an employment relationship. We agree that Boyd was not an employee of SOI.

A. The Relationship Between Boyd and SOI

The Workers' Compensation Act defines an employee as "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written . . . ." N.C. Gen. Stat. § 97-2(2) (2003). This Court has observed that "it is fundamental that under some circumstances a person can be an employee of two different employers at the same time, in which event either employer or both may be liable for Workers' Compensation." *Henderson v. Manpower of Guilford County, Inc.*, 70 N.C. App. 408, 413, 319 S.E.2d 690, 693 (1984). Joint employment exists " 'when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other.' " *Id.* at 413-14, 319 S.E.2d at 693 (quoting 1C Larson, *Workman's Compensation Law*

§ 48.40 (1982)). When joint employment has occurred, both employers are liable for workers' compensation. *Id.*

Nevertheless, " 'joint employment as to one employer cannot be found in the absence of a contract with that employer.' " *Anderson v. Texas Gulf, Inc.*, 83 N.C. App. 634, 638, 351 S.E.2d 109, 111 (1986) (quoting 1C Larson, *The Law of Workmen's Compensation* § 48.44, pp. 8-531 to 32). This is consistent with the general rule that "[t]he relationship of employer-employee 'is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, express or implied.' " *Dockery v. McMillan*, 85 N.C. App. 469, 473, 355 S.E.2d 153, 155 (quoting *Hollowell v. N.C. Dep't of Conservation & Dev.*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934)), *disc. review denied*, 320 N.C. 167, 358 S.E.2d 49 (1987).

We must, therefore, first address the question whether the evidence established that there was a contract, express or implied, between Boyd and SOI. While plaintiff points to evidence that Shipley acted as an agent for SOI in hiring assigned employees and argues that he necessarily was acting as SOI's agent when hiring Boyd, plaintiff's argument overlooks the limits placed on Shipley's authority by the parties' agreement. Paragraph 4.1 of the service agreement between SOI and Dasco provides that no individual shall be hired by SOI until the individual has completed an SOI employment application, the application has been accepted and signed by Dasco and SOI, and SOI has designated the individual as an assigned employee. While the testimony was conflicting as to whether Boyd filled out an application, the record contains no evidence that Shipley ever forwarded any application from Boyd to SOI. Moreover, under the agreement between Dasco and SOI, receipt of an application by Dasco was not enough to create an employee relationship under the service agreement. SOI had to approve the application and receive payroll information before the individual became an SOI employee. SOI offered uncontroverted testimony that SOI received neither an application nor any payroll information regarding Boyd—and indeed was not aware of Boyd's hiring at all.

The only evidence as to any connection whatsoever between SOI and Boyd was that Boyd was supervised by Epperson, who was an assigned employee of SOI. This fact, while relevant to the question whether Boyd was an independent contractor or an employee, does not have any bearing on whether Boyd had entered into a contractual relationship with SOI in the first place.

Accordingly, we find from the evidence that there was no contractual relationship, implied or otherwise, between Boyd and SOI. Since " 'joint employment as to one employer cannot be found in the absence of a contract with that employer[,]' " *Anderson*, 83 N.C. App. at 638, 351 S.E.2d at 111 (quoting 1C Larson, *The Law of Workmen's Compensation* § 48.44, pp. 8-531 to 32), we conclude that Boyd was not an employee of SOI. As a result, the Commission lacked jurisdiction over the claim against SOI. *Youngblood*, 321 N.C. at 383, 364 S.E.2d at 437.

B. Equitable Estoppel

Alternatively, the Commission concluded that "given that SOI clothed Scott Shipley with apparent authority to hire joint employees, SOI is estopped from denying that the decedent was a joint employee of SOI and Dasco." " 'The law of estoppel applies in [workers'] compensation proceedings as in all other cases.' The status of [a] claimant as an employee may be established by way of estoppel." *Garrett v. Garrett & Garrett Farms*, 39 N.C. App. 210, 212-13, 249 S.E.2d 808, 809 (1978) (quoting *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 665, 75 S.E.2d 777, 781 (1953)), *disc. review denied*, 296 N.C. 736, 254 S.E.2d 178 (1979). Estoppel cases have typically involved situations when a carrier repeatedly accepted insurance premiums for the injured individual, but then denied employment status following the injury. *See, e.g., Carroll v. Daniels & Daniels Constr. Co.*, 327 N.C. 616, 622, 398 S.E.2d 325, 329 (1990) ("This Court has stated in several workers' compensation cases that if an insurance carrier accepts workers' compensation insurance premiums for an individual, it cannot deny liability for coverage."); *Godley v. County of Pitt*, 306 N.C. 357, 360, 293 S.E.2d 167, 169 (1982) (appellate courts have applied estoppel "when the carrier has previously and routinely accepted the payment of insurance premiums pertaining to the injured individual").

Here, there is no evidence that either SOI or Continental Casualty Co., SOI's workers' compensation insurance carrier, accepted insurance premiums on behalf of Boyd. Instead, it appears that the Commission was relying more on the doctrine of apparent authority. Our Supreme Court has explained the governing principles:

> The rights and liabilities which exist between a principal and a third party dealing with that principal's agent may be governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possess-

> ing or which he has permitted the agent to represent that he possesses; *however, the 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.*

Zimmerman v. Hogg & Allen, P.A., 286 N.C. 24, 30-31, 209 S.E.2d 795, 799 (1974) (emphasis added). In other words, if the apparent authority doctrine applies, the proper question is: What authority did Boyd reasonably believe SOI had conferred upon Dasco? The record, however, contains no evidence suggesting that Boyd had any knowledge that SOI existed or that it had granted any authority at all to Dasco. Indeed, Boyd's stepfather, Mark Hughart, testified that he was not aware of SOI's existence.

Because there is no evidence that Boyd was aware of SOI or that SOI was aware of Boyd, we hold that the Commission erred in concluding that SOI was estopped from denying that Boyd was its employee. We, therefore, reverse the Commission's Opinion and Award to the extent it imposed liability on SOI.[1]

II

[2] Defendant Dasco contends that the Commission erred in concluding that Boyd was its employee rather than an independent contractor. In making its argument, Dasco assumes that Boyd could only have been either an assigned employee of SOI or an independent contractor. We observe at the outset that the evidence indicates that another alternative existed: that Boyd was solely an employee of Dasco.

The service agreement between Dasco and SOI expressly anticipates that Dasco could employ additional individuals who would not be covered by the agreement, but would still be employees of Dasco. Paragraph 4.1.1 provides that SOI is not responsible for wages and benefits until the hired individual is designated by SOI as an assigned employee and that if Dasco allows someone to work before the designation, Dasco "shall be responsible for the individual's salary and related employee benefits, including worker's compensation . . . ." Paragraph 6.2 states that Dasco agrees that workers' compensation coverage applies only to assigned employees and that "[Dasco]

1. Because of our disposition of SOI's appeal, we need not address its contention that the Commission abused its discretion when it ordered the parties to produce the service agreement between SOI and Dasco.

assumes complete responsibility for any and all Workers' Compensation claims, of any and all parties hired by [Dasco] as employee, independent contractor, or other status, outside of this Service Agreement." Finally, paragraph 6.4 provides: "If [Dasco] employs any employees other than the Assigned Employees during the term of this Service Agreement, [Dasco] shall maintain workers' compensation insurance to cover the activities of all such employees and shall name SOI as an additional insured."

These provisions contemplate that Dasco could have employees who were either not intended to ever be assigned employees or who had not yet qualified as assigned employees. In either instance, Dasco was responsible for the individual's workers' compensation insurance. If Dasco's assumption that someone working for it had to be either an assigned employee or an independent contractor were correct, then these provisions would be meaningless. Taken as a whole, the purpose of Paragraph 6 appears to be to ensure that every possible individual working for Dasco is covered by workers' compensation insurance, whether through SOI (for individuals designated as assigned employees), through Dasco (for all other employees), or through his or her own coverage (as an independent contractor).

We have concluded that Boyd was not designated as an assigned employee. He could still be an employee of Dasco or an employee intended to be an assigned employee, but not yet approved by SOI. The question before this Court is whether Boyd was an employee of Dasco or an independent contractor. Our Supreme Court has held that the definition of "employee" contained in the Workers' Compensation Act "adds nothing to the common law meaning of the term." *Lucas*, 289 N.C. at 219, 221 S.E.2d at 261. To determine whether a worker is an independent contractor or an employee, we apply the traditional common law tests. *McCown v. Hines*, 353 N.C. 683, 686, 549 S.E.2d 175, 177 (2001). As this Court has previously held, "[t]he question of whether a relationship is one of employer-employee or independent contractor turns upon the 'extent to which the party for whom the work is being done has the right to control the manner and method in which the work is performed.' " *Williams v. ARL, Inc.*, 133 N.C. App. 625, 630, 516 S.E.2d 187, 191 (1999) (quoting *Fulcher v. Willard's Cab Co.*, 132 N.C. App. 74, 79, 511 S.E.2d 9, 13 (1999)).

In *Hayes v. Bd. of Trustees of Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944), the Supreme Court announced eight factors that courts should consider in determining the degree of control exer-

cised by the hiring party. An independent contractor relationship likely exists if:

> [t]he person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Id. at 16, 29 S.E.2d at 140. "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 claimant possessed the degree of independence necessary for classification as an independent contractor." *McCown*, 353 N.C. at 687, 549 S.E.2d at 178.

Keeping in mind the relevant factors, we find the following jurisdictional facts. With respect to whether Boyd was engaged in an independent business, calling, or occupation, Hughart testified that Boyd had previously worked as a helper and a driver in the in-home furniture delivery business. Boyd had not, however, ever had his own furniture delivery business or owned his own truck, but instead worked under the control of other employers. He was not engaged in an independent business, calling, or occupation.

The record contains no evidence suggesting that Boyd's experience in carrying furniture and driving a 35-foot furniture truck involved specialized skill, knowledge, or training. Boyd did not even have a commercial driver's license. In addition, Boyd's position as a "helper" to Epperson, the lead driver, did not allow him to exercise independent judgment in applying his experience. Hughart testified that the helper "just helps [do] the driving and carry the furniture in," whereas the lead driver "is responsible for mapping out the routes, making the phone calls, getting directions, things like that." The evidence relied upon by Dasco to demonstrate independence related only to the freedom of the lead driver and not that of the helper. The evidence showed that Boyd did not act independently, but instead was directly supervised by Epperson, an assigned employee of Dasco. Through Epperson, Dasco controlled how Boyd did his job. The evidence also gives rise to the inference that Epperson, as the lead

driver, set the hours and schedule for the trip, within the overall time frame established by Dasco. Thus, the evidence showed that Boyd was not free to control his own time on the furniture delivery trips.

The evidence tended to show that Boyd was in the regular employ of Dasco. We find it more likely that Boyd did complete an application, something that Shipley required only when he intended to have an individual become an assigned employee. He did not have Boyd sign an independent contractor's agreement and although independent contractors hired by Dasco were required under the service agreement to have workers' compensation insurance, there is no evidence that Dasco required that Boyd have workers' compensation insurance. Hughart also testified, without objection, that Boyd did not plan to return to his previous job but "had decided to stay with Dasco because he liked going out and doing in-home delivery better than he did . . . working in a warehouse."

In addition to the *Hayes* factors, our Supreme Court has held that "when valuable equipment is furnished to the worker, the relationship is almost invariably that of employer and employee." *Youngblood*, 321 N.C. at 385, 364 S.E.2d at 438 (citing 1C A. Larson, *The Law of Workmen's Compensation* § 44.34(a)). Here, at the time of the accident, Boyd was driving a 35-foot truck registered to Dasco, which qualifies as "valuable equipment."

The only factor that militates against a finding that Boyd was an employee of Dasco is that he was doing a specified piece of work at a fixed price or for a lump sum. Since no single *Hayes* factor is controlling, *McCown*, 353 N.C. at 687, 549 S.E.2d at 178, the pay received by Boyd does not mandate the conclusion that he was an independent contractor.

Application of the relevant factors reveals that: (1) Boyd was not engaged in an independent business, calling, or occupation; (2) he did not have the independent use of any special skill, knowledge, or training in the execution of the work; (3) the details of how he performed his work, including the time the work was done, was controlled by Dasco; (4) Dasco did not require proof of workers' compensation insurance as it did for independent contractors or completion of an independent contract; (5) Dasco had Boyd complete an employment application; and (6) Dasco entrusted Boyd with its furniture delivery truck. We hold that these factors substantially outweigh the fact that Boyd was apparently paid a flat rate. Boyd was, therefore, an employee of Dasco rather than an independent contractor.

Accordingly, we affirm the Commission's opinion and award to the extent it imposes liability on Dasco. Because we have also concluded that Boyd was not an employee of SOI, we need not address Dasco's contention that the Commission erred in concluding that Dasco and SOI are equally liable for workers' compensation benefits. We remand to the Commission for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judges HUDSON and THORNBURG concur.

Judge THORNBURG concurred prior to 31 December 2004.

STATE OF NORTH CAROLINA v. JERRY DELANE JENKINS, DEFENDANT

No. COA03-1544

(Filed 4 January 2005)

1. Drugs— conspiracy to traffic in cocaine by possession— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss at the close of the State's evidence the charge of conspiracy to traffic in cocaine by possession, because: (1) a reasonable juror could infer that three men riding around in a pickup truck had a relationship and were conversing with one another; (2) there was a reasonable inference that the subject of their conversation was a drug deal when the cocaine was found in a bag on the seat of the truck between defendant and one of the other men; (3) a jury could reasonably infer that the driver would not count thousands of dollars in drug money in front of defendant and the second man if they were not involved in a drug deal, nor would there be 79.3 grams of cocaine on the seat between the two passengers; and (4) viewed in the light most favorable to the State, there was sufficient evidence of both a mutual implied understanding and of other incriminating circumstances to support the elements of conspiracy and constructive possession.

2. Drugs— conspiracy to traffic in cocaine by possession— instruction—constructive possession

The trial court did not err in a conspiracy to traffic in cocaine by possession case by denying defendant's motion for an instruction on constructive possession, because: (1) although the trial court initially denied defendant's request for an instruction on constructive possession at the charge conference, the judge did include the pattern jury instruction on constructive possession while charging the jury on the offense of trafficking by possession; and (2) the trial court's charge on conspiracy to traffic in cocaine referred the jury to its prior instruction on trafficking by possession.

Judge ELMORE dissenting.

Appeal by defendant from judgment entered 28 May 2003 by Judge James M. Webb in Montgomery County Superior Court. Heard in the Court of Appeals 2 September 2004.

Attorney General Roy Cooper, by Assistant Attorney General Jane T. Hautin, for the State.

The Turrentine Group, P.L.L.C., by Karlene Scott-Turrentine, for defendant-appellant.

STEELMAN, Judge.

On 16 March 2002, Montgomery County Deputy Sheriff Robert George and Biscoe Police Officer Brant Phillips, as part of a local drug unit, responded to an anonymous call that Romeo Meza had a large quantity of cocaine coming into the city of Biscoe. George and Phillips saw Meza's truck and proceeded to pull the vehicle over for a traffic stop. Along with the driver Meza, two other male passengers were in the cab of the pick-up truck: defendant, seated next to the passenger door, and Prentice Southerland, seated in between Meza and defendant. Other officers were called in to assist with the stop.

Deputy George approached the truck on the driver's side while Officer Phillips and Officer Phillip Chappell, also of the Biscoe Police Department, approached the passenger's side. At the driver's side window, Deputy George noticed that Meza had a "large sum of cash on his lap," and "asked Mr. Meza to step out of the vehicle." Deputy George testified that

> [t]he money was in Mr. Meza' lap as if he was counting. It was folded out and there was numerous hundred-dollar bills visible. And when I asked him to get out of the vehicle, he tried to pick it up and put it back in his pocket.

The amount of money in Meza's lap was approximately $2,800.00. As Meza opened the driver's door, Deputy George observed a semiautomatic pistol inside the door panel.

Upon seeing the gun, later determined to be loaded with a round in the chamber, Deputy George "[i]mmediately handcuffed Mr. Meza and indicated to the other officer there was a firearm in the vehicle." At that point, Meza was passed back to other officers on the scene and Officers Phillips and Chappell, who were already at the passenger's side of the truck, proceeded to remove defendant and Southerland.

As defendant was "sliding out," Deputy George saw "a plastic bag on the front seat between Mr. Southerland's right leg and Mr. Jenkins' left leg," which was later determined to contain 51.5 grams of cocaine base and 27.8 grams of cocaine hydrochloride. Defendant and Southerland were also placed into custody and taken to the Biscoe Police Department.

Officer Chappell's testimony was consistent with that of Deputy George: the bag was not visible when both defendant and Southerland were in the truck, but "[a]s [defendant] was getting out, as Sergeant Phillips was asking them to get out and as they were getting out of the vehicle, it was laying there in the seat." Officer Chappell described the bag as a "clear plastic bag . . . [that was] wrapped up . . . [and] knotted up." Although Officer Chappell testified he could not see into the bag, he stated that in his experience "drugs are packaged that way." He also testified that while in custody at jail, Southerland attempted to dispose of some cocaine in the toilet.

Officer Phillips testified that after he asked defendant to step out of the car and placed him in custody, Officer Chappell began to assist Southerland out of the car. "And before he got to get [Southerland] out of the vehicle, he noticed a bag, which he handed to me." Officer Phillips testified the bag was rolled up, not clear, and that he could not ascertain its contents until he took them out. The bag itself was described by the forensic chemist as a "vegetable grocery style bag that . . . then [had] three . . . other bags that were knotted little plastic bags containing the material."

On 27 May 2002 defendant was tried in Montgomery Superior Court for trafficking in cocaine by possession of at least 28 grams but less than 200 grams, trafficking in cocaine by manufacturing (of the same amount), conspiracy to traffic in cocaine by possession (of the same amount), and possession of cocaine. Defendant was found guilty of conspiracy to traffic in cocaine, and acquitted of the remaining charges. He received an active sentence of 35 to 42 months. Defendant appeals.

At the close of the State's case, defendant made a motion to dismiss all charges for lack of sufficient evidence. This motion was denied. The defendant put on no evidence, and renewed his motion to dismiss. It was also denied. Our review is limited to the conviction for conspiracy to traffic in cocaine.

[1] In defendant's first and second assignments of error, he argues that the trial court erred in denying his motion to dismiss at the close of all the evidence because there was insufficient evidence to support the charge of conspiracy to traffic in cocaine by possession. We disagree.

In reviewing a trial court's denial of a defendant's motion to dismiss at the close of the State's evidence, we view the evidence in the light most favorable to the State. *State v. Sams*, 148 N.C. App. 141, 143-44, 557 S.E.2d 638, 640 (2001); *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). The State bears the burden of proving each element of the offense charged and must show substantial evidence of each element. *State v. Brinkley*, 10 N.C. App. 160, 161, 177 S.E.2d 727, 728 (1970).

"Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986). The State may meet this burden by either direct or circumstantial evidence. The law makes no distinction between the weight to be accorded to direct or circumstantial evidence. *State v. Salters*, 137 N.C. App. 553, 557, 528 S.E.2d 386, 390 (2000) (citation omitted).

"In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice. Nor is it necessary that the unlawful act be completed." *State v. Morgan* 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (internal citations omitted). A conspiracy may be shown by circumstantial evidence, or by a defendant's behavior. *State v.*

Harris, 145 N.C. App. 570, 579, 551 S.E.2d 499, 505 (2001), *disc. rev. denied, appeal dismissed* 355 N.C. 218, 560 S.E.2d 146 (2002) (citation omitted). Conspiracy may also be inferred from the conduct of the other parties to the conspiracy. *State v. Batchelor*, 157 N.C. App. 421, 427, 579 S.E.2d 422, 427 (2003), *disc. rev. denied*, 357 N.C. 462, 586 S.E.2d 101 (2003) (citation omitted). "[P]roof of a conspiracy [is generally] established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *Id.* (internal quotations and citations omitted).

"Trafficking in cocaine by possession of at least 28 grams but not more than 200 grams of cocaine is a violation of N.C. Gen. Stat. § 90-95(h)(3)(a). Possession of the drugs need not be exclusive." *State v. Outlaw*, 159 N.C. App. 423, 426, 583 S.E.2d 625, 628 (2003) (citation omitted). "It is well established in North Carolina that possession of a controlled substance may be either actual or constructive. A person is said to have constructive possession when he, without actual physical possession of a controlled substance, has both the intent and the capability to maintain dominion and control over it." *State v. Jackson*, 103 N.C. App. 239, 243, 405 S.E.2d 354, 357 (1991) (internal citations omitted).

> As the terms "intent" and "capability" suggest, constructive possession depends on the totality of circumstances in each case. No single factor controls, but *ordinarily the question will be for the jury*. . . . The fact that a person is present in a [vehicle] where drugs are located, nothing else appearing, does not mean that person has constructive possession of the drugs. . . . [T]here must be evidence of other incriminating circumstances to support constructive possession.

State v. James, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986) (internal citations omitted) (emphasis added).

In order to find defendant guilty of conspiracy to traffic in cocaine in the instant case, the State must prove that defendant entered into an agreement to traffic by possessing cocaine weighing at least 28 grams but less than 200 grams, and intended the agreement to be carried out at the time it was made. *See State v. Diaz*, 155 N.C. App. 307, 319, 575 S.E.2d 523, 531 (2002), *cert. denied*, 357 N.C. 464, 586 S.E.2d 271 (2003). Defendant argues that there was insufficient evidence to support either the element of agreement, or the element of possession.

In this matter, the defendant stipulated that the stop of the pickup truck by the officers was valid and legal, and the amount of cocaine is not in dispute. When the truck was stopped by the officers, Meza was driving, Southerland was seated in the middle and defendant was next to the passenger window. They were seated together on the bench seat of the pickup truck. Meza had a pile of money in his lap. When Meza exited the vehicle, there was a pistol plainly visible in the driver's door of the truck. When defendant exited the truck, there was a bag of drugs *on the seat between defendant and Southerland.*

We hold that this evidence was sufficient to submit the charge of conspiracy to traffic in cocaine by possession to the jury. A reasonable juror could infer that three grown men riding around in a pickup truck had a relationship and were conversing with one another. With evidence tending to show that Meza was in the process of counting thousands of dollars in cash when he was pulled over, and that 27.8 grams of powdered cocaine, 51.5 grams of crack cocaine and a loaded handgun were in the open cabin of the truck, there is also a reasonable inference that the subject of their conversation was a drug deal and not something more innocuous. This is particularly true in light of the fact that the cocaine was found in a bag on the seat of the truck between defendant and Southerland. A jury could reasonably infer that Meza would not count thousands of dollars in drug money in front of defendant and Southerland if they were not involved in a drug deal, nor would there be 79.3 grams of cocaine on the seat between the two passengers. "In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury . . . ." *Jackson*, 103 N.C. App. at 244, 405 S.E.2d at 357 (internal quotations and citations omitted) (Case finding adequate evidence to submit trafficking in cocaine and conspiracy to traffic in cocaine to the jury on facts similar to the instant case). Viewed in the light most favorable to the State, there was sufficient evidence of both a mutual, implied understanding, and of other incriminating circumstances to support the elements of conspiracy and constructive possession. These assignments of error are without merit.

[2] In his third assignment of error, defendant asserts that the trial court erred in denying defendant's motion for an instruction on constructive possession. We disagree.

"Every substantial feature of the case arising on the evidence must be presented to the jury even without a special request for instructions on the issue." *State v. Watson*, 80 N.C. App. 103, 106, 341 S.E.2d 366, 369 (1986) (citation omitted). The trial court initially

denied defendant's request for an instruction on constructive possession at the charge conference. However, in charging the jury on the offense of trafficking by possession, the judge did include the pattern jury instruction on constructive possession (NCPI Criminal 104.41). The judge's charge on conspiracy to traffic in cocaine referred the jury to his prior instruction on trafficking by possession. This complied with defendant's request for an instruction on constructive possession. This assignment of error is without merit.

NO ERROR.

Judge CALABRIA concurs.

Judge ELMORE dissents.

ELMORE, dissenting.

I must respectfully dissent from the majority opinion in this case because I cannot hold that the State presented sufficient evidence of conspiracy. Accordingly, I would vacate defendant's conviction for conspiracy to traffic in cocaine by possession.

On appeal we review the evidence supporting a conviction of conspiracy to traffic in cocaine in the light most favorable to the State. *State v. Sams*, 148 N.C. App. 141, 144, 557 S.E.2d 638, 641 (2001).

> A motion to dismiss is proper when the State fails to present substantial evidence of each element of the crime charged. *See State v. McDowell*, 329 N.C. 363, 389, 407 S.E.2d 200, 214 (1991). 'Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt.' *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986).

Id. In order to find defendant guilty of conspiracy to traffic in cocaine, the state must prove that defendant entered into an agreement to traffic in cocaine (for a specified amount), and intended the agreement to be carried out at the time which it was made. *See State v. Valentine*, 357 N.C. 512, 522, 591 S.E.2d 846, 855 (2003); *State v. Diaz*, 155 N.C. App. 307, 319, 575 S.E.2d 523, 531 (2002), *cert. denied*, 357 N.C. 464, 586 S.E.2d 271 (2003); *State v. Harris*, 145 N.C. App. 570, 579, 551 S.E.2d 499, 504-05 (2001).

The essential element of conspiracy is that of the agreement. Therefore, for the denial of defendant's motion to dismiss to be

proper, there must be evidence of an agreement which the jury could find beyond a reasonable doubt. *See Sams*, 148 N.C. App. at 143-44, 557 S.E.2d at 641. Even in the light most favorable to the State, and recognizing the inherent difficulty of proving conspiracy, I cannot find substantial evidence that the defendant *agreed* to traffic in cocaine.

There was no evidence presented as to whether defendant had a previous relationship with Southerland or Meza, or even that he knew them. *Cf. Sams*, 148 N.C. App. 141, 557 S.E.2d 638 (evidence that defendant and drug dealer had worked together in the past to facilitate cocaine sales was enough to support a denial of a motion to dismiss a conspiracy charge). There was no evidence presented that defendant even spoke with the other two men. *Cf. State v. Morgan*, 329 N.C. 654, 406 S.E.2d 833 (1991) (multiple prior transactions and conversations between defendant and others regarding the sale and delivery of cocaine was sufficient to support an inference of a conspiracy); *State v. Batchelor*, 157 N.C. App. 421, 579 S.E.2d 422 (informant testified to previous conversations with defendant supporting inference of agreement), *disc. review denied*, 357 N.C. 462, 586 S.E.2d 101 (2003); *State v. Diaz*, 155 N.C. App. 307, 575 S.E.2d 523 (2002) (co-defendants had multiple conversations with one another regarding the sale of drugs), *cert. denied*, 357 N.C. 464, 586 S.E.2d 271 (2003).

There was no evidence presented as to how long the three men had been in the truck before being stopped by police. There was no evidence presented that defendant could see either the drugs in the seat or the gun in the pocket of the door opposite him. Defendant did not have drugs on his person, like Southerland did, nor did he have possession of a large sum of money, like Meza did. *Cf. State v. Harris*, 145 N.C. App. 570, 551 S.E.2d 499 (2001) (inference of conspiracy where defendant was found with a large amount of money on him and was sharing a hotel room with another person who had drugs on him at the time of arrest).

The majority relies on *Batchelor* to assert that a conspiracy may be inferred from the conduct of the other parties to the conspiracy. Here, in order to infer conspiracy from the *other* parties, the majority is stating that mere presence with others who may be in agreement to bring about a certain result is substantial evidence of an agreement with them. The *Batchelor* court did not go that far, and I do not think this panel should either.

In *Batchelor*, evidence reviewed in the light most favorable to the State showed that the defendant had agreed to sell drugs to a confidential informant because the two set up a face-to-face location for the buy. *Batchelor*, 157 N.C. App. at 427-28, 579 S.E.2d at 427. When the defendant came to the agreed-upon location, he brought a passenger with him. Despite pat-down searches, no drugs were recovered on either the defendant or his passenger; yet, after placing the defendant and his passenger in separate patrol cars, drugs were later found in the patrol car of the passenger. *Id.* Evidence further showed that the passenger was the only person who could have placed the drugs in the car, creating an inference that the drugs were on his person while he was with the defendant. *Id.* That, *plus* the conversations with the confidential informant in which the two agreed to a prearranged meeting location was sufficient evidence to send a conspiracy charge to the jury. *Id.*

Here, the evidence presented at trial, in congruence with *Batchelor*, would support an inference of a conspiracy between Meza and Southerland, who was later disposing of drugs while in custody, but not between defendant and Meza or defendant and Southerland. Defendant Batchelor had at least made several phone calls relating to the sale of cocaine that, together with the conduct of his passenger, would support an inference of conspiracy: upon arrival at the location the only drugs apparently to sell were located on the passenger. *See State v. Valentine*, 357 N.C. 512, 522, 591 S.E.2d 846, 855 (2003) ("[I]n establishing a criminal conspiracy, direct proof is not required. . . . 'It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.' "(citations and emphasis omitted)).

The only *act* proven on behalf of the defendant to show agreement between he and Meza or Southerland was that of being in the truck. Mere presence cannot stand as the only act linking a defendant to a conspiracy. *See State v. Merrill*, 138 N.C. App. 215, 221, 530 S.E.2d 608, 612 (2000) (Upon evaluating the State's argument that the conduct of others supported a jury question as to conspiracy the Court determined that "[m]ere passive cognizance of the crime or acquiescence in the conduct of others will not suffice to establish a conspiracy.")

Conclusively, I would hold that when marshaled together there was no evidence presented which could support a finding beyond a reasonable doubt that defendant agreed with either Meza or

Southerland to traffic in cocaine. As such, I would reverse the trial court's denial of defendant's motion to dismiss the charge of conspiracy to traffic in cocaine, and, since defendant was only convicted of this offense, I would vacate the trial court's judgment against him. Accordingly, I would not reach defendant's other assignments of error.

STATE OF NORTH CAROLINA v. MILAS KENNEDY HUDGINS, DEFENDANT

No. COA03-1485

(Filed 4 January 2005)

1. **Criminal Law— defenses—necessity—driving while impaired**

An instruction on the defense of necessity should have been given in a DWI trial. The defense remains available even though DWI is a strict liability offense, and a trial judge is not relieved of the duty to give a correct instruction, there being evidence to support it, merely because the request was not altogether correct. There was substantial evidence of the defense in that defendant said he jumped behind the wheel of the moving truck and steered it to prevent collisions with another vehicle and a house and injuries to others. Credibility is for the jury.

2. **Evidence— prior crimes or bad acts—opportunity to stipulate—use despite stipulation**

In an action reversed on other grounds, the trial court erred by introducing an exhibit listing defendant's prior convictions before arraigning him on an habitual DWI charge and giving him an opportunity to stipulate to the prior convictions. Introducing the prior convictions on the charge of driving with a revoked license was also error; the State offered no justification for admission of the prior convictions in addition to license suspensions (to which defendant had stipulated).

Appeal by defendant from judgments entered 4 June 2003 by Judge Zoro J. Guice, Jr. in Yancey County Superior Court. Heard in the Court of Appeals 17 June 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins and Assistant Attorney General Patricia A. Duffy, for the State.

L. Jayne Stowers for defendant-appellant.

GEER, Judge.

Defendant Milas Kennedy Hudgins appeals from his conviction of habitual driving while impaired and driving while license revoked. Because the evidence at trial supported an instruction on the defense of necessity, we hold that the trial court erred in failing to give such an instruction. We accordingly reverse defendant's convictions and remand for a new trial.

Facts

The State's evidence tended to show the following. In the early evening hours on 3 September 2002, Joe Austin and a friend were standing next to Austin's house when they heard "something coming off the hill real fast" and saw a white Toyota pickup truck barreling down a steep hill behind Austin's house. The Toyota hit an old truck cab that Austin had parked on the hill and another vehicle parked in front of the house and came to rest in Austin's driveway. Austin ran to the truck and saw defendant lying on top of Benny Maney on the floorboard with defendant on the driver's side and Maney on the passenger side. Austin testified that the truck was still running, and his friend reached in and turned it off. Austin ran to his house and told his wife to call an ambulance. About fifteen minutes later, before the ambulance arrived, defendant got out of the truck and started walking toward his house.

When Trooper Rocky Dietz of the North Carolina Highway Patrol arrived, Austin told him that defendant had left to walk to his house. Dietz went to defendant's house, where defendant answered the door. Dietz noticed that defendant had a strong odor of alcohol coming from his person. Dietz asked defendant if he had been in a motor vehicle accident, and defendant replied that he had not, but agreed to accompany Dietz to the accident scene. Dietz placed defendant in his patrol car and administered *Miranda* warnings.

At the accident scene, Austin identified defendant as the person he had seen in the driver's seat of the truck, and defendant apologized to Austin for what had happened. Dietz placed defendant under arrest and transported him to the Yancey County Sheriff's

Department, where he informed defendant of his Intoxilyzer rights and administered an Intoxilyzer test. The test indicated that defendant had a breath alcohol concentration of .26.

Toward the end of the State's case-in-chief, the trial court admitted into evidence State's Exhibit 6, consisting of defendant's record of convictions for violations of motor vehicle laws, a notice of an alcohol-related suspension of defendant's North Carolina driver's license, and defendant's DMV driver's record. Following admission of this evidence, defendant was arraigned outside the presence of the jury on the charge of habitual driving while impaired. Defendant then admitted having three prior convictions involving impaired driving within the past seven years and confirmed that he had signed a stipulation that his license was revoked on the date of the accident. The signed stipulation was admitted into evidence as State's Exhibit 7. At that point, the State rested.

Defendant offered evidence that he began drinking at approximately 1:00 p.m. on 3 September 2002 and drank six or seven beers over the course of the afternoon. His friend Benny Maney picked him up in a white Toyota pickup truck to take him to Maney's house for supper. Denise Sturgill, the fiancée of defendant's brother, testified that she saw defendant get into the passenger side of Maney's truck. According to defendant, he was still riding as a passenger when the two men stopped on the side of the road to examine a dead tree and decide how best to cut it down for wood. Maney's truck was parked on the unpaved shoulder of the road, facing traffic. Defendant looked back and saw that the truck was rolling. He ran to the truck, jumped in the passenger door, slid over to the driver's side, and unsuccessfully tried to stop the truck by pumping the brakes. Maney followed through the passenger side and pulled the emergency brake, but the truck just rolled faster. Defendant testified that the truck was traveling on the wrong side of the road with defendant attempting to steer although the truck's power steering was not working. As they approached a sharp curve, defendant saw an oncoming car and steered the truck across the road to the opposite bank. According to defendant, the truck went over an embankment, then hit Austin's truck cab and a parked car and headed straight towards Austin's house. Defendant testified that he "tried to do the best [he] could to keep from hitting that house below [them]." The truck came to rest in Austin's driveway. Defendant testified that had he not jumped in the truck and ultimately steered it down the driveway, it would "have went right through [the] house."

Defendant "busted [his] head over the windshield coming down through there" and "was kind of addled." After the ambulance came and took Maney to the hospital, defendant got out and waited a time for the state trooper to come, then returned to his house. Trooper Dietz arrived about ten minutes later.

The jury convicted defendant of driving while impaired ("DWI") and driving while his license was revoked ("DWLR"), but found him not guilty of displaying a fictitious license plate. He was sentenced to 120 days imprisonment on the DWLR conviction and 19 to 23 months for a habitual DWI conviction based on his stipulation to the prior DWIs. From his convictions and sentences, defendant appealed to this Court.

I

[1] At trial, defendant requested the following jury instruction on the defense of necessity:

> I instruct you that North Carolina recognizes the defense of "necessity." A person is excused from criminal liability if he acts under a duress of circumstances to prevent some serious event from happening, and if he has no other acceptable choice. The law ought to promote the achievement of higher values at the expense of lesser values and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law. If you find that [defendant] had no other acceptable way in which to prevent possible injury to occupants and property damage and only drove to steer the truck away from houses, the defense of necessity requires you to find him not guilty.

Defendant contends that it was reversible error for the trial court to refuse to give his requested instruction on the defense of necessity.

"A trial court must give a requested instruction if it is a correct statement of the law and is supported by the evidence." *State v. Haywood*, 144 N.C. App. 223, 234, 550 S.E.2d 38, 45, *appeal dismissed and disc. review denied*, 354 N.C. 72, 553 S.E.2d 206 (2001). Even in the absence of a request, "[f]ailure to instruct upon a substantive or 'material' feature of the evidence and the law applicable thereto will result in reversible error . . . ." *State v. Ward*, 300 N.C. 150, 155, 266 S.E.2d 581, 585 (1980). Any defense raised by the evidence is deemed a substantial feature of the case and requires an instruction. *State v. Smarr*, 146 N.C. App. 44, 54, 551 S.E.2d 881, 888 (2001), *disc. review denied*, 355 N.C. 291, 561 S.E.2d 500 (2002).

For a jury instruction to be required on a particular defense, there must be substantial evidence of each element of the defense when "the evidence [is] viewed in the light most favorable to the defendant . . . ." *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000), *disc. review denied*, 353 N.C. 386, 547 S.E.2d 25 (2001). "Substantial evidence" is evidence that a reasonable person would find sufficient to support a conclusion. *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). Whether the evidence presented constitutes "substantial evidence" is a question of law. *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982).

A. Availability of Necessity Defense in DWI Prosecution

As an initial matter, the State asserts that the defense of necessity is inapplicable to a DWI prosecution, arguing that DWI is a strict liability offense to which there are no common law defenses.[1] The only case the State cites for this proposition, *State v. Rose*, 312 N.C. 441, 323 S.E.2d 339 (1984), involved a challenge that the statute was unconstitutionally vague, *id.* at 442, 323 S.E.2d at 340, and fails to support the State's argument. The State also points to N.C. Gen. Stat. § 20-138.1(b) (2003), which provides that "[t]he fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section." N.C. Gen. Stat. § 20-138.1(b). This provision does not establish a strict liability offense; it simply provides that legal use of alcohol or drugs does not justify driving while impaired.

The State's argument cannot be reconciled with decisions of this Court indicating that common law defenses are available in DWI prosecutions. This Court recently held that "[i]n appropriate factual circumstances, the defense of entrapment is available in a DWI trial." *State v. Redmon*, 164 N.C. App. 658, 663, 596 S.E.2d 854, 858 (2004) (remanding for new trial for failure to instruct on defense of entrapment). This Court has also implicitly acknowledged that the defense of duress would be appropriate in a DWI trial. *See State v. Cooke*, 94 N.C. App. 386, 387, 380 S.E.2d 382, 382-83 (emphasis omitted) ("The trial court was correct in refusing to instruct the jury on the defense of coercion, compulsion or duress as there was no evidence that defendant faced threatening conduct of any kind at the time the officer saw him driving while intoxicated."), *disc. review denied*, 325 N.C. 433, 384 S.E.2d 542 (1989).

1. The State does not contend that the defense is unavailable in a DWLR prosecution.

Moreover, courts in other jurisdictions have specifically held that the defense of necessity is available in a DWI prosecution. *See, e.g., People v. Pena*, 149 Cal. App. 3d Supp. 14, 22, 197 Cal. Rptr. 264, 269 (1983) (duress/necessity defense was available to a defendant charged with misdemeanor driving under the influence); *Stodghill v. State*, 881 So. 2d 885, 889 (Miss. Ct. App.) ("[Defendant's] decision to drive after drinking may be excused as necessary."), *cert. denied*, 883 So. 2d 1180 (2004); *State v. Shotton*, 142 Vt. 558, 562, 458 A.2d 1105, 1107 (1983) (in DWI prosecution, trial court erred in not instructing the jury on the defense of necessity). We likewise hold that the defense of necessity is available in a DWI prosecution.

B. The Need for a Jury Instruction on Necessity

This Court has explained, with respect to the defense of necessity, that " '[a] person is excused from criminal liability if he acts under a duress of circumstances to protect life or limb or health in a reasonable manner and with no other acceptable choice.' " *State v. Thomas*, 103 N.C. App. 264, 265, 405 S.E.2d 214, 215 (1991) (quoting *State v. Gainey*, 84 N.C. App. 107, 110, 351 S.E.2d 819, 820 (1987)), *disc. review denied*, 329 N.C. 792, 408 S.E.2d 528 (1991). Our Supreme Court long ago restricted the necessity defense to situations where "a human being was thereby saved from death or peril, or relieved from severe suffering." *State v. Brown*, 109 N.C. 802, 807, 13 S.E. 940, 942 (1891).

Because of this limitation on the defense, defendant's requested instruction was not a correct statement of the law to the extent it suggested that the defense was available for attempts to prevent "serious events" or possible property damage. A trial judge is not, however, "relieved of his duty to give a correct . . . instruction, there being evidence to support it, merely because defendant's request was not altogether correct." *State v. White*, 288 N.C. 44, 48, 215 S.E.2d 557, 560 (1975). *See also State v. Black*, 34 N.C. App. 606, 608, 239 S.E.2d 276, 277 (1977) ("[T]he trial judge is not relieved of his duty to give a correct instruction merely because defendant's request was not altogether correct."), *disc. review denied*, 294 N.C. 362, 242 S.E.2d 632 (1978).

The question before this Court is, therefore, whether defendant presented substantial evidence to support the defense of necessity. A defendant must prove three elements to establish the defense of necessity: (1) reasonable action, (2) taken to protect life, limb, or

health of a person, and (3) no other acceptable choices available. *Thomas*, 103 N.C. App. at 265, 405 S.E.2d at 215. In this case, defendant offered evidence that he jumped into the moving truck and steered it to prevent the truck from hitting another car or Austin's house and harming someone.

Although the State argues that defendant's testimony was "an elaborate fabrication," that argument presents a question of credibility that is solely within the purview of the jury. "All defenses presented by the defendant's evidence are substantial features of the case, even if that evidence contains discrepancies or is contradicted by evidence from the state. This rule reflects the principle in our jurisprudence that it is the jury, not the judge, that weighs the evidence." *State v. Norman*, 324 N.C. 253, 267, 378 S.E.2d 8, 17 (1989) (internal citation omitted).

The State also appears to argue that there was only a risk of property damage, rendering the defense inapplicable. Defendant's evidence, if believed, presented the prospect—in the absence of defendant's actions—of a truck barreling down a steep hill in the wrong lane of a public road, creating a substantial risk of physical harm to other drivers or the occupants of the nearby house. The fact that defendant and Maney were themselves safely out of harm's way, as the State argues, is irrelevant if the jury believed that defendant's actions were necessary to protect others. *See State v. S. Ry. Co.*, 119 N.C. 814, 821, 25 S.E. 862 (1896) (recognizing that a necessity defense may be available where "it was necessary . . . in order to preserve the health or to save the lives of the crew . . ., or relieve them from suffering"); *Haywood*, 144 N.C. App. at 234-35, 550 S.E.2d at 45 (instruction on necessity proper where defendant testified that he had participated in sexual assaults to prevent the other defendant from hurting the victim).

Whether jumping into the truck to attempt to stop the vehicle was reasonable under the circumstances and whether defendant had any other acceptable options were questions for the jury. The State argues that because Maney could have jumped into the truck, there was no need for defendant to get behind the wheel. It was, however, up to the jury to decide whether the situation involved a split-second decision in an emergency situation that rendered defendant's actions reasonable and necessary.

In sum, because the record contains substantial evidence of each element of the necessity defense, the trial court should have

instructed the jury on that defense. Failure to instruct on a defense raised by the evidence is reversible error. *Ward*, 300 N.C. at 155, 266 S.E.2d at 585. Accordingly, defendant is entitled to a new trial.

II

[2] Defendant also contends that admission of State's Exhibit 6 during the State's case-in-chief violated N.C. Gen. Stat. § 15A-928(c)(1) (2003), as well as Rules 402 and 403 of our Rules of Evidence. We address defendant's argument because of the possibility of repetition on retrial.

N.C. Gen. Stat. § 15A-928 (2003) governs the method of proof of previous convictions in superior court when the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter. It applies to prosecutions for habitual DWI, *State v. Scott*, 356 N.C. 591, 593, 573 S.E.2d 866, 867 (2002), and provides:

> (c) After commencement of the trial and before the close of the State's case, the judge in the absence of the jury must arraign the defendant upon the special indictment or information, and must advise him that he may admit the previous conviction alleged, deny it, or remain silent. Depending upon the defendant's response, the trial of the case must then proceed as follows:
>
> (1) *If the defendant admits the previous conviction*, that element of the offense charged in the indictment or information is established, *no evidence in support thereof may be adduced by the State*, and the judge must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense.

N.C. Gen. Stat. § 15A-928 (emphasis added). "The purpose of this procedure is to afford the defendant an opportunity to admit the prior convictions which are an element of the offense and prevent the State from presenting evidence of these convictions before the jury." *State v. Burch*, 160 N.C. App. 394, 397, 585 S.E.2d 461, 463 (2003).

In this case, the trial court admitted State's Exhibit 6, listing defendant's prior convictions, before arraigning defendant on the habitual DWI charge and giving him an opportunity to stipulate to those prior convictions. This procedure contravened the purpose of

N.C. Gen. Stat. § 15A-928(c) to "insure that the defendant is informed of the previous convictions the State intends to use and is given a fair opportunity to either admit or deny them or remain silent." *State v. Jernigan*, 118 N.C. App. 240, 244, 455 S.E.2d 163, 166 (1995).

With respect to the DWLR charge, defendant argues that because defendant signed a stipulation that his license was revoked on the date of the offense and that he knew his license had been revoked, the admission of State's Exhibit 6 violated Rules 402 and 403 of our Rules of Evidence. As a leading commentator has observed, "a stipulation or admission by the defendant cannot limit the State's *right* to prove all essential elements of its theory of the case." 2 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 198 (6th ed. 2004). *See also State v. Jackson*, 139 N.C. App. 721, 732, 535 S.E.2d 48, 55 (2000) (the trial court's decision to allow evidence of defendant's prior felony conviction, notwithstanding defendant's tendered stipulation, did not violate Rule 403), *rev'd in part on other grounds*, 353 N.C. 495, 546 S.E.2d 570 (2001). Nevertheless, the State offers no justification for admission of defendant's prior convictions, as opposed to just the license suspension, on the DWLR charge.

Due to our disposition of this case, we need not consider whether the jury "probably would have reached a different verdict" had State's Exhibit 6 not been admitted. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). Upon retrial, however, these errors should be avoided. We decline to address defendant's remaining contentions on appeal since we believe it is unlikely that any errors that occurred will be repeated.

New trial.

Judges HUDSON and THORNBURG concur.

Judge THORNBURG concurred prior to 31 December 2004.

MELVIN LOWERY, EMPLOYEE, PLAINTIFF v. DUKE UNIVERSITY, EMPLOYER, SELF-INSURED, DEFENDANT

No. COA04-62

(Filed 4 January 2005)

Workers' Compensation— suitable employment—constructive refusal

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff utility worker did not constructively refuse suitable employment when he refused to attempt the job offered by defendant after the injury to plaintiff's right knee and leg, because: (1) competent evidence in the record supported the Commission's finding that plaintiff was not offered suitable employment when he was told that he could not use his cane while working; (2) the work plaintiff was instructed to do did not fall within the doctor's restrictions; and (3) plaintiff's testimony and the medical opinion of another doctor further supported the Commission's finding that the job offered to plaintiff was one he was physically unable to perform.

Appeal by defendant from Opinion and Award entered 6 October 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 November 2004.

Perry, Perry & Perry, P.A., by Robert T. Perry, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Kari R. Johnson, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Duke University, self-insured, appeals from an opinion and award entered 6 October 2003 by the North Carolina Industrial Commission (hereinafter "Commission") awarding plaintiff benefits.

Defendant contends that the Commission erred when it reversed the opinion and award of the Deputy Commissioner and found that plaintiff did not constructively refuse suitable employment. Specifically, defendant asks this Court to find that there is no competent evidence to support the Commission's finding of fact that defendant-employer "failed to offer plaintiff a job that was within his

restrictions and that he was physically able to perform." After careful consideration, we affirm the Industrial Commission.

Evidence before the Industrial Commission tended to show that plaintiff began working as a utility worker at Duke University in or around 1969. At the time of his injury he was assigned to work at Carr Gymnasium, where his job duties included mopping restrooms, locker rooms and hallways; vacuuming; removing trash; wiping benches; and cleaning lobbies, equipment rooms, the gym floor, a classroom, and a stairwell and landing. Plaintiff used dust mops, wet mops, brooms, a wet vac, a vacuum cleaner, cleaning chemicals and dust cloths.

Plaintiff suffers from poorly controlled Type II diabetes, has had complications from epilepsy in the past, and takes medication for depression. Plaintiff suffered a right knee injury as a child which resulted in his right leg being shorter than his left leg.

On 24 November 1999, plaintiff fell down some stairs while in the course of his employment and sustained an acute right quadriceps tendon rupture. Defendant accepted plaintiff's right knee injury as compensable and paid temporary total disability compensation pursuant to a Form 60, Employer's Admission of Employee's Right to Compensation, dated 28 April 2000.

On 6 December 1999, plaintiff underwent a quadriceps tendon repair procedure performed by orthopedic surgeon Lawrence Higgins, M.D. Following his surgery, plaintiff began using a cane due to right leg weakness to ensure he did not fall. On 11 April 2000, Dr. Higgins released plaintiff to return to light duty work for four weeks with a transition to full duty thereafter and continued physical therapy. Plaintiff returned to work with restrictions on 1 May 2000. Defendant-employer did not allow him to use his cane while working. Plaintiff attempted to work without his cane, but was evidently unsuccessful.

Dr. Carol Epling of Duke University Employee Occupational Health and Wellness Services took plaintiff out of work while he underwent additional physical and rehabilitation therapy. Dr. Epling referred plaintiff to Southwind Spine Rehabilitation Center to participate in a work transitioning program that plaintiff began on or about 23 May 2000. After completing physical therapy, plaintiff continued to suffer from chronic pain in his right knee and weakness of the right leg. There was also a significant atrophy of the right quadriceps.

After performing a functional capacity examination on 28 September 2000, Dr. Epling released plaintiff to return to modified housekeeping work on a trial basis with restrictions, including not kneeling or squatting and not lifting or pulling more than twenty pounds without assistance and no more than forty pounds under any circumstances.

Dr. Epling further noted that plaintiff "[m]ay have [sic] cane with him to work but not to use cane during work activities within restrictions previously written." She testified that "[i]f he did activities [compatible with] this very lengthy list of activities restrictions . . . his actual activities at the job would be quite restricted within these recommendations." She also opined that if plaintiff "didn't have a Duke job, then it would be difficult to find a job that would fit within those limitations." Dr. Epling was aware that plaintiff suffered fatigue, headaches, "and some other systemic symptoms that he attributed to poor glucose control." However, she admitted that when assessing plaintiff's functional capacity and determining work restrictions, she had failed to consider his diabetic condition. "My role in this clinic," she stated, "is to assess the injury status and to write relevant indicated activity limitations *for that injury*." (emphasis added).

Dr. Richard F. Bruch, an orthopedic surgeon, examined plaintiff on 27 April 2001 in connection with plaintiff's application for Social Security Disability benefits. It was Dr. Bruch's opinion that, some eighteen months after his surgery, plaintiff retained a fifteen percent (15%) permanent partial impairment rating to his lower right leg, and an additional five percent (5%) permanent partial impairment rating to the leg due to preexisting weakness attributable to the old injury. Dr. Bruch also opined, taking into consideration plaintiff's medical records, X-rays and his own physical examination of plaintiff, that he was more likely to fall than someone who had normal quadriceps muscle function and tone, and that plaintiff's use of a cane "was appropriate, either at home, out in public, or in the workplace."

"The standard of review for an appeal from an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). If there is competent evidence to support the findings, they are conclusive on appeal even though there is evidence to support contrary findings. *Hedrick*

v. PPG Industries, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997). 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). However, "findings of fact by the Commission may be set aside on appeal when there is a complete lack of competent evidence to support them." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000).

We also emphasize that " '[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Dolbow v. Holland Industrial*, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984) (citation omitted). "Thus, the Commission may assign more weight and credibility to certain testimony than other." 64 N.C. App. at 697, 308 S.E.2d at 336. *See also Boles v. U.S. Air, Inc.*, 148 N.C. App. 493, 499, 560 S.E.2d 809, 813 (2002).

Defendant purports to bring forward twenty-four assignments of error. In defendant's brief, however, only one argument is advanced: "The Full Commission erred when it reversed the Opinion and Award of the Deputy Commissioner and found that plaintiff's refusal of employment at Duke was justified thereby entitling plaintiff to continuing benefits." Questions raised by assignments of error in the record on appeal, but not then presented and discussed in a party's brief, are deemed abandoned. N.C. R. App. P. 28(b)(6).

The scope of appellate review is thus limited to the Commissioner's finding of fact No. 23, and its conclusion of law No. 1.[1]

The Commission's finding of fact No. 23 reads in pertinent part:

> Defendant-employer failed to offer plaintiff a job that was within his restrictions and that he was physically able to perform . . . .

1. Defendant further takes exception to finding of fact No. 21 which states, in pertinent part, "it was medically necessary for plaintiff to use his cane at all times due to his high risk of falling." Inasmuch as the Commission's conclusion of law that plaintiff was not offered suitable employment does not depend upon a finding that the cane was medically necessary, we need not inquire into whether the record supports the Commission's finding. Assuming, *arguendo*, that the cane was not medically necessary, the employment procured for plaintiff was nevertheless unsuitable.

The Commission's conclusion of law No. 1 provides:

> On October 10, 2000,[2] defendant-employer offered plaintiff a job he was physically unable to perform. Plaintiff did not constructively refuse suitable employment without justification when he refused to attempt the job offered by defendant without the use of his cane. N.C.G.S. § 97-32.

Thus, we must consider (1) whether the record contains any competent evidence to support the Commission's finding of fact that defendant failed to offer plaintiff a job that was within his restrictions and that he was physically able to perform; and (2) whether the findings of fact justify the Commission's conclusion of law that plaintiff did not refuse suitable employment.

G. S. § 97-32 (2003) provides:

> If an injured employee refuses employment procured for him ***suitable to his capacity*** he shall not be entitled to any compensation at any time during the continuance of such refusal, ***unless in the opinion of the Industrial Commission such refusal was justified***. (Emphasis supplied).

"The plain language of this statute requires that the proffered employment be suitable to the employee's capacity. If not, it cannot be used to bar compensation for which an employee is otherwise entitled." *McLean v. Eaton Corp.*, 125 N.C. App. 391, 393, 481 S.E.2d 289, 290 (1997); *see also Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444-45, 342 S.E.2d 798, 810 (1986).

"The burden is on the employer to show that plaintiff refused suitable employment." *Gordon v. City of Durham*, 153 N.C. App. 782, 787, 571 S.E.2d 48, 51 (2002). We have defined "suitable employment," in the context of G.S. § 97-32, as "any job that a 'claimant is capable of performing considering his age, education, physical limitations, vocational skills and experience.' " *Shah v. Howard Johnson*, 140 N.C. App. 58, 68, 535 S.E.2d 577, 583 (2000), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001). Once the employer shows, to the satisfaction of the Commission, that the employee was offered suitable work, the burden shifts to the employee to show that his refusal was justified. *See, e.g., Moore v. Concrete Supply Co.*, 149 N.C. App. 381, 390, 561 S.E.2d 315, 320 (2002) (where a position constituted "make work" specially created for plaintiff, did not exist in the

2. Evidence of record indicates the actual date plaintiff returned to work was 12 October 2000.

ordinary marketplace, was never advertised to the public, had never previously existed and was never subsequently filled after being refused by plaintiff, plaintiff was justified in refusing the position even though the work was suitable in light of his physical limitations and restrictions).

Defendant argues that plaintiff's insistence upon using his cane while working constituted a constructive refusal to return to work. Alternatively, defendant contends that the work offered to plaintiff could have been performed adequately while plaintiff was using a cane, and his refusal of suitable work renders him ineligible to receive continuing compensation. After careful consideration, we reject defendant's arguments.

There is competent evidence in the record to support the Commission's finding that plaintiff was not offered suitable employment. Plaintiff reported to work on 12 October 2000, whereupon he was told he could not use his cane, and his supervisor, Michelle Logan, sent him home. Plaintiff testified before the Deputy Commissioner:

A. [My employer] told me that . . . I couldn't use the cane, but I can, you know, work and hold on to walls and things and work like that, but I told them I wasn't going to do that. You know, it's something, you know, like doing dishes and things. I could hold to the walls. I didn't think that was appropriate for me to do.

. . .

Q. Why didn't you think that was appropriate for you to do?

A. I shouldn't work, you know, holding on to walls and things, you know, holding on to desks and walls and things.

Q. So you wanted to do your job with your cane?

A. I wanted—I wanted to do my job without my cane, but I was afraid to do my job without my cane. I really didn't want to—I really didn't want to—you know, work with the cane, period. I wanted to work, period, but like I say, I was afraid to work without my cane.

Q. Now could you perform your job with your cane?

A. Well, no. Anybody with, you know, common sense couldn't—you know, couldn't perform my job with a cane in your hand.

> How you going to work with a cane in your hand? But I tried, you know.

Plaintiff also testified that after completing his course of physical therapy, he continued to experience pain and weakness in his right leg. He stated that he fell three or four times while using the cane, and that he refused to work without his cane because he feared another serious fall.

Ms. Logan testified that the job of utility worker cannot be performed with a cane because the functions of utility worker require the use of both hands. "They can't use one hand to hold on to the cane and the other hand to mop or dust mop or run a machine or anything like that." She further testified that when plaintiff was discharged from physical therapy and returned to restricted work, it was her understanding that "he was not supposed to use the cane at that time." The work she asked plaintiff to do included "other options that he could use if he needed that clutch," such as "wall borders around the wall" inside the tennis building. She asked plaintiff to blow off an indoor tennis court using an electric leaf blower, and suggested that if he got tired "he could sit down on [the] benches and finish the court." Ms. Logan testified that janitorial duties ordinarily required standing on one's feet the entire shift, except for breaks, and that there is no position at Duke in janitorial or housekeeping services that would permit the employee to work while using a cane.

Plaintiff's testimony indicates that he did not understand the specific work restrictions Dr. Epling had given him: "The only thing I know, they put me on light duty work, but like I said, it ain't no light duty work out there to do."

We conclude the Commission did not err when it determined that plaintiff did not constructively refuse suitable employment. As the employer's own evidence shows, the work plaintiff was instructed to do did not fall within Dr. Epling's restrictions. Ms. Logan testified that she believed plaintiff could clean bathrooms, including "cleaning the sinks and toilets," even though his work restrictions stated he could do no kneeling or squatting. Dr. Epling testified that plaintiff would not be able to clean bathrooms insofar as that task required squatting or kneeling. Ms. Logan stated he should be able to "pull[] trash," even though the restrictions state that he must have assistance when lifting between 20 and 40 pounds, and that he must not lift more than 40 pounds. Plaintiff testified that he experienced great difficulty when he attempted to lift full trash bags from their

containers, and that he had to remove some of the trash from the bags before he could lift the bags.

Despite Dr. Epling's recommendation that plaintiff "may sweep and blow off tennis court but speed and endurance will progress with time," Dr. Epling was unfamiliar with the occupational demands of using an electric-powered leaf blower and at her deposition was unable to answer, to a reasonable degree of medical certainty, questions pertaining to whether or not plaintiff could work safely with a leaf blower, either with or without a cane.

The plaintiff's testimony and the medical opinion of Dr. Bruch further support the Commission's finding that the job offered to plaintiff was one he was physically unable to perform.[3] Accordingly, the findings of fact justify the Commission's conclusion of law that "[p]laintiff did not constructively refuse suitable employment."

For the foregoing reasons, the Opinion and Award of the Industrial Commission is affirmed.

Affirmed.

Judges McCULLOUGH and STEELMAN concur.

STATE OF NORTH CAROLINA v. EDDIE PURNELL AMMONS, JR.

No. COA03-1592

(Filed 4 January 2005)

1. Evidence— redacted statement—properly admitted

There was no error in the trial court's admission of a redacted version of defendant's statement which replaced racially derogatory information with a blank. The court had granted defendant's motion in limine to exclude the racial language, so that he received the relief requested, even if he now argues that the court should have used a noun or pronoun instead of a blank to prevent inferences by the jury. Moreover, defendant did not object at trial and does not argue plain error on appeal.

3. Because competent evidence of record supports the Commission's finding of fact that plaintiff was not offered suitable employment, the Commission need not have addressed whether plaintiff's rejection of employment was justified.

2. Homicide— second-degree murder—self-defense—sufficiency of evidence

There was sufficient evidence negating a second-degree murder defendant's claim of self-defense where the jury could find that the threat was no longer imminent when defendant acted, and that he lacked a reasonable belief in the threat of serious bodily injury.

3. Evidence— prior violent behavior—cross-examination—relevance—defendant's evidence of non-violent character

The trial court did not err in a voluntary manslaughter prosecution by allowing the State to cross-examine the defendant about his prior violent behavior. Although a claim of self-defense does not automatically put defendant's character for violence or aggression at issue, defendant testified to his character for non-violence and these inquires were relevant to his credibility.

4. Witnesses— leading questions—ten-year-old

There was no abuse of discretion in allowing the State to ask leading questions of the ten-year-old son of the victim to refresh his recollection of his statement to an officer. Limiting instructions were given.

Judge THORNBURG concurred before 31 December 2004.

Appeal by defendant from judgment entered 5 May 2003 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 19 October 2004.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John F. Oates, Jr., for the State.

Jon W. Myers for defendant-appellant.

HUNTER, Judge.

Eddie Purnell Ammons, Jr. ("defendant") appeals from a judgment dated 5 May 2003 entered consistent with a jury verdict finding him guilty of voluntary manslaughter. Defendant contends the trial court erred in: (I) admitting improperly redacted testimony, (II) denying defendant's motion to dismiss for insufficient evidence, (III) allowing introduction of evidence of alleged prior acts of violence, and (IV) allowing testimony after a child witness' recollection was

refreshed by leading questions. For the reasons stated within, we find no error.

The evidence tends to show that defendant met Allen Roher ("Roher") in December 2000 at a crack house. The two became acquainted through their mutual drug habit and spent considerable time together.

On 9 June 2002, defendant pawned a VCR to Roher for ten dollars, and agreed to pay thirty dollars to redeem the device. A dispute arose over the amount needed to redeem the VCR. On 17 June 2002, Roher asked defendant to come to his house to redeem the VCR. On 18 June 2002, defendant, driven by his uncle, Gerald Locklear ("Locklear"), arrived at Roher's house in a Ford Thunderbird whose passenger side window was broken and could not be rolled up.

Defendant accompanied Roher into his residence and offered thirty dollars to redeem the VCR. Roher then grabbed defendant, refused to return the device, and attempted to throw defendant out. A struggle ensued between the men. During the confrontation, Roher's son appeared at the door and was told to call the police. The struggle between defendant and Roher continued until Locklear entered. Roher then returned defendant's money and asked him to leave.

Defendant exited, followed by Roher, who picked up a bed slat outside the residence. Roher continued to follow defendant as he returned to Locklear's car, and repeatedly swung the slat at him. Defendant attempted to block the swings with his arm, but was struck in the neck by one of the blows. Defendant produced a knife, told Roher to stop hitting him, to keep the VCR, and not to come to his house. Defendant then got into the passenger side of the automobile and asked Locklear to start the engine. Roher continued to strike at the vehicle and defendant as the car backed down the driveway.

Upon reaching the road, the vehicle's engine cut off. As Locklear attempted to restart the car, Roher continued to swing the slat at the vehicle. Defendant stabbed Roher through the heart. The car then pulled away and defendant returned home with Locklear, where he began drinking heavily.

Upon investigation, officers of the Cumberland County Sheriff's Department found injuries to defendant's right arm, including swelling, contusions, and scrapes. Defendant was taken to the sheriff's office and awaited treatment in an interrogation room, which

contained audio and video equipment. Defendant was left in the room with the equipment on for approximately two hours. During that time, defendant made voluntary statements regarding the incident which were recorded and later used at trial.

Defendant was indicted on a charge of second degree murder and convicted of voluntary manslaughter. Defendant was sentenced to a term of 94 to 122 months. Defendant appeals.

I.

[1] Defendant first contends that the trial court erred in allowing admission of a redacted version of defendant's recorded statement upon defendant's motion *in limine*. We disagree.

" 'A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.' " *State v. McNeil*, 350 N.C. 657, 669, 518 S.E.2d 486, 494 (1999) (quoting N.C. Gen. Stat. § 15A-1443(c)).

Here defendant made a motion *in limine* to "exclude any evidence of, or reference to the defendant referring to Allen Roher as a 'Nigger[,]' " in voluntary statements made by defendant about the incident. The trial court granted the motion, permitting the racially derogatory language to be replaced in the statement by a blank. Defendant contends that by inserting blanks in place of the racially derogatory language used by defendant, rather than a noun or pronoun such as Roher's name, the trial court created a prejudicial risk that the jury would understand the purpose of the blank as a veiled racial reference. However, defendant did not object to the substitution of a blank for the racially derogatory language at the time the trial court granted the motion, nor later when the evidence was presented to the jury using the blank. As defendant received the relief requested, he cannot now raise the issue of prejudice resulting from the grant of the motion *in limine*. We find no error in the trial court's admission of the redacted evidence.

Further, even if the question raised had been error, it was plainly waived by defendant. "In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) (citing N.C.R. App. P. 10(b)(1)). "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal." *Id.*

As noted *supra*, defendant did not object at the time the blank was inserted into the statement, nor at trial when the statement was presented. Nor does defendant allege plain error. *See State v. Bell*, 359 N.C. 1, 27, 603 S.E.2d 93, 111 (2004) (holding failure to specifically assert plain error will not preserve issue for appellate review). Defendant's failure to object to such a substitution waives his right to appellate review of this issue.

II.

[2] Defendant next contends the trial court erred in denying defendant's motion to dismiss the charge of second degree murder for insufficient evidence that defendant did not act in self-defense. We disagree.

> The State bears the burden of proving that defendant did not act in self-defense. To survive a motion to dismiss, the State must therefore present sufficient substantial evidence which, when taken in the light most favorable to the State, is sufficient to convince a rational trier of fact that defendant did not act in self-defense.

State v. Hamilton, 77 N.C. App. 506, 513, 335 S.E.2d 506, 511 (1985) (citation omitted). " 'In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.' " *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000) (citations omitted) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

"Second-degree murder is an unlawful killing with malice, but without premeditation and deliberation." *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991). Perfect self-defense, which provides a complete excuse for a killing, is established when the following elements are found:

> "(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm."

State v. Reid, 335 N.C. 647, 670, 440 S.E.2d 776, 789 (1994) (quoting *State v. McAvoy*, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992)).

To negate the defense of self-defense altogether, the State need only prove beyond a reasonable doubt the non-existence of either the first or second element, i.e., either defendant had no belief that it was necessary to kill to save himself from death or great bodily harm, or that defendant's belief, if he had one, was unreasonable because the circumstances as they appeared to defendant were not sufficient to create such a belief in the mind of a person of ordinary firmness. *Id.* at 670-71, 440 S.E.2d at 789.

In the instant case, the evidence, taken in the light most favorable to the State, tends to show that defendant came armed with a sharpened knife to confront Roher in his home over the disputed VCR, and that the confrontation led to a fight between the two men. Roher followed defendant as he left his home and picked up a bed slat which he swung at defendant, hitting defendant four times on the arm. Defendant pulled his knife at this time and told Roher to stop hitting him, then got into the waiting vehicle. Roher continued to hit the car with the bed slat as it pulled down the drive. The vehicle's engine cut off as it reached the roadway. Roher continued swinging the bed slat at the vehicle as it stopped, and defendant produced the lockblade knife, reached outside the window, and stabbed Roher through the heart, while his uncle restarted the engine. Defendant immediately thereafter left the scene without notifying authorities.

In light of this evidence, a jury could find that defendant lacked a reasonable belief in the threat of serious bodily injury or death at the time he stabbed Roher, as defendant had reached the relative safety of the car and such a threat was no longer imminent. Further evidence negating the reasonableness of defendant's belief in the need to kill is found in his hasty departure from the scene. *See State v. Watson*, 338 N.C. 168, 181, 449 S.E.2d 694, 702 (1994) (overruled on other grounds, *State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724

(1995)) (holding such flight would permit a jury to infer defendant harbored a sense of guilt inconsistent with a killing justified on the basis of self-defense). As sufficient evidence of the elements of second degree murder and evidence negating defendant's claim of self-defense were presented, the trial court correctly denied defendant's motion to dismiss the charge of second degree murder and all lesser-included offenses at the close of all the evidence, and the case was properly submitted to the jury for determination of the disputed factual issues.

III.

[3] Defendant next contends that the trial court erred in allowing the State to cross-examine the defendant regarding his prior violent behavior. We disagree.

A claim of self-defense by defendant does not automatically place his character for violence or aggression at issue. *See State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986). In *Morgan*, the defendant charged with shooting his business partner was cross-examined about an incident three months prior in which he pointed a gun at another individual. *Id.* at 631, 340 S.E.2d at 88. In *Morgan*, the Supreme Court of North Carolina held that such evidence was not admissible under Rule 608(b) of the North Carolina Rules of Evidence, which permits evidence of specific conduct for the purpose of proving credibility of a witness or the lack thereof, "because extrinsic instances of assaultive behavior, *standing alone*, are not in any way probative of the witness' character for truthfulness or untruthfulness." *Id.* at 635, 340 S.E.2d at 90 (emphasis added), *see* N.C. Gen. Stat. § 8C-1, Rule 608(b) (2003). The State, in *Morgan*, also contended such evidence was proper under Rule 404(b), as it was relevant to whether the defendant was the aggressor in the altercation. Id. at 635-36, 340 S.E.2d at 91-92. However the Court found such evidence inadmissible as it served only to prove the defendant's violent disposition, and action in conformity with defendant's character, precisely what Rule 404(b) prohibited. *Id.* at 636-38, 340 S.E.2d at 92-93.

A similar finding was reached in *State v. Mills*, 83 N.C. App. 606, 351 S.E.2d 130 (1986). In *Mills*, the State questioned another witness regarding evidence that the defendant pointed a weapon at the victim three years earlier to show that the defendant's act was premeditated and deliberate under Rule 404(b). *Id.* at 609-10, 351 S.E.2d at 132-33. This Court found the questioning impermissible under Rule 404(b), as

its primary purpose was to show the defendant was the aggressor and did not act in self-defense. *Id.* at 611-12, 351 S.E.2d at 134.

Although evidence of other acts is not permissible under Rule 404(b) to show a propensity for violence solely because a defendant raised the claim of self-defense, such evidence may be used to refute specific evidence of defendant's credibility under Rule 608, when such credibility is at issue. N.C. Gen. Stat. § 8C-1, Rule 608. "A criminal defendant is entitled to introduce evidence of his good character, thereby placing his character at issue." *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12 (2000). When the criminal defendant introduces such evidence, "[t]he State in rebuttal can then introduce evidence of defendant's bad character." *Id.* Under Rule 405(a), the State may do so by cross-examining a defendant's character witnesses as to "relevant specific instances of conduct." N.C. Gen. Stat. § 8C-1 Rule 405(a) (2003). The Supreme Court recognized this distinction in *Morgan*, specifically distinguishing the facts of that case from the case of *Atkinson v. State*, 611 P.2d 528 (Alaska 1980), where evidence was admitted that defendant had previously pointed a gun at and threatened two other trespassers, after defendant claimed that he would never point a gun. *Morgan*, 315 N.C. at 638-39, 340 S.E.2d at 92. Further, the Supreme Court of North Carolina distinguished *Morgan* in *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118 (1993), holding that where the defendant testified on direct examination to the positive relationship with his family, the door was opened for cross-examination regarding specific acts of misconduct, and that where a "defendant proffered evidence of his character, including his character for non-violence, the State was entitled to impeach him, in proper order, by rebuttal evidence." *Syriani*, 333 N.C. at 379-80, 428 S.E.2d at 133 (1993).

Here, defendant testified on direct examination that he had "never injured anyone." Defendant's uncle also testified on direct examination that defendant was not a violent person. On cross-examination, defendant was then questioned regarding specific acts of violence towards individuals. Unlike in *Morgan* and *Mills*, where only the issue of self-defense but not the defendant's character were raised, but similar to *Syriani*, where the defendant testified to his character for non-violence, such inquiries in the instant case into prior violent behavior during cross-examination were relevant as to defendant's credibility once defendant placed his character for non-violence at issue. Therefore, the trial court did not err in permitting such inquiries.

IV.

[4] Defendant finally contends the trial court abused its discretion in allowing the State to ask leading questions to a child witness to refresh his recollection of prior statements made to a detective. We disagree.

"It is generally recognized that an examining counsel should not ask his own witness leading questions on direct examination." *State v. Greene*, 285 N.C. 482, 492, 206 S.E.2d 229, 235 (1974). However, the trial judge has sound discretion to permit such questions and may be aided by guidelines which have evolved over the years as to when counsel should be allowed to lead his or her own witness. *Id.* at 492, 206 S.E.2d at 235-36. These include "when the witness . . . has difficulty in understanding the question because of immaturity, age . . . or . . . the examiner seeks to aid the witness' recollection or refresh his memory when the witness has exhausted his memory without stating the particular matters required[.]" *Id.* at 492, 206 S.E.2d at 236. "[I]n the absence of abuse the exercise of such discretion will not be disturbed on appeal." *Id.* at 492, 206 S.E.2d at 235.

Here, the child in question was ten years old at the time of the trial, and the son of the victim. The trial court permitted the State to ask leading questions of the child after recognizing the tender age of the witness and the child's stated inability to remember the substance of his interview with the police officer who spoke with him on the day of the incident. Further, the trial court provided a limiting instruction to the jury that such questions were only for purposes of corroborating the child's testimony at trial. Therefore, no abuse of discretion is found.

For the reasons stated therein, we find no error.

No error.

Judges WYNN and THORNBURG concur.

Judge Thornburg concurred in this opinion prior to 31 December 2004.

STATE OF NORTH CAROLINA v. OMAR SARIK BATTLE, DEFENDANT

No. COA03-1626

(Filed 4 January 2005)

1. **Drugs— possession of cocaine with intent to sell—sufficiency of evidence—intent to sell**

   The trial court erred by failing to dismiss the charge of possession of cocaine with intent to sell and the case is remanded for resentencing on the lesser-included offense of possession of cocaine because although the State presented substantial evidence as to the element of constructive, if not actual, possession of the cocaine found in the motel room, the State presented little evidence supporting defendant's alleged intent to sell cocaine.

2. **Drugs— intentionally keeping and maintaining room for purpose of selling cocaine—motion to dismiss—sufficiency of evidence**

   The trial court erred by failing to dismiss the charge of intentionally keeping and maintaining a room for the purpose of selling cocaine, because: (1) only 1.9 grams of compressed powder cocaine, little enough to have been for personal use only according to the State's own chemist, was found; (2) the investigators found no implement with which to cut the cocaine, no scales to weigh cocaine doses, and no containers for selling cocaine doses in the motel room; and (3) investigators searched defendant's car and found neither drugs nor paraphernalia.

3. **Appeal and Error— preservation of issues—failure to argue assignment of error**

   There was no error in defendant's conviction on the charge of possession of marijuana, an assignment of error defendant expressly abandoned.

Appeal by Defendant from conviction and sentence entered 21 August 2003 by Judge Cy A. Grant in Superior Court, Pitt County. Heard in the Court of Appeals 12 October 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Donald R. Teeter, for the State.

Haral E. Carlin, for defendant-appellant.

WYNN, Judge.

Defendant Omar Sarik Battle appeals from his conviction and sentence and argues that the trial court committed reversible error by failing to dismiss charges of possession of cocaine with intent to sell and intentionally keeping and maintaining a room for the purpose of selling cocaine, for which Defendant contends the State lacked sufficient evidence. After careful review, we affirm in part and reverse in part Defendant's conviction and sentence.

A brief procedural and factual history of the instant appeal is as follows: On 21 November 2002, Defendant and several others were in a room at a motel. Police investigators, visiting the area because it was known to be a hot spot for drug trade, asked to enter the motel room. Defendant's brother allowed the investigators into the room, where Defendant was first seen playing video games. After the investigators returned from an adjacent room where they made drug-related arrests, they found Defendant asleep on the bed. While the room was rented out to a Chris Rogers with Defendant's brother recorded as a guest, the room contained a number of Defendant's affects, including clothing and personal papers. Also, Defendant's car was parked in the motel parking lot.

The investigators searched the room, where they smelled and saw evidence of marijuana use. The investigators found 1.9 grams of compressed powder cocaine, which the State's own chemist agreed "it is fair to say that one person can use . . . for their own personal use," as well as 4.8 grams of marijuana. Testimony revealed that the investigators found no implement with which to cut the cocaine, no scales with which to weigh drug doses, and no containers for selling drug doses.[1] The investigators searched Defendant's car and found neither drugs nor paraphernalia indicating drug sales. The investigators found only seventy-one dollars on Defendant's person.

Defendant was arrested and indicted on charges of: (1) possession with intent to manufacture, sell, and deliver cocaine; (2) knowingly possessing with intent to use drug paraphernalia; (3) possessing less that one-half ounce of marijuana; and (4) intentionally maintain-

1. While one investigator stated that there were plastic bags and scales in the room, no scales or bags were presented as evidence, and that investigator later admitted that she was confusing the scene of Defendant's arrest with a crime scene in a neighboring motel room, where scales were indeed found. The only other investigator who testified at trial explicitly stated that "nothing else" was found other than the drugs and Defendant's personal affects.

ing a dwelling for the purpose of keeping or selling cocaine, to all of which Defendant pled not guilty.

Defendant was declared indigent and appointed counsel, and on 19 August 2003, trial began. Following the presentation of the evidence at trial, Defendant moved to have charges dismissed for lack of sufficient evidence as to the elements of the offenses charged. The trial court granted Defendant's motion as to possession with intent to use drug paraphernalia but denied the motion as to the other charges. On 21 August 2002, Defendant was convicted on all remaining charges and sentenced to a minimum of nineteen months and a maximum of thirty-four months imprisonment and $1625 in fees. Defendant appeals.

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[1] Defendant first argues that the trial court committed reversible error in not dismissing the charge of possession of cocaine with intent to sell because the evidence was insufficient to convince a jury beyond a reasonable doubt. To withstand Defendant's motion, "the State was required to present substantial evidence that defendant (i) had either actual or constructive possession of the cocaine and (ii) possessed the cocaine with the intent to sell." *State v. Alston*, 91 N.C. App. 707, 709-10, 373 S.E.2d 306, 310 (1988) (citing *State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 374 (1983)). In determining whether there existed substantial evidence of each element of the offense, the evidence is viewed in the light most favorable to the State, with the State getting the benefit of all reasonable inferences. *Id.*; *see also State v. Price*, 344 N.C. 583, 587, 476 S.E.2d 317, 319 (same).

A person is in possession of a controlled substance when they have "the power and intent to control it; possession need not be actual[,]" but may be constructive. *State v. Rich*, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987) (citation omitted); *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972) (finding possession of narcotics may be actual or constructive). In showing possession, the State is not required to prove that a defendant owned the controlled substance, nor that a defendant was the only person with access to it. *Rich*, 87 N.C. App. at 382, 361 S.E.2d at 323 (citations omitted). In *Rich*, for example, the State's evidence showed that the defendant was seen at the house where the illegal substance was found on the evening before and evening of the arrest, and that the defendant's clothes and mail were found in the house. The State's evidence was held to be sufficient to show that the defendant had constructive possession of the cocaine.

Here, the State demonstrated that Defendant was seen in the motel room where the drugs were found, playing video games and sleeping on the bed. While the room was rented out to a Chris Rogers, the room contained a number of Defendant's affects, including clothing and personal papers. Also, Defendant's car was parked in the motel parking lot. These facts constitute substantial evidence as to the element of constructive, if not actual, possession of the cocaine found in the motel room.

With regard to the "intent to sell" element of the cocaine offense, "[a] jury can reasonably infer from the amount of the controlled substance found within a defendant's constructive or actual possession and from the manner of its packaging an intent to transfer, sell, or deliver that substance." *State v. Morgan*, 329 N.C. 654, 659, 406 S.E.2d 833, 835 (1991) (citing, *inter alia*, *State v. Baxter*, 285 N.C. 735, 208 S.E.2d 696 (1974) (amount of marijuana found, its packaging, and presence of packaging materials indicated intent to sell); *Rich*, 87 N.C. App. 380, 361 S.E.2d 321 (twenty grams of cocaine plus packaging paraphernalia indicated intent to sell); *State v. Casey*, 59 N.C. App. 99, 296 S.E.2d 473 (1982) (possession of over 25,000 individually wrapped dosage units of LSD indicated intent to sell); *State v. Mitchell*, 27 N.C. App. 313, 219 S.E.2d 295 (1975) (possession of considerable inventory of marijuana plus other seized "suspicious" items indicated intent to sell)).

Here, the State presented little evidence supporting Defendant's alleged intent to sell cocaine. Only 1.9 grams of compressed powder cocaine—little enough, according to the State's own chemist, to have been only for personal use—was found. The investigators found no implement with which to cut the cocaine, no scales to weigh cocaine doses, no containers for selling cocaine doses.[2] The investigators further searched Defendant's car and found neither drugs nor paraphernalia. The State's meager evidence of intent to sell cannot be considered "substantial evidence" supporting the charge of possession of cocaine with intent to sell. *See State v. Wiggins*, 33 N.C. App. 291, 294-95, 235 S.E.2d 265, 268, *cert. denied*, 293 N.C. 592, 241 S.E.2d 513 (1977) (A relatively small drug quantity alone, "without some additional evidence, is not sufficient to raise an inference that the [drug] was for the purpose of distribution."). We therefore reverse Defendant's conviction and remand this matter to the trial court for resentencing on the lesser-included offense of possession of cocaine. *See State v. Simmons*, 165 N.C. App. 685, 689, 599 S.E.2d 109, 112

2. *See supra*, note 1.

(2004) (recognizing possession of cocaine as a lesser-included offense of possession of cocaine with intent to sell); *State v. Robinson*, 160 N.C. App. 564, 565, 586 S.E.2d 534, 535 (2003) (same).

[2] Defendant next argues that the trial court committed reversible error in not dismissing the charge of intentionally keeping and maintaining a room for the purpose of selling cocaine because the evidence was insufficient to convince a jury beyond a reasonable doubt. To withstand Defendant's motion, the State must show that Defendant intentionally and "knowingly ke[pt] or maintain[ed a] . . . dwelling house, building, . . . or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same[.]" N.C. Gen. Stat. §§ 90-108(a)(7), 90-108(b) (2003). The State's evidence of the offense is viewed in the light most favorable to the State. *Price*, 344 N.C. at 587, 476 S.E.2d at 319.

In determining whether a defendant maintained a dwelling *for the purpose of selling illegal drugs*, this Court has looked at factors including the amount of drugs present and paraphernalia found in the dwelling. For example, in *State v. Rosario*, 93 N.C. App. 627, 379 S.E.2d 434, *cert. denied*, 325 N.C. 275, 384 S.E.2d 527 (1989), the defendant was properly convicted on maintaining a dwelling with the intent to use it to sell drugs where the State showed delivery of a package of cocaine, discovery of additional cocaine, a cocaine grinder, and scales. *Rosario*, 93 N.C. App. at 638, 379 S.E.2d at 440. In *State v. McDougald*, 18 N.C. App. 407, 197 S.E.2d 11, *cert. denied*, 283 N.C. 756, 198 S.E.2d 726 (1973), the defendant's possession of 276 grams of marijuana, concealment of the marijuana, and the marijuana's being separated into twenty smaller containers, indicating that it was being broken up for ready distribution, was held properly to support a jury finding that the defendant intended to sell the marijuana.

Here, the State has presented little evidence supporting the charge that Defendant intentionally kept and maintained a room for the purpose of selling cocaine. As stated earlier, only 1.9 grams of compressed powder cocaine—little enough, according to the State's own chemist, to have been for personal use only—was found. The investigators found no implement with which to cut the cocaine, no scales to weigh cocaine doses, and no containers for selling cocaine doses. The investigators further searched Defendant's car and found neither drugs nor paraphernalia. The State's meager evidence of

intent to sell cannot be considered "substantial evidence" supporting the charge of intentionally keeping and maintaining a room for the purpose of selling cocaine.

[3] In sum, we find no error in Defendant's conviction on the charge of possession of marijuana—an assignment of error Defendant expressly abandoned. However we do find error in Defendant's convictions on the charges of possession of cocaine with intent to sell and intentionally keeping and maintaining a room for the purpose of selling cocaine. We therefore affirm Defendant's conviction for possession of marijuana; reverse his convictions for possession of cocaine with intent to sell and intentionally keeping and maintaining a room for the purpose of selling cocaine; and remand this matter to the trial court for resentencing on the lesser-included offense of possession of cocaine.

No error in part, reversed in part, and remanded for resentencing.

Judge HUNTER concurs.

Judge THORNBURG concurred prior to 31 December 2004.

LINDA REINHOLD, PLAINTIFF v. MATTIE LUELLA LUCAS, DEFENDANT/THIRD-PARTY PLAINTIFF v. ROBERT FRANCIS REINHOLD, THIRD-PARTY DEFENDANT

No. COA04-140

(Filed 4 January 2005)

1. Appeal and Error— issue first raised on appeal—not considered

Plaintiff raised for the first time on appeal (and therefore could not argue) that injuries to her neck and wrist were separate and distinct for purposes of N.C.G.S. § 1B-4 and a payment received by plaintiff from a third-party defendant.

2. Costs— attorney—fees—judgment less than zero

The trial court did not err by awarding attorney fees to plaintiff where the damages to be recovered were reduced to less than zero after deduction of a payment received from a third-party defendant. Under N.C.G.S. § 6-21.1, as long as the amount is less

than $10,000, the precise amount awarded is of no consequence; a judgment for less than zero is still a judgment.

3. Costs— award—judgment exceeding offer—calculation of judgment amount—attorney fees included

The trial court did not err by awarding costs to plaintiff where the final judgment exceeded defendant's offer when attorney fees were included and the judgment was reduced by the amount paid by a third-party defendant.

Appeal by plaintiff from judgment entered 8 October 2003 and by defendant from judgment and order entered 8 October 2003 by Judge Milton F. Fitch, Jr. in Superior Court, Wilson County. Heard in the Court of Appeals 13 October 2004.

Anderson Law Firm, by Michael J. Anderson, for plaintiff.

Baker, Jenkins, Jones, Murray, Askew & Carter, PA, by Ernie K. Murray and Kevin N. Lewis, for defendant/third-party plaintiff.

McGEE, Judge.

Linda Reinhold (plaintiff) suffered an injury to her wrist and an injury to her neck in a vehicle collision on 1 October 1999. Plaintiff was a passenger in a vehicle owned and driven by Robert Francis Reinhold (third-party defendant). Third-party defendant stopped suddenly and collided with the vehicle in front of him. At the same time, a vehicle driven by Mattie Luella Lucas (defendant) collided with the rear of third-party defendant's vehicle.

Plaintiff filed a complaint on 6 April 2001, alleging that defendant's negligence caused plaintiff's injuries. Defendant denied these allegations and joined third-party defendant, seeking contribution from him should defendant be determined to be negligent. Third-party defendant filed a counterclaim against defendant for damages due to defendant's collision with third-party defendant's vehicle. Defendant again denied that she was negligent and asserted contributory negligence as an affirmative defense to third-party defendant's claims. Defendant served plaintiff with an offer of judgment in the amount of $3,000 on 20 September 2001, which plaintiff refused. Plaintiff settled her claim against third-party defendant for $5,000 on 6 June 2002, releasing him from further action.

At trial, defendant admitted negligence, but did not admit that her negligence was the proximate cause of plaintiff's or third-party defendant's injuries. Evidence presented by plaintiff showed that the medical expenses for her injuries were in excess of $9,600, and that her wrist injury was more likely caused by the first collision, rather than by the second collision. The jury found defendant's negligence to be the cause of plaintiff's and third-party defendant's injuries and awarded plaintiff $4,500. The jury also found that third-party defendant was not entitled to recover for his personal injuries, or for property damage, because he was contributorily negligent.

Pursuant to N.C. Gen. Stat. § 1B-4, the trial court reduced plaintiff's $4,500 award by the $5,000 paid to plaintiff by third-party defendant. The damages therefore owed by defendant were less than zero dollars and the trial court entered an order on 8 October 2003 denying plaintiff compensatory damages from defendant. Pursuant to N.C. Gen. Stat. § 6-21.1, the trial court ordered defendant to pay plaintiff's attorney's fees of $7,500 and $1,382.65 in costs.

Plaintiff appeals the judgment denying compensatory damages from defendant; defendant appeals the award to plaintiff of costs and attorney's fees and the denial of defendant's request for costs.

I. Plaintiff's Appeal

[1] Plaintiff argues the trial court erred when it reduced the amount of the judgment entered against defendant by the sum of money that plaintiff had received from third-party defendant. Specifically, plaintiff argues that N.C.G.S. § 1B-4 does not apply in this case. N.C. Gen. Stat. § 1B-4 (2003) provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,
>
> (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

Plaintiff correctly states that for N.C.G.S. § 1B-4 to apply, there must be a single indivisible injury, but plaintiff now argues that she had two distinct injuries: her wrist injury and her neck injury. Plaintiff asserts that third-party defendant alone was liable for the wrist injury, and plaintiff suggests that the settlement with third-party defendant related only to plaintiff's wrist injury. Plaintiff supports her argument by directing us to the 8 October 2003 order in which the trial court stated that "it appears to the Court that the jury awarded damages for [plaintiff's] alleged neck injury in the amount $4,500.00." The trial court based this statement on the fact that plaintiff had: (1) alleged she suffered two injuries, (2) presented evidence that she had put her hands on the dashboard to brace for impact from third-party defendant's sudden stop, and (3) testified that her hands were moving towards the dashboard but did not hit the dashboard when defendant's vehicle collided with third-party defendant's vehicle. The trial court based its assumption that the jury awarded damages only for the neck injury on the testimony of an orthopedist. The orthopedist had opined that the wrist injury most reasonably occurred during the first impact.

Plaintiff, however, raises this argument for the first time on appeal. N.C.R. App. P. 10(b)(1) requires that for an issue to be preserved for appeal, it first "must have been presented to the trial court." While the record on appeal does not include a transcript, there is sufficient evidence in the record demonstrating that at trial, plaintiff was seeking recovery for both injuries. She did not separate the injuries as being caused by two distinct collisions. Plaintiff's complaint does not delineate the different injuries she suffered; it merely seeks damages in excess of $10,000 for medical expenses, among other things. The trial court's 8 October 2003 order stated that "[p]laintiff alleged to suffer from two injuries following the wreck: a neck injury and carpal tunnel syndrome; the latter being a condition involving the median nerve at the level of the wrist." The order also stated that the trial court "noted that special damages for both the neck injury and carpal tunnel syndrome total in excess of $9,600.00." Additionally, the verdict sheet did not distinguish between the wrist injury and the neck injury. Rather, the jury was asked if plaintiff was "injured or damaged by the admitted negligence of the defendant," and if so, what amount the plaintiff was entitled to recover. The record therefore shows that plaintiff contended both of her injuries were caused by defendant. Plaintiff cannot now argue that the injuries to her neck and to her wrist were separate and distinct injuries caused by two collisions.

Furthermore, plaintiff's argument depends on the assumption that the jury concluded that defendant alone caused plaintiff's neck injury. As discussed above, the record does not show that plaintiff contended at trial that her injuries were caused by two distinct collisions. Even if the jury decided that plaintiff's wrist injury could only have been caused by the first collision, it does not logically follow that it concluded that the neck injury was a result only of the second collision.

We dismiss plaintiff's appeal.

II. Defendant's Appeal

[2] First, defendant argues that the trial court erred in awarding attorney's fees to plaintiff. "As a general rule, in the absence of some contractual obligation or statutory authority, attorney fees may not be recovered by the successful litigant as damages or a part of the court costs." *Washington v. Horton*, 132 N.C. App. 347, 349, 513 S.E.2d 331, 333 (1999) (citing *Hicks v. Albertson*, 284 N.C. 236, 238, 200 S.E.2d 40, 42 (1973)). However, N.C. Gen. Stat. § 6-21.1 was enacted as an exception to this general rule. *Washington*, 132 N.C. App. at 349, 513 S.E.2d at 333. N.C. Gen. Stat. § 6-21.1 (2003) provides that:

> In any personal injury or property damage suit . . . where the judgment for recovery of damages is ten thousand dollars ($ 10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

A trial court's award for attorney's fees may only be overturned on appeal if the trial court abused its discretion. *Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 570, 551 S.E.2d 852, 855 (2001). Abuse of discretion occurs where a trial court's determination cannot be supported by reason. *Id.* We find no abuse of discretion in the present case.

Defendant does not argue that the trial court abused its discretion. Rather, defendant argues that the trial court erred when it ordered defendant to pay plaintiff's attorney's fees pursuant to N.C.G.S. § 6-21.1, because plaintiff "did not recover a 'judgment for damages' from Defendant." The jury determined that plaintiff was entitled to recover $4,500 in damages from defendant. Since defendant and third-party defendant were joint tortfeasors, the trial court properly reduced the amount of damages that defendant would have

to pay plaintiff by the $5,000 settlement between plaintiff and third-party defendant. The result of this reduction was that the judgment for damages was less than zero, and thus defendant was not ordered to pay any damages to plaintiff. Defendant argues that because the damages were less than zero, there was no judgment for damages. We disagree.

N.C. Gen. Stat. § 6-21.1 applies when "the judgment for recovery of damages is ten thousand dollars ($10,000) or less." The statute does not refer to the amount of compensatory damages awarded; it specifically refers to a "judgment for recovery of damages." N.C.G.S. § 6-21.1. As long as the amount of damages awarded is less than $10,000, the precise amount awarded is of no consequence. A judgment for zero dollars or a judgment for less than zero dollars, as is the case here, is nevertheless a judgment, and N.C.G.S. § 6-21.1 applies.

Although the Courts of this state have not previously determined this issue, we can analogize the awarding of attorney's fees under N.C.G.S. § 6-21.1 to awarding them under N.C. Gen. Stat. § 75-16.1 (2003), which provides:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon [certain findings].

In addition to showing that a defendant violated N.C.G.S. § 75-1.1, our Court has held that a plaintiff must prove that the plaintiff has suffered an actual injury to be "the 'prevailing party' within the meaning of G.S. 75-16.1." *Mayton v. Hiatt's Used Cars*, 45 N.C. App. 206, 212, 262 S.E.2d 860, 864, *disc. review denied*, 300 N.C. 198, 269 S.E.2d 624 (1980). In *Mayton*, we reversed the trial court's grant of attorney's fees pursuant to N.C.G.S. § 75-16.1 where the jury, in spite of finding that the defendants violated N.C. Gen. Stat. § 75-1.1, found that the plaintiff was not entitled to recover damages. *Mayton*, 45 N.C. App. at 208, 262 S.E.2d at 861-62. Since the jury in *Mayton* had not awarded the plaintiff any damages, the plaintiff could not be the prevailing party because the plaintiff had not suffered any actual injury as a proximate result of the defendants' actions, and thus the plaintiff was not entitled to attorney's fees. *Id.* at 212, 262 S.E.2d at 864.

While the present case does not involve N.C.G.S. § 75-16.1, the principle that attorney's fees may be awarded to the prevailing party

is the same. N.C.G.S. § 6-21.1 does not specifically use the language "prevailing party," but it applies to the prevailing party or "successful litigant" when it permits the trial court to grant attorney's fees only to the party "obtaining a judgment for damages." Unlike the plaintiff in *Mayton*, plaintiff in this case did suffer actual injuries and the jury recognized these injuries by awarding plaintiff $4,500 in damages. Plaintiff obtained a judgment for damages and was the prevailing party. Plaintiff was thus entitled to receive attorney's fees under N.C.G.S. § 6-21.1. Reducing the judgment by the amount paid to plaintiff by third-party defendant does not change the fact that plaintiff obtained a judgment for damages against defendant.

Furthermore, the purpose of N.C.G.S. § 6-21.1 is

> to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that is not economically feasible to bring suit on his claim. In such a situation the Legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations.

Hicks, 284 N.C. at 239, 200 S.E.2d at 42. As mentioned above, plaintiff in this case did sustain injury, which was caused by defendant's negligence. With the amount plaintiff recovered being reduced to less than zero, she could not have paid her attorney from her recovery and it would not have been "economically feasible" for plaintiff to bring her claim. Moreover, we note that "[t]his statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope." *Id.* The trial court did not err in awarding attorney's fees to plaintiff where damages to be recovered were reduced to less than zero.

[3] Second, defendant argues that the trial court erred in not awarding costs to defendant. Specifically, defendant argues that plaintiff should pay defendant's attorney's fees and costs because costs are shifted to the party who fails to accept an offer of judgment when "the judgment finally obtained is not more favorable than the offer." *See* N.C. Gen. Stat. § 1A-1, Rule 68 (2003). However, defendant's argument on this issue is dependent upon defendant prevailing on her first argument. Since attorney's fees were properly awarded to plaintiff, the final judgment obtained by plaintiff was more favorable than defendant's $3,000.00 offer of judgment. The trial court found the judgment

to be $13,382.65, which was comprised of $4,500 awarded by the jury, $7,500 in attorney's fees, and $1,382.65 in costs. Our Supreme Court has construed "judgment finally obtained" to be

> "the amount ultimately and *finally* obtained by the plaintiff from the court which serves as the measuring stick for purposes of Rule 68. For these reasons, we conclude that, within the confines of Rule 68, 'judgment finally obtained' means the amount ultimately entered as representing the final judgment, i.e., the jury's verdict as modified by any applicable adjustments, by the respective court in the particular controversy, not simply the amount of the jury's verdict."

Roberts v. Swain, 353 N.C. 246, 249, 538 S.E.2d 566, 568 (2000) (quoting *Poole v. Miller*, 342 N.C. 349, 353, 464 S.E.2d 409, 411 (1995)). Attorney's fees are properly included when calculating the amount of the final judgment. *See Roberts*, 353 N.C. at 249, 538 S.E.2d at 568. The trial court properly found that "[t]he judgment of $13,382.65, exclusive of interest, exceeds the offer of judgment of [$3,000] even if reduced by $5,000.00 paid by the third-party defendant." The trial court did not err in awarding attorney's fees and costs to plaintiff and in denying them to defendant.

Dismissed in part and affirmed in part.

Judges McCULLOUGH and ELMORE concur.

CITIFINANCIAL, INC., F/K/A COMMERCIAL CREDIT CORPORATION, PLAINTIFF v. CYNTHIA D. MESSER, DEFENDANT/THIRD-PARTY PLAINTIFF v. T.L. DAVIS, STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES, THIRD-PARTY DEFENDANTS

No. COA04-261

(Filed 4 January 2005)

Motor Vehicles— recovery of stolen vehicles—notice to subsequent purchaser

The trial court erred by granting summary judgment for DMV in an action arising from the recovery of a stolen car where there was no evidence that DMV gave defendant, a subsequent purchaser, the notice required by statute. Although DMV argued that

defendant had no right to notice or a hearing because she could not show a paramount right to the car, her evidence showed a sufficient property interest to merit protection under the North Carolina Constitution. N.C.G.S. § 20-108(c).

Judge STEELMAN concurring.

Appeal by defendant from order entered 20 November 2003 by Judge Bradley B. Letts in Haywood County District Court. Heard in the Court of Appeals 13 October 2004.

Russell L. McLean, III, for defendant/third-party plaintiff.

Attorney General Roy Cooper, by Assistant Attorney General Jeffrey R. Edwards, for the State.

CALABRIA, Judge.

Cynthia D. Messer ("appellant") appeals the entry of summary judgment in favor of T.L. Davis ("Davis") and the State of North Carolina Department of Transportation, Division of Motor Vehicles ("DMV") (collectively "appellees"). We reverse.

On 24 June 1999, appellant executed a note and security agreement with Citifinancial, Inc., f/k/a Commercial Credit Corporation ("Citifinancial") in the principal amount of $9,352.81 for the purchase of a Chevrolet Monte Carlo. Citifinancial obtained a security interest in the vehicle to secure the loan.

In July of 2000, an officer of DMV conducted a routine vehicle identification number ("VIN") verification, discovered there were possibly two stolen vehicles from Canada sold by Timothy Ramey, and contacted the National Insurance Crime Bureau ("NICB") for assistance in locating a Canadian officer to aide in the investigation. Subsequent investigation indicated Ramey, his uncle, and his father were tampering, removing, or altering VINs of vehicles and selling those cars in the United States with new or altered VINs. Eight vehicles bearing VINs matching the VIN of a vehicle owned by the three Ramey suspects were located in North Carolina, one of which was registered to appellant.

On 19 July 2000, Davis seized and stored appellant's vehicle. At that time, Davis provided appellant with a document that stated he was "authorized to seize, take and possess any motor vehicle or motor vehicle part [which he had] reason to believe [was] stolen or

which ha[d] an altered, covered, defaced, removed or destroyed serial or identification number[]." The document went on to state that DMV would "notify the owner of a vehicle seized and stored officially of the location and purpose of the seizure within 15 days." Nothing in the record indicates any further written notice was given to appellant within that period.

Due to similarities in the VINs and other similar characteristics between appellant's vehicle and the car reported stolen in Canada, DMV concluded Ramey had removed the true VIN from the car stolen in Canada, replaced it with a VIN registered to him from a similar, and likely salvaged, vehicle, and sold it to appellant, who had subsequently relied on the most readily observable VINs as opposed to checking the VINs found elsewhere such as the frame and engine. Accordingly, on 5 September 2000, DMV turned the vehicle over to State Farm Insurance, the successor-in-interest to the Canadian owner from whom DMV concluded the car had been stolen.

On or about March 2001, appellant ceased making payments on the note and security agreement, and Citifinancial filed suit, seeking the balance of the amount owed. Appellant answered the complaint and filed a third-party complaint against appellees on 15 May 2001. Citifinancial moved for summary judgment against appellant, which the trial court granted on 9 October 2002. After denying in part appellees' motion to dismiss, appellees answered the third-party complaint and moved for summary judgment. The trial court granted appellees' motion for summary judgment on 20 November 2003. Appellant seeks review before this Court.

In her only assignment of error, appellant asserts the trial court erred as a matter of law in granting summary judgment in favor of appellees. 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). "In ruling on such motion, the trial court must view all evidence in the light most favorable to the non-movant, taking the non-movant's asserted facts as true, and drawing all reasonable inferences in her favor." *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 611, 538 S.E.2d 601, 607 (2000).

North Carolina General Statutes § 20-108 (2003) governs issues arising from vehicles or component parts of vehicles without manu-

facturer's numbers or with manufacturer's numbers that have been altered, changed, or obliterated. Under subsection (a), a person is guilty of a Class 2 misdemeanor if they knowingly undertake certain actions with respect to a vehicle or component part of a vehicle ("property") bearing an identification mark or number that has been modified "for the purpose of concealing or misrepresenting the identity" of the property. N.C. Gen. Stat. § 20-108(a). Where the property has such a modification to its VIN or designated officers of DMV have probable cause to believe there was a violation of subsection (a), those officers are permitted to take and possess it. N.C. Gen. Stat. § 20-108(b). After the seizure, the seizing officer must immediately notify DMV and the rightful owner, if known, and DMV has fifteen days to notify the person from whom the property was seized and all claimants with interest or title in the registration records of DMV. N.C. Gen. Stat. § 20-108(b),(c). The notice to the person from whom the property was seized must be sent by certified mail and must contain, *inter alia*, the following information: (1) DMV has taken custody of the property; (2) the name and address of the person or persons from whom the property was seized; (3) a statement that the property was seized for "investigation as provided in" N.C. Gen. Stat. § 20-108 and will be released to the rightful owner upon either a determination that the identification number has not been altered, changed or obliterated or presentation of satisfactory evidence of ownership of the property if no other person claims an interest within thirty days of when the notice was mailed. N.C. Gen. Stat. § 20-108(c). If another person claims an interest, a dispositional hearing for the property before a court is permitted. *Id.* This dispositional hearing may be commenced either by DMV after the property has come within the custody of one of its officers or by any possessor of the property. N.C. Gen. Stat. § 20-108(d). The purpose of the dispositional hearing is to allow the court to order whether the property should be sold, destroyed, converted to the use of DMV, or otherwise disposed of. *Id.*

The burden of establishing, by a preponderance of the evidence, the occurrence of a violation with respect to the property is upon DMV. N.C. Gen. Stat. § 20-108(h). Anyone claiming ownership to the property bears the burden of showing satisfactory evidence of ownership. N.C. Gen. Stat. § 20-108(i). No court order disposing of the property may issue unless the person from whom the property was seized and all claimants with interest or title in the registration records of DMV are provided (a) a postseizure hearing and (b) ten days' notice of the postseizure hearing via certified mail. N.C. Gen. Stat. § 20-108(f).

In the instant case, the record is devoid of evidence that DMV gave appellant notice complying with the requirements of N.C. Gen. Stat. § 20-108(c); however, DMV asserts non-compliance with N.C. Gen. Stat. § 20-108(c) is irrelevant because N.C. Gen. Stat. § 20-108(e) trumps the other provisions of N.C. Gen. Stat. § 20-108 and gives it the authority to "return[] a seized motor vehicle or component part to the owner following presentation of satisfactory evidence of ownership[.]" We disagree with DMV's proposed reading of the statute.

First, DMV would still have to notify the person from whom the property was seized as mandated by subsection (c) even if subsection (e) were construed in the manner suggested by DMV. Second, DMV's construction of subsection (e) would render untrue the notification required by subsection (c) by DMV to the person from whom the property was seized that the seized property would be released to the rightful owner upon presentation of satisfactory evidence of ownership "if no other person claims an interest in it within 30 days of the date the notice is mailed. Otherwise, a hearing regarding the disposition of [the seized property] may take place in a court having jurisdiction." N.C. Gen. Stat. § 20-108(c)(2)b.

Moreover, DMV's proposed reading of subsection (e) would raise significant constitutional concerns. While DMV, citing *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 447, 450 S.E.2d 888, 890 (1994), suggests there can be no state procedural due process argument for lack of a "legitimate claim of entitlement" to the seized property, we are of the opinion that this view improperly restricts the required property interest. In *Dwyer*, our Supreme Court did not require a showing of title to establish a property interest. *Id.* The Court stated that the party need not have undisputed title to the property and that possession is sufficient: "Even if there are underlying disputes about the validity of their title, this should have no effect on defendants' standing to challenge the constitutionality of the statute. Defendants are also in open and full possession of the property. Accordingly, defendants' property interest cannot be seized without their consent or due process of law." *Id.*, 338 N.C. at 447-48, 450 S.E.2d at 890. We hold accordingly.

Although it is merely persuasive and not controlling, *see Lorbacher v. Housing Authority of the City of Raleigh*, 127 N.C. App. 663, 675, 493 S.E.2d 74, 81 (1997), we note our construction of appellant's due process rights under our state constitution accords with the approach adopted by the United States Supreme Court for the federal constitution:

> The Fourteenth Amendment's protection of "property," however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to "any significant property interest," . . . . The appellants were deprived of such an interest in the replevied goods—the interest in continued possession and use of the goods . . . . Clearly, their possessory interest in the goods, dearly bought and protected by contract, was sufficient to invoke the protection of the Due Process Clause.

Fuentes v. Shevin, 407 U.S. 67, 86-87, 32 L. Ed. 2d 556, 573 (1972).

In the instant case, appellant's evidence tended to show she purchased and possessed the car without knowledge that it was stolen. This showing constitutes, in our mind, a sufficient property interest to merit protection by our constitution. DMV's argument, that appellant had no right to notice or a hearing because she could not show a paramount right to the car over that of the true owner, places the cart before the horse:

> The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods.

Fuentes, 407 U.S. at 87, 32 L. Ed. 2d at 574 (internal quotation marks and citations omitted). Accordingly, we hold the trial court erred in granting summary judgment and remand for further proceedings not inconsistent with this opinion.

Reversed.

Judge GEER concurs.

Judge STEELMAN concurs with a separate opinion.

STEELMAN, Judge concurring.

I agree entirely with the majority opinion in this matter, but write separately to address the increasingly frequent abuse of the appendix to briefs by appellate counsel. In this case, counsel for the Department of Transportation (DOT) attached as a portion of the appendix to its brief, fourteen pages of material from five different Internet sites pertaining to vehicle identification numbers for Chevrolet automobiles. DOT argued this material in its brief to bolster its argument that the vehicle in question was in fact the vehicle stolen from Canada. This matter was decided by the trial court upon DOT's motion for summary judgment, which was granted on 20 November 2003. None of this material is contained in the record on appeal. All of the Internet material bears the date of 17 May 2004, two days prior to the filing of DOT's brief in this matter.

Rule 28(d) of the Rules of Appellate Procedure governs appendixes to briefs. N.C. R. App. P. 28(d). Subsection (d)(1)c allows an appellant to reproduce in an appendix the following: "relevant portions of statutes, rules, or regulations, the study of which is required to determine questions presented in the brief." While not expressly stated in Rule 28(d), it would appear that this provision would be equally applicable to appellees as well. None of the Internet material contained in appellee's appendix constitutes "statutes, rules, or regulations." On their face, it is clear the documents do not come from any website operated by a government agency or the manufacturer of Chevrolet automobiles, but rather are private sites. There is no provision in Rule 28(d) allowing for the inclusion of material found on the Internet in appendixes to appellant briefs.

"This Court has held, 'it [is] improper [for a party] . . . to attach a document not in the record and not permitted under N.C. R. App. P. 28(d) in an appendix to its brief.' " *Duke Univ. v. Bishop*, 131 N.C. App. 545, 547, 507 S.E.2d 904, 905 (1998) (quoting *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858 (1996)). The rationale for this rule is clear. The role of an appellate court is to review the rulings of the lower court, not to consider new evidence or matters that were not before the trial court. If this were permitted, the appellate process would never end.

Appellate counsel should take care to follow the requirements of Rule 28(d) in placing material in an appendix. Failure to comply with this rule subjects counsel to sanctions by this court.

STATE OF NORTH CAROLINA v. MARCUS ELRON PETRO

No. COA03-1558

(Filed 4 January 2005)

1. Kidnapping— second-degree—failure to instruct on false imprisonment as lesser-included offense

The trial court did not err by denying defendant's request to instruct the jury on the charge of false imprisonment as a lesser-included offense of second-degree kidnapping, because: (1) defendant's theory of the case is that a letter written by the victim accurately portrayed the events of 20 August 2001 and negates a purpose to terrorize the victim at any point during that time; (2) defendant's theory, if believed, eliminates not only the purpose element required for second-degree kidnapping, but also the unlawful restraint element of both second-degree kidnapping and false imprisonment; and (3) the jury would therefore have to find defendant guilty of second-degree kidnapping if the victim's testimony was believed or not guilty of any offense if the victim's letter was believed.

2. Constitutional Law— effective assistance of counsel—appointed counsel—necessary experience—local rules—invited error

Defendant was not denied effective assistance of counsel in a second-degree kidnapping and assault on a female case based on the fact that his appointed counsel did not have the required experience in excess of three years for appointment to a second-degree kidnapping case according to the rules in effect for appointment of counsel for the judicial district in which his trial took place, because: (1) defendant cites no authority for the proposition that a violation of local rules regarding the appointment of counsel denies a defendant the right to counsel; (2) even if the premise were true, defendant failed to raise this constitutional issue to the trial court and it is therefore waived; and (3) defendant's counsel was appointed for the assault charge as permitted under the local rules and only after defendant expressed his desire that his counsel be officially appointed to the second-degree kidnapping charge did his counsel move to be appointed counsel of record on that charge.

3. Evidence— prior crimes or bad acts—assault

The trial court did not abuse its discretion in a second-degree kidnapping and assault on a female case by admitting testimony under N.C.G.S. § 8C-1, Rule 404(b) by defendant's ex-girlfriend concerning an alleged assault on her by defendant in the summer of 1999, because: (1) in each instance, the evidence tended to show defendant isolated and abused the victims, alternated between anger, repentance, and fear of going to jail, and caused an imminent fear of death; (2) in each instance, defendant offered to procure medical aid for the victims; (3) after the assaults, defendant continued to contact the victims and convinced them to accompany him to a hotel where he again held them against their will; (4) the similarities indicate a common plan or design on the part of defendant, and the witness's testimony served a purpose other than to show mere propensity to commit the crime charged; and (5) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

Appeal by defendant from judgments entered 30 August 2002 by Judge Melzer A. Morgan, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 16 September 2004.

Attorney General Roy Cooper, by Assistant Attorney General Joyce S. Rutledge, for the State.

Megerian & Wells, by Franklin E. Wells, Jr., for defendant-appellant.

CALABRIA, Judge.

Marcus Elron Petro ("defendant") appeals judgments entered on jury verdicts of guilty of one count of second-degree kidnapping and one count of assault on a female, which was enhanced as a result of defendant's plea of guilty to habitual misdemeanor assault. Defendant was sentenced to consecutive terms of a minimum term of 34 months to a maximum term of 50 months and a minimum term of 8 months to a maximum term of 10 months, respectively, in the North Carolina Department of Correction. We find no error.

In the late spring of 2001, defendant and Amanda Chapman (the "victim") met at a bar where the victim was employed. They developed a friendship that evolved into an intimate relationship. Shortly thereafter, defendant moved into the victim's residence.

On or about 20 August 2001, defendant was involved in an altercation where the victim worked. As a result, he was expelled from the bar. Later that morning between three and four o'clock, defendant and the victim returned to her residence and discussed the earlier altercation. The discussion escalated into an argument concerning previous disagreements. When the victim perceived defendant was getting angry, she attempted to calm him, but defendant told her to "shut up" and hit her in the head with his hand, causing her to bleed. Defendant apologized and offered to call 911 for help, but the victim asked for time to see how she felt and decide whether she needed emergency assistance. Defendant joined the victim in the bathroom and started "freaking out again." Although he told the victim he was "mad at himself for hitting" her, he "hit [the victim] on the other side of [her] head because he was mad at himself." This second blow caused dizziness and bleeding.

The victim started crying and pleading with the defendant to stop. This also angered defendant, and he warned her, "The more you cry, the worse it's going to get." He pulled the victim into her bedroom, made sure there were no communication devices in the room, and put her on the bed. Defendant became "frantic" with concern that the incident would "get [him] in . . . trouble" and "he would . . . [have to go to] jail." Defendant then got on the bed with the victim, straddled her, told her to "shut up," and started hitting her. Defendant got a pair of needle-nose pliers, "reared back with the pliers like he was going to . . . put th[em] in [the victim's] neck," and told her, "[I]t will be okay in just a couple of minutes. It will all be over." After repeating these actions a few times, defendant relented and tired. He placed his legs over the victim when he went to sleep.

The next morning, the victim's mother ("Ms. Watkins") came to her residence because she was concerned when the victim failed to pick up her daughter at the normal time. Ms. Watkins had a key to the victim's residence but was unable to enter because the door was latched. Defendant allowed the victim to open the door, whereupon the victim left with her daughter and Ms. Watkins. Ms. Watkins called the police, and defendant fled.

Defendant and the victim continued to communicate. Defendant was apprehended, but the victim posted bail. The victim also wrote a letter stating it was her belief she had been drugged and was hallucinating on the night of 20 August 2001. She further stated her injuries were self-inflicted and she abused and threatened defendant. The letter went on to assert that defendant's sole motive in restraining her

and staying up with her that night was to prevent her from "caus[ing] harm to [her]self and quite possibly others." The victim's letter concluded that defendant spent the night trying to help and calm her as opposed to hurting her. Thereafter, the relationship between the victim and defendant continued until they went to a hotel together, where defendant again assaulted the victim. Subsequently, the victim terminated the relationship and testified against defendant at trial.

At trial, the trial court admitted, over defendant's objection, testimony from Crystal Woods ("Woods") concerning her previous relationship with defendant. This testimony, which involved allegations of abuse and kidnapping, was admitted by the trial court under Rule 404(b) as evidence of a common plan and design. At the close of the State's evidence and again at the close of all the evidence, defendant moved to dismiss the charges against him. The trial court denied both motions. At the charge conference, defendant requested an instruction on false imprisonment based on the recounting of events set forth in the victim's letter. The trial court denied submitting the false imprisonment charge to the jury. The jury convicted defendant of second-degree kidnapping and assault on a female. Defendant appeals.

On appeal, defendant asserts the trial court erred by (I) failing to instruct the jury on false imprisonment, (II) appointing counsel with less experience than required by the applicable provisions for the charges, and (III) admitting evidence pursuant to Rule 404(b).

I. Jury Instruction

[1] In his first assignment of error, defendant asserts the trial court erred in denying his request to instruct the jury on the charge of false imprisonment as a lesser included offense of second-degree kidnapping. "The law is well settled that the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense." *State v. Boykin*, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984). Second-degree kidnapping occurs when the victim is released in a safe place without having been sexually assaulted or seriously injured and the following elements, in relevant part, are met: "(1) [unlawful] confinement, restraint, or removal from one place to another; (2) of a person; (3) without the person's consent; (4) for the purpose of [terrorizing the victim]." *State v. Lucas*, 353 N.C. 568, 582-83, 548 S.E.2d 712, 722 (2001); N.C. Gen. Stat. § 14-39 (2003). The elements of the lesser included offense of false

imprisonment are the (1) intentional and unlawful, (2) restraint or detainment of a person, (3) without that person's consent. *State v. Miller*, 146 N.C. App. 494, 505, 553 S.E.2d 410, 417 (2001).

Defendant's theory of the case is that the letter written by the victim accurately portrayed the events of 20 August 2001, and this evidence negates a purpose to terrorize the victim at any point during that time. The State contends that defendant's theory, if believed, eliminates not only the purpose element, required for second-degree kidnapping, but also the unlawful element of both second-degree kidnapping and false imprisonment; therefore, the jury would have to find defendant guilty of second-degree kidnapping if the victim's testimony was believed and would have to find defendant not guilty of any offense if the victim's letter was believed. We agree with the State.

A prominent expert on criminal law has observed that "[o]ne who reasonably believes that a felony, or a misdemeanor amounting to a breach of the peace, is being committed, or is about to be committed, in his presence may use reasonable force to terminate or prevent it." 2 W. LaFave, *Substantive Criminal Law* § 10.7(c) (2d ed. 2003). In the instant case, the victim's letter, if believed, sets forth circumstances of violent actions resulting in pronounced self-inflicted bodily injuries by an individual who admitted it was "quite possibl[e]" she would have inflicted violence upon others had she been allowed to leave. Under this set of facts, defendant restrained a violent and hallucinating victim in the comfort of her home and bedroom until she fell asleep without threats or violence. The following morning when the victim had recovered her normal faculties, defendant did nothing to prohibit her from leaving. We are of the opinion that this restraint would not be unlawful in light of the circumstances surrounding the detention and the nature of the offense that could reasonably be expected to occur, given the victim's state of mind and evidenced by the nature and extent of her self-inflicted injuries. Accordingly, if the jury accepted the recounting of events contained in the letter, defendant would not have unlawfully restrained the victim; therefore, the trial court did not err in rejecting defendant's instruction on the lesser included offense. This assignment of error is overruled.

II. Right to Counsel

[2] In his second assignment of error, defendant asserts he was denied his right to counsel because "his attorney was appointed in violation of rules requiring experience in excess of three years for

appointment to [second-degree kidnapping,] a Class E felony." Defendant's assertion is premised on the rules in effect for appointment of counsel for the judicial district in which his trial took place, which precluded defendant's counsel from representing him on a Class E felony due to insufficient experience. As to any constitutional argument, defendant cites no authority for the proposition that a violation of local rules regarding the appointment of counsel denies a defendant of the right to counsel, nor are we persuaded it does so. Moreover, even if we were to accept the premise, defendant failed to raise this constitutional argument to the trial court and has, thereby, waived it. *See State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995) (noting that "[e]ven alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court").

Regarding any argument premised upon the local rules, defendant's counsel was appointed for the assault charge as permitted under the local rules and, only after defendant "expressed his desire that [his] counsel be officially appointed to [the second-degree kidnapping charge]," did his counsel move to be appointed counsel of record on that charge. The record reveals defendant, his counsel, the district attorney, and the court all considered defendant's counsel competent to undertake the defense. Any violation of the local rules that occurred was occasioned by defendant's invitation. This assignment of error is overruled.

III. Evidentiary Ruling

[3] In his last assignment of error, defendant asserts the trial court improperly admitted, under N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003), Woods' testimony concerning an alleged assault on her by defendant in the summer of 1999. Rule 404(b) provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b). Our Supreme Court has

> held that Rule 404(b) is a "clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged."

State v. Lloyd, 354 N.C. 76, 88, 552 S.E.2d 596, 608 (2001) (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)).

> Accordingly, evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue other than* the character of the accused. In addition to the requirement that the evidence be offered for a purpose other than to show criminal propensity, the admissibility of evidence under [Rule 404(b)] is guided by two further constraints—similarity and temporal proximity [of the acts].

Id. (internal citations and quotation marks omitted).

Woods' testimony tended to show that she and defendant were involved in an intimate relationship and defendant lived with her "off and on." Following an altercation between Woods and defendant at a bar where they had been drinking, defendant drove Woods to his grandparents' house. During the drive, defendant struck Woods, causing her to bleed. After arriving at his grandparents' and determining they were not home, defendant "dr[ug] [Woods] into the house," held her for eight hours, stripped and raped her, and beat her with his hands and various implements. While defendant was holding Woods, he repeatedly apologized and expressed concern about "go[ing] to jail." Woods testified that she thought she "was going to die." After the assault, defendant offered to take Woods to the hospital. When she declined, defendant took her and held her at her apartment until the following morning when he left. Despite these actions, defendant convinced Woods to go with him to a hotel, where he held her against her will a second time and "pushed [her] around."

Defendant correctly points out that the alleged assault on Woods involved a sexual assault and that defendant used implements in the abuse in addition to his hands. However, in each instance, the evidence tended to show defendant isolated and abused the victims, alternated between anger, repentance, and fear of going to jail, and caused an imminent fear of death. In each instance, defendant offered to procure medical aid for the victims. After the assault, defendant continued to contact the victims and convinced them to accompany him to a hotel where he again held them against their will. We think these similarities sufficiently indicate a common plan or design on the part of defendant, and Woods' testimony served a purpose other than to show mere propensity to commit the crime charged.

Nonetheless, evidence of the assault on Woods may have been excluded if its probative value was substantially outweighed by the danger of unfair prejudice under N.C. Gen. Stat. § 8C-1, Rule 403 (2003). "The determination of whether to exclude such evidence is a

matter left to the sound discretion of the trial court, and its determination will not be disturbed on appeal absent an abuse of discretion." *Lloyd*, 354 N.C. at 90-91, 552 S.E.2d at 609. In the instant case, the trial court admitted the evidence of the assault on Woods for the limited purpose of showing a common plan or design. After considering the similarity in factors and the proximity of the two assaults, the trial court found "the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice" and overruled defendant's objection. The trial court did not abuse its discretion in its ruling on the evidence, and this assignment of error is overruled.

No error.

Judges ELMORE and STEELMAN concur.

LEROY AND ROSEMARY WETCHIN, ET AL., PLAINTIFFS v. OCEAN SIDE CORPORATION AND CAN-AM DEVELOPMENT CORPORATION, LLC, DEFENDANTS

No. COA03-1684

(Filed 4 January 2005)

1. Appeal and Error— improper assignment of error—discretionary hearing of appeal

Although plaintiffs' assignment of error fails to state the legal basis upon which error is assigned and is not confined to a single issue of law, the Court of Appeals exercised its discretion under N.C. R. App. P. 2 to hear the appeal.

2. Process and Service— service of summons—motion for extension of time—discretion of trial court

The trial court erred by mistakenly believing that it did not have the discretion to consider plaintiffs' motions to extend the time for service of the summons, and the case is remanded to the trial court to consider whether to exercise its discretion to extend the time based on the inquiry of excusable neglect in regards to serving a dormant summons because: (1) although the alias and pluries summons became dormant after sixty days, prior to plaintiffs' effectuating service on 20 November 2002, it was before expiration of the summons on 20 November 2002; and (2) the summons was merely dormant at the time of service, it had

not expired, and the trial court had the discretion to retroactively extend the time for service of the alias and pluries summons.

3. Process and Service— wrong name on summons—sufficiency of service

A summons served on defendant Ocean Side was sufficient to meet requirements of Rule 4 for service of process although it was directed to defendant Con-Am and Ocean Side's name did not appear on the summons because there was no substantial possibility of confusion about the identity of Ocean Side as a party being sued where Ocean Side received the summons by certified mail, addressed to Ocean Side, and its name appeared on the complaint contained therein.

Appeal by plaintiffs from judgment entered 13 May 2003 by Judge Jack W. Jenkins in Brunswick County Superior Court. Heard in the Court of Appeals 16 September 2004.

Bradsher, Grissom & Holloman, PLLC, by Wallace W. Bradsher, Jr., for plaintiffs-appellants.

Patterson, Dilthey, Clay, Bryson & Anderson, LLP, by Stuart L. Egerton, for defendant-appellant [Ocean Side Corporation].

STEELMAN, Judge.

Plaintiffs, Leroy and Rosemary Wetchin, et al, appeal the trial court's order denying their motion for extension of time and denying their motion to amend, and granting defendant Ocean Side Corporation's motion to dismiss. For the reasons discussed herein, we reverse and remand this matter.

This appeal deals only with defendant, Ocean Side Corporation (Ocean Side), since plaintiffs filed a notice of voluntary dismissal as to the other defendant, Can-Am Development Corporation, L.L.C. (Can-Am).

On 3 April 2000, plaintiff brought suit against Ocean Side in the Brunswick County Superior Court (File No. 00 CVS 539). Plaintiffs dismissed this action without prejudice on 24 September 2001. Plaintiffs refiled their lawsuit, the instant action, on 31 May 2002, adding Can-Am as a party defendant. That same day, the Clerk of Superior Court issued separate civil summonses, directed to each of the defendants. Plaintiffs did not serve these summonses on either defendant. On 29 August 2002, the Clerk of Court issued separate

alias and pluries summonses for each defendant. On 14 November 2002, plaintiffs' counsel mailed a copy of the summons and complaint to each defendant by certified mail. While each mailing included a copy of the complaint, Ocean Side was sent the summons directed to Can-Am, and Can-Am was sent the summons directed to Ocean Side. The summons mailed to Ocean Side was directed to "Gordon N. Titcomb, Can-Am Development Corporation, L.L.C., 6401 Orr Rd., Charlotte, NC 28213." Nowhere in the summons sent to Ocean Side was Ocean Side, or its agent's name mentioned, including in the caption of the summons. Ocean Side received the certified mailing on 20 November 2002. On 26 November 2002, counsel for plaintiff filed an affidavit of service by certified mail, asserting that a copy of the summons and complaint was served on "WJ McLamb at 101255 Hwy. 179 Box 4640, Calabash, North Carolina."

Ocean Side moved to dismiss plaintiffs' complaint on 17 December 2002, pursuant to Rule 12(b)(2), Rule 12(b)(4), and Rule 12(b)(5) of the North Carolina Rules of Civil Procedure. These motions came on for hearing before Judge Jenkins on 28 February 2003. The morning of the hearing plaintiffs filed a motion requesting the court "extend the summons as OCEAN SIDE CORPORATION for thirty days to and including up [sic] November 27, 2002." During the course of the hearing, plaintiffs made an oral motion to amend the summons directed to Can-Am so that it was directed to defendant Ocean Side. Judge Jenkins entered an order on 13 May 2003 containing the following rulings: (1) Ocean Side's motion to quash the attempted service and dismiss plaintiffs' action was granted; (2) plaintiffs' written motion to extend the summons until 27 November 2002 was denied; and (3) plaintiffs' oral motion to amend the summons was denied. The order was signed out of county and out of session by consent of the parties. Plaintiffs appeal.

Plaintiffs' bring forward one assignment of error, which reads as follows: "The ruling of the trial court in its Order of Dismissal entered on May 13, 2003."

Our review of a matter 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). Rule 10(c)(1) sets forth the requirements for the form of an assignment of error, stating:

> Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is

> assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references.

N.C. R. App. P. 10(c)(1).

[1] Plaintiffs' assignment of error fails to state the legal basis upon which error is assigned and is not confined to a single issue of law. Rather, the assignment is a broadside attack on the trial court's order, not specifying which of the court's three rulings was erroneous. Such an assignment of error is designed to allow counsel to argue anything and everything they desire in their brief on appeal. "This assignment—like a hoopskirt—covers everything and touches nothing." *State v. Kirby*, 276 N.C. 123, 131, 171 S.E.2d 416, 422 (1970). It is an improper assignment of error. *Id.* Despite this defect, we choose to exercise our discretion under Rule 2 of the Rules of Appellate Procedure and address plaintiffs' appeal on the merits.

[2] Plaintiffs contend the trial court mistakenly believed it did not have the discretion to consider its motions to extend the time for service of the summons and to amend the summons served to Ocean Side.

We note that plaintiffs failed to assign error to any of the findings of fact contained in Judge Jenkins' order, thus they are presumed correct and are binding on appeal. *In re Beasley*, 147 N.C. App. 399, 405, 555 S.E.2d 643, 647 (2001). Our review is therefore limited to whether the trial court's findings of fact support its conclusions of law and whether those conclusions of law represent a correct application of the law. *See Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E.2d 595, 600 (1988).

The alias and pluries summons was issued on 29 August 2002. Under Rule 4(c) of the Rules of Civil Procedure, plaintiffs were required to serve the summons on Ocean Side within sixty days of the date of issuance. N.C. Gen. Stat. § 1A-1, Rule 4(c) (2004). Upon the expiration of the sixty days, the alias and pluries summons became dormant, and any service effected thereafter does not confer jurisdiction over the case upon the trial court. *Hollowell v. Carlisle*, 115 N.C. App. 364, 366, 444 S.E.2d 681, 682 (1994). However, the expiration of the sixty day period does not discontinue the action, since under Rule 4(d) plaintiffs could have secured an endorsement to the summons, or caused another alias and pluries summons to be issued

within ninety days from the date of issuance. N.C. Gen. Stat. § 1A-1, Rule 4(d) (2004).

In the instant case, the trial court held that plaintiffs' motion to extend the time for service of the alias and pluries summons was "outside of its power to grant," citing the case of *Dozier v. Crandall*, 105 N.C. App. 74, 411 S.E.2d 635, *disc. review denied*, 332 N.C. 480, 420 S.E.2d 826 (1992). The trial court further concluded that if it were permitted to do so, it would exercise its discretion and extend the time for service, but it was of the opinion that it did not have discretion to prevent a discontinuance of this action. We hold this conclusion was erroneous.

The case of *Dozier v. Crandall* and the more recent case of *Russ v. Hedgcock*, 161 N.C. App. 334, 588 S.E.2d 69 (2003), *disc. review denied*, 358 N.C. 545, 599 S.E.2d 407 (2004), involve identical fact situations which differ materially from that presented in the instant case. In both *Dozier* and *Russ*, the summons was not served within ninety days, and the action was discontinued. The plaintiffs subsequently obtained an alias and pluries summons, which was served upon the defendant. In each case, the plaintiff sought an order extending the time for issuance of the alias and pluries summons. This Court held in each case that once the summons expired because of the passage of ninety days, the action was discontinued. *Russ*, 161 N.C. App. at 336, 588 S.E.2d at 70; *Dozier*, 105 N.C. App. at 78, 411 S.E.2d at 638. Upon discontinuance of the action, the statute of limitations barred the plaintiff's claims and the trial court was without authority to retroactively extend the time for issuance of the alias and pluries summons. *Russ*, 161 N.C. App. at 337, 588 S.E.2d at 71; *Dozier*, 105 N.C. App. at 78, 411 S.E.2d at 638.

The instant case is controlled by *Lemons v. Old Hickory Council*, 322 N.C. 271, 367 S.E.2d 655 (1988). In *Lemons*, the plaintiff was injured on 15 May 1982, and originally filed suit on 21 March 1984. Plaintiff dismissed the action on 6 February 1985, but refiled it on 6 February 1986. An alias summons was issued on 2 May 1986 and was served on 5 June 1986, after the summons had become dormant.[1] The defendant moved to dismiss the plaintiff's action. The plaintiff moved the trial court for a retroactive extension of time from 2 June 1986 to 6 June 1986, to serve the alias summons. The trial court denied the

1. Prior to the amendment of Rule 4(c), a summons in a civil action, other than an action for tax foreclosure, became dormant thirty days after issuance. 2001 N.C. Sess. Laws ch. 379 § 1.

motion, holding that under Rule 6(b) of the Rules of Civil Procedure it did not have the authority to enlarge the time for service. *Id.* at 273, 367 S.E.2d at 656. It further held the plaintiff's failure to obtain service until 5 June 1986 was the result of "excusable neglect." *Id.* The Supreme Court reversed, stating "Rule 6(b) grants our trial courts broad authority to extend any time period specified in any of the Rules of Civil Procedure for the doing of any act, after expiration of such specified time, upon a finding of 'excusable neglect.' " *Id.* at 276, 367 S.E.2d at 658. It therefore held that "pursuant to Rule 6(b) our trial courts may extend the time for service of process under Rule 4(c)." *Id.* at 277, 367 S.E.2d at 658.

The instant case is factually identical to *Lemons*. The alias and pluries summons became dormant after sixty days, prior to plaintiffs' effectuating service on 20 November 2002, but before the expiration of the summons on 27 November 2002. The summons was merely dormant at the time of service; it had not expired and the trial court had the discretion to retroactively extend the time for service of the alias and pluries summons.

We hold that the trial court erred in determining that it lacked the discretion to extend the time for service of the alias and pluries summons in this case. This matter is remanded to the trial court to consider whether or not to exercise its discretion to extend the time for service of the alias and pluries summons.

It should be noted that the motion to extend the time for service of the alias and pluries summons was made after the expiration of the time for service, and under the provisions of Rule 6(b), the trial court must find that the "failure to act was the result of excusable neglect." N.C. Gen. Stat. § 1A-1, Rule 6(b) (2004). In its order, the trial court found that excusable neglect "could have occurred" as a result of depositing the summons and complaint into the mail after they became dormant, and sending the wrong summons to Ocean Side. With respect to plaintiffs' motion to extend the time for service of the summons, the relevant inquiry concerning excusable neglect pertains to the delay in serving a dormant summons, and not to the sending of the wrong summons to Ocean Side.

[3] We now turn to the issue of whether the trial court erred in determining that it did not have discretion to amend the summons served on Ocean Side to change the name on the summons from Can-Am to Ocean Side.

Plaintiffs contend this issue is controlled by *Harris v. Maready*, 311 N.C. 536, 319 S.E.2d 912 (1984), *disc. review denied*, 320 N.C. 168, 358 S.E.2d 50 (1987), while Ocean Side contends it is controlled by *Stone v. Hicks*, 45 N.C. App. 66, 262 S.E.2d 318 (1980). Each of these cases deals with the service of the wrong summons upon a party, but do not deal, in relevant parts, with the issue of amending the summons.[2] The threshold issue in this case is whether the summons served on Oceanside was sufficient to meet the requirements of Rule 4. We hold that it was, and therefore, do not reach the amendment question.

In *Stone*, this Court held that the service of the summons was fatally defective and as a result, was insufficient to confer jurisdiction, where the summons delivered to the first defendant named the second defendant and the summons delivered to the second defendant named the first defendant. 45 N.C. App. at 67-68, 262 S.E.2d at 319-20. In *Harris*, a deputy sheriff delivered a copy of a summons to Maready. This summons was directed to a different defendant. Our Supreme Court held that the service upon Maready met the requirements for service of process prescribed in Rule 4. 311 N.C. at 545, 319 S.E.2d at 918. We are bound by the holding in *Harris*, which is controlling in this case, and hold that the trial court erred in relying on *Stone v. Hicks*.

Although Ocean Side's name does not appear on the summons, we are convinced there was no substantial possibility of confusion in this case about the identity of Ocean Side as a party being sued. *Accord Harris*, 311 N.C. at 544, 319 S.E.2d at 917 (holding the same). Ocean Side received the summons by certified mail, addressed to Ocean Side, and their name appeared on the complaint contained therein. There was no confusion about the fact that Ocean Side was being sued. Counsel for Ocean Side advised the trial court:

> I recall checking with the Clerk and finding out, by golly, there was something filed out there May 31 with an A&P out there August 29 or whatever. And so I knew it was there. I informed everyone, as I am able to do, but still the rules weren't being followed again.

2. *Harris v. Maready*, 311 N.C. 536, 319 S.E.2d 912, presented two issues, one concerning the wrong summons being served on the individual defendant, Maready; and the other with the misnomer in another summons identifying a different defendant as a partnership rather than a corporation. For the purposes of our discussion here, the relevant portion of the *Harris* opinion is that dealing with the service of the summons on Maready. The portion of the opinion dealing with the amendment of the partnership summons is not germane to this discussion.

Our Supreme Court has stated that a lawsuit is "not a children's game, but a serious effort on the part of adult human beings to administer justice[.]" *Hazelwood v. Bailey*, 339 N.C. 578, 584, 453 S.E.2d 522, 525 (1995) (citations and internal quotations omitted). " 'The purpose of a service of summons is to give notice to the party against whom a proceeding is commenced to appear at a certain place and time and to answer a complaint against him.' " *Id.* at 581, 453 S.E.2d at 523 (quoting *Harris*, 311 N.C. at 541, 319 S.E.2d at 916). Where the party being sued is named in such a manner that every intelligent person understands who is intended, then the purpose of the service of process has been fulfilled. *Id.* at 584, 453 S.E.2d at 525. As such, we will not and should not put ourselves in the "position of failing to recognize what is apparent to everyone else." *Id.* (citations and internal quotations omitted).

Ocean Side in this case was not confused as to whether or not they were a party to this lawsuit. Based on the facts of this case, we hold that the requirements for service of process, as required under Rule 4, have been met.

We reverse and remand this case to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and ELMORE concur.

BRENDA ROBINSON, PLAINTIFF v. RICHARD CURTIS GARDNER AND PIKE ELECTRIC, INC., DEFENDANTS

CORY R. ROBINSON, PLAINTIFF v. RICHARD CURTIS GARDNER AND PIKE ELECTRIC, INC., DEFENDANTS

No. COA03-1477
No. COA03-1478

(Filed 4 January 2005)

Appeal and Error— appealability—interlocutory orders—denial of motion to dismiss—setting aside voluntary dismissal

Defendants' appeal was dismissed as premature where plaintiff filed two actions arising from an automobile accident; each was voluntarily dismissed; plaintiff filed a third; defendants

moved to dismiss under N.C.G.S. § 1A-1, Rule 41(a)(1); plaintiff moved to set aside one of the earlier dismissals; and the court granted that motion and denied defendants' motion to dismiss. Defendants have not demonstrated the existence of a substantial right that would qualify them for an immediate appeal.

Appeal by defendants from orders entered 28 May 2003 and 12 June 2003 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 August 2004.

Poyner & Spruill, L.L.P., by E. Fitzgerald Parnell, III, and Cynthia V. McNeely; and Karney, deBrun & Wilcox, by Robert A. Karney, for plaintiffs-appellees.

Hedrick, Eatman, Gardner & Kinchloe, L.L.P., by Allen C. Smith and Heather T. Twiddy, for defendants-appellants.

GEER, Judge.

This appeal arises from a traffic accident. Plaintiffs Brenda and Cory Robinson twice filed lawsuits and then voluntarily dismissed them without prejudice pursuant to Rule 41(a) of the Rules of Civil Procedure. When they filed suit a third time, defendants filed a motion to dismiss pursuant to the "two-dismissal" principle of Rule 41(a)(1). In response, the Robinsons moved, pursuant to Rule 60(b) of the Rules of Civil Procedure, to set aside one of the earlier voluntary dismissals. The trial court entered two orders with the first granting the Robinsons' motion to set aside the earlier voluntary dismissal, and the second denying defendants' motion to dismiss. Defendants have appealed from these two orders. Because this appeal is interlocutory and defendants have failed to identify a substantial right that will be lost without immediate review, we dismiss the appeal.

Facts

On the afternoon of 13 February 2001, plaintiff Cory Robinson was driving a car with his wife, plaintiff Brenda Robinson, and his parents, Lawrence and Gloria Robinson, as passengers. When defendant Richard Gardner—driving a vehicle owned by his employer, defendant Pike Electric, Inc.—attempted to merge into traffic, he forced a car driven by Sharon Simmons across the center line and into a head-on collision with the Robinsons. Gloria Robinson and Sharon Simmons were killed in the collision, while Cory, Brenda, and Lawrence Robinson were injured.

On 31 October 2001, Cory and Brenda Robinson each filed a lawsuit naming Richard Gardner and Pike Electric, Inc. as co-defendants ("the 2001 lawsuits"). The complaints alleged that Gardner was negligent in his driving and that Gardner's negligence was imputed to Pike under a theory of *respondeat superior*.[1] On 29 August 2002, despite the pendency of their 2001 lawsuits, the Robinsons' attorney filed two new lawsuits against Gardner and Pike ("the 2002 lawsuits"), repeating the prior allegations, but also adding claims of negligent entrustment, negligent hiring and retention, and negligent training and supervision.

The Robinsons' attorney, Robert Karney, testified that on 6 September 2002, he received a letter from defendants' attorney stating that defendants intended to move to dismiss the 2002 lawsuits as duplicative. Karney testified that he replied by fax, noting that a mediation was scheduled for 11 September 2002, but agreeing to amend the 2001 lawsuits and dismiss the 2002 lawsuits if no settlement occurred.

The mediation on 11 September 2002 ended in an impasse. On 13 September 2002, the Robinsons' attorney voluntarily dismissed both the 2001 and 2002 lawsuits pursuant to Rule 41(a). Karney testified that he instructed his secretary to prepare voluntary dismissals of the 2002 lawsuits for his signature, but that she instead prepared dismissals for both the 2001 and the 2002 lawsuits, which Karney then signed. Copies of these dismissals were filed and mailed to defendants' attorney on 13 September 2002, a Friday.

On Monday, 16 September 2002, defendants' attorney served offers of judgment on the Robinsons' attorney. Plaintiff's attorney Karney testified that he subsequently sent a letter referencing the 2001 lawsuits and enclosing subpoenas he intended to serve in support of the 2001 lawsuits.

On 3 February 2003, the Robinsons' attorney filed new lawsuits against Gardner and Pike ("the 2003 lawsuits") that were virtually identical to the 2002 complaints. On 12 February 2003, defendants moved to dismiss the 2003 lawsuits. Defendants argued that the dismissal of the 2001 and 2002 complaints operated as a final adjudication on the merits and barred any further action on the same set of

1. Lawrence Robinson also filed a lawsuit on behalf of himself and his late wife's estate. This lawsuit was settled in December 2002 and avoided the procedural morass that gives rise to this appeal.

operative facts under the "two-dismissal" principle of Rule 41(a)(1). On 2 May 2003, the Robinsons filed an opposition to the motion to dismiss and a "Motion for Relief from Judgment," pursuant to Rule 60(b), seeking to set aside the voluntary dismissal of the 2002 lawsuits. On 7 May 2003, Cory and Brenda Robinson filed affidavits in which they said that they had not given consent to dismiss with prejudice their negligent entrustment, negligent hiring and retention, and negligent supervision claims against Pike and that it was their understanding that these claims could be refiled.

The hearing on the parties' motions was scheduled for 15 May 2003. On the day before the hearing, the Robinsons filed the affidavit of their attorney, Robert Karney. At the hearing, the Honorable Jesse B. Caldwell, III, over defendants' objection, considered plaintiffs' Rule 60(b) motion prior to hearing defendants' motion to dismiss. During the course of the hearing, Judge Caldwell, again over defendants' objection, allowed Karney to present his oral testimony in support of the Rule 60(b) motion. Following the hearing, defendants filed two documents with the court entitled "Rebuttal to the Testimony of Robert A. Karney." In his subsequent orders, Judge Caldwell indicated that he did not consider these submissions before ruling.

On 28 May 2003, Judge Caldwell entered an order setting aside the voluntary dismissals of the 2001 lawsuits. Although the Robinsons' motion had requested that the 2002 dismissals be set aside, Judge Caldwell amended the motion to conform to the evidence presented and found (1) that the dismissals of the 2001 lawsuits were inadvertently and mistakenly filed by the Robinsons' attorney and (2) that neither the Robinsons nor the defendants had contemplated dismissal of the 2001 lawsuits. On 12 June 2003, Judge Caldwell filed an additional order denying defendants' motion to dismiss.

Defendants filed notices of appeal on 17 June 2003 from both orders. Because the appeal in Cory Robinson's case and the appeal in Brenda Robinson's case involve identical issues and briefs, we have consolidated the appeals for purposes of hearing and filing our opinion. Plaintiffs have moved to dismiss these appeals as interlocutory.

Discussion

Defendants contend on appeal that the trial court erred in granting the Robinsons' Rule 60 motion and in denying their motion

to dismiss pursuant to Rule 41(a)(1).[2] Both orders are interlocutory in that they do not "determine the issues but direct[] some further proceeding preliminary to final decree." *Greene v. Charlotte Chem. Labs., Inc.*, 254 N.C. 680, 693, 120 S.E.2d 82, 91 (1961). This Court must, as an initial matter, determine whether the appeal is properly before the Court.

An interlocutory order is immediately appealable in only two circumstances: (1) if the trial court has certified the case for appeal under Rule 54(b) of the Rules of Civil Procedure; and (2) "when the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Embler v. Embler*, 143 N.C. App. 162, 165, 545 S.E.2d 259, 261 (2001). Since Rule 54(b) certification (involving entry of judgment as to some, but not all, claims or parties) is inapplicable to this situation, defendants are entitled to appeal only if the trial court's orders affect a substantial right that would otherwise be lost without immediate review.

Our courts have consistently held that appeals from orders allowing a Rule 60 motion "must be dismissed as interlocutory." *Braun v. Grundman*, 63 N.C. App. 387, 388, 304 S.E.2d 636, 637 (1983) (dismissing appeal of Rule 60(b) order setting aside judgment for surprise and excusable neglect). *See also Bailey v. Gooding*, 301 N.C. 205, 210, 270 S.E.2d 431, 434 (1980) (order setting aside default judgment not immediately appealable); *Metcalf v. Palmer*, 46 N.C. App. 622, 625, 265 S.E.2d 484, 485 (1980) (order setting aside involuntary dismissal not immediately appealable). Similarly, "[a] ruling denying a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) is ordinarily a nonappealable interlocutory order." *Bolton Corp. v. T. A. Loving Co.*, 317 N.C. 623, 629, 347 S.E.2d 369, 373 (1986).

Defendants argue, however, that they are entitled to an immediate appeal under N.C. Gen. Stat. § 1-277(b) (2003), which provides: "Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person . . . of the defendant . . . ." Our Supreme Court has, however, narrowly construed N.C. Gen. Stat. § 1-277(b), holding that "the right of immediate appeal of an adverse ruling as to jurisdiction over the person, under [N.C. Gen. Stat. § 1-277(b)], is limited to rulings on

2. Rule 41(a)(1) provides that a voluntary dismissal "is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim."

'minimum contacts' questions, the subject matter of Rule 12(b)(2)." *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982). Since the adverse rulings against defendants in this case are not based on "minimum contacts," they do not give rise to an immediate appeal.

Defendants next argue that operation of Rule 41(a)(1) creates a form of immunity that supports an interlocutory appeal. This Court rejected that contention in *Allen v. Stone*, 161 N.C. App. 519, 588 S.E.2d 495 (2003). In *Allen*, the plaintiff had twice filed and voluntarily dismissed lawsuits. When the plaintiff filed a third suit, the defendant filed a motion to dismiss on the grounds that Rule 41(a)(1) barred the third suit. The trial court denied the motion to dismiss, and the defendant appealed, arguing that "the Rule 41(a)(1) two-dismissal rule creates a 'right to be free from the burdens of litigation' giving rise to a 'conditional immunity from suit,' such that denial of a motion to dismiss grounded on Rule 41(a)(1) likewise affects a substantial right and is immediately appealable." *Id.* at 522, 588 S.E.2d at 497. This Court unambiguously stated: "We decline to adopt defendant's interpretation of Rule 41(a)(1) as creating a 'conditional immunity from suit.' " *Id.* The Court then held: "[W]e discern no substantial right that would be affected absent immediate appellate review. This Court has previously stated that avoidance of a trial, no matter how tedious or unnecessary, is not a substantial right entitling an appellant to immediate review." *Id.*

Despite defendants' attempts to distinguish it, *Allen* controls. While defendants urge that the *Allen* Court did not consider whether the defense of *res judicata*, arising out of the two-dismissal rule, justified an immediate appeal, we disagree. In *Allen*, *id.* at 522, 588 S.E.2d at 497, the Court specifically relied upon *Country Club of Johnston County, Inc. v. United States Fid. & Guar. Co.*, 135 N.C. App. 159, 519 S.E.2d 540 (1999), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207 (2000), in which this Court held that an order denying a motion based on the defense of *res judicata* gives rise to a "substantial right" only when allowing the case to go forward without an appeal would present the possibility of inconsistent jury verdicts. *Id.* at 167, 519 S.E.2d at 546. When, however, the prior decision was a summary judgment order, there would be "no possibility of inconsistent verdicts" and no substantial right that could not be vindicated in an appeal from a final judgment. *Id. See also Northwestern Fin. Group, Inc. v. County of Gaston*, 110 N.C. App. 531, 536, 430 S.E.2d 689, 692, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993) (holding that the defense of *res judicata* gives rise to a "substantial

right" only when there is a risk of two actual trials resulting in two different verdicts). *But see Williams v. City of Jacksonville Police Dep't*, 165 N.C. App. 587, 589-90, 599 S.E.2d 422, 426 (2004) ("substantial right" affected when defendants raised defenses of *res judicata* and collateral estoppel based on a prior federal summary judgment decision rendered on the merits).

The present appeal does not involve possible inconsistent jury verdicts or even an inconsistent decision on the merits since, as in *Allen*, there was only a voluntary dismissal that would—if not set aside—result in an adjudication on the merits only by operation of law. There has been no decision by any court or jury that could prove to be inconsistent with a future decision. Defendants do not seek to avoid inconsistent decisions; they seek to avoid any litigation at all. But, as this Court stressed in *Allen*, mere "avoidance of a trial . . . is not a substantial right entitling an appellant to immediate review." *Allen*, 161 N.C. App. at 522, 588 S.E.2d at 497.

Defendants have not demonstrated the existence of any substantial right that would qualify them for immediate appeal. Moreover, defendants have neither filed a petition for writ of certiorari nor identified any reason that would warrant this Court's exercising its discretion to hear this appeal under Rule 21 of the Rules of Appellate Procedure. We, therefore, allow plaintiffs' motions to dismiss the appeals.

Dismissed.

Judges LEVINSON and THORNBURG concur.

Judge THORNBURG concurred prior to 31 December 2004.

STATE OF NORTH CAROLINA v. PATRICK CORNELIUS DAVIS, DEFENDANT

No. COA04-115

(Filed 4 January 2005)

1. **Criminal Law— response to jury question—not expression of opinion**

The trial court did not express an opinion where defendant was charged with the armed robbery and common-law robbery of several victims, the jury asked a question about the requirement of a firearm as to a particular victim, the court instructed the jury that it could return a verdict of guilty of armed robbery, guilty of common-law robbery, or not guilty, and the court then instructed the jury on common-law robbery, having already instructed on robbery with a firearm. N.C.G.S. § 15A-1234(a)(1).

2. **Evidence— photo lineup from mug shots—not plain error**

There was no plain error in a robbery prosecution in allowing an officer to testify that he created a photo lineup from mug shots on file with the police department. There were other references to defendant's prior criminal record, and ample evidence to find the elements of common-law robbery and armed robbery.

3. **Constitutional Law— effective assistance of counsel—negative remarks about defendant**

Defendant was not denied effective assistance of counsel where his attorney made negative remarks at sentencing about defendant's intelligence and decision-making in opting for trial rather than taking a plea bargain in an effort to show that he was not capable of informed, reasoned decisions and that his sentence should not be disproportionate to sentences of his codefendants. Defense counsel was advocating for his client; moreover, each of defendant's sentences was within the statutory range and there is no evidence that counsel's remarks improperly influenced the sentencing.

4. **Sentencing— discrepancy—announced sentence and written judgment—right to be present**

Robbery sentences were vacated where there were discrepancies between the sentence announced in open court and the written judgment. A defendant has the right to be present when the sentence is imposed.

5. Sentencing— restitution—sufficiency of evidence

The restitution ordered to several victims in a robbery sentence was not supported by the evidence in several instances, but was supported in one where the court took an average between the amount the victim estimated was in her pocketbook and the higher amount an accomplice testified was in the pocketbook.

Appeal by defendant from judgment entered 31 October 1995 by Judge Preston Cornelius in Guilford County Superior Court. Heard in the Court of Appeals 19 October 2004.

Attorney General Roy Cooper, by Assistant Attorney General Daniel D. Addison, for the State.

Appellate Defender Staples Hughes, by Assistant Appellant Defender Matthew D. Wunsche, for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from judgments imposing active sentences of imprisonment entered upon his conviction of three counts of robbery with a dangerous weapon and one count of common-law robbery.

The evidence at trial tended to show that on the evening of 26 November 1994, defendant, Sam Blackmon (Blackmon) and Jamie West (West) were driving around Greensboro in a car Blackmon had stolen the day before. After defendant suggested "holding somebody up" to make some easy money, the men saw Benny Fields, (Fields) age fourteen, walking down Creekridge Road. Defendant, who was driving, stopped the car and handed West a gun. Blackmon and West got out of the car, hit Fields over the head knocking him out, and then stole his Kansas City Chiefs Starter jacket which held Fields' calculator and a wallet containing four dollars in it.

Blackmon and West jumped back in the car and defendant drove them to the Four Seasons Mall. They drove around the parking lot looking for someone they could "get an easy move on." Defendant parked the car about fifteen to twenty feet from Michael Ellis' (Ellis) truck, took the gun, got out of the car and approached Ellis. Defendant pointed the gun at Ellis' head and told him "to empty [his] pockets and put them on the hood of the truck." Ellis put his money clip which held about fifty to sixty dollars on top of the truck. Defendant grabbed the money, got back in his car and, with Blackmon driving, the men drove away.

Walter Farlow and his then girlfriend (now wife), Barbara, were putting packages in their car when a car pulled up beside them in the Wal-Mart parking lot. As Barbara returned the shopping cart and Walter unlocked the driver's door, a young black male with a gun came behind him and said, "Give me your wallet." When Barbara saw the man, she put her purse along with a shopping bag under another car. Then, after the man demanded she return to her car, she joined Walter by the car. As she started toward them, another man got out of the car and picked up Barbara's purse. At Barbara's urging, Walter took his money, approximately forty dollars, out of his wallet and laid the money along with his wallet on the trunk of the car. The man picked up the money and ran back to his car. As it sped away, Walter observed three individuals in the car.

Officer Norman Rankin investigated the crimes and, as a result of his investigation, arrested Blackmon on 28 November 1994. Blackmon made a statement to Officer Rankin confessing his involvement in the crimes and implicating West and defendant. The police arrested defendant on 30 November 1994 charging him with four counts of robbery with a dangerous weapon.

I.

[1] Defendant first argues the trial court violated its statutory and constitutional responsibilities by expressing its opinion as to defendant's guilt in response to the jury's question about an element of robbery with a dangerous weapon. During deliberations the jury sent a note asking the court, "Is guilty of robbery allowed without saying by firearm? RE: Benny Fields." The court brought the jury back into the courtroom and instructed them as follows:

> As to that particular charge, members of the jury, you may return one of three possible verdicts—guilty of robbery with a firearm and I'm going to tell you about common law robbery or not guilty. I think you've already been charged as to robbery with a firearm.

The judge then proceeded to instruct the jury on common law robbery.

First, the State notes that defendant failed to preserve this issue for review on appeal because he failed to object to the instructions at trial. However, in *State v. Tucker*, 91 N.C. App. 511, 516, 372 S.E.2d 328, 331 (1988) this Court held defendant did not waive his right to pursue his appeal by failing to object to additional jury instructions.

N.C. Gen. Stat. § 15A-1234(a)(1) (2003) provides "[a]fter the jury retires for deliberation, the judge may give appropriate additional instructions to . . . [r]espond to an inquiry of the jury made in open court." This statute does not prevent the judge from responding in open court to a written question from the jury. *State v. Davis*, 353 N.C. 1, 17, 539 S.E.2d 243, 255 (2000), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 55 (2001). In addition, the judge is not "required to repeat instructions which have been previously given to the jury in the absence of some error in the charge." *State v. Hockett*, 309 N.C. 794, 800, 309 S.E.2d 249, 252 (1983).

It is apparent from the record that the judge instructed the jurors that they had three options: guilty of robbery with a firearm, guilty of common law robbery or not guilty. Since an instruction in the elements necessary for conviction of robbery with a firearm had previously been given, the court only instructed the jury on the elements of common law robbery. The instruction does not indicate an expression of opinion in violation of defendant's statutory or constitutional rights. The assignment of error is overruled.

II.

[2] Next, defendant argues the trial court committed plain error by allowing Detective A. C. Yow (Yow) to testify that he created a photo lineup from mug shots on file with the police department. The testimony was prejudicial, defendant argues, because it amounted to evidence of defendant's prior criminal record.

Where a defendant has not preserved an issue for review by objecting at trial, an appellate court may review the issue only for plain error. N.C. R. App. P. 10(c)(4). "Under a plain error analysis, defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

Detective Yow testified at trial that he

> took the names of the known suspects and in our computer system with Guilford County all mug shots are done in this computer and filed. This filing system, when you are setting up a series of picture line-ups picks subjects of the same characteristics, same heights, basically the same weight and they present these pictures to us and then we do the line-up.

However, there were other references at trial to defendant's prior criminal record. Blackmon testified that after defendant got back into the car at Wal-Mart, defendant "was all tensed up" and "said he wasn't going back to prison." Blackmon also testified that when he answered a phone call at defendant's mother's home, he asked who was calling because defendant's mother said, "which one called because he has brothers that's locked up too." At trial, Detective Norman Rankin of the Greensboro Police Department read a statement given on 23 October 1995 by Blackmon in his own handwriting which said, *inter alia*, "[defendant] don't [sic] want to go back to prison."

Furthermore, there was ample evidence in the record to permit the jury to find the elements of common-law robbery and robbery with a dangerous weapon. After careful review of the record, we cannot say absent the reference to the mug shots, the outcome of the trial would have been different. Therefore, the assignment of error is without merit.

III.

[3] Defendant alleges he was denied effective assistance of counsel during sentencing when his attorney failed to advocate for him and argued he should receive a harsher sentence than his co-defendants. A defendant has a right to the effective assistance of his counsel. *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985). In order to establish a claim of ineffective assistance of counsel, defendant, using an objective standard of reasonableness, must meet a two-prong test established by the United States Supreme Court. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have

been a different result in the proceedings," *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

Although defense counsel made negative remarks during the sentencing hearing about defendant's intelligence, his decision making and his decision to opt for a trial rather than taking a plea bargain, when viewing the totality of the evidence, it is apparent he did this in an effort to advocate for his client. Defense counsel attempted to show that defendant was not mentally capable of making informed, reasoned decisions and therefore his sentence should not be "incredibly disproportionate to his fellows when he's got that kind of thing going on."

Defense counsel requested that the court consolidate the Farlow cases into one case and the other two cases into one so defendant would be sentenced for only two cases rather than four. Without consolidation, defense counsel contended defendant would be looking at "20-some years" which he argued was "incredibly disproportionate to the other people involved in the crime as well as what to me would be simple notions of justice."

Defendant relies on *State v. Davidson*, 77 N.C. App. 540, 335 S.E.2d 518 (1985), *disc. review denied*, 315 N.C. 393, 338 S.E.2d 882 (1986), where defendant's counsel was deemed ineffective. However, in *Davidson*, unlike the present case, defendant's counsel "offered no argument in defendant's favor, made no plea for findings of mitigating factors, failed to argue for reduced punishment on the basis that defendant was not the armed participant, failed to suggest any favorable or mitigating aspects of defendant's background, and failed even to advocate leniency." *Id.* at 545, 335 S.E.2d at 521.

In addition to failing to establish that defense counsel was not functioning as counsel, defendant has not demonstrated that but for counsel's error his sentence would have differed. When a sentence is within the statutory limit it will be presumed regular and valid unless "the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence." *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987). Each of defendant's sentences were within the presumptive range and there is no evidence in the record showing that counsel's arguments improperly influenced the trial court's sentencing. Accordingly, the assignment of error is overruled.

IV.

[4] Next defendant contends the trial court erred when it increased defendant's sentence in the written judgment after announcing a different sentence in open court. The State, in its brief, concedes there were discrepancies between the judgment announced in open court and the written judgment form.

A defendant has a right to be present at the time the sentence was imposed. *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999). Because defendant was not present at the time the written judgment was entered, the "sentence must be vacated and the matter remanded for the entry of a new sentencing judgment." *Id.*

V.

[5] In his final argument, defendant asserts the evidence did not support the amount of restitution the trial court ordered defendant to pay to the four victims. At the sentencing hearing, the trial court awarded $45.00 to Michael Ellis, $125.00 to Benny Fields. $180.00 to Barbara Farlow and $50.00 to Walter Farlow as restitution. The State concedes the evidence did not support the amounts of restitution ordered as to Michael Ellis, Benny Fields and Walter Farlow. As to Barbara Farlow, the evidence at trial was conflicting.

Barbara Farlow testified that although she did not know the exact amount, the pocketbook taken from her contained "between a hundred and twenty and a hundred and fifty dollars in cash." On the other hand, West testified the pocketbook contained about $240.00 of which he took $40.00. It appears the trial court, in awarding $180.00, took an average between Barbara Farlow's lowest estimate of $120.00 and West's estimate of $240.00.

The amount of restitution ordered by the trial court must be supported by the evidence. *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995). However, "[w]hen, as here, there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986). Therefore, we will not disturb the trial court's order of restitution to Barbara Farlow. We remand for reconsideration of restitution as to Michael Ellis, Benny Fields and Walter Farlow.

Defendant's remaining assignments of error were not brought forward in his brief and thus are deemed abandoned. N.C. R. App. P. 28(a).

No error in trial, remanded for resentencing and redetermination of restitution.

Judges McCULLOUGH and ELMORE concur.

STATE OF NORTH CAROLINA v. BRADLEY DEAN CRAWFORD

No. COA04-286

(Filed 4 January 2005)

1. **Assault— on law enforcement officer—serious injury or serious bodily injury—felony**

An indictment was sufficient to charge the felony of assault on a law enforcement officer under N.C.G.S. § 14-34.7 even though it alleged the infliction of "serious injury" rather than "serious bodily injury." The manifest intent of the Legislature in enacting N.C.G.S. § 14-34.7 was to punish as a felony assaults against law enforcement officers inflicting serious injury or serious bodily injury.

2. **Assault— on law enforcement officer—lesser offense of misdemeanor assault—instruction refused**

The trial court did not err in a prosecution for assault on a law enforcement officer inflicting serious bodily injury by not instructing the jury on the lesser offense of assault inflicting serious injury. N.C.G.S. § 14-34.7 aggravates misdemeanor assault inflicting serious injury when the offense is against a law enforcement officer; there is no evidence that the victim here was not a law enforcement officer.

Appeal by Defendant from judgment entered 31 October 2003 by Judge Russell J. Lanier, Jr. in Superior Court, New Hanover County. Heard in the Court of Appeals 16 November 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General John J. Aldridge, III, for the State.

Richard E. Jester for defendant-appellant.

WYNN, Judge.

Under N.C.G.S. § 14-34.7, an assault upon a law enforcement officer inflicting *serious bodily injury* constitutes a felony. Defendant contends that because N.C.G.S. § 14-33(c) makes an assault inflicting *serious injury* a misdemeanor, the indictment in this case charging him with inflicting *serious injury* (rather than *serious bodily injury*) on a law enforcement officer was fatally defective. Because our Supreme Court recognizes a "manifest purpose" exception to the rule of lenity, we are constrained to hold that even if the language of this statute is ambiguous, the "manifest purpose" of the legislature was to make an assault upon a law enforcement officer inflicting *serious injury* a felony under N.C.G.S. § 14.34.7. *State v. Jones*, 358 N.C. 473, 598 S.E.2d 125 (2004). Accordingly, we uphold Defendant's conviction.

The evidence at trial tended to show that on 18 November 2002, New Hanover County Deputy Sheriff Michael Howe received a radio transmission from his supervisor regarding a priority outstanding warrant for Defendant. After receiving this transmission, Deputy Howe proceeded to Defendant's residence where he arrived at approximately 9:49 a.m. and knocked on the door. Defendant opened the door and stepped outside. When Deputy Howe informed Defendant that he had a warrant for his arrest, Defendant went back into the house and yelled that he needed to get some shoes. Deputy Howe followed Defendant inside the residence and into a room where Defendant said he was getting shoes. Deputy Howe did not see any shoes in the room and asked Defendant to place his hands on the desk; Defendant complied.

But before Deputy Howe could place handcuffs on Defendant, a scuffle ensued. Deputy Howe testified that Defendant knocked the handcuffs away and punched him. Deputy Howe then punched Defendant several times with a closed fist and as the two fell to the floor Deputy Howe's right hand hit a television. Defendant's girlfriend, Francis Renee Clayton, testified that she witnessed the arrest. She testified that after Defendant placed his hands on the desk, Deputy Howe threw him to the ground and punched his head several times.

Deputy Howe suffered from a fracture to the fourth metacarpal in his right hand. The injury completely healed, however, Deputy Howe lost twenty percent extension of his right wrist. He underwent physical therapy and returned to his job in full duty.

At the close of the State's evidence, the trial court denied Defendant's motion to dismiss and a jury found Defendant guilty of assault on a law enforcement officer inflicting serious bodily injury and resist, delay or obstructing an officer in the performance of his duties. The trial court arrested judgment on the resist, delay, or obstruct charge and sentenced Defendant to a term of fifteen to eighteen months imprisonment. The imprisonment was suspended and Defendant was placed on supervised probation with a thirty-day split active sentence. Defendant appealed.

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[1] On appeal, Defendant first contends that the trial court lacked jurisdiction to try the offense because the indictment was fatally defective. He contends that because the text of the indictment charged him with assault on a law enforcement officer inflicting *serious injury* rather than *serious bodily injury*, the indictment was fatally defective since N.C.G.S. § 14-33 makes an assault inflicting serious injury a misdemeanor. We disagree.

An indictment is "a written accusation by a grand jury, filed with a superior court, charging a person with the commission of one or more criminal offenses." N.C. Gen. Stat. § 15A-641(a) (2003). "North Carolina law has long provided that '[t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court [acquires] no jurisdiction [whatsoever], and if it assumes jurisdiction a trial and conviction are a nullity.' " *State v. Neville*, 108 N.C. App. 330, 332, 423 S.E.2d 496, 497 (1992) (quoting *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966)). An indictment is fatally defective "if it 'wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty.' " *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (citation omitted). "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981).

Here the indictment stated:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did assault M. J. Howe, a law enforcement officer of the New Hanover Sheriff's Department, and did inflict *serious injury* on

> the officer. At the time of this offense, the officer was performing the duties of his office by attempting to serve outstanding warrants on the defendant.

(emphasis added). The indictment listed N.C.G.S. § 14-34.7 as the relevant statute.

North Carolina statutory law defines "serious bodily injury" 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." N.C. Gen. Stat. § 14-32.4 (2003). While our statutes do not define the term "serious injury", in *State v. Hannah*, 149 N.C. App. 713, 563 S.E.2d 1 (2002), this Court stated "the element of 'serious bodily injury' requires proof of more severe injury than the element of 'serious injury.' " *Id.* at 719, 563 S.E.2d at 5. Further, N.C.G.S. § 14-33(c) makes assault inflicting serious injury a misdemeanor.

In general, when a criminal statute is unclear, the long-standing rule of lenity "forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention." *State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 681 (1985); *see also Bell v. United States*, 349 U.S. 81, 99 L. Ed. 905 (1955) (defining the rule of lenity). The rule of lenity applies only when the applicable criminal statute is ambiguous. *State v. Cates*, 154 N.C. App. 737, 740, 573 S.E.2d 208, 210 (2002).

In this case, Defendant was convicted under N.C.G.S. § 14-34.7, which is entitled, with emphasis added, "Assault inflicting *serious injury* on a law enforcement, probation, or parole officer or on a person employed at a State or local detention facility." However, the text of N.C.G.S. § 14-34.7 makes assault inflicting "serious bodily injury" upon a law enforcement officer a class F felony.[1] This creates an ambiguity within the statute as the title states "serious injury" and the text states "serious bodily injury."

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1 N.C.G.S. § 14-34.7 provides:

> Unless covered under some other provision of law providing greater punishment, a person is guilty of a Class F felony if the person assaults a law enforcement officer, probation officer, or parole officer while the officer is discharging or attempting to discharge his or her official duties and inflicts serious bodily injury on the officer.

N.C. Gen. Stat. § 14-34.7(a) (2003).

Under North Carolina law, the terms "serious injury" and "serious bodily injury" do not appear to be interchangeable. *See Hannah*, 149 N.C. App. at 719, 563 S.E.2d at 5; *cf.* N.C.G.S. §§ 14-32.4[2] (assault inflicting serious bodily injury is a felony) and 14-33(c)[3] (assault inflicting serious injury is a misdemeanor). Thus, under the traditional rule of lenity, any ambiguity between the use of the term "serious injury" in the title of N.C.G.S. § 14-34.7 and the text thereafter would be construed against the State to mean that an indictment charging assault on a law enforcement officer creates a misdemeanor, not a felony. *Boykin*, 78 N.C. App. at 577, 337 S.E.2d at 681.

But recently our Supreme Court recognized that even if the statute is ambiguous, "[w]hen interpreting statutes, our principal goal is 'to effectuate the purpose of the legislature.' " *Jones*, 358 N.C. at 477, 598 S.E.2d at 128 (citation omitted). Thus, while the Court acknowledged that the statute in that case evinced "at best, an ambiguity", it concluded that " 'where a literal interpretation of the language of a statute will . . . contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.' " *Id.* at 477-8, 598 S.E.2d at 128 (quoting *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921)).

In *Jones*, N.C.G.S. § 90-90(1) classified cocaine as a Schedule II controlled substance. The punishment for a Schedule II controlled substance is found in N.C.G.S. § 90-95(d)(2), which provides that a person found in possession of a Schedule II controlled substance is "guilty of a Class 1 misdemeanor," but the third sentence creates

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2. N.C.G.S. § 14-32.4 provides:

> Unless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts serious bodily injury is guilty of a Class F 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.

N.C. Gen. Stat. § 14-32.4(a).

3. N.C.G.S. § 14-33(c) provides:

> Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she: (1) Inflicts serious injury upon another person or uses a deadly weapon.

N.C. Gen. Stat. § 14-33(c) (2003).

ambiguity by stating "the violation shall be punishable as a Class I felony." N.C. Gen. Stat. § 90-95(d)(2) (2003). The Supreme Court held that since the criminal statute was ambiguous, but the "manifest purpose" of the legislative was to make possession of cocaine a felony, the statute would be interpreted as making possession of cocaine a felony. *Jones*, 358 N.C. at 486, 598 S.E.2d at 133.

Following *Jones*, we are constrained to hold that notwithstanding the language of the statute, the "manifest purpose" of the Legislature in enacting N.C.G.S. § 14-34.7 was to make an assault inflicting "serious injury" or "serious bodily injury" against a law enforcement officer, a felony. Accordingly, we reject Defendant's assignment of error to the contrary.[4]

[2] Defendant next argues that the trial court erred in failing to instruct the jury on the lesser-included offense of assault inflicting serious injury. We disagree.

Under North Carolina law, a defendant may be convicted of the offense charged or of a lesser-included offense when the greater offense in the indictment includes all the essential elements of the lesser offense. *State v. Snead*, 295 N.C. 615, 622, 247 S.E.2d 893, 897 (1978); *State v. Riera*, 276 N.C. 361, 368, 172 S.E.2d 535, 540 (1970). When there is evidence to support the milder verdict, the court must charge upon it even when there is no specific prayer for the instruction. *Id.*

In this case, there is no evidence to suggest that Deputy Howe was not a law enforcement officer. Inasmuch as we hold that N.C.G.S. § 14-34.7 aggravates assault inflicting "serious injury" when the offense is against a law enforcement officer, we conclude that the trial court did not err in not presenting the misdemeanor charge to the jury.

We have considered Defendant's remaining assignments of error and find them to be without merit.

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4. Additionally, if interpreted the plain language of the statute N.C.G.S. § 14-34.7 would simply be a repetition of N.C.G.S. § 14-32.4. N.C.G.S. § 14-34.7 would create no additional punishment for assaulting a law enforcement officer, as was the legislature's intent by writing a law enforcement specific statute. However, if N.C.G.S. § 14-34.7 is interpreted to mean assault on a law enforcement officer inflicting *serious injury*, then this statute would aggravate the punishment for assault on a law enforcement officer from a misdemeanor to a class F felony, which was the legislature's "manifest purpose."

No error.

Judges HUDSON and ELMORE concur.

STATE OF NORTH CAROLINA v. GREGORY SCOTT

No. COA04-95

(Filed 4 January 2005)

1. **Evidence— prior crimes or bad acts—driving while impaired—not admissible**

The trial court erred in a prosecution for driving with a revoked license by admitting multiple letters of suspension with no redaction of the specific offenses, including multiple counts of driving while impaired.

2. **Sentencing— habitual felon—underlying offenses—felonies**

In an appeal decided on other grounds, an indictment charging defendant with being an habitual felon was not defective where it charged defendant with cocaine possession and speeding to elude arrest with aggravating circumstances, which by statute elevates the initial misdemeanor to a felony. Cocaine possession is a felony for all purposes.

3. **Motor Vehicles— driving with revoked license—indictment—notice of suspension**

In an action decided on other grounds, defendant was properly indicted for driving with a revoked license even though the indictment did not list the element of notice of suspension.

4. **Motor Vehicles— speeding to elude arrest—notice of elements**

In an appeal decided on other grounds, defendant was properly indicted for speeding to elude arrest with the aggravating factor of driving with a revoked license, even though all of the elements of the offense were not listed.

Appeal by defendant from judgment entered 28 August 2003 by Judge J. Richard Parker in Nash County Superior Court. Heard in the Court of Appeals 19 October 2004.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jason T. Campbell, for the State.

Stubbs, Cole, Breedlove, Prentis & Biggs, P.L.L.C., by C. Scott Holmes, for defendant-appellant.

HUNTER, Judge.

Gregory Scott ("defendant") appeals from a judgment dated 28 August 2003 entered consistent with a jury verdict finding him guilty of felony operation of a motor vehicle to elude arrest, reckless driving, and driving while license revoked. As we find error in the trial court's admission of defendant's prior convictions, we reverse and remand for a new trial.

The evidence tends to show that defendant was driving a green Honda Accord on Beale Street in the town of Rocky Mount after midnight on 10 May 2001. Officer Ian Kendrick ("Officer Kendrick") and Officer C. D. Joyner ("Officer Joyner") of the Rocky Mount Police Department were patrolling on bicycles. After hearing a vehicle with a revved engine and squealing tires, the officers approached defendant, who was stopped at a stop sign. The officers asked defendant to turn off his engine and remove the keys from the ignition. Defendant refused and sped away from the scene, causing Officer Kendrick to leap from his bicycle in order to avoid being struck by the departing vehicle.

The officers were unable to catch the vehicle, but dispatched a description of the automobile and tag number to other officers in the area. State Highway Patrol Trooper William R. Bullock ("Trooper Bullock"), received the dispatch and spotted the Accord jumping over train tracks with all four tires airborne at an estimated speed of fifty to fifty-five miles per hour. Trooper Bullock pursued the vehicle and found it abandoned in the middle of the road with the driver's side door opened.

Defendant was charged with assault with a deadly weapon of a law enforcement officer, driving while license revoked, reckless driving, and feloniously operating a motor vehicle to elude arrest. Defendant did not testify at trial. Defendant was not convicted of assault with a deadly weapon, but was convicted of the remaining three charges. Defendant pled guilty to a habitual felon charge after the jury returned a verdict of guilty as to the predicate felony. Defendant's convictions were consolidated and he was sentenced to a term of 100 to 126 months. Defendant appeals.

I.

[1] Defendant contends the trial court erroneously admitted evidence of prior convictions against defendant. As we agree, we reverse and remand for a new trial.

Defendant was charged with "unlawfully and willfully . . . operat[ing] a motor vehicle on a street or highway while the defendant's driver's license was revoked." One element of the crime of driving while license revoked is actual or constructive notice of the revocation. *See State v. Atwood*, 290 N.C. 266, 271, 225 S.E.2d 543, 545 (1976). At trial, the State submitted defendant's driving record ("Exhibit 3A") as evidence of defendant's multiple convictions and suspensions, as well as multiple letters of suspension for various traffic offenses ("Exhibit 2A") as evidence of notice for this charge, both of which included statements of defendant's specific prior offenses. Defendant objected to the admission of Exhibit 3A as it listed prior convictions. The trial court permitted the driving record to be admitted only after the State offered a redacted copy which removed the specific offenses from Exhibit 3A. The specific offenses were not removed from Exhibit 2A, however. Although defendant did not raise a specific objection to Exhibit 2A regarding the prior convictions, defendant's objection to the admission of this evidence in Exhibit 3A, presented together with Exhibit 2A, was sufficient to preserve this issue for appellate review. *See* N.C.R. App. P. 10(b)(1).

Under Rule 404(b) of the North Carolina Rules of Evidence, evidence of other crimes, wrongs or acts is not admissible to show action in conformity therewith. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). Evidence of the bare facts of a conviction are rarely, if ever, admissible against a non-testifying defendant. *See State v. Wilkerson*, 148 N.C. App. 310, 319, 559 S.E.2d 5, 11 (Wynn, J., dissenting), *rev'd per curiam*, 356 N.C. 418, 571 S.E.2d 583 (2002) (for reasons stated in dissenting opinion). Admission of a letter of suspension is appropriate as evidence of notice in a charge of driving while license revoked, as defendant concedes. *See Atwood*, 290 N.C. at 271, 225 S.E.2d at 545 (holding that for purposes of a conviction for driving while license is revoked, mailing of the notice of suspension raises a *prima facie* presumption that defendant received the notice and thereby acquired knowledge of the suspension or revocation). However, the trial court's admission of multiple letters of suspension, with no redaction of the specific offenses for which the license was revoked, including multiple counts of driving while impaired, is a violation of Rule

404(b), as no basis in this case has been shown for admission of the bare facts of the specific offenses. *Wilkerson*, 148 N.C. App. at 319-20, 559 S.E.2d at 11.

Further, such error in admission is not so harmless as to prevent the conclusion that "had the error in question not been committed, a different result would have been reached[.]" N.C. Gen. Stat. § 15A-1443(a) (2003). Although, as the State notes, the prior convictions were not highlighted in the text of the letters and were listed in the same font and size as the rest of the text, the jury was properly charged by the trial court with the duty to "weigh all of the evidence in the case[,]" *see State v. McClain*, 282 N.C. 396, 400, 193 S.E.2d 113, 115 (1972), including the letters of suspension plainly listing defendant's prior convictions. Therefore, we find that admission of the letters with inclusion of the specific offenses cannot be said to be harmless error and we grant a new trial. Although this error is dispositive of this appeal, we will discuss the additional assignments of error likely to arise again at defendant's next trial that are properly before this Court.

II.

[2] Defendant next contends that the predicate substantive felony used in the habitual felon charge is not a felony, and therefore the indictment is fatally defective. Defendant further argues that one of the underlying felonies, possession of cocaine, in the ancillary habitual felon indictment is also not a felony. We disagree.

Under the Habitual Felons Act, N.C. Gen. Stat. § 14-7.3 (2003), two indictments are required, one for the predicate substantive felony, and one for the ancillary habitual charge. *See State v. Cheek*, 339 N.C. 725, 727-28, 453 S.E.2d 862, 863 (1995). Under the Article, a felony offense is defined "as an offense which is a felony under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed." N.C. Gen. Stat. § 14-7.1 (2003).

Here, defendant was charged with speeding to elude arrest, N.C. Gen. Stat. § 20-141.5 (2003). Under this statute, such a violation is a misdemeanor, unless the presence of two or more aggravating factors are found. If such aggravating factors are found, N.C. Gen. Stat. § 20-141.5(b) states that "violation of this section shall be a Class H felony." Defendant suggests that the finding of aggravating factors merely changes the level of punishment, and not the actual defini-

tional classification of the crime. However, as the Supreme Court of North Carolina recently noted in *State v. Jones*, 358 N.C. 473, 598 S.E.2d 125 (2004), " '[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.' " *Jones*, 358 N.C. at 477, 598 S.E.2d at 128 (citation omitted). The *Jones* Court found that the statutory language of N.C. Gen. Stat. § 90-95(d) (2003), stating that possession of certain controlled substances was " 'punishable as a Class I felony,' " did not merely connote a sentencing classification, but rather dictated "that a conviction for possession of the substances listed therein . . . is elevated to a felony classification for all purposes." *Jones*, 358 N.C. at 478, 598 S.E.2d at 128. Here, the statutory language of N.C. Gen. Stat. § 20-141.5(b) contains no ambiguity whatsoever, clearly stating that the violation is a felony when two or more aggravating factors are found. As the crime with which defendant was charged is "an offense which is a felony under the laws of the State[,]" there is no fatal defect in the indictment. N.C. Gen. Stat. § 14-7.1.

Further, defendant's contention that the underlying felony of possession of cocaine is a misdemeanor for purposes of the habitual felon statute is also without merit. As discussed above, the Supreme Court's ruling in *Jones* has clarified that cocaine possession is a felony for all purposes. *Jones*, 358 N.C. at 486, 598 S.E.2d at 133. Therefore, defendant's indictment as a habitual felon was not fatally defective and the trial court had jurisdiction to proceed as to the charges. Defendant's assignment of error is overruled.

III.

[3] Defendant next contends the indictments for driving while license revoked and speeding to elude arrest were defective, as they failed to list all elements of the crime of driving with license revoked. We disagree.

Defendant contends that the indictment failed to list the element of notice of suspension in the charge of driving while license revoked. While notice is not a required element under the governing statute, N.C. Gen. Stat. § 20-28 (2003), the Supreme Court has held proof of constructive or actual notice is necessary in order to obtain a conviction of this offense. *Atwood*, 290 N.C. at 271, 225 S.E.2d at 545. This Court has held, however, that it is not necessary to charge on knowledge of revocation when unchallenged evidence shows that the State has complied with the provisions for giving notice of revocation

under N.C. Gen. Stat. § 20-16(d), as is the case here. *See State v. Funchess*, 141 N.C. App. 302, 311, 540 S.E.2d 435, 440-41 (2000).

[4] As defendant was properly indicted with the offense of driving while license revoked, we also find no error in the indictment for speeding to elude arrest using the aggravating factor of driving while licence revoked. As the Supreme Court recently explained in *State v. Squires*, 357 N.C. 529, 591 S.E.2d 837 (2003), "[t]he United States Supreme Court has consistently declined to impose a requirement mandating states to prosecute only upon indictments which include all elements of an offense." *Id.* at 537, 591 S.E.2d at 842 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 477, n.3, 147 L. Ed. 2d 435, 447, n.3 (2000)). *Squires* noted that our courts have consistently held that statutory short-form murder indictments are constitutional as they "give a defendant sufficient notice of the nature and cause of the charges against him or her[,]" even when elements such as premeditation and deliberation or felony-murder are excluded. *Squires*, 357 N.C. at 537, 591 S.E.2d at 842. Similarly, as the indictment for speeding to elude arrest properly included the statutory aggravating factor of driving while licence revoked, sufficient notice was given to defendant of the underlying aggravating factor. *Funchess*, 141 N.C. App. at 311, 540 S.E.2d at 440-41. Thus, we find no error in the challenged indictments.

IV.

Defendant brings forward four additional assignments of error. In view of our disposition of this appeal, we decline to address these errors.

As the trial court erred in admission of evidence of defendant's past convictions, we order a new trial. Those additional assignments of error discussed above are overruled.

New trial.

Judges WYNN and THORNBURG concur.

Judge Thornburg concurred in this opinion prior to 31 December 2004.

CHARLES DEXTER JOHNSON, INDIVIDUALLY AND IN HIS CAPACITY AS A SHAREHOLDER OF DEXTER SPORTS SUPPLEMENTS, INC. AND POWERSTAR, INC., PLAINTIFF V. SAMUEL J. WORNOM, III; DEXTER SPORTS SUPPLEMENTS, INC.; AND POWERSTAR, INC. (AS NOMINAL CORPORATE DEFENDANTS), DEFENDANTS

No. COA04-356

(Filed 4 January 2005)

1. **Appeal and Error— appealability—interlocutory order—grant of partial summary judgment—substantial right**

The trial court's grant of partial summary judgment in favor of defendant individual is immediately appealable even though it is an appeal from an interlocutory order, because: (1) a substantial right is affected and the judgment is immediately appealable when a ruling on a motion for summary judgment constitutes the final dismissal of a claim; and (2) plaintiff individual's loan broker claim was dismissed with prejudice upon the trial court's grant of summary judgment for defendant individual, and all other claims in the action have been dismissed.

2. **Brokers— loan broker—failure to comply with statutory requirements—summary judgment**

A de novo review revealed that the trial court erred by granting partial summary judgment in favor of defendant individual on plaintiff individual's claim that defendant acted as a loan broker as defined by N.C.G.S. § 66-106 and that he failed to comply with the statutory requirements governing loan brokers because viewed in the light most favorable plaintiff, defendant failed to show that there is no genuine dispute as to whether defendant acted as a loan broker given that defendant promised to, and did, procure a loan from a third party in return for consideration.

Appeal by Plaintiff from order entered 6 October 2003 by Judge James M. Webb in Superior Court, Moore County. Heard in the Court of Appeals 16 November 2004.

Van Camp, Meacham & Newman, PLLC, by Thomas M. Van Camp, for Plaintiff-Appellant.

Staton, Perkinson, Doster, Post & Silverman, by Jonathan Silverman, for Defendant-Appellee.

WYNN, Judge.

Plaintiff Charles Dexter Johnson asserts that the trial court erred in granting Defendant Samuel J. Wornom, III's motion for partial summary judgment. Johnson contends that Wornom was a loan broker as defined by North Carolina General Statute section 66-106 and failed to fulfill his loan broker obligations pursuant to North Carolina General Statute sections 66-107 *et seq.* After careful review, we reverse the trial court's order and remand for further proceedings.

A brief procedural and factual history of the instant appeal is as follows: Johnson is the founder of Dexter Sports Supplements, Inc. and Powerstar, Inc., which sell sports and nutritional dietary supplements. Wornom is, *inter alia*, the former co-owner of convenience and/or variety stores, a land developer, and a member of the board of directors of Capital Bank. Before their business dealings, Johnson and Wornom knew one another from their health club, Sanford Nautilus.

The records tends to show that in July 1998, Johnson sought a loan line for Dexter Sports Supplements, Inc. and Powerstar, Inc. from Capital Bank. But Capital Bank would not approve his loan, suggesting instead that he consult with Wornom regarding financing. Johnson soon thereafter approached Wornom at the Sanford Nautilus and inquired into his interest in investing in Johnson's businesses.

Wornom agreed to guarantee a Capital Bank loan of $82,000 for Dexter Sports Supplements, Inc. and Powerstar, Inc. in exchange for, *inter alia*, active involvement in managing the businesses and an interest in the businesses and certain real estate. Ultimately, Johnson defaulted on this loan, and Wornom, as guarantor, paid Capital Bank over $84,000 to satisfy the debt. Nevertheless, Wornom continued investing in Dexter Sports Supplements, Inc. and Powerstar, Inc. through 2000, putting up approximately $250,000.

On 2 February 2001, Johnson filed an action alleging, *inter alia*, that Wornom acted as a loan broker as defined by North Carolina General Statute section 66-106 and that he failed to comply with the statutory requirements governing loan brokers set forth in North Carolina General Statute sections 66-107 *et seq.* The parties moved for partial summary judgment. On 6 October 2003, the trial court denied Johnson's motion for summary judgment and granted Wornom's motion, finding that Wornom had not acted as a loan broker and dismissing Johnson's loan broker claim with prejudice. Johnson

appealed the order, while both parties voluntarily dismissed the other claims filed in the action.

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[1] The grant of summary judgment as to fewer than all parties or claims is generally not appealable. *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 164, 168, 265 S.E.2d 240, 242, 245 (1980) (quotation omitted). Where a ruling on a motion for summary judgment constitutes the final dismissal of a claim, however, a substantial right is affected, and the judgment is immediately appealable. *Tinch v. Video Indus. Servs.*, 347 N.C. 380, 381-82, 493 S.E.2d 426, 427-28 (1997). Here, because Johnson's loan broker claim was dismissed with prejudice upon the trial court's grant of summary judgment for Wornom, and because all other claims in the action have been dismissed, the partial summary judgment is appealable.[1]

"We review the trial court's grant of summary judgment de novo." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 296, 603 S.E.2d 147, 157 (2004) (citation omitted). In so doing, we undertake 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)). The movant has the burden of establishing the absence of any genuine issue of material fact and his/her entitlement to judgment as a matter of law. *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999). The evidence must be viewed in the light most favorable to the non-moving party, and all inferences must be drawn against the movant and in favor of the non-moving party. *Id.*

[2] In this appeal, Johnson asserts that the trial court erred in granting Wornom's motion for partial summary judgment. Johnson contends Wornom acted as a loan broker as defined by North Carolina General Statute section 66-106 and failed to comply with loan broker obligations identified in North Carolina General Statute sections 66-107 *et seq.*

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1. Johnson also appeals from the denial of his motion for partial summary judgment. We do not address that issue because the denial of a motion for summary judgment is interlocutory and therefore generally not appealable. *Carriker v. Carriker*, 350 N.C. 71, 73 511 S.E.2d 2, 4 (1999); *Iverson v. TM One, Inc.*, 92 N.C. App. 161, 165-66, 374 S.E.2d 160, 163 (1988).

"A 'loan broker' is any person, firm, or corporation who, in return for any consideration from any person, promises to (i) procure for such person, or assist such person in procuring, a loan from any third party; or (ii) consider whether or not it will make a loan to such person." N.C. Gen. Stat. § 66-106 (2003). A loan broker is required to provide a disclosure statement (N.C. Gen. Stat. § 66-107 (2003)), obtain a surety bond or establish a trust account (N.C. Gen. Stat. § 66-108 (2003)), and file various materials with the Secretary of State (N.C. Gen. Stat. § 66-109 (2003)).

Here, the record shows that Johnson approached Wornom about investing in Dexter Sports Supplements, Inc. and Powerstar, Inc. Wornom agreed, and the parties entered into a contract, prepared by Wornom's attorney, stating that "the business[es] asked Wornom to provide access to capital, which Wornom has agreed to do[.]" Wornom agreed to "arrange a loan at Capital Bank or other commercial bank, or he will personally loan the Business[es] the sum of $82,000[.]" In exchange, Wornom was to receive, *inter alia*, a one-half interest in certain real estate and stock warrants. Ultimately, Wornom arranged and guaranteed a loan of $82,000 from Capital Bank and received an interest in the businesses and real estate, as well as a role in the businesses' management. Given that Wornom promised to, and did, procure a loan from a third party in return for consideration, Wornom has not shown, in the light most favorable to Johnson, that there is no genuine dispute that he did not act as a loan broker. *See* N.C. Gen. Stat. § 66-106 (" "A 'loan broker' is any person . . . who, in return for any consideration from any person, promises to (i) procure for such person, or assist such person in procuring, a loan from any third party; or (ii) consider whether or not it will make a loan to such person[.]"). The trial court therefore erred in granting Wornom's motion for partial summary judgment.

Accordingly, we reverse the trial court's order granting Wornom's motion for partial summary judgment.[2]

2. Wornom has urged this Court to refrain from reviewing this case, contending that Johnson abandoned his two assignments of error by failing to reference them in his appellate briefing. First, we note that Johnson was allowed to amend his brief by adding references to his assignments of error. Moreover, the only case Wornom cites in support of his argument squarely undercuts the argument. In *Anthony v. City of Shelby*, we did indeed state that in an appellate brief, "immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. . . . [P]etitioners' failure to observe the requirements of the Rules subjects their appeal to dismissal." *Anthony v. City of Shelby*, 152 N.C. App. 144, 146, 567 S.E.2d 222, 224-25 (2002) (quotation and citations omitted). While recognizing the appellants'

Reversed and remanded.

Judges HUDSON and ELMORE concur.

STATE OF NORTH CAROLINA v. CHARLES MICHAEL CRAIG, SR.

No. COA04-427

(Filed 4 January 2005)

Firearms and Other Weapons— possession of firearm by felon—special instruction—justification defense—failure to request in writing

The trial court did not err by denying defendant's request to give a special instruction on the defense of justification of possession of a firearm by a felon, because: (1) defendant failed to request the special instruction in writing as required by N.C.G.S. § 1-181 and Rule 21 of the General Rules of Practice for the Superior and District Courts; and (2) assuming arguendo that defendant had properly presented the special instruction, the trial court still did not err by declining to instruct the jury on the justification defense since the uncontroverted evidence in this case shows that, after leaving the altercation, defendant kept the gun and took it with him to a friend's house where he was not under an imminent threat while possessing the gun.

Appeal by Defendant from judgment entered 10 July 2003 by Judge Ronald K. Payne in Superior Court, Henderson County. Heard in the Court of Appeals 7 December 2004.

Attorney General Roy Cooper, by Assistant Attorney General Brandon L. Truman, for the State.

Broker & Hamrick, P.A., by Leah M. Broker for defendant-appellant.

WYNN, Judge.

Under N.C.G.S. § 1-181 and Rule 21 of the General Rules of Practice for the Superior and District Courts, requests for spe-

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failure to reference his assignments of error, though, in *Anthony* we expressly nevertheless considered the appellants' arguments. *Id.*

cial instructions to the jury must be in writing. N.C. Gen. Stat. § 1-181(a)(1) (2003). Defendant contends the trial court erred by denying his request to give a special instruction on the defense of justification of possession of a firearm by a felon. Where, as here, Defendant failed to submit the special instruction in writing, the trial court did not error by declining to give it.

The facts at trial tended to show that on 15 November 2002 Defendant went to Jimmy Higgins's auto garage in Henderson County, North Carolina to sell him a tire changer. When Defendant arrived Steven Pearson, James Higgins, Paul Higgins, Dane Allen, and Brian Stepp were all present at the garage.

The State's evidence tended to show that as Defendant drove into the garage, he almost hit Pearson. Thereafter, Defendant got out of his car with a pistol sticking out of the front of his pants. When Pearson approached Defendant about the incident, Defendant "got in [his] face and began cussing[.]" Pearson hit Defendant in the face and walked away. Defendant then fired three gunshots hitting Pearson in the left buttock and the right leg.

Rhonda Jones, Defendant's girlfriend and niece, testified that she drove Defendant and Paul Craig to Higgins's garage on 15 November 2002 around 5:30 p.m. Defendant got out of the car and Jones observed Defendant "hit the floor" a few minutes later. Jones reached to the seat beside her, got her gun, and stuck it in the front of her pants. She walked into the garage and observed several men kicking Defendant. She "got to [Defendant's] head" and put the gun in his hand. Defendant fired a shot in the air, then two more shots. Jones got Defendant to the car and they drove to a friend's house on Dana Road. Defendant testified to essentially the same facts.

In rebuttal, the State presented Robert Hamilton, Jones's first cousin and Defendant's nephew. Hamilton testified that on 15 November 2002 at about 6:15 p.m. he went to a friend's house on Dana Road, and when he arrived Jones was the only person present. He asked her "[w]here's Mike?[,]" and she responded that "[h]e went to Jimmy's." Five to ten minutes after Hamilton arrived Defendant drove up in his car. Defendant was alone and told Hamilton that he shot Pearson. Hamilton saw Defendant with a gun.

At trial, Defendant requested, "an instruction, Your honor, 310.10, the compulsion, duress or coercion with respect to the possession of a firearm by a felon." The trial court declined to give the instruction after deliberation.

A jury found Defendant guilty of assault with a deadly weapon inflicting serious injury and possession of a firearm by a felon. The trial court sentenced Defendant to thirty-four to fifty months imprisonment for the assault charge and sixteen to twenty months imprisonment for the possession charge but suspended the sentence for sixty months of probation to begin after the other active sentence was completed. Defendant appealed the possession of a firearm by a felon charge.

On appeal, Defendant argues the trial court erred by failing to give the jury a special instruction on justification as a defense to possession of a firearm by a felon. We disagree.

In North Carolina, requests for special jury instructions are allowable under N.C.G.S. § 1-181 and 1A-1, Rule 51(b) of the North Carolina General Statutes. N.C. Gen. Stat. §§ 1-181, 1A-1, Rule 51(b) (2003). It is well settled that the trial court must give the instructions requested, at least in substance, if they are proper and supported by the evidence. *See Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995). "The proffered instruction must . . . contain a correct legal request and be pertinent to the evidence and the issues of the case." *State v. Scales*, 28 N.C. App. 509, 513, 221 S.E.2d 898, 901 (1976). "However, the trial court may exercise discretion to refuse instructions based on erroneous statements of the law." *Roberts*, 120 N.C. App. at 726, 464 S.E.2d at 83 (citation omitted).

N.C.G.S. § 1-181 and Rule 21 of the General Rules of Practice for the Superior and District Courts require that requests for special instructions to the jury must be in writing. N.C. Gen. Stat. § 1-181(a)(1). This Court has held that a trial court's ruling denying requested instructions is not error where the defendant fails to submit his request for instructions in writing. *State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997); *State v. Martin*, 322 N.C. 229, 237, 367 S.E.2d 618, 623 (1988). Here, Defendant did not submit his proposed special instruction in writing, and therefore it was not error for the trial court to fail to charge as requested. *Id.*

Assuming *arguendo* that Defendant had properly presented the special instruction to the jury, the trial court was still not in error declining to instruct the jury on the justification defense.

Federal courts have recently recognized justification as an affirmative defense to possession of firearms by a felon. *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000). Under the test set out in

Deleveaux, a defendant must show four elements to establish justification as a defense to a charge of possession of a firearm by a felon:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Id. at 1297. However, this Court has specifically noted "that the *Deleveaux* court limited the application of the justification defense to 18 U.S.C. § 922(g)(1) cases (federal statute for possession of a firearm by a felon) in 'only extraordinary circumstances.' " *State v. Napier*, 149 N.C. App. 462, 465, 560 S.E.2d 867, 869 (2002) (quoting *Deleveaux*, 205 F.3d at 1297).

In *Napier*, the defendant was a convicted felon who was involved in an on-going dispute with his neighbor and the neighbor's son. In June 1999, the neighbor's son discharged a shotgun directed over the defendant's property. The neighbor's son continued this action for the next several days. On 3 July 1999, the defendant walked over to the neighbor's property armed with a nine millimeter handgun in a holster on his hip to confront the neighbor and the neighbor's son. The confrontation escalated into a physical altercation, and the defendant shot the neighbor's son in the arm.

Without ruling on the general availability of the justification defense in possession of a firearm by a felon cases in North Carolina, this Court declined to apply the *Deleveaux* rationale in *Napier* because the evidence did not support a conclusion that the defendant was under an imminent threat of death or injury. *Napier*, 149 N.C. App. at 465, 560 S.E.2d at 869. This Court reached this conclusion despite evidence that the neighbor had been firing bullets over the defendant's property and that the two parties engaged in prior altercations. *Id. See also State v. Boston*, 165 N.C. App. 214, 222, 598 S.E.2d 163, 167-68 (2004) ("no evidence to support the conclusion that defendant was under an imminent threat of death or injury when he made the decision to carry the gun").

The uncontroverted evidence in this case shows that after leaving the altercation, Defendant kept the gun and took it with him to a

friend's house on Dana Road. He continued to hold it and carry it while speaking with Hamilton. At that time, Defendant was not under any imminent threat of harm. *Napier*, 149 N.C. App. at 465, 560 S.E.2d at 869. Thus, the evidence did not support giving a special instruction on justification because there was a time period where Defendant was under no imminent threat while possessing the gun.

Defendant's remaining assignment of error was not argued in the brief and no authority was cited, therefore, it is deemed abandoned. N.C. R. App. P. 28(b)(6).

No error.

Judges McGEE and TYSON concur.

STATE OF NORTH CAROLINA v. STEVEN LEE BATCHELOR, DEFENDANT

No. COA04-125

(Filed 4 January 2005)

1. Assault— on government official—car used as deadly weapon—lesser charge not submitted

The trial court did not err by refusing to submit the charge of assault on a government official (a misdemeanor) as a lesser offense to assault on a government official with a deadly weapon (a felony). The only additional element required for the felony is use of a deadly weapon, and the evidence showed that defendant drove his car directly toward a deputy standing in defendant's driveway, and then drove at high speed directly at two officers' vehicles in their lane of travel, finally crashing into a third officer's car. The key element in determining whether a weapon is deadly per se is how it is used; here the evidence leads to but one conclusion.

2. Assault— on government official—sufficiency of evidence—knowledge that officer was government official

The trial court did not err by denying a motion to dismiss charges of assault on a government official with a deadly weapon where defendant contended that there was insufficient evidence that he knew that the officers were government officials. It was

daylight, the officers were wearing uniforms or identifying clothes, their cars had police lights on top, two were marked "Sheriff," and two of the cars had their blue lights on as they chased defendant.

Appeal by defendant from judgment entered 22 May 2003 by Judge W. Russell Duke, Jr. in Gates County Superior Court. Heard in the Court of Appeals 15 November 2004.

Attorney General Roy Cooper, by Assistant Attorney General Ashby T. Ray, for the State.

Winifred H. Dillon, Attorney for Defendant-Appellant.

MARTIN, Chief Judge.

Defendant was convicted by a jury of multiple felony and misdemeanor charges, including four counts of assault with a deadly weapon on a government official. He appeals from judgments entered upon the four convictions of assault with a deadly weapon on a government official.

Evidence at defendant's trial tended to show, *inter alia*, that on 29 August 2002, Gates County Sheriff Ed Webb, along with Deputies Wiggins, Noble and Bunch, and Hertford County Deputy Liverman of the Roanoke/Chowan Narcotics Task Force, went to defendant's home around 6:30 p.m. to execute a search warrant. Defendant was not home at the time, and the search warrant was served on defendant's wife. While the officers were in the yard of the home, defendant drove into the yard. His wife identified him to the officers. Deputy Liverman approached the vehicle with his hands in the air, yelling for defendant to stop. Instead, however, defendant drove around the U-shaped driveway, increased his speed, and headed back towards the road.

Deputy Wiggins was standing in or near the driveway as defendant drove away. Defendant made no attempt to avoid hitting Deputy Wiggins, and as he passed, the side mirror of defendant's vehicle struck the deputy, knocking him "off [his] balance," though he did not fall. Sheriff Webb observed: "[Deputy Wiggins] was right directly in his path. He had to jump behind his patrol car . . . I saw him stumble."

When defendant left the driveway, four of the officers got in three vehicles to pursue him, leaving Deputy Liverman behind to complete

the search. They reached speeds in excess of 100 miles per hour while trying to keep defendant in sight. Sheriff Webb, accompanied by Deputy Noble, was driving the vehicle in front. As they rounded a curve, Sheriff Webb realized that defendant had turned around and was driving back towards the three patrol vehicles in their lane of travel. Sheriff Webb was forced to brake and pull off the road onto the shoulder. Deputy Wiggins, driving the vehicle directly behind Sheriff Webb, was forced to pull into the opposite lane to avoid a head-on collision. Deputy Bunch, driving the third vehicle slightly farther behind, stopped his car and pulled it sideways across one lane of travel hoping to stop the defendant. The other lane of travel was still open. Defendant collided with Deputy Bunch's vehicle and came to a stop on the side of the road in a ditch. The defendant was then taken into custody.

Defendant testified that it was after dark when he drove into his yard and that he saw something jump out at him. He tried to brake, but his brakes did not work so he drove around the yard and back onto the road. He denied that he was speeding or that anyone yelled at him to stop. He testified that he could not avoid hitting Deputy Bunch's vehicle because the deputy backed the vehicle into his path.

The defendant makes two arguments on appeal: (1) the trial court committed plain error by not instructing the jury on the lesser offense of misdemeanor assault on a government official, and (2) the trial court erred in denying his motion to dismiss the four charges of assault with a deadly weapon on a government official because there was insufficient evidence that defendant knew or had reason to know the officers were government officials. Defendant's remaining assignments of error are not argued on appeal and are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

[1] Defendant first argues the misdemeanor lesser offense of assault on a government official in violation of N.C. Gen. Stat. § 14-33(c)(4) should have been submitted to the jury in addition to the felony of assault with a deadly weapon on a government official in violation of N.C. Gen. Stat. § 14-34.2. The only additional element required for conviction of the felony charge is the use of a deadly weapon.

In *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977), our Supreme Court held that the question of "whether simple assault should have been submitted as an alternative verdict depends upon whether the [instrument] was a deadly weapon . . . as a matter of law.

If it was, simple assault need not have been submitted." *Id.* at 642, 239 S.E.2d at 412. The question in the current case, then, is whether or not an automobile driven at a high speed is a deadly weapon as a matter of law. We hold that it is.

In *State v. Smith*, 187 N.C. 469, 121 S.E. 737 (1924), the Court defined a deadly weapon as "[a]ny instrument which is likely to produce death or great bodily harm, under the circumstances of its use." *Id.* at 470, 121 S.E. at 737. The key element in determining whether or not a weapon is deadly per se is the manner of its use:

> The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . is one of law, and the Court must take the responsibility of so declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use . . . its alleged deadly character is one of fact to be determined by the jury.

Id. at 470, 121 S.E. at 737. A car sitting idle may not be deadly, but "the manner of its use" by defendant clearly put the officers in danger of death or great bodily harm. The evidence showed that defendant drove his car directly towards Deputy Wiggins who was standing in the driveway, and defendant drove at a high rate of speed directly at the officers' vehicles in their lane of travel. Two cars had to take evasive action to avoid a head-on collision with defendant, and defendant crashed into the third car with the officer in it. The evidence, therefore, leads to "but one conclusion," which is the deadly nature of defendant's use of the car, and we find no error in the trial court's failure to submit the lesser charge of assault on a government official to the jury.

[2] Defendant's second argument is that the trial court erred in denying defendant's motion to dismiss the four charges of assault with a deadly weapon on a government official because there was insufficient evidence that defendant knew or had reason to know the officers were government officials. To withstand a defendant's motion to dismiss criminal charges, the State must offer substantial evidence to show that the defendant committed each element necessary for conviction of the offense charged. *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620 (2002). Substantial evidence is evi-

dence which a reasonable mind could conclude to be adequate to support a conclusion. *State v. Carrilo*, 149 N.C. App. 543, 548, 562 S.E.2d 47, 50 (2002).

Deputy Liverman testified to the following: when defendant pulled into the driveway of his home, (1) Deputy Liverman went towards defendant wearing a vest labeled "Sheriff"; (2) his patrol car and at least one other car in the driveway were also marked "Sheriff"; (3) all the cars had police lights on top; (4) the other deputies in the yard were wearing uniforms or identifying clothing; and (5) it was daylight outside. In addition, Sheriff Webb testified that the blue lights on his car and the car behind him were operating while they were in pursuit of defendant. Considering the evidence in the light most favorable to the State as we must, *State v. Carrilo*, *supra*, we conclude there was substantial evidence to show that defendant knew or had reason to know the officers were law enforcement officers and, therefore, were government officials.

No Error.

Judges McCULLOUGH and STEELMAN concur.

IN THE MATTER OF: T.M.M.

No. COA04-17

(Filed 4 January 2005)

Child Abuse and Neglect— neglect—failure to distinguish between findings of fact and conclusions of law—clear, cogent, and convincing evidence

The trial court erred in a child neglect case by adjudicating respondent mother's minor child as neglected and dependent and the case is remanded for further proceedings, because: (1) the order does not distinguish between findings of fact and conclusions of law and does not reference any of the several statutory grounds for determining neglect; (2) the trial court relied upon the adjudication of respondent's other two children as neglected in determining that the youngest child was neglected and dependent; and (3) the fact that the order for the two older children has been remanded for adequate findings of fact and conclusions of

law means the trial court's determination in this case is not supported by clear, cogent, and convincing evidence.

Appeal by respondent from an order entered 2 April 2003 by Judge P. Gwynett Hilburn in Pitt County District Court. Heard in the Court of Appeals 12 October 2004.

Pitt County Legal Department, by Janis Gallagher, for petitioner-appellee Pitt County Department of Social Services.

Wanda Naylor for Guardian ad Litem.

Gaylord, McNally, Strickland & Holscher, by Emma Holscher, for respondent-appellee Octavious Matthews.

Terry F. Rose for respondent-appellant Erica Moore.

HUNTER, Judge.

E.M., the mother of T.M., appeals from the trial court's order adjudicating T.M. neglected and dependent on 2 April 2003. T.M. was born on 12 June 2002 and was removed from his mother's care the next day. A petition alleging T.M. was a neglected and dependent juvenile was filed on 13 June 2002 and amended on 18 June 2002. The adjudication and disposition hearing was held on 6 March 2003.

At the hearing, the Pitt County Department of Social Services ("DSS") asked the court to take judicial notice of court orders and evidence submitted in the matters of T.S. and S.M., the older siblings of T.M. After taking judicial notice, the trial court adjudged T.M. neglected and dependent and "adopt[ed] the findings in the orders entered by the judges" in the prior orders. After the written order was filed on 2 April 2003, the mother appealed.

T.S. and S.M. had been adjudicated neglected on 22 January 2002 and custody had been granted to DSS. The mother appealed the 22 January 2002 order. On 20 April 2004, this Court rendered an opinion in *In re T.S.*, 163 N.C. App. 783, 595 S.E.2d 239 (2004) (unpublished) in which we held: "[T]his Court remands the case to the trial court 'with instructions to make ultimate findings of fact based on the evidence and to enter clear and specific conclusions of law based on the findings of fact.' " *Id.* (quoting *In re Gleisner*, 141 N.C. App. 475, 480-81, 539 S.E.2d 362, 366 (2000)) In our analysis, we stated:

When reviewing an adjudication of neglect, our Court must determine whether the trial court's findings of fact are supported

by clear and convincing evidence and whether the trial court's conclusions of law are supported by those findings of fact. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). In the case before us, the trial court's order did not distinguish between findings of fact and conclusions of law, thus hindering the ability of this Court to conduct a review of the trial court's reasoning in determining the children were neglected. *Id.* at 480-81, 539 S.E.2d at 366. The better practice would have been for the trial court to distinguish its findings of fact from its conclusions of law so that this Court could conduct a meaningful review.

After determining what appears to be the trial court's conclusions of law, we find that the trial court summarily declared the children to be neglected, but made no reference to the statutory basis for its conclusion, nor did it cite any one incident or a series of incidents as a basis for its determination of neglect. N.C.G.S. § 7B-101(15) provides several grounds for determining neglect; however, the trial court made no reference to the statutory grounds.

In re T.S., 163 N.C. App. 783, 595 S.E.2d 239.

Similarly, the order in this case does not distinguish between findings of fact and conclusions of law and does not reference any of the several statutory grounds for determining neglect. Moreover, the trial court relied upon the adjudication of T.S. and S.M. as neglected in determining T.M. was neglected and dependent. Specifically, the trial court stated in its order: "19. That the court had previously found by clear, cogent and convincing evidence that respondent mother was unable to provide a safe and appropriate home her two other children; and respondent mother provided no other appropriate, alternative plan of care for this juvenile." The trial court also incorporated the contents of the juvenile files regarding T.S. and S.M. into its order and included several facts from the 22 January 2002 order in the order at issue in this case. As this Court has determined the 22 January 2002 order was deficient because it did not contain ultimate findings of fact and specific conclusions of law, we conclude the trial court's determination that T.M. was neglected and dependent, based upon an order which has been remanded for adequate findings of fact and conclusions of law, is not supported by clear, cogent and convincing evidence. Moreover, we conclude that several of the problems identified by this Court in its 20 April 2004 opinion in *In re T.S.*, are present in the trial court's order in this case. Specifically, the order does not dis-

tinguish between the findings of fact and conclusions of law and the trial court does not reference any of the statutory grounds for a neglect determination. Accordingly, we remand for further proceedings consistent with this opinion.

Remanded.

Judges WYNN and THORNBURG concur.

Judge Thornburg concurred in this opinion prior to 31 December 2004.

IN THE MATTER OF: T.S., S.M., AND T.M.

No. COA04-61

(Filed 4 January 2005)

Child Abuse and Neglect— permanency planning orders— underlying adjudicatory orders remanded

Permanency planning orders were vacated where the underlying orders adjudicating neglect and dependence were remanded for entry of adequate findings and conclusions.

Appeal by respondent from orders entered 28 July 2003 by Judge P. Gwynett Hilburn in Pitt County District Court. Heard in the Court of Appeals 12 October 2004.

Pitt County Legal Department, by Jo Anne Burdorff and Janis Gallagher, for petitioner-appellee Pitt County Department of Social Services.

Wanda Naylor, Guardian ad Litem.

Gaylord, McNally, Strickland & Holscher, by Emma Holscher, for respondent-appellee Octavious Matthews.

Graham, Silver, Nuckolls & Brown, by David Silver, for respondent-appellee Tyrone Moore.

Terry F. Rose for respondent-appellant Erica Moore.

HUNTER, Judge.

E.M., the biological mother of T.S., S.M., and T.M., presents the following pertinent issue for our consideration: Whether the trial court has subject matter jurisdiction to conduct a permanency planning review while the appeal of adjudication and disposition orders finding the children neglected and dependent are pending before this Court. N.C. Gen. Stat. § 7B-907(a) (2003) provides in pertinent part:

> In any case where custody is removed from a parent, . . . 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 . . . .

Id. In this case, the orders adjudicating T.S. and S.M. neglected, and T.M. neglected and dependent, have been remanded for the entry of adequate findings of fact and conclusions of law. As this Court has determined the underlying adjudication orders did not properly determine the minor children to be neglected or dependent, the permanency planning order must be vacated. *See In re T.S.*, 163 N.C. App. 783, 595 S.E.2d 239 (2004) (unpublished) and *In re T.M.M.*, 167 N.C. App. 801, 606 S.E.2d 416 (2005).

Vacated.

Judges WYNN and THORNBURG concur.

Judge Thornburg concurred in this opinion prior to 31 December 2004.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 4 JANUARY 2005

ADAMS v. ADAMS No. 04-279	Forsyth (00CVD7602)	Affirmed and remanded for determination of attorney's fees
COVINGTON v. REAVES No. 04-361	Guilford (03CVD12531)	Dismissed
HUSE v. REID No. 04-726	Caldwell (03CVS943)	Affirmed
IN RE F.L.R. No. 04-48	Yadkin (01J73)	Affirmed
IN RE K.F. No. 04-293	Robeson (03J176)	Reversed
IN RE M.A.L. No. 04-614	Johnston (01J120)	Affirmed
IN RE M.L.L. No. 04-759	Alamance (02J218)	Affirmed
IN RE N.M.B. No. 04-355	Buncombe (03J51)	Dismissed and affirmed
JONES v. JONES No. 03-1505	Mecklenburg (99CVD16304)	Reversed and remanded for new trial
LAVALLEY v. LAVALLEY No. 04-227	Carteret (01CVD875)	Affirmed
MUZZILLO v. MUZZILLO No. 04-39	Mecklenburg (00CVD16041)	Affirmed
PEVERALL v. COUNTY OF ALAMANCE No. 04-416	Alamance (00CVS1741)	Dismissed in part, remanded in part
RUTHERFORD MGMT. CORP. v. TOWN OF COLUMBUS No. 03-1242	Polk (03CVS111)	Affirmed in part, reversed in part, and remanded
STATE v. ADAMS No. 03-1004	Cumberland (00CRS56201)	No error
STATE v. BURKE No. 03-1557	Mecklenburg (00CRS35238) (00CRS35239) (01CRS162263) (01CRS162264)	No error

STATE v. BUSH No. 04-673	Lincoln (03CRS2686)	Affirmed
STATE v. CAMPBELL No. 04-403	Columbus (03CRS6431) (03CRS6432)	No error in 03CRS6431, judgment arrested in 03CRS6432
STATE v. DAWKINS No. 04-342	Guilford (01CRS106228) (02CRS69648)	No error
STATE v. DUPREE No. 04-628	Pitt (03CRS058533)	No error
STATE v. FELTON No. 04-832	Alamance (03CRS16806) (03CRS56281) (03CRS56282)	Affirmed; remanded for correction of clerical errors
STATE v. GRAHAM No. 04-442	Guilford (02CRS103711) (02CRS103300) (02CRS103298)	No error
STATE v. GRAHAM No. 04-273	Mecklenburg (03CRS202421) (03CRS202422) (03CRS202423)	No error in appeal. Remand for correction of Clerical error
STATE v. GURGANIOUS No. 03-1622	Pender (01CRS51028) (01CRS51029) (02CRS4565)	No error
STATE v. GWYNN No. 04-802	Alamance (03CRS56313)	No error
STATE v. PARRISH No. 04-769	Mecklenburg (03CRS62787)	Dismissed
STATE v. RICHMOND No. 04-559	Person (02CRS53901) (02CRS53899)	No error
STATE v. RODRIGUEZ No. 04-733	Forsyth (03CRS53272) (03CRS53275) (03CRS53276)	Affirmed
STATE v. SAUNDERS No. 03-1437	Johnston (97CRS8575) (97CRS8576)	Affirmed; remanded for correction of order
STATE v. SIMMONS No. 04-731	Stanly (01CRS3282) (01CRS5738)	No error

STATE v. SIMPSON No. 04-881	Wake (03CRS58572) (03CRS58573)	Reversed and remanded
STATE v. STATON No. 04-655	Forsyth (02CRS58986)	No error
STATE v. SUITT No. 04-330	Durham (02CRS57707) (03CRS11462)	No error
STATE v. TRAVIS No. 04-679	Surry (03CRS51607) (03CRS51608) (03CRS51609) (03CRS51611) (03CRS4392)	Remanded
STATE v. WILLIAMS No. 03-1482	Duplin (02CRS3986) (02CRS3987)	New trial
STEWART v. N.C. DEP'T OF JUVENILE JUSTICE No. 04-431	Cabarrus (02CVS1545)	Dismissed
WILKERSON v. WILKERSON No. 04-124	Rutherford (03CVD214)	Vacated
ZANDER v. GREATER EMMANUEL PENTACOSTAL TEMPLE OF DURHAM No. 03-1456	Wake (00CVD14502)	Affirmed

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APPEAL AND ERROR—Continued

N.C.G.S. § 1A-1, Rule 12(c) motion is interlocutory, the denial of a motion for judgment on the pleadings based on res judicata affects a substantial right and is immediately appealable. **Skinner v. Quintiles Transnational Corp., 478.**

Appealability—interlocutory order—grant of partial summary judgment—substantial right—The trial court's grant of partial summary judgment in favor of defendant individual is immediately appealable even though it is an appeal from an interlocutory order, because: (1) a substantial right is affected and the judgment is immediately appealable when a ruling on a motion for summary judgment constitutes the final dismissal of a claim; and (2) plaintiff individual's loan broker claim was dismissed with prejudice upon the trial court's grant of summary judgment for defendant individual, and all other claims in the action have been dismissed. **Johnson v. Wornom, 789.**

Appealability—interlocutory orders—setting aside voluntary dismissal—denial of motion to dismiss—Defendants' appeal was dismissed as premature where plaintiff filed two actions arising from an automobile accident; each was voluntarily dismissed; plaintiff filed a third; defendants moved to dismiss under N.C.G.S. § 1A-1, Rule 41(a)(1); plaintiff moved to set aside one of the earlier dismissals; and the court granted that motion and denied defendants' motion to dismiss. Defendants have not demonstrated the existence of a substantial right that would qualify them for an immediate appeal. **Robinson v. Gardner, 763.**

Appealability—joinder—plain error analysis inapplicable—Although defendant contends the trial court committed plain error by granting the State's motion to join the three codefendants' cases for trial, this assignment of error is overruled because plain error analysis is inapplicable. **State v. Walker, 110.**

Appealability—use of uncertified interpreter—plain error analysis inapplicable—Although defendant contends the trial court committed plain error by permitting an uncertified Spanish interpreter to interpret the testimony of three witnesses during the State's case-in-chief, this assignment of error is overruled because plain error analysis is inapplicable. **State v. Walker, 110.**

Appellate rules—double spacing brief—Counsel for a defendant who did not double space defendant's brief was assessed printing costs as a sanction for violating the Rules of Appellate Procedure. **State v. Riley, 346.**

Assignments of error—failure to properly assign error—A single assignment of error generally challenging the sufficiency of the evidence to support numerous findings of fact is broadside and ineffective. **State v. Sutton, 242.**

Existence of insurance—irrelevant to agency—not argued in brief—abandoned—In an action arising from a boat collision at a fishing tournament, the issue of the exclusion of plaintiffs' proffer regarding defendants' insurance was deemed abandoned because it was not argued in their brief. Even if it had been properly argued, insurance is irrelevant to the issue at hand (whether defendant Bell was defendant American's agent) and could induce the jury to decide the case on improper grounds. **Williams v. Bell, 674.**

Failure to object—sentencing issue—not waived—Appellate review of a sentencing issue was not waived by failure to object; an error at sentencing is not an error at trial and no objection is required to preserve the issue for review. **State v. Jeffery, 575.**

APPEAL AND ERROR—Continued

Guilty plea—certiorari—motion for appropriate relief—The appeal of a defendant who had pled guilty was heard in the Court of Appeals even though it did not fall within the statutory categories for appeals after pleading guilty where defendant filed a petition for certiorari; certiorari was granted on the first assignment of error (whether the plea was voluntary), as may be done when a defendant challenges the procedure employed in accepting a guilty plea; and the second assignment of error (sentencing for both larceny and possession of the stolen property) was heard on the court's own motion for appropriate relief since the petition for certiorari was properly pending. **State v. Carter, 582.**

Improper assignment of error—discretionary hearing of appeal—Although plaintiffs' assignment of error fails to state the legal basis upon which error is assigned and is not confined to a single issue of law, the Court of Appeals exercised its discretion under N.C. R. App. P. 2 to hear the appeal. **Wetchin v. Ocean Side Corp., 756.**

Issue first raised on appeal—not considered—Plaintiff raised for the first time on appeal (and therefore could not argue) that injuries to her neck and wrist were separate and distinct for purposes of N.C.G.S. § 1B-4 and a payment received by plaintiff from a third-party defendant. **Reinhold v. Lucas, 735.**

Mistrial—defendant in handcuffs—no plain error analysis—The question of whether the trial judge should have declared a mistrial after a report that some jurors may have seen defendant in handcuffs in a hallway was not preserved for appeal because defendant did not object or seek a mistrial. Plain error does not apply to mistrial rulings; moreover, none of the jurors raised their hand when the court asked whether they had seen defendant in the hallway. **State v. Peoples, 63.**

Mootness—school suspension—Respondent board of education's appeal from the trial court's order reversing the board's imposition of a long-term suspension of petitioner from high school for drug possession is dismissed as moot where the school year has ended. **J.S.W., D.W. & G.W. v. Lee Cty. Bd. of Educ., 101.**

Motion for appropriate relief—aggravating sentences—The Court of Appeals deferred ruling on defendant Browning's motion for appropriate relief based on *Blakely v. Washington*, 159 L. Ed. 2d 403 (2004), pending guidance of this issue from our Supreme Court. **State v. Walker, 110.**

Motion to modify record on appeal—denied—consideration on remand—Defendants' motion to modify the appellate record to include an affidavit was denied in an appeal from the imposition of sanctions against plaintiff. There is no indication that the affidavit was part of the trial court record; however, as the case is remanded on other grounds, the trial court may consider the issue. **Adams v. Bank United of Texas FSB, 395.**

Preservation of issues—failure to argue—The assignments of error that defendant failed to present in her brief are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). **Moses H. Cone Mem'l Health Servs. Corp. v. Triplett, 267.**

Preservation of issues—failure to argue assignment of error—There was no error in defendant's conviction on the charge of possession of marijuana, an assignment of error defendant expressly abandoned. **State v. Battle, 730.**

CRIMINAL LAW—Continued

was not so much a part of the entire instructions as to have prejudiced the jury against defendant or his witnesses. **State v. Peoples, 63.**

Motion for joinder of offenses—first-degree murder—common law robbery—The trial court did not abuse its discretion in a first-degree murder and common law robbery case by granting the State's motion for joinder even though the two offenses were separated in time by several days and involved different victims. **State v. Simmons, 512.**

Response to jury question—not expression of opinion—The trial court did not express an opinion where defendant was charged with the armed robbery and common-law robbery of several victims, the jury asked a question about the requirement of a firearm as to a particular victim, the court instructed the jury that it could return a verdict of guilty of armed robbery, guilty of common-law robbery, or not guilty, and the court then instructed the jury on common-law robbery, having already instructed on robbery with a firearm. N.C.G.S. § 15A-1234(a)(1). **State v. Davis, 770.**

Self-defense—denial of instruction—The trial court did not err in a first-degree murder case by denying defendant's request for a jury instruction on self-defense where the trial court determined that defendant was the aggressor and that defendant did not intentionally discharge his weapon under the belief that it was necessary to save himself from death or great bodily harm. **State v. Simmons, 512.**

DAMAGES AND REMEDIES

Breach of covenant not to compete—measure of damages—lost profits—The trial court erred by awarding plaintiff healthcare provider $53,340.16 in damages and restitution for defendant doctor's violation of the parties' contract involving a covenant not to compete which was the amount plaintiff paid defendant over the course of defendant's employment as covenant payments and by alternatively granting summary judgment on plaintiff's unjust enrichment claim when there was in fact a breach of contract because the correct measure of damages is lost profits. **Moses H. Cone Mem'l Health Servs. Corp. v. Triplett, 267.**

Punitive—asbestos—destruction of memo about improper handling—The trial court did not err by granting a directed verdict for defendant on punitive damages in an asbestos case. The destruction of a memo about improper handling of asbestos did not demonstrate willful disregard for the safety of others because defendant's resident engineer told the expert who wrote the memo that he wanted to be informed, but not in writing. Moreover, there was no evidence that the engineer was an officer, director, or manager, as required for punitive damages, and there was no evidence that the destruction of the memo was related to plaintiff's injuries. **Schenk v. HNA Holdings, Inc., 47.**

Punitive—asbestos—rejection of recommended removal method—The rejection of an asbestos expert's recommendation of a method of asbestos removal does not demonstrate willful and wanton behavior, and a directed verdict was correctly granted for defendant on punitive damages. The expert admitted that no state or federal regulation required his recommended method, and that the removal was done properly within the regulations. **Schenk v. HNA Holdings, Inc., 47.**

DIVORCE—Continued

in an equitable distribution case where the evidence supported the court's findings that defendant had refused to attend hearings, provide responses to discovery, or pay financial obligations as ordered. **Dalgewicz v. Dalgewicz, 412.**

Equitable distribution—classification and valuation of property—An equitable distribution judgment was remanded where the trial court did not properly classify and value a residence, a vehicle, and a contract. Whether the court's method of distribution was unreasonable or arbitrary could not be discerned without proper classification, valuation, and listing of all of the property owned by the parties. **Dalgewicz v. Dalgewicz, 412.**

Equitable distribution—divisible property—postseparation diminution in fair market value of marital home—The trial court erred in an equitable distribution case by concluding that a $7,000 postseparation diminution in the fair market value of the marital home was not divisible property. **Robertson v. Robertson, 567.**

Equitable distribution—early retirement benefit—calculation—evidence insufficient—Findings in an equitable distribution order regarding a pension benefit were not supported by the evidence where plaintiff retired at an earlier date than anticipated due to a disability. The correct value of defendant's share of plaintiff's pension as of the separation date is unclear from the evidence in the record. **Lee v. Lee, 250.**

Equitable distribution—payment of distributive award—finding of sufficient liquid assets required—The trial court erred in an equitable distribution case by ordering defendant to pay a distributive award of $52,100.07 without finding that he had sufficient liquid assets with which to pay the award. **Robertson v. Robertson, 567.**

Equitable distribution—retirement distribution—change in stock market—The trial court did not abuse its discretion in a divorce proceeding by denying a Rule 60(b) motion to set aside a judgment regarding a pension distribution. A change in the value of the stock market over the course of 5 years does not amount to an extraordinary or even unforeseeable circumstance. **Lee v. Lee, 250.**

Equitable distribution—retirement plan—fees and penalties for transfer—correction of omission—The trial court did not err by ordering a divorce plaintiff to pay all of the fees and penalties associated with a lump sum transfer of funds from defendant's retirement account. **Lee v. Lee, 250.**

Equitable distribution—retirement plan—formula for share of benefit—unclear—There was credible evidence before the court in a divorce proceeding to support a finding about the calculation of additional pension payments from plaintiff to defendant. An order in the matter provided evidence of a telephone conversation with the company administrator in which the actuarial formula was set out. **Lee v. Lee, 250.**

Equitable distribution—valuation—application of coverture fraction—marital portion of pension plan—The trial court did not err in an equitable distribution case by applying a coverture fraction to determine the marital portion of defendant's defined contribution pension plan. **Robertson v. Robertson, 567.**

EVIDENCE—Continued

testimony comparing glass fragments from the scene with fragments found in the sole of defendant's boot. The trial court did not have precedent to determine the reliability of the testing procedure, but there was extensive voir dire testimony supporting reliability, the witness had an extensive background in trace evidence and experience in glass analysis, and defendant made no argument about the relevancy of the evidence. **State v. McVay, 588.**

Mug shot of defendant—not prejudicial—There was no prejudicial error in the admission of a mug shot of a narcotics defendant showing him in police custody where there were multiple live identifications by an undercover officer trained in identifying people. Moreover, the jury was instructed that the photograph was to be used solely to illustrate and explain the officer's testimony. **State v. Joyner, 635.**

Officer giving payments to informant for bills after cooperation and prior to trial—credibility—The trial court did not err in a trafficking in cocaine by possession and transportation case by denying defendant's motion to dismiss the charges based on a police officer's payments totaling $350.00 to the State's material witness for her bills several weeks after the witness cooperated in the operation that led to defendant's arrest and prior to his trial. **State v. Brice, 72.**

Officer's testimony—defendant as drug dealer—The trial court acted within its discretion to deny defendant's motion to strike an officer's testimony explaining that defendant was arrested rather than those buying cocaine from him because the operation was targeting drug dealers. The statement was general and did not seem purposefully calculated to prejudice the jury against defendant. **State v. Peoples, 63.**

Photo lineup from mug shots—not plain error—There was no plain error in a robbery prosecution in allowing an officer to testify that he created a photo lineup from mug shots on file with the police department. There were other references to defendant's prior criminal record, and ample evidence to find the elements of common-law robbery and armed robbery. **State v. Davis, 770.**

Prior crimes or bad acts—assault—The trial court did not abuse its discretion in a second-degree kidnapping and assault on a female case by admitting testimony under N.C.G.S. § 8C-1, Rule 404(b) by defendant's ex-girlfriend concerning an alleged assault on her by defendant in the summer of 1999 because the similarities between the two incidents indicate a common plan or design on the part of defendant, and the witness's testimony served a purpose other than to show mere propensity to commit the crime charged **State v. Petro, 749.**

Prior crimes or bad acts—driving while impaired—not admissible—The trial court erred in a prosecution for driving with a revoked license by admitting multiple letters of suspension with no redaction of the specific offenses, including multiple counts of driving while impaired. **State v. Scott, 783.**

Prior crimes or bad acts—opportunity to stipulate—use despite stipulation—In an action reversed on other grounds, the trial court erred by introducing an exhibit listing defendant's prior convictions before arraigning him on an habitual DWI charge and giving him an opportunity to stipulate to the prior convictions. Introducing the prior convictions on the charge of driving with a revoked license was also error; the State offered no justification for admission of

SENTENCING—Continued

the court's directive to show this defendant's armed robbery sentence as concurrent rather than consecutive. **State v. Ellis, 276.**

Habitual felon—arraignment—The failure of the trial court to arraign defendant as an habitual felon before the close of the State's evidence was not prejudicial where defendant pled guilty to the habitual felon charge, the court conducted a full inquiry into the plea, defendant was fully aware of the consequences, and defendant was notified that he was being tried as a recidivist before the trial. **State v. Peoples, 63.**

Habitual felon—indictment—Defendant was validly indicted for being an habitual felon where he was charged in one bill with felonious possession of cocaine and in another with being an habitual felon. All the information required to charge defendant was included; the statute does not require that the indictment charging the underlying felony also charge habitual felon status. **State v. Peoples, 63.**

Habitual felon—underlying offenses—felonies—An indictment charging defendant with being an habitual felon was not defective where it charged defendant with cocaine possession and speeding to elude arrest with aggravating circumstances, which by statute elevates the initial misdemeanor to a felony. Cocaine possession is a felony for all purposes. **State v. Scott, 783.**

Juveniles—assault with a deadly weapon inflicting serious injury—Level 3 disposition—abuse of discretion standard—The trial court did not err by imposing a Level 3 disposition on a juvenile for committing the offense of assault with a deadly weapon inflicting serious injury even though the juvenile had no prior delinquency history, had a low risk of re-offending, and an assessment of her needs was low as well. **In re N.B., 305.**

Mitigating factor—acknowledged wrongdoing prior to arrest—The trial court did not abuse its discretion in a multiple felony incest, double first-degree rape, and triple second-degree rape case by failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing prior to arrest and at an early stage of the criminal process where defense counsel's statement that defendant "admitted some of this" did not constitute a request that the court find this statutory mitigating factor, and defendant only grudgingly admitted that having sex with his daughters was a mistake. **State v. Shelton, 225.**

Mitigating factor—good character—The trial court did not err in a robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury case by failing to find the mitigating factor of good character for defendant Browning. **State v. Walker, 110.**

Motion to withdraw guilty plea—second sentence different from plea arrangement—The trial court erred in an assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon while being an habitual felon case by denying defendant's motion to withdraw his guilty plea during a second sentencing hearing where the trial court stated the error in the first sentencing hearing was the result of a clerical error, miscommunication, or something else, the error in the first sentencing hearing was not merely clerical, and the provisions of N.C.G.S. § 15A-1024 applied when the court decided that a sentence different from that provided for in the plea agreement must be imposed. **State v. Wall, 312.**

WORKERS' COMPENSATION—Continued

Causal connection between injury and condition—fall while styling hair—The evidence in a workers' compensation case supported the Industrial Commission's findings that plaintiff's cervical condition was causally related to her work-related fall. Even though one doctor testified that his opinion was based on speculation, there was other testimony that a causal connection existed to a reasonable degree of medical certainty; the Commission is the sole judge of the witnesses and the weight of their testimony. **Barbour v. Regis Corp., 449.**

Causal relationship—back injury and mental condition—The Industrial Commission's determination in a workers' compensation case that a causal relationship existed between plaintiff's back injury and mental condition was supported by competent evidence, and plaintiff is entitled to have her medical expenses paid for her back and mental conditions. **Craven v. VF Corp., 612.**

Causation testimony—psychiatrists versus endocrinologists—posttraumatic stress disorder—aggravation of diabetes—The Industrial Commission did not err in a workers' compensation case by relying on the causation testimony of psychiatrists rather than on the causation testimony of endocrinologists regarding the aggravation of plaintiff's diabetes. **Lewis v. N.C. Dep't of Corr., 560.**

Disability—laid off—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff is not currently disabled as a result of his prior injuries and by denying plaintiff further compensation, because: (1) plaintiff was physically able to perform his former job and would have returned to those duties if he had not been laid off due to an economic downturn; and (2) plaintiff's lack of employment was not due to his injuries. **Segovia v. J.L. Powell & Co., 354.**

Disability—permanent and total—The Industrial Commission did not err in a workers' compensation case by finding that plaintiff was permanently and totally disabled as a result of the May 2000 injury. **Goforth v. K-Mart Corp., 618.**

Disability—temporary total disability benefits—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff was disabled as defined by N.C.G.S. § 97-2 and by awarding ongoing temporary total disability benefits. **Aboagwa v. Raleigh Lions Clinic for the Blind, Inc., 554.**

Elimination of lien—settlement not final—The superior court's order eliminating unnamed defendant insurance carrier's workers' compensation lien is vacated because the mediated settlement agreement entered by the parties that was subject to a satisfactory resolution of the lien on those funds was not final and does not constitute a settlement within the purview of N.C.G.S. § 97-10.2(j). **Wilkerson v. Norfolk S. Ry. Co., 607.**

Employee—independent contractor—The Industrial Commission did not err in a workers' compensation case by concluding that decedent worker who died in a motor vehicle accident while delivering furniture for defendant Dasco was an employee of Dasco, rather than an independent contractor or an assigned employee of defendant SOI. **Hughart v. Dasco Transp., Inc., 685.**

Findings—burden of proof—totality of evidence—The Industrial Commission did not err in a workers' compensation case by finding that no physician testified to a reasonable degree of medical certainty that plaintiff's back injuries

WORKERS' COMPENSATION—Continued

ZONING—Continued

Variance denied—whole record considered—decision not arbitrary— The trial court properly considered the whole record when reviewing a board of adjustment's denial of a variance, and the conclusion that the board's decision was based on competent, material, and substantial evidence is not arbitrary and capricious. **Robertson v. Zoning Bd. of Adjust. for the City of Charlotte, 531.**

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