NORTH CAROLINA COURT OF APPEALS REPORTS

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RULES OF APPELLATE PROCEDURE

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

HANDEX OF THE CAROLINAS, INC., PLAINTIFF v. COUNTY OF HAYWOOD, AND MUNICIPAL ENGINEERING SERVICES COMPANY, P.A., DEFENDANTS

No. COA03-1658

(Filed 18 January 2005)

1. Contracts— professional negligence in performance of contract—failure to allege contractual privity or intended third-party beneficiary—directed verdict

The trial court did not err by granting directed verdict in favor of defendant engineering company on plaintiff's contract claims for professional negligence arising out of a contract for the extension of a county landfill, because: (1) where there were no allegations of contractual privity or that plaintiff was an intended third-party beneficiary under the professional contract, plaintiff's exclusive remedy against the professional sounds in tort; and (2) plaintiff's complaint does not allege privity of contract with defendant or that plaintiff was an intended third-party beneficiary of the contract between defendant county and defendant engineering company.

2. Negligence— professional negligence—directed verdict

The trial court did not err by granting directed verdict in favor of defendant engineering company on plaintiff's claim for professional negligence regarding the standard of care for a civil engineer administering a landfill project, because: (1) the lay testimony of plaintiff's civil engineer did not rebut the relevant

standard of care set out by defendant's expert civil engineer; (2) viewed in its most favorable light, plaintiff's lay testimony established the witness's opinion of what the administering engineer should have done in overseeing the bidding and contract modifications requests and it does not show, as required to sustain the claim, what an engineer practicing under the relevant standard of care actually does nor any specific instances of breach of that relevant standard; and (3) the alleged breaches to the standard of care for administering this landfill project, concerning the localized expectations and terms of art relating to excavation and landfill construction, does not fall within the realm of a layperson's common knowledge and experience.

3. Costs— depositions—mediation fees—witness fees—service of process fees for trial subpoenas

The trial court's order in a general contract/tort based civil action awarding defendant company costs under N.C.G.S. § 6-20 for depositions, mediation fees, witness fees, and service of process fees for trial subpoenas is remanded for a modification to eliminate the award of deposition costs, because: (1) costs under N.C.G.S. § 6-20 is limited to those items enumerated in N.C.G.S. § 7A-305(d), and the trial court does not have discretion to award costs under N.C.G.S. § 6-20 which are not enumerated; and (2) there is no statutory authority for the award of deposition costs.

4. Construction Claims— breach of contract—timeliness of notice to proceed with construction

The trial court erred by failing to grant directed verdict in favor of defendant county for contractual breaches that were not submitted to defendant engineering company as a claim for contract modification regarding the extension of a landfill based on defendant county allegedly causing delay in issuing the notice to proceed with the construction, because: (1) defendant county gave timely notice under the terms of the bid and contract; and (2) there was no evidence of breach of contract or claim made for a time extension due to the agreed change from Alternative 1 to Alternative 2.

5. Construction Claims— breach of contract—lost timber value

The trial court did not err by denying defendant county's motion for directed verdict for contractual breaches that were not submitted to defendant engineering company as a claim for contract modification regarding the extension of a landfill based

on lost timber value on the contract site based on the county clearing 20 acres of timber on the landfill site after the bids had been accepted for the landfill and despite language in the contract that all timber shall become property of the contractor, because: (1) the general conditions language of the contract is ambiguous as to whether the question of whose property the timber was at the time of the clear cutting falls withing the purview of a dispute or other matter relating to the acceptability of the work or the performance of the work; and (2) the issue was properly presented to the jury when any delay in the removal of the remaining stumps was proximately caused by this breach.

6. Construction Claims— breach of contract—additional time and travel costs

The trial court erred by failing to grant defendant county's motion for directed verdict for contractual breaches that were not submitted to defendant engineering company as a claim for contract modification regarding the extension of a landfill based on additional time and travel costs of defendant company's management, because: (1) as a condition precedent for raising them in subsequent litigation, the costs should have been requested as part of a change order for the work to which they were directly related; and (2) judging by the eight change orders sought under this construction contract, defendant county had not waived the requirement of section 12.01 of the General Conditions that additional cost requests must be made through change orders.

7. Construction Claims— lost timber revenue—rock removal and blasting—additional time cost—undercutting of unsuitable soils

Claims arising from the construction of a landfill extension which were proper for the jury to consider should have been limited to: (1) lost timber revenue from the county's clear-cutting of the landfill site and damages related to stump removal; (2) evidence of the claim for rock removal and blasting and related damages due to its denial of negotiating its price as stated in Addendum 1 (change order #2); (3) evidence of additional time as authorized by the contract for abnormal weather conditions which had occurred within the scope of the contract's time for substantial completion and final payment (change order #3); and (4) undercutting of unsuitable soils as approved by defendant company (change order #4).

8. Trials— motion for new trial—single-figure verdict

A new trial should be granted to determine both the question of liability and damages as to the four claims for lost timber revenue, rock removal and blasting, additional time, and undercutting of unsuitable soils, because in light of the single-figure jury verdict, it cannot be determined whether the jury awarded damages pursuant to any of the four claims properly submitted to the jury.

9. Damages and Remedies— liquidated damages—substitute for actual damages

While liquidated damages may still be awarded even if no actual damages arise from the breach, they cannot be awarded in addition to actual damages because it would constitute double recovery. Therefore, at any new trial, the liquidated damages provision of the pertinent contract shall be deemed as a substitute for any actual damages suffered by defendant county due to plaintiff company's delay.

10. Damages and Remedies— alteration of verdict—liquidated damages—monies retained by county

Without more evidence, the trial court did not have authority to alter the verdict so substantially from the $16,000 sum the jury returned as a verdict to $137,107.60 that the trial court interpreted as the amount withheld by defendant county over and above the jury's finding of $16,000 liquidated damages. However, the question of liquidated damages and monies retained by defendant county may again be argued and clarified since a new trial has been granted on plaintiff company's remaining claims.

Appeal by plaintiff from order entered 17 April 2003 by Judge James L. Baker, Jr., and appeal by defendant County of Haywood from judgment entered 6 May 2003 by Judge James L. Baker Jr., in Haywood County Superior Court. Heard in the Court of Appeals 14 September 2004.

Roberts & Stevens, P.A., by Sarah Patterson Brison Meldrum and Walter L. Currie, for plaintiff appellant-appellee.

Jeffrey W. Norris & Associates, P.L.L.C., by Jeffrey W. Norris, for defendant appellant-appellee County of Haywood.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Philip J. Smith and W. James Johnson, for defendant appellee Municipal Engineering Services, Inc.

McCULLOUGH, Judge.

This appeal arises from the alleged breaches of duties owed by all parties under a contract for the extension of an existing landfill ("the landfill" or "the project") site in the White Oak section of Haywood County. The extension was to create a new landfill cell, approximately ten acres in surface area, to meet the County's solid waste disposal needs. Parties to the appeal are: County of Haywood (County), who solicited bids and then was contractually bound for the additional excavation of the landfill; Handex of the Carolinas, Inc. (Handex), who upon submitting the lowest bid was awarded the contract for the project by the County ("the contract"); and Municipal Engineering Services ("MES"), who was contracted by the County to provide a number of engineering services related to the bidding and performance of the project (the "County-MES contract"). Due to a number of problems arising from the performance of the contract, Handex brought suit against MES for professional negligence and breach of contract, and against the County for breach of contract. The County counterclaimed for breach of contract.

The Facts

I. The Bidding Process

The County-MES contract consisted of the following engineering services: providing design services, reviewing and obtaining lump-sum bids, administering contract performance, and reviewing and advising on change orders by the contractor. For the project, MES prepared the contract documents and specifications along with the lump-sum bid advertisement, instructions to bidders, and the bid form. This was made part of the contract. The bids were based on certain specifications, specifically that the site work for the project consisted of "approximately 160,000 cubic yards of spoil, excavation, compaction, tests, waste disposal, berm construction, etc." The bid form and instructions called for a base bid portion, plus bids on Alternative 1 (utilizing a clay liner) and Alternative 2 (utilizing a synthetic liner). Handex was the low bidder for both alternatives and was awarded the contract for Alternative 1, as notified by letter 14 September 2000. In that letter, MES informed Handex that Notice to Proceed was expected for 21 September 2000, after a Permit to

Construct had been issued by North Carolina Waste Section ("NCWS"). MES informed Handex that a preconstruction meeting was required to be held.

II. Notice to Proceed

The preconstruction meeting was held with NCWS in mid-October 2000. The record indicates NCWS had recently modified their requirements, and was then allowing liner systems like that in the County's advertised bid as Alternative 2. Handex's bid for Alternative 2 was $8,960.00 less than their bid for Alternative 1. Testimony of the County Manager, Mr. Jack Horton ("Mr. Horton"), asserted that Handex insisted on Alternative 2, and that the contract had to be re-awarded. Mr. Horton testified further that he believed that the County accepted Alternative 2 because "Alternative 2 would actually be a lot quicker and shorten the time of construction as compared to Alternate 1." Handex's representative at the preconstruction meeting testified that it was an "open discussion" upon which Alternative 2 was generally decided. Alternative 2 was bid for a total lump-sum price of $2,272,343.61. The County and Handex entered into a written contract for the base bid work and Alternative 2 on or about 13 October 2000. In a letter dated 8 November 2000, MES gave Handex "Notice To Proceed" as of 13 November 2000.

III. Implementation of the Contract

The contract provided Handex 180 days from the Notice to Proceed to achieve Substantial Completion on the landfill, and 45 days from Substantial Completion to be ready for Final Payment. The date of Substantial Completion was to be 12 May 2001 and Final Completion 45 days thereafter. If Handex did not complete within those times, the contract allowed the County to retain $1,000.00 for each day Handex was late in reaching Substantial Completion, and $500.00 for each day until Final Completion. Under the contract, these were to be assessed as liquidated damages should Handex finish late, obligating the County to pay only the difference of monies owed under the contract upon Final Completion. Handex completed the work 93 days beyond the Substantial Completion date, and 10 days beyond Final Completion.

The contract contained three sections: the General Conditions section, the General Specifications section, and the Project Specifications section. The Project Specifications section covers only requirements differing from what appears in the General

Specifications section. The contract required that, if Handex desired to make a claim during the course of the project as to one of its terms, or a Change Order for time or money, these claims would be submitted to MES. Section 9.09 of the General Conditions states in pertinent part:

> A. ENGINEER will be the initial interpreter of the requirements of the Contract Documents and judge of the acceptability of the Work thereunder. Claims, disputes and other matters relating to the acceptability of the Work, the quantities and classifications of Unit Price Work, the interpretation of the requirements of the Contract Documents pertaining to the performance of the Work, and Claims seeking changes in the Contract Price or Contract Times will be referred initially to ENGINEER in writing, in accordance with the provisions of paragraph 10.05, with a request for a formal decision.
>
> B. When functioning as interpreter and judge under this paragraph 9.09, ENGINEER will not show partiality to OWNER or CONTRACTOR and will not be liable in connection with any interpretation or decision rendered in good faith in such capacity.

Section 10.05 of the General Conditions of the contract provided:

> A. *Notice*: Written notice stating the general nature of each Claim, dispute, or other matter shall be delivered by the claimant to ENGINEER and the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto. Notice of the amount or extent of the Claim, dispute, or other matter with supporting data shall be delivered to the ENGINEER and the other party to the Contract within 60 days after the start of such event.

During the course of the project construction, there were eight attempts made to modify or change the contract terms or specifications. Of these, the County and MES approved only one, and MES recommended another be modified which was denied by the County. Handex appealed each of the seven denials by the County. Additionally, under the terms of the contract, Handex took issue with the delayed start time of the project, additional expenses absorbed by Handex in finishing the project, and timber removal from the project site by the County.

III. Litigation/Judgment/Issues on Appeal

On 21 December 2001, Handex filed a complaint initiating this action against MES for professional negligence and breach of contract and against Haywood for breach of contract. MES filed their answer 8 March 2002. The County filed their answer and a counterclaim seeking to recover the agreed upon amount for liquidated damages under the contract and engineering fees from Handex.

A trial was held 7-17 April 2003. At the close of all evidence, MES and the County moved for directed verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(a) (2003). The trial court granted a directed verdict in favor of MES, dismissing all claims against MES with prejudice. In a later order, the trial awarded MES "costs" in the amount of $6,919.17. Handex appealed both of these orders.

At the close of all evidence, the trial court denied the County's motion for directed verdict. The court also denied the County's request that the jury be given a detailed verdict sheet, and instead allowed the jury a single figure verdict sheet. This verdict sheet also provided for the award of liquidated damages and engineering costs to the County. The jury rendered a verdict against the County for breach of contract and awarded Handex damages. The judgment entered by the court ordered the County to pay the following: $201,928.41 for the damages of the breach of contract, less $1.00 in damages Handex could have avoided; and, $137,107.60 of monies owed to Handex under the contract, as this figure was the difference between the $153,107.60 retained by the County as liquidated damages and the $16,000.00 the jury actually awarded. The County filed a motion for judgment notwithstanding the verdict ("JNOV"), a motion to amend the judgment, or in the alternative, a motion for a new trial. These motions were denied in an order by the trial court. The court further awarded Handex "costs." The County appealed.

Additional evidence, facts, and relevant contract provisions are raised as necessary in the legal analysis below.

Handex's Appeal

In their appeal, Handex raises two issues: Handex argues that the trial court erred in granting a directed verdict in favor of MES; and that the court erred in awarding MES costs. We address these in turn.

I. Directed Verdict in Favor of MES

A. Standard of Review

When ruling on a motion for a directed verdict, the trial court must consider the evidence in the light most favorable to the nonmovant, taking the evidence supporting the nonmovant's claims as true with all contradictions, conflicts, and inconsistencies resolved in the nonmovant's favor so as to give the nonmovant the benefit of every reasonable inference. *Newton v. New Hanover County Bd. of Education*, 342 N.C. 554, 563, 467 S.E.2d 58, 65 (1996). " 'On appeal the standard of review for a JNOV . . . is the same as that for a directed verdict,' " requiring the issue be presented to a jury if there is more than a scintilla of evidence to support each element of the nonmovant's *primae facie* case. *Kearns v. Horsley*, 144 N.C. App. 200, 207, 552 S.E.2d 1, 6, *disc. review denied*, 354 N.C. 573, 559 S.E.2d 179 (2001) (citations omitted).

B. Handex's Claims

In the case at bar, Handex brought claims for breach of contract and breach of professional negligence against MES.

1. Contract Claims

[1] For Handex to survive a directed verdict motion for its contract claims against MES for professional malpractice, Handex was required to present beyond a scintilla of evidence either privity of contract with MES and elements of contractual breach, or that Handex was an intended third party beneficiary of the County-MES contract, of which Handex was denied its intended benefits due to some breach by MES. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 404, 580 S.E.2d 1, 6, *aff'd per curium*, 357 N.C. 567, 597 S.E.2d 673 (2003). In *Leary*, we clarified the divisions of this somewhat convoluted area of professional malpractice claims, stating that where there is neither allegations of contractual privity, or that the plaintiff was an intended third-party beneficiary under the professional contract, that plaintiff's exclusive remedy against the professional sounds in tort. *Id. See also Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 667, 255 S.E.2d 580, 584, *disc. review denied*, 298 N.C. 295, 259 S.E.2d 911 (1979) (where we held that an architect, in the absence of privity of contract, may be sued by a general contractor for breach of an architect's *common law duty of due care* in the performance of his contract with the owner, but that neither the general contractor nor a subcontractor could maintain a

cause of action alleging negligent performance of the architect's contract with the County).

There were two contracts in play governing the landfills construction: the County-MES contract, where MES was to provide various engineering services to the County for the landfill project; and the contract between the County and Handex for the excavation work and construction of the landfill.

Handex's complaint does not allege privity of contract with MES, nor that Handex was the intended third-party beneficiary of the County-MES contract. Their complaint refers only to the terms set forth in Article 9 of the County-Handex contract, and alleges as a contractual claim that, "[t]he Engineer has breached its contractual duties owed to Handex under the Contract." The "Contract" being referred to is the County-Handex contract. Handex alleges its contractual claims stem from Section 9.09(B) of the County's contract with Handex, as set out above. Without providing more, we do not believe this is sufficient to find contractual privity between Handex and MES, nor is it sufficient for Handex to raise a claim as a third-party beneficiary under the County-MES contract. Therefore, we need not consider the evidence supporting Handex's breach of contract theory, as we find no basis for MES's liability to Handex sounding in contract. The trial court was not in error in granting directed verdict on this issue.

This assignment of error is overruled.

2. Professional Negligence

[2] To survive a motion for directed verdict on a claim of professional negligence, Handex was required to present more than a scintilla of evidence for each of the following elements: (1) the nature of MES's profession; (2) MES's duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to Handex. *See Greene v. Pell & Pell L.L.P.*, 144 N.C. App. 602, 604, 550 S.E.2d 522, 523 (2001); *see also, Davidson & Jones, Inc.*, 41 N.C. App. at 667, 255 S.E.2d at 584. At issue in this appeal is whether Handex provided sufficient evidence of the relevant standard of care for a professional civil engineer akin to that applied by MES, and whether or not MES breached that standard.

"The standard of care provides a template against which the finder of fact may measure the actual conduct of the professional. The purpose of introducing evidence as to the standard of care in a

professional negligence lawsuit 'is to see if this defendant's actions "lived up" to that standard[,]' " and generally this is established by way of expert testimony. *Associated Indus. Contr'rs, Inc. v. Fleming Eng'g, Inc.*, 162 N.C. App. 405, 410, 590 S.E.2d 866, 870 (2004) (quoting *Little v. Matthewson*, 114 N.C. App. 562, 567, 442 S.E.2d 567, 570 (1994), *aff'd per curiam*, 340 N.C. 102, 455 S.E.2d 160 (1995)). Implicit in the expert's establishment of the professional standard of care as the baseline for the jury, is that by way of establishing that standard the expert can assist the jury in discerning whether defendant's professional performance or conduct did not conform therewith, and thus was in breach of that duty and the proximate cause of plaintiff's injury. The only exception to the requirement of establishing the professional standard of care by way of expert testimony is where the "common knowledge and experience of the jury is sufficient to evaluate compliance with a standard of care[.]" *Delta Env. Consultants of N.C. v. Wysong & Miles Co.*, 132 N.C. App. 160, 168, 510 S.E.2d 690, 695, *disc. review denied*, 350 N.C. 379, 536 S.E.2d 70 (1999). The "common knowledge" exception to the requirement of expert testimony in professional negligence cases is implicated where the conduct is gross, or of " 'such a nature that the common knowledge of lay persons is sufficient to find the standard of care required, a departure therefrom, or proximate causation.' " *Little*, 114 N.C. App. at 568, 442 S.E.2d at 571 (quoting *Bailey v. Jones*, 112 N.C. App. 380, 387, 435 S.E.2d 787, 792 (1993)).

In the case at bar, Handex offered the lay testimony of the Vice-President of Handex's operating divisions, Mr. Gary Conway ("Mr. Conway"). Mr. Conway was a licensed civil engineer in the State of Texas. In light of his experience on approximately 50 to 100 landfill projects, he testified to what he believed was misleading information as to the quantity of excavation in the bid advertisement and subsequent contract ambiguities for the County landfill. He testified as to each contract modification request, and certain instances where he believed MES was insufficient in administering the request. Later, Handex put on MES's expert Mr. Bill Lapsley ("Mr. Lapsley"), over MES's objection, to establish the standard of care. MES had subpoenaed Mr. Lapsley to rebut any expert or other evidence Handex might have called to establish the relevant standard of care and breach thereof. During Handex's examination, it was established that Mr. Lapsley was a registered professional civil engineer in North Carolina, licensed since 1974. Particularly, Mr. Lapsley was familiar with the methods and peculiarities of earth work in Western North Carolina, and that he was familiar with the standard of care of

licensed engineers who design and observe construction for the purpose of administering contracts for these earth work jobs. On cross-examination by MES, Mr. Lapsley stated: "I can see no violations of the standard of care that this engineer did, that I would have done the same thing that this engineer did. I found no flaws in his response and how he handled the situation."

We believe the testimony of Mr. Conway neither rebuts nor raises more than a scintilla of evidence that MES breached the relevant standard of care set out by Mr. Lapsley. Viewed in its most favorable light, Mr. Conway's testimony established his opinion of what the administering engineer should have done in overseeing the bidding and contract modifications requests. It does not show, as is required to sustain the claim, what an engineer practicing under the relevant standard of care actually does, nor any specific instances of breach of *that relevant* standard. Furthermore, we cannot find that the alleged breaches to the standard of care for administering this landfill project, concerning the localized expectations and terms of art relating to excavation and landfill construction, fall within the realm of a layperson's common knowledge and experience. *Delta Env. Consultants of N.C.*, 132 N.C. App. at 168, 510 S.E.2d at 695-96. Thus, Handex failed to carry the elements of a *primae facie* case for professional negligence upon which a jury could find MES in breach of its duty and directed verdict was proper.

This assignment of error is overruled.

II. Costs

[3] MES's motion for costs in this case was made pursuant to N.C. Gen. Stat. § 6-21 (2003), and it was under this authority the court awarded fees. A reading of N.C. Gen. Stat. § 6-21 reveals this statute does not authorize costs for the general contract/tort based civil action at bar. However, this was not raised in Handex's responsive motion on the issue, nor was it specifically assigned as error in this appeal. As both parties argue this issue in their briefs as if the court awarded costs under N.C. Gen. Stat. § 6-20 (2003), and because the court had authority to do so under that provision, we will frame our analysis in conformance.

N.C. Gen. Stat. § 6-20 provides that: "In other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law." In *Department of Transp. v. Charlotte Area Mfd. Housing, Inc.*, 160 N.C. App. 461, 469, 586 S.E.2d 780, 785 (2003), we determined:

> [T]he language of N.C.G.S. § 6-20 states that "in other actions, costs may be allowed or not, in the discretion of the court . . . ." By referring to "other actions," section 6-20 apparently grants a trial judge discretion to determine whether or not costs should be taxed to a party in an action not specified in sections 6-18 and 6-19. Thus, the discretion granted is the discretion to allow costs, not the discretion to judicially create costs. Put differently, the word "discretion" qualifies the word "allowed," not the word "costs."

We then held that costs, as intended by the legislature to be used in N.C. Gen. Stat. § 6-20, is limited to those items enumerated in N.C. Gen. Stat. § 7A-305(d) (2003). *Id.* at 470, 586 S.E.2d at 785. In short, the trial court does not have discretion to award costs under N.C. Gen. Stat. § 6-20 which are not otherwise enumerated in the exhaustive list set out in N.C. Gen. Stat. § 7A-305(d).

The following is an itemized list composing the $6,919.17 award of costs to MES: deposition costs of $1,980.61; half the expert witness fee generated by Mr. Lapsey, totaling $4,612.34; MES's portion of the mediation fee, totaling $300.00; service of process fees for trial subpoenas, totaling $17.22. In light of *Department of Transp.*, we find statutory authority for the following awards: mediation fees pursuant to N.C. Gen. Stat. § 7A-305(d)(6); witness fees of Mr. Lapsley, an expert witness under subpoena pursuant to N.C. Gen. Stat. § 7A-305(d)(1) and N.C. Gen. Stat. § 7A-314 (2003); and service of process fees for trial subpoenas, pursuant to N.C. Gen. Stat. § 7A-305(6). We find no statutory authority for the award of deposition costs.

Therefore, the order awarding costs to MES must be modified to eliminate the award of deposition costs.

Haywood's Appeal

In their appeal, Haywood County raises the following issues: the County argues that the trial court erred in denying its motion for directed verdict and its motion for judgment notwithstanding the verdict ("JNOV"); that the court erred denying its motion to amend the judgment, and in the alternative, its motion for a new trial. Because we find the court should have granted directed verdict on some of the claims submitted to the jury, and that the judgment was based in part on an irregularity at trial not clarified by the record, we grant a new trial in accordance with the mandate set forth below.

I. Denial of Directed Verdict and JNOV

A. Standard of Review

Upon review of the trial court's denial of Haywood's motion for directed verdict and JNOV, we apply that standard as set out in Handex's appeal from MES's directed verdict.

B. Evidence of Handex's Claims against the County

The County argues there was insufficient evidence to submit to the jury the question of any of the numerous contractual breaches alleged by Handex. These alleged breaches fall into two categories: those *not* submitted to MES as a claim for a contract modification—delay in the notice to proceed, lost timber value and related delay, and additional time and travel of Handex's management; and those claims submitted to MES for approval as contract modifications—additional rock and other soil excavation, additional liner, additional undercutting, and weather-related delays.

1. Claims Not Submitted to MES

[4] The jury was allowed to consider claims first raised by Handex in this litigation contending the County caused delay issuing the "Notice to Proceed" the construction, and causing damages to Handex. Section 2.02 of the bid provided "the Bid will remain subject to acceptance for (90) days after Bid opening[.]" The Supplemental Conditions provide, "[t]he Contract Times will commence to run on the day indicated in the Notice to Proceed. A Notice to Proceed may be given at anytime within 60 days after the Effective Date of the Agreement." Though the record is unclear, the bid opening seems to have occurred sometime in late August of 2000. Within the 90-day time period, the County awarded Handex's bid for Alternative 1 on or about 14 September 2000, and later contracted with Handex on Alternative 2 on or about 13 October 2000. In a letter dated 8 November 2000, MES gave Handex the "Notice To Proceed" as of 13 November 2000. Therefore, this was timely under the terms of the bid and contract, and there was no evidence of breach of contract or claim made for a time extension due to the agreed change from Alternative 1 to Alternative 2. The trial court erred in not granting directed verdict on this claim for breach.

[5] The next issue not formally raised as a "claim" under the contract was related to timber ownership on the construction site. The

County, in preparation for the landfill, clear-cut 20 acres of timber on the landfill site after the bids had been accepted for the landfill. This was done despite section 1.01.1(d) of the General Conditions, providing that "all timber . . . shall become property of the Contractor." We believe this to be a clear breach by the County of this provision. The expected timber proceeds were likely to be used by contractors to submit lower bids. The County claims that Handex failed to preserve this claim by submitting it as a formal claim to MES as provided by section 9.09 and that it was untimely under section 10.05 of the General Conditions. We disagree that these provisions preclude Handex's ability to later litigate this claim for breach. We find the General Conditions ambiguous as to whether the question of whose property the timber was at the time of the clear cutting falls within the purview of a "dispute" or "other matter relating to the *acceptability* of the work" or "the *performance* of the work" as set out in section 10.05. (Emphasis added.) Furthermore, because any delay in the removal of the remaining stumps was proximately caused by this breach, that issue was also properly allowed to be presented to the jury. Therefore, the court was correct in allowing those issues involving timber removal to be determined by the jury, despite first being raised in this litigation.

[6] Lastly, the jury was allowed to consider evidence of claims related to additional management costs and travel time costs caused by the County's alleged breach during the performance of the contract. These costs were never sought by Handex as contract modifications made through the change order process, and were evidenced only by a description of the revised contract value in one of Handex's numerous exhibits. The transcript reflects that these additional travel and management costs were related to the performance of obligations of the contract or attempted contract modifications. Therefore, as a condition precedent for raising them in subsequent litigation, they should have been requested as part of a change order for the work to which they were directly related. Judging by the eight change orders sought under this construction contract, the County had clearly not waived the requirement of section 12.01 of the General Conditions that additional cost requests must be made through change orders. Therefore, we believe evidence of these additional management and travel costs were improperly submitted to the jury as evidence of damages, and hold the trial court erred in not granting directed verdict on these claims of breach.

2. Claims Submitted to MES as Change Orders

[7] The first change order denied by the County was change order #2 requesting additional money and time for blasting and rock excavation. At issue was the language of Addendum 1 to the construction contract, stating that "costs for removal of rock" encountered in the excavation area would be negotiated at the time of removal. However, Addendum 2, sealed by MES a day after Addendum 1, states excavation material in the bid is "unclassified." Mr. Lapsley, the only expert witness before the court, stated on cross-examination that "unclassified" meant the contractor would not be paid for any particular type of material they were removing. In response, Handex put on evidence that showed that another bidder's inquiry of MES into the effect of Addendum No. 2, it was recorded that "[a]ddendum 2—rock will still be paid for if encountered." Upon this conflicting evidence, we believe Addendums 1 & 2, when read together, raise an ambiguity in the contract and therefore provided a question to be properly submitted to the jury. *See Crider v. Jones Island Club, Inc.*, 147 N.C. App. 262, 266-67, 554 S.E.2d 863, 866-67 (2001), *disc. review denied*, 356 N.C. 161, 568 S.E.2d 192 (2002) (Where we reaffirmed the long-standing rule of contract interpretation that when a contract is ambiguous, deciphering its potential interpretations is for the jury). We note that no days should have been credited for the rock excavation, as Addendum 1 clearly only allowed for negotiation of cost, but not additional time.

Change orders #3 and #8 denied by the County both related to the contract's provisions governing abnormal weather conditions. Change order #3 sought additional time of 30 days due to poor weather conditions. The contract provided that "abnormal weather conditions" were to be determined based upon the National Weather Service's thirty-year average. The evidence before the jury provided two different interpretations of what constituted the time frame for measuring these conditions, thus affecting calculations of whether it was above or below the National Weather Service's thirty-year average. It was also unclear, as testified to by Mr. Conway, whether the "average" was to consider days of rain, or inches of rain, and where the statistical data for the weather conditions was to be collected. We find this means of determining "abnormal weather conditions" ambiguous. Therefore, for change order #3, we believe there was sufficient evidence of an "abnormal weather condition" as described in Handex's weather logs and data to give the issue to the jury. However, concerning change order #8's request for time *and* price adjustment,

Handex's request for $80,000.00 was not an offered remedy under the express contract terms set out in section 12.05(A) of the General Conditions ("an equal amount of time lost due to [abnormal weather conditions is the] exclusive remedy." Handex was required to get insurance under the contract to cover such costs pursuant to General Condition 5.06. Furthermore, the contract clearly states that claims for more time due to "abnormal weather conditions" would only be considered when brought "within the Contract Times" as stated in 12.03 of the General Conditions. Their request, made 10 July 2001, was well outside of the contract time. Therefore, the requests in change order #8 was governed by the express terms of the contract for which there was no issue of fact to be decided by a jury.

Change order #4 sought by Handex was for additional undercutting of 2,532 cubic yards of unsuitable soils and backfilling in the subgrade. Handex requested $17,121.60 with a time extension of 14 calendar days. MES approved the request for excavation of the unsuitable soils, though modifying it to allow only 3 days and $13,470.24. The modification was made because the contract specifications stated that cost of backfilling was already included in the cost of excavation. Despite MES's recommendation, the County denied the claim as authorized by MES, and Handex appealed. Mr. Lapsley testified that he believed Handex was entitled to the claims for time and money as modified by MES. We believe that on this issue, in light of the fact MES approved the change order as modified, there was more than a scintilla of evidence upon which a jury was properly allowed to determine whether the County had breached the contract denying the change order as modified.

Change order #5 sought by Handex was for $28,112.00 and 14 calendar days based upon a need for an increase in the liner area square footage for the landfill phase. The bid for the liner system was at the unit quantity of 448,000 square feet. The contract states that payment will only be made for "actual number of units incorporated in the work," and that "[m]easurement for payment of the Composite Liner System . . . will be based on . . ." "the plane whose boundaries are the anchor and liner extension trenches," and "the cost shall include an appropriate allowance for seam overlap, wrinkles, expected wastage, slopes, irregular shapes, etc." At trial, Mr. Lapsley's testimony provided that the "appropriate allowances" should have been considered in the bid itself, and, therefore, MES properly denied the change order. For their change order, Handex attached a land survey stating that the actual verified surface area of the landfill was 460,550 square

feet for the clay liner, and 485,300 square feet for the membrane liner surface area. We agree with Mr. Lapsley and the County. The terms "plane" and "expected wastage" plainly indicated that the liner area required for the landfill was a figure to be incorporated into the bid, with the "appropriate allowance" to be estimated in addition to the 448,000 square feet of the landfill's plane. Therefore, we do not believe there was sufficient evidence of breach to present this issue to the jury.

Change order #6 by Handex sought neither additional time nor costs. Rather, they requested to take cover soil from the borrow area outside the clearing limits without "seeding or landscaping" the area. This was in express contravention of the terms of the Project Specification section 3.03, requiring that in such instances "[r]eclamation, which will include but not be limited to seeding and mulching . . . at the Contractor's expense." The court erred in failing to grant directed verdict on this claim of breach.

Change order #7 sought by Handex was for the approval of $196,655.00 and an additional 29 workdays. The basis of this request was, by Handex's calculations, that they had encountered 38% more excavation and 92% more berm construction in the field than was depicted in the bid and contract. We find the bidding provisions incorporated in the contract and the relevant contractual provisions govern this issue. Handex submitted a lump sum bid, without using any local survey, for the amount and cost of earth work it estimated the landfill project required. This figure was 165,000 cubic yards, approximately 5,000 yards more than what was estimated in the bid advertisement. The record indicates that after their low bid had been awarded, Handex later hired Mr. Randy Herron, a local surveyor, to calculate the earth work quantities of the project, based on the documents MES provided for the *initial bid.* In the Instructions to the Bidder portion of the contract, section 4.07 stated: "It is the responsibility of the Bidder before submitting a Bid to: Obtain and carefully study (or assume responsibility for doing so) all additional supplemental examinations . . . which may affect cost, progress, or performance . . ." and "to agree at the time of submitting its Bid that no further examinations . . . are necessary for the determination of its bid for performance." Moreover, when Handex discovered the earth work was more significant than they had bid, instead of halting excavation and putting the County and MES on notice as required by the General Conditions section 4.03 of the contract, they continued to excavate. In sum, in addition to not doing their due diligence during

the bidding process, Handex did not comply with General Conditions requiring they halt excavation when making a claim that the site differs materially from that represented in the bid and contract. Therefore, the trial court should have granted directed verdict on the claim of additional excavation because the County's denial of Handex's claim was authorized under the terms of the contract and made without breach. On facts akin to those at bar, we affirmed a trial court's grant of JNOV on the seasoned principle of construction/contract law: "[t]hat plaintiff encountered difficulties which it failed to anticipate when making its bid did not entitle it to the increased compensation it now seeks to recover." *Brokers, Inc. v. Board of Education*, 33 N.C. App. 24, 30, 234 S.E.2d 56, 60, *disc. review denied*, 293 N.C. 159, 236 S.E.2d 702 (1977)

C. Summary of Claims for Which Directed Verdict was Improper

In this case, the evidence of claims which was proper for the jury to consider should have been limited to the following: (1) lost timber revenue from the County's clear-cutting of the landfill site and damages related to the stump removal; (2) evidence of the claim for rock removal and blasting and related damages due to its denial of negotiating its price as stated in Addendum 1 (change order #2); (3) evidence of additional time as authorized by the contract for "abnormal weather conditions" which had occurred within the scope of the contract's time for Substantial Completion and Final Payment (change order #3); and lastly (4) undercutting of unsuitable soils, as approved by MES (change order #4).

II. Denial of Motion for Amended Judgment/New Trial

[8] The County also motioned for a new trial and amended judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) (2003). The County argued that, because some, if not all, of Handex's claims were not supported by the evidence and therefore that the single-figure verdict awarded by the trial court was not authorized, a new trial must be granted. We agree.

Rule 59(a)(7) of the North Carolina Rules of Civil Procedure provides that grounds for a new trial may be when "[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law." N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) (2003). "An appellate court's review of a trial judge's discretionary ruling denying a motion to set aside a verdict and order a new trial is limited to a determination of

whether the record clearly demonstrates a manifest abuse of discretion by the trial judge." *Pittman v. Nationwide Mutual Fire Ins. Co.*, 79 N.C. App. 431, 434, 339 S.E.2d 441, 444, *disc. review denied*, 316 N.C. 733, 345 S.E.2d 391 (1986). A new trial as to damages only should be ordered if the damage issue is separate and distinct from the other issues and the new trial can be had without danger of complication with other matters in the case. *Robertson v. Stanley*, 285 N.C. 561, 568-69, 206 S.E.2d 190, 195 (1974). It must be clear that the error in assessing damages did not affect the entire verdict. *Id.* If it appears the damages awarded were from a compromise verdict, a new trial on damages alone should not be ordered. *Weyerhaeuser Co. v. Supply Co.*, 292 N.C. 557, 566, 234 S.E.2d 605, 610 (1977).

As set out above, we have determined those claims raised by Handex which were properly submitted to the jury, and those claims which were clearly governed by the terms of the contract. In light of the single-figure jury verdict, we cannot determine whether the jury awarded damages pursuant to any of the four claims properly submitted to the jury, and we are therefore constrained to grant a new trial to determine both the question of liability and damages as to these four claims. *Weyerhaeuser Co.*, 292 N.C. at 566, 234 S.E.2d at 610 (where the Supreme Court modified this Court's grant of a new trial on the issue of damages relating to counterclaims under a contract, and granted a new trial on the question of liability as well).

[9] Also at issue in this appeal is the propriety and amount of liquidated damages and extra engineering fees awarded to the County by the jury's verdict. The County, under the terms of the contract, began retaining liquidated damages for the days Handex was overdue for Substantial Completion, at $1,000.00 per day, and overdue for Final Payment, at $500.00 per day. In addition, the County retained amounts it attributed to extra engineering fees caused by Handex's delay. In total, the monies held by the County at the time the jury rendered its verdict, including interest, was approximately $153,107.60. The jury's verdict awarded the County $16,000.00 in liquidated damages, and $8,880.00 for extra engineering fees.

We first address the extra engineering fees. The trial court, though allowing the jury to assess them for purposes of appellate review, ordered that under North Carolina's jurisprudence the County was not entitled to the engineering fees in addition to liquidated damages. The trial court was correct in this ruling. Our Supreme Court has long held that liquidated damages, when not a penalty, may be awarded as both parties' measure of the estimated, actual damages

that would arise in the event of a breach. *Knutton v. Cofield*, 273 N.C. 355, 363, 160 S.E.2d 29, 35-36 (1968). Therefore, while liquidated damages may still be awarded even if no actual damages arise from the breach, they cannot be awarded in addition to actual damages because this would constitute double recovery. *Id.* Therefore, at any new trial, the liquidated damages provision of the contract shall be deemed as a substitute for any actual damages suffered by the County due to Handex's delay.

[10] Turning next to the liquidated damages that were awarded to the County at trial. After the jury returned their verdict with the $16,000.00 sum, the jury was discharged. Handex then raised the following issue:

> [HANDEX'S ATTORNEY]: I believe that leaves us with the issue of the $160,000 or so that the County is holding. I am assuming that the answer to question number two is a true damages award and is not inclusive of the $160,000.

Handex's attorney at that time requested another question be submitted to the jury as to whether the County was required to return the difference of the monies it had retained as liquidated damages and engineering fees, and the $16,000.00 awarded by the jury. To this the court concluded:

> THE COURT: . . . If the plaintiff had the money, then I can see that as creating a real problem. I can't—when you think about it though, there's no way they could have intended that the $201,000 be increased by the money that [the County is] holding. It wouldn't make sense that way.

The transcript from a subsequent hearing held before the trial court issued its judgment was lost and is not part of the record on appeal. There was, however, the affidavit of one juror expressing what he alleged the verdict to encompass. Despite its initial strict reading of the jury's verdict, in its judgment order, the trial court interpreted the verdict to encompass $137,107.60 to be recovered by Handex as the amount withheld by the County over and above the jury's finding of $16,000.00 liquidated damages.

Vital to a party's right to a jury, when so requested, is the verdict:

> A verdict is a substantial right. A trial judge in the due and orderly administration of justice has the power to set a verdict aside in his discretion or as a matter of law, and it is his duty to

> do so when a palpable miscarriage of justice would result. The ultimate objective of the law is to guarantee justice to all the parties. A trial is the process ordained and sanctioned for realizing that objective. A jury in proper cases may correct its verdict with the approval of the court in the event the verdict does not correctly express the actual agreement of the jury.

Bundy v. Sutton, 207 N.C. 422, 427, 177 S.E. 420, 422 (1934). Our courts have consistently held that the general rule prohibiting jurors from impeaching their own verdict does not prevent the reception of evidence from jurors on the issue of whether a clerical error was made by the jury in recording their verdict. *Chandler v. U-Line Corp.*, 91 N.C. App. 315, 324-25, 371 S.E.2d 717, 722-23, *disc. review denied*, 323 N.C. 623, 374 S.E.2d 583 (1988). In *Chandler*, we held that where the trial court sets aside or amends a verdict pursuant to Rule 59 after the jury has been discharged, there must be evidence that all jurors are in agreement that the verdict sheet did not represent their intentions. *Id.*

In the case at bar, without more, we do not believe the court had authority to alter the verdict so substantially. However, because we are granting a new trial on Handex's remaining claims, the question of liquidated damages and monies retained by the County may again be argued and clarified.

Conclusion

The mandate of this opinion, based upon our thorough review of the transcripts, record, briefs, and exhibits, is as follows: The court's grant of directed verdict for MES is affirmed on the claims of breach of contract and professional negligence. The court's award of costs shall be amended to allow only those costs permitted by statute. Concerning Handex's numerous contract claims against the County, a new trial is appropriate for those four claims for which there was sufficient evidence to survive directed verdict. Additionally, concerning the County's counterclaims for breach and liquidated damages, these too may be re-litigated. At any new trial, there shall be clear instruction as to the following: that any liquidated damages found under the contract cannot be increased by actual damages proved at trial; and that the verdict specify whether the amount of liquidated damages set by the jury is in lieu of the $153,107.60 retained by the County with the balance to be returned to Handex, or if it is an award of damages in addition to those monies.

Affirmed in part, modified in part, reversed in part, and new trial.

Judges TIMMONS-GOODSON and HUNTER concur.

PATRICIA BROOKS, EMPLOYEE, PLAINTIFF-APPELLEE v. CAPSTAR CORPORATION, EMPLOYER, THE HARTFORD, CARRIER, DEFENDANTS-APPELLANTS

No. COA03-1064

(Filed 18 January 2005)

1. Workers' Compensation— vocational rehabilitation—compliance—disputed evidence

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff had complied with vocational rehabilitation services. Although there was evidence that plaintiff could have presented herself more favorably in job interviews, there was no evidence that she failed to keep appointments for interviews or that her behavior at the interviews was "balky." There was evidence that plaintiff was cooperative with her vocational case manager and did not intentionally sabotage defendants' efforts to find her employment.

2. Workers' Compensation— disability—admitted claim—no finding

The Industrial Commission did not err in a workers' compensation case by not finding that plaintiff was disabled before awarding disability. Defendants had admitted plaintiff's claim; the issue was whether plaintiff complied with vocational rehabilitation.

3. Workers' Compensation— expense of appeal—granted

The Court of Appeals granted plaintiff's request for expenses in the appeal of a workers' compensation case where defendants appealed a deputy commissioner's decision that temporary total disability be paid, the Commission affirmed the award of disability, defendants appealed to the Court of Appeals, and the Court of Appeals also affirmed. The requirements of N.C.G.S. § 97-88 are satisfied.

Judge TYSON dissenting.

Appeal by defendants from opinion and award entered 29 April 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 May 2004.

David P. Parker, for plaintiff-appellee.

Morris York Williams Surles & Barringer, L.L.P., by John F. Morris and Roberta S. Sperry, for defendants-appellants.

McGEE, Judge.

Capstar Corporation (employer) and The Hartford, carrier (collectively defendants) appeal from an opinion and award of the North Carolina Industrial Commission (the Commission) filed 29 April 2003 finding and concluding that Patricia Brooks (plaintiff) complied with the vocational services provided by defendants and that she had not constructively refused to accept employment. Accordingly, defendants were ordered to reinstate plaintiff's total disability compensation.

The evidence before the Commission tended to show that at the date of injury, plaintiff had worked for employer as a seamstress for ten years. Plaintiff was injured on 27 January 1997 when her left arm and elbow were struck by a door as she turned to see a coworker. Defendants accepted the claim as compensable through a Form 60.

Dr. Wodecki initially diagnosed plaintiff with a left elbow contusion on 28 January 1997, and she was allowed to return to work with lifting restrictions. Plaintiff continued to complain of pain and Dr. Wodecki referred plaintiff to Dr. Bryon Dunaway (Dr. Dunaway). Dr. Dunaway diagnosed plaintiff on 28 March 1997 as having a "left medial elbow contusion resulting in a chronic medial tennis elbow." Dr. Dunaway released plaintiff to return to work. He also noted that plaintiff's motivation for returning to work was low. Plaintiff continued to seek treatment from Dr. Dunaway until 21 May 1997. During this time, plaintiff complained of neck, shoulder, arm, and hand pain attributable to a prior motor vehicle accident. Dr. Dunaway ultimately diagnosed plaintiff as having a disc herniation.

Plaintiff next sought treatment on 5 June 1997 from Dr. Larry Pearce (Dr. Pearce) who provided pain management treatment for plaintiff through July 1998. Dr. Pearce signed a Form 28U on 6 November 1997, but defendants did not reinstate plaintiff's benefits since Dr. Pearce was not plaintiff's authorized treating physician.

However, after the Commission authorized Dr. Pearce as a treating physician for plaintiff, defendants reinstated plaintiff's benefits. Plaintiff next sought treatment from Dr. T. Kern Carlton (Dr. Carlton) on 18 April 2000.

A deputy commissioner entered an opinion and award on 25 October 2000 ordering defendants to pay plaintiff temporary total disability compensation until further order of the Commission. The deputy commissioner also concluded that as a condition of receiving these benefits, plaintiff was required to "cooperate fully with medical and vocational services[.]"

In a Form 24 dated 5 February 2001, defendants requested that plaintiff's compensation be suspended, alleging that plaintiff had "impeded [defendants'] efforts at returning [plaintiff] to suitable employment[.]" Plaintiff disputed that compensation should be suspended on the ground that "no suitable employment ha[d] been found, offered, approved and [was] available." In an order filed 29 March 2001, a special deputy commissioner approved defendants' application to suspend plaintiff's compensation from the date the Form 24 was filed until plaintiff demonstrated compliance with the vocational and rehabilitation services.

A deputy commissioner entered an opinion and award on 29 August 2002 rescinding the special deputy commissioner's order which had allowed defendants to suspend plaintiff's temporary total disability compensation. Defendants appealed to the Commission. In an opinion and award filed 29 April 2003, the Commission concluded that plaintiff had complied with the vocational services provided by defendants and that defendants' Form 24 application was improvidently granted. Accordingly, the Commission vacated the special deputy commissioner's order allowing defendants to suspend plaintiff's compensation. The Commission further ordered that plaintiff's benefits be reinstated effective 8 February 2001 until further order of the Commission. Defendants appeal.

This Court's review of an opinion and award of the Commission 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). "Under our Workers' Compensation Act, 'the Commission is the fact finding body.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Brewer v. Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d

608, 613 (1962)). "The facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *disc. review denied*, 350 N.C. 310, 534 S.E.2d 596, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999). So long as "there is *any* credible evidence to support the findings, the reviewing court is bound by it." *Roman v. Southland Transp. Co.*, 350 N.C. 549, 556, 515 S.E.2d 214, 219 (1999).

[1] Defendants first argue in multiple assignments of error that the Commission erred in concluding that plaintiff complied with the vocational rehabilitation services and in concluding that the Form 24 was improvidently granted. Defendants argue that plaintiff had a suitable work opportunity, that she sabotaged the vocational rehabilitation efforts, and that although capable of work, she "chose to thwart efforts to obtain suitable employment." For the reasons stated below, we disagree.

The Commission specifically found that:

> 13. The greater weight of the evidence of record shows that from December 20, 2001 to March 29, 2001, plaintiff was cooperative with the vocational case manager, Ms. O'Kane. Plaintiff did whatever Ms. O'Kane asked her to do and met with Ms. O'Kane on a regular basis.
>
> 14. Plaintiff did not intentionally sabotage vocational efforts regarding the security job available with Statesville Auto Auction.

Accordingly, the Commission concluded that:

> 1. Plaintiff has complied with the vocational services provided by defendants. Plaintiff has not constructively refused to accept suitable employment available to her that she could have obtained with due diligence. N.C. Gen. Stat. § 97-25; 97-32.
>
> 2. In that plaintiff has not refused to comply with vocational rehabilitation, the Form 24 application was improvidently granted and defendants are not entitled to suspend payment of compensation. N.C. Gen. Stat. § 97-25.

As support for their first argument, defendants assert that plaintiff "had an opportunity for suitable work with Statesville Auto Auction within the guidelines set by her doctor, but she sabotaged the efforts of vocational rehabilitation[.]" Defendants also

emphasize plaintiff's interview with Cracker Barrel as support for their argument.

Defendants assert that plaintiff's vocational case manager, Katherine O'Kane (Ms. O'Kane), testified that plaintiff "was attempting to impede [d]efendants' efforts at suitable job placement." Defendants primarily rely on the events surrounding plaintiff's potential job as a security guard at the Statesville Auto Auction. Ms. O'Kane prepared a job analysis for the available position and plaintiff's counsel responded in an 18 October 2000 letter that the position would be suitable with the exception of the report writing requirement and the time of work. Nonetheless, plaintiff's counsel stated that he would "recommend and encourage [plaintiff] to apply." Ms. O'Kane forwarded the job analysis to Dr. Carlton and, in a letter dated 27 October 2000, Dr. Carlton stated that the position was "within [plaintiff's] capabilities if it does not require excessive report writing." Ms. O'Kane provided Dr. Carlton with clarification on the report writing requirement.

Ms. O'Kane's 14 November 2000 report indicates that she and plaintiff met with two managers at Statesville Auto Auction on 7 November 2000 about the security guard position. The area manager indicated that an integral part of the position was the ability to read vehicle identification numbers on cars and make sure they matched the numbers on paper. At the meeting, plaintiff indicated that she could read the numbers on the vehicles but that she could not read the numbers on the paper. Plaintiff also mentioned that when her hand was swollen, she had difficulty focusing on small objects. Plaintiff further expressed to the managers that she was unable to write. In the report, Ms. O'Kane stated that plaintiff "often focuses on what she cannot do versus what she can do, and expresses this to the employer which is not the most effective method to interview." Ms. O'Kane also noted that plaintiff's "motivation to return to work is questionable because of how she presents herself to employer[.]"

In a letter dated 19 December 2000, Dr. Carlton approved the security guard position. However, when Ms. O'Kane contacted the Statesville Auto Auction on 20 December 2000, she was told that no positions were available.

As additional support for their argument, defendants also point to Ms. O'Kane's testimony regarding when she accompanied plaintiff to an employer meeting at Cracker Barrel on 4 October 2000 for a position as a hostess. Ms. O'Kane stated that there was "a little bit of

tension" at the meeting because plaintiff had brought along work restrictions from Dr. Pearce that she wanted to review with the potential employer. Ms. O'Kane attempted to explain that the restrictions were not applicable because Dr. Pearce was not plaintiff's treating physician. In her report dated 9 October 2000, Ms. O'Kane stated that the Cracker Barrel manager "relayed that he [did] not feel that [plaintiff] want[ed] to work" even though Cracker Barrel makes an effort to "work with individuals with disabilities or work restrictions[.]"

In spite of the testimony and evidence cited by defendants, we conclude that there is sufficient evidence in the record to support the disputed findings of fact. Ms. O'Kane testified extensively about her experience working as plaintiff's vocational case manager. She testified that prior to the interview for the security guard position, plaintiff had attended every meeting, had been cooperative, and had followed up on all leads about which Ms. O'Kane had instructed her.

Regarding the interview process for the security guard position, Ms. O'Kane was asked whether plaintiff cooperated with her up until 20 December 2000. Ms. O'Kane responded affirmatively but then stated that she thought their meeting with the two managers "could have been handled a little differently." However, she further stated that she did not know "if that would be deemed [] cooperative or uncooperative." Ms. O'Kane also testified that after 20 December 2000, plaintiff "was cooperative and did . . . whatever I asked her to do and met with me on a regular basis." Further, the following exchange occurred between Ms. O'Kane and plaintiff's counsel:

> Q. Her attitude towards work and finding work up until you stopped working with her, what was it generally?
>
> A. Her attitude? I think she was just very nervous to try something new.
>
> Q. Did she cooperate with you?
>
> A. She did, but then there's the gray area of the employer meeting at the Statesville Auto Auction. I wouldn't say that it wasn't not—was cooperating or not cooperating with me. It just added some issues, I guess, to possibly meeting with another employer in the future possibly.

When asked on cross-examination to elaborate, Ms. O'Kane clarified that she thought "generally, yes, [plaintiff] . . . did everything

[Ms. O'Kane] asked her to do." However, Ms. O'Kane again testified about how plaintiff expressed her inability to read the vehicle identification numbers.

When asked on cross-examination why Ms. O'Kane thought plaintiff was not offered the security guard position, Ms. O'Kane did state that plaintiff could have presented her alleged inability to read the vehicle identification numbers in a more favorable manner. For example, Ms. O'Kane indicated that plaintiff could have asked to come back after getting glasses. However, despite this testimony, Ms. O'Kane also specifically stated that she did not think that plaintiff "intentionally did anything to mess anything up with the employer[.]" She further stated that she was "not saying specifically that it was messed up[.]"

This testimony is in contrast to the evidence presented to the Commission in *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 599 S.E.2d 508 (2004), where the defendant argued the plaintiff constructively refused suitable employment. In *Johnson*, a vocational rehabilitation and employment counselor testified he identified approximately twelve jobs that were suitable for the plaintiff, given plaintiff's vocational background and physical limitations. The counselor testified the plaintiff failed to keep appointments for some job interviews that were arranged for him and that the plaintiff had "balky behavior" at the job interviews he did attend. He also testified that in his opinion the plaintiff could have found work if he had made a diligent effort to do so. In spite of the counselor's testimony, the Commission found that " 'in no manner were plaintiff's actions regarding these job leads inappropriate and he did not constructively refuse suitable employment.' " *Johnson*, 358 N.C. at 710, 599 S.E.2d at 514. However, the Supreme Court determined this finding was not supported by any evidence cited in the Commission's opinion and award. The Court stated "[t]he Commission's opinion and award should have contained specific findings as to what jobs plaintiff [was] capable of performing and whether jobs [were] reasonably available for which plaintiff would have been hired had he diligently sought them." *Id.*

Although there was evidence that plaintiff in the case before us could have presented herself more favorably, there was no evidence, as there was in *Johnson*, that plaintiff failed to keep appointments for job interviews or that she had "balky behavior" at her job interviews. There is competent evidence in the record in this case that supports the Commission's findings that plaintiff was cooperative with Ms.

O'Kane and did not intentionally sabotage defendants' efforts to find her suitable employment. Therefore, the Commission did not err in its findings. These findings support the conclusions that plaintiff complied with the vocational rehabilitation and that the Form 24 application was improvidently granted. Defendants' argument is without merit.

[2] Defendants next argue that the Commission erred in awarding plaintiff temporary total disability from 8 February 2001 until further order of the Commission since there was no competent evidence or finding of fact that plaintiff was disabled as defined by N.C. Gen. Stat. § 97-2(9). Defendants cite *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982) to show what the Commission must find in order to support a conclusion of disability. However, for the reasons stated below, we find this argument unpersuasive.

The case before our Court involves an admitted claim. Defendants filed a Form 60 dated 2 April 1997 admitting plaintiff's right to compensation because of the arm injury. Furthermore, the parties stipulated that "plaintiff sustained an admittedly compensable injury to her left arm on January 28, 1997." In the Form 24 filed by defendants, employer checked the box stating that "[t]he employer admitted employee's right to compensation pursuant to N.C. Gen. Stat. § 97-18(b)." Thus, as stated in the Commission's opinion and award, the only issue before the Commission was "whether plaintiff has complied with vocational rehabilitation as ordered by Deputy Commissioner Lorrie Dollar on October 25, 2000." Whether or not plaintiff was disabled was not at issue. Rather, the dispute focused on whether or not plaintiff complied with vocational rehabilitation efforts. Accordingly, the Commission did not err by not finding as a fact that plaintiff was disabled. This argument is without merit.

[3] In addition to addressing defendants' arguments, we note that plaintiff asserts that she is entitled to have defendants pay her expenses incurred in connection with the present appeal. Under N.C. Gen. Stat. § 97-88 (2003), the Commission or a reviewing court may award costs, including attorney's fees, to an injured employee " 'if (1) the insurer has appealed a decision to the full Commission or to any court, and (2) on appeal, the Commission or court has ordered the insurer to make, or continue making, payments of benefits to the employee.' " *Brown v. Public Works Comm.*, 122 N.C. App. 473, 477, 470 S.E.2d 352, 354 (1996) (quoting *Estes v. N.C. State University*, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994)). In the case before

us, defendants appealed the deputy commissioner's decision that temporary total disability compensation be paid to plaintiff. On appeal, the Commission affirmed the award of temporary total disability compensation. Defendants now appeal to this Court the Commission's decision, and we too affirm the decision that defendants reinstate plaintiff's disability compensation. The requirements of N.C. Gen. Stat. § 97-88 are therefore satisfied, and we grant plaintiff's request for expenses incurred in this appeal in our discretion. *See Flores v. Stacy Penny Masonry Co.*, 134 N.C. App. 452, 459, 518 S.E.2d 200, 205 (1999); *Brown*, 122 N.C. App. at 477, 470 S.E.2d at 354. Accordingly, this matter is remanded to the Commission with instruction that the Commission determine the amount due plaintiff for the expenses she incurred as a result of the appeal to this Court, including reasonable attorney's fees.

For the foregoing reasons, the opinion and award of the Commission is affirmed and this matter remanded for a determination of the appropriate amount of costs to be taxed to defendants.

Affirmed; remanded for costs determination.

Judge TIMMONS-GOODSON concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge dissenting.

The majority affirms the Commission's Opinion and Award by attempting to distinguish this case from our Supreme Court's decision in *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 599 S.E.2d 508 (2004). *Johnson* is directly on point and controlling precedent. The Commission must make relevant and specific findings of fact, which it failed to do in this case. I vote to reverse and remand the Commission's opinion and award which held that plaintiff: (1) complied with the vocational services provided by the defendants; and (2) did not constructively refuse to accept suitable employment. I respectfully dissent.

I. *Johnson v. Southern Tire Sales & Service*

In *Johnson*, our Supreme Court outlined the appropriate legal standard to be applied to determine whether a plaintiff constructively refused suitable employment. "An employer need not show that the employee was specifically offered a job by some other employer in

order to prove that the employee was capable of obtaining suitable employment." *Johnson*, 358 N.C. at 709, 599 S.E.2d at 514 (citing *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201 (4th Cir. 1984)). "Instead, the crucial question is whether the employee can obtain a job." *Johnson*, 358 N.C. at 709, 599 S.E.2d at 514 (citing *Bridges v. Linn-Corriher Corp.*, 90 N.C. App. 397, 400-01, 368 S.E.2d 388, 390-91, *disc. rev. denied*, 323 N.C. 171, 373 S.E.2d 104 (1988)).

N.C. Gen. Stat. § 97-32 (2003) provides that, "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." "[I]f an employer makes a showing that the employee refused a suitable job, the employee may respond by 'producing evidence that either contests the availability of other jobs or his suitability for those jobs, or establishes that he has unsuccessfully sought the employment opportunities located by his employer.' " *Johnson*, 358 N.C. at 709, 599 S.E.2d at 514 (quoting *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 74, 441 S.E.2d 145, 149 (1994) (citation omitted)).

In *Johnson*, the defendants presented evidence to show the plaintiff constructively refused employment. 358 N.C. at 709-10, 599 S.E.2d at 514. "As a result [of this evidence], relevant findings by the Commission were required." *Id.* at 710, 599 S.E.2d at 514. The *Johnson* Court noted the Commission made two factual findings. First, "in no manner were plaintiff's actions regarding these job leads inappropriate and he did not constructively refuse suitable employment." *Id.* Second, the Commission found that, "because no job was ever offered to plaintiff, it cannot be found that he unjustifiably refused suitable employment." *Id.*

Our Supreme Court concluded the first finding was "not supported by any evidence cited in the . . . opinion and award . . . . [It] should have contained specific findings as to what jobs plaintiff is capable of performing and whether jobs are reasonably available for which plaintiff would have been hired had he *diligently sought* them." *Id.* (emphasis supplied). The Court determined the second finding was "legally inadequate," as it completely negated the doctrine of constructive refusal. *Id.* at 710, 599 S.E.2d at 515.

Due to the Commission's insufficient and "legally inadequate" findings, our Supreme Court reversed and remanded the matter for more specific factual findings. *Id.* at 711, 599 S.E.2d at 515.

II. Fully Comply and Constructive Refusal

Defendants argue that plaintiff did not "fully comply" with her employer's attempts to find her suitable employment following her injury in January 1997 and constructively refused suitable employment. They introduced the testimony of Ms. O'Kane and Dr. Carlton's deposition as evidence.

Ms. O'Kane wrote in her vocational reports that plaintiff's "motivation to return to work is questionable because of how she presents herself to the employer" and noted plaintiff always focused on activities she was incapable of performing. Her lack of motivation was apparent during the two interviews Ms. O'Kane set up and attended with plaintiff. First, plaintiff interviewed at Cracker Barrel in October 2000. She "interjected several times what duties she could not perform while the manager reviewed the job description." Plaintiff presented a note to the manager detailing purported work restrictions from a doctor who was not authorized by the Commission to act as her treating physician. Afterwards, the interviewing manager confided in Ms. O'Kane that plaintiff seemed "defensive" and "he wasn't sure whether [plaintiff] wanted to work or not," even though Cracker Barrel was willing to accommodate its employees' physical limitations. Ms. O'Kane testified that "there was a little bit of tension" and plaintiff "could have presented herself a little more favorably to the manager."

Second, plaintiff interviewed with the Statesville Auto Auction in November 2000. The job entailed plaintiff reading vehicle identification numbers ("VIN") off of motor vehicles, compare them to VIN listed on a sheet, and writing reports concerning vehicular damage. Plaintiff complained that she could not read the VIN on the sheet and that her hand would swell after writing. The interviewer offered to write reports for her, suggested she come back with some reading glasses, and expressed a desire to employ her. Again, Ms. O'Kane testified that plaintiff could have presented herself in a better manner. Ms. O'Kane wrote in her 14 November 2000 report after the interview that plaintiff "often focuses on what she cannot do versus what she can do, and expresses this to the employer." She later testified that "it just added some issues . . . to possibly meeting with another employer in the future . . . ." Both the jobs available at Cracker Barrel and the Statesville Auto Auction fit the work restrictions set out by plaintiff's treating physician at the time.

Dr. Carlton testified to plaintiff's lack of motivation to return to work in his deposition. He noted plaintiff lacked economic motivation to return to work as shown by her application for social security disability payments and her continued receipt of defendants' payments without working. Dr. Carlton indicated he offered constant encouragement for plaintiff to find suitable employment. At the time plaintiff interviewed with Statesville Auto Auction, she had no physical restrictions on her employment. Yet, she objected to performing *any* physical activity and failed to cite any restriction from her injury that would have prevented her from taking the job.

Finally, Dr. Carlton testified to other activities plaintiff was capable of and was actually performing as evidence of her capacity to work, such as light housework, driving, and babysitting and caring for her grandchildren. As in *Johnson*, the Commission failed to make any relevant findings of fact on defendants' competent and uncontradicted evidence.

Several additional factors from the record are compelling. First, plaintiff was injured on 27 January 1997. No evidence shows that she has worked at gainful employment since her injury. Second, the record refers to just two interviews plaintiff attended over the course of almost eight years. Third, plaintiff admitted, "I just did whatever [Ms. O'Kane] was telling me to do." The record is devoid of any indication that plaintiff was proactive in obtaining employment. Fourth, competent and uncontested testimony proved plaintiff is capable of physical activity beyond any limitations imposed by her injury. Fifth, the record fails to show that plaintiff contacted Dr. Carlton to inquire why he was delayed in responding to the Statesville Auto Auction job. Sixth, a Deputy Commissioner suspended compensation payments to plaintiff for failing to fully comply with vocational rehabilitation services provided by defendants after finding plaintiff "failed to present herself in a manner befitting a person genuinely seeking employment."

These factors show that plaintiff has not appropriately, actively, or "diligently sought" suitable employment and has made no "reasonable effort to return to work," as is required by law. *Johnson*, 358 N.C. at 708-09, 599 S.E.2d at 514 (the applicable standard in reviewing the employee's efforts is whether she "diligently sought" employment) (citations omitted); *Effingham v. Kroger Co.*, 149 N.C. App. 105, 114-15, 561 S.E.2d 287, 294 (2002) (A presumption exists that an employee will eventually recover and go back to work and they must make "reasonable efforts to go back to work."). Doing "whatever [Ms.

O'Kane] was telling me to do" is insufficient to: (1) overcome defendants' evidence of plaintiff's refusal to work; (2) overcome the presumption that plaintiff is capable of performing work; and (3) show that she "diligently sought" to return to work. The Commission's opinion and award and the majority's opinion places the entire burden to procure a job for plaintiff on defendants while allowing plaintiff every opportunity to sabotage defendants' efforts. Plaintiff is allowed to be recalcitrant by sitting idly by and not make *any* effort to secure, much less "diligently seek," employment.

These observations, combined with defendants' uncontradicted proffered evidence, show: (1) suitable employment was available for plaintiff; and (2) she constructively refused and sabotaged efforts to procure suitable employment. *See Johnson*, 358 N.C. at 709-10, 599 S.E.2d at 514.

III. Commission's Findings

The Commission made three findings of fact regarding whether plaintiff fully complied with defendants' search for suitable employment.

> 13. The greater weight of the evidence of record shows that from December 20, 2001 to March 29, 2001 [sic], plaintiff was cooperative with the vocational case manager, Ms. O'Kane. Plaintiff did whatever Ms. O'Kane asked her to do and met with Ms. O'Kane on a regular basis.
>
> 14. Plaintiff did not *intentionally* sabotage vocational efforts regarding the security job available with Statesville Auto Auction.
>
> 15. The Full Commission finds by the greater weight of the credible evidence that plaintiff has complied with vocational rehabilitation as ordered by Deputy Commissioner Dollar on October 25, 2000.

(Emphasis supplied).

As in *Johnson*, the Commission made no specific findings "as to what jobs plaintiff is capable of performing and whether jobs are reasonably available for which plaintiff would have been hired had [she] diligently sought them." 358 N.C. at 710, 599 S.E.2d at 514. The Commission's findings are not supported by any competent evidence. *See id.* at 710-11, 599 S.E.2d at 515; *see* also *Dolbow v. Holland Industrial*, 64 N.C. App. 695, 696, 308 S.E.2d 335, 336 (1983), *disc.*

rev. denied, 310 N.C. 308, 312 S.E.2d 651 (1984) (citation omitted) (review of the Commission's order is two-fold: "(1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether . . . the findings of fact of the Commission justify its legal conclusions and decisions.")

The Commission found that: (1) the Cracker Barrel job was not suitable for plaintiff pursuant to Dr. Carlton's restrictions (despite such restrictions not existing at the time of her interview); and (2) plaintiff was not responsible for losing the job opportunity at Statesville Auto Auction. However, as our Supreme Court explained in response to similar findings in *Johnson*, "these findings alone are insufficient to support the Commission's conclusions of law and do not cure the error resulting from the lack of findings concerning the suitability of alternative employment." *Id.* at 710, 599 S.E.2d at 515.

IV. Conclusion

Johnson v. Southern Tire Sales & Service is controlling precedent at bar. I would reverse and remand the case to the Commission with instructions to make further and more specific findings of fact. In light of my view that this case must be remanded, it is premature to determine whether to award expenses to plaintiff. I respectfully dissent.

NEILL GRADING & CONSTRUCTION COMPANY, INC., PLAINTIFF v. DAVID B. LINGAFELT AND NEWTON CONOVER COMMUNICATIONS, INC., DEFENDANTS

No. COA04-108

(Filed 18 January 2005)

Appeal and Error; Libel and Slander— appealability—interlocutory order—denial of summary judgment—public concern—private individual

Defendants' appeal from the trial court's denial of their motion for summary judgment and motion for partial summary judgment is dismissed as an appeal from an interlocutory order in a libel action where the particular facts evoke the question of whether defendants defamed plaintiff construction company when issuing a statement injurious to plaintiff's reputation on a matter of public concern regarding sinkholes in a parking lot

resulting from a downpour, because no substantial right was affected where: (1) although determining the cause of the sinkholes was a matter of public concern, North Carolina's standard of fault for speech regarding a matter of public concern is negligence when plaintiff is a private individual; (2) the trial court was correct in leaving for the jury the factual question of whether defendants were negligent in their investigation of who did the site work at the pertinent parking lot before issuing the injurious statements; (3) while First Amendment protections supplant a state's common law where the content is a matter of public concern, the dissemination of information regarding a private individual is not of a kind benefitted by the uninhibited, robust, and wide-open speech promoted by the actual malice standard of fault for public officials or public figures; (4) the negligence standard of fault does provide its own cooling and deliberate effect on the kind of speech at issue in this case; and (5) finding a substantial right where it would not further any First Amendment protection would unnecessarily weigh against North Carolina's constitutional mandate that its courts of justice protect the otherwise good names of its private citizens.

Appeal by defendants from judgment entered 17 November 2003 by Judge Robert C. Ervin in Catawba County Superior Court. Heard in the Court of Appeals 19 October 2004.

Patrick, Harper & Dixon, L.L.P., by Stephen M. Thomas and Michael J. Barnett, for plaintiff appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mark J. Prak, Mack Sperling and Charles E. Coble, for defendant appellants.

McCULLOUGH, Judge.

This is an appeal from the trial court's denial of Mr. David Lingafelt's ("Mr. Lingafelt") and Newton Conover Communications, Inc.'s ("NCC") (collectively "defendants") motion for summary judgment and motion for partial summary judgment in a libel action brought by Neill Grading & Construction Company, Inc. ("plaintiff").

The record sets forth the following undisputed facts: Plaintiff is a North Carolina corporation involved in the construction business, particularly in grading and site preparation, with its principal place of business in Catawba County, North Carolina. The company was incor-

porated sometime in the 1960s. Plaintiff is a well-known corporation in the area, and does "quite a lot of site preparation work in and around Catawba County."

Defendant Mr. Lingafelt is president of defendant NCC, a North Carolina Corporation that holds licenses to two radio stations, WIRC and WNNC, operating in Western North Carolina. Mr. Lingafelt and his wife are the sole shareholders of NCC. WNNC is broadcast daily from 5:00 a.m. to midnight. Mr. Lingafelt is general manager of WNNC; he acts as the station engineer, manager, and on-the-air morning personality. His on-the-air hours are typically Monday through Friday, from 5:00 a.m. to 9:00 a.m.

Buffalo's Restaurant ("Buffalo's") is located on Highway 70 in Hickory. Approximately 30 years ago a drainage pipe was laid beside a creek bed on the property where Buffalo's now sits. The area around the pipe filled in with sediment over the years. Before the property was sold to the current owners, a prior owner solicited a bid from plaintiff to remove and replace the pipe. Plaintiff's bid was approximately $300,000 to $400,000 to remove all the earth to gain access to the original pipe and replace it. The work was never contracted for.

On the afternoon of Saturday, 17 August 2002, approximately four to six inches of rain fell in Hickory in a period of some 90 minutes. Over the area of the underlying drainage pipe, two large sinkholes ("the sinkholes") in Buffalo's parking lot resulted from the downpour. The sinkholes were subject to rather substantial media coverage.

Mr. Lingafelt believed, and plaintiff asserted by way of deposition, "that there was a high probability that [plaintiff] would have been involved" in the site preparation where the sinkholes occurred. Mr. Lingafelt testified that he had seen plaintiff's signs on or very near Buffalo's property. He believed he had seen these signs in the late 1990's or early 2000's when a good deal of construction was going up in that area. Thereafter, Mr. Lingafelt asked his production manager Mr. Carl Campbell ("Mr. Campbell"), who also worked for the county as a 911 operator, to look into who did the site preparation at Buffalo's. By way of his deposition, Mr. Campbell testified that such a request was "very, very rare," and that Mr. Campbell "[didn't] know exactly if [Mr. Lingafelt] thought maybe that [Mr.Campbell] was going to go to the permit office and try to find out or something like that." Mr. Campbell asked a trainee at the communications center, known here only as Richie, to identify who did the site preparation work at

Buffalo's. Richie stated directly that it was plaintiff. Mr. Campbell testified that he knew of no basis for Richie's information, and that the trainee no longer works at the communications center. In "passing conversation," Mr. Campbell spoke with Mr. Mike Isenhour (Mr. Isenhour), another trainee at the communications center. Mr. Isenhour, less definitive than Richie, said he "believed" plaintiff had done the work at Buffalo's. Reporting the results of his investigation to Mr. Lingafelt, Mr. Campbell mentioned that he had heard in "casual conversation" from two people that plaintiff had done the site work at Buffalo's.

During "Catawba Valley in the Morning," defendants' 6:00 a.m. morning newscast on 21 August 2002, Mr. Lingafelt made a number of statements concerning the sinkholes and plaintiff. The substance of these statements was submitted to the court by way of affidavit of Ms. Robbie Neill, the mother of plaintiff's owner and president Mr. Edward Neill. She attested:

> I heard Mr. Lingafelt say the following, which if it is not set forth verbatim is very, very close to the actual words he spoke: (1) I have conducted an investigation about who did the site preparation at Buffalo's Restaurant where the well-publicized sink holes appeared last Saturday; (2) that Neill Grading Company did the site preparation there; (3) that Neill Grading does quite a lot of site preparation in and around Catawba County and frequently has to go back to sites to make repairs to satisfy the customer; and (4) that the drain site at Buffalo's Restaurant was a gully and they (Neill Grading) just "covered it over instead of removing it and fixing it right" and then the paved parking lot caved in.

On the same day these statements were made by Mr. Lingafelt, plaintiff demanded that defendants, pursuant to N.C. Gen. Stat. §§ 99-1 and 99-2, broadcast a retraction. Plaintiff asked to be notified of the dates and times when such a retraction was to be broadcast so that it could be monitored. No such notice was given, and defendants contended no tape or record containing the contents of the retraction existed.

During discovery, plaintiff produced a videotape containing the retraction. Defendants stated in interrogatories that the retraction was broadcast twice on 22 August 2002 via WNNC and at approximately the same times as the comments were made the preceding day. The substance of this retraction was as follows:

> Now I'm going to say that and they're not always, I said yesterday morning that reportedly, according to our sources, that Neill Grading & Construction Company [plaintiff] had been involved in site preparation there. And they are denying that and I stand corrected. So if indeed they have never done any work in that part of the world, then obviously they are not involved at all in that situation at Buffalo Restaurant's parking lot. Some of the other things that were said were my own investigation, my own experiences, etc., etc., and I certainly stand by those 100%.
>
> So, but anyway, it is true, according, actually they sent out a press release on this—did you get it? I'll give you a copy of it—that said that they had never been involved in any grading or pipe installation work for either the past or present owners at the site of the two large sinkholes in Buffalo's Restaurant's parking lot on Highway 70. That's according to their President, that's it. And anyway, so my sources apparently were incorrect and, as I said, that was reportedly what they have done, passed on to me. So, we won't use those sources anymore I guess.

Defendants and plaintiff had a preexisting relationship before the events of the case at bar. In 1999, Mr. Lingafelt had been bothered by an incident that occurred on his property where plaintiff had inadvertently removed trees from Mr. Lingafelt's property "after some documents had been signed that said that wouldn't happen[.]" This incident started Mr. Lingafelt to question other work that plaintiff was performing for cities, municipalities, and school boards. He found that the people involved were not always satisfied with plaintiff's work. Defendants' newsman, Mr. Al Mainess ("Mr. Mainess"), was alleged to have attended a Hickory School Board meeting where problems with plaintiff's work were discussed. By letter dated 26 July 2001, plaintiff stated the following:

> Mr. Al Maness [sic] made disparaging comments concerning the manner in which [plaintiff] conducts its business. Specifically, you suggested that [plaintiff] caused the fire at Cranford Woodcarving, that they 'mess-up' their projects and then cover-up their mistakes, that they perform projects without permits, and that "there is some pretty bad stuff coming out on them."

The letter maintained that these statements were "slander per se." In his deposition, Mr. Mainess claimed he did not remember the circumstances that provoked this letter or that he made any such allegations against plaintiff.

Plaintiff filed its suit against defendants on 12 September 2002 claiming defendants' on-the-air statements of 21 August 2002 constituted "malicious, willful and wanton defamation," and sought actual damages and punitive damages. After discovery, which included depositions taken of Mr. Lingafelt, Mr. Mainess, Mr. Campbell, and Mr. Neill, as well as various interrogatories, defendants filed their motion for summary judgment on 20 October 2003. Defendants claimed there was no genuine issue of material fact that defendants "act[ed] with the requisite malice which Plaintiff must prove by clear and convincing evidence; and furthermore because Plaintiff cannot establish that it suffered any actual damages whatsoever as a result of the allegedly defamatory statements referred to in the Complaint." In the alternative, defendants moved for partial summary judgment on the issue of compensatory and punitive damages, claiming that no factual basis had been alleged upon which compensatory damages could be found, and that punitive damages are barred as a matter of law where defendants complied with N.C. Gen. Stat. § 99-2 (2003). In the trial court's complete denial of defendants' motion, the court made no reference to the degree of fault, actual malice or otherwise, when finding that genuine issues of material fact existed as to the defamation claim, and the actual and punitive damages arising thereunder.

In their appeal, those assignments of error preserved in defendants' brief allege that summary judgment should have been rendered in their favor as a matter of law. They contend no issue of material fact exists to sustain plaintiff's claims of defamation, actual damages, and/or punitive damages.

Motion to Dismiss this Appeal as Interlocutory

I. Standard of Review

As a threshold matter, the posture of this case is interlocutory in nature, and plaintiff has moved we dismiss this appeal as being presently unfit for our review.

Generally, a denial of summary judgment, because it does not dispose of the case, "is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). Notwithstanding this rule, there are two instances in which a party may petition for appellate review of an otherwise interlocutory order. One type of order worthy of judicial review, as defendants allege in the case at bar, is where delaying an

appeal would prejudice a petitioner's "substantial right." *Liggett*, 113 N.C. App. at 23-24, 437 S.E.2d at 677. In North Carolina, a two-part test has developed for the determination of whether a substantial right has been prejudiced: the "right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). As raised in their answer, defendants contend plaintiff's defamation suit implicates the First Amendment guarantees of the United State's Constitution, falling outside the rubric of North Carolina's general common law of defamation, and therefore affects a substantial right.

II. United States Supreme Court First Amendment/Libel Jurisprudence

Before addressing defendants' substantial right contention, it is necessary to briefly review when potentially *libelous per se* speech, as alleged in this case, is elevated from a state's common law to having at least some guarantees of protection under the First Amendment of the Constitution. Generally, this degree of First Amendment protection is governed by two factors: first, the individual capacity of the plaintiff; and, second, the content of the speech. In a majority opinion by the United States Supreme Court, Justice O'Connor summarized how these two factors interplay:

> One can discern . . . two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure . . . the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure . . . the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 774, 89 L. Ed. 2d 783, 791-92 (1986). Justice O'Connor's summary was rooted in three seminal Supreme Court opinions. In *New York Times Co. v. Sullivan*, the Court held that where the alleged libelous speech involved a public official, false statements regarding critiques of their official conduct must be shown to have been made with "actual malice." 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 726 (1964). Later, in *Gertz v. Welch* the Court held that

> so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a *private individual*.

418 U.S. 323, 347, 41 L. Ed. 2d 789, 809 (1974) (emphasis added). Though neither *New York Times* nor *Gertz* specifically addressed the content of the speech at issue, focusing instead on the status of the plaintiffs and the defendants, it was later determined by the Court that at the heart of those decisions was that the content of the speech was "of public concern." *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 757-61, 86 L. Ed. 2d 593, 601-04 (1985). The U.S. Supreme Court went on to hold that where the plaintiff is a private figure, and the speech at issue is of private concern, a state court is free to apply its governing common law without implicating First Amendment concerns. *Id.* at 763, 86 L. Ed. 2d at 605; *see also Mutafis v. Erie Ins. Exch.*, 775 F.2d 593, 595 (4th Cir. 1985).

Therefore, after *Dun & Bradstreet*, *Gertz* sets the framework for First Amendment jurisprudence concerning speech that is of "public concern," but is injurious to a "private individual."

III. *Priest v. Sobeck*

In the case at bar, the basis of defendants' argument alleging a substantial right rests in our Supreme Court's decision in *Priest v. Sobeck*, 357 N.C. 159, 579 S.E.2d 250 (2003) (adopting dissent at 153 N.C. App. 662, 670-71, 571 S.E.2d 75, 80-81 (2002) (Greene, J., dissenting). In *Priest*, the North Carolina Supreme Court adopted a dissenting opinion of this Court which determined that a substantial right was affected where, in applying the "actual malice" standard of fault of *New York Times v. Sullivan*, the trial court allowed a libel *per se* claim to survive summary judgment. *Priest*, 153 N.C. App. at 670-71, 571 S.E.2d at 80-81.

The facts of *Priest* involved statements made in a worker's union newsletter concerning complaints regarding whether union members could be forced to hire and work with non-union members. In evoking First Amendment guarantees as the basis for finding a substantial right, the dissent cited *New York Times v. Sullivan* as the standard adopted for libel suits arising under labor disputes. *See Linn v. United Plant Guard Workers*, 383 U.S. 53, 15 L. Ed. 2d 582 (1966). The dissent determined that if the "actual malice" standard was misapplied by the trial court, it could have a chilling effect on rights of free speech and thus affected a substantial right worthy of immediate appellate review. *Priest*, 153 N.C. App. at 670-71, 571 S.E.2d at 80-81. The dissent based its determination on *Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 711, 719, 504 S.E.2d 802, 807 (1998) (where we reviewed a preliminary gag order restraining information of public concern from being relayed to the press by parties or their attorney, stating that it was a form of "prior restraint" in violation of the First Amendment prejudicing a substantial right.) The Court in *Sherrill* rested its substantial right analysis on *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 15, 431 S.E.2d 828, 834, *appeal dismissed, disc. review denied*, 335 N.C. 175, 436 S.E.2d 379 (1993), *and cert. denied*, 512 U.S. 1253, 129 L. Ed. 2d 894 (1994) (where the Court found a substantial right prejudiced by the trial court's order issuing a preliminary injunction barring pro-life activists from picketing in front of a doctor's home). These cases all found a substantial right where the full breadth, or nearly full breadth ("actual malice"), of First Amendment protections of speech were implicated.

IV. Defendants' Speech Issue of Public Concern

Pursuant to the rationale of our Supreme Court's adoption of the dissent in *Priest*, we must now determine if defendants' speech at issue falls within some degree of First Amendment safeguards.

Defendants have not asserted in their brief, nor do we find as a matter of law, that plaintiff is a "public official" or "public figure" for First Amendment purposes. *New York Times*, 376 U.S. at 272, 11 L. Ed. 2d 686, 702 (public officials); *Gertz*, 418 U.S. at 345, 41 L. Ed. 2d at 808 (identifying types of public figures). Therefore, the case at bar necessarily falls out of the *Priest* and *New York Times v. Sullivan* paradigm. The question then becomes whether the First Amendment is implicated by Mr. Lingafelt's statements of 21 August 2002 because the content of those statements are a matter "public concern" where the First Amendment requires some degree of fault. *Gertz*, 418 U.S. at 347, 41 L. Ed. 2d at 809. If they are not, then North

Carolina's common law standards of libel govern plaintiff's claims without regard to the First Amendment, and this appeal is interlocutory. *Dun & Bradstreet*, 472 U.S. at 763, 86 L. Ed. 2d at 605; *See Renwick v. News and Observer*, 310 N.C. 312, 316, 312 S.E.2d 405, 408 (1984) (stating the common law presumptions in North Carolina for a claim of libel *per se*). If these statements are a matter of "public concern," then we must determine the level of First Amendment protection North Carolina affords such statements, and, when applying that degree of protection to defendants' speech, whether a substantial right is affected by the trial court's denial of summary judgment. North Carolina has yet to clearly set the scope for what is a matter of "public concern" in the context of protected speech in libel actions, and there is little guidance on point in other jurisdictions and federal case law. In *Dun & Bradstreet*, the Supreme Court provided some guidance for this determination: "In a related context, we have held that " '[whether] . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record.' " *Dun & Bradstreet*, 472 U.S. at 760-61, 86 L. Ed. 2d at 604 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48, 75 L. Ed. 2d 708, 720 (1983)). A similar examination of the content and surrounding circumstances of speech was applied by the North Carolina Supreme Court for determining whether a public employee's statements regarded a "matter of public concern" to warrant First Amendment protection:

> [O]nly speech on a matter "of public concern" is constitutionally protected. To determine whether speech fits in this category, the Court examines the content, form, and context of the public employee's speech.

Corum v. University of North Carolina, 330 N.C. 761, 775-76, 413 S.E.2d 276, 285-86 (citations omitted), *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992).

Defendants' four alleged libelous statements, set out in full above, were made four days after the sinkholes appeared at Buffalo's due to a heavy downpour. As attested to in plaintiff's interrogatories, the sinkholes were discussed throughout the community, nationally, and even internationally. There is evidence that CNN covered the issue over its ticker tape running at the bottom of the television screen stating, "After four months, Corvette pulled from sinkhole in Hickory, North Carolina." Additionally, there is evidence the story was covered by Fox morning news, "Shepard Smith's Across America," and seen on television in Germany. The record reveals that,

more than merely being newsworthy, the sinkholes were a matter of public study: two days after they developed, the sinkholes were discussed at the Western Piedmont Council of Government which was attended by a number of influential people, including members of North Carolina's Department of Transportation; North Carolina State University and University of North Carolina at Charlotte began teaching on the sinkhole subject; and that the Hickory Visitors Bureau received calls from as far away as Michigan asking how to find the sinkholes. Based on this record and in light of the clear safety ramifications the sinkholes posed to the community of Hickory, we find that determining the *cause* of the sinkholes was a matter of "public concern"—whether by insufficient site preparation by a contractor, regardless of which contractor, or by some greater geological force affecting the community at large.

As we have concluded that defendants' statements regarding the sinkholes were matters of public concern warranting some First Amendment Protection, we must next turn to the question of what degree of protection North Carolina provides such speech where the plaintiff is a "private individual."

V. North Carolina's *Gertz* Standard of Fault

Gertz and its progeny left for the individual states to determine what level of First Amendment protection "public concern" speech would be given where the plaintiff is a private individual. This was "so long as [states] do not impose liability without fault[.]" *Gertz*, 418 U.S. at 347, 41 L. Ed. 2d at 809.

North Carolina case law has not squarely set the standard of fault pursuant to *Gertz*. This issue has been presented to our Court in at least two prior cases, but it was not necessary to determine the *Gertz* standard in either because in both cases the plaintiff failed to establish any degree of fault, be it negligence or "actual malice." *McKinney v. Avery Journal, Inc.*, 99 N.C. App. 529, 393 S.E.2d 295, 297 (plaintiff "failed to forecast evidence which would meet even the lesser requirement that defendants were at fault or negligent . . ." and defendant was granted summary judgment), *disc. review denied*, 327 N.C. 636, 399 S.E.2d 123 (1990); *Walters v. Sanford Herald*, 31 N.C. App. 233, 228 S.E.2d 766, 767 (1976) (plaintiff's case was dismissed where her complaint failed to allege false publications were due to defendant's negligence or with defendant's knowledge of falsity or with reckless disregard.). However, in a diversity case, the federal Eastern District Court of North Carolina reading *McKinney* and

Walker found that "[i]n North Carolina, the applicable standard of liability is negligence." *English Boiler & Tube, Inc. v. W.C. Rouse & Son, Inc.*, 1997 U.S. Dist. LEXIS 15941 (*38-*43) (E.D.N.C. 1997), *aff'd without opinion*, 172 F.3d 862 (4th Cir. 1999).

Of premier and fundamental interest to the State of North Carolina is protecting the reputations of its citizens. Courts exist so that every person may have remedy by due course of law for any "injury done him in his lands, goods, *person, or reputation*[.]" N.C. Const., art. I, § 18 (emphasis added). The constitution also demands that freedom of the press not be restrained, "but every person shall be held responsible for the abuse" of the same. N.C. Const., art. I, § 14. In balancing these constitutional mandates, we now hold that North Carolina's standard of fault for speech regarding a matter of public concern, where the plaintiff is a private individual, is negligence. Such a standard strikes the sensitive balance between First Amendment tension regarding speech of "public concern," and maintaining the reputation and livelihoods of private individuals who are somehow harmed by the dissemination of this information.

VI. Substantial Right

Finally, we must determine whether the degree of constitutional protection over defendants' speech in this case affects a substantial right. In doing so, we examine whether misapplication of the "negligence" standard of fault for a defendant's speech regarding a private individual over a matter of public concern would have a chilling effect on defendant's rights to continue to disseminate speech of like content. We do not think that it would.

Our Supreme Court has stated: "[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Veazey v. Durham*, 231 N.C. 357, 363-64, 57 S.E.2d 377, 382 (1950). Thus, based upon the particular facts of each case and its procedural context, we extend substantial rights to warrant review of an otherwise interlocutory appeal with some restriction. *Waters v. Personnel*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978); *Blackwelder v. State Dept. of Human Resources*, 60 N.C. App. 331, 334, 299 S.E.2d 777, 780 (1983).

In this case, the particular facts evoke the question of whether defendants defamed plaintiff when issuing a statement injurious to plaintiff's reputation, the content of which was a matter of public

concern. In light of our adoption of the negligence standard of First Amendment protection of such speech, we look to general applications of this standard at summary proceedings. Summary judgment is a drastic measure, and should be approached cautiously. *Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979). "This is especially true in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case." *Id.* Therefore, we believe the trial court was correct in leaving for the jury the factual question of whether defendants were negligent in their investigation of who did the site work at Buffalo's before issuing the injurious statements.

Moreover, while *Dun & Bradstreet* makes clear that First Amendment protections supplant a state's common law where the content is a matter of public concern, we do not believe the dissemination of information regarding a "private individual" is of a kind benefitted by the "uninhibited, robust, and wide-open" speech we see promoted by the "actual malice" standard of fault for public officials or public figures. *New York Times*, 376 U.S. at 270-71, 11 L. Ed. 2d at 701. Thus, we are not concerned that a trial court's application of the negligence standard of fault, beyond the stage of summary judgment, would have a chilling effect on free speech where "the substance of the defamatory statement 'makes substantial danger to reputation apparent.' " *Gertz*, 418 U.S. 323, 348, 41 L. Ed. 2d 789, 810. The negligence standard of fault does, and we believe should, provide its own cooling and deliberative effect on the kind of speech at issue in this case. Thus, finding a substantial right where it would not further any First Amendment protection would unnecessarily weigh against North Carolina's constitutional mandate that its courts of justice protect the otherwise good names of its private citizens.

Therefore, this interlocutory appeal is

Dismissed.

Judges McGEE AND ELMORE concur.

ANTHONY MAGLIONE, M.D., PLAINTIFF v. AEGIS FAMILY HEALTH CENTERS, A NORTH CAROLINA NONPROFIT CORPORATION, DEFENDANT

No. COA03-1488

(Filed 18 January 2005)

1. Appeal and Error— preservation of issues—failure to object

Although plaintiff contends that the trial court erred in a breach of contract action by denying his request for jury instructions on the interpretation of an ambiguous contractual provision, this issue is not properly before the Court of Appeals because: (1) plaintiff did not object to or otherwise properly preserve this issue; and (2) the transcript shows plaintiff voluntarily withdrew his request of this instruction.

2. Contracts— breach of contract—instruction—implied covenant of good faith and fair dealing

The trial court erred in a doctor's breach of employment contract action by failing to submit to the jury an instruction on the implied covenant of good faith and fair dealing, because: (1) plaintiff properly submitted the request for special jury instruction under N.C.G.S. § 1A-1, Rule 51(b), and it was a correct statement of the law; (2) the evidence viewed in a light most favorable to plaintiff was sufficient to have warranted this instruction, and without such instruction, there is a likelihood the jury was misled; (3) defendant employer provided notice that a change to the calculation method would not occur until the next fiscal year in a memo suggesting that fair dealing under the contract would require at least notice of this switch, and then changed the method the very next quarter without providing notice; and (4) the evidence suggesting defendant's economic disarray provides the jury with a potential motive for defendant's acting with potential bad faith and unfair dealing.

3. Evidence— hearsay—party admissions exception—unfairly prejudicial

The trial court did not abuse its discretion in a doctor's breach of employment contract case regarding plaintiff's bonus by denying admission of the testimony of another doctor employed by defendant relating discussions that doctor had with defendant's chief executive officer and defendant's director of financial management about his bonus even though the trial court

erred by finding this testimony did not fit the hearsay exception of party admissions under N.C.G.S. § 8C-1, Rule 801(d), because the evidence was prejudicially misleading under N.C.G.S. § 8C-1, Rule 403 since the evidence could have confused the jury to find in favor of plaintiff based only on the evidence of defendant's actions and potential breach of its contract with the testifying doctor.

4. Evidence— prior performance problems—rebuttal evidence

The trial court did not abuse its discretion in a breach of employment contract case by allowing defendant to cross-examine plaintiff doctor concerning prior performance problems plaintiff had at another hospital, because: (1) the trial court is granted great deference in its determination of relevant rebuttal evidence; and (2) plaintiff was allowed to testify over defendant's objection for relevance that his previous collection rate before working at the pertinent company was 68%, and defendant properly rebutted this testimony by revealing through plaintiff's cross-examination that plaintiff experienced performance problems in his prior position including problems collecting for charges on medical tests based on insufficient medical documentation to justify the tests and incidences of having left a room while severe stress inducing tests on patients' hearts were being conducted.

5. Evidence— relevancy—reservations about hiring—opportunity to remain in employment under certain conditions

The trial court did not err in a breach of employment contract case by admitting evidence relating to defendant's reservations about hiring plaintiff doctor and that plaintiff was offered an opportunity to remain in defendant's employment under certain conditions, because: (1) the evidence of defendant's reservations is of some relevance to rebut plaintiff's offered evidence of his high collection rate at a previous hospital and his generally successful cardiology practice; and (2) the evidence of defendant's contingent employment is of some relevance to both the issues of defendant's attempt to mitigate any damages had the jury found defendant in breach, and it goes toward defendant's good faith and fair dealing for attempting to adhere to its interpretation of the employment contract terms.

Appeal by plaintiff from judgment entered 19 June 2003 by Judge Richard L. Doughton in Caldwell County Superior Court. Heard in the Court of Appeals 31 August 2004.

Wilson, Lackey & Rohr, P.C., by David S. Lackey, for plaintiff appellant.

Smith Moore L.L.P., by Julie C. Theall and Beth Mabe Gianopulos, for defendant appellee.

McCULLOUGH, Judge.

Plaintiff appeals from a judgment by the trial court entered pursuant to a jury's verdict denying his claim for breach of contract. Issues arising in this appeal are based upon the following evidence presented at trial: Plaintiff, a board certified cardiologist licensed to practice medicine in the states of North Carolina, New York, and Georgia entered into an employment contract ("the contract") with Aegis Family Health Centers ("defendant"), a North Carolina non-profit corporate organization. The contract became effective on 5 April 1999 and continued for a period of twelve (12) months. The base salary as provided in the contract was $200,000, along with a Provider Incentive Compensation Plan ("PICP") which governed bonuses awarded under the contract. The PICP was attached to and incorporated into the contract.

The PICP awarded bonuses annually based on a physician meeting six performance criteria: quality of care; patient satisfaction; cost/affordability of care; contributions to the community; contributions to the company; and provider productivity. During the 1999-2000 fiscal year, only provider productivity was being measured for purposes of the PICP. The productivity criteria required the physician to produce sufficient revenues to surpass a certain revenue "threshold." This threshold was determined on a physician-by-physician basis after considering the overhead of a physician's individual practice. If revenues surpassed this threshold, the physician then received a certain percentage, approximately 30%, of the revenue above this threshold. Defendant retained the remainder.

In determining a physician's productivity, the PICP incorporated one of two varying methods to calculate these revenues. The PICP stated:

> Timing differences in the realization of revenue, i.e. cash in the door, and the date the service was delivered to a patient, may

cause productivity numbers not to match up in exact quarters. Aegis recognizes the potential of these timing differences to affect quarterly productivity numbers. Therefore Aegis will consistently review reports and processes in order to determine a methodology that most accurately provides productivity information. Aegis will use one of two methods when determining physician/midlevel revenue:

1. Actual revenue collected on behalf of the physician/midlevel for the month, quarter, year, or

2. Gross Professional Charges multiplied by the collection rate of the practice site[.]

The first method ("actual revenue method") for determining productivity was what "cash [came] in the door" for the applicable measure of time, regardless of when the care was actually provided. The second method ("collection rate method") consisted of multiplying the physician's gross charges for each quarter by the historical collection rate for the practice where the physician worked.

Pursuant to the employment contract, plaintiff was hired by defendant to work at Thompson Medical Specialist Center ("Thompson"). At the time of plaintiff's employment, defendant had traditionally used the collection rate method for determining the quarterly revenue for the PICP. The collection rate at Thompson for the relevant time was approximately 60%. For the first two quarters of the fiscal year of 1999-2000, defendant calculated plaintiff's revenue using the collection rate method.

At the start of the third quarter, in January 2000, defendant's founder, president, and Chief Executive Officer (CEO), Dr. Edward Huntsinger ("Dr. Huntsinger"), expressed concern to plaintiff about his low collection rate because it was at about half the percentage of Thompson's historical average, or at about 25-30%. Thereafter, beginning with the third quarter of the 1 July 1999 fiscal year, defendant began measuring plaintiff's revenue, for purposes of calculating the PICP bonus, using the actual revenue method. Plaintiff was never given notice that defendant was switching to the actual revenue calculation method.

Plaintiff attributed his low collection rate to two factors. The first factor related to the 1 July 1999 fiscal year, where patients at Thompson were being charged for a number of the cardiology services greatly in excess of the prevailing market rate. The charges had

been increased without consulting the cardiologists at Thompson. The second factor related to a coding modifier used to identify and separate the professional service charges provided by the physician and the technical service charges owed to Thompson. The coding modifier was not being entered correctly and it therefore appeared to third-party providers—insurance companies, Medicare, and Medicaid—that plaintiff was overcharging patients for his professional services in addition to already assessing charges well above the market rate. Generally, third-party providers, no matter the itemized charge, will only pay out at the usual, customary, and reasonable amounts for any particular service. The result of these two factors was that plaintiff's itemized charges for a number of procedures were exceptionally high in the first two quarters of his employment. The third-party providers were paying out only reasonable, lesser amounts. This caused plaintiff's collection rate to appear much lower than it would had charges been accurately assessed.

Plaintiff brought these factors of overcharging to the attention of defendant's director of financial management, Sterling Wooten ("Mr. Wooten"). Mr. Wooten was the developer of the PICP and managed the plan during the relevant time period. In August of 1999, Mr. Wooten testified that:

> I told [plaintiff] that, well he had sent me a fax through Laura Caruso, the practice manager, and then I got in touch with him and told him that I would research those, and check them out. He was concerned about the prices being to [sic] high and effecting [sic] patients, or either have us look bad in the community, by being way out of line with our charges.

Pursuant to Mr. Wooten's research into the matter, he sent plaintiff a memo (the "cardiology fee memo") dated 22 November 1999 comparing the overcharges with the appropriate charges. This showed a great disparity in what should have been charged and what was actually being charged. In the memo, Mr. Wooten stated the following:

> This pricing issue also has an effect [sic] on your bonus calculations. Since the pricing was substantially higher than the actual collected. Ultimately it has lowered your collection rate to below 25%. This collection rate does not reflect a true picture of what your rates should be, nor does it reflect a true threshold for each of you when it is incorporated into the PICP formula. Therefore, I have gone back for the quarter July through September and "repriced" your charges . . . . This change more appropriately

> reflects your actual performance, and it allows the PICP to keep your collection rate at 60%, which is consistent with your peers at the practice.

In another memo (the "PICP bonus report memo") from Mr. Wooten to plaintiff, also dated 22 November 1999, the PICP bonus report was issued. The report included changes that had been effective 1 July 1999 which increased the maximum bonus a provider could earn for productivity from 30% to 40% above each physician's threshold, depending on how much above the threshold they earned. Also included in the PICP bonus report memo was the following language:

> We continue to modify and adjust the compensation plan to reflect the strategy changes of Aegis and the market changes in health care. We anticipate more changes in the plan next fiscal year, which may include but are not limited to: changes in scoring on the checklist, scoring for quality of care, and using actual dollars collected instead of collection percentages.

(Emphasis in original.)

Sometime in January of 2000, plaintiff negotiated a second employment contract with defendant, becoming effective 5 April 2000 at the expiration of the first contract. This employment contract provided a base salary of $300,000, and an added provision stating:

> **3.7 Coding and Documentation.** Physician will accept responsibility for the proper diagnoses and procedures which are supported with timely and accurate documentation according to standards set forth and approved by [defendant]. Physician will maintain a level of accuracy in the aforementioned documen-tation as set forth by the [defendant]. Physician acknowledges that failure to maintain these standards may impact phy-sician's base salary, bonus and continued employment. Physician further acknowledges that Medicare, Medicaid, other governmental agencies and private payors require Physician's [sic] to document properly as a prerequisite to reimbursement for patient care services.

At trial, defendant asserted that this was added due to plaintiff's difficulties in providing the required documentation for billing and collection purposes required for defendant's reimbursement. This second contract was later terminated due to the same collection difficulties, along with both plaintiff's large base salary which was

straining the financially struggling defendant and some interpersonal issues plaintiff had with a number of people.

Plaintiff filed suit on 21 March 2002 against defendant seeking to recover additional PICP bonus monies which he claimed were owed to him under the first employment contract for the fiscal year of 1 July 1999. Plaintiff's claims were for breach of contract and for defendant's violations of North Carolina's Wage and Hour Act, N.C. Gen. Stat. § 95-24, *et seq.* (2003). The case was tried by jury at the 3 June 2003 Civil Term of Superior Court in Caldwell County before the Honorable Richard L. Doughton. The jury found defendant had not breached the contract, and pursuant thereto the court entered judgment awarding plaintiff nothing.

On appeal plaintiff raises two issues concerning jury instructions plaintiff had submitted to the trial court but which were denied. Additionally, plaintiff raises four evidentiary issues where the trial court allegedly improperly admitted or denied certain offered evidence. We address these issues in turn and incorporate further relevant facts when necessary.

Jury Instructions

[1] Plaintiff contends that the court erred in denying his request for jury instructions on the following: interpretation of an ambiguous contractual provision, and on the implied covenant of good faith and fair dealing of a contract. Plaintiff did not object to or otherwise properly preserve the issue of whether the trial court erred in denying an instruction on contract ambiguity, and the transcript shows he voluntarily withdrew his request of this instruction. Therefore, pursuant to Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure, that issue is not properly before this Court to review and is hereby dismissed. N.C.R. App. P. 10(b)(2) (2004) (requiring a party to object to the omission of a jury instruction to be able to assign the omission as error). However, plaintiff did properly object to the court's denial of the requested instruction on good faith and fair dealing, and we agree that the evidence warranted such an instruction. On that basis, we grant a new trial.

I. Standard of Review

"When a party's requested jury instruction is correct and supported by the evidence, the trial court is required to give the instruction." *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 464, 553 S.E.2d 431, 441 (2001), *disc. review denied*, 356

N.C. 315, 571 S.E.2d 220 (2002). On this basis, for an appeal to prevail, plaintiffs must show "that (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002)). "The instructions must be based on evidence, which when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted." *Anderson v. Austin*, 115 N.C. App. 134, 136, 443 S.E.2d 737, 739, *disc. review denied*, 338 N.C. 514, 452 S.E.2d 806 (1994) (citations omitted). "When a party aptly tenders a written request for a specific instruction which is correct in itself and supported by evidence, the failure of the court to give the instruction, at least in substance, is error." *Faeber v. E. C. T. Corp.*, 16 N.C. App. 429, 430, 192 S.E.2d 1, 2 (1972). However, the trial court need not give the exact instruction as requested, and will not be found to be in error so long as "the substance of the requested instruction" is given. *Parker v. Barefoot*, 130 N.C. App. 18, 20, 502 S.E.2d 42, 44 (1998), *rev'd on other grounds*, 351 N.C. 40, 519 S.E.2d 315 (1999).

II. Implied Covenant of Good Faith and Fair Dealing

In addition to its express terms, a contract contains all terms that are necessarily implied "to effect the intention of the parties" and which are not in conflict with the express terms. *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973) (citations omitted.) Among these implied terms is the "basic principle of contract law that a party who enters into an enforceable contract is required to act in good faith and to make reasonable efforts to perform his obligations under the agreement." *Weyerhaeuser Co. v. Building Supply Co.*, 40 N.C. App. 743, 746, 253 S.E.2d 625, 627 (1979) (citations omitted). All parties to a contract must act upon principles of good faith and fair dealing to accomplish the purpose of an agreement, and therefore each has a duty to adhere to the presuppositions of the contract for meeting this purpose. *Id.*

III. Requested Instruction and Evidence in Support of

[2] Pursuant to N.C. Gen. Stat. § 1A-1, Rule 51(b) (2003), plaintiff submitted the following request for special jury instruction:

> The law implies an agreement by the parties to a contract to do and perform those things that according to reason and justice

> they should do in order to carry out the purpose for which the contract was made. Moreover, in every contract there exists an implied contract of good faith and fair dealing; and more specifically, under such rule, the law will imply an agreement that neither party will do anything which will destroy or injure the right of the other to receive the benefits of the agreement.

In light of *Weyerhaeuser Co.*, we find this to be a correct statement of the law.

Furthermore, we find the evidence, when viewed in a light most favorable to plaintiff, was sufficient to have warranted this instruction, and that without such instruction, there is a likelihood the jury was misled. Plaintiff's evidence of breach of the implied covenant of good faith and fair dealing was supported by the following: Throughout the PICP, defendant's bonus program is referred to as an "annual bonus program." Up until 31 December of the July 1999 fiscal year, defendant had always used the collection rate method to calculate physician's revenue for purposes of the PICP bonuses. During the first two quarters of the fiscal year beginning 1 July 1999, defendant used this method. Also in the course of the first two quarters, plaintiff brought to the attention of defendant over billing of certain cardiology procedures, as well as defendant's incorrect billing modifier that was charging patients of plaintiff for both professional and technical services, instead of merely the professional services provided by plaintiff. After defendant had looked into this over-billing matter, defendant sent plaintiff the 22 November 1999 "cardiology fee memo" explaining defendant's error in billing, and attributing plaintiff's low collection rate to this error. Plaintiff and defendant agreed to recalculate plaintiff's bonus in light of these discovered errors. In the "PICP bonus report memo," also dated 22 November 1999, defendant stated that changes to the annual PICP were anticipated in the "next fiscal year," and such changes could include switching from the collection rate method to the actual revenue method for calculating PICP bonuses. However, for the third and fourth quarters of the July 1999 fiscal year, starting in January of 2000 and just a month and a half after plaintiff was given the two memos acknowledging defendant's own billing mistakes made and the potential changes to the PICP calculations for the *next fiscal year*, defendant switched to the actual revenue method for calculating plaintiff's PICP. Defendant made the switch on the grounds that plaintiff's collection rate was approximately half that of Thompson's historical collection rate.

In January, defendant met with plaintiff to discuss potential remedies to plaintiff's low collection rate, which had remained at around 30% despite the changes defendant had made to fix their over-billing issues. There was no evidence from this meeting that plaintiff was put on notice that defendant was switching or may switch to the actual revenue method. In February of 2000, plaintiff signed another employment contract to begin at the expiration of the first contract, increasing his base salary by $100,000. There is no evidence surrounding the negotiation of this second employment contract, also containing the PICP, that defendant specified to plaintiff they had switched or may switch to the actual revenue method under the current contract or the second contract. And finally, evidence suggests that defendant was in economic disarray during the third and fourth quarters of the July 1999 fiscal year, during which time it switched to the actual revenue method.

Assuming, without opinion, that the relevant contract was unambiguous such that it is clear defendant can switch the PICP bonus calculation method on a quarterly basis and is not required to use the same method throughout a fiscal year, we believe the evidence set out above supports a claim that defendant breached their duty of good faith and fair dealing. Moreover, defendant provided notice that a change to the calculation method would not occur until the next fiscal year, a memo suggesting that fair dealing under the contract would require at least notice of this switch, and then changed the method the very next quarter without providing notice. The basis of this switch was plaintiff's low collection rate, a factor the jury could find to have been due to defendant's own billing miscalculation. Finally, the evidence suggesting defendant's economic disarray provides the jury with a potential motive for defendant's acting with potential bad faith and unfair dealing.

Therefore, we grant plaintiff a new trial in which he would be given the benefit of the breach of good faith and fair dealing instruction.

Evidentiary Issues

Plaintiff has assigned as error certain evidentiary determinations made by the trial court. We here address these briefly because they may arise at any new trial.

I. Hearsay Exception—Rule 801(d) and Rule 403 Balancing

[3] Plaintiff contends the trial court erred in denying admission of the testimony of Dr. Jay Schmidt ("Dr. Schmidt"), another doctor employed by defendant, relating discussions Dr. Schmidt had with Dr. Huntsinger and Mr. Wooten. While we find the court erred in finding this testimony did not fit the hearsay exception under which it was offered, we cannot say the court abused its discretion in denying the evidence on the alternative basis that it was prejudicially misleading.

N.C. Gen. Stat. § 8C-1, Rule 801(d) (2003) provides for the following exception to the hearsay rule:

> (d) Exception for Admissions by a Party-Opponent.—A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship[.]

N.C. Gen. Stat, § 8C-1, Rule 403 (2003) provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

At trial, offered under the hearsay exception, the court denied the testimony of Dr. Schmidt.

Dr. Schmidt was a doctor at Thompson employed under defendant's contract with the same PICP bonus program. His proffered *voir dire* testimony was the following:

> Q Dr. Schmidt, what conversation did you have with Dr. Huntsinger about your bonus?
>
> A At the time that he asked if I would work an extra month or two, uh, until the doctor that they had hired to replace me could start, I took the opportunity to check to make sure that the bonus that was due me would be paid. And because I was concerned at that time with the financial problems that [defendant] was in, and the fact that there were a number of people being laid off, and so on, I was concerned that there could be a problem with the bonus. And, he assured me sometime in early March, that there weren't gonna be any problems with the bonus being

paid out, as usual, according to the formula that had been used over the previous years.

Q Early March of what year?

A Of 2000.

Q Did you inquire of [defendant], by the end of May of 2000—had you received any bonus payment for the quarter ending in March 31 of 2000?

A No sir.

****

Q What did Mr. Wooten tell you about you[r] bonus for the quarter ending March 31 of 2000?

A Well, he said that there wasn't gonna be one because the calculation to determine how the bonus was paid was being changed. And, uh, as it turned out with the new calculations, I was [sic] supposedly was not to receive a bonus.

Q Prior to that conversation, had anyone in [defendant's] management told you that a change in the way that the bonuses were calculated were going to be made during that fiscal year?

A No sir.

We believe that both the hearsay statements of Dr. Huntsinger and Mr. Wooten fall within the hearsay exception of Rule 801(d). These were party admissions made by agents of defendant and concerning the scope of their employment as CEO and director of financial management respectively. Though the admissions were not directly concerning plaintiff's own claims, they related to the terms of the same contract provisions plaintiff was disputing, governing the same time period, and were being offered for the truth of the matter asserted against defendant for breach of these express and implied terms.

However, after the court denied the admission of this testimony under Rule 801(d), the court went on to state:

> [A]lso even if it were relevant I think it's, uh, would be so misleading under 403 it shouldn't be admitted, and that's another reason I'm not gonna allow it. In my discretion, okay?

When the court makes N.C. Gen. Stat. § 8C-1, Rule 403 finding that relevant evidence's probative value is substantially outweighed by its

unfair prejudice, we grant the court wide latitude in its discretionary determination and will reverse only for an abuse of discretion. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 463, 597 S.E.2d 674, 689 (2004) (citations omitted). We cannot say the court abused its discretion in this instance when such evidence could have confused the jury to find in favor of plaintiff based only on the evidence of defendant's actions and potential breach of their contract with Dr. Schmidt.

This assignment of error is overruled.

II. Rebuttal Evidence

[4] Plaintiff next contends the court erred in allowing defendant to cross-examine him concerning prior performance problems plaintiff had at another hospital. We do not agree.

"[T]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself." *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). When a party is allowed in the discretion of the trial court to introduce evidence of some relevance, "the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *Id.*; *see also State v. Walters*, 357 N.C. 68, 86-87, 588 S.E.2d 344, 355, *cert. denied*, — U.S. —, 157 L. Ed. 2d 320 (2003). As with an initial determination of relevant evidence, we grant the trial court great deference in its determination of relevant rebuttal evidence.

Presenting his case-in-chief, plaintiff was allowed to testify over defendant's objection for relevance, that his previous collection rate before working at Thompson was 68%. To rebut this testimony, cross-examination of plaintiff revealed that he had experienced performance problems in this prior position, including problems collecting for charges on medical tests because of insufficient medical documentation to justify the tests, and incidences of having left a room while severe stress inducing tests on patients' hearts were being conducted.

We cannot say the court erred in allowing this rebuttal evidence and this assignment of error is overruled.

III. Relevancy

[5] Lastly, plaintiff argues the court erred in its admission of evidence relating to defendant's reservations about hiring plaintiff, and

that plaintiff was offered an opportunity to remain in defendant's employment under certain conditions. Plaintiff argues this evidence was not relevant and prejudiced the jury. We do not agree.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2003). Although " 'the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.' " *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (quoting *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991)).

In the case at bar, the trial court allowed the testimony that defendant had reservations about hiring plaintiff. We cannot say the court erred in finding this to be relevant. We believe it is of some relevance to rebut plaintiff's offered evidence of his high collection rate at a previous hospital and his generally successful cardiology practice.

The trial court also allowed the testimony that defendant offered plaintiff to continue his employment "as long as he was paid on actual receipts," and "took the risk of collections." We cannot say the court erred in finding this relevant. We believe this evidence is of some relevance to both the issues of defendant's attempt to mitigate any damages had the jury found defendant in breach, and it goes towards defendant's good faith and fair dealing for attempting to adhere to its interpretation of the employment contract terms.

In conclusion, we believe the court erred in failing to submit to the jury an instruction of the implied covenant of good faith and fair dealing. In addressing the evidentiary issues raised by plaintiff, we cannot say that at any new trial the court would be in error making the same determinations as the trial court did in this appeal.

New trial.

Judges TIMMONS-GOODSON and HUNTER concur.

ESTATE OF THOMAS GRAHAM AND KAY FRANCES FOX TAYLOR, PLAINTIFFS V. LUCILLE MORRISON, JOHN HALLMAN, AND LADD MORRISON, DEFENDANTS

No. COA03-1673

(Filed 18 January 2005)

1. Powers of Attorney— conveyance by attorney-in-fact to herself—alleged services as consideration—value compared to value of property

Plaintiffs' motion for a judgment notwithstanding the verdict should have been granted in an action challenging an attorney-in-fact's conveyance of the principal's property to herself. There was no testimony indicating that the value of the services provided by the attorney-in-fact were comparable to the value of the land, and there was testimony indicating that the land was not conveyed to the attorney-in-fact as compensation for her services.

2. Powers of Attorney— conveyance of principal's property—no power of gift—transfer not payment for services

The trial court erroneously denied plaintiffs' motion for a judgment notwithstanding the verdict in an action challenging an attorney-in-fact's conveyance of the principal's home to her son. The power of attorney did not give the attorney-in-fact the power to make gifts, and there was no indication that the transfer was intended to be payment for services.

3. Powers of Attorney— sale of principal's property—funds used for principal—fiduciary duty—obtaining fair price—no evidence of value

The trial court properly denied plaintiffs' motion for judgment notwithstanding the verdict on an allegation of conversion by attorney-in-fact arising from her sale of the principal's property to her brother. The power of attorney granted her the authority to sell property for the principal's benefit, and there was testimony that she used the money to hire an attorney to represent the principal in competency proceedings. The attorney-in-fact also had a fiduciary duty to obtain a fair price (not necessarily full value) and there was no evidence of the property's fair market value. Plaintiffs' did not prove breach of fiduciary duty regarding this transaction by a preponderance of the evidence.

4. Powers of Attorney— deed of trust—beyond authority of attorney-in-fact

A deed of trust by an attorney-in-fact was remanded for further proceedings where she did not have the power to execute a deed of trust on the property.

5. Powers of Attorney— attorney-in-fact—transfer of principal's property—breach of fiduciary duty

The trial court erroneously denied plaintiffs' motion for a judgment notwithstanding the verdict on plaintiffs' claim for breach of fiduciary duty where the attorney-in-fact did not have the power to give the principal's property to herself or her son.

Appeal by plaintiffs from judgment entered 4 April 2003 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 October 2004.

Thurman, Wilson & Boutwell, P.A., by John C. Snyder, III, for plaintiff-appellants.

Lawrence U. Davidson, III for defendant-appellees.

HUNTER, Judge.

Plaintiffs, Kay Frances Fox Taylor and the Estate of Thomas Graham, present the following issues for our consideration: Whether the trial court erroneously denied their motion for judgment notwithstanding the verdict because: (I) defendant, Lucille Morrison, made gifts to herself and her son using a power of attorney for Thomas Graham that did not contain an express provision to make gifts; (II) no consideration was given for the gifts of property to Lucille and her son; (III) Lucille converted money for herself from the sale of Graham's real property to pay legal bills and executed a deed of trust for future legal bills; and (IV) Lucille breached her fiduciary duty to Graham by using a power of attorney to give gifts to herself and family members. After careful review of the record and transcripts, we conclude the trial court erroneously denied plaintiffs' motion for judgment notwithstanding the verdict.

Based upon the evidence presented during the trial of this matter, the pertinent facts indicate that Kay Frances Fox Taylor is the daughter of the late Thomas Graham. Lucille Morrison was Graham's niece, and Ladd Morrison was Lucille Morrison's son and Graham's great-nephew. Graham resided in Charlotte, North Carolina, until his death

on 7 August 2001. Lucille Morrison also lived in Charlotte. Taylor lived out of state.

On 31 May 2000, Graham made Lucille Morrison his attorney-in-fact by executing a durable and general power of attorney. Lucille indicated she signed Graham's name to the power of attorney at his request. The power of attorney was notarized and filed in the Mecklenburg County Register of Deeds on 1 June 2000. The power of attorney granted Lucille broad powers and discretion in Graham's affairs. However, the power of attorney did not contain the express authority to make gifts.

On 26 October 2000, Lucille, as attorney-in-fact for Graham, executed a deed granting a portion of Graham's property to herself as grantee. The deed was recorded on 31 October 2000. The real property consisted of 11.92 acres. Prior to execution of the deed, Graham had been negotiating with several developers to sell the property Lucille deeded to herself. Several developers had offered to purchase the property for between $400,000.00 and $700,000.00.

On 5 June 2001, Lucille, as attorney-in-fact for Graham, executed a general warranty deed to her son, Ladd Morrison. By execution of this deed, Ladd became the owner of Graham's home on Coronet Way in Charlotte. On the same date, Lucille, as attorney-in-fact, conveyed Graham's Oakview Terrace property to John Hallman, her brother, for $3,000.00. According to Lucille, this money was used to pay an attorney to defend Graham in a competency proceeding.

On 20 June 2001, Thomas Graham filed a complaint against Lucille Morrison, Ladd Morrison, and John Hallman seeking to have the deeds executed by Lucille voided as gifts outside the authority of the power of attorney. Graham also alleged conversion, breach of fiduciary duty, and neglect. He sought an accounting and asked that the durable power of attorney be voided. After Graham's death on 7 August 2001, an amended complaint was filed on 10 August 2001 substituting the Estate of Thomas Graham as a plaintiff.

On 9 November 2001, plaintiffs filed a motion for partial summary judgment and defendants filed their motion for summary judgment on 7 December 2001. On 25 February 2002, partial summary judgment was granted for plaintiffs, voiding the deeds on the basis that the power of attorney did not specifically authorize gifts. Defendants' motion for summary judgment and plaintiffs' motion for summary judgment on the claim of conversion were respectively denied.

On appeal, this Court in *Estate of Graham v. Morrison*, 156 N.C. App. 154, 576 S.E.2d 355 (2003), reversed the trial court's order voiding the deeds as gifts. We remanded this case for a factual determination of whether the deeds were gifts, or conveyances supported by valuable consideration. *Id.* at 160, 576 S.E.2d at 359. On remand, the jury determined valuable consideration supported the conveyances, that Lucille did not breach her fiduciary duty to Graham by using money of Thomas Graham for her own benefit, and that Lucille did not convert Graham's money for her own benefit. Plaintiffs appeal.

As an initial matter, we address defendants' contention that this action is barred by the doctrine of *res judicata*.

> Under the doctrine of *res judicata*, a final judgment on the merits by a court of competent jurisdiction is conclusive as to rights, questions and facts in issue. Such judgment bars all subsequent actions involving the same issues and the same parties or those in privity with them. . . . The doctrine only applies, however, when a party attempts to litigate the same cause of action after a full opportunity to do so in a prior proceeding.

Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 84, 398 S.E.2d 628, 631 (1990) (citations omitted).

Defendants argue that in our prior opinion addressing the appeal of the summary judgment orders, this Court held the deeds at issue did not convey gifts of real property and reinstated ownership to defendants. This was not our holding in *Estate of Graham*. In *Estate of Graham*, we specifically held:

> These deeds are void if the conveyances are determined to be gifts. Lucille's broad power of attorney did not expressly grant her the right to make gifts of real property on behalf of Mr. Graham.
>
> . . .
>
> Genuine issues of material fact exist whether the conveyances were gifts or were transferred for "valuable consideration" as recited in the deeds. We reverse the trial court's grant of summary judgment. The trial court did not reach these issues during the summary judgment hearing.

Estate of Graham, 156 N.C. App. at 159, 576 S.E.2d at 358-59. Thus, whether the deeds constituted gifts of real property or were conveyances supported by valuable consideration was one of the issues

to be determined by the jury at trial. Accordingly, plaintiffs' appeal is not barred by the doctrine of *res judicata*.

[1] Plaintiffs first contend the trial court should have granted its motion for judgment notwithstanding the verdict because the evidence shows Lucille Morrison made gifts using a power of attorney that did not contain an express provision to make gifts. Plaintiffs further argue that there was no consideration given for the property deeded to Lucille and Ladd Morrison. Moreover, plaintiffs argue that even if there was some consideration given, the consideration did not constitute full or valuable consideration to overcome the fact that a gift of some significant amount was made in violation of the power of attorney. Thus, plaintiffs contend the gifts to Lucille and her son were in violation of the power of attorney.

> A motion for judgment notwithstanding the verdict is essentially a renewal of an earlier motion for directed verdict. Like a motion for directed verdict, a motion for judgment notwithstanding the verdict tests the legal sufficiency of the evidence to take the case to the jury. The motion for judgment notwithstanding the verdict "shall be granted if it appears that the motion for directed verdict could properly have been granted." G.S. 1A-1, Rule 50(b). Accordingly, the test for determining the sufficiency of the evidence is the same under both motions.
>
> In considering a motion for judgment notwithstanding the verdict, all the evidence must be considered in the light most favorable to the nonmoving party. The nonmovant is given the benefit of every reasonable inference that may legitimately be drawn from the evidence and all contradictions are resolved in the nonmovant's favor. If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict and any subsequent motion for judgment notwithstanding the verdict should be denied.

Ace Chemical Corp. v. DSI Transports, Inc., 115 N.C. App. 237, 241-42, 446 S.E.2d 100, 102-03 (1994) (citations omitted); *see also* N.C. Gen. Stat. 1A-1, Rule 50(b) (2003).

This Court has already determined that the power of attorney held by Lucille Morrison, granting her broad powers over the affairs of Thomas Graham, did not give her the authority to make gifts. *Estate of Graham*, 156 N.C. App. at 157-58, 576 S.E.2d at 358-59. Therefore, this Court remanded to the trial court for a jury determi-

nation of whether the conveyances at issue were supported by valuable consideration.

What constitutes valuable consideration depends upon the context of a particular case. *See Bank v. Evans*, 296 N.C. 374, 378, 250 S.E.2d 231, 234 (1979) (indicating that in a contract dispute, mere inadequacy of price is not sufficient to set aside a contract where the parties have negotiated a bargained-for exchange and there are no allegations of any improprieties). In contrast, where a deed transferring property may have been executed to defraud a creditor, valuable consideration must be a fair and reasonable price. *See id.* In cases where fraud in the procurement of a deed is at issue, the inadequacy of the price received is a factor considered in determining whether fraud occurred. *See McPhaul v. Walters*, 167 N.C. 182, 183-84, 83 S.E. 321, 322 (1914); *Hartly v. Estis-Estis v. Hartly*, 62 N.C. 167 (1866). Although our appellate courts have examined what constitutes valuable consideration in the context of contracts and fraudulent conveyances, we have not determined what constitutes valuable consideration in circumstances where an attorney-in-fact conveys the principal's property to herself, and the attorney-in-fact contends the conveyance was supported by consideration.

Nonetheless, our Supreme Court has indicated that an attorney-in-fact has an obligation to act in the best interests of the principal. *Whitford v. Gaskill*, 345 N.C. 475, 478, 480 S.E.2d 690 692 (1997). The authority to sell and convey the principal's property " 'implies a sale for the benefit of the principal and does not authorize the agent to make a gift of the property, or to convey or transfer it without a present consideration inuring to the principal.' " *Honeycutt v. Farmers & Merchants Bank*, 126 N.C. App. 816, 818, 487 S.E.2d 166, 167 (1997) (citation omitted).

Moreover, " 'in the case of an agent with a power to manage all the principal's property it is sufficient to raise a presumption of fraud when the principal transfers property to the agent. Self dealing by the agent is prohibited.' " *Hutchins v. Dowell*, 138 N.C. App. 673, 677, 531 S.E.2d 900, 903 (2000) (citation omitted); *see also* 3 Am. Jur. 2d *Agency* § 205 (2002) (footnote omitted) (stating "[i]n a transaction between principal and agent in which an agent obtains a benefit, such as a gift, a presumption arises against its validity which the agent must overcome"). "An agent 'can neither purchase from nor sell to the principal' unless the agent, in good faith, fully discloses to the principal all material facts surrounding the transaction, and the principal

consents to the transaction." *Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 470, 500 S.E.2d 732, 736 (1998) (citation omitted), *rev'd in part on other grounds by*, 351 N.C. 27, 519 S.E.2d 308 (1999). "This general rule applies although no positive fraud or unfairness may have been practiced by the agent and although he purchases the property 'at a fair market price, or at the price set by the principal, and even though he was unable to sell to anyone else at the price fixed.' " *Real Estate Exchange & Investors v. Tongue*, 17 N.C. App. 575, 576, 194 S.E.2d 873, 874 (1973).

Thus, we hold that in situations where an attorney-in-fact conveys the principal's property to herself based upon a consideration of alleged services rendered to the principal, the valuable consideration must reflect a fair and reasonable price when compared to the fair market value of the property. *See Morehead v. Harris*, 262 N.C. 330, 338, 137 S.E.2d 174, 182 (1964) (stating "[v]aluable consideration or 'value' is a fair consideration, not necessarily up to full value, but a price paid which would not cause surprise"), and *Hodges v. Wilson*, 165 N.C. 323, 332, 81 S.E. 340, 345 (1914) (citation omitted) (indicating valuable consideration is " 'a fair consideration, not up to the full price, but a price paid which would not cause surprise or make any one exclaim, "He got the property for nothing; there must have been some fraud or contrivance about it" ' ").

Indeed, unlike the situation in which two parties enter a contract after negotiating the terms, the attorney-in-fact has the authority under the statutory durable power of attorney to convey the principal's real property without the input of the principal. Thus, our appellate courts have held the agent can not convey to himself or purchase the principal's property without full disclosure to the principal and the principal's consent. *Sara Lee Corp.*, 129 N.C. App. at 470, 500 S.E.2d at 736. Similarly, our appellate courts have held that a presumption of fraud arises when the principal transfers property to the agent. *See Hutchins*, 138 N.C. App. at 677, 531 S.E.2d at 902-03. It necessarily follows that when the agent transfers the principal's property to herself, a presumption of fraud arises. Furthermore, we have indicated that self-dealing by an agent is prohibited. *Id.* Given these restrictions upon an agent's conduct, we conclude a higher standard for what constitutes valuable consideration must be applied. Accordingly, to withstand the plaintiffs' motion for judgment notwithstanding the verdict, Lucille had to demonstrate that her services rendered to Graham were equal to a fair and reasonable price for the real property conveyed.

As explained in *Estate of Graham*, 156 N.C. App. at 159, 576 S.E.2d at 359 (citation omitted):

> Past consideration or moral obligation is not adequate consideration to support a contract. Services performed by one family member for another, within the unity of the family, are presumptively "rendered in obedience to a moral obligation and without expectation of compensation." "[T]his principle of law does not prevent a parent from compensating a child for such services, and does not render consideration for a compensating conveyance inadequate."

Id.

In the cases where the courts have upheld a conveyance based upon the past services given to the grantor, a parent had conveyed the land to a child without the child having any input regarding, or knowledge of, the conveyance. *See Walters v. Bridgers*, 251 N.C. 289, 111 S.E.2d 176 (1959) (indicating the mother told the attorney without any input from her daughter to draft a deed conveying land to three of her seven living heirs), and *Jones v. Saunders*, 254 N.C. 644, 119 S.E.2d 789 (1961) (indicating a father, unbeknownst to his daughter, had a deed drafted conveying his real property to the daughter that cared for him for over twenty years and helped pay his bills). Also, in each of these cases, the familial relationship involved was that of parent and child, and not some other type of familial relationship. Moreover, none of these cases involved a conveyance of a principal's real property by the attorney-in-fact to himself. Rather, in each of these cases, the principal conducted all of the necessary steps to convey the real property to his or her child.[1]

In this case, Lucille gave conflicting testimony regarding the facts surrounding the conveyance of real property to herself. First, she testified the property was transferred to herself to facilitate the sale of the property. Several developers had contacted Graham and offered to purchase the land for between approximately $400,000.00 and

1. In this case, Graham could have taken the necessary steps to convey the property to Lucille. At the time of the conveyance to Lucille, Graham's competence had not been questioned. Graham only needed assistance with his daily living and care because both of his legs had been amputated and he was confined to a wheelchair. Thus, Graham could have executed the deed himself or he could have devised the property to Lucille in a will. Moreover, if Lucille believed she had a contractual right to compensation, she could have brought a claim or counterclaim against Graham or his estate. Finally, Lucille could have sought authorization from the clerk of superior court for authority to make gifts of Graham's property that was not inconsistent with the terms of the power of attorney. N.C. Gen. Stat. § 32A-14.10.

$700,000.00. Lucille testified that Graham was trying to sell the property in the Spring of 2000 because he was running out of money and after growing more ill,

> he said that he didn't want to continue with it in his name and he would like to do it in my name, and Uncle Tom agreed to put it in my name, to give it to me so I could do what I was supposed to do, what he wanted me to do.

She further testified that one of the companies wanted the property in her name because they were afraid Graham would become more ill and would not be able to finish the deal. Therefore, in May 2000, Lucille Morrison became Graham's attorney-in-fact and on 26 October 2000, she executed a deed conveying the Sardis Road property to herself. She signed the deed as attorney-in-fact for Thomas Graham. Lucille testified that she executed the 26 October 2000 deed "when [they] were supposed to sell [the property] to [one of the companies]." After the deal with this company fell apart, Lucille found another buyer, entered into a purchase contract, and read the contract to Graham. However, the property was never sold.

Lucille also testified that Graham "agreed to have it put in my name because he wanted to give it to us because we had been doing everything for him, and so that is what he did. He wanted me to do it." Lucille explained that she had taken care of Graham and his late wife Linda during their illnesses. She would take Graham to dialysis and other doctors' appointments, she would make sure he was fed and she renovated his house to make it wheel-chair accessible and habitable. She further explained that she had helped Graham and his late wife with their business affairs for several years because they could not read and write. However, she also testified that she did not ask to be paid for these services, but that "[Graham] always said that he owed me and he knew that he owed me because I had really been his sole supporter at all times." According to Lucille, "[h]e would tell me this all along. How he never had a kid and how I would do more—how I had done more for him than anybody would do for a person like that. I was always there for him." Thus, Lucille essentially testified that while Graham was directing her to sell the Sardis Road property for between $400,000.00 and $700,000.00 because he was running out of money, he was also telling her he wanted her to have the property.

Although Lucille took care of Graham and his wife during their illnesses and helped handle their business affairs, unlike the situation in *Walters* and *Jones*, Graham did not execute the deed to Lucille.

Rather, Lucille utilized her power of attorney to execute the deed to herself. Given that during the time the deed was drafted, Graham was trying to sell the property, and that Lucille testified the deed was drafted to help finalize the sale of Graham's property, the testimony tends to indicate that the land was not conveyed to Lucille as compensation for her past services. Moreover, there was no testimony indicating the value of Lucille's services were comparable to the value of the real property, between $400,000.00 and $700,000.00. Accordingly, we conclude the trial court erroneously denied plaintiffs' motion for judgment notwithstanding the verdict.

[2] Plaintiff has also challenged a conveyance of Graham's home on Coronet Way in Charlotte, North Carolina, to Ladd Morrison, the son of Lucille Morrison. On 5 June 2001, Lucille executed a deed, as attorney in fact for Thomas Graham, which conveyed the property to Ladd. Lucille testified that Ladd had spent over $12,000.00 to improve the condition of the house so Graham could live in it. Ladd paid for windows, paint, supplies, a furnace, and labor. Ladd testified, however, that "[he] was just taking care of [his] family" and that he never expected to get the money back. According to Lucille, Graham told her to give Ladd the property on Coronet Way and she indicated that she was following his instructions. However, there was no indication in the testimony that the conveyance was intended to be payment for services. Thus, this deed must be set aside because this Court has already determined that the power of attorney held by Lucille over Graham's affairs did not give her the power to make gifts. *See Estate of Graham*, 156 N.C. App. at 157-59, 576 S.E.2d at 358-59. Accordingly, the trial court erroneously denied plaintiffs' motion for judgment notwithstanding the verdict.[2]

[3] Next, plaintiffs contend the trial court should have granted its motion for judgment notwithstanding the verdict on the conversion claim. "Conversion is defined as: (1) the unauthorized assumption and exercise of the right of ownership; (2) over the goods or personal property; (3) of another; (4) to the exclusion of the rights of the true owner." *Di Frega v. Pugliese*, 164 N.C. App. 499, 509, 596 S.E.2d 456, 463 (2004).

Plaintiffs contend Lucille sold property owned by Graham to her brother, John Hallman, for $3,000.00 and used the money to secure an attorney for herself. However, Lucille testified that the money was

2. Ladd could have filed a claim or counterclaim against Graham or his estate if Ladd believed he had a claim for payment of services rendered or for repayment of a loan.

used to retain an attorney to represent Graham in an incompetency proceeding. According to the testimony, on 6 June 2001, Graham was admitted to the hospital. The next day, on 7 June 2001, his daughter filed a petition to have Graham declared incompetent. Upon learning of the petition, Lucille testified she sold the property and retained an attorney to represent herself and Graham at the hearing. The power of attorney granted Lucille the power to sell Graham's real estate and to "perform all and every act or thing, whatsoever requisite or necessary to be done for [Graham's] upkeep, care, and maintenance, and for the management of any property owned by me, as fully, and to all intents and purposes as I might or could do if I were personally present and acting . . . ." The power of attorney also granted Lucille the authority to make contracts, including selling real property for adequate consideration, on Graham's behalf. As Lucille testified that she hired the attorney to represent Graham in the competency hearing, and the power of attorney granted Lucille the authority to take such actions, we conclude the trial court properly denied plaintiffs' motion for judgment notwithstanding the verdict on this particular conversion allegation.

However, as attorney-in-fact over Graham's property, Lucille had a fiduciary obligation to act in the best interests of the principal. *Whitford*, 345 N.C. at 478, 480 S.E.2d at 692. Moreover, the authority to sell and convey the principal's property, " 'implies a sale for the benefit of the principal, and does not authorize the agent to make a gift of the property, or to convey or transfer it without a present consideration inuring to the principal.' " *Honeycutt*, 126 N.C. App. at 818, 487 S.E.2d at 167 (citation omitted). Although Lucille had the authority to sell Graham's property, as Graham's fiduciary, she had an obligation to obtain a price for the property that was comparable to the property's value. As stated, valuable consideration is a fair consideration, not necessarily up to full value, but a price paid which would not cause surprise. *Morehead*, 262 N.C. at 338, 137 S.E.2d at 182. Thus, the failure to obtain valuable consideration for the property may constitute a breach of fiduciary duty. As no evidence of the property's fair market value was presented, however, plaintiffs did not prove by a preponderance of the evidence that Lucille breached her fiduciary duty in regards to this transaction. Therefore, the trial court properly denied plaintiffs' motion for judgment notwithstanding the verdict.

[4] Plaintiffs also contend Lucille executed a deed of trust on land that she deeded to herself for $250,000.00 to cover the

expenses of this action brought by Thomas Graham, initially, and his daughter. Lucille testified that she did not have any money to defend this present action. Therefore, she executed a $250,000.00 deed of trust on the property she deeded to herself on 26 October 2000. The grantee under the deed of trust was her attorney in this action. Lucille testified that the execution of the deed of trust was not done for Graham's benefit. As we have already concluded the trial court should have granted plaintiffs' motion for judgment notwithstanding the verdict on plaintiffs' claim to set aside the deed conveying the 11.92 acres to Lucille, Lucille did not have any power to execute a deed of trust on this property. Accordingly, we remand to the trial court for further proceedings to determine the proper remedy regarding the deed of trust.

[5] Finally, plaintiffs contend the trial court erroneously denied its motion for judgment notwithstanding the verdict on its breach of fiduciary duty claim.

> Under well-established principles of North Carolina agency law:
>
> "An agent is a fiduciary with respect to matters within the scope of his agency. In an agency relationship, at least in the case of an agent with a power to manage all the principal's property, it is sufficient to raise a presumption of fraud when the principal transfers property to the agent. Self dealing by the agent is prohibited."

Hutchins, 138 N.C. App. at 677, 531 S.E.2d at 902-03 (citation omitted) (indicating the relationship created by a power of attorney between the attorney-in-fact and the principal is fiduciary in nature); *see also* N.C. Gen. Stat. § 32A-8 (2003). The fiduciary relationship " 'implies that the principal has placed trust or confidence in the agent, and the agent or employee is bound to the exercise of the utmost good faith, loyalty, and honesty toward his principal or employer.' " *Sara Lee Corp.*, 129 N.C. App. at 470, 500 S.E.2d at 736 (citation omitted). Thus, "an attorney-in-fact is presumed to act in the best interests of the principal." *Whitford*, 345 N.C. at 478, 480 S.E.2d at 692.

In this case, Lucille did not have authority under the power of attorney to give Graham's property to herself or her son. Therefore, she breached the fiduciary duty owed to Graham. Accordingly, the trial court erroneously denied plaintiffs' motion for judgment notwithstanding the verdict on plaintiffs' claim for breach of fidu-

ciary duty. Therefore, we remand this cause to the trial court for a determination of damages, if any, in light of this opinion.

In sum, the trial court should have granted plaintiffs' motion for judgment notwithstanding the verdict on their claims to have the deeds to Lucille Morrison and Ladd Morrison set aside and on the breach of fiduciary duty claim. The trial court correctly denied the motion for judgment notwithstanding the verdict on the conversion claim based upon the sale of property to John Hallman. Finally, the deed of trust on the 11.92 acres must be set aside.Affirmed in part, reversed and remanded in part.

Judges WYNN and THORNBURG concur.

Judge Thornburg concurred in this opinion prior to 31 December 2004.

BELLSOUTH TELECOMMUNICATIONS, INC., PLAINTIFF v. CITY OF LAURINBURG, A NORTH CAROLINA MUNICIPAL CORPORATION, AND SCHOOL LINK, INC., A NORTH CAROLINA CORPORATION, DEFENDANTS

No. COA04-145

(Filed 18 January 2005)

Cities and Towns— public enterprises—cable television system—fiber optic network—extent of municipal authority

Summary judgment for defendants was affirmed in an action seeking a permanent injunction and declaratory judgment against defendants' operation of a fiber optics network, based on allegations that the network was beyond Laurinburg's statutory authority. North Carolina cities have the statutory authority to operate certain public enterprises, including cable television systems, and statutes are to be construed in favor of the municipality when there is an ambiguity.

Appeal by plaintiff from judgment entered 11 July 2003 by Judge B. Craig Ellis in Scotland County Superior Court. Heard in the Court of Appeals 13 October 2004.

Hunton & Williams, L.L.P., by Edward S. Finely and Christopher J. Ayers, for plaintiff appellant.

Tharrington Smith, L.L.P., by Michael Crowell, for defendant appellee City of Laurinburg; and Gordon, Horne, Hicks & Floyd, P.A., by Charles L. Hicks, Jr., for City of Laurinburg defendant appellee.

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, by Ronnie M. Mitchell and Coy E. Brewer, for School Link, Inc., defendant appellee.

McCULLOUGH, Judge.

Plaintiff appellant, BellSouth Telecommunications, Inc. ("BellSouth" or "plaintiff") filed a verified complaint against the City of Laurinburg ("Laurinburg") and School Link, Inc. ("School Link") (collectively "defendants") on 25 July 2002. School Link filed a motion for summary judgment dated 22 May 2003, and BellSouth and Laurinburg filed separate motions for summary judgment dated 23 May 2003. The trial court granted summary judgment in favor of Laurinburg and School Link on 11 July 2003.

This appeal from the trial court's order arises from the following facts and circumstances: BellSouth is a Georgia corporation licensed to do business in North Carolina, and is a public utility subject to the North Carolina's Utilities Commission ("Utilities Commission"). Pursuant to Chapter 62 of North Carolina's General Statutes and its Certificate of Public Convenience and Necessity issued by the Utilities Commission, BellSouth is authorized to "convey[] or transmit[] messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation." N.C. Gen. Stat. § 62-3(23)(a)(6) (2003). BellSouth provides Digital Subscriber Line (DSL) high speed Internet service, and is an Internet Service Provider (ISP) over these lines. Laurinburg is a city in Scotland County and is a North Carolina municipal corporation as defined under N.C. Gen. Stat. § 160A, *et seq.* (2003). School Link is a North Carolina Corporation which, as an ISP, provides Internet services in Scotland County.

Sometime in 1996, Laurinburg laid a twelve (12) strand fiber optic network consisting of multi-mode cable for the purposes of providing electronic communication services between its city hall and the Laurinburg public works building ("LPW"). In 1998, the multi-mode

cable was replaced with single-mode fiber optic cable in what amounted to a nineteen (19) mile loop, with an increase in the number of fiber optic strands from twelve (12) to thirty-six (36). Laurinburg believed this would provide sufficient capacity for its known present needs as well as future required information capacity to meet needs not yet foreseeable in light of changing technology.

From approximately 1998 to 2000, the Electronic Community Resource Center (ECRC), a defense contractor, was connected to the network between its office in downtown Laurinburg and a training room leased by it at St. Andrews College ("St. Andrews"). Though ECRC went out of business in 2000, the fiber used for that connection was left in place.

In late spring or early summer of 2000, School Link became a party to the network as its ISP pursuant to a lease with Laurinburg. Because School Link needed a certain volume of business to make its link to Laurinburg financially feasible, the lease discussions included representatives from School Link, Laurinburg, the Scotland County government, the Scotland County schools, St. Andrews College, and the Scotland Memorial Hospital ("Scotland Memorial"). The Laurinburg City Council approved a lease to School Link following a 21 August 2000 public hearing. School Link was to provide the network with internet services including Bandwidth, Mail, Domain Name System (DNS), and web-hosting.

Using the necessary hardware, Laurinburg serviced the rest of the city government, and additionally the non-city users, to the network by routing the network traffic onto the users' property by way of City utility poles. The first non-city users connected were Scotland County school buildings, two (2) of which were connected in October 2000, and the remaining seven (7) in March of 2001. In early to mid-2001, three Scotland County government buildings were connected. St. Andrews was connected in September of 2001, and Scotland Memorial was connected in November or early December of 2001. Each of the users used two (2) strands of the fiber optic network.

The hardware components for running the network included the following: The city loop consists of one Cisco 3548 switch, one Cisco 7200 router, five Cisco 3524's (two used as backup), eight single-mode fiber converters, and eight two gigabit fiber connections. The Scotland County government loop consists of six single-mode fiber converters and one hub, three converters located in the LPW with a hub, and one fiber converter at the county administration building,

Emergency Medical Services (EMS), and the county library. The Scotland County school loop consists of 18 single-mode fiber converters and eight hubs located at six schools, the school administration building, and LPW. Scotland Memorial is fed by two single mode fiber converters, one at LPW and the other at the hospital. St. Andrews is fed by two single mode fiber converters, one at LPW and the other St. Andrews. School Link's connection is through an interface at LPW with the Laurinburg network, where School Link leases space on a rack holding their own router and equipment. This allows School Link to connect its outside lines to the fiber optic network.

Laurinburg receives $350 per connection per month from each connected user. Payments from the county schools and library differ in that these users pay their fees directly to School Link minus the fees subsidized through E-Rate funding (a federal program that provides grants to entities in rural areas, which funds the substantial majority of the connection fees for the library and the schools.) School Link then forwards to the city the total amount of the connection fees charged by the city for the schools, $2,800, and the library, $350. School Link pays an additional $2,000 per month for the space of their router on the rack at LPW. Currently, Laurinburg's fiber optics network is being used solely for the purpose of data transmission, and those internet services provided by School Link. Laurinburg has not yet sought to provide cable television programming, and despite the current large amount of excess capacity on the network (approximately 24 strands), it claims that it would have to purchase additional fiber to do so.

BellSouth owns and operates utility poles throughout Laurinburg to transmit telephone services. Since the 1930's, BellSouth has leased from Laurinburg access to its utility poles for such service. Laurinburg has likewise leased from BellSouth access to BellSouth's utility poles to transmit data services.

Before the Laurinburg network was in place and providing an ISP service with School Link, BellSouth provided internet service to Scotland County schools by running a T-1 line to the schools' central office which was the hub for the schools. Those schools, now serviced by Laurinburg and School Link, were at one time serviced by BellSouth over the Laurinburg network. All of those schools out of the reach of the Laurinburg network remain on lines connecting them to the schools' central office, and thus to School Link, on BellSouth's network. Before St. Andrews was a part of the Laurinburg network and with School Link as its ISP, BellSouth provided internet service

over a T1 line that connected St. Andrews to the University of North Carolina at Pembroke. Before Scotland County's three buildings were connected to the Laurinburg network with School Link as its ISP, Carolina Online was its ISP. With one exception, all Scotland County users were using a "dial-up" connection over regular telephone lines owned and maintained by BellSouth. The Scotland County Department of Social Services was connected through a T1 line provided by the North Carolina Cooperative Extension Office. After the county buildings had connected to the Laurinburg network, the county turned down BellSouth's offer to provide DSL service.

In their complaint, BellSouth sought a permanent injunction and declaratory judgment, alleging the following grounds for their relief: That Laurinburg fiber optics network was being operated as a "public enterprise" beyond a municipality's authority to do so under N.C. Gen. Stat. § 160A-311 (2003); and that the contract made with School Link to service non-city users over the network was therefore *ultra vires*. In response to this complaint, and at differing stages of the litigation, Laurinburg and School Link offered a host of legal authority permitting the municipality's operation of their fiber optic network and their agreement with School Link. *See* N.C. Gen. Stat. § 160A-272 (2003) (lease of excess property); N.C. Gen. Stat. §§ 160A-460 through -464 (2003) ("interlocal" agreements); N.C. Gen. Stat. § 160A-311(7) (acting as a public enterprise "cable television systems"); and N.C. Gen. Stat. § 158-7.1 (2003) (allowing for "local development" appropriations).

In reaching our holding on the merits of the case at bar, our analysis addresses two significant issues. The first, which affects the second, is a question of which tools of legal construction are to be implemented in our reading of statutes authorizing municipal powers. And second, when applying the correct tools, do the actions taken by Laurinburg in establishing their fiber optics network fall within one of its authorized powers as a municipality. Based on our analysis set out herein, we affirm the trial court's grant of summary judgment in favor of Laurinburg and School Link on the basis that the municipality is operating what is by North Carolina statutory definition, a "cable television system." *See* N.C. Gen. Stat. § 160A-319(2003). As such, Laurinburg has authority to engage in this "public enterprise" and contract with School Link for its ISP services. N.C. Gen. Stat. § 160A-311(7). We do not, and need not, address those alternative theories offered by Laurinburg as authority for their fiber optics network.

I. Standard of Review/Legal Construction of Chapter 160A

On appeal from an order granting summary judgment, we review the record in a light most favorable to the party against whom the order has been entered to determine whether there exists a genuine issue as to any material fact. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, 276 S.E.2d 283 (1981). Where no such issue of fact exists and summary judgment is proper, we review the trial court's ruling on the motion for summary judgment *de novo* because its basis is found solely in law. *Coastal Plains Utils., Inc. v. New Hanover County*, 166 N.C. App. 333, 340-41, 601 S.E.2d 915, 920 (2004).

The undisputed facts of this case implicate the municipal powers granted to a city authorized under Chapter 160A of the North Carolina General Statutes. "It is a well-established principle that municipalities, as creatures of statute, can exercise only that power which the legislature has conferred upon them." *Bowers v. City of High Point*, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (1994); *Homebuilders Assn. of Charlotte v. City of Charlotte*, 336 N.C. 37, 41-42, 442 S.E.2d 45, 49 (1994). In setting out these exclusive and limited municipal powers, the legislature has mandated the following:

> **§ 160A-4. Broad construction**
>
> It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters *shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect*: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State.

N.C. Gen. Stat. § 160A-4(2003) (emphasis added). N.C. Gen. Stat. § 160A-4 was a part of a 1971 revision of the North Carolina statutes governing municipalities. 1971 N.C. Sess. Laws ch. 698. In *Homebuilders*, the Supreme Court squarely addressed the issue of statutory construction under rule N.C. Gen. Stat. § 160A-4, stating:

> This statute makes it clear that the provisions of chapter 160A and of city charters shall be broadly construed and that grants of power shall be construed to include any additional and

> supplementary powers that are reasonably necessary or expedient to carry them into execution and effect.

Homebuilder's Assn. of Charlotte, 336 N.C. at 43-44, 442 S.E.2d at 49-50 (where the Court applied this statute to uphold the assessment of regulatory fees assessed by the city for its related and clearly authorized regulatory activities). In its reading of N.C. Gen. Stat. § 160A-4, the Court found that the narrow rule of construction established over some 100 years prior by common law, known as "Dillon's Rule," had been replaced by the legislature's 1971 enactment. *Id.*; *see, e.g.*, *Smith v. Newbern*, 70 N.C. 14 (1874), *modified*, 73 N.C. 303 (1875). Dillon's Rule, set out in a treatise on municipal law by Judge John S. Dillon, stated:

> [A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable.

Dillon, Commentaries on the Law of Municipal Corporations, § 237 (5th ed. 1911). The Court in *Homebuilders* goes out of its way to distinguish two of its holdings applying Dillon's Rule after the enactment of N.C. Gen. Stat. § 160A-4. *See Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 276 S.E.2d 443 (1981); *Greene v. City of Winston-Salem*, 287 N.C. 66, 213 S.E.2d 231 (1975). The Court stated:

> In neither case was N.C.G.S. § 160A-4 discussed or cited by the Court and the issue of the interplay between Dillon's Rule of construction and N.C.G.S. § 160A-4 was, therefore, not addressed. Thus, we do not consider *Porsh* and *Greene* as determinative on the issue squarely presented in the instant case: the proper rule of construction of grants of powers to municipalities in light of N.C.G.S. § 160A-4.

Homebuilders Assn. of Charlotte, 336 N.C. at 45, 442 S.E.2d at 50.

In the same year the opinion in *Homebuilders* was rendered, the Supreme Court decided *Bowers v. City of High Point*, 339 N.C. 413, 451 S.E.2d 284 (1994). In *Bowers*, the Court allowed the city to void a contract as being *ultra vires*, stating that the city was correct in asserting that it did not have statutory authority to contract to pay a separation allowance to early-retired police officers based on anything beyond their "base rate of compensation" as set out in N.C. Gen.

Stat. § 143-166.41(A) (1993). *Bowers*, 339 N.C. at 420, 451 S.E.2d at 289. The Court concluded the city lacked statutory power to interpret what the "base rate" included. *Id.* While the Court seemed to resuscitate "Dillon's Rule" by restating it at the beginning of its analysis, the holding of the Court hinged on the following plain meaning analysis:

> Although we are unable to set forth any rule which easily and conclusively determines what forms of compensation are to be included in "base rate of compensation," we are satisfied that the plain meaning of "base rate of compensation" does not include overtime pay, longevity pay, or pay for unused accrued vacation. "Base pay" is defined as "wages, *exclusive of overtime, bonuses, etc.*"

Id. (quoting *Black's Law Dictionary* 157 (6th ed. 1990)). Most recently, without citing either Dillon's Rule, N.C. Gen. Stat. § 160-4, *Homebuilders*, or *Bowers*, the Supreme Court utilized the plain meaning rule again to strike down the City of Durham's Storm Water Quality Management Program ("SWQMP") and fees assessed thereunder. *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E.2d 874 (1999) ("*Smith Chapel*"). The Court in *Smith Chapel* found that under the plain meaning of N.C. Gen. Stat. § 160A-311(10) (1998) (authorizing a municipality to operate as a public enterprise "stormwater and drainage systems of all types") and N.C. Gen. Stat. § 160A-314(a), (a1) (1998), Durham had authority to run a stormwater management public enterprise for compensation, but "limited to those systems of physical infrastructure, structural or natural, for servicing stormwater." *Smith Chapel Baptist*, 350 N.C. at 812, 517 S.E.2d at 879. Therefore, because much of Durham's SWQMP and related fees were not related to the physical stormwater system (such as education programing), the program was found to function as an unauthorized public enterprise and was struck down. In his dissent writing for three Justices, Justice Frye applied N.C. Gen. Stat. § 160A-4 and *Homebuilders* for the minority opinion's belief that there was some ambiguity in the language of " 'stormwater and drainage *system*' " that should have been resolved in favor of enabling Durham to execute their authorized public enterprise. *Id.* at 821, 517 S.E.2d at 884.

Though not without nuances and distinguishing factors, we find *Homebuilders*, *Bowers*, and *Smith Chapel* to be consistent statements of the law and in accord with N.C. Gen. Stat. § 160A-4. The narrow Dillon's Rule of statutory construction used when interpreting municipal powers has been replaced by N.C. Gen. Stat. § 160A-4's

mandate that the language of Chapter 160A be construed in favor of extending powers to a municipality where there is an ambiguity in the authorizing language, or the powers clearly authorized reasonably necessitate *"additional and supplementary powers" "to carry them into execution and effect*[.]" N.C. Gen. Stat. § 160A-4 (emphasis added); *see Homebuilders Assn. of Charlotte*, 336 N.C. at 45, 442 S.E.2d at 50. However, where the plain meaning of the statute is without ambiguity, it "must be enforced as written." *Bowers*, 339 N.C. at 419-20, 451 S.E.2d at 289; *see also, Smith Chapel Baptist*, 350 N.C. at 812, 517 S.E.2d at 879.

II. "Cable Television System"/Fiber Optics Network

Turning to the merits of the case. Among the legal rationales offered by Laurinburg for the operation of its fiber optics network is that it is a "[c]able television system[]" ("CTS") authorized to be owned and operated as a public enterprise. N.C. Gen. Stat. § 160A-311(7). We agree.

A. CTS Defined

In North Carolina, a city has authority to operate any or all of the ten "public enterprise[s]" set out in N.C. Gen. Stat. § 160A-311, one of which being a CTS. N.C. Gen. Stat. § 160A-311(7). Included in this authority is the following:

> A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens.

N.C. Gen. Stat. § 160A-312 (2003).

Laurinburg claims the operation of its fiber optics network falls within its authority to operate a CTS, where a CTS is defined as follows:

> (b) For the purposes of this section, "cable television system" means *any system or facility that*, by means of a master antenna and wires or cables, *or by wires or cables alone, receives*, amplifies, modifies, *transmits*, or distributes any television, radio, or *electronic signal, audio or video or both*, to subscribing members of the public for compensation.

N.C. Gen. Stat. § 160A-319(b) (emphasis added). BellSouth claims that this definition pertains only to N.C. Gen. Stat. § 160A-319, a

statute which authorizes and sets time limits for a municipality's authority to franchise utilities. Instead, BellSouth argues the applicable definition is that of a "cable system" as set out in the Cable Communications Policy Act of 1984:

> (7) [A] facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include . . . (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter [47 USCS §§ 201, et seq.], except that such facility shall be considered a cable system (other than for purposes of section 541(c)) of this title [47 USCS § 541(c)] to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services[.]

47 U.S.C. § 522(7) (2002).

We do not read the definition of CTS to be confined to N.C. Gen. Stat. § 160A-319, rather, we believe this clearly represents the legislature's intended definition for CTS as used in N.C. Gen. Stat. § 160A-311(7). The first sentence of N.C. Gen. Stat. § 160A-319(a) states that

> [a] city shall have authority to grant upon reasonable terms franchises for the operation within the city of any of the enterprises listed in G.S. 160A-311 and for the operation of telephone systems.

N.C. Gen. Stat. § 160A-319(b) explicitly refers to the term CTS as used in the public enterprises statute to define the contours of what a municipality may franchise as a CTS. Additionally, N.C. Gen. Stat. § 160A-319, as first enacted under N.C. Gen. Stat. § 160-2 (effective 4 July 1967), was added to the General Statutes before there was any clear authority that a city could operate its own CTS as a "public enterprise." 1967 Session Laws ch. 100, § 2, ch. 1122, § 1. Had the legislature intended CTS to take on a different meaning when enacting N.C. Gen. Stat. § 160A-311 in 1971, and recodifying N.C. Gen. Stat. § 160-2 into N.C. Gen. Stat. § 160A-319 the same year, we believe they would have done so. *See* Session Laws 1971, Ch. 698. Lastly, without more, we can find no logical reason, nor has one been offered, why

the legislature would desire CTS be defined as something different when operated as a public enterprise by the City than that definition used when a City is granting a franchise of the same.

Therefore, for the purpose of defining CTS in N.C. Gen. Stat. § 160A-311(7), we look to N.C. Gen. Stat. § 160A-319(b) and not the federal code. We note that the federal definition of "cable system" is relevant to the issue of *how* the system will be regulated under the federal code, but offers little guidance as to whether municipalities in North Carolina have *statutory authority* to operate those as a system or network falling within its definition of CTS as a public enterprise.[1]

B. Laurinburg's Network is a CTS

We next consider whether services offered by Laurinburg over their fiber optic network fall within the plain meaning of N.C. Gen. Stat. § 160A-319(b). Restating that statute in part, a CTS is

> *any system or facility* that, by means of . . . wires or cables alone, receives, amplifies, modifies, transmits, or distributes any television, radio, or *electronic signal, audio or video or both*, to subscribing members of the public for compensation.

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1. There is a line of federal cases touching on the issue of what is and is not a "cable system" under the federal code and for purposes of Federal Communications Commission (FCC) regulations. These cases vary in their conclusions, representing a clear ambiguity under federal law of what is a "cable system" in light of today's bundled technology. *See AT&T v. City of Portland*, 216 F.3d 871, 876-80 (9th Cir. 2000) (The court concluded transmission of internet service over cable broadband facilities is a telecommunication service for purposes of regulation: "Surfing cable channels is one thing; surfing the Internet over a cable broadband connection is quite another"); *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356, 365 (4th Cir. 2001) ("We do not have to reach the question of whether MediaOne's bundled Road Runner service is a cable service, a telecommunications service, or an information service"); *Nat'l Cable & Telecom v. Gulf Power*, 534 U.S. 327, 151 L. Ed. 2d 794, (2002) (In interpreting the federal Pole Attachments Act, 47 U.S.C. § 224, Justice Kennedy writing for a majority applied the plain meaning rule in stating that, "even if a cable television system is only a cable television system to the extent it provides cable television, an "attachment . . . by a cable television system" is still (entirely) an attachment "by" a cable television system whether or not it does other things as well"); *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, 4802(2002) (Where the FCC concluded that a "cable modem service, as it is currently offered, is properly classified as an interstate information service, not as a cable service, and that there is no separate offering of telecommunications service"); and *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003) (The Court overruled the FCC's declaratory ruling in part, holding that cable broadband service was not a "cable service" but instead was part "telecommunications service" and part "information service.").

Id. (emphasis added). The statute in no way limits CTS to a specified type of wire or cable, such as coaxial cable, copper T1 lines, or fiber optic lines. Nor does it limit the transmission or reception of electronic signals to any specific content. Thus, in reading this statute, we cannot say that its plain meaning clearly forecloses the statutory authority of Laurinburg to operate its fiber optic network. *See Bowers*, 339 N.C. at 417, 451 S.E.2d at 287; *Smith Chapel Baptist*, 350 N.C. at 812, 517 S.E.2d at 879. Stated differently, the language of this statute is ambiguous as to whether the fiber optic network run by Laurinburg falls within its contours. Thus, we apply N.C. Gen. Stat. § 160A-4's broad rule of construction.

Laurinburg's network is run over fiber optic "wires or cable," providing a "*system*" for "transmit[ting]" and "receiv[ing]" electronic signals capable of being converted to "audio" and/or "video" streams of information. *See* N.C. Gen. Stat. § 160A-319(b). We believe this fits within a broad construction of the definition of a CTS. Therefore, we hold that Laurinburg is acting within its municipal authority to run its network, and was not acting *ultra vires* in contracting with School Link to provide the network's ISP service.[2]

We acknowledge that Laurinburg's fiber optics network was most likely not something the legislature envisioned in 1971 when they enacted the statute allowing a municipality to operate a CTS as a public enterprise. However, if Laurinburg were currently offering the kind of cable programming in place in 1971, and doing so over their fiber optic network, they clearly would be authorized to offer the current bundle of network services over these same lines as "additional and supplementary *powers that are reasonably necessary or expedient.*" N.C. Gen. Stat. § 160A-4. Without authority to offer the bundled CTS services, no municipality could effectively operate in today's market.[3] Moreover, just as BellSouth is able to leverage its telephone infrastructure to provide low cost DSL broadband services in the market, so too should a municipality be able to leverage its CTS infrastructure. We believe it would elevate form over function, against the intent of our legislature's mandate for broad construction, to first demand 1971-type cable programming be in place before a 2004 CTS could be authorized as a public enterprise. Rather, the legislature's intent in 1971 was to enable the municipality's public enterprise to grow in reasonable stride with technological

2. The record indicates that Laurinburg has offered BellSouth the opportunity to offer its ISP services over the fiber optics network.

3. Cable modem service provides high-speed access to the Internet . . . [t]he service is available to approximately 73% of U.S. households. 17 FCC Rcd 4798, 4799-4800.

advancements, as it is this advancement which marks the ever-approaching horizon of necessity.

Based upon the record, appendices, exhibits, and briefs, we uphold the trial court's grant of summary judgment in favor of Laurinburg and School Link.

Affirmed.

Judges McGEE and ELMORE concur.

REGINALD NEWBERNE, PLAINTIFF-APPELLANT v. CRIME CONTROL AND PUBLIC SAFETY, AN AGENCY OF THE STATE OF NORTH CAROLINA, DIVISION OF STATE HIGHWAY PATROL, A PRINCIPAL SUBUNIT OF AN AGENCY OF THE STATE OF NORTH CAROLINA, BRYAN E. BEATTY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, RICHARD W. HOLDEN, IN HIS OFFICIAL CAPACITY AS COMMANDING OFFICER OF THE DIVISION OF STATE HIGHWAY PATROL AND C.E. MOODY, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF INTERNAL AFFAIRS FOR DIVISION OF STATE HIGHWAY PATROL, AND A.C. COMBS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS FIRST SERGEANT WITH THE DIVISION OF STATE HIGHWAY PATROL, DEFENDANTS-APPELLEES

No. COA03-530

(Filed 18 January 2005)

1. **Public Officers and Employees— whistleblower complaint—highway patrol trooper—incomplete report**

The trial court did not err by dismissing a whistleblower complaint for failure to state a claim where plaintiff was a highway patrol trooper who had filed a report in which he held back information about excessive force by another officer, eventually filed a complete report, and was dismissed for violating State Highway Patrol truthfulness requirements. The purpose of the Whistleblower Act is to protect truthful reporting, not to condone untruthful conduct.

2. **Public Officers and Employees— whistleblower complaint—failure to exhaust administrative remedies**

A whistleblower complaint by a highway patrol trooper was properly dismissed under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff admitted in his complaint that he had not exhausted his administrative remedies.

Judge TYSON dissenting.

Appeal by plaintiff from an order entered 29 January 2003 by Judge Henry W. Hight, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 24 February 2004.

Allen and Pinnix, P.A., by J. Heydt Philbeck, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Donald K. Phillips, for the State.

McGEE, Judge.

Plaintiff appeals from the trial court's dismissal on 29 January 2003 of plaintiff's complaint of retaliation made pursuant to North Carolina's Whistleblower Act, N.C. Gen. Stat. § 126-84, *et. seq.*

Reginald Newberne (plaintiff) was a law enforcement officer with the State Highway Patrol (SHP) in the position of trooper. While on duty on 14 May 2000, plaintiff arrived at approximately 12:30 a.m. at a crime scene where Owen Jackson Nichols (Nichols) had been apprehended and arrested. At the time of plaintiff's arrival on the scene, Nichols had already been arrested and placed in the rear seat of the patrol car of Trooper B.O. Johnson (Trooper Johnson). Plaintiff did not participate in, nor witness, the apprehension of Nichols, and was never close enough to Nichols to assess Nichols' physical condition.

Trooper P.A. Collins (Trooper Collins) approached plaintiff at the scene of the arrest. Plaintiff observed that Trooper Collins was rubbing one of his hands and plaintiff asked Trooper Collins whether he had hurt it. Trooper Collins responded that he had jammed his hand after hitting Nichols and that Trooper J.R. Edwards (Trooper Edwards) had attempted to pull "[Trooper Collins' hand] back in place." Plaintiff suggested that Trooper Collins go to the hospital for treatment, but Trooper Collins responded that he would not know how to explain his injury to the sergeant. Trooper Collins speculated that he could tell the sergeant that he hurt himself in a fall. Plaintiff then left the scene of the arrest.

Nichols' father filed a complaint on 14 May 2000 with the Internal Affairs section of the Division of State Highway Patrol, alleging that Troopers Johnson, Collins, and Edwards had used excessive force in arresting his son.

Plaintiff's supervisor, Sergeant A.C. Combs (Sergeant Combs), asked plaintiff on 13 June 2000 whether he had been involved in the apprehension of Nichols. Plaintiff responded that Nichols was arrested prior to plaintiff's arrival on the scene. Sergeant Combs then asked plaintiff whether he saw anyone use force on Nichols. Plaintiff responded that he had not, but that Trooper Collins had hurt his hand while at the scene of the arrest. Sergeant Combs directed plaintiff to write a report stating what he recalled seeing at the scene of Nichol's arrest, and for plaintiff to leave the report in Sergeant Comb's basket by the end of plaintiff's shift that day.

Concerned about retaliation and reprisal as a result of his report, plaintiff called Sergeant Combs on the morning of 14 June 2000 and expressed his reluctance to write the statement. Plaintiff suggested that he was "not involved" in the arrest of Nichols. Sergeant Combs again directed plaintiff to write the report regarding what he had seen on 14 May 2000.

Plaintiff submitted a statement (Statement I) later in the day on 14 June 2000. Plaintiff had limited Statement I to what plaintiff had literally *seen* transpire on 14 May 2000. Plaintiff noted in Statement I that Trooper Collins had apparently hurt his hand and that plaintiff suggested he receive medical attention. When plaintiff submitted Statement I to Sergeant Combs, Sergeant Combs immediately handed plaintiff a previously prepared Trooper Performance Record which cited plaintiff's failure to follow the sergeant's request to complete the report by the initial deadline and for being "argumentative" about the directive to write a report.

Plaintiff was concerned that he had not included in Statement I Trooper Collins' admission that he had hurt his hand in the apprehension of Nichols. Plaintiff thereafter sought the advice of a fellow trooper and mentor, Sergeant Montgomery. After speaking with Sergeant Montgomery, plaintiff approached Sergeant Combs on 20 June 2000 and informed him that Statement I had not included all that plaintiff had witnessed on 14 May 2000. Sergeant Combs directed plaintiff to write an amended statement including all that plaintiff knew about the events of 14 May 2000.

Plaintiff complied with Sergeant Combs' order and wrote a second statement (Statement II) in which he noted that Trooper Collins had told him that he had hurt his hand hitting Nichols and that Trooper Collins had suggested he could tell the sergeant that he had hurt his hand in a fall. Plaintiff noted in Statement II that he

had failed to include this information in Statement I because he did not consider himself to be involved in the incident and did not want to get involved.

Plaintiff believed Sergeant Combs reported to Captain Moody that plaintiff was "misleading, untruthful and incomplete in his oral and written communications" with Sergeant Combs on 13 June 2000 regarding the 14 May 2000 incident. Captain Moody thereafter filed a personnel complaint on or about 15 September 2000 alleging that plaintiff had committed a Serious Personal Conduct Violation of Directive No. H.1. Section VI (Truthfulness Directive) of the Division of State Highway Patrol's policy manual. Plaintiff's employment was terminated on 10 April 2001 as a result of his failure to comply with the Truthfulness Directive.

Plaintiff filed a complaint in Wake County Superior Court on 9 April 2002 alleging defendants had violated North Carolina's Whistleblower Act in terminating plaintiff's employment. Defendants filed a motion to dismiss plaintiff's complaint on the grounds that he had failed to state a claim upon which relief could be granted. Defendants' motion was granted in an order filed 29 January 2003. Plaintiff appeals.

[1] In plaintiff's first assignment of error, he argues the trial court erred in granting defendants' Rule 12(b)(6) motion to dismiss plaintiff's complaint. Plaintiff contends that his complaint properly alleged a *prima facie* claim pursuant to the Whistleblower Act and that plaintiff made no disclosure in his complaint that would defeat that claim. North Carolina's Whistleblower Act, N.C. Gen. Stat. § 126-84 *et seq.* (2003), provides that

> No head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the State employee's compensation, terms, conditions, location, or privileges of employment because the State employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in G.S. 126-84, *unless the State employee knows or has reason to believe that the report is inaccurate.*

N.C. Gen. Stat. § 126-85(a) (2003) (emphasis added). In order to present a claim under the Whistleblower Act, plaintiff must establish a *prima facie* case consisting of the following elements: "(1) [plaintiff]

engaged in protected activity, (2) followed by an adverse employment action, and (3) the protected conduct was a substantial or motivating factor in the adverse action." *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 584, 448 S.E.2d 280, 282 (1994); *see also Wells v. N.C. Dep't of Corr.*, 152 N.C. App. 307, 567 S.E.2d 803 (2002). The explicit policy supporting the Whistleblower Act is to encourage State employees to report

> verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:
>
> (1) A violation of State or federal law, rule or regulation[.]

N.C. Gen. Stat. § 126-84(a)(1).

In considering a Rule 12(b)(6) motion, a trial court must determine whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2003). A motion to dismiss directs the trial court to test the legal sufficiency of the complaint, not the facts which support the claim. *Warren v. New Hanover County Bd. of Education*, 104 N.C. App. 522, 525, 410 S.E.2d 232, 234 (1991). Specifically, the trial court is to dismiss a complaint " ' "if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim." ' " *Plummer v. Community Gen. Hosp. of Thomasville, Inc.*, 155 N.C. App. 574, 576, 573 S.E.2d 596, 598 (2002) (citations omitted), *disc. review denied*, 357 N.C. 63, 579 S.E.2d 392 (2003).

As to the first element of a claim under the Whistleblower Act, plaintiff argues that in filing his statement, he was engaged in a "protected activity," pursuant to N.C.G.S. § 126-84(a)(1). Secondly, plaintiff alleges in his complaint that defendants terminated his employment following his submission of his statements about the incident. Plaintiff further contends that his protected conduct in reporting that "the Troopers violated State or federal law . . . and exercised gross abuse of authority in the apprehension and arrest of Owen Nichols" was a substantial or motivating factor in his firing.

Defendants argue, however, that plaintiff's complaint also alleges facts which necessarily defeat plaintiff's claim for relief. We agree. Plaintiff admitted in the allegations of his complaint that he knew the original report prepared and submitted by him was inaccurate.

Plaintiff's complaint stated that he knowingly filed an incomplete report and later filed a correction after conferring with Sergeant Montgomery. Plaintiff's admission in his complaint of his own inaccurate reporting disclosed facts which " ' "will necessarily defeat the claim." ' " *Plummer*, 155 N.C. App. at 576, 573 S.E.2d at 59 (citations omitted).

The stated purpose of the Whistleblower Act is to encourage state employees to report improper conduct. Plaintiff in this case was directed to write Statement I, which by his own admission, he wrote in an incomplete and misleading manner. Plaintiff alleged he was troubled by his account in Statement I and sought to amend the original report. Furthermore, plaintiff alleged he wrote both statements at the behest of Sergeant Combs. Plaintiff makes no allegation that Sergeant Combs directed plaintiff to write anything counter to the truth. The purpose of the Whistleblower Act is to protect truthful reporting, not to condone untruthful conduct such as plaintiff's. The fact that plaintiff wrote Statement II does not render the filing of Statement I meaningless in the context of the Whistleblower Act, which protects a state employee from retaliation, except when that employee knows the report is inaccurate. The trial court did not err in dismissing plaintiff's complaint and this assignment of error is without merit.

[2] In addition, prior to filing the complaint in this case, plaintiff filed an action before the Office of Administrative Hearings alleging retaliation and racial discrimination. In *Swain v. Elfland*, 145 N.C. App. 383, 550 S.E.2d 530, *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (2001), our Court noted that there existed for a plaintiff two means of redress for violations of the Whistleblower statute: (1) N.C. Gen. Stat. § 126-86 which provides that " '[a]ny State employee injured by a violation of G.S. 126-85 may maintain an action in superior court . . .' " and (2) N.C. Gen. Stat. § 126-34.1(a)(7) which states that a State employee may file in the Office of Administrative Hearings a contested case for " '[a]ny retaliatory personnel action that violates G.S. 126-85.' " *Swain*, 145 N.C. App. at 389, 550 S.E.2d at 535 (quoting N.C.G.S. § 126-34 and N.C.G.S. § 126-34.1(a)(7)). Our Court determined in *Swain* that "[t]he only reasonable interpretation of these statutes is that a state employee may choose to pursue a Whistleblower claim in either forum, but not both." *Id.*; *see also Huang v. N.C. State University*, 107 N.C. App. 710, 715, 421 S.E.2d 812, 815 (1992).

The plaintiff in *Swain*, a police officer, filed a complaint in Superior Court pursuant to the Whistleblower Act, which included

allegations of wrongful discharge and racial discrimination. Shortly thereafter, the plaintiff alleged in an administrative action that he had been suspended as a result of racial discrimination and retaliation. *Swain*, 145 N.C. App. at 385-86, 550 S.E.2d at 533. Our Court stated that if the plaintiff could maintain an administrative action and an action in Superior Court simultaneously, "this would allow [the] plaintiff two bites of the apple, could lead to the possibility that different forums would reach opposite decisions, as well as engender needless litigation in violation of the principles of collateral estoppel." *Swain*, 145 N.C. App. at 389, 550 S.E.2d at 535.

Plaintiff admits in his complaint that he "did not exhaust his potential administrative remedies for his claim of retaliation[.]" As our Supreme Court stated in *Presnell v. Pell*, interrupting administrative proceedings through " 'premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies.' " *Presnell*, 298 N.C. 715, 722, 260 S.E.2d 611, 615 (1979) (citations omitted) (the plaintiff's wrongful discharge claim was properly dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)). Plaintiff in the case before us failed to exhaust his administrative remedies and the trial court did not err in dismissing his claim filed in Superior Court. *Swain*, 145 N.C. App. at 390, 550 S.E.2d at 535.

Because we find the trial court did not err in dismissing plaintiff's complaint, we do not reach plaintiff's remaining assignment of error.

Affirmed.

Judge WYNN concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge dissenting.

I vote to reverse the trial court's Order dismissing plaintiff's action for failure to state a claim upon which relief can be granted. I respectfully dissent.

I. Standard of Review

In reviewing the trial court's grant of a Rule 12(b)(6) motion to dismiss, we must determine whether "as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim

upon which relief can be granted under some legal theory." *Considine v. Compass Grp. USA, Inc.*, 145 N.C. App. 314, 316-17, 551 S.E.2d 179, 181 (citing *Lynn v. Overlook Development*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991)), *aff'd*, 254 N.C. 568, 557 S.E.2d 528 (2001); *see also* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2003). The trial court's dismissal is affirmed only if " 'it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief.' " *Meyer v. Walls*, 347 N.C. 97, 111-12, 489 S.E.2d 880, 888 (1997) (quoting *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987)).

> Dismissal of a complaint under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim.

Jackson v. Bumgardner, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986) (citing *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E.2d 222 (1985)).

II. Sufficiency of Complaint

Plaintiff's action is governed by N.C. Gen. Stat. § 126-84, *et seq.*, the Whistleblower Act. The Whistleblower Act protects State employees who report, among other things, illegal activity by a State agency or employee. N.C. Gen. Stat. § 126-84, *et seq.* (2003). Department heads and supervising authorities are prohibited from retaliating against employees who engage in protected activity. N.C. Gen. Stat. § 126-84; N.C. Gen. Stat. § 126-85 (2003). The necessary elements for a claim under the Whistleblower Act include: "(1) the plaintiff's engagement in a 'protected activity,' (2) an 'adverse employment action' occurring subsequent to the 'protected activity,' and (3) the plaintiff's engagement in the 'protected activity' was a 'substantial or motivating factor' in the 'adverse employment action.' " *Wells v. N.C. Dep't. of Corr.*, 152 N.C. App. 307, 314, 567 S.E.2d 803, 809 (2002) (quoting *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 584, 448 S.E.2d 280, 282 (1994) (quoting *McCauley v. Greensboro City Bd. of Educ.*, 714 F. Supp. 146, 151 (M.D.N.C. 1987))).

Here, plaintiff's complaint properly alleges each required element and that he engaged in "protected activity," pursuant to N.C. Gen. Stat. § 126-84(a). Specifically, plaintiff's complaint alleges: (1) he was

a State employee and a Trooper with the North Carolina Division of State Highway Patrol; (2) all defendants were State employees who exercised supervisory authority over plaintiff pursuant to N.C. Gen. Stat. § 126-85; (3) plaintiff's initial statement, Statement I, was "truthful and complied with the instruction of [Sergeant] Combs;" (4) plaintiff, after seeking "the counsel and mentorship of another trooper," approached Sergeant Combs "on his own volition" to inform him that there were "things he didn't know about what had happened," which resulted in plaintiff's subsequent preparation and submission of an amended statement.

Regarding the second element, plaintiff's complaint alleges that defendants terminated plaintiff following submission of his amended statement regarding the incident. In filing his first report, plaintiff literally complied with his supervisor's request to "write what he saw in a statement" by filing his statement the next morning. Although plaintiff reluctantly filed Statement I one day after Sergeant Combs demanded the statement, the short delay does not indicate "misleading, untruthful [or] incomplete . . . written communications," which were the reasons cited for plaintiff's termination. The majority's opinion does not identify any "misleading" or "untruthful" communication contained in plaintiff's Statement I. State employees, and state patrolmen in particular, regularly and routinely file amendments or continuations to their initial reports.

The third element is supported by allegations that "Defendants discharged Plaintiff because Plaintiff reported to his superiors, both verbally and in writing, information in the Amended Statement that supports a contention that the Troopers violated State or federal law . . . and exercised gross abuse of authority in the apprehension and arrest of Owen Nichols."

Plaintiff's claim under the Whistleblower Act is further supported by allegations that: (1) "[his] sanction of dismissal for allegedly withholding information . . . was grossly inequitable in comparison with the treatment and/or sanctions received by other Troopers;" (2) "Defendants' termination of plaintiff was pretextual in the need to protect the Department and Division from a potential civil law suit by Owen Nichols for the use of excessive force;" (3) "When Plaintiff submitted the Statement [I], Sergeant Combs handed Plaintiff a previously prepared Trooper Performance Record," a disciplinary action; and (4) "Defendants essentially punished Plaintiff for reporting on Plaintiff's own volition the truth, which truth was protected by N.C. Gen. Stat. § 126-84."

These allegations, construed liberally and taken as true, are sufficient to support plaintiff's claim that he engaged in "protected activity," which became a "substantial or motivating factor in the adverse employment action." *Wells*, 152 N.C. App. at 314, 567 S.E.2d at 809 (quotations omitted).

III. Disclosure of Facts to Defeat Plaintiff's Claim

Plaintiff argues his complaint does not reveal any fact to defeat his claim. I agree. "When considering a 12(b)(6) motion to dismiss, the trial court need only look to *the face of the complaint* to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Locus v. Fayetteville State University*, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991) (citing *Hawkins v. Webster*, 78 N.C. App. 589, 337 S.E.2d 682 (1985)).

A. Truthfulness of the Report

The majority's opinion concludes, "Plaintiff's complaint stated that he knowingly filed an incomplete report and later filed a correction after conferring with Sergeant Montgomery." Plaintiff's complaint does *not* allege or reveal that "he knew the original report prepared and submitted by him was inaccurate," as the majority's opinion contends.

Taking plaintiff's allegations as true, he was "truthful and complied with the instruction of [Sergeant] Combs . . . [and] *strictly followed* [Sergeant] Combs'[s] instructions to write what he 'saw' . . . ." (Emphasis supplied). Plaintiff "remained troubled about whether he should had [sic] also included Collins' Statements [regarding how he had injured his hand] in the Statement [I] . . . ." On his own accord, plaintiff later informed Sergeant Combs of Collins's statements and amended his statement to include, at Sergeant Combs's request, "everything he knows about the Incident." Both statements completed by plaintiff properly conformed to the direction and request of his commanding officer and were wholly true and accurate. Treating plaintiff's allegations as true, Statement I included everything plaintiff "saw," and the amended statement included everything he "knew."

No allegation contained on the face of plaintiff's complaint defeats his claim for relief. The majority's opinion fails to identify specifically any allegation to defeat plaintiff's complaint and errs in its holding to affirm the trial court's Rule 12(b)(6) dismissal of plaintiff's complaint on this basis.

B. Office of Administrative Hearings

Defendants contend and the majority's opinion concludes plaintiff's claim with the Office of Administrative Hearings ("OAH") bars the action at bar. I disagree.

Plaintiff's complaint admits he "did not exhaust all his potential administrative remedies," but mentions no pending claim with the OAH. Defendants' argument and assertion of other defenses may be appropriate for a summary judgment hearing under Rule 56, but are not to be considered in a motion to dismiss under Rule 12(b)(6). *See Locus*, 102 N.C. App. at 527, 402 S.E.2d at 865 (converting motion to dismiss into motion for summary judgment "where matters outside the pleadings are presented to and not excluded by the court . . . .").

Reliance by the majority's opinion on *Swain v. Elfland*, 145 N.C. App. 383, 550 S.E.2d 530, *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (2001), is misplaced. Although this Court held that a plaintiff, under the Whistleblower Act, has two means of redress, we stopped short of concluding that a plaintiff *must* first exhaust all his administrative remedies before seeking relief in the superior court. *Id.* at 390, 550 S.E.2d at 535. As plaintiff's complaint includes no allegation regarding a hearing conducted in the OAH, *Swain* does not apply. The majority's opinion acknowledges plaintiff's right to bring an action in the superior court is allowed pursuant to N.C. Gen. Stat. § 126-86 (2003).

IV. Conclusion

Neither the majority's opinion nor defendants identify any fact or set of facts contained on the face of plaintiff's complaint to defeat plaintiff's Whistleblower claim. Upon review of "the face of the complaint," plaintiff presents no fact to reveal an "insurmountable bar" to recovery. *See Locus*, 102 N.C. App. at 527, 402 S.E.2d at 866.

I vote to reverse the trial court's judgment granting defendants' Rule 12(b)(6) motion to dismiss. Upon defendants' motion to dismiss for failure to state a claim upon which relief can be granted, the trial court must liberally treat plaintiff's allegations as true. Plaintiff's complaint sufficiently alleges a claim under the Whistleblower Act. I respectfully dissent.

STATE OF NORTH CAROLINA v. JAMES EARL EWELL

No. COA04-372

(Filed 18 January 2005)

1. **Evidence— expert medical testimony—sexual abuse in absence of physical evidence—plain error**

The trial court committed plain error in a first-degree sex offense, attempted statutory sex offense, statutory rape, and indecent liberties with a child case by admitting the opinion testimony of a doctor indicating it was probable that the minor child was a victim of sexual abuse in the absence of any physical evidence, because: (1) the improperly admitted opinion by a medical expert on the child's credibility prejudiced defendant in the eyes of the jury; and (2) the State presented no other evidence beyond what the child told other witnesses, and as such, the child's credibility was the strength of the State's case.

2. **Indecent Liberties; Rape; Sexual Offenses— defense of lawful marriage—validity of defense**

The trial court did not err by denying defendant's motion to dismiss the charges of first-degree sex offense, attempted statutory sex offense, statutory rape, and indecent liberties with a child based on the State's alleged failure to show that defendant and the child were not lawfully married during the period of time at issue, because: (1) even though the defense of marriage is valid for the charges of attempted statutory sex offense and statutory rape, defendant and the child could not be lawfully married when N.C.G.S. § 51-2(b1) states it is unlawful for any person under 14 years of age to marry, and the child in this case was between the ages of 11 and 13 during all the times and events at issue; and (2) the remaining charges of attempted first-degree sex offense of a child under the age of thirteen years, taking indecent liberties with a child who was thirteen years old, first-degree rape of a female under the age of thirteen years, and taking indecent liberties with a child under the age of thirteen, do not permit lawful marriage as a defense.

Appeal by defendant from judgments entered 5 November 2003 by Judge Thomas D. Haigwood in Martin County Superior Court. Heard in the Court of Appeals 18 November 2004.

Attorney General Roy Cooper, by Assistant Attorney General Sue Y. Little, for the State.

Jeffrey Evan Noecker, for defendant-appellant.

TYSON, Judge.

James Earl Ewell ("defendant") appeals from judgments entered after a jury found him to be guilty of: (1) attempted first-degree sex offense of a child under the age of thirteen years (03 CRS 1673); (2) attempted statutory sex offense of a victim who was thirteen years old (03 CRS 1674); (3) statutory rape of a victim who was thirteen years of age (03 CRS 1675); (4) taking indecent liberties with a child who was thirteen years old (03 CRS 1675); (5) first-degree rape of a female under the age of thirteen years (03 CRS 1676); and (6) taking indecent liberties with a child under the age of thirteen (03 CRS 1676). We vacate defendant's convictions and order a new trial.

I. Background

Defendant dated J.H., a single mother of four children. T.G. is J.H.'s daughter, born on 22 May 1989. J.H. and her children lived in a small mobile home. Defendant occasionally stayed over at J.H.'s home.

The State's evidence tended to show defendant initially engaged in nonconsensual sexual intercourse with T.G. on 27 January 2001, when T.G. was eleven. T.G. testified that from that day until September 2002 defendant allegedly forced her to engage in sexual intercourse on "more than thirteen" occasions.

In October 2002, T.G. was diagnosed with Trichomonas, a sexually transmitted disease. T.G. initially told her mother that she had engaged in sexual relations with defendant's stepson, who may have transmitted the disease to her. However, defendant's stepson tested negative for the disease. T.G. then told her mother that defendant was sexually abusing her. She also spoke with Dr. Warren Webster, the school counselor, and Investigator Gregory Daniels ("Investigator Daniels") of the Martin County Sheriff's Office about the abuse. Dr. Webster reported the incidents to the Martin County Department of Social Services ("DSS"), who conducted an investigation. T.G. spoke with Investigator Daniels two more times. When T.G. initially returned with her mother, she recanted her story and stated that she had "made it up" because she thought defendant was trying to hurt

her mother. During her third interview, T.G. told Investigator Daniels that defendant had sexually abused her and that she lied earlier because she was scared of defendant.

Investigator Daniels and DSS referred T.G. to Dr. Kathleen Previll ("Dr. Previll") for a medical examination. Dr. Previll examined T.G. on 5 February 2003 and interviewed J.H. Dr. Previll found no signs of trauma surrounding T.G.'s vaginal area and could not reach an opinion of whether T.G. was sexually active based on the physical evidence. She noted that although Trichomonas could be contracted without sexual contact, it was unlikely.

Defendant was arrested on 23 June 2003. Defendant was later indicted for: (1) attempted first-degree sex offense; (2) attempted statutory sex offense; (3) statutory rape of person 13, 14, or 15; (4) indecent liberties with child; (5) first-degree statutory rape; and (6) indecent liberties with child.

Defendant pled not guilty and did not testify or offer any evidence at trial. He was found guilty of: (1) attempted first-degree sex offense of a child under the age of thirteen years; (2) attempted statutory sex offense of a victim who was thirteen years old; (3) statutory rape of a victim who was thirteen years of age; and (4) taking indecent liberties with a child who was thirteen years old. The trial court found defendant possessed a prior record level of IV based on ten misdemeanor convictions. The trial court sentenced defendant to two consecutive active sentences of not less than 339 nor more than 416 months each. Defendant appeals.

II. Issues

Defendant's assignments of error are whether the trial court erred: (1) in admitting the testimony of Dr. Previll opining that T.G. "probably suffered sexual abuse;" and (2) by failing to dismiss the charges due to insufficiency of the evidence that defendant and T.G. were not lawfully married. Defendant also asserts he was denied his constitutional rights to effective assistance of counsel when defendant's counsel failed to object to Dr. Previll's opinion testimony.

III. Admission of Dr. Previll's Opinion Testimony

[1] Defendant argues the trial court committed plain error by admitting the opinion testimony of Dr. Previll indicating it was "probable" that T.G. was a victim of sexual abuse in the absence of any physical evidence. We agree.

A. Preservation of Potential Error for Appellate Review

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure requires:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

N.C.R. App. P. 10(b)(1) (2004). Assignments of error are generally not considered on appellate review unless an appropriate and timely objection was entered. *State v. Short*, 322 N.C. 783, 790, 370 S.E.2d 351, 355 (1988) (citing *State v. Reid*, 322 N.C. 309, 367 S.E.2d 672 (1988)); N.C. Gen. Stat. § 15A-1446(a) (2003).

Our review of the transcripts and record fails to show that defendant made a timely and specific objection when the State proffered Dr. Previll's opinion testimony into evidence. The State prefaced its question to Dr. Previll by stating to the trial court, "I'm not sure whether [defendant's counsel] is going to object to my next question . . . ." Following Dr. Previll's response, the trial court asked defendant's counsel, "Are you going to object to that?" She answered, "No, sir."

Under Rule 10(b)(1), defendant failed to preserve this assignment of error for review.

B. Plain Error Rule

Our Supreme Court adopted the plain error rule as an exception to Rule 10 in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983) (applied to assignments of error regarding jury instructions). A defendant seeking plain error review must "specifically and succinctly" argue that any error committed by the trial court amounted to plain error. *State v. Nobles*, 350 N.C. 483, 514-15, 515 S.E.2d 885, 904 (1999). The proponent must show that:

> [A]fter reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). Our Supreme Court has extended plain error review to issues concerning admissibility of evidence. *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983).

We examine the entire record to decide whether the error "had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 379 (citation omitted). We determine whether, absent the error, would the jury have returned a different verdict. *State v. Riddle*, 316 N.C. 152, 161, 340 S.E.2d 75, 80 (1986).

Defendant properly argued in his brief with citations to relevant authority that the admission of Dr. Previll's opinion testimony constitutes plain error, warranting this Court's review of an otherwise unpreserved assignment of error.

1. Expert Medical Testimony on Sexual Abuse

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2003) provides, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." However, an expert's opinion testimony may not be used to establish or bolster the credibility of a witness. *State v. Heath*, 316 N.C. 337, 342, 341 S.E.2d 565, 568 (1986).

Our Supreme Court stated in *State v. Stancil*, "In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse,

such testimony is an impermissible opinion regarding the victim's credibility." 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (citation omitted) (emphasis supplied).

In *State v. Dixon*, this Court stated:

> [A]n expert medical witness may render an opinion pursuant to Rule 702 that sexual abuse has in fact occurred *if* the State establishes a proper foundation, i.e. physical evidence consistent with sexual abuse. . . . However, *in the absence of physical evidence to support a diagnosis of sexual abuse, expert testimony that sexual abuse has in fact occurred is not admissible because it is an impermissible opinion regarding the victim's credibility.*

150 N.C. App. 46, 52, 563 S.E.2d 594, 598 (emphasis supplied) (citing *Stancil*, 355 N.C. 266, 559 S.E.2d 788), *per curiam aff'd*, 356 N.C. 428, 571 S.E.2d 584 (2002); *see also State v. Grover*, 142 N.C. App. 411, 418-19, 543 S.E.2d 179, 183-84 (Expert opinion testimony that a child has been sexually abused based solely on the child's statements lacks a proper foundation where no physical evidence of abuse is shown), *aff'd*, 354 N.C. 354, 553 S.E.2d 679 (2001); *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 90 (Where there was no clinical evidence to support a diagnosis of sexual abuse, experts' "opinions that sexual abuse had occurred merely attested to truthfulness of the child" witness and were inadmissible), *disc. rev. denied*, 346 N.C. 551, 488 S.E.2d 813 (1997); *State v. Trent*, 320 N.C. 610, 614, 359 S.E.2d 463, 465-66 (1987) (evidence that hymen was not intact was alone insufficient to support evidence of a diagnosis of sexual abuse).

However, "[w]hile it is impermissible for an expert, in the absence of physical evidence, to testify that a child has been sexually abused, it is permissible for an expert to testify that a child exhibits 'characteristics [consistent with] abused children.' " *Grover*, 142 N.C. App. at 419, 543 S.E.2d at 184 (alteration in original) (quoting *State v. Aguallo*, 322 N.C. 818, 821, 370 S.E.2d 676, 677 (1988)); *see also Stancil*, 355 N.C. at 267, 559 S.E.2d at 789 ("an expert witness may testify, upon proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith."). This testimony is permitted "to inform the jury that the lack of physical evidence of abuse is not conclusive that abuse did not occur." *State v. Bush*, 164 N.C. App. 254, 258, 595 S.E.2d 715, 718 (2004) (citations omitted).

2. *State v. Couser*

This Court recently ruled on a similar issue in *State v. Couser*, 163 N.C. App. 727, 594 S.E.2d 420 (2004). In *Couser*, the defendant was charged with first-degree statutory rape and taking indecent liberties with a child. *Id.* at 729, 594 S.E.2d at 422. The victim testified that the defendant forced her to engage in sexual intercourse. *Id.* at 728, 594 S.E.2d at 421. "The State offered further corroborating evidence from the victim's mother, father, sister, and another acquaintance." *Id.* at 729, 594 S.E.2d at 422. Finally, the medical doctor who examined the victim following the alleged incident testified that "she performed an examination on the victim and that her only abnormal finding was the presence of two abrasions on either side of the introitus" and "her diagnosis was probable sexual abuse with abrasions consistent with the victim's history of sexual assault." *Id.* at 729, 594 S.E.2d at 422. On cross examination, the doctor testified that "the abrasions on the introitus could be caused by something other than a sexual assault." *Id.* at 729, 594 S.E.2d at 422. The defendant's counsel failed to object to the doctor's testimony. *Id.* at 729, 594 S.E.2d at 423.

This Court found the admission of the doctor's testimony to be plain error due to several factors: (1) the only evidence that directly linked defendant to the alleged incident was the victim's testimony as corroborated by the mother, father, sister, and an acquaintance; (2) the defendant submitted to a rape suspect kit with negative results; (3) the doctor's "opinion was based on her examination and the history of the victim as given to her;" (4) the abrasions the doctor observed on the victim's introitus "were not diagnostic nor specific to sexual abuse;" (5) no evidence was proffered to show the "victim's behavior or symptoms following the assault were consistent with being sexually abused;" and (6) the doctor's opinion testimony of "probable sexual abuse," could be "construed by the jury to include" an attempted rape and taking indecent liberties. *Id.* at 731-32, 594 S.E.2d at 423-24.

Here, the State offered expert medical opinion testimony through Dr. Previll based upon: (1) her physical examination of T.G.; (2) T.G.'s medical history; and (3) the existence of a sexually transmitted disease. The only physical indication of any sexual activity was T.G.'s diagnosis and treatment for Trichomonas. Dr. Previll testified that based upon the physical exam, "[t]here's no way . . . I could prove or disprove that she's had sexual intercourse or been sexually active." She found none of the physical indicators for sexual activity, such as vaginal trauma, tears in the hymen, or other associated injuries,

despite T.G.'s allegations of "more than thirteen" separate instances of sexual intercourse. *See State v. Moore*, 103 N.C. App. 87, 94, 404 S.E.2d 695, 699 (indications of sexual abuse include: (1) no hymenal tissue; (2) "ragged scar tissue;" (3) a urinary tract infection; and (4) a significantly larger than normal vaginal opening for a child that age), *disc. rev. denied*, 330 N.C. 122, 409 S.E.2d 607 (1991); *State v. Herring*, 322 N.C. 733, 739, 370 S.E.2d 363, 367-68 (1988) (bruising around throat indicated defendant choked victim in process of rape; red and swollen eyes showed defendant tried to "put her eyes out with his thumbs"). Rather, T.G.'s genital exam was within the "normal limits." Finally, on cross examination, Dr. Previll acknowledged that "I'm relying on the history [i.e., T.G.'s statements] being true," in giving her opinion of probable sexual abuse.

Following this Court's analysis in *Dixon* and *Couser* and our Supreme Court's decision in *Stancil*, we conclude the admission of Dr. Previll's testimony that it was "probable that [T.G.] was a victim of sexual abuse" was not based on any physical evidence or behaviors consistent with sexual abuse and was error. Since defendant did not object to Dr. Previll's opinion testimony, we consider whether this error constitutes plain error.

3. Plain Error

Our review of the entire transcript and record on appeal indicates the only evidence linking defendant to T.G. were her statements and other witnesses' corroborative testimony. A medical exam conducted six months after the last of "at least thirteen" alleged sexual assaults returned no evidence of vaginal trauma. T.G.'s contraction of Trichomonas is the sole physical evidence that any sexual activity occurred. Dr. Previll testified that sexual intercourse was not the only path of the disease's transmission, although she acknowledged that nonsexual transmission was "unlikely." T.G. initially told J.H. that defendant's stepson gave her the disease during intercourse. The stepson tested negative for the disease. No evidence was presented that defendant ever tested positive for Trichomonas. T.G.'s post-incident anger management at school was described to be "like many students." *See Couser*, 163 N.C. App. at 731, 594 S.E.2d at 423. In addition, T.G. recanted her allegations to Investigator Daniels.

In the absence of any physical evidence, the admission of Dr. Previll's opinion testimony that "it was probable that [T.G.] was a victim of sexual abuse" was error. *See Couser*, 163 N.C. App. at 731, 594 S.E.2d at 423. The improperly admitted opinion by a medical expert

on T.G.'s credibility prejudiced defendant in the eyes of the jury. *See Odom, supra*; *see also Grover*, 142 N.C. App. at 421, 543 S.E.2d at 185 ("[W]e note that because all of the State's charges against defendant rest upon the alleged sexual abuse of defendant's two children, and because the inadmissible expert opinion lent credibility to the children's testimonies with no other supporting evidence, defendant is entitled to a new trial as to all charges.").

The State presented no other evidence beyond what T.G. told other witnesses. As such, T.G.'s credibility was the strength of the State's case and evidence was presented to put T.G.'s honesty in doubt. Consequently, any comment on T.G.'s credibility weighed heavily on all charges. The jury could have interpreted Dr. Previll's testimony of "probable sexual abuse" to include all of the sexual offenses defendant was charged with, even those not associated with physical injuries. *See Couser*, 163 N.C. App. at 731, 594 S.E.2d at 423. We hold the admission of Dr. Previll's expert medical opinion testimony was prejudicial to defendant and constitutes plain error.

We vacate defendant's convictions of: (1) attempted first-degree sex offense of a child under the age of thirteen years; (2) attempted statutory sex offense of a victim who was thirteen years old; (3) statutory rape of a victim who was thirteen years of age; and (4) taking indecent liberties with a child who was thirteen years old. In light of our holding, we do not address defendant's assignment of error regarding ineffective assistance of counsel.

IV. Motion to Dismiss

[2] Defendant asserts the trial court erred in denying his motion to dismiss on all the charges due to the State's failure to show T.G. and defendant were not lawfully married during the period of time at issue. We address this issue because it may arise during any retrial of defendant and we disagree.

Defendant was charged with: (1) attempted first-degree sex offense of a child under the age of thirteen years; (2) attempted statutory sex offense of a victim who was thirteen years old; (3) statutory rape of a victim who was thirteen years of age; (4) taking indecent liberties with a child who was thirteen years old; (5) first-degree rape of a female under the age of thirteen years; and (6) taking indecent liberties with a child under the age of thirteen.

The charges of attempted statutory sex offense and statutory rape allow for the defense of marriage. However, it only applies if

the victim and perpetrator are *lawfully* married. *See* N.C. Gen. Stat. § 14-27.7A (2003). Under N.C. Gen. Stat. § 51-2(b1) (2003), defendant and T.G. could not be lawfully married. N.C. Gen. Stat. § 51-2(b1) states, "It shall be unlawful for any person under 14 years of age to marry." T.G. was between the ages of 11 and 13 during all the times and events at issue.

The remaining charges of: (1) attempted first-degree sex offense of a child under the age of thirteen years; (2) taking indecent liberties with a child who was thirteen years old; (3) first-degree rape of a female under the age of thirteen years; and (4) taking indecent liberties with a child under the age of thirteen do not permit lawful marriage as a defense. *See* N.C. Gen. Stat. § 14-27.4 (First-degree sexual offense), § 14-202.1 (Taking indecent liberties with children), and § 14-27.2(a)(1) (First-degree rape). This assignment of error is overruled.

V. Conclusion

The admission of Dr. Previll's expert medical opinion testimony that it was "probable that [T.G.] was a victim of sexual abuse" was plain and prejudicial error concerning all charges against defendant. A new trial is ordered for: (1) attempted first-degree sex offense of a child under the age of thirteen years; (2) attempted statutory sex offense of a victim who was thirteen years old; (3) statutory rape of a victim who was thirteen years of age; and (4) taking indecent liberties with a child who was thirteen years old. Lawful marriage is not a defense to the charges brought against defendant. We decline to address defendant's assertion of ineffective assistance of counsel.

We order a new trial in 03 CRS 1673, 03 CRS 1674, 03 CRS 1675, and 03 CRS 1676.

New Trial.

Judges TIMMONS-GOODSON and GEER concur.

BOBBY H. CLAWSON, EMPLOYEE, PLAINTIFF v. PHIL CLINE TRUCKING, INC., EMPLOYER, SELF INSURED (KEY RISK MANAGEMENT SERVICES, ADJUSTING AGENT), DEFENDANT

No. COA03-1569

(Filed 18 January 2005)

1. **Workers' Compensation— Form 26 Agreement—medical documentation—insufficient**

The Industrial Commission did not err in a workers' compensation action by invalidating a Form 26 Agreement for lack of medical documentation where the only document submitted that could be classified as a medical report was a one-paragraph note to plaintiff's chart. Plaintiff was treated at an emergency room and two pain clinics; in addition to the emergency room personnel, he saw three orthopedic surgeons, a neurosurgeon, a neurologist, and received physical therapy. Whether or not plaintiff had copies of the records which he did not submit, the fact remains that the necessary and relevant medical records were not submitted with the Agreement.

2. **Workers' Compensation— attorney fee—contingency—grounds for award—not addressed**

An award of attorney fees by the Industrial Commission in a workers' compensation case was remanded where the award was simply the ordinary contingent fee, awarded pursuant to N.C.G.S. § 97-90, and the Commission did not address whether grounds existed for the award of additional attorney fees pursuant to plaintiff's motion under N.C.G.S. §§ 97-88 and 97-88.1.

Appeal by plaintiff and defendants from Opinion and Award of the North Carolina Industrial Commission filed 14 April 2003. Heard in the Court of Appeals 20 September 2004.

Walden & Walden, by Daniel S. Walden, attorney for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Philip J. Mohr and Craig D. Cannon, attorneys for defendant-appellants.

TIMMONS-GOODSON, Judge.

Phil Cline Trucking, Inc. ("Cline Trucking") and Key Risk Management Services ("Key Risk") (collectively "defendants") appeal

an Opinion and Award by the North Carolina Industrial Commission ("Full Commission") invalidating a settlement agreement between Bobby H. Clawson ("plaintiff") and Key Risk for lack of medical documentation. Plaintiff cross appeals, arguing that the agreement should have been invalidated on grounds of fraud, misrepresentation, and/or undue influence. For the reasons stated herein, we affirm the Full Commission's Opinion and Award in part and remand in part for determination of a remaining issue.

The factual and procedural history of this case is as follows: On 3 January 1995, plaintiff was employed as a long-distance truck driver for Cline Trucking, earning an average of $550 per week. Plaintiff sustained a compensable injury while making a delivery in Lawrence, Massachusetts, where plaintiff slipped on ice covering an asphalt parking lot and fell, injuring his lower back, tailbone and left foot. Shortly after plaintiff was injured, he and Cline Trucking entered into an Agreement for Compensation for Disability (a "Form 21 Agreement"). Under the terms of the Form 21 Agreement, Cline Trucking agreed to pay plaintiff temporary total disability ("TTD") benefits in the amount of $347.50 per week beginning 13 January 1995, and continuing for as long as necessary. On 17 March 1995, Key Risk Management Services, insurance carrier for Cline Trucking, notified plaintiff that his TTD benefits would be terminated on 1 May 1995, the day that plaintiff was due to return to work on a trial basis. Because plaintiff would be returning to work in a different capacity and at lower wages than he earned at the time of his injury, plaintiff was still entitled to compensation for partial disability.

On 16 July 1995, plaintiff stopped working due to pain from his injury. Key Risk reinstated plaintiff's TTD benefits, and plaintiff underwent physical therapy treatments for several months. In October, plaintiff underwent a functional capacity evaluation to determine if and in what capacity he would be able to work. In November, plaintiff was referred to a pain management clinic, and participated in a four-week inpatient pain management program in March 1996.

In March 1996, Key Risk enlisted CorVel Corporation to provide vocational rehabilitation to assist plaintiff in finding a job. After one year, plaintiff was still unable to obtain employment. CorVel ceased providing vocational rehabilitation services for plaintiff on 24 February 1997. At that time, CorVel vocation rehabilitation expert Lou Drumm sent plaintiff's case file to legal counsel for Key Risk. On 3 March 1997, Key Risk stopped paying plaintiff TTD benefits but

failed to file an Application to Terminate or Suspend Payment of Compensation ("Form 24"). Key Risk claims adjuster Janice Sherrell testified that the payments ceased due to a computer error.

On 23 October 1997, plaintiff filed a request for a hearing (a "Form 33 request") with the Full Commission to address the "termination of temporary total benefits and disagreement over degree of disability." Sherrell later testified that she did not realize that plaintiff was no longer receiving TTD benefits until she received notice of the Form 33 request for a hearing. When Sherrell received notice of the request, she "was instructed by superiors to send it on to the defense counsel for representation, and not to issue a back check." Sherrell did not reinstate plaintiff's TTD benefits.

On 1 November 1999, plaintiff and Key Risk filed a Supplemental Agreement as to Payment of Compensation ("a Form 26 Agreement") which states that plaintiff has a 10% permanent partial impairment of his back. The Form 26 Agreement further states that Key Risk agreed to pay plaintiff permanent partial disability compensation in the amount of $347.50 for 30 weeks as a lump sum of $10,425. The Form 26 Agreement included a one-paragraph note to plaintiff's medical file drafted by a doctor who treated plaintiff at a neurology clinic, but did not include other documentation ordinarily submitted with a Form 26 Agreement, such as medical records, the insurance rating, the return-to-work report or other documentation showing why the employee was no longer entitled to TTD benefits.

On 3 February 2000, a deputy commissioner approved the Form 26 Agreement. On 7 January 2001, plaintiff filed a Motion in the Cause to Set Aside the Form 26 Agreement. Plaintiff argued, in pertinent part, that the Form 26 Agreement was not fair and just to plaintiff for the following reason:

> defendant did not supply the Commission with, and the Commission did not require or have the extensive medical records, rehabilitation records, and vocational records and reports generated in the five year period from 3 January 1995, the date of plaintiff's accident, to 3 February 2000, the date the Commission approved the Form 26.

The motion was called for hearing before another deputy commissioner on 13 March 2002, and concluded on 22 March 2002. On 8 August 2002, the deputy commissioner issued an Opinion and Award declaring the Form 26 Agreement "null and void due to defendants'

violation of the provisions of G.S. 97-82." The deputy commissioner further ruled that plaintiff had an alternate basis for relief in that Key Risk's "unilateral termination of plaintiff's disability benefits" was conduct constituting "fraud and/or misrepresentation on the Commission," and "undue influence over plaintiff," and therefore "justifies setting aside the Form 26 Agreement."

Defendants appealed the deputy commissioner's Opinion and Award to the Full Commission. The Full Commission heard the appeal on 27 January 2003, and issued an Opinion and Award on 14 April 2003. The Full Commission found the following pertinent facts: (1) The only document or record attached to the Form 26 Agreement which could be classified as a medical report was a one-paragraph note to plaintiff's medical chart from a neurology clinic; (2) the note mentions that plaintiff was a patient at the MidAtlantic Center for Pain, but no records from the MidAtlantic Center were submitted with the Form 26 Agreement; (3) the Form 26 Agreement indicates that Key Risk paid $53,187.48 in medical costs, rehabilitation services, and other miscellaneous costs related to plaintiff's injury, but no medical records related to these costs were submitted with the Form 26 Agreement; (4) the parties had approximately 140 pages of medical records pertaining to plaintiff's injury and approximately 127 pages of rehabilitation reports that were not submitted with the Form 26 Agreement. The Full Commission ultimately found that the deputy commissioner "did not have all relevant records necessary to properly determine the approval of the Form 26 Agreement," and therefore the Agreement "was not fair and just to the employee."

The Full Commission concluded that "[t]he Form 26 agreement in this claim, approved on February 3, 2000, should be declared null and void because the Commission did not have all relevant information within the possession of the parties." The Full Commission further found that "[b]ased on the circumstances of the evidence in this case, the Commission does not find that either party's conduct arises to the level of fraud. Similarly, the evidence does not support a conclusion that plaintiff entered into the Form 26 Agreement under duress." The Full Commission entered the following award:

1. Defendants shall pay plaintiff total disability compensation benefits at the rate of $347.50 per week for the period beginning January 6, 1995 and continuing until plaintiff returns to work or further order of the Commission. Defendants are entitled to a credit for benefits paid during this period, including

the payment for the impairment rating pursuant to the voided Form 26 Agreement. Defendants are entitled to a credit for the income received by plaintiff during his four unsuccessful attempts to return to work. To the extent that these benefits have accrued, they shall be paid in a lump sum, subject to attorney's fees awarded below. Other benefits accrue weekly, and absent other order from the Commission, shall be paid weekly, subject to the attorney's fees awarded below.

2. Defendants shall pay a 10% late payment penalty on all past unpaid compensation due plaintiff after April 22, 2001 until timely paid.

3. Defendants shall pay for all medical expenses incurred by plaintiff or to be incurred by plaintiff as a result of his back injury. Defendants shall pay for any treatment by Dr. Poehling for the period after January 2001.

4. A reasonable attorney's fee in the amount of one third of all unpaid accrued compensation awarded herein to plaintiff is approved for plaintiff's present counsel. This fee shall be withheld from the recovery of plaintiff and paid directly to counsel for plaintiff. A reasonable attorney's fee of one-fourth of ongoing future compensation due plaintiff is approved for plaintiff's counsel, and every fourth check shall be paid directly to counsel for plaintiff.

5. Defendants shall pay all costs, including the expert witness fees previously awarded.

It is from this Opinion and Award that plaintiff and defendants appeal.

As an initial matter, we note that defendants' brief does not contain an argument supporting Assignment of Error #9. The omitted assignment of error is deemed abandoned pursuant to N.C.R. App. P. 28(b)(6) (2004). We therefore limit our review to the assignments of error properly addressed in plaintiff's and defendants' briefs.

The issues presented on appeal are whether the Full Commission erred by (I) invalidating the Form 26 Agreement for lack of medical documentation; (II) ruling in plaintiff's favor when it was plaintiff's responsibility to submit the proper documentation; (III) failing to address one of the issues for determination at the hearing; (IV) failing to invalidate the Form 26 Agreement on grounds of fraud, misrepre-

sentation, and/or undue influence; and (V) awarding attorney's fees of one-fourth of plaintiff's compensation.

[1] Defendants first argue that the Full Commission erred by invalidating the Form 26 Agreement for lack of medical documentation. We disagree.

Our standard of review is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). " '[T]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Jones v. Desk Co.*, 264 N.C. 401, 141 S.E.2d 632 (1965)).

"If the employer and the injured employee or his dependents reach an agreement in regard to compensation under [the Workers' Compensation Act], they may enter into a memorandum of the agreement in the form prescribed by the Commission." N.C. Gen. Stat. § 97-82(a) (2003). "The memorandum of agreement, *accompanied by a full and complete medical report*, shall be filed with and approved by the Commission." *Id.* (emphasis added). The North Carolina Industrial Commission Workers' Compensation Rules provide that "[n]o agreement for permanent disability will be approved until all *relevant* medical, vocational and nursing rehabilitation reports *known to exist* in the case have been filed with the Industrial Commission." Workers' Comp. R. of N.C. Indus. Comm'n 501(3) (emphasis added). While the Workers' Compensation Rules do not define the term "relevant medical reports," "reading 501(3) in light of N.C. Gen. Stat. § 97-82(a) leads us to conclude that relevant records include the full and complete medical records related to the work-related injury." *Atkins v. Kelly Springfield Tire Co.*, 154 N.C. App. 512, 514, 571 S.E.2d 865, 866 (2002).

There is sufficient evidence that the parties failed to submit a full and complete medical report with the Form 26 Agreement to support the Full Commission's findings of fact and conclusions of law. The record on appeal demonstrates that plaintiff was treated by numerous doctors for his back injury. Plaintiff testified that he sought treatment at an emergency room immediately after his fall, that upon his return to North Carolina he was treated by three orthopaedic sur-

geons, a neurosurgeon and a neurologist. Plaintiff sought treatment at two pain clinics and received physical therapy treatment. The record further demonstrates that the parties failed to submit any documentation of plaintiff's extensive medical treatment as required by Rule 501(3). Accordingly, we affirm the Full Commission's ruling.

Defendants next argue that the Full Commission erred by ruling in plaintiff's favor, because plaintiff had the responsibility to submit the proper documentation. We disagree.

"After the employer or carrier/administrator has received a memorandum of agreement which has been signed by the employee and employee's attorney of record, if any, it shall have 20 days within which to submit the memorandum of agreement to the Industrial Commission for review and approval . . . ." Workers' Comp. R. of N.C. Indus. Comm'n 501(7). Thus, it is the responsibility of the employer or its insurance carrier to submit the Form 26 Agreement and all attendant medical documentation to the Full Commission.

In the present case, defendants argue that plaintiff volunteered to submit the Form 26 Agreement to the Full Commission, and that plaintiff had copies of all relevant medical records but did not submit them with the Form 26 Agreement. Therefore, defendants argue, because plaintiff failed to submit the medical records with the Form 26 Agreement, plaintiff had no right to appeal the Form 26 Agreement based on the lack of appropriate medical documentation.

Without regard to which party submitted the Form 26 Agreement to the Full Commission, the fact remains that the necessary and relevant medical records were not submitted with the Agreement. A full and complete medical report is essential for the deputy commissioner to accurately assess the proposed settlement agreement. Because the parties failed to file a full and complete medical report, we conclude that the Full Commission properly invalidated the Form 26 Agreement.

Defendants next argue that, although the Form 26 Agreement was set aside, the Full Commission erred by failing to address one of the issues for determination at the hearing. We disagree.

"All questions arising under [the Workers' Compensation Act] if not settled by agreements of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided." N.C. Gen. Stat. § 97-91 (2003).

In the underlying Opinion and Award, the Full Commission indicated the following question as an issue for determination in the alternative to the issues regarding the Form 26 Agreement:

> [H]as plaintiff undergone a G.S. §97-47 change of condition since 3 February 2000 when the Form 26 compensation agreement was approved?

Defendant correctly points out that the Full Commission failed to address this issue in its findings of fact and conclusions of law. However, since the Full Commission determined the matter based on its resolution of the Form 26 issues, it did not need to address this issue. As we have reached the same conclusion, we need not address this issue. This assignment of error is overruled.

Having addressed all of the issues presented by defendant on appeal, we turn to the issues presented by plaintiff on cross-appeal. Plaintiff first argues that the Full Commission erred by failing to invalidate the Form 26 Agreement on grounds of fraud, misrepresentation, and/or undue influence.

As discussed *supra*, this Court is bound by the Full Commission's findings of fact "if supported by competent evidence even though there is evidence to support a contrary finding." *Roberts v. Century Contrs., Inc.*, 162 N.C. App. 688, 691, 592 S.E.2d 215, 218 (2004). "[T]his Court is not at liberty to reweigh the evidence and to set aside the findings . . . simply because other . . . conclusions might have been reached." *Id.* (citations and quotations omitted).

The Full Commission found that "[b]ased on the circumstances of the evidence in this case, the Commission does not find that either party's conduct arises to the level of fraud. Similarly, the evidence does not support a conclusion that plaintiff entered into the Form 26 Agreement under duress." The Full Commission's decision to void the Form 26 Agreement is supported by competent evidence, discussed *supra*, and, therefore, is conclusive on appeal. Accordingly, we decline to reconsider the issue of fraud, misrepresentation or undue influence, or set aside the findings of the Full Commission on the possibility that a different conclusion might have been reached.

[2] Plaintiff also argues that the Full Commission erred by "reversing the deputy's award of attorney's fees against defendant under G.S. 97-88.1," and failing to address plaintiff's 13 January 2003 motion for attorney's fees under N.C. Gen. Stat. §§ 97-88 and 97-88.1.

The standard of review for an award of attorneys' fees by the Full Commission is abuse of discretion. *Childress v. Trion, Inc.*, 125 N.C. App. 588, 590, 481 S.E.2d 697, 698, *disc. rev. denied*, 346 N.C. 276, 487 S.E.2d 541 (1997) (citing *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 298 S.E.2d 681 (1983)). The General Statutes provide for attorneys' fees in workers' compensation cases as follows:

> If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

N.C. Gen. Stat. § 97-88 (2003).

> If 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 (2003).

In the present case, the deputy commissioner awarded plaintiff attorney's fees as follows:

> A reasonable attorney's fee in the amount of one third percent of all accrued compensation awarded herein to plaintiff is approved for plaintiff's present counsel. . . . A reasonable attorney's fee of one third of ongoing future compensation due plaintiff is approved for plaintiff's counsel, and shall be paid as a part of the cost of this action.

Defendants' counsel filed a Notice of Appeal of the Opinion and Award on 12 August 2002. On 13 January 2003, plaintiff filed a Motion for Award of Attorney's Fees as follows:

> Plaintiff moves the Commission panel to order that the cost to plaintiff of this proceeding, including reasonable attorney's fees, be paid by defendant as a part of the bill of costs. Plaintiff seeks

to be awarded an attorney's fee of 25 percent of all additional past and future benefits awarded plaintiff, to be paid in addition to the $347.50 weekly disability benefit due plaintiff.

The Full Commission conducted a hearing on 27 January 2003, and issued an Opinion and Award with regard to attorney's fees as follows:

> A reasonable attorney's fee in the amount of one third of all unpaid accrued compensation awarded herein to plaintiff is approved for plaintiff's present counsel. . . . A reasonable attorney's fee of one-fourth of ongoing future compensation due plaintiff is approved for plaintiff's counsel, and every fourth check shall be paid directly to counsel for plaintiff.

The Full Commission's Opinion and Award did not mention N.C. Gen. Stat. §§ 97-88 or 97-88.1 or plaintiff's motion filed 13 January 2003. Thus, we conclude that the attorney's fee award above is simply the ordinary contingent fee, awarded pursuant to N.C. Gen. Stat. § 97-90, and that the Full Commission has not addressed whether grounds exist for an award of additional attorney's fees pursuant to plaintiff's motion. Plaintiff correctly notes that this Court has ruled it is error for the Full Commission to fail to address such a motion. *Cialino v. Wal-Mart Stores*, 156 N.C. App. 463, 577 S.E.2d 345 (2003). Thus, we remand this case for the Full Commission to address plaintiff's motion.

AFFIRMED in part, REMANDED in part.

Chief Judge MARTIN and Judge HUDSON concur.

STATE OF NORTH CAROLINA v. ABDUL JERMAINE CORBETT

No. COA03-1494

(Filed 18 January 2005)

1. Kidnapping— first-degree—requested instruction—safe place

The trial court did not err in a first-degree kidnapping case by granting the State's request for a jury instruction relating to whether the victim was released in a safe place, because: (1) the testimony was sufficient to support a jury's determination that

the victim's release was involuntary and into the focal point of at least one officer's weapon; (2) the instruction did not conclude that the victim was released in an unsafe place, but at all times ensured that it was still upon the jury to find the facts surrounding the release beyond a reasonable doubt; and (3) being in the line of fire of one weapon falls within the legislature's intent of what is not a safe place under N.C.G.S. § 14-39(b).

2. Evidence— arrest warrant—relevancy

The trial court did not err in a first-degree kidnapping case by refusing to admit the arrest warrant containing defendant's initial charge of second-degree kidnapping, because: (1) the allegations of the arrest warrant do not necessarily frame what is relevant to a particular criminal case tried upon an indictment; (2) the arrest warrant was outside the scope of matters relevant to whether the victim had been released in a safe place; and (3) if relevant at all, the warrant was corroborative of the testimony that the victim at some point was placed in the line of fire and there was a likelihood that she was released in an unsafe place.

Judge TIMMONS-GOODSON dissenting.

Appeal by defendant from judgment entered 1 July 2003 by Judge A. Leon Stanback in Wake County Superior Court. Heard in the Court of Appeals 14 September 2004.

Attorney General Roy Cooper, by Assistant Attorney General Susan R. Lundberg, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from his judgment and sentence imposed following a jury's verdict finding him guilty of the charge of first-degree kidnapping. Additionally, defendant was charged with and pled guilty to common law robbery for which the trial court entered judgment.

The State's evidence tended to show the following: On the night of 9 March 2003, Reginald Harris ("Mr. Harris") was working the closing shift of the Blockbuster Video Store ("video store") in Ashton Square off Raleigh's Capital Boulevard. Mr. Harris was a manager of the store and was working with a fellow employee, Rebecca Carman

("Ms. Carman"). Defendant was in the store near closing time, and was observed by Mr. Harris as suspiciously walking back and forth, from one side of the store to the other. Mr. Harris called the police and requested an officer come by the store.

Mr. Harris then announced that the video store would be closing shortly and walked to lock the front door of the store so no more patrons could enter. At that point defendant was the only patron left in the store. When Mr. Harris entered the alcove area between the video store's inside and outside doors, he turned and observed defendant grab Ms. Carman by her waist. Defendant pulled her off the step stool she was working from, and gripping her by the neck, shoved a blunt, hard object into her back. Defendant gestured to Mr. Harris to come back into the video store, which he did leaving the front door unlocked. Mr. Harris could not discern at any point if it was a knife or a gun defendant had at Ms. Carman's back. Defendant forced Ms. Carman to the front of the store and pushed her down behind the counter area so that she could not be seen from the front door. Defendant demanded Mr. Harris give him the money in the store's safe and cash register. The safe was time delayed and Mr. Harris informed defendant it would take approximately 10 minutes to open. Defendant told Mr. Harris to sit down, relax, and read something.

Soon thereafter, Raleigh Police Officer David Dufault ("Officer Dufault") entered the video store. Officer Dufault immediately saw defendant with Ms. Carman in front of him and behind the counter on the floor. As he entered the store, he unsnapped the holster of his weapon, and touching it with his hand, told defendant to put his weapon down and to free Ms. Carman. Defendant pulled Ms. Carman up by the neck and placed her in between him and Officer Dufault, and began threatening he would "blow her way." Officer Dufault tried continually to calm defendant, but defendant kept threatening Ms. Carman's life and began moving himself, with her as his shield, towards the front of the video store. He told Mr. Harris to get Officer Dufault's gun by the count of ten, or he would shoot Ms. Carman.

When defendant reached the front door, he backed himself and Ms. Carman into the one-way door attempting to open it from the wrong direction. Defendant demanded someone open the front door and Mr. Harris came and assisted him. It was at approximately this point when Raleigh Police Officer Jeremy Garkalins ("Officer Garkalins") drove up to the video store. Officer Garkalins stepped out of his squad car, and standing behind it, drew his sidearm. Defendant

saw Officer Garkalins arrive and then threatened to kill everyone at the scene.

Believing defendant had reached his "boiling point," Officer Dufault drew his sidearm, and pointed it such that defendant and Ms. Carman were in his line of fire. Defendant immediately released his grip on Ms. Carman, allowing her to drop to her knees. Defendant threw his weapon to the ground. Officer Dufault instructed defendant to get down on the ground. Defendant laid on his stomach on the floor and Officer Dufault and Officer Garkalins arrested him.

Defendant put on no evidence. The jury returned a guilty verdict.

Based on his prior record level of III, the Court gave defendant consecutive sentences of 10 to 12 months pursuant to his guilty plea of common law robbery, and 116 to 149 months pursuant to the jury's verdict of finding him guilty of first-degree kidnapping.

Defendant now raises two issues on appeal relating to the charge of kidnapping: first, that the trial court erred in granting the State's request for a jury instruction relating to whether Ms. Carman was released in a safe place; and second, that the court erred in not allowing to be placed into evidence, or to be referred to in defendant's closing argument, the arrest warrant initially charging defendant for second-degree kidnapping. For the reasons stated herein, we overrule defendant's assignments of error.

Jury Instruction on First-Degree Kidnapping

[1] Defendant first argues that the court erred in granting the State's request regarding the jury instruction on the "safe place" element of first-degree kidnapping. Based on the evidence presented in this case, we find the court did not err in granting the State's requested instruction.

N.C. Gen. Stat. § 14-39(b) (2003) states that:

> There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

The legislature has not defined by statute what is or is not a "safe place." Nor is there any mention in the Criminal Pattern Jury Instructions as to the parameters of a "safe place." Therefore, the determination of whether a kidnapping victim was released in a safe place has been decided on a case-by-case basis. *See State v. Sakobie*, 157 N.C. App. 275, 280-81, 579 S.E.2d 125, 129 (2003) (Releasing the victim in an isolated wooded area with which the victim was not familiar was not a "safe place"); *State v. Heatwole*, 333 N.C. 156, 161, 423 S.E.2d 735, 738 (1992) (releasing the victim in the focal point of law enforcement weapons was not a "safe place"); *State v. Pratt*, 306 N.C. 673, 682-83, 295 S.E.2d 462, 468 (1982) (releasing a victim bound, undressed, in the wintertime, in an area unfamiliar to him, and in view of his obvious handicap that he has no hands, he was not released in a "safe place"); *State v. Pratt*, 152 N.C. App. 694, 700, 568 S.E.2d 276, 280 (2002), *cert. denied*, *appeal dismissed*, 357 N.C. 168, 581 S.E.2d 442 (2003) (victim left bound and gagged in the woods at nighttime was not a "safe place"); *State v. Smith*, 110 N.C. App. 119, 137, 429 S.E.2d 425, 434, *aff'd per curiam*, 335 N.C. 162, 435 S.E.2d 770 (1993) (victim left tied to a tree in a wooded area off a dirt road where snakes were later seen was not a "safe place").

In *Heatwole*, our Supreme Court held the following to be a sufficient factual basis to support a guilty plea of first-degree kidnapping:

> [R]eleasing a kidnap victim when the kidnapper is aware he is cornered and outnumbered by law enforcement officials is not "voluntary" and that sending her out into the focal point of their weapons is not a "safe place."

333 N.C. 156, 161, 423 S.E.2d 735, 738 (1992). The victim in *Heatwole* was defendant's former girlfriend. She was kidnapped and taken to the defendant's father's house. *Heatwole*, 333 N.C. at 159, 423 S.E.2d at 737-38. There the defendant killed the security guard of the subdivision in which the house was located, and killed his stepmother. *Id.* Ten officers surrounded the home with weapons drawn, and the defendant released the victim sending her out of the house and into the focal point of the weapons. *Id.*

In the case at bar, defendant was charged with first-degree kidnapping based on the evidence that defendant did not release Ms. Carman, his victim, in a safe place. The basis of the State's theory was pursuant to *Heatwole*, that the evidence supported an instruction that

defendant released the victim into the focal point of the arresting officers' drawn weapons, and thus not a "safe place." The instruction consisted of the following:

> And fifth, that the person was not released by the Defendant in a safe place. Now, release of a kidnap victim when the kidnapper is aware he is cornered and outnumbered by law enforcement officials is not voluntary, and sending the kidnap victim out into the focal point of the weapons of the police officers is not a safe place.

Defendant argues that this instruction denied him the presumption of innocence in that it is conclusive that Ms. Carman's release in this case was not in a "safe place." Defendant additionally argues the facts of his case do not warrant a *Heatwole* instruction, as the facts of *Heatwole* are of a different and much more heinous circumstance than those at bar. We do not agree with either contention.

In this case, defendant made Officer Dufault believe he had a gun in the victim's back. He threatened he would kill her and everyone else at the scene before ever going back to jail. Based upon this interpretation, Officer Dufault's testimony revealed that he drew his weapon on defendant and Ms. Carman when he believed the risk of hitting Ms. Carman, should he be required to shoot, was outweighed by the peril in which she was being held:

> A. . . . When he got into that space, he then proceeded to say he's going to count to three and he's going to kill her. At that time he says one, like he was counting. At that time, that's when I drew my weapon, because I figured, from the whole time from the very beginning when I first entered to then, he had gradually gotten angrier and angrier. And reason I drew my weapon when he said one, because I figured he's cornered now, he's outnumbered, because there's another officer here. I figured if he's going to do something, he's going to do something now, because he's beyond his boiling point.

On cross-examination, when asking to clarify when exactly defendant let go of the victim, Officer Dufault stated:

> A. She—he let her go once I had the weapon drawn on him, where she was still being held. I mean, he didn't let her go when I was drawing it, he only let her go when I had it pointed.

Officer Garkalin testified as to the following:

> Q. So while you're setting up sight and you have your weapon drawn, but not pointed at him, but basically—
>
> A. In the low ready.
>
> Q. —Officer Dufault comes from this way and he ultimately pulls his weapon, at that point the Defendant surrenders; is that right?
>
> A. Exactly.

We conclude that this testimony was sufficient to support a jury's determination that Ms. Carman's release was involuntary and into the focal point of at least one officer's weapon. It is thus sufficient to support an instruction under *Heatwole*. The court's instruction did not conclude Ms. Carman was released in an unsafe place. Rather, it provided that should the jury find the circumstances of the instruction as to the release of Ms. Carman to be in such place, such a release was not in a "safe place." At all times it was still upon the jury to find the facts of the circumstances surrounding the release beyond a reasonable doubt.

Lastly, we note that, while in this instance there was arguably only one officer's weapon endangering the life of Ms. Carman, we believe that being in the line of fire of one weapon falls well within the legislature's intent of what is not a "safe place" under N.C. Gen. Stat. § 14-39(b). Defendant's argument that there needs to be circumstances akin to having two prior homicides and ten officers' weapons drawn upon the kidnapping victim to warrant an instruction based on *Heatwole*, underestimates the threat of being placed in the potential path of even a single bullet.

This assignment of error is overruled.

Evidence of Arrest Warrant

[2] Next, defendant contends the trial court erred in refusing to admit the arrest warrant containing defendant's initial charge of second-degree kidnapping. We do not agree.

We have held that:

> An arrest warrant issues upon probable cause that an offense has been committed and that the person to be arrested was the perpetrator. This does not mean, however, that a subsequent indictment must necessarily flow from or be framed within the

> allegations of the arrest warrant. When a defendant is tried upon an indictment, for example, the validity of the arrest warrant has no effect upon the trial court's jurisdiction over the subject of the indictment.

State v. Riggs, 100 N.C. App. 149, 153, 394 S.E.2d 670, 672 (1990) (citation omitted), *disc. review denied*, 328 N.C. 96, 402 S.E.2d 425 (1991). Therefore, the allegations of the arrest warrant do not necessarily "frame" what is relevant to a particular criminal case tried upon an indictment.

In the case at bar, defendant was indicted for first-degree kidnapping on the theory that the victim was not released in a "safe place." This is the crime for which the State put on evidence in its case-in-chief, and defendant conceded all elements except whether or not the victim was released in a "safe place." During the cross-examination of Officer Dufault, the court denied defendant's attempt to admit evidence of the arrest warrant charging defendant with second-degree kidnapping. It is clear from the transcript the court believed the warrant had no relevance on the issue of defendant's guilt or whether Ms. Carman was released in a "safe place."

While " 'the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.' " *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (quoting *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991); see N.C. Gen. Stat. § 8C-1, Rule 401 and Rule 403 (2003).

We agree with the court that the arrest warrant in this case was outside the scope of matters relevant to whether the victim had been released in a "safe place." Additionally, we note that the face of the warrant stated that the victim was a "hostage," and was used "as a shield in an attempt to facilitate the commission of an armed robbery." If of any relevance, the warrant is corroborative of the testimony that Ms. Carman at some point was placed in the line of fire, and there was a likelihood that she was released in an unsafe place.

This assignment of error is overruled.

Based upon thorough review of the transcript, record, and briefs, we find defendant received a fair trial free from reversible error.

No error.

Judge HUNTER concurs.

Judge TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge, dissenting.

Because I disagree with the majority's conclusion that the trial court did not err in instructing the jury, I respectfully dissent.

Our Supreme Court has previously concluded that "[e]lements of criminal offenses present questions of *fact* which must be resolved by the *jury* upon the State's proof of their existence beyond a reasonable doubt." *State v. Torain*, 316 N.C. 111, 119, 340 S.E.2d 465, 469 (emphasis in original), *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986). "This principle prohibits the use of evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." *State v. Locklear*, 331 N.C. 239, 244, 415 S.E.2d 726, 729 (1992). In the instant case, I conclude that the challenged portion of the trial court's instruction impermissibly relieved the State of its burden regarding an essential element of defendant's first-degree kidnapping charge—that the victim was not released in a safe place.

Although I recognize that a jury instruction does not relieve the State of its burden when it "merely state[s] the substantive law of this state[,]" *Id.* at 245, 415 S.E.2d at 729, I note that "the General Assembly has neither defined nor given guidance as to the meaning of the term 'safe place' in relation to the offense of first degree kidnapping[,]" and "our case law in North Carolina has not set out any test or rule for determining whether a release was in a 'safe place.' " *State v. Sakobie*, 157 N.C. App. 275, 282, 579 S.E.2d 125, 130 (2003) (citing N.C. Gen. Stat. § 14-39 (2003)). Thus, because our courts have "not [been] provided any clear standard to apply," we employ "a case-by-case approach" that relies on the particular facts of each case. *Id.* Despite our Supreme Court's "agree[ment]" with "the State's position" in *State v. Heatwole*, 333 N.C. 152, 161, 423 S.E.2d 735, 737 (1992), I conclude that the "case-by-case approach" has not yet pronounced a strict rule of law regarding whether a particular place is "safe" for the purposes of N.C. Gen. Stat. § 14-39(b).

In *Heatwole*, the defendant argued that the trial court lacked a sufficient factual basis to accept his guilty plea because there was

insufficient evidence that the victim had not been released in a safe place. The Supreme Court disagreed, concluding that "[i]nasumch as there was a factual basis for each element of the offense, there is no reason to upset [the] defendant's guilty plea to first-degree kidnapping[.]" 333 N.C. at 161, 423 S.E.2d at 738. I am not convinced that this statement amounts to a strict pronouncement that, as a matter of law, a defendant has failed to release a victim in a "safe place" where the defendant releases the victim unharmed, in the same place where the alleged kidnapping occurred, in plain view of police officers, and following the police officers' commands to do so. Instead, I believe it is "for the jury to resolve the conflicting inferences arising from this evidence." *State v. Jerrett*, 309 N.C. 239, 263, 307 S.E.2d 339, 352 (1983) (holding that, although the evidence presented a "close question" as to whether the defendant released the victim in a safe place, because the evidence was sufficient to permit the jury to reasonably infer that the victim escaped, was rescued by the presence and intervention of a police officer, or was released by the defendant in the presence of the police officer, the trial court did not err in submitting the issue of first-degree kidnapping to the jury). Therefore, because I conclude that the challenged portion of the trial court's instruction in the instant case relieved the State of its burden of proving that the victim was not released in a safe place, I would reverse defendant's conviction and order a new trial.

DAVID G. JONES, PLAINTIFF v. EDWARD D. RATLEY AND BEST ROOFING COMPANY, DEFENDANT

No. COA03-1496

(Filed 18 January 2005)

1. Small Claims— de novo appeal to district court—informal process

The district court did not err in a de novo trial from small claims court where defendant apparently contended that the court did not make adequate conclusions and speculated that the court based its decision on a theory of fraud that was not pled with particularity. Defendant does not explain how the claim involved fraud, a complaint in a small claims action need be in no particular form, the legislature intended the informal processes of the small claims court to continue in the de novo appeal, and

the district court on a de novo appeal has the discretion to order further pleadings or to try the case as pled.

2. Small Claims— appeal to district court—no answer

There was no error in a district court trial de novo from small claims court where the court found that no answer was filed by defendant, as no answer is required in small claims (no response is a general denial). Defendant does not argue that the finding is erroneous or explain how he was harmed.

3. Courts— district—finding—supported by evidence

The evidence supported the district court's finding and conclusion regarding disputed funds paid from a closing under the belief that there was a valid judgment on the record.

4. Trials— judicial notice—not requested—necessary information not supplied

The trial court did not abuse its discretion by not taking judicial notice that judgments are public records that could have been checked by a closing attorney where defendant did not argue that he requested that the court take judicial notice or that he supplied the court with the necessary information.

Judge TYSON dissenting.

Defendant appeals from judgment entered 8 August 2003 by Judge Thomas G. Foster, Jr. in Guilford County District Court. Heard in the Court of Appeals 1 September 2004.

Douglas S. Harris, for defendant-appellant.

No brief filed for plaintiff-appellee.

HUDSON, Judge.

On 1 July 2002, plaintiff Jones filed a small claims "complaint for money owed" on an Administrative Office of the Courts (AOC) form, alleging that he had sent $2,000 to defendant "in error." On 3 September 2002, the small claims court, using an AOC form Judgment, agreed "that the plaintiff has proved the case by the greater weight of the evidence," and ordered defendant Ratley and Best (hereinafter "Ratley") to pay plaintiff $2,000. Ratley appealed to the district court and on 27 November 2002, the district court arbitrator entered an arbitration award and judgment in favor of Jones. Ratley requested a trial *de novo* in district court, which was held on

3 March 2003. After the court awarded $2,000 to Jones, Ratley appealed. We affirm.

The record includes no transcript, but does contain documentary evidence. From these documents, it appears that in 1997 Ratley sued Jones in Randolph County for $2,000, seeking payment for work Ratley alleged he completed for Jones. Ratley contends in his brief that Jones's mortgage company contacted him at the time and requested that he drop the suit so that Jones's closing could proceed. In return, Ratley would be paid $2,000 out of the closing. Ratley introduced a letter he wrote to the mortgage company on 5 July 2000 indicating he would drop his suit upon receipt of the $2,000. However, the record indicates that the case was dismissed on 13 June 2000 by entry of an order entitled "Order of Dismissal (Pursuant to Rule 41 (b))." N.C. Gen. Stat. § 1A-1, Rule 41(b) (2003) (involuntary dismissal "for failure of the plaintiff to prosecute"). The date of the order preceded by several weeks the letter to the mortgage company, when "the plaintiff ["Ratley"] informed the court that he did not wish to proceed." The current case arose when Jones sued Ratley in 2002, claiming that he sent $2,000 to Ratley in error.

[1] Defendant contends here that the court erred by "making no findings as to what theory of law" supported its judgment. In his brief, defendant appears to be arguing actually that the court did not make adequate conclusions of law, as it did not specify its legal theory, but he cites no authority for this proposition. Defendant then speculates that the trial court based its decision on a theory of fraud and argues that fraud was not pled with particularity by plaintiff here. Although defendant cites cases supporting the argument that fraud must be pled with particularity, he does not explain how this claim involved fraud. To the contrary, defendant acknowledges that "[p]laintiff speaks of an error, but never really says that he was defrauded." Thus we decline to hold that those cases apply. In addition, the complaint in a small claim action "need be in no particular form, but is sufficient if in a form which enables persons of common understanding to know what is meant." N.C. Gen. Stat. § 7A-216 (2003). Furthermore, in a trial *de novo* on appeal to the district court, the judge "*may* order repleading or further pleading . . . or may try [the case] on the pleadings as filed." G.S. § 7A-229 (2003) (emphasis added). Thus, the statute leaves it to the discretion of the court to decide whether the pleadings need detail.

Defendant also fails to cite any legal authority supporting his assertion that the trial court must provide more detailed legal con-

clusions in an appeal to the district court from small claims court. While Rule 52 of the North Carolina Rules of Civil Procedure requires that the trial courts in general state conclusions of law separately, we believe the General Assembly has indicated that these types of formalities do not apply in small claims proceedings, including the *de novo* appeal in district court. The "simple forms and procedures" of small claims court were devised by the legislature to provide citizens with "an expedient, inexpensive, speedy forum in which they can process litigation involving small sums without obtaining a lawyer." *Duke Power Co. v. Daniels*, 86 N.C. App. 469, 472, 358 S.E.2d 87, 89 (1987). In order to facilitate simplified litigation, many of the rules of civil procedure do not apply to small claims court. *See, e.g.*, G.S. § 7A-216 (2003) (no particular form of complaint required); G.S. § 7A-220 (2003) (no required pleadings other than complaint); G.S. § 7A-222 (2003) (rules of evidence "generally are observed"). Thus, in the absence of any statute or other authority suggesting that legal theories be formally described in these cases, we decline to create such a requirement.

Further, reading the statutory provisions governing appeals from small claims, G.S. §§ 7A-225, et seq., *in pari materia*, we conclude that unless otherwise specified, the legislature intended that the informal processes of the small claims court continue in the *de novo* appeal. In this regard, G.S. § 7A-229 provides: "The district judge before whom the action is tried may order repleading or further pleading by some or all of the parties; may try the action on stipulation as to the issue; or may try it on the pleadings as filed." Here, the district court did not require further pleadings and did make findings of fact and conclusions of law, indicating that "plaintiff over paid defendant in an amount not less than $2,000" and that plaintiff was entitled to recover that sum plus interest. The documents support the findings, which in turn support the conclusions and the judgment. We conclude that the court acted within the statutory process and properly exercised its discretion, and we decline to disturb the judgment on this basis.

[2] Defendant also argues that the court erred in finding that no answer or other responsive pleading was filed by defendant, as no answer is required in a proceeding appealed from the magistrate's court. As noted above, in a small claims action, no pleadings beyond a complaint are required and no response is considered a general denial. G.S. § 7A-220 (2003). Defendant does not argue that the finding was erroneous, nor does he explain how the court's

finding harmed him or influenced the case. We overrule this assignment of error.

[3] Defendant also asserts that the court erred by finding that plaintiff's closing attorney gave defendant $2,000 under the belief that there was a valid judgment on the record. Defendant contends that there was no basis to support this finding. "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980). Here, we conclude that evidence did support the court's finding and conclusion, specifically the letter from defendant to the plaintiff's mortgage company promising to "dismiss" the suit in return for $2,000 when it had already been dismissed. Defendant's argument has no merit.

[4] Defendant further argues that the court erred by not taking judicial notice of the fact that judgments are public records and plaintiff's closing attorney thus had constructive notice of the status of any judgment. We disagree. Rule 201 of the North Carolina Rules of Evidence clearly states that judicial notice is discretionary: "A court *may* take judicial notice, whether requested or not." G.S. § 8C-1, Rule 201 (c) (2003) (emphasis added). Judicial notice is mandatory only where "requested by a party and supplied with the necessary information." G.S. § 8C-1, Rule 201 (d). Here, defendant does not argue that he requested the court take judicial notice or that he supplied the court with the necessary information. Thus, the trial court did not abuse its discretion by failing to take judicial notice.

Finally, defendant asserts that no theory of law exists which would support an award for plaintiff and that the court erred in not reaching this conclusion. We have discussed the essence of this argument above, under defendant's first assignment of error, and for the same reasons, we find it lacks merit.

Affirmed.

Judge BRYANT concurs.

Judge TYSON dissents.

TYSON, Judge dissenting.

The trial court's Judgment fails to: (1) set forth proper conclusions of law; (2) make a finding of fact regarding whether plaintiff

was obligated to pay $2,000.00 to Ratley; and (3) address whether plaintiff should have had notice of the dismissal taken by in the earlier action. I would reverse and remand the trial court's judgment. I respectfully dissent.

I. *De Novo* Review at the District Court

The majority's opinion holds that "the legislature intended that the informal processes of the small claims court continue in the *de novo* appeal" and relies largely upon the case of *Duke Power Co. v. Daniels*, 86 N.C. App. 469, 358 S.E.2d 87 (1987). I disagree.

In *Duke Power Co.*, the plaintiff originally brought an action in small claims court. 86 N.C. App. at 470, 358 S.E.2d at 88. The defendant appealed to the District Court, and again appealed from that order granting summary judgment. *Id.* This Court recognized the parties conducted discovery and were represented by counsel in the district court, despite the lack of either of these procedures before the small claims court. *Id.* at 470-71, 358 S.E.2d at 88. In affirming the trial court's judgment, we reviewed the applicable North Carolina Rules of Civil Procedure and the North Carolina Rules of Appellate Procedure. *Id.* at 471, 358 S.E.2d at 88-89. We indicated the triggering of these rules upon appeal to the district court from a decision in small claims court. *Id.*

Here, the majority's opinion avers "the informal processes of the small claims court continue in the *de novo* appeal." Contrary to the holding of the majority's opinion, *Duke Power Co.* supports the application of the general rules to *all* cases in district court, including those that originate in small claims court but are appealed for trial *de novo*. *Id.*

"Any judgment rendered by the magistrate is a judgment of the district court and is appealable to the district court for a trial *de novo*." *Chandak v. Electronic Interconnect Corp.*, 144 N.C. App. 258, 263, 550 S.E.2d 25, 29 (2001) (citing N.C. Gen. Stat. § 7A-224 (1999); N.C. Gen. Stat. § 7A-228 (1999)). In explaining "the nature of the district court *de novo* trial" on appeal from a magistrate's judgment rendered in small claims court, this Court looked to "cases construing the nature of the *de novo* trial in superior court following an adjudication in district court." *First Union National Bank v. Richards*, 90 N.C. App. 650, 653, 369 S.E.2d 620, 621-22 (1988). Precedent shows, "[W]hen an appeal as of right is taken to the [trial court], in contemplation of law *it is as if the case had been brought there originally*

and there had been no previous trial. The judgment appealed from is completely annulled and is not thereafter available for any purpose.' " *Id.* at 653, 369 S.E.2d at 621-22 (emphasis supplied) (quoting *State v. Sparrow*, 276 N.C. 499, 507, 173 S.E.2d 897, 902 (1970)). This Court summarized, "[W]hen plaintiff gave notice of appeal for trial *de novo* in district court, *it was as if the case had been brought there originally.*" *First Union National Bank*, 90 N.C. App. at 653, 369 S.E.2d at 622 (emphasis supplied). Following the reasoning in *Duke Power Co.*, we review the district court's order anew and apply the standards normally employed in reviewing an order entered by the trial court following a trial without a jury. *Id.*

II. Standard of Appellate Review

The trial court must enter an order such that the appellate court can readily understand the basis of the order or judgment. In *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980), our Supreme Court held:

> Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Here, the trial court failed to make adequate findings of fact and conclusions of law to support its judgment. "Under our rules, where a case is tried before a court without a jury, findings of fact and conclusions of law sufficient to support a judgment are essential parts of the decision making process." *Bank v. Easton*, 12 N.C. App. 153, 155, 182 S.E.2d 645, 646, *cert. denied*, 279 N.C. 393, 183 S.E.2d 245 (1971); *see also Department of Transp. v. Byerly*, 154 N.C. App. 454, 458, 573 S.E.2d 522, 524-25 (2002) ("one mixed finding of fact and conclusion of law regarding defendant's adverse possession claim . . . forms an inadequate basis for this Court to conduct a review and assess appellant's contentions.").

Here, the trial court found that "[Ratley] received a check . . . based upon the representation and belief that a valid judgment was of

record . . . ." The trial court further found "that said Judgment or claim had in fact been dismissed . . . ." The record on appeal includes only an "Order of Dismissal Pursuant to Rule 41(b)." Although the Order dismisses Ratley's action "under Rule 41(b) of the Rules of Civil Procedure," the Order states, "Upon the call of the case, the Plaintiff [Ratley, defendant in this action] informed the Court that he/she did not wish to proceed with this action." Further, plaintiff, who was the defendant in the earlier action, did not move for dismissal as contemplated under Rule 41. *See* N.C. Gen. Stat. § 1A-1, Rule 41(b) (2003). The dismissal is a voluntary dismissal pursuant to Rule 41(a), not an involuntary dismissal pursuant to Rule 41(b).

No portion of Rule 41 permits a trial court to "dismiss" a judgment already entered. Neither a judgment from the prior case, nor an order vacating the judgment, appears in the record on appeal, other than Ratley's reference in his letter offering to release the judgment "recorded in Deed Book 57, page 36." The trial court erred by finding that "said Judgment . . . had been dismissed . . . " pursuant to Rule 41(b).

Additionally, no evidence supports the trial court's finding that "Plaintiff over paid [sic] [Ratley] in an amount not less than $2,000.00." The evidence showed that plaintiff made only one payment to Ratley in the amount of $2,000.00. The trial court's Judgment errs by finding an "overpayment."

The trial court also failed to make findings of fact, or state a basis to support its only conclusion of law that stated, "Plaintiff is entitled to recover of [Ratley] the principal sum of $2,000.00 plus interest at the legal rate from July 1, 2002."

III. Notice

The trial court also failed to make a finding of fact regarding whether plaintiff was estopped from seeking a return of the monies paid based on notice and his own actions. Plaintiff was a party to the prior action, and the record shows plaintiff received a letter dated 5 July 2000 from Ratley agreeing to release the judgment recorded in "Deed Book 57, page 36" upon receipt of payment. Plaintiff failed to verify Ratley's dismissal prior to remitting the $2,000.00 payment to him.

Even if payment was made after Ratley took a voluntary dismissal, plaintiff failed to produce any evidence that the debt never

existed or that the sum he paid was not in satisfaction of a valid debt or pursuant to a contractual agreement between the parties. As a party to the first action, plaintiff was on notice of Ratley's claims. Although Ratley took a voluntary dismissal, he was free to file "a new action based on the same claim . . . within one year." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1). The act of a voluntary dismissal did not adjudicate the merits of Ratley's claim or create a judicial determination that Ratley was not lawfully owed the money that plaintiff had paid to him. *See* N.C. Gen. Stat. § 1A-1, Rule 41(a)(2) (2003) ("Unless otherwise specified in the order, a dismissal under this subsection is without prejudice.").

Public notice of the dismissal was available to plaintiff prior to payment. The trial court's Judgment rewards plaintiff for his failure to fulfill his obligations and to know what actions were pending against him without a finding that his actions were proper under the law.

IV. Conclusion

The abbreviated procedures that are permissible in small claims court allow prompt resolution of disputes that do not exceed $4,000.00, while allowing for a full *de novo* review upon appeal by the party against whom judgment was entered by the magistrate. N.C. Gen. Stat. § 7A-210 (2003); N.C. Gen. Stat. § 7A-228 (2003); *see also* 2004 N.C. Sess. Law c. 128, § 1 (increasing amount to $5,000.00 effective 1 October 2004). The majority's opinion abolishes the *de novo* aspect of the appeal, with all its attendant procedural rights and processes. Magistrates are not required to be attorneys, and some litigants in small claims court do not avail themselves of counsel or procedural processes in reliance on the right to *de novo* appeal to district court.

The trial court's error in failing to make adequate findings of fact and state the basis for its conclusion of law limits our ability to review this Judgment. The Judgment fails to contain "essential parts of the decision making process." *Bank*, 12 N.C. App. at 155, 182 S.E.2d at 646. I would reverse and remand the Judgment for entry of findings of fact supported by the evidence presented and conclusions of law upon which the trial court relied in ordering Ratley to return $2,000.00 "over paid" to plaintiff. I respectfully dissent.

IN RE WACHOVIA SHAREHOLDERS LITIGATION

No. COA04-402

(Filed 18 January 2005)

Costs— attorney fees—equitable exception—corporate benefit doctrine—common benefit doctrine

The special business court did not have legal authority to award attorney fees to shareholders of Wachovia Corporation for their lawsuit brought against Wachovia where the successful product of the lawsuit provided some alleged corporate benefit to fellow shareholders by obtaining the invalidation of a non-termination provision in Wachovia's agreement to merge with First Union, because: (1) in regard to the corporate benefit doctrine, the Court of Appeals cannot extend equitable exceptions in this state's jurisprudence where a prior panel of this Court has chosen not to do so; (2) assuming arguendo that the common benefit doctrine is a recognized equitable extension of awarding attorney fees in North Carolina, the facts of this case do not fall within the purview of the doctrine when plaintiffs have not demonstrated a dominating reason or exceptional circumstance, nor did they show any specific pecuniary benefit to the shareholders stemming from the business court's order invalidating the non-termination provision of the merger agreement; and (3) Delaware's application of the doctrine seems to require some indicia of monetary benefit, and the business court found that there was not even an increase in the stock price attributable to any action by plaintiffs' counsel, nor did any subsequent bidder appear after the non-termination provision was deemed invalid.

Appeal by defendant Wachovia Corporation from judgment entered 23 December 2003 by Judge Ben F. Tennille in Special Superior Court for Complex Business Cases. Heard in the Court of Appeals 22 October 2004.

Wilson & Iseman, L.L.P., by G. Gray Wilson; Abbey Gardy, L.L.P., by Stephen T. Rodd, for Wachovia Shareholder plaintiff appellees.

Wilson & Iseman, L.L.P., by Linda L. Helms, for Wachovia Shareholder plaintiff appellees.

Robinson, Bradshaw & Hinson, P.A., by Robert W. Fuller; Bell, Davis & Pitt, P.A., by William K. Davis; Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James T. Williams, Jr.; and Deputy General Counsel for Wachovia Corporation Francis C. Clark, for Wachovia Corporation defendant appellant.

McCULLOUGH, Judge.

Arising from a complex business merger between Wachovia Corporation ("Wachovia") and First Union Corporation ("First Union"), this appeal raises a single question of law for our consideration. Did the special business court ("business court") have legal authority to award attorney's fees to shareholders of Wachovia Corporation ("plaintiffs") for their lawsuit brought against Wachovia, where the successful product of the lawsuit provided some alleged corporate benefit to fellow shareholders? Our following recitation of the facts is narrowed in scope to address this single issue of law.

On 15 April 2001, Wachovia and First Union announced their planned merger. Both were North Carolina corporations prior to their merger, as is the merged entity. Their merger agreement included two contested provisions, known in merger jargon as "deal protection devices": a cross option provision, and a non-termination provision. Under the cross-option provision, if the Wachovia/First Union merger failed to close, and one partner merged with a third entity within eighteen (18) months, the remaining partner was potentially entitled to what the business court referred to as a "$780 million break-up fee." Under the non-termination provision, Wachovia and First Union agreed their merger agreement would not terminate until January of 2002 even if either of their shareholders failed to approve the merger in the initial vote.

A number of suits were filed by shareholders of Wachovia seeking to block the merger by challenging the cross-option provision and the non-termination provision of the merger agreement ("the shareholder suits"). These suits alleged that the Board of Directors of Wachovia had breached its statutory "fiduciary" duties under N.C. Gen. Stat. § 55-8-30 (2003) by approving these provisions. Also stemming from the merger, Suntrust Banks, Inc. ("Suntrust") made a hostile bid on Wachovia. First Union filed suit against Suntrust ("the Suntrust suit"). Both the Suntrust suit and the shareholder suits were assigned to the business court, and the cases were consolidated for discovery and other purposes.

On 20 July 2001, the business court issued an order holding that the cross-option was a valid provision, but that the non-termination provision impermissibly restricted the ability of Wachovia's Board to consider merger partners other than First Union and was thus invalid and unenforceable. The business court determined that the non-termination provision cornered Wachovia's Board of Directors into the position of either breaching their fiduciary duty or breaching the merger agreement if a better merger offer came along during the agreement's dormancy. Additionally, the business court found the non-termination provision to be coercive upon the shareholders, stating: "[t]he longer the option is effective, the more likely shareholders are to vote for the bird in the hand."

Pursuant to this order, plaintiffs petitioned the business court for attorney's fees. The business court postured plaintiffs' petition upon the following facts and legal considerations:

> (53) The Court next turns to the fee issues in the class action litigation. In those cases, because the parties agreed to a consent dismissal of the cases as moot the Court is required to determine only the fee request which is strenuously opposed by defendants.
>
> (54) In this class action no common fund was created. There is no pool of money from which to pay attorney fees and no money to be distributed to shareholders. In this instance there was not even an increase in the stock price attributable to any action by plaintiffs' counsel, nor did any subsequent bidder appear after the Wachovia sleeping pill [the non-termination provision] was invalidated.
>
> (55) Under those circumstances, the fee request raises four issues for consideration by the Court.
>
> (56) First, will North Carolina recognize a "corporate benefit" theory analogous to the common fund theory and award attorney fees where a common benefit is provided in merger and acquisition litigation?
>
> (57) Second, was there a common benefit provided by the litigation in this case?
>
> (58) Third, what standard should the Court apply in determining any fee award?
>
> (59) Fourth, applying that standard, what would an appropriate fee award be in this case?

The business court answered the first question affirmatively, stating:

> North Carolina would be well served by following the majority rule and adopting the Delaware decision framework.
>
> Public policy, the legislative intent of N.C.G.S. § 57-7-46, and judicial economy and efficiency all dictate that the common law recognize that shareholders who file class actions in merger and acquisition cases and produce a real corporate demonstrable benefit for shareholders should be permitted to apply for attorney fees and expenses.

Upon this determination, plaintiffs were awarded $325,000 in attorney's fees and $36,000 for expenses.

We now address whether the business court, in making this determination, had authority to extend upon the equitable doctrines established in this state on non-statutory grounds for an award of attorney's fees.

Generally, attorney's fees are taxable as costs only as provided by statute. *Horner v. Chamber of Commerce*, 236 N.C. 96, 97, 72 S.E.2d 21, 22 (1952). However, our Supreme Court has recognized at least one equitable exception to the general rule known as the "common fund" doctrine:

> The rule is well established that a court of equity, or a court in the exercise of equitable jurisdiction, may in its discretion, and without statutory authorization, order an allowance for attorney fees to a litigant who at his own expense has maintained a successful suit for the preservation, protection, or increase of a common fund or of common property, or who has created at his own expense or brought into court a fund which others may share with him.

Id. at 97-98, 72 S.E.2d at 22; *see also*, *Bailey v. State of North Carolina*, 348 N.C. 130, 160, 500 S.E.2d 54, 71 (1998), *appeal dismissed*, 353 N.C. 142, 540 S.E.2d 313 (2000); *Taylor v. City of Lenoir*, 148 N.C. App. 269, 275-79, 558 S.E.2d 242, 247-49, *disc. review denied*, 355 N.C. 500, 564 S.E.2d 235 (2002). A separate and distinct equitable doctrine of awarding attorney's fees, where no such common fund is created, is known in other jurisdictions as the common "corporate benefit." This doctrine is most clearly expressed in Delaware common law, providing the following elements:

> [A] litigant who confers a common monetary benefit upon an ascertainable stockholder class is entitled to an award of counsel fees and expenses for its efforts in creating the benefit . . . . To be entitled to an award of fees under the corporate benefit doctrine, an applicant must show . . . that:
>
> (1) the suit was meritorious when filed;
>
> (2) the action producing benefit to the corporation was taken by the defendants before a judicial resolution was achieved; and
>
> (3) the resulting corporate benefit was causally related to the lawsuit.

Cal-Maine Foods, Inc. v. Pyles, 858 A.2d 927, 927 (Del. 2004) (quoting *United Vanguard Fund v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)).

In the case at bar, the business court "adopt[ed] the Delaware decisional framework" for the "corporate benefit" doctrine and awarded attorney's fee thereunder. *See Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 334, 525 S.E.2d 441, 443 (2000) ("the Chancery Court of Delaware[] [is] generally recognized as an authority in the interpretation of business law[.]"). Plaintiffs contend the business court had authority to do so based on jurisprudence of this State's recognition that equity requires "allowance [of attorney's fees] [be] made in certain equity cases prosecuted in behalf of a class, when the successful prosecution of the cause inures to the benefit of the members of the class." *Rider v. Lenoir County*, 238 N.C. 632, 635, 78 S.E.2d 745, 747 (1953). Plaintiffs would have our Court decide this case as a matter of first impression, and adopt the common "corporate benefit" doctrine of attorney's fees based upon the above stated principles of equity, the application of the doctrine in numerous state and federal jurisdictions, and a number of policy concerns as specified in the business court's order.

Defendant, in seeking to reverse the business court's award, alleges that, upon similar facts to those at bar, we have already chosen not to adopt the common "corporate benefit" doctrine, and we are therefore bound by a prior panel of our Court.

In *Madden v. Chase*, 84 N.C. App. 289, 292, 352 S.E.2d 456, 458 *disc. review denied*, 320 N.C. 169, 358 S.E.2d 53 (1987), we denied an award of attorney's fees sought by a group of plaintiffs filing suit to enjoin a "going private" merger. The plaintiffs in that case believed

the price per share being offered to the two private purchasers was undervalued. After the case had been pending for approximately five months, the investment banking firm which had initially appraised the shares for the directors re-evaluated its opinion and withdrew it. Thereafter, the "going private" merger was abandoned and the public shareholders maintained their shares, mooting the plaintiffs' claims. Pursuant to the plaintiffs' petition for attorney's fees, we found that North Carolina had not recognized an applicable equitable exception raised by these facts for overriding the general rule requiring statutory authority to award attorney's fees. *Id.* In doing so, we reviewed the very same cases plaintiff now requests we consider for awarding attorney's fees pursuant to common "corporate benefit." *See Rider*, 238 N.C. 632, 78 S.E.2d 745; and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 24 L. Ed. 2d 593 (1970).

In the case at bar, the business court found *Madden* was distinguishable, and the facts not appropriate for application of the "common benefit" doctrine of attorney's fees. The business court stated:

> *Madden* involved a going private transaction which was abandoned after suit was filed. It was never certified as a class action and did not deal with the invalidation of deal protection devices in merger agreements between publicly held companies. It is apparent from the short opinion and the cases cited as precedent by the court that the plaintiff's claims were treated as individual claims related to the plaintiff's stock.

Therefore, the business court found our holding in *Madden* did not preclude its adoption of the common "corporate benefit" theory, asserting that "[t]he appellate courts of North Carolina have never been called upon to rule on th[is] question[.]"

We believe the common "corporate benefit" doctrine was applicable in *Madden*, despite the nuances focused on by the business court. Therefore, we conclude that *Madden* did call upon our Court to rule on the question of the common "corporate benefit" doctrine, and we refrained from its incorporation into North Carolina common law.

Under Delaware law, as applied by the business court in this case, the common benefit doctrine awards "*a litigant* who confers a *common monetary benefit upon an ascertainable stockholder class.*" *United Vanguard Fund*, 693 A.2d at 1079 (emphasis added). It does not require more than one litigant or that there be a certified class of

litigants, nor does it limit itself to how the benefit is conferred, whether by invalidating deal protection devices or otherwise. Furthermore, the doctrine in no way considers the intent of the litigant bringing the suit, be it to protect their own investment, create a common benefit, or both. The doctrine focuses on who *receives* the benefit, and whether the benefit is causally related to a meritorious action filed before the issue had been resolved. *Id.; see also, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 265, 44 L. Ed. 2d 141, 158, n.39 (1975) (summarizing that in common benefit cases the classes of beneficiaries are small in number and easily ascertainable; the benefits can be traced with some accuracy, and there is reason for confidence that the costs can be shifted with some exactitude to those benefitting).

Shedding relevant light on the applicability of the common "corporate benefit" doctrine to the facts of *Madden* is a recent opinion by the Delaware Supreme Court. In *Cal-Maine Foods, Inc. v. Pyles*, Cal-Maine Foods, Inc., the largest producer and distributor of shell eggs in the United States, announced a going-private transaction at $7.35 per share. *Id.* However, on its last trading day before the announcement, Cal-Maine's common stock closed at $7.56 per share. Stockholders filed a complaint alleging breach of fiduciary duty and seeking injunctive relief. *Id.* Among its claims, the complaint alleged that the proposed price was unfair because it failed to reflect rising egg prices and Cal-Maine's improved performance. *Id.* While the case was pending, the going private transaction was abandoned. The Chancery Court, finding the stockholders' claims causally related to the transaction's abandonment, awarded the stockholders' attorney's fees under the "common benefit" theory. And, upon these facts, none of which we find materially distinct from *Madden*, the Delaware Supreme Court affirmed.

While noting the reasoned policy argument offered by the business court in its opinion and with due respect the breadth of support the petitioner found in other jurisdictions which have applied the common benefit theory, our Court does not possess the power to extend equitable exceptions in this state's jurisprudence where a prior panel of this Court has chosen not to do so. In light of the elements of the common "corporate benefit" theory as provided in Delaware's respected corporate jurisprudence, and application of those elements in *Cal-Maine Foods, Inc.*, by the Delaware Court of Chancery, we believe the plaintiff's petition for attorney's fees is governed by *Madden* and precludes any award. Lastly, assuming

arguendo that the common benefit doctrine is a recognized equitable extension of awarding attorney's fees in North Carolina, we are not convinced the facts of this case fall within the purview of the doctrine. Plaintiffs rely on *Brewer v. School Board of City of Norfolk*, 456 F.2d 943 (4th Cir. 1972) for the proposition that the 4th Circuit has adopted the common benefit theory of awarding attorney's fees where no monetary benefit has been conferred. However, the *Brewer* court awarded attorney's fees based on the following:

> There is . . . a unique feature of this case, involving at least a quasi-application of the "common fund" doctrine . . . . The plaintiffs have by this appeal secured for the students of this school system an additional right, a right of direct *pecuniary* benefit . . . . It is true the right is not represented by a "common fund" and has not resulted in a monetary recovery, against which attorney's fees may be charged but, so far as the students affected are concerned, "the effect * * * is the same as though a fund were created." The students have secured a right worth approximately $60 per year to each of them. This *pecuniary* benefit to the students involved would, under normal circumstances, warrant the imposition of a charge against them for their proportionate share of a reasonable attorney's fee incurred in securing such *pecuniary* benefit for them. It is not practical, however, to do this in this case and, too, to do so would defeat the basic purpose of the relief provided by the amendment in the decree, which was to secure for the student concerned transportation *without cost or deduction*. The only feasible solution in this peculiar situation would seem to lie in requiring the school district itself to supplement its provision of free transportation with payment of an appropriate attorney's fee to plaintiffs' attorneys for securing the addition of such a provision to the plan of desegregation. There are thus "dominating reasons" under the "exceptional circumstances" of this case to award attorney's fees for the services of plaintiffs' attorneys in securing for these students this *pecuniary* benefit.

Brewer, 456 F.2d at 948 (citations omitted). In the case at bar, plaintiffs have demonstrated no similar "dominating reason" or "exceptional circumstances," nor did they show any specific *pecuniary* benefit to the Wachovia shareholders stemming from the business court's order invalidating the non-termination provision of the merger agreement. Thus, no "effect of the suit is the same as though a [common] fund were created." *Id.* Moreover, Delaware's application of the doc-

trine seems to require some indicia of "monetary benefit." *United Vanguard Fund, Inc.*, 693 A.2d at 1079. The business court expressly found "there was not even an increase in the stock price attributable to any action by plaintiffs' counsel, nor did any subsequent bidder appear" after the non-termination provision was deemed invalid.

Based upon a close review of the records, briefs, and exhibits in this case, we reverse the business court's grant of attorney's fees.

Reversed and remanded.

Chief Judge MARTIN and Judge HUDSON concur.

IN THE MATTERS OF: J.F.M. AND T.J.B.

No. COA04-183

(Filed 18 January 2005)

1. Schools and Education; Search and Seizure— temporary detainment of student—level of suspicion for school resource officer

The trial court did not err by denying respondent juveniles' motion to dismiss charges of resisting, delaying, and obstructing a public officer and assault on a public officer even though the juveniles contend a deputy, who was a school resource officer, was without legal authority to detain one of the juveniles at the bus stop, because: (1) the deputy was acting in conjunction with the school administrator, and the deputy intended immediately to present the minor to the administrator in order to discuss the ramifications of her actions under the rules and policies of the school rather than as violations of the law of North Carolina; (2) the detainment occurred while the officer was on duty, on school premises, and close in time to his investigation; (3) the seizure was reasonable and reasonably related in scope to the circumstances which justified it in the first place when the minor was involved in an affray; (4) in light of the potential danger of allowing the matter to carry over into another school day, the circumstances justified the minor's temporary detainment to resolve the matter; (5) it is reasonable to infer that the minor was aware of her own culpability as justification for the resource officer's

detainment; and (6) the fact that the minor's resistance escalated the measures the deputy employed for the purposes of such detainment did not implicate the Fourth Amendment.

2. **Arrest and Bail; Assault— resisting, delaying, and obstructing a public officer—assault on a government officer/employee—sufficiency of petitions**

The trial court did not lack jurisdiction to adjudicate respondent juvenile a delinquent based on the charges of resisting, delaying, and obstructing a public officer and assault on a public officer even though respondent contends the petitions charging her were fatally deficient, because the petitions were sufficient to apprise respondent of the specific allegations alleged against her, including each element thereof, thus enabling her to prepare an adequate defense.

Appeal by respondents from adjudication order entered 26 June 2003 by Judge William Graham, and disposition entered 21 July 2003 by Judge Lawrence J. Fine in Forsyth County District Court. Heard in the Court of Appeals 15 November 2004.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth N. Strickland for the State's case against J.F.M.

Attorney General Roy Cooper, by Assistant Attorney General Gaines M. Weaver for the State's case against T.J.B.

Joal H. Broun for respondent appellant J.F.M.

Jon W. Meyers for respondent appellant T.J.B.

McCULLOUGH, Judge.

Arising from the same contended facts and circumstances, sisters J.F.M. ("JM") and T.J.B. ("TB") (collectively "juveniles") were adjudicated delinquent on petitions alleging resisting, delaying, and obstructing a public officer and assault on a public officer. Both adjudications were rendered 26 July 2003. On 21 July 2003, the juveniles' disposition orders placed each on twelve (12) months' probation with varying terms and conditions.

The State's evidence tended to show the following: On the day of 15 May 2003, JM was aged 15 and TB was aged 13. That day, Deputy S.L. Barr ("Deputy Barr") of the Forsyth County Sheriff's Department, and the Kennedy Learning Center's (the "Center") resource officer,

was investigating an affray involving TB and another student. The affray occurred at around 2:00 p.m, and while not observing the affray, Deputy Barr had observed a group of students circled outside on the Center's grounds. Later, he saw TB leaving the grounds and gave her three commands to stop which she ignored. Continuing his investigation, he spoke with a school administrator who told him that TB had been in the affray and was leaving campus.

Later, at approximately 3:00 p.m., Deputy Barr was leaving the Center when he saw TB at the bus stop on the corner of Highland and Martin Luther King Boulevard, which was on the Center's grounds. He was still on duty. Stopping his vehicle, he approached TB and told her that she needed to come back to the Center to talk to the school administrator about the affray, and see whether she was going to be suspended. He himself did not plan on questioning her. TB told the Deputy, "I'm not going with you anywhere," and Deputy Barr responded by grabbing her arm and telling her she needed to come with him. At that point, JM pushed Deputy Barr and told him to "get [his] D hands off her sister, and told [TB] to run." Deputy Barr told JM that she was under arrest for resisting and delaying an officer, and grabbed her arms when she tried to run. As she struggled against his attempt to handcuff her, she bit him on the right arm. TB returned and struck Deputy Barr with an umbrella. He let go of JM and the two sisters ran down the street. Deputy Barr called for assistance, and then chased after the two girls. The two sisters were soon apprehended. The sisters were so violent that they had to be placed in handcuffs and leg restraints to be placed into patrol cars.

At the close of the State's evidence, the juveniles' motion for dismissal was denied.

By way of their testimony, the juveniles' case tended to allege the following: TB had been in a fight on 15 May 2004, and having discussed the matter with the school administrator was authorized to leave the Center. At the bus stop, Deputy Barr pulled up and told TB to come with him. JM, also at the bus stop, asked Deputy Barr, "why you want her to go with you." TB told the Deputy she was not going anywhere with him. While they began walking away, Deputy Barr spoke on his walkie-talkie. He then grabbed JM's hair and put his right arm around her neck. It was then that JM bit his arm. TB began hitting him with the umbrella, and after JM was freed, both fled.

At the close of the juveniles' evidence, they again moved for dismissal and were denied.

In their separate briefs on appeal the juveniles argue common issues of error by the trial court, and TB raises additional errors. The common issues are all founded on the contention that the trial court erred in finding Deputy Barr had authority to detain TB. TB's additional issues contend that the trial court was without jurisdiction to hear this matter where the petitions for TB were fatally deficient. Based on the analysis herein, we find no error by the trial court's adjudication and disposition orders of the juveniles.

Common Issues—Motions to Dismiss

[1] The juveniles contend Deputy Barr was without legal authority to detain TB at the bus stop, amounting to an unlawful arrest, and therefore their resistance to Deputy Barr was lawful. Thus, they allege the court erred when it denied their motions to dismiss. We do not agree.

In cases where the juvenile moves to dismiss, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [juvenile's] being the perpetrator of such offense." *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted)). If the evidence raises merely "suspicion or conjecture" as to the offense's commission, or the identity of the juvenile as its perpetrator, the motion should be allowed. *Id.* "In reviewing a challenge to the sufficiency of evidence, it is not our duty to weigh the evidence, but to determine whether there was substantial evidence to support the adjudication, viewing the evidence in the light most favorable to the State, and giving it the benefit of all reasonable inferences." *Id.* at 29, 261 S.E.2d at 819. However, because juveniles in no way deny the events which took place subsequent to Deputy Barr's detention of TB, the sufficiency of the evidence is not in question. Rather, it is the legal framework in which those events fell that is before us. Thus, we apply the evidence, viewed in a favorable light to the State, to what we hold below to be the proper legal framework.

In *New Jersey v. T.L.O.*, 469 U.S. 325, 83 L. Ed. 2d 720 (1985), the United States Supreme Court determined that a search of a student's purse, conducted by a school official, and with some level of suspicion that the purse contained contraband, did not require that level of suspicion be probable cause. The Court, expounding on the principles of its seminal decision in *Terry v. Ohio*, 392 U.S. 1, 20, 20 L. Ed. 2d 889, 905 (1968), reasoned:

> Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

New Jersey, 469 U.S. at 341, 83 L. Ed. 2d 734. Pursuant thereto, the Court adopted a looser reasonableness standard for school searches by school administrators, applying a twofold inquiry as to whether this standard has been met:

> [T]he accommodation of the privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.

Id. at 341, 83 L. Ed. 2d at 734. Recently, the Fourth Circuit extended *T.L.O.'s* reasonableness standard to the context of detainment of a student, tantamount to seizure under the Fourth Amendment, stating that:

> It would be an odd state of affairs to tie school officials' hands merely because fulfillment of this mandate requires the detention, not the inspection, of a pupil. We thus address appellants' claim of illegal seizure under the rubric announced in *T.L.O.*

Wofford v. Evans, — F.3d —, — (4th Circuit 2004) (seizure of a student suspected of possessing a gun at school).

While the holding in *T.L.O.* was limited to searches by school administrators and officials, our Court has recently adopted an extension of this reasonableness standard to searches conducted by law enforcement officials. We have since held that the *T.L.O.* standard governs searches conducted by resource officers working " 'in conjunction with' school officials," where these officers are primarily responsible to the school district rather than the local police department. *In re D.D.*, 146 N.C. App. 309, 320, 554 S.E.2d 346, 353-54, *appeal dismissed and disc. review denied*, 354 N.C. 572, 558 S.E.2d 867 (2001); *see also*, *In re Murray*, 136 N.C. App. 648, 651, 525 S.E.2d 496, 499 (2000) (applying the T.L.O. standard to a search conducted by a law enforcement officer at the behest of a school administrator).

We are now faced with the question of what is the required level of suspicion for a school resource officer, who, acting in conjunction with school officials, detains a pupil. As no North Carolina case law has yet addressed this set of facts, we look to the above stated principles and extensions of *T.L.O.* for our determination. In light of the underlying rationale for the extension of *T.L.O.'s* standard for temporary detainment of a pupil as found in *Wofford*, and its extension to searches by resource officers working in conjunction with school officials as found in *In re D.D.*, we hereby find applicable the *T.L.O.* standard to incidents where a resource officer, acting in conjunction with a school official, detains a student on school premises.

Before applying *T.L.O.* to the case at bar, we must first determine whether Deputy Barr was acting in conjunction with the school administrator. *In re D.D.*, 146 N.C. App. at 321, 554 S.E.2d at 353-54. We are convinced he was.

On the day in question, Deputy Barr, as the Center's resource officer, was called upon to investigate an affray involving TB. After observing a circle of students outside, he saw TB leaving the school grounds and commanded three times that she stop. She did not. He then spoke with a school administrator who confirmed that TB had been involved in the affray, and that she had left campus. Approximately 45 minutes from that discussion, Deputy Barr was leaving campus when he saw TB still at the bus stop on school property. He was still on duty and the school day had concluded within the hour. Close in time to speaking with the administrator and conducting the investigation, Deputy Barr sought to detain TB for the sole purpose of taking her to the administrator to determine whether she would be suspended for her actions. When she turned to walk away, he grabbed her arm and told her to come with him.

We believe that based upon these facts the resource officer was clearly acting in conjunction with the school administration. Practicality demands that a school administrator must be able to rely on some autonomy by a resource officer in conducting an investigation on school premises, and we believe this necessarily includes an officer's ability to detain a student outside the presence of an administrator for the purpose of presenting them to an administrator. The facts clearly indicate that Deputy Barr intended immediately to present TB to the administrator in order to discuss the ramifications of her actions under the rules and policies of the school, not as violations of the laws of North Carolina. The detainment occurred

while he was on duty, on school premises, and close in time to his investigation.

We now apply the *T.L.O.* standard to determine whether Deputy Barr's seizure of TB was reasonable. In doing so, we apply the twofold consideration as set out in *T.L.O.*, and as applied in *Murray*, *In re D.D.*, and *Wofford*:

> Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception," *Terry v. Ohio*, [392 U.S. 1, 20, 20 L. Ed. 2d 889, 905 (1968)]; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place[.]"

T.L.O., 469 U.S. at 341, 83 L. Ed. 2d at 734; *Murray*, 136 N.C. App. at 651, 525 S.E.2d at 499; *In re D.D.*, 146 N.C. App. at 321, 554 S.E.2d at 353-54; and *Wofford*, —— F.3d at ——.

A search is lawful at its inception when there are "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *T.L.O.*, 469 U.S. at 342, 83 L. Ed. 2d at 735. "Analogously, a school official may detain a student if there is a reasonable basis for believing that the pupil has violated the law or a school rule." *Wofford*, —— F.3d at ——. An affray is a violation of North Carolina law, and necessarily a violation of North Carolina school rules and policy. N.C. Gen. Stat. § 14-33 (2003). The evidence reasonably infers the following: Deputy Barr, acting as a school resource officer known to TB, saw TB on school grounds after observing a group of students circled around what appeared to be an affray. He commanded three times that she stop and she ignored him. He then spoke with the school administrator who indicated to him that TB had been involved in the affray. Seeing TB close in time after speaking with the school administrator, he detained her. We believe this is sufficient to satisfy as reasonable grounds to detain.

We next consider whether the seizure was "reasonably related in scope to the circumstances which justified [it] in the first place." *T.L.O.*, 469 U.S. at 341, 83 L. Ed. 2d at 734. The evidence indicated that TB had been involved in an affray. There was conflicting evidence as to whether TB had resolved the matter of the affray with the Center's administration. Close in time to the affray and his discussion with the school administrator, Deputy Barr came across TB on school

grounds. In light of the potential danger of allowing the matter to carry over into another school day, we believe these circumstances justified TB's temporary detainment to resolve the matter. It is reasonable to infer that TB was well aware of her own culpability as justification for the resource officer's detainment. And while we are concerned by the evidence that the resource officer grabbed her arm for such detainment, upon these circumstances, we do not think this amounted to a Fourth Amendment violation. Because Deputy Barr otherwise had authority to detain her, the fact that TB's resistance escalated the measures Deputy Barr employed for the purposes of such detainment does not implicate the Fourth Amendment. *See, e.g., In re Joseph F.*, 85 Cal. App. 4th 975, 985 (2000) (the First Appellate District of California found that where a school resource officer otherwise has authority to detain a juvenile on school grounds, the Fourth Amendment is not violated where a juvenile resisted the officer's efforts and the level of force to effect the lawful detention escalated). Thus, we believe there was sufficient justification to satisfy the second part of the *T.L.O.* test.

Based upon our conclusion that the detainment of TB by Deputy Barr was lawful and did not amount to an arrest, the undisputed resistance and assaults on Deputy Barr by FM and TB that ensued were without legal justification. Therefore, the court did not err in denying the motions to dismiss these petitions.

These assignments of error are overruled.

TB's Additional Issues—The Petitions

[2] Next, TB contends the trial court lacked jurisdiction to adjudicate TB delinquent. She argues that the petitions charging her were fatally deficient because an essential element of each offense was not alleged. We do not agree.

When a petition is fatally deficient, it is inoperative and fails to evoke the jurisdiction of the court. *In re Green*, 67 N.C. App. 501, 504, 313 S.E.2d 193, 195 (1984). Because juvenile petitions are generally held to the standards of a criminal indictment, we consider the requirements of the indictments of the offenses at issue. *In re Griffin*, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004). "[O]ur Supreme Court held that indictment for the charge of resisting an officer must: 1) identify the officer by name, 2) indicate the official duty being discharged, and 3) indicate generally how defendant resisted the officer." *State v. Swift*, 105 N.C. App. 550, 553, 414

S.E.2d 65, 67 (1992); *see* N.C. Gen. Stat. § 14-223 (2003). An indictment for assault on a government officer requires allegations that the offender assaulted "an officer or employee of the State or any political subdivision of the State, when the officer or employee is discharging or attempting to discharge his official duties[.]" N.C. Gen. Stat. § 14-33(c)(4) (2004).

The petition alleging resisting, delaying and obstructing an officer by TB states in relevant part:

> [T]he juvenile did unlawfully and willfully resist, delay and obstruct (name officer) S.L. Barr, by holding the office of (name office) Deputy (describe conduct) delay and obstructing a public [officer] in attempting to discharge a duty of his office.
>
> At the time, the officer was discharging and attempting to discharge a duty of his/her(name duty) investigate and detain [TB]whom was involved in an affray[.]
>
> This offense is in violation of G.S. 14-233.

The same is true for the petition alleging assault on a government officer/employee, stating in relevant part:

> **ASSAULT ON A GOVERNMENT OFFICER/EMPLOYEE** [G.S. 14-33(c)(4)] and strike (name person) STANLEY BARR a government 9 officer 9 employee, by Forsyth County Sheriff' [sic] Office. At the time of the offense the officer or employee named above was attempting to discharge the following duty of his/her office or employment INVESTIGATING A DISTURBANCE ON SCHOOL GROUNDS.

On their face, we hold that these petitions were sufficient to apprise TB of the specific allegations alleged against her, including each element thereof, thus enabling her to prepare an adequate defense. *See In re Griffin*, 162 N.C. App. at 493, 592 S.E.2d at 16. Thus, the district court had jurisdiction to adjudicate these matters.

These assignments of error are overruled.

After thorough review of the briefs, record, and transcript, we find the juveniles received fair adjudication and disposition hearings.

No error.

Chief Judge MARTIN and Judge STEELMAN concur.

STATE OF NORTH CAROLINA v. RODNEY EUGENE TURNER, DEFENDANT

No. COA03-1667

(Filed 18 January 2005)

1. **Drugs— possession—constructive—hand movement under blanket**

   There was sufficient evidence of constructive possession of cocaine where defendant and his codefendant appeared to officers searching a house to be passing a tube of crack cocaine back and forth under a blanket which was between them on the loveseat on which they were sitting.

2. **Drugs— intent to sell—deputy's opinion of normal amount for personal use—sufficiency of evidence**

   There was insufficient evidence of intent to sell cocaine where the only evidence of intent was a deputy's testimony that the amount of crack found was more than most people would "normally" or "generally" carry for personal use. However, a conviction for possession with intent to sell necessarily includes the lesser offense of possession.

Appeal by defendant from judgment entered 25 July 2003 and order entered on 11 August 2003 by Judge Robert C. Ervin in Gaston County Superior Court. Heard in the Court of Appeals 1 September 2004.

Attorney General Roy C. Cooper, by Assistant Attorney General Roberta A. Ouellette, for the State.

William B. Gibson, for defendant-appellant.

GEER, Judge.

Defendant Rodney Eugene Turner appeals his conviction for possession of cocaine with intent to sell and deliver, arguing that the evidence was insufficient to support the charge and the trial court should have granted his motion to dismiss. While we hold that the evidence was sufficient for a jury to find that defendant was in constructive possession of crack cocaine, we further hold that the evidence was insufficient to establish an intent to sell and deliver. Accordingly, we vacate the judgment imposed upon the verdict of guilty of possession with intent to sell and deliver and remand for resentencing for simple possession of cocaine.

Facts

The State's evidence tended to show the following. On 13 November 2001, police went to the residence of Neal Terry to serve an arrest warrant on Terry for violating his probation. They found Terry standing in his kitchen with another individual, Charles Byrd. Seated on a loveseat in the adjoining living room were defendant and Ishmar Smith, who were visitors. Police also found an unnamed female in one of the bedrooms. After Terry was taken into custody, he consented to a search of his house.

In the course of the search, Deputy R.T. Smith found a tube containing approximately ten rocks of a white substance, later determined to be crack cocaine. The tube was concealed under a blanket that was draped over the loveseat between defendant and Ishmar Smith. Deputy Smith testified as follows:

> Q. And did you notice anything out of the ordinary when you approached where the two defendants [defendant and Ishmar Smith] were on the loveseat?
>
> A. When we stepped—or when I stepped into the living room, I noticed the two defendants sitting. They were real jittery, and that they kind of had their hands on the outside of their legs, which would—toward each other. It's kind of if they're on the loveseat like so, you had one here and one here, and there was their legs coming out like so. And then they had hands here that was jumbling back and forth real nervously.
>
> Q. Did you see anything else in that area where those hands were?
>
> A. There was a blanket that was—that had been draped over the loveseat for one reason or another, and they kind of had the blanket wadded up a little bit, and you could see the tip of a white tube.
>
> Q. Where was that in relation to the hands of the two defendants?
>
> A. It was being pushed back and forth kind of.

When asked to identify the tube at trial, Deputy Smith reiterated, "That appears to be the tube that they were passing back and forth, kind of, on the loveseat there."

According to Deputy Smith, the size and number of crack cocaine rocks in the tube were greater than a drug user would normally carry for personal purposes. Deputy Smith testified that the average drug user in possession of drugs for personal use would, at any one time, typically carry only one or two rocks worth approximately $20.00 to $30.00, while the ten rocks in the tube weighed a total of 4.8 grams and were valued at approximately $150.00 to $200.00.

After the tube was discovered, everyone present denied knowledge of it. A search of defendant and Smith yielded no large sums of money or drug paraphernalia, nor was any paraphernalia found elsewhere in Terry's residence.

Defendant, Ishmar Smith, Terry, and Byrd were arrested and charged with possession with intent to manufacture, sell, and deliver cocaine. The charges against Byrd and Terry were later dismissed, although Terry pled guilty to a charge of maintaining a dwelling for keeping or selling controlled substances. Defendant was indicted on 1 July 2002 and tried jointly with Smith on 24 and 25 July 2003 in Gaston County Superior Court, the Honorable Robert C. Ervin presiding. At the close of the State's evidence, defendant made a motion to dismiss, in whole or in part, for insufficiency of the evidence. Although defendant did not offer any evidence of his own, he did renew his motion to dismiss. At that time, the trial court expressed doubts about the sufficiency of the evidence, but it deferred ruling on defendant's motion until after the jury rendered a verdict.

The jury found both defendant and Smith guilty on 25 July 2003. The trial court did not expressly rule on the deferred motion to dismiss, but proceeded to sentence defendant to a term of six to eight months. This sentence was suspended for 24 months, with defendant on intensive probation for the first six months. Following sentencing, defendant filed a motion for appropriate relief, based solely on the sufficiency of the evidence, which the trial court denied. Defendant appeals the denial of his motion to dismiss as well as his motion for appropriate relief.[1]

Discussion

In ruling on a criminal defendant's motion to dismiss, the trial court must determine whether the State has presented substantial

1. Since the sole basis for defendant's motion for appropriate relief was the alleged insufficiency of the evidence, his motion presents no new legal issues and, therefore, we will not address it separately.

evidence (1) of each essential element of the offense with which defendant is charged and (2) of the defendant being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984)). " 'Whether evidence presented constitutes substantial evidence is a question of law for the court.' " *State v. Frogge*, 351 N.C. 576, 584-85, 528 S.E.2d 893, 899 (quoting *State v. Stager*, 329 N.C. 278, 322, 406 S.E.2d 876, 901 (1991)), *cert. denied*, 531 U.S. 994, 148 L. Ed. 2d 459, 121 S. Ct. 487 (2000).

When considering a defendant's motion to dismiss, the trial court must view all of the evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818, 115 S. Ct. 2565 (1995). Specifically, if a reasonable juror could draw an inference of defendant's guilt from the evidence before him, the evidence is sufficient to allow the jury to consider the issue even if the same evidence may also support an equally reasonable inference of the defendant's innocence. *Matias*, 354 N.C. at 551, 556 S.E.2d at 270.

Defendant was convicted of violating N.C. Gen. Stat. § 90-95(a)(1) (2003), which prohibits possession with intent to sell or deliver a controlled substance. This offense involves two separate elements: (1) illegal possession of a controlled substance (here, crack cocaine) and (2) intent to sell or deliver that substance. *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985). We consider each element in turn.

A. Constructive Possession of Cocaine

[1] For the purposes of N.C. Gen. Stat. § 90-95(a)(1), unlawful possession of the controlled substance may be actual or constructive. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). "A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use." *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002). Here, since the cocaine was found under a blanket next to defendant, rather than on his person, the State based its case on a theory of constructive possession.

Constructive possession exists when the defendant, " 'while not having actual possession, . . . has the intent and capability to maintain control and dominion over' the narcotics." *Matias*, 354 N.C. at 552, 556 S.E.2d at 270 (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)). When the defendant does not have exclusive possession of the location where the drugs were found, the State must make a showing of "other incriminating circumstances" in order to establish constructive possession. *Id.* at 552, 556 S.E.2d at 271.

In the present case, it is undisputed that defendant was not in exclusive control of the premises. The State's evidence tended to show the following circumstances: Defendant was sitting next to a wadded-up blanket beneath which the drugs were concealed. He appeared agitated, and his hands were "jumbling" around "nervously." He and his co-defendant appeared to be passing the tube back and forth underneath the blanket. Our appellate courts have previously held that similar circumstances—involving close proximity to the controlled substance and conduct indicating an awareness of the drugs, such as efforts at concealment or behavior suggesting a fear of discovery—are sufficient to permit a jury to find constructive possession.

In *State v. Butler*, 356 N.C. 141, 147-48, 567 S.E.2d 137, 141 (2002), the Supreme Court found sufficient incriminating circumstances to survive a defendant's motion to dismiss when a taxicab driver felt defendant "struggling" in the backseat behind him and pushing against the front seat, and the police found drugs under the seat 12 minutes later. Similarly, in *State v. Harrison*, 14 N.C. App. 450, 450-51, 188 S.E.2d 541, 542, *cert. denied*, 281 N.C. 625, 190 S.E.2d 468 (1972), police stopped a car for a routine driver's license inspection, but asked all three of the car's occupants to step out of the car after an officer noticed the defendant moving around on the back seat and partially concealing a brown envelope with his hand. The envelope later proved to contain narcotics. The Court held that there was sufficient evidence to submit the charge of possession to the jury. *Id.* at 453, 188 S.E.2d at 543-44.

More recently, in *State v. Neal*, 109 N.C. App. 684, 687-88, 428 S.E.2d 287, 290 (1993), this Court found sufficient incriminating circumstances to survive a motion to dismiss when defendant had been in a bathroom where another person was flushing drugs down the toilet, but fled from the bathroom as the police arrived. *See also State v. Frazier*, 142 N.C. App. 361, 367, 542 S.E.2d 682, 687 (2001) (finding

sufficient incriminating circumstances to survive a motion to dismiss when defendant was observed lunging into a bathroom and placing his hands in the ceiling where drugs were later located); *State v. Carr*, 122 N.C. App. 369, 373, 470 S.E.2d 70, 73 (1996) (finding sufficient incriminating circumstances to survive a motion to dismiss when search of a car yielded drugs located in an area that had been occupied solely by defendant).

Defendant argues that his case is more analogous to *State v. Balsom*, 17 N.C. App. 655, 195 S.E.2d 125 (1973). In *Balsom*, however, defendants were merely visiting the house where drugs were found in a dresser drawer and clothes closet. In contrast to the behavior of defendant in this case, the record in *Balsom* contained no evidence suggesting that defendants had any knowledge of the existence of the drugs. We find this case more analogous to *Butler*, *Harrison*, and *Neal* than to *Balsom*. Accordingly, we hold that the State offered sufficient evidence of constructive possession of cocaine.

B. Possession of Cocaine with Intent to Sell and Deliver

[2] We next examine whether sufficient evidence existed to submit to the jury the issue of defendant's intent to sell and deliver cocaine. "The amount of the controlled substance, the manner of its packaging, labeling, and storage, along with the activities of a defendant may be considered in establishing intent to sell and deliver by circumstantial evidence." *Carr*, 122 N.C. App. at 373, 470 S.E.2d at 73.

In arguing that defendant had the intent to sell and deliver, the State relies solely upon the testimony of Deputy Smith:

> Q. When you say substantial amounts of crack cocaine, could you describe what you mean?
>
> A. [The cocaine rocks in the tube were] in an area that are larger than what you would normally see or someone would normally carry. If you were going to smoke it yourself, you may have one tiny rock or one small rock, or maybe even a couple that would last you a long period of time or an extended period of time. . . .
>
> . . . .
>
> Q. Do you have an opinion as to the value of those drugs, the street value?
>
> A. All of them or just—

Q. Total.

A. Total? Probably close to [$]150 to $200.

Q. Do you have an opinion satisfactory to yourself as to quantities generally carried for personal use?

. . . .

A. Yes, sir. Generally most people that would carry rock cocaine for their personal use may carry one or two rocks that would—maybe [$]20 to $30.[2]

The State points to no other evidence or circumstances that in any way suggest that defendant had an intent to sell or deliver the crack cocaine contained in the tube lying on the loveseat between defendant and Ishmar Smith.

The State, for example, presented no evidence of statements by defendant relating to his intent, of any sums of money found on defendant, of any drug transactions at that location or elsewhere, of any paraphernalia or equipment used in drug sales, of any drug packaging indicative of an intent to sell the cocaine, or of any other behavior or circumstances associated with drug transactions. The State's entire case rests only on a deputy's opinion testimony about what people "normally" and "generally" do. The State has cited no authority and we have found none in which such testimony—without any other circumstantial evidence of a defendant's intent—was found sufficient to submit the issue of intent to sell and deliver to the jury. *Compare Carr*, 122 N.C. App. at 373, 470 S.E.2d at 73 (substantial evidence of intent to sell or deliver existed when officers found two pill bottles with one containing a single large rock and the other containing eight smaller rocks of the size sold on the street for between $20.00 and $40.00; defendant was seen having discussions through a car window with known drug users, one of whom had a crack cocaine pipe in his possession; and defendant attempted to disguise his identity when questioned by the police).

At best, this testimony regarding the normal or general conduct of people, without more, raises only a suspicion—although perhaps a strong one—that defendant had the necessary intent to sell and deliver. "[W]hen the evidence is . . . sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the

2. Although defendant objected to portions of this testimony at trial, he has not challenged it on appeal.

identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983). Because the State failed to present substantial evidence of an "intent to sell and deliver," the trial court erred in denying defendant's motion to dismiss the charge of possession with intent to sell and deliver.

Three possible verdicts were submitted to the jury in this case: guilty of possession with intent to manufacture, sell, or deliver cocaine; guilty of possession of cocaine; and not guilty. As we indicated above, possession of cocaine is an element, and therefore a lesser included offense, of possession with intent to manufacture, sell, or deliver cocaine. "When a jury finds the facts necessary to constitute one offense, it also inescapably finds the facts necessary to constitute all lesser-included offenses of that offense." *State v. Squires*, 357 N.C. 529, 536, 591 S.E.2d 837, 842 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252, 124 S. Ct. 2818 (2004). When the jury found defendant guilty of possession with intent to sell and deliver, it necessarily found defendant guilty of simple possession of cocaine, a verdict that, as we have held, was supported by substantial evidence. Accordingly, the judgment on the charge of possession with intent to sell and deliver is vacated, and the case is remanded for entry of judgment on possession of cocaine and resentencing. *See State v. Gooch*, 307 N.C. 253, 258, 297 S.E.2d 599, 602 (1982) (vacating the judgment imposed upon the verdict of guilty of possession of more than one ounce of marijuana and remanding for resentencing "as upon a verdict of guilty of simple possession of marijuana," a lesser included offense).

Vacated in part, reversed in part, and remanded for resentencing.

Judges LEVINSON and THORNBURG concur.

Judge THORNBURG concurred prior to 31 December 2004.

IN THE MATTER OF THE WILL OF SALLIE SCHENCK MASON, DECEASED

No. COA04-318

(Filed 18 January 2005)

1. **Wills— caveat—validity of prior will—issues not raised by pleadings of evidence**

Where a caveator sought to have a 1992 will set aside and a 1996 will adjudged to be the deceased's last will and testament, the trial court did not err by not submitting to the jury the specific issue of the validity of the 1992 will. The caveator did not challenge the validity of the 1992 will on any basis other than its purported revocation by execution of the later will and the jury resolved all issues pertaining to that later will.

2. **Appeal and Error— preservation of issues—caveat—issues not raised at trial**

Issues which were not raised at trial in a caveat proceeding were not preserved for appellate review.

Appeal by Caveator from judgment entered 9 July 2003 by Judge Charles C. Lamm, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 November 2004.

Malcolm B. McSpadden for caveator-appellant.

Moore & Van Allen, PLLC, by Jeffrey J. Davis and McNeill Y. Wester for petitioner-appellee.

LEVINSON, Judge.

This appeal arises from a will caveat to the last will and testament of Sallie Schenk Mason. Caveator appeals from judgment entered for propounders. We affirm.

Sallie Mason (deceased) died 28 December 1997. On 29 December 1997 the Bank of America N.A. (executor) propounded certain paper writings for probate on behalf of Robert E. Mason, III, Robert E. Mason, IV, John Bohannon Mason, Esten Mason Walker, and Esten Bohannon Mason (propounders). These consisted of two documents executed by deceased and offered as her last will and testament executed 9 April 1992, and a codicil to the will executed 24 May 1994. In January, 1998, Lucinda Mason (caveator) propounded a second paper writing executed 2 August 1996 and purported to be deceased's last will and testament. On 11 February 1998 the Clerk of Superior Court

of Mecklenburg County, North Carolina, set aside probate of the 1996 will submitted by caveator. On 28 December 2000 caveator filed a caveat to the 1992 will and the 1994 codicil submitted by propounders, and sought to have the 1992 will set aside and the 1996 will adjudged to be deceased's last will and testament. The parties executed pretrial stipulations on 12 May 2003, including in relevant part stipulations that:

1. . . . Exhibit A is a Last Will and Testament of [deceased], which was **properly executed by her, in accordance with the statutes** . . . on April 9, 1992, . . . and a First Codicil to said Will executed on May 24, 1994. . . .

2. . . . Exhibit B is a Last Will and Testament of [deceased], **duly executed by her, in accordance with the statutes** . . . on August 2, 1996.

. . . .

6. The [c]aveator claims that the [1992] Will and [1994] Codicil . . . were revoked by the [1996] Will. . . .

7. Propounders claim that the [1992] Will . . . is the proper Last Will . . . because the [1996] Will . . . is invalid on the grounds that [deceased] was not competent to make a will at the time of its execution, and that the will was procured by undue influence and duress.

8. Propounders of the [1992] Will . . . have the burden of proving the invalidity of the [1996] Will. . . .

9. The issues to be decided by the jury will be the following:

   A. Did [deceased] lack sufficient mental capacity to make and execute a will at the time that the 1996 [w]ill was executed?

   B. Was the 1996 Will procured by undue influence?

   C. Was the 1996 Will procured by duress?

(emphasis added). A jury trial was conducted on these issues beginning 12 May 2003. On 20 May 2003 the jury returned the following verdicts:

1. Did [deceased] lack sufficient mental capacity to make and execute a will at the time that the 1996 [W]ill was executed?

   Answer: No.

2. Was the 1996 Will procured by undue influence?

Answer: Yes.

3. Was the 1996 Will procured by duress?

Answer: Yes.

Following return of these verdicts, the trial court on 9 July 2003 entered judgment for propounders. The court decreed "that the 1996 Will propounded by Caveator Lucinda L. Mason is invalid, and the paper writings dated April 9, 1992 and May 24, 1994, which were submitted by the Propounders to the Clerk of Court and admitted to probate in common form on December 29, 1997, are declared to be the Last Will and Testament of [deceased] and the First Codicil thereto." From this judgment caveator appeals.

Standard of Review

Caveator appeals from the entry of judgment in favor of the propounders. A caveat is "an attack upon the validity of the instrument purporting to be a will. The will and not the property devised is the *res* involved in the litigation." *In re Will of Cox*, 254 N.C. 90, 91, 118 S.E.2d 17, 18 (1961) (citation omitted). "A caveat is an *in rem* proceeding. The 'parties' are not parties in the usual sense but are limited classes of persons specified by the statute who are given a right to participate in the determination of probate of testamentary script." *In re Will of Ashley*, 23 N.C. App. 176, 181, 208 S.E.2d 398, 401 (1974).

"Upon the filing of the *caveat* the proceeding is transferred [to superior court] . . . for trial before a jury . . . [so] that the court may determine whether the decedent left a will and, if so, whether any of the scripts before the court is the will." *In re Will of Charles*, 263 N.C. 411, 415, 139 S.E.2d 588, 591 (1965). The issue of whether the decedent made a will and whether a given document is his will, is known as *devisavit vel non*, translated from the Latin as "he devises or not." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE, 272 (2nd ed. 1995). "Devisavit vel non [sic] requires a finding of whether or not the decedent made a will and, if so, whether *any of the scripts* before the court is that will." *In re Will of Hester*, 320 N.C. 738, 745, 360 S.E.2d 801, 806 (1987) (citation omitted). "In a multiple-script case . . . numerous sub-issues must be answered in order to determine this ultimate issue." *Id.*

When the validity of a will is challenged,

> the burden of proof is upon the propounder to prove that the instrument in question was executed with proper formalities required by law. "Once this has been established, the burden shifts to the caveator to show by the greater weight of the evidence that [the instrument is invalid because, *e.g.*,] the execution of the instrument was procured by undue influence."

In re Will of Prince, 109 N.C. App. 58, 61, 425 S.E.2d 711, 713 (1993) (quoting *In re Andrews*, 299 N.C. 52, 54, 261 S.E.2d 198, 199 (1980)). Also, if several writings are offered as the last will and testament of a deceased, the trial court has authority to bifurcate the trial, or to first submit to the jury only the issues pertaining to one of the writings. *Hester*, 320 N.C. at 743, 360 S.E.2d at 804. Thus, the trial court does not err by first submitting to the jury the issue of the validity of the more recently executed writing. *In re Will of Barnes*, 157 N.C. App. 144, 162, 579 S.E.2d 585, 597 (2003) (Hudson, J., concurring in part and dissenting in part), *rev'd per curiam for reasons stated in the dissent*, 358 N.C. 143, 592 S.E.2d 688-89 (2004).

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[1] Caveator argues that the trial court committed reversible error by not submitting to the jury the specific issue of the validity of the 1992 will and 1994 codicil. We disagree.

In the instant case, the caveator challenged the validity of the 1992 will on the sole basis that it had been revoked by the testatrix's execution of the 1996 will. Indeed, the parties stipulated that the 1992 will, 1994 codicil, and 1996 will all were properly executed according to statutory requirements. Further, the parties agreed pretrial that the only disputed factual issues for trial were (1) whether testatrix had the mental capacity to execute a will at the time when the 1996 will was executed; (2) whether execution of the 1996 will was obtained through the caveator's undue influence; and (3) whether execution of the 1996 will was obtained by duress. Accordingly, the trial evidence pertained to these issues, and caveator does not identify any specific trial evidence raising other relevant issues of fact. During the charge conferences, caveator submitted several drafts of proposed jury instructions on the stipulated issues, and never requested that the jury be instructed on issues pertaining to the 1992 will. The three issues were submitted to the jury, which returned a verdict as to each one. Thus, the caveator did not challenge the validity of the 1992 will on any basis other than its purported revocation by execution of a

later will; the jury resolved all the issues pertaining to the 1996 will; and caveator neither presented evidence of another basis to challenge the 1992 will, nor requested that the jury be instructed on any issues other than those stipulated by the parties. Against this factual backdrop, caveator argues that, notwithstanding jury resolution of the only factual issues raised by the caveat, the trial court nonetheless lacked authority to enter judgment in favor of the propounders without first submitting to the jury the technical "issue" of the validity of the 1992 will. Caveator's argument is based primarily on her interpretation of the holding of *In re Will of Dunn*, 129 N.C. App. 321, 500 S.E.2d 99 (1998), which caveator claims is "dispositive" on the issue. We disagree.

In *Dunn*, three documents were presented by the parties as the last will and testament of the decedent, all executed within a few months of each other. Following the jury's determination that the second and third paper writings were obtained by undue influence, the trial court made findings of fact that decedent had properly revoked the first will when he executed the second and third; that decedent had sufficient mental capacity to revoke his first will; and that the revocation was not the product of undue influence. However, these were issues upon which conflicting evidence had been presented at trial. Consequently, this Court held that the trial court erred by determining these issues of fact, instead of submitting them to the jury:

> It is the duty of the trial judge to submit such issues to the jury as are necessary to resolve the material controversies arising upon the pleadings and the evidence. . . . "The trial court may not, at least where there are any factual issues, resolve those issues even by consent. . . ." We interpret this holding to mean that in a caveat proceeding the parties may not waive, either by consent or by implication, jury resolution of an issue upon which the evidence is in conflict and material facts are in controversy.

Dunn, 129 N.C. App. at 325-27, 500 S.E.2d at 102-03 (quoting *In re Will of Mucci*, 287 N.C. 26, 35, 213 S.E.2d 207, 213 (1975)). The holding of *Dunn*, that jury resolution of contested issues in a caveat proceeding may not be waived, is consistent both with general trial procedure and with long-standing policy considerations regarding caveat proceedings:

> [T]he intentions of testators could be frustrated, and the grossest injustice and fraud practiced, if the actors in an issue of *devisavit vel non* . . . [had] unrestricted control over the issue;

> for instance, the propounders, by collusion with the caveators, might . . . prove [the will's] execution according to the forms of the law and then defeat it by admitting the insanity of the testator, or . . . a paper wanting in the requisites of a good will, having for example only one subscribing witness, might be established by the caveators simply admitting that it was executed according to the requirements of the statute.

Syme v. Broughton, 85 N.C. 367, 369 (1881). However, *Dunn* neither imposes a bar on stipulations in all caveat proceedings, nor supports caveator's position that the court may **never** enter judgment in a caveat proceeding, even where there is no evidentiary conflict on an issue.

For example, summary judgment may be entered in a caveat proceeding in factually appropriate cases. *See, e.g., In re Will of McCauley*, 356 N.C. 91, 100-01, 565 S.E.2d 88, 95 (2002) (analyzing case in which trial court granted summary judgment for caveators under traditional summary judgment standards and reversing only upon concluding that there were genuine issues of material fact). Further, in appropriate circumstances, the trial court may enter a directed verdict in a caveat proceeding. *See, e.g., In re Will of Jarvis*, 334 N.C. 140, 142, 430 S.E.2d 922, 923 (1993) (holding "that the trial court properly directed verdicts as to the issues of improper execution and undue influence"); *Mucci*, 287 N.C. at 36, 213 S.E.2d st 214 (holding that directed verdict is proper where propounder fails to come forward with evidence of a testamentary disposition: "Rather than direct or peremptorily instruct the jury to do what is essentially a mechanical act the better practice is for the trial court to enter a directed verdict pursuant to Rule 50 of the Rules of Civil Procedure."). Moreover, both stipulations and peremptory instructions to the jury have been upheld in caveat proceedings. *See, e.g., In re Ball's Will*, 225 N.C. 91, 92-93, 96, 33 S.E.2d 619, 620-22 (1945) (holding that court's peremptory charge was supported by the record where "[caveators] formally conceded that the paper writing was duly executed . . . as required by statute and at the time of its execution the testator possessed sufficient mental capacity to make and execute a will" and "[n]o part of [the evidence] . . . show[ed] . . . fraudulent influence of the beneficiary controlling the mind of the testator"); *In re Will of Campbell*, 155 N.C. App. 441, 461, 573 S.E.2d 550, 564 (2002) ("Both the will and the codicil were self-proving. Caveators presented no contrary evidence to the jury. We . . . conclude the trial court properly instructed the jury on this issue, as com-

petent, uncontroverted evidence of proper execution of both documents was presented."), *disc. review denied*, 357 N.C. 63, 579 S.E.2d 385 (2003); *In re Will of Smith*, 159 N.C. App. 651, 655-56, 583 S.E.2d 615, 619 (2003). This Court has noted that "although motions for directed verdict have not generally been granted in caveat proceedings . . . propounders may move for directed verdict on the issue of whether a validly executed will exists . . . and . . . caveators may move for directed verdict at the close of the propounders' case. . . ." *Smith*, 159 N.C. App. at 655-56, 583 S.E.2d at 619.

Finally, the failure of the trial court to specifically designate its judgment as a directed verdict does not preclude our Court from interpreting it as such. *See Akzona, Inc. v. Southern Ry. Co.*, 314 N.C. 488, 495, 334 S.E.2d 759, 763 (1985) ("Because the trial court did not instruct the jury with respect to negligence, trespass and strict liability, its jury charge amounted to an implied directed verdict on those issues."); *In re Estate of Ferguson*, 135 N.C. App. 102, 104, 518 S.E.2d 796, 798 (1999) (noting that where a trial court "refused to submit an issue to the jury, . . . the trial court acknowledged that its ruling 'amount[ed] to a granting of the motion for a directed verdict on th[e] point.' ").

In the instant case, all disputed factual issues raised by the pleadings and the trial evidence were resolved by the jury, and caveator does not identify evidence raising new issues. Following the jury's verdict, the trial court entered judgment that the 1996 will was invalid, in accord with the jury's verdicts and entered judgment in favor of propounders on the validity of the 1992 will. We conclude that the trial court, in effect, conducted a bifurcated trial. First, the jury resolved the factual issues pertaining to the validity of the 1996 will, allowing the court to enter judgment as to the 1996 will. Thereafter, as there were no remaining issues pertaining to the 1992 will, the judge entered what amounted to a directed verdict for propounders on caveator's challenge to the 1992 will. We further conclude that entry of a directed verdict for propounders was not barred by the holding of *Dunn*. This assignment of error is overruled.

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[2] The caveator also raises several issues on appeal pertaining to the admission at trial of certain evidence. These include her arguments that the trial court committed reversible error by admitting: (1) testimony of medical care providers regarding their treatment of the deceased; (2) expert opinion testimony based in part upon hearsay evidence; (3) non-expert opinion testimony based in part upon

hearsay evidence; (4) the videotaped deposition of Dr. Faye Sultan; (5) a letter written to the deceased; and (6) evidence pertaining to the value of the testatrix's estate.

N.C. R. App. P. 10(b)(1) provides in pertinent part:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.

See also In re Estate of Peebles, 118 N.C. App. 296, 301, 454 S.E.2d 854, 858 (1995) ("[C]aveator argues for the first time on appeal that . . . the trial court erred in denying her motion. . . . Because the trial court never had the opportunity to consider the issue, it is not properly before us on appeal.") (citing N.C. R. App. P. 10(b)(1)); *In re Will of Maynard*, 64 N.C. App. 211, 222, 307 S.E.2d 416, 425 (1983) ("[P]ropounders did not make a timely objection to evidence of the contract. . . . Consequently, there was no error in allowing testimony relating to the contract. . . .").

In the instant case, caveator failed to object at trial to the introduction of any of the challenged items or categories of evidence. Consequently, she failed to preserve these issues for appellate review. Moreover, the challenged evidence was either properly admitted or nonprejudicial to caveator. These assignments of error are overruled.

We have reviewed caveator's remaining assignments of error and conclude that they do not have merit. The judgment of the trial court is:

Affirmed.

Judges HUNTER and CALABRIA concur.

IN THE MATTER OF: D.S.C., MINOR CHILD

No. COA04-264

(Filed 18 January 2005)

Termination of Parental Rights— guardian ad litem for parent—appointment by court required

The trial court erred by terminating respondent mother's parental rights to her son before appointing a guardian ad litem (GAL) to represent her interests pursuant to N.C.G.S. § 7B-1101 when the Department of Social Services' (DSS) petition alleged grounds for termination under N.C.G.S. § 7B-1111(a)(6) based on respondent's physical conditions of having lupus and being prone to seizures, because: (1) the relevant time for the mandate of N.C.G.S. § 7B-1101 is when the termination petition is filed and not when the hearing is held; (2) on the day the petition was filed, the applicable prior version of N.C.G.S. § 7B-1101 mandated appointment of a GAL where it is alleged that a parent's rights should be terminated pursuant to N.C.G.S. § 7B-1111(a)(6), and there was no qualifying or narrowing language as is present in the current version; and (3) it was incumbent upon the court to appoint respondent a GAL, and the trial court was not free to make the determination of whether N.C.G.S. § 7B-1111(a)(6) allegations were based on physical or mental incapability that allowed for an appointment of a GAL only if it determined mental incapability was alleged.

Appeal by respondent mother from judgment entered 2 October 2003 by Judge Gary S. Cash in Buncombe County District Court. Heard in the Court of Appeals 22 September 2004.

Michael N. Tousey, for Buncombe County Department of Social Services and Guardian Ad Litem for Angela Baisley, petitioner appellees.

Hall & Hall Attorneys at Law, P.C., by Susan P. Hall, for respondent appellant.

McCULLOUGH, Judge.

Respondent-mother ("respondent"), appeals from the district court order terminating parental rights to her son D.C. D.C.'s father, whose parental rights were terminated in the same order, has brought no appeal.

The rather extensive background facts of this case have been tailored to address the issues of this appeal. D.C. was born 27 weeks premature on 15 July 1998 in Buncombe County. D.C. has had a variety of serious health conditions, including seizures, asthma, walking problems, speech problems, and behavior problems. Respondent also has had a variety of health conditions, including lupus and seizures. At the time of the termination hearing, respondent was on kidney failure dialysis, and taking medicine three times a day to treat her condition.

After D.C. was twice adjudicated neglected, and after a number of permanency planning hearings, Buncombe County Department of Social Services ("BCDSS" or "petitioner") petitioned to terminate respondent's parental rights on 8 January 2003. One of the grounds for termination was that D.C. was dependent pursuant to N.C. Gen. Stat. § 7B-1111(a)(6) (2003). After a hearing on 8 August 2003, the court ordered termination of respondent's rights on the following grounds: that she neglected D.C. pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2003); that she willfully left D.C. in foster care or placement outside the home for more than 12 months, pursuant to N.C. Gen. Stat. § 7B-1111(a)(2); and that she was incapable of providing the proper care and supervision for D.C. pursuant to N.C. Gen. Stat. § 7B-1111(a)(6).

In her appeal from this order, respondent raises the following issues: (I) that the trial court erred in proceeding to terminate her parental rights before appointing a Guardian ad Litem ("GAL") to represent her interests; (II) that the trial court's findings of fact lacked clear, cogent, and convincing evidence to support any of the alleged grounds for termination; and (III) that the trial court failed to conduct a dispositional hearing as required by statute.[1] For the reasons stated herein, we reverse the trial court's termination order and remand this case for rehearing.

Guardian Ad Litem/Incapable Parent

Respondent argues that, pursuant to N.C. Gen. Stat. § 7B-1101 (2002), the court was under statutory mandate to appoint a GAL where BCDSS's petition alleged grounds for termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(6). Petitioner argues that N.C. Gen. Stat. § 7B-1101 (2001), as amended and in effect on the day of the termination hearing, required a GAL be appointed only in instances where

1. While not timely filed, we address the merits of this appeal under the explicit powers of this Court to prevent manifest injustice to a party. N.C.R. App. P. 2 (2004).

a parent's "mental incapacity" is alleged. Additionally, petitioner argues that even if the prior version of N.C. Gen. Stat. § 7B-1101 is applicable, that version did not mandate the trial court to appoint a GAL on the facts of this case. Because we hold (I) that the relevant time for the mandate of N.C. Gen. Stat. § 7B-1101 to take effect is when the termination petition is filed and not when the hearing is held, and (II) that the applicable prior version of N.C. Gen. Stat. § 7B-1101 mandated appointment of a GAL in this case, we reverse the trial court on this issue.

I. When Mandate of N.C. Gen. Stat. § 7B-1101 Takes Effect

Prior to 4 June 2003, N.C. Gen. Stat. § 7B-1101 required the trial court to appoint a GAL where "it is *alleged* that a parent's rights should be terminated pursuant to G.S. 7B-1111(6)." N.C. Gen. Stat. § 7B-1101 (emphasis added). Pursuant thereto, we have held that where the court failed to appoint a GAL, although there was no evidence that the respondent had been prejudiced by such failure, per se reversal was called for because " 'the mandate of the statute must be observed, and a guardian ad litem must be appointed.' " *In re Estes*, 157 N.C. App. 513, 517, 579 S.E.2d 496, 499 (quoting *Richard v. Michna*, 110 N.C. App. 817, 822, 431 S.E.2d 485, 488 (1993), *disc. review denied*, 357 N.C. 459, 585 S.E.2d 390 (2003)) (reversing and remanding for appointment of GAL and a new hearing). In *Richard*, the mother was alleged to be incapable of maintaining her parental rights due to mental retardation and other mental conditions. *Richard*, 110 N.C. App. at 821, 431 S.E.2d at 488. In *Estes*, the mother was alleged to be incapable of maintaining her parental rights due to mental illness. *Estes*, 157 N.C. App. at 517, 579 S.E.2d at 499.

Effective 4 June 2003, N.C. Gen. Stat. § 7B-1101 was amended to require appointment of a GAL where

> it is alleged that a parent's rights should be terminated pursuant to G.S. 7B-1111(6), *and* the incapability to provide proper care and supervision pursuant to that provision is the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition.

N.C. Gen. Stat. § 7B-1101(1) (2003) (emphasis added). Borrowing from the language of N.C. Gen. Stat. § 7B-1111(a)(6),[2] the amended version of N.C. Gen. Stat. § 7B-1101 qualifies and narrows the

2. The language of N.C. Gen. Stat. § 7B-1111(a)(6) has not changed from the 2001 to 2003 editions of the General Statutes.

appointment of a GAL to only those instances where (a)(6) grounds for termination allege some mental incapability.

Petitioner argues that the amended and more narrow version of N.C. Gen. Stat. § 7B-1101(1) was controlling at the 8 August 2003 termination hearing. Under this version, petitioner contends that only where the petition alleges "substance abuse, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition" does the statute mandate the court appoint a GAL. *Id.* As respondent suffered from lupus and seizures, conditions not of the kind petitioner believes to be contemplated by this statute, petitioner asserts the court did not err in failing to appoint a GAL. Alternatively, petitioner argues that under the prior version of N.C. Gen. Stat. § 7B-1101, a GAL was still only mandated by the statute where "mental incapacity" was alleged in the termination petition.

As a threshold matter, we hold that the proper time for appointing a GAL where grounds for termination are based on N.C. Gen. Stat. § 7B-1111(a)(6) is upon the filing of the petition. Appointment of a GAL under this statute is for the purpose of protecting and ensuring, at the very least, the procedural due process rights of a parent who may be later adjudicated as "incapable." *See* N.C. Gen. Stat. § 1A-1, Rule 17(e); *In re Shepard*, 162 N.C. App. 215, 227, 591 S.E.2d 1, 9 (2004); *In re Montgomery*, 311 N.C. 101, 115, 316 S.E.2d 246, 255 (1984). We believe, as contemplated by the legislature, if the trial court first complied with the requirements of N.C. Gen. Stat. § 7B-1101 for GAL appointment on the day of the termination hearing, there would be insufficient protection for the rights of parents who may otherwise be incapable of facilitating these rights on their own. Furthermore, the statute speaks to when termination is "alleged" pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), clearly placing the burden on the court to appoint a GAL by way of notice in the petition.

In a related action seeking to adjudicate a child dependent, where that statute has a similar mandate for appointment of a GAL in certain instances, we have looked to the commencement of the action for the determination of whether the court's failure to appoint a GAL constituted error. *In re H.W.*, 163 N.C. App. 438, 447-48, 594 S.E.2d 211, 218-19, *disc. review denied*, 538 N.C. 543, 599 S.E.2d 46 (2004); N.C. Gen. Stat. § 7B-602(b)(1) (2003). In *H.W.*, we found no *prejudice* despite the court's error in failing to appoint a GAL at commencement of the action because a GAL was present for every critical stage of the adjudication proceedings. Similarly, in a termination action, we found no prejudice where the court failed to appoint a GAL

despite BCDSS's alleged grounds for termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(6). *In re Dhermy*, 161 N.C. App. 424, 429-30, 588 S.E.2d 555, 558-59 (2003). The basis for *Dhermy* was that the parent was not prejudiced by the error "since [N.C. Gen. Stat. § 7B-1111(a)(6) grounds] was not pursued by BCDSS at the hearing or found as a grounds for termination by the trial court." *Id.* In the case at bar, N.C. Gen. Stat. § 7B-1111(a)(6) was a grounds for termination pursued by BCDSS, respondent was not represented by a GAL at any of the termination proceedings, and this grounds for termination was specifically found as a matter of law by the trial court.

Therefore, we look to the version of N.C. Gen. Stat. § 7B-1101 (2001) in effect the day the petition was filed for our analysis of whether the court erred in failing to appoint a GAL in this case.

II. Mandate of N.C. Gen. Stat. § 7B-1101 in Effect

On 8 January 2003, the day the petition was filed, the trial court was required to appoint a GAL "[w]here it is *alleged* that a parent's rights should be terminated pursuant to G.S. 7B-1111(6)." N.C. Gen. Stat. § 7B-1101 (2001) (emphasis added). BCDSS, in their petition, alleged that grounds for termination existed under N.C. Gen. Stat. § 7B-1111(a)(6), stating:

> 4. That pursuant to N.C.G.S. 7B-1111(a)(6) the Respondent Mother is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of N.C.G.S. 7B-101, and there is a reasonable probability that such incapability will continue for the foreseeable future, to wit:
>
> a) That the Respondent Mother suffers from Lupus and is prone to having seizures. That the Court therefore previously ordered that the Respondent Mother was not to be alone with the minor child at any time.
>
> b) That following a court-sanctioned unsupervised, extended visit with the Respondent Mother in January 2002, the court thereafter determined that the Respondent Mother was unable to adequately care for the minor child, to wit:
>
> 1) That the Respondent Mother did not ensure that the minor child was getting to the daycare at the appropriate times for his therapies to continue on a regular basis.

2) That the Respondent Mother failed to arrange a schedule for the minor child to have his therapies as the DEC had recommended, and she did not schedule any therapy with the Blue Ridge Center.

3) That the Respondent Mother did not supply the needed medications for the minor child after his medication was destroyed in a fire.

4) That the Respondent Mother indicated to the Department that the minor child drained her emotionally, physically, and mentally.

We hold that these allegations, when filed, mandated appointment of a GAL under N.C. Gen. Stat. § 7B-1101 (2001).

We do not believe, as petitioner contends, that even if the prior version of N.C. Gen. Stat. § 7B-1101 was controlling, that this would mandate appointment of a GAL for only a judicially proscribed "mental incapacity" subset of petitions which cite N.C. Gen. Stat. § 7B-1111(a)(6) as grounds for termination. Petitioner points the Court to a number of cases for their argument. *See, e.g., Estes*, 157 N.C. App. 513, 579 S.E.2d 496; *Richard*, 110 N.C. App. 817, 431 S.E.2d 485; and *Shepard*, 162 N.C. App. 215, 591 S.E.2d 1. Petitioner asserts that, because respondent suffered from a "physical disability," no version of N.C. Gen. Stat. § 7B-1101 warrants appointment of a GAL.

Our Court has previously held "the exclusive judicial procedure to be used in termination of parental rights cases is prescribed by the Legislature." *Curtis v. Curtis*, 104 N.C. App. 625, 626-27, 410 S.E.2d 917, 919 (1991) (emphasis added) (trial court erred by granting summary judgment in a termination action because the relevant statute does not provide for a summary proceeding); *see also In re Peirce*, 53 N.C. App. 373, 380, 281 S.E.2d 198, 203 (1981) (the court declined to add by imputation the right to file a counterclaim to the statutorily established procedure for the termination of parental right); *In re Jurga*, 123 N.C. App. 91, 96, 472 S.E.2d 223, 226 (1996) (the court found that nothing in the statutorily established procedure for the termination of parental rights allowed for a unilateral declaration of termination by the parents, and declined to find so by imputation). While the holdings of these cases have declined to judicially impute procedural rights to parties which are not otherwise authorized by the termination statute, on the flip side of the same token we here decline to impute judicial limitations to rights plainly given under the termination statutes.

At the time BCDSS's petition for termination was filed, the plain language of N.C. Gen. Stat. § 7B-1101 (2001) required appointment of a GAL to the respondent whose parental rights were under threat of termination "pursuant to N.C. Gen. Stat. § 7B-1111(a)(6)." There was no qualifying or narrowing language in N.C. Gen. Stat. § 7B-1101 taken from N.C. Gen. Stat. § 7B-1111(a)(6), as is present in the current version.[3]

N.C. Gen. Stat. § 7B-1111(a)(6) states in full:

> (6) That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision *may* be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

(Emphasis added.) The statute provides that parental "incapability" "may" be the result of some mental incapacity or handicap, but that these are not the only causes resulting in a parent's incapability to care for their child. Therefore, BCDSS petitioned for termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(6) based on respondent's unfortunate physical conditions of having lupus and being prone to seizures, and the court concluded the same as a matter of law.

Under the plain language and broad mandate of N.C. Gen. Stat. § 7B-1101 (2001) controlling at the time the petition was filed, it was incumbent upon the court to appoint respondent a GAL. The trial court was not free to make the determination of whether § 7B-1111(a)(6) allegations were based on physical or mental incapability, and appoint a GAL only if it determined mental incapability was alleged. The plain language of the controlling version of N.C. Gen. Stat. § 7B-1101 did not distinguish on which (a)(6) basis a GAL should be appointed, and the court erred in failing to appoint one in this instance.

Therefore we mandate a rehearing to determine the parental rights of respondent, and that she be appointed a GAL in accord with

3. We make no determination as to whether, under the current version of N.C. Gen. Stat. § 1101 (2003), a GAL should have been appointed based upon the facts of this case.

this opinion. This mandate makes unnecessary review of the remaining issues raised by respondent.

Reversed and remanded.

Judges McGEE and ELMORE concur.

ESTATE OF WORTH APPLE, ON BEHALF OF WORTH APPLE, DECEASED EMPLOYEE, AND BESSIE HUTCHINS APPLE, WIDOW OF WORTH APPLE, DECEASED EMPLOYEE, PLAINTIFF v. COMMERCIAL COURIER EXPRESS, INC., EMPLOYER; MICHIGAN MUTUAL INSURANCE COMPANY, CARRIER DEFENDANTS

No. COA03-850-2

(Filed 18 January 2005)

Workers' Compensation— standing—employee's estate—medical expenses owed by employer to third-party medical provider

An employee's estate did not have standing to bring a claim for past due medical expenses owed to a third-party medical provider by defendant employer in a compensable workers' compensation claim when: (1) the employer admitted compensability; (2) the employer and medical provider entered into an accord and satisfaction; (3) the medical provider made no claim for relief before the Commission; and (4) plaintiff made no showing that the failure to make payment results in injury in fact. However, this holding does not preclude a workers' compensation claimant from pursuing a medical only compensation claim when the claim is disputed or contested and there has not been an intervention of a medical provider in the lawsuit.

Judge TYSON concurring in result only.

Appeal by plaintiff from an Opinion and Award entered 13 February 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 March 2004. Opinion filed 20 July 2004. Petition for rehearing granted 19 August 2004, reconsidering the case with the filing of additional briefs only. The following opinion supersedes and replaces the opinion filed 20 July 2004.

R. James Lore for plaintiff-appellant.

Carruthers & Roth, P.A., by Norman F. Klick, Jr. and J. Patrick Haywood, for defendant-appellees.

HUNTER, Judge.

Plaintiff appeals an Opinion and Award of the Full Commission of the North Carolina Industrial Commission filed 13 February 2003 ruling that Commercial Courier Express, Inc. ("CCE") and Michigan Mutual Insurance Company (collectively "defendants") were not responsible for additional payments for rehabilitation care of Worth Apple ("Apple"). Because we conclude plaintiff lacks standing to bring this claim, we must vacate that portion of the Commission's Opinion and Award.

This case stems from the same facts as *Estate of Apple v. Commercial Courier Express, Inc.*, 165 N.C. App. 530, 598 S.E.2d 623 (2004). Apple was working as a courier for CCE when he was attacked and hit in the head with a hammer in August 1994. He remained in a persistent vegetative state until his death in January 2001. This appeal solely involves a claim by plaintiff that defendants failed to pay $160,000.00 in accrued medical expenses to Winston-Salem Rehabilitation and Healthcare Center ("W-S Rehab") pursuant to a Form 21 agreement entered into by the parties.

W-S Rehab did not intervene in the action and the record in this case reveals W-S Rehab accepted a reduced payment of $50,000.00 as payment in full for services rendered to Apple and the account was settled to the satisfaction of W-S Rehab. On this issue, the Commission concluded, *inter alia*:

> 3. As a result of decedent's compensable injury, decedent was entitled to have defendants provide all necessary medical treatment arising from his compensable injury to the extent it tended to effect a cure, give relief or lessen decedent's disability. . . . Plaintiff failed to establish . . . that defendants have failed to pay the agreed reimbursement for the reasonable services provided by W-S Rehab.
>
> 4. [W-S Rehab] is estopped to request further compensation after accepting the $50,0000 payment as a full accord and satisfaction of the claim or potential claim for unpaid medical services. . . .

Thus, in the award portion of the Opinion and Award, the Commission stated: "Defendants are not responsible for payment of any additional monies to W-S Rehab for the care of decedent . . . ."

Although the Commission ruled in favor of defendants on the merits of the case primarily on the ground of accord and satisfaction between defendants and W-S Rehab, the dispositive issue before us on appeal is whether plaintiff even has standing to assert the non-payment of medical expenses by decedent's employer to a third-party provider.

If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim. *See Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002); *see also Henke v. First Colony Builders, Inc.*, 126 N.C. App. 703, 704, 486 S.E.2d 431, 432 (1997) (stating in a workers' compensation case, "[t]his Court may *ex mero motu* dismiss an appeal for lack of subject matter jurisdiction, even if it is not raised by the parties on appeal"). Standing consists of three main elements:

> "(1) 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Neuse River Found., 155 N.C. App. at 114, 574 S.E.2d at 52 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 364 (1992)). The issue of standing generally turns on whether a party has suffered injury in fact. *See id.*

In this case, plaintiff has made no showing that injury in fact has resulted or will result if defendants are not required to pay W-S Rehab the full $160,000.00. First of all, there is no outstanding debt to W-S Rehab to be collected as evidenced by W-S Rehab's own correspondence. Further, even if there was an outstanding debt, W-S Rehab is barred by law from attempting to collect any such debt from plaintiff. *See* N.C. Gen. Stat. § 97-88.3(c) (2003) (class 1 misdemeanor for a healthcare provider to knowingly hold an employee responsible for medical expenses incurred as a result of a compensable injury); *see also* N.C. Gen. Stat. § 97-90(e) (2003) (a health care provider shall not pursue a private claim against an employee for costs of treatment unless claim is adjudicated not compensable). In

addition, the sole and exclusive remedy for a healthcare provider seeking payment from an employer in a compensable claim is to apply for relief from the Commission. *See Palmer v. Jackson*, 157 N.C. App. 625, 634-35, 579 S.E.2d 901, 908 (2003), *disc. review improvidently allowed*, 358 N.C. 373, 595 S.E.2d 145 (2004). No such application was made in this case.

Nonetheless, plaintiff asserts it has suffered an injury in fact because it must protect its relationship with the medical provider by ensuring bills are fully paid. Plaintiff contends it is highly unlikely that a medical provider would be willing to continue providing treatment when its bills are compromised or not paid at all. To constitute an injury in fact, the invasion of a legally protected interest can not be conjectural or hypothetical. *See Neuse River Found.*, 155 N.C. App. at 114, 574 S.E.2d at 52. Plaintiff's assertion that it would be highly unlikely a medical provider would be willing to continue providing treatment when its bills are compromised or not paid at all is conjecture or hypothetical. Furthermore, in this case, the Commission found decedent received appropriate care and that his care was not improperly limited.

Plaintiff also contends it has suffered an injury in fact because it has a pecuniary interest in the payment of interest on medical compensation under N.C. Gen. Stat. § 97-86.2. However, under N.C. Gen. Stat. § 97-86.2, plaintiff would be entitled to interest on medical compensation only where there is an appeal resulting in an ultimate award to the employee. The possibility of a favorable decision on appeal is not an invasion of a legally protected interest that is either concrete and particularized, or actual or imminent. *See Neuse River Found.*, 155 N.C. App. at 114, 574 S.E.2d at 52.

Next, plaintiff asserts it has a pecuniary interest in awards of attorney fees granted under N.C. Gen. Stat. §§ 97-88.1 and 97-88. Under N.C. Gen. Stat. §§ 97-88 and 97-88.1, an award of attorney's fees is a discretionary decision made by the Commission. *See Taylor v. J. P. Stevens Co.*, 307 N.C. 392, 397, 298 S.E.2d 681, 684 (1983). Similar to plaintiff's assertions regarding interest on medical compensation, the possibility of an attorney's fees award is not an invasion of a legally protected interest that is concrete and particularized, or actual or imminent. *See Neuse River Found.*, 155 N.C. App. at 114, 574 S.E.2d at 52.

Plaintiff also argues the cases of *Hyler v. GTE Products Co.*, 333 N.C. 258, 425 S.E.2d 698 (1993) and *Pearson v. C.P. Buckner Steel*

Erection Co., 348 N.C. 239, 498 S.E.2d 818 (1998) confer standing to plaintiff. Plaintiff cites the following language from *Hyler*:

> [W]e conclude that the legislature always has provided for, and continues to provide for, two distinct components of an award under the Workers' Compensation Act: (1) payment for the cost of medical care, now denominated "medical compensation," which consists of payment of the employee's medical expenses incurred as a result of a job-related injury; and (2) general "compensation" for financial loss other than medical expenses, which includes payment to compensate for an employee's lost earning capacity and payment of funeral expenses.

Hyler, 333 N.C. at 267, 425 S.E.2d at 704. This language in *Hyler* does not confer standing upon plaintiff. Rather, our Supreme Court was explaining a claimant may seek two types of compensation under our workers' compensation statute—medical compensation for medical expenses and general compensation for financial loss. Nothing in our opinion today precludes a claimant from pursuing a "medical only" claim.

Similarly, *Pearson v. C.P. Buckner*, does not confer standing upon plaintiff. In *Pearson*, our Supreme Court considered the issue of

> whether an employer who denies liability but is ordered to pay medical expenses under the Workers' Compensation Act (Act) may fulfill this obligation by merely reimbursing Medicaid where Medicaid has paid medical providers a portion of the cost of treatment or whether the employer must also pay medical providers the difference between the amount covered by Medicaid and the full amount authorized by the Act under the Industrial Commission (Commission) fee schedule for medical expenses.

Pearson, 348 N.C. at 240, 498 S.E.2d at 819. Thus, in *Pearson*, our Supreme Court had to consider whether the federal Medicaid statutes and regulations preempted North Carolina's Workers' Compensation Act. *Id.* at 243-47, 498 S.E.2d at 820-23. The issue before us in this case is whether a workers' compensation claimant has standing to challenge a compromise and settlement agreement entered into by an employer and a medical provider. In *Pearson*, our Supreme Court did not discuss standing, compromise and settlement agreements, or the issue presented by this case.

As such, we conclude plaintiff does not have standing to bring a claim for past due medical expenses owed to a third-party medical provider by an employer in a compensable workers' compensation claim where (1) the employer has admitted compensability, (2) the employer and medical provider entered into an accord and satisfaction, (3) the medical provider has made no claim for relief before the Commission, and (4) plaintiff has made no showing that the failure to make payment results in injury in fact.[1] Furthermore, our holding today does not preclude a workers' compensation claimant from pursuing a medical only compensation claim when the claim is disputed or contested and there has not been an intervention of a medical provider in the lawsuit.[2] Accordingly, the portion of the Opinion and Award of the Commission addressing this issue, as contained in paragraphs 3 and 4 of the Commission's conclusions of law and paragraph 3 of the award, must be vacated.[3]

Finally, as we have concluded plaintiff does not have standing to contest the compromise and settlement agreement between defend-

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1. To the extent that plaintiff impliedly asserts in this appeal that defendants' failure to make full payment led to a reduction in the standard of care provided by W-S Rehab to Apple, plaintiff's recourse was not to force payment by defendants, but was instead under N.C. Gen. Stat. § 97-25, which provides that "[t]he Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer . . . ." N.C. Gen. Stat. § 97-25 (2003). Furthermore, if plaintiff believed the care given to Apple by W-S Rehab was legally substandard, the proper remedy would have been to pursue a potential tort action against W-S Rehab outside of the workers' compensation regime.

2. Plaintiff argued in its petition for rehearing that our decision could result in the dismissal of more than 100,000 current workers' compensation cases. Plaintiff also explained that for seventy-five years it had been the practice of the Industrial Commission to view the injured party plaintiff as a real party at interest having standing to bring "medical only" claims. Indeed, in the last Biennial Report of the North Carolina Industrial Commission, covering 1988-89 and 1989-90, the number of reported "medical only" cases involving medical compensation of $1,000.00 or less was 143,040 for 1988-89 and 120,407 for 1989-90. While we acknowledge that a substantial number of cases before the Industrial Commission involve "medical only" claims, we reiterate that our holding today does not impact these cases. As we stated, a workers' compensation claimant in a contested case has standing to pursue a "medical only" claim. However, in those instances where the medical provider and the insurance carrier or employer have agreed to a compromise and settlement of the claim, plaintiff lacks standing to pursue that medical claim. In those instances, the medical provider is precluded from seeking redress against the claimant.

3. We note the remaining issues dealt with by the Commission regarding indemnity compensation to plaintiff are not before us on appeal and thus, this decision does not address the remaining portion of the Commission's Opinion and Award.

ants and the medical provider, we do not reach the issue of whether the Commission had to approve the settlement agreement under the facts of this case.

Vacated in part.

Judge WYNN concurs.

Judge TYSON concurs in the result only in a separate opinion.

TYSON, Judge concurring in the result only.

I agree with this Court's reasoning in our first opinion, *Estate of Worth Apple v. Commercial Courier Express, Inc.*, 165 N.C. App. 530, 598 S.E.2d 623 (2004) ("*Apple I*").

As stated in *Apple I* and restated above in the majority's opinion, the issue before this Court is whether plaintiff has standing to assert the non-payment of medical expenses by Apple's employer to a third-party provider. In *Apple I*, we held:

> plaintiff has no standing to bring a claim for past due medical expenses owed to a third-party medical provider by an employer in a compensable workers' compensation claim where[:] (1) the medical provider has made no claim for relief before the Commission[;] and (2) plaintiff has made no showing that the failure to make payment results in injury in fact.

Id. at 532, 598 S.E.2d at 625.

Our reasoning and analysis was sufficiently set forth in *Apple I*. Defendant raised the issue of plaintiff's standing in its brief. Plaintiff had the opportunity, but failed, to file a reply brief. *See* N.C.R. App. P. 28(h) (2004). Plaintiff demonstrated no need to address arguments not originally raised on appeal. I concur only in the result reached in the majority's opinion on rehearing and adhere to the reasoning set forth in our first opinion.

GREGORY SZYMCZYK AND DIANE SZYMCZYK, PLAINTIFFS v. SIGNS NOW CORPORATION, DEFENDANT

No. COA04-41

(Filed 18 January 2005)

1. **Arbitration and Mediation— Florida franchise agreement—interstate commerce**

The trial court improperly enjoined a forum selection clause requiring arbitration of a franchise agreement in Florida where the contacts between the plaintiffs in North Carolina and the defendant in Florida were sufficient to establish interstate commerce, so that the Federal Arbitration Act governed rather than our state arbitration statutes. Morever, even if there was no interstate commerce, the contract was formed in Florida.

2. **Jurisdiction— forum selection clause—Florida contract**

N.C.G.S. § 22B-3 (which prohibits forum selections clauses which contravene the public policy of North Carolina) applies to contracts entered into in North Carolina. In this case, the last signature was defendant's, in Florida, and the statute does not apply.

3. **Injunction— preliminary—covenant not to compete—Florida contract**

The trial court erred by granting a preliminary injunction to enforce a covenant not to compete on the ground that it was unreasonable. The clause was enforceable under Florida law, which governed the contract.

4. **Injunctions— preliminary—Florida action halted—not justified**

Reversal of a North Carolina preliminary injunction halting a Florida action was proper where the case dealt with North Carolina plaintiffs and a Florida defendant, a Florida contract, and forum selection issues. Plaintiffs did not show irreparable harm and the case did not present the clear equity justifying the use of extraordinary power.

Appeal by defendant from an order entered 7 August 2003 by Judge Milton F. Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 19 October 2004.

Battle, Winslow, Scott & Wiley, P.A., by Marshall A. Gallop, Jr.; Thomas and Farris, P.A., by Albert S. Thomas, Jr., for plaintiff-appellees.

Helms Mulliss & Wicker, P.L.L.C., by Robert H. Tiller and Corby C. Anderson, for defendant-appellant.

HUNTER, Judge.

Signs Now Corporation ("defendant") appeals from a preliminary injunction enjoining arbitration and a civil action from proceeding in a Florida court. As we find such injunctions were improperly entered, we reverse the trial court for the following reasons.

In November 1993, Gregory and Diane Szymczyk ("plaintiffs") entered into a twenty-year franchise agreement with defendant to operate a Signs Now store in Wilson, North Carolina.

The contract specified several terms with regards to subsequent legal action. First, the contract provided that claims related to the franchise agreement would be subject to arbitration by the American Arbitration Association under the Federal Arbitration Act, prior to the commencement of legal action by either party. The contract contained an exception to the general requirement of arbitration for one of the terms of the agreement, permitting claims for injunctive relief relating to the covenant not to compete. The contract contained a choice of law provision, specifying Florida as the governing law. Finally, the contract agreed that the venue for any claims arising by virtue of the franchise relationship would be Manatee County, Florida.

Plaintiffs operated their franchise store in Wilson, North Carolina, until 2003 under the terms of the franchise agreement. During that time, plaintiffs received operations manuals, training materials, and support and assistance via telephone from defendant in Florida. Plaintiff sent royalty checks to defendant in Florida and attended two of defendant's annual conventions in Florida.

In 2003, plaintiffs contacted defendant to inform them plaintiffs were transferring their store to satisfy a debt, and would no longer be operating the business. Plaintiffs continued to operate a sign shop at the same location, first under the name "Signs Wow," and then under the name "Sign Solutions." Defendant notified plaintiffs they were in violation of the franchise agreement on 7 February 2003, but plaintiffs continued operation of the store.

Defendant filed a demand for arbitration in Florida against plaintiffs in June 2003, as well as a complaint in Manatee County, Florida, seeking injunctive relief for violation of the covenant not to compete. Plaintiffs responded by filing a complaint for breach of the franchise agreement and a motion for a temporary restraining order in Wilson County, North Carolina, on 16 July 2003, enjoining defendants from proceeding with arbitration. The order was granted. Plaintiffs later amended their complaint to seek an injunction to prohibit enforcement of the covenant not to compete. On 7 August 2003, the Wilson County trial court granted a preliminary injunction preventing defendant from proceeding with arbitration and the pending civil action in Florida. The trial court, in the same order, permitted plaintiffs' claims to move forward and allowed arbitration on those claims in North Carolina.[1] Defendant appeals.

I.

[1] Defendant first contends that the trial court erred in issuing a preliminary injunction prohibiting defendant from proceeding with an arbitration in Florida. We agree.

We first note the considerations for issuance of a preliminary injunction:

> "[A] preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation."

Redlee/SCS, Inc. v. Pieper, 153 N.C. App. 421, 423, 571 S.E.2d 8, 11 (2002) (quoting *A.E.P. Industries v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983)). On appellate review of a preliminary injunction, this Court is not bound by the trial court's findings of fact. Rather, the appellate court reviews the evidence *de novo* and makes its own findings of fact and conclusions of law. *See Jeffery R. Kennedy, D.D.S., P.A. v. Kennedy*, 160 N.C. App. 1, 8, 584 S.E.2d 328, 333, *appeal dismissed*, 357 N.C. 658, 590 S.E.2d 267 (2003).

1. We note that under the terms of the trial court's order, both parties were directed to pursue arbitration within ten days or proceed with litigation on plaintiff's claims. Defendant filed for arbitration in North Carolina pursuant to that order. Neither party moved for a stay from this Court or the trial court as to this arbitration while the appeal was pending, and the arbitration has proceeded as to those issues. We note, however, that the arbitration at the time of hearing was incomplete.

N.C. Gen. Stat. § 22B-3 provides that a forum selection clause which requires prosecution or arbitration in another state, when entered into in North Carolina, is against public policy and is void and unenforceable. *Id.* However, plaintiffs concede in their brief that if the Federal Arbitration Act ("FAA") applies, the law of the state of North Carolina is preempted with respect to the applicability of N.C. Gen. Stat. § 22B-3, on which basis the trial court granted the preliminary injunction enjoining arbitration. *See Boynton v. ESC Med. Sys., Inc.*, 152 N.C. App. 103, 109, 566 S.E.2d 730, 734 (2002). The application of the FAA in this case turns on whether the transaction involved interstate commerce. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277-81, 130 L. Ed. 2d 753, 766-69 (1995) (holding that the FAA applies when a contract evidences a transaction involving commerce in fact). This Court has previously noted that:

> "[A]ll interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons or information, is a transaction of interstate commerce."

Snelling & Snelling v. Watson, 41 N.C. App. 193, 197-98, 254 S.E.2d 785, 789 (1979) (citations omitted). *Snelling* involved a franchise agreement in which the licensor provided the licensee, among other things, training manuals, advice, and use of a carefully regulated service mark. *Id.* at 201-02, 254 S.E.2d at 791. The Court found all of these factors to provide evidence of interstate commerce. *Id.* at 204, 254 S.E.2d at 793.

Here, the record shows that plaintiffs and defendant entered into a franchise agreement in which defendant provided support to plaintiffs in the form of manuals, training, and advice via telephone, as well as the use of a specific name and trademark. Further, plaintiffs routinely transmitted payments in the form of bank drafts from North Carolina to Florida. Finally, there is evidence that plaintiffs twice traveled to Florida to attend defendant's annual convention, which provided additional training. Such contacts were sufficient to establish the franchise agreement as interstate commerce, and the FAA therefore properly governs the franchise agreement, rather than our state's arbitration statutes. *See Boynton*, 152 N.C. App. at 109, 566 S.E.2d at 734. Thus, under the FAA, the franchise agreement's provision requiring arbitration in Florida should have been

enforced. However, even if there was no interstate commerce and the FAA did not preempt N.C. Gen. Stat. § 22B-3, we note the arbitration forum selection clause would not be void as the contract was formed in Florida, as discussed *infra* in Section II. Therefore, we find the trial court improperly granted the preliminary injunction enjoining the arbitration.

II.

[2] Defendant next contends the trial court erred in enjoining defendant from seeking to enforce a covenant not to compete against plaintiffs through a civil action in Florida. We agree.

"In general, a court interprets a contract according to the intent of the parties to the contract." *Cable Tel Servs., Inc. v. Overland Contr'g., Inc.*, 154 N.C. App. 639, 642, 574 S.E.2d 31, 33 (2002). Further, the Supreme Court of North Carolina has held that "where parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect." *See Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980). Here, the parties specifically agreed in the terms of the contract that the laws of the State of Florida would govern the agreement.

Under certain circumstances, however, North Carolina courts will not honor a choice of law provision, such as when

> "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of applicable law in the absence of an effective choice of law by the parties."

Cable Tel Servs., Inc., 154 N.C. App. at 643, 574 S.E.2d at 34 (citations omitted). Here, plaintiffs argue that N.C. Gen. Stat. § 22B-3 prohibits forum selection clauses as contravening the strong public policy of North Carolina, and therefore the forum selection clause in the franchise agreement is void and unenforceable.[2]

2. Although we find N.C. Gen. Stat. § 22B-3 inapplicable to this contract based on the reasoning *infra*, we note that this statute, passed in 1993, specifically overrules the holding in *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 423 S.E.2d 780 (1992), which held that forum selection clauses were valid in North Carolina, although this case has continued to be cited by this Court in determining the validity of forum selection clauses formed in this state.

However, N.C. Gen. Stat. § 22B-3 (2003) specifies that it applies to "any provision in a contract entered into *in North Carolina*[.]" *Id.* (emphasis added). Although this question has not been directly addressed by our courts, we find the reasoning in *Key Motorsports v. Speedvision Network, L.L.C.*, 40 F. Supp. 2d 344 (M.D.N.C. 1999), regarding the applicability of N.C. Gen. Stat. § 22B-3 to out of state contracts, to be persuasive. In *Key*, a contract with a forum selection clause was formed in Connecticut and the court found that enforcement of the forum selection clause would not violate North Carolina public policy, as the "provision is limited to contracts 'entered into in North Carolina.' " *Key*, 40 F. Supp. 2d at 349. The threshold question for determining if the contact's forum selection clause violates North Carolina law, therefore, is a determination of where the instant contract was formed.

It is well-accepted that

> "the test of the place of a contract is as to the place at which the last act was done by either of the parties essential to a meeting of minds. Until this act was done there was no contract, and upon its being done at a given place, the contract became existent at the place where the act was done. Until then there was no contract."

Bundy v. Commercial Credit Co., 200 N.C. 511, 515, 157 S.E. 860, 862 (1931) (citations omitted). In *Bundy*, a contract negotiated by the North Carolina office of a Maryland company was not deemed existent until the final signature was made by the company's officers in Maryland. *Id.* at 514-15, 157 S.E. at 862.

Here, the terms of the franchise agreement were discussed with representatives of defendant and a form agreement was signed by plaintiffs in North Carolina. The contract was then returned to Florida and defendant's president signed the agreement. Just as in *Bundy*, the last act of signing the contract was an essential element to formation. As the contract was formed in Florida, N.C. Gen. Stat. § 22B-3 does not apply to the forum selection clause in the instant agreement.

[3] Plaintiffs allege further that the forum selection clause should not be honored as it is unreasonable. As the interpretation of a contract is governed by the law of the place where the contract was made, we apply Florida law to address the validity of the forum selection clause. *See Land Co.*, 299 N.C. at 262, 261 S.E.2d at 656 (holding the provisions of the contract as to choice of law govern interpretation of the validity of the contract).

Under Florida law, forum-selection clauses have been met with approval. *See Manrique v. Fabbri*, 493 So.2d 437, 440 (Fla. 1986) (holding forum selection clauses enforceable in the absence of a showing that enforcement would be unreasonable or unjust). Further, plaintiffs bear the burden of showing that the enforcement of the forum selection clause is unreasonable or unjust. *See Swarovski N. Am., Ltd. v. House of China, Crystal & Silver, Inc.*, 848 So.2d 452, 453 (Fla. 2003) (holding "unambiguous mandatory forum selection clauses contained in contract documents are presumptively valid and should be enforced in the absence of a showing that enforcement would be unreasonable or unjust"); *Kanner v. Pan American Assistance, Inc.*, 807 So.2d 80, 82 (Fla. 2001) (noting the test of unreasonableness is not mere inconvenience or additional expense).

Here, plaintiffs contend that the mere fact that they were a small family business confronted by a lengthy form contract renders the contract unenforceable. However the forum selection clause is clearly identified in the text of the contract and the franchisee is admonished to seek legal counsel to facilitate understanding of the terms of the agreement, which offers benefits and liabilities for both parties. Further, plaintiffs had nearly a month to contemplate the terms of the franchise agreement, receiving the offer in October of 1993 and signing the contract on 19 November 1993. As plaintiffs fail to show why recognizing the legitimate expectations of the parties as agreed to in the terms of the contract would be unreasonable or unjust, the forum selection clause would be enforceable under Florida law. *See Manrique*, 493 So.2d at 440. Therefore the trial court erred in granting a preliminary injunction as to defendant's action to enforce the covenant not to compete.

III.

[4] Defendant finally contends the trial court erred in granting a preliminary injunction to plaintiffs when they failed to show irreparable harm. As the trial court's grant of a preliminary injunction as to pending arbitration in Florida and a civil action to enforce a covenant not to compete were in error, it is unnecessary to reach defendant's remaining assignment of error.

However, a brief review of defendant's contentions further substantiates reversal of the trial court's grant of preliminary injunctions. Defendant contends that the issuance of such preliminary injunctions enjoining actions in another state were improper.

> [I]t is well established that "a court . . . which has acquired jurisdiction of the parties, has power, on proper cause shown, to enjoin them from proceeding with an action in another state . . . , particularly where such parties are citizens or residents of the state, or with respect to a controversy between the same parties of which it obtained jurisdiction prior to the foreign court."
>
> However, the rule is that this power of the court should be exercised sparingly, and only where "a clear equity is presented requiring the interposition of the court to prevent manifest wrong and injustice."

Childress v. Motor Lines, 235 N.C. 522, 531, 70 S.E.2d 558, 564-65 (1952) (citations omitted). Here, defendants are neither citizens nor residents of the state and the North Carolina court did not obtain jurisdiction prior to the foreign court. Nor have plaintiffs demonstrated "manifest wrong and injustice" by defendant's proceedings in Florida's courts. *Id.* at 531, 70 S.E.2d at 565. Therefore as this case fails to present the clear equity which justifies the use of such extraordinary power by our trial courts, reversal of the preliminary injunctions is proper in this case.

Further, the extraordinary measure of a preliminary injunction to preserve the status quo is only to be taken when the moving party can show irreparable loss is likely unless the injunction is issued. *Redlee/SCS, Inc.*, 153 N.C. App. at 423, 571 S.E.2d at 11. Here, plaintiff fails to make a showing of likely irreparable harm unless the injunction is issued, alleging no harm from such proceedings in plaintiffs' deposition. Thus, the failure to show irreparable harm further invalidates the grant of such an injunction.

For the reasons stated herein, the trial court erred in issuing preliminary injunctions enjoining defendants from proceeding with enforcement of the contractual agreement in Florida.

Reversed.

Judges WYNN and THORNBURG concur.

Judge Thornburg concurred in this opinion prior to 31 December 2004.

STATE OF NORTH CAROLINA v. JAMI TOR ALLAH

No. COA04-391

(Filed 18 January 2005)

1. **Firearms and Other Weapons— possession by felon—no restoration of rights**

The Court of Appeals denied a motion for appropriate relief which sought to set aside defendant's conviction for possession of a firearm by a felon on the ground that his right to possess a firearm had been restored. Under N.C.G.S. § 14-415.1(b)(1), as amended, there is no time bar and no provision for restoration.

2. **Firearms and Other Weapons— possession by felon—place of business exception—not applicable**

A felon's possession of a firearm did not fall within the place of business exception where defendant, a truck driver, was an independent contractor who confronted the owner of a trucking company at that company. Defendant had no proof that he had dominion and control to the exclusion of the public and admitted that another owned the company.

3. **Constitutional Law— effective representation—advising defendant to accept guilty plea**

Defendant was not deprived of the effective assistance of counsel where he was advised to plead guilty to possession of a firearm by a felon. Defendant's contentions of error regarding that charge were without merit as a matter of law.

4. **Constitutional Law— presumption of innocence—instruction**

Defendant was not deprived of his constitutional presumption of innocence by the statutorily required instruction not to form an opinion before deliberations or by the court not giving the Pattern Jury Instruction on presumption of innocence. The court instructed the jury clearly on the State's burden of showing guilt beyond a reasonable doubt.

5. **Sentencing— prior record points—only one of eight contested—harmless**

Any error in the assignment of record points when sentencing defendant was harmless where defendant takes issue with only one of eight prior points; assuming that point was erroneously

assessed, defendant would still have been assigned the same record level.

6. Constitutional Law— double jeopardy—discharging a weapon into occupied property—assault with a deadly weapon

Discharging a weapon into occupied property and assault with a deadly weapon inflicting serious injury are separate offenses with unique elements which do not place defendant in double jeopardy.

7. Sentencing— mitigating factors not found—presumptive range

The lack of findings on mitigating factors was not error despite there being mitigating evidence where all of defendant's sentences were in the presumptive range.

8. Sentencing— overlapping presumptive and aggravated range—aggravating factor not found

Imposing a sentence within the aggravated range without findings in aggravation was not error where defendant was sentenced to a term within an overlap between the presumptive and aggravated ranges.

Appeal by defendant from judgments entered 27 August 2003 by Judge Frank R. Brown in Washington County Superior Court. Heard in the Court of Appeals 17 November 2004.

Attorney General Roy A. Cooper, III, by Assistant Attorneys General David J. Adinolfi, II and Rudy Renfer, for the State.

Everett & Hite, L.L.P., by Stephen D. Kiess, for defendant-appellant.

HUNTER, Judge.

Jami Tor Allah ("defendant") appeals from judgments dated 27 August 2003 entered consistent with a jury verdict finding him guilty of assault with a deadly weapon with intent to kill inflicting serious injury and discharging a weapon into occupied property, and a guilty plea to possession of a firearm by a felon.

The evidence tends to show that on 24 November 2002, defendant confronted Ronald Toppin ("Toppin"), the owner of Faith Transportation Company. Defendant, an independent semi-tractor

operator, was seeking payment from Toppin following a vehicular accident in which defendant had been involved in Virginia on 23 November 2002. Defendant arrived carrying a .32 or .38 caliber revolver and approached Toppin in the dispatch area of the office. After discussing his payment, defendant began firing his weapon at Toppin, who was wounded by the gunfire. Defendant fled towards the rear of the establishment, continuing to fire his weapon. Defendant then exited the building, and was seen firing at the building with a firearm described as a .22 or .25 caliber slide-action semi-automatic.

Toppin contacted 911 and was transported to the hospital, during which time he identified defendant as his assailant. Defendant called 911 to turn himself in, and was taken into custody by the Williamston police. A .32 caliber handgun was found in defendant's possession when he was taken into custody, but the semi-automatic handgun was not recovered. Defendant testified at trial that he acted in self-defense, but admitted on cross-examination that he did not see a firearm in Toppin's possession.

Defendant was convicted by jury verdict of assault with a deadly weapon with intent to kill inflicting serious injury and discharging a weapon into occupied property. Prior to trial, defendant had entered a plea of guilty to possession of a firearm by a felon. The trial court found defendant to be a prior record level III and sentenced defendant to consecutive sentences of 116 to 149 months for assault with a deadly weapon with intent to kill inflicting serious injury, thirty-four to fifty months for discharging a weapon into occupied property, and sixteen to twenty months for possession of a firearm by a felon. Defendant appeals.

The issues in this case are whether: (1) defendant's conviction for possession of a firearm should be vacated, (2) the trial court deprived defendant of his constitutional right to a presumption of innocence, (3) the trial court erred in finding eight record points in sentencing defendant, (4) the trial court erred in imposing judgment for both assault with a deadly weapon with intent to kill while inflicting serious injury and discharging a weapon into occupied property, (5) the trial court erred in failing to find whether the offenses were mitigated, and (6) the trial court committed reversible error in imposing an aggravated sentence without making any findings in aggravation.

I.

[1] By his first assignment of error, and in a separate motion for appropriate relief, defendant contends the conviction for possession

of a firearm by a felon should be vacated as a matter of law, as defendant's right to possession of a firearm had been restored prior to the date of the alleged offense, and as the prohibition on possession was inapplicable to defendant at his place of business. We disagree.

N.C. Gen. Stat. § 14-415.1(a) (2003) prohibits possession of a firearm by a convicted felon except within his own home or lawful place of business. The statute further specifies that prior convictions which cause disentitlement include felony convictions in North Carolina that occurred before, on, or after 1 December 1995. N.C. Gen. Stat. § 14-415.1(b)(1). The statute, amended in 1995, contains no time bar for possession of a firearm and includes no provisions for restoration of the right to possess a firearm by a convicted felon. *See State v. Gaither*, 161 N.C. App. 96, 103, 587 S.E.2d 505, 510 (2003).

Here, defendant pled guilty to the charge of possession of a firearm by a felon. Defendant had a felony conviction prior to 1 December 1995, and as a result had no right to possess a firearm outside his home or place of business under N.C. Gen. Stat. § 14-415.1. Defendant's argument supported by superceded case law is without merit and the motion for appropriate relief is denied.

[2] Defendant further contends that his possession of a firearm is exempted under N.C. Gen. Stat. § 14-415.1 because it occurred at his place of business. "A defendant who is charged with the substantive offense and seeks to utilize the exception has the burden of bringing himself within the exception." *State v. Bishop*, 119 N.C. App. 695, 698, 459 S.E.2d 830, 832 (1995). This Court has construed the exception for possession of a firearm by a felon narrowly, limited "to the convicted felon's own premises over which he has dominion and control to the exclusion of the public." *State v. Cloninger*, 83 N.C. App. 529, 532, 350 S.E.2d 895, 897 (1986).

Here, Toppin testified that he owned Faith Transportation and that all drivers were independent contractors. Defendant provided no proof that Faith Transportation was his place of business where he had dominion and control to the exclusion of the public, and in fact testified that Toppin owned Faith Transportation. Defendant therefore failed to meet the burden to bring himself within the exception, and thus the assignment of error is without merit.

[3] Defendant finally contends ineffective assistance of counsel in pleading guilty to the charge of possession of a firearm by a felon. In

order to reverse a conviction on the basis of ineffective assistance of counsel, a defendant must show that the counsel's conduct fell below an objective standard of reasonableness. *See Strickland v. Washington*, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 693 (1984). Defendant must show first that counsel's performance was deficient and second that the deficient performance prejudiced the defendant in a manner so serious as to deprive the defendant of a fair trial. *Id.* at 687, 80 L. Ed. 2d at 693.

As defendant's assignment of error to the charge of possession of a firearm by a felon is without merit as a matter of law, defendant fails to show that counsel's performance in advising defendant to enter a plea of guilty was deficient. Therefore defendant's claim of ineffective assistance of counsel is overruled.

II.

[4] Defendant next contends the trial court deprived defendant of his constitutional right to presumption of innocence by instructing the jury not to form an opinion as to defendant's guilt or innocence. We disagree.

N.C. Gen. Stat. § 15A-1236(a)(3) (2003) instructs the trial judge at appropriate times to admonish the jury "[n]ot to form an opinion about the guilt or innocence of the defendant, or express any opinion about the case until they begin their deliberations[.]" *Id.*

Here, the trial court instructed the jury under N.C. Gen. Stat. § 15A-1236(a) not to discuss the case, speak with parties, witnesses, or counsel, or form an opinion about defendant's guilt or innocence on three occasions, all before the court was about to recess. The trial court's adherence to the statutory language almost verbatim cannot be found as error. *See State v. Harrington*, 335 N.C. 105, 118, 436 S.E.2d 235, 242 (1993) (holding that an instruction for a jury to keep an open mind, in context, is proper and contains no expression of opinion about any question to be decided by the jury or about the weight of the evidence). Therefore defendant's assignment of error is without merit.

Defendant additionally presents arguments regarding the propriety of the trial court's jury instructions, contending that the trial court's failure to instruct the jury on presumption of innocence pursuant to the Pattern Jury Instruction further deprived defendant of his right to presumption of innocence. Our courts have previously

noted that a judge's failure to instruct on presumption of innocence is not error when the trial court has clearly defined the offense and placed the burden of proof beyond a reasonable doubt upon the State to find the defendant guilty. *See State v. Perry*, 226 N.C. 530, 534, 39 S.E.2d 460, 464 (1946); *State v. Bowser*, 214 N.C. 249, 254, 199 S.E. 31, 34 (1938); *State v. Herring*, 201 N.C. 543, 548-49, 160 S.E. 891, 894 (1931).

Here, the trial court instructed the jury:

> In these cases, the defendant has entered pleas of "not guilty". The fact that he has been charged is no evidence of guilt. Under our system of justice, when a defendant pleads "not guilty", he is not required to prove his innocence; he has denied the charges pending against him. It becomes the obligation of the prosecution to prove the defendant's guilt, to prove it beyond a reasonable doubt, and that means that after you've heard all of the evidence in these cases, you must, and I repeat, you must find the defendant not guilty unless you decide that the guilt of the defendant has been proven not by a probability, not to a reasonable certainty, nor to any lesser standard, but beyond a reasonable doubt.

Such an instruction is not error when the trial court clearly instructed the jury as to the burden of proof upon the State to show guilt beyond a reasonable doubt. As we do not find the trial court deprived defendant of his constitutional right to presumption of innocence by its instructions, this error is overruled.

III.

[5] Defendant next contends the trial court erred in assigning defendant a prior record level III after erroneously finding defendant had eight record points. We disagree.

A Prior Record Level III is assigned for at least five but no more than eight points. *See* N.C. Gen. Stat. § 15A-1340.14(c) (2003). Defendant takes issue with only one of the eight prior record points found by the trial court, based on the trial court's allegedly erroneous finding that all the elements of defendant's present offense were included in a prior offense. *See* N.C. Gen. Stat. § 15A-1340.14(b)(6). Assuming *arguendo* the one point was erroneously assessed, defendant would still have seven prior record points and would have properly been assigned a prior record level of III. As removal of the prior record point would not change defendant's prior record level, this

error is therefore deemed harmless. *See State v. Adams*, 156 N.C. App. 318, 324, 576 S.E.2d 377, 381-82 (2003).

IV.

[6] Defendant next contends the trial court erred in imposing judgment for both assault with a deadly weapon with intent to kill while inflicting serious injury and discharging a weapon into occupied property, as such convictions violated defendant's right to be free from double jeopardy. We disagree.

"It is an ancient and basic principle of criminal jurisprudence that no one shall be twice put in jeopardy for the same offense." *State v. Hicks*, 233 N.C. 511, 516, 64 S.E.2d 871, 875 (1951). In determining whether two indictments are for the same offense, our courts have used the " 'same-evidence test.' " *Id.* The same evidence test holds that there must be at least partial reciprocity of the required elements of an offense for it to be the same at law as another offense. In *State v. Hill*, our Supreme Court further explained this rule.

> " 'Therefore, in proving the required elements A, B, and C under one statute in the first indictment, and in proving the required elements A, B, and D under another statute in the second indictment, one will not run afoul of the former jeopardy rule. C, an element of the first is not an element of the second. D, an element of the second, is not an element of the first indictment. Therefore each offense required proof of an element which the other did not.' "

State v. Hill, 287 N.C. 207, 215, 214 S.E.2d 67, 73 (1975) (citations omitted) (emphasis omitted).

In *State v. Shook*, the Supreme Court of North Carolina held that:

> It is manifest that the two offenses . . . (1) discharging a firearm into an occupied building and, (2) assault with a deadly weapon inflicting serious injury, are entirely separate and distinct offenses. To prove the one, the state must show that defendant fired into an occupied building, an element which need not be shown to support the second charge. Likewise to prove the second charge, it must show the infliction of serious injury, which is not an element of the first charge.

Shook, 293 N.C. 315, 320, 237 S.E.2d 843, 847 (1977). As discharging a weapon into occupied property and assault with a deadly weapon inflicting serious injury are separate offenses with unique elements

which do not place defendant in double jeopardy, this assignment of error is without merit.

V.

[7] Defendant next contends the trial court erred in failing to find whether the offenses were mitigated, as evidence presented to the court would have permitted the finding of numerous mitigating factors. We disagree.

N.C. Gen. Stat. § 15A-1340.16 (2003) governs the imposition of aggravated and mitigated sentences. N.C. Gen Stat.§ 15A-1340.16(c) states that: "The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S.15A-1340.17(c)(2). Findings shall be in writing." *Id.* "Since the court may, in its discretion, sentence defendant within the presumptive range without making findings regarding proposed mitigating factors," this Court has found no error in the failure to make such findings. *State v. Ramirez*, 156 N.C. App. 249, 258-59, 576 S.E.2d 714, 721 (2003).

Here, the trial court sentenced defendant for the charge of assault with a deadly weapon with intent to kill inflicting serious injury, a Class C felony, to a minimum sentence of 116 months. The presumptive range for a Class C felony with Prior Record Level III is 93-116 months. *See* N.C. Gen. Stat. § 15A-1340.17 (2003). The trial court sentenced defendant for the charge of discharging a weapon into occupied property, a Class E felony, to a minimum sentence of thirty-four months. The presumptive range for a Class E felony with Prior Record Level III is twenty-seven to thirty-four months. *Id.* Finally, the trial court sentenced defendant for the charge of possession of a firearm by a felon, a Class G felony, to a minimum sentence of sixteen months. The presumptive range for a Class G felony with Prior Record Level III is thirteen to sixteen months. *Id.* As defendant was sentenced for all offenses in the presumptive range, the trial court did not err in failing to make findings as to mitigating factors.

VI.

[8] Finally, defendant contends the trial court committed reversible error in imposing an aggravated sentence without making any findings in aggravation. Defendant asserts that because defendant was given a minimum sentence which falls in both the presump-

tive and aggravated ranges, a finding of aggravation was required. We disagree.

This question has been previously addressed by this Court. *See Ramirez*, 156 N.C. App. 249, 576 S.E.2d 714. In *Ramirez*, the defendant argued it was error to sentence within an overlapping range between a presumptive and aggravated sentence without a finding of an aggravated factor. *Id.* at 259, 576 S.E.2d at 721. The Court in *Ramirez* found "[t]he fact that the trial court could have found aggravating factors and sentenced defendant to the same term does not create an error in defendant's sentence[,]" and held that the statute was not ambiguous as a result of the overlap. *Id.* In accord with the holding in *Ramirez*, defendant was properly sentenced within the presumptive range and the trial court did not err in failing to find aggravating factors.

For the reasons stated herein, we find no error.

No error.

Judges CALABRIA and STEELMAN concur.

YVONNE EVERITTE BRITT (NOW SHANKS), PLAINTIFF v. THOMAS M. BRITT, DEFENDANT

No. COA04-381

(Filed 18 January 2005)

1. Divorce— equitable distribution—sixteen-month delay between hearing and order

The trial court did not err by entering an equitable distribution order sixteen months after the equitable distribution hearing, because: (1) the Court of Appeals has declined to reverse late-entered equitable distribution orders where the facts have revealed that the complaining party was not prejudiced by the delay; (2) the instant case does not present a situation in which changes in the value of marital or divisible property between the hearing and entry of the equitable distribution order counsel in favor of additional consideration by the trial court when plaintiff concedes that the marital home was the most significant item of property distributed, it was sold prior to the equitable distribu-

tion hearing, and the value of the marital home will not change for the purposes of equitably distributing the parties' marital property; and (3) plaintiff failed to identify any potential change in circumstances that would have an impact upon the equitable distribution order.

2. Divorce— equitable distribution—motion to set aside—motion for new trial

The trial court did not err by denying plaintiff wife's motions to set aside the equitable distribution order under N.C.G.S. § 1A-1, Rule 60(b)(4) and to grant a new trial, because: (1) no jurisdictional challenge has ever been raised; and (2) plaintiff does not assert that the district court was without authority to enter the equitable distribution order.

3. Divorce— equitable distribution—unequal division

The trial court did not abuse its discretion in an equitable distribution case by granting an unequal division of the parties' marital property in favor of defendant husband because although plaintiff presented evidence that may have permitted contrary findings, the trial court's findings are supported by competent evidence and are, in turn, sufficient to support the trial court's conclusion.

Appeal by plaintiff from judgment entered 25 June 2003 by Judge Nancy C. Phillips in Brunswick County District Court. Heard in the Court of Appeals 3 November 2004.

Hosford & Hosford, P.L.L.C., by Sofie W. Hosford, for plaintiff.

The Del Re' Law Firm, by Benedict J. Del Re', Jr. for defendant.

LEVINSON, Judge.

Plaintiff Yvonne Britt (now Shanks) appeals from an equitable distribution order granting an unequal division of the parties' marital property to defendant Thomas Britt and from the denial of her motion seeking relief from the equitable distribution order and a new trial. We affirm.

The parties married on 8 November 1997, separated on 15 March 1999, and were divorced by judgment entered 24 May 2000. An equitable distribution hearing was held on 19 February 2002. The evidence at the hearing tended to show the following: Prior to the mar-

riage of the parties, Mr. Britt purchased two adjacent lots in the Salt Marsh Cove Subdivision for $30,000. During the marriage of the parties, Mr. Britt conveyed this property to himself and Mrs. Shanks. The parties subsequently purchased a mobile home for approximately $65,000 which they placed on the property. In addition, the parties purchased a garage for $6,261, and paid $32,066.57 for a carport, porch, concrete wall, permits and landscaping of the property. The sum of the expenditures for the property, the home, and related improvements was approximately $134,000.

In 1999, Mr. Britt made an early withdrawal from his IRA account in the amount of $64,000. He used approximately eighty percent of this money to satisfy marital debt incurred in purchasing the mobile home. The withdrawal was subject to an early withdrawal penalty and taxation. In December 2000, Mrs. Shanks conveyed the Salt Marsh Cove Lots and the mobile home to a third party in consideration for $110,000 by a private sale exclusive of a real estate broker or advertisement.

The marital residence was the most substantial item of marital property. Mrs. Shanks testified that the fair market value of the marital residence was between $94,000 and $98,000 and its tax value as of the date of separation was $101,700. Mr. Britt contended, and the trial court found, that the fair market value of the marital residence, including improvements, was $130,000 as of the date of separation. The trial court also determined that the marital estate included a Dodge truck, a Mitsubishi 3000 GT automobile, and miscellaneous items valued at $1000.

As of the date of the hearing, Mrs. Shanks was fifty-one years old and was earning $4,300 per month as the Director of Human Services for the City of Sanford. Mr. Britt was sixty-six years old and retired. He testified that he had hypertension and also required knee replacement surgery. Mr. Britt further testified that he was unable to work due to his knee problems but that he received a Social Security check in the amount of $1032.00 per month.

On 25 June 2003, approximately sixteen months after the equitable distribution hearing, the trial court entered its equitable distribution order. The court determined that an equal distribution of the property would not be equitable and awarded Mr. Britt a fifty-five percent share of the parties' marital property. Mrs. Shanks was ordered to pay Mr. Britt a distributive award of $39,750, in three equal annual installments, to effect the distribution.

On 7 July 2003, Mrs. Shanks filed a motion alleging, *inter alia*, that the entry of the equitable distribution order sixteen months after the equitable distribution hearing entitled her to have the order set aside and a new trial conducted pursuant to N.C.G.S. §§ 1A-1, Rules 59(a)(9) and 60(b)(4). Mrs. Shanks did not make any argument to the trial court that either the value of the marital property or the parties' respective conditions had changed. The trial court denied Mrs. Shanks' motion.

Mrs. Shanks now appeals, contending that the trial court erred by (1) entering the equitable distribution order sixteen months after the equitable distribution hearing, (2) denying her motion to set aside the late-entered order and grant a new trial, and (3) awarding Mr. Britt an unequal distribution of the marital estate where such an award is contrary to the evidence presented and unsupported by sufficient findings of fact. For the reasons that follow, the trial court's equitable distribution order and the order denying Mrs. Shanks' motion to set aside the equitable distribution judgment and for a new trial are affirmed.

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[1] We first address Mrs. Shanks' argument that the trial court erred by entering the equitable distribution order sixteen months after the equitable distribution hearing. According to Mrs. Shanks, entry of the order after the long delay violated this Court's decision in *Wall v. Wall*, 140 N.C. App. 303, 313-14, 536 S.E.2d 647, 654 (2000). We are not persuaded.

In *Wall*, this Court held that, on the facts of that case, a nineteen-month delay between the date of trial and the date of disposition constituted more than "a *de minimis* delay, and require[d] that the trial court enter a new distribution order on remand." *Id.* at 314, 536 S.E.2d at 654. Given the nature of the property involved in the case and the extensive delay, this Court required "the trial court [to] allow the parties to offer additional evidence as to any substantial changes in their respective conditions or post-trial changes, if any, in the value of items of marital property." *Id.* Specifically, on remand, the trial court was to

> reconsider the evidence of the increase in value of the husband's profit-sharing plan following separation, treating such increase as a distributional factor, . . . reconsider the evidence offered by the husband on the state of his health, make appropriate findings about the evidence, and give it appropriate weight in making a

> new distribution decision[, and] give the parties an opportunity to offer evidence on the changes, if any, in value of the marital property since the trial. . . .

Id. The remainder of the equitable distribution order was affirmed. *Id.*

We observe that *Wall* establishes a case-by-case inquiry as opposed to a bright line rule for determining whether the length of a delay is prejudicial. *See id.*; SUZANNE REYNOLDS, 3 LEE'S NORTH CAROLINA FAMILY LAW § 12.114 (5th ed. rev. 2002). Indeed, since *Wall*, this Court has declined to reverse late-entered equitable distribution orders where the facts have revealed that the complaining party was not prejudiced by the delay. *See, e.g., White v. Davis*, 163 N.C. App. 21, 26, 592 S.E.2d 265, 269 (holding that delay of seven months between hearing and entry of equitable distribution order was not prejudicial), *disc. review denied*, 358 N.C. 739, 603 S.E.2d 127 (2004).

In the present case, the challenged equitable distribution order was entered sixteen months after the hearing. Though Mrs. Shanks contends that this Court's decision in *Wall* requires a reversal of the untimely order, she has made no argument that the circumstances that counseled in favor of reversing the order in *Wall* are present in the case *sub judice*.

In *Wall*, potential changes in the value of marital or divisible property between the hearing and entry of the equitable distribution order warranted additional consideration by the trial court. By contrast, in the instant case Mrs. Shanks concedes that the marital home was the most significant item of property distributed and that it was sold prior to the equitable distribution hearing. She further admits that the value of the marital home will not change for the purposes of equitably distributing the parties' marital property. Thus, the instant case does not present a situation in which changes in the value of marital or divisible property between the hearing and entry of the equitable distribution order counsel in favor of additional consideration by the trial court.

Likewise, in *Wall*, potential changes in the relative circumstances of the parties warranted additional consideration by the trial court. In the instant case, Mrs. Shanks baldly asserts that the trial court's late-entered order "ignored . . . the impact of a change in the parties' respective conditions after the trial," but she has identified no potential change in circumstances that would have an impact upon the

equitable distribution order. Indeed, Mrs. Shanks neither identified any change in the parties' respective conditions in her written motion for a new trial, nor asserted that any had occurred during the motions hearing before the trial court.

It is Mrs. Shanks' central position that the **delayed entry** of the equitable distribution order, **standing alone**, entitles her to a new hearing as a matter of law. We do not agree that *Wall* establishes such a proposition. Moreover, we are unpersuaded that, given the circumstances of the instant case, Mrs. Shanks was prejudiced by entry of the equitable distribution order sixteen months after the equitable distribution hearing. This assignment of error is overruled.

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[2] We next address Mrs. Shanks' argument that the trial court erred by denying her motion to set aside the equitable distribution judgment and grant a new trial. Though her brief lacks clarity with respect to this argument, Mrs. Shanks apparently intends to argue that this Court's decision in *Wall* entitles her to a new trial pursuant to N.C.G.S. §§ 1A-1, Rules 59(a)(9) and/or 60(b)(4). We do not agree.

N.C.G.S. § 1A-1, Rule 59(a)(9) (2003) is a catch-all provision which permits a trial court to grant a new trial for any reason not specifically enumerated in Rule 59 "heretofore recognized as grounds for new trial." A ruling under Rule 59(a)(9) is consigned to the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Beneficial Mortgage Co. v. Peterson*, 163 N.C. App. 73, 84, 592 S.E.2d 724, 731 (2004). In the instant case, we discern no abuse of discretion in the trial court's refusal to grant a new trial pursuant to Rule 59(a)(9).

N.C.G.S. § 1A-1, Rule 60(b)(4) (2003) provides that "[o]n motion and upon such terms as are just, [a trial] court may relieve a party . . . from a final judgment . . . [if] [t]he judgment is void." A Rule 60(b)(4) motion is "only proper where a judgment is 'void' as that term is defined by the law." *Burton v. Blanton*, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992). "A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered." *Id.*

In the instant case, we conclude that the trial court properly denied Mrs. Shanks' motion to set aside the equitable distribution judgment pursuant to Rule 60(b)(4). As already indicated, the trial court did not commit reversible error in entering the order. Further, no jurisdictional challenge has ever been raised, and Mrs. Shanks

does not assert that the district court was without authority to enter the equitable distribution order. As such, the record is bereft of any indication that the late-entered order is void. This assignment of error is overruled.

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[3] We next address Mrs. Shanks' argument that the trial court erred by awarding Mr. Britt an unequal distribution of the marital estate. Mrs. Shanks does not argue that the trial court failed to consider one or more of the distributional factors required by G.S. § 50-20(c). Rather, she generally contends that the unequal distribution is unsupported by sufficient findings of fact and is contrary to the evidence presented. We do not agree.

"The distribution of marital property is vested in the discretion of the trial court[] and the exercise of that discretion will not be upset absent clear abuse." *Beightol v. Beightol*, 90 N.C. App. 58, 60, 367 S.E.2d 347, 348 (1988) (citation omitted). "In order to reverse the trial court's decision for [an] abuse of discretion, we must find that the decision was unsupported by reason and could not have been the result of a competent inquiry." *Id.* (citation omitted). "Accordingly, the [trial court's] findings of fact are conclusive if they are supported by any competent evidence [in] the record." *Id.*

Pursuant to N.C.G.S. § 50-20(c) (2003), "[t]here shall be an equal division . . . of marital . . . and . . . divisible property . . . unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably." When making an unequal distribution, the trial court must consider the factors enumerated in G.S. § 50-20(c) and must make findings which indicate that it has done so. *See Collins v. Collins*, 125 N.C. App. 113, 117, 479 S.E.2d 240, 242 (1997). It is not necessary that the findings recite in detail the evidence considered but they must include the ultimate facts considered by the trial court. *Armstrong v. Armstrong*, 322 N.C. 396, 405-06, 368 S.E.2d 595, 600 (1988).

In the instant case, the trial court made numerous findings concerning the distributional factors upon which the parties presented evidence including, *inter alia*, the following:

> 68. In evaluating the statutory distributional factors as presented by the parties, the court has considered the following:

A. The income of the parties. The husband [receives] Social Security, is retired and unable to work, having income of $1032 per month and additional income of [$]1500 per year from farm rental. The wife earns in excess of $4300 per month from her employment as Director of Human Services.

B. [Mrs. Shanks] and [Mr. Britt] both sold their prior residences to form the marital residence herein which was retained by [Mrs. Shanks] and sold by her to purchase her new residence in Lee County of which she has $55,000 in equity. The husband does not have a separate residence.

C. [Mr. Britt] paid a debt of the marital residence after the date of separation in the amount of $46,814 and incurred a net penalty of $11,740, but saved the marital estate interest. This was a tax consequence pursuant to Factor 11 to [Mr. Britt]. The penalty should be considered as a factor in the distributive award and not as a marital expense.

D. [Mr. Britt] maintained the marital property after the date of separation, whereas [Mrs. Shanks] sold the marital residence while this action was pending for $110,000 when the parties' investment in said property was substantially higher.

E. The total duration of the marriage was only 16 months.

Having carefully reviewed the record, we conclude that, although Mrs. Shanks presented evidence that may have permitted contrary findings, the trial court's findings are supported by competent evidence and they are, in turn, sufficient to support the trial court's conclusion that an unequal distribution in Mr. Britt's favor was equitable. Accordingly, we discern no abuse of discretion in the trial court's distribution of property in the instant case. The corresponding assignments of error are overruled.

Affirmed.

Judges HUNTER and CALABRIA concur.

IN RE: L.D.B.

No. COA04-194

(Filed 18 January 2005)

1. **Termination of Parental Rights— paternity—full hearing—due process rights of parent**

The trial court erred in a termination of parental rights proceeding by not holding a full hearing on paternity even though a paternity test showed a zero probability that respondent was the father. The right of a named respondent to offer evidence is inherent in the due process rights of parents.

2. **Termination of Parental Rights— findings—lack of evidence—court's observations not sufficient**

There was insufficient evidence to support the court's findings in a termination of parental rights proceeding where no evidence was presented at the hearing and paternity test results which the court had seen were not entered into evidence. A fact finder's observation does not constitute evidence and cannot provide the basis for a finding.

3. **Paternity— admissibility of test results—rebuttable presumption not applicable**

The rebuttable presumption of admissibility of paternity test results created by N.C.G.S. § 8-50.1(b1) did not apply where the test results had been seen by the court but never actually offered or received into evidence. The statute creates a rebuttable presumption, but the court here refused to give respondent an opportunity to rebut the presumption.

4. **Termination of Parental Rights— father excluded by paternity test—standing—service**

A respondent in a termination of parental rights case who was excluded by a paternity test lacked standing to raise any issue concerning service on a John Doe father, but the court erred by excluding respondent from the proceeding because he was the only potential father served, and the proceeding could only have concerned his parental rights.

Respondent appeals from order entered 29 May 2003 by Judge Avril Ussery Sisk in Mecklenburg County District Court. Heard in the Court of Appeals 20 September 2004.

Thurman, Wilson & Boutwell, by W. David Thurman, for petitioner-appellee.

Rebekah W. Davis, for respondent-appellant.

HUDSON, Judge.

Respondent Mungo appeals the trial court's order terminating parental rights of minor child L.D.B. For the reasons set forth below, we reverse the decision of the trial court.

Minor child L.D.B. was born in August of 2001, at which time her mother surrendered parental rights and put her up for adoption. At that time, the mother refused to give the adoption agency the father's name. Within a couple of weeks, though, the mother named respondent Mungo as L.D.B.'s father, and he acknowledged that he could be the father. Respondent Mungo and petitioner, the adoption agency (hereinafter "the agency"), discussed paternity testing, but could not agree where the test would be performed or who would pay for it. The record reveals nothing further on this case until the agency filed the petition for termination of parental rights (TPR) on 22 July 2002. The petition named Mungo as the father and the sole respondent, alleging as grounds failure to support the child. Mungo asserts that the parties were unable to agree on a cost effective paternity test, while the agency argues that respondent agreed to pay for half but did not follow through. The agency filed a motion for a paternity test on 8 November 2002 and on 7 January 2003 the court entered an order for Mungo to submit to the test.

Mungo missed two court-imposed deadlines for the test and was sanctioned by the court on 31 March 2003. Also on that date, the court again ordered him to arrange for the test and notify the court once it was completed. The test was completed on or about 10 April 2003. Mungo asserts that the test results were not delivered to the court or the parties' attorneys, but were held by the Child Support Enforcement Agency until his attorney went to the agency office and got a copy of the top page of the test on 6 May 2003. His attorney then transmitted a copy of the paternity test to the agency's counsel, who sent it directly to the court. The test showed a zero percent probability that Mungo is L.D.B.'s father.

In a 6 May 2003 letter to the agency's counsel, Mungo's attorney stated, "if I hear nothing from my client, I do not plan to be at the next hearing which will enable you to proceed in whatever manner you

wish." Eight days later, on 14 May 2003, the TPR hearing was held. Mungo and his attorney attended and attempted to proffer evidence, but the court did not allow them to introduce any evidence, declaring that Mungo had no standing, based on the results of the paternity test. On 29 May 2003, the court entered orders excluding Mungo as the father of the child and terminating the parental rights of the father.

[1] Respondent Mungo first argues that the trial court erred in refusing to hold a full and fair hearing or take any evidence regarding the issue of paternity. We agree. It is well-established that a termination of parental rights must comply with the requisites of the Due Process Clause. *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 606 (1982). "The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998).

Here, the TPR petition alleges that "[t]he identified father of the child in this action is" Mungo and that sufficient grounds exist to terminate his parental rights pursuant to N.C. Gen. Stat. § 7B-111(a)(1), (3), (5) and (7) (2003). Although Mungo was duly served with the petition to terminate his parental rights and was present at the hearing, the trial court nevertheless chose not to hear any argument or receive any evidence from Mungo. The judge told Mungo's attorney:

> At the stage we are in these proceedings, *I think it's most appropriate that your client be excluded from any opportunity to offer evidence at this point* . . . . According to the official result of the paternity test ordered by the Court, it's this Court's ruling that he does not have standing to participate in this hearing and that as to his interest, this hearing is complete (emphasis added).

The court holds a hearing in order to determine the existence or nonexistence of the grounds alleged in the TPR petition. N.C.G.S. § 7B-1109 (2003). Our Supreme Court has recognized that the "parental liberty interest 'is perhaps the oldest of the fundamental liberty interests.' " *Owenby v. Young*, 357 N.C. 142, 144, 579 S.E.2d 264, 266 (2003). Similarly, this Court has previously concluded that, at an adjudication of neglect hearing, "the trial court must protect the due process rights not only of the child, but also of the parent." *Thrift v. Buncombe County Dep't of Soc. Servs.* 137 N.C. App. 559, 561, 528 S.E.2d 394, 395 (2000). We conclude that these due process rights also extend to the parent during a termination proceeding. We further conclude that the right of a named respondent to offer evidence regard-

ing the petition's allegations, including whether the respondent is actually a parent of the minor child, is inherent in the protection of due process. Thus, having properly been made a party to the proceedings, Mungo was entitled to an adequate opportunity to be heard regarding the termination of his parental rights, unless and until the trial court either dismissed him as a party or dismissed the underlying petition. The trial court's subsequent exclusion of Mungo for lack of standing did not amount to his dismissal from the hearing, after which the trial court terminated "the parental rights of the father of" L.D.B. We conclude that the trial court erred in refusing to consider evidence and arguments from Mungo.

[2] Mungo also argues that there was insufficient evidence to support the court's findings of fact and conclusions of law, as no evidence was presented at the hearing and the test results were not entered into evidence. Again, we agree. There must be competent evidence to support the court's findings of fact and conclusions of law. *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 418 S.E.2d 841 (1992). The court found that Mungo was not the father based solely on the results of the paternity test, which the judge had seen before the hearing when the agency's counsel sent a copy of the results to the court. A copy of the test results was in the court file, but the original was missing and neither the results, nor any other evidence, were introduced. Mungo's attorney informed the trial court that "both [Mungo] and the biological mother are convinced that he's the father and the tests don't bear that out, so something is askewed [sic] from their point of view," and that he intended to call witnesses regarding the circumstances of the paternity test. However, as discussed, the court refused to take this evidence and based its findings solely on the paternity test results the judge had viewed before the hearing. A fact-finder's observation "does not constitute evidence and cannot provide the basis for any finding of fact." *Carrington v. Housing Authority of the City of Durham*, 54 N.C. App. 158, 160, 282 S.E.2d 541, 542 (1981) (citing *Weidle v. Cloverdale Ford*, 50 N.C. App. 555, 557, 247 S.E.2d 263, 264 (1981)). As Mungo correctly asserts, without any evidence, the court is unable to make proper findings of fact or conclusions of law based solely on a copy of the test results viewed prior to the hearing.

[3] Both parties devote considerable argument to N.C. Gen. Stat. § 8-50.1 (b1) (2003) in their respective briefs. G.S. § 8-50.1 (b1) provides for admission of paternity tests in civil actions. In relevant part, it states:

> In the trial of any civil action in which the question of parentage arises, the court shall, on motion of a party, order the mother, the child, and the alleged father-defendant to submit to one or more blood or genetic marker tests . . . . Verified documentary evidence of the chain of custody of the blood specimens obtained pursuant to this subsection shall be competent evidence to establish the chain of custody. Any party objecting to or contesting the procedures or results of the blood or genetic marker tests shall file with the court written objections setting forth the basis for the objections and shall serve copies thereof upon all other parties not less than 10 days prior to any hearing at which the results may be introduced into evidence . . . . If no objections are filed within the time and manner prescribed, the test results are admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy. The results of the blood or genetic marker tests shall have the following effect:
>
> (1) If the court finds that the conclusion of all the experts, as disclosed by the evidence based upon the test, is that the probability of the alleged parent's parentage is less than eighty-five percent (85%), the alleged parent is presumed not to be the parent and the evidence shall be admitted. This presumption may be rebutted only by clear, cogent, and convincing evidence. G.S. § 8-50.1(b1).

Here, it is undisputed that Mungo was ordered to submit to the DNA test and thus the test falls within the ambit of this statute. Mungo contends that the test did not meet the statutory requirements because there was no verified documentary evidence of the chain of custody. He also argues that he did not have enough time before the hearing to file a written objection. The agency contends that the test results did meet the statutory requirements and could thus not be challenged by Mungo at the hearing, as he had not filed a written objection to the test results prior to the trial. Without deciding the merits of these arguments, we conclude that even if the document were properly verified and even if Mungo failed to file written objections before the hearing, the trial court still erred by precluding Mungo from participating, since the presumption created by the test is, according to this statute, rebuttable. G.S. § 8-50.1(b1)(1).

First, the statute clearly states that if the test meets the statutory requirements, the results are merely "*admissible as evidence* of paternity without the need for foundation testimony or other proof of authenticity or accuracy." G.S. § 8-50.1(b1) (emphasis added). The

test results, while admissible, were never actually offered or received into evidence. *Admissible* is not the same as *admitted* into evidence.

Furthermore, even if the test results met the statutory requirements and had been properly admitted into evidence, they only create a rebuttable presumption. A rebuttable presumption is not "an irrebutable conclusion of law. It is a mere inference of fact." *In Re: Will of Wall*, 223 N.C. 591, 595, 27 S.E.2d 728, 731 (1943) (internal quotes and citation omitted). A rebuttable presumption has

> no weight as evidence. It serves to establish a *prima facie* case, but *if challenged by rebutting evidence, the presumption cannot be weighed against the evidence.* Supporting evidence must be introduced, without giving any evidential weight to the presumption itself. *Id.* at 596, 27 S.E.2d at 731. (emphasis added; internal citations and quotes omitted).

As discussed, the court refused to give Mungo an opportunity to rebut the presumption. The agency argues that because the test showed a zero percent probability of Mungo's paternity, no evidence could have been presented which would rebut the presumption by "clear, cogent, and convincing evidence," as required by the statute. G.S. § 8-50.1(b1)(1). However, this Court has affirmed cases in which testimony overcame the paternity test results. For example, this Court held that a putative father's testimony that he did not know the mother nor recall meeting her was sufficient to establish that he was not the father, even though a paternity test showed a 99.96% probability of parentage. *Nash County Dep't of Soc. Servs. v. Beamon*, 126 N.C. App. 536, 538, 485 S.E.2d 851, 852 (1997) (holding that testimony rebutted the presumption created by G.S. § 8-50.1(b1) (4), which creates a presumption of parenthood where the paternity test shows a probability of parentage 97% or greater that "may be rebutted only by clear, cogent, and convincing evidence"). Thus, the court erred in not allowing Mungo to attempt to rebut the statutory presumption created by the test results.

[4] Respondent Mungo also argues that the trial court erred by entering a TPR order because there was no service on any prospective father other than him, and he was not allowed to participate in the TPR hearing. Petitioner asserts that Mungo lacks standing to raise this argument. We agree that Mungo lacks standing to raise any issue regarding the court's lack of service on a potential John Doe father, but he has properly raised the issue regarding the court's failure to allow *him* to participate in the TPR hearing.

Although the court first found that Mungo was not the father, it then proceeded to hold the TPR hearing, but denied Mungo the opportunity to participate. The TPR hearing could only have concerned termination of Mungo's parental rights, as the entire proceeding was based on a petition to terminate his rights. Although the court concluded as law that "the father has been properly served," Mungo was the only potential father served. The court had no authority to proceed as to any potential father except for Mungo; thus, the court improperly excluded Mungo from the TPR hearing about his parental rights.

For the above reasons, we reverse the trial court's orders regarding paternity and termination of parental rights.

Reversed.

Chief Judge MARTIN and Judge TIMMONS-GOODSON concur.

MARY HILL MITCHELL, PLAINTIFF v. MITCHELL'S FORMAL WEAR, INC., M. LEWIS CONSTRUCTION, INC., AND CRABTREE VALLEY MALL & PLAZA ASSOCIATES, DEFENDANTS

No. COA03-1486

(Filed 18 January 2005)

Statutes of Limitation and Repose— statute of repose—defective or unsafe condition of improvement to real property

The trial court did not err by granting summary judgment in favor of defendant construction company in an action arising out of plaintiff's injury in the dressing room of defendant formal wear store when a bench on which she was sitting collapsed and caused her to fall to the floor, because: (1) plaintiff's complaint was barred by the six-year statute of repose set forth in N.C.G.S. § 1-50(a)(5) when the record indicated that defendant construction company substantially completed its renovations more than six years prior to plaintiff's injury and subsequent complaint; (2) although defendant store operated for more than three years prior to receiving a final certificate of occupancy from the pertinent city, a certificate of compliance or a certificate of occupancy is not required to be issued before a renovation project is deemed

substantially complete; and (3) although plaintiff argues in the alternative that the date of substantial completion was defined by the contract between defendant store and defendant construction company, plaintiff does not invoke a real party in interest statute nor is she named as a third-party beneficiary of the contract between defendants.

Appeal by plaintiff from order entered 16 July 2003 by Judge Ripley E. Rand in Wake County Superior Court. Heard in the Court of Appeals 31 August 2004.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Philip A. Collins, for plaintiff-appellant.

Poe, Hoof & Associates, P.A., by J. Bruce Hoof, for defendant-appellee M. Lewis Construction, Inc.

TIMMONS-GOODSON, Judge.

Mary Hill Mitchell ("plaintiff") appeals the trial court order granting summary judgment in favor of M. Lewis Construction, Inc. ("Lewis Construction"). For the reasons discussed herein, we affirm the trial court order.

The facts and procedural history pertinent to the instant appeal are as follows: In November 1995, Mitchell's Formal Wear, Inc. ("Mitchell's Formal Wear") entered into a contract with Lewis Construction whereby Lewis Construction would make certain renovations to a Mitchell's Formal Wear store located at Crabtree Valley Mall in Raleigh. The renovation plans included the construction and installation of benches in the store's dressing rooms.

Although the store opened for business on or about 15 January 1996, the City of Raleigh did not issue a permanent certificate of occupancy for the store until January 1999. Michael Lewis ("Lewis"), President of Lewis Construction, stated in an affidavit that a temporary certificate of occupancy was issued to Mitchell's Formal Wear in January 1996. Lewis explained that the delay between the completion of the renovations and the issuance of the permanent certificate of occupancy was attributable to ongoing renovations at Crabtree Valley Mall that were unrelated to the Mitchell's Formal Wear store.

On 23 February 2000, plaintiff was injured in the dressing room of Mitchell's Formal Wear when a bench on which she was sitting collapsed and caused her to fall to the floor. After reviewing pho-

tographs of the dressing room and the bench, Michael J.E. Sanchez ("Sanchez"), a professional engineer, determined that the bench had been attached to the wall by one strip of glue and one drywall screw. Sanchez further determined that the collapse of the bench was due to its faulty construction.

On 12 March 2002, plaintiff filed suit against Mitchell's Formal Wear, Lewis Construction, and Crabtree Valley Mall and Plaza Associates. On 9 May 2002, plaintiff filed an amended complaint, alleging *inter alia* that Mitchell's Formal Wear knew or should have known that the bench was in a dangerous condition, and that Lewis Construction constructed and installed the bench in a negligent manner. On 11 February 2003, Lewis Construction filed a motion for summary judgment, arguing that plaintiff's complaint against Lewis Construction was barred by the six-year statute of repose set forth in N.C. Gen. Stat. § 1-50(a)(5). In an order entered 2 July 2003 and amended 16 July 2003, the trial court granted summary judgment in favor of Lewis Construction. Plaintiff appeals.

The only issue on appeal is whether the trial court erred by granting summary judgment in favor of Lewis Construction. Plaintiff argues that she filed her complaint against Lewis Construction within the time specified in the statute of repose, and that therefore judgment as a matter of law in Lewis Construction's favor was inappropriate. We disagree.

N.C. Gen. Stat. § 1-50(a)(5) (2003) provides as follows:

> No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

The statute further provides that "an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes . . . [a]ctions to recover damages for the negligent construction or repair of an improvement to real property[.]" *Id.* The statute defines "substantial completion" as "that degree of completion of a project, improvement or specified area or portion thereof . . . upon attainment of which the owner can use the same for the purpose for which it was intended[,]" and the statute provides that "[t]he date of substantial completion may be established by written agreement." *Id.*

Whether a statute of repose has run is a question of law. *Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 75, 518 S.E.2d 789, 791 (1999), *disc. review denied*, 351 N.C. 359, 542 S.E.2d 214 (2000). "Summary judgment is proper if the pleadings or proof show without contradiction that the statute of repose has expired." *Bryant v. Don Galloway Homes, Inc.*, 147 N.C. App. 655, 657, 556 S.E.2d 597, 600 (2001). "The moving party has the burden of producing evidence sufficient to show that summary judgment is justified. The burden then shifts to the non-moving party to ' "set forth specific facts showing that there is a genuine issue for trial." ' " *Id.* (citations omitted).

In the instant case, the pleadings, depositions, and other documentary evidence suggest that the date of "substantial completion" for the Mitchell's Formal Wear renovation was 6 December 1995. Attached to Lewis Construction's Supplemental Responses to Plaintiff's Requests for Admissions was an invoice addressed to Mitchell's Formal Wear and dated 6 December 1995. The invoice indicates that "100%" of the "Framing" and "Woodwork" was complete. In his affidavit, Lewis states that he believes the bench was completed on or before 6 December 1995 "based upon the Lewis Construction invoice dated December 6, 1995 . . . [which] reflects that 100% of the framing and 100% of the woodwork for the job had been completed as of December 6, 1995." Lewis further states that "[t]he construction of the dressing room benches would have been part of the framing and woodwork for th[e] job." Although there is indication in the record that, after 6 December 1995, Lewis Construction performed work on the "punch list" items listed in its contract with Mitchell's Formal Wear, there is no indication that any of these items related to the dressing room bench that allegedly injured plaintiff. "In order to constitute a last act or omission, the act or omission must give rise to the cause of action. Here, the work on the punch list did not give rise to this action and therefore does not constitute defendant's last act or omission." *Nolan*, 135 N.C. App. at 79, 518 S.E.2d at 793. Thus, in light of the record in the instant case, we conclude that Lewis Construction substantially completed its renovations more than six years prior to plaintiff's injury and subsequent complaint.

Plaintiff maintains that the project was not substantially complete until the City of Raleigh issued a permanent certificate of occupancy to Mitchell's Formal Wear in January 1999. In support of this contention, plaintiff cites our decision in *Nolan*, in which we held that, "[s]ince it could be utilized for its intended purposes," the plaintiff's house was "substantially completed" under N.C. Gen. Stat.

§ 1-50(a)(5) "upon issuance of the certificate of compliance" from the county inspections department. *Id.* at 76, 518 S.E.2d at 791. However, we are not convinced that *Nolan* requires that a certificate of compliance—or, in this case, a certificate of occupancy—be issued before a renovation project is deemed "substantially complete." In *Bryant*, we examined a similar argument and found the following two problems:

> First, plaintiffs have offered no evidence that they were prevented from using the house as a residence. In fact, the record indicates otherwise. Plaintiffs lived in the house for six years before bringing this complaint. Second, plaintiffs point to no specific language in *Nolan* in support of their argument that a *rebuttable* presumption arises.

147 N.C. App. at 659, 556 S.E.2d at 601 (emphasis in original).

In the instant case, the record indicates that Mitchell's Formal Wear operated the store for more than three years prior to receiving a final certificate of occupancy from the City of Raleigh. The contract between Mitchell's Formal Wear and Lewis Construction provides that "[t]he Contractor shall achieve Substantial Completion of the entire Work not later than January 1, 1996[,]" and in his affidavit, Lewis states the following:

> It is my best recollection that the Crabtree Valley Mall Mitchell's store opened for business on about January 15, 1996. I recall that it received a Temporary Certificate of Occupancy from the City of Raleigh Inspections Department allowing it to open at that time. The final Certificate of Occupancy for that store . . . was, as I recall, not issued at that time because of certain work that the City of Raleigh Inspections Department required to be done to the area of the Crabtree Valley Mall in which this Mitchell's store was located. This work was not part of the renovation work contracted to Lewis Construction for the Mitchell's store located in Crabtree Valley Mall. . . . It was not until Crabtree Valley Mall completed this work, which was unrelated to the Mitchell's store, that the stores in that section of the mall (including Mitchell's) were able to obtain permanent Certificates of Occupancy.

Although Mitchell's Formal Wear offered evidence tending to show that the City of Raleigh does not have a record of the temporary certificate referred to in Lewis' affidavit, neither plaintiff nor Mitchell's

Formal Wear offered any evidence tending to show that the Crabtree Valley Mall store was not operating in January 1996. Furthermore, neither plaintiff nor Mitchell's Formal Wear offered any evidence tending to show that, in January 1996, the bench was incapable of being used for its intended purpose. Thus, no genuine issue remains as to whether the renovations were substantially complete by January 1996, more than six years prior to plaintiff's filing suit against Lewis Construction.

Plaintiff argues in the alternative that the date of substantial completion was defined by the contract between Mitchell's Formal Wear and Lewis Construction. Contained within the contract between Mitchell's Formal Wear and Lewis Construction is a provision stating that "[w]hen the Architect agrees that the Work is substantially complete, the Architect will issue a Certificate of Substantial Completion." Plaintiff contends that because the architectural firm failed to issue a Certificate of Substantial Completion, the statute of repose is tolled. We disagree.

> "[T]he obligations arising out of a contract are due only to those with whom it is made; a contract cannot be enforced by a person who is not a party to it or in privity with it, except under a real party in interest statute, or under certain circumstances, by a third-party beneficiary."

Meyer v. McCarley and Co., 288 N.C. 62, 70-71, 215 S.E.2d 583, 588 (1975) (quoting 17 Am. Jur. 2d Contracts § 297 (now 17A Am. Jur. 2d Contracts § 416)). In the instant case, plaintiff does not invoke a real party in interest statute, nor is she named as a third-party beneficiary of the contract between Mitchell's Formal Wear and Lewis Construction. Thus, plaintiff cannot enforce the contract. Accordingly, we conclude that the trial court did not err by ruling as a matter of law that plaintiff's complaint, filed more than six years after substantial completion of the renovations, was barred by the statute of repose. The trial court's judgment as to Lewis Construction is therefore affirmed.

Affirmed.

Judges HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA, BY AND THROUGH THE MOORE COUNTY BOARD OF EDUCATION v. DON PELLETIER, AND LEXINGTON NATIONAL INSURANCE CORPORATION, D/B/A, LEXINGTON NATIONAL BAIL SERVICES, MANAGING AGENT FOR AMERICAN CASUALTY INSURANCE COMPANY, AND ITS AGENT BRASWELL SURETY SERVICES, INC.

No. COA04-215

(Filed 18 January 2005)

1. Trials— motion for new trial—timeliness of motion—bond forfeiture proceeding

The trial court did not lack jurisdiction to entertain the Board of Education's N.C.G.S. § 1A-1, Rule 59(a) motion for a new trial or relief from order granting relief from a bond forfeiture even though the surety contends the Board failed to file and serve its motion within the time period prescribed, because: (1) Rule 59 provides that a motion for a new trial shall be served not later than 10 days after entry of the judgment; and (2) the judgment in the instant case was entered on 3 March 2003, and even though the Board's motion was filed on 14 March 2003, the certificate of service indicated that the Board served the motion for a new trial on 13 March 2003.

2. Bail and Pretrial Release— bond forfeiture—civil action

The trial court erred as a matter of law by concluding that the Board of Education's motion for a new trial or relief from order granting relief from a bond forfeiture under N.C.G.S. § 1A-1, Rules 59(a) and 60(b) must be denied without consideration of its merits on the ground that the Board improperly attempted to proceed under the North Carolina Rules of Civil Procedure, because: (1) N.C.G.S. § 15-544.7(a)9 provides that the clerk of superior court shall docket a final judgment of forfeiture as a civil judgment against defendant and against each surety named in the judgment; (2) the Court of Appeals has previously utilized our Rules of Civil Procedure in reviewing a trial court's denial of remission of a bond forfeiture; (3) N.C.G.S. § 15A-544.8 provides that an appeal from an order on a motion for relief from a final judgment of forfeiture is the same as provided for appeals in civil actions; and (4) due to the nature and function of a bond, while a bond forfeiture proceeding is ancillary to the underlying criminal proceeding, it is a civil matter.

3. Appeal and Error— appellate rules—citing unpublished opinions

The surety's citation to unpublished authority in a bond forfeiture case is expressly disfavored by our appellate rules, and citation to unpublished opinions should be done solely in those instances where the persuasive value of a case is manifestly superior to any published opinion.

Appeal by the Moore County Board of Education from order entered 19 March 2003 by Judge Michael E. Helms in Moore County Superior Court. Heard in the Court of Appeals 20 October 2004.

Schwartz & Shaw, P.L.L.C., by Richard A. Schwartz and Craig W. Noyes, for the State.

Charles M. Lineberry, Jr., for Lexington National Insurance Corporation.

CALABRIA, Judge.

The Moore County Board of Education (the "Board") appeals the trial court's denial of its motion to grant a new trial or relief from order entered 3 March 2003 granting Lexington National Insurance Corporation's (the "surety") motion for relief from final judgment of bond forfeiture. We reverse.

In September 2000, the surety posted bond for Don Pelletier (the "defendant") in the amount of $150,000.00 for charges pending in Moore County. The defendant failed to appear as required before the court, and the bond was ordered forfeited on 28 February 2001 with a final judgment date of 3 August 2001. After final judgment of bond forfeiture was entered and the bond was paid by the surety, the surety contacted law enforcement in Nevada on or about 12 November 2001 and directed them to defendant's location. Defendant was arrested, and the surety helped coordinate defendant's return to Moore County.

On 29 January 2003, the surety moved for relief from final judgment of forfeiture. The matter was set for hearing on 3 March 2003 in Moore County Superior Court. Judge Michael E. Helms called the bond forfeiture calendar at 10:30 a.m. after the criminal calendar had been called. The courtroom clerk informed Judge Helms that it was customary in Moore County to allow the Board's attorney to arrive at 11:00 a.m. for the forfeiture cases since the criminal calendar call usually lasted until 11:00 a.m. Notwithstanding this custom, Judge

Helms elected to proceed with the surety's motion in the absence of the Board's attorney and granted relief from the bond forfeiture at the close of the hearing. The Board's attorney arrived at approximately 10:40 a.m. and asked to approach the bench approximately twenty minutes after learning the bond forfeiture cases had been decided and was advised by the trial court that she had "won one and . . . lost one." A bench conference ensued, which concluded when Judge Helms informed the Board's attorney, "I don't intend to debate it with you. You may step back." Judgment granting relief from forfeiture was entered 3 March 2003.

On 14 March 2003, the Board moved for a new trial or relief from order pursuant to N.C. Gen. Stat. § 1A-1, Rules 59(a) and 60(b) (2003). The Board's motion noted, in pertinent part, the following: (1) "[t]he bond forfeiture calendar is always called by the school board attorney[,]" (2) "the custom and procedure of the court [was] to hear bond forfeiture matters at 11:00 o'clock," (3) the judges and district attorney requested that the Board's attorney not arrive at 10:00 a.m., (4) the procedure was that "the Superior Court calendar and preliminary matters [were] handled prior to the bond forfeiture matters[,]" and (5) the Board's attorney "arrived at court the same time that she has been arriving for over three years, by agreement with the court and its officers." Nonetheless, in denying the Board's motion, Judge Helms found "that the orderly and expeditious disposition of cases in the Superior Court . . . is adversely affected when the Court allows the attorneys to set their own schedules as to when they will be in Court without prior communication with or permission of the Court."[1] In addition, the trial court found "that the school board is attempting to obtain relief from the Court's order pursuant to Rules 59(a) and 60(b) of the N.C. Rules of Civil Procedure." The trial court found the proceeding was "obviously . . . a criminal matter and [was] controlled by the N.C. Rules of Criminal Procedure" based on N.C. Gen. Stat. § 15A-544.8(a), which provides that "[t]here is no relief from a final judgment of forfeiture except as provided in this section." The trial court therefore found that the Board "brought its motion relying on a statute that does not allow the Court to consider their prayer for relief" and concluded that "the Court must deny the motion without a hearing" because "the school board . . . attempted to proceed under the rules of Civil Procedure instead of the rules of Criminal Procedure," which it further concluded was "the exclusive

1. As noted above, the only evidence contained in the record regarding this issue indicates the Board's attorney was not setting her own schedule but was abiding by the schedule requested by the Moore County judges and district attorney.

remedy for this situation." The Board appeals, asserting the trial court erred as a matter of law by refusing to consider the merits of its motion on the ground that the Board had improperly utilized the North Carolina Rules of Civil Procedure.

[1] As a preliminary matter, the surety argues the trial court lacked jurisdiction to entertain the Board's Rule 59(a) motion because it "failed to file and serve its motion with the time period prescribed . . . ." "A motion for a new trial shall be served not later than 10 days after entry of the judgment." N.C. Gen. Stat. § 1A-1, Rule 59(b) (2003). Thus, the relevant action the movant must make within 10 days of entry of judgment under Rule 59(a) is service, not filing. *Accord Muse v. Charter Hospital of Winston-Salem*, 117 N.C. App. 468, 480, 452 S.E.2d 589, 598 (1995). In the instant case, judgment was entered on 3 March 2003. While the Board's motion was filed on 14 March 2003, the certificate of service clearly indicates the Board served the motion for a new trial on 13 March 2003. Accordingly, the Board's motion was timely. We additionally note, with disapproval, that the surety has asserted in its brief that the Board's "motion for new trial was not dated until 14 March 2003, more than ten (10) days after entry of the judgment, and had attached a certificate of service thereto reflecting mailing to counsel for [the surety] *on the same date*, and was filed with the clerk of court *on the same day*." It is incumbent on all parties to an appeal to carefully and accurately set forth in their briefs and arguments that which appears in the settled record on appeal.

[2] Turning to the nature of a bond forfeiture proceeding, the trial court accurately noted N.C. Gen. Stat. § 15A-544.8(a) (2003) provides "[t]here is no relief from a final judgment of forfeiture except as provided in this section." However, this does not necessarily mean, as the trial court concluded, that a bond forfeiture proceeding is governed by the North Carolina Rules of Criminal Procedure. First, N.C. Gen. Stat. § 15A-544.7(a) (2003), entitled "Docketing and enforcement of final judgment of forfeiture[,]" provides that the clerk of superior court "shall docket [a final judgment of forfeiture] as a civil judgment against the defendant and against each surety named in the judgment." Second, this Court has previously utilized our Rules of Civil Procedure in reviewing a trial court's denial of remission of a bond forfeiture. *See, e.g., State v. Coronel*, 145 N.C. App. 237, 550 S.E.2d 561 (2001) (applying Rules 52(a) and 58 of the North Carolina Rules of Civil Procedure). Third, N.C. Gen. Stat. § 15A-544.8 provides that an appeal from an order on a motion for relief from a final judgment

of forfeiture "is the same as provided for appeals in civil actions." It would be anomalous to categorize the underlying action as a criminal action yet treat its appeal as an appeal of a civil action. Finally, due to the nature and function of a bond, it stands to reason that a bond forfeiture proceeding, while ancillary to the underlying criminal proceeding, is a civil matter. *See State v. Mathis*, 349 N.C. 503, 509 S.E.2d 155 (1998) (describing the relationship between a surety and the person who has been arrested as contractual in nature).

For these reasons, we hold the Board properly proceeded by moving for a new trial or relief from order granting relief from forfeiture under Rules 59(a) and 60(b), and the trial court erred as matter of law in concluding that the Board's motion must be denied without consideration of its merits on the grounds that the Board improperly attempted to proceed under the North Carolina Rules of Civil Procedure. We reverse and remand for further proceedings not inconsistent with this opinion.

[3] As a final matter, we deem it appropriate to address the surety's citation of an unpublished opinion in its brief to this Court. The surety cites *State v. Nixon*, 150 N.C. App. 440, 563 S.E.2d 640 (COA01-1238) (2002) for the propositions that (1) relief from final judgment of forfeiture may be granted within the discretion of the trial court upon (2) finding diligent efforts by the surety. Citation to unpublished authority is expressly disfavored by our appellate rules but permitted if a party, in pertinent part, "believes . . . there is no published opinion that would serve as well" as the unpublished opinion. N.C. R. App. 30(e)(3) (2004). Neither of the principles propounded by the surety justify citation to the *Nixon* opinion in this matter, and we reiterate that citation to unpublished opinions is intended solely in those instances where the persuasive value of a case is manifestly superior to any published opinion.

Reversed and remanded.

Judges STEELMAN and GEER concur.

HOBBS STAFFING SERVICES, INC., PLAINTIFF v. LUMBERMENS MUTUAL CASUALTY CO., AMERICAN PROTECTION INSURANCE CO., KEMPER CASUALTY INSURANCE CO., DEFENDANTS

No. COA03-1420

(Filed 18 January 2005)

1. **Appeal and Error— appealability—denial of arbitration—substantial right—immediately appealable**

An order denying arbitration is immediately appealable.

2. **Arbitration and Mediation— arbitration clause—inclusive reading**

A dispute about the cancellation of an insurance policy fell within the very broad arbitration clause of the policy and must be submitted to an arbitrator for resolution. The trial court erred by giving the policy a narrow reading; the court should grant a motion to arbitrate unless it can be said with confident authority that the arbitration clause cannot be read to include the asserted dispute.

3. **Appeal and Error— alternative basis to support ruling—cross-assignment of error required**

An argument that an arbitration agreement was unconscionable was not properly before the appellate court where plaintiff did not make a cross-assignment of error to present an alternative basis for supporting the trial court's order denying arbitration.

Appeal by plaintiff from judgment entered 26 June 2003 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 26 August 2004.

Pell & Pell, L.L.P., by Gerald A. Pell, for plaintiff-appellee.

Nexsen Pruet Adams Kleemeier, PLLC, by J. Scott Hale; and Cole, Schotz, Meisel, Forman & Leonard, by Michael Stingone, for defendants-appellants.

STEELMAN, Judge.

Defendants-appellants, Lumbermens Mutual Casualty Co., American Protection Insurance Co., and Kemper Casualty Insurance Co. (collectively known as "Kemper") appeal the trial court's order

granting partial summary judgment in favor of plaintiff, Hobbs Staffing Services, and denying their motion to compel arbitration.

Plaintiff is a staffing organization, which provides temporary employees for other businesses. Plaintiff is incorporated in Tennessee, and has a principal place of business in Guilford County, North Carolina. Defendants are Illinois corporations, in the business of providing insurance coverage. On 15 October 2002, plaintiff and defendants entered into an Insurance Program Agreement (IPA), under the terms of which defendants agreed to provide workers' compensation insurance coverage for plaintiff's employees in North Carolina, Florida, Virginia, and Tennessee. This agreement became effective on 30 September 2002 and contained an arbitration clause. Defendants required plaintiffs to sign and return the IPA within thirty days. The IPA was a pre-printed form prepared by Kemper. Plaintiff's check for the first payment due under the IPA was returned for insufficient funds.

On 5 December 2002, defendants sent plaintiff an email threatening to cancel defendants' insurance. The email stated: "Per our conversation, we are sending out notice of cancellation tomorrow (12/6/2002) for non payment. The effective date of our cancellation will be 12/19. That is 10 days with 3 days mailing time." On 17 December 2002 plaintiff received the formal notice of cancellation from defendants, setting an effective date of cancellation as 27 December 2002. On that same day, plaintiff had Bank of America wire the full amount of all premiums then due, plus the lost escrow deposit to defendants. Defendant received and accepted the wire transfer.

As of 27 December 2002, defendants treated the policy as cancelled and refused to reinstate coverage. Plaintiff filed suit, seeking a preliminary injunction, as well as asserting that the cancellation of its workers' compensation and employers liability insurance coverage was ineffective. On 15 May 2003, the trial court denied plaintiff's motion for preliminary injunction. The next day plaintiff filed a motion for partial summary judgment. On 17 June 2003, defendants filed a motion to dismiss pursuant to Rule 12(b)(1) based on the arbitration clause, and under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. In the alternative, defendants requested that the action be stayed pending arbitration. The trial court granted plaintiff's motion for partial summary judgment and denied defendants' motion to compel arbitration. Defendants appeal.

[1] In defendants' first assignment of error, they contend the trial court erred in finding the arbitration agreement was not applicable to the dispute between the parties and denying their motion to compel arbitration.

Initially, we note defendants' appeal is from an interlocutory order. Generally, no right to appeal an interlocutory order exists, except where the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. *Boynton v. ESC Med. Sys., Inc.*, 152 N.C. App. 103, 105-06, 566 S.E.2d 730, 731 (2002). This Court has held " '[t]he right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable.' " *Id.* at 106, 566 S.E.2d at 732 (citations omitted).

[2] Whether a dispute is subject to arbitration is an issue for judicial determination. *Id.* The trial court's conclusion that a particular dispute is or is not subject to arbitration is a conclusion of law, and is reviewable by the appellate courts *de novo*. *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 478, 583 S.E.2d 325, 330 (2003), *aff'd per curium*, 358 N.C. 146, 593 S.E.2d 583 (2004).

Whether a dispute is subject to arbitration involves a two-part inquiry: "(1) whether the parties had a valid agreement to arbitrate, and also (2) whether 'the specific dispute falls within the substantive scope of that agreement.' " *Id.* (citations omitted).

In its order, the trial court held that "the matters alleged in this action do not come within the scope of the parties' arbitration agreement," and denied defendants' motions to dismiss based on the arbitration clause, or in the alternative, to stay the action pending arbitration. In order to ascertain whether a dispute falls within the scope of the arbitration agreement, "we must look at the language in the agreement, *viz.*, the arbitration clause[.]" *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 23-24, 331 S.E.2d 726, 731 (1985). A presumption in favor of arbitration exists. *Sloan*, 159 N.C. App. at 479, 583 S.E.2d at 331. Any doubts regarding the scope of arbitrable issues should be resolved in favor of arbitration. *Id.* at 477, 583 S.E.2d at 329.

In the instant case, the relevant portion of the arbitration clause is as follows:

> A. Submission to Arbitration:—In the event of any dispute between Kemper and the Insured with reference to the interpretation, application, formation, enforcement or validity of this

> Agreement or any other agreement between them, or their rights with respect to any transaction involved, whether such dispute arises before or after termination of this Agreement, such a dispute . . . shall be submitted to the decision of a board of arbitration . . . .
>
> B. Sole Remedy:—The parties agree that arbitration pursuant to the terms of this Article is the sole remedy for the resolution of disputes between them under this Agreement or any other agreement between them.

Unless it can be said with confident authority that the arbitration clause cannot be read to include the asserted dispute, the court should grant a parties' motion to arbitrate the particular grievance. *Id.* (citing *United Steelworkers v. Warrior & G. Nav. Co.*, 363 U.S. 574, 582-83, 4 L. Ed. 2d 1409, 1417 (1960)). In the instant case, the arbitration clause is written very broadly. The agreement requires that "any dispute" with reference to the "interpretation, application, foundation, enforcement or validity" of the agreement, or any "transaction involved, whether such dispute arises before or after termination of [the] Agreement" shall be submitted to arbitration. A dispute involving the cancellation of a policy for non-compliance with its terms falls within the covered areas of interpretation, application, enforcement, or a transaction. We decline to adopt the trial court's narrow reading of the policy, as it is contrary to the principles of construction previously enunciated by our appellate courts as noted above. This matter must be submitted to the arbitrator for resolution.

[3] We note that plaintiff asserts in its brief that the arbitration agreement was unconscionable, and therefore unenforceable. The trial court made no such ruling. Had plaintiff wished to present an alternative basis in law for supporting the trial court's order, it was required to make a cross-assignment of error pursuant to Rule 10(d) of the Rules of Appellate Procedure. In the absence of such an assignment, this question is not properly before this Court.

The parties also argue in their briefs regarding whether the agreement and its arbitration clause are to be construed under the North Carolina Uniform Arbitration Act or the Federal Arbitration Act (FAA). The FAA will apply if the contract evidences a transaction involving interstate commerce. *See Sillins v. Ness*, 164 N.C. App. 755, 757-58, 596 S.E.2d 874, 876 (2004) (citing 9 U.S.C. § 2)). This is a question of fact, which an appellate court should not initially decide. *Eddings v. Southern Orthopedic & Musculoskeletal Assocs. P.A.*, 356

N.C. 285, 569 S.E.2d 645 (2002), (*per curiam*) (adopting dissent of Greene, J., 147 N.C. App. 375, 385, 555 S.E.2d 649, 656 (2001)). This question should be determined by the trial court upon remand. *Id.*

We hold that the trial court erred in denying defendants' motion to compel arbitration and to stay this matter pending arbitration. It was thus improper for the trial court to grant plaintiff's motion for partial summary judgment. In light of our ruling on defendants' first assignment of error, it is unnecessary for this Court to address their second assignment of error. The order of the trial court is vacated and this matter is remanded to the trial court for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges CALABRIA and ELMORE concur.

J. GUY REVELLE, JR., EXECUTOR OF THE ESTATE OF WILLIAM T. CHAMBLEE, JR., PETITIONER v. NELLIE D. CHAMBLEE, WIDOW, JAMES B. CHAMBLEE, AND WIFE, BETTY ANN D. CHAMBLEE, RESPONDENTS

No. COA03-1704

(Filed 18 January 2005)

1. Appeal and Error— appealability—interlocutory order—preliminary injunction

Although petitioner's appeal from the trial court's order granting a preliminary injunction restraining petitioner from proceeding with a sale of the pertinent real property belonging to decedent's estate is an appeal from an interlocutory order, it is immediately appealable, because: (1) the merits of the underlying special proceeding between petitioner and respondent were decided by the entry of respondent's default in 1994; and (2) there can be no final order confirming a sale of respondent's allotted portion of the pertinent farm until a sale, which the trial court's order enjoins, is accomplished.

2. Injunction— preliminary injunction—sale of real property—default

The trial court erred by granting a preliminary injunction restraining petitioner from proceeding with a sale of the pertinent

real property belonging to decedent's estate, because: (1) respondent did not move to set aside her default even though nearly a decade had passed between its entry and the filing of her motion for a preliminary injunction; (2) there is no current pending injunctive order in either federal suit filed by respondent, one of which has been terminated and the other of which is an entirely separate action to which petitioner is not a party; and (3) the trial court did not have jurisdiction to grant the preliminary injunction since there is no pending litigation between petitioner and respondent regarding petitioner's authority to sell the land, and thus, there is no action to which the ancillary remedy against petitioner may attach.

Appeal by petitioner from an order entered 31 July 2003 by Judge Cy A. Grant in Hertford County Superior Court. Heard in the Court of Appeals 13 September 2004.

L. Frank Burleson, Jr., for petitioner-appellant.

NCABL Land Loss Prevention Project, by Stephon J. Bowens, for respondent-appellee.

MARTIN, Chief Judge.

William T. Chamblee died testate in December of 1987. At the time of his death, he owned an undivided one-half interest in land known as the Cowan farm, located in Hertford County, North Carolina. His undivided interest was the primary asset in his estate. In his will, Mr. Chamblee left this interest to his wife, the respondent, subject to the debts of his estate. Petitioner was named executor of decedent's estate in January of 1988. During 1988, Mrs. Chamblee and the estate became delinquent in the debt owed on loans from the United States Department of Agriculture Farm Service Administration [FSA].

Alleging that it was in the best interest of the estate to partition the farm and to sell the estate's interest, petitioner filed a petition for actual partition and sale of the Cowan farm on 4 January 1994. The following day respondent was served with the summons and petition by certified mail. She did not file an answer or otherwise appear, and her default was entered on 16 February 1994. An order to partition the property was entered on 29 September 1994 and a final amended report of the commissioners partitioning the property was entered on 31 May 1996. The commissioners' report was confirmed by order entered 17 June 1996.

A sale of respondent's allotted portion of the Cowan farm was ordered, and a resale was ordered for 13 February 1998. Prior to the resale, respondent brought an action in the United States District Court for the Eastern District of North Carolina seeking review of FSA's decision to suspend consideration of her application for loan servicing. Upon her motion, the District Court issued a preliminary injunction enjoining the sale of the land until that action was resolved on its merits. On 12 October 1999, the federal court action was resolved on the merits by the entry of summary judgment in respondent's favor ordering the Secretary of the United States Department of Agriculture to direct the FSA to consider respondent's application for loan servicing. Petitioner in this proceeding was not a party to the federal action, and the order granting summary judgment did not include injunctive relief.

In October 2000, respondent and others filed a class action complaint in the United States District Court for the District of Columbia against the Secretary of the United States Department of Agriculture alleging discrimination against minority and female family farmers. The action sought declaratory relief and compensatory damages, but did not seek injunctive relief. Again, petitioner in this action was not made a party to the federal discrimination action.

On 14 January 2003, the Clerk of Superior Court of Hertford County ordered a resale of the property, and the sale was noticed for 19 February 2003. Respondent sought and obtained a temporary restraining order, and a preliminary injunction was subsequently issued restraining petitioner's sale of the property pending the outcome of the federal discrimination action. Petitioner appeals.

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[1] Petitioner appeals from an interlocutory order. *See Barnes v. St. Rose Church of Christ*, 160 N.C. App. 590, 591, 586 S.E.2d 548, 549 (2003) (stating that "[a] preliminary injunction is an interlocutory order"). There is no immediate right of appeal from an interlocutory order unless the order affects a substantial right. N.C. Gen. Stat. §§ 1-277(a), 7A-27(d)(1) (2003). A substantial right is one which might be lost if the order is not reviewed before the entry of final judgment in the case. *Action Cmty. Television Broadcasting Network, Inc. v. Livesay*, 151 N.C. App. 125, 129, 564 S.E.2d 566, 569 (2002). Under the unusual circumstances before us in this case, the merits of the underlying special proceeding between petitioner and respondent in which petitioner's right to partition the property and to sell respondent's interest therein were decided by the entry of

respondent's default in 1994. Moreover, there can be no final order confirming a sale of respondent's allotted portion of the Cowan farm until a sale, which the trial court's order enjoins, is accomplished. Thus, we hold the trial court's order granting a preliminary injunction to be immediately appealable.

[2] N.C. Gen. Stat. § 1-485 (2), authorizes the issuance of a preliminary injunction:

> When, during the litigation, it appears by affidavit that a party thereto is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual;

N.C. Gen. Stat. § 1-485(2) (2003). A preliminary injunction is an ancillary remedy, not an independent cause of action. *Hutchins v. Stanton*, 23 N.C. App. 467, 469, 209 S.E.2d 348, 349 (1974). It merely "preserve[s] the status quo pending trial on the merits." *State v. School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980).

Here, there is no on-going litigation between the parties in the courts of this State as required by N.C. Gen. Stat. § 1-485(2) for the issuance of a preliminary injunction. The sale of the property was ordered by default judgment in 1994 due to respondent's failure to answer in the partition action.

> When a defendant fails to timely answer a complaint, an entry of default may be made by the clerk on motion of the plaintiff. G.S. § 1A-1, Rule 55(a). The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff's complaint, G.S. § 1A-1, Rule 8(d), and is prohibited from defending on the merits of the case.

Spartan Leasing v. Pollard, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991). Once a party's default has been established, it may be set aside only for good cause shown. N.C. Gen. Stat. § 1A-1, Rule 55(d) (2003). Respondent did not move to set aside her default even though nearly a decade had passed between its entry and the filing of her motion for a preliminary injunction.

Before the trial court, respondent argued that the partition and sale of the Cowan farm should be stayed pending FSA's resolution of her application for debt servicing and she contended there was a

demonstrable likelihood of success on the merits of the federal discrimination claim, which could result in a settlement large enough to satisfy the debt which necessitated the partition and sale of the property. While we find respondent's circumstances compelling, there is no current pending injunctive order in either federal suit, one of which has been terminated and the other of which is an entirely separate action to which petitioner is not a party.

Because there is no pending litigation between petitioner and respondent regarding the petitioner's authority to sell the land, there is no action to which the ancillary remedy against petitioner may attach and the trial court had no jurisdiction to grant the preliminary injunction. Therefore, the trial court's order granting a preliminary injunction restraining petitioner from proceeding with a sale of the real property belonging to the estate of William T. Chamblee, Jr. must be reversed.

Reversed.

Judges WYNN and HUNTER concur.

TINA R. SILLERY, PLAINTIFF v. SCOTT THOMAS SILLERY, DEFENDANT

No. COA04-334

(Filed 18 January 2005)

Appeal and Error— notice of appeal from additional findings— not timely

An appeal from a child custody order was dismissed where the trial court made additional findings and plaintiff missed the deadline for filing notice of appeal from that order. The appellate court does not acquire jurisdiction without a proper notice of appeal, and neither the court nor the parties may waive the jurisdictional requirements, even for good cause.

Appeal by plaintiff from judgment entered 29 July 2003 by Judge Jerry A. Jolly in Brunswick County District Court. Heard in the Court of Appeals 2 December 2004.

J. Albert Clyburn, P.L.L.C., by J. Albert Clyburn, for plaintiff-appellant.

Hosford & Hosford, P.L.L.C., by Sofie W. Hosford, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Tina Sillery ("plaintiff") appeals an order of the trial court permitting Scott Sillery ("defendant") to relocate, with custody of the parties' minor child, to West Virginia. For the reasons stated herein, we dismiss the appeal.

The pertinent factual and procedural history of this case is as follows: Plaintiff and defendant were married from 31 October 1993 to 28 September 1995. Their son, Chad Thomas Sillery, was born 23 May 1994. At the time of the parties' divorce, the trial court awarded primary custody of Chad to plaintiff with visitation rights for defendant. On 5 March 2002, the trial court modified the custody arrangement, awarding primary custody of Chad to defendant with visitation rights for plaintiff. On 8 April 2003, defendant filed a Motion in the Cause, seeking a modification in the custodial order which would accommodate defendant's plans to relocate with Chad to West Virginia. Plaintiff filed a response to defendant's motion whereby she requested that, if defendant relocated to West Virginia, she be awarded primary custody of Chad.

On 29 July 2003, the trial court heard evidence on defendant's custody modification motion and issued an order containing the following conclusions of law:

1. That a substantial and material change of circumstances has occurred regarding the best interests of the parties' minor child.

2. That the Defendant is relocating to the state of West Virginia and the same will adversely affect the welfare of the parties' minor child in that the relocation will prevent the said child from being geographically situated close to his mother.

3. That the best interests of the parties' minor child require that his primary care, custody and control remain with the Defendant and secondary custody to the Plaintiff in the form of visitational [sic] privileges.

The trial court ordered that "the primary care, custody and control of Chad Thomas Sillery be and hereby is ordered to remain with the Defendant." The trial court further ordered that "the secondary care, custody and control of the aforesaid minor child be and hereby is ordered to remain with the Plaintiff subject to a modified visitational [sic] schedule."

On 12 August 2003, plaintiff filed a Rule 52(b) Motion for Additional Findings of Fact requesting, *inter alia*, the following addition to the 29 July 2003 custody order: "That the Court include a conclusion of law as follows: 'that this Court is without authority to prevent the Defendant from relocating with the parties' minor child from Brunswick County, North Carolina to Glengarry, West Virginia.' " The trial court granted plaintiff's motion and filed, on 12 August 2003, an amended order incorporating the specific conclusion of law requested by plaintiff. Plaintiff also filed, on 12 August 2003, a notice of appeal of the 29 July 2003 order. Plaintiff filed a notice of appeal on 23 September 2003 of the 12 August 2003 order. On 23 October 2003, plaintiff and defendant executed a stipulation purporting to extend the time in which to file the notice of appeal for the order entered 12 August 2003 until 23 September 2003.

The issue presented by this case is whether plaintiff has preserved for appeal any issue relative to the 29 July 2003 custody order. Because we conclude that plaintiff has failed to raise any issue arising out of the 29 July 2003 order, we dismiss the appeal.

The Rules of Appellate Procedure provide the time for taking appeals as follows:

> In civil actions and special proceedings, a party must file and serve a notice of appeal:
>
> (1) within 30 days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or
>
> . . . .
>
> (3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the 30-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely serv-

> ice upon the party, as provided in subsections (1) and (2) of this subdivision (c).

N.C.R. App. P. 3(c) (2004). Civil Procedure Rule 52(b) allows for the amendment of findings by the trial court and provides that "[u]pon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." N.C.R. Civ. P. 52(b) (2004).

In the present case, the trial court entered its original judgment on 29 July 2003. Plaintiff filed the Motion for Additional Findings of Fact on 12 August 2003, fourteen calendar days after the judgment was entered and four days after the time for seeking such an amendment expired. Nevertheless, the trial court decided the merits of plaintiff's motion. Plaintiff then filed the Notice of Appeal of the 12 August 2003 order on 23 September 2003, forty-two days after the order granting the Motion for Additional Findings of Fact was entered, and twelve days after the time for filing a notice of appeal had expired. Thus, we dismiss plaintiff's appeal of the 12 August 2003 order for failure to comply with the time limit set forth in N.C.R. App. P. 3(c)(3). "Without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2." *Bromhal v. Stott*, 116 N.C. App. 250, 253, 447 S.E.2d 481, 483 (1994), *aff'd*, 341 N.C. 702, 462 S.E.2d 219 (1995).

Plaintiff's sole argument on appeal asserts that the trial court erred by concluding as a matter of law that it had "no authority to restrict the Defendant from moving with the parties' minor child from Brunswick County, North Carolina to the state of West Virginia." Notwithstanding the substantial energy and effort that plaintiff devotes to addressing the issue in her brief, the question is not properly before this Court. Plaintiff assigned error to a conclusion of law which appears in the 12 August 2003 order, not the 29 July 2003 order which is the only order properly appealed to this Court.

Because the appeal of the 12 August 2003 order is the basis for plaintiff's sole assignment of error, dismissing the appeal on these grounds disposes of this matter in its entirety.

DISMISSED.

Judges TYSON and GEER concur.

STATE OF NORTH CAROLINA BY AND THROUGH THE ALBEMARLE CHILD SUPPORT ENFORCEMENT AGENCY, *EX REL.*, ZITA Y. CROSS, PLAINTIFF v. MAURICE L. SAUNDERS, DEFENDANT

No. COA04-30

(Filed 18 January 2005)

Child Support, Custody, and Visitation— child support modification—change in circumstances—newborn child

The trial court erred in a child support modification case by concluding that a significant and material change in circumstances had occurred, because: (1) N.C.G.S. § 50-13.7 provides that a child support order may be modified or vacated at any time upon motion in the cause and a showing of changed circumstances; and (2) the trial court's findings and conclusions contravened the guidelines by equating defendant's financial responsibility to his newborn child, standing alone, with changed circumstances.

Appeal by plaintiff from order entered 6 October 2003 by Judge C. Christopher Bean in Gates County District Court. Heard in the Court of Appeals 6 December 2004.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Eaddy, for the State.

No brief filed for defendant-appellee.

CALABRIA, Judge.

The State of North Carolina by and through the Albemarle Child Support Enforcement Agency *ex rel.* Zita Y. Cross ("plaintiff") appeals an order of the Gates County District Court modifying a previous child support order upon finding a substantial and material change in circumstances. We reverse.

On 25 May 1995, Maurice L. Saunders ("defendant") signed a voluntary support agreement certifying paternity and responsibility for D.A.S., a minor child in Cross' custody. The agreement was subsequently approved by and became an order of the court. Defendant was ordered to repay, in monthly installments of $20.00, the sum of $924.00 owed as reimbursement for past public assistance for his dependent child; however, no ongoing child support was imposed. Defendant fulfilled this obligation in June 1997, and defendant's file

was closed the following month with a notation that all arrearages were paid in full.

On 24 September 2002, plaintiff moved to modify the existing child support order to seek ongoing child support. The matter was heard on 11 December 2002. The trial court ordered, *inter alia*, monthly child support in the amount of $391.00 as determined by completion of the worksheet contained in the North Carolina Child Support Guidelines (the "Guidelines") after concluding there was a substantial and material change in circumstances ("changed circumstances") in that the needs of the minor child had increased since entry of the prior child support order. The order was signed on 3 April 2003.

On 10 April 2003, defendant moved to modify the existing child support order, seeking a reduction in his child support obligation. Defendant cited changed circumstances because of the birth of a new child on 9 April 2003. The trial court granted defendant's motion on that basis. Plaintiff appeals.

On appeal, plaintiff asserts the trial court "erred when it concluded, based on the single fact that [defendant] had a newborn child in his home, that a significant and material change of circumstances had occurred." We agree. North Carolina General Statutes § 50-13.7 (2003) provides that a child support order "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances[.]" The Guidelines expressly provide as follows:

> A parent's financial responsibility (as determined below) for his or her natural or adopted children who currently reside with the parent (other than children for whom child support is being determined in the pending action) is deducted from the parent's gross income. Use of this deduction is appropriate when a child support order is entered or modified, *but may not be the sole basis for modifying an existing order.*

2004 Ann. R. N.C. 50 (emphasis added). In the instant case, the trial court found as fact, relevant to the conclusions of law, that defendant filed a motion to modify the existing child support order on the grounds that he had a newborn child. The trial court concluded, in relevant part, as follows:

> 3. There was a substantial and material change in circumstances since entry of the April 3, 2003 Order in that the defendant now

has a newborn child in his home for whom he has financial responsibility.

4. As a result of the change in circumstances, defendant is entitled to modify the April 3, 2003 Order.

The trial court's findings and conclusions contravened the Guidelines by equating defendant's financial responsibility to his newborn child, standing alone, with changed circumstances. *Accord Lee's North Carolina Family Law* § 10.55(a) (5th rev. ed. 2002). Accordingly, we reverse the trial court's modification of the existing child support order. We need not reach plaintiff's remaining assignments of error.

Reversed.

Chief Judge MARTIN and Judge GEER concur.

JAMES JOHNSON, PLAINTIFF v. ROWLAND MOTOR COMPANY, DEFENDANT

No. COA04-536

(Filed 18 January 2005)

Appeal and Error— motion to certify interlocutory order for appeal—time of notice of appeal—not tolled

An appeal was dismissed where notice of appeal was not timely filed and no motion was filed that would toll the time for taking an appeal. There is no provision for tolling the time for taking an appeal when a motion to certify an interlocutory order for immediate review has been made.

Appeal by plaintiff from judgment entered 16 June 2003 by Judge Robert Frank Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 27 December 2004.

The Anderson Law Firm, P.L.L.C., by Richard J. Hollar, for plaintiff-appellant.

Law Office of Robert E. Price, by Robert E. Price for defendant-appellee.

HUNTER, Judge.

On 16 June 2003, Judge Robert Frank Floyd, Jr. filed a judgment granting partial summary judgment in favor of defendant on plaintiff's claim for fraud and unfair trade practices and reserving for trial plaintiff's claim for breach of contract. On the same date, the judgment was served by defendant on plaintiff by first class mail. On 21 October 2003, Judge Gary L. Locklear entered an order certifying the order for immediate review pursuant to Rule 54(b) of the Rules of Civil Procedure. On 19 November 2003, plaintiff filed notice of appeal from the judgment entered by Judge Floyd on 16 June 2003.

To confer jurisdiction on an appellate court of this state, a party appealing from a lower court order must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure. *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). This rule requires that notice of appeal from a judgment or order in a civil action be given within thirty days after its entry. N.C.R. App. P. 3(c). This rule further provides that the running of the time for giving notice of appeal is tolled under the following circumstances: (1) the duration of any period of noncompliance with the service requirement of Rule 58 of the Rules of Civil Procedure; (2) a motion under Rule 50(b) for judgment notwithstanding the verdict; (3) a motion under Rule 52(b) to amend or make additional findings of fact; (4) a motion under Rule 59 to alter or amend a judgment; and (5) a motion under Rule 59 for a new trial. *Id.* There is no provision for tolling of the time for taking an appeal when a motion to certify an interlocutory order for immediate review has been made. When timely notice of appeal in accordance with Rule 3(a) is not given, the appellate court must dismiss the appeal. *Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 189, 301 S.E.2d 99, 100 (1983).

In the case at bar, the order from which appeal is taken was filed on 16 June 2003 and served on plaintiff on the same date by first class mail. However, the notice of appeal was not filed until 19 November 2003. No motion that would toll the time for taking an appeal under Rule 3(c) was filed. Because notice of appeal was not timely given, we must dismiss the appeal.

Appeal dismissed.

Judges ELMORE and STEELMAN concur.

CASES REPORTED WITHOUT OPINIONS

FILED 18 JANUARY 2005

BARRINGER v. HOFFMAN No. 04-72	Catawba (02CVS1569)	Affirmed
DANIELS v. WINSTON-SALEM/ FORSYTH CTY. BD. OF EDUC. No. 03-1575	Forsyth (01CVS5744)	Affirmed
DORROH v. WILLIAMS No. 04-104	Chatham (02CVD727)	Affirmed
GILLETTE v. DOLLAR TREE STORES, INC. No. 04-56	Ind. Comm. (I.C. 162533)	Affirmed
GREENE v. GREENE No. 04-510	Johnston (01CVD1882)	Vacated and remanded
HANEY v. GREENE CONSTR., INC. No. 03-1418	Watauga (02CVS746)	Affirmed
IN RE B.R. No. 04-233	Mecklenburg (03J40)	Affirmed
IN RE C.S. No. 04-811	Watauga (02J72)	Affirmed
IN RE C.Y.P. & I.P. No. 04-207	Chatham (02J71) (02J72)	Reversed and remanded
IN RE D.D.H. No. 04-390	Davidson (02J216)	Affirmed
IN RE D.D.M. No. 04-50	Cabarrus (02J159)	Affirmed
IN RE H.N.T. & J.E.A.M. No. 04-772	Watauga (02J24) (02J25)	Affirmed
IN RE J.Q.F., D.D.P., & C.W.B. No. 04-271	Cabarrus (01J184) (01J185) (01J186)	Affirmed
IN RE K.L.J. No. 04-314	Forsyth (01J480)	Affirmed in part, reversed in part
IN RE M.S.B. No. 04-256	Harnett (02J204)	Affirmed

IN RE T.S., S.S., & L.R. No. 04-638	Harnett (00J212) (00J213) (00J214)	Affirmed
INMAN v. INMAN No. 04-398	Haywood (02CVD642)	Reversed and remanded
JWR SALES CO. v. NEW MILLENIUM CINEMAS, LLC No. 03-1672	Mecklenburg (01CVD1186)	Affirmed
LAFELL v. LAFELL No. 04-675	Moore (01CVD327)	Dismissed in part; reversed and remanded in part
MECHANICAL SYS. & SERVS., INC. v. CAROLINA AIR SOLUTIONS, L.L.C. No. 04-473	Mecklenburg (02CVS8572)	Dismissed
MOORE v. DUNCAN No. 04-359	Columbus (03CVS00176)	Affirmed
PEARCE v. ROSENBLUM No. 04-303	Buncombe (02CVS4088)	Affirmed
STATE v. ARMOUR No. 04-148	Cumberland (03CRS23102) (03CRS23150)	Reversed and remanded
STATE v. ARNETTE No. 04-163	Cumberland (02CRS50446)	No prejudicial error in part; dismissed without prejudice in part
STATE v. BAKER No. 04-53	Onslow (02CRS59492)	No error
STATE v. BENNETT No. 04-214	Wake (02CRS34170)	No error
STATE v. BERARDUCCI No. 03-1595	Onslow (02CRS51810)	No error
STATE v. BOOMER No. 04-117	Craven (03CRS50307)	No error
STATE v. BURR No. 04-422	Wake (03CRS53002) (03CRS53003) (03CRS53004) (03CRS53005) (03CRS53006) (03CRS53007)	No error

	(03CRS53008) (03CRS53009)	
STATE v. CAUDLE No. 03-1573	Halifax (98CRS8469) (01CRS54291)	No error
STATE v. CLINE No. 04-27	Rowan (01CRS13258) (01CRS57544)	No error
STATE v. CULLER No. 03-1588	Richmond (02CRS54567) (03CRS1572)	No error
STATE v. DOWDLE No. 04-78	Cleveland (02CRS6737)	No error
STATE v. FRANKS No. 03-1644	Macon (02CRS51055) (02CRS51056)	No error
STATE v. FRAZIER No. 03-1682	Craven (02CRS53157) (02CRS53158) (02CRS53159) (02CRS53160) (02CRS53161) (02CRS53162)	No error
STATE v. GRANTHAM No. 03-1685	Guilford (02CRS24402)	No error
STATE v. GREEN No. 03-1613	Randolph (02CRS55636)	No error
STATE v. HARRELL No. 03-1620	Forsyth (02CRS8417) (02CRS26867)	No error
STATE v. HUANG No. 03-1716	Wake (03CRS872)	No error
STATE v. JAMES No. 04-522	Surry (02CRS52198)	Reversed and remanded
STATE v. JENKINS No. 03-1642	Surry (01CRS3848) (01CRS3849) (01CRS51018) (01CRS51019) (01CRS51020) (01CRS51021) (01CRS51022) (01CRS51023)	No error

STATE v. MURCHISON No. 03-1650	Lee (02CRS3441) (02CRS6740) (02CRS52044)	No error
STATE v. MURCHISON No. 04-221	Lee (02CRS6916)	No error
STATE v. NICHOLS No. 03-1584	Rowan (02CRS50724) (02CRS50725)	No error
STATE v. PARKER No. 04-756	Durham (03CRS43894)	No error
STATE v. PONDS No. 04-817	Richmond (03CRS4489) (03CRS50524)	No error in part; reversed and remanded in part
STATE v. REVEL No. 04-684	Forsyth (03CRS16100) (03CRS2328)	No error
STATE v. ROBBINS No. 03-1717	Davidson (93CRS16908)	No error
STATE v. SMITH No. 03-1525	Moore (02CRS8205)	No error
STATE v. SPELL No. 04-409	Cumberland (99CRS59947) (99CRS59949) (99CRS59950)	Affirmed
STATE v. THOMPSON No. 04-652	Forsyth (03CRS16573) (03CRS51878)	No error
STATE v. WASHINGTON No. 03-1522	Mecklenburg (02CRS211505)	No error
STATE v. WILLIAMS No. 04-135	Davidson (02CRS61852) (02CRS62106)	No error

STEIN v. ASHEVILLE CITY BD. OF EDUC.

[168 N.C. App. 243 (2005)]

KATHLYN MARIE STEIN AND MICHAEL HOOTSTEIN, PLAINTIFFS V. ASHEVILLE CITY BOARD OF EDUCATION, COOPERATIVE LEARNING CENTER (ALSO KNOWN AS WOLFE CREEK SCHOOL, NOW BUNCOMBE COMMUNITY SCHOOL WEST, AT THE TIME ADMINISTERED JOINTLY BY BLUE RIDGE HUMAN SERVICES FACILITIES, INC. AND/OR BLUE RIDGE MENTAL HEALTH AND/OR ASHEVILLE CITY BOARD OF EDUCATION AND/OR BUNCOMBE COUNTY BOARD OF EDUCATION), BUNCOMBE COUNTY BOARD OF EDUCATION, BLUE RIDGE CENTER FOR MENTAL HEALTH, AND BLUE RIDGE AREA AUTHORITY, DEFENDANTS

No. COA03-1498

(Filed 1 February 2005)

1. Appeal and Error— refiled action—appeal not timely

Plaintiffs' appeal of the trial court's dismissal of their claims against the Buncombe County School Board was dismissed as untimely where the original notice of appeal was on 11 June 2001; that appeal was dismissed as interlocutory, which left the trial court's order intact subject to a subsequent appeal; plaintiffs had dismissed their claims against other parties while the appeal was pending and had several options for maintaining their original challenge; rather than pursue those options, they filed this action, which was also dismissed; and they gave notice of appeal on 5 September 2003. The original dismissal was with prejudice, so that the refiled action was barred by res judicata, and any notice of appeal on 5 September 2003 from the 11 June 2001 order was untimely.

2. Schools and Education— negligence by bus driver and monitor—jurisdiction—Industrial Commission

The Industrial Commission had exclusive jurisdiction over plaintiffs' claims against the Asheville School Board arising from a bus driver and a bus monitor not reporting threats from emotionally handicapped children who had problems with anger and violence. The plain language of N.C.G.S. § 143-300.1 makes the statute applicable to negligent acts of the driver and monitor and not just to mechanical defects. There is no concurrent jurisdiction in superior court because plaintiff asserted claims only against the Board, and such claims are barred by sovereign immunity. The immunity waiver coming from the purchase of insurance does not apply to claims within the scope of N.C.G.S. § 143-300.1.

3. Negligence; Schools and Education— area mental health program—violent students—school bus driver and monitor—failure to report conversations—negligence

Plaintiff shooting victim's complaint was sufficient to state a claim for negligence against defendant area mental health program for violent students where it alleged that the driver and monitor of a public school bus that transported students with behavioral and violence problems to a cooperative learning center failed to report overheard conversations in which one student told another that he had a gun and the two students planned to rob and kill someone, the driver and monitor were acting within their duties for defendant area mental health program, and the two students and others attempted to rob plaintiff and shot her in the head.

Judge TYSON concurring in part and dissenting in part.

Appeals by plaintiffs from orders entered 11 June 2001 by Judge James E. Lanning and on 8 August 2003, 13 August 2003, and 8 September 2003 by Judge Zoro J. Guice, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 1 September 2004.

Orbock, Bowden, Ruark & Dillard, P.C., by Mark A. Leach and Kristen L. Harris, for plaintiffs-appellants.

Schwartz & Shaw, P.L.L.C., by Richard A. Schwartz and Michael R. Delafield, for defendant-appellee Asheville City Board of Education.

Patrick, Harper & Dixon, L.L.P., by David W. Hood, for defendants-appellees Cooperative Learning Center, Blue Ridge Human Services Facilities, Inc., Blue Ridge Mental Health, Blue Ridge Center for Mental Health, and Blue Ridge Area Authority.

Roberts & Stevens, P.A., by Christopher Z. Campbell and K. Dean Shatley, II, for defendant-appellee Buncombe County Board of Education.

GEER, Judge.

Plaintiffs Kathlyn Marie Stein and Michael Hootstein appeal from the trial courts' orders dismissing their claims against the Buncombe County Board of Education (the "Buncombe County Board") and the Asheville City Board of Education (the "Asheville Board"). Because plaintiffs have not timely appealed from the order dismissing the

claims against the Buncombe County Board, we dismiss the appeal from that order. As for the Asheville Board, we hold that the trial court properly concluded that the Industrial Commission has exclusive jurisdiction over those claims and, therefore, affirm the trial court's order dismissing all claims against the Asheville Board.

Plaintiffs also appeal from the trial court's dismissal of their claims against the Blue Ridge Area Authority and programs operated by the Authority, including the Cooperative Learning Center ("CLC") and Blue Ridge Center for Mental Health (collectively "the Blue Ridge defendants"). Because the allegations of the complaint are sufficient to state a claim for relief with respect to the Blue Ridge defendants, we reverse the trial court's order granting the Blue Ridge defendants' motion to dismiss.

Facts

Plaintiffs' amended complaint alleged the following facts. Juveniles J.B. and C.N., who were 13 and 15 years old respectively, were behaviorally/emotionally handicapped children. Both had also been identified as having problems with anger and violence. They attended school at CLC and traveled to and from CLC on a public school bus driven by Nancy Patton. The bus monitor was Gail Guzman. The amended complaint alleged (1) that "at all pertinent times, [Patton] was acting as an employee for" the Asheville Board, CLC (including related entities), the Blue Ridge Area Authority, and/or the Buncombe County Board, and (2) that Guzman, at the time of "[a]ny acts or omissions," was acting within "the course and scope of her duties" for the Asheville Board, the Blue Ridge Area Authority, CLC, and the Buncombe County Board.

A week prior to 17 March 1998, Guzman overheard C.N. tell J.B. that he had a gun at his house under his mattress. She also overheard a second conversation in which C.N. suggested to J.B., "Let's rob somebody." When J.B. responded, "Okay," C.N. said, "I have the gun." J.B. stated, "I'll kill them." Guzman reported the conversation to bus driver Patton. Neither Guzman nor Patton informed anyone at CLC, Buncombe County Schools, Asheville City Schools, or the Asheville Police Department about what Guzman had overheard.

On 17 March 1998, from approximately 7:00 p.m. until 8:15 p.m., J.B. and C.N., along with another minor and an 18 year old, began stopping cars at an intersection in Asheville. They approached three different cars with the intent to rob and kill each of the drivers. J.B.

used a loaded handgun supplied by C.N. to shoot Stein in the head. As a result of the shooting, Stein has suffered vascular injury, spinal fracture, nerve damage, and post-traumatic stress disorder. All four assailants entered guilty pleas to charges stemming from their assault on Stein.

Procedural History

On 1 March 2001, plaintiffs filed an initial complaint in file number 01 CVS 1219, asserting claims arising out of the shooting against essentially the same defendants sued in this case. The trial court dismissed with prejudice plaintiffs' claims against the Buncombe County Board on 11 June 2001. Plaintiffs filed an interlocutory appeal of that order. On 22 January 2002, prior to receiving a decision from this Court, plaintiffs voluntarily dismissed without prejudice their claims against all the remaining defendants. Plaintiffs did not notify this Court of the voluntary dismissal.

On 16 July 2002, this Court filed an unpublished opinion dismissing as interlocutory plaintiffs' appeal of the Buncombe County Board's dismissal. *Stein v. Asheville City Schs.*, No. COA01-1028, (N.C. Ct. App. July 16, 2002) (unpublished). Plaintiffs did not seek rehearing of that dismissal.

Instead, on 17 January 2003, plaintiffs filed this action against the Buncombe County Board, the Asheville Board, the Blue Ridge defendants, and the Asheville City Schools. Plaintiffs' amended complaint, filed 21 January 2003, dropped the Asheville City Schools as a defendant. On 11 April 2003, the Buncombe County Board moved to dismiss the amended complaint under N.C.R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. The Blue Ridge defendants simultaneously answered and moved to dismiss under Rule 12(b)(6) on 22 April 2003. On 13 June 2003, the Asheville Board also filed a motion to dismiss under Rule 12(b)(6) and under Rule 12(b)(7) for failure to join a necessary party.

The trial court granted the Buncombe County Board's motion on 8 August 2003, the Asheville Board's motion to dismiss on 13 August 2003, and the Blue Ridge defendants' motion on 8 September 2003. Plaintiffs appeal all three dismissals.

The Buncombe County Board

[1] Plaintiffs contend, in this appeal, that the trial court erred in dismissing their claims against the Buncombe County Board in the order

filed 11 June 2001. The Buncombe County Board argues in response that the appeal from this order, filed 5 September 2003, is untimely. We agree with the Buncombe County Board.

In its 11 June 2001 order in the 01 CVS 1219 action, the trial court directed "that plaintiffs' Complaint against . . . the Buncombe County Board of Education is dismissed, with prejudice." On 2 July 2001, plaintiffs filed notice of appeal of that order. This Court's dismissal of that appeal on 16 July 2002 explained:

> In the instant case, the order appealed from is interlocutory as there has been no final judgment as to all of the parties. While the trial court's order does not constitute a final adjudication of the claims against the City of Asheville and the Buncombe County Board of Education, the record does not indicate that plaintiffs' claims against the other named defendants (Asheville City Schools, Blue Ridge Center for Mental Health, Blue Ridge Area Authority, Buncombe County and Buncombe County Department of Social Services) have been dismissed or otherwise adjudicated. The trial court did not certify the order pursuant to Rule 54(b), and plaintiffs have failed to present any argument in their brief to this Court that a substantial right will be affected if this appeal is not accepted at this time. Accordingly, plaintiffs' appeal must be dismissed.

As a result of this dismissal, plaintiffs could still appeal the 11 June 2001 order once a final adjudication was entered in the underlying case.

Plaintiffs' voluntary dismissal of the "remaining claim[s] . . . ha[d] the effect of making the trial court's grant of partial summary judgment a final order." *Combs & Assocs., Inc. v. Kennedy*, 147 N.C. App. 362, 367, 555 S.E.2d 634, 638 (2001). Ordinarily, with the filing of the voluntary dismissal, plaintiffs would have had 30 days in which to appeal the trial court's Buncombe County Board order. Significantly, however, this voluntary dismissal occurred while the initial appeal of that order was still pending before this Court and four months before the filing of the decision dismissing the appeal as interlocutory.

Once they filed their voluntary dismissal of the remaining claims, plaintiffs had various options with respect to the Buncombe County Board order. First, immediately after the filing and prior to this Court's rendering its decision, they could have notified the Court of the voluntary dismissal and filed a motion to amend the record to

include the voluntary dismissal. *See Tarrant v. Freeway Foods of Greensboro, Inc.*, 163 N.C. App. 504, 507-08, 593 S.E.2d 808, 811 (declining to dismiss appeal from partial summary judgment order, even though initially interlocutory, because of plaintiff's voluntary dismissal of the remaining claims prior to the Court's ruling), *disc. review denied*, 358 N.C. 739, 603 S.E.2d 126 (2004).

Alternatively, plaintiffs could have petitioned this Court for rehearing pursuant to N.C.R. App. P. 31(a) following issuance of this Court's decision holding the appeal to be interlocutory. In the recent case of *McManus v. Kluttz*, 165 N.C. App. 564, 599 S.E.2d 438 (2004), this Court had dismissed as interlocutory an appeal from an order granting partial summary judgment to the plaintiff, unaware that a voluntary dismissal had been filed resulting in the appealed order becoming a final judgment. The Court subsequently withdrew its first opinion and reached the merits of the appeal. *Id.* The Court, however, sanctioned the appellants' counsel pursuant to N.C.R. App. P. 34(a)(3) and 34(b)(2) for failing to inform the Court of the voluntary dismissal.

Third, plaintiffs could have renewed their appeal within 30 days of this Court's decision, pursuant to N.C.R. App. P. 3(c). *See Whitford v. Gaskill*, 119 N.C. App. 790, 792, 460 S.E.2d 346, 347 (1995) (defendant appealed from summary judgment order, but Court dismissed appeal as interlocutory because damages had not been determined; on remand, plaintiff voluntarily dismissed her claim for damages and this Court allowed defendant's renewed appeal), *rev'd on other grounds*, 345 N.C. 475, 480 S.E.2d 690 (1997).

Plaintiffs did not, however, pursue any of the procedures available to maintain their challenge to the trial court's dismissal of the Buncombe County Board until they filed the present notice of appeal on 5 September 2003. Plaintiffs' appeal on 5 September 2003 of the 11 June 2001 order was untimely and failed to satisfy the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure, requiring that a party file and serve a notice of appeal within 30 days after entry of judgment. As this Court has explained:

> In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure. Appellate Rule 3 is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed.

Henlajon, Inc. v. Branch Highways, Inc., 149 N.C. App. 329, 331, 560 S.E.2d 598, 600 (2002) (internal citations and quotation marks omitted). Because plaintiffs failed to take timely action to appeal, we do not possess jurisdiction to address plaintiffs' appeal of the 11 June 2001 order dismissing the claims against the Buncombe County Board. We, therefore, dismiss this appeal to the extent it purports to appeal from the 11 June 2001 order.

Plaintiffs argue that because they intended to refile their action and wanted to avoid presenting a "fragmented case" to this Court, this Court may still review the 11 June 2001 order. Plaintiffs' argument fails to recognize that the trial court dismissed the claims against the Buncombe County Board "with prejudice." This Court's dismissal of plaintiffs' appeal from the 16 July 2001 order as interlocutory left that order intact subject to a subsequent appeal. "The legal import of the words 'with prejudice' as applied to a judgment of dismissal is to terminate the action operating as *res judicata* and barring any further prosecution by the plaintiff of the same cause of action." *Ottinger v. Chronister*, 13 N.C. App. 91, 96, 185 S.E.2d 292, 295 (1971). Without a reversal by the Court of Appeals of the dismissal "with prejudice," any refiling of the claims against the Buncombe County Board was barred by *res judicata*. The trial court in this case, therefore, properly dismissed the reasserted claims against the Buncombe County Board.

The Asheville Board

[2] Plaintiffs next argue that the trial court erred in concluding that the Industrial Commission had exclusive jurisdiction over their claims against the Asheville Board. We disagree.

N.C. Gen. Stat. § 143-300.1 (2003) states:

> The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education, which claims arise as a result of any alleged mechanical defects or other defects which may affect the safe operation of a public school bus or school transportation service vehicle resulting from an alleged negligent act of maintenance personnel *or as a result of any alleged negligent act or omission of the driver, transportation safety assistant, or monitor of a public school bus* or school transportation service vehicle . . . .

(Emphasis added.) Plaintiffs argue that the statute does not apply because their claims do not arise as a result of any mechanical or other defect in the bus caused by a negligent act or omission of the driver.

The plain language of the statute, however, makes it applicable not only to mechanical defects affecting the bus, but also claims arising "as a result of any alleged negligent act or omission" of a driver or monitor. The statute's broad scope was confirmed by the Supreme Court in *Huff v. Northampton County Bd. of Educ.*, 259 N.C. 75, 77, 130 S.E.2d 26, 28 (1963) (citing N.C. Gen. Stat. § 143-300.1):

> An award against a county board of education under the provisions of the Tort Claims Act . . . must be based on the negligent act or omission of the driver of a public school bus who was employed at the time by the county or city administrative unit of which such board was the governing body.

In *Huff*, the plaintiff had asserted a claim in the Industrial Commission, alleging the bus driver negligently failed to prevent a fight. *Id.*

In *Newgent v. Buncombe County Bd. of Educ.*, 340 N.C. 100, 455 S.E.2d 157 (1995), our Supreme Court reversed a Court of Appeals decision holding that the Industrial Commission did not have jurisdiction over a negligence claim brought by the parents of a student who was hit by a car while crossing the road to board a public school bus. *Newgent* adopted the dissenting opinion from this Court, which stated that the Industrial Commission had jurisdiction to hear "tort claims wherein certain alleged negligent acts or omissions arose out of, and were inseparably connected to, events occurring at the time a school bus driver was operating the bus in the course of her employment." *Newgent v. Buncombe County Bd. of Educ.*, 114 N.C. App. 407, 409, 442 S.E.2d 158, 159 (1994) (Orr, J., dissenting), *adopted per curiam*, 340 N.C. 100, 455 S.E.2d 157 (1995).

Huff, *Newgent*, and our review of other cases involving N.C. Gen. Stat. § 143-300.1 establish that the Industrial Commission possesses jurisdiction over plaintiffs' claims against the Asheville Board. *See also Crawford v. Wayne County Bd. of Educ.*, 275 N.C. 354, 363, 168 S.E.2d 33, 39 (1969) (applying statute when child struck by bus). Plaintiffs, however, cite *Meyer v. Walls*, 347 N.C. 97, 108, 489 S.E.2d 880, 886 (1997) for the proposition that even when subject matter jurisdiction lies in the Industrial Commission, the superior court retains concurrent jurisdiction.

Plaintiffs misinterpret *Meyer's* holding. Our Supreme Court held in *Meyer* that "[a] plaintiff may maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and *a suit against the negligent agent or employee in the General Court of Justice for common-law negligence.*" *Id.* (emphasis added). The plaintiff in *Meyer* alleged claims against individual parties that the Court ruled could be asserted in the trial court division, but her claims against the state entity could only be filed in the Industrial Commission. In this case, plaintiffs failed to join as defendants any employees of the Asheville Board (or, in fact, any individuals at all). Plaintiffs instead assert claims only against the Asheville Board.

Concurrent jurisdiction cannot exist because any claim against the Asheville Board brought in superior court is barred by sovereign immunity. Plaintiffs rely upon N.C. Gen. Stat. § 115C-42 (2003) and the Board's purchase of insurance as providing a waiver of sovereign immunity. After setting out the conditions for waiver of immunity, N.C. Gen. Stat. § 115C-42 concludes with a proviso:

> Provided, that this section shall not apply to claims for damages caused by the negligent acts or torts of public school bus, or school transportation service vehicle drivers, while driving school buses and school transportation service vehicles when the operation of such school buses and service vehicles is paid from the State Public School Fund.

Accordingly, as this Court has previously pointed out, "G.S. 115C-42, by its own terms, apparently does not apply to the type of claims which are covered by G.S. 143-300.1 . . . ." *Smith v. McDowell County Bd. of Educ.*, 68 N.C. App. 541, 543 n.1, 316 S.E.2d 108, 110 n.1 (1984).

Thus, there cannot be concurrent jurisdiction: if a plaintiff's claim against a Board of Education falls within the scope of N.C. Gen. Stat. § 143-300.1, then N.C. Gen. Stat. § 115C-42 excludes the claim from the waiver of immunity. Without a waiver of immunity, the Board of Education cannot be sued in superior court.

Here, plaintiffs' complaint alleges the bus driver and monitor were negligent in failing to report a conversation that occurred on the public school bus. Plaintiffs do not dispute that the driver and the monitor are employees whose acts are covered by N.C. Gen. Stat. § 143-300.1. We, therefore, hold that N.C. Gen. Stat. § 143-300.1 applies to give the Industrial Commission exclusive jurisdiction over plaintiffs' negligence claims against the Asheville Board.

The Blue Ridge Defendants

[3] This appeal is before us from an order granting a motion to dismiss as to plaintiffs' negligence claim. We hold that the complaint sufficiently alleges a duty, a breach of that duty, and proximate causation to defeat a motion to dismiss, and accordingly conclude that the trial court erred in granting the Blue Ridge defendants' motion to dismiss.

When a party files a motion to dismiss pursuant to Rule 12(b)(6), the question for the court is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001). The court must construe the complaint liberally and "should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000). We review the trial court's dismissal *de novo*.

With respect to the duty element of plaintiffs' negligence claim, defendants rely upon this Court's decision in *King v. Durham County Mental Health Developmental Disabilities & Substance Abuse Auth.*, 113 N.C. App. 341, 439 S.E.2d 771, *disc. review denied*, 336 N.C. 316, 445 S.E.2d 396 (1994). *King* involved a Willie M. class member who left his residential Willie M. program and shot the plaintiff's decedent. Although *King* acknowledged that "[t]he general rule is that there is no duty to protect others against harm from third persons," it also held that "[a]n exception to this general rule is recognized when a special relationship exists between parties." *Id.* at 345, 439 S.E.2d at 774 (internal quotation marks omitted). When that relationship exists, "there is a duty upon the actor to control the third person's conduct and to guard other persons against his dangerous propensities." *Id.* at 345-46, 439 S.E.2d at 774 (internal citations and quotation marks omitted). The Court held that in deciding whether the necessary relationship exists, " 'the chief factors justifying imposition of liability are 1) the ability to control the person and 2) knowledge of the person's propensity for violence.' " *Id.* at 346, 439 S.E.2d at 774 (quoting *Abernathy v. United States*, 773 F.2d 184, 189 (8th Cir. 1985)).

Since *King* involved a motion for summary judgment and not a motion to dismiss, it does not address the allegations necessary to survive a motion to dismiss. Nevertheless, the Court articulated the

test as being "whether any of the defendants had custody of [the third person] or the ability or right to control him." *Id.* at 347, 439 S.E.2d at 775. After reviewing the materials in the *King* record, the Court held that defendants were entitled to summary judgment based on the undisputed fact that participation in the Willie M. program is strictly voluntary in the absence of a court order and, "because there is no evidence of a court order requiring his participation in the Willie M. program, they had no legal right to mandate his return to the facility. It cannot therefore be said that any of the defendants had custody of [the Willie M. class member] or that they had the ability or right to control him." *Id.*

In this case, the parties do not dispute the Blue Ridge defendants' knowledge of the students' propensity for violence. The dispositive issue is the Blue Ridge defendants' ability and right to control the students. Here, plaintiffs' amended complaint alleges: "Bus driver Nancy Patton, bus monitor Gail Guzman, Cooperative Learning Center principal Keith Roden, . . . and other authorities associated with defendants had custody of [J.B. and C.N.] and/or had the ability or right to control them at the pertinent time."[1] In addition, the amended complaint alleges:

> 9. One week prior to the March 17, 1998 shooting, school bus monitor Gail Guzman overheard [C.N.] tell [J.B.] that he [C.N.] had a gun and that it was at home under his mattress. . . .
>
> 10. Gail Guzman . . . overheard another conversation between [C.N. and J.B.], wherein [C.N.] said to [J.B.], "Let's rob somebody." [J.B.] then responded, "Okay." [C.N.] answered back, "I have the gun." [J.B.] said, "I'll kill them."
>
> 11. Gail Guzman . . . reported this conversation to the bus driver, Nancy Patton. Upon information and belief, Ms. Patton did not thereafter inform anyone at the CLC or Buncombe County Schools, or the Asheville Police Department, about the gun or about the boys' conspiracy to commit armed robbery and murder.

Plaintiffs then allege that, contrary to N.C. Gen. Stat. § 115C-245 (2003), when "Ms. Patton learned from school bus monitor Gail Guzman that [J.B. and C.N.] had a gun, intended to rob someone, and intended to kill someone," she "took no action whatsoever, including,

1. The amended complaint alleges that any acts or omissions of Patton and Guzman are imputed to defendants, including the Blue Ridge defendants, because Patton and Guzman were acting within the course and scope of their duties for the defendants.

but not limited to informing school officials of the announced plan to commit armed robbery and murder." In addition, plaintiffs allege "[t]o the extent that Ms. Gail Guzman failed to inform school bus driver Nancy Patton of the verbal plot to commit armed robbery and murder described above, then Ms. Guzman's failure likewise constitutes a violation of the duty imposed upon her by N.C. Gen. Stat. §115C-245." N.C. Gen. Stat. § 115C-245 provides:

> (b) The driver of a school bus subject to the direction of the superintendent or superintendent's designee . . . shall report promptly to the principal any misconduct upon such bus or disregard or violation of the driver's instructions by any person riding upon such bus. The principal may take such action with reference to any such misconduct upon a school bus, or any violation of the instructions of the driver, as he might take if such misconduct or violation had occurred upon the grounds of the school.
>
> . . . .
>
> (d) The superintendent or superintendent's designee may, in his discretion, appoint a monitor for any bus assigned to any school. It shall be the duty of such monitor, subject to the discretion of the driver of the bus, to preserve order upon the bus and do such other things as may be appropriate for the safety of the pupils and employees assigned to such bus while boarding such bus, alighting therefrom or being transported thereon, and to require such pupils and employees to conform to the rules and regulations established by the local board of education for the safety of pupils and employees upon school buses.

These allegations are sufficient to allege that defendants had "the ability or right to control" J.B. and C.N. and, under *King*, defendants had a duty to protect others against harm from J.B. and C.N. *See also Hedrick v. Rains*, 121 N.C. App. 466, 469, 466 S.E.2d 281, 283-84 ("An exception to the general rule exists where there is a special relationship between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct . . . ."), *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996). The amended complaint also alleges that defendants breached this duty by failing to report J.B.'s and C.N.'s threats of violence.

Defendants contend, however, that no duty existed because plaintiffs cannot establish that defendants had custody or the ability

to control the students after school hours, when the shooting occurred. This argument relates to the question of proximate cause rather than duty. Plaintiffs' complaint does not argue that defendants breached their duty by failing to control the students at the time that they were shooting plaintiff Kathlyn Stein, but rather that the breach occurred while the students were on the bus, at a time when the Blue Ridge defendants did have custody and control over the students. In other words, the negligence occurred not at 7:00 p.m., but rather while the students were on school property and the Blue Ridge defendants had custody and the legal right to control them. *See, e.g., Loram Maint. of Way, Inc. v. Ianni*, 141 S.W.3d 722, 728-29 (Tex. App. El Paso 2004) (employer could be held liable for off-duty shooting by an employee based on its negligent failure to take steps to address that employee's on-duty drug usage); *Hoyem v. Manhattan Beach City Sch. Dist.*, 22 Cal. 3d 508, 515-17, 150 Cal. Rptr. 1, 5, 585 P.2d 851, 855 (Cal. 1978) (school could be held liable for injury that occurred on the way to or from school if breach of its duty to supervise students while on school premises proximately caused the injury). *See also* W. Page Keeton, *Prosser and Keeton on the Law of Torts* § 56, at 384 (1984 & Supp. 1988) ("So also may a police officer be required to take the keys from a drunk driver, take him into custody, or otherwise take reasonable steps to keep him off the highway.").

The proper question is whether any breach of the Blue Ridge defendants' duty proximately caused plaintiffs' injuries arising from an off campus shooting after school hours. The amended complaint alleges repeatedly that had defendants not breached their duty, C.N.'s gun would have been confiscated and plaintiff Kathlyn Stein would not have been shot; that Kathlyn Stein suffered her injuries "[a]s a direct and proximate result" of defendants' breach of their duty; and that defendants' acts and omissions "have proximately caused damage to plaintiff Michael Hootstein."

Defendants and the dissent rely upon *Williamson v. Liptzin*, 141 N.C. App. 1, 539 S.E.2d 313 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 456, 548 S.E.2d 734 (2001), which involved an appeal following a trial. The Court in that case had before it a full evidentiary record, including expert testimony, compiled after discovery. This case involves a Rule 12(b)(6) motion. Our Supreme Court and this Court have repeatedly cautioned against trial and appellate courts judging proximate causation at the motion to dismiss stage. *See, e.g., Sutton v. Duke*, 277 N.C. 94, 108, 176 S.E.2d 161, 169 (1970)

(although the Court believed, based on the facts alleged in the complaint, that plaintiff's injury could not have been foreseen, nonetheless holding "we cannot say on the basis of the 'bare bones pleadings' that plaintiff cannot prove otherwise"; "[t]his case is not yet ripe for a determination that there can be no liability as a matter of law"); *McMillan v. Mahoney*, 99 N.C. App. 448, 455-56, 393 S.E.2d 298, 303 (1990) ("This Court has held that in reviewing a . . . motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), the Court is not concerned with whether plaintiff can prove his factual allegations; neither are we concerned with whether plaintiff can establish proximate cause, including foreseeability, at the trial." (internal quotation marks omitted)).

As this Court has previously stated, "[a]n allegation that certain negligence was the proximate cause of an injury is sufficient against a motion to dismiss under Rule 12(b)(6) 'unless it appears affirmatively from the complaint that there was no causal connection between the alleged negligence and the injury.' " *Al-Hourani v. Ashley*, 126 N.C. App. 519, 523, 485 S.E.2d 887, 890 (1997) (quoting *Reynolds v. Murph*, 241 N.C. 60, 64, 84 S.E.2d 273, 275-76 (1954)). Since we cannot say, based solely on the allegations in the complaint, that there is "no causal connection" between Patton's and Guzman's failure to report the students' plan to shoot someone and plaintiff Kathlyn Stein's shooting, plaintiffs' allegation of proximate causation is sufficient to defeat the motion to dismiss. *Compare id.* ("[W]e find no causal connection between the [gas station and oil company] defendants' allegedly selling the gasoline into an antifreeze container in violation of G.S. § 119-43, and the criminal acts of dousing and burning plaintiff's brother. . . . The tragic consequences in this case did not 'flow' from the sale of gasoline into an unapproved container.").

Because this case is before this Court on a motion to dismiss and because the complaint sufficiently alleges a duty, a breach of that duty, and proximate causation, we hold that the trial court erred in granting the Blue Ridge defendants' motion to dismiss. As our Supreme Court stated in *Sutton*, "[t]o dismiss the action now would be 'to go too fast too soon.' " 277 N.C. at 108, 176 S.E.2d at 169 (quoting *Barber v. Motor Vessel "Blue Cat,"* 372 F.2d 626, 629 (5th Cir. 1967)). "By utilizing the discovery rules defendants may ascertain more precisely the details of plaintiff[s'] claim and whether [they] can prove facts which will entitle [them] to have a jury decide the merits of [their] claim." *Id.* at 109, 176 S.E.2d at 170.

Conclusion

Plaintiffs' appeal of the trial court's order dismissing the Buncombe County Board is not properly before this Court and is dismissed. The trial court did not err in granting the Asheville Board's motion to dismiss based on the Industrial Commission's having exclusive jurisdiction of plaintiffs' claims against the Asheville Board. We hold, however, that the trial court erred in granting the Blue Ridge defendants' motion to dismiss and remand for further proceedings in accordance with this opinion.

Dismissed in part; affirmed in part; reversed in part.

Judge HUDSON concurs.

Judge TYSON concurs in part and dissents in part in a separate opinion.

TYSON, Judge concurring in part, dissenting in part.

I fully concur in the majority's reasoning and result to dismiss plaintiffs' appeal from the dismissal of the Buncombe County Board and to affirm the trial court's dismissal of the Asheville Board. I disagree with the majority's decision to reverse the trial court's order granting the Blue Ridge defendants' motion to dismiss. I respectfully dissent.

I. Negligence

Plaintiffs contend and the majority's opinion concludes the complaint sufficiently alleges a negligence action against the Blue Ridge defendants. I disagree.

> A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting "the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory."

Forsyth Memorial Hospital v. Armstrong World Industries Inc., 336 N.C. 438, 442, 444 S.E.2d 423, 425-26 (1994) (alteration in original) (quoting *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991)). To state a claim for relief for negligence, a plaintiff's complaint must allege: (1) the defendant owed the plaintiff a duty; (2) the defendant breached that duty; and (3) the defendant's breach was the

actual and proximate cause of the plaintiff's injury. *Williamson v. Liptzin*, 141 N.C. App. 1, 10, 539 S.E.2d 313, 319 (2000) (quoting *Beaver v. Hancock*, 72 N.C. App. 306, 311, 324 S.E.2d 294, 298 (1985)), *appeal dismissed*, 353 N.C. 456, 548 S.E.2d 734 (2001); *see also Tise v. Yates Constr. Co.*, 345 N.C. 456, 460, 480 S.E.2d 677, 680 (1997). The majority's opinion correctly states the proper standard of review to be applied on a Rule 12(b)(6) motion to dismiss. The trial court properly applied that standard, and its order should be affirmed.

A. Duty

"The general rule is that there 'is no duty to protect others against harm from third persons' " unless a special relationship exists between the parties. *King v. Durham Co. Mental Health Authority*, 113 N.C. App. 341, 345, 439 S.E.2d 771, 774, *disc. rev. denied*, 336 N.C. 316, 445 S.E.2d 396 (1994) (quoting W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* § 56, at 385 (5th ed. 1984)) (citations omitted). When a special relationship exists, "there is a duty upon the actor to control the third person's conduct, and to guard other persons against his dangerous propensities." *King*, 113 N.C. App. at 345-46, 439 S.E.2d at 774 (quotations omitted).

As listed in *King*, examples of "special relationships" recognized by North Carolina courts include: (1) parent and child, *Moore v. Crumpton*, 55 N.C. App. 398, 403-04, 285 S.E.2d 842, 845, *modified*, 306 N.C. 618, 295 S.E.2d 436 (1982); (2) master and servant, *Vaughn v. Dep't. of Human Resources*, 296 N.C. 683, 686, 252 S.E.2d 792, 795 (1979); (3) landowner and licensee; (4) custodian and prisoner, *Hull v. Oldham*, 104 N.C. App. 29, 38, 407 S.E.2d 611, 616, *disc. rev. denied*, 330 N.C. 441, 412 S.E.2d 72 (1991); and (5) mental patient and hospital, *Pangburn v. Saad*, 73 N.C. App. 336, 347-48, 326 S.E.2d 365, 372-73 (1985). *See King*, 113 N.C. App. at 346, 439 S.E.2d at 774 (other citations omitted). "In each example, 'the chief factors justifying imposition of liability are 1) the ability to control the person and 2) knowledge of the person's propensity for violence.' " *King*, 113 N.C. App. at 346, 439 S.E.2d at 774 (quoting *Abernathy v. United States*, 773 F.2d 184, 189 (8th Cir. 1985)) (other citations omitted). Here, the parties do not dispute the Blue Ridge defendants' "knowledge of [the juveniles'] propensity for violence." *Id.* The dispositive issue becomes whether Blue Ridge had "the ability to control" the juveniles when plaintiffs were injured. *Id.*

In *King*, the victim was shot by a juvenile with a known history of committing violent crimes. 113 N.C. App. at 342, 439 S.E.2d at 772.

The juvenile resided in a facility that provided treatment to "Willie M." class members. *Id.* The facility was supervised by the Durham County Mental Health Department, and the juvenile was required to stay at the facility at all times. *Id.* at 343, 439 S.E.2d at 772. Durham County Mental Health failed to inform the police when he escaped from the facility. *Id.* at 343, 439 S.E.2d at 773. The juvenile killed Sherri Sparrow King after his escape. *Id.* King's estate brought an action against Durham County Mental Health alleging its negligence caused the victim's death. *Id.* We held the defendant did not have custody of the juvenile or the ability to control him at the time he killed King, because there was "no evidence of a court order requiring his participation in the Willie M. program, [therefore, the defendants] had no legal right to mandate his return to the facility." *Id.* at 347, 439 S.E.2d at 775. In affirming summary judgment for the defendants, we concluded, "[Durham Mental Health] cannot be held liable for the conduct of [the juvenile] and are entitled to judgment as a matter of law." *Id.*

The majority's opinion at bar attempts to distinguish *King* on the grounds that it ruled on a motion for summary judgment and not a motion to dismiss. However, the majority's opinion fails to explain how the Blue Ridge defendants owed these plaintiffs a duty "as a matter of law." *Id.*

Here, plaintiffs' complaint alleges facts, which taken as true, conclusively establish that the Blue Ridge defendants did not have "the ability or right to control" the juveniles when the violent acts occurred. *Id.* Plaintiffs' complaint alleges, "Bus driver Nancy Patton, bus monitor Gail Guzman, Cooperative Learning Center principal Keith Roden . . . and other authorities associated with defendants had custody of [the juveniles] and/or had the ability or right to control them at the pertinent time." Plaintiffs' complaint also alleges that CLC was a school operated by the Blue Ridge defendants and that Patton and Guzman were employed by them, Buncombe County Schools, and Asheville City Schools. Plaintiffs' complaint does not state or define the meaning of "at the pertinent time." In a 12(b)(6) motion to dismiss, these allegations are taken as true and show the Blue Ridge defendants had control over the juveniles when the conversation occurred on the school bus. The complaint shows that the juveniles used a gun C.M. "had at home under his mattress." This allegation shows that the Blue Ridge defendants had neither custody over the juveniles nor the ability to control them at the time Stein was shot.

Our case law establishes that "the pertinent time" in a negligence action requires consideration of whether the Blue Ridge defendants had custody over or the right to control the juveniles when plaintiffs suffered injury: the time of the shooting. *See O'Connor v. Corbett Lumber Corp.*, 84 N.C. App. 178, 352 S.E.2d 267 (1987) (employer did not have requisite level of custody over the work release inmate employee to create a special relationship—employer had no duty to protect the public outside the scope of employment, which occurred while the perpetrator was not on the job or the job site); *see also King*, 113 N.C. App. at 346-47, 439 S.E.2d at 774 (held no liability because no special relationship existed where the treatment facility did not have custody, ability, or right to control the perpetrator after he left the facility); *Sage v. U.S.*, 974 F. Supp. 851, 860 (E.D. Va., 1997) (holding a "confinement setting" and "heightened obligation to monitor and direct the third party's movements" are required to show ability to control) (citing *Nasser v. Parker*, 455 S.E.2d 502 (Va. 1995)).

Plaintiffs' allegations conclusively establish that the Blue Ridge defendants did *not* possess or exercise any ability or right to control defendants during the time, place, or manner where and when plaintiffs were injured. Plaintiffs allege: (1) the juveniles "were at all times students at CLC and traveled to and from CLC on a public school bus . . . ;" (2) "at approximately 7:00-8:15 p.m. on March 17, 1998, [the juveniles and two others] were armed with the loaded handgun [and] began stopping cars at the intersection . . . near Memorial Mission Hospital in Asheville . . . ;" and (3) "at approximately 8:15 p.m., [J.B.] used the loaded handgun provided by [C.N.] to shoot Stein in the head . . . ." None of plaintiffs' allegations assert that at the time the shooting occurred, the juveniles were traveling on the school bus, attending CLC or any other activity within the Blue Ridge system, "skipping" a required activity conducted by the Blue Ridge defendants, or under the supervision, custody, or control of the Blue Ridge defendants or any of its employees.

Plaintiffs' complaint fails to state a claim for negligence against the Blue Ridge defendants "as a matter of law." *King*, 113 N.C. App. at 347, 439 S.E.2d at 775. It fails to allege the Blue Ridge defendants had custody or control at the time the incident occurred to show a duty owed to plaintiffs. As plaintiffs' complaint fails to establish the Blue Ridge defendants owed them a duty, the trial court properly granted the Blue Ridge defendants' motion to dismiss. This assignment of error should be overruled.

B. Proximate Cause

Presuming, as the majority's opinion contends, that plaintiffs' complaint establishes the Blue Ridge defendants owed a duty to plaintiffs and breached that duty, the complaint fails to allege that such breach proximately caused plaintiffs' injuries.

Proximate cause is defined as

> a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Williamson, 141 N.C. App. at 10, 539 S.E.2d at 319 (quoting *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984) (citations omitted)). The law does not require a defendant to "foresee events which are *merely possible* but only those which are reasonably foreseeable." *Id.* at 11, 539 S.E.2d at 319 (quoting *Hairston*, 310 N.C. at 234, 311 S.E.2d at 565 (emphasis added) (citations omitted)). As "every person has the right to presume that every other person will perform his duty and obey the law," criminal acts are not presumed to be foreseeable. *Wilkinson v. R.R.*, 174 N.C. 761, 766, 94 S.E. 521, 523 (1917) (quoting Cyc., vol. 29, p. 516; *Wyatt v. R.R.*, 156 N.C. 313, [72 S.E. 383 (1911)]).

In addition to foreseeability, proximate cause requires a consideration of

> whether the cause is, in the usual judgment of mankind, likely to produce the result; whether the relationship between cause and effect is too attenuated; whether there is a direct connection without intervening causes; whether the cause was a substantial factor in bringing about the result; and whether there was a natural and continuous sequence between the cause and the result.

Williamson, 141 N.C. App. at 11, 539 S.E.2d at 319-20 (quoting *Wyatt v. Gilmore*, 57 N.C. App. 57, 59, 290 S.E.2d 790, 791 (1982)).

Plaintiffs' complaint alleges Guzman overheard the conversation between the juveniles "one week prior to the March 17, 1998 shooting." Regarding foreseeability to the Blue Ridge defendants, plaintiffs' complaint fails to allege any specific plans overheard by the Blue Ridge defendants or their employees beyond the general comments,

"Let's rob somebody;" "I have the gun;" and "I'll kill them." These statements appear to be general threats that are not specific to any time, place, or intended victim, and are not a reasonably foreseeable criminal act against Stein. Under the majority's analysis, these statements are sufficient to establish a duty, proximate cause, and foreseeability on the Blue Ridge defendants to survive a motion to dismiss. If so, the Blue Ridge defendants would be liable to any victim, at any time or place, whom the juveniles might eventually "rob" or "kill." The majority's result establishes a duty to the whole world, imposes strict liability, and also eliminates the presumption that criminal acts are not foreseeable. *See Wilkinson*, 174 N.C. at 766, 94 S.E. 523. Plaintiffs also failed to allege either Patton or Guzman were aware of any specific violent acts committed by the juveniles. *Williamson*, 141 N.C. App. at 11, 539 S.E.2d at 319.

C. Failure to Join

The Blue Ridge defendants' liability to plaintiffs, if any, is derivative of the acts of its alleged employees. Here, plaintiffs failed to join either Patton or Guzman, the juveniles' parents, or the other perpetrators as named defendants to this action.

Plaintiffs' failure to allege the juveniles were in custody or under the control of the Blue Ridge defendants for the entire period between the conversation on the school bus and the time of the shooting more than one week later allows opportunity for numerous "intervening causes." *Id.* Plaintiffs' complaint fails to plead a "natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries . . . ." *Id.* at 10, 539 S.E.2d at 319.

Justice Cardozo stated, long ago in a case that is required hornbook law for all first-year law students, "One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person." *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 101, *reh'g denied*, 164 N.E. 564 (N.Y. 1928).

> Proof of negligence in the air, so to speak, will not do. . . . In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury.

Id. at 99-100 (quotations and citations omitted). Plaintiffs' complaint fails to show that the Blue Ridge defendants, aside from any duties or

allegations pertaining to the other defendants, had the ability to either "avert[] or avoid[]" the injury. *Id.*

Plaintiffs failed to allege the Blue Ridge defendants' breach of a duty, if any, proximately caused plaintiffs' injuries. The trial court properly dismissed plaintiffs' complaint for failure to state a claim of negligence.

II. Conclusion

I concur in the majority's opinion as it: (1) dismisses plaintiffs' appeal of the trial court's order dismissing the Buncombe County Board because the appeal is not properly before this Court; and (2) affirms the Asheville Board's motion to dismiss because the Industrial Commission has exclusive jurisdiction of plaintiffs' claims against the City Board.

The trial court did not err in granting the Blue Ridge defendants' motion to dismiss, and its order should be affirmed. Plaintiffs' complaint failed to state a claim for negligence against the Blue Ridge defendants by failing to allege a duty owed, breach of that duty, or proximate cause. Further, plaintiffs failed to join the employees alleged to be responsible or the parents of the juveniles who perpetrated the acts and caused the injuries to plaintiffs.

Plaintiff Kathlyn Stein suffered serious and lifelong injuries and could have rightfully asserted her claims against all those individuals who caused her injuries. Her complaint fails to assert her claims against the proper parties. "This Court should not, however, permit these 'bad facts' to lure it into making 'bad law.' " *N.C. Baptist Hospitals, Inc. v. Mitchell*, 323 N.C. 528, 539, 374 S.E.2d 844, 850 (1988). I respectfully dissent.

STATE OF NORTH CAROLINA v. JAMES EDWARD THAGGARD

No. COA04-368

(Filed 1 February 2005)

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

Defendant voluntarily abandoned two assignments of error in a statutory rape, statutory sexual offense, and taking indecent liberties case related to admission of evidence concerning the vic-

tims' past sexual conduct and that sustained the State's objection to character testimony about one of the victims, because defendant failed to argue these issues in his brief.

2. Evidence— prior crimes or bad acts—similar sex offenses—temporal proximity—opportunity—common scheme or modus operandi—identity

The trial court did not abuse its discretion in a statutory rape, statutory sexual offense, and taking indecent liberties case by allowing two witnesses who were not the victims in this case to testify that they had been sexually abused by defendant, because: (1) the alleged incidents involving the witnesses occurred in 1999 and 2000, while the events at bar occurred in early to mid 2001; (2) the witnesses were the same age as the victims; (3) in both situations, defendant frequently visited or stayed overnight at the homes where the incidents occurred; (4) all four girls were assaulted as they slept or were about to fall asleep while others were present elsewhere in the residence; (5) the two sets of victims are sisters, and the oldest was abused first in both cases; and (6) based on the above similarities and the temporal proximity, the testimony was proper to show opportunity, a common scheme or modus operandi, and the assailant's identity.

3. Evidence— officer's testimony—prior consistent statements—corroboration

The trial court did not err in a statutory rape, statutory sexual offense, and taking indecent liberties case by permitting an investigator to testify that the two minor victims' in-court testimony was consistent with their previous statements to the investigator, because: (1) a review of the investigator's testimony with the victims' in-court testimony shows his testimony to be corroborative; (2) the differences that defendant cites in the statements are not appreciable variances and instead appeared to be either where the investigator did not receive all the details during the initial meetings or the order of details in the victims' stories varied between their initial statements and their testimony at trial; and (3) any disparities affect the weight, not the admissibility, of the statements and the witnesses' credibility.

4. Evidence— opinion testimony—medical expert—sexual abuse—no prejudicial error

Although the trial court erred in a statutory rape, statutory sexual offense, and taking indecent liberties case by admitting

opinion testimony from a medical expert, a forensic pediatrician, that the victims were truthful and did not just get together to tell each other what to say, the error was not prejudicial to defendant because the State presented other overwhelming evidence against defendant including that: (1) the victims' testimony was consistent with statements made to parents, counselors, social workers, law enforcement officers, and the pediatrician as shown through corroborative testimony, (2) the pediatrician's medical examinations discovered numerous physical and emotional injuries consistent with the victims' histories and indicative of sexual abuse; and (3) both victims experienced noticeable behavioral changes following the incidents.

5. Evidence— prior crimes or bad acts—indecent liberties— no prejudicial error

Although the trial court erred in a statutory rape, statutory sexual offense, and taking indecent liberties case by allowing the State to ask a defense witness, defendant's former girlfriend, whether she knew that defendant had previously been convicted of taking indecent liberties with a child, this error was not prejudicial to defendant even though defendant contends it made him change trial tactics and forced him to testify because: (1) the State presented a wealth of testimony and physical evidence implicating defendant as the perpetrator of the crimes against the two victims; (2) the trial court gave a lengthy limiting instruction prior to two witnesses testifying about defendant's prior sexual abuse of them that the evidence could not be used to show defendant acted in conformity with it to commit the crimes; and (3) the court's jury instructions prior to deliberation ensured that any evidence pertaining to defendant's prior convictions of taking indecent liberties with children was to be considered solely for the N.C.G.S. § 8C-1, Rule 404(b) factors of identity, motive, intent, or common scheme.

6. Evidence— victims' juvenile records—failure to grant complete access

The trial court did not err in a statutory rape, statutory sexual offense, and taking indecent liberties case by failing to allow defendant to gain complete access to the victims' juvenile records, because: (1) the trial court reviewed the victims' juvenile records upon defendant's motion and determined that there was nothing defendant was entitled to see; (2) the records do not contain information material to defendant's case and no reasonable

probability exists that the result of the proceeding would have been different; and (3) the documentation further corroborated the facts of the case.

7. Indecent Liberties; Rape; Sexual Offenses— statutory rape—statutory sexual offense—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss the charges of statutory rape, statutory sexual offense, and taking indecent liberties with a minor based on alleged insufficiency of the evidence, because: (1) in regard to the rape and sexual offense charges, the record indicated that the pertinent victim was fourteen years old, defendant was thirty-six years old, they were not lawfully married at the time of the incident, and defendant forced the victim to engage in vaginal and anal intercourse; (2) in regard to the taking indecent liberties charge, the pertinent victim was twelve and defendant was over the age of sixteen and at least five years older than the victim, the victim awoke after passing out to find defendant on top of her, both the victim's and defendant's pants and underwear were pulled down, the victim later experienced pain in her vaginal and anal areas, and a forensic pediatrician determined from a medical exam that the victim was both physically and mentally injured by nonconsensual sexual abuse; and (3) although defendant contends the victims' and the corroborative testimonies are contradictory and lack credibility, the credibility and weight given to a witness's testimony is determined by the jury and not the court.

Appeal by defendant from judgments entered 3 November 2003 by Judge James Floyd Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 18 November 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Christine M. Ryan, for the State.

Terry W. Alford, for defendant-appellant.

TYSON, Judge.

James Edward Thaggard ("defendant") appeals from judgments entered after a jury found him to be guilty of: (1) statutory rape; (2) statutory sexual offense; and (3) taking indecent liberties with a child. We find no prejudicial error.

I. Background

Sisters Jo.P., age fourteen, and Je.P., age twelve (collectively, "the victims") lived with their father and brother in a three bedroom mobile home in Cumberland County. Defendant was a friend of the victims' father and occasionally spent the night with them. In August 2001, defendant was at the home watching television in the living room with the victims and several others. Defendant left and went to their brother's bedroom. Jo.P. left the living room to take a shower. After her shower, she went to her bedroom and laid face down on her bed.

The State's evidence tended to show that after Jo.P. laid on her bed, she felt someone crawl up behind her, put a gun to her head, and say he would shoot her if she made a sound. Jo.P. could not see the person, but recognized defendant's voice. The assailant removed Jo.P.'s underwear, pulled up her nightgown, and proceeded to engage in anal and vaginal intercourse with her. After the assaults were completed, the assailant got off of the bed and walked out of the bedroom. Jo.P. turned to see who the assailant was and recognized defendant. Jo.P. first told her sister, Je.P., about the assault a week later, and told the Cumberland County Department of Social Services ("DSS") and the police in April 2002.

Later that summer, the sisters, brother, and father held a cookout at their mobile home. Je.P. drank liquor at her brother's request and became dizzy. She went inside, laid down on the couch, and passed out. When she awoke, defendant was on top of her. Je.P.'s and defendant's pants and underwear were pulled down. She fell back asleep until her brother came into the mobile home and began arguing with defendant. Je.P. felt pain in her vaginal and anal areas. Je.P. told her sister and her guardian *ad litem* about the assault.

In April 2002, DSS conducted a neglect investigation of the sisters. The investigator, Edward Morley ("Investigator Morley"), met with Jo.P. and Je.P. separately, and each described the above events. A medical exam was performed by Dr. Sharon Cooper ("Dr. Cooper") on the victims. Tears and scarring consistent with sexual trauma were found in Jo.P.'s vagina and anus. A similar injury was found in Je.P.'s vagina. Dr. Cooper diagnosed the victims with injuries consistent with a non-consensual sexual assault.

On 9 December 2002, defendant was indicted for one count of statutory rape of a person who is 13, 14, or 15 years old, one count of

statutory sexual offense of a person who is 13, 14, or 15 years old, and one count of taking indecent liberties with children with respect to Jo.P. Defendant was also indicted for one count of statutory rape and one count of taking indecent liberties with children with respect to Je.P. Defendant was tried before a jury during the 27 October 2003 Criminal Session of the Superior Court of Cumberland County.

Defendant's former girlfriend, Brenda Murray ("Murray"), testified she knew the victims and their reputations as "liars" in the community. Defendant testified the victims conspired against him. He also admitted to being previously convicted of two counts of taking indecent liberties with minors.

The jury found defendant to be not guilty of: (1) taking indecent liberties with a child for Jo.P.; and (2) first-degree statutory rape of Je.P. Defendant was found to be guilty of: (1) statutory rape of Jo.P.; (2) statutory sexual offense of Jo.P.; and (3) taking indecent liberties with a child for Je.P. The trial court sentenced defendant to three consecutive active sentences of: (1) not less than 336 nor more than 413 months for statutory rape; (2) not less than 336 nor more than 413 months for statutory sex offense; and (3) not less than twenty-one nor more than twenty-six months for indecent liberties. Defendant appeals.

II. Issues

The issues on appeal are whether the trial court erred in: (1) not allowing admission of evidence concerning the victims' past sexual conduct; (2) allowing two witnesses to testify that they were sexually abused by defendant when they were minors; (3) allowing Investigator Morley to testify that Jo.P.'s testimony was consistent with prior statements she had made to him; (4) allowing the State's medical expert to testify that she did not believe the two sisters conspired together to lie against defendant; (5) permitting the State to ask defendant's character witness about defendant's prior convictions; (6) sustaining the State's objection to character testimony about Jo.P.; (7) not providing defendant access to the victims' juvenile files; and (8) failing to dismiss the charges against defendant for insufficiency of the evidence.

III. Abandonment of Assignments of Error

[1] Defendant voluntarily abandoned assignment of error number 1, not allowing admission of evidence concerning the victims' past sexual conduct; and number six, sustaining the State's objection

to character testimony about Jo.P., by failing to argue them in his brief. N.C.R. App. P. 10 (2004); N.C.R. App. P. 2 (2004). We decline to review these abandoned assignments of error and dismiss. N.C.R. App. P. 2.

IV. Other Crimes, Wrongs, or Acts

[2] Defendant asserts the trial court erred in allowing two witnesses who were not the victims to testify that they had been sexually abused by defendant. We disagree.

Rule 404(b) of the North Carolina Rules of Evidence states in part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). The admissibility of 404(b) evidence is "subject to the weighing of probative value versus unfair prejudice mandated by Rule 403." *State v. Agee*, 326 N.C. 542, 549, 391 S.E.2d 171, 175 (1990); N.C. Gen. Stat. § 8C-1, Rule 403 (2003) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of unfair delay, waste of time, or needless presentation of cumulative evidence."). Rule 404(b) is a rule of inclusion, not exclusion. *Agee*, 326 N.C. at 550, 391 S.E.2d at 175.

The balancing of these factors lies "within 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)), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001).

Here, the State offered the testimonies of C.W. and N.W., defendant's nieces. C.W. testified that when she was fourteen, she spent the night at her grandmother's house. Defendant stopped by the house while she was asleep. C.W. stated that she awoke to discover that defendant "had put his mouth on my vaginal area . . . and had his

tongue down there." Defendant asked C.W. if she wanted to have sex, then "stuck his finger . . . in my vaginal area."

N.W. testified that when she was between eleven and twelve years old, she awoke one night as defendant was trying to remove her pants. She tried to push and kick him away, but he succeeded in rubbing her buttocks with his hands before she got up and left the room.

The trial court specifically instructed the jury before the witnesses testified that they could consider this evidence only to show

> the identity of a person who has committed a crime that's charged in the case, to show that the defendant had the motive for commission of a crime that is charged in this case, to show that a defendant had the intent, which is a necessary element of a crime that might be charged in this case or to show that there existed in the mind of a defendant a plan, a scheme or a system designed to involve the elements involved in the crime charged in this case . . . . I want you to . . . keep these limitations in mind.

Defendant participated in crafting this instruction. He received three opportunities to cross-examine C.W. and cross-examined N.W. once.

North Carolina's appellate courts have been "markedly liberal in admitting evidence of similar sex offenses to show one of the purposes enumerated in Rule 404(b)." *State v. Scott*, 318 N.C. 237, 247, 347 S.E.2d 414, 419 (1986) (citations omitted). Our Supreme Court "has been very liberal in admitting evidence of similar sex crimes in construing the exceptions to the general rule." *State v. Greene*, 294 N.C. 418, 423, 241 S.E.2d 662, 665 (1978) (citing *State v. Arnold*, 284 N.C. 41, 199 S.E.2d 423 (1973); *State v. Davis*, 229 N.C. 386, 50 S.E.2d 37 (1948); *State v. Biggs*, 224 N.C. 722, 32 S.E.2d 352 (1944)).

This Court has also applied a liberal interpretation of Rule 404(b). *See State v. Carpenter*, 147 N.C. App. 386, 392, 556 S.E.2d 316, 321 (2001) (where this court permitted evidence of prior bad sex acts to show the defendant "used ministry and church activities as an excuse for spending time" with his previous victims, "did similar activities" with the victims, and sexually abused the victims in similar areas and by using a similar manner), *cert. denied*, 355 N.C. 217, 560 S.E.2d 143, *cert. denied*, 536 U.S. 967, 153 L. Ed. 2d 851, *reh'g denied*, 536 U.S. 983, 153 L. Ed. 2d 885 (2002); *State v. Patterson*, 149 N.C. App.

354, 362-64, 562 S.E.2d 321, 326-27 (2002) (affirming trial court's admission of evidence showing prior bad acts by defendant who met his victims at skating rinks, invited the victims to his home, and provided them drugs and alcohol); *State v. Brothers*, 151 N.C. App. 71, 76-77, 564 S.E.2d 603, 607 (2002) (noting prior bad acts need not be " 'unique or bizarre' " and it was not error to admit evidence showing the defendant's victims were the same age, the acts occurred under similar circumstances, the defendant used a similar manner to commit the acts, and the defendant was the stepfather to both victims), *cert. denied*, 356 N.C. 681, 577 S.E.2d 895 (2003).

"[S]uch evidence is relevant and admissible so long as the incidents are sufficiently similar and not too remote." *State v. Blackwell*, 133 N.C. App. 31, 35, 514 S.E.2d 116, 119 (citing *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247-48 (1987)), *cert. denied*, 350 N.C. 595, 537 S.E.2d 483 (1999); *see also State v. Smith*, 152 N.C. App. 514, 527, 568 S.E.2d 289 (2002) ("The use of evidence permitted under Rule 404(b) is guided by two constraints: similarity and temporal proximity.") (citation omitted).

The alleged incidents involving C.W. and N.W. occurred in 1999 and 2000, while the events at bar occurred in early to mid 2001. Je.P. and N.W. were both about twelve years old, and Jo.P. and C.W. were fourteen years old. In both situations, defendant frequently visited or stayed overnight at the homes where the incidents occurred. All four girls were assaulted as they slept or were about to fall asleep while others were present elsewhere in the residence. The two sets of victims are sisters, and the oldest was the abused first in both cases.

Based on the above similarities and the temporal proximity, we conclude the admission of C.W. and N.W.'s testimony was for proper purposes: to show opportunity, a common scheme or *modus operandi*, and the assailant's identity. Although differences exist in the four assaults, defendant failed to show that the trial court abused its discretion by allowing the testimony. This assignment of error is overruled.

V. Corroborative Witness Testimony

[3] Defendant contends the trial court erred in permitting a witness to testify that the victims' testimony was consistent with what they told him during an earlier conversation. We disagree.

Our Supreme Court has held that a witness's prior consistent statements may be admissible to corroborate the witness's in-court

testimony. *State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000). To constitute corroborative evidence, "the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony." *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573 (1986).

The trial court possesses broad discretion in deciding whether a prior consistent statement may be admitted for corroboration. *State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 513 (1998) (citing *State v. Levan*, 326 N.C. 155, 388 S.E.2d 429 (1990)), *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001), *cert. denied*, 357 N.C. 579, 589 S.E.2d 130 (2003). The statements must be "generally consistent" with one another. *State v. Britt*, 291 N.C. 528, 535, 231 S.E.2d 644, 650 (1977). "Slight variations will not render the statements inadmissible, but such variations only affect the credibility of the statement," not its admissibility. *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983) (citing *Britt*, 291 N.C. at 528, 231 S.E.2d at 644). The State may not proffer evidence of prior statements of a witness that directly contradict that witness's trial testimony. *Gell*, 351 N.C. at 204, 524 S.E.2d at 340.

Here, defendant assigns error to Investigator Morley's testimony that the victims' in-court testimony was consistent with their earlier statements to him. Defendant argues four discrepancies exist between the victims' statements to Investigator Morley and their testimony in court. First, Investigator Morley testified that Je.P. complained that "[defendant] tried to touch her and that he was a pervert . . . and that he had also tried to touch her sister." Je.P. did not mention to Investigator Morley "*at that time*" that she awoke to find defendant on top of her. Second, Jo.P. initially told Investigator Morley that defendant came up behind her and took her clothes off while she was standing. She then immediately corrected herself to say that she was lying on the bed during the entire incident. Third, Jo.P. did not tell Investigator Morley that she saw defendant leave the room after the assault. Fourth, Investigator Morley testified that Jo.P. stated defendant penetrated her vaginally first, then anally, where Jo.P. testified to the reverse order.

A careful review of Investigator Morley's testimony with the victims' in-court testimony shows them to be corroborative. The differences that defendant cites are not appreciable variances. This was not a situation where multiple, divergent stories were told. Rather,

the differences appeared to be either where Investigator Morley did not receive all the details during the initial meetings or the order of details in the victims' stories varied between their initial statements and their testimony at trial. *See State v. Harrison*, 328 N.C. 678, 681-82, 403 S.E.2d 301, 303-04 (1991) (slight variances in corroborative testimony go to credibility, not admissibility). Considered in totality, Investigator Morley's testimony of the victims' statements to him were substantially consistent with that of the victims' in-court testimony. Any disparities affect the weight, not the admissibility, of the statements and the witnesses' credibility. *Britt*, 291 N.C. at 535, 231 S.E.2d at 650. This assignment of error is overruled.

VI. Medical Expert Opinion Testimony

[4] Defendant argues the trial court committed prejudicial error by admitting opinion testimony from a medical expert that the victims were truthful. We agree, but find the error to be non-prejudicial to defendant.

A. Expert Opinion on Witness Credibility

Our Supreme Court has held that under Rules 405(a) and 608(a) of the North Carolina Rules of Evidence, "an expert witness may not testify that the prosecuting child-witness in a sexual abuse trial is believable, *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986), or that the child is not lying about the alleged sexual assault, *State v. Heath*, 316 N.C. 337, 341 S.E.2d 565 (1986)." *State v. Baymon*, 336 N.C. 748, 752, 446 S.E.2d 1, 3 (1994); *see also* N.C. Gen. Stat. § 8C-1, Rule 405(a) (2003); N.C. Gen. Stat. § 8C-1, Rule 608(a) (2003).

However, a trial court may permit otherwise inadmissible evidence to be admitted if the opposing party opens the door through cross-examination of the witness. *Baymon*, 336 N.C. at 752, 446 S.E.2d at 3. "Opening the door" is the principle where one party introduces evidence of a particular fact and the opposing party may introduce evidence to explain or rebut it, even though the rebuttal evidence would be incompetent or irrelevant, if offered initially. *Id.* at 752-53, 446 S.E.2d at 3 (citations omitted).

Here, Dr. Cooper, a forensic pediatrician, was tendered by the State as a witness. The Court recognized Dr. Cooper as "an expert in the field of child sexual abuse and child sexual evaluations." She treated both victims after removal from their father's house. Dr. Cooper explained the histories as told to her by the victims, social workers, and counselors. She further discussed the physical exami-

nations she performed on the victims and existing behavioral disorders caused by the incidents. Based on the histories, physical examinations, and behavioral issues, Dr. Cooper diagnosed Jo.P. and Je.P. as victims of sexual assault, sexual exploitation, and post-traumatic stress disorder.

Following Dr. Cooper's explanation of her diagnosis of the victims, the State asked on direct examination, "Now, Dr. Cooper, based on your training and experience and your examination of the two girls, [Jo.P.] and [Je.P.], do you think that the two girls just got together and told each other what to say to you?" Following an objection by defendant, which the trial court overruled, Dr. Cooper responded, "No. No, I don't." Dr. Cooper then proceeded to discuss the basis of her opinion.

The State's question and Dr. Cooper's answer speak directly to the credibility of the victims' testimony. This testimony was an impermissible comment by an expert medical witness on the credibility of the two prosecuting witnesses. This evidence is allowed only if defendant "opened the door" by addressing the victims' credibility on cross-examination. *See Baymon*, 336 N.C. at 752-53, 446 S.E.2d at 3 (citations omitted). This opinion was expressed on direct examination of Dr. Cooper during the State's case-in-chief before defendant had the opportunity to "open the door." Admission of Dr. Cooper's opinion that she did not believe "the two girls just got together and told each other what to say" was error.

B. Prejudicial Error

Having found the admission of Dr. Cooper's opinion bolstering the credibility of the victims was error, we now consider whether this error was prejudicial to defendant.

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

N.C. Gen. Stat. § 15A-1443(a) (2003). A reasonable possibility must exist that the evidence complained of contributed to the conviction. *State v. Milby*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981). The burden is on the defendant to show both the error and its prejudicial effect. *Id.*; N.C. Gen. Stat. § 15A-1443(a).

Defendant failed to argue how Dr. Cooper's testimony was prejudicial to his case. After a complete review of the record and transcripts, we do not conclude that Dr. Cooper's opinion testimony concerning the victims' credibility caused a different result at trial. The State presented other overwhelming evidence against defendant. The victims' testimony was consistent with statements made to parents, counselors, social workers, law enforcement officers, and Dr. Cooper, as shown through corroborative testimony. Dr. Cooper's medical examinations discovered numerous physical and emotional injuries consistent with the victims' histories and indicative of sexual abuse. Both victims experienced notable behavioral changes following the incidents.

Based on other overwhelming evidence of defendant's guilt, we hold the admission of Dr. Cooper's opinion was not prejudicial error. This assignment of error is overruled.

VII. Admission of Prior Convictions

[5] Defendant asserts the trial court committed prejudicial error by allowing the State to ask a defense witness whether she knew that defendant had previously been convicted of taking indecent liberties with a child. We disagree.

A. Impeachment of a Witness

The North Carolina Rules of Evidence permit the introduction of opinion and reputation testimony concerning the credibility of a previously heard witness. *State v. Oliver*, 85 N.C. App. 1, 22-23, 354 S.E.2d 527, 539, *cert. denied*, 320 N.C. 174, 358 S.E.2d 64 (1987); N.C. Gen. Stat. § 8C-1, Rule 405; N.C. Gen. Stat. § 8C-1, Rule 608. This method of impeachment must be preceded by a proper foundation showing the "testifying witness has sufficient contact with the community" to qualify as having a credible opinion or knowing what kind of reputation the other witness has. *State v. Morrison*, 84 N.C. App. 41, 47-48, 351 S.E.2d 810, 814 (citing *State v. Sidden*, 315 N.C. 539, 340 S.E.2d 340 (1986); *State v. McEachern*, 283 N.C. 57, 194 S.E.2d 787 (1973)), *cert. denied*, 319 N.C. 408, 354 S.E.2d 724 (1987).

Here, the State offered the testimony of both victims and additional corroborative evidence from other witnesses. In response, defendant offered the testimony of his former girlfriend, Murray, who lived in the same community as the victims and who was familiar with their reputations.

Defendant: Ms. Murray, do you—in the community in which you live, does (sic) [Jo.P.] and [Je.P.] have a reputation as to whether or not they tell the truth?

Murray: Yes.

Defendant: What is that reputation?

Murray: They lie.

Under Rules 405(a) and 608(a) of the North Carolina Rules of Evidence and North Carolina case law, this line of questioning by defendant is permitted as an impeachment of the credibility of the State's two prosecuting witnesses. N.C. Gen. Stat. § 8C-1, Rule 405(a); N.C. Gen. Stat. § 8C-1, Rule 608(a); *see State v. Wise*, 326 N.C. 421, 426, 390 S.E.2d 142, 145, *cert. denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990).

"A defendant in a criminal case is entitled to introduce evidence of his own good character as substantive evidence in his favor." *State v. Gappins*, 320 N.C. 64, 69, 357 S.E.2d 654, 658 (1987) (citations omitted). However, should the defendant proffer such testimony, the State may respond by introducing evidence of his bad character in rebuttal. *Id.*; N.C. Gen. Stat. § 15A-1226(a) (2003).

B. Cross-Examination of Defense Character Witness

In North Carolina, "[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); *see also State v. Freeman*, 319 N.C. 609, 616, 356 S.E.2d 765, 769 (1987). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2003). However, "evidence admissible during cross-examination remains subject to the limits of other rules governing relevancy, including Rules 402, 403, and 404, as well as to Rule 609." *State v. Lynch*, 334 N.C. 402, 411, 432 S.E.2d 349, 353 (1993).

Rule 404(a)(1) of the North Carolina Rules of Evidence limits the evidence the State may offer to "a pertinent trait of [the defendant's] character offered by an accused, or by the prosecution to rebut the same . . . ." N.C. Gen. Stat. § 8C-1, Rule 404(a)(1). Rule 405 provides the options available to proving character:

(a) *Reputation or opinion.*—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.

(b) *Specific instances of conduct.*—In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

N.C. Gen. Stat. § 8C-1, Rule 405. Under Rule 405, the State may question the defense witness's basis for the favorable testimony by asking, "did you know," or "have you heard" about specific instances of the defendant's conduct. *See id.*; *see also* N.C. Gen. Stat. § 8C-1, Rule 608(b) (2003) (cross examination permitted only for questions probative of truthfulness).

Here, Murray testified solely to the credibility of Je.P. and Jo.P. Defendant did not proffer opinion or reputation testimony of his good character through Murray as permitted under Rules 404 and 405. *See State v. Powell*, 340 N.C. 674, 691, 459 S.E.2d 219, 227 (1995), *cert. denied*, 516 U.S. 1060, 133 L. Ed. 2d 688 (1996). Rather, Murray's testimony was offered to impeach the State's primary witnesses. Murray made no mention of defendant's character until the State initiated the inquiry on cross-examination.

Murray:	Me and [defendant] were like off and on. We didn't have a steady relationship. We were off and on.
State:	But you just said you dated him for three and a half years?
Murray:	We did. Everybody have their problems. We break up, go back together, break up, go back together.
State:	So you're saying Mr. Thaggard wouldn't do anything like this?
Murray:	No.
State:	Your Honor, may I approach?

. . . .

State: Ms. Murray—

Murray: Yes.

State: —do you know Mr. Thaggard was convicted—

Defendant: Objection.

The Court: Overruled.

State: —of taking indecent liberties with a child?

Defendant: Objection.

The Court: Overruled.

Murray: Yes.

State: Do you know he was convicted of two counts of taking indecent liberties with a child?

Murray: Yes.

This was an impermissible admission into evidence of defendant's prior convictions. The victims' characters, not defendant's, were placed in issue by Murray's testimony. Any inquiries into Murray's credibility regarding her testimony should have been limited as such. We further note that, in moving the trial court for admission of C.W. and N.W.'s testimony concerning the underlying facts of the prior indecent liberties convictions, the State specifically declared, "The State's not going to attempt to bring in the actual convictions through these young ladies." The trial court erred in permitting the State to introduce evidence of defendant's previous convictions through Murray.

C. Prejudicial Error

Defendant contends the error was prejudicial in that it changed trial tactics and forced him to testify. He further asserts that by taking the stand, he was forced to answer additional questions about the prior convictions, which created a reasonable possibility that the jury returned a different verdict after listening to the prior convictions evidence. *State v. Brown*, 101 N.C. App. 71, 80, 398 S.E.2d 905, 910 (1990). We disagree.

We have already determined the admission of C.W. and N.W.'s testimony concerning the previous sexual abuse by defendant was proper under Rule 404(b). The same reasoning also applies here. The State presented a wealth of testimonial and physical evidence implicating defendant as the perpetrator of the crimes against Je.P. and

Jo.P. The trial court gave a lengthy limiting instruction prior to C.W. and N.W. testifying that the Rule 404(b) evidence could not be used to show defendant acted in conformity with it to commit the crimes at bar. The court's jury instructions prior to deliberation ensured that any evidence pertaining to defendant's prior convictions of taking indecent liberties with children was to be considered solely for the Rule 404(b) factors: identity, motive, intent, or common scheme.

We hold the admission of defendant's prior crimes through Murray and defendant's subsequent decision to testify in response to the evidence is not prejudicial error in light of the considerable amount of other evidence against defendant. In addition, the trial court twice provided the jury limiting instructions concerning the use of the Rule 404(b) evidence.

VIII. Review of Juvenile Records

[6] Defendant argues the trial court erred in not providing him complete access to the victims' juvenile records. We disagree.

In *Pennsylvania v. Ritchie*, the Supreme Court of the United States held that a defendant may request the trial court to conduct an *in camera* review of juvenile records created during the investigation of a victim's complaint. 480 U.S. 39, 58, 94 L. Ed. 2d 40, 58 (1987). The purpose is to protect the defendant's due process rights by access, through the trial court, of files that may contain information material to his guilt or punishment. *Id.*; *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963). However, in the interest of protecting the minors involved, defense counsel is prohibited from personally combing through the files. *Id.*

Our Supreme Court ruled in *State v. Hardy*,

> since realistically a defendant cannot know if a statement of a material State's witness covering the matters testified to at trial would be material and favorable to his defense, *Brady* [373 U.S. 83, 10 L. Ed. 2d 215] and *Agurs* [*United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976)] require the judge to, at a minimum, order an *in camera* inspection and make appropriate findings of fact. As an additional measure, if the judge, after the *in camera* examination, rules against the defendant on his motion, the judge should order the sealed statement placed in the record for appellate review.

293 N.C. 105, 128, 235 S.E.2d 828, 842 (1977) (citing *State v. Chavis*, 24 N.C. App. 148, 176-84, 210 S.E.2d 555, 574-78 (1974)).

On appeal, the appellate court is required to examine the sealed records to determine whether they contain information that is favorable and material to an accused's guilt or punishment. *Ritchie*, 480 U.S. at 57, 94 L. Ed. 2d at 57 (citations omitted). " 'Favorable' evidence includes evidence which tends to exculpate the accused, as well as 'any evidence adversely affecting the credibility of the government's witnesses.' " *State v. McGill*, 141 N.C. App. 98, 102, 539 S.E.2d 351, 355 (2000) (quoting *U.S. v. Trevino*, 89 F.3d 187, 189 (4th Cir. 1996)). Evidence " 'is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Ritchie*, 480 U.S. at 57, 94 L. Ed. 2d at 57 (quoting *U.S. v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985)).

A defendant "is not entitled to a new trial based on trial errors unless such errors were material and prejudicial." *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983). A constitutional rights violation is prejudicial unless this Court "finds that it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b) (2003).

Here, the trial court reviewed the victims' juvenile records upon defendant's motion and determined there was nothing defendant was "entitled to see." Under *Ritchie* and *Hardy*, this Court thoroughly reviewed the juvenile files for both victims provided in the record. The record included medical examination reports, DSS progress updates, evaluations by social workers, updates from foster homes, status reports from Falcon Children's Home, and legal documentation regarding the victims' removal from their father's custody.

We conclude the trial court properly withheld the files from defendant. They do not contain information material to defendant's case and no "reasonable probability" exists that "the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682, 87 L. Ed. 2d at 494. The documentation further corroborated the facts of the case. This assignment of error is overruled.

IX. Motions to Dismiss

[7] Defendant contends the trial court erred in denying his motions to dismiss for insufficiency of the evidence. We disagree.

The standard of review for a motion to dismiss in a criminal trial is, "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. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)).

Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995) (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). If substantial evidence, whether direct, circumstantial, or both, supports a finding that the offense charged has been committed and that the defendant committed it, the motion to dismiss should be denied and the case goes to the jury. *State v. Williams*, 319 N.C. 73, 79, 352 S.E.2d 428, 432 (1987) (quoting *State v. Young*, 312 N.C. 669, 680, 325 S.E.2d 181, 188 (1985)). But, "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." *Powell*, 299 N.C. at 98, 261 S.E.2d at 117 (citations omitted).

In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995). The trial court must also resolve any contradictions in the evidence in the State's favor. *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witnesses' credibility. *Id.* It is concerned "only with the sufficiency of the evidence to carry the case to the jury." *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983). Ultimately, the court must decide whether a reasonable inference of defendant's guilt may be drawn from the circumstances. *Powell*, 299 N.C. at 99, 261 S.E.2d at 117.

The jury found defendant to be guilty of three crimes. The first two were the statutory rape and the sexual offense of Jo.P. North Carolina defines these two crimes as "vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person." N.C. Gen. Stat. § 14-27.7A(a) (2003). The record indicates that Jo.P. was fourteen years old, defendant was thirty-six years old, and they were not lawfully married at the time of the incident. Further evidence in the case, considered in the light most favorable to the State, tended to show

defendant forced Jo.P. to engage in vaginal and anal intercourse. This evidence was based on Jo.P.'s testimony, corroborative testimony by the State's witnesses, and physical evidence.

Third, defendant was convicted of taking indecent liberties with a minor, Je.P. The elements are: (1) the defendant was at least 16 years of age; (2) he was five years older than his victim; (3) he willfully took or attempted to take an indecent liberty with the victim; (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred; and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire. *State v. Rhodes*, 321 N.C. 102, 104-05, 361 S.E.2d 578, 579 (1987) (citing *State v. Hicks*, 79 N.C. App. 599, 339 S.E.2d 806 (1986)); N.C. Gen. Stat. § 14-202.1(a) (2003).

At the time of the alleged incident, Je.P. was twelve and defendant was over the age of sixteen and at least five years older than Je.P. Additional evidence considered in the light most favorable to the State showed Je.P. awoke after passing out to find defendant on top of her. Both Je.P.'s and defendant's pants and underwear were pulled down. Je.P. later experienced pain in her vaginal and anal areas. Dr. Cooper determined from a medical exam that Je.P. was both physically and mentally injured by nonconsensual sexual abuse.

Defendant contends the victims' and the corroborative testimonies are contradictory and lack credibility. Our Supreme Court has held that the credibility of and the weight given to a witness's testimony is determined by the jury, not the court. *State v. Upright*, 72 N.C. App. 94, 100, 323 S.E.2d 479, 484 (1984), *cert. denied*, 313 N.C. 610, 332 S.E.2d 82 (1985); *see also State v. Miller*, 270 N.C. 726, 730-31, 154 S.E.2d 902, 904-05 (1967). Contradictions and inconsistencies are credibility factors the jury considers and are not grounds for dismissal. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (quoting *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982)). Defendant was provided the opportunity and attempted to impeach witnesses through cross-examination, his testimony, and the testimony of his witnesses.

We hold that the State presented sufficient evidence that defendant committed statutory rape and sexual offense against Jo.P. and took indecent liberties with a minor, Je.P., to withstand defendant's motions to dismiss. The record and transcripts are replete with substantial evidence to warrant consideration of the charges by the jury. The jury has the ultimate responsibility of determining

the credibility of and weight given to the evidence. This assignment of error is overruled.

X. Conclusion

The trial court did not err in: (1) allowing C.W. and N.W. to testify about past sexual abuse by defendant; (2) permitting Investigator Morley to testify that Jo.P. and Je.P.'s in-court testimony was consistent with their previous statements to him; (3) not allowing defendant to gain complete access to the victims' juvenile records; and (4) denying defendant's motions to dismiss the charges for insufficiency of the evidence. Defendant did not suffer prejudicial error by the trial court allowing: (1) Dr. Cooper to testify that she did not believe the victims' conspired to testify against defendant; and (2) the State to ask Murray about defendant's prior convictions. Defendant received a fair trial free from prejudicial errors he assigned and argued.

No prejudicial error.

Judges TIMMONS-GOODSON and GEER concur.

SEAN CHRISTIAN SPICER, PLAINTIFF v. KRISTEN LEIPPE SPICER, DEFENDANT

No. COA03-1197

(Filed 1 February 2005)

1. **Child Support, Custody, and Visitation— child support—free housing for disabled parent—included as income**

The trial court did not err in a child support action by including in the disabled father's income the value of the rent-free housing supplied by his parents. Housing is a form of financial support that may be considered in determining the proper amount of child support.

2. **Child Support, Custody, and Visitation— support—trust for disabled parent—nonrecurring income**

The trial court did not err in a child support action by finding that a trust established for a disabled father with proceeds from a settlement after an auto accident was nonrecurring income. In light of the breadth of the definition of income in the Guidelines, the trial court could include the trust as nonrecurring income.

3. Child Support, Custody, and Visitation— child support— principal of disabled father's trust

The trial court did not err by supplementing the funds available for child support by invading the principal of the disabled father's trust.

4. Child Support, Custody, and Visitation— child support— monthly and lump sum payments

The trial court did not err in ordering the father to make both monthly payments and a lump sum payment to be placed in trust for the support of his minor child.

5. Child Support, Custody, and Visitation— child support— child's needs—findings insufficient

A child support order which deviated from the Guidelines was remanded for further findings about the child's specific needs. In the absence of sufficient findings about the child's reasonable needs, it could not be determined whether the lump sum awarded would meet or exceed the child's needs.

6. Child Support, Custody, and Visitation— child support— disabled father—health and related circumstances

The trial court gave sufficient consideration in a child support action to the disabled father's present condition and estate, including his health and other related circumstances. No authority was cited requiring findings about possible future medical expenses.

7. Child Support, Custody, and Visitation— child support— use of formula

On remand of a child support order, the trial court may again use a formula so long as it is based on logic and reason and reaches a result consistent with the child's reasonable needs in light of the parties' accustomed standard of living and the father's ability to pay.

8. Child Support, Custody, and Visitation— child support— attorney fees—determination of hours

The trial court did not abuse its discretion in calculating attorney fees in a child support action. The case was for both support and custody since custody had not been resolved when the support hearing began, and the sole required findings were that the party seeking fees acted in good faith and lacked the

means to defray the suit. The trial court here made the necessary findings, and the number of hours for which counsel was compensated were calculated based on a careful consideration of counsel's affidavit and an extensive discussion with counsel.

Appeal by plaintiff and cross-appeal by defendant from order entered 10 June 2003 by Judge Rebecca T. Tin in Mecklenburg County District Court. Heard in the Court of Appeals 19 May 2004.

Andrew D. Taylor, Jr. & Assoc., by Andrew D. Taylor, Jr.; and Michelle D. Reingold, for plaintiff-appellant.

Ellis M. Bragg, Jr., for defendant-appellee.

GEER, Judge.

In his appeal from a child support order, plaintiff Sean Christian Spicer contends primarily that the trial court erred in concluding that a trust fund established for his support following a disabling automobile accident was non-recurring income within the meaning of the North Carolina Child Support Guidelines, 2005 Ann. R. N.C. 47 (Rev. Oct. 2002) ("the Guidelines") and ordering him to pay $74,722.80 to establish a trust fund for the support of his son. We conclude that the trial court did not err in determining that the settlement was non-recurring income and that it could be used to establish a child support trust. Because, however, the trial court failed to make sufficient findings of fact regarding the reasonable needs of the child, we must remand for further proceedings.

Factual Background

The Spicers were married on 20 June 1998 and their son was born 1 January 1999. At that time, Mr. Spicer, who was the sole financial provider for the family, worked for Time Warner Cable Company, earning approximately $25,000.00 annually. On 1 April 1999, Mr. Spicer was severely injured when a truck swerved into his lane and collided head-on with his vehicle. As a result of his injuries, Mr. Spicer was in a coma for several weeks, was hospitalized for approximately four months, and underwent rehabilitation for approximately one year. Mr. Spicer's cognitive abilities, including his short-term memory, have been severely impaired as a result of his traumatic head injury.

Mr. Spicer ultimately entered into a lump-sum settlement with the company that owned the truck. Mr. Spicer's father, a financial plan-

ner, placed the settlement proceeds in an *inter vivos* family trust, naming Sean Spicer as grantor and himself as trustee. The trust instrument provides that Sean Spicer, as grantor, has the right to "alter, amend, or revoke" the trust agreement "in whole or in part at such time as [he] may see fit by written notice delivered to the Trustee." Although the instrument provides that the trustee may "pay to or for the benefit of [Sean Spicer] . . . such amounts of the income and principal of this trust as [Sean Spicer] may in writing request," it also includes a spendthrift clause. After payments to resolve a medical insurance subrogation claim and for litigation expenses, a balance of $622,690.22 remained in the trust.

The Spicers separated on 27 March 2000, approximately a year after the accident. A final divorce decree was entered 1 June 2001. On 10 July 2001, Mr. Spicer filed a complaint seeking joint custody of his son. On 31 August 2001, Ms. Spicer filed an answer and counterclaim seeking temporary and permanent custody of the child.

A consent order for permanent custody and visitation was entered on 28 March 2003, granting Ms. Spicer permanent custody of the child and granting Mr. Spicer permanent supervised visitation. On 10 June 2003, the trial court entered an order for permanent child support, in which the court (1) applied the Guidelines to Mr. Spicer's recurring income resulting in a child support obligation of $460.02 per month, (2) treated Mr. Spicer's entire trust principal as non-recurring income under the Guidelines, (3) determined that it would be unjust to Mr. Spicer and inappropriate to use the methods specified in the Guidelines to calculate the amount of non-recurring income to be applied toward child support, (4) ordered, based on application of a formula, a lump sum payment of $74,722.80 from the trust principal to be placed in a second trust for the child, and (5) awarded Ms. Spicer $5,583.75 in attorneys' fees and costs. Mr. Spicer has appealed from this order.

Discussion

Under N.C. Gen. Stat. § 50-13.4(c) (2003), a court "shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section." Child support set in accordance with the Guidelines "is conclusively presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support." *Buncombe County ex rel. Blair v. Jackson*, 138 N.C.

App. 284, 287, 531 S.E.2d 240, 243 (2000). The trial court may, however, deviate from the Guidelines if:

> after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate . . . .

N.C. Gen. Stat. § 50-13.4(c). In this case, the trial court applied the Guidelines to Mr. Spicer's recurring income, but decided to deviate from the Guidelines with respect to Mr. Spicer's non-recurring income.

In reviewing child support orders, our review is limited to a determination whether the trial court abused its discretion. *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. *Id.* The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law. *Id.* at 441-42, 567 S.E.2d at 837.

I. APPLICATION OF THE GUIDELINES TO PLAINTIFF'S RECURRING INCOME

[1] In applying the Guidelines to Mr. Spicer's recurring income, the trial court found that Mr. Spicer receives an average monthly gross income of $98.90 from a part-time job, $851.00 from social security disability, $442.00 in social security benefits for his child (as a result of Mr. Spicer's disability), and $221.00 from Time Warner disability. In addition, the trial court found that Mr. Spicer lives with his parents rent-free and that "the benefit of a rent-free residence reduces the Plaintiff's personal living expenses and that the sum of Three Hundred and 00/100 Dollars ($300.00) monthly should be attributed to the Plaintiff as income for this benefit."

Mr. Spicer argues on appeal that this finding represents an improper imputation of income under the Guidelines. In discussing "income" to be used in calculating support, the Guidelines provide:

> (3) *Potential or Imputed Income.* If either parent is voluntarily unemployed or underemployed to the extent that the parent

> cannot provide a minimum level of support for himself or herself and his or her children when he or she is physically and mentally capable of doing so, and the court finds that the parent's voluntary unemployment or underemployment is the result of a parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income. *Potential income may not be imputed to a parent who is physically or mentally incapacited* or is caring for a child who is under the age of three years and for whom child support is being determined.

Guidelines, 2005 Ann. R. N.C. 49 (emphasis added). Mr. Spicer contends that imputation of income is improper because he is mentally incapacitated.

Based on our review of the record, we disagree with Mr. Spicer's characterization of the trial court's finding. Instead of imputing potential income to Mr. Spicer, the court was considering his cost-free housing as a form of gross income valued at $300.00 per month. *See Burnett v. Wheeler*, 128 N.C. App. 174, 177, 493 S.E.2d 804, 806 (1997) ("Judge Foster did not 'impute' an income of $77,000 to defendant. A careful review of the record reveals that the trial court found that defendant's total income, from all available sources, equaled at least $77,000.")

The Guidelines include as "income" any "maintenance received from persons other than the parties to the instant action." Guidelines, 2005 Ann. R. N.C. 48. "Maintenance" is defined as "[f]inancial support given by one person to another . . . ." *Black's Law Dictionary* 973 (8th ed. 2004). As our appellate courts have previously recognized, cost-free housing is a form of financial support that may be considered in determining the proper amount of child support to be paid. *See Guilford County ex rel. Easter v. Easter*, 344 N.C. 166, 171, 473 S.E.2d 6, 9 (1996) (voluntary support by maternal grandparents, including cost-free housing, properly considered in determining child support); *Gibson v. Gibson*, 24 N.C. App. 520, 522-23, 211 S.E.2d 522, 524 (1975) (evidence that employer supplied father with automobile and rent-free apartment that reduced his living expenses was evidence of "additional income" from his job beyond his salary). *See also* 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 10.8 at 533 (5th ed. 1999) (included in income are "in-kind payments, such as a company car, free housing or reimbursed meals, if they are significant

and reduce personal living expenses"). We therefore hold that the trial court did not err in including the $300.00 per month value of Mr. Spicer's housing as income.

II. THE TRIAL COURT'S TREATMENT OF MR. SPICER'S TRUST

Mr. Spicer next contends the trial court erred when it ordered him to invade the principal of the settlement trust and make a lump-sum payment that would in turn be used to establish a trust for the child's support. He argues further that even if the trial court properly considered his trust as income, it failed to make sufficient findings of fact to support its deviation from the Guidelines with respect to the trust.

A. Treatment of the Trust as Non-Recurring Income

[2] We first consider Mr. Spicer's contention that since the trust was established to pay for outstanding debts due to the accident and to compensate his pain and suffering, the trial court erred in finding that the settlement trust was "non-recurring income" within the meaning of the Guidelines. The Guidelines, however, specifically include as income: "income from *any* source, including but not limited to . . . trusts[.]" Guidelines, 2005 Ann. R. N.C. 48 (emphasis added). Accordingly, this Court held in *Swink v. Swink*, 6 N.C. App. 161, 164, 169 S.E.2d 539, 541 (1969), that a father's interest in a spendthrift trust "can be reached to provide child support and alimony . . . ." *Cf. Shaw v. Cameron*, 125 N.C. App. 522, 528, 481 S.E.2d 365, 369 (1997) (mother was entitled to discovery of the terms of father's trust because any judgment setting child support would depend upon the amount of the father's income and the nature of his estate, including the trust).

Mr. Spicer argues that we should construe the Guidelines' definition of "income" as encompassing only settlements providing compensation for lost wages. In support of this argument, Mr. Spicer relies solely upon *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986), an equitable distribution case. In *Johnson*, our Supreme Court held that, in determining whether the proceeds from a personal injury settlement obtained during marriage should be classified as marital or separate property,

> the portion of an award representing compensation for non-economic loss—*i.e.*, personal suffering and disability—is the separate property of the injured spouse; the portion of an award representing compensation for economic loss—*i.e.*, lost wages,

> loss of earning capacity during the marriage, and medical and hospital expenses paid out of marital funds—is marital property.

Id. at 448, 346 S.E.2d at 436. Nothing in *Johnson* suggests that its analysis of separate and marital property for purposes of distributing a marital estate should have any impact on the calculation of child support.

The purpose of equitable distribution is so dissimilar from that of child support that we cannot accept Mr. Spicer's invitation to analogize the two. While the purpose of equitable distribution is to require married persons to share their maritally-acquired property with each other after the marriage has dissolved, *id.* at 450, 346 S.E.2d at 437, the purpose of our child support law is to ensure that parents meet their legal obligation " 'to secure support commensurate with the needs of the child and [the parents'] *ability* . . . to meet the needs.' " *Holt v. Holt*, 29 N.C. App. 124, 126, 223 S.E.2d 542, 544 (1976) (quoting *Crosby v. Crosby*, 272 N.C. 235, 237, 158 S.E.2d 77, 79 (1967)). Thus, while our equitable distribution laws are designed to protect the property interests of divorcing spouses, child support laws are designed to protect the welfare of children. *See In re Foreclosure of Deed of Trust from Cooper*, 81 N.C. App. 27, 39, 344 S.E.2d 27, 35 (1986) (because of the differing public policies involved, holding that contingent fee contracts are permitted in equitable distribution cases even though void in child support actions). Because of the differing policies, it would be inappropriate to extend *Johnson* to child support determinations. In light of the breadth of the definition of "income" in the Guidelines, we hold that the trial court could properly include Mr. Spicer's trust as non-recurring income.

Mr. Spicer urges that public policy demands that the settlement not be regarded as income for purposes of a child support calculation since taking money from this source potentially could render him "a ward of the state unable to care for his, or his son's, needs." As Mr. Spicer recognizes, however, this situation presents competing policy considerations. A decision regarding how to balance these interests in light of the statutory framework falls uniquely within the purview of the General Assembly. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) ("The General Assembly is the 'policy-making agency' because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws."). The General Assembly has chosen to give the district courts broad discretion to devise an appropriate child support award in light of

the circumstances of all the parties. It is the responsibility of the district court to weigh those circumstances and determine what is just and appropriate; we may not dictate a result as a matter of law.

[3] Alternatively, Mr. Spicer argues that the trial court should have left the trust principal intact and considered the interest on that trust principal as recurring income. The Guidelines provide that:

> When income is received on an *irregular, non-recurring*, or *one-time basis*, the court may average or prorate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.

Guidelines, 2005 Ann. R. N.C. 48-49 (emphasis added). The personal injury settlement in this case was paid on a one-time, non-recurring basis, thus meeting the Guidelines' definition of "non-recurring income." If we were to adopt Mr. Spicer's contention that because the trust gave rise to interest, the trust principal should not be considered non-recurring income, then few lump sum amounts would ever be considered non-recurring income, since interest may be earned on almost any sum. The trial court did not, therefore, err when it sought to supplement the funds available for the child's support by invading the trust principal.

[4] Finally, Mr. Spicer contends the trial court erred in requiring that he pay both monthly payments and a lump sum payment. N.C. Gen. Stat. § 50-13.4(e) (2003) provides, in relevant part:

> Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein, or a security interest in or possession of real property, as the court may order.

This Court has previously held that a trial court "is not limited to ordering one method of payment to the exclusion of the others provided in the statute. The Legislature's use of the disjunctive and the phrase 'as the court may order' clearly shows that the court is to have broad discretion in providing for payment of child support orders." *Moore v. Moore*, 35 N.C. App. 748, 751, 242 S.E.2d 642, 644 (1978). Further, a trial court is not limited to the methods of payment specified in the statute. *Weaver v. Weaver*, 88 N.C. App. 634, 637, 364 S.E.2d 706, 708-09 ("In utilizing this provision, the trial court is vested with broad discretion, and is not limited to ordering any one of the desig-

nated methods of payment."), *disc. review denied*, 322 N.C. 330, 368 S.E.2d 875 (1988). We note that our Courts have specifically held, as Mr. Spicer concedes, that a parent's property may be placed in trust to secure or provide child support. *Id.* at 638, 364 S.E.2d at 709 (affirming sale of real property to establish a trust securing future child support). The trial court did not, therefore, err in determining that Mr. Spicer's child support obligation could be fulfilled by requiring income from both monthly payments and a lump sum award.

B. The Trial Court's Deviation from the Guidelines

[5] After determining (1) that applying the Guidelines to the trust principal would result in payment of a lump sum of $130,764.90 and (2) that payment of this amount would exceed the minor child's reasonable needs and expenses and would be unjust and inappropriate, the trial court decided to deviate from the Guidelines. A trial court's deviation from the Guidelines is reviewed under an abuse of discretion standard. *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 644, 507 S.E.2d 591, 593 (1998).

Nevertheless, in deviating from the Guidelines, a trial court must follow a four-step process:

> First, the trial court must determine the presumptive child support amount under the Guidelines. Second, the trial court must hear evidence as to the reasonable needs of the child for support and the relative ability of each parent to provide support. Third, the trial court must determine, by the greater weight of this evidence, whether the presumptive support amount would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate. Fourth, following its determination that deviation is warranted, in order to allow effective appellate review, the trial court must enter written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the child; the relative ability of each party to provide support; and that application of the Guidelines would exceed or would not meet the reasonable needs of the child or would be otherwise unjust or inappropriate.

Sain v. Sain, 134 N.C. App. 460, 465-66, 517 S.E.2d 921, 926 (1999) (internal citations and quotation marks omitted). Mr. Spicer contends the trial court's findings of fact do not meet the requirements of the fourth step regarding the reasonable needs of the child and Mr. Spicer's ability to provide support.

We agree with Mr. Spicer that the trial court's findings of fact are not adequate to allow us to review the basis for the amount awarded as a result of the deviation. Our Supreme Court has explained that "an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the relative ability of the parties to provide that amount." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (quoting N.C. Gen. Stat. § 50-13.4(c)). These conclusions must in turn be based on factual findings "specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, [and] accustomed standard of living of both the child and the parents." *Id.* (internal quotation marks omitted). Without sufficient findings, an appellate court has no means of determining whether the order is adequately supported by competent evidence. *Id.* The Court stressed that "[i]t is not enough that there may be evidence in the record sufficient to support findings which *could have been made.* The trial court must itself determine what pertinent facts are actually established by the evidence before it . . . ." *Id.*

In finding the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support, the trial court must consider:

> the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c1) (2003). These "factors should be included in the findings if the trial court is requested to deviate from the [G]uidelines." *Gowing v. Gowing*, 111 N.C. App. 613, 618, 432 S.E.2d 911, 914 (1993).

Here, the trial court did not make any specific findings regarding the reasonable needs of the child. The court simply found, without further explanation, that the child's reasonable needs and expenses totaled $1,260.10 per month. The findings contain no specific consideration of what amount is necessary for the child's health, education, and maintenance. Nor does the order contain any findings as to actual expenditures. *See Fisher*, 131 N.C. App. at 646, 507 S.E.2d at 594 (trial court erred in failing to make findings regarding mother's actual past expenditures on the child's behalf); *Savani v. Savani*, 102

N.C. App. 496, 503, 403 S.E.2d 900, 904 (1991) (" 'Evidence of actual past expenditures is essential in determining [a child's] present reasonable needs.' " (quoting *Koufman v. Koufman*, 97 N.C. App. 227, 232, 388 S.E.2d 207, 209 (1990), *rev'd on other grounds*, 330 N.C. 93, 408 S.E.2d 729 (1991))). *See also* 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 10.17 at 547 (5th ed. 1999) ("The trial court must also make specific findings as to the child's past and present expenses in order to determine the reasonable needs of the child.").

Further, there is no indication that the trial court considered the "accustomed standard of living of the child and the parties," as required by N.C. Gen. Stat. § 50-13.4(c). The trial court found that Mr. Spicer's *gross income* prior to the accident was approximately $25,000.00 per year (or $2,083.33 per month). Even taking into account added expenses for health insurance and work-related child care—which became necessary when Mr. Spicer could no longer work—the total "reasonable expenses" found by the trial court, without explanation, of $2,875.10 for Ms. Spicer and the child alone significantly exceeds the monthly expenses of the family of three. While the trial court's finding of reasonableness may be supportable and may reflect the trial court's assessment of the accustomed standard of living, we cannot make that determination without more specific findings of fact.

We observe, although there is no finding saying so, that the trial court appears to have adopted, without question, Ms. Spicer's Affidavit of Financial Standing. This affidavit includes as expenses *for the four-year-old child alone*: $600.00 per year in Christmas gifts, $600.00 per year in birthday gifts, $75.00 per month in restaurant meals, $75.00 per month in entertainment and recreation, $150.00 per month in clothing, and $900.00 per year for vacation. Without findings regarding the child's or parties' accustomed standard of living and the reasonableness of the expenses in light of that standard of living, we cannot determine whether the trial court considered the standard of living factor and whether the trial court's finding of reasonable needs—including such generous expenses—is supported by the evidence. *See Fisher*, 131 N.C. App. at 649, 507 S.E.2d at 596 (reversing and remanding for further findings regarding accustomed standard of living and child's reasonable needs).

In the absence of specific findings regarding the child's reasonable needs, taking into account the accustomed standard of living, we

are precluded from reviewing the basis of the award. We cannot determine whether the lump sum awarded would actually exceed the child's reasonable needs or, for that matter, whether it would fail to meet the child's reasonable needs. We must, therefore, remand this case to the trial court for further findings of fact.

[6] Mr. Spicer further contends that the trial court erred by failing to take "due regard" of his future medical expenses. Our courts have required trial courts to "make findings of fact on the parents' income, estates . . . and *present reasonable expenses* to determine the parties' relative ability to pay." *Newman v. Newman*, 64 N.C. App. 125, 128, 306 S.E.2d 540, 542 (emphasis added), *disc. review denied*, 309 N.C. 822, 310 S.E.2d 351 (1983). Mr. Spicer cites no authority requiring a trial court to make findings regarding possible future medical expenses. Our review of the trial court's order reveals that the trial court did give due regard to Mr. Spicer's present health and other related circumstances, including the facts that Mr. Spicer is not living independently, that the trust funds "are not expected to be sufficient to meet [his] lifetime needs," and that most of his current medical costs were covered by Medicare programs. These findings were supported by competent evidence and are sufficiently specific for us to determine that the trial court gave due regard to Mr. Spicer's present condition and estate.

[7] Mr. Spicer also argues that the trial court applied a "random" formula in determining the amount of the lump sum payment to be drawn from his settlement for establishment of the child-support trust. Although we have remanded this case for further findings of fact, we note that our appellate courts have approved trial courts' use of formulas to determine child support. *Plott v. Plott*, 313 N.C. 63, 79, 326 S.E.2d 863, 873 (1985) ("[A] formula based on a ratio established by the parties' disposable income figures seems a fair method to apply . . . . The judge's use of a ratio seems to be supported by logic and reason, based upon simple mathematics rather than simple guesswork."); *Hamilton v. Hamilton*, 57 N.C. App. 182, 184, 290 S.E.2d 780, 781 (1982) (encouraging trial courts' use of formulas to promote consistency in the amount of awards, particularly when "considerations of fairness dictate a substantial departure from the standard award"). The trial court may, upon remand, again use a formula, so long as it is based on logic and reason and reaches a result consistent with the child's reasonable needs in light of the parties' accustomed standard of living and Mr. Spicer's ability to pay.

III. THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES

[8] Mr. Spicer lastly contends that the trial court erred in awarding fees to Ms. Spicer's counsel, arguing (1) that the trial court failed to make sufficient findings of fact to support an award of fees and (2) that the court "randomly" calculated the number of hours to be compensated. We find that the trial court did not err in its award of fees.

N.C. Gen. Stat. § 50-13.6 (2003) provides, in relevant part:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

An award of attorneys' fees is within the sound discretion of the trial judge. *Stanback v. Stanback*, 287 N.C. 448, 462, 215 S.E.2d 30, 40 (1975). When that discretion has been properly exercised in accordance with the statutory requirements, the order must be affirmed on appeal. *Id.*

In construing N.C. Gen. Stat. § 50-13.6, our courts have distinguished between fee awards in proceedings solely for child support and fee awards in actions involving both custody and support. *Stanback*, 287 N.C. at 462, 215 S.E.2d at 40. Before a court may award fees in an action solely for child support, the court must make the required finding under the second sentence of the statute: that the party required to furnish adequate support failed to do so when the action was initiated. *Id.* On the other hand, when the proceeding or action is for both custody and support, the court is not required to make that finding. *Id.* ("The General Assembly, having limited the second provision to support actions, apparently did not intend the requirement to apply to custody or custody and support actions.").

A case is considered one for both custody and support when both of those issues were contested before the trial court, even if the custody issue is resolved prior to the support issue being decided. *See, e.g., Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996) ("The instant action is properly characterized as one for 'custody and support' because both the custody and support actions were before the trial court [at] the times the case was called for trial."); *Forbes v. Forbes*, 72 N.C. App. 684, 685, 325 S.E.2d 272, 273 (1985) ("In this case both custody and support were contested. The plaintiff was not deprived of the right to have attorney fees because the order for custody was entered before the order for support."). In this case, the record shows that the custody issue had not yet been resolved when the support hearing began. The case was, therefore, one for both custody and support.

As a result, the sole required findings were that the party seeking fees (1) acted in good faith and (2) lacks the means to defray the expense of the suit. *Gibson v. Gibson*, 68 N.C. App. 566, 574, 316 S.E.2d 99, 105 (1984). The trial court made the necessary findings and our review of the record reveals that each of those findings was supported by competent evidence.

As to defendant's contention that the court "randomly" calculated the number of hours for which Ms. Spicer's counsel should be paid, our review of the record reveals that the trial court based its calculation on an extensive discussion with Ms. Spicer's counsel as well as careful consideration of his affidavit stating the number of hours he worked on Ms. Spicer's custody and support claims. The trial court's fee award does not appear manifestly unreasonable and, therefore, does not constitute an abuse of discretion.

Conclusion

We affirm the trial court's ruling with respect to Mr. Spicer's recurring income, its inclusion of the trust as non-recurring income, and its award of attorneys' fees and expenses. We remand, however, for further findings of fact as to the reasonable needs of the child. The decision whether to hear additional evidence is left to the sound discretion of the trial judge.

Affirmed in part and remanded in part.

Judges BRYANT and ELMORE concur.

JUSTICE FOR ANIMALS, INC., PLAINTIFF v. LENOIR COUNTY SPCA, INC., DEFENDANT

No. COA04-69

(Filed 1 February 2005)

1. Animals— feral or wild—subject matter jurisdiction—72-hour impoundment period

The trial court erred by concluding that it had subject matter jurisdiction over plaintiff's claim under N.C.G.S. § 130A-192 asserting that defendant SPCA animal control facility was causing unjustifiable physical pain, suffering, and death in its euthanization of feral cats without holding them for seventy-two hours, because: (1) our General Assembly specifically designated the administration and enforcement of N.C.G.S. § 130A-192 to either the Secretary of Health and Human Services or a local health director and local health department; (2) plaintiff is unable to file a complaint against defendant, a private nongovernmental agency, in the office of administrative hearings; and (3) plaintiff failed to allege that defendant is a division of the local health department.

2. Animals— feral or wild—subject matter jurisdiction—animal cruelty

The trial court had subject matter jurisdiction under N.C.G.S. § 19A-2 over plaintiff's claim seeking injunctive relief against defendant SPCA animal control facility alleging the cruel treatment of animals as defined by N.C.G.S. § 192-1.

3. Animals— feral or wild—euthanization—animal cruelty—involuntary dismissal

The trial court erred by entering an involuntary dismissal under N.C.G.S. § 1A-1, Rule 41(b) for plaintiff's claim seeking injunctive relief against defendant SPCA animal control facility alleging the cruel treatment of animals, because: (1) the trial court's findings, conclusions, and judgment are grounded in its interpretation of N.C.G.S. § 130A-192 which was not properly before the trial court; and (2) the trial court failed to enter proper findings based on the evidence presented that defendant's action of immediately euthanizing an animal as defined by N.C.G.S. § 19A-1 does not constitute cruel treatment. On remand, the trial court should make findings of fact and conclusions of law regarding whether plaintiff has presented sufficient evidence to show

defendant's use of a poke test to determine whether a cat is feral or tame and defendant's subsequent immediate euthanization constitutes unjustifiable pain, suffering, or death.

Judge LEVINSON concurring in part and dissenting in part.

Appeal by plaintiff from order entered 18 August 2003 by Judge Elizabeth A. Heath in Lenoir County District Court. Heard in the Court of Appeals 23 September 2004.

Ward and Smith, P.A., by A. Charles Ellis; and William A. Reppy, Jr., for plaintiff-appellant.

White & Allen, P.A., by David J. Fillippeli, Jr., and Gregory E. Floyd, for defendant-appellee.

TYSON, Judge.

Justice for Animals, Inc., ("plaintiff") appeals from an Order that granted Lenoir County SPCA, Inc.'s ("defendant") motion for an involuntary dismissal pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. We vacate portions of the trial court's order, and reverse and remand in part.

I. Background

Plaintiff filed a complaint pursuant to N.C. Gen. Stat. § 19A-1, *et. seq.*, seeking injunctive relief and asserting defendant was causing unjustifiable physical pain, suffering, and death in its euthanization of animals. Plaintiff alleged that defendant's practice of euthanizing feral cats without holding them for seventy-two hours is unjustifiable because it violates N.C. Gen. Stat. § 130A-192. "*Webster's New Collegiate Dictionary* provides several definitions for 'feral' including: 'wild animal' and 'having escaped from domestication and become wild.' " *Malloy v. Cooper*, 162 N.C. App. 504, 509, 592 S.E.2d 17, 21 (quoting *Webster's New Collegiate Dictionary* 456 (9th ed. 1991)), *disc. rev. denied*, 358 N.C. 376, 597 S.E.2d 133 (2004). N.C. Gen. Stat. § 130A-192 (2003) permits the euthanization of animals after a minimum seventy-two hour impoundment, if the animal is not claimed and provides:

> The Animal Control Officer shall canvass the county to determine if there are any dogs or cats not wearing the required rabies vaccination tag. If a dog or cat is found not wearing the required tag, the Animal Control Officer shall check to see if the owner's identification tag can be found on the animal. . . . If the animal is not

> wearing an owner identification tag and the Animal Control Officer does not otherwise know who the owner is, the Animal Control Officer may impound the animal. The duration of the impoundment of these animals . . . shall not be less than 72 hours.

Plaintiff contends this statute requires defendant to impound all cats, tame or feral, for seventy-two hours prior to euthanization.

Ella Marie Harrell ("Harrell"), a former animal control officer for defendant, testified at trial regarding defendant's process for determining whether a cat was feral or "tame" when deciding to hold the animal or immediately euthanize it. She testified, "If it was a cat, when it was brought to the shelter they would go out with a pen, pencil, whatever and they would poke the animal. And, if the animal responded aggressively to the object, then they would say its wild, go put it down." Harrell further testified that prior to arriving at the shelter, the "animal is very upset, very agitated, because normally they have not been ridden around in vehicles. And, occasionally you also have dogs that are in the back of that truck that are barking, and a cat's normal response is to become agitated around dogs."

At the close of plaintiff's evidence, the trial court granted defendant's motion for an involuntary dismissal pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. It found that the seventy-two hour impoundment period set forth in N.C. Gen. Stat. § 130A-192 "applies only to domestic felines and canines as defined in N.C. [Gen. Stat.] § 130A-184(2) and (4), respectively, and not to feral or wild animals." The trial court further found that plaintiff offered no evidence, other than the fact that defendant immediately euthanizes feral cats prior to impounding them for seventy-two hours, to support their claim that defendant caused unjustifiable physical pain, suffering, and death to any animal. Plaintiff appeals.

II. Issues

The issues on appeal are: (1) whether the trial court had subject matter jurisdiction over plaintiff's claims against defendant; and (2) whether the trial court erred by granting defendant's motion for an involuntary dismissal.

III. Subject Matter Jurisdiction

A. N.C. Gen. Stat. § 130A-192

[1] In its complaint, plaintiff alleged that defendant's practice of euthanizing feral cats without holding them for seventy-two hours is

unjustifiable because it violates N.C. Gen. Stat. § 130A-192. Its complaint states, "The killing of these cats, dogs, kittens, and puppies before the statutory seventy-two hour impoundment period causes unjustifiable physical pain, suffering, and death." The threshold issue is whether the trial court had subject matter jurisdiction over plaintiff's claim.

> The issue of whether a court has subject matter jurisdiction may be raised at any time during a proceeding, and the issue may be raised for the first time on appeal. Even if the parties did not raise the issue in their briefs, the court may raise the question of subject matter jurisdiction by its own motion. Further, the parties cannot stipulate to give a court subject matter jurisdiction where no such jurisdiction exists.

Northfield Dev. Co. v. City of Burlington, 165 N.C. App. 885, 887, 599 S.E.2d 921, 924 (citations omitted), *disc. rev. denied*, 359 N.C. 191, 607 S.E.2d 278 (2004).

Our General Assembly specifically designated the administration and enforcement of N.C. Gen. Stat. § 130A-192 to either the Secretary of Health and Human Services or a local health director and local health department. N.C. Gen. Stat. § 130A-4(a) (2003) provides:

> (a) Except as provided in subsection (c) of this section, the Secretary shall administer and enforce the provisions of this Chapter and the rules of the Commission. A local health director shall administer the programs of the local health department and enforce the rules of the local board of health.
>
> (b) When requested by the Secretary, a local health department shall enforce the rules of the Commission under the supervision of the Department. The local health department shall utilize local staff authorized by the Department to enforce the specific rules.

Further, N.C. Gen. Stat. § 130A-24 (2003) states:

> (a) Appeals concerning the enforcement of rules adopted by the Commission, concerning the suspension and revocation of permits and program participation by the Secretary and concerning the imposition of administrative penalties by the Secretary shall be governed by Chapter 150B of the General Statutes, the Administrative Procedure Act.
>
> (a1) Any person appealing an action taken by the Department pursuant to this Chapter or rules of the Commission shall file a

petition for a contested case with the Office of Administrative Hearings as provided in G.S. 150B-23(a). The petition shall be filed not later than 30 days after notice of the action which confers the right of appeal unless a federal statute or regulation provides for a different time limitation. The time limitation imposed under this subsection shall commence when notice of the agency decision is given to all persons aggrieved. Such notice shall be provided to all persons known to the agency by personal delivery or by the placing of notice in an official depository of the United States Postal Service addressed to the person at the latest address provided to the agency by the person.

(b) Appeals concerning the enforcement of rules adopted by the local board of health and concerning the imposition of administrative penalties by a local health director shall be conducted in accordance with this subsection and subsections (c) and (d) of this section. The aggrieved person shall give written notice of appeal to the local health director within 30 days of the challenged action. The notice shall contain the name and address of the aggrieved person, a description of the challenged action and a statement of the reasons why the challenged action is incorrect. Upon filing of the notice, the local health director shall, within five working days, transmit to the local board of health the notice of appeal and the papers and materials upon which the challenged action was taken.

(c) The local board of health shall hold a hearing within 15 days of the receipt of the notice of appeal. The board shall give the person not less than 10 days' notice of the date, time and place of the hearing. On appeal, the board shall have authority to affirm, modify or reverse the challenged action. The local board of health shall issue a written decision based on the evidence presented at the hearing. The decision shall contain a concise statement of the reasons for the decision.

(d) A person who wishes to contest a decision of the local board of health under subsection (b) of this section shall have a right of appeal to the district court having jurisdiction within 30 days after the date of the decision by the board. The scope of review in district court shall be the same as in G.S. 150B-51.

In *Justice for Animals, Inc. v. Robeson County*, 164 N.C. App. 366, 368, 595 S.E.2d 773, 775 (2004), the plaintiffs filed a complaint alleging "the treatment of animals at the Animal Control

Facility is cruel and unlawful under N.C. Gen. Stat. § 19A-1 *et seq.*, § 130A-192, and § 14-360." This Court held that the plaintiffs were "aggrieved persons" whose claims fell within the scope of N.C. Gen. Stat. § 130A-24(b). *Id.* at 370, 595 S.E.2d at 776-77. We affirmed the trial court's dismissal of the plaintiffs' complaint for failure to exhaust the administrative remedies available under N.C. Gen. Stat. § 130A-24(b) and failure to plead a basis for avoiding the exhaustion requirement. *Id.* at 373, 595 S.E.2d at 777-78.

"Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re from the Civil Penalty Assessed for Violations of the Sedimentation Pollution Control Act etc.*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Plaintiff here is the identical plaintiff in *Justice for Animals, Inc.*, and alleged defendant violated N.C. Gen. Stat. § 130A-192, one of the statutes also at issue in *Justice for Animals, Inc.*

Portions of plaintiff's complaint seek injunctive relief against defendant to halt the destruction of animals for failure to wear the required rabies vaccination tags pursuant to N.C. Gen. Stat. § 130A-192, a statute contained within the Public Health Chapter. To the extent plaintiff's complaint alleges an action pursuant to this statute, it must seek administrative remedies, including its rights to appeal, against the local health department and local health director. *Justice for Animals, Inc.*, 164 N.C. App. at 369, 595 S.E.2d at 775; N.C. Gen. Stat. § 130A-4(a); N.C. Gen. Stat. § 130A-24.

Plaintiff is unable to file a complaint against defendant, a private non-governmental agency, in the office of administrative hearings. The defendants in *Justice for Animals, Inc.*, included the local board of health and its animal control divisions. As plaintiff failed to allege defendant is a division of the local health department, plaintiff's claim for relief under N.C. Gen. Stat. § 130A-192 is not proper against defendant. *See* N.C. Gen. Stat. § 130A-4(a).

Neither the trial court nor this Court has jurisdiction at this stage in the proceedings to address the issue of whether this defendant is required to hold all animals for seventy-two hours pursuant to N.C. Gen. Stat. § 130A-192. The trial court erred by finding "the 72-hour impoundment period set forth in N.C. [Gen. Stat.] § 130A-192 applies only to domestic cats and dogs as those terms are defined in N.C. Gen. Stat. § 130A-184(2) and (4), respectively, and not to feral or wild

animals." The trial court was without subject matter jurisdiction to enter findings or conclusions regarding plaintiff's claim for violations by defendant under N.C. Gen. Stat. § 130A-192. Enforcement of this statute is proper against the local board of health in the Office of Administrative Hearings. N.C. Gen. Stat. § 130A-4(a); N.C. Gen. Stat. § 130A-24. We vacate these portions of the trial court's order.

B. N.C. Gen. Stat. § 19A-1.1

[2] The trial court has subject matter jurisdiction pursuant to N.C. Gen. Stat. § 19A-2 over plaintiff's claim to the extent it seeks an injunction against defendant by alleging the cruel treatment of animals, as defined in N.C. Gen. Stat. § 19A-1. We note that N.C. Gen. Stat. § 19A-1.1 sets forth several exemptions regarding the ability to seek a remedy under the provisions of Chapter 19A. Specifically, N.C. Gen. Stat. § 19A-1.1(5) (2003) states that this Article, Civil Remedy for Protection of Animals, shall not apply to "the lawful destruction of any animal for the purposes of protecting the public, other animals, or the public health." This statute, however, was enacted during the 2003 session of the legislature and was not effective until 19 June 2003. As this action was filed prior to the effective date of N.C. Gen. Stat. § 19A-1.1, its exceptions do not apply to the case at bar.

Plaintiff's complaint specifically alleges jurisdiction pursuant to N.C. Gen. Stat. § 19A-2. Further, its complaint alleges: "The killing of these cats, dogs, kittens, and puppies [by defendant] before the statutory seventy-two (72) hour impoundment period causes unjustifiable physical pain, suffering, and death." Plaintiff's complaint prays the trial court to "permanently enjoin defendant, pursuant to N.C. Gen. Stat. § 19A-4, from killing any cats, dogs, kittens, or puppies before the expiration of the statutory seventy-two hour impoundment period for each such animal killed." These allegations set forth a cause of action against defendant sufficient to establish subject matter jurisdiction for a claim of cruel treatment as defined in N.C. Gen. Stat. § 19A-1(2).

We recognize that defendant's actions, as well as its decision to either immediately euthanize animals or impound them, are guided by N.C. Gen. Stat. § 130A-192. As stated above, neither the trial court nor this Court has jurisdiction over plaintiff's claim regarding the interpretation, application, or enforcement of this statute as it relates to claims against the private party defendant. However, the trial court and this Court have subject matter jurisdiction over plaintiff's action to the extent plaintiff's complaint generally alleges an

action for "unjustifiable pain, suffering, or death" to animals based on defendant's immediate euthanization of cats. N.C. Gen. Stat. § 19A-1(2) (2003).

IV. Standard of Review

[3] As the trial court had jurisdiction over plaintiff's allegations of cruelty pursuant to N.C. Gen. Stat. § 19A-1, our review turns to whether the trial court erred in entering an involuntary dismissal pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure.

The well-established rules regarding our review of a trial court's order dismissing an action are set forth in *Miles v. Carolina Forest Ass'n*, 167 N.C. App. 28, 35, 604 S.E.2d 327, 331-32 (2004):

> 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).

Here, plaintiff failed to specifically object to any of the trial court's findings of fact. Our review turns to whether the trial court's findings of fact support its conclusions of law and judgment.

V. Civil Remedy for Protection of Animals

N.C. Gen. Stat. § 19A-1(1) (2003) defines "animals" as "every living vertebrate in the classes Amphibia, Reptila, Aves, and Mammalia

except human beings." This broad definition clearly includes both feral and tame cats. The statute further defines "cruelty" and "cruel treatment" as "every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted." N.C. Gen. Stat. § 19A-1(2).

The trial court's unchallenged findings of fact, other than those portions vacated above, show "Plaintiff at trial offered no evidence, other than the fact that defendant immediately euthanizes feral or wild cats prior to impounding them for 72 hours, to support their claim that defendant has caused unjustifiable physical pain, suffering, or death to any animal." The trial court also "found" that "[a]s plaintiff offered no evidence of cruel treatment or unjustifiable physical pain, suffering, or death other than its contention that defendant's euthanization of feral animals prior to impounding the same for 72 hours constitutes cruel treatment per se, defendant's [Rule 41(b)] Motion . . . should be granted." We note this "finding" should be more appropriately labeled as a conclusion of law. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (determination requiring exercise of judgment or application of legal principles is a conclusion of law).

The trial court's findings, conclusions, and judgment are grounded in its interpretation of N.C. Gen. Stat. § 130A-192, which we have held was not properly before the trial court. Further, the trial court's conclusion that plaintiff failed to set forth facts or present evidence to support an allegation for cruel treatment of animals is based solely on its earlier interpretation of N.C. Gen. Stat. § 130A-192. We have already held these portions of the trial court's order to be erroneous and have vacated them accordingly.

Without these "findings," the trial court has set forth no other basis to grant defendant's motion for an involuntary dismissal. The trial court erred by dismissing plaintiff's case without entering proper findings, based on the evidence presented, that defendant's action of immediately euthanizing an "animal," as defined in N.C. Gen. Stat. § 19A-1, does not constitute "cruel treatment" as also defined in that statute. Without proper findings regarding the appropriate statutes at issue, the trial court's conclusions of law are unsupported.

Testimony presented at trial tended to show that defendant employs a "poke" procedure to determine whether to impound or immediately euthanize an animal. On remand, the trial court should make findings of fact and conclusions of law regarding whether plain-

tiff has presented sufficient evidence to show defendant's use of the "poke" test to determine whether a cat is feral or tame and defendant's subsequent immediate euthanization constitutes "unjustifiable pain, suffering, or death." N.C. Gen. Stat. § 19A-1(2).

VI. Conclusion

Both the trial court and this Court lack subject matter jurisdiction over plaintiff's claim against defendant for violating N.C. Gen. Stat. § 130A-192. The portions of the trial court's order that seek to interpret and apply this statute against defendant are vacated. Plaintiff has standing to bring against, and the trial court has subject matter jurisdiction over, defendant pursuant to N.C. Gen. Stat. § 19A-1-4. The trial court failed to make proper findings under Article I of the Protection of Animals statutes. N.C. Gen. Stat. § 19A-1-4. The trial court's order is vacated in part and reversed in part. This case is remanded for further proceedings.

Vacated in part; Reversed in part and Remanded.

Judge BRYANT concurs.

Judge LEVINSON concurs in the result in part and dissents in part.

LEVINSON, Judge concurring in the result in part and dissenting in part.

I concur only in the majority's conclusion that this matter must be reversed and remanded. I dissent from those portions of the majority opinion which purport to vacate, on subject matter grounds, the portions of the trial court's order related to N.C.G.S. § 130A-192 (2003).

I respectfully disagree with the majority opinion in three important respects. First, I disagree with the majority's holding that, if the plaintiff lacks standing to seek redress against this defendant for the violation of G.S. § 130A-192, then the trial court is without authority to consider that statute even if its meaning and application are relevant to an issue in the case. Secondly, this matter should be reconsidered by the trial court on the central issue actually raised in the pleadings and tried before it originally, not on an entirely different one identified by this Court. Thirdly, the trial court, in its evaluation of the merits of plaintiff's claim, materially relied upon a misinterpretation of a relevant statute, such that the trial court's con-

clusion that defendant's actions did not constitute "cruelty" cannot be sustained.

Preliminarily, I observe that the majority opinion unnecessarily addresses the issue of plaintiff's standing to bring suit under G.S. § 130A-192. The discussion of standing arises from the majority's erroneous premise that plaintiff herein brought a lawsuit against defendant, a private nonprofit corporation, for violation of G.S. § 130A-192, a statute applicable only to county or other governmental entities. In fact, as the majority acknowledges, plaintiff "filed a complaint pursuant to [N.C.G.S.] § 19A-1 *et seq.*," alleging cruelty. Although plaintiff's complaint makes some reference to G.S. § 130A-192, the gist of its claim is that defendant inflicts unjustifiable pain, suffering, and death to certain cats and dogs, by euthanizing them almost immediately after they are received. Plaintiff sought to **demonstrate** or **illustrate** the alleged cruelty by reference to defendant's failure to hold these stray cats and dogs for even the bare minimum of 72 hours that G.S. § 130A-192 requires of **county** animal shelters.[1] However, plaintiff did not bring suit under G.S. § 130A-192, so the majority's extensive discussion of plaintiff's standing to bring such a suit is wholly unnecessary.

A serious problem arises from the majority opinion's confusion of a **party's** standing to bring suit under a statute against a certain party with the **court's** authority to consider or interpret the statute when it may be relevant to an issue before the court. The majority opinion concludes that, because **plaintiff** lacked standing to sue defendant SPCA under G.S. § 130A-192, "neither the trial court nor this Court has jurisdiction . . . regarding the interpretation" of the statute, and that the interpretation of G.S. § 130A-192 "was not properly before the trial court." The majority cites no authority for its holding that a court may not utilize its interpretation of a statute unless it provides a cause of action for the plaintiff. A plaintiff's lack of standing to challenge a statute **does not deprive the court of authority to interpret the statute**. And, of course "[i]t is permissible in the interpretation of statutes to consider other statutes related to the particular subject, or to the statutes under construction." *Davidson County v. City of High Point*, 85 N.C. App. 26, 34, 354 S.E.2d 280, 284 (1987) (citing *Abernethy v. Board of Comm'rs*, 169 N.C. 631, 86 S.E. 577 (1915)). In holding that neither the trial court nor this Court had the

1. The definition of "cruelty" includes "every act, omission, or neglect whereby unjustifiable . . . death is caused or permitted." G.S. § 19A-1(2). Thus, even in the absence of the 72-hour provision in G.S. § 130A, the trial court would be obligated to determine whether failure to hold all cats for 72 hours constituted cruelty.

authority to interpret the scope of G.S. § 130A-192, the majority is in error. Accordingly, I dissent from that portion of the majority opinion that purports to vacate, on lack of subject matter jurisdiction grounds, the findings of fact and conclusions of the trial court "regarding plaintiff's claim for violations by defendant under N.G. Gen. Stat. § 130A-192."

Further, in my opinion, it is essential to address the meaning of G.S. § 130A-192 inasmuch as the trial court rested its decision, in large part, on its interpretation of the statute. The interpretation of the statute is relevant to plaintiff's claim because the fact (if proven) that defendant fails to adhere to the minimum standards applicable to county agencies is **some evidence** of whether "unjustifiable . . . death is caused or permitted[]" by defendant. *See* N.C.G.S. § 19A-1(2) (defining "cruelty").

Turning to the meaning of G.S. § 130A-192, the trial court erred in its interpretation of this statute. The trial court judge concluded that the requirement of G.S. § 130A-192, that dogs and cats without rabies tags be held at least 72 hours before being killed, was applicable only to "tame" cats and not to "wild" or "feral" cats. The court based its ruling on the definitions in N.C.G.S. § 130A-184 (2003), of animals subject to rabies control measures. The statute states that " 'cat' means a domestic feline," and that " 'dog' means a domestic canine." The correct interpretation of this is that "domestic cat" and "domestic dog" are delineating which **species of animals** are within the ambit of the statute. That this is the correct interpretation is immediately apparent when one considers the following: The 72 hour hold is one small item in a comprehensive rabies control statute, which **applies the same definitions to all statutes in the rabies control section**. Consequently, if stray dogs and cats are excluded from the provisions of G.S. § 130A-192, then they are **also excluded from the rest of the rabies section.** In that event, the animal control officer would have no authority to take crucial measures to reduce the spread of rabies—a truly absurd interpretation and application of the statutes. *See, e.g.,* N.C.G.S. § 130A-195 ("Destroying stray dogs and cats in quarantine districts"); N.C.G.S. § 130A-197 ("Infected dogs and cats to be destroyed"); N.C.G.S. § 130A-199 ("Rabid animals to be destroyed"); N.C.G.S. § 130A-200 ("Confinement or leashing of vicious animals).

Finally, the majority opinion instructs the trial court to enter findings and conclusions on remand regarding whether a "poke test" that defendant purportedly employed to decide whether a cat is a house

pet or a stray "feral" animal constitutes "cruel treatment." The "poke test" was neither the basis of plaintiff's claim, nor the basis of the trial court's ruling. I emphasize that plaintiff's claim is premised on a claim that defendant inflicts unjustifiable pain, suffering, and death to certain cats and dogs by euthanizing them almost immediately after they are received. During oral argument before this Court, both parties agreed that this case does not implicate the question of whether the "poke test" constitutes "cruelty". This inquiry, now required by operation of the majority opinion, is simply not relevant to a determination of plaintiff's claim—except as it may collaterally help establish that defendant, indeed, failed to hold all cats for a certain period.

In short, the trial court's incorrect interpretation of G.S. § 130A-192 materially impacted its determination on the ultimate issue before it, and requires remand for the court to utilize the correct interpretation in its consideration of plaintiff's claim that the defendant caused unjustifiable pain, suffering, and death to certain animals by its failure to hold all cats for some minimum period. In making its ultimate determination on the merits, the judge may consider as some evidence not only the fact that our legislature generally requires county entities to hold all cats for 72 hours, G.S. § 130A-192, but also a host of other statutory provisions that may be relevant. *See, e.g.*, G.S. § 130A-197 and G.S. § 130A-199.

For all the foregoing reasons, I would reverse and remand for the entry of a new order by the trial court, leaving in its discretion whether to receive additional evidence.

JARVIS LASSITER, PLAINTIFF v. C.L. COHN (IN HER OFFICIAL CAPACITY AS A POLICE OFFICER FOR THE CITY OF DURHAM), AND CITY OF DURHAM, DEFENDANTS/THIRD-PARTY PLAINTIFFS v. PATRICIA THEISEN, THIRD-PARTY DEFENDANT

No. COA04-672

(Filed 1 February 2005)

1. Appeal and Error— appealability—interlocutory order—substantial right—sovereign immunity—public duty doctrine

Although defendants' appeal from the trial court's denial of summary judgment is an appeal from an interlocutory order, the appeal is subject to immediate review because the government's assertion of sovereign immunity and the public duty doctrine affects a substantial right.

2. Police Officers— public duty doctrine—negligent control of accident scene

The trial court erred in a case against the City of Durham and a police officer arising out of the alleged negligent control of an accident scene by denying defendants' motion for summary judgment based on the public duty doctrine, because: (1) an officer fulfilling his duty to provide police protection must employ some level of discretion as to what each particular situation requires, criminal or otherwise; (2) the record reflects that defendant officer actively weighed the safety interests of the public when applying her discretion, and that there was nothing accidental about her conduct; (3) while there are measures that defendant officer may have taken to decrease the threat of a potentially negligent third-party hitting plaintiff, placing an unreasonable hindsight based standard upon a police officer when performing public duties is exactly what the public duty doctrine seeks to alleviate; (4) the special relationship exception to the public duty doctrine does not subject defendants to liability where the officer, as part of her general duty to the public, requested to speak with a party to an accident or crime scene for the purposes of an investigation and the party was not a state's witness or informant nor in police custody; and (5) North Carolina has not adopted the high risk exception to the public duty doctrine that has been accepted by a minority of jurisdictions.

Appeal by defendants from judgment entered 29 January 2004 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 8 December 2004.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher and Carlos E. Mahoney; and E. Richard Jones, Jr., for plaintiff appellee.

The Banks Law Firm, P.A., by Sherrod Banks, for the City of Durham and C.L. Cohn, defendant appellants.

McCULLOUGH, Judge.

This appeal arises out of plaintiff's claim of negligence against the City of Durham and Durham Police Officer C.L. Cohn (collectively "defendants[1]"). The forecast evidence of the facts giving rise to this

1. Defendants implead Ms. Patricia Theisen ("Ms. Theisen"), the driver who hit Mr. Lassiter. Plaintiff and Ms. Theisen's insurer have concluded a good faith settlement of their claims.

appeal showed the following: On the night of 25 August 2000, there was excess traffic on Garrett Road in Durham due to the conclusion of a football game at Jordan High School. Adjacent to the high school, Garrett Road has three lanes, a northbound and southbound lane, and a center turning lane. An off-duty police officer was directing the game traffic, and stopped a taxi in front of plaintiff, both heading northbound on Garrett Road with the taxi in front. Approximately ten seconds after plaintiff came to a stop behind the taxi, a minivan struck plaintiff's vehicle from behind and pushed it into the taxi, creating a three-car collision in the northbound lane. The street was not well lit in the area of the accident.

Officer Cohn was dispatched to the accident and arrived coming southbound on Garrett Road in approximately six minutes. Officer Cohn chose to park her vehicle across the street from the accident with her emergency lights in operation, facing southbound, because the heavy traffic prevented her from making a quick maneuver to pull behind the accident to face northbound. She decided not to use flares or other warnings to protect those exposed at the accident scene as well as other drivers because she believed they would interfere with the officer directing traffic out of the game. At no point did she direct plaintiff or the other vehicles at the scene to turn on their car lights. Additionally, she did not require the vehicles to move further off the road or further north on Garrett Road, based on her determination that the cars were already as far off the road as they could be without falling into the ditch on its eastern edge. Plaintiff's vehicle was the most severely damaged, and required towing from the scene.

Officer Cohn conducted a solo investigation of the collision by speaking with the drivers and obtaining their licenses, registrations, and insurance information. Once Officer Cohn received all necessary information from the driver of the minivan, that driver was allowed to leave the scene which left plaintiff's vehicle exposed to any oncoming northbound traffic. Officer Cohn next requested that plaintiff come to the rear of his vehicle so that she could ask him some questions. When he reached the rear of his vehicle, they discussed information of the other drivers, insurance issues, and where he wanted the vehicle towed. Plaintiff stood at the rear for a couple of minutes with his back turned to the northbound traffic.

Ms. Theisen, the third-party defendant in the case, approached the accident in a Mazda Miata coming northbound on Garrett Road. As she rounded a bend on the road just before the accident, she diverted her eyes to the opposite side of the road to the flashing lights

of Officer Cohn's southbound facing police vehicle. Nearly the same time that she was approaching the accident, a tow truck arrived coming via the southbound lane of Garrett Road with its yellow light bar on top of the truck. Ms. Theisen then noticed the accident scene directly in the path of her vehicle, and attempted to avoid hitting it by applying her brakes, and steering towards the shoulder of the road. Attempting to jump out of Ms. Theisen's way, Officer Cohn was struck by the vehicle and landed in a wooded area on the shoulder of the road. Plaintiff was pinned between his car and the Miata, suffering a severe injury to his left leg.

Due to plaintiff's injury he has incurred $196,018.55 of medical expenses, $33,000.00 of lost wages, and a 40% impairment of his left leg. Defendant City of Durham maintains a self-insured retention policy ("SRI") for damage awards in excess of $350,000.00. However, this threshold is reduced by an amount equal to attorney's fees and defense costs defendant expended on litigation of plaintiff's claim. Thus, a theoretical award of $500,000.00 to a plaintiff, where defendant spent $100,000.00 defending the suit, would be insured to the extent of $250,000.00. Initially, plaintiff brought only a negligence action to which defendants asserted the defenses of contributory negligence and all applicable immunities bestowed upon North Carolina governmental bodies and their agents. Plaintiff then filed its first amended complaint, adding claims that the City of Durham's policy of applying the defense of sovereign immunity violated federal due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution ("U.S. Constitution"), and Equal Protection guarantees of Article I, Section 32 of the North Carolina Constitution ("N.C. Constitution"). In their second amended complaint, plaintiff added claims for violations arising under Article I of the N.C. Constitution found in the following sections: Section 19, "Law of the Land"; Section 32, "Exclusive Emoluments"; Section 35, "Recurrence of Fundamental Principles"; and Section 36, "Other Rights of the People." The second amended complaint sought declaratory and injunctive relief regarding Durham's official practice of asserting sovereign immunity. Defendants answered both amended complaints, maintaining the defense of "all applicable immunities."

Plaintiff filed a motion for summary judgment arguing defendants' defense of contributory negligence should be denied as a matter of law because there was no issue of material fact suggesting plaintiff was contributorily negligent. In the same motion, plaintiff also contended the court should enjoin defendants from asserting immunity

because defendants' customary practice of waiving/asserting immunity was unconstitutional. The trial court denied summary judgment to plaintiff on the basis that issues of material fact existed concerning the contributory negligence, and in a separate order granted summary judgment in favor of defendants on the N.C. Constitutional claim under Article I, Section 32 ("Exclusive Emoluments"), but allowed the rest to go forward. Subsequently, plaintiff voluntarily dismissed N.C. Constitutional claims under Article I, Sections 35 and 36.

Defendants filed a later motion for summary judgment, asserting that the defense of the "public duty doctrine" acted as a complete bar to plaintiff's remaining claims. Alternatively, defendants asserted immunity for any and all claims not insured by Durham's SRI. Defendants further sought that all constitutional claims raised by defendants' assertion of immunity be dismissed as a matter of law. The trial court denied this motion, finding there to be genuine issues of material fact as to each of plaintiff's remaining constitutional claims. It is from this second summary judgment order that defendants have appealed and which is now before this Court.

Defendants' appeal from the trial court's denial of summary judgment raises two issues. First, defendants assert that the public duty doctrine acts as a complete bar to plaintiff's negligence claims. Secondly, to the extent they are not covered by Durham's SRI policy, defendants contend they are insulated from liability by sovereign immunity, and that their application of the defense in this case raises no constitutional implications. Lastly, on the day of oral argument, defendants submitted a motion to dismiss plaintiff's constitutional claims alleging grounds that plaintiff lacks standing to challenge Durham's policy for asserting immunity, or alternatively, that the constitutional issues are not ripe for appellate review. Because we herein hold that plaintiff's claims are completely barred by the public duty doctrine, we need not consider the constitutional issues raised by plaintiff's complaints, nor defendants' grounds for their motion to dismiss the same. *See Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (acknowledging the long-held principle of judicial restraint that "the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.")

I. Interlocutory Nature of Appeal

[1] Initially, we address the nature of this appeal as being interlocutory and not subject to immediate appellate review because the

instant order rendered no final judgment. However, previous panels of this court have found a substantial right in a local government's assertion of sovereign immunity and the public duty doctrine. N.C. Gen. Stat. § 1-277 (2003) (allowing appeals from superior court which affect a substantial right); *see, e.g., Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283 ("[O]rders denying dispositive motions grounded on the defense of governmental immunity are immediately reviewable as affecting a substantial right."), *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996); *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 403, 442 S.E.2d 75, 77 (a substantial right is affected where "defendants have asserted governmental immunity from suit through the public duty doctrine"), *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994); *Derwort v. Polk County*, 129 N.C. App. 789, 790-91, 501 S.E.2d 379, 380 (1998) (a substantial right is affected where Polk County asserted the public duty doctrine).

II. Standard of Review

[2] Defendants contend the trial court erred in denying their motion for summary judgment based on their assertion of the public duty doctrine and sovereign immunity. When reviewing an order of summary judgment, we discern "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003); *Williams v. City of Jacksonville Police Dep't*, 165 N.C. App. 587, 590, 599 S.E.2d 422, 426-27 (2004). In doing so, we view the evidence and allegations forecast in a light most favorable to the non-moving party. *Stafford v. Barker*, 129 N.C. App. 576, 577, 502 S.E.2d 1, 2, *disc. review denied*, 348 N.C. 695, 511 S.E.2d 650 (1998). For the case at bar, we must discern whether, upon review of the evidence in a light most favorable to plaintiff's claims, judgment as a matter of law should have been entered in favor of defendants upon the assertion of the defenses of the public duty doctrine and sovereign immunity.

With this standard in mind, we now address the merits.

III. The Public Duty Doctrine

Our Supreme Court first expressly adopted the public duty doctrine in *Braswell v. Braswell*, 330 N.C. 363, 370-71, 410 S.E.2d 897, 901 (1991) expressing its principles as follows:

> [T]hat a municipality and its agents act for the benefit of the public, and therefore, there is *no liability for the failure to furnish police protection to specific individuals*. This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act.

Id. (citations omitted) (emphasis added). The Supreme Court in *Braswell* relied on a New York Court for its determination that the doctrine's underlying policy is one of public resources and the executive decisions as to how these resources are to be deployed:

> "For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection *based on specific hazards*, could and would inevitably determine how the limited police resources . . . should be allocated and without predictable limits."

Id. (quoting *Riss v. City of New York*, 240 N.E.2d 860, 860-61, (N.Y. 1968). In *Braswell*, the Court upheld a directed verdict on claims brought by a plaintiff against a North Carolina sheriff, acting in his official capacity, alleging failure to protect the plaintiff's mother against the criminal acts of plaintiff's father. *Id.*

After *Braswell* implemented the public duty doctrine into North Carolina's common law, the doctrine was interpreted to apply to public duties beyond those related to law enforcement protection. *See Moses v. Young*, 149 N.C. App. 613, 616, 561 S.E.2d 332, 334-35 (providing extensive review of the application of the doctrine since its adoption), *disc. review denied*, 356 N.C. 165, 568 S.E.2d 199 (2002). In response to this expansion, the Supreme Court reasserted its holding in *Braswell*, stating:

> The holding in Braswell was specifically limited to the facts in that case and to the issue of whether the sheriff negligently failed to protect the decedent . . .
>
> [W]e have never expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their *general duty to protect the public* . . . .

Lovelace v. City of Shelby, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000) (emphasis added) (*Lovelace I*). After remand and rehearing from *Lovelace I*, this Court found that the public duty doctrine did not

immunize a police officer employed as a 911 operator alleged to be negligent in a six-minute delay of dispatching firefighter personnel to the fire where plaintiff's daughter was killed. *Lovelace v. City of Shelby*, 153 N.C. App. 378, 384-86, 570 S.E.2d 136, 141, *disc. review denied*, 356 N.C. 437, 572 S.E.2d 785 (2002) (*Lovelace II*).

Plaintiff contends that in light of *Lovelace I* and *Lovelace II* and their reassertion of *Braswell*, the public duty doctrine does not apply to the facts at bar. Specifically, plaintiff argues the doctrine applies to only those instances where the police fail to provide protection from criminal acts. Therefore, plaintiff asserts that allegations of Officer Cohn's negligent control of the accident scene on Garrett Road was not "police protection" as contemplated in *Braswell*, and therefore, when that alleged negligence leads to a third party unintentionally harming a victim at the scene, defendants are subject to liability. We do not agree.

Lovelace I sought to reign in the expansion of the public duty doctrine's application to other government agencies and ensure it would be applied in the future only to law enforcement agencies fulfilling their "general duty to protect the public," and thus reasserted the principles of *Braswell*. *Lovelace I*, 351 N.C. at 461, 526 S.E.2d at 654. *Braswell's* rationale for the rule focused on the limited resources of local government, and necessarily the discretionary decisions as to how those resources must be deployed. However, we find implicit in *Braswell* and the public duty doctrine that an officer fulfilling his or her duty to provide police protection must employ some level of discretion as to what each particular situation requires, criminal or otherwise. Therefore, we do not read *Braswell* or *Lovelace I* as immunizing discretionary decisions of law enforcement officers to *only* those occasions when responding to criminal offenders.

Since *Lovelace I*, a panel of this Court has considered the public duty doctrine as concerning the following: " 'failure to furnish police protection' or 'failure to prevent [a] criminal act' or *any other act of negligence proximately resulting in injury.*" *Moses*, 149 N.C. App. at 618, 561 S.E.2d at 335 (quoting *Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901) (emphasis added)). In *Moses*, we found there was no "discretionary governmental action" when a police officer accidentally hit another vehicle and killed its driver in pursuit of a speeding motorcycle. *Moses*, 149 N.C. App. at 618, 561 S.E.2d at 335. We determined that the officer was not applying any discretion for his duties when accidentally hitting the *victim's* vehicle. *Id.* Similarly, in *Lovelace II*, there was no forecast evidence before our Court of any

discretionary determination made by the police officer to delay reporting a fire for some six minutes. *Lovelace II*, 153 N.C. App. at 381, 570 S.E.2d at 138.

In the case at bar, Officer Cohn promptly responded to an accident report. Using her trained judgment amidst heavy traffic and other peculiarities of the scene, and prioritizing her concern for the safety of those individuals involved in the accident, she parked her vehicle on the southbound shoulder of the roadway and employed all of her safety lights. She made a discretionary determination not to call for officer assistance as there was no personal injury at the scene, and she did not use flares or cones to redirect traffic around the scene based upon her determination that this would unnecessarily impede the flow of traffic where there were already traffic control measures in place for directing the heavy game traffic. Furthermore, she did not have the vehicles in the first collision move further north or off Garrett Road because the cars involved in the accident were already as far off the road as they could be without falling into a ditch, and plaintiff's vehicle required towing.

Though viewing the evidence in a light most favorable to plaintiff, we cannot ignore the discretionary demands of a police officer fulfilling her general duties owed when responding to the many and synergistic elements of a traffic accident. *See Beaver v. Gosney*, 825 S.W.2d 870 (Mo. App. 1992) (determining that measures required to be taken at an accident scene fall within the public duty doctrine). The record reflects Officer Cohn "actively weigh[ed] the safety interests of the public" when applying her discretion, and that there was nothing accidental about her conduct. *Moses*, 149 N.C. App. at 618-19, 561 S.E.2d at 335. While there are surely measures that Officer Cohn may have taken to decrease the threat of a potentially negligent third-party from hitting plaintiff, it is placing this unreasonable hindsight based standard of liability upon a police officer when performing public duties which is exactly that which the public duty doctrine seeks to alleviate.

Therefore, we hold that upon these limited facts, the public duty doctrine is applicable.

IV. Exceptions to the Public Duty Doctrine

In the alternative, plaintiff contends that the "special relationship" exception to the public duty doctrine subjects defendants to liability in this case. We do not agree.

In adopting the public duty doctrine in *Braswell*, the Court also adopted two exceptions to the doctrine:

> There are two generally recognized exceptions to the public duty doctrine: (1) where there is a special relationship between the injured party and the police, for example, a state's witness or informant who has aided law enforcement officers; and (2) "when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered."

Braswell, 330 N.C. at 371, 410 S.E.2d at 902 (citations omitted). A "special relationship" is formed where a victim detrimentally relies on a police officer's words or conduct, and that reliance exposes plaintiff to a harm which is the result of police negligence. *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 338, 511 S.E.2d 41, 44, *cert. denied*, 350 N.C. 851, 539 S.E.2d 13 (1999). "The 'special relationship' exception must be specifically alleged, and is not created merely by a showing that the state undertook to perform certain duties." *Frazier v. Murray*, 135 N.C. App. 43, 50, 519 S.E.2d 525, 530 (1999).

A search of North Carolina case law reveals favorable consideration by our Courts for only a limited number of alleged special relationships in the public duty context. The Court in *Braswell* gave as an example of this special relationship "a state's witness or informant who has aided law enforcement officers[.]" *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. Additionally, our Court has intimated that "a special relationship existed between [plaintiff] and defendants, as [plaintiff] alleges that he was injured *while in police custody*." *Sellers v. Rodriguez*, 149 N.C. App. 619, 624, 561 S.E.2d 336, 339 (2002) (emphasis added). However, these cases provide little rationale for their consideration.

Plaintiff asserts a special relationship was formed with Officer Cohn when she motioned to him to stand next to her for the purpose of resolving issues related to the first collision. In his complaint, plaintiff alleges:

> B. [T]he Defendant Cohn negligently instructed the Plaintiff to stand behind his vehicle thereby placing him in a position of peril and in danger from oncoming traffic proceeding northward on Garrett Road.

Without assessing the sufficiency of this allegation for purposes of asserting the "special relationship" exception to the public duty doctrine, we find the evidence read in a light most favorable to plaintiff does not support the application of this exception to the case at bar.

Those instances where our Courts have intimated that a special relationship exists relate to some affirmative step taken by the police. These steps either provide a *quid pro quo* with a state's witness or informant where a plaintiff would rely on an agreement with law enforcement, the basis of which most likely includes bargained for police protection in exchange for inculpatory testimony or information, *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902, or where the plaintiff is actually taken into police custody and therefore is at the will of an officer and subject to any dangers that arise, *Sellers*, 149 N.C. App. at 624, 561 S.E.2d at 339. These situations are different in kind from that where a police officer, as part of her general duty to the public, requests to speak with a party to an accident or crime scene for purposes of an investigation. There is no reliance in such a situation, nor a surrendering of freedom of movement or judgment. We believe finding a special relationship in that instance would lead to second guessing and hesitation in performance of these general investigatory duties and the discretionary determinations they require, eroding the very underpinnings of the public duty doctrine of providing robust police protection despite limited public resources.

Lastly, we note a third exception to the public duty doctrine accepted by a minority of jurisdictions to which there may be an issue of fact as to its applicability in the case at bar. Without adopting the "high risk" exception to the public duty doctrine, this Court recognized it in *Vanasek*, 132 N.C. App. at 339, 511 S.E.2d at 45:

> "[L]ocal government officials knew or should have known the plaintiff or members of his class would be exposed to an unusually high risk if care was not taken by local government personnel, even without proof of reliance by the plaintiff."

(Citations omitted.) In *Vanasek*, a downed power line was reported to the local police. After being called to the scene, police officers had their dispatcher notify Duke Power and then left without providing any visible warning or barrier to the high risk condition. *Id.* at 336, 511 S.E.2d at 43. A cable worker coming near the line for unrelated work was later killed when brushing against it. *Id.* We note this exception to the public duty doctrine to acknowledge that situations akin to those of plaintiff have been provided for in the common law

of some jurisdictions. However, as we determined in *Vanasek*, adoption of the exception is best left to the Supreme Court or the General Assembly. *Id.*

Therefore, upon these facts, we find no exceptions to the public duty doctrine apply.

V. Conclusion

When viewed in a light most favorable to plaintiff, we find the evidence as forecast fell completely within Durham's immunization of performing a public duty, without exception, and summary judgment in favor of defendants on this ground should have been rendered as a matter of law. Further, in light of this determination, we need not reach those constitutional questions raised by plaintiff concerning defendants' policy for asserting sovereign immunity as a defense. *See Sellers*, 149 N.C. App. at 623, 561 S.E.2d at 339 (the public duty doctrine is its own bar immunizing police in performance of the general duties, and thus even "a waiver of governmental liability will not create a cause of action where none previously existed").

Therefore, after thorough review of the record, briefs, and transcripts in this matter, we hereby

Reverse.

Judges ELMORE and LEVINSON concur.

STATE OF NORTH CAROLINA v. BRANDON BUFORD DAVIS

No. COA03-1718

(Filed 1 February 2005)

1. Constitutional Law— right to counsel—indigent defendant—retained counsel—court appointment of assistant counsel

The trial court erred in a first-degree murder case by failing to appoint assistant counsel to defendant's privately retained counsel under N.C.G.S. § 7A-450(b1) where defendant was otherwise indigent and the State was seeking the death penalty, because: (1) our Supreme Court has already assumed that when

a defendant has retained one counsel in a capital case, he still may be entitled to an appointed assistant counsel if he is otherwise indigent; (2) N.C.G.S. § 7A-450 provides that retaining counsel does not itself remove a defendant's indigent status where necessary expenses cannot be met; and (3) assistant counsel which cannot be retained falls within a necessary expense of a capital defense which the State must provide or defendant must waive.

2. **Evidence— prior crimes or bad acts—prior arrest—drug possession**

The trial court did not err in a first-degree murder case by admitting evidence of defendant's prior arrest on the evening before the alleged murder where defendant was found with 18 grams of cocaine, approximately $2,600, and a bag of marijuana, because: (1) defendant's prior arrest for drug possession was admissible under the theory that it went to the motive for the later drug-related murder; and (2) defendant did not object under N.C.G.S. § 8C-1, Rule 403, nor has defendant argued such in his brief.

Appeal by defendant from judgment entered 14 August 2002 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 15 November 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Alexander McC. Peters, for the State.

Daniel Shatz for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from the trial court's judgment having been found guilty of first-degree murder, and sentenced to life imprisonment without parole. The State's evidence tended to show the following: On 1 February 2001, around 5:15 p.m., Officer Wilde of the Greensboro Police Department (GPD) pulled over a vehicle for tag violations. Defendant, a passenger, fled the vehicle when it came to a stop. Officer Wilde apprehended defendant about 200 meters away. From defendant's person, he retrieved $2,641.68, 18 grams of crack cocaine, and a bag of marijuana. Defendant was arrested and put in jail.

Raymond Hampton ("Mr. Hampton") and Kevin Shepard ("Mr. Shepard") bailed defendant out of jail that same evening. They went

back to Mr. Hampton's apartment and watched the end of the Duke-North Carolina basketball game. Soon thereafter, Reggie Little ("Mr. Little") and Michael Murphy ("Mr. Murphy") arrived at the apartment driving a Kia jeep. At the apartment, defendant used both Mr. Hampton's and Mr. Shepard's phones. Mr. Murphy observed defendant on Mr. Shepard's phone arguing with someone. Nearing midnight, defendant asked if he could get a ride with Mr. Little and Mr. Murphy. They drove defendant to his mother's house where he went inside for a few minutes, returned, and they left. Defendant then asked Mr. Little to take him to meet someone off of High Point Road, instructing him to park next to some apartments. Saying he was going to meet with a friend, defendant got out and walked towards the apartments. During the 15 or 20 minutes Mr. Little and Mr. Murphy were waiting in the vehicle, they heard what sounded like gunshots. Soon after, defendant returned stating, "I did that Dude," or, "Yo, I done that kid." Defendant went on to say "he didn't do it for nothing," revealing a little package of what appeared to be cocaine. Mr. Murphy also saw that defendant was carrying a gun.

Defendant was then dropped off at his girlfriend Teksha Cummings' ("Ms. Cummings"), place sometime after 1:00 a.m. Ms. Cummings observed that defendant was acting scared when he arrived, and that he possessed drugs and a handgun.

Around midnight on 2 February 2001, James Moore ("Mr. Moore") of Cedar Forks Apartments ("Cedar Forks") heard loud sounds. Going outside to investigate, he saw a dark-colored minivan with flashing lights in the parking lot. He approached the van and saw a man slumped over in the driver's seat, not moving and non-responsive. He could see glass on the ground and bullet holes in the next car, and realized the man was dead. Lavonda Donnell ("Ms. Donnell") and her sister Tonya Fennell ("Ms. Fennell"), also residents of Cedar Forks, saw from their respective apartment windows a black male dressed in a white T-shirt and dark pants in the parking lot using a white towel to wipe off the passenger-side door of a van with its lights blinking. The man then ran away with a white object in his hand. Within minutes, some residents of Cedar Forks building 2006 heard a car door slam and a car speed off from behind their building.

The victim, shot eleven times, was identified by GPD as Francisco Solis ("Mr. Solis"). Evidence collected at the scene included: 11 9-mm bullets and shell casings, glass fragments, Mr. Solis's cell phone, $657, 16.1 grams of crack cocaine, and some methamphetamine in Mr. Solis's rear pocket.

Detective Rankin of the GPD was the lead investigator. He collected Mr. Solis's cell phone and obtained court orders to get subscriber information which ultimately showed Mr. Solis had received calls from Mr. Hampton, Mr. Shepard, and defendant, and that Mr. Solis had called defendant's phone on previous days. These records led police to question Mr. Murphy and Mr. Little regarding their involvement with defendant on the night in question. Little was able to show the detective the street where defendant instructed them to stop, an area directly behind building 2006 of Cedar Forks where several witnesses heard car tires spinning minutes after hearing the gunshots.

K-9 Officer Davis used his dog Bear to track the suspect's trail from the Cedar Forks parking lot. Bear picked up the trail in front of building 2006, and followed it to the street behind the apartment complex where he then lost it. Officer Davis opined that this suggested a vehicle was involved.

State Bureau of Investigation (SBI) Agent Jones, a firearms expert, examined the 9-mm bullet shell casings collected by GPD from the crime scene and Mr. Solis's body, and determined that all of them had been fired by the same gun, most likely a semiautomatic handgun fired at very close range. No gun was submitted for analysis.

Defendant was arrested for the shooting of Mr. Solis on 22 February 2001 at the Extended Stay Hotel.

Defendant's evidence tended to show the following: defendant did not live with his mother, Celia Davis ("Ms. Davis"). Ms. Davis's late husband had kept a handgun in the house and owned hunting guns. These had all been given to her brother and a friend of her husband when he passed away, and the 9-mm rifle rounds found during the GPD search of her home probably belonged to her husband.

Janet Harris, a notary public and wife of the defendant's trial counsel, testified to preparing and notarizing sworn statements of Mr. Murphy and Mr. Little. Both men voluntarily came to defendant's lawyer's office. In Mr. Murphy's affidavit of 27 November 2001, he denied seeing defendant with a gun or hearing the gunshots on the night of the shooting. He also denied hearing defendant brag about the shooting. In Little's affidavit of 3 December 2001, he also denied hearing gunshots while they waited for defendant in the car.

Based upon the above evidence, the jury found defendant guilty of first-degree felony murder, with the underlying felony being armed

robbery. Defendant contends the trial court made four errors: first, by denying defendant's motion to dismiss at the close of all evidence; second, by denying defendant's counsel's petition for appointment of assistant counsel; third, by denying defendant's petition for exculpatory evidence; and fourth, by allowing the State to present evidence that defendant had been arrested on the evening preceding the murder in possession of drugs. Because we grant defendant a new trial on the basis that the court erred in denying his request for an assistant counsel, we address only that issue and those that may recur at any new trial.

I. Appointment of Assistant Counsel

[1] Defendant contends the trial court erred in failing to appoint assistant counsel to defendant's retained counsel, where defendant was otherwise indigent and the State was seeking the death penalty. We agree.

For purposes of court appointment of counsel, an "indigent" defendant is one "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." N.C. Gen. Stat. § 7A-450(a) (2003). When a defendant is determined by the court to be indigent and entitled to counsel, "it is the responsibility of the State to provide him with Counsel and the other necessary expenses of representation." N.C. Gen. Stat. § 7A-450(b). "An indigent person indicted for murder may not be tried where the State is seeking the death penalty without an assistant counsel being appointed in a timely manner." N.C. Gen. Stat. § 7A-450(b1). Unless specifically waived, the court must *sua sponte* appoint an indigent capital defendant an assistant counsel. *State v. Hucks*, 323 N.C. 574, 581, 374 S.E.2d 240, 245 (1988). Failure by defendant to move for assistance does not constitute a waiver; and failure by the court to appoint assistant counsel in a timely manner is *per se* prejudicial error. *Id.* at 579, 374 S.E.2d at 274. Counsel can be reassessed at any stage of the criminal proceedings, and where a defendant no longer is of indigent status, it must be made known to the court. N.C. Gen. Stat. § 7A-450(c) and (d).

On 9 October 2001, the State gave notice of its intent to seek the death penalty against defendant. On the following day, the trial court found that defendant was not financially able to provide the necessary legal expenses of legal representation, and therefore was indigent and entitled to services as contemplated by law. Later, in a 7 May 2002 order denying defendant's petition for an assistant counsel pur-

suant to N.C. Gen. Stat. § 7A-450(b1), the trial court found that defendant had accepted services from a privately retained attorney, and therefore was no longer indigent and his retained counsel could not be appointed assistant counsel. In denying defendant assistant counsel, the court cited *State v. Richardson*, 342 N.C. 772, 467 S.E.2d 685, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996).

In *Richardson*, relied on by the State, the defendant assigned as error the court's refusal to change the status of defendant's two privately retained attorneys to that of appointed indigent counsel. Defendant argued that the trial court's failure to switch counsels' status, while otherwise providing funds for an investigator and experts as "necessary expenses," required reversal of defendant's conviction. *Richardson*, 342 N.C. at 780, 467 S.E.2d at 689-90. Our Supreme Court did not agree, stating:

> Once defendant accepted the services of properly retained counsel and consented to the withdrawal of appointed counsel, he was no longer indigent within the meaning of 7A-450(a). His retained counsel's general notice of appearance pursuant to 15A-143 meant that [defendant's two counsel] were required to represent him in the case through the "entry of final judgment." [Defendant's two counsel] themselves acknowledged that they were "in the case whether . . . compensated or not, and we understand that," and never moved to withdraw from the case. [Defendant's two counsel] continued their zealous representation of defendant throughout the case despite the possibility that their hard work would go uncompensated.

Id. at 781, 467 S.E.2d 690. Thus, at all times that defendant was being tried capitally, he was represented by two counsel and could not be considered indigent unless his counsel withdrew. *Id.*

The Court in *Richardson* cited *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991). In *McDowell*, also relied on by the State, the defendant was denied assistant counsel based upon the following:

> [D]efendant was found indigent by the trial court . . . and was subsequently represented by court-appointed counsel . . . . However . . . defendant had obtained private counsel . . . retained by members of his family, and [appointed counsel] had been allowed to withdraw . . . . During the pretrial proceeding, defendant *explicitly accepted* attorney Oates as his counsel of his own choosing. We hold that from this point on in the pretrial proceed-

ing, defendant was not an indigent within the meaning of N.C.G.S. § 7A-450(a), as he had, through his family, secured private representation and therefore was not entitled to the appointment of assistant counsel.

McDowell, 329 N.C. at 373, 407 S.E.2d at 206 (emphasis added). From the appointment hearing of counsel retained by the family for the defendant in *McDowell*, our Supreme Court excerpted the following colloquy:

> COURT: Let me ask the defendant, Mr. McDowell. Mr. McDowell, *is Mr. Oates seated with you at the table your attorney in the trial of this case?*
>
> MR. MCDOWELL: *Yes, sir.*
>
> COURT: Are you satisfied with him? The State's attorney indicated that your family retained Mr. Oates and *you consider him retained for you and you accept him as your lawyer?*
>
> MR. MCDOWELL: *Yes, I do.*
>
> COURT: Thank you.
>
> [STATE]: Your Honor, I think he probably is otherwise indigent because of his situation and I take it by this that he is waiving any additional counsel because of his indigent status and Mr. Oates is his counsel of record.
>
> [COURT]: Do you understand, Mr. McDowell, and I will ask you the same question. You may be indigent and cannot afford a lawyer yourself. *Mr. Oates is your attorney and he is retained by your family to represent you[,] that you waive any other rights that you may have to an additional court appointed lawyer and you accept Mr. Oates as your attorney, is that correct?*
>
> MR. MCDOWELL: *Yes, sir.*

Id. at 372-73, 407 S.E.2d at 205 (emphasis original).

Rebutting the State's assertion that *Richardson* and *McDowell* are controlling, defendant argues these cases are distinguishable from the facts of those at bar. Specifically, defendant contends that unlike *Richardson*, at no point was defendant represented by two counsel during the defense of his capital charge; and unlike *McDowell*, defendant never specifically waived his right to assistant counsel.

Defendant asserts that *State v. Locklear*, 322 N.C. 349, 368 S.E.2d 377 (1988) is the proper case through which to address his assignment of error. In *Locklear*, a capital defendant's retained counsel moved for appointment of assistant counsel pursuant to N.C. Gen. Stat. § 7A-450(b1). After being appointed assistant counsel, the defendant sought a continuance so that assistant counsel could become familiar with the case. The denial of this continuance was the defendant's basis for error. Rather than holding that the defendant did not have the right to assistant counsel in the first place, our Supreme Court found no error because neither the "statutory" entitled assistant counsel or the retained counsel seemed inadequately prepared to argue relevant motions in the case. *Locklear*, 322 N.C. at 357, 368 S.E.2d at 382. Defendant contends the Court in *Locklear* assumed the propriety of appointing assistant counsel on its facts, and thus we should specifically do so in the case at bar. To rebut, the State argues that the discussion in *Locklear* does not address defendant's case because the retained counsel in *Locklear* only gave "Notice of Limited Representation," and that it is when a general appearance is made by an attorney that the defendant no longer is indigent for purposes of N.C. Gen. Stat. § 7A-450(b1). *Id.* at 356, 368 S.E.2d at 382.

We agree with defendant that *Richardson* and *McDowell* do not govern the facts concerning defendant's request for appointed assistant counsel. In *Richardson*, the Court focused on the fact that at all times, the capital defendant was represented by two counsel. In *McDowell*, the Court emphasized that the capital defendant, with one retained counsel, clearly and unequivocally waived appointment of an assistant attorney where the trial court, by its questioning indicated it was within the defendant's rights to request one. We read *Locklear* to be the closest case factually on point, and a case where our Supreme Court clearly assumed appointment of an assistant attorney on such facts was proper. In *Locklear*, despite giving the court a "Notice of Limited Representation," defendant's attorney stated that she would represent the defendant for "[a]ll further Superior Court Proceedings". *Locklear*, 322 N.C. at 357, 368 S.E.2d at 382. Thus, it was made clear to the court that she would provide representation until final judgment was rendered in the trial stage in superior court. *See* N.C. Gen. Stat. § 15A-143 (2003) (An attorney undertakes to represent a defendant "at all subsequent stages of the case until entry of final judgment, at the trial stage" when making a general entry.). Despite having a retained counsel make what was in fact a general entry, the defendant was still appointed assistant coun-

sel. *Locklear*, 322 N.C. at 357, 368 S.E.2d at 382. It is evident that our Supreme Court assumed, upon facts which are akin to those at bar, that when a defendant has retained one counsel in a capital case, he still may be entitled to an appointed assistant counsel if he is otherwise indigent.

We find authority in the N.C. Gen. Stat. § 7A-450 definition of "indigency" and the statute's subsequent safeguards for indigent capital defendants for requiring appointment of an assistant counsel to defendants similarly situated to those in *Locklear* and the case at bar. The section defines a defendant as indigent if he cannot afford legal counsel "*and to provide all other necessary expenses of representation.*" N.C. Gen. Stat. § 7A-450(a) (emphasis added). The plain language of the statute is clear that retaining counsel does not itself remove a defendant's indigent status where necessary expenses cannot be met. The statute guarantees indigent capital defendants two counsel, and assumes the representation will be the same as if the two appointed counsel were privately retained counsel. N.C. Gen. Stat. § 7A-450(b) & (b1). The statute reflects due regard for the gravity of a capital charge and its potential for many exhaustive procedural overlays and dire ramifications. It stands to reason that, if a defendant were able to procure funds sufficient for only one attorney his defense would be severely handicapped by denying appointment of assistant counsel. Therefore, we hold that assistant counsel which cannot be retained falls within a "necessary expense" of a capital defense which the State must provide or the defendant must waive. *See McDowell*, 329 N.C. 372-73, 407 S.E.2d at 205.

The principle behind our holding has been applied where our Supreme Court has held that hiring a single counsel does not itself remove a defendant's indigent status, and "does not in itself foreclose defendant's access to state funds for other necessary expenses of representation—including expert witnesses." *See State v. Boyd*, 332 N.C. 101, 109, 418 S.E.2d 471, 475 (1992). The *Richardson* Court distinguished *Boyd* on facts very different from those in the case at bar. In *Richardson*, two attorneys had made general appearances for defendant and neither sought to withdraw their representation. *Richardson*, 342 N.C. at 782, 467 S.E.2d at 690-91. Thus, the defendant's capital defense was provided all the safeguards and necessary expenses contemplated in N.C. Gen. Stat. § 7A-450, and whether or not the representation and its necessary expenses were being paid for by the State, the defendant, or no one at all, there was no error as to the adequacy of the defense itself for purposes of reversal.

Lastly, common sense militates a reading of N.C. Gen. Stat. § 7A-450(b1) as affording assistant counsel to a capital defendant as a "necessary expense" where the defendant is, beyond a single retained counsel paid for by himself or another source, otherwise indigent. Because denying a defendant assistant counsel in such an instance would handicap his defense, a defendant would be better off never having sought or accepted any retained counsel. Moreover, were we to read N.C. Gen. Stat. § 7A-450 as narrowly as the State, the most likely outcome would be that indigent capital defendants would refuse retained counsel when offered by some outside source for fear of losing the statutory right of an assistant counsel. The result of this outcome would be an unnecessary drain on State funds and directly contrary to our Supreme Court's declaration of the policy behind N.C. Gen. Stat. § 7A-450. *See State v. Hoffman*, 281 N.C. 727, 738, 190 S.E.2d 842, 850 (1972) (stating that N.C. Gen. Stat. § 7A-450 "clearly manifest[s] the legislative intent that every defendant in a criminal case, to the limit of his ability to do so, shall pay the cost of his defense. It is not the public policy of this State to subsidize any portion of a defendant's defense which he himself can pay.").

In the case at bar, defendant, otherwise indigent, was afforded counsel by his family. The retained counsel, presumably overwhelmed by what is involved in defending a capital case and its obvious potential ramifications, sought the necessary expense of an assistant counsel to provide an adequate defense. The court denied defendant this necessary expense. We believe this was error *per se*, and in violation of N.C. Gen. Stat. § 7A-450. We hereby reverse on that ground, and grant defendant a new trial. *Hucks*, 323 N.C. at 581, 374 S.E.2d at 245.

II. Issues that May Recur at Any New Trial[1]

[2] Defendant contends the trial court erred in admitting evidence of defendant's prior arrest on the evening before the alleged murder where defendant was found with 18 grams of cocaine, approximately $2,600.00, and a bag of marijuana. We do not agree the trial court erred, and find this evidence may be admissible at any new trial.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003) permits the trial court to admit evidence of "other crimes, wrongs, or acts," where the evi-

1. We note that defendant's assignment of error concerning the trial court's denial of his motion for exculpatory evidence is now moot. In the motion, defendant sought the identity of the victim's girlfriend who had made a statement to the GPD. As revealed in defendant's brief, her identity has since been determined.

dence is offered for the exclusive purpose of "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." However, evidence of these other acts is not admissible in an attempt to prove the general criminal propensities or disposition of a defendant. *Id.* Generally, this rule is one of inclusion of relevant evidence, so long as its probative value serves more than to show this criminal propensity or disposition. *State v. Coffey*, 326 N.C. 268, 280, 389 S.E.2d 48, 55 (1990).

In *State v. Ligon*, 332 N.C. 224, 234, 420 S.E.2d 136, 142 (1992) our Supreme Court allowed evidence of a defendant's prior history of drug dealing to show "motive" where the defendant was alleged to have murdered the victim after a drug transaction. The evidence of the defendant as a drug dealer was not limited to the circumstances of the specific transaction from which the murder arose. The State was allowed to admit evidence of prior weekly drug transactions in which the defendant was involved, earning $1,000.00 per week. *Id.* After the shooting in the case, a witness testified that the defendant stated: "That will teach people not to rip Burton Street off." *Id.*

In the case at bar, the court admitted defendant's prior arrest to show "motive" based on the State's forecast evidence that after hearing gunshots from the alleged incident, Mr. Murphy and Mr. Little observed defendant return to the car where they were waiting, and stated: "I did that Dude" or "Yo, I done that kid." Evidence was forecast that defendant stated "he didn't do it for nothing," and then showed Mr. Murphy and Mr. Little a small package of what appeared to be cocaine. Additionally, the State later introduced circumstantial evidence that defendant called the victim immediately after getting out of jail, and immediately before going to the apartment complex where the victim was killed. Both when the evidence was tendered, and before the jury's deliberations, the trial court gave instructions to the jury limiting the use of this evidence exclusively for discerning a "motive" to the crime at issue.

Credibility of the evidence notwithstanding, we believe the State's evidence sufficiently showed defendant's prior arrest for drug possession was admissible under the theory that it went to the motive for the later drug-related murder. Defendant did not object pursuant to N.C. Gen. Stat. § 8C-1, Rule 403 (2003) after the court found the evidence admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b), nor has defendant argued as such in his brief. Therefore, we need not review

the discretion of the court in balancing the probative value of the "motive" evidence verses its prejudicial effect.

This assignment of error is overruled.

After thorough review of the briefs, transcript, record, and relevant case law, in conformance with this opinion, we hereby order a

New trial.

Chief Judge MARTIN and Judge STEELMAN concur.

JAMES DREWRY, ADMINISTRATOR OF THE ESTATE OF ROGER McKINLEY DREWRY, DECEASED, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA03-1390

(Filed 1 February 2005)

Tort Claims Act— negligence—maintenance of public highways—standing water on roadway

The Industrial Commission did not err by dismissing plaintiff's negligence action against defendant Department of Transportation (DOT) and two of its employees based on its findings of fact that there was no evidence of a standard of care required by DOT for design and maintenance of water flow vis-a-vis public roads such as N.C. Highway 217 and that there was no evidence in the record that the water was backed up from the area of the pertinent pipe due to the water having entered the roadway from the pertinent field, because: (1) while plaintiff's expert evidence may have indicated a 42-inch pipe should have been installed, it fails to indicate a standard of care or duty required by DOT to install a 42-inch pipe; (2) the evidence shows that the silt from the recently disked field caused the drain pipe to clog, which in turn, caused water to flow across the highway as opposed to the drain in the ditch; and (3) in addition to failing to prove that DOT owed a specific duty or that it breached any duty, plaintiff's evidence did not show that DOT's failure to install a 42-inch drainage pipe proximately caused plaintiff decedent's accident.

Appeal by plaintiff from opinion and award filed 30 July 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 May 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert T. Hargett, for the State.

Reid, Lewis, Deese, Nance & Person, by James R. Nance, Jr., for plaintiff-appellant.

BRYANT, Judge.

James Drewry[1] (plaintiff) appeals from an opinion and award of the Full Commission (Commission) filed 30 July 2003 dismissing plaintiff's negligence action against the North Carolina Department of Transportation (NCDOT) and two of its employees.

This case was heard before a Deputy Commissioner on 14 October 2002. Defendant's motion to dismiss at the close of plaintiff's evidence was granted and an order was filed on 1 November 2002. Upon appeal, the Commission made the following findings to which the plaintiff assigns no error[2]:

> 1. On April 15, 1996, at approximately 9:15 p.m., one to two inches of water was standing in a 90-100 foot long pond on North Carolina Highway 217, (N.C. 217), 0.8 miles south of Linden in Cumberland County. The weather records from nearby monitoring stations show that it had rained heavily, up to two inches that day. The evidence shows that silt from an adjacent field, which had been recently disced for farming, had washed out of the field and clogged a drainage ditch that ran parallel to the roadway. This caused water to flow across the roadway instead of down the ditch to a highway drainpipe under the roadway and created the aforementioned pond.
>
> 2. On April 15, 1996, the decedent, Roger Drewry, was driving his 1995 Pontiac Trans Am V-8 Convertible. Plaintiff-decedent left home and with a passenger, Lee Morgan, and drove to Fayetteville, North Carolina. After shopping, plaintiff-decedent and Mr. Morgan returned to Linden. After leaving U.S. 401 [N]orth, plaintiff-decedent and Mr. Morgan proceeded down N.C.

1. Administrator of the estate of Roger McKinley Drewry, deceased.

2. Accordingly, these findings are deemed supported by competent evidence and are binding on appeal. *See Watson v. Employment Sec. Comm'n*, 111 N.C. App. 410, 412, 432 S.E.2d 399, 400 (1993).

217 [N]orth towards Linden at 50 to 55 miles per hour. Plaintiff-decedent ran into the standing water, lost control of his car, left the roadway and overturned. Plaintiff-decedent and Mr. Morgan were thrown from the vehicle and pinned underneath it. Mr. Morgan freed himself; however, even with the help of two others who stopped to assist, he could not free plaintiff-decedent. Plaintiff-decedent died at the scene of the accident. Trooper Minchew with the Highway Patrol investigated the accident and testified that standing water and driver's speed were contributing causes to the accident.

3. On July 3, 1995, Mr. Denning contacted the [NCDOT] concerning standing water problems on N.C. 217 at the scene of the subsequent accident. Thomas Burchell, a DOT Transportation Supervisor III in charge of roadway maintenance for that area responded. Mr. Burchell investigated the complaint and determined the ditch had silted in and following [NCDOT] practice determined that the ditch needed to be cleared and a berm built. On July 3, 1995, while investigating Mr. Denning's complaint Mr. Burchell took a video of the area. Mr. Burchell later showed the video to his supervisor Hugh Matthews who concurred with Mr. Burchell's remedial recommendations.

4. Records reflect that Mr. Burchell's crew members as of August 21, 1995 had completed the remedial work. Mr. Burchell periodically checked the area to see if the action which had been taken to correct the problem had its desired effect. Mr. Burchell believed that it did and [NCDOT] received no further complaints of drainage problems in that area until after plaintiff-decedent's accident on April 15, 1996. While plaintiff presented witnesses who testified that they encountered standing water on N.C. 217, no one notified [NCDOT] of the problems they encountered.

5. Plaintiff contends that the reason water was standing on the roadway was that a twenty-four inch drainage pipe located approximately one hundred feet down from the silted-over ditch was inadequate to handle the amount of water from the rainfall which occurred on the date of the accident. Plaintiff's hydrology expert, James A. Spangler, II, testified that the drainage area into the ditch and pipe located adjacent to and under N.C. 217 was thirty-one acres plus or minus and included cultivated land. Mr. Spangler testified that [NCDOT] regulations indicate in some instances that oversized piping can or should be used in order to allow for obstructions. However, the twenty-four inch pipe was

some distance from the silted area of the ditch which caused the flooding. Further, Mr. Spangler testified that the twenty-four inch pipe, had it been unobstructed, was adequate to handle the flow of water which fell on April 15, 1996[3].

6. Robert Godwin, the fire chief of Linden, responded to the emergency call for [the] accident. Mr. Godwin spoke with the passenger Lee Morgan at the scene of the accident. Mr. Morgan stated to Mr. Godwin that he (Morgan) had come through the same area of N.C. 217 about twenty minutes before the accident occurred. Mr. Godwin further testified that whenever he noticed water hazards in the roadway he would contact the Cumberland County Emergency Operations Center, but he never directly contacted DOT.

. . .

9. [NCDOT] had no prior notice of N.C. 217 being flooded on April 15, 1996 prior to the accident that killed plaintiff-decedent.

The Commission also found as fact the following, to which plaintiff did assign error:

7. Plaintiff-decedent and Mr. Morgan had passed through the flooded area in question approximately twenty minutes prior to the time of the accident in question here and were aware that the road was flooded prior to the accident.

8. Plaintiff has failed to offer any evidence as to what relevant [NCDOT] regulations and standards require as to design and maintenance of roads such as N.C. 217 including the design and control of water flow.

. . .

10. In this situation, the problem was not the drainage pipe but the area where the water ran out of the field into the ditch. Plaintiff presented no testimony that the water after running out of the field was backed up from the point of entering the ditch down to the location of the pipe running under the roadway, but that the water ran directly out of the field into the roadway. Plaintiff presented no testimony that the water was ponded at the location of the pipe under the roadway. Plaintiff presented no testimony as to whether the ditch was properly designed or negli-

3. Plaintiff assigned error to finding #5, but failed to argue same in his brief; it is therefore deemed abandoned. N.C. R. App. P. 28(a) (2003).

gently designed or maintained. Plaintiff only presented testimony that water was in the roadway. Plaintiff offered no standard to compare and determine whether there was negligence on the part of defendant in maintaining N.C. 217.

Based on these findings, the Commission concluded that plaintiff: (1) failed to prove his case by the greater weight of the evidence with respect to the standard of care or duty owed by NCDOT or their employees to either plaintiff-decedent or the public; and (2) failed to prove his case by the greater weight of the evidence that NCDOT's actions were the proximate or the contributing cause of the accident or injuries to plaintiff-decedent. Further, the Commission concluded that plaintiff-decedent was contributorily negligent by having driven in the same location twenty minutes prior to the accident and failing to take driving precautions of a reasonable person given the known road and weather conditions. Plaintiff appeals from the opinion of the Commission.

The dispositive issue for our review is whether the Commission erred in findings of fact #8 and #10, respectively, that there was no evidence of a standard of care required by NCDOT for design and maintenance, nor evidence that the water was backed up from the area of the pipe, due to water having entered the roadway from the field.

Plaintiff first argues the Commission erred in findings of fact #8 and #10 that there was no evidence of a standard of care required by NCDOT for design and maintenance of water flow vis-a-vis public roads such as N.C. Highway 217. In a related assignment of error, plaintiff argues the Commission erred in findings of fact #10 that there was no evidence in the record that the water was backed up from the area of the pipe, due to the water having entered the roadway from the field. In these two assignments of error, plaintiff is essentially arguing that NCDOT's failure to install a 42-inch drainage pipe proximately caused Drewry's accident. We disagree.

The [NCDOT] is subject to a suit to recover damages for death caused by its negligence only as is provided in the Tort Claims Act. *Davis v. Highway Commission*, 271 N.C. 405, 408, 156 S.E.2d 685, 687 (1967). The Tort Claims Act states in part, "the Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee . . . under circumstances where the State of North Carolina, if a private person,

would be liable to the claimant in accordance with the laws of North Carolina." N.C. Gen. Stat. § 143-291(a) (2003).

Our Court has previously ruled on the standard of review for tort claims from the Commission. "Under the Tort Claims Act, 'when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision.' " *Smith v. N.C. Dep't of Transp.*, 156 N.C. App. 92, 97, 576 S.E.2d 345, 349 (2003) (quoting *Fennell v. N.C. Dep't of Crime Control & Pub. Safety*, 145 N.C. App. 584, 589, 551 S.E.2d 486, 490 (2001)); *see* N.C.G.S. § 143-293 (2003). Our Supreme Court has explained the role of appellate courts in cases appealed from the North Carolina Industrial Commission holding, an appellate court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (citation omitted).

Under the Tort Claims Act, N.C. Gen. Stat. § 143-291(a) (2003), "negligence is determined by the same rules as those applicable to private parties." Plaintiff must show that "(1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury." *Woolard v. N.C. Dept. of Transportation*, 93 N.C. App. 214, 217, 377 S.E.2d 267, 269 (1989) (quoting *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988)).

Additionally, under the Tort Claims Act:

> [T]he burden of proof as to [negligence is] on the plaintiff. Evidence is usually not required in order to establish and justify a finding that a party has failed to prove that which he affirmatively asserts. It usually occurs and is based on the absence or lack of evidence.

Bailey v. N.C. Dept. of Mental Health, 2 N.C. App. 645, 651, 163 S.E.2d 652, 656 (1968); *Viar v. N.C. DOT*, 162 N.C. App. 362, 364, 590 S.E.2d 909, 912 (2004) ("The plaintiff has the burden of proof on the issue of negligence."); *Griffis v. Lazarovich*, 161 N.C. App. 434, 443, 588 S.E.2d 918, 924 (2003) (negligence was not presumed from the

"mere happening of an accident" . . . [when the plaintiff] failed to meet [his] burden of proving negligence).

In examining whether NCDOT failed to meet the standard of care owed to a plaintiff, we note that our Supreme Court has held that the public duty doctrine applies to causes of action under the Tort Claims Act:

> The general common law rule provides that governmental entities, when exercising their statutory powers, act for the benefit of the general public and therefore have **no duty to protect specific individuals.** Because the governmental entity owes no particular duty to any individual claimant, it cannot be held liable for negligence for a failure to carry out its statutory duties. Absent a duty, there can be no liability.

Stone v. N.C. Dept. of Labor, 347 N.C. 473, 482, 495 S.E.2d 711, 716 (1998) (internal citations omitted) (emphasis supplied).

The NCDOT possesses the statutory authority to plan, construct, maintain, and operate the system of public highways in this State. N.C. Gen. Stat. § 143B-346 (2003); *C.C.T. Equipment Co. v. Hertz Corp.*, 256 N.C. 277, 282, 123 S.E.2d 802, 806 (1962). The NCDOT is vested with broad discretion in carrying out its duties and the discretionary decisions it makes are not subject to judicial review "unless [their] action is so clearly unreasonable as to amount to oppressive and manifest abuse." *State Highway Comm'n v. Greensboro City Bd. of Education*, 265 N.C. 35, 48, 143 S.E.2d 87, 97 (1965).

In the instant case, the evidence shows that at some point prior to July 1995, NCDOT installed a 24-inch drain pipe in the ditch along N.C. Highway 217. Plaintiff offered into evidence the steps taken by NCDOT in July 1995 after a farmer, Mr. Denning notified the agency of standing water on N.C. Highway 217. NCDOT employee, Thomas Burchell, testified that he surveyed, video-taped and conferred with his supervisor as to the recommended measures to take in order to eliminate standing water on the roadway. The repairs included clearing ditches and putting in an earthen berm. Once completed, Burchell drove by the site on occasion to observe the repairs. The NCDOT received no further complaints of standing water until plaintiff-decedent's accident which occurred on N.C. Highway 217 on 15 April 1996 at about 9:15 p.m. after a heavy rain.

In attempting to show evidence of a standard of care requiring a 42-inch drain pipe, plaintiff points to certain testimony in the record.

Plaintiff's expert hydrologist James Spangler testified as to different methods that NCDOT may use in determining drain pipe size based on variable amounts of rainfall. Spangler stated that he used a method called the "TR-55 method" to study the 24-inch drain pipe's capacity to carry water run-off based on a 25-year rainfall event[4], while acknowledging that there are four different methodologies used to calculate water flow. Spangler testified that "our calculations show that a two inch rainfall event would have been carried efficiently by the 24-inch culvert that existed out there had it not been blocked." While plaintiff's expert evidence may have indicated a 42-inch pipe should have been installed, it fails to indicate a standard of care or duty required by NCDOT to install a 42-inch pipe. Therefore it appears the Commission's findings, that plaintiff presented insufficient evidence to establish NCDOT's standard of care, are supported by competent evidence.

Plaintiff also argues the Commission erred in finding of fact #10 when it found there was no evidence the water was backed up from the pipe. We disagree. The evidence shows that the silt build-up that created the flooding on the roadway came from a combination of the farmer's discing the field and the heavy rainfall. In other words, standing water in the highway occurred when the adjacent, silt-clogged ditch, prevented excess water from reaching the drainage pipe. Both water and silt were observed in the clogged drain pipe as the recently exposed soil filled the ditch with silt which then caused excess water to run onto the highway.

Plaintiff's expert Spangler testified "in some instances that oversized piping can or should be used in order to allow for obstructions." However, the 24-inch pipe was some distance away from the silted area of the ditch which caused the flooding. Further, Spangler testified "the 24-inch pipe, had it been unobstructed was adequate to handle the flow of water which fell on April 15, 1996." We note the unchallenged findings of the Commission indicating that silt from the recently disced field cause the drain pipe to clog, which in turn, caused water to flow across the highway as opposed to the drain in the ditch. Therefore, there is sufficient competent evidence to support the Commission's findings of fact #10.

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4. A "25-year event", with respect to rainfall, is defined by plaintiff's expert hydrologist as the calculation of "the amount of water that would be expected at a particular point based on drainage area and soil types and precipitation and other coefficients having to do with friction and how water travels across the landscape" over a twenty-five-year time period.

In addition to failing to prove that NCDOT owed a specific duty or that it breached any duty, plaintiff's evidence did not show that the NCDOT's failure to install a 42-inch drainage pipe proximately caused Drewry's accident.

> Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced [a] plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Woolard, 93 N.C. App. at 218, 377 S.E.2d at 270 (1989) (quoting *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984)).

Plaintiff offered no evidence tending to show that plaintiff-decedent Drewry could or would have survived the accident had the 42-inch drainage pipe been installed. Plaintiff's evidence here lacked key facts to meet his burden of proving that NCDOT's actions were the proximate cause of the accident. *See Bailey*, 2 N.C. App. 645, 651, 163 S.E.2d 652, 656 (1968). NCDOT received notice of the flooded roadway in 1996 only *after* plaintiff-decedent's fatal accident *and* after having repaired, maintained and inspected the area for the year prior. Upon learning of Drewry's accident, NCDOT revisited the scene noting the farmer had again disced the field and the previously installed berm from 1995 was no longer in place. Here, the Commission concluded, based on the lack of plaintiff's evidence as to NCDOT's standards required to maintain the highway, and the facts showing an independent cause of the water flooding the road, plaintiff failed to meet his burden of proving NCDOT's negligence. Therefore, we find the Commission made adequate findings of fact to support such a conclusion. Plaintiff also challenges the Commission's finding of fact #7. Because this finding of fact concerns contributory negligence, and as we have determined the Commission did not err in dismissing plaintiff's negligence action, it is not necessary to address this issue.

We affirm the Commission's opinion and award dismissing plaintiff's negligence action.

Affirmed.

Judges TYSON and STEELMAN concur.

DAVID LLOYD HOFECKER, PLAINTIFF v. JONATHAN COOPER CASPERSON, GARY JAY CASPERSON, DEFENDANTS

No. COA04-419

(Filed 1 February 2005)

1. Motor Vehicles— contributory negligence—auto-pedestrian collision

There was no material issue of fact as to whether plaintiff was contributorily negligent, and summary judgment was correctly granted for defendant on this issue, where plaintiff was struck by an automobile driven by defendant while walking on an unlit roadway at night, outside a crosswalk, with his back to traffic, while wearing dark overalls with a light shirt, and with an elevated alcohol level and detectable levels of drugs in his bloodstream.

2. Motor Vehicles— negligence—last clear chance—auto-pedestrian collision

Summary judgment for defendant on last clear chance was reversed in an auto accident case where it was clear that defendant did not have the time or the means to avoid plaintiff, a pedestrian, after discovering plaintiff's peril, but there was an issue as to whether defendant should have discovered plaintiff's peril earlier. It was unclear whether plaintiff had been walking in the roadway for some time prior to the accident, or staggered in front of defendant immediately prior to the accident.

Judge TYSON concurring in part and dissenting in part.

Appeal by plaintiff from order entered 10 November 2003 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 18 November 2004.

Robert J. Harris for plaintiff-appellant.

Brown, Crump, Vanore & Tierney, L.L.P., by O. Craig Tierney, Jr., and W. John Cathcart, for defendants-appellees.

TIMMONS-GOODSON, Judge.

David Lloyd Hofecker ("plaintiff") appeals the trial court order granting summary judgment in favor of Jonathan Cooper Casperson ("Jonathan") and Gary Jay Casperson ("Gary") (collectively, "defend-

ants"). For the reasons discussed herein, we affirm in part and reverse in part.

The facts and procedural history pertinent to the instant appeal are as follows: At approximately 6:56 p.m. on 1 November 2001, Jonathan was driving his vehicle at approximately forty miles per hour in the northbound lane of RP-1423 in Cary. At that time, plaintiff was walking home from work, in or to the right of the northbound lane of RP-1423. Plaintiff was walking with his back toward the traffic traveling north on RP-1423, and he was wearing his work uniform. The roadway was dark and unlighted, and medical records indicate that plaintiff had drugs as well as an elevated level of alcohol in his system. As Jonathan traveled along the roadway, he suddenly "caught a glimpse of" plaintiff in the northbound lane. According to Jonathan, plaintiff "came out of nowhere, walked directly into the path of my car and was wearing dark clothing." Jonathan's vehicle struck plaintiff in the northbound lane of RP-1423, and the impact threw plaintiff into the median lane of the roadway. As a result of the accident, plaintiff suffered injuries to his head, legs, and spleen.

On 26 February 2003, plaintiff filed a complaint against defendants, alleging that Jonathan's negligent operation of Gary's vehicle caused plaintiff's injuries. On 28 May 2003, defendants filed an answer denying plaintiff's allegations and raising the affirmative defense of contributory negligence. Defendants alleged that plaintiff "was wearing non-reflective clothing, . . . was in a public street that was not a marked crosswalk, . . . [and] failed to use reasonable care to avoid the accident[.]" On 24 September 2003, defendants filed a motion for summary judgment, alleging that no material fact or issue remained as to "the lack of negligence on the part of defendants and the existence of contributory negligence on the part of plaintiff." On 2 October 2003, plaintiff moved the trial court to deny defendants' motion for summary judgment, and on 13 October 2003, plaintiff filed a reply to defendants' answer. In his reply, plaintiff denied defendants' allegations of contributory negligence and asserted that Jonathan had the last clear chance to avoid the accident. On 10 November 2003, the trial court issued an order denying defendants' motion for summary judgment with regard to defendants' negligence, but granting defendants' motion for summary judgment with regard to plaintiff's contributory negligence. The trial court made the following findings in its order:

> 1) That there is a genuine issue of material fact as to the negligence of Defendant Jonath[a]n Casperson;

2) That there is no genuine issue as to any material fact as to Plaintiff David Lloyd Hofecker's contributory negligence and Defendants are entitled to judgment as a matter of law; and

3) That Plaintiff has failed to produce sufficient evidence to support a claim of last clear chance and there is no genuine issue of material fact as to the doctrine of last clear chance as set forth in Plaintiff's Reply filed on October 13, 2003.

Plaintiff appeals.

The issue on appeal is whether the trial court erred by granting summary judgment in defendants' favor. Because we conclude that defendants were entitled to judgment as a matter of law with respect to plaintiff's contributory negligence but were not entitled to judgment as a matter of law with respect to whether Jonathan had the last clear chance to avoid the accident, we affirm the trial court's order in part and reverse it in part.

[1] Plaintiff first argues that the trial court erred by concluding that no genuine issue of material fact remained with respect to his contributory negligence. Plaintiff asserts that the evidence is inconclusive as to whether he was contributorily negligent with respect to the accident. We disagree.

"In ruling on a motion for summary judgment, the court does not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact." *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980). The movant must demonstrate "that there is no triable issue of fact and that he is entitled to judgment as a matter of law." *Id.* "In considering the motion, the trial judge holds the movant to a strict standard, and 'all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion.' " *Id.* (quoting *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975)). Summary judgment is rarely appropriate in a negligence case, "since the standard of reasonable care should ordinarily be applied by the jury under appropriate instructions from the court." *Ragland*, 299 N.C. at 363, 261 S.E.2d at 668.

In the instant case, the uncontroverted evidence demonstrates that plaintiff was traveling by foot across or in the northbound lane of a roadway, while Jonathan was driving a vehicle in the northbound lane of the same roadway. N.C. Gen. Stat. § 20-174 (2003) provides the following pertinent duties in such a situation:

> (a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.
>
> . . . .
>
> (d) Where sidewalks are provided, it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway. Where sidewalks are not provided, any pedestrian walking along and upon a highway shall, when practicable, walk only on the extreme left of the roadway or its shoulder facing traffic which may approach from the opposite direction. Such pedestrian shall yield the right-of-way to approaching traffic.
>
> (e) Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway.

In light of this statute, this Court has held that "[a] pedestrian crossing the road at any point other than a marked crosswalk, or walking along or upon a highway, has a statutory duty to yield the right of way to all vehicles on the roadway." *Whitley v. Owens*, 86 N.C. App. 180, 182, 356 S.E.2d 815, 817 (1987). Furthermore, "[s]uch a pedestrian also has a common law duty to exercise reasonable care for his own safety by keeping a proper lookout for approaching traffic before entering the road and while on the roadway." *Id.* (citations omitted). However, "[f]ailure to yield the right of way to traffic pursuant to G.S. Sec. 20-174 does not constitute negligence *per se* but is some evidence of negligence." *Id.* at 183, 356 S.E.2d at 817 (citations omitted). Thus, "summary judgment may be properly entered against a plaintiff pedestrian only when 'all the evidence so clearly establishes his failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible.' " *Ragland*, 299 N.C. at 369, 261 S.E.2d at 671 (quoting *Blake v. Mallard*, 262 N.C. 62, 65, 136 S.E.2d 214, 216 (1964)).

In the instant case, while the evidence is inconclusive as to whether plaintiff was crossing RP-1423 or merely walking upon it when struck, the uncontroverted evidence indicates that plaintiff was walking in the northbound lane of RP-1423, outside of a crosswalk

with his back to approaching traffic. RP-1423 is an unlighted roadway with approximately eight feet of paved shoulder on both sides. On the night of the accident, plaintiff was wearing dark colored coveralls with a light shirt. Plaintiff had an elevated level of alcohol in his system, as well as detectable levels of benzodiazepines and opiates. Although plaintiff stated in his answers to interrogatories that he "looked to see if there was any traffic coming" down RP-1423, plaintiff stated in his deposition that he did not recall seeing Jonathan's headlights approaching, and when defendants' counsel suggested "you wouldn't have seen headlights because you were walking with the line of traffic, right, they were coming from behind you[,]" plaintiff answered in the affirmative. David A. Harmon, Jr. ("Harmon"), who owned a residence located on RP-1423, stated in a sworn affidavit that, prior to the accident, plaintiff "was walking up the side of the road [and then] staggered into [the] road and went on up the road staggering in the [e]xtra lane." Cary Police Department Officer J.D. Perdue ("Officer Perdue"), the law enforcement officer who investigated the accident, stated in his accident report that plaintiff "was walking in the roadway in the northbound lane" of RP-1423 when he was struck by Jonathan's vehicle. Jonathan stated in his answer to interrogatories that he "did not have a chance to avoid the collision as [] plaintiff came out of nowhere, walked directly into the path of my car and was wearing dark clothing." Jonathan stated that he applied his vehicle's breaks a split second before or immediately after he first saw plaintiff. In light of the foregoing evidence, we conclude that no material issue of fact remains regarding whether plaintiff was contributorily negligent. Thus, we overrule plaintiff's first argument.

[2] Plaintiff next argues that the trial court erred by concluding that no genuine issue of material fact remained regarding his claim that Jonathan had the last clear chance to avoid the accident. Plaintiff asserts that he presented sufficient evidence to withstand defendants' motion for summary judgment on this issue. We agree.

Our Supreme Court has held that "an injured pedestrian found to be contributorily negligent must establish four elements in order to invoke the doctrine of last clear chance against the driver of the motor vehicle which struck and injured him." *Watson v. White*, 309 N.C. 498, 504, 308 S.E.2d 268, 272 (1983). These elements are:

> "(1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of

> reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) *that the motorist had the time and means to avoid injury* to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) *that the motorist negligently failed to use the available time and means to avoid injury* to the endangered pedestrian, and for that reason struck and injured him."

Id. (quoting *Clodfelter v. Carroll*, 261 N.C. 630, 634-35, 135 S.E.2d 636, 639 (1964)).

In *White*, the Court concluded that where, as here, a pedestrian plaintiff "never saw defendants' vehicle and therefore could not reasonably have been expected to act to avoid injury[,]" the first element of the last clear chance doctrine is satisfied. 309 N.C. at 505, 308 S.E.2d at 272. Furthermore, the Court noted that " 'a motorist upon the highway does owe a duty to all other persons using the highway, including its shoulders, to maintain a lookout in the direction in which the motorist is traveling.' " *Id.* at 505, 308 S.E.2d at 273 (quoting *Exum v. Boyles*, 272 N.C. 567, 576, 158 S.E.2d 845, 852 (1968)). Thus, where, as here, the defendant sees only a glimpse of the plaintiff prior to impact but does not sound his horn, apply his brakes, or take other evasive action to avoid the accident, "it is reasonable to conclude that [the] defendant owed a duty to the plaintiff to maintain a proper lookout; that [the] defendant was originally negligent in failing to keep a proper lookout; and that although not knowing of [the] plaintiff's peril, [the] defendant, by the exercise of reasonable care, could have discovered [the] plaintiff's perilous position." *White*, 309 N.C. at 505, 308 S.E.2d at 273. Therefore, we conclude that the evidence in the instant case satisfies the first two elements of the last clear chance doctrine. However, because we conclude that there is a genuine issue regarding whether the third and fourth elements of the last clear chance doctrine were satisfied, we reverse the trial court's order granting summary judgment in defendants' favor.

While it is clear that Jonathan had neither the time nor the means to avoid injuring plaintiff when he first discovered plaintiff's position of peril, the evidence is in dispute as to whether Jonathan should have discovered plaintiff's position of peril earlier. The doctrine of last clear chance "contemplates a last 'clear' chance, not a

last 'possible' chance to avoid the accident; it must have been such a chance as would have enabled a reasonably prudent man in like position to have acted effectively." *Battle v. Chavis*, 266 N.C. 778, 781, 147 S.E.2d 387, 390 (1966). As discussed above, although it is uncontroverted that the accident occurred at night and in the middle of the roadway, it is unclear from the record whether plaintiff was walking in the middle of the roadway for some time prior to the accident, or merely staggered in front of Jonathan's vehicle immediately prior to the accident. Although plaintiff stated in his answer to interrogatories that he was crossing the roadway when struck by Jonathan's vehicle, in his deposition, plaintiff stated that he did not recall whether he was walking on the side of the roadway or in the middle of the roadway prior to the accident, but did recall that traffic could pass "without hitting me[.]" Officer Perdue's accident report suggests that plaintiff was walking in the middle of the northbound lane of RP-1423, and, as discussed above, Harmon's affidavit indicates that plaintiff was walking in the median lane of RP-1423 sometime prior to the accident. There is no indication in the record that Jonathan's view of the roadway before him, or those objects or persons upon it, was obstructed. Thus, in light of the record in the instant case, including the evidence detailed above, we conclude that an unresolved issue of fact remains as to whether Jonathan should have discovered plaintiff's perilous position prior to the accident. Therefore, because determination of whether Jonathan had the last clear chance to avoid the accident is properly for the jury, we reverse the trial court's order granting summary judgment in favor of defendants with regard to that issue.

In light of the foregoing conclusions, we affirm in part and reverse in part the order of the trial court granting summary judgment in favor of defendants.

Affirmed in part; reversed in part.

Judge GEER concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge concurring in part and dissenting in part.

I concur with the majority's holding to affirm the trial court's Order on the issue of contributory negligence. I disagree with the majority's reversal of the trial court's Order on the issue of last clear

chance. Plaintiff failed to present sufficient evidence of each element of last clear chance. I respectfully dissent.

I. Last Clear Chance

Summary judgment on the issue of last clear chance is properly granted for the defendant if the plaintiff fails to forecast evidence to show:

> (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him.

Vancamp v. Burgner, 328 N.C. 495, 498, 402 S.E.2d 375, 376-77 (1991) (citing *Clodfelter v. Carroll*, 261 N.C. 630, 634-35, 135 S.E.2d 636, 638-39 (1964) (quoting *Wade v. Jones Sausage Co.*, 239 N.C. 524, 525, 80 S.E.2d 150, 151 (1954))), *reh'g denied*, 329 N.C. 277, 407 S.E.2d 854 (1991).

"The doctrine of last clear chance imposes liability upon a defendant who did not actually know of the plaintiff's situation if, *but only if*, the defendant owed a duty to the plaintiff to maintain a lookout *and* would have discovered his situation had such a lookout been maintained." *Grogan v. Miller Brewing Co. Inc.*, 72 N.C. App. 620, 623, 325 S.E.2d 9, 11 (citing *Exum v. Boyles*, 272 N.C. 567, 575-76, 158 S.E.2d 845, 852 (1968); *Sink v. Sumrell*, 41 N.C. App. 242, 248, 254 S.E.2d 665, 670 (1979)) (emphasis supplied), *disc. rev. denied*, 313 N.C. 600, 330 S.E.2d 609 (1985). Further, "the doctrine contemplates a last 'clear' chance, not a last 'possible' chance, to avoid the injury; it must have been such as would have enabled a reasonably prudent man in like position to have acted effectively." *Culler v. Hamlett*, 148 N.C. App. 372, 379, 559 S.E.2d 195, 200 (2002) (citing *Grant v. Greene*, 11 N.C. App. 537, 541, 181 S.E.2d 770, 772 (1971); *accord*, *Battle v. Chavis*, 266 N.C. 778, 781, 147 S.E.2d 387, 390 (1966)).

We all agree Jonathan, as the driver of the vehicle, owed plaintiff a duty to maintain a proper lookout to the roadway in front of him. *Exum*, 272 N.C. at 576, 158 S.E.2d at 852. Plaintiff failed to allege facts, present evidence, or forecast evidence to show Jonathan: (1) did not maintain a proper lookout; or that (2) Jonathan would have discovered plaintiff's perilous position had he maintained a proper lookout.

The accident occurred in the evening, on a dark and unlighted roadway. Plaintiff was walking with his back toward the traffic, wearing a dark non-reflective work uniform. Defendants admitted Jonathan "caught a glimpse of" plaintiff in the northbound lane and immediately applied his vehicle's brakes. Plaintiff failed to forecast any evidence to show that Jonathan: (1) was driving at a "greatly excessive rate of speed," *Trantham v. Estate of Sorrells*, 121 N.C. App. 611, 615, 468 S.E.2d 401, 404, *disc. rev. denied*, 343 N.C. 311, 471 S.E.2d 82 (1996); (2) "had a view of 1,200 to 1,500 feet [or any other significant distance] before the collision," *Carter v. Poole*, 66 N.C. App. 143, 146, 310 S.E.2d 617, 619, *disc. rev. denied*, 310 N.C. 624, 315 S.E.2d 689 (1984); (3) "could have moved either to the left or right had he seen" plaintiff and avoided the accident, *Williams v. Spell*, 51 N.C. App. 134, 136, 275 S.E.2d 282, 284 (1981); (4) was preoccupied or distracted prior to the accident; or (5) failed to abide by the rules of the road or traveled in the wrong lane of traffic.

Plaintiff's allegation that Jonathan had the last clear chance to avoid the accident rests solely on the fact that Jonathan's vehicle struck plaintiff while plaintiff was located somewhere in the roadway. This allegation, standing alone, without a forecast of evidence to show Jonathan failed to maintain a proper lookout or that he could have avoided the accident, is insufficient to withstand a motion for summary judgment.

Further, plaintiff could not recall his location in the road immediately prior to the accident. The majority states, "the uncontroverted evidence demonstrates that plaintiff was traveling by foot across or in the northbound lane of a roadway, while Jonathan was driving a vehicle in the northbound lane of the same roadway." Even if plaintiff was located in the roadway prior to the accident, this "fact" is not determinative of whether Jonathan should have discovered plaintiff.

Plaintiff failed to forecast any evidence to show Jonathan was speeding, not paying attention, failed to maintain a proper lookout, or would have reasonably discovered plaintiff's perilous position.

Presuming plaintiff's location in the roadway, the majority's resolution of any discrepancies in plaintiff's favor regarding this "fact" is an insufficient basis to reverse the trial court's judgment on last clear chance.

II. Conclusion

I concur with the majority opinion's ruling to affirm the trial court's Order on contributory negligence. I would also affirm the trial court's Order granting summary judgment for defendants on the issue of last clear chance. I respectfully dissent.

IN THE MATTER OF: B.M., M.M., AN.M., AND AL.M.

No. COA04-455

(Filed 1 February 2005)

1. Termination of Parental Rights— failure to file petition within sixty-day time period—directory rather than mandatory time period

The trial court did not lack jurisdiction based on DSS's failure to file a petition seeking termination of respondents' parental rights within the sixty-day time period specified in N.C.G.S. § 7B-907(e), because: (1) the purpose of the legislature in including the filing specifications in the statute was to provide parties with a speedy resolution of cases where juvenile custody is at issue; (2) by holding that the order terminating respondents' parental rights should be reversed simply based on the fact that it was filed outside of the specified time limit would only aid in further delaying a determination regarding the minor children since juvenile petitions would have to be refiled and new hearings conducted; (3) generally statutory time periods are considered to be directory rather than mandatory unless the legislature expresses a consequence for failure to comply within the time period, and thus, the time limitation specified in N.C.G.S. § 7B-907(e) is directory; and (4) respondents failed to show how they were prejudiced by the untimely filing.

2. Termination of Parental Rights— adequacy of notice—waiver

The trial court did not lack jurisdiction to hear the motion to terminate respondents' parental rights based on the fact that

respondents were not served with the notice required by N.C.G.S. § 7B-1106.1, because: (1) a party who is entitled to notice of a hearing waives that notice by attending the hearing of the motion and participating in it without objecting to the lack thereof; and (2) respondents made no objection at trial regarding any lack of notice of the proceeding, and they were represented by counsel and participated in the hearing.

3. Termination of Parental Rights— failure to appoint guardian ad litem—parental incapacity

The trial court erred in a termination of parental rights case by failing to appoint a guardian ad litem under N.C.G.S. § 7B-1101 to represent respondent parents where DSS sought to terminate their parental rights based upon their incapacity to provide proper care and supervision of the children, and the case is remanded for a new trial because: (1) while DSS's motion for termination of parental rights does not specifically cite N.C.G.S. § 7B-1111(a)(6), the language in the motion tracks that language; (2) the fact that incapacity is defined in N.C.G.S. § 7B-1111(a)(6) means that it is not necessary that the allegation in the petition specifically state one of the enumerated ways listed under the statute in order to trigger the requirement of appointment of a guardian ad litem; (3) both respondent mother's mental illness and respondent father's mental retardation factored heavily in the removal of the children from respondents' custody; and (4) the same mental health issues that bear upon respondents' ability to provide proper care and supervision for their children also bear upon whether the parents have made reasonable progress toward correcting the conditions that led to the removal of the children from their home.

Appeal by respondent parents from judgment entered 21 October 2003 by Judge William Leavell in Watauga County District Court. Heard in the Court of Appeals 1 November 2004.

Eggers, Eggers, Eggers & Eggers, by Stacey C. Eggers, IV, for petitioner, Watauga County Department of Social Services.

Steven M. Carlson for Watauga County Guardian Ad Litem Program.

Charlotte Gail Blake for respondent-appellant father.

M. Victoria Jayne for respondent-appellant mother.

STEELMAN, Judge.

Respondents appeal an order of the trial court terminating their parental rights to all four of their children. For the reasons discussed herein, we reverse the order of the trial court.

The pertinent factual and procedural history is as follows: respondents are the natural parents of B.M., M.M., An.M., and Al.M., born December 1996, October 1997, April 1999, and August 2000, respectively. Each of the children have special needs, including one child who has cerebral palsy. The family moved to Boone, North Carolina in September 1998. Soon after respondents moved to Boone, Watauga County Department of Social Services (DSS) received a report alleging that respondents' home environment was potentially dangerous in that two of the children had breathing problems, yet the parents kept several animals, and respondents' were such poor housekeepers that the smell and filth were extraordinary. Immediately following receipt of this report, DSS began providing services to the family. Numerous agencies in the county provided respondents with many services in an attempt to educate and assist them in caring for their children. At one point, there were fifteen separate agencies involved with the family. Respondent father receives Social Security Disability due to his extreme learning disability and does not work. Respondent mother works part-time and has a borderline personality disorder and a history of depression. On 6 March 2001, DSS filed a petition alleging the minor children were neglected and dependent following numerous reports of filthy home conditions and marital disputes, and respondents' failure to comply with the family preservation plan. On 15 May 2001, respondents entered into a consent order finding the children dependent. The children remained in respondents' custody, with DSS providing assistance to the family in obtaining services needed for the children.

Following a review hearing in August 2001, the trial court placed physical custody of the children with DSS due to respondents' lack of compliance with the disposition order. DSS continued to make efforts to reunify the children with respondents. As part of DSS's reunification efforts, it developed several case plans for respondents to complete. On 1 August 2002, the trial court relieved DSS of reunification efforts following respondents' failure to comply with the case plans in that they: (1) failed to comply with mental health recommendations; (2) document stable employment; (3) obtain family counseling; (4) obtain financial counseling; (5) address anger management issues;

and (6) failed to obtain suitable housing. While in foster care, each of the children made significant improvement.

On 30 June 2003, DSS filed a motion seeking to terminate the parental rights of both parents. This motion alleged as grounds for termination of parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a): that the parents willfully left their children in foster care for more than twelve months without demonstrating they had made reasonable progress to correct the conditions which led to the removal of the children (N.C. Gen. Stat. § 7B-1111(a)(2)); that the children had been placed in the custody of DSS, for a continuous period of six months preceding the filing of the motion (N.C. Gen. Stat. § 7B-1111(a)(3)); and the parents are incapable of caring for the children, such that they are dependent within the meaning of N.C. Gen. Stat. § 7B-101, and there is a reasonable probability that such incapability will continue for the foreseeable future (N.C. Gen. Stat. § 7B-1111(a)(6)). The trial court granted DSS's motion and terminated respondents' parental rights on 21 October 2003. In its order, the trial court cited as grounds for terminating respondents' parental rights § 7B-1111(a)(2) and § 7B-1111(a)(6). The trial court further determined it was in the best interests of the minor children that respondents' parental rights be terminated and entered an order providing for such termination. Respondents appeal.

[1] We first address respondents' second and third assignments of error which deal with the issue of whether the trial court had jurisdiction to enter the order terminating their parental rights.

In respondents' second assignment of error they contend the trial court lacked jurisdiction over this matter because DSS failed to file the petition seeking termination of their parental rights within the time specified by statute, and as a result they were prejudiced. N.C. Gen. Stat. § 7B-907(e) provides that DSS:

> shall file a petition to terminate parental rights within 60 calendar days from the date of the permanency planning hearing unless the court makes written findings why the petition cannot be filed within 60 days. If the court makes findings to the contrary, the court shall specify the time frame in which any needed petition to terminate parental rights shall be filed.

N.C. Gen. Stat. § 7B-907(e) (2004). At the 26 August 2002 permanency planning review hearing, the trial court determined that the permanent plan for the children was adoption. DSS did not file a motion to

terminate respondents' parental rights until 30 June 2003, almost eleven months later. The trial court did not make any written findings as to why the petition could not be filed within the sixty days or extend the time in which DSS could file the petition.

Recently, this Court held that exceeding the time frames specified in the statutes for adjudication and disposition orders did not amount to reversible error. *In re E.N.S.*, 164 N.C. App. 146, 153, 595 S.E.2d 167, 171-72, *disc. review denied*, 359 N.C. 189, 606 S.E.2d 903 (2004) (2004 N.C. LEXIS 1215). We find this reasoning applicable here. The purpose of the legislature in including the filing specifications in the statute was to "provide parties with a speedy resolution of cases where juvenile custody is at issue[,]" as is the case here. *Id.* at 153, 595 S.E.2d at 172. By holding that the order terminating respondents' parental rights should be reversed simply because it was filed outside of the specified time limit "would only aid in further delaying a determination regarding [the minor children] because juvenile petitions would have to be re-filed and new hearings conducted." *Id.*

"Mandatory provisions are jurisdictional, while directory provisions are not." *Commissioner of Labor v. House of Raeford Farms*, 124 N.C. App. 349, 354, 477 S.E.2d 230, 233 (1996). Whether the time provision of N.C. Gen. Stat. § 7B-907(e) is jurisdictional in nature depends on whether the legislature intended the language of that provision to be mandatory or directory. *See id.* at 353, 477 S.E.2d at 232. "Generally, 'statutory time periods are . . . considered to be directory rather than mandatory unless the legislature expresses a consequence for failure to comply within the time period.' " *Id.* at 353, 477 S.E.2d at 233 (citations omitted). Here, none of the statutes in Chapter 7B address the consequences that would flow from the untimely filing of a petition to terminate parental rights. Significantly, N.C. Gen. Stat. § 7B-907(e) fails to provide a consequence for DSS's failure to comply with the sixty-day filing period. *See id.* at 354, 477 S.E.2d at 233. As a result, we conclude that the time limitation specified in N.C. Gen. Stat. § 7B-907(e) is directory rather than mandatory and thus, not jurisdictional.

While DSS's delay clearly violated the sixty-day provision of N.C. Gen. Stat. § 7B-907(e), we find no authority compelling that the termination of parental rights order be vacated.

Respondents have also failed to show they were prejudiced by the late filing of the petition to terminate their parental rights. Respondents' right to appeal was not affected by the untimely filing.

An order following a review hearing or permanency planning hearing that changes the permanency plan from reunification to termination of parental rights is a dispositional order that fits within the statutory language of N.C. Gen. Stat. § 7B-1001. *See In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003). *See also In re H.W.*, 163 N.C. App. 438, 594 S.E.2d 211, *disc. review denied*, 358 N.C. 543, 599 S.E.2d 46 (2004) (reviewing a decision by the trial court relieving DSS of its reunification efforts following a regularly scheduled court review). Respondents could have appealed from either the review hearing ceasing DSS's efforts to reunify the family or from the permanency planning order which changed the permanency plan for the juveniles to termination of parental rights, as they both constituted dispositional orders which were immediately appealable under the provisions of N.C. Gen. Stat. § 7B-1001.

In this case, DSS's failure to file the petition seeking termination of respondents' parental rights within sixty days as required by N.C. Gen. Stat. § 7B-907(e) is not a ground for reversal.

We do note there are several instances in this case in which the trial court failed to enter various orders within the times specified by statute. One such order was not reduced to writing until approximately eleven months following the hearing. We strongly caution against this practice, as it defeats the purpose of the time requirements specified in the statute, which is to provide parties with a speedy resolution of cases where juvenile custody is at issue.

[2] In respondents' third assignment of error, they contend the trial court lacked jurisdiction to hear the motion to terminate their parental rights because they were not served with the notice required by N.C. Gen. Stat. § 7B-1106.1.

N.C. Gen. Stat. § 7B-1106.1 requires that upon the filing of a motion for termination of parental rights, "the movant shall prepare a notice directed to . . . (1) The parents of the juvenile." N.C. Gen. Stat. § 7B-1106.1(a)(1) (2004). Section (b) then lists the things that notice must include. N.C. Gen. Stat. § 7B-1106.1(b). "[W]here a movant fails to give the required notice, prejudicial error exists, and a new hearing is required." *In re Alexander*, 158 N.C. App. 522, 526, 581 S.E.2d 466, 469 (2003). However, a party who is entitled to notice of a hearing waives that notice by attending the hearing of the motion and participating in it without objecting to the lack thereof. *In re J.S.*, 165 N.C. App. 509, 514, 598 S.E.2d 658, 662 (2004).

In the instant case, respondents made no objection at trial regarding any lack of notice of the proceeding. Furthermore, they were represented by counsel and participated in the termination of parental rights hearing. Respondents have waived their right to now object to the adequacy of notice. This assignment of error is without merit.

[3] We now address respondents' first assignment of error, in which they contend the trial court committed reversible error by failing to appoint a guardian *ad litem* for them where DSS sought to terminate their parental rights based upon their incapability to provide proper care and supervision of their children.

N.C. Gen. Stat. § 7B-1101 requires that a guardian *ad litem* shall be appointed, in accordance with Rule 17 of the Rules of Civil Procedure, to represent a parent in a termination hearing

> *[w]here it is alleged* that a parent's rights should be terminated pursuant to G.S. 7B-1111(6)[1], and the incapability to provide proper care and supervision pursuant to that provision is the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition.

N.C. Gen. Stat. § 7B-1101(1) (2004) (emphasis added). N.C. Gen. Stat. § 7B-1111(a)(6) provides that a trial court may terminate parental rights upon a finding:

> [t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-1111(a)(6) (2004). A dependent juvenile is defined as a minor child "whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9)

1. This statute makes an incorrect reference to "G.S. 7B-1111(6)." However, the language in G.S. 7B-1101(1) tracks identically the language in G.S. 7B-1111(a)(6), thus it is clear that G.S. 7B-1111(a)(6) is the section to which this statute refers.

(2004). The trial court's failure to appoint a guardian *ad litem* in such situations requires reversal of the order terminating parental rights, remand for appointment of a guardian *ad litem*, and a new trial. *In re Estes*, 157 N.C. App. 513, 518, 579 S.E.2d 496, 499, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 390 (2003).

In this case, DSS's motion for termination of parental rights states:

> That grounds exist pursuant to N.C.G.S. §7B-1111 for terminating the parental rights of the respondents, to wit: c) That the parents are incapable of providing for the proper care and supervision of the juveniles, such that the juveniles are dependent juveniles within the meaning of N.C.G.S. §7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future.

While DSS's motion for termination of parental rights does not specifically cite to N.C. Gen. Stat. § 7B-1111(a)(6), the language in the motion tracks the language of section (a)(6) verbatim. It is the use of the term "incapable" which triggers the requirement of N.C. Gen. Stat. § 7B-1101 for the appointment of a guardian *ad litem*. Incapability is defined in the statute as encompassing "substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile . . . ." N.C. Gen. Stat. § 7B-1111(a)(6). Since incapability is defined in the statute, it is not necessary that the allegation in the petition specifically state one of the enumerated ways listed under the statute in order to trigger the requirement of appointment of a guardian *ad litem*.

In this case, both the mother's mental illness and the father's mental retardation factored heavily in the removal of the children from respondents' custody. The allegations and evidence before the trial court tended to show that respondent mother was incapable of providing proper care to her children due to mental illness. In the trial court's order terminating parental rights, the findings of fact provide:

> 39. That the respondent mother testified that she was suicidal before the children were removed.
>
> 42. That the respondent mother has suffered from major depression and borderline personality disorder.

It was these very findings which the trial court based its conclusions of law on in deciding respondents' parental rights should be terminated because the children were dependent and respondent mother was incapable of providing for their needs.

Furthermore, the allegations and evidence before the trial court tended to show that respondent father was incapable of providing proper care to the minor children due to his lack of mental capabilities. The record is replete with evidence from DSS and GAL reports, respondent father's psychological evaluation, and the trial court's previous orders, that both the trial court and DSS found that respondent father suffered at least from mild mental retardation. Furthermore, each of respondents' mental problems were used to magnify that of the other. For example, one DSS report on which the trial court relied, stated that while respondent mother was mentally capable of providing care for her children and learning from the services provided by DSS, respondent mother's "acute psychiatric problems" prevented her from providing supervision and guidance to respondent father regarding the day-to-day care of their children. In a review order entered 31 August 2001, the trial court found that respondent father had "significant mental disability impairing his ability to make unsupervised day-to-day parenting decisions." Evidence was presented at trial concerning respondent father's receipt of Social Security Disability due to his severe learning disability. In DSS's petition to adjudicate the children neglected, it stated "[t]he parents each have emotion/mental problems and conditions which affect their ability to learn and/or to practice what is taught to them about how to provide a more stable, nurturing, and developmentally adequate environment for their children." The petition further went on to state that both parents were "limited in their ability to parent the children by the mother's apparent depression and by the father's mental retardation."

Petitioner argues in the alternative that, even if a guardian *ad litem* should have been appointed, since another ground existed to terminate respondents' parental rights, which did not require the appointment of a guardian *ad litem*, the trial court's failure to appoint one was harmless error.

In *In re J.D.*, this Court reversed and remanded a case for the appointment of a guardian *ad litem* where the trial court did not terminate the respondent's parental rights based on dependency, but where the petition sufficiently alleged dependency and evidence was presented regarding the respondent's relevant debilitating condition.

164 N.C. App. 176, 182, 605 S.E.2d 643, 646, (stating that evidence of the respondent's mental health issues and the child's neglect "were so intertwined at times as to make separation of the two virtually, if not, impossible"), *disc. review denied*, 358 N.C. 732, 601 S.E.2d 531 (2004). We find this reasoning applicable in this case. The same mental health issues that bear upon respondents' ability to provide proper care and supervision for their children also bears upon whether the parents have made reasonable progress towards correcting the conditions that led to the removal of the children from their home.

The trial court erred in failing to appoint a guardian *ad litem* to represent respondents. As a consequence, the order terminating respondents' parental rights is vacated and the matter is remanded for new trial.

Since we have remanded this matter for a new trial, we do not reach respondents' remaining assignments of error.

REVERSED AND REMANDED.

Chief Judge MARTIN and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA v. ROBERT LOUISE ETHRIDGE, DEFENDANT

No. COA03-1715

(Filed 1 February 2005)

1. Burglary and Unlawful Breaking or Entering; Larceny; Possession of Stolen Property— defendant as perpetrator—sufficiency of evidence

The trial court correctly denied defendant's motion to dismiss charges of felonious breaking and entering, felonious larceny, and felonious possession of stolen goods where the State provided substantial circumstantial evidence that defendant was the perpetrator. Defendant's vehicle was seen at the site, pulled to the door of the house with its tailgate open and a coffee table inside, and defendant was placed next door on the day the offenses were committed.

2. Criminal Law— flight—instruction supported by the evidence

There was no error in giving the Pattern Jury Instruction on flight in a prosecution for felonious breaking and entering, felonious larceny, and felonious possession of stolen goods. The State provided evidence that reasonably supports the theory that defendant fled after the commission of the crimes.

3. Criminal Law— recent possession of stolen property—instruction

The trial court did not err by giving the Pattern Jury Instruction on possession of recently stolen property in a prosecution for felonious breaking and entering, felonious larceny, and felonious possession of stolen goods.

4. Sentencing— possession of stolen goods and larceny—same goods

The trial court erred by entering judgment for possession of stolen goods where defendant's convictions for possession of stolen goods and felonious larceny were based on taking and possessing the same goods.

Judge HUNTER dissenting.

Appeal by Defendant from conviction and sentence entered 23 July 2003 by Judge Jerry Braswell in Superior Court, Lenoir County. Heard in the Court of Appeals 19 October 2004.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen M. Waylett, for the State.

Sue Genrich Berry, for the defendant-appellant.

WYNN, Judge.

Defendant Robert Louise Ethridge appeals from his conviction and sentence. He argues that the trial court erred by: (1) failing to dismiss charges of felonious breaking and entering, felonious larceny, and felonious possession of stolen goods; (2) including in its jury instruction Pattern Jury Instruction 104.35 regarding flight; (3) including in its jury instruction Pattern Jury Instruction 104.40 regarding the doctrine of recent possession of stolen property; and (4) entering judgment on the felonious larceny and possession of stolen property convictions where the latter offense is based on possession of the items that were the subject of the former offense. For

the reasons stated herein, 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 24 May 2002, Jackie Brown received calls informing her that furniture was being taken out of a vacant home owned by her cousin. Ms. Brown watched the house for her cousin, was the only holder of the keys to the house, and kept the house doors locked and reinforced with plywood. When Ms. Brown arrived at the house, she found it had been broken into and property—more than thirty items, including coffee tables, a television, and air conditioners—had been removed. She also found items that had been in the house scattered around the backyard.

Malena Jones lived next door to the house owned by Ms. Brown's cousin. On 24 May 2002, Ms. Jones returned home from work at approximately 3:00 p.m. and noticed a blue station wagon with tinted windows in the driveway of the house. The rear of the car faced the back door of the house and the car's tailgate was open. Ms. Jones testified she saw what appeared to be a coffee table hanging out the back of the car. Ms. Jones recognized one of two men standing by the car to be Derrick Hembry, with whom her daughter had a relationship and who visited her home with some frequency. Ms. Jones's daughter recognized the car, which by then was driving away, to be the one in which Mr. Hembry had arrived at her home earlier that day and knew the car belonged to Defendant.

The blue station wagon was registered to Defendant. Mr. Hembry acknowledged his acquaintance with Defendant and stated that Defendant had driven him to Ms. Jones's house on the day of the commission of the crimes.

The police officers quickly located Defendant's car but not Defendant. Ultimately, Defendant was found about a month later, arrested, and tried on charges of breaking and entering, larceny after breaking and entering, and possession of stolen goods. On 23 July 2003, the jury found Defendant guilty on all charges. Defendant received sentences of six to eight months imprisonment, twelve months probation, and fees and costs totaling $5931 for breaking and entering, six to eight months imprisonment and twelve months probation for larceny after breaking and entering, and six to eight months imprisonment and twelve months probation for possession of stolen goods. Defendant appealed.

[1] On appeal, Defendant first contends that the trial court erred by denying his motions to dismiss charges of felonious breaking and entering, felonious larceny, and felonious possession of stolen goods at the close of the State's evidence and at the close of all evidence because "the evidence was insufficient to prove the Defendant was the perpetrator of the offenses" (Assignments of Error Nos. 1, 2, and 3). To survive a motion to dismiss, the State must present substantial evidence of each element of the offense charged and the defendant's being the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). In considering whether such substantial evidence, *i.e.*, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[,]" (*State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted)), exists, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference. *State v. Price*, 344 N.C. 583, 587, 476 S.E.2d 317, 319 (1996).

Here, the State provided substantial circumstantial evidence to prove the Defendant was the perpetrator of the offenses, including: A vehicle registered to Defendant and identified by others as belonging to Defendant, was seen at the crime scene. The vehicle, with its tailgate open, was pulled up to the door of the house. A coffee table was seen in the car. Defendant was placed by Mr. Hembry next door to the crime scene on the day the offenses occurred. We hold that, in the light most favorable to the State, the State provided substantial circumstantial evidence that Defendant perpetrated the offenses. *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 919 (1993) (On a motion to dismiss, circumstantial evidence constitutes sufficient substantial evidence where "the court decides that a reasonable inference of defendant's guilt may be drawn[.]"). We therefore affirm the trial court's denial of Defendant's motion to dismiss.

[2] Defendant next contends that the trial court erred by including in its jury instructions Pattern Jury Instruction 104.35 regarding flight (Assignment of Error No. 4). An instruction on flight "is appropriate where 'there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime[.]' " *State v. Kornegay*, 149 N.C. App. 390, 397, 562 S.E.2d 541, 546 (2002) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)). " 'The relevant inquiry concerns whether there is evidence that defendant left the scene of the [crime] and took steps to avoid apprehension.' " *Id.* (quoting *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990)). If we find "some evidence in the record reasonably

supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *Irick*, 291 N.C. at 494, 231 S.E.2d at 842 (citation omitted).

Here, the State provided some evidence of flight. Defendant left the crime scene shortly after Ms. Jones arrived home. Furniture that had been in the house was found scattered in the backyard. While the police found Defendant's vehicle, they were not able to locate Defendant for several weeks. This evidence reasonably supports the theory that Defendant fled after commission of the crimes charged. We therefore find no error with the trial court's instructing the jury on flight.

[3] Defendant also contends that the trial court erred by including in its jury instructions Pattern Jury Instruction 104.40 regarding the doctrine of recent possession of stolen property (Assignment of Error No. 5). The doctrine of recent possession is "a rule of law that, upon an indictment for larceny, possession of recently stolen property raises a presumption of the possessor's guilt of the larceny of such property." *State v. Maines*, 301 N.C. 669, 673, 273 S.E.2d 289, 293 (citing *State v. Bell*, 270 N.C. 25, 153 S.E.2d 741 (1967); *State v. Allison*, 265 N.C. 512, 144 S.E.2d 578 (1965)). The recent possession presumption is allowed only where:

> the State shows beyond a reasonable doubt: (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; and (3) the possession was recently after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilt.

Maines, 301 N.C. at 674, 273 S.E.2d at 293 (citations omitted).

Here, as in *State v. Joyner*, 301 N.C. 18, 269 S.E.2d 125 (1980), while the trial court referred to the doctrine of recent possession at the State's request, it

> nowhere charged that the fact of possession raised a presumption or even an inference that defendant was guilty of any of the crimes charged against him. [The trial judge] merely stated that the jury might consider defendant's recent possession together

with all the other facts and circumstances in deciding whether or not the defendant is guilty of [] larceny.

Joyner, 301 N.C. at 29, 269 S.E.2d at 132 (quotation omitted). " 'Whenever goods have been taken as a part of the criminal act, the fact of subsequent possession is some indication that the possessor was the taker, *and therefore the doer of the whole crime.*' " *Id.* (quoting 1 WIGMORE ON EVIDENCE § 153 (3d ed. 1940). We therefore find that the trial judge properly instructed the jury that, if it found recent possession, it could consider that recent possession as relevant in determining whether Defendant was guilty of the crimes charged.

[4] Lastly,[1] Defendant contends, and the State agrees, that the trial court erred in entering judgment for the offense of possession of stolen goods. Defendant's convictions for possession of stolen goods and felonious larceny were based on the taking and possessing of the same goods. North Carolina, however, does not "punish an individual for larceny of property and the possession of the same property which he stole." *State v. Perry*, 305 N.C. 225, 235, 287 S.E.2d 810, 816 (1982). Defendant's conviction for the possession of stolen goods is therefore reversed.

No error in part; reversed in part.

Judge THORNBURG concurred prior to 31 December 2004.

Judge HUNTER dissents in a separate opinion.

HUNTER, Judge, dissenting.

I respectfully dissent from the majority opinion's conclusion that the trial court did not err in including the Pattern Jury Instruction for flight in its jury instructions. Therefore, I would grant defendant a new trial. Specifically, I take issue with the majority's conclusion that sufficient evidence of avoiding apprehension was offered by the State to warrant such an instruction.

As the majority notes, the relevant inquiry in determining whether an instruction on flight is properly offered is "whether there is evidence that defendant left the scene . . . and *took steps to avoid apprehension.*" *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990) (emphasis added). An instruction of flight, offered as some

1. Defendant expressly abandoned his other assignments of error.

evidence of a guilty mind, means more, therefore, than merely departing the scene of the crime, as nearly all perpetrators do. Rather, it implies the defendant took some action to avoid apprehension beyond merely leaving.

In *State v. Holland*, 161 N.C. App. 326, 330, 588 S.E.2d 32, 36 (2003), this Court found that it was error for the trial court to instruct on flight. In *Holland*, the evidence showed the defendant left the crime scene with his co-conspirators after one of the victims escaped and ran next door to contact 911. *Id.* at 327, 588 S.E.2d at 34. After returning to the home of a co-conspirator, the defendant was driven to his girlfriend's house. *Id.* at 330, 588 S.E.2d at 36. The Court in *Holland* concluded that visiting a friend at their residence after the commission of a crime, by itself, did not raise a reasonable inference that the defendant was attempting to avoid apprehension. *Id.*

Here, Ms. Jones offered testimony that she returned to her home neighboring 916 Lincoln on the day of the incident, around 3:00 p.m. Ms. Jones then testified:

> A. And in the driveway was a station wagon.
>
> Q. Okay.
>
> A. And I pulled into my driveway, which would be on the right.

Ms. Jones identified the vehicle as a blue station wagon.

> Q. Now did you—how many people did you see around the station wagon or inside the station wagon?
>
> A. There was two people in the station wagon and two on the outside behind the back of the station wagon.

Ms. Jones then stated she recognized one of the parties as her daughter's former boyfriend, Derrick Hembry.

> Q. All right. Now when you got home did you talk to your daughter?
>
> A. Yes. When I pulled into the driveway I went—I was getting ready to go around the house and the vehicle pulled out of the driveway. And the guy—the other two guys went down the street.

Ms. Jones further testified that she did not see whether the doors of the vehicle were open or shut as she approached the driveway, and that she did not see if any of the people standing at the station wagon were looking at her as she drove by. On cross-examination, Ms. Jones

also testified that the front end of the station wagon was facing the street when she saw the vehicle, and that she did not see any of the individuals enter or exit the property at 916 Lincoln.

Ms. Jones' testimony does not reasonably support the theory that defendant did anything more than merely leave the scene of the crime, which under our standard does not support an instruction of flight without further evidence that defendant acted in a manner to avoid apprehension. *Levan*, 326 N.C. at 165, 388 S.E.2d at 434. At the time Ms. Jones arrived, her testimony indicates that two men were already in the car and that the car was facing the street. Neither Ms. Jones nor her daughter testified that they observed the vehicle speeding as it drove down the street, evidence which would justify an instruction of flight. *See State v. Reeves*, 343 N.C. 111, 113, 468 S.E.2d 53, 55 (1996) (holding that an instruction for flight was warranted when the evidence showed the defendant "ran from the scene of the crime"). Thus, Ms. Jones' testimony fails to offer evidence that defendant left the scene of the crime in a manner so as to avoid apprehension.

The majority also looks to evidence offered by the caretaker of the property, Ms. Brown, that there were items left sitting in the backyard of the house, suggesting defendant left in haste. Both Ms. Brown and Ms. Jones testified that furniture, a coffee table and end table, were sitting in the back yard after the robbery.

However, Ms. Brown also testified that a number of items were missing from the house, including two porch swings, two coffee tables, a nineteen inch television, several fans, an air conditioning unit, a carpet shampooer, and an antique pedal sewing machine. The list of stolen items included more than enough items to fill the back of a station wagon. Thus, the mere fact that items remained in the back yard does not reasonably support the theory that defendant fled the scene in a manner so as to avoid apprehension.

Finally, the majority suggests the evidence that the police were able to locate defendant's car, but unable to locate defendant for several weeks, permits an instruction of flight. Here, however, Officer Lewis testified that the blue station wagon identified by Ms. Jones and her daughter was found approximately a week after the incident in the Simon Bright area, precisely where the daughter stated defendant usually parked. Further, although the officers were unable to locate defendant on that occasion, no one testified as to any subsequent active efforts to locate defendant. Rather, Officer Lewis testified there was further investigation to positively identify defendant as

the individual known by Ms. Jones' daughter and Mr. Hembry as Matt Boone. Once defendant's identity was confirmed, a warrant was sworn out in defendant's name and placed in the warrant box of the Kinston Police Department on approximately 12 June 2002. The arresting officer, Officer Hewitt, testified that he knew there was an active warrant on defendant and spotted him at Carver Court on 22 June 2002. Officer Hewitt testified that defendant readily identified himself at that time, was cooperative when arrested, and immediately gave a statement as to his actions on the day of the incident. Thus, the failure of the police to locate defendant at the same time they located his car, parked in its usual location, does not reasonably support the theory of flight. *See State v. Lampkins*, 283 N.C. 520, 196 S.E.2d 697 (1973) (finding an instruction of flight proper when officer testified he searched for the defendant without success after the commission of the crime).

Here, the evidence, even when taken in the light most favorable to the State, merely suggests that defendant left the scene of the crime, much like the defendant in *Holland*. Unlike other cases where an instruction of flight was justified by specific evidence of efforts made to avoid apprehension, here there was insufficient evidence of such steps to permit the instruction. *See State v. Grooms*, 353 N.C. 50, 540 S.E.2d 713 (2000) (finding instruction on flight proper when the defendant hid the victim's body and asked another individual to assist him in leaving town); *Levan*, 326 N.C. 155, 388 S.E.2d 429 (finding instruction on flight proper when the defendant attempted to conceal the victim's body and threw away the victim's personal effects).

Although the jury was properly instructed that proof of flight alone is insufficient to establish defendant's guilt, such an instruction in this case, based entirely on circumstantial evidence, cannot be said to be harmless error. Unlike in *Holland*, where the evidence included three co-defendants identifying the defendant as the perpetrator of the crime, 161 N.C. App. 326, 330, 588 S.E.2d 32, 36, the circumstantial evidence here, while sufficient to survive a motion to dismiss, was not sufficient to conclude harmless error. Mr. Hembry offered the only evidence directly linking defendant to the crime scene in a statement given to the police on 12 June 2002, but later rescinded that statement while under oath. Mr. Hembry stated at trial that he did not see defendant at 916 Lincoln after being dropped off by defendant at Ms. Jones' residence, and that he had only signed the statement because, "[t]hey told me if I wouldn't sign the paper they were going to lock me up." Aside from Mr. Hembry's testimony, the only evidence

linking defendant to the crime was testimony that a blue station wagon was seen at 916 Lincoln, and that defendant drove a blue station wagon. As our Supreme Court has previously noted, although flight alone is not sufficient to establish guilt, it provides some evidence which may be considered in determining guilt, and therefore the inclusion of the instruction on flight in a case with only circumstantial evidence linked defendant to the crime may have produced a different result. *See State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977) (quoting *Proverbs* 28:1 (King James), " '[t]he wicked flee when no man pursueth, but the righteous are bold as a lion' "). I therefore respectfully disagree with the majority that the trial court did not err in offering this instruction. As such error was not harmless, defendant should therefore be granted a new trial.

MICHELE BARR ALLEN, PLAINTIFF V. HARVEY H. ALLEN, DEFENDANT

No. COA03-1702

(Filed 1 February 2005)

1. Divorce— equitable distribution—findings—diminution of stock value

An equitable distribution order was remanded for further findings about whether the diminution of stock value during the separation was the result of defendant's actions. If not, the decline in stock value is included in the equitable distribution of marital and divisible property; if so, the diminution may be considered as a distributional factor.

2. Divorce— equitable distribution—presumption for in-kind division—closely held corporation

An equitable distribution order was remanded for further findings about the in-kind distribution presumption where there was evidence that defendant's business was a closely held corporation not susceptible to division.

3. Divorce— equitable distribution—tax refund—marital property

The trial court did not err in an equitable distribution action by classifying a tax refund as marital property. The refund was not included on the stipulated list of marital property, but plain-

tiff did not waive the inclusion of unlisted property in the equitable distribution. Furthermore, funds received after the separation may be considered marital property when the right to receive those funds was acquired before the separation.

4. Divorce— equitable distribution—corporate profits—owned by corporation

The trial court erred in an equitable distribution action by distributing profits from a Subchapter S corporation as marital property. Profits of a Subchapter S corporation are owned by the corporation, not by the shareholders.

5. Divorce— equitable distribution—IRA

The trial court erred in an equitable distribution case by not distributing plaintiff's IRA where the parties included it on their list of marital property and stipulated to its value.

6. Divorce— equitable distribution—distributive award—source of assets

The trial court did not err in an equitable distribution action, as defendant contended, by failing to point to a source of liquid assets from which defendant could pay a distributive award. The court entered findings on the income generated by defendant's business and the equity in the marital home, which was awarded to defendant. There was no concern here that defendant might incur adverse tax consequences (which the court must take into account).

Appeal by defendant from judgment entered 23 June 2003 by Judge Robert J. Stiehl, III in Cumberland County District Court. Heard in the Court of Appeals 16 September 2004.

Hedahl & Radtke, by Debra J. Radtke, for plaintiff-appellee.

Reid, Lewis, Deese, Nance & Person, L.L.P., by Renny W. Deese, for defendant-appellant.

ELMORE, Judge.

Harvey H. Allen (defendant) appeals from a judgment of equitable distribution. For the reasons discussed herein, we reverse in part and remand for further findings on the basis for the distributive award.

Defendant and Michele Barr Allen (plaintiff) were married on 28 April 1984, separated on 25 June 2000, and divorced on 5 September

2001. The parties adopted two children during the marriage. Defendant, a licensed engineer, started an engineering firm where plaintiff was an employee and 25 percent shareholder. Defendant continued to operate the business after the parties' separation.

Plaintiff filed this action on 18 July 2000 seeking, *inter alia*, an equitable distribution of property. Defendant was awarded custody of the minor children and exclusive possession of the marital home. The parties signed a pre-trial order and stipulated to a schedule listing all property to be distributed by the court. This schedule included several investment accounts with their values on the date of the parties' separation. Defendant's evidence at trial tended to show, and plaintiff does not dispute, that the value of the accounts declined between the date of separation and the date of distribution.

In its 23 June 2003 equitable distribution order, the trial court made the following findings regarding an equitable distribution:

> That the Court has considered as distributional factors, the following:
>
> a. The income, property and liabilities of each at the time the division is effective;
>
> b. The 16 year 2 months length of marriage, the parties' age and health;
>
> c. The need of Defendant to occupy the residence due to the children;
>
> d. The contributions of Plaintiff/wife in assisting in the business;
>
> e. The liquidity of the investment accounts and the Defendant's control over those accounts during the separation.
>
> . . .
>
> That as a divisible factor, the Court has also considered the diminution in value of the stocks that occurred after the date of separation.

The court concluded that an equal division of the property was fair and divided the marital property listed on the pre-trial schedule, with the exception of an IRA account in plaintiff's name. The court then ordered the following additional distribution:

> 5. That the Defendant is to pay the $5,203.00 of the company profit sharing plan, that he indicated had been paid to [plaintiff]

and one half of the 1999 income tax refund in the amount of $5490.00 for a total of $10,693.00.

6. That the Allen-Kimley business is awarded to the Defendant and that he is solely responsible for all debt and liability thereon.

7. That the Defendant shall owe the Plaintiff a distributive award of $223,530.00 with a credit of $15,000 previously paid as an interim distributive award leaving $208,530 due, along with the $10,693.00 for a total of $219,223.00.

8. That the Defendant shall pay the $219,223.00 by paying $10,000.00 at the closing of his refinancing the marital home within 30 days of the entry of this order and the remaining $209,223 within six years at the rate of $17,435.25 every six months at eight percent (8%) interest.

I.

[1] By his first assignment of error, defendant argues that the diminution in value of the parties' investment accounts after the date of separation and prior to the date of distribution should be classified as divisible property. The court distributed the accounts at their date of separation values. Defendant's evidence at trial indicated that the value of the accounts had declined considerably following the date of separation. Plaintiff contends that the trial court properly viewed the decline in stock value as a distributional factor.

In equitable distribution actions, the trial court is required to classify, value, and distribute the marital and divisible property of the parties. *Fountain v. Fountain*, 148 N.C. App. 329, 332, 559 S.E.2d 25, 29 (2002). Once the court classifies property as marital or divisible property, it must distribute that property equitably. *Larkin v. Larkin*, 165 N.C. App. 390, 598 S.E.2d 651, 655 (2004). Divisible property is defined in part as follows:

> 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 post-separation actions or activities of a spouse shall not be treated as divisible property.

N.C. Gen. Stat. § 50-20(b)(4)(a) (2003). Any appreciation or diminution due to a spouse's post-separation activities may be considered by the trial court as a distributional factor. *See, e.g., Hay v. Hay*, 148

N.C. App. 649, 655, 559 S.E.2d 268, 273 (2002) (trial court may treat post-separation mortgage payments as a distributional factor); *Larkin*, 165 N.C. App. at 396, n. 2, 598 S.E.2d at 655 (parties' post-separation withdrawals from a joint checking account could not be considered divisible property given their actions in actively depleting it without accounting to each other).

Here, the trial judge made a specific finding that the investment accounts were under defendant's control during the separation period. It is undisputed from the record that plaintiff and defendant held two Prav AmeriTrade accounts (AmeriTrade accounts) jointly and several accounts with Aim Fund Centura (Aim accounts). The record shows that defendant was a day trader and traded on the AmeriTrade accounts during the marriage, but that he ceased this trading activity prior to the separation. Evidence of plaintiff's access to certain accounts after the separation was contradictory. Defendant testified that plaintiff continued to have access to the AmeriTrade accounts after the separation. Plaintiff testified that she could not gain access to the parties' Aim accounts because they were in the company's name and could be signed over to her only by the company's president or an officer.

After examining the record, we conclude that there is insufficient evidence to determine whether defendant's actions contributed to the diminution of the stock value after the separation date. We, therefore, reverse the trial court on this assignment of error and remand to allow the court to make additional findings of fact on whether the diminution in stock value was the result of defendant's post-separation actions. If the court determines that the diminution in value was not attributable to defendant's actions, then the court must include the stock decline in the equitable distribution of marital and divisible property. *See* N.C. Gen. Stat. § 50-20(a) (2003). Conversely, if the court finds that the diminution was the result of the actions of defendant, then the diminution may be considered as a distributional factor. N.C. Gen. Stat. § 50-20 (c)(11a) (2003) (acts of either party to "waste, neglect, devalue or convert the marital property or divisible property, during the period after separation of the parties and before the time of distribution").

II.

[2] By his next assignment of error, defendant argues that the court failed to state a finding sufficient to indicate its basis for entering a distributive award. We agree. N.C. Gen. Stat. § 50-20(e) (2003)

creates a presumption that an in-kind distribution of marital or divisible property is equitable, but permits a distributive award "to facilitate, effectuate, or supplement" the distribution. The judgment of equitable distribution must contain a finding of fact, supported by evidence in the record, that the presumption in favor of an in-kind distribution has been rebutted. *Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999). In the instant case, the trial court did not make findings pertaining to the presumption that an in-kind division of the property was equitable. Yet, the record contains evidence that defendant's business was a closely held corporation and not susceptible of division. Such evidence would support a finding that the in-kind presumption was rebutted. *Fountain*, 148 N.C. App. at 339, 559 S.E.2d at 33 (when the property interest is a closely held corporation, the presumption may be rebutted). We remand for the entry of further findings of fact regarding the basis for the court's distributive award.

III.

[3] Defendant's next assignment of error challenges the court's award of $5,490.00, approximately one-half of the parties' 1999 federal income tax refund, to plaintiff. The record shows that the parties filed their federal income tax return jointly in 1999 and applied this tax refund toward the 2000 estimated income tax. In 2000, the parties filed separately. Both parties agree that the equitable distribution order contains a typographical error and that the correct value of one-half of the tax return was $5,940.00. The parties disagree, however, on the classification of this asset. Defendant contends that the parties did not include the tax refund on the stipulated list of marital property, and thus the evidence does not support a conclusion that this is a marital asset. We disagree.

Here, the parties signed a pre-trial order containing a stipulation that all property to be classified, evaluated, and distributed was disclosed on the attached schedules. When entered, this order was binding upon the parties as to all assets classified as marital property. *See Hamby v. Hamby*, 143 N.C. App. 635, 642-43, 547 S.E.2d 110, 114-15 (2001) (where parties stipulated in pre-trial order that retirement and deferred compensation plans were marital property, neither party could later challenge this classification). However, with respect to any property not listed in the pre-trial agreement between the parties, plaintiff has not waived its inclusion in the equitable distribution. *See Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 418, 588 S.E.2d 517, 521

(2003) (plaintiff spouse did not waive inclusion of defendant's profit-sharing plan in marital property distribution where parties did not enter into any agreement concerning the plan prior to trial). We hold that the trial judge did not err in considering the tax refund as marital property.

Defendant argues, nonetheless, that the tax refund was not "presently owned" by either spouse on the date of separation and therefore does not meet the definition of marital property. We reject this argument. Marital property is defined as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property . . ." N.C. Gen. Stat. § 50-20(b)(1) (2003). The spouse claiming that the property is separate bears the burden of proof, as under N.C. Gen. Stat. § 50-20(b)(1), "[i]t is presumed that all property acquired after the date of marriage and before the date of separation is marital property . . ." *Id.* Further, funds received after the separation may appropriately be considered as marital property when the right to receive those funds was acquired during the marriage and before the separation. *Rice v. Rice*, 159 N.C. App. 487, 495, 584 S.E.2d 317, 323 (2003). Therefore, the fact that the parties chose to defer receipt of this property does not change the character of it, as it was acquired during the marriage. *See Talent v. Talent*, 76 N.C. App. 545, 555, 334 S.E.2d 256, 262 (1985). The trial judge did not err in classifying the tax refund as marital property. On remand, the amount of the refund awarded to plaintiff can be corrected to $5,940.00.

IV.

[4] Next, defendant assigns error to the court's award of a $5,203.00 profit sharing distribution to plaintiff. The trial court's distribution of this asset appears to be based upon testimony regarding defendant's 2001 reported income. The first reference in the record to this asset is within expert testimony concerning the valuation of the business. Defendant's 2001 income tax return indicated that during the previous year there was a $15,000 "pass-through" of earnings from the company, a Subchapter S corporation, and that plaintiff's share of this profit was $5,203.00. Defendant testified that he had not paid out a shareholder distribution in this amount to plaintiff.

As discussed *supra*, the fact that the profit sharing distribution was not included in the pre-trial list of property to be divided did not

preclude the trial judge from considering it as such. However, the evidence does not support a finding or conclusion that this asset is marital property. Profits of a Subchapter S corporation are owned by the corporation, not by the shareholders, and are referred to as "retained earnings." *In re Marriage of Brand*, 44 P.3d 321, 325 (Kan. 2002). Income tax is paid by the shareholders, rather than the corporation, and income is allocated to shareholders based upon their proportionate ownership of stock. *Id.* Although North Carolina courts have not addressed the issue, other jurisdictions have held that as a general matter, retained earnings of a corporation are not marital property until distributed to the shareholders. *See, e.g., Robert v. Zygmunt*, 652 N.W.2d 537, 542 (Minn. App. 2002); *Thomas v. Thomas*, 738 S.W.2d 342, 344 (Tex. App. 1987); *Hoffman v. Hoffman*, 676 S.W.2d 817, 827 (Mo. 1984).

Here, defendant testified that he was not aware of the "pass-through" assets indicated on his 2001 tax return. Plaintiff has failed to meet her burden of proving that the retained earnings of the Allen business were acquired by either spouse during the marriage. As such, the evidence does not support a classification of the $5,203.00 earnings as marital property. Rather, the pass-through earnings were one component of the book value of the corporation. The trial court's distribution of the earnings as marital property was error.

V.

[5] Next, defendant argues that the trial court erred in failing to distribute plaintiff's Prav IRA account (IRA). The parties included this asset on the list of marital property attached to the pre-trial order and stipulated to its value on the date of separation.[1] In its findings, the trial court listed the marital property but failed to include plaintiff's IRA. Because the parties stipulated that plaintiff's IRA was property to be distributed and not separate property, the trial court erred in not including the IRA within the property division. *See Hamby*, 143 N.C. App. at 643, 547 S.E.2d at 115; *see also White v. Davis*, 163 N.C. App. 21, 29, 592 S.E.2d 265, 271 (2004) (stipulation in pre-trial order classifying defendant's interest in medical practice as marital property was binding on the court and the parties). We remand for the court to incorporate the IRA as marital property and properly distribute it.

1. On appeal, plaintiff does not contest the stipulated value of the IRA. The parties agree that a remand on this issue is proper.

VI.

[6] Finally, defendant argues that the court failed to point to a source of liquid assets from which defendant could pay the distributive award. We disagree. The trial court stated that defendant owed a total distributive award of $219,223.00 and "[t]hat Defendant shall pay the $219,223.00 by paying $10,000.00 at the closing of his refinancing the marital home within 30 days of the entry of this order and the remaining $209,223 within six years at the rate of $17,435.25 every six months at eight percent (8%) interest."

Defendant cites to the case of *Embler v. Embler*, 159 N.C. App. 186, 582 S.E.2d 628 (2003), as support for his argument that the court failed to specify a sufficient source of liquid assets from which he could make the distributive award payments. On the facts of this case, we believe that *Embler* is distinguishable. In *Embler*, the trial court ordered the defendant spouse to pay a distributive award of $24,876.00 within sixty days. The defendant argued on appeal that he had insufficient liquid assets and would incur penalties if he withdrew the necessary funds from his retirement accounts. A panel of this Court held that the trial court should have determined whether the defendant had sufficient liquid assets and adjusted the distributive award in order to offset any adverse financial consequences to be incurred by using non-liquid assets. *Embler*, 159 N.C. App. at 188-89, 582 S.E.2d at 630.

In the instant case, the trial court entered findings on the income generated by the Allen business in 2001 and on the equity in the marital home, which was awarded to defendant. Specifically, the court found that the business paid an income of $144,000.00 in 2001 and that defendant receives an additional $1,000.00 each month for renting space at the residence. With respect to the marital residence, the court found that as of the separation date it had been appraised at $327,000.00 and the net equity was $68,599.00, and that after the separation date defendant had increased the equity line. The court directed defendant to pay the initial $10,000.00 of the distributive award from the refinancing of the marital home. As the money derived from refinancing the mortgage on the marital home was a source of liquid funds available to defendant, the concern that defendant might incur adverse tax consequences by borrowing from non-liquid sources is not implicated here. *Embler*, 159 N.C. App. at 188-89, 582 S.E.2d at 630 (if defendant is to pay distributive award from non-liquid assets or by obtaining a loan, trial court must take tax consequences into account). Likewise, defendant's income from his

operation of the business was an obvious source of liquid assets available to pay the remainder of the award over a period of six years. Defendant's assignment of error is overruled.

Affirmed in part, reversed in part, and remanded.

Judges CALABRIA and STEELMAN concur.

DAVID N. WEATHERFORD, EMPLOYEE, PLAINTIFF v. AMERICAN NATIONAL CAN CO., EMPLOYER, GALLAGHER BASSETT SERVICES, CARRIER, DEFENDANTS

No. COA03-1374

(Filed 1 February 2005)

Workers' Compensation— disability—medical restrictions—retirement

The Industrial Commission properly concluded that plaintiff suffered a disability which rendered him incapable of any employment, based on competent evidence including personal and medical testimony, where plaintiff injured his knees, attempted to return to work, continued to experience pain, and retired. Plaintiff's condition, as well as his medical restrictions, prevented his performing his job with defendant.

Appeal by defendants from opinion and award filed 1 August 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 May 2004.

Robinson & Lawing, L.L.P., by Jolinda J. Babcock, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by George H. Pender and Tara D. Muller, for defendant-appellants.

BRYANT, Judge.

American National Can Company, Inc.[1] (employer-defendant) and Gallagher Bassett Services (carrier-defendant), collectively defendants, appeal from an opinion and award of the North Carolina

1. Co-defendant, Gallagher Bassett Services, is the carrier for the employer, a qualified self-insurer.

Industrial Commission (Commission) dated 6 August 2003 awarding David N. Weatherford (plaintiff) ongoing total disability compensation after 1 July 2000 as a result of his work related knee injuries.

Plaintiff, age 64 (born 1940), began working for defendant in 1976. For the final fifteen years of his employment, plaintiff worked as a back-end maintainer of the decorator machine which prints out labels directly onto soda and beer cans. He worked twelve-hour shifts, four days per week, occasionally working overtime. His job consisted of standing, walking, climbing steps and kneeling on cement and metal surfaces.

In 1998, plaintiff began experiencing knee problems. On 17 August 1998, plaintiff met with Dr. King who diagnosed plaintiff with chondromalacia, patella femoral joint and internal derangement with mild synovitis in his left knee. Dr. King authorized plaintiff to be out of work from 15 September 1998 through 8 November 1998 in order to perform arthroscopic surgery on plaintiff's left knee.

After having surgery on his left knee, plaintiff resumed his same job duties as a maintainer for defendant. On 17 June 1999, plaintiff returned to see Dr. King for problems that had developed with his right knee. Dr. King diagnosed internal derangement with chondromalacia patella of plaintiff's right knee and performed arthroscopic surgery on 13 July 1999. Plaintiff returned to work on 27 September 1999.

On 20 March 2000, plaintiff once again consulted with Dr. King, complaining of pain and swelling in his right knee. Dr. King prescribed Novacain, physical therapy and authorized plaintiff to be out of work until 1 July 2000. Because plaintiff continued to experience knee pain even after he had been authorized to return to work, he retired 2 July 2000.

Plaintiff received short-term group disability payments for the periods of medical leave that Dr. King had authorized. Plaintiff was paid a gross weekly amount of $313.00 in addition to the following payments: a) $2,369.84 for 9 September 1998 through 7 November 1998; b) $4,247.86 for 20 June 1999 through 3 October 1999; and c) $4,292.57 for 20 March 2000 to 1 July 2000.

On 13 September 2000, plaintiff filed two separate occupational disease claims, one for each knee. Defendants filed an Industrial Commission (I.C.) Form 61 on 15 November 2000, denying plaintiff's claims. In April 2002, Dr. King testified in his deposition plaintiff was

not physically capable of returning to his former job with defendant due to his knee conditions.

After reviewing Dr. King's deposition and hearing testimony from plaintiff, two of plaintiff's co-workers, and plaintiff's wife, the parties stipulated to plaintiff's disability and the compensability of plaintiff's claim. They further stipulated plaintiff was disabled from 9 September 1998 to 7 November 1998; from 17 June 1999 to 2 October 1999; and from 20 March 2000 to 1 July 2000. However, no I.C. Form 21 was ever filed. Nonetheless, pursuant to the stipulation, defendants agreed to pay plaintiff for periods of work missed due to his occupational diseases, subject to a credit for all disability paid by the defendant's group insurance plan. The parties also stipulated to plaintiff's compensation rate: $532.00 for the left knee, and $560.00 for the right knee.

At the hearing before the Deputy Commissioner, the sole issue was whether the plaintiff was entitled to benefits after 1 July 2000; and, if so, the amount and type of benefits. After hearing live testimony, reviewing deposition testimony, exhibits and other submissions of the parties, the Deputy Commissioner issued an opinion and award on 15 October 2002. The Deputy Commissioner concluded that plaintiff sustained a compensable occupational disease as a result of work related injury to his knees and was therefore entitled to ongoing disability benefits. Defendants were ordered to pay past medical compensation as well as ongoing temporary total disability benefits and future medical treatment for plaintiff's knee condition.

Defendants appealed to the Full Commission. In an opinion and award dated 1 August 2003, the Commission found plaintiff to be totally disabled, affirmed the opinion and award of the Deputy Commissioner, with modifications, and ordered defendants "to pay total disability benefits from 9 September 1998 to 7 November 1998; from 17 June 1999 to 2 October 1999; and from 20 March 2000 continuing through the present date until further order of the Commission." In addition, defendants were ordered to pay all medical expenses related to plaintiff's work related injury. Defendants appeal from the Commission's order dated 1 August 2003.

At the outset, defendant argues, and we agree, that plaintiff had no continuing presumption of disability after 1 July 2000. *Johnson v. Southern Tire Sales and Serv.*, 358 N.C. 701, 706, 599 S.E.2d 508, 512 (2004) (burden remained on employee to prove disability in the absence of Form 21 or Form 26).

We now review the dispositive issue raised on appeal: whether the Commission erred in finding and concluding that plaintiff's knee pain makes him incapable of any employment after 1 July 2000.

It is well-settled that review of an Industrial Commission decision by this Court is limited to the determination of whether there is competent evidence to support the Commission's Findings of Fact and whether those findings support the Conclusions of Law. *Cox v. City of Winston-Salem*, 157 N.C. App. 228, 232, 578 S.E.2d 669, 673 (2003); *Pernell v. Piedmont Circuits*, 104 N.C. App. 289, 292, 409 S.E.2d 618, 619 (1991) (citation omitted). The Commission's findings of fact are conclusive on appeal even where there is contrary evidence, and such findings may only be set aside where there is a "complete lack of competent evidence to support them." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003) (citation omitted); *see also Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). It is the Commission's duty to judge the credibility of the witnesses and to determine the weight given to testimony. *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 653, 508 S.E.2d 831, 834 (1998).

Disability under the Workers' Compensation Act is defined 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." N.C. Gen. Stat. § 97-2(9) (2003). The burden is on the employee to show that he is unable to earn pre-injury wages, either in the same employment or in other employment. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). Plaintiff may show his incapacity to earn pre-injury wages 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 working in any employment;** (2) the production of evidence that he is capable of some work, but that he has, after 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 he earned prior to the injury.

Russell v. Lowes, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (emphasis added). Medical evidence that the plaintiff suffers from

pain as a result of physical injury, combined with the plaintiff's own testimony that he is in pain has been held to be sufficient to support a conclusion of total disability. *Webb v. Power Circuit, Inc.*, 141 N.C. App. 507, 512-13, 540 S.E.2d 790, 793-94 (2000) (affirming opinion and award in plaintiff's favor based on testimony from plaintiff regarding nature of the injury and medical testimony regarding severity of pain and nature of treatment subsequent to injury); *Barber v. Going West Transp. Inc.*, 134 N.C. App. 428, 436, 517 S.E.2d 914, 920 (1999). "Where . . . an employee's effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986) (any effort by plaintiff to obtain sedentary employment, the only employment of which he is physically capable, would have been futile because of such preexisting factors; e.g., plaintiff was 57 years old, had limited education and work experience, and his injury was caused by over 25 years of performing same duties for defendant).

Here, Dr. King explained plaintiff's condition as of 20 March 2000 and testified as to complaints of genuine pain consistent with plaintiff's knee injuries. Dr. King described plaintiff's condition as:

> [S]ynovitis, which is the inflammatory process inside the knee and leg weakness or muscle weakness. And they sort of run hand in hand when—the pain becomes significant and the inflammation becomes significant, when the patient is less willing to use the leg, that leads to weakness and then weakness in turn keeps the synovitis and the pain at a fairly high level.

On 4 May 2000, plaintiff returned to see Dr. King after having been out of work and having received six weeks of physical therapy and medication. At that visit, Dr. King noted in his medical records that plaintiff was unable to return to work stating:

> In a case like this, lab tests, dates, results, medications, doses and treatment plans are not helpful in determining whether the plaintiff can return to work or not. What is helpful in making that determination is actually sending him back to work and trying to perform. We have done that and his knee has repeatedly swelled and caused limping, pain, tenderness and swelling. Recommend against further working for him.

Although the parties stipulated to compensability and disability until 1 July 2000, the Commission concluded plaintiff's disability continued after his retirement based on the following findings of fact:

> 1. At the time of the hearing before [the] Deputy Commission[], plaintiff was 61 years old and was born June 12, 1940. Plaintiff did not finish high school but did obtain a GED. Plaintiff had brief experience working as a mechanic and in construction prior to becoming employed with defendants in 1976. . . . For 25 years plaintiff worked in the same facility. . . .
>
> . . .
>
> 23. Plaintiff . . . would have continued to work but for his knee conditions and . . . his inability to work as of July 1, 2000 was due to the condition of his knees.
>
> . . .
>
> 26. Plaintiff has continued to suffer from pain, swelling and weakness in his knees. Dr. King has indicated that even if plaintiff could find employment he would be limited to no climbing, stooping, squatting, bending kneeling, or going up steps and only intermittent standing for a total of two hours out of an eight hour workday, with the remainder of the time in a seated position. Dr. King testified that if plaintiff had not retired, he would not have allowed him to return to work.
>
> 27. Plaintiff testified that he has never had a sedentary position. He has no job training or skills to obtain sedentary work.
>
> 28. Plaintiff testified that he is unable to stay in one position any period of time. If he sits for too long, he is unable to get up. He is unable to walk for very long and must balance his activities with his continuous pain.
>
> . . .
>
> 34. As of July 1, 2000 plaintiff reached maximum medical improvement. Plaintiff's pain is genuine and his testimony regarding his pain, symptoms and abilities is accepted as credible and convincing.
>
> 35. Plaintiff has been disabled since July 1, 2000 and continues to be disabled. Defendants have presented no evidence of suitable employment to rebut plaintiff's disability.

Accordingly, plaintiff satisfied the first and third *Russell* prongs as reflected in the pertinent Commission's conclusion of law:

> 2. [T]hrough the production of medical evidence that his pain is genuine and his own credible testimony regarding his pain, symptoms and abilities, plaintiff has proven that he is physically incapable of any employment as a consequence of his compensable occupational diseases. . . . [And] [p]laintiff has also shown that even if he were capable of some sedentary work, it would be futile for him to engage in a job search in light of his age, lack of work experience, lack of training, lack of transferable skills and physical impairment.

In concluding that plaintiff was disabled, the Commission considered plaintiff's evidence as follows: he was 61 years old at the time he retired; he had a GED and had worked all his life in maintenance positions, without having had any office skills or training; he testified he would have continued to work except for his knee condition and that he retired early because the pain in his knees was so severe and he was concerned that continuing to work, given his knee conditions and the activities required of him, would eventually prevent him from being able to walk; his early retirement entitled him to a reduced pension and health benefit, less than that commensurate with having worked a thirty year career with defendant; he also testified that he continued to suffer from genuine pain, swelling and weakness in his knees even after retirement; defendant's medical examiner, Dr. Elkin, as well as Dr. King, both testified as to plaintiff's pain being consistent with his medical condition; and, finally, Dr. King restricted plaintiff from repetitive bending, stooping, squatting, or walking for more than a few minutes at a time upon returning to work for defendant after 1 July 2000. In other words, plaintiff's condition, as well as his medical restrictions, prevented him from performing his job with defendant.

Moreover, the Commission's findings of fact 1, 26, and 27 based on competent evidence indicate plaintiff went beyond proving his disability and his inability to earn a wage by "showing that even if he were capable of some sedentary work, it would be futile for him to engage in a job search in light of his age, lack of work experience, lack of training and education, lack of transferable skills and physical impairment."

Therefore, based on competent evidence, including personal and medical testimony, the Commission properly concluded plaintiff

suffered from a disability which rendered him "incapable of any employment" after 1 July 2000. The opinion and award of the Commission is affirmed.

Affirm.

Judges TYSON and STEELMAN concur.

JAMES M. KRANTZ, A/K/A JIM KRANTZ; AND CHRISTINE M. KRANTZ, PLAINTIFFS V. DONALD E. OWENS, D/B/A OWENS CONSTRUCTION; ALL AMERICAN HOMES OF NORTH CAROLINA, L.L.C.; CENTURA BANK, A BANKING CORPORATION; AND PETER E. LANE, TRUSTEE, DEFENDANTS

No. COA03-1518

(Filed 1 February 2005)

1. **Appeal and Error— preservation of issues—failure to make request for findings of fact**

Although plaintiffs contend the trial court abused its discretion in a breach of contract case by failing to include findings of fact in its order denying plaintiffs' motion for a new trial, this assignment of error is dismissed because: (1) there is no designation in the record that plaintiff's counsel made a request for findings of fact; and (2) without a record of a request being made, the Court of Appeals cannot properly evaluate whether there was error.

2. **Trials— motion for new trial—failure to show irregularity, misconduct, accident, or surprise**

The trial court did not abuse its discretion in a breach of contract case by denying plaintiffs' motion for a new trial even though plaintiffs contend a defense witness gave false testimony that plaintiffs were on the job site while plaintiffs maintain that they were not, because there was no irregularity, misconduct, accident or surprise borne out by the record.

3. **Appeal and Error— appellate rules violations—appeal dismissed**

Defendant's appeal from the denial of his motion for sanctions in a breach of contract case is dismissed based on multiple

violations of the Rules of Appellate Procedure, because: (1) there is no certificate of service for defendant's notice of appeal in the record as required by Rule 3; (2) defendant's purported appeal is not a cross-assignment of error, and thus he must file a separate appellate brief as required by Rule 13(a)(1); (3) defendant's assignment of error does not state the legal basis upon which the error is assigned as required by Rule 10(c)(1); (4) defendant's motion for sanctions was based on N.C.G.S. §1A-1, Rule 11, but he failed to base his argument on Rule 11 in his brief; and (5) defendant's sole citation to authority in his brief is to a case that is not applicable to the trial court's denial of his Rule 11 motion for sanctions.

4. Pleadings— Rule 11 sanctions—findings of fact and conclusions of law needed

A de novo review revealed that the trial court erred in a breach of contract case by denying plaintiffs' motion for sanctions under N.C.G.S. § 1A-1, Rule 11 against defendant and defense counsel on the ground that defendant improperly sought sanctions against plaintiffs, and the case is remanded for proper findings of fact and conclusions of law because in the light most favorable to plaintiffs, defendant's motion for sanctions may lack a sufficient factual basis and also might have been filed for an improper purpose.

Appeal by plaintiffs and defendant from orders entered 15 November 2002 by Judge Zoro J. Guice, Jr. in Rutherford County Superior Court. Heard in the Court of Appeals 2 September 2004.

Baiba Bourbeau for plaintiff-appellants James M. Krantz, a/k/a Jim Krantz and Christine M. Krantz.

J. Christopher Callahan for defendant-appellee Donald E. Owens d/b/a Owens Construction.

ELMORE, Judge.

Plaintiffs appeal from orders denying their motions for a new trial and sanctions against defendant Donald E. Owens d/b/a Owens Construction (Owens) and defense counsel. Defendant Owens appeals from the denial of his motion for sanctions against plaintiffs and plaintiffs' counsel. After careful review, we find that the trial court did not err in denying the motion for a new trial and we dismiss defendant's appeal from the denial of his motion for sanc-

tions; however, we reverse the trial court's denial of plaintiffs' motion for sanctions and remand for further findings.

Plaintiffs filed suit on 12 June 2000, alleging numerous claims arising from construction of a modular home in Union Mills, North Carolina, but on 30 September 2002, trial commenced only on the issues of 1) whether defendants breached the implied warranty of workmanlike quality, and 2) whether plaintiffs breached their contract in failing to pay. After almost a week of trial, the jury returned a verdict in favor of defendants on both issues, finding that defendants did not breach the warranty of workmanlike quality and awarding $8,000.00 on their breach of contract claim.

Based partially on what plaintiffs alleged to be false testimony by one of Owens's witnesses, plaintiffs filed a motion for a new trial. In their motion, plaintiffs also alleged that counsel for Owens knew of the false testimony, but still offered it to the court. As such, counsel for plaintiffs sent letters to the North Carolina State Bar and, since one of the witnesses who allegedly gave false testimony was a licensed general contractor, to the North Carolina Licensing Board for General Contractors.

In response, Owens's counsel filed a motion for sanctions against plaintiffs and their attorney pursuant to N.C. Gen. Stat. § 1A-1, Rule 11. Plaintiffs' counsel thereafter filed a motion for Rule 11 sanctions against defendant Owens and his counsel, alleging that Owens's counsel's motion for sanctions was for "the improper purpose of retaliation due to the filing . . . for a new trial."

Motion for a New Trial

A. Findings of Fact

[1] Plaintiffs' first assignment of error is that the trial court abused its discretion by not including findings of fact in its order denying the motion for a new trial. It is true that once requested by counsel, a trial court must make specific findings of fact, even with regards to discretionary rulings. *Andrews v. Peters*, 318 N.C. 133, 347 S.E.2d 409 (1986). Yet, there is no designation in the record that plaintiffs' counsel made this request. According to the trial court's order settling the record on appeal, which the parties agreed upon, no transcript of the hearing regarding the motion for a new trial was included. "It is appellant's duty and responsibility to see that the record is in proper form and complete." *Pharr v. Whorley*, 125 N.C. App. 136, 139, 479 S.E.2d 32, 34 (1997); *see* N.C.R. App. P. 9(a)(1)(e) and (j). Without a record

of a request being made this Court cannot properly evaluate whether there was error. *Id.*; *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968) ("An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court."); *see also Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 484-85, 290 S.E.2d 599, 604 (1982) ("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 that heavy burden of proof.").

B. Denial of Motion

[2] Plaintiffs also contend that the trial court abused its discretion in denying their motion for a new trial. We disagree. Plaintiffs' motion for a new trial, filed pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(1), (2), (3) and Rule 60(b)(3), was on the basis that one of Owens's witnesses gave false testimony at trial. Plaintiffs allege that Owens's witness's statement that plaintiffs were on the job site, while they maintain they were not, misled and prejudiced the jury. The trial court's decision as to whether this type of falsity warrants a new trial is discretionary. "[A]n appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington*, 305 N.C. at 482, 290 S.E.2d at 602 (citing cases). "During review, we accord 'great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for new trial.' " *Burgess v. Vestal*, 99 N.C. App. 545, 550, 393 S.E.2d 324, 327 (quoting *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605), *disc. review denied*, 327 N.C. 632, 399 S.E.2d 324 (1990); *see also McGinnis v. Robinson*, 43 N.C. App. 1, 10, 258 S.E.2d 84, 90 (1979) ("A trial judge on hearing Rule 60(b) motions should consider such factors as '(1) the general desirability that a final judgment not be lightly disturbed, . . . (3) the opportunity the movant had to present his claim or defense, and (4) any intervening equities.' ") (quoting *Equipment Co. v. Albertson*, 35 N.C. App. 144, 147, 240 S.E.2d 499, 501-02 (1978).

Bearing these principles in mind, we are not convinced that the trial court's denial of the new trial motion was a substantial miscarriage of justice. There is no "irregularity, misconduct, or accident or surprise" borne out by the record. *See* N.C. Gen. Stat. § 1A-1, Rule 59(a) (2003). It is clear from the record that plaintiffs had evidence at the time of trial which placed them in Indiana at times at which the

witness was claiming he spoke with them in North Carolina. Plaintiffs' counsel also conducted no discovery of this witness's testimony prior to trial, despite him being one of the contractors who worked on plaintiffs' home and being named as a witness. At trial, plaintiffs' counsel cross-examined the witness on his statements, but failed to impeach him with the evidence.

It is also clear from the record that the Owens's witness only testified that he *saw* plaintiffs, not that plaintiffs waived any potential claims in their alleged conversation at the job site—a false claim that might have prevented a fair trial. "[T]he party alleging the existence of an abuse bear[s] that heavy burden of proof." *Worthington*, 305 N.C. at 484-85, 290 S.E.2d at 604. Plaintiffs' claims cannot bear this burden. We hold that the trial court did not abuse its discretion in denying the motion for a new trial.

Motions for Sanctions

As to Owens's motion for sanctions, this Court dismisses his appeal, but we reverse on plaintiffs' motion for sanctions and remand for findings.

A. Defendants' Motion Against Plaintiffs

[3] We dismiss Owens's appeal based on multiple violations of the Rules of Appellate Procedure. First, there is no certificate of service for his notice of appeal in the record. This is a violation of Rule 3 of the North Carolina Rules of Appellate Procedure, which is jurisdictional, and thus requires that his appeal be dismissed. *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 402 S.E.2d 407 (1991); *Gum v. Gum*, 107 N.C. App. 734, 421 S.E.2d 788 (1992); *Giannitrapani v. Duke University*, 30 N.C. App. 667, 228 S.E.2d 46 (1976).

Second, Owens's purported appeal is not a cross-assignment of error, and thus he must comply with the same rules of appellate procedure as any other appellant, including filing a separate appellate brief. *Cherry, Bekaert & Holland v. Worsham*, 81 N.C. App. 116, 118, 344 S.E.2d 97, 99 (1986); *see also People Unlimited Consulting v. B&A Indus., LLC*, 158 N.C. App. 744, 582 S.E.2d 82 (2003). Owens's failure to do so is a violation of Rule 13(a)(1), and permits this Court to dismiss his appeal under Rule 13(c). Owens's brief also violates Rules 28(b)(1), (3), (4), and (6). Further, Owens's assignment of error in the record violates Rule 10(c)(1) in that it does not state the legal basis upon which the error is assigned. *Kimmel v. Brett*, 92 N.C.

App. 331, 334, 374 S.E.2d 435, 436 (1988). These Rules are mandatory, and violation of these Rules subjects the appeal to dismissal. *Wiseman v. Wiseman*, 68 N.C. App. 252, 314 S.E.2d 566 (1984).

Third, Owens's motion for sanctions was based on Rule 11 of the North Carolina Rules of Civil Procedure, but in his brief he fails to base his argument on Rule 11. Thus, even assuming *arguendo* that Owens properly preserved this issue for appellate review through his assignment of error in the record, because he fails to argue that issue in his brief, it is deemed abandoned. N.C.R. App. P. 28(b)(5) (2004); *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 567, 500 S.E.2d 752, 755 (1998). We further find that Owens has abandoned this argument because his sole citation to authority in his brief is to a case that is not applicable to the trial court's denial of his Rule 11 motion for sanctions. *Id.* Owens sole argument is that the behavior of plaintiff's counsel in the instant case was worse than that of plaintiffs' counsel in *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 554 S.E.2d 356 (2001). *Couch* did not involve sanctions under Rule 11. Rather, *Couch* involved violations of the North Carolina Rules of General Practice for the Superior and District Courts and the Rules of Professional Conduct. When considering the appropriateness of sanctions under Rule 11, the trial court looks at the document in question, and then determines if it was well founded in both fact and law, and whether it was filed for an improper purpose. *Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992). Unlike in *Couch*, the seriousness of the allegations made by plaintiffs' counsel are not relevant in the Rule 11 context. What is relevant is plaintiffs motivation for filing the motion, and the factual and legal basis therefor. Nowhere in Owens's argument does he address the real issue before us; whether there was sufficient evidence in support of his allegation that plaintiffs filed their motion for a new trial for an improper purpose, or that plaintiffs' motion was not well founded in fact or law.

B. Plaintiffs' Motion Against Defendant

[4] After defendant Owens filed his motion for sanctions referencing plaintiffs' filing for a new trial, plaintiffs filed a motion for sanctions against defendant Owens and counsel on the grounds that defendant sought sanctions without a proper factual and legal sufficiency and for "the improper purpose of retaliation due to the filing . . . for a new trial." Although the trial court denied this motion for sanctions, we review *de novo* a trial court's decision to grant or deny a motion for sanctions.

> This Court exercises de novo review of the question of whether to impose Rule 11 sanctions. . . . If we determine that the sanctions were warranted, we must review the actual sanctions imposed under an abuse of discretion standard. . . . There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. . . . A violation of any one of these requirements mandates the imposition of sanctions under Rule 11."

Dodd v. Steele, 114 N.C. App. 632, 635, 422 S.E.2d 363, 365 (1994) (internal citations omitted). The record bears out that plaintiffs are basing their own motion for sanctions on the previous filing of sanctions by defendant. Plaintiffs maintain in their motion for sanctions that their motion for a new trial was validly brought and therefore defendant's motion for sanctions was baseless or improper, and hence opened the door for sanctions against himself and counsel.

This adversarial battle between counsels strains the patience of this Court; yet, we must reverse and remand to the trial court for findings of fact and conclusions of law with regards to plaintiffs' motion for sanctions. Our *de novo* review requires us to determine:

> (1) whether the findings of fact of the trial court are supported by a sufficiency of the evidence; (2) whether the conclusions of law are supported by the findings of fact; and (3) whether the conclusions of law support the judgment. [*Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989), *disc. review denied*, 329 N.C. 505, 407 S.E.2d 552 (1991).] "As a general rule, remand is necessary where a trial court fails to enter findings of fact and conclusions of law regarding a motion for sanctions pursuant to Rule 11." *Sholar Bus. Assocs. v. Davis*, 138 N.C. App. 298, 303, 531 S.E.2d 236, 240 (2000). " 'However, remand is not necessary when there is no evidence in the record, considered in the light most favorable to the movant, which could support a legal conclusion that sanctions are proper.' " *Id.* at 304, 531 S.E.2d at 240 (citation omitted).

Tucker v. Blvd. at Piper Glen, L.L.C., 150 N.C. App. 150, 155, 564 S.E.2d 248, 251 (2002). Without findings of fact and conclusions of law entered by the trial court, we cannot adequately conduct our review. And, in the light most favorable to plaintiffs, the movant, Owens's motion for sanctions may lack a sufficient factual basis and also might have been filed for an improper purpose: just six days after

plaintiff filed for a new trial against Owens, he filed his motion for sanctions and filed no other response to the motion for new trial. At this point the Court is not in a position to determine whether plaintiffs' last salvo hit its mark or not.

In conclusion, we affirm the trial court's denial of plaintiffs' motion for a new trial and dismiss defendant's appeal for numerous violations of the Rules of Appellate Procedure. We reverse the trial court's denial of plaintiffs' Rule 11 motion for sanctions, and remand to the trial court on this issue to enter proper findings of fact and conclusions of law.

Affirmed in part, dismissed in part, and reversed in part.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA v. WALTER HERMAN HILL

No. COA04-867

(Filed 1 February 2005)

Constitutional Law— right to counsel—waiver—knowing and voluntary

The trial court fully complied with statutory requirements in determining that defendant voluntarily, knowingly, and intelligently waived his right to counsel at a probation revocation hearing. In addition to the written waiver, the court's discussion with defendant in open court was sufficient to satisfy the statutory mandate. N.C.G.S. § 15A-1242.

Appeal by defendant from judgment entered 05 April 2004 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 17 January 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Ann Stone, for the State.

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

HUNTER, Judge.

On 31 August 1999, Walter Herman Hill ("defendant") was convicted of assault with a deadly weapon inflicting serious injury. The trial court imposed a suspended sentence of twenty-nine to forty-four months imprisonment and placed defendant on supervised probation for sixty months. As a condition of his probation, defendant was ordered to pay restitution totaling $19,573.95.

A violation report filed 20 December 2002 charged that defendant had failed to pay $19,018.95 of the court-ordered restitution and had "absconded and move[d] to the State of . . . Alabama without informing his probation officer[.]" The trial court appointed counsel to represent defendant in the probation violation proceeding. At the hearing on the charged violations, defendant appeared with his appointed counsel but discharged her, executed a written waiver of his right to assistance of counsel, and elected to represent himself. After hearing testimony from defendant and his probation officer, the court found defendant in willful violation of his probation as alleged in the violation report. It revoked defendant's probation and activated his suspended sentence.

On appeal, defendant argues that the trial court erred in allowing him to proceed *pro se* at the probation hearing without first engaging him in the colloquy mandated by N.C. Gen. Stat. § 15A-1242 (2003), to ensure that his waiver of counsel was knowing and voluntary.

Under N.C. Gen. Stat. § 15A-1345(e) (2003), a defendant has a right to the assistance of counsel at a probation revocation hearing. It is equally true, however, that a defendant enjoys " ' "a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes." ' " *State v. Fulp*, 355 N.C. 171, 174, 558 S.E.2d 156, 158 (2002) (citations omitted). This Court has held that a waiver of the right to counsel at a revocation hearing is subject to the same procedural safeguards as apply in criminal trials, to wit:

> [T]he right to assistance of counsel may only be waived where the defendant's election to proceed *pro se* is "clearly and unequivocally" expressed and the trial court makes a thorough inquiry as to whether the defendant's waiver was knowing, intelligent and voluntary. This mandated inquiry is satisfied only where the trial court fulfills the requirements of N.C. Gen. Stat. § 15A-1242.

State v. Evans, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) (citation omitted). By statute, the trial court must undertake a "thorough inquiry" to determine that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(2) Understands and appreciates the consequences of this decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242.

As noted above, defendant appeared at his probation violation hearing with court-appointed counsel but announced, "I would like to dismiss [counsel] for representing me on this case based on some inadequate preparation . . . , and I'm prepared to represent myself in this matter." Defendant expressed his belief that his attorney at trial had failed to provide competent representation at sentencing, and that the district attorney had not properly "verified" the restitution amount. As grounds for dismissing his appointed counsel, defendant claimed she initially advised him of "a discrepancy in the sentencing" during a consultation prior to 15 March 2004. When defendant asked counsel about his sentence on 5 April 2004, however, she told him that "she believed it to be right." Defendant also objected to counsel's advice that many of his concerns about his original sentencing proceeding were not germane to the probation violation hearing.

Following defendant's proffer, the transcript reflects the following discussion in open court:

> [PROSECUTOR]: . . . [D]efendant was found guilty of assault with a deadly weapon inflicting serious injury, E felony, Level II, received a 29-month minimum, 44-month maximum sentence suspended for 60 months, restitution was ordered at $19,389.95. . . .
>
> He was placed on probation. The violation he's here before today is the $19,000 he's supposed to pay, $19,573. . . . He paid about $500 since 1999. And other allegation he's absconded from supervision, that he moved to the [city] of Mobile, Alabama without getting prior approval from the probation officer, and revocation would be our ultimate recommendation to the Court.

[DEFENDANT]: Excuse me, Your Honor.

COURT: Hold on. I'll get back to you.

Upon inquiry to defendant's appointed counsel, the trial court found no grounds for her dismissal or for the appointment of substitute counsel to represent defendant.

Having concluded that it would not appoint new counsel for defendant, the court engaged him in the following colloquy:

> [COURT:] Now, you have a Constitutional right to represent yourself, handle this case yourself. No one can make you have a lawyer if you don't wish to have a lawyer, and because I don't see any reason . . . to excuse her as a lawyer, she's going to represent you until I excuse her. I will excuse her if you want to handle this case yourself, and you won't have a lawyer, but I'm not going to give you another Court-appointed attorney.
>
> [DEFENDANT]: That will be fine.
>
> COURT: What would be fine?
>
> [DEFENDANT]: If I represent myself.
>
> COURT: All right. You understand that as a consequence of representing yourself, you could go to prison apparently for a minimum of 29 months, a maximum of 44 months, that that is the penalty that you're looking—
>
> [DEFENDANT]: Yes, sir.
>
> COURT: I tell you that so that you will understand the consequences of proceeding without a lawyer. Do you understand that?
>
> [DEFENDANT]: Yes, Your Honor.
>
> COURT: All right. . . .
>
> Sir, what this means when you sign this waiver is you no longer wish to have the Court have [appointed counsel] to represent you or any other lawyer.
>
> [DEFENDANT]: If I choose to hire a lawyer for an appeal or something like that, I would be able to do that, right?
>
> COURT: Yes, sir. If you're able to hire a lawyer for an appeal or if you ask for Appellate Defender to represent you, that's an issue that I would have to consider at the time.

Defendant signed a written Waiver of Counsel certified by the trial court. The waiver first states an Acknowledgment of Rights and Waiver as follows:

> As the undersigned party in this action, I freely and voluntarily declare that I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me and my right to have the assistance of counsel in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive the right to assigned counsel and the right to assistance of counsel.
>
> I freely, voluntarily and knowingly declare that:
>
> (Check only one)
>
> ! 1. I waive my right to assigned counsel and that I, hereby, expressly waive that right.
>
> (2. I waive my right to all assistance of counsel which includes my right to assigned counsel and my right to the assistance of counsel. In all respects, I desire to appear in my own behalf, which I understand I have the right to do.

After selecting only the second box, defendant signed the waiver of counsel form. The trial judge then certified the waiver as follows:

> I certify that the above named defendant has been fully informed in open court of the charges against him/her, the nature of and the statutory punishment for each charge, and the nature of the proceeding against the defendant and his/her right to have counsel assigned by the court and his/her right to have the assistance of counsel to represent him/her in this action; that the defendant comprehends the nature of the charges and proceedings and the range of punishments; that he/she understands and appreciates the consequences of his/her decision and that the defendant has voluntarily, knowingly and intelligently elected in open court to be tried in this action:
>
> (Check only one)
>
> ! 1. without the assignment of counsel.
>
> (2. without the assistance of counsel, which includes the right to assigned counsel and the right to assistance of counsel.

Here, where both the defendant and trial judge properly completed the form, the signed and certified written waiver creates a presumption that the waiver was knowing, intelligent and voluntary. *See State v. Kinlock*, 152 N.C. App. 84, 89-90, 566 S.E.2d 738, 741 (2002).

Upon completion of the waiver, the trial court excused his appointed counsel, discharging her from further representation. Even after signing the written waiver, defendant was given a final opportunity to delay the proceeding for the purpose or retaining private counsel, which he declined as follows:

> [PROSECUTOR]: If [defendant]'s not making a motion to continue to hire an attorney, we're ready to go ahead and proceed with the probation violation hearing.
>
> COURT: All right. [Defendant], what is your position at this particular time? The State's ready to go forward unless you are requesting time to hire a lawyer. . . .
>
> [DEFENDANT]: I would like to go forward.
>
> COURT: All right. . . .

In addition to the written waiver, we believe the court's discussion with defendant in open court was sufficient to satisfy the mandate of N.C. Gen. Stat. § 15A-1242.

> If defendant clearly indicates a desire to have counsel removed and proceed *pro se*, then the trial judge should make further inquiry; he should advise defendant of his right to represent himself, and determine whether defendant understands the consequences of his decision and voluntarily and intelligently wishes to waive his rights.

State v. Gerald, 304 N.C. 511, 519, 284 S.E.2d 312, 317 (1981). Defendant was unquestionably apprised of his right to counsel, having appeared at the hearing with his appointed counsel and acknowledging that he had consulted with her on at least one prior occasion. The trial court directly advised defendant that, while he had a constitutional right to self-representation, his appointed counsel would continue to represent him unless defendant affirmatively chose to excuse her and to proceed *pro se*. Even after defendant discharged his appointed counsel and signed the written waiver of his right to assistance of counsel, the court offered defendant the opportunity to request a continuance for the purpose of hiring a private attorney. Instead, defendant told the court, "I would like to go forward."

Regarding the consequences of his decision, the court advised defendant that he would not be appointed a new counsel and that "as a consequence of representing yourself, you could go to prison . . . for a minimum of 29 months, a maximum of 44 months[.]" Defendant stated that he understood these consequences but asked if he would retain the right to counsel on appeal. The court clarified for defendant that his waiver would not affect his right to either hire or request appointment of appellate counsel.

Finally, although the trial judge did not directly ask defendant if he was aware of the nature of the charges and proceedings, the prosecutor announced the charges in open court, as follows: "[Defendant] was placed on probation. The violation he's here before today is the $19,000 he's supposed to pay, $19,573. . . . He paid about $500 since 1999. And other allegation he's absconded from supervision, that he moved to the [city] of Mobile, Alabama without getting prior approval from the probation officer[.]" *Cf. State v. Phillips*, 152 N.C. App. 679, 685-86, 568 S.E.2d 300, 304 (2002) (overruling challenge to waiver of counsel where "[t]he charges were read to defendant by the assistant district attorney, and he acknowledged being served with the Misdemeanor Statement of Charges"). Moreover, defendant confirmed to the court his awareness that he was facing an active prison sentence of twenty-nine to forty-four months. When informed that the prosecution was prepared to "proceed with the probation violation hearing[,]" defendant likewise affirmed to the court his desire "to go forward." Here, "there is no indication in the record before us that defendant misunderstood the nature of the proceedings, was misunderstood by the court, or was given no chance to explain." *State v. Warren*, 82 N.C. App. 84, 88, 345 S.E.2d 437, 440 (1986).

Having carefully reviewed the hearing transcript, we conclude that the trial court fully complied with the requirements of N.C. Gen. Stat. § 15A-1242 in determining that defendant "voluntarily, knowingly and intelligently" waived his right to counsel.

The record on appeal contains additional assignments of error not addressed by defendant in his brief to this Court. Pursuant to N.C.R. App. P. 28(b)(6), we deem them abandoned.

Affirmed.

Judges ELMORE and STEELMAN concur.

FIRST UNION SECURITIES, INC., FORMERLY KNOWN AS WACHOVIA SECURITIES, INC., PLAINTIFF V. ROBERT LORELLI, DEFENDANT

ROBERT LORELLI, PETITIONER V. FIRST UNION SECURITIES, INC., NOW KNOWN AS WACHOVIA SECURITIES, INC., RESPONDENT

No. COA04-116

(Filed 1 February 2005)

Arbitration and Mediation— arbitration—attorney fees

The superior court did not err in a securities broker's defamation, wrongful termination, failure to pay severance benefits, tortious interference with contractual relations, and withholding of referral fees case by affirming an arbitration award granting attorney fees to petitioner even though respondent contends that the arbitration panel lacked the authority to award attorney fees, because: (1) both parties specifically requested attorney fees; and (2) the parties' uniform submission agreement incorporated the New York Stock Exchange (NYSE) Rules, and NYSE Rule 629 allowed a panel of arbitrators to award attorney fees.

Appeal by petitioner from judgment entered 6 October 2003 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 October 2004.

Hamilton Gaskins Fay & Moon, P.L.L.C., by Margaret Behringer Maloney and David G. Redding, for petitioner-appellant.

Ferguson Stein Chambers Wallas Adkins Gresham & Sumter, P.A., by John W. Gresham and Liddle & Robinson, L.L.P., by James R. Hubbard, Laurence Moy and Candace M. Adiutori, for respondent/cross-petitioner appellee.

ELMORE, Judge.

Wachovia Securities, Inc., formerly First Union Securities, Inc. (First Union), appeals an order of the superior court affirming the arbitration award in favor of Robert Lorelli (Lorelli). First Union contends that the arbitration panel lacked authority to award attorneys' fees to Lorelli. We conclude that the arbitration panel did not exceed its authority in making the award and affirm the judgment below.

The record establishes the following: In June 2000, Lorelli received notice that he was being terminated by First Union, where he was employed as a brokerage representative. First Union filed with the NASD Central Registration Depository a Uniform Termination Notice for Securities Industry Registration (Form U-5), which stated as the reason for Lorelli's termination that "Internal compliance review uncovered violations of firm policy and industry standards of conduct." As a result, Lorelli's NASD registration with First Union was effectively terminated. Lorelli requested an arbitration hearing before a panel appointed by the New York Stock Exchange (NYSE), of which First Union is a member firm. By executing a Uniform Submission Agreement, Lorelli and First Union agreed to arbitrate the matter "in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the [NYSE]." Lorelli brought forth several claims, including defamation for the filing of a false and disparaging Form U-5; wrongful termination; failure to pay severance benefits; tortious interference with contractual relations; and withholding of referral fees. In their pleadings, both parties requested that the arbitrators grant attorneys' fees. In addition, after the arbitration proceeding, Lorelli filed an application for attorneys' fees and motion for sanctions. In its 20 May 2003 award, the panel ordered that the U-5 be expunged and that First Union file an amended form stating the reason for Lorelli's termination as "Personality Conflict with supervisor." The panel awarded Lorelli attorneys' fees of $196,911.25 and costs of $26,715.00. On the severance pay claim, the panel awarded First Union attorneys' fees in the amount of $5,000.00. First Union filed a petition with the superior court seeking to vacate or modify the attorneys' fee award, and Lorelli filed a petition to confirm. On 6 October 2003 the court entered its order confirming the award. From this award and judgment, First Union appeals.

At the outset, we note that this arbitration dispute involves a contract affecting interstate commerce, and thus is governed by the Federal Arbitration Act (FAA). *See LSB Fin. Servs., Inc. v. Harrison*, 144 N.C. App. 542, 546, 548 S.E.2d 574, 577 (2001) (brokerage agreements and U-4 securities industry registration forms are contracts involving commerce within the meaning of the FAA). Section 10(a) of the Act provides that an award may be vacated upon one of the following grounds:

> (1) where the award was procured by corruption, fraud, or undue means;

> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a) (2003). Judicial review of an arbitration award is severely limited in order to encourage the use of arbitration and in turn avoid expensive and lengthy litigation. *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994), *cert. denied*, 513 U.S. 1112, 130 L. Ed. 2d 786 (1995). Thus, "[u]nder the FAA, 'an arbitration award is presumed valid, and the party seeking to vacate it must shoulder the burden of proving the grounds for attacking its validity.' " *Carpenter v. Brooks*, 139 N.C. App. 745, 751, 534 S.E.2d 641, 646, (quoting *Pinnacle Group, Inc. v. Shrader*, 105 N.C. App. 168, 171, 412 S.E.2d 117, 120 (1992)), *disc. review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000). On appeal of a trial court's decision confirming an arbitration award, we accept the trial court's findings of fact that are not clearly erroneous and review its conclusions of law *de novo*. *See id.* (citing to *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48, 131 L. Ed. 2d 985, 996 (1995)).

First Union contends that the trial court erred in confirming the arbitration award because the arbitration panel lacked the authority to award attorneys' fees to Lorelli. In considering this argument, the trial court remarked as follows:

> Lorelli, in his petition to confirm the award, contends that there are three bases upon which the arbitrators had the authority to award fees. The first is that the rules of the New York Stock Exchange authorize a panel to award attorneys' fees. The second is that the parties agreed to submit the issue of attorneys' fees to the panel. Lorelli's third argument is that the conduct of First Union in destroying documents it was required to maintain and in failing to timely produce documents provided an additional basis for the award of fees.

The court specifically found that NYSE Rule 629 allows a panel of arbitrators to award attorneys' fees and that both parties submitted the issue of attorneys' fees to the panel. We conclude that these two grounds are sufficient to uphold the panel's award of fees.[1]

The Uniform Submission Agreement signed by both parties is a valid and binding contract and modifies the arbitration agreement. *See Dean Witter Reynolds, Inc. v. Fleury*, 138 F.3d 1339, 1342 (11th Cir. 1998). Thus, the scope of the arbitrators' jurisdiction is defined by both the intent of the parties as expressed in the contract containing the arbitration clause and the submission agreement. *Executone Info. Sys. v. Davis*, 26 F.3d 1314, 1323 (5th Cir. 1994); *Thomas v. Prudential Securities, Inc.*, 921 S.W.2d 847, 849 (Tex. Ct. App. 1996). Here, the parties agreed to submit their dispute to arbitration and be bound by the Constitution and Rules of the NYSE. As such, these rules provide a contractual basis for the arbitrators' authority to resolve a particular claim. NYSE Rule 629 provides that "In addition to forum fees, the arbitrator(s) may determine in the award the amount of costs incurred . . . and, unless applicable law directs otherwise, other costs and expenses of the parties. The arbitrator(s) shall determine by whom such costs shall be borne." NYSE Rule 629(c) (2003). In *Prudential-Bache Securities, Inc. v. Tanner*, 72 F.3d 234, 242-43 (1st Cir. 1995), the First Circuit interpreted "other costs and expenses" to include attorneys' fees. The court concluded the record supported its determination that the arbitration panel had jurisdiction to award fees, as both parties requested attorneys' fees from the panel. *Id.* Here, both parties requested attorneys' fees as part of the panel's award. First Union's argument to the contrary, that Lorelli failed to request attorneys' fees on all claims, is unpersuasive. Lorelli's Statement of Claim contained requests for attorneys' fees, costs, and other appropriate relief.

The Texas Court of Appeals addressed a similar set of facts in *Thomas v. Prudential Securities, Inc.*, 921 S.W.2d 847, 849 (Tex. Ct. App. 1996). In that case, both parties requested that the arbitration panel award attorneys' fees and signed a submission agreement incorporating the NYSE Rules into the arbitration agreement. In concluding that the panel did not exceed its authority in granting attorneys' fees, the court agreed with the reasoning of the First Circuit in

1. The court determined that First Union's discovery conduct was an additional ground to support the award of attorneys' fees. Under our limited review, we need not address this alternative ground, as we find that the first two grounds adequately support the award.

Tanner that NYSE Rule 629 permits the arbitrators to award such fees. *See id.* at 850-51. The court also noted that the parties submitted claims for attorneys' fees to the panel, and that this is an indicator of the arbitrators' authority. *Id.* In the instant case, as in *Thomas*, the parties specifically requested attorneys' fees, and their agreement incorporated the NYSE Rules. We see no reason to depart from the analysis articulated by the court in *Tanner* and approved in *Thomas*, and thus conclude that attorneys' fees were properly awarded pursuant to NYSE Rule 629(c).

First Union argues nonetheless that state substantive law controls, and that North Carolina law does not allow a prevailing party to recover attorneys' fees on a defamation claim. In support of this argument, First Union cites to *Pinnacle Group, Inc. v. Shrader*, 105 N.C. App. 168, 412 S.E.2d 117 (1992), wherein this Court decided that New York substantive law upheld the arbitrators' award of attorneys' fees. However, that case is distinguishable because there the parties' arbitration agreement contained a clause declaring that *state* substantive law would govern. *See Pinnacle*, at 173, 412 S.E.2d at 122 ("The agreement upon which the arbitration is based stated that the law of New York governs the parties to the contract and any disputes between the parties should be resolved through arbitration."). In contrast, the parties in the case *sub judice* submitted their dispute to arbitration in accordance with the NYSE Rules; the agreement to arbitrate contained no such state law provision. Additionally, we note that decisions issued after *Pinnacle* have reasoned that a state choice of law clause in an arbitration agreement should not be construed to limit the authority of arbitrators. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 131 L. Ed. 2d 76 (1995) (state choice of law provision shall not be interpreted to preclude an arbitration award of punitive damages unless agreement between parties specifically and unequivocally states that such relief is excluded); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996) (applying *Mastrobuono* analysis to arbitrators' authority to award attorneys' fees).

We conclude that in light of the parties' requests for fees and execution of the submission agreement expressing their intent that the Constitution and Rules of the NYSE define the scope of the panel's jurisdiction, the arbitrators did not exceed their authority in awarding attorneys' fees to Lorelli.

Affirmed.

Judges McGEE and McCULLOUGH concur.

WELLONS CONSTRUCTION, INC., PLAINTIFF v. LANDSOUTH PROPERTIES, LLC, COMMUNITY NATIONAL BANK, WORTH HARRIS CARTER, JR., AND KENNETH R. MOSS, DEFENDANTS

No. COA04-476

(Filed 1 February 2005)

Venue— materialman's lien—venue—breach of contract

The trial court correctly denied defendants' motion for a change of venue in an action for breach of contract and enforcement of materialman's liens. Although the property is in Cumberland County, plaintiff's principal place of business is in Harnett County, where the action was filed, and venue in Harnett County is proper under N.C.G.S. § 1-82. N.C.G.S. § 1-76 (actions for the recovery of real property or mortgage foreclosure) does not apply where the primary purpose of the action, as here, is the recovery of money damages. Moreover, it has been held that a lien enforcement action may properly be brought in a venue other than where the property is located.

Judge TYSON concurring.

Appeal by Defendants from order entered 2 February 2004 by Judge Franklin F. Lanier in Superior Court, Harnett County. Heard in the Court of Appeals 7 December 2004.

Bugg & Wolf, PA, by Bonnor E. Hudson, III, for plaintiff-appellee.

J. Gates Harris, for defendant-appellants.

WYNN, Judge.

Defendants Landsouth Properties, LLC, Community National Bank, Worth Harris Carter, Jr., and Kenneth R. Moss appeal from an order of the trial court denying their motion to change venue. Defendants assert that the trial court committed reversible error in denying their motion to change venue for an action to foreclose ma-

terialmen's liens. After careful review, we disagree and affirm the order of the trial court.

Briefly, the procedural and factual history of the instant appeal is as follows: In May 2002, Wellons Construction, Inc. entered into a written contract with Defendants to provide labor, materials, and equipment for the construction of portions of a mobile home park in Cumberland County, North Carolina. Through changes in orders, the parties agreed to increase the scope and value of the original contract. Wellons Construction allegedly performed its contractual obligations but did not receive the payment(s) required under the contract. On 3 November 2003, Wellons Construction filed a claim of lien in Cumberland County. Thereafter, Wellons Construction filed the instant action (seeking damages for breach of contract, unjust enrichment, and lien enforcement) in Harnett County, and a notice of *lis pendens* in Cumberland County. Defendants in response filed a motion to change venue, asserting that Harnett County is an improper venue for the action. Following the trial court's denial of that motion, Defendants appealed.

Absent a statute mandating otherwise, proper venue for an action is determined by the residence of the parties to that action. North Carolina General Statute section 1-82 directs that an action must be tried:

> ***[I]n the county in which the plaintiffs or the defendants, or any of them, reside at its commencement***, or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in his summons and complaint[.]

N.C. Gen. Stat. § 1-82 (2003) (emphasis added). A domestic business resides where its principal place of business is located. N.C. Gen. Stat. § 1-79 (2003). Here, Wellons Construction, a domestic business, has its principal place of business in Harnett County. Venue in Harnett County would therefore appear to be proper.

Defendants argue, however, that North Carolina General Statute section 1-76, and not the default section 1-82, applies to actions, such as the instant one, in which a plaintiff seeks the enforcement of a lien against real property. North Carolina General Statute section 1-76 states that actions for "[r]ecovery of real property, or of an [] interest

therein" or for "[f]oreclosure of a mortgage of real property" must be brought where the property at issue is situated. N.C. Gen. Stat. § 1-76 (2003). Defendants cite to *Penland v. Red Hill Methodist Church*, 226 N.C. 171, 37 S.E.2d 177 (1946), and *Sugg v. Pollard*, 184 N.C. 494, 115 S.E. 153 (1922), which applied North Carolina General Statute section 1-76 to lien enforcement actions and thus limited venue in such actions to the underlying property's situs.

The cases upon which Defendants rely were, however, decided decades before the 1969 enactment of North Carolina General Statute section 44A-13. North Carolina General Statute section 44A-13(a) states that "[a]n action to enforce [a] lien . . . ***may*** be instituted in any county in which the lien is filed." N.C. Gen. Stat. § 44A-13(a) (2003) (emphasis added). This Court has previously found that "may" is not properly construed as "must" and that a lien enforcement action may therefore properly be brought in a county other than that in which the lien is filed, *i.e.*, in which the property subject to the lien is located. *Ridge Cmty. Investors, Inc. v. Berry*, 32 N.C. App. 642, 648, 234 S.E.2d 6, 10 (1977). While *Ridge* was overturned in part, our Supreme Court explicitly affirmed our holding that a lien enforcement action may properly be brought in a venue other than that where the property subject to the lien is situated. *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 694-95, 239 S.E.2d 566, 570-71 (1977).

Moreover, North Carolina General Statute section 1-76 is not applicable to actions, such as the instant one, where the primary purpose is the recovery of money damages. For purposes of determining venue, *i.e.*, for determining whether North Carolina General Statute section 1-76 applies, "consideration is limited to the allegations in plaintiff's complaint." *McCrary Stone Service, Inc. v. Lyalls*, 77 N.C. App. 796, 799, 336 S.E.2d 103, 105 (1985) (citations omitted). "If the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land[,]" section 1-76 applies. *Thompson v. Horrell*, 272 N.C. 503, 504-05, 158 S.E.2d 633, 634 (1968). However, where the principal objective of an action is "to recover monetary damages for breach of [] contract," even where issues surrounding a lien are involved, section 1-76 does not apply. *Wise v. Isenhour*, 9 N.C. App. 237, 239-40, 175 S.E.2d 772, 773-74 (1970) (where the primary objective of an action alleging breach of a construction contract was to collect monetary damages, but where plaintiff also requested removal of a lien, venue was properly determined not by section 1-76 but by residence of the parties). Because the primary objective of the instant action is the recovery of money dam-

ages for breach of a construction contract, North Carolina General Statute section 1-76 does not apply.

For the reasons stated herein, we affirm the order of the trial court.

Affirmed.

Judges McGEE concurs.

Judge TYSON concurs in a separate opinion.

TYSON, Judge concurring in a separate opinion.

I concur in the majority's opinion. I write separately to amplify the majority's discussion of our Supreme Court's holding in *Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977), regarding the appropriate jurisdiction within which to file a notice of and to enforce a lien.

N.C. Gen. Stat. § 44A-13(a) (2003) provides, "An action to enforce the lien created by this Article may be instituted in any county in which the lien is filed." In 1969, the General Assembly amended the statute to enact a new section regarding Notice of Action, N.C. Gen. Stat. § 44A-13(c) (2003), portions of which say:

> (c) Notice of Action.—. . . If neither an action nor a notice of lis pendens is filed in each county in which the real property subject to the lien is located within 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien, as to real property claimed to be subject to the lien in such counties where the action was neither commenced nor a notice of lis pendens filed, the judgment entered in the action enforcing the lien *shall not direct a sale of the real property subject to the lien* enforced thereby nor be entitled to any priority under the provisions of G.S. 44A-14(a), but shall be entitled only to those priorities accorded by law to money judgments.

(Emphasis supplied). This statute, entitled "Action to enforce lien," limits plaintiff's remedy to money damages because plaintiff chose not to file or to enforce the lien in the county where the property was located. Without filing either the claim of lien or notice of the action

in the county where the property lies, a trial court cannot direct a sale of the property and is limited in "priorities accorded by law to money judgments." *Id.*

Following enactment of this amendment, our Supreme Court emphasized in *Investors, Inc.*, "The effect of this amendment is to give protection to purchasers and examiners of titles no matter where the action to enforce the lien is instituted." 293 N.C. at 695, 239 S.E.2d at 570. The Supreme Court noted, "In our opinion, it is *the better practice* to file the action to enforce a lien in the county in which the claim of lien is filed." *Id.* (emphasis supplied).

The Court affirmed the Court of Appeals holding that held, "the Superior Court of Mecklenburg County had jurisdiction to enforce the claim of lien filed in Watauga County." *Id.* at 695, 239 S.E.2d at 571. Our Supreme Court recognized the importance of filing the action to enforce the lien in the county where the claim of lien is filed and the real property is situated in order to protect the clarity and priority of the records affecting the real property at issue. Notwithstanding, the statutes permit and the Supreme Court has upheld the ability to file an action to enforce the lien in "any county in which the lien is filed." *Id.*; N.C. Gen. Stat. § 44A-13(a). The trial court's judgment must be affirmed.

In *Investors, Inc.*, our Supreme Court discussed the "*better practice*" for the filing of lien disputes, despite the other procedures available. 293 N.C. at 695, 239 S.E.2d at 570 (emphasis supplied). As I find its discussion relevant and noteworthy to the decision at bar, I write separately to concur in the majority's opinion.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 1 FEBRUARY 2005

ADVANCED WALL SYS., INC. v. HIGHLANDE BUILDERS, LLC No. 04-611	Watauga (02CVS29)	Appeal dismissed
DEBROW v. N.C. DEP'T OF CORR. No. 04-878	Ind. Comm. (I.C. 620236)	Affirmed
IN RE BABY BOY M. No. 04-870	Johnston (01J209)	Affirmed
IN RE C.E.M. No. 04-114	Johnston (02J154)	Appeal dismissed
IN RE K.O.S. No. 04-773	Johnston (01SP0442)	Affirmed
MOODY v. NATIONWIDE MUT. INS. CO. No. 04-243	Wake (02CVD4254)	Dismissed
STATE v. ANDERSON No. 04-831	Hoke (02CRS50085) (02CRS50086) (02CRS50087) (02CRS50088) (02CRS50089)	Affirmed
STATE v. BACON No. 04-617	Davidson (01CRS60031)	Affirmed
STATE v. BEASLEY No. 04-511	Alamance (01CRS58869)	Affirmed
STATE v. BLACK No. 04-723	Guilford (03CRS89346)	No error
STATE v. BROWN No. 04-752	Lenoir (03CRS54555)	No error
STATE v. CUMMINGS No. 04-633	New Hanover (03CRS669)	No error
STATE v. JONES No. 04-908	Gaston (99CRS28548) (99CRS28549) (99CRS28550)	No error
STATE v. MACDONELL No. 04-835	Cherokee (03CRS3004) (03CRS3005) (03CRS3006) (03CRS3007) (03CRS51460)	Affirmed

STATE v. McCULLOUGH No. 04-494	Mecklenburg (03CRS29304)	No error
STATE v. MORGAN No. 04-897	New Hanover (02CRS20732) (02CRS61276)	No error
STATE v. PEARSON No. 04-585	Caldwell (02CRS52949)	No error
STATE v. ROSE No. 04-882	Carteret (03CRS53077) (03CRS53078)	No error
STATE v. SPROUSE No. 04-161	Henderson (00CRS2829) (00CRS51991)	No error
STATE v. STRICKLAND No. 04-746	Lenoir (03CRS4480)	No error
STATE v. TERRY No. 04-959	Forsyth (02CRS63602)	No error
STATE v. WHITE No. 04-556	Pasquotank (02CRS51921) (02CRS2556)	No error
STATE v. WILLIAMS No. 04-680	New Hanover (03CRS8880)	No error

CHARLES H. SMITH, III, EMPLOYEE, PLAINTIFF v. RICHARDSON SPORTS LTD. PARTNERS D/B/A CAROLINA PANTHERS, EMPLOYER; LEGION INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA03-1130

(Filed 15 February 2005)

1. **Workers' Compensation— professional football player— dollar-for-dollar credit**

The Industrial Commission did not err in a workers' compensation case involving plaintiff injured professional football player by concluding that defendant employer was not entitled to a dollar-for-dollar credit for the amounts paid to plaintiff after his injury, because: (1) N.C.G.S. § 97-42 provides that any credit awarded to an employer for any amount paid to an employee after his injury is limited to shortening of the period in which compensation is paid, and not by reducing the amount of the weekly payment; (2) the North Carolina Workers' Compensation Act precludes a dollar-for-dollar credit and prohibits contractual modification of the workers' compensation statutory provisions; and (3) the NFL players' contract has been interpreted to provide for a time credit and not a dollar-for-dollar credit.

2. **Workers' Compensation— professional football player—no credit for payments due and payable—roster bonus—signing bonus—minicamp—workout—appearance fees**

The Industrial Commission did not abuse its discretion in a workers' compensation case involving plaintiff injured professional football player by concluding that defendant employer was not entitled to a greater credit for five of the payments received by plaintiff post-injury including one of the fifteen payments of $47,059 paid during the 2000 season, the $1,000,000 roster bonus of 3 April 2001, the $1,985.72 paid for workouts and mini-camps in 2001, a $2,500 appearance fee for 7 March 2001, and the $4,500,000 signing bonus, because: (1) N.C.G.S. § 97-42 provides that payments made by the employer which were due and payable when made are not deductible, and the pertinent five payments had been earned by plaintiff and were due and payable when made; and (2) the 18 September 2000 $47,059 payment was for services rendered during the prior week, including the 17 September 2000 game in which plaintiff was injured.

3. Workers' Compensation— professional football player— credit for payments—additional findings of fact necessary

The Industrial Commission erred in a workers' compensation case involving plaintiff injured professional football player by concluding that defendant employer was not entitled to a greater credit for payments including the $225,000 injury protection provision payments paid during the 2001 regular season, the $750,000 one year skill and injury guarantee payments paid in 2002, and the injured reserve pay of fourteen $47,059 installments in 2000, and the case is remanded for further findings on these payments because: (1) the determination that the injury protection plan payments were from an employee-funded plan was not supported by competent evidence; (2) although the parties stipulated that plaintiff would receive $750,000 in seventeen equal payments during the 2002 football season, the Commission did not render any findings of fact or conclusions of law as to whether it would award defendants a credit for these payments; and (3) on remand, the Commission may hear additional evidence and may make further findings of fact as to whether the effect of N.C.G.S. § 97-42 has been modified in this case regarding the injured reserve pay.

4. Workers' Compensation— professional football player— post-injury wage earning capacity

The Industrial Commission did not err in a workers' compensation case involving plaintiff injured professional football player by concluding that plaintiff's post-injury wage earning capacity outside the NFL is $40,000 per year during the relevant 300-week period covered by N.C.G.S. § 97-30, because: (1) plaintiff's uncontradicted testimony that he was making $40,000 a year was competent evidence upon which the Commission could determine plaintiff's wage-earning capacity; and (2) if plaintiff's income changed and plaintiff began making more than $40,000 a year during the 300-week period, such that he was no longer entitled to the maximum compensation rate, defendants could move to terminate or diminish the amount of compensation pursuant to N.C.G.S. § 97-47.

Appeal by defendants from an opinion and award entered 3 June 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 June 2004.

R. James Lore for plaintiff-appellee.

Hedrick, Eatmon, Gardner & Kincheloe, L.L.P., by Hatcher Kincheloe and Shannon P. Herndon, for defendant-appellants.

HUNTER, Judge.

Richardson Sports Ltd. Partners, d/b/a The Carolina Panthers, et al. ("defendants") present the following issues for our consideration: whether the North Carolina Industrial Commission ("Commission") erred in (I) only allowing defendants a fourteen-week credit, with an approximately $8,000.00 value, for approximately six million dollars in post-injury payments to plaintiff and not allowing a dollar-for-dollar credit for the total amount paid to plaintiff post-injury,[1] (II) awarding plaintiff an automatic right to receive 300 weeks of partial disability benefits, and (III) finding that the $225,000.00 paid to plaintiff pursuant to a contractual injury protection plan represents payments made from revenue designated as "employee revenue" and not funded by the defendants. We affirm the opinion and award in part and remand this case to the Commission for the reasons stated herein.

This is a rare case in which a highly paid individual suffered a compensable injury and occupational disease and received several millions of dollars after his injury pursuant to his employment contract. Charles H. Smith, III ("plaintiff"), entered into a contract with defendants on 1 March 2000 to play professional football for the Carolina Panthers ("Panthers") of the National Football League ("NFL"). The contract was scheduled to end on 28 or 29 February 2005, unless the contract was terminated, extended, or renewed as specified by the contract. The contract provided that defendants would pay plaintiff (1) $800,000.00 for the 2000 season, (2) $1,500,000.00 for the 2001 season, (3) $2,700,000.00 for the 2002 season, (4) $3,500,000.00 for the 2003 season, and (5) $4,000,000.00 for the 2004 season. In addition to the salary, plaintiff would receive financial bonuses such as a $4,500,000.00 signing bonus, a $1,000,000.00 roster bonus for each season he was placed on the team's roster starting in 2001, and payments for making public

1. Our calculation of the sum of the payments for which defendants seek a credit does not equal $6,172,135.40. We also note that some of the stipulated exhibits do not equal some of the amounts stated by defendants in their briefs. However, we choose to use the numbers and figures used by the parties in their brief for the sake of clarity. If necessary, on remand the parties and the Commission may address any discrepancies.

appearances and attending the team minicamps and workouts. A one-year skill and injury guarantee addendum to the contract provided plaintiff would receive $750,000.00 in 2002 if the team determined plaintiff's skill for performance was unsatisfactory when compared with other players competing for positions on the roster or if plaintiff was unable to pass the team's 2002 preseason physical due to a football-related injury occurring prior to the 2002 season. The Collective Bargaining Agreement ("CBA") between the NFL clubs and the NFL Players Association was also a part of plaintiff's contract, and it contained several benefits, including an injury protection provision. Under certain conditions, this provision provides a one-time benefit to injured players during the season after a player's injury. Plaintiff received $225,000.00 under this provision.

Prior to entering into a five-year contract with defendants, plaintiff played football for four years in college and played with the Atlanta Falcons ("Falcons") of the NFL from 1992 until 2000. With the Falcons, plaintiff received awards, including being voted greatest defensive lineman in Falcon history, being selected to the All-Pro Bowl NFL team, and being chosen as co-captain in Super Bowl XXXIII. While playing for the Falcons, plaintiff sustained a knee injury and had knee reconstruction surgery in 1994. He only missed one game with the Falcons related to that injury.

After joining the Panthers in 2000, plaintiff passed the pre-employment physical examination performed by defendants' physician, which made him eligible to play football. After passing the physical examination, defendants allowed plaintiff to undergo another surgical procedure to get his knee "cleaned out." Plaintiff continued rehabilitation treatment and attended practices sporadically. After playing the first two games of the season, plaintiff sustained another knee injury during the third game on 17 September 2000, and plaintiff was placed on injured reserve. While on injured reserve, plaintiff continued to receive his salary. During the 2000 season, plaintiff was paid $800,000.00 in installments of $47,059.00 for seventeen weeks. Three of these installment payments were for the three games in which plaintiff played, including the third game in which he was injured. The remaining fourteen installment payments, totaling $658,826.00, was injured reserve pay.

Plaintiff had knee surgery towards the end of the 2000 regular football season. Defendants decided to place plaintiff on its 2001 roster. As a result, plaintiff received a $1,000,000.00 roster bonus in April

2001. From 2 April 2001 to 21 May 2001 plaintiff participated in minicamps, workouts, and training camps, for which plaintiff was paid $1,985.72. Plaintiff also made appearances during this time period, for which defendants paid him $2,500.00. On 23 July 2001, plaintiff's contract was terminated by defendants due to unsatisfactory skill or performance as compared with that of other players competing for positions on the club's roster. Defendants paid plaintiff $87,500.00 in severance pay, an amount based on his years of service with the NFL. As the conditions of the contractual injury protection provision were met, plaintiff also received $225,000.00 in installments during the 2001 regular season. In 2002, plaintiff received $750,000.00 pursuant to the one year skill and injury guarantee addendum to his contract.

At the time of the Commission's review, plaintiff earned $40,000.00 per year as a radio announcer for 790 Zone Radio in Atlanta, Georgia. If it had not been for the injury, he would have had the capacity to earn at least $20,000,000.00 under the contract, which included the signing bonus of $4,500,000.00, his salary each year, and his projected roster bonus each year. In the Pre-trial Agreement, defendants agreed to pay $588.00 per week, the maximum workers' compensation rate in effect for 2000, until the hearing.

Defendants denied plaintiff's injury was compensable by filing a Form 61 with the Commission on 11 October 2001. Thereafter, on 5 March 2002, defendants filed a Form 60 admitting compensability. The parties then proceeded before the deputy commissioner regarding the amount of workers' compensation, if any, to which plaintiff was entitled. Defendants argued they were entitled to credits for post-injury payments made to plaintiff. In a 1 July 2002 opinion and award, Deputy Commissioner Phillip A. Holmes determined plaintiff was entitled to 300 weeks of compensation at a rate of $588.00 per week. Defendants were awarded a fourteen week credit. Thus, plaintiff was awarded compensation at the rate of $588.00 per week for 286 weeks and medical expenses. On appeal, the Commission affirmed the opinion and award with some modifications. The Commission concluded "[p]laintiff sustained a compensable injury by accident and developed compensable occupational disease(s) as a result of an admittedly compensable event arising out of and in the course of his employment with defendants on September 17, 2000." In the award, plaintiff was awarded partial disability compensation of $588.00 for 300 weeks with a fourteen-week credit to defendants. This would result in a total award of $168,168.00. Plaintiff was also awarded payment for past

and future medical coverage for injuries, diseases, and conditions resulting from the injury. Defendants appeal.[2]

Defendants assert that they are entitled to a greater credit than that awarded by the Commission. Specifically, defendants contend they should have been awarded either a period credit or dollar-for-dollar credit for the following payments:

- fifteen payments of $47,059.00 totaling $705,885.00 paid during the 2000 season post-injury,
- $1,000,000.00 roster bonus paid on 3 April 2001,
- $1,985.72 paid in 2001 for workouts and mini-camps,
- a $2,500.00 appearance fee paid on 7 March 2001,
- $225,000.00 in injury protection payments for the 2001 season,
- $750,000.00 paid during the 2002 season pursuant to the One-Year Skill and Injury Guarantee which is Addendum C to the 2001 contract, and the
- $4,500,000.00 signing bonus.

We first address defendants' contention that they were entitled to a dollar-for-dollar credit for the above amounts paid to plaintiff post-injury.

[1] Defendants contend they are entitled to a dollar-for-dollar credit because this Court has previously affirmed a dollar-for-dollar credit in

2. We initially note that defendants have not appealed the Commission's computation of the average weekly wage. In its conclusions of law, the Commission determined that exceptional reasons existed for using an alternative method to calculate plaintiff's average weekly wage in order to most accurately approximate the amount which plaintiff would have earned but for the injury or disease he sustained. *See Larramore v. Richardson Sports Ltd. Partners*, 141 N.C. App. 250, 540 S.E.2d 768 (2000), *per curiam aff'd*, 353 N.C. 520, 546 S.E.2d 87 (2001). Defendants, however, do state in their brief's statement of facts, that the Commission's determination that plaintiff would have earned $20,000,000.00 under the entire contract was speculative, as there was no guarantee plaintiff would have made the team each year. Our appellate rules indicate that the statement of facts "should be a non-argumentative summary of all material facts underlying the matter in controversy[.]" N.C.R. App. P. 28(b)(5). As defendants did not properly argue this issue in their brief, we will consider this assignment of error abandoned. *See* N.C.R. App. P. 28(b)(6) ("[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned"). However, even assuming this issue was properly argued, our review of the record indicates competent evidence supports the findings of fact regarding what plaintiff would have earned under the contract.

Larramore, a workers' compensation case involving a professional football player. *See Larramore v. Richardson Sports Ltd. Partners*, 141 N.C. App. 250, 540 S.E.2d 768. In *Larramore*, however, this Court did not address the issue of whether an employer was entitled to a dollar-for-dollar credit for the amounts paid to an employee after his injury. Moreover, this Court does not even discuss a dollar-for-dollar credit in *Larramore*. The only reference to a credit in *Larramore* is in this Court's summary of the Commission's opinion and award. This Court stated: "The Commission calculated plaintiff's average weekly wage as $1,653.85, yielding a weekly compensation rate of $478.00, minus appropriate credits to defendants." *Id.* at 253, 540 S.E.2d at 770. Accordingly, we conclude this Court's opinion in *Larramore* does not hold an employer is entitled to a dollar-for-dollar credit for any amounts paid to an employee after his injury. Rather, this issue is governed by N.C. Gen. Stat. § 97-42 (2003).

N.C. Gen. Stat. § 97-42 states:

> Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment. Unless otherwise provided by the plan, when payments are made to an injured employee pursuant to an employer-funded salary continuation, disability or other income replacement plan, the deduction shall be calculated from payments made by the employer in each week during which compensation was due and payable, without any carry-forward or carry-back of credit for amounts paid in excess of the compensation rate in any given week.

Thus, any credit awarded to an employer for any amount paid to an employee, after his injury, is limited to shortening of the period in which compensation is paid, under the restrictions set forth in N.C. Gen. Stat. 97-42, and not by reducing the amount of the weekly payment.[3]

Nonetheless, defendants argue that they are entitled to a dollar-for-dollar credit pursuant to their contract with plaintiff. Paragraph 10 of the NFL Player Contract entered into by the parties states:

3. See *infra* for a discussion of the 1994 amendments to this statute.

> WORKERS' COMPENSATION. Any compensation paid to Player under this contract or under any collective bargaining agreement in existence during the term of this contract for a period during which he is entitled to workers' compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability will be deemed an advance payment of workers' compensation benefits due Player, and Club will be entitled to be reimbursed the amount of such payment out of any award of workers' compensation.

Defendants argue that this contractual provision "specifically sets forth that the types of payments that were made to Employee-Plaintiff in this action are deemed advances against any award of workers' compensation." In support of this contention defendants cite *Pittsburgh Steelers Sports, Inc. v. Workmen's Compensation Appeal Board*, 604 A.2d 319 (Pa. 1992) and *Station v. Workmen's Compensation Appeal Board*, 608 A.2d 625 (Pa. 1992). In *Steelers* and *Station*, the Commonwealth Court of Pennsylvania explained the Workmen's Compensation Board should have determined the credit owed to the professional football team for payments made to an injured player on a dollar-for-dollar basis. *See Steelers*, 604 A.2d at 323; *Station*, 608 A.2d at 632. In each of these decisions, the Pennsylvania court based its decision upon Paragraph 10 of the NFL Player Contract. *Steelers*, 604 A.2d at 322-23; *Station*, 608 A.2d at 632.[4]

While the same contractual provision is present in this case, *Station* and *Steelers* do not provide relevant guidance. First, in North Carolina, N.C. Gen. Stat. § 97-42 does not allow a credit to be given by reducing the amount of the weekly payment. Rather, the number of weeks in which a claimant receives workers' compensation should be shortened. Our review of the Pennsylvania statutes does not reveal a similar provision.[5] Second, North Carolina statutes provide: "No con-

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4. The Pennsylvania decisions in *Steelers* and *Station* were decided prior to the arbitration decision indicating any credit under paragraph 10 of the NFL contract would be imposed on a time basis. The NFL CBA indicates each NFL team is bound by arbitration decisions. For further discussion, *see infra*.

5. After the Pennsylvania decisions in *Station* and *Steelers*, the Pennsylvania legislature enacted legislation applicable to highly paid professional athletes which limited workers' compensation benefits. *See* 77 P.S. § 565 (2004). This legislation makes a distinction between highly paid professional athletes and athletes that do not earn high salaries. *See Lyons v. Workers' Comp. Appeal Bd.*, 803 A.2d 857 (Pa. 2002). North Carolina has not enacted similar legislation.

tract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer in whole or in part, of any obligation created by this Article, except as herein otherwise expressly provided." N.C. Gen. Stat. § 97-6 (2003). Thus, the North Carolina Workers' Compensation Act precludes a dollar-for-dollar credit and prohibits contractual modification of the workers' compensation statutory provisions. *See Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 507-08, 293 S.E.2d 807, 811 (1982) (stating "an employer would not be permitted to escape his liability or obligations under the Act through the use of a special contract or agreement if the elements required for coverage of the injured individual would otherwise exist").

Moreover, in *In the Matter of an Arbitration between National Football League Players Association and National Football League Management Council*, Opinion and Decision of Sam Kagel, National Arbitrator (28 December 1994), the arbitrator determined Paragraph 10 of the NFL Players Contract was

> designed to avoid "double dipping" by a Player in a case where the Player is receiving a salary or injury protection compensation and is also receiving Workers' Compensation by providing that the Club can offset Workers' Compensation payments against such salary or injury protection payments.
>
> The "period" during which such offsets can be made by the Club is the period of salary payments or the period related to the injury protection period. . . .

See Arbitration at 19. Thereafter, the arbitrator decided the Club was entitled to an "offset on a time basis." *Id.* The NFL CBA indicates that each NFL club is bound by arbitration decisions. Article IX, Section 8 of the NFL CBA states in pertinent part: "The decision of the arbitrator will constitute full, final and complete disposition of the grievance, and will be binding upon the player(s) and Club(s) involved and the parties to this Agreement . . . ." As the Panthers are a party to the CBA, they are bound by the arbitrator's decision that Paragraph 10 of the Players' contract provides for an offset on a time basis. Therefore, not only does North Carolina law preclude a dollar-for-dollar credit, the NFL Players' contract has been interpreted to provide for a time credit and not a dollar-for-dollar credit.

[2] We next consider defendants' arguments that they were entitled to a greater credit than that awarded by the Commission. In its award,

the Commission granted defendants a credit for fourteen weeks of compensation payments at the weekly rate of $588.00, to be deducted from the end of the 300-week period. As previously stated, defendants contend they should have been awarded a credit for the following payments:

- fifteen payments of $47,059.00 totaling $705,885.00 paid during the 2000 season post-injury,
- $1,000,000.00 roster bonus paid on 3 April 2001,
- $1,985.72 paid in 2001 for workouts and mini-camps,
- a $2,500.00 appearance fee paid on 7 March 2001,
- $225,000.00 in injury protection payments for the 2001 season,
- $750,000.00 paid during the 2002 season pursuant to the One-Year Skill and Injury Guarantee which is Addendum C to the 2001 contract, and the
- $4,500,000.00 signing bonus.

Whether an employer is awarded a credit for payments made to an employee post-injury is governed by N.C. Gen. Stat. § 97-42, which states:

> Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment. Unless otherwise provided by the plan, when payments are made to an injured employee pursuant to an employer-funded salary continuation, disability or other income replacement plan, the deduction shall be calculated from payments made by the employer in each week during which compensation was due and payable, without any carry-forward or carry-back of credit for amounts paid in excess of the compensation rate in any given week.

For an employer to receive a credit under this statute (1) the payment must not have been due and payable, and (2) the Commission must decide, in its discretion, whether to award a credit. If the Commission

decides to award a credit, the credit is awarded by shortening the number of weeks for which the claimant receives compensation. The employer is not entitled to a dollar-for-dollar credit. If the payment was made pursuant to an employer funded disability plan, different rules may apply.

N.C. Gen. Stat. § 97-42 "expressly provides that payments made by the employer which were 'due and payable' when made are not deductible." *Moretz v. Richards & Associates*, 316 N.C. 539, 541, 342 S.E.2d 844, 846 (1986); *see also Thomas v. B.F. Goodrich*, 144 N.C. App. 312, 318-19, 550 S.E.2d 193, 197 (2001) (stating "[i]f payments made by an employer are due and payable, the employer may not be awarded a credit for the payments under section 97-42"). Our appellate courts have determined there are at least three instances where a payment is "due and payable." First, a payment is due and payable when the Commission has entered an opinion awarding benefits to a claimant. *See Foster v. Western-Electric Co.*, 320 N.C. 113, 115, 357 S.E.2d 670, 672 (1987). Second, a payment is due and payable after the employer has admitted the worker's injury is compensable and therefore entitled to workers' compensation benefits.[6] *Moretz*, 316 N.C. at 541-42, 342 S.E.2d at 846. As explained by our Supreme Court in *Moretz*,

> [t]he Workers' Compensation Act provides that a policy insuring an employer against liability arising under that Act must contain an agreement by the insurer to pay promptly all benefits conferred by its provisions, and that such agreement is to be construed as a direct promise to the person entitled to compensation. N.C.G.S. § 97-98 (1985). By virtue of this promise, once the employer has accepted an injury as compensable, benefits are "due and payable." *See also* N.C.G.S. § 97-18(b) (1985). Because defendants accepted plaintiff's injury as compensable, then initiated the payment of benefits, those payments were due and payable and were not deductible under the provisions of section 97-42, *so long as* the payments did not exceed the amount determined by statute or by the Commission to compensate plaintiff for his injuries.

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6. Plaintiff was injured on 17 September 2000. Although the parties stipulated that defendants admitted compensability by filing a Form 60 with the Commission, the record indicates the Form 60 was not filed until 5 March 2002. The record also indicates that defendants initially denied compensability by filing a Form 61 on 10 October 2001. On remand, the Commission should determine whether any of the payments for which defendants seek a credit were due and payable when made.

Id. Thus, if the payments exceed the amount to which the plaintiff is entitled, the employer will not have to pay any additional compensation. *See id.* at 542, 342 S.E.2d at 847 (stating the employer did not have to pay any additional compensation because the plaintiff had already been fully compensated for his injury). Third, a payment is due and payable when made if the employee has earned the compensation or benefit. In *Christopher v. Cherry Hosp.*, 145 N.C. App. 427, 550 S.E.2d 256 (2001), the employer denied the employee's workers' compensation claim and the injured employee used fifty-two days of accrued sick leave and vacation leave while she was out of work. *Christopher*, 145 N.C. App. at 427, 550 S.E.2d at 257. This Court explained that "an employee's accumulated vacation and sick leave could be used by the plaintiff for purposes other than those served by the [Workers' Compensation] Act, [and] were not tantamount to workers' compensation benefits." *Id.* at 430, 550 S.E.2d at 258. We further explained that:

> "Such benefits have nothing to do with the Workers' Compensation Act . . . . [P]laintiff in the instant case cannot be held to have received duplicative payments for his injury or to have received more than he was entitled by the Workers' Compensation Act to receive."

Id. (citation omitted). Based upon our analysis, we held in *Christopher* "that payments for such vacation and sick leave are 'due and payable' when made because they have been earned by the employee and are not solely under the control of the employer." *Id.* at 432, 550 S.E.2d at 260.

> When, however, an employer makes payments that are not due and payable, the Commission may in its discretion award the employer a credit for the payments pursuant to section 97-42. . . . Thus, this Court's review of the Commission's decision to grant or deny a credit for payments made by an employer that were not due and payable "is strictly limited to a determination of whether the record affirmatively demonstrates a manifest abuse of discretion" by the Commission.

Thomas, 144 N.C. App. at 319, 550 S.E.2d at 197 (footnote omitted).

When a credit is awarded, the deduction "shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment." N.C. Gen. Stat. § 97-42. Thus, any credit awarded to defendants may not result in the re-

duction of the $588.00 weekly rate of compensation. Rather, the number of weeks in which plaintiff receives compensation would be shortened.

However, if the payment was made pursuant to an employer-funded salary continuation, disability, or other income replacement plan, different rules may apply. In *Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670, our Supreme Court indicated that if an employer pays an employee wage-replacement benefits at a time when workers' compensation benefits are not due and payable, the employer is entitled to a credit. Allowing a credit for these payments is in accord with the public policies behind our Workers' Compensation Act, i.e., "to relieve against hardship," "to provide payments based upon the actual loss of wages[,]" and the avoidance of "duplicative payments." *Id.* at 116-17, 357 S.E.2d at 673.

In *Evans v. AT&T Technologies*, 332 N.C. 78, 418 S.E.2d 503 (1992), our Supreme Court indicated that the credit for payments made pursuant to an employer-funded wage replacement plan should be a dollar-for-dollar credit. In response to this holding, the General Assembly amended N.C. Gen. Stat. § 97-42 in 1994 to add the following provision:

> Unless otherwise provided by the plan, when payments are made to an injured employee pursuant to an employer-funded salary continuation, disability or other income replacement plan, the deduction shall be calculated from payments made by the employer in each week during which compensation was due and payable, without any carry-forward or carry-back of credit for amounts paid in excess of the compensation rate in any given week.

The statute "was amended to modify the decision of the Supreme Court [of North Carolina] in *Evans v. AT&T Technologies*, 332 N.C. 78, 418 S.E.2d 503 (1992), which provided a dollar-for-dollar credit against workers' compensation due for payments received under an employer-funded disability program." Henry N. Patterson, Jr. and Maxine Eichner, *1994 Workers' Compensation Reform Act*, pp. 27-28.

> Under the new language, unless otherwise provided by the plan, payments made under an employer-funded salary continuation, disability or other income replacement plan will be deducted from payments due from the employer in each week during which compensation is payable "without any carry-forward or carry-

> back for credit for amounts paid in excess of the compensation rate in any given week." The employer, therefore, is now entitled only to a credit against compensation payable for weeks during which the employer-funded disability benefits were paid unless otherwise provided in the employer's disability plan.

Id. Therefore, under N.C. Gen. Stat. § 97-42, any credit an employer receives for payments made pursuant to an employer-funded salary continuation, disability, or other income replacement plan is awarded by reducing the number of weeks of workers' compensation awarded to the claimant by the number of weeks in which an employer made payments under the plan, if the payments were not due and payable when made. If the payment made by the employer was more than what the employee was to receive under the Workers' Compensation Act, the excess cannot be used towards an additional week of credit. However, the language "[u]nless otherwise provided by the plan" indicates an employer may include language in the wage-replacement plan which modifies the application of this amendment to N.C. Gen. Stat. 97-42.

In this case, our review of the record indicates that five of the payments received by plaintiff post-injury had been earned by the plaintiff, and were due and payable when made. Thus, defendants cannot seek a credit for these five payments: (1) one of the fifteen payments of $47,059.00 paid during the 2000 season, (2) the $1,000,000.00 roster bonus paid on 3 April 2001, (3) $1,985.72 paid in 2001 for workouts and mini-camps, (4) a $2,500.00 appearance fee paid on 7 March 2001, and (5) the $4,500,000.00 signing bonus.

1. The $47,059.00 Payment Received in 2000

Plaintiff was injured on 17 September 2000 and the next day, on 18 September 2000, the plaintiff received $47,059.00. In finding of fact 16, the Commission found in pertinent part: "The payment made on September 18, 2000, represented earnings for playing in the September 17, 2000, game in which plaintiff was injured, and was not paid as a disability payment." According to Article XXXVIII, Section 9 of the NFL CBA: "Unless agreed upon otherwise between the Club and the player, each player will be paid at the rate of 100% of his salary in equal weekly or bi-weekly installments over the course of the regular season commencing with the first regular season game. . . ." Plaintiff's payment history indicates he was receiving his salary weekly. As the CBA indicates a player would begin receiving his salary weekly after the first regular season game, the

Commission's conclusion that the 18 September 2000 payment reflected plaintiff's earnings for playing in the 17 September 2000 game is supported by competent evidence, as the players were paid after the weekly football game. Thus, defendants cannot seek a credit for this payment because it was due and payable when made.[7]

2. The $1,000,000.00 Roster Bonus Paid in 2001

Defendants seek a credit for the $1,000,000.00 roster bonus paid on 3 April 2001. In finding of fact 19, the Commission found in pertinent part:

> The roster signing bonus of $1,000,000.00 paid April 3, 2001, to plaintiff was the result of a unilateral decision on the part of the Panthers to place plaintiff on the 2001 roster, most likely to keep him from being picked up by another team if he had been able to recover from his injury and play again. This payment is deemed as earnings to plaintiff.

Paragraph 27 of Addendum B to plaintiff's Player Contract states:

> If Player is a member of the 80-man roster on the following dates of the respective seasons below, he will be paid as follows:
>
> April 1, 2001—$1,000,000 payable April 1, 2001.
>
> March 1, 2002—$1,000,000 payable March 1, 2002.
>
> March 1, 2003—$1,000,000 payable March 1, 2003.
>
> March 1, 2004—$1,000,000 payable March 1, 2004.

Thus, plaintiff was contractually entitled to the $1,000,000.00 roster bonus when the Panthers decided to place him on the roster for the 2001 season. In explaining the decision to place plaintiff on the roster and to reduce plaintiff's salary from $1,500,000.00 to $500,000.00 for the 2001 season, Marty Hurney, General Manager for the Panthers, testified:

> Q. . . . Did you have any part in the consideration of that renegotiation of the contract?
>
> A. Yes, sir.
>
> Q. Why did that occur?

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7. For a discussion of the remaining installment payments which constituted injured reserve pay, *see infra*.

A. Because we wanted to give Chuck extra time to rehab from the injury, to see if—see if he could get healthy enough to play for us, since we had invested money into him, to play for us over a long term. And his salary cap number was too high to keep him. We had a March roster that we had to pay in consideration for him to play for us that year, and we asked him to reduce his Paragraph 5 salary by a million dollars.

Q. What would be the incentive for him to reduce it by a million dollars?

A. To get a chance to still play for us, and to receive the million-dollar roster bonus that was part of that contract to play for us that season.

Q. So if he had not been accepted onto the team in March of 2001, what would have happened to the roster bonus that would have otherwise been payable?

A. Well, if we would have released him before March 1, he wouldn't have received a roster bonus.

The general manager's testimony indicates that the roster bonus was neither paid as a result of plaintiff's workers' compensation claim nor was it a part of a wage replacement plan for employees unable to work. Rather, plaintiff was contractually entitled to the bonus because the Panthers decided to place him on the roster. Thus, the Commission's finding that the bonus should be classified as earnings is supported by competent evidence. As this bonus was due and payable, defendants cannot seek a credit for the roster bonus as it was due and payable when made.

3. and 4. The $1,985.72 Payment for Mini-Camps and Workouts and the $2,500.00 Appearance Fee

In finding of fact 15, the Commission found:

> Post injury payments in the sum of $4,805.72 were made to plaintiff during the period of April 2, 2001, to May 21, 2001, for plaintiff's participation in the Workout, MiniCamp and Training Camps, as well as an Appearance Fee pursuant to his contract. These payments constitute post-injury earnings.

Plaintiff's payment history indicates he received six $320.00 payments between 2 April 2001 and 21 May 2001 for workouts, one payment of $385.72 for minicamp, and $2,500.00 on 7 May 2001 for an appearance.

According to plaintiff's contract, he was obligated to participate in minicamps, workouts, and to make appearances on behalf of the team. As plaintiff's payment history indicates these payments between 2 April and 21 May 2001 were for participating in these activities, the Commission's conclusion that these were post-injury earnings is supported by competent evidence. As such, defendants cannot seek a credit for these payments because they were due and payable when made.

5. The $4,500,000.00 Signing Bonus

Defendants contend they are entitled to a credit of $4,500,000.00 for the signing bonus because "[e]ven though the signing bonus was paid in two lump sums, for salary cap purposes and pursuant to the Collective Bargaining Agreement, that $4,500,000.00 signing bonus is considered to be spread over the five-year length of Employee-Plaintiff's Contract." In finding of fact 14, the Commission found: "The payment of a deferred 3.5 million dollar signing bonus on April 3, 2001, relates back as an amount plaintiff earned, though later paid, for signing with the Panthers in February of 2000." According to plaintiff's contract:

> As additional consideration for the execution of NFL Player Contract(s) for the year(s) 2000, 2001, 2002, 2003, and 2004, and for the Player's adherence to all provisions of said contract(s), Club agrees to pay Player the sum of Four Million Five Hundred Thousand Dollars $4,500,000.
>
> The above sum is payable as follows:
>
> $1,000,000 PAID ON 2/22/00. . . .
>
> $3,500,000 on April 1, 2001.

According to the Panther's general manager, plaintiff would have received the remainder of his signing bonus even if he had not been placed on the 2001 roster. The general manager also explained that even though the signing bonus was paid in two lump sums in 2000 and 2001, for salary cap purposes, the signing bonus amount is spread over the length of the contract. Notwithstanding this testimony, however, plaintiff became entitled to the signing bonus upon signing the contract, which occurred pre-injury. Therefore, finding of fact 14 is supported by competent evidence. As such, defendants may not seek a credit for the signing bonus because it was due and payable when made.

[3] We now turn to the remaining payments for which defendants seek a credit: (a) the $225,000.00 injury protection provision payments paid during the 2001 regular season, (b) the $750,000.00 one year skill and injury guarantee payments paid in 2002, and (c) the injured reserve pay of fourteen $47,059.00 installments in 2000.

> It is well-established that our standard of review of an opinion and award of the 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."

Larramore, 141 N.C. App. at 254, 540 S.E.2d at 770 (citation omitted).

a. The $225,000.00 Injury Protection Payments

Defendants contend plaintiff received $225,000.00 in seventeen installments between 20 September 2001 and 31 December 2001 for which they are entitled a credit. In finding of fact 17, the Commission found:

> Payments in the sum of $225,000.00 pursuant to the injury protection plan running from September 20, 2001, to approximately December 31, 2001 (made in installments of $13,235.30) represent payments made from revenue designated as employee revenue under the division of revenue between management and the players' union pursuant to the collective bargaining agreement. The source of the injury protection plan monies were paid *in toto* by all NFL player-employees, including plaintiff, and is for a type of disability plan. The revenues that funded this plan, which was the source of the payments made to plaintiff, were not paid by the employer.

Defendants also contend the Commission's finding the injury protection plan was employee-funded is unsupported by competent evidence. We agree this finding of fact is not supported by competent evidence.

In this case, Tim English ("English"), staff counsel for the NFL Players' Association, gave the following explanation of how the injury protection plan was funded. First, he explained that NFL revenue generated from television and ticket sales is the "designated gross revenue"[8] for the League. Then, according to English, pursuant to the

8. The CBA refers to this money as "defined gross revenue," not "designated gross revenue." As the CBA uses the term "defined gross revenue," we will use the same term for clarity.

CBA, the portion of the defined gross revenue that can be used for player salary and benefits is limited by a salary cap, which was sixty-three percent (63%) in 2000. The injury protection plan is part of the benefits a player receives under the CBA. Then, English testified as follows:

> Q. Now, what is the source of the injury protection payments that are listed on this document, beginning on 9-20, 2001, and you may presume that it went up through 12-31, 2001?
>
> A. Well, the player's side of the revenue, the sixty-three percent or so, is divided up generally into two categories. The vast majority of the money goes into the salary cap, which the players'—all the players' salaries come out of. And a smaller amount goes into what's called the benefit cap.
>
> . . .
>
> Q. Well, stated alternatively for purposes of the question, did Chuck Smith's injury protection money come out of the players' side of the revenue, the sixty-three percent, or the management side of the revenue, the thirty—thirty-seven percent?
>
> A. Yeah, the players' side of the revenue.

Although English testified that the injury protection plan is funded out of the players' side of the revenue used for the salary cap, he did not testify that sixty-three percent (63%) of the defined gross revenue generated belonged to the players. Indeed, the CBA indicates the defined gross revenue belongs to the NFL and the NFL teams. In Article XXIV, Section 1(a)(i), the agreement states in pertinent part:

> "Defined Gross Revenues" (also referred to as "DGR") means the aggregate revenues received or *to be received* on an accrual basis, for or with respect to a League Year during the term of this Agreement, *by the NFL and all NFL Teams* (and their designees), from all sources, whether known or unknown, derived from, relating to or arising out of the performance of players in NFL football games, with only the specific exceptions set forth below. The NFL and each NFL Team shall in good faith act and use their best efforts, consistent with sound business judgment, so as to maximize Defined Gross Revenues for each playing season during the term of this Agreement. . . .

(Emphasis added.)

In this case, the testimony regarding the salary cap and revenue did not provide a clear explanation of how the process worked. The lack of a clear explanation led to contradictory results. According to English, all of the players' salary and benefits in 2000 were paid out of the sixty-three percent (63%) salary cap. The salary and benefits included, among other things, the injury protection plan and the injured reserve pay. Thus, the $47,059.00 weekly injured reserve payments plaintiff received was paid out of the sixty-three percent (63%) salary cap. Similarly, the injury protection plan payments received by plaintiff in 2001 would have been paid out of the salary cap.[9] However, the Commission determined in finding of fact 16 that the injured reserve payments were made pursuant to an employer totally funded disability plan. Then in finding of fact 17, the Commission determined the injury protection plan was employee funded. These findings of fact are contradictory as the injured reserve pay and the injury protection plan payments were part of the salary cap. The Commission's findings of fact do not clarify the contradiction.

Therefore, we conclude the determination that the injury protection plan payments were from an employee-funded plan is unsupported by competent evidence as there is insufficient evidence upon which a determination can be made. Accordingly, we remand to the Commission for the hearing of additional evidence and further findings of fact as to whether the injury protection plan is employee funded, employer funded, or both. If the injury protection plan is employer funded, then the Commission must determine if a credit should be awarded in accordance with this opinion. As plaintiff did not appeal the Commission's determination in finding of fact 16, that the injured reserve pay was part of an employer-funded disability plan, the Commission shall not address whether injured reserve pay was employer-funded or employee-funded on remand.

b. The $750,000.00 Payment

Defendants also contend they are entitled to a credit for the $750,000.00 paid to plaintiff in 2002 pursuant to the One-Year Skill and Injury Guarantee which is Addendum B to plaintiff's 2001 contract. This guarantee stated:

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9. Defendants also argue that under English's interpretation of the NFL CBA, all of the players' salaries and benefits would have been paid out of money belonging to the players. According to defendants, this would mean the players paid themselves. We express no opinion on the merits of defendants' argument as the Commission may consider it on remand.

> Despite any contrary language in this NFL Player contract, Club agrees that for 2002 only it will pay Player Seven Hundred Fifty Thousand Dollars ($750,000) of the salary provided in Paragraph 5, if, in Club's sole judgment Player's skill for performance is unsatisfactory as compared with that of other players competing for positions on Club's roster and Player's contract is terminated via the NFL waiver system, or, if, due to an injury suffered while participating or playing for the Club prior to the 2002 season Player, in the sole discretion of Club's physician, is unable to pass Club's pre-season physical examination for 2002 and Player's contract is terminated via the NFL waiver system.
>
> This guarantee by Club only applies for the 2002 season, regardless of whether Player is under contract or option to Club for a subsequent year; and regardless of whether Player passes Club's physical examination for a year subsequent to 2002.
>
> This guarantee is for one year only and in no way supersedes or obviates the applicability of the League's waiver system to Player.

Although the parties stipulated that plaintiff would receive $750,000.00 in seventeen equal payments during the 2002 football season, the Commission did not render any findings of fact or conclusions of law as to whether it would award defendants a credit for these payments. Thus, this case must be remanded to the Commission for a determination of whether defendants are entitled to a credit for these guarantee payments in accordance with this opinion.

c. Fourteen Payments of $47,059.00 in 2002

In finding of fact 16, the Commission found defendants made fourteen post-injury weekly payments of $47,059.00 pursuant to an employer totally funded disability plan. As stated, plaintiff did not appeal the determination that these payments were from an employer totally funded disability plan. In conclusion of law 4, the Commission determined "[d]efendant is entitled to a credit for 14 weeks of compensation payments at the weekly rate of $588.00, to be deducted from the end of the 300-week period under N.C. Gen. Stat. §§ 97-30 and 97-42." Defendants contend they are entitled to additional weeks of credit for the time period between the last regular season game in 2000 through the end of plaintiff's yearly contract on the last day of February 2001. Defendants did not make any payments to plaintiff

during this time period. However, they argue that because plaintiff was paid his yearly salary during the seventeen week regular season, as earnings and injured reserve pay, they should be awarded a credit extending to the end of the contractual year.

As explained, the 1994 amendment to N.C. Gen. Stat. § 97-42 precludes the dollar-for-dollar credit allowed by *Evans*, and allows a credit against compensation for weeks during which the employer-funded disability benefits were paid. *See* N.C. Gen. Stat. § 97-42; N.C. Academy of Trial Lawyers, *Work Place Torts and Workers' Comp 1994, 1994 Workers' Compensation Reform Act*, Henry N. Patterson, Jr. Although defendants are not seeking to carry-forward a portion of the $47,059.00 payment to subsequent weeks in the contract year, they are seeking a credit for weeks in which they did not make any payments. To allow such a credit would be contrary to the spirit of the 1994 amendment. *See Shelton v. Morehead Memorial Hospital*, 318 N.C. 76, 81-82, 347 S.E.2d 824, 828 (1986) (stating "[l]egislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish").

Nonetheless, N.C. Gen. Stat. § 97-42 allows an employer to modify how a credit is applied by including the modification in its benefits or wage continuation plan. On remand, the Commission may hear additional evidence and may make further findings of fact as to whether the effect of N.C. Gen. Stat. § 97-42 has been modified in this case.

[4] Finally, defendants challenge finding of fact 18 which states: "Plaintiff's post injury wage earning capacity outside of the NFL is $40,000.00 per year during the relevant 300-week time period covered by N.C. Gen. Stat. § 97-30." At the time of the hearing on 22 March 2002, plaintiff was earning $40,000.00 a year as a radio announcer. Defendants argue the Commission's determination that plaintiff would only make $40,000.00 a year throughout the entire 300 week compensation period was speculative. Defendants argue plaintiff could obtain employment making the same or greater amount of money that he was making with the Panthers. Therefore, defendants argue finding of fact 18 is not supported by the evidence. We disagree.

Plaintiff's uncontradicted testimony that he was making $40,000.00 a year was competent evidence upon which the Commis-

sion could determine plaintiff's wage-earning capacity. Moreover, if plaintiff's income changed and plaintiff began making more than $40,000.00 a year during the 300 week period, such that he was no longer entitled to the maximum compensation rate, defendants could move to terminate or diminish the amount of compensation pursuant to N.C. Gen. Stat. § 97-47. *See also Smith v. Swift & Co.*, 212 N.C. 608, 194 S.E. 106 (1937) (indicating a party can move for a modification of an award if the claimant began receiving a higher salary post injury than his average weekly wage prior to injury as the change in salary could constitute a change in condition).

In sum, we conclude the Commission properly classified the roster bonus, signing bonus, minicamp, workout, and appearance fees as plaintiff's earnings for which defendants were not entitled to a credit, as these payments were due and payable when made. Similarly, the Commission correctly found the 18 September 2000 $47,059.00 payment was for services rendered during the prior week, including the 17 September 2000 game in which plaintiff was injured. Also, the Commission's finding that plaintiff was entitled to 300 weeks of compensation was supported by competent evidence. However, the Commission did not make any findings of fact or conclusions of law regarding the $750,000.00 payments to be received by plaintiff in 2002. Also, the Commission's finding that the $225,000.00 injury protection payments were paid out of an employee-funded plan was unsupported by competent evidence. Finally, the parties are allowed to present argument to the Commission as to whether additional credit should be awarded for the injured reserve pay paid to plaintiff in 2000. Accordingly, this case is remanded to the Commission for further proceedings in accordance with this opinion.

Affirmed in part, remanded for further proceedings in part.

Judges MARTIN and TIMMONS-GOODSON concur.

LINDA JONES, PLAINTIFF v. THE CITY OF DURHAM AND JOSEPH M. KELLY [IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER FOR THE CITY OF DURHAM], DEFENDANTS

No. COA04-662

(Filed 15 February 2005)

1. Police Officers— standard of care—operation of motor vehicle—answering distress call

An officer's conduct when responding to another officer's distress call is governed by N.C.G.S. § 20-145 and the standard of care is gross negligence. This standard applies to the overall operation of the vehicle, not just to the officer's speed.

2. Police Officers— operation of motor vehicle—answering distress call—not grossly negligent

Plaintiff did not demonstrate the existence of a genuine issue of material fact as to gross negligence by Officer Kelly in the operation of his car while responding to a distress call by another officer. The courts look to a number of factors in determining whether an officer was grossly negligent pursuant to N.C. Gen. Stat. § 20-145, with the three primary factors being the reason the officer was in pursuit; the probability of harm to the public; and evidence of the law enforcement officer's conduct during the pursuit.

Judge LEVINSON dissenting in part and concurring in part.

Appeal by both plaintiff and defendants from judgment entered 6 January 2004 by Judge A. Leon Stanback, Jr., in Durham County Superior Court. Heard in the Court of Appeals 8 December 2004.

Glenn, Mills & Fisher, P.A., by Robert B. Glenn, Jr., Stewart W. Fisher and Carlos E. Mahoney, for plaintiff appellant-appellee.

Faison & Gillespie, by Reginald B. Gillespie Jr., and Keith D. Burns, for defendant appellants-appellees.

Of Counsel Elliot Pishko Morgan, P.A., by Robert M. Elliot, Amicus Curie of American Civil Liberties Union of North Carolina Legal Foundation, Inc., and North Carolina Academy of Trial Lawyers in support of plaintiff appellant-appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Mark A. Davis, Amicus Curiae for N.C. Association of County Commissioners in support of defendant appellants-appellees.

McCULLOUGH, Judge.

The claims and defenses raised in this case resulted in the partial summary judgment order now on appeal. Effective review of the order will best be achieved by first providing the underlying evidence before the court at the time of its entry.

On 15 September 2000, at approximately 9:00 a.m., Officer Tracy Fox ("Officer Fox") was dispatched to investigate a domestic disturbance at 800 North Street in Durham. Soon after arriving at the scene, Officer Fox determined that she would need assistance and called for backup. Dispatch, upon receiving her call, issued a "signal 20" requiring all other officers give way for Officer Fox's complete access to the police radio by holding all calls. Officer Joseph M. Kelly ("Officer Kelly" or "defendants" when referred to collectively with the City of Durham) was approximately 2-½ miles from North Street, as were fellow Officers H.M. Crenshaw ("Officer Crenshaw") and R.D. Gaither ("Officer Gaither"). These officers were in their own police vehicles, but together the three were investigating a scene of suspicious activity.

In response to the first call by Officer Fox, Officers Kelly, Crenshaw, and Gaither got in their separate vehicles and began driving towards North Street on Alston Avenue and turning west onto Liberty Street. Officer Fox then made a second distress call, stating with a voice noticeably shaken, that she needed more units. Officers Kelly and Crenshaw activated their blue lights and sirens and increased the speed of their vehicles towards North Street. Officer Gaither took a different route.

At approximately 9:09 a.m. on the same morning, Linda Jones ("plaintiff") was leaving her sister's apartment complex at the southwest corner of the intersection of Liberty Street and Elizabeth Street ("the intersection"). The posted speed limit for motorists traveling upon Liberty Street was 35 miles per hour. At the curb of Liberty Street, plaintiff observed no vehicles approaching, but heard sirens coming from an undeterminable direction. A bystander outside the apartment complex also heard the sirens, but could not determine their direction. Plaintiff, some 95 feet west of the intersection, began to cross Liberty Street outside of any designated cross walk and against the controlling traffic signal. At this point in the road, Liberty Street had three undivided lanes: two eastbound lanes (the second or middle eastbound lane was for making northbound right turns only) and a westbound lane. Reaching the double yellow lines divid-

ing the two eastbound lanes which she crossed, plaintiff first saw a police vehicle heading towards her in the westbound. The vehicle came over the railroad tracks on the eastern side of the intersection. Sergeant Willie Long, an eyewitness who was in his vehicle at the corner of Grace Drive and Liberty Street, and plaintiff both observed Officer Kelly's vehicle go completely airborne over the railroad tracks. Once his vehicle crossed the railroad tracks, defendant saw plaintiff at a distance of between 300-332 feet and standing at the double-yellow lines.

Plaintiff turned and began running back in the direction from which she came, across the two eastbound lanes. Officer Kelly, crossing the intersection and accelerating, turned his vehicle with one hand into the eastbound lanes and struck plaintiff on her side as she was retreating to the curb. She was launched six feet into the air over the vehicle and landed in a gutter approximately 76 feet down along the eastbound lane of Liberty Street. Officer Kelly's vehicle traveled approximately 160 feet after striking plaintiff and came to a complete stop in the eastbound lane of Liberty Street. Plaintiff suffered severe injuries.

While Officer Kelly was en route to Officer Fox's two distress calls, he was aware at least four other officers were responding. Officer Crenshaw's vehicle, behind Officer Kelly's, videotaped Officer Kelly's vehicle on Liberty Street going through the intersection and colliding with plaintiff. Using the videotape and the field measurements taken at the scene of the accident, an accident reconstruction expert determined Officer Kelly's speed to have varied between 55 and 74 miles per hour.

In her initial complaint, plaintiff brought claims against Officer Kelly and the City of Durham ("defendants") for negligence, gross negligence, and obstruction of public justice and spoilation of evidence ("spoilation claim"). Defendants' answer included a motion to dismiss based on N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2003) and pled the affirmative defenses of immunity and contributory negligence. Plaintiff responded alleging the doctrine of last clear chance to defendants' defense of contributory negligence. Plaintiff then filed an amended complaint, bringing additional claims alleging that defendants' assertion of immunity in this case violated a number of plaintiff's rights proscribed under the N.C. Constitution. This matter, with pleadings, exhibits, affidavits, and depositions of forecast evidence, was presented before the trial court in a summary judgment

hearing held on 11 December 2003 pursuant to motions brought by both parties.

In an order entered 6 January 2004, the trial court concluded the following: (1) that plaintiff's ordinary negligence claim was dismissed as a matter of law; (2) that there were issues of fact as to whether Officer Kelly was grossly negligent in his emergency response to assist and apprehend the suspect threatening Officer Fox; (3) that there were issues of fact concerning plaintiff's spoilation claim; (4) that plaintiff's claim for violation of the prohibition of exclusive emoluments based on Section 1, Article 32 of the N.C. Constitution, was dismissed[1] as a matter of law; and lastly, (5) defendants' assertion of sovereign immunity violates the guarantees of due process and equal protection under Section 1, Article 19 of the N.C. Constitution as a matter of law. The trial court certified its order under N.C. Gen. Stat. § 1A-1, Rule 54(b) (2003) as an entry of final judgment. Both parties appealed.

In their appeal, defendants assign error to the trial court's finding of an issue of fact supported by forecast evidence as to whether defendants were grossly negligent and argue the court should have granted summary judgment as a matter of law in their favor. Additionally, defendants allege the trial court erred when failing to rule in their favor as a matter of law on the spoilation claim and constitutional claim. Plaintiff's only issue on appeal submits that the trial court erred in dismissing her claim of ordinary negligence, finding the standard to be inapplicable as a matter of law in light of the forecast evidence.

At the outset we note this appeal, not being a final judgment as to all claims and all parties and therefore otherwise interlocutory, was certified as a final judgment by the trial court pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) and with a finding of no just reason for delay. Additionally, previous panels of this Court have found a substantial right in a local government's assertion of sovereign immunity and its implications to a government body. N.C. Gen. Stat. § 1-277 (2003) (allowing appeals from superior court which affect a substantial right[]); *see, e.g.*, *Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283 ("orders denying dispositive motions grounded on the defense of governmental immunity are immediately reviewable as affecting a substantial right"), *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996). Therefore, this appeal is properly before us for review.

1. Plaintiff has not appealed this dismissal.

I. Standard of Review

When reviewing an order of summary judgment, we discern "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003); *Parish v. Hill*, 350 N.C. 231, 236, 513 S.E.2d 547, 550, *reh'g denied*, 350 N.C. 600, 537 S.E.2d 215 (1999) (finding as a matter of law the proper standard of care of police officer in pursuit is that of "gross negligence," and that the forecast evidence was insufficient to survive summary judgment under that standard). In doing so, we view the evidence and allegations forecast in a light most favorable to the non-moving party. *Id.*

Pursuant to plaintiff's appeal, in light of the circumstances of the case at bar, we must determine as a matter of law what the proper standard of care to which defendants' conduct will be held. Next, pursuant to defendants' appeal, we must apply that proper standard to determine if there is an issue of fact forecast by the evidence before the trial court of whether defendants breached the proper standard.

In this opinion we hold the proper standard of care to which Officer Kelly was to adhere is that of "gross negligence," and therefore affirm the portion of the trial court's summary judgment order dismissing plaintiff's ordinary negligence claim. Applying that standard, we conclude that the forecast evidence before the court was not sufficient to maintain a claim of gross negligence, and we grant summary judgment in favor of defendants on that basis. Thus, we need not consider plaintiff's spoilation or constitutional claims as there is no longer an issue of underlying liability to which defendants may be subject, rendering moot these remaining issues. *See Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (acknowledging the long-held principle of judicial restraint that "the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.").

We now turn to consider the merits of these appeals.

II. Plaintiff's Appeal: N.C. Gen. Stat. § 20-145

[1] Plaintiff contends that N.C. Gen. Stat. § 20-145 (2003) is inapplicable to the facts and circumstances of this case. In the alternative, she submits that, even if this is the applicable statute, the trial court

erred in applying the gross negligence standard of care to Officer Kelly's conduct. We do not agree.

N.C. Gen. Stat. § 20-145 provides the following:

> The speed limitations set forth in this Article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the *chase or apprehension of violators of the law or of persons charged with or suspected of any such violation*, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances and rescue squad emergency service vehicles when traveling in emergencies, nor to vehicles operated by county fire marshals and civil preparedness coordinators when traveling in the performances of their duties. This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others.

(Emphasis added.) Our Supreme Court has held that the standard of care a police officer must use when acting within the contours of this statute is that of "gross negligence." *Young v. Woodall*, 343 N.C. 459, 462, 471 S.E.2d 357, 359 (1996).

Before our Supreme Court's opinion in *Young*, the extent of liability under N.C. Gen. Stat. § 20-145 was unclear. A previous opinion of the Court read N.C. Gen. Stat. § 20-145 to apply the gross negligence standard only to that of the police officer's speed, stating, "the speed law exemption is effective only when the officer *operates* his car 'with due regard to safety' and does not protect him 'from the consequences of a reckless disregard of the safety of others." *Goddard v. Williams*, 251 N.C. 128, 133, 110 S.E.2d 820, 824 (1959) (emphasis added). Thus, pursuant to *Goodard*, an officer was held to two different standards of care, gross negligence as to his speed, and ordinary negligence for general operation of the vehicle. However, in *Young* our Supreme Court clarified that the gross negligence standard applied to both violations of the relevant speed limitations for the vehicle, and to the operation of the vehicle during the event of the justified increased speed. *Young*, 343 N.C. at 462-63, 471 S.E.2d at 359-60, *overruled by Goodard*, 251 N.C. at 133, 110 S.E.2d at 824 (1959). The Court stated, "We do not believe the General Assembly intended to provide two different standards of care in one section of the statute." *Young*, 343 N.C. at 462, 471 S.E.2d at 359.

Plaintiff submits that Officer Kelly's conduct was related to an "emergency response," and thus not governed by N.C. Gen. Stat.

§ 20-145 which she reads to govern only cases of police pursuit. However, the statute plainly allows for increased speed "in the chase *or apprehension* of violators of the law or of persons charged with or suspected of any such violation[.]" N.C. Gen. Stat. § 20-145 (emphasis added). We read the statute's use of "or" to mean an officer is exempt from speed restrictions when going to assist another officer to *apprehend* a suspect in a single location, even when unrelated to any "chase." Had the legislature chosen to limit the speed exemption to apprehension of those suspects only produced from a chase, arguably they would have used the conjunction "and."

Furthermore, another panel of our Court has read this statute to provide the following:

> The language of G.S. 20-145 is broad enough to include not only police in direct or immediate pursuit of law violators or suspected violators but also police who receive notice of the pursuit and *respond by proceeding to the scene for the purpose of assisting in the* chase or *apprehension.*

State v. Flaherty, 55 N.C. App. 14, 22, 284 S.E.2d 565, 571 (1981) (emphasis added). The issue in *Flaherty* was whether a police officer, found guilty of manslaughter, was availed of the benefits of a proper jury charge based on N.C. Gen. Stat. § 20-145 where the court asked the jury to apply the standard of ordinary negligence. *Id.* at 16-17, 284 S.E.2d at 567-68. Finding error, we granted a new trial based on this improper instruction. While the facts of *Flaherty* did involve a pursuit, the officer in question was responding to a call for assistance in the pursuit and at no time joined in the actual pursuit or even observed the suspect being chased. *Id.* The Court in *Flaherty* focused on the defendant's emergency response and made no mention of any limitation of N.C. Gen. Stat. § 20-145 to cases of a police pursuit.

Lastly, we note that the statute reflects due regard for emergency response situations other than criminal apprehension, *e.g.*, fires and medical emergencies. We believe assisting an officer in peril falls within the statute's purview as well. Generally, there will be a lesser degree of public risk created in emergency response cases because the speed of the responder does not escalate the level of the imminent peril itself, unlike that of a vehicle "chase."

Based upon a plain reading of the statute and our prior interpretation of its expanse in *Flaherty*, we find that Officer Kelly's conduct in the case at bar was governed by N.C. Gen. Stat. § 20-145.

Next, plaintiff submits that, even if defendant's emergency response is governed by N.C. Gen. Stat. § 20-145, the gross negligence standard only applies to a responding officer's speed and not the overall operation of his vehicle. In light of our Supreme Court's holding in *Young* and its specific rejection of such a dual standard, we find this argument to be without merit. *See Flaherty*, 55 N.C. App. at 15, 284 S.E.2d at 565 (where the Court allowed gross negligence to be applied to evidence that the officer ran a red light at the intersection where the accident occurred and the officer failed to activate his blue lights or siren).

Therefore, we affirm the trial court's grant of summary judgment on plaintiff's ordinary negligence claim.

III. Defendants' Appeal: Gross Negligence

[2] Defendants assert that the trial court erred in finding that the forecast evidence presented an issue of fact as to plaintiff's claim of gross negligence. We agree and dismiss this case on that ground without review of those claims made moot by our summary dismissal.

Pursuant to N.C. Gen. Stat. § 20-145, "[t]he standard of care intended by the General Assembly involves the reckless disregard of the safety of others, which is gross negligence." *Young*, 343 N.C. at 462, 471 S.E.2d at 359. Accordingly, for a plaintiff to survive a motion for summary judgment based on a police officer's violation of this standard, she must forecast evidence that the officer's conduct was "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988). "A wanton act is one 'done of wicked purpose [sic] or when done needlessly, manifesting a reckless indifference for the rights of others.' " *Fowler v. N.C. Dept. of Crime Control & Public Safety*, 92 N.C. App. 733, 736, 376 S.E.2d 11, 13, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 773 (1989) (citation omitted).

Citing *Clayton v. Branson*, 153 N.C. App. 488, 570 S.E.2d 253 (2003), plaintiff asserts that the trial court was correct in finding an issue of fact as to whether Officer Kelly's conduct rose to a level of gross negligence. In that case we found an issue of fact that a police officer's conduct breached a level of gross negligence where evidence suggested plaintiff was placed in the back of a police squad car in custody and ordered to sit in a fashion where he was unable to put on his seatbelt. *Id.* at 490, 570 S.E.2d at 255. The officer then proceeded to drive through heavy traffic at a rate of speed two times the speed

limit. *Id.* at 492-93, 570 S.E.2d at 256. In that case, we affirmed the trial court's determination that an issue of material fact existed as to whether the officer was acting within the scope of his official duties for such conduct. *Id.* In *Clayton*, we did not address the gross negligence standard in light of N.C. Gen. Stat. § 20-145, nor was it apparently argued as such. Furthermore, there are no facts presented in the opinion suggesting the officer's high rate of speed would fall within the justification of N.C. Gen. Stat. § 20-145. Thus, we find *Clayton* to be of little legal or factual guidance to the case at bar.

Rather, in determining whether an officer was grossly negligent in police pursuit or for purposes of apprehension pursuant to N.C. Gen. Stat. § 20-145, our courts have looked to a number of factors to determine whether the claim was sufficient to survive summary judgment. *See Norris v. Zambito*, 135 N.C. App. 288, 294, 520 S.E.2d 113, 117 (1999) (citing an extensive list of cases for the factors considered by this Court and our Supreme Court for a determination of gross negligence). The three primary factors summarized by our Court in *Norris* were found to be: 1) the reason for the officer to be in pursuit; 2) the probability of harm to the public in light of such pursuit and its continuation; and 3) evidence with respect to the law enforcement officer's conduct during the pursuit. *Id.* at 294-95, 520 S.E.2d at 117-18.

Applying these factors to the forecast evidence of the case at bar and viewing such in a light most favorable to plaintiff, we conclude that plaintiff did not demonstrate the existence of a genuine issue of material fact as to gross negligence on the part of Officer Kelly, and judgment as a matter of law should have been rendered denying plaintiff's gross negligence claim against defendants. In response to Officer Fox's two distress calls, Officer Kelly responded to apprehend the threatening suspect and defuse what he believed to be a life or death situation of a fellow Durham police officer. In pursuit of the situation, there was some dispute as to what speed Officer Kelly was alleged to have been traveling. In a light most favorable to plaintiff, this speed varied between 55 and 74 miles per hour on a road where the speed limit was 35 miles per hour. *Zambito*, 135 N.C. App. at 291, 520 S.E.2d at 115 (officer not grossly negligent where he testified his car never exceeded 65 miles per hour where the posted speed limit was 35 miles per hour and the pursuit was of a drunk driver lasting less than a mile). Moreover, the apparent probability of harming the public was low at the time of the emergency response; it was a cool, clear, and dry day, with a bright sun and the officer had activated his blue lights and siren to respond to an emergency only 2-½ miles from

his location. Plaintiff's own deposition shows she heard sirens before crossing the road. Lastly, while there was evidence of Officer Kelly's negligent conduct when going airborne over the railroad tracks before entering the intersection, he did not violate the traffic signal in going through the intersection. Plaintiff, in violation of the traffic signal and outside of any designated crosswalk, was at the double yellow line of the road when observed by Officer Kelly at a distance of 300-332 feet. At that point, she was two-thirds of the way across Liberty Street. Plaintiff has forecast no evidence of wanton conduct to rebut the material fact of record that Officer Kelly steered his vehicle into the wrong lane of traffic where there was a larger area to evade hitting plaintiff, in due regard for plaintiff's safety and in anticipation that she would attempt to get out of the traffic lanes by the shortest distance possible. Defendants' forecast evidence showed that this evasive maneuver was consistent with the emergency response procedures of law enforcement officers. Plaintiff's forecast evidence on this point suggested Officer Kelly "breach[ed] his duty of care" when failing to apply his brakes or slow his vehicle to avoid collision. Thus, plaintiff raises an issue of fact only as to a claim in negligence, which we find to be immaterial to the standard of gross negligence in this case. *Norris*, 135 N.C. App. at 291, 520 S.E.2d at 115 (where the Court determined "evidence of violation [of the city's pursuit policy] would not show gross negligence. A violation of voluntarily adopted safety policies is merely some evidence of negligence and does not conclusively establish negligence."). Thus, we find the forecast evidence of Officer Kelly's conduct bereft of a material fact of wickedness or of any indifference for the rights or safety of others. *See Young*, 343 N.C. at 460, 471 S.E.2d at 358 (the Supreme Court reversing the trial court's denial of summary judgment and finding no gross negligence as a matter of law where a police officer ran through a yellow-signaled intersection at a high rate of speed and without his blue lights activated, crashing into an oncoming car); *c.f.*, *D'Alessandro v. Westall*, 972 F. Supp. 965, 971-76 (W.D.N.C. 1999) (the District Court, in applying the gross negligence standard under N.C. Gen. Stat. § 20-145 as interpreted by North Carolina appellate courts, found summary judgment was not proper where the forecast evidence showed an extensive list of violations of police procedures by two different police agencies in a dangerous and extensive high speed chase; that the pursuing officers had with them young, non-commissioned, "explorer scouts" riding as part of a program to introduce prospective deputies; and that the officers were on notice that a ten-month-old infant was in the fleeing vehicle.).

Because plaintiff has not forecast sufficient evidence to show a genuine issue of material fact as to gross negligence on the part of Officer Kelly, defendants are entitled to judgment as a matter of law. We hereby direct the trial court to enter summary judgment dismissing plaintiff's claims against defendants as all claims are made moot by this opinion.

Affirmed in part, reversed in part.

Judge ELMORE concurs.

Judge LEVINSON concurs in part and dissents in part.

LEVINSON, Judge dissenting in part and concurring in part.

I concur with the majority's application of a gross negligence standard to the facts of this case, and with its upholding of the trial court's dismissal of plaintiff's claim of simple negligence. However, I believe there are genuine issues of material fact regarding plaintiff's claim of gross negligence, and dissent from the majority opinion's reversal of the trial court's denial of defendant's motion for summary judgment on that claim. I also dissent from the majority's holding that plaintiff's constitutional claim and her claim for obstruction of justice are moot. I would uphold the trial court's denial of defendants' summary judgment motion as to obstruction of justice, and reverse for entry of summary judgment for defendants on plaintiff's claim of violation of her rights to due process and equal protection under N.C. Const. art. 1, § 19. Additionally, I believe that defendants are entitled to assert sovereign immunity at trial, to the extent that they have not waived immunity by the purchase of liability insurance.

The majority concludes the record evidence raises no genuine issues of material fact as to whether defendant Kelly was grossly negligent. I respectfully disagree. "Summary judgment is a drastic measure, and should be approached cautiously." *Neill Grading & Constr. Co. v. Lingafelt*, 168 N.C. App. 36, 48, 606 S.E.2d 734, 742 (2005) (citation omitted). "In ruling on a motion for summary judgment, a trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact." *RD&J Properties v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 742, 600 S.E.2d 492, 497 (2004) (citation omitted). Thus, "[s]ummary judgment is not appropriate where matters of credibility and determining the weight

of the evidence exist." *Lee v. R & K Marine, Inc.*, 165 N.C. App. 525, 527, 598 S.E.2d 683, 684 (2004).

In the instant case, the question is whether the evidence raises any genuine issue of material fact on the issue of gross negligence. Regarding gross negligence by a law enforcement officer, this Court has held:

> An officer 'must conduct a balancing test, weighing the interests of justice in apprehending the fleeing suspect with the interests of the public in not being subjected to unreasonable risks of injury.' 'Gross negligence' occurs when an officer consciously or **recklessly disregards an unreasonably high probability of injury to the public despite the absence of significant countervailing law enforcement benefits.**

Eckard v. Smith, 166 N.C. App. 312, 319, 603 S.E.2d 134, 139 (2004) (quoting *Parish v. Hill*, 350 N.C. 231, 236, 513 S.E.2d 547, 550 (1999)) (emphasis added).

Viewed, as it must be, in the light most favorable to the plaintiff, the record evidence would allow a jury to find that: (1) Kelly was not pursuing an escaping felon, but was responding to Officer Fox's call for assistance with a situation whose nature Kelly knew nothing about; (2) Kelly knew other officers had also responded to the call for backup, so that Officer Fox was not solely dependent on his aid; (3) Kelly was familiar with the street where the accident occurred, and knew it was a densely populated urban area; (4) as Kelly approached the accident site he was driving between 50 and 74 mph, and did not have his blue light and siren activated; (5) Kelly knew that the intersection of Liberty and Elizabeth Streets had been the site of several previous accidents, and that there were "people hanging out" there; (6) Kelly knew from previous experience that the safest maximum speed on the relevant stretch of Liberty Street was 45 mph; (7) Kelly did not apply his brakes when he saw plaintiff in his way; (8) Kelly lost control of his vehicle and struck plaintiff with such force that she suffered serious injuries; and (9) Kelly's failure to drive at a safe speed for road conditions was a violation of the Basic Law Enforcement Training manual. I conclude that this evidence, if believed by the jury, tended to show a "high probability of injury to the public despite the absence of significant countervailing law enforcement benefits," *id.*, and thus raises a genuine issue of material fact on the question of gross negligence. Accordingly, I believe the trial court correctly denied defendants' motion for summary judg-

ment on plaintiff's claim for damages based on Kelly's alleged gross negligence, and would submit the case to a jury.

Plaintiff also brought a claim for obstruction of public justice. "Obstruction of justice is a common law offense in North Carolina." *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983). "It is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice." *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 33, 588 S.E.2d 20, 30 (2003) (citing *Burgess v. Busby*, 142 N.C. App. 393, 408-09, 544 S.E.2d 4, 12 (2001)). In the instant case, the evidence would allow a jury to conclude that a camera in Kelly's police car had made a videotape recording of the accident, and that the videotape was subsequently misplaced or destroyed. I would affirm the trial court's denial of defendants' motion for summary judgment on this claim.

The majority concludes that, upon dismissal of plaintiff's underlying negligence claims, her constitutional claim is moot. However, as I would vote to allow plaintiff's underlying claims to proceed for trial, I also address plaintiff's constitutional claim.

Plaintiff's complaint alleges that defendant City of Durham (the City) violated her rights under N.C. Const. art. 1, § 19 "by their assertion of the defense of governmental immunity to the Plaintiff's first two claims for relief in this civil action." She also contends that the City's "assertion of governmental immunity as a legal defense to the Plaintiff's first two claims for relief constitutes an unreasonable, arbitrary, and capricious governmental action." I disagree, and would vote to reverse the trial court and remand for entry of summary judgment in favor of **defendants** on plaintiff's constitutional claim. I reach this conclusion for several reasons.

Preliminarily, it is important to note that the trial court's order mistakenly characterizes plaintiff's suit as presenting a challenge to the facial constitutionality of the City's practices for handling claims against it. Plaintiff's complaint is strictly limited to allegations that defendants violated her state constitutional rights by asserting sovereign immunity "**in this cause**" as a defense to "Plaintiff's first two claims." Thus, plaintiff challenges the manner in which the city's policies have been **applied to her**, rather than making the separate and distinct claim that the City's customs are facially unconstitutional. *See Maines v. City of Greensboro*, 300 N.C. 126, 130, 265 S.E.2d 155, 158 (1980) (discussing the two types of claims where plaintiff "first contends that the ordinance is unconstitutional on its face . . . alter-

native[ly], plaintiff argues that the ordinance is unconstitutional as applied"). However, the trial court's order repeatedly refers to plaintiff's having brought claims against the city's assertion of sovereign immunity "in this **and other cases**." This is an erroneous characterization of plaintiff's complaint, which properly should be analyzed as a challenge to the City's policies for handling claims, as the policies have been applied to her.

I conclude that plaintiff failed to present evidence raising a genuine issue of material fact on her constitutional claim. The core of plaintiff's argument is her allegation that the City has a policy or practice of "waiving" sovereign immunity in some cases but not in others. She further alleges that the City's determination of when to "waive sovereign immunity" resides in the "unbridled discretion" of certain city employees, and that the City's waiver of sovereign immunity for certain "similarly situated" claimants violates her rights to due process and equal protection. Plaintiff's argument rests on the **erroneous** premise that the City has a practice of selectively "waiving" the defense of sovereign immunity. The uncontradicted record evidence establishes that claims against the City are never denied on the basis of sovereign immunity, and that claims are paid or denied on the basis of their legal merits, based on evaluation of whether (1) the claimant asserts a legally cognizable cause of action; (2) investigation shows the claim to be meritorious; and (3) the damages have been documented. Plaintiff presents no evidence that defendant ever **denies** a claim based on sovereign immunity. However, if sued by a claimant, the City always raises the defense of sovereign immunity when appropriate. Thus, the City **never** denies claims based on sovereign immunity, but **always** asserts the defense if it is sued. Accordingly, there is no evidence that defendants have a practice of "selectively waiving" this defense.

Nor does the City's practice of executing settlement contracts with certain claimants constitute a waiver of sovereign immunity in those cases. " 'Whether denominated accord and satisfaction or compromise and settlement, the executed agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts.' " *Bolton Corp. v. T. A. Loving Co.*, 317 N.C. 623, 628, 347 S.E.2d 369, 372 (1986) (quoting *Casualty Co. v. Teer Co.*, 250 N.C. 547, 550, 109 S.E.2d 171, 173 (1959)). The representative settlement form in the record makes no mention of sovereign immunity or of a waiver of that or any other defense. Further, it specifically states that:

> This release expresses a full and complete settlement of a liability claimed and denied, . . . and the acceptance of this release shall not operate as an admission of liability on the part of anyone **nor as an estoppel, waiver, or bar with respect to any claim the party or parties released may have against the undersigned.**

(emphasis added). Thus, should a tort claimant violate the settlement agreement by suing the City after executing the settlement contract, the City would be entitled to raise any applicable defense, including satisfaction and accord, or sovereign immunity. Plaintiff presents no evidence that the City ever executed a settlement contract **waiving** the right to assert sovereign immunity in the event that the claimant tried to sue the City after executing the settlement contract.

Moreover, even if we assume, *arguendo*, that the City has waived sovereign immunity in certain cases, plaintiff has not presented evidence that the City's practices violated her due process or equal protection rights under the State constitution. " '[T]he touchstone of due process is protection of the individual against arbitrary action of government,' . . . Arbitrary and capricious acts by government are also prohibited under the Equal Protection Clauses of the United States and the North Carolina Constitutions." *Dobrowolska v. Wall*, 138 N.C. App. 1, 14, 530 S.E.2d 590, 599 (2000). Further:

> The equal protection 'principle requires that all persons similarly situated be treated alike.' Accordingly, to state an equal protection claim, a claimant must allege (1) the government (2) arbitrarily (3) treated them differently (4) than those similarly situated.

Lea v. Grier, 156 N.C. App. 503, 509, 577 S.E.2d 411, 416 (2003) (quoting *Dobrowolska*, *id.*). In another case challenging a city's exercise of discretion, *Maines v. City of Greensboro*, 300 N.C. 126, 131-32, 265 S.E.2d 155, 158-59 (1980), the North Carolina Supreme Court held that:

> [A]n ordinance which vests unlimited or unregulated discretion in a municipal officer is void. . . . On the other hand, actions of public officials are presumed to be regular and done in good faith[,] and the burden is on the challenger to show that the actions as to him were unequal when compared to persons *similarly situated.* The initial question then is whether plaintiff has met his burden of showing that he received treatment different from others similarly situated.

In the instant case, plaintiff has failed to show either that (1) similarly situated claimants are not treated equally, or that (2) the determination not to waive sovereign immunity in her case was arbitrary and capricious.

Plaintiff has not shown she was treated differently from "**similarly situated**" claimants. She has assembled a long list of claimants from a given time period. However, she articulates no "similarity" between her case and those of claimants receiving settlements, other than having brought a claim, which may or may not involve a law enforcement officer, against the City of Durham. There is no information about the relative merits of claims, the similarity or differences in claimant's background, or other information that would enable us to conclude that plaintiff had been treated differently from similar claimants.

Nor does the evidence raise an issue of fact regarding whether the city's decision not to settle her particular claim was arbitrary and capricious. "Not every deprivation of liberty or property constitutes a violation of substantive due process granted under article I, section 19. Generally, any such deprivation is only unconstitutional where the challenged law bears no rational relation to a valid state objective." *Affordable Care Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 535, 571 S.E.2d 52, 59 (2002) (citing *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 562 S.E.2d 82 (2002), *aff'd*, 358 N.C. 160, 594 S.E.2d 1 (2004)). In the instant case, defendants presented ample evidence supporting their decision that plaintiff's claim was not meritorious.

Further, I strongly disagree with plaintiff that the holding of *Dobrowolska* controls the result in the instant case. The defendant in *Dobrowolska*, the City of Greensboro, customarily responded to **all** claims for damages by asserting the defense of sovereign immunity. Thereafter, the City would sometimes waive the defense and enter into a settlement agreement:

> [A]t the same time the City has asserted governmental immunity towards plaintiffs . . . it has **asserted such immunity** against injured individuals similar to plaintiffs, **but then waived immunity** by paying damages to those injured individuals. . . . The City has opted to pay damages to some claimants **after asserting** governmental immunity; therefore, it must carry out this custom, or 'unwritten' policy in a way which affords due process to all similarly situated tort claimants . . . [The City] classifies claims . . . into two different categories—(1) immunity is

asserted with no exception, or (2) immunity is **asserted but the claim is paid in settlement.**

Dobrowolska, 138 N.C. App. at 12-13 and 17, 530 S.E.2d at 598-99 and 601 (emphasis added). This contrasts sharply with Durham's policy of never asserting sovereign immunity as a basis for denial of a claim, and of always asserting it in response to a lawsuit. Further, unlike defendant City in *Dobrowolska*, Durham does not leave decisions about settlement of cases to the unfettered discretion of city employees. As discussed above, the uncontroverted evidence is that claims against the City are resolved by determination of whether the claimant (1) presents a legally cognizable claim, that (2) is meritorious, as shown by investigation into the facts, and (3) has documented injuries.

"[Plaintiff's] position results from the assumption that the [City of Durham] may purposely and wilfully abuse the discretion with which the law invests it. **It is hard to see how any administrative body can function without exercising discretion**; but even then the discretion must not be whimsical, or capricious, or arbitrary, or despotic." *North Carolina State Highway Com. v. Young*, 200 N.C. 603, 607, 158 S.E. 91, 93 (1931) (emphasis added). A party's determination of whether to settle a claim will **always** require exercise of discretion and the weighing and assessment of largely subjective factors, such as the credibility and demeanor of prospective witnesses, or the likely response of a jury to certain evidence. It also requires evaluation of legal issues such as a claim's validity, the impact of relevant precedent on trial issues, or the availability of affirmative defenses. Accordingly, the determination of how to respond to a claim brought against the City is akin to other discretionary judgments that cannot be reduced to a mathematical formula, such as decisions about hiring, firing, or resource allocation. The process is very different from that involved in decisions about zoning, permitting, or eligibility for public services, because such determinations can be reduced to an objective set of criteria.

Indeed, the gravamen of plaintiff's claim is in reality a challenge to the inequality in bargaining strength between a tort claimant and the City. Ordinarily, if parties cannot settle a civil dispute, a plaintiff has the option of filing suit. However, if sovereign immunity is available as a defense, then the plaintiff has no recourse if a settlement cannot be reached. Thus, plaintiff seeks to redress the reality that the City can decide whether or not to settle claims, while plaintiff lacks the usual power to bring suit if the claim is not settled. During the

hearing on these motions, plaintiff's counsel conceded as much, stating to the trial court that:

> . . . [O]ur purpose in bringing these declaratory and injunctive claims is to stop [the City] from having the ability to . . . pay some claims, but also to unilaterally assert immunity[.]
>
> . . . .
>
> Because they have immunity, they can browbeat citizens into taking whatever it is they're willing to offer.
>
> . . . . **That's our reason for bringing this case**, . . . **to put everybody on equal footing**.

"The plaintiff asks us either to abolish governmental immunity or to change the way it is applied. . . . [A]ny change in this doctrine should come from the General Assembly." *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 435-36 (1992). "It may well be that the logic of the doctrine of sovereign immunity is unsound and that the reasons which led to its adoption are not as forceful today as they were when it was adopted. However, despite our sympathy for the plaintiff in this case, we feel that any further modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly, not this Court." *Steelman v. City of New Bern*, 279 N.C. 589, 595, 184 S.E.2d 239, 243 (1971).

Finally, even if we **were** to hold that the City's policies governing its decisions of when to waive sovereign immunity were constitutionally infirm, defendants would nonetheless be entitled to assert sovereign immunity in this case. "A police officer in the performance of his duties is engaged in a governmental function." *Galligan v. Town of Chapel Hill*, 276 N.C. 172, 175, 171 S.E.2d 427, 429 (1970). "In general, municipalities in North Carolina are immune from liability for their negligent acts arising out of governmental activities unless the municipality waives such immunity by purchasing liability insurance." *Anderson v. Town of Andrews*, 127 N.C. App. 599, 600, 492 S.E.2d 385, 386 (1997). Under N.C.G.S. § 160A-485(a) (2003), "[a]ny city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. . . . Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability." However, the statute also provides that "no city shall be deemed to have waived its tort immunity **by any action other than** the purchase of liability insurance." (emphasis added). Our appellate courts have consistently held that "N.C.G.S. § 160A-485 provides that

the **only** way a city may waive its governmental immunity is by the purchase of liability insurance." *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 435 (1992) (emphasis added). In *Blackwelder*, defendant City formed a corporation to handle claims against the City of less than $1,000,000. The North Carolina Supreme Court held that this corporation (RAMCO), was not liability insurance and therefore did not constitute a waiver of sovereign immunity. The Court also held that:

> Finally, the plaintiff contends that the City has violated the Equal Protection Clause of the Fourteenth Amendment . . . and Article I, Section 19 of the Constitution of North Carolina[,] . . . because the City, through RAMCO, can pick and choose what claims it will pay, thus depriving the plaintiff of the equal protection of the law. . . . **If we were to hold the City has acted unconstitutionally . . . it would not mean the City had waived its governmental immunity**. The most we could do is strike down RAMCO. A decision involving this constitutional question would not resolve this case and we do not consider it.

Blackwelder 332 N.C. 325-26, 420 S.E.2d at 436-37 (emphasis added).

Similarly, in *Ripellino v. N.C. School Bds. Ass'n*, 158 N.C. App. 423, 581 S.E.2d 88 (2003), *cert. denied*, 358 N.C. 156, 592 S.E.2d 694 (2004), plaintiffs were injured while driving through a traffic control gate on school property. Defendant school board paid plaintiffs for their property damage, but would not pay medical expenses or other compensation. Plaintiffs argued that, because defendants compensated them for property damage, they should be estopped from asserting sovereign immunity on their other claims. This Court held:

> A waiver of sovereign immunity must be established by the General Assembly. "Our Supreme Court has stated that 'it is for the General Assembly to determine when and under what circumstances the State [and its political subdivisions] may be sued.' " . . . **[Sovereign immunity] 'should not and cannot be waived by indirection or by procedural rule. . . . If a court could estop the Board from asserting an otherwise valid defense of sovereign immunity, 'then, effectively, that court, rather than the General Assembly, would be waiving [the Board's] sovereign immunity.'**

Id. at 429, 581 S.E.2d at 93 (quoting *Wood v. N.C. State Univ.*, 147 N.C. App. 336, 338 and 347, 556 S.E.2d 38, 40 and 45 (2001) (quoting

Guthrie v. State Ports Authority, 307 N.C. 522, 534, 299 S.E.2d 618, 625)) (emphasis added).

In sum, plaintiff has raised genuine issues of material fact in her claims for obstruction of justice and gross negligence, and I would remand for jury trial on these substantive claims. At trial, defendants are entitled to assert sovereign immunity to the extent that they have not waived the defense by purchase of liability insurance. Plaintiff has failed to present evidence that the City's decision not to pay her claim violated her constitutional rights, and has failed to present evidence that defendant City of Durham selectively waives the defense of sovereign immunity, or that its handling of claims against the city is arbitrary and capricious. Moreover, even if the City were required to change its policies for settling cases, it would still be able to assert sovereign immunity in this case. Accordingly, I would vote to affirm the trial court's denial of defendants' summary judgment motion with respect to plaintiff's negligence and obstruction of justice claims, and remand for entry of summary judgment for defendants on plaintiff's constitutional claims.

SYBIL SMITH, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR BRITTANY SMITH, A MINOR, PLAINTIFF V. JACKSON COUNTY BOARD OF EDUCATION, ELIZABETH BALCEREK, INDIVIDUALLY AND AS AN EMPLOYEE OF JACKSON COUNTY BOARD OF EDUCATION, JOSEPH CARROLL BROOKS, INDIVIDUALLY AND AS AN EMPLOYEE OF JACKSON COUNTY BOARD OF EDUCATION, JAMES L. CRUZAN, INDIVIDUALLY AND IN HIS CAPACITY AS SHERIFF OF JACKSON COUNTY, CHARLES R. HESS, III, INDIVIDUALLY AND AS AN EMPLOYEE OF THE SHERIFF OF JACKSON COUNTY, JEREMY STEWART, AND WESTERN SURETY COMPANY, SURETY FOR JAMES L. CRUZAN, SHERIFF OF JACKSON COUNTY, DEFENDANTS

No. COA03-233

(Filed 15 February 2005)

1. Appeal and Error— appealability—interlocutory order—denial of motion to dismiss—substantial right

Although ordinarily the denial of a motion to dismiss is an interlocutory order from which there may be no appeal, this case is immediately appealable because it involves a substantial right when defendants base their appeal on the public duty doctrine and sovereign immunity.

2. Schools and Education; Police Officers— school resource officer—public duty doctrine—civil conspiracy—intentional infliction of emotional distress—duty to report child abuse—breach of fiduciary duty—negligent supervision, hiring, and retention

The trial court did not err by denying motions by defendants school resource officer and the sheriff to dismiss plaintiff's amended complaint and the cross-claims of defendants Board of Education and school principal on the ground that the claims are barred by the public duty doctrine in an action where plaintiff alleged that defendant teacher manipulated a 14-year-old female into having a sexual relationship with an 18-year-old student and then attempted to videotape her having sex with the student, because: (1) the public duty doctrine does not apply to plaintiff's claims against the school resource officer for civil conspiracy under N.C.G.S. § 99D-1 and intentional infliction of emotional distress since these claims were not based on negligence; (2) in regard to the claim under N.C.G.S. § 99D-1 for interference with civil rights, the allegations reflect affirmative conduct by the school resource officer directly injuring the minor female and do not constitute only the failure to prevent a third person's harmful conduct; (3) in regard to the intentional infliction of emotional distress claim, plaintiff included the necessary allegations of calculated conduct on the part of the school resource officer directed at the minor female to rise above mere aggravated negligence that cause the public duty doctrine to cease to apply; (4) in regard to the school resource officer's failure to report knowledge of defendant teacher's actions in promoting a sexual relationship between two students and in failing to notify administrative staff of the minor female's absence from school, the duty to report child abuse is not the type of discretionary law enforcement function shielded by the public duty doctrine given the mandatory language and broad application of N.C.G.S. § 7B-301 to the general public; (5) to the extent the claims of plaintiff, the Board of Education, and the school principal are based on negligence other than a failure to report abuse, the amended complaint and cross-claims sufficiently allege that the facts of this case fall within the special duty exceptions to the public duty doctrine when the school resource officer undertook to provide protective services not the public generally, but to an identifiable group of students at the pertinent school, including the 14-year-old female, during school hours; (6) in regard to the claim for

breach of fiduciary duty, the school resource officer failed to challenge on appeal plaintiff's allegations regarding the existence of a fiduciary duty; and (7) in regard to claims against the sheriff for negligent supervision, hiring, and retention of the school resource officer, the question of whether the parties have adequately alleged those claims is not before the Court of Appeals.

3. Pleadings— motion to amend—adding defendants

The trial court did not abuse its discretion by allowing plaintiff to amend her complaint a second time to add sheriff Cruzan in his individual capacity and Western Surety, the surety of Cruzan's official bond, in an action where plaintiff alleged that Cruzan negligently supervised and retained Hess, a school resource officer who knew of a teacher's improper conduct regarding students but failed to report it, because: (1) in regard to adding claims against Cruzan individually, the proposed amended complaint alleged willfulness and a factual basis for that general allegation; and (2) N.C.G.S. § 58-76-5 allows a plaintiff to maintain suit against a public officer and the surety on his official bond for acts of negligence in performing his official duties, and immunity is immaterial with respect to a claim on a bond under N.C.G.S. § 58-76-5.

Appeal by defendants James L. Cruzan and Charles R. Hess, III from orders entered 7 November 2002 and 15 November 2002 by Judge J. Marlene Hyatt in Jackson County Superior Court. Heard in the Court of Appeals 17 March 2004.

McGuire, Wood & Bissette, P.A., by Joseph P. McGuire and Mary E. Euler, for plaintiff-appellee.

Benjamin R. Olinger, Jr.; and Long, Parker, Warren & Jones, P.A., by Robert B. Long, for defendant-appellant Charles R. Hess, III.

Lovejoy & Bolster, P.A., by Jeffrey S. Bolster, for defendant-appellant James L. Cruzan.

Roberts & Stevens, P.A., by Christopher Z. Campbell and K. Dean Shatley, II, for defendant-appellee Jackson County Board of Education.

Cranfill, Sumner & Hartzog, L.L.P., by Ann S. Estridge, for defendant-appellee Elizabeth Balcerek.

No brief filed on behalf of defendant-appellee Joseph Carroll Brooks.

No brief filed on behalf of defendant-appellee Jeremy Stewart.

No brief filed on behalf of defendant-appellee Western Surety Company.

GEER, Judge.

In this case, plaintiff Sybil Smith, individually and as guardian ad litem for her minor daughter Brittany Smith, has alleged that defendant Joseph Brooks, a teacher at Brittany's school, manipulated her 14-year-old daughter into having a sexual relationship with an 18-year-old student, defendant Jeremy Stewart, and then attempted to videotape her having sex with the student. According to plaintiff, the school resource officer—defendant Charles R. Hess, III—knew of Brooks' conduct, but failed to report it. Plaintiff further alleges that Hess' employer, defendant Jackson County Sheriff James L. Cruzan, negligently supervised and retained Hess. The school defendants—defendant Jackson County Board of Education and Brittany's principal (defendant Elizabeth Balcerek)—asserted cross-claims against defendants Hess and Cruzan.

Hess and Cruzan appeal from the trial court's denial of their motion to dismiss plaintiff's complaint and the school defendants' cross-claims based on the public duty doctrine. Because we find that the claims are either beyond the scope of the public duty doctrine or fall within one of the doctrine's exceptions, we affirm.

Facts

In considering, as here, a motion to dismiss, we must treat as true the factual allegations of plaintiff, the Board of Education, and Balcerek. *Lovelace v. City of Shelby*, 351 N.C. 458, 459, 526 S.E.2d 652, 653 (2000). Plaintiff's amended complaint alleges the following facts.

During the 2000-2001 school year, Brittany was a ninth-grade student at the Blue Ridge School, a school operated by the Jackson County Board of Education. Brittany took a physical education class and a health class taught by Brooks. Jeremy was a twelfth-grade student and a member of one or more athletic teams coached by Brooks.

During the spring semester, Brooks encouraged Jeremy to develop a personal, dating, and sexual relationship with Brittany.

Early in the semester, Brooks told Jeremy that he could use Brooks' school office, home, and automobile to facilitate the sexual relationship. By 1 March 2001, "with the prompting and arrangements of Brooks," Jeremy and Brittany had begun having a sexual relationship. They used Brooks' office during school hours and Brooks' home both during and after school hours. Brooks excused Jeremy from athletic practice and obtained Brittany's excused absence from class or study hall so that the students could engage in their sexual relationship.

Defendant Hess, a deputy sheriff with the Jackson County Sheriff's Department, was the school resource officer and a longtime friend of Brooks. The complaint alleges that Hess was aware that Brooks was promoting a sexual relationship between Brittany and Jeremy and was allowing Jeremy to use Brooks' office and home for that purpose. Hess did not report Brooks' actions to the students' parents, to school officials, to the Sheriff's Department, or to the county Department of Social Services.

On 25 May 2001, Brooks arranged for Jeremy to drive Brittany to Brooks' home during school hours for the purpose of engaging in sex. After arriving at Brooks' home, Jeremy discovered Brooks hiding in the closet of his bedroom. The complaint alleges that Brooks had intended to surreptitiously watch, listen, and videotape the students having sex. Jeremy and Brittany immediately left and drove to Brittany's home. Brooks followed them there, broke into the house, screamed at the two of them, and then offered them $500.00 if they would allow him to watch them have sex in the bedroom of Brittany's parents. Jeremy and Brittany refused and returned to school.

When they arrived at the school, Jeremy and Brittany encountered Hess in the hall. Hess chastised both students for leaving school, but did not investigate their absence, notify their parents of their absence, or take any other appropriate disciplinary or official action. Later that day, Hess found Brittany crying in a hall at the school. Hess escorted her to Brooks' office, where Brooks sought to obtain her silence about the incident earlier that day.

Brooks subsequently paid Jeremy money to remain silent and directed Jeremy to pay a part of the sum to Brittany so that she would remain silent as well. The complaint alleges that "Brooks had surreptitiously set up a hidden tape-recorder and camera to audiotape and videotape Stewart having sex with Brittany, and actually used the tape recorder and camera to audiotape and videotape students engaged in sex in his office and/or home."

Based on these allegations, plaintiff brought suit on 31 January 2002 against the Board of Education, the school's principal Balcerek (individually and as an employee of the Board), Brooks (individually and as an employee of the Board), Cruzan "in his capacity as Sheriff of Jackson County," Hess (individually and as an employee of the Sheriff of Jackson County), and Jeremy. With respect to the causes of action pertinent to this appeal, plaintiff asserted claims against Hess for negligent performance of law enforcement duties, breach of fiduciary duty, negligent infliction of emotional distress, intentional infliction of emotional distress, and civil conspiracy to deprive Brittany of her civil rights as a female, in violation of N.C. Gen. Stat. § 99D-1 (2003). Plaintiff asserted a claim against Cruzan for negligent supervision and retention of Hess.

Plaintiff subsequently filed an amended complaint on or about 28 March 2002. The defendant Board of Education and Balcerek each brought cross-claims for indemnification or contribution against Hess and Cruzan. Hess and Cruzan moved to dismiss the amended complaint and the cross-claims, arguing that the claims were barred by the public duty doctrine and immunity.

On 15 August 2002, plaintiff moved to amend the complaint a second time in order to (1) sue defendant Cruzan in his individual capacity as well as his official capacity and (2) to add Cruzan's surety as an additional party so as to assert a claim under N.C. Gen. Stat. § 58-76-5 (2003). Defendant Cruzan opposed the motion to amend.

On 7 November 2002, Judge J. Marlene Hyatt allowed plaintiff to amend her complaint and on 15 November 2002, Judge Hyatt denied Cruzan's and Hess' motions to dismiss the first amended complaint and the cross-claims. Defendants Hess and Cruzan filed timely notices of appeal from the denial of the motion to dismiss based on the public duty doctrine. Cruzan has also appealed from the order allowing the motion to amend on the ground that the added claims are barred by immunity. On 23 April 2003, this Court stayed the appeal pending resolution of defendant Balcerek's proceedings in bankruptcy court. The Court subsequently lifted the stay and appellants were ordered to file briefs.

Interlocutory Appeal

[1] As a preliminary matter, we note that ordinarily the denial of a motion to dismiss is an interlocutory order from which there may be no immediate appeal. *Block v. County of Person*, 141 N.C. App. 273,

276, 540 S.E.2d 415, 418 (2000). Since, however, defendants base their appeal on the public duty doctrine and sovereign immunity, their appeal involves a substantial right warranting immediate appellate review. *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 403, 442 S.E.2d 75, 77, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994).

Motion to Dismiss

[2] Defendants Hess and Cruzan contend that the trial court erred in denying their motions to dismiss plaintiff's amended complaint and the cross-claims of the Board of Education and Balcerek on the ground that the claims are barred by the public duty doctrine.[1] "A motion to dismiss pursuant to Rule 12(b)(6) should not be granted *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Isenhour v. Hutto*, 350 N.C. 601, 604-05, 517 S.E.2d 121, 124 (1999) (internal quotation marks omitted).

The Supreme Court first adopted the public duty doctrine in *Braswell v. Braswell*, 330 N.C. 363, 370-71, 410 S.E.2d 897, 901 (1991) (internal citations omitted):

> The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act.

The Court has, however, limited the application of this doctrine "to the facts of *Braswell*." *Lovelace*, 351 N.C. at 461, 526 S.E.2d at 654. Accordingly, "[a]s applied to local government, [the Supreme] Court has declined to expand the public duty doctrine beyond agencies other than local law enforcement departments exercising their general duty to protect the public." *Wood v. Guilford County*, 355 N.C. 161, 166-67, 558 S.E.2d 490, 495 (2002).

On remand from the Supreme Court's decision in *Lovelace*, this Court recognized that "[t]he public duty doctrine is simply meant to

1. Hess, in his appellant's brief, also urges that the claims should have been dismissed based on public official immunity. Since his assignment of error was expressly limited to the public duty doctrine, his immunity arguments are not properly before us, and we do not consider them. *See* 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.").

provide protection to local law enforcement officials and the municipalities for which they work in a narrow set of circumstances." *Lovelace v. City of Shelby*, 153 N.C. App. 378, 386, 570 S.E.2d 136, 141, *disc. review denied*, 356 N.C. 437, 572 S.E.2d 785 (2002). After reiterating that the Supreme Court had limited the public duty doctrine to the facts of *Braswell*, we observed that *Braswell* applied the public duty doctrine to a suit based on negligence "for failure to provide protection to a specific individual from the criminal acts of another." *Id.* at 385, 570 S.E.2d at 140. *See also Block*, 141 N.C. App. at 283, 540 S.E.2d at 422 (holding that the public duty doctrine "will not be expanded to local government agencies other than law enforcement departments exercising their general duty to protect the public"). Keeping these limitations in mind, we consider the applicability of the public duty doctrine with respect to each of the claims asserted by plaintiff, the Board of Education, and Balcerek.

A. Intentional Tort Claims Asserted Against Hess

Plaintiff has sued Hess for civil conspiracy in violation of N.C. Gen. Stat. § 99D-1[2] and intentional infliction of emotional distress. Because these claims are not based on negligence, the public duty doctrine does not apply.

As already mentioned, the Supreme Court held in *Lovelace* that "the public duty doctrine, as it applies to local government, is limited to the facts of *Braswell*." *Lovelace*, 351 N.C. at 461, 526 S.E.2d at 654. *Braswell* involved a claim against a sheriff for "negligent failure to protect" the victim from a third party's criminal acts. *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Accordingly, "where the conduct complained of rises to the level of an intentional tort[,] . . . the public duty doctrine cease[s] to apply." *Clark*, 114 N.C. App. at 406, 442 S.E.2d at 79. It is not, however, sufficient to avoid the doctrine that the conduct—otherwise alleged to be negligent—is also alleged to be grossly negligent, willful, or wanton. *Id.*

In addition to considering whether the underlying claim lies in negligence—regardless whether aggravated—a trial court must also consider whether the cause of action rests on the failure to protect the victim from the acts of another or is the direct misconduct of the

2. N.C. Gen. Stat. § 99D-1 authorizes a civil action if "[t]wo or more persons, motivated by . . . gender, but whether or not acting under color of law, conspire to interfere with the exercise or enjoyment by any other person or persons of a right secured by the Constitutions of the United States or North Carolina, or of a right secured by a law of the United States or North Carolina that enforces, interprets, or impacts on a constitutional right . . . ."

defendant. As this Court explained in *Moses v. Young*, 149 N.C. App. 613, 616, 561 S.E.2d 332, 334, *disc. review denied*, 356 N.C. 165, 568 S.E.2d 199 (2002):

> An exhaustive review of the public duty doctrine as applied in North Carolina reveals no case in which the public duty doctrine has operated to shield a defendant from acts directly causing injury or death. Rather, the application of the public duty doctrine in this State has been confined to cases where the defendant's actions proximately or indirectly result in injury.

See also 63C Am. Jur. 2d *Public Officers and Employees* § 248 (1997) ("[T]he public duty rule applies only to situations in which a plaintiff has been directly harmed by the conduct of a third person and only indirectly by a public employee's dereliction of a duty—a duty imposed on him or her solely by his or her contract of employment—to interrupt or prevent the third person's harmful activity.").

Plaintiff's claim under N.C. Gen. Stat. § 99D-1 for interference with civil rights—requiring proof that Hess' acts were "motivated by race, religion, ethnicity, or gender"—involves intentional conduct not covered by the public duty doctrine. *Cf. Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756, 141 L. Ed. 2d 633, 649, 118 S. Ct. 2257, 2266 (1998) ("Sexual harassment under Title VII presupposes intentional conduct."). In addition, plaintiff has specifically alleged that Hess—acting with Brooks and Jeremy—"undertook a course of conduct" to prey on Brittany's status as a 14-year-old female and "to conceal from law enforcement and school authorities their manipulation and exploitation of Brittany." These allegations reflect affirmative conduct by Hess directly injuring Brittany and do not constitute only the failure to prevent a third person's harmful conduct. Accordingly, the trial court properly denied defendant Hess' motion to dismiss the N.C. Gen. Stat. § 99D-1 claim.

It is well-established that a claim for intentional infliction of emotional distress is, as the name of the tort suggests, an intentional tort. *See, e.g., Wells v. N.C. Dep't of Corr.*, 152 N.C. App. 307, 321, 567 S.E.2d 803, 813 (2002) ("Moreover, because intentional infliction of emotional distress is an intentional tort, [defendants] were not entitled to immunity as to this claim."); *Hawkins v. State*, 117 N.C. App. 615, 630, 453 S.E.2d 233, 242 (accord), *disc. review improvidently allowed*, 342 N.C. 188, 463 S.E.2d 79 (1995). Nevertheless, this Court has also held that the public duty doctrine applies to a claim for intentional infliction of emotional distress when "plaintiffs are alleging

substantially the same conduct used to support the claim of negligence against the defendants." *Simmons v. City of Hickory*, 126 N.C. App. 821, 825, 487 S.E.2d 583, 587 (1997). In affirming the dismissal of a claim for intentional infliction of emotional distress based on the public duty doctrine, this Court rested its decision on the fact that the plaintiffs' claim was based solely on the defendant inspectors' failure to discover code violations and other defects in their house. *Id.* at 826, 487 S.E.2d at 587. In *Little v. Atkinson*, 136 N.C. App. 430, 434, 524 S.E.2d 378, 381, *disc. review denied*, 351 N.C. 474, 543 S.E.2d 492 (2000), this Court clarified *Simmons*, explaining that a plaintiff may avoid dismissal under the public duty doctrine of an intentional infliction of emotional distress claim by "alleg[ing] any type of calculated conduct on the part of defendants directed at the plaintiffs which would establish the element of intent in a claim for intentional infliction of emotional distress."

Here, plaintiff has included the necessary allegations of "calculated conduct" on the part of Hess directed at Brittany to rise above mere aggravated negligence and cause the public duty doctrine to cease to apply. The motion to dismiss was, therefore, properly denied as to the intentional infliction of emotional distress claim.

B. Negligence Claims Alleged against Hess

Plaintiff has asserted two claims against Hess based on negligence: negligent performance of law enforcement duties and negligent infliction of emotional distress. Specifically, with respect to each claim, plaintiff alleges that Hess was negligent (1) in failing to report knowledge of Brooks' actions in promoting a sexual relationship between Jeremy and Brittany and (2) in failing to notify administrative staff of Brittany's absence from school.

As the Court explained in *Moses*, application of the public duty doctrine as a "blanket defense" to all actions of police officers "would not be consistent with the purpose of the public duty doctrine, which is to shield[] the state and its political subdivisions from tort liability arising out of discretionary governmental actions." *Moses*, 149 N.C. App. at 618, 561 S.E.2d at 335 (alteration in original) (internal quotation marks omitted). We must, therefore, first determine whether plaintiff's claims involve "the type of discretionary governmental action shielded by the public duty doctrine," such as those acts that involve "actively weighing the safety interests of the public." *Id.* at 618-19, 561 S.E.2d at 335 (internal quotation marks omitted).

N.C. Gen. Stat. § 7B-301 (2003) provides that "[a]ny person . . . who has cause to suspect that any juvenile is abused . . . shall report the case of that juvenile to the director of the department of social services in the county where the juvenile resides or is found." N.C. Gen. Stat. § 7B-310 (2003) states that "[n]o privilege shall be grounds for any person or institution failing to report that a juvenile may have been abused . . . even if the knowledge or suspicion is acquired in an official professional capacity . . . ." *See also* N.C. Gen. Stat. § 115C-400 (2003) (with respect to schools, providing: "Any person who has cause to suspect child abuse or neglect has a duty to report the case of the child to the Director of Social Services of the county, as provided in Article 3 of Chapter 7B of the General Statutes.").

Given the mandatory language and broad application of N.C. Gen. Stat. § 7B-301 to the general public, we conclude that the duty to report child abuse is not the type of discretionary law enforcement function shielded by the doctrine. Hess was not required—nor was he permitted—to weigh the safety interests of the public when he decided not to report Jeremy's possible statutory rape of Brittany or Brooks' sexual exploitation of Brittany and Jeremy. Rather, his duty to report abuse was imposed by statute and involved no deliberation or discretionary consideration. Hess' failure to report known child abuse was, therefore, outside the scope of conduct generally associated with law enforcement, and the public duty doctrine does not bar this claim.

In addition, "there are two well-established exceptions to the doctrine that prevent inequities to certain individuals: (1) when there is a special relationship between the injured party and the police; and (2) when a municipality creates a special duty by promising protection to an individual." *Wood*, 355 N.C. at 166, 558 S.E.2d at 495. To the extent the claims of plaintiff, the Board of Education, and Balcerek are based on negligence other than a failure to report abuse, we hold that the amended complaint and cross-claims sufficiently allege that the facts of this case fall within these exceptions to the public duty doctrine.

Our Supreme Court applied the special relationship exception in *Isenhour*, holding that the public duty doctrine did not apply to a city that "by providing school crossing guards, has undertaken an affirmative, but limited, duty to protect certain children, at certain times, in certain places." *Isenhour*, 350 N.C. at 608, 517 S.E.2d at 126. The Court explained:

> [T]here is a meaningful distinction between application of the public duty doctrine to the actions of local law enforcement, as in *Braswell* . . . and the application of the doctrine to the actions of a school crossing guard . . . . Unlike the provision of police protection to the general public . . . , a school crossing guard is employed to provide a protective service to an identifiable group of children. Moreover, the relationship between the crossing guard and the children is direct and personal, and the dangers are immediate and foreseeable.

Id. at 607-08, 517 S.E.2d at 126.

Taking the plaintiff's and cross-claimants' allegations as true in this case, Hess, as a school resource officer, undertook to provide protective services not to the public generally, but to an identifiable group of students at Blue Ridge School, including Brittany, during school hours. The pleadings do not allege that Hess breached a general law enforcement duty, but rather breached his duty to the school, the principal, and the children.

Our General Assembly has defined "a school resource officer" as a "person who is regularly present in a school for the purpose of promoting and maintaining safe and orderly schools . . . ." N.C. Gen. Stat. § 14-202.4(d)(3a) (2003). Indeed, the legislature has acknowledged the special nature of the relationship between a school resource officer and a student: if a school resource officer "takes indecent liberties with a victim who is a student, at any time during or after the time the defendant and victim were present together in the same school but before the victim ceases to be a student, the defendant is guilty of a Class I felony, unless the conduct is covered under some other provision of law providing for greater punishment." N.C. Gen. Stat. § 14-202.4(a) (2003). Further, in order to implement the state policy "that all schools should be safe, secure, and orderly," N.C. Gen. Stat. § 115C-105.45 (2003), every school must be subject to a "safe school plan" that includes "[a] plan to work effectively with local law enforcement officials and court officials to ensure that schools are safe and laws are enforced." N.C. Gen. Stat. § 115C-105.47 (2003). These statutory provisions indicate that there is a direct and personal relationship between the school resource officer and the children and that danger to those students while attending school is foreseeable—just as was the case with the school crossing guards in *Isenhour*.

Significantly, this Court has also distinguished the role of a school resource officer from that of a general law enforcement officer in the

Fourth Amendment search context. In contrast to searches by police, searches by school officials do not require a warrant or probable cause under *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 83 L. Ed. 2d 720, 734, 105 S. Ct. 733, 742 (1985). As this Court has explained, "the *T.L.O.* standard has also been applied to cases where a school resource officer conducts a search, based upon his own investigation or at the direction of another school official, in the furtherance of well-established educational and safety goals." *In re D.D.*, 146 N.C. App. 309, 318, 554 S.E.2d 346, 352, *appeal dismissed and disc. review denied*, 354 N.C. 572, 558 S.E.2d 867 (2001). On the other hand:

> Courts draw a clear distinction between [these] categories of cases and those cases in which outside law enforcement officers search students as part of an independent investigation or in which school official[s] search students at the request or behest of the outside law enforcement officers and law enforcement agencies. . . . The purpose of the search conducted by so-called outside police officers is not to maintain discipline, order, or student safety, but to obtain evidence of a crime.

Id., 554 S.E.2d at 252-53 (internal quotation marks omitted). We have, thus, already acknowledged that school resource officers acting to preserve student safety are not acting in a general law enforcement capacity.

In light of state policies, related case law authority, and the allegations of the claims, we cannot say to a certainty that the claimants will be unable to prove a special relationship sufficient to except the parties' negligence claims from the public duty doctrine. The claims presented by this case are more analogous to those in *Isenhour* than to those in *Braswell*. Accordingly, the trial court properly denied the motion to dismiss based on the special relationship exception.

With respect to the "special duty" exception, the public duty doctrine does not apply " 'when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered.' " *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902 (quoting *Coleman v. Cooper*, 89 N.C. App. 188, 194, 366 S.E.2d 2, 6, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988), *partially overruled on other grounds*, *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997)). In *Braswell*, the Court acknowledged that a sheriff's

promise to protect a woman as she went to and from work was arguably specific enough to fall within the special duty exception. *Id.* at 372, 410 S.E.2d at 902.[3]

Here, as the school defendants have observed, there is no statutory requirement that a sheriff provide a school resource officer. Nonetheless, according to the Board of Education's cross-claim, Hess, acting as a school resource officer, "undertook to provide protection to children at Blue Ridge School, had a special duty to these Defendants to perform his duties and obligations in a professional manner, and had a special duty to protect [Brittany] from criminal acts." Balcerek's cross-claim similarly alleges that "Hess, in his capacity as the school resource officer assigned to Blue Ridge School, *had a duty to Balcerek* and to minor plaintiff Brittany Smith to perform his duties and obligations in a professional manner and to protect all school children from criminal acts." These allegations allege a special duty to the school and principal apart from a general law enforcement obligation.[4] The precise nature of Hess' duties and any contractual obligations between the Board of Education and the Sheriff's Department will be the subject of discovery and subsequent review, but on the basis of the pleadings we find that the cross-claims sufficiently allege a special duty to defeat a motion to dismiss based on the public duty doctrine.

C. Breach of Fiduciary Duty Claim Alleged against Hess

Plaintiff has also alleged that Hess' actions constituted a breach of fiduciary duty. Our appellate courts have never addressed whether the public duty doctrine applies to a claim for breach of fiduciary duty; nor have we found a decision of any other jurisdiction addressing this question.

"Breach of fiduciary duty occurs when there is unfair dealing with one to whom the defendant has an active responsibility; it requires a special relationship unlike actual fraud." *Speck v. N.C. Dairy Found., Inc.*, 64 N.C. App. 419, 428, 307 S.E.2d 785, 792 (1983), *rev'd on other grounds*, 311 N.C. 679, 319 S.E.2d 139 (1984). As the Supreme Court has explained, a fiduciary relationship exists when:

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3. That fact was not sufficient to establish liability because the woman was killed while on a midday errand and thus not within the scope of protection promised by the sheriff. *Id.*

4. Similarly, plaintiff has alleged that Hess breached his duty as a school resource officer to report Brittany's absences from school to the school administrative staff, suggesting a special duty to the school.

> there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. . . . [I]t extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.

Abbitt v. Gregory, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (internal quotation marks omitted).

This fiduciary relationship is analogous to the special relationship that provides an exception to the public duty doctrine. Accordingly, we hold that if plaintiff is able to prove the special relationship necessary to support a claim for breach of fiduciary duty, then she will also have established an exception to the public duty doctrine.[5] Since defendant has not challenged on appeal plaintiff's allegations regarding the existence of a fiduciary relationship, we hold that the trial court properly denied the motion to dismiss.

D. Claims of Negligent Supervision Against Cruzan

Plaintiff, the Board of Education, and Balcerek have asserted against Cruzan claims for negligent supervision, hiring, and retention. Defendant Cruzan's argument that these claims are barred by the public duty doctrine cannot be squared with *Braswell* or with this Court's decision in *Leftwich v. Gaines*, 134 N.C. App. 502, 521 S.E.2d 717, *disc. review denied*, 351 N.C. 357, 541 S.E.2d 713-14 (1999).

In *Braswell*, the plaintiff sued for both negligent failure to protect and negligent supervision and retention. The Supreme Court applied the public duty doctrine only to the negligent failure to protect claim; it addressed the merits of the negligent supervision and retention claim. As this Court observed in *Leftwich*:

> [T]he public duty doctrine is not incompatible with negligent supervision. The public duty doctrine was adopted in *Braswell* . . . . Our Supreme Court held that the trial court properly directed a verdict in favor of the defendant on the issue of negligent failure to protect because the public duty doctrine prevented a lawsuit against the sheriff. The Court also found that the trial court properly directed a verdict for the defendant as to negligent supervision and retention; however, the *Braswell* Court did not apply the public duty doctrine to the claim of negligent

5. We do not mean to suggest that the special relationship exception to the doctrine requires proof of a fiduciary relationship.

> retention and supervision, even though the doctrine had been asserted as a defense and even though the Court had relied on the doctrine elsewhere in its opinion.

Leftwich, 134 N.C. App. at 514, 521 S.E.2d at 726. This Court then pointed out that the Supreme Court instead reviewed whether the evidence was sufficient to establish that the sheriff had the notice necessary to impose liability for negligent supervision and retention. *Id.* at 514-15, 521 S.E.2d at 726.

Based on *Braswell*, this Court in *Leftwich* also declined to apply the public duty doctrine to bar a negligent supervision claim, but rather reviewed the evidence to determine whether plaintiff offered sufficient evidence to allow her claim of negligent supervision to be submitted to the jury. Because it concluded that plaintiff had offered evidence that the municipality had notice of prior wrongdoing by the individual defendant of the same nature as that involved in the lawsuit and yet did not take action adequate to cause the individual defendant to change his ways, this Court held that the trial court properly declined to direct a verdict on plaintiff's claim for negligent supervision. *Id.* at 515, 521 S.E.2d at 727.

Braswell and *Leftwich* both involved review of a trial court's decision on a motion for a directed verdict during a jury trial. Although these two decisions compel our holding that the public duty doctrine does not bar the negligent supervision and retention claims, the question whether the parties have adequately alleged those claims is not before us.

Motion to Amend

[3] We next consider defendant Cruzan's contention that the trial court erred in granting plaintiff's motion to amend her complaint a second time to add as defendants: (1) Cruzan in his individual capacity and (2) Western Surety, the surety on Cruzan's official bond. Cruzan argues that the amendment was futile since he is entitled to public official immunity so long as his acts were neither malicious nor corrupt. He contends that his surety is immune from liability for the same reasons.

"A motion to amend the pleadings is addressed to the sound discretion of the trial court. The exercise of the court's discretion is not reviewable absent a clear showing of abuse. The party opposing the amendment has the burden to establish that it would be prejudiced by the amendment. Reasons justifying denial of an amendment are (a)

undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Carter v. Rockingham County Bd. of Educ.*, 158 N.C. App. 687, 690, 582 S.E.2d 69, 72 (2003) (internal citations and quotation marks omitted).

We turn first to the question whether the trial court erred in allowing plaintiff to sue Cruzan individually. A public officer, such as defendant Cruzan, "is shielded from liability unless he engaged in discretionary actions which were allegedly: (1) corrupt; (2) malicious; (3) outside of and beyond the scope of his duties; (4) in bad faith; or (5) willful and deliberate." *Reid v. Roberts*, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119 (internal citations omitted), *disc. review denied*, 335 N.C. 559, 439 S.E.2d 151 (1993). *See also Epps v. Duke Univ.*, 122 N.C. App. 198, 204, 468 S.E.2d 846, 851 ("The exceptions to official immunity have expanded over the years, with bad faith and willful and deliberate conduct now operating as additional common law bases for liability."), *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996).

Plaintiff alleges that Cruzan's action in assigning Hess to the school while concealing that Hess had previously assaulted a minor was in "willful, wanton and reckless disregard for the safety of Brittany and other students at the Blue Ridge School." Because the proposed amended complaint alleges willfulness and a factual basis for that general allegation, we cannot find that the trial court abused its discretion in allowing plaintiff's motion to amend to add claims against Cruzan individually.

As to whether the trial court erred in allowing plaintiff to add Western Surety as a defendant, N.C. Gen. Stat. § 58-76-5 provides, in relevant part:

> Every person injured by the neglect, misconduct, or misbehavior in office of any clerk of the superior court, register, surveyor, sheriff, coroner, county treasurer, or other officer, may institute a suit or suits against said officer or any of them *and their sureties upon their respective bonds* for the due performance of their duties in office in the name of the State, without any assignment thereof; and no such bond shall become void upon the first recovery, or if judgment is given for the defendant, but may be put in suit and prosecuted from time to time until the whole penalty is recovered; and every such officer *and the sureties on his official bond* shall be liable to the per-

son injured for all acts done by said officer by virtue or under color of his office.

(Emphasis added.)

This statute "allows a plaintiff to maintain suit against a public officer and the surety on his official bond for acts of negligence in performing his official duties." *Slade v. Vernon*, 110 N.C. App. 422, 427, 429 S.E.2d 744, 746 (1993). "By expressly providing for this cause of action, the General Assembly has abrogated common law immunity where a public official causes injury through 'neglect, misconduct, or misbehavior' in the performance of his official duties or under color of his office." *Id.* at 427-28, 429 S.E.2d at 747. Immunity is thus immaterial with respect to a claim on a bond under N.C. Gen. Stat. § 58-76-5. The trial court, therefore, did not err in allowing plaintiff to amend her complaint to add Western Surety as a defendant.

Affirmed.

Chief Judge MARTIN and Judge HUDSON concur.

SAMPIE ADAMS, EMPLOYEE, PLAINTIFF v. METALS USA, EMPLOYER, AMERICAN HOME ASSURANCE/AIG CLAIMS SERVICES, INC., CARRIER, DEFENDANTS

No. COA04-177

(Filed 15 February 2005)

1. Workers' Compensation— causation—expert testimony

The Industrial Commission did not err in a workers' compensation case by concluding that there was competent evidence that plaintiff's injury was caused by his employment, because: (1) the pertinent doctor testified that the development with plaintiff's symptoms was consistent with the injury occurring from plaintiff's fall from a truck ladder at work, and although a disc herniation can be caused by everyday activities, he had no indication that everyday activities caused plaintiff's disc herniation; (2) the doctor's testimony, combined with the additional evidence in the case, provided competent evidence which supports the Commission's finding with respect to causation; (3) although the doctor testified that he could not opine to a reasonable degree of medical certainty whether the fall from the ladder caused plain-

tiff's back injury, the degree of the doctor's certainty goes to the weight of his testimony; and (4) the decision concerning what weight to give expert testimony is a duty for the Commission and not the Court of Appeals.

2. Workers' Compensation— ongoing disability—suitable employment

The Industrial Commission did not err in a workers' compensation case by concluding that there existed sufficient evidence to prove ongoing disability, because: (1) from the evidence presented, plaintiff was still currently disabled as he had not yet regained his preinjury wage capacity; (2) defendants have not shown suitable employment opportunities are available to plaintiff who worked as a truck loader for several years and has few transferable skills and limited education; and (3) plaintiff testified that he searched for employment but was unsuccessful.

Judge TYSON dissenting.

Appeal by defendants from opinion and award filed 19 September 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 October 2004.

R. Steve Bowden & Associates, by Jarvis T. Harris, for plaintiff-appellee.

Robinson & Lawing, L.L.P., by Jolinda J. Babcock, for defendants-appellants.

BRYANT, Judge.

Metals USA (employer) and American Home Assurance/AIG Claims Services, Inc. (carrier), collectively defendants, appeal an opinion and award of the Full Commission granting plaintiff temporary total disability benefits.

At the time of the hearing before the deputy commissioner, plaintiff, a married forty-seven-year old father of two children had a work history as a laborer. Plaintiff had worked for the defendant-employer as a truck loader since October 1995.

On 1 October 2000, after loading a truck with steel, plaintiff slipped while climbing down a ladder on the truck. Moisture on the bottom of his shoes and on the steps of the ladder caused him to slip and fall. Plaintiff testified at the hearing before the deputy commis-

sioner that the trucks were kept outside and some were covered and others were uncovered. During his fall, plaintiff skinned his arm and fell on his hip as he attempted to catch himself. Immediately, after the fall, plaintiff felt some pain and discomfort in his legs, hips and foot; however, he continued to work notwithstanding the pain.

Plaintiff mentioned the fall to his co-worker, Corey Wiseman who was the punch press operator that evening. Corey Wiseman testified at the hearing that plaintiff told her that he fell off the ladder and showed her the scrapes on his arm.

Even though plaintiff minimized the injury, he reported the incident to Larry Mallotte, the lead man on the third shift, and showed Mallotte the abrasions on his arm because he thought he was supposed to tell someone in case the injury became more serious. Plaintiff testified that at the time he reported the injury to Mallotte, his arms were hurting and he felt like he bruised his hip.

Michael Wiseman, another co-worker, testified during his deposition that during a shift change on or about 1 October 2000, plaintiff told him that he had fallen down a ladder. Michael Wiseman asked plaintiff if he had reported the injury to Mallotte. Michael Wiseman testified that an employee is supposed to report an injury to whomever is in charge. Plaintiff indicated to Michael Wiseman that he had told Mallotte about the fall.

Mallotte testified at the hearing that plaintiff told him he slipped and fell. Mallotte testified that he remembered this conversation occurring on or about 1 October 2000. Mallotte testified that he is supposed to report an injury to the supervisor if an incident was reported to him, but that he did not complete an injury report because plaintiff did not indicate he was seriously injured.

Plaintiff did not seek medical treatment immediately following the injury. He continued to perform his regular job; however, he noticed an increase of pain and discomfort in his hip, leg and foot. He thought the problem was related to years of walking on cement floors.

On 18 January 2001, plaintiff sought medical treatment at White Oak Family Physicians from Dr. Robert B. Scott due to severe back pain. Plaintiff stated he could hardly walk and his left foot was going numb. Plaintiff could not recall a specific injury. Dr. Scott diagnosed plaintiff with substantial sciatica and noted that a disc herniation was suspected. Plaintiff was taken out of work for two weeks.

On or about 22 January 2001, plaintiff contacted defendant-employer regarding his back injury and out-of-work status. Plaintiff was referred to Scott Stafford, Regional Human Resources Manager for defendant-employer; and Stafford offered plaintiff some information regarding short-term disability benefits. Stafford did not complete an accident report at that time. Ultimately, plaintiff did not receive any short-term disability benefits due to the work-related nature of his complaints. Stafford testified that if an injury had been reported to a lead man, then the lead man was to go to the supervisor with that information, but such had not been done in this case. Following plaintiff's conversation with Stafford, Stafford made some inquiries of plaintiff's supervisor and others regarding the injury. Stafford also reported the injury to the workers' compensation servicing agent.

On 29 January 2001, plaintiff returned to White Oak Family Physicians for follow-up care of his back pain. Plaintiff stated he was doing better and was no longer having pain during rest; however, he would hurt when he had been up and about for a very long time. Plaintiff also stated that the drive to the doctor's office had caused a slight flare up in the pain. Dr. Scott continued plaintiff's out-of-work status and prescribed Decadron.

Plaintiff was eventually referred to Randleman Medical Center by the defendant-employer, and was seen there on 30 January 2001, for his back pain. Plaintiff reported he had fallen off a ladder and that the pain had really started bothering him. Plaintiff was prescribed 200 mg of Celebrex.

On 1 February 2001, plaintiff returned to Randleman Medical Center for follow-up care of his back pain. An MRI was requested of plaintiff's lumbar spine and the MRI was approved by Stafford and defendant-appellant. On 7 February 2001, plaintiff had an MRI at Southeastern Radiology, which showed that he had degenerative disc disease at L4-L5 and L5-S1. The MRI also showed a dominant finding of a "large leftward disc protrusion/extrusion with moderate to marked neutral neural encroachment."

On 22 February 2001, plaintiff returned to Randleman Medical Center for a follow-up of his back pain. Plaintiff, stating that his back pain was still intense, was referred to Dr. Henry Poole at Microneurosurgical Specialist of Central Carolina.

On 13 March 2001, Dr. Randy O. Kritzer saw plaintiff at Microneurosurgical Specialist. Plaintiff was being evaluated for left

buttock, hip and leg pain with numbness and tingling. Plaintiff stated that he fell off a ladder at work. Dr. Kritzer noted that plaintiff's reflexes were absent at the knees, the right ankle, and the left ankle. Dr. Kritzer also noted that plaintiff had decreased sensation in the lateral aspect of the left foot. Dr. Kritzer reviewed the MRI scan, which showed a very large disc herniation at L5-S1 on the left. Dr. Kritzer scheduled surgery for later in the month in the event that plaintiff was not improving. On 29 March 2001, plaintiff returned to Dr. Kritzer, electing to proceed with surgery.

On 6 April 2001, plaintiff underwent a lumbar microdiskectomy performed by Drs. Kritzer and Poole. On 9 May 2001, three weeks following surgery, plaintiff was seen at Microneurosurgical Specialist by Dr. Kritzer. Dr. Kritzer noted that plaintiff was doing well and that most of his pre-operative pain had resolved. Plaintiff stated that he was walking a few miles daily without difficulty. Dr. Kritzer stated that he would see plaintiff back in three weeks, and hopefully release him to return to work at that time.

On 6 June 2001, plaintiff complained to Dr. Kritzer that his pains were worsening again. Dr. Kritzer recommended an MRI scan. On 7 June 2001, plaintiff returned to Dr. Kritzer to follow-up on the lumbar scan. Dr. Kritzer stated that his latest scan showed excellent disk removal and no evidence of neural compression. Dr. Kritzer recommended two epidural steroid shots.

On 25 July 2001, plaintiff returned to Dr. Kritzer after receiving two epidural steroid shots, which did not provide any relief. Dr. Kritzer recommended Elavil and planned to see plaintiff back in a month. On 27 August 2001, plaintiff returned to Dr. Kritzer without receiving much relief after taking the Elavil. Dr. Kritzer stated that plaintiff had reached maximum medical improvement, and he would return plaintiff to work in approximately ten days with some lifting limitations and that he would see him in the future on an as-needed basis. During his deposition, Dr. Kritzer indicated he assigned plaintiff an eleven percent (11%) permanent partial disability rating to his back.

On 13 December 2001, plaintiff was presented to Johnson Neurological Clinic by referral from Dr. Scott to be evaluated by Dr. Victor D. Freund. Plaintiff stated that he had done well for roughly one month following the surgery and then had a recurrence of symptoms. Plaintiff also stated that his leg pain had worsened progressively despite having a repeat MRI scan in June 2001, which showed

no recurrent disc herniation; however, there was significant epidural scarring. After reviewing the MRI scans, previous medical history and conducting a physical examination, according to his medical notations, Dr. Freund could see no need for further neurosurgical intervention. Dr. Freund noted that the best option for improvement of living with the symptoms would be treatment through a chronic pain clinic.

This matter came for hearing before a deputy commissioner, and by order filed 30 August 2002, plaintiff's claim for benefits was denied. The deputy commissioner found that plaintiff continued to perform his normal job duties after the 1 October 2000 incident and failed to report any alleged back injury to his supervisors, coworkers, or the human resources manager; plaintiff did not seek medical treatment until three and one-half months after the alleged accident; and plaintiff's claim to Dr. Kritzer, that he suffered back and leg pain since 1 October 2000, was not corroborated by the other credible evidence. Based upon all of these facts, the deputy commissioner found that plaintiff suffered no back injury as a result of the 1 October 2000 fall and denied his claim for benefits. Plaintiff appealed to the Full Commission.

On review, the Full Commission, like the deputy commissioner, found that plaintiff did not immediately seek medical attention after the 1 October 2000 incident and that he continued to perform his normal job duties. The Full Commission, however, found that during this time plaintiff suffered increasing pain in his hip, leg, and foot. The Full Commission then concluded that plaintiff's testimony was credible and that he suffered a compensable injury by accident on 1 October 2000. The Full Commission reversed the opinion and award of the deputy commissioner and granted plaintiff's claim for benefits.

The issues on appeal are whether: (I) the decision of the Full Commission should be reversed because there was insufficient evidence of causation; and (II) plaintiff presented sufficient evidence to prove ongoing disability.

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). In reviewing a workers'

compensation claim, our Court "does not have the right to weigh the evidence and decide the issue on the basis of weight. The Court's duty goes no further than to determine whether the record contains any evidence tending to support the finding[s]." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). 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, defendants argue that the decision of the Full Commission should be reversed because there did not exist any competent evidence to support the conclusion that plaintiff's injury was caused by his employment. Specifically, defendants seek to undermine plaintiff's evidence by: (1) arguing that Dr. Kritzer did not testify to a reasonable degree of medical certainty, and (2) suggesting that the evidence merely establishes that plaintiff's condition is possibly related to his work injuries and is speculative at best.

The claimant in a workers' compensation case bears the burden of initially proving "each and every element of compensability," including a causal relationship between the injury and his employment. *Whitfield v. Lab. Corp. of Amer.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003). "The quantum and quality of the evidence required to establish prima facie the causal relationship will of course vary with the complexity of the injury itself." *Hodgin v. Hodgin*, 159 N.C. App. 635, 639, 583 S.E.2d 362, 365 (2003). Plaintiff must prove causation by a "greater weight" of the evidence or a "preponderance" of the evidence. *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541, 463 S.E.2d 259, 261 (1995). Our Supreme Court has also held that in cases involving complicated medical questions, those questions must be addressed by an expert and only an expert can give competent opinion testimony as to the issue of causation. *Click v. Pilot Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980).[1] Where, as here, medical opinion testimony is required, "medical certainty is not required, [but] an expert's 'speculation' is insufficient to establish

1. "[C]ases involving . . . ruptured discs . . . remain 'the anathema of the orthopedic and neurosurgeon,' not only because of the difficulties of treatment but also because '[i]t is . . . extremely difficult at times to sort out the complaints due to injury from those of nontraumatic origin.' " *Click*, 300 N.C. at 168, 265 S.E.2d at 391 (quoting Brooke, *In the Wake of Trauma* 124, 132 (2nd Ed. 1974)).

causation." *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003).[2] The opinion of a physician is not rendered incompetent merely because it is based wholly or in part on statements made to him by the patient in the course of treatment or examination. *Penland v. Bird Coal Co., Inc.*, 246 N.C. 26, 31, 97 S.E.2d 432, 436 (1957).

It is permissible, but not compulsory for a fact-finder to infer causation where a medical expert offers a qualified opinion as to causation, along with an accepted medical explanation as to how such a condition occurs, and where there is additional evidence tending to establish a causal nexus. *Johnson v. Piggly Wiggly of Pinetops, Inc.*, 156 N.C. App. 42, 52, 575 S.E.2d 797, 804 (2003).

"[The Supreme] Court has allowed 'could' or 'might' expert testimony as probative and competent evidence to prove causation." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000). However, " 'could' or 'might' expert testimony [is] insufficient to support a causal connection when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." *Id.* (citing *Maharias v. Weathers Bros. Moving & Storage Co.*, 257 N.C. 767, 767-68, 127 S.E.2d 548, 549 (1962)). An expert witness' testimony is insufficient to establish causation where the expert witness is unable to express an opinion to "any degree of medical certainty" as to the cause of an illness. *Id.* Likewise, where an expert witness expressly bases his opinion as to causation of a complex medical condition solely on the maxim *post hoc ergo propter hoc* (after it, therefore because of it), the witness provides insufficient evidence of causation. *Id.* at 232-233; 538 S.E.2d at 916.

In *Holley*, our Supreme Court discussed expert testimony which it found insufficient to establish causation because such testimony suggested "that a causal connection between plaintiff's accident and her [injury] was possible, but unlikely." *Holley*, at 233-34, 581 S.E.2d at 753-54. *Holley* involved an employee who felt a sudden pain in her left calf after twisting her leg at work. She was subsequently diagnosed with a pulled calf muscle. *Id.* Approximately six weeks later, the employee developed a painful, swollen leg. She was diagnosed with deep vein thrombosis ("DVT"), a condition caused by a blood clot in a deep vein that obstructed blood flow and caused inflammation. *Id.* at 233, 581 S.E.2d at 751. The issue presented to the Court

2. Moreover, the causal relationship must be established by evidence "such as to take the case out of the realm of conjecture and remote possibility." *Holley*, 357 N.C. at 232, 581 S.E.2d at 753.

was the sufficiency of the evidence regarding the cause of the employee's DVT. *Id.* Although two physicians testified that it was possible that her DVT was caused by her earlier accident, neither physician could testify to a reasonable degree of medical certainty that a plaintiff's injury had been caused by an accident at work. *Id.* One doctor testified that he thought there was a "low possibility" that the plaintiff's injury had been caused by the accident at work, that the plaintiff could have been developing the problem prior to the incident at work, and that, given plaintiff's medical history, the cause of the plaintiff's injuries was "just a galaxy of possibilities." *Id.* The other doctor stated the following on cross-examination: "I don't really know what caused the [injury]." *Id.* Given this equivocal expert testimony and evidence that plaintiff's medical history made her susceptible to developing DVT in the absence of the accident at work, the Court concluded that causation had not been established. *Id.*

Following *Holley*, this Court decided the case of *Hodgin*, which involved a carpet layer who alleged that he suffered a paraesophageal hernia as a direct result of lifting an unusually heavy chest of drawers while at work. *Hodgin*, 159 N.C. App. at 636, 583 S.E.2d at 363. There was evidence before the Commission that plaintiff had experienced possible symptoms before the incident at work. *Id.* One physician testified that the episode at work "could have been related to the plaintiff-employee's paraesophageal hernia," but noted that paraesophageal hernias can be asymptomatic for extended periods and chest pains are only symptomatic of the condition. *Id.* at 641, 583 S.E.2d at 366. Another doctor testified that paraesophageal hernias can be asymptomatic for some time such that there was no way of knowing exactly when the plaintiff-employee's paraesophageal hernia appeared without X-rays taken before and after the appearance of symptoms. *Id.* at 642, 583 S.E.2d at 366-67. Because the medical testimony before the Commission tended to establish that a paraesphogeal hernia is difficult to diagnose, that it was possible that plaintiff already had such a condition and that, at best, plaintiff's hernia *could possibly have been caused* by the incident at work, we reversed the Commission's award on the ground that causation was lacking. *Id.* at 642, 583 S.E.2d at 367. In reaching this decision, we observed that, while speculation may play an important role in patient diagnosis, it is not alone sufficient to establish legal causation: "Our Supreme Court has recognized that although physicians "are trained not to rule out medical possibilities no matter how remote[,] . . . mere possibility has never been legally competent to

prove causation." *Id.* at 640, 583 S.E.2d at 366 (quoting *Holley*, 357 N.C. at 233, 581 S.E.2d at 751).

In the instant case, the only medical deposition testimony offered into evidence was the testimony of Dr. Kritzer taken on 7 March 2002. Dr. Kritzer's deposition transcript on direct examination reads in pertinent part:

> Q. Now, Dr. Kritzer, did you have an occasion to treat [plaintiff]?
>
> A. Yes, I did.
>
> Q. And did you see [plaintiff] for the first time on March the 13th, 2001?
>
> A. I did.
>
> Q. And did you take a history from [plaintiff] at that time?
>
> A. I did.
>
> Q. And what history did you take from him, sir?
>
> A. He reported falling off a ladder at work approximately six months prior to that, to the date given, was around October 1st of 2000. Fell off a ladder at work and hurting his back at that time.
>
> Q. And what were his subjective complaints during that visit?
>
> A. Pain in his left buttock, hip, and leg, with numbness and tingling.
>
> Q. Okay. And did he bring an MRI with him [to] you or an MRI report with him?
>
> A. Yes, he did.
>
> Q. Okay. Did you have an opportunity to review that MRI report?
>
> A. Yes.
>
> Q. And what were your—
>
> A. I didn't review the report, I reviewed the films.
>
> Q. Okay. And what were your—
>
> A. And it showed a large disk herniation at L5-S1 on his left side.

Q. Okay. And would that L5-S1 disk herniation be consistent wit the leg numbness and complaints that [plaintiff] presented to you on March 13th, 2001?

A. Yes—yes, it would be.

Q. And just as a general background, what type of symptoms manifest themselves from an L5-S1 disk herniation?

A. Pain in the buttock, hip, and leg, with numbness and tingling, just like [plaintiff] had.

Q. Now, in your treatment of [plaintiff] would it be important to your treatment that before falling off the ladder on October 1st, 200[0] he didn't have any back or leg pain?

. . .

A. Yes, it would be important that he did not have a previous history.

Q. And would it be significant to your treatment that after October 1st, 2000 that [plaintiff] did start complaining of leg and hip numbness and tingling and pain and discomfort?

A. Yes.

Q. Now, Dr. Kritzer, if the Industrial Commission were to find that [plaintiff] fell off a ladder on October 1st, 2000 and landed on his back, do you have an opinion whether that incident caused his disk herniation at L5-S1?

. . .

[Dr. Kritzer]: The—all you can say is that his symptoms started then, and that's really the main issue, temporally speaking. And he don't have to fall [off] a ladder to rupture a disk. People can do it in their sleep, can do it emptying a dishwasher. It does not have to be some sort of big event. But if he was asymptomatic before he fell off and then developed symptoms after he fell off, then **I would certainly believe that the falling off the ladder was the cause of his difficulty**.

(emphasis added).

Dr. Kritzer's deposition transcript on cross-examination reads in pertinent part:

Q. . . .Would you expect pain to occur at the time of a disk herniation?

A. No, do not have to.

Q. Okay. What about some of symptoms, radicular pain, radicular symptoms—

A. Not necessarily. When someone comes in and they have a ruptured disk and they say they've had a problem for three weeks, that doesn't mean that three weeks earlier from that date is when that disk came popping out. You can have a disk rupture—I always kind of make the analogy of walking around with a knife in your pocket, okay. I can have a knife in my pocket and not have any problems from it, but if somehow I twisted or banged into a wall or fell down and that knife stabs me, then I start to have difficulty. So you cannot necessarily equate the weight of symptoms with the exact date of herniation . . . .

Q. Okay. If you'll assume for a moment—can coughing and sneezing cause a herniated disk?

A. It can.

Q. Can everyday activities cause a herniated disk?

A. Yes.

Q. Have you seen cases in which you cannot point to a specific traumatic event as the cause of a herniated disk?

A. Yes, very many.

Q. Your opinion you stated regarding causation was based upon the temporal nature of the complaint and the fall?

A. Yes.

Q. His history he gave to you was that he had these pain[s] and symptoms after he fell, correct?

A. Correct.

Q. Was it your understanding that he had it immediately after he fell?

A. Well, he said he had it minor for about two or three months and then it started to get a lot worse. That was the original history that he gave me.

Q. Okay.

A. But he did have some difficulty immediately after [the fall].

. . .

Q. I'm sorry. If you'll assume for a moment that in October—and again just assume that the Commission finds these facts.

A. Okay.

Q. That in October of 2000 [plaintiff] slipped from a low rung of a ladder and scraped his arms; that he did not complain of any symptoms in his back, no pain or radiculopathy, continued working for three and half months in his normal job, during which he never asked to see a doctor, never told his supervisors that he was having any problems with his back; the first time he saw a doctor was in mid-January of 2001, three and half months after the fall from the low rung on the ladder, at which time he was sneezing and coughing because he was sick.

If you'll assume those facts, would you [be] able to tell us, to a reasonable degree of medical certainty, that falling a couple of feet from the ladder caused the herniated disk?

A. No, I would not be able to say that with reasonable medical certainty.

Q. Okay. And I guess the opinion you gave previously was based upon the temporal nature of the pain and the fall?

A. That's correct.

Dr. Kritzer's deposition transcript on redirect reads in pertinent part:

Q. Now, Doctor, just one or two follow-up questions. Was there any indication in your treatment of [plaintiff] that sneezing or coughing or everyday activities caused his disk herniation at L5-S1?

A. No.

Q. And would it be significant as well that after October 1st, 2000, [plaintiff] complained of problems going down his leg into his feet?

A. I'm sorry, repeat that question.

Q. Excuse me. Would it be significant that after his fall on October 1st, 2000 that [plaintiff] complained of having problems going down his leg and into his feet?

. . .

A. [Dr. Kritzer]: That would be significant.

. . .

Q. Your opinion on causation is based upon the history given to you in this case, correct?

A. Correct.

The record shows that plaintiff complained of pain in his left hip and leg, and numbness and tingling in his feet—which evidence is consistent with the testimony of Dr. Kritzer that a left herniation would cause problems on the left side down into the legs. The medical records in evidence objectively verify a disk herniation, based an MRI scan as of 7 February 2001. In addition, Dr. Kritzer testified he relied on the medical records in rendering his decision. *See* N.C.G.S. § 8C-1, Rule 703 (2003) ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.").

In the instant case, the evidence was sufficient to allow the Commission to determine that the accident at work caused plaintiff's injury. Although Dr. Kritzer testified that he could not opine to a reasonable degree of medical certainty whether the fall from the ladder caused plaintiff's back injury, testimony attesting "medical certainty is not required." *Holley*, 357 N.C. at 234, 581 S.E.2d at 754. Dr. Kritzer also testified that "if [plaintiff] was asymptomatic before he fell off and then developed symptoms after he fell off, then I would certainly believe that the falling off the ladder was the cause of his difficulty." The doctor further testified that the development with plaintiff's symptoms was consistent with the injury occurring from the fall and that, although a disc herniation can be caused by everyday activities, he had no indication that everyday activities caused plaintiff's disc herniation. This testimony, combined with the additional evidence in the case, including the history and medical testimony, provided competent record evidence which supports the Commission's finding with respect to causation.

The fact that the treating physician in this case could not state with reasonable medical certainty that plaintiff's accident caused his disability, is not dispositive—the degree of the doctor's certainty goes to the weight of his testimony. *Martin v. Martin Brothers Grading*, 158 N.C. App. 503, 507-08, 581 S.E.2d 85, 88 (2003). The decision concerning what weight to give expert evidence is a duty for the Commission and not this Court. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414. The dissent's suggestion that we consider the "greater weight" of the evidence is a suggestion that this Court adopt the duty of weighing the evidence. As compelled by statute, weighing of the evidence is not our function. *See* N.C.G.S. § 97-86 (2003) ("The award of the Industrial Commission . . . shall be conclusive and binding as to all questions of fact"); *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 530 S.E.2d 549 (2000) ("[I]f the commission's conclusions are otherwise supported by competent evidence, the [C]ourt may not scrutinize the commission's reasons for believing a witness while engaged in its fact-finding role and overturn its decision on the basis of those reasons."). Since there exists competent evidence that plaintiff's work injury proximately caused his disability, this assignment of error is overruled.

II

[2] Second, defendants argue that there existed insufficient evidence to prove ongoing disability.

Disability under the Workers' Compensation Act is defined 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." N.C.G.S. § 97-2(9) (2003). The burden of proving the extent and degree of disability lies with the plaintiff. *Simmons v. Kroger Co.*, 117 N.C. App. 440, 442, 451 S.E.2d 12, 14 (1994). The plaintiff may meet this burden 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.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993); *see also Simmons*, 117 N.C. App. at 442-43, 451 S.E.2d at 14. Once the plaintiff establishes disability, there is a presumption that the disability continues until he returns to work at wages equal to those he was receiving at the time of his injury. *Simmons*, 117 N.C. App. at 443, 451 S.E.2d at 14.

In the instant case, plaintiff testified that he was released from Dr. Kritzer's care with a permanent partial disability rating of eleven percent (11%) as to his back, and a lifting restriction of fifty pounds. At the time plaintiff was released to return to work, defendant-employer had terminated his position. Moreover, defendant-employer never offered plaintiff any light duty work or vocational rehabilitation assistance.

From the evidence presented, it appears plaintiff was still currently disabled as he had not yet regained his pre-injury wage capacity. *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994) ("[a]n employee's release to return to work is not the equivalent of a finding that the employee is able to earn the same wage earned prior to the injury"). Plaintiff had worked as a truck loader for several years and has few transferable skills and limited education; defendants have not shown suitable employment opportunities are available to plaintiff; and plaintiff testified that he searched for employment but was unsuccessful. *See Foster v. U.S. Airways, Inc.*, 149 N.C. App. 913, 918, 563 S.E.2d 235, 239 (stating an employer may rebut the presumption of ongoing disability "by showing that suitable jobs are available, taking into consideration the employee's physical and vocational limitations, and taking into consideration whether the employee is capable of obtaining a suitable job"), *disc. review denied*, 356 N.C. 299, 570 S.E.2d 505 (2002). Based on evidence that plaintiff has not yet returned to pre-injury wages, nor has he refused suitable employment, this assignment of error is overruled.

Affirmed.

Judge LEVINSON concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion holds that Dr. Kritzer's testimony sufficiently established causation to affirm the Commission's award. I respectfully dissent.

"Plaintiff has the burden to prove each element of compensability." *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003) (citing *Harvey v. Raleigh Police Dep't*, 96 N.C. App. 28, 35, 384 S.E.2d 549, 553, *disc. rev. denied*, 325 N.C. 706, 388 S.E.2d 454 (1989); *Taylor v. Twin City Club*, 260 N.C. 435, 437, 132 S.E.2d 865, 867 (1963)). "[T]he plaintiff must prove that the accident was a causal factor by a 'preponderance of the evidence.' " *Holley*, 357 N.C. at 232, 581 S.E.2d at 752 (quoting *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158-59, 357 S.E.2d 683, 685 (1987), and citing 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 41, at 137 (5th ed. 1998)). With injuries involving complex medical questions:

> "only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). "The evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation." *Gilmore v. Hoke Cty. Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942) . . . .

Holley, 357 N.C. at 232, 581 S.E.2d at 753.

In *Holley*, our Supreme Court clarified the employee's burden and the required standard of proof to establish causation and stated, "[a]lthough expert testimony as to the *possible* cause of a medical condition is admissible if helpful to the jury, it is insufficient to prove causation, particularly 'when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation.' " 357 N.C. at 233, 581 S.E.2d at 753 (quoting *Young*, 353 N.C. at 233, 538 S.E.2d at 916) (internal citation omitted). In reversing this Court's majority opinion, which had affirmed the Commission's finding of compensability, our Supreme Court held, "the entirety of causation evidence before the Commission failed to meet the reason-

able degree of medical certainty standard necessary to establish a causal link between plaintiff's . . . injury and her [disease]." *Holley*, 357 N.C. at 234, 581 S.E.2d at 754.

Here, Dr. Kritzer was the *only* medical expert whose testimony was considered by the Commission. He testified that plaintiff's injury could have been caused by "emptying a dishwasher," "in [his] sleep," or "coughing and sneezing." Dr. Kritzer also stated he could not testify to a "reasonable degree of medical certainty" that plaintiff's "falling a couple of feet from the ladder caused the herniated disk." Further, Dr. Kritzer did not review "any previous medical history" from plaintiff, other than plaintiff's "account" of the accident and an MRI film. Dr. Kritzer's only basis for causation was admittedly based on "the temporal nature of the pain and the fall." The "entirety of causation evidence" fails to establish plaintiff's fall off the ladder caused his back injury. *Id.*

Dr. Kritzer's deposition and testimony show that numerous possible causes of plaintiff's injury exist. His opinion regarding the cause of plaintiff's injury was based on the "history" given to him regarding plaintiff's injury and the "temporal nature of the complaint and the fall." Although Dr. Kritzer's testimony may be admissible, it was based on "mere speculation" and is "insufficient to prove causation." *Id.* at 233, 581 S.E.2d at 753.

To support its holding that plaintiff presented sufficient evidence regarding causation, the majority's opinion relies in part on *Johnson v. Piggly Wiggly of Pinetops, Inc.*, 156 N.C. App. 42, 575 S.E.2d 797 (2003), which was decided by this Court prior to the Supreme Court's decision in *Holley*. Further, this Court's majority opinion in *Holley v. ACTS, Inc.*, relied on *Johnson* and was reversed by our Supreme Court. *See Holley v. ACTS, Inc.*, 152 N.C. App. 369, 567 S.E.2d 457 (2002), *rev'd*, 357 N.C. 228, 581 S.E.2d 750 (2003). Reliance on this case as precedential authority was rejected by the Supreme Court in *Holley* and the majority's opinion fails to apply the proper standard. *Id.* We are bound by the decisions of our Supreme Court. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (noting the Court of Appeals is bound by decisions of the Supreme Court).

Even accepting the majority's interpretation of *Holley* that expert testimony to a "reasonable degree of medical certainty" is not required to prove causation, *no* competent evidence exists to support the Commission's finding that "plaintiff's [injury] was causally related to his October 1, 2000[,] fall from the ladder." Dr. Kritzer, the sole

expert, testified to numerous possible causes of plaintiff's injury. Dr. Kritzer's opinion, based solely on temporal proximity and "plaintiff's account," does not constitute competent evidence of causation. His opinion is speculation and conjecture, which *we all agree* is insufficient under *Holley*. 357 N.C. at 232, 581 S.E.2d at 752.

Without competent evidence to support a finding of fact to prove the required element of causation, the Commission's conclusion of law that "Plaintiff suffered a compensable injury" cannot be supported. The Opinion and Award should be reversed. I respectfully dissent.

STATE OF NORTH CAROLINA v. ELI ALVAREZ

No. COA04-521

(Filed 15 February 2005)

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

A short-form indictment used to charge defendant with first-degree murder is constitutional.

2. Jury— peremptory challenges—*Batson* challenge—race-neutral reasons

The trial court did not err in a double first-degree murder, first-degree kidnapping, and robbery with a firearm case by denying defendant's *Batson* challenge to the State's exercise of a peremptory challenge to remove a prospective African-American juror, because sufficient race-neutral reasons for the State's challenge to the prospective juror were presented to comply with *Batson* including that: (1) the prospective juror's responses on the death penalty questionnaire were weak; (2) she admitted she might develop sympathy toward defendant; and (3) she made a misrepresentation on her juror questionnaire.

3. Identification of Defendants— photographic identification—discrepancies

The trial court did not err in a double first-degree murder, first-degree kidnapping, and robbery with a firearm case by denying defendant's motion to suppress a photographic identification,

because: (1) although defendant argues several instances that question the validity of the witness's identification, her interaction with defendant both on 10 February 2001 and 11 February 2001 supports her identification; (2) the witness was in the driver's seat of the pertinent car when defendant yelled at her to open the door, banged on the window, and shot out the driver's side window; and (3) the discrepancies cited by defendant do not render the identification impermissible, but are for the jury to weigh and consider in determining the witness's credibility.

4. Evidence— prior crimes or bad acts—robberies

The trial court did not abuse its discretion in a double first-degree murder, first-degree kidnapping, and robbery with a firearm case by denying defendant's motion to suppress evidence of prior robberies, because: (1) the robberies were sufficiently similar in how they were committed and occurred within weeks of each other; (2) the State proffered testimony that the robberies were all part of a common scheme or plan toward a drug transaction with a Connecticut gang; and (3) prior to the introduction of testimony concerning the robberies, the trial court cautioned and instructed the jury to consider the evidence only for the limited purpose of showing an alleged common scheme, and the trial court again provided this limiting instruction when it charged the jury prior to deliberations.

5. Evidence— limitation on cross-examination—coparticipant's pending charges

The trial court did not abuse its discretion in a double first-degree murder, first-degree kidnapping, and robbery with a firearm case by allegedly limiting the cross-examination of defendant's coparticipant concerning pending charges against him, because: (1) the only instances where the trial court sustained the State's objections during defendant's cross-examination occurred after defendant had asked the witness about third-party statements offered for the truth of the matter asserted; (2) other testimony was admitted regarding the witness's penal interest in defendant's case; (3) the jury instructions specifically pointed to the potential bias concerning the witness's testimony against defendant; and (4) the record did not disclose any voir dire or offers of proof submitted by defendant's counsel following the trial court sustaining the State's hearsay objections of what the witness's answers would have been.

6. Constitutional Law— effective assistance of counsel— alleged concession of guilt

Defendant was not denied effective assistance of counsel in a double first-degree murder, first-degree kidnapping, and robbery with a firearm case based on his counsel allegedly conceding defendant's guilt twice during the closing argument to the jury, because: (1) taken in context with counsel's closing argument that all events arose in a drug deal gone bad, the concession that defendant was the getaway driver related to an intended drug deal, not a murder, and was the crux of defendant's argument throughout trial; (2) the other pertinent comment that if the jury found defendant not guilty of going to the victim's residence to commit an armed robbery, "you will find him guilty of everything else or not guilty of everything else" merely spoke to the charges involved and the resulting practical implications rather than being a reference to or indication of defendant being guilty of the crimes charged; (3) neither attorney conceded defendant's guilt to the crimes charged or to any lesser-included offense; and (4) defendant failed to show that his counsels' performance was so deficient that they were not acting as counsel for defendant and that the deficiencies complained of deprived defendant of a fair trial.

7. Homicide— first-degree murder—failure to instruct on lesser-included offense of involuntary manslaughter

The trial court did not err in a double first-degree murder case by failing to provide a jury instruction on involuntary manslaughter because when a jury is properly instructed on the elements on first-degree murder and second-degree murder and thereafter returns a verdict of first-degree murder based on premeditation and deliberation like in the instant case, any error in the trial court's failure to instruct on involuntary manslaughter is harmless even if the evidence would have supported such an instruction.

Appeal by defendant from judgments entered 1 April 2003 by Judge Melzer A. Morgan, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 25 January 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General David Roy Blackwell, for the State.

Paul Pooley, for defendant-appellant.

TYSON, Judge.

Eli Alvarez ("defendant") appeals from judgments entered after a jury found him to be guilty of: (1) two counts of first-degree murder; (2) first-degree kidnapping; and (3) robbery with a firearm. We find no error.

I. Background

The State's evidence tended to show Robert E. Sanchez ("Sanchez"), Juan Suarez ("Suarez"), and defendant met in January 2001. Defendant and Sanchez were both members of the "Latin Kings," a Puerto Rican gang. Sanchez, Suarez, and defendant discussed various crimes they planned to commit. One possible crime involved robbing Jose Luis Vera ("Chepa"), a well-known drug dealer who dealt in large amounts of contraband. The three men obtained information that Chepa may live in an apartment complex located on Timlic Avenue in Winston-Salem, North Carolina. They traveled there on the night of 11 February 2001 to find him.

Defendant, Suarez, and Sanchez arrived at the apartment complex and observed a black Honda in the parking lot. Defendant "just flipped" and ran towards the car.

Gustavo Saguilan Ventura ("Gustavo"), Noe Silva ("Noe"), Felipa Ayona ("Felipa"), Noelina Ayona ("Noelina"), and Ader Gonzalez ("El Flocco") had planned to go to a dance club on the night of 11 February 2001. Felipa drove Gustavo, Noe, and Noelina in a black Honda to pick up El Flocco, who lived in an apartment on Timlic Avenue.

While Felipa, Gustavo, Noe, and Noelina waited for El Flocco in the parking lot, defendant, Sanchez, and Suarez attacked the car. One of the attackers "spoke Puerto Rican" and told them to get out of the car. He hit the driver's side window with a gun, but it did not break. He then aimed the gun at the window, fired the gun, and shattered the window. Felipa backed the Honda away from the men and drove to Chepa's house on Marne Street.

After Felipa drove the black Honda away from the scene, defendant ran towards El Flocco as he emerged from his apartment. Defendant held El Flocco at gunpoint while Suarez and Sanchez ransacked his apartment. After El Flocco told defendant where Chepa lived, the assailants forced El Flocco into their car and drove to Chepa's house.

Vincenta Marin Cruz ("Cruz") and her husband, Chepa, were present at their house on Marne Street the night of 11 February 2001, along with Bernarda Marin, her husband, Ignacio Clemente, and their two daughters. At approximately 9:00 p.m., Felipa, Ventura, Noe, and Noelina arrived at Chepa's house nervous and scared. They explained what occurred at El Flocco's apartment. Ignacio Clemente looked out the window and saw three men walking toward the house with El Flocco. Chepa told everyone to get in a back bedroom and call the police. Cruz gave Chepa an "AK-47 rifle" before he left the bedroom to confront the three men.

Defendant and Sanchez, both armed, led El Flocco up to Chepa's front door. Sanchez kicked in the door to find Chepa standing in the hallway holding the rifle. Sanchez dropped to the floor. Defendant, while using El Flocco as a human shield, fired multiple times hitting Chepa.

While in the bedroom, Ventura heard gunshots and Chepa cry out that he had been shot. Cruz called the police, then passed the phone to Felipa who provided the street address to the dispatcher.

After defendant shot Chepa, Sanchez grabbed Chepa's rifle and ran out of the house towards their car. Defendant led El Flocco through the house to the back door, then "emptied his clip" into El Flocco, killing him. Sanchez and Suarez had driven away and met with defendant later.

Winston-Salem Police Officers Livingstone and Branshaw both responded to a "shots fired call" on Marne Street shortly before 9:00 p.m. Officer Livingstone arrived at Chepa's home just after 9:00 p.m. Officer Branshaw was already on the scene. Officer Livingstone observed a black Honda with a shattered window parked near the street, and spent brass shell casings on the steps and front porch. He entered the living room through the open front door and saw Chepa's body lying in the hallway. Officer Branshaw informed Officer Livingstone that he found El Flocco's body near the back door. Cruz, Bernarda Marin, Ignacio Clemente, Marin and Clemente's two daughters, Felipa, Ventura, Noe, and Noelina remained at the scene. All appeared to be "traumatized." Both officers observed massive blood splatter on the kitchen floor and table.

Winston-Salem Police Detective Russell Lamar Barbee ("Detective Barbee") arrived on the scene at 10:30 p.m. He also observed Felipa's black Honda parked at the foot of the driveway with a shattered driver's side window. As he approached Chepa's house, he

observed several brass shell casings on the front sidewalk and the front porch. More brass shell casings were located just inside the front door. Inside, the wall dividing the living room from the kitchen bore several bullet holes sprayed randomly. The ceiling bore one bullet hole, and another bullet had penetrated a window.

Detective Barbee saw Chepa's body "literally covered in blood." He viewed blood splatter all over the floor and on the walls of the kitchen. Detective Barbee found a spent, deformed bullet laying on the concrete step at the back of the house, near El Flocco's body. The bullet was later identified to have been fired from defendant's gun.

On 12 February 2001, defendant was arrested for the murders of Chepa and El Flocco. The police seized his gun and ammunition that was later identified as the murder weapon. The Grand Jury returned true bills of indictment charging defendant with: (1) two counts of first-degree murder; (2) first-degree kidnapping; (3) robbery with a dangerous weapon; and (4) discharge of a dangerous weapon into occupied property. On 27 January 2003, the Grand Jury returned a superceding indictment in the first-degree murders.

Defendant was tried capitally by a jury at the 24 February 2003 Criminal Session in Forsyth County Superior Court. On 26 March 2003, the jury found defendant to be guilty of: (1) two counts of first-degree murder; (2) first-degree kidnapping; and (3) robbery with a firearm. The jury failed to reach an unanimous verdict on the discharge of a dangerous weapon into occupied property charge, and the State took a dismissal.

Following a capital sentencing hearing and after the jury did not recommend death, defendant was sentenced to two consecutive terms of life imprisonment without parole. Defendant appeals.

II. Issues

Defendant argues: (1) the short-form indictments are unconstitutional; (2) the trial court erred in: (a) denying defendant's objection to the State's peremptory challenge to strike a juror; (b) denying defendant's motion to suppress a photographic identification and evidence of prior robberies; (c) limiting defendant's cross-examination of a State's witness; and (d) not submitting the charge of involuntary manslaughter to the jury; and (3) defendant was denied his constitutional right to effective assistance of counsel.

III. Short-Form Indictments

[1] Defendant argues that the short-form murder indictment violated his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and under Article I, §§ 19, 22, and 23 of the North Carolina Constitution. We disagree.

"We have reviewed over fifty additional decisions in which this issue has been raised and rejected by our Supreme Court and this Court in the last three years. These decisions consistently hold that the short[-]form murder indictment is constitutional." *State v. Messick*, 159 N.C. App. 232, 238, 585 S.E.2d 392, 396 (2003), *per curiam aff'd*, 358 N.C. 145, 593 S.E.2d 583 (2004). This assignment of error is summarily dismissed.

IV. Peremptory Challenge

[2] Defendant argues the trial court erred in denying his *Batson* challenge to the State's exercising of a peremptory challenge to remove a prospective African-American juror. We disagree.

Our Supreme Court recently addressed *Batson's* application in *State v. Williams.*

> "The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution prohibit a prosecutor from peremptorily excusing a prospective juror solely on the basis of his or her race. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986); *State v. Floyd*, 343 N.C. 101, 106, 468 S.E.2d 46, 50, *cert. denied*, [519] U.S. [896], 136 L. Ed. 2d 170 (1996). A three-step process has been established for evaluating claims of racial discrimination in the prosecution's use of peremptory challenges. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405, 111 S. Ct. 1859 (1991). First, defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race. *Id.* Second, if such a showing is made, the burden shifts to the prosecutor to offer a race-neutral explanation to rebut defendant's *prima facie* case. *Id.* Third, the trial court must determine whether the defendant has proven purposeful discrimination. *Id.*"

355 N.C. 501, 550, 565 S.E.2d 609, 638-39 (2002) (quoting *State v. Lemons*, 348 N.C. 335, 360-61, 501 S.E.2d 309, 324-25 (1998), *sentence*

vacated on other grounds, 527 U.S. 1018, 144 L. Ed. 2d 768 (1999)), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

Here, defendant argues the State's peremptory challenge of a prospective African-American juror was based solely on race. Defendant offered the following evidence to support his *prima facie* case of discrimination: (1) seventy-five percent of prospective African-American jurors were excused; (2) the prospective juror rejected was not distinguishable from a white juror the State selected earlier; and (3) the prospective juror supplied good, "middle of the road" answers on her questionnaire.

The State offered the following race-neutral explanations for its challenge to the prospective juror: (1) her responses on the death penalty questionnaire "were weak;" (2) she admitted that she might develop sympathy towards defendant; and (3) she made a misrepresentation on her juror questionnaire.

Defendant responded to the State's three race-neutral reasons by arguing those reasons were insufficient to distinguish this prospective juror from others the State had selected. First, the juror's hesitancy towards use of the death penalty is a common answer and is "exactly what the law is." Second, although she admitted that she might feel sympathy for defendant, "she was very adamant about . . . being able to set that aside." Third, the State selected a "white, male, twenty-seven-year-old, unemployed, ninth grade dropout" who did not fit the "conservative, employed, educated, members of the community" demographic the State supposedly sought from the jury pool.

The trial court ruled, "there has been no purposeful discrimination proven [and] the explanations given were not pretextual."

The *Williams* Court noted that once the prosecutor offers race-neutral explanations for the peremptory challenges, " 'the only issue for [the appellate court] to determine is whether the trial court correctly concluded that the prosecutor had not intentionally discriminated.' " 355 N.C. at 551, 565 S.E.2d at 638-39 (quoting *Lemons*, 348 N.C. at 361, 501 S.E.2d at 325). As " 'the trial court is in the best position to assess the prosecutor's credibility, we will not overturn its determination absent clear error.' " *Williams*, 355 N.C. at 551, 565 S.E.2d at 638-39 (quoting *Lemons*, 348 N.C. at 361, 501 S.E.2d at 325 (citation omitted)).

Defendant has failed to show "clear error" in the trial court's overruling of defendant's objection. Sufficient race-neutral reasons

for the State's challenge to the prospective juror were presented to comply with *Batson*. This assignment of error is overruled.

V. Motions to Suppress

[3] Defendant contends the trial court erred in denying his motions to suppress: (1) a photographic identification; and (2) evidence of prior robberies. We disagree

A. Photographic Identification

Our Supreme Court addressed this issue in *State v. Rogers*, where it recognized that determining "[w]hether an identification procedure is unduly suggestive depends on the totality of the circumstances." 355 N.C. 420, 432, 562 S.E.2d 859, 868 (2002) (citing *State v. Pigott*, 320 N.C. 96, 99, 357 S.E.2d 631, 633 (1987)). " 'First, the Court must determine whether the identification procedures were impermissibly suggestive . . . . If so, the Court must then determine whether the [suggestive] procedures created a substantial likelihood of irreparable misidentification.' " *Rogers*, 355 N.C. at 432, 562 S.E.2d at 868 (quoting *State v. Fowler*, 353 N.C. 599, 617, 548 S.E.2d 684, 698 (2001), *cert. denied*, 535 U.S. 939, 152 L. Ed. 2d 230 (2002)) (alteration in original). Our standard of review is to determine whether competent evidence supports the trial court's findings of fact. *Rogers*, 355 N.C. at 433, 562 S.E.2d at 869 (citing *Fowler*, 353 N.C. at 618, 548 S.E.2d at 698).

1. Impermissible Suggestiveness

In *Rogers*, our Supreme Court considered the factors in analyzing whether a photographic identification was impermissibly suggestive, including: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty shown by the witness; and (5) the time between the offense and the identification. 355 N.C. at 432, 562 S.E.2d at 868; *see Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 154 (1977).

Here, Felipa identified defendant based on: (1) seeing defendant and recognizing his voice during the attack on the black Honda at El Flocco's apartment; and (2) seeing and hearing defendant at a bar the night before the shooting. Felipa did not see any of the three individuals as they arrived at Chepa's house.

Defendant argues that despite Felipa's recognition of defendant, her photo identification in January 2003 was impermissibly sugges-

tive because: (1) Felipa failed to identify defendant from a similar line-up ten days after the crime; (2) Felipa saw a photo of defendant in a newspaper article discussing the case in February 2001; (3) Felipa saw defendant in court at a bond hearing in May 2002; and (4) Felipa was not completely certain about identifying defendant's photo in January 2003.

Under our standard of review, we hold that competent evidence exists to justify the trial court's denial of defendant's motion to suppress the photographic identification. *See Rogers*, 355 N.C. at 432, 562 S.E.2d at 868 (citing *Fowler*, 353 N.C. at 618, 548 S.E.2d at 698). Although defendant argues several instances that question the validity of Felipa's identification, Felipa's interaction with defendant both on 10 February 2001 and 11 February 2001 supports her identification. She was in the driver's seat of the black Honda when defendant yelled at her to open the door, banged on the window, and shot out the driver's side window. The trial court correctly noted that discrepancies cited by defendant do not render Felipa's identification inadmissible, but are for the jury to weigh and consider in determining Felipa's credibility. This assignment of error is overruled.

B. Other Crimes

[4] Defendant argues the trial court's admission of evidence of other crimes was prejudicial error and requires a new trial. We disagree.

Rule 404(b) of the North Carolina Rules of Evidence states in part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). The admissibility of 404(b) evidence is "subject to the weighing of probative value versus unfair prejudice mandated by Rule 403." *State v. Agee*, 326 N.C. 542, 549, 391 S.E.2d 171, 175 (1990) (citing *United States v. Montes-Cardenas*, 746 F.2d 771, 780 (11th Cir. 1984)); N.C. Gen. Stat. § 8C-1, Rule 403 (2003) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of unfair delay, waste of time, or needless presentation of cumulative

evidence."). Rule 404(b) is a rule of inclusion, not exclusion. *Agee*, 326 N.C. at 550, 391 S.E.2d at 175 (citation omitted).

The balancing of these factors lies "within 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)), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001). "[S]uch [404(b)] evidence is relevant and admissible so long as the incidents are sufficiently similar and not too remote." *State v. Blackwell*, 133 N.C. App. 31, 35, 514 S.E.2d 116, 119 (citing *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247-48 (1987)), *cert. denied*, 350 N.C. 595, 537 S.E.2d 483 (1999); *see also State v. Smith*, 152 N.C. App. 514, 527, 568 S.E.2d 289 ("The use of evidence permitted under Rule 404(b) is guided by two constraints: similarity and temporal proximity.") (citation omitted), *cert. denied*, 356 N.C. 623, 575 S.E.2d 757 (2002).

The State offered evidence concerning the robberies by defendant of Severo Peralta, Marchello Young, and Toledo Leopoldo. All three robberies occurred immediately prior to 11 February 2001, satisfying temporal proximity. Each of the robberies was committed: (1) by Sanchez, Suarez, and defendant; (2) at gunpoint; (3) for money, jewelry, and/or drugs; (4) after the three men discussed robbing individuals to finance their drug trafficking operation involving a gang in Connecticut; and (5) based upon an agreement to divide the loot. The robberies involved Hispanic drug dealers and show a particular *modus operandi* of defendant, Suarez, and Sanchez. Finally, the robberies were interrelated with the murders and kidnapping under a common scheme and purpose.

"Evidence of other crimes or acts" committed by defendant may be admissible under Rule 404(b) if they establish a chain of circumstances or help create a context of the charged crime. *Agee*, 326 N.C. at 548, 391 S.E.2d at 174 (citation omitted). The evidence must enhance the natural development of the facts or be necessary to complete the story of the crime at issue for the jury. *Id.*

Our review of the record and transcript indicate the trial court did not err in permitting the admission of the three robberies. Each was sufficiently similar in how they were committed and occurred within weeks of one another. In addition, the State proffered testimony that

the robberies were all part of a common scheme or plan towards a drug transaction with a Connecticut gang.

We further recognize that prior to the introduction of testimony concerning the robberies, the trial court cautioned and instructed the jury to consider the evidence only for the limited purposes of showing "an alleged common scheme." The trial court again provided this limiting instruction when it charged the jury prior to deliberations.

Defendant has failed to show the trial court abused its discretion in admitting the evidence of the prior robberies. This assignment of error is overruled.

VI. Limitation of a Cross-Examination

[5] Defendant contends the trial court erred in prohibiting the cross-examination of Suarez concerning pending charges against him. We disagree.

"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). Evidence that tends to show that a witness is biased with respect to a party or issue goes to credibility. *State v. Hart*, 239 N.C. 709, 711, 80 S.E.2d 901, 902-03 (1954) (citation omitted). Thus, a party may inquire of an opposing witness "on cross-examination particular facts having a logical tendency to show that the witness is biased against him or his cause, or that the witness is interested adversely to him in the outcome of the litigation." *Id.* (citations omitted). Although the scope of cross-examination is subject to the control of the trial court, *State v. Hosey*, 318 N.C. 330, 334-35, 348 S.E.2d 805, 808 (1986), it may not limit a showing of bias or interest, a recognized substantial legal right. *Hart*, 239 N.C. at 711, 80 S.E.2d at 902-03 (citations omitted).

Here, defendant sought to cross-examine Suarez about his interest in the case. Specifically, defendant inquired whether Suarez was receiving favorable treatment from the State in exchange for his testimony against defendant. Under the North Carolina Rules of Evidence and prior case law, such questioning is permitted to attack the credibility of the witness. *See State v. Graham*, 118 N.C. App. 231, 237-38, 454 S.E.2d 878, 882, *disc. rev. denied*, 340 N.C. 262, 456 S.E.2d 834 (1995). We review the trial court's limitation of this line of questioning under the abuse of discretion standard. *Jones v. Rochelle*, 125 N.C. App. 82, 85-86, 479 S.E.2d 231, 233 (such a ruling will not be disturbed unless it is shown that it was so arbitrary that it could not have

been the product of a reasoned decision), *disc. rev. denied*, 346 N.C. 178, 486 S.E.2d 205 (1997).

Our complete review of the transcript detailing defendant's cross-examination of Suarez shows the limitations imposed by the trial court resulted from N.C. Gen. Stat. § 8C-1, Rule 802 (2003). ("Hearsay is not admissible except as provided by these rules."). The only instances where the trial court sustained objections by the State during defendant's cross-examination occurred after defendant had asked Suarez about third-party statements offered for the truth of the matter asserted. *See Livermon v. Bridgett*, 77 N.C. App. 533, 539-40, 335 S.E.2d 753, 757 (1985) (a statement by one other than the presently testifying witness is hearsay and inadmissible if offered for the truth of the matter asserted), *cert. denied*, 315 N.C. 391, 338 S.E.2d 880 (1986). Defendant fails to show that the State's objections were sustained for any other reason. Other testimony was admitted regarding Suarez's penal interest in defendant's case.

We hold the trial court did not abuse its discretion in limiting defendant's cross-examination of Suarez for hearsay reasons. We further note that in the jury instructions the trial court specifically pointed to the potential bias concerning Suarez's testimony against defendant. Finally, the record did not disclose any voir dire or offers of proof submitted by defendant's counsel following the trial court sustaining the State's hearsay objections of what Suarez's answers would have been. This assignment of error is overruled.

VII. Ineffective Assistance of Counsel

[6] Defendant contends his attorneys violated his constitutional rights by twice conceding his guilt during the closing argument to the jury. We disagree.

Our Supreme Court adopted the United States Supreme Court's language in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, *reh'g denied by*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984), concerning claims of ineffective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). The *Braswell* Court developed a two-part test in considering these arguments:

> "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 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."

312 N.C. at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693). In *State v. Harbison*, our Supreme Court determined "that ineffective assistance of counsel, *per se* in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." 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).

A. First Concession

Here, defendant was represented by two attorneys, each of whom made a closing argument to the jury. Defendant's first attorney chronicled the events of 11 February 2001 and described them as a "drug deal gone bad." He argued that defendant, Sanchez, and Suarez went to Chepa's house for a drug transaction. Sanchez and Suarez went to the house, while defendant remained in the car. Defense counsel explained that once the shooting began, he described defendant's situation as: "He's the getaway driver. He's a bad getaway driver because he just left them there." Defendant argues this concession that he was the "getaway driver" was made without his consent and violated his constitutional rights.

The strength of defendant's defense against the charges of first-degree murder, first-degree kidnapping, and robbery with a firearm, was his assertion that the events of 11 February 2001 were a "drug deal gone bad." Defendant asserted no intention of participating in a kidnapping or killing. Rather, he argued that he was the driver, while Suarez and Sanchez attempted to broker a drug deal with Chepa. Defendant testified to and offered further evidence of this argument. Taken in context with counsel's closing argument that all events arose in a "drug deal gone bad," the concession that defendant was the "getaway driver:" (1) related to an intended drug deal, not a murder; and (2) was the crux of defendant's argument throughout trial. This assignment of error is overruled.

B. Second Concession

Defendant's second counsel continued the argument that the events of 11 February 2001 were not intended to be a kidnapping, robbery, and/or killings. Instead, he argued that everyone went to Chepa's house on Marne Street for a drug transaction. Included in this closing argument was the following excerpt:

> I think the whole case really stems from the [State's] allegation that [defendant] and these other people went over there to commit a robbery with a dangerous weapon; that is, to steal a rifle from [Chepa]. I contend to you there's no evidence that [defendant] ever did that, and everything else flows from that. If you find him not guilty of that, I would contend, as a practical matter, although the judge will give you the law, *that you will find him guilty of everything else or not guilty of everything else.*

(emphasis supplied). This language does not amount to a concession of guilt by defense counsel.

Defense counsel argued that Suarez and Sanchez were the "real" perpetrators of the crimes and defendant "was the perfect patsy." The above comment on defendant's guilt merely spoke to the charges involved and the resulting practical implications. There is no reference to or indication of defendant being guilty of the crimes charged.

C. *Harbison* and *Strickland* Analysis

Harbison applies when defense counsel concedes defendant's guilt to either the charged offense or a lesser included offense. *State v. Wiley*, 355 N.C. 592, 619-20, 565 S.E.2d 22, 42 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). Here, the primary defense to the crimes charged centered on explaining the events as an uncharged drug transaction gone terribly wrong. Both closing argument comments which defendant assigns error to were in the context of that central argument. Neither attorney conceded defendant's guilt to the crimes charged or any lesser-included offense. *See State v. Gainey*, 355 N.C. 73, 92-93, 558 S.E.2d 463, 476 ("counsel merely noted defendant's involvement in the events surrounding the death of the victim"), *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002).

In addition, defendant has failed to show and our review of the record and transcript does not indicate that: (1) defense counsel's performance was so deficient that they were not acting as counsel for defendant; and (2) the deficiencies complained of deprived defendant of a fair trial. *See Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. This assignment of error is overruled.

VIII. Lesser-Included Offense

[7] Defendant asserts the trial court erred in not providing the jury an instruction on involuntary manslaughter. We disagree.

Our Supreme Court has held that "when a jury is properly instructed on the elements of first-degree and second-degree murder and thereafter returns a verdict of first-degree murder based on premeditation and deliberation, any error in the court's failure to instruct the jury on involuntary manslaughter is harmless even if the evidence would have supported such an instruction." *State v. Hales*, 344 N.C. 419, 425-26, 474 S.E.2d 328, 331-32 (1996) (citing *State v. Jones*, 339 N.C. 114, 451 S.E.2d 826 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995)); *State v. Hardison*, 326 N.C. 646, 392 S.E.2d 364 (1990); *State v. Young*, 324 N.C. 489, 380 S.E.2d 94 (1989)).

Our review of the transcript shows the trial court properly instructed the jury on: (1) discharging a firearm into an occupied vehicle; (2) first-degree kidnapping; (3) first-degree murder; (4) second-degree murder; and (5) robbery with a firearm. The defendant was found guilty of two counts of first-degree murder, first-degree kidnapping, and robbery with a firearm. The jury found premeditation and deliberation to support first-degree murder and rejected second-degree murder. *See Hales*, 344 N.C. at 425-26, 474 S.E.2d at 331-32. Under our Supreme Court's guidance, presuming the trial court erred in not charging the jury on involuntary manslaughter, defendant's conviction of first-degree murder negated any prejudice to defendant. This assignment of error is overruled.

IX. Conclusion

Our Supreme Court and this Court has repeatedly held that the short-form murder indictment is constitutional. The State provided race-neutral reasons for its challenge to an African-American prospective juror. The trial court properly denied defendant's motions to suppress both the photographic identification and Rule 404(b) evidence pertaining to the three prior robberies. Defendant's cross-examination of Suarez was appropriately limited due to defendant's solicitation of hearsay evidence. Defense counsel, in their closing arguments, did not concede defendant's guilt to the crimes charged. Presuming defendant was entitled to an instruction of involuntary manslaughter to the jury, the jury rejected second-degree murder and found defendant guilty of first-degree murder, negating any prejudice to defendant. *Id.*

No error.

Judges WYNN and McGEE concur.

ROBERT M. MAYO, PETITIONER v. NORTH CAROLINA STATE UNIVERSITY, RESPONDENT

No. COA04-240

(Filed 15 February 2005)

1. Administrative Law— review of agency decision—de novo

The de novo standard of review was proper for review of an agency decision by NCSU regarding an alleged overpayment of salary. De novo review must be used when a petitioner alleges that an agency's decision is based upon an error of law.

2. Contracts— integration of documents—clear language—no parol evidence

Petitioner does not owe a debt to NCSU as result of an alleged overpayment of salary and it is not necessary to address whether the superior court, upon de novo review, properly determined the issue of estoppel. There was a full integration of the documents constituting the employment agreement, the language of the agreement is clear and unambiguous, and the terms relied upon by NCSU were not expressly included in that agreement. Parol evidence may not be introduced to explain the agreement's terms because the language of the agreement was not ambiguous.

3. Creditors and Debtors— no contract—tendered check and garnishment—refund

As held above, petitioner does not owe a debt to NCSU, and the superior court erred by failing to order NCSU to return a check from petitioner and a garnished tax refund.

Judge HUNTER dissenting.

Appeal by respondent and cross-appeal by petitioner from order filed 13 November 2003 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 3 November 2004.

Young Moore & Henderson, P.A., by Christopher A. Page, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Q. Shante' Martin, for respondent.

BRYANT, Judge.

North Carolina State University (NCSU) (respondent) appeals an order filed 13 November 2003, reversing an agency decision and holding that respondent was estopped to claim an overpayment of salary owed by Robert M. Mayo (petitioner). Petitioner cross-appeals.

Procedural History

On 8 November 2002, NCSU conducted a hearing to determine the validity of a debt NCSU claimed petitioner owed as result of a salary overpayment. On 19 November 2002, NCSU issued its final agency decision pursuant to N.C. Gen. Stat. § 150B-42, upholding the validity of the debt.

Petitioner filed a petition for judicial review on 20 December 2002. Petitioner subsequently filed an amended petition for judicial review on 27 January 2003. This matter came for hearing on the 5 November 2003 session of Wake County Superior Court with the Honorable Donald W. Stephens presiding. By order filed 13 November 2003, the superior court reversed the final agency decision, holding that it was affected by error of law and NCSU was estopped to claim the overpayment of salary as a debt. The superior court, however, held petitioner was not entitled to return of the $500.00 check tendered by petitioner, nor return of any tax refund garnished from petitioner.

On 11 December 2003, NCSU filed notice of appeal to this Court. Petitioner filed his notice of appeal on 22 December 2003, cross-appealing only the portion of the order holding that he was entitled to return of either the check tendered or the seized tax refund.

Facts

In July 2001, petitioner had worked for NCSU for a period of ten years and was a tenured faculty member of NCSU's Engineering Department and also served as Director of Graduate Programs for the Nuclear Engineering Department. That same month, petitioner informed his Department Head, Dr. Paul Turinsky that he desired to leave NCSU's employment effective 1 September 2001. Dr. Turinsky accepted petitioner's resignation, but failed to report the resignation to NCSU's payroll department until 14 September 2001, two weeks after petitioner's departure.

At the time of accepting petitioner's resignation, Dr. Turinsky did not inform petitioner that petitioner would not be entitled to any

salary for the time period of 1 July 2001 through 14 August 2001. Nor did Dr. Turinsky inform petitioner that it was NCSU's policy that salary paid to petitioner during the 1 July through 14 August time period was a pre-payment for the upcoming academic year, and if petitioner in fact received such money, petitioner would have to repay NCSU the amount received. Dr. Turinsky testified at the agency hearing that it was the department head's duty to inform the faculty in the respective department of the terms of their employment agreement. He also testified that petitioner was at the department on a daily basis between July and August 2001, working on department business, including serving as the Director of Graduate Programs.

On 3 October 2001, Phyllis Jennette, NCSU's Special Payroll Coordinator, informed petitioner that NCSU had determined that he was overpaid in July and August 2001 by a net amount of $4,587.45. The letter stated that the "overpayment was due to your early separation from [NCSU], which resulted in your overpayment for July and August 2001." Jennette requested petitioner to repay the amount of the overpayment. Petitioner declined.

By letter dated 10 April 2002, NCSU informed petitioner that it had garnished his state income tax refund in the amount of $437.88 pursuant to N.C. Gen. Stat. § 105A. The letter stated that the amount would be applied to petitioner's past due payroll debt.

NCSU claimed the debt owed was based on two terms of the employment agreement between NCSU and petitioner. Those terms, according to NCSU, include first, that the July and first half of August salary payments to a nine-month employee are pre-payments for the upcoming academic year. Second, when a nine-month employee who is paid on a twelve-month basis, leaves during the fall of a given academic year, that employee must repay the amount of overpayment.

Dr. Turinsky testified at the agency hearing that these employment terms were material terms of the employment agreement, and that NCSU had the obligation to inform its faculty of the terms of their employment agreement. Both Dr. Turinsky and Brian Simet, NCSU's Director of Payroll Department, however, conceded at the agency hearing that neither of the alleged terms were included in the written employment agreement. Simet moreover testified that these policies were "not stated anywhere specifically." Additionally, Dr. Turinsky testified that he had never heard of those terms prior to being informed by the payroll department in September 2001.

NCSU admits the only written documents constituting the employment agreement between NCSU and petitioner are contained in petitioner's appointment letter, his annual salary letter, and the policies adopted and amended by the UNC Board of Governors and by the NCSU Board of Trustees. Petitioner's official appointment letter stated, "[y]our appointment is subject to all policies adopted and amended by the UNC Board of Governors and by the NCSU Board of Trustees. Pertinent sections of the UNC Code are printed in the Faculty Handbook." None of these documents set forth the terms upon which NCSU based its claim for repayment.

Simet testified at the agency hearing that the only written term of employment upon which the claim is based is the language found in the section of the Faculty Handbook titled "Appointment Pay Periods." Upon cross-examination, however, Simet admitted the provision is also silent concerning NCSU's assertion that salary payments during July and the first half of August are to be considered as prepayments for the upcoming fall academic year, and is silent concerning whether a faculty member who leaves prior to commencement of the upcoming fall academic year must repay those payments.

In support of his argument regarding entitlement to the disputed salary, petitioner testified that in addition to working during the time period of July 2001 through mid August 2001, he did not receive the monthly salary that he was entitled to for the first four months of his employment in 1991. Per his written agreement, petitioner was to be paid at a rate of $3,833.33 per month during the first year of his employment. Instead, he was paid at the rate of $2,253.13 per month for the first four months. In rebuttal, NCSU stated that petitioner was only entitled to the $3,833.33 rate of pay if he had worked the entire twelve months of the previous academic year, and since he started in March, he was entitled to only a portion of the rate of $3,833.33 per month. This partial-pay policy was not contained in any of NCSU's written policies, and petitioner argued he remained undercompensated for his initial employment period.

Petitioner further testified that, as part of an agreement to serve as Director of Graduate Programs, he was required to work one summer month per academic year and was to receive additional compensation equal to one month's salary. Petitioner served as Director of Graduate Programs during July through August 2000, and May through June 2001. In 2001, NCSU paid him a total of $7,968.78, the agreed upon amount, for service as Director of Graduate Programs

for the 2000-2001 academic year. Petitioner continued to serve as Director of Graduate Programs during July through August 2001. Petitioner argued that he remained undercompensated for his July through August 2001 service in this capacity.

The issues on appeal are whether the superior court erred when it held: (I) NCSU was estopped from collecting money it claims petitioner allegedly owed to NCSU as a result of an overpayment in salary; and (II) NCSU could retain petitioner's tax refund and settlement check tendered as reimbursement applied toward the debt allegedly owed for salary overpayment.

I. *NCSU's Appeal*

[1] When a petitioner alleges that an agency's decision is based upon an error of law, the superior court must undertake a *de novo* review. *Air-A-Plane Corp. v. N.C. Dept. of E.H.N.R.*, 118 N.C. App. 118, 124, 454 S.E.2d 297, 301 (1995). "Under the *de novo* standard of review, the trial court " 'considers the matter anew[] and freely substitutes its own judgment for the agency's.' " *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (citation omitted). Where, however, a petitioner alleges that an agency's decision is unsupported by substantial evidence in the record or is arbitrary and capricious, the superior court must review the "whole record" to determine if the agency's decision is supported by substantial evidence. *Id.*

When this Court reviews appeals from superior court either affirming or reversing the decision of an administrative agency, our scope of review is twofold, and is limited to determining: (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard. *In re Appeal by McCrary*, 112 N.C. App. 161, 166, 435 S.E.2d 359, 363 (1993). However, this Court's obligation to review a superior court order for errors of law 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 and remanding the case if the standard of review utilized by the superior court cannot be ascertained. *Capital Outdoor, Inc. v. Guilford County Board of Adjustment*, 152 N.C. App. 474, 475, 567 S.E.2d 440, 441 (2002).

Upon review of the superior court's order, it appears that the superior court properly utilized the *de novo* standard of review as to

the issue presented. This Court must now determine whether it properly applied the standard of review.

[2] With all contracts, the goal of construction is to arrive at the intent of the parties when the contract was issued. *Wal-Mart Stores, Inc. v. Ingles Mkts., Inc.*, 158 N.C. App. 414, 418, 581 S.E.2d 111, 115 (2003). The intent of the parties may be derived from the language in the contract. *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996). When the contract language is unambiguous, our courts have a duty to construe and enforce the contract as written, without disregarding the express language used. *Southpark Mall Ltd. Part. v. CLT Food Mgmt., Inc.*, 142 N.C. App. 675, 679, 544 S.E.2d 14, 17 (2001). However, if a contract contains language which is ambiguous, a factual question exists, which must be resolved by the trier of fact. *Crider v. Jones Island Club, Inc.*, 147 N.C. App. 262, 266-67, 554 S.E.2d 863, 866 (2001).

Moreover, the terms of employment contracts require sufficient certainty and specificity with regard to the nature of the services to be performed, the place in which the services are to be rendered, and the compensation to be paid. *Humphrey v. Hill*, 55 N.C. App. 359, 361, 285 S.E.2d 293, 295 (1982). As a general rule, the law of contracts maintains that compensation is an essential term for a contract to render services, and the term "must be definite and certain or capable of being ascertained from the contract itself." *Howell v. C.M. Allen & Co.*, 8 N.C. App. 287, 289, 174 S.E.2d 55, 56 (1970).

Here, the language of the employment agreement is clear and unambiguous—petitioner is to be paid in twelve monthly installments for his service as a nine-month, academic year, tenured faculty member.

The two terms relied upon by NCSU[1] were not expressly included in the employment agreement. Dr. Turinsky, head of petitioner's department, testified that petitioner's written employment agreement is comprised of terms found in petitioner's appointment letter, annual salary letter, and written policies adopted and amended by the UNC Board of Governors and the NCSU Board of Trustees.[2] However, none

1. Those terms include first, the July and first half of August salary payments to a nine-month employee are pre-payments for the upcoming academic year. Second, when a nine-month employee, who is paid on a twelve-month basis, leaves prior to commencement of the upcoming fall academic year, that employee must repay the amount of overpayment.

2. In addition, the record reflects an offer of appointment letter sent from NCSU to petitioner dated 8 January 1990 which stated: "A copy of the faculty handbook with

of these documents forming the employment agreement set forth the compensation policies upon which NCSU bases its claim.[3] Simet, Director of NCSU's Payroll Department, admitted at the agency hearing that the policies were "not stated anywhere specifically." Further, Dr. Turinsky testified he did not know of the existence of the terms until September 2001, after petitioner left his employment with NCSU. NCSU, however, attempts to offer parol evidence to explain that payments made in July and August 2001 were pre-payments for the following academic year.

"The parol evidence rule prohibits the admission of parol evidence to vary, add to, or contradict a written instrument intended to be the final integration of the transaction." *Hall v. Hotel L'Europe, Inc.*, 69 N.C. App. 664, 666, 318 S.E.2d 99, 101 (1984). " 'The rule is otherwise where it is shown that the writing is not a full integration of the terms of the contract,' " *Vestal v. Vestal*, 49 N.C. App. 263, 266, 271 S.E.2d 306, 308 (1980) (citation omitted), or "[w]hen a contract is ambiguous, parol evidence is admissible to show and make certain the intention behind the contract," *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 422, 547 S.E.2d 850, 852-53 (2001).

Here Dr. Turinsky testified that petitioner's employment agreement consisted only of petitioner's appointment letter, his annual salary letter, and the policies adopted and amended by the UNC Board of Governors and by the NCSU Board of Trustees. It therefore

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tenure regulations that govern your appointment was provided to you during your recent visit." Via letter dated 10 January 1991, petitioner accepted NCSU's offer of appointment stating: "I hereby agree to the terms and conditions put forth in your letter of 8 Jan. 1991."

The record contained an appointment letter dated 25 February 1991 which stated: "Your employment is subject to all policies adopted and amended by the UNC Board of Governors and by the NCSU Board of Trustees. Pertinent sections of the UNC Code are printed in the Faculty Handbook along with the text of or reference to other University policies."

Finally, the record contained an appointment letter dated 19 May 1997 which stated: "Your appointment is subject to all policies adopted and amended by the UNC Board of Governors and by the N.C. State University Board of Trustees."

Accordingly, we conclude the written policies adopted and amended by the UNC Board of Governors and the NCSU Board of Trustees were adopted by reference into the employment agreement; and these documents in addition to the appointment letter constituted a full integration of the employment agreement.

3. In addition, during oral arguments before this Court, counsel for NCSU conceded that none of the documents comprising petitioner's employment agreement, specifically stated that NCSU's fiscal year was 1 July through 30 June.

appears the parties intended the above documents to be the final integration of the employment agreement. Additionally, we have already noted the language contained in the documents are unambiguous; thus, parol evidence may not be introduced to explain the terms of the agreement.

We hold petitioner does not owe a debt to NCSU as result of an alleged overpayment of salary. It is therefore unnecessary to address whether the superior court properly determined whether the principle of estoppel applied. This assignment of error is overruled.

II. *Petitioner's Cross-Appeal*

[3] In its 10 April 2002 letter to petitioner, NCSU stated that it had garnished petitioner's state income tax refund pursuant to the Setoff Debt Collection Act (N.C. Gen. Stat. § 105A) (SODCA). SODCA authorizes garnishment when a person owes a debt to a state agency. *See* N.C.G.S. §§ 105A-2 and 105A-3 (2003). If, however, "a decision finds that a State agency is not entitled to any part of an amount set off, the agency must send the taxpayer the entire amount set off plus the collection assistance fee retained by the Department." N.C.G.S. § 105A-8(d) (2003).

We hold the superior court committed error in failing to order NCSU to return the tax refund garnished from petitioner. We have held petitioner does not owe a debt to NCSU. We further hold that the superior court committed error in failing to order NCSU to return the check petitioner tendered to NCSU in December 2001. As with the tax refund, this amount was erroneously applied by NCSU to the payroll debt alleged by NCSU. Accordingly, we reverse the order of the superior court as pertains to retention of the tax refund and check tendered as a settlement offer.

Affirmed in part; reversed in part.

Judge McGEE concurs.

Judge HUNTER dissents in a separate opinion.

HUNTER, Judge dissenting.

I respectfully dissent from the majority opinion, as the terms of the employment agreement were sufficient to permit collection of the

overpayment found by both the trial court and the administrative law judge. Having so concluded, I would reverse the portion of the trial court's order that estopped respondent from collection of the overpayment, and affirm the portion of the order allowing respondent to retain funds already collected towards the debt.

Petitioner alleges, and the majority agrees, that respondent is prevented from collecting the overpayment in salary made in July and August of 2001 under the terms of the contract. The majority concludes that as the specifics of the fiscal year were not explicitly set out in the faculty handbook, so as to indicate that such payments were in fact prepayments for the upcoming academic year, the contract fails for lack of certainty.

As the majority correctly notes, personal service contracts are enforceable if certain as to "the nature and extent of the services to be performed, the place where and the person to whom services are to be rendered, and the compensation to be paid." *Humphrey v. Hill*, 55 N.C. App. 359, 361, 285 S.E.2d 293, 295 (1982). Such certainty does not, however, require intricacy of detail to enforce an employment contract. "The specifics of where and when the services were to be performed, the nature of the services and *how compensation was to be made* do not make the contract fail for lack of certainty[.]" *Humphrey*, 55 N.C. App. at 361, 285 S.E.2d at 295 (emphasis added).

Here, however, sufficient evidence is present in the record to find with certainty the terms of petitioner's compensation. Expressly included in his employment agreement were petitioner's yearly salary increase letters. Each of these letters, sent in August, September, or October after the academic year began, stated that petitioner's salary increase for that academic year would be retroactive to 1 July of the respective year. Petitioner's last salary increase letter for the academic year in question, dated 14 August 2000, stated that once approved by the Board of Governors, petitioner would receive an increase of 5.6%, resulting in a "2000-2001 salary of $71,719[,]" and that "[s]alary increases would then be reflected in the August 2000 paychecks, retroactive to July 1, 2000." In conjunction with the terms of the faculty handbook, which stated that "academic-year (9-month) appointments are payable in 12 equal monthly installments[,]" this letter provided petitioner notice that his salary for the 2000-2001 academic year would be paid in full as of June 2001, when the twelve monthly installments begun in July 2000 were complete. The terms of the contract

for petitioner's employment for the academic term were therefore certain enough to permit enforcement.[4]

Respondent contends that payments made to petitioner in July and August were due to a mistake of fact, and are therefore recoverable. Our courts have held that " 'money paid to another under the influence of a mistake of fact . . . may be recovered, provided the payment has not caused such a change in the position of the payee that it would be unjust to require a refund.' " *Bank v. McManus*, 29 N.C. App. 65, 70, 223 S.E.2d 554, 557 (1976) (citations omitted). This "rule is bottomed on the equitable doctrine that an action will lie for the recovery of money received by one to whom it does not in good conscience belong, the law presuming a promise to pay." *Guaranty Co. v. Reagan*, 256 N.C. 1, 9, 122 S.E.2d 774, 780 (1961). As our Supreme Court noted in *Guaranty Co.*, " '[a]s a general rule, it is no defense to an action for the recovery of a payment made under mistake of fact that the money or property has been paid over to another or spent by the payee.' " *Guaranty Co.*, 256 N.C. at 10, 122 S.E.2d at 781 (citation omitted).

Here, it is uncontested that petitioner resigned from respondent in August 2001 and served only a two-week period of the 2001-2002 academic year in August. Further, although petitioner notified his supervisor of his intent to resign in July 2001, his supervisor did not inform the payroll division until after petitioner's actual separation from respondent. As a result, petitioner was paid two months salary in July and August of 2001. Based on the evidence presented, the administrative law judge concluded:

> [W]hen Dr. Mayo resigned his position with the University on August 31, 2001, he had been paid his annual rate of salary for July and August 2001, which was a prepayment for work to be performed for the upcoming academic year, which began on August 16, 2001. Dr. Mayo was only due compensation for the twelve workdays in the Fall Semester for the period beginning August 16, 2001 through August 31, 2001.
>
> My determination is that the debt owed to the [U]niversity by Dr. Mayo for overpayment of salary is valid.

4. We note that although some issues were raised in the administrative law hearing regarding petitioner's work as director of graduate admissions during July and August 2001, the evidence of record demonstrated that petitioner was paid in full the agreed upon compensation for that additional duty in May and June of 2001, and that the issue of overpayment is solely with regards to petitioner's salary for his academic appointment.

The trial court affirmed the finding of overpayment, stating that: "Under the undisputed facts of this case, the University is estopped to claim the *overpayment of salary* as a debt to the State." (Emphasis added.)

A review of the whole record for competent evidence, as required under the appropriate standard of review, *see Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 152 N.C. App. 474, 475, 567 S.E.2d 440, 441 (2002), supports the finding of an overpayment made by both the administrative law judge and trial court. Petitioner's supervisor testified he was unaware of the prepayment policy and had delayed reporting petitioner's resignation for internal departmental reasons related to graduate students within the program. As a result, payroll was not informed of petitioner's separation from respondent until after petitioner officially left on 31 August 2001. Payroll had began prepaying petitioner his 2001-2002 salary, as specified in the faculty handbook, under the mistaken belief that petitioner would be continuing as a faculty member in the upcoming academic year. Further, petitioner failed to present sufficient evidence that recovery of the overpayment had caused him to change his position to such an extent that recovery would be unjust, arguing at the administrative hearing only that it was a penalty to require repayment of money which was already spent. This provides no defense to respondent's action. *See Guaranty Co.*, 256 N.C. at 10, 122 S.E.2d at 781.

Therefore, unlike the majority, I would find that petitioner's contract with respondent was enforceable. As a result, an uncontested mistake of fact, as shown by respondent, as to payment under the terms of the contract created a recoverable debt. As petitioner did not demonstrate that such recovery would be unjust, the administrative law judge properly found that respondent could collect the debt created by the mistake of fact.

Petitioner contends that the trial court correctly ruled that collection of the overpayment was barred by estoppel. I disagree.

> The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts.

State ex rel. Easley v. Rich Food Servs., Inc., 139 N.C. App. 691, 703, 535 S.E.2d 84, 92 (2000). Although our courts have found that

"[a] governmental agency is not subject to an estoppel claim to the same extent as an individual or a private corporation[,]" *Kings Mountain Bd. of Educ. v. N.C. State Bd. of Educ.*, 159 N.C. App. 568, 577, 583 S.E.2d 629, 636 (2003), here, even under the lower standard applied to a private corporation, the essential elements of estoppel are not present.

In this case, no evidence has been presented that respondent made a false representation to petitioner to induce his reliance on the overpayments. Rather, as discussed *supra*, the evidence presented at the hearing showed that there was a mutual mistake, as both petitioner's supervisor and petitioner were unaware at the time of petitioner's resignation that continued payments would result in overpayment. Thus, respondent's actions demonstrate a regrettable misunderstanding rather than an attempt to induce petitioner's reliance on the actions. Therefore, the trial court erred in concluding estoppel barred respondent from collecting the debt created by the overpayment.

Finally, I would affirm the trial court's holding that respondent had no obligation to return either the money garnished from petitioner's income tax return or petitioner's voluntary payment towards his debt. The North Carolina Constitution mandates that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." N.C. Const. art. I, § 32. Our courts have construed this provision to prevent gifts or gratuities of public money and have held that "additional compensation . . . beyond that due for services rendered" is not constitutionally permissible. *Leete v. County of Warren*, 341 N.C. 116, 121, 462 S.E.2d 476, 479 (1995). Further, our statutes require that money due to a state agency, including overpayments, must be "promptly billed, collected and deposited." N.C. Gen. Stat. § 147-86.11(e)(3) (2003), see also N.C. Gen. Stat. §§ 147-86.21 and 147-86.20 (2003). As respondent had both a constitutional and statutory obligation to recoup the overpayment of salary to petitioner, the trial court correctly found that retention of funds already collected was proper.

For the above reasons, I respectfully dissent from the majority and would reverse the portion of the trial court's order estopping respondent from collection of the overpayment, and affirm the portion of the order permitting respondent to retain such monies as have already been collected.

PATRICIA JOHNSON, DORIS LARYEA, LOVIE H. JONES, AND GERALDINE COLLIER, PLAINTIFFS v. LYNWOOD LUCAS AND JOE PEACOCK, T/A TRIANGLE TIMBER SERVICES, DEFENDANTS

No. COA03-1358

(Filed 15 February 2005)

Appeal and Error— appealability—partial summary judgment

Defendant's appeal was dismissed as interlocutory where his brief contained no statement of grounds for appellate review of the interlocutory order (partial summary judgment) and no discussion of any substantial right that would be affected without immediate review.

Judge TYSON dissenting.

Appeal by defendant Lynwood Lucas from judgment entered 2 June 2003 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 25 August 2004.

Hunter, Higgins, Miles, Elam & Benjamin, P.L.L.C., by Robert N. Hunter, Jr. and Christopher M. Craig, for plaintiff-appellees.

Ligon and Hinton, by George Ligon, Jr., for defendant-appellant.

HUDSON, Judge.

Lynwood Lucas ("defendant Lucas") appeals from partial summary judgment awarding seventy-seven thousand dollars ($77,000) with costs to Patricia Johnson, Doris Laryea, Lovie H. Jones, and Geraldine Collier (collectively, "plaintiffs"), the judgment recoverable from defendant Lucas and Joe Peacock ("defendant Peacock") (collectively, "defendants"), jointly and severally. The court based its judgment in part upon prior findings of fact by Judge J.B. Allen, Jr., from a July 2001 order in which defendant Lucas was ordered to pay defendant Peacock seventy-seven thousand dollars ($77,000). We dismiss this appeal as interlocutory.

I. Background

James Lucas, Sr., owned property ("Property") located in Wake County, North Carolina. His children are Patricia Johnson, Doris Laryea, Geraldine Collier, defendant Lucas, and William Lucas, who is not a party to this action. When James Lucas, Sr., died in 1967, the

Property passed by will to his widow, plaintiff Lovie H. Jones, for life. Upon her death, the Property passed equally to his children as remaindermen and joint tenants. The Estate of James Lucas, Sr. was closed on 2 December 1969 after the Clerk of Court approved the Final Account, filed by defendant Lucas as Executor.

At the time of relevant events, plaintiff Lovie H. Jones lived on the Property, where she remained until her death in April 1999. Upon Lovie H. Jones' death, plaintiff Patricia Johnson assumed possession of the Property.

In November 1995, defendant Lucas approached defendant Peacock regarding the sale of timber growing on the Property. Defendant Lucas represented and warranted to defendant Peacock that plaintiff Lovie H. Jones owned the property and that he was authorized to sell the timber. Defendant Lucas and plaintiff Lovie H. Jones executed a "Timber Deed" granting defendant Peacock ownership in the timber on the Property. Defendant Peacock testified he purchased the timber believing that defendant Lucas and his mother, Plaintiff Lovie H. Jones, were authorized to sell it. Defendant Peacock harvested the timber and sold it to several lumber yards for $107,040.74. Defendant Peacock subsequently paid defendant Lucas $32,413.20, the purchase price set forth in the agreement.

On 5 May 1997, plaintiffs filed suit alleging that defendant Lucas sold the timber without authorization from the other remaindermen and did not share the proceeds. Plaintiffs alleged: (1) Fraud and Misrepresentation, (2) Conversion, (3) Trespass, (4) Civil Conspiracy, (5) Unlawful Cutting of Timber, and (6) entitlement to Punitive Damages. The record contains returned summonses showing service of process by the Sheriff of Wake County on defendant Lucas and defendant Peacock's agent personally. Defendant Lucas did not answer the complaint.

Defendant Peacock filed an answer and crossclaim against defendant Lucas alleging: (1) defendant Lucas represented himself as agent for the owners of the timber and defendant Peacock relied in good faith on those representations, (2) defendant Lucas covenanted and warranted to defendant Peacock that he was authorized to act on the "behalf of the owners of the timber," and (3) defendant Peacock should be indemnified by defendant Lucas if damages are awarded. Defendants Peacock and Lucas stipulated in the record that service of process of the crossclaim was not obtained on defendant Lucas.

On 27 June 1997, plaintiffs obtained an Entry of Default from the Wake County Assistant Clerk of Superior Court against defendant Lucas for failure to appear, plead, or otherwise defend. Subsequently, following a hearing on 2 July 2001 in Wake County Superior Court, Defendant Peacock obtained judgment against defendant Lucas for seventy-seven thousand dollars ($77,000). Defendant Lucas was not notified, and was neither present at the hearing nor represented by counsel.

On 13 March 2002, the court dismissed plaintiffs' complaint with prejudice for lack of activity after the hearing on 2 July 2001, and ordered plaintiffs to pay court costs. Defendant Lucas was not present. On 6 February 2003, plaintiffs filed a Motion for Relief from Judgment under Rule 60(b) of the N.C. Rules of Civil Procedure. Judge Narley Cashwell heard the motion on 6 April 2003, and ordered the dismissal set aside and the case reinstated. Both defendants took exception to the ruling.

On 10 March 2003 defendant Lucas filed a Motion for Relief from Judge Allen's 2 July 2001 order that required him to pay defendant Peacock Seventy-Seven Thousand Dollars ($77,000).

On 5 May 2003, Defendant Lucas filed a Motion to Set Aside the Default entered against him on 27 June 1997, and also filed a Motion to Dismiss defendant Peacock's Crossclaim. These motions remain pending.

Plaintiffs filed a Motion for Partial Summary Judgment against defendant Peacock on 10 April 2003 based on Claim #5 of their complaint entitled "Unlawful Cutting of Timber" and a hearing was held on 9 June 2003. The court entered Partial Summary Judgment for plaintiffs against both defendants for the Unlawful Cutting of Timber. The ruling was based solely upon the findings of fact in the 12 July 2001 judgment against defendant Lucas. Defendant Lucas appeals.

II. Issues

The issues on appeal are whether: (1) this appeal by defendant Lucas is interlocutory; (2) the superior court erred in granting summary judgment if William Lucas was a necessary party; (3) the prior judgment was void; and (4) there were issues of fact as to damages. However, in light of our conclusion that this appeal should be dismissed as interlocutory, we do not reach any of the remaining issues.

III. Interlocutory Appeal

We initially consider whether this appeal from a partial summary judgment is properly before this Court. Neither party raised the issue of whether the appeal is interlocutory or properly before the Court, and the appellant has asserted that the order appealed from is a final judgment. Given that the record shows the order to be interlocutory, as discussed below, we address this issue on our own motion.

It appears from the record that the trial court granted defendant's motion for partial summary judgment, leaving several of the plaintiff's claims still pending. "A final judgment is one that determines the entire controversy between the parties, leaving nothing to be decided in the trial court." *Ratchford v. C.C. Mangum, Inc.*, 150 N.C. App. 197, 199, 564 S.E.2d 245, 247 (2002). As such, the order granting partial summary judgment is interlocutory. Ordinarily, there is no right of immediate appeal from an interlocutory order. *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 332 N.C. 288, 292, 420 S.E.2d 426, 428 (1992). The record indicates that the trial court did not certify this case for immediate appeal pursuant to Rule 54(b) of the Rules of Civil Procedure.

It is well established that the appellant bears the burden of showing to this Court that the appeal is proper. First, when an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P., Rule 28(b)(4). Here, defendant simply asserts in its statement of grounds for appellate review that the order "is a final judgment," and, not recognizing the appeal as interlocutory, does not address what substantial right might be lost if this appeal does not lie. Thus, we could dismiss the appeal based solely on failure to comply with this requirement of the Rules.

In addition, however, defendant has failed to carry the burden of showing why the appeal affects a substantial right. "It is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal, . . . and not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.]" *Thompson v. Norfolk & Southern Ry.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000) (internal citations and quotation marks omitted). Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444

S.E.2d 252, 254 (1994). The appellant's brief here contains no statement of the grounds for appellate review of the interlocutory order, and no discussion of any substantial right that will be affected if we do not review this order at this time. Therefore, both because of defendant's failure to comply with Rule 24(b)(4), and for defendant's failure to carry its burden of proof, we dismiss this appeal as interlocutory. In light of our conclusion that we should dismiss this appeal, we do not reach the merits of the issues.

Dismissed.

Judge BRYANT concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion dismisses defendant Lucas's appeal for failing to: (1) state in his brief the grounds for appellate review of an interlocutory appeal; and (2) discuss the substantial rights that will be affected if this appeal is not reviewed at this time. Neither party raised the issue of the interlocutory nature of this appeal in their respective briefs. The majority's opinion reached that issue *ex mero motu*. In my view, defendant Lucas sufficiently argues the applicable substantial rights that would be adversely affected without this Court's review. I vote to reach the merits of the case, vacate the trial court's judgment, and remand the matter for further proceedings. I respectfully dissent.

I. Interlocutory Appeals

Interlocutory appeals are those "made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court to settle and determine the entire controversy." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (quoting *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999)); *accord Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950).

A. Rules of Appellate Procedure

Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure requires the appellant's brief to include a "statement of the grounds for appellate review." N.C.R. App. P. 28(b)(4) (2004); *see Chicora*

Country Club, Inc., et al. v. Town of Erwin, 128 N.C. App. 101, 105, 493 S.E.2d 797, 800 (1997). If the appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the grounds that the challenged judgment either affects a substantial right, or was certified by the trial court for immediate appellate review. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379-80, 444 S.E.2d 252, 254 (1994).

Defendant Lucas does not specifically address appellate review of an interlocutory appeal in his "statement of the grounds for appellate review." He argues the trial court violated his constitutional due process and statutory rights when it entered summary judgment against him based solely on the findings of fact contained in a judgment in a prior case in which he never received service of process.

B. Appellate Review of Interlocutory Judgments

Interlocutory judgments may only be appealed in the following two situations: (1) certification by the trial court for immediate review under N.C. Gen. Stat. § 1A-1, Rule 54(b); or (2) a substantial right of the appellant is affected. *Tinch v. Video Industrial Services.*, 347 N.C. 380, 381, 493 S.E.2d 426, 427 (1997) (citing *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980)); N.C. Gen. Stat. §§ 1-277A and 7A-27(d) (2003). Here, the trial court did not certify its judgment from which defendant Lucas appeals under Rule 54(b).

1. Substantial Right

In determining whether a substantial right is affected "a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990); N.C. Gen. Stat. § 1-277A; N.C. Gen. Stat. § 7A-27(d).

Our Supreme Court adopted the dictionary definition of "substantial right" in *Oestreicher v. American Nat'l Stores, Inc.*: " 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right.' " 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 2280 (1971)).

a. Service of Process

The Constitutional right of " '[d]ue process of law' requires that a defendant shall be properly notified of the proceeding against him, and have an opportunity to be present and to be heard." *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 10, 149 S.E.2d 570, 577 (1966). The parties stipulate that defendant Peacock failed to serve defendant Lucas with the crossclaim. It is also undisputed that the findings of fact from the 12 July 2001 judgment that ruled on defendant Peacock's crossclaim were the basis of the 9 June 2003 judgment from which defendant Lucas appeals.

Defendant Peacock failed to satisfy the requirements of Rules 4 and 5 of the N.C. Rules of Civil Procedure governing proper service of process. N.C. Gen. Stat. § 1A-1, Rule 4 (2003); N.C. Gen. Stat. § 1A-1, Rule 5 (2003); *see also County of Wayne ex. rel. Williams v. Whitley*, 72 N.C. App. 155, 158, 323 S.E.2d 458, 461 (1984) (an action may be continued against that defendant by either: (1) the plaintiff securing an endorsement upon the original summons for an extension of time to complete service of process; or (2) the plaintiff may sue out an alias or pluries summons within 90 days after the issuance of the previous summons or prior endorsement).

If a party fails to extend time for service, the suit is discontinued, and treated as if it had never been filed. *Johnson v. City of Raleigh*, 98 N.C. App. 147, 148-49, 389 S.E.2d 849, 851, *disc. rev. denied*, 327 N.C. 140, 394 S.E.2d 176 (1990) (citing *Hall v. Lassiter*, 44 N.C. App. 23, 26-27, 260 S.E.2d 155, 158 (1979)). Without service of process, the court has no jurisdiction. *Columbus County v. Thompson*, 249 N.C. 607, 610, 107 S.E.2d 302, 305 (1959) (citing *Collins v. Highway Com.*, 237 N.C. 277, 74 S.E.2d 709 (1953); *Moore v. Humphrey*, 247 N.C. 423, 101 S.E.2d 460 (1958)). A subsequent judgment entered against the unserved party after the action is discontinued for want of valid service of process is void. *Bowman v. Ward*, 152 N.C. 602, 602-03, 68 S.E. 2, 2 (1910) (citations omitted).

"A void judgment is not a judgment and may always be treated as a nullity . . . it has no force whatever." *Clark v. Carolina Homes, Inc.*, 189 N.C. 703, 708, 128 S.E. 20, 23 (1925) (citations omitted). No matter how much time has passed, a void judgment will never become valid. *Columbus County*, 249 N.C. at 610, 107 S.E.2d at 305 (citations omitted).

The judgment entitling defendant Peacock to recover damages from defendant Lucas was discontinued for want of service of

process and is void as a matter of law. *Locklear v. Scotland Memorial Hosp.*, 119 N.C. App. 245, 247-48, 457 S.E.2d 764, 766 (1995); *see also Bowman*, 152 N.C. at 602-03, 68 S.E. at 2; N.C. Gen. Stat. § 1A-1, Rule 4(e). The 9 June 2003 judgment defendant Lucas appeals from was based solely on findings of fact from defendant Peacock's discontinued action and void judgment. Defendant Peacock's failure to provide defendant Lucas any notice of the crossclaim violated his due process rights under Section I of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution.

Failure to review the judgment appealed from would deprive defendant Lucas an opportunity to protect his constitutional and substantial right to due process of law and result in substantial financial and legal injury to him. Defendant Lucas has shown that both a constitutional and substantial right exist, which will be lost if not corrected before appeal from final judgment. *See Goldston*, 326 N.C. at 726, 392 S.E.2d at 736.

b. Monetary Judgment

Alternatively, defendant Lucas also argues the entry of a monetary judgment, the result of the appealed judgment, further affects his substantial rights. This Court held in *Equitable Leasing Corp. v. Myers* that a "trial court's entry of summary judgment for a monetary sum against [a] defendant . . . affects a 'substantial right' of [the] defendant." 46 N.C. App. 162, 172, 265 S.E.2d 240, 247 (1980) (citation omitted). The 9 June 2003 judgment decreed plaintiffs are entitled to recover judgment against defendants, jointly and severally, in the amount of $77,000.00 for the unlawful cutting of timber. Stipulated facts show that defendant Lucas and his mother, Lovie H. Jones, received only $32,413.20 in proceeds from the sale of the timber. Both the award and the amount of the monetary sum against defendant Lucas affect a substantial right and are immediately appealable.

Further, the trial court did not stay its judgment pending resolution of the remaining claims against defendant Lucas and failed to rule on pending dispositive motions. This subjects defendant Lucas to immediate execution of the judgment.

Defendant Lucas sufficiently argued two substantial rights that will be adversely affected without this Court's immediate review of the case. The merits of the issues presented by this appeal are ripe for resolution.

II. Necessary Parties

Defendant Lucas contends the judgment is void for failure to join a necessary party under Rule 19 of the N.C. Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 19 (2003). He argues William Lucas, his brother and the fifth remainderman, is necessary to protect his rights and interests in the case. I disagree.

A necessary party is one who has or claims a material interest in the subject matter of the controversy and whose interests will be directly affected by the outcome of the case. *N.C. Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 638-39, 180 S.E.2d 818, 821 (1971) (citing *Gaither Corp. v. Skinner*, 238 N.C. 254, 256, 77 S.E.2d 659, 661 (1953)). Rights of the necessary party must be ascertained and settled before the rights of the parties to the suit can be determined. *Wall v. Sneed*, 13 N.C. App. 719, 724, 187 S.E.2d 454, 457 (1972) (quoting *Equitable Life Assur. Soc. of United States et al. v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951)).

Plaintiffs argue William Lucas is a proper party, but that his participation in the suit is not necessary or required to protect either his or defendant Lucas's rights and interests. Proper parties are those whose interests may be affected by the outcome of the case, but whose presence is not necessary to go forward. *N.C. Monroe Constr. Co.*, 278 N.C. at 638-39, 180 S.E.2d at 821 (quoting *Gaither Corp.*, 238 N.C. at 256, 77 S.E.2d at 661).

William Lucas was an equal remainderman under his father's will and became a joint tenant upon the death of the life tenant, his mother, Lovie H. Jones. While his interest in the Property will be affected by the outcome, that interest does not require his entry into the case for determination of possible damages.

Our Supreme Court addressed a similar issue in *Winborne v. Elizabeth City Lumber Co.*, 130 N.C. 32, 40 S.E. 825 (1902). A single co-tenant sought compensation for the harvesting of timber from property. *Id.* at 33, 40 S.E. at 825. The Court awarded him a *pro rata* part of the damages, reserving the remaining shares for the other co-tenants. *Id. Winborne's* logic applies to the case at bar.

Should plaintiffs be awarded damages for some or all of their claims against defendants, each remainderman will receive their *pro rata* share, including defendant Lucas and William Lucas. Their shares will be separated to protect their interest in the Property. I

would hold that William Lucas is a proper but not a necessary party to this action. This assignment of error should be overruled.

III. Life Tenancy and Waste

Defendant Lucas's final assignment of error asserts the trial court erred by granting partial summary judgment when genuine issues of material fact exist regarding the amount of damages. I agree.

The existence and amount of damages rest on two factors. First, the 9 June 2003 partial summary judgment awarding damages was based on findings of fact in the void 12 July 2001 judgment. This included the $77,000.00 in damages. It is undisputed that the 12 July 2001 judgment is void for lack of service of process on defendant Lucas. Thus, the amount of damages against defendant Lucas, if any, was not properly determined.

Second, the foundation of all claims in plaintiffs' complaint asserts that a life tenant may not sell timber from the property without the authorization of all remaindermen and the sharing of proceeds. *Thomas v. Thomas*, 166 N.C. 627, 631, 82 S.E. 1032, 1034 (1914) (citing *Dorsey v. Moore*, 100 N.C. 41, 44, 6 S.E. 270, 271 (1888)). Plaintiffs argue such behavior constitutes waste and impairs the substance of the inheritance. *Dorsey*, 100 N.C. at 44, 6 S.E. at 271. However, a long standing exception allows a life tenant to harvest and sell sufficient timber to maintain the property for the proper enjoyment of the land. *Fleming v. Sexton*, 172 N.C. 250, 257, 90 S.E. 247, 250-51 (1916) (citing *Thomas*, 166 N.C. at 631, 82 S.E. at 1034 (citations omitted)). This right includes physically using the timber or the proceeds from its sale to maintain or repair the life estate. *Id.*

Defendant Lucas contends this exception applies to him. In his Motion to Set Aside Entry of Default filed on 5 May 2003, which the trial court did not rule upon, he asserts the proceeds from the sale of the timber were given to the life tenant, plaintiff Lovie H. Jones, for the maintenance of the Property. He argues this issue again on appeal to this Court. This defense to allegations of waste also affects the determination of damages.

Both the failure to complete service of process of the crossclaim by defendant Peacock and defendant Lucas's defense to waste are questions of fact in calculating damages. Defendant Lucas argues his mother received the full contract price of $32,413.20, while he is liable under the void judgment for $77,000.00 plus costs. The issue of damages is a question of fact. *Olivetti Corp. v. Ames Business*

Systems, Inc., 319 N.C. 534, 548, 356 S.E.2d 578, 586, *reh'g denied by*, 320 N.C. 639, 360 S.E.2d 92 (1987). Since a genuine issue of material fact exists, partial summary judgment awarding damages was improper. *Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd.*, 294 N.C. 661, 677, 242 S.E.2d 785, 794 (1978); N.C. Gen. Stat. § 1A-1, Rule 56(d). A judgment that rests upon a void judgment for its validity is itself void. *See Clark*, *supra*. I would vacate the trial court's decision and remand for further proceedings consistent with this opinion.

IV. Hearings for Defendant Lucas's Motions

Defendant Lucas filed three separate motions for relief during the course of this action: (1) Motion for Relief of Judgment dated 10 March 2003; (2) Motion to Set Aside Entry of Default dated 5 May 2003; and (3) Motion to Dismiss Crossclaim dated 5 May 2003. Although these dispositive motions were filed and pending, the record does not disclose whether any of the three were ruled upon prior to entry of the appealed judgment.

All three motions are dispositive of issues present in the case. Upon remand, these motions should be heard.

V. Conclusion

Defendant Lucas sufficiently argued that his substantial rights will be adversely affected without this Court's review of the case. In accordance with my discussion of the merits, I would: (1) vacate the trial court's entry of partial summary judgment against defendant Lucas, as it was based solely on findings of fact from a void judgment entered without jurisdiction over defendant Lucas; and (2) remand this case for further proceedings. I respectfully dissent.

STATE OF NORTH CAROLINA v. PHILLIP LEE SNIPES

No. COA04-664

(Filed 15 February 2005)

1. Appeal and Error— plain error review—defendant's capacity to proceed

Recognizing that a conviction cannot stand where the defendant lacks the capacity to defend himself, the Court of Appeals used its discretion under N.C.R. App. P. 2 (2004) to apply plain

error analysis to the question of whether defendant had the capacity to proceed.

2. Criminal Law— defendant's capacity to proceed—plain error review—evidence of incompetency insufficient

There was insufficient evidence of incompetency to require a sua sponte competency hearing where defendant presented no evidence of previous psychological treatment or medical records regarding his capacity to proceed with trial, and his trial demeanor was rational and obedient. Although some of defendant's testimony included rambling and irrelevant statements, the record as a whole indicates that he was oriented to his present circumstances and knew the offenses with which he was charged.

3. Stalking— sufficiency of evidence

The State offered sufficient evidence to support a charge of felony stalking and the trial court did not err by denying defendant's motion to dismiss. N.C.G.S. § 14-277.3.

4. Criminal Law— victim's daughter—sitting in courtroom with doll

There was no plain error in a stalking and assault prosecution where the trial court allowed the victim's daughter to sit in the courtroom with a doll which was part of a school assignment, and which occasionally cried. The court made appropriate arrangements regarding the presence of the doll prior to trial, and its comments about the doll during trial were wholly unrelated to any fact at issue in defendant's case.

Appeal by defendant from judgment entered 21 November 2003 by Judge Ola M. Lewis in Lee County Superior Court. Heard in the Court of Appeals 26 January 2005.

Attorney General Roy Cooper, by Assistant Attorney General Richard J. Votta, for the State.

George E. Kelly, III, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Phillip Lee Snipes ("defendant") appeals his convictions for two counts of assault with a deadly weapon inflicting serious injury and one count of felony stalking. For the reasons discussed herein, we

hold that defendant received a trial free of prejudicial error, but we remand the case for the correction of clerical errors.

The State's evidence presented at trial tends to show the following: On 13 July 2003, Bridget Roseboro ("Roseboro") was standing in front of her apartment when defendant approached her with what she believed to be a knife in his hand. Roseboro turned and knocked on the front door of a nearby apartment occupied by Fletcher Quick ("Quick"). As Roseboro knocked on Quick's front door, defendant attacked Roseboro with the knife. During the altercation, defendant stabbed Roseboro with the knife several times in her head and hand, and he remarked, "Bitch, didn't I tell you I was going to get you?"

After hearing Roseboro knock on his front door, Quick exited his residence and saw defendant "beating" Roseboro with a "silver weapon." Quick grabbed defendant, and the two men "went down to the ground." Defendant stood up and began beating Quick with "a different weapon" which Quick believed was a "piece of iron." Defendant struck Quick several times in the head, side, and arm with the weapon, causing Quick's head to bleed. Defendant eventually "ran off" when a nearby neighbor informed Quick that the police were on their way.

After law enforcement and medical personnel arrived, Roseboro and Quick were transported to Central Carolina Hospital. As a result of her injuries, Roseboro received seven staples in her head and a cast for a broken finger on her hand. As a result of his injuries, Quick received five staples in his head.

Defendant was apprehended and arrested the following day. After being advised of his rights, defendant offered the following statement to law enforcement officials:

> On 7-13-2003, around 12:30 to 1:30 AM I was walking down Washington Avenue when Bridget Roseboro and Fletcher Quick came up to me and started wailing on my head. I started fighting back. After I got them off of me, I left and went home.

On 4 August 2003, defendant was indicted for two counts of assault with a deadly weapon inflicting serious injury and one count of felonious stalking. Defendant's trial began 18 November 2003. On 21 November 2003, the jury returned a verdict of guilty for each charge. The trial court determined that defendant had a prior felony record level II and a prior misdemeanor record level III, and on 21 November 2003, the trial court sentenced defendant

to a total of fifty-eight to eighty-eight months incarceration. Defendant appeals.

We note initially that defendant's brief contains arguments supporting only three of his four original assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2004), the omitted assignment of error is deemed abandoned. Therefore, we limit our present review to those assignments of error properly preserved by defendant for appeal.

The issues on appeal are whether the trial court erred by: (I) failing to investigate defendant's capacity to proceed at trial; (II) denying defendant's motion to dismiss the charge of felony stalking; and (III) allowing Roseboro's daughter to sit in the courtroom with a doll and commenting on the doll's presence.

[1] Defendant first argues that the trial court erred by failing to investigate defendant's capacity to proceed. Defendant asserts that the trial court was required to hold a hearing to determine whether defendant had the mental capacity necessary to proceed with trial. We disagree.

We note initially that defendant assigns plain error to this issue. Our appellate courts have traditionally applied plain error analysis only to jury instructions and evidentiary matters. *State v. Wiley*, 355 N.C. 592, 615-16, 565 S.E.2d 22, 39-40 (2002). However, recognizing that "a conviction cannot stand where [the] defendant lacks [the] capacity to defend himself[,]" *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 580 (1977), in our discretion pursuant to N.C.R. App. P. 2 (2004), we choose to address the merits of defendant's argument.

[2] N.C. Gen. Stat. § 15A-1001(a) (2003) provides as follows:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

N.C. Gen. Stat. § 15A-1002 (2003) governs the determination of a defendant's capacity to proceed. Subsection (a) of the statute provides as follows:

> The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the

> defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed.

N.C. Gen. Stat. § 15A-1002(a). Pursuant to subsection (b), the trial court is required to hold a hearing to determine the defendant's capacity to proceed if his or her capacity "is questioned[.]" N.C. Gen. Stat. § 15A-1002(b). Our Supreme Court has recognized that " 'a defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it.' " *Young*, 291 N.C. at 567, 231 S.E.2d at 580 (quoting *State v. Gaiten*, 277 N.C. 236, 239, 176 S.E.2d 778, 781 (1970)). However, the Court has also recognized that " 'a trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent.' " *Young*, 291 N.C. at 568, 231 S.E.2d at 581 (quoting *Crenshaw v. Wolff*, 504 F. 2d 377, 378 (8th Cir. 1974), *cert. denied*, 420 U.S. 966, 43 L. Ed. 2d 445 (1975)); *see Wolf v. United States*, 430 F. 2d 443, 444 (10th Cir. 1970) ("bona fide doubt" as to competency).

In the instant case, on 30 July 2003, defendant's trial counsel filed a motion questioning defendant's capacity to proceed with the trial. Defendant concedes that he waived the statutory right to question his competency by withdrawing the motion in open court on 20 August 2003. Nevertheless, defendant asserts that the trial court was required to conduct a competency hearing in light of *Young* and other relevant case law. Because we conclude that the evidence of incompetency in the instant case was insufficient to require a *sua sponte* competency hearing, we hold that the trial court did not err.

" 'Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant' to a bona fide doubt inquiry." *State v. McRae*, 139 N.C. App. 387, 390, 533 S.E.2d 557, 559 (2000) (quoting *Drope v. Missouri*, 420 U.S. 162, 180, 43 L. Ed. 2d 103, 118 (1975)). "There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Drope*, 420 U.S. at 180, 43 L. Ed. 2d at 118. In the instant case, defendant presented no evidence of previous psychological treatment or medical records regarding his capacity to proceed with trial, and his trial demeanor was rational and obedient.

Defendant consistently answered the trial court's pre-trial questions and obeyed the trial court's request to slow the pace of his speech. Defendant waited for the trial court's permission to leave the witness stand during his testimony, and he returned to the witness stand when instructed by the trial court to do so. During his testimony, defendant consistently denied carrying a weapon during the altercation with Roseboro and Quick, and he offered a consistent version of the altercation as well as rationale for his actions.

Although some of defendant's answers during his trial testimony include rambling, irrelevant statements, after reviewing the record as a whole, we conclude that defendant was "accurately oriented regarding his present circumstances" and "knew the offenses with which he was charged." *State v. Hepinstall*, 309 N.C. 231, 236, 306 S.E.2d 109, 112 (1983). We are unable to conclude that the trial court had "substantial evidence" before it "indicating that defendant 'lack[ed] the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense' at the time his trial commenced." *State v. King*, 353 N.C. 457, 467, 546 S.E.2d 575, 585 (2001) (quoting *Drope*, 420 U.S. at 171, 43 L. Ed. 2d at 113) (alteration in original), *cert. denied*, 534 U.S. 1147, 151 L. Ed. 2d 1002, *reh'g denied*, 535 U.S. 1030, 152 L. Ed. 2d 646 (2002). Therefore, we conclude that the trial court was not required to conduct a competency hearing *sua sponte*, and, accordingly, we overrule defendant's first argument.

[3] Defendant next argues that the trial court erred by denying his motion to dismiss the felony stalking charge. Defendant contends that the State failed to provide sufficient evidence tending to show that he feloniously stalked Roseboro between the dates alleged in the indictment. We disagree.

When ruling on a motion to dismiss, the trial court must determine whether there is sufficient evidence of each essential element of the offense charged. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The trial court views the evidence in the light most favorable to the State, and the trial court gives the State the benefit of all reasonable inferences arising from the evidence. *Id.* "Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918-19 (1993) (citations omitted).

In the instant case, defendant was charged with violation of N.C. Gen. Stat. § 14-277.3, which provides as follows:

> (a) Offense.—A person commits the offense of stalking if the person willfully on more than one occasion follows or is in the presence of, or otherwise harasses, another person without legal purpose and with the intent to do any of the following:
>
> (1) Place that person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.
>
> . . . .
>
> (b) Classification.—A violation of this section is a Class A1 misdemeanor. . . . A person who commits the offense of stalking when there is a court order in effect prohibiting similar behavior by that person is guilty of a Class H felony.

N.C. Gen. Stat. § 14-277.3 (2003). The indictment in the instant case charged defendant with stalking Roseboro between the dates of 17 October 2002 and 13 July 2003, for the purpose of putting her "in reasonable fear . . . for her safety[.]" After reviewing the record, we conclude that the State offered sufficient evidence at trial to support this charge.

At trial, the State offered evidence tending to show that on 25 September 2002, Roseboro obtained a "no contact" order that required defendant to refrain from contacting Roseboro. The "no contact" order was continued by the trial court on 16 October 2002. At trial, Roseboro testified that as she was walking to her cousin's residence one morning after the "no contact" order was continued, defendant "c[a]me riding up on on his bicycle . . . . [and] follow[ed] [her] all the way to her [cousin's] house." Roseboro testified that defendant followed her for approximately one block and communicated with her. Roseboro testified that

> I asked him why he was bothering me. He couldn't give me no definite answer. I told him, "I don't bother you. So why don't you just leave me alone." He said, "Okay." But he continued on.

Roseboro further testified that she would encounter defendant riding his bicycle "[e]very morning" as she walked to her cousin's house, but that "sometime[s] [she] would beat [defendant] down there to [her] cousin's house because [she] would leave a little bit earlier." Roseboro testified that defendant "would make contact" with

her and would travel in the "[s]ame direction" as she was traveling. Roseboro testified that when she would reach her cousin's house, defendant would "leave." When asked how many times she saw defendant between 17 October 2002 and 13 July 2003, Roseboro testified that she would see defendant "near about every day," and that although defendant did not "[r]eally" communicate with her, he followed her "about 50" times, as close as "[l]ike from me to this young man right here [indicating the trial court reporter]." Roseboro testified that she would "always get a ride back [from her cousin's residence] because it would be dark[,]" and she stated that she "felt like if you're not trying to be bothering with anybody, why would you follow them all the time?" Roseboro further testified that on the night of the altercation, defendant approached her with a knife, causing her to immediately begin knocking on the front door of a nearby residence. Sanford Police Department Detective Vinnie Frazer ("Detective Frazer") testified that when he interviewed Roseboro the night of the altercation, "[s]he was very upset, crying, stated she was in fear for her life." In light of the foregoing evidence, we conclude that the State presented sufficient evidence tending to show that defendant stalked Roseboro during the time periods alleged in the indictment. Thus, we hold that the trial court did not err in denying defendant's motion to dismiss the charge of felony stalking. Furthermore, while we recognize that defendant also argues in his brief that the trial court erred in instructing the jury regarding the charge, we note that defendant did not object to the relevant portion of the trial court's instruction or assign plain error to the instruction on appeal. Therefore, defendant has failed to properly preserve this issue for appeal. *See* N.C.R. App. P. 10(b) (2004). Accordingly, we overrule defendant's second argument.

[4] Defendant's final argument is that the trial court committed plain error by allowing Roseboro's daughter to sit in the courtroom with a doll and by commenting on the doll's presence. As discussed above, our appellate courts have traditionally applied plain error analysis only to jury instructions and evidentiary matters. *Wiley*, 355 N.C. at 615-16, 565 S.E.2d at 39-40. Nevertheless, in our discretion pursuant to N.C.R. App. P. 2, we have chosen to review defendant's assignment of error, and we conclude that the trial court did not err.

The record reflects that Roseboro's daughter, Kendra West ("West"), was present at defendant's trial and holding a doll assigned to her in a school project. Prior to trial, the trial court gave the following instructions to the jury pool:

> And I would also like to introduce Ms. Kendra West. Ms. Kendra, would you please stand, please? Turn around so that the jury can see you. Ms. Kendra is the daugther of Ms. Bridget Roseboro. Thank you. And, as you will observe, she's holding a baby doll, and this is a school project. So, if the baby doll cries we are going to ignore it—okay—and keep going.

During the course of the trial, West's doll cried three times, and each time West immediately left the courtroom with the doll. Following the second interruption, the trial court said, "Makes me not want to have any children." Following the third interruption, the trial court said, "School project." Defendant contends that the trial court's comments amount to an impermissible expression of opinion which fundamentally prejudiced his trial. We disagree.

"The trial judge . . . has the duty to supervise and control a defendant's trial . . . to ensure fair and impartial justice for both parties." *State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999). In performing its duties, the trial court's position as the " 'standard-bearer of impartiality' " requires that " 'the trial judge must not express any opinion as to the weight to be given to or credibility of any competent evidence presented before the jury.' " *State v. Larrimore*, 340 N.C. 119, 154-55, 456 S.E.2d 789, 808 (1995) (quoting *State v. Harris*, 308 N.C. 159, 167, 301 S.E.2d 91, 97 (1983)); *see* N.C. Gen. Stat. § 15A-1222 (2003) (stating that the trial court "may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury."). "In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." *Larrimore*, 340 N.C. at 155, 456 S.E.2d at 808.

In the instant case, we are not convinced that the trial court's comments or conduct related to the doll had any influence on the outcome of defendant's case. The trial court made appropriate arrangements regarding the presence of the doll prior to trial, and its comments regarding the doll's interruptions were wholly unrelated to any fact at issue in defendant's case. We note that "[n]ot every disruptive event occurring during the course of the trial requires the court automatically to declare a mistrial." *State v. Dais*, 22 N.C. App. 379, 384, 206 S.E.2d 759, 762, *cert. denied and appeal dismissed*, 285 N.C. 664, 207 S.E.2d 758 (1974). "Ordinarily, the manner in which a trial is conducted rests in the discretion of the court, '[so] long as defendant's rights are scrupulously afforded him.' " *Id.* (quoting *State*

v. Perry, 277 N.C. 174, 177, 176 S.E.2d 729, 731 (1970)). "This principle applies to control by the court of the conduct of spectators during the course of trial." *Davis*, 22 N.C. App. at 384, 206 S.E.2d at 762. In the instant case, we conclude that the trial court's conduct related to the doll's presence in the courtroom did not infringe upon defendant's right to an impartial trial. Therefore, the trial court did not err by allowing Roseboro's daughter to sit in the courtroom with the doll and by commenting on the doll's presence.

While we recognize that defendant also asserts in his brief that the trial court's comments regarding media coverage were impermissible, we note that defendant failed to object to these comments at trial, and he failed to assign error to them on appeal. Therefore, we decline to address the merits of this assertion. *See* N.C.R. App. P. 10(b). Accordingly, we overrule defendant's final argument.

In light of the foregoing conclusions, we hold that defendant received a trial free of prejudicial error. However, we note that each of the judgment and commitment forms contains a clerical error. On each form, the trial court has checked the box indicating that it "[i]mposes the prison term pursuant to a plea arrangement as to sentence under Article 58 of G.S. Chapter 15A." Our review of the record reveals that defendant pled not guilty to each of the offenses for which he was convicted. Therefore, we remand this case to the trial court for correction of these clerical errors.

No error at trial; remand for correction of clerical errors.

Judges HUDSON and STEELMAN concur.

KATIE OWEN MORGAN, A/K/A KATIE OWEN, PLAINTIFF V. AT&T CORPORATION, DEFENDANT

No. COA04-435

(Filed 15 February 2005)

1. Civil Procedure— conversion of 12(b)(6) motion to summary judgment—no abuse of discretion

There was no abuse of discretion where the trial court converted defendant's 12(b)(6) motion to a motion for summary judgment in an unfair trade practices claim arising from a long-dis-

tance telephone contract. Defendant's motion raised two issues of fact outside the pleadings pertinent to whether defendant's action was barred by exclusive federal jurisdiction over telephone charges, and both parties were afforded a reasonable opportunity to present all material pertinent to the motion.

2. Telecommunications— contract in tariffed environment— federal preemption

The trial court correctly granted summary judgment for defendant on plaintiff's claim for unfair and deceptive practices in the misrepresentation of telecommunication rates. As this agreement was made while the defendant was operating in a federally tariffed environment, plaintiff's state action for fraud and unfair and deceptive practices in misrepresentation of the rates offered by defendant is barred.

3. Unfair Trade Practices; Fraud— telecommunications agreement—actions after agreement ended—no federal preemption

Summary judgment for defendant was reversed in an action for fraud and unfair and deceptive practices in a telecommunications agreement as to those actions (continued charges and harassing phone calls) taken after plaintiff's cancellation of the contract and which were independent of the agreement governed by the federal tariff.

Appeal by plaintiff from an order entered 8 August 2003 by Judge Addie Harris Rawls in Harnett County District Court. Heard in the Court of Appeals 17 November 2004.

Morgan, Reeves & Gilchrist, by Robert B. Morgan, for plaintiff-appellant.

Smith Moore, L.L.P., by Jon Berkelhammer and Travis W. Martin, for defendant-appellee.

HUNTER, Judge.

Katie Owen Morgan ("plaintiff") appeals from an order of dismissal with prejudice dated 8 August 2003 of her action for damages and a declaratory judgment against AT&T Corporation ("defendant"). As we find the trial court's grant of summary judgment improper as to plaintiff's claim under N.C. Gen. Stat. § 75-1.1 (2003) for fraud and

unfair and deceptive practices after the cancellation of the agreement, we reverse in part.

Plaintiff's evidence tends to show that on 27 February 2001, plaintiff was contacted by an agent of defendant via telephone regarding an offer for long-distance service. The agent represented that plaintiff would receive a rate of five cents per minute for long-distance calls for a small monthly fee. Plaintiff accepted the offer and began to use the plan.

Some months later, plaintiff noticed that she had been charged a rate of ten cents per minute for some long-distance calls on her telephone bill. She contacted defendant on 1 June 2001 and was advised the five cent rate applied only to interstate calls on weekends. Plaintiff then asked defendant to cancel her service with them and resumed service with her previous carrier.

Defendant continued to bill plaintiff for services through April 2002. Plaintiff attempted to contact defendant using the printed number on the statements, but was unable to reach a live representative. Plaintiff then wrote a letter to defendant, dated 24 March 2002, advising defendant that she had previously cancelled the service. Plaintiff continued to receive bills from defendant and shortly thereafter was pursued by collection agencies for non-payment of the account. Although she advised the collection agents she had cancelled the account, she continued to receive calls demanding payment.

Plaintiff filed an action on 21 May 2002 for fraud and unfair and deceptive practices against defendant. Plaintiff sought injunctive relief to bar the harassing phone calls and correspondence, and monetary damages. Defendant denied the allegations in the complaint and moved for dismissal under Rule 12(b)(6) for lack of jurisdiction by the trial court. Defendant alleged that its rates were regulated by the Federal Communications Commission, which has exclusive jurisdiction over such tariffs, and that any action challenging communication charges was vested exclusively in the federal courts and the Federal Communications Commission.

Following a period of discovery, a delayed hearing on defendant's motion to dismiss pursuant to Rule 12(b)(6) was held on 14 July 2004. Defendant moved to convert the 12(b)(6) motion to a motion for summary judgment, and for dismissal of the action on the grounds the fixed tariff doctrine was an absolute bar to plaintiff's action. The motion was opposed in writing by plaintiff. The trial court converted defendant's original motion to one for summary

judgment and granted the motion, dismissing plaintiff's complaint with prejudice on the grounds that plaintiff's exclusive remedy lay in the Federal Communications Act of 1934 ("FCA"). Plaintiff appeals from this order.

We note that plaintiff conceded during oral argument before this Court that she no longer sought injunctive relief against defendant. We therefore make our determination as to whether plaintiff's complaint is preempted solely upon plaintiff's claim for damages for fraud and unfair and deceptive practices.

I.

[1] Plaintiff first contends the trial court erred by converting defendant's Rule 12(b)(6) motion to a motion for summary judgment and dismissing plaintiff's action with prejudice prior to completion of discovery. We disagree.

When matters outside the pleadings are considered in a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2003), that Rule states that the motion "shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *Id.* "The standard of review of a trial court's decision to convert a Rule 12(b)(6) motion to a Rule 56 motion is abuse of discretion." *Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 84, 590 S.E.2d 15, 18 (2004).

Here, defendant raised the affirmative defense of the federal filed tariff rate doctrine, arguing it preempted state action as a matter of law. *See AT&T v. Central Office Telephone*, 524 U.S. 214, 222, 141 L. Ed. 2d 222, 233 (1998). A claim is properly dismissed if the moving party shows that the "opposing party's claim is barred by an affirmative defense which cannot be overcome." *Rahim v. Truck Air of the Carolinas*, 123 N.C. App. 609, 612, 473 S.E.2d 688, 690 (1996). However, the Federal Telecommunications Act of 1996 and subsequent rulemaking by the Federal Communications Commission substantially ended the tariffed environment under which most telecommunications firms operated. *See Ting v. AT&T*, 319 F.3d 1126, 1132 (9th Cir. 2003). As recent cases in other jurisdictions arising post-detariffication have recognized, the filed tariff doctrine applies only to contracts formed while the tariff was in effect, not to those formed after the tariffs were ended. *See Ting*, 319 F.3d at 1139. Thus defendant's motion raised two issues of fact outside the pleadings

pertinent to the determination of whether the filed rate doctrine barred defendant's claim: (1) the date plaintiff and defendant entered into their agreement, and (2) the date on which defendant's rates were detarrifed and the filed rate doctrine no longer applied to its contracts. The trial court requested defendant provide that additional information for the limited purpose of supporting the motion, and affidavits were introduced showing that the agreement between the parties was entered into on 27 February 2001, and that defendant ended operation under a tariffed environment on 31 July 2001. Plaintiff did not contest the above evidence introduced at the hearing on the motion to dismiss. Thus the evidence presented clearly established that defendant was operating in a tariffed environment when the agreement was entered into, and the filed rate doctrine was therefore an affirmative defense which was properly before the trial court. As both parties were afforded a reasonable opportunity to present all material pertinent to the motion, we therefore find no abuse of discretion on the part of the trial court in converting defendant's 12(b)(6) motion to a motion for summary judgment.

II.

[2] Plaintiff next contends the trial court erred in ruling that the FCA preempted state consumer protection laws and barred plaintiff's action. We agree in part on this question of first impression for our courts, and reverse the grant of summary judgment as to plaintiff's claim for unfair and deceptive practices for the continued harassment after cancellation of the telecommunications service with defendant.

We first note the standard of review on appeal of a motion for 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, when the evidence presented by the parties is viewed in the light most favorable to the non-movant. *See Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). The dispositive question raised here, as noted *supra* in Section I, is whether plaintiff's claim is preempted as a matter of law by the FCA.

The United States Supreme Court has held that Congress' intent to supercede state law may be inferred in three ways, absent explicit pre-emptive language: (1) when the scheme of federal regulation is so pervasive that an inference is reasonable that Congress left no room for the States to supplement it, (2) when the legislation concerns a field in which the federal interest is so dominant that the federal system is assumed to preclude enforcement of state laws on the same

subject, or (3) when the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose. *See Fidelity Federal S. & L. Assn. v. de la Cuesta*, 458 U.S. 141, 153, 73 L. Ed. 2d 664, 675 (1982). Further, even if express or implied preemption is not found, state law is nullified to the extent that it actually conflicts with federal law. *Id.*

The stated purpose of the FCA is to regulate

> interstate and foreign commerce in communication . . . so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges[.]

47 U.S.C. § 151 (2001). In order to accomplish this purpose, the Federal Communications Commission formerly required telephone companies which were common carriers to file what were known as tariffs, or rate schedules of all charges for interstate services. 47 U.S.C. § 203(a) (2001). To prevent unfair or discriminatory charges, 47 U.S.C. § 203(c) made it unlawful for a carrier to provide services except as specified in the filed tariff. *Id.*

The FCA therefore preempts state actions to enforce even fraudulent agreements of rates which vary from the filed tariff. *See AT&T v. Central Office Telephone*, 524 U.S. at 222, 141 L. Ed. 2d at 233 (holding that "even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff"). Thus, as the agreement was made while the defendant was operating in a tariffed environment, plaintiff's state action for fraud and unfair and deceptive practices in misrepresentation of the rates offered by defendant is barred and we affirm the trial court's grant of summary judgment as to that portion of the complaint.

[3] The FCA does not, however, exclusively preempt state action against purveyors of telecommunications. Section 414 of the FCA states that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414 (2001). The United States Supreme Court has held that this savings clause "preserves only those rights that are not inconsistent with the statutory filed-tariff requirements."

AT&T v. Central Office Telephone, 524 U.S. at 227, 141 L. Ed. 2d at 236. As such, "[a] claim for services that constitute unlawful preferences or that directly conflict with the tariff . . . cannot be 'saved' under § 414." *Id.* However the Second Circuit has noted that:

> The FCA not only does not manifest a clear Congressional intent to preempt state law actions prohibiting deceptive business practices, false advertisement, or common law fraud, it evidences Congress's intent to allow such claims to proceed under state law. . . . Moreover, while the FCA does provide some causes of action for customers, it provides none for deceptive advertisement and billing. . . .
>
> The states may have an equal or greater interest in preventing such conduct as manifested by state consumer protection laws.

Marcus v. AT&T Corp., 138 F.3d 46, 54 (2nd Cir. 1998) (footnote omitted).

In this case, plaintiff's complaint, in addition to alleging fraud in the misrepresentation of the rate, also raised a claim of fraud and unfair and deceptive practices under N.C. Gen. Stat. § 75-1.1 for defendant's continued charges to plaintiff after cancellation of the service, and continuing harassing phone calls to plaintiff. Our courts have established that an unfair and deceptive practices claim must show "(1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury." *Unifour Constr. Servs., Inc. v. BellSouth Telecomm., Inc.*, 163 N.C. App. 657, 665, 594 S.E.2d 802, 807 (2004). An unfair practice has been recognized as one which " 'offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. [A] party is guilty of an unfair act or practice when it engages in conduct that amounts to an inequitable assertion of its power or position.' " *Unifour Constr. Servs.*, 163 N.C. App. at 665-66, 594 S.E.2d at 807-08.

The statement of "an intention to perform an act, when no such intention exists, constitutes misrepresentation of the promisor's state of mind, an existing fact, and as such may furnish the basis for an action for fraud if the other elements of fraud are present[.]" *Unifour Constr. Servs.*, 163 N.C. App. at 666, 594 S.E.2d at 808. "[P]roof of fraud necessarily constitutes a violation of the statutory prohibition against unfair and deceptive acts[.]" *Id.*

Here, plaintiff contacted defendant regarding cancellation of the service, but continued to be billed for several months after the cancellation, even after attempting to contact defendant by telephone and in writing regarding the continued charges. Additionally, defendant placed plaintiff's account with a collection agency who continued to call and harass plaintiff, even after notification by plaintiff that the account had been cancelled. These actions, taken after plaintiff's cancellation of the contract and independent of the agreement governed by the filed tariff, present a claim sufficient, when taken in the light most favorable to the plaintiff, to overcome a motion for summary judgment.

Further, although courts have held that awards of damages which would provide compensation for misrepresented rates would violate the filed tariff doctrine by effectively giving claimants a discounted rate for phone service, *see Marcus*, 138 F.3d at 60, *Hill v. BellSouth Telecommunications, Inc.*, 364 F.3d 1308, 1316-17, (11th Cir. 2004), damages for unfair and deceptive practices for the continued harassment by defendant after cancellation of the phone service, such as sought by plaintiff in this case, present no conflict with the statutory filed-tariff requirements and are therefore not preempted by the FCA. *See Marcus*, 138 F.3d at 62. As an award under N.C. Gen. Stat. § 75-16 (2003) provides treble damages for unfair and deceptive practices, not purely compensatory damages, a monetary award under the statute would not provide a discounted rate to plaintiff, but rather would both punish defendant for unethical practices and provide remediation for plaintiff's harassment. *See Marshall v. Miller*, 302 N.C. 539, 546, 276 S.E.2d 397, 402 (1981) (holding that Section 75-16 is both punitive and remedial, serving as a deterrent, encouraging private enforcement, and providing a remedy for aggrieved parties).

As plaintiff's action for fraud and unfair and deceptive practices for defendant's actions subsequent to plaintiff's cancellation of service is not preempted by the Federal Communications Act, we therefore reverse the trial court's grant of summary judgment as to this issue.

In conclusion, we affirm the trial court's grant of summary judgment as to plaintiff's claim for fraud and unfair and deceptive practices as to defendant's misrepresentation of the filed rate, and reverse the trial court's grant of summary judgment as to plaintiff's claim for fraud and unfair and deceptive practices as to defendant's actions after the cancellation of the agreement between the parties.

Affirmed in part and reversed in part.

Judges CALABRIA and LEVINSON concur.

MARTIN & LOFTIS CLEARING & GRADING, INC., PLAINTIFF v. SAIEED CONSTRUCTION SYSTEMS CORP. AND HARTFORD FIRE INSURANCE COMPANY, DEFENDANTS

No. COA04-363

(Filed 15 February 2005)

Costs— attorney fees—offer of judgment accepted

The trial court erred in a breach of contract and claim for an enforcement of a lien case by awarding plaintiff subcontractor attorney fees after an offer of judgment was accepted under N.C.G.S. § 44A-35, because: (1) under N.C.G.S. § 44A-35, neither party is a prevailing party and therefore cannot recover attorney fees; (2) given the rationale behind an offer of judgment, the disallowance of attorney fees under N.C.G.S. § 44A-35 when an offer of judgment is made and accepted does not thwart the remedial nature of the statute; and (3) nothing precludes the parties from negotiating the inclusion of attorney fees in the offer of judgment.

Appeal by defendants from judgment entered 19 December 2003 by Judge Orlando F. Hudson, Jr. in Person County Superior Court. Heard in the Court of Appeals 3 November 2004.

Bugg & Wolf, P.A., by Bonner E. Hudson, III, for plaintiff-appellee.

Safran Law Offices, by John M. Sperati; Taylor Penry Rash & Riemann, P.L.L.C., by J. Anthony Penry and Cynthia A. O'Neal, for defendant-appellants.

HUNTER, Judge.

Saieed Construction Systems Corporation ("defendant"), presents the following issues for our consideration: Whether the trial court (I) erroneously awarded plaintiff attorneys' fees as the plaintiff was not a prevailing party under N.C. Gen. Stat. § 44A-35; and (II) erroneously awarded plaintiff attorneys' fees because the finding that

defendants unreasonably refused to resolve the matter was unsupported by the evidence. After careful review, we reverse the trial court's award of attorneys' fees.

Defendant was the general contractor for the construction of a restaurant in Yanceyville, North Carolina. Defendant subcontracted with Martin & Loftis Clearing & Grading, Inc. ("plaintiff"), to perform the grading and landscaping work. Defendant terminated the subcontract with plaintiff and hired another subcontractor to complete the work.

Plaintiff filed a complaint against defendant alleging, *inter alia*, breach of contract and a claim for an enforcement of a lien. Defendant answered and filed a counterclaim for breach of contract. Prior to trial, defendant served an Offer of Judgment pursuant to N.C.R. Civ. P. 68 on plaintiff. The Offer of Judgment offered to have judgment taken against it for the sum of $19,500.00 together with costs accrued at the time the offer was filed. On 20 November 2003, plaintiff accepted the Offer of Judgment, and on 21 November 2003, plaintiff filed the Offer of Judgment and the Acceptance of the Offer of Judgment with the trial court. On the same day, plaintiff moved for costs and attorneys' fees pursuant to N.C. Gen. Stat. § 44A-35 and N.C.R. Civ. P. 68. On 19 December 2003, the trial court entered a judgment against defendant in the amount of $19,500.00, plus $593.73 in court costs and $10,358.35 in attorneys' fees pursuant to N.C. Gen. Stat. § 44A-35, plus interest. Defendant appeals.

Defendant first contends plaintiff was not a prevailing party under N.C. Gen. Stat. § 44A-35 (2003), which states:

> In any suit brought or defended under the provisions of Article 2 or Article 3 of this Chapter, the presiding judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party. This attorneys' fee is to be taxed as part of the court costs and be payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit or the basis of the defense. For purposes of this section, "prevailing party" is a party plaintiff or third party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim or is a party defendant or third party defendant against whom a claim is asserted which results in a judgment of less than fifty percent (50%) of the amount sought in the claim defended. Notwithstanding the foregoing, in the event an offer of

> judgment is served in accordance with G.S. 1A-1, Rule 68, a "prevailing party" is an offeree who obtains judgment in an amount more favorable than the last offer or is an offeror against whom judgment is rendered in an amount less favorable than the last offer.

Id. Defendant contends that plaintiff was not a prevailing party under N.C. Gen. Stat. § 44A-35 because plaintiff accepted the offer of judgment.

In *Evans v. Full Circle Productions*, 114 N.C. App. 777, 443 S.E.2d 108 (1994), this Court stated:

> Where an offer of judgment is accepted by the plaintiff, there is not a "prevailing party" or a "losing party." A purpose of N.C.R. Civ. P. 68 is to encourage compromise and avoid lengthy litigation. Because the rationale behind N.C.R. Civ. P. 68 is to encourage a voluntary, mutual settlement, both parties may consider themselves prevailing parties. Furthermore, when a case is settled, there is no admission or judgment of liability by defendant . . . .

Id. at 781, 443 S.E.2d at 110 (citation omitted). Plaintiff contends this case is inapposite because the *Evans* court ruled on whether the *Evans* plaintiff was a "prevailing party" as it applied in a Chapter 75 claim. However, in *Reinhold v. Lucas*, 167 N.C. App. 735, 606 S.E.2d 412 (2005), this Court indicated that even though a case may not involve Chapter 75 of our General Statutes, the principles regarding what constitutes a prevailing party is the same.

Plaintiff also argues *Evans* does not apply to this case because N.C. Gen. Stat. § 44A-35 "clearly defines 'prevailing party' as a Plaintiff that recovers at least fifty percent of the amount sought."

> Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning. But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will. The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent. This intent "must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied."

Burgess v. Your House of Raleigh, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990) (citations omitted).

N.C. Gen. Stat. § 44A-35 does state:

> For purposes of this section, "prevailing party" is a party plaintiff or third party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim or is a party defendant or third party defendant against whom a claim is asserted which results in a judgment of less than fifty percent (50%) of the amount sought in the claim defended.

Id. However, the next sentence states:

> *Notwithstanding the foregoing*, in the event an offer of judgment is served in accordance with G.S. 1A-1, Rule 68, a "prevailing party" is an offeree who obtains judgment in an amount more favorable than the last offer or is an offeror against whom judgment is rendered in an amount less favorable than the last offer.

Id. (emphasis added). The introductory phrase "notwithstanding the foregoing" indicates the statutory language prior to the sentence should not apply to the subject matter following the introductory phrase. *See* Black's Law Dictionary 1094 (8th ed. 2004) (defining notwithstanding as "[d]espite; in spite of"), *see also* The American Heritage College Dictionary 532 (3rd ed. 1997) (defining foregoing as "[s]aid, written, or encountered just before; previous"). Therefore, the definition of prevailing party in N.C. Gen. Stat. § 44A-35 which states " 'prevailing party' is an offeree who obtains judgment in an amount more favorable than the last offer or is an offeror against whom judgment is rendered in an amount less favorable than the last offer" is applicable to this case, and thus under *Evans*, as interpreted by *Reinhold*, neither party was a prevailing party.

Plaintiff also argues our Supreme Court's decision in *Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (1973) allows an award of attorneys' fees when a party accepts an offer of judgment, if the statutory requirements are established. Based upon the decision in *Hicks*[1], plaintiff first contends that N.C. Gen. Stat. § 44A-35 is a remedial statute that must be liberally construed, and that under a liberal construction, attorneys' fees should be allowed as part of the court costs.

1. Plaintiff also cites the case of *Hill v. Jones*, 26 N.C. App. 168, 215 S.E.2d 168 (1975). This Court in *Hill* relied upon our Supreme Court's decision in *Hicks v. Albertson* in stating N.C. Gen. Stat. § 6-21.1 is a remedial statute.

Plaintiff argues N.C. Gen. Stat. § 44A-35 is remedial in nature because a statute that creates an exception to the general rule that attorneys' fees are not allowable as part of the costs in civil actions is a remedial statute. Therefore, plaintiff contends that because N.C. Gen. Stat. § 44A-35 provides for attorneys' fees as part of costs in lien and bond enforcement suits, it is remedial.

" 'A remedial statute . . . is for the purpose of adjusting the rights of the parties as between themselves in respect to the wrong alleged.' " *Edminsten, Attorney General v. Penney Co.*, 292 N.C. 311, 319, 233 S.E.2d 895, 900 (1977) (citation omitted); *see also Byrd v. Johnson*, 220 N.C. 184, 16 S.E.2d 843 (1941) (discussing principles regarding remedial statutes) *and* Black's Law Dictionary 1449 (8th ed. 2004) (defining a remedial statute as "[a] law that affords a remedy"). "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). By allowing the recovery of attorneys' fees, N.C. Gen. Stat. § 44A-35 creates an exception to the general rule that attorneys' fees are not recoverable. Thus, the statute is remedial in nature, and must be liberally construed. *See Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (indicating remedial statutes are to be liberally construed to accomplish the purpose of the legislature).

As explained, however, under N.C. Gen. Stat. § 44A-35, certain requirements must be established prior to an award of attorneys' fees being allowed. One of these requirements is that the party seeking attorneys' fees must be a prevailing party, and N.C. Gen. Stat. § 44A-35 has a specific definition for what constitutes a prevailing party when an offer of judgment has been made. This Court has held that "[w]here an offer of judgment is accepted by the plaintiff, there is not a 'prevailing party' or a 'losing party.' " *Evans*, 114 N.C. App. at 781, 443 S.E.2d at 110.

Nonetheless, plaintiff argues that under a liberal construction of N.C. Gen. Stat. § 44A-35, an offeree can be a prevailing party if its recovery is at least fifty percent of the amount sought, despite acceptance of an offer of judgment, as long as it had not previously rejected a more generous offer of judgment. Plaintiff contends to hold otherwise would allow a recalcitrant defendant to unreasonably refuse to settle a matter in which liability was clear, causing the plaintiff to expend substantial sums in pursuing the litigation, and delaying the

resolution of the matter until immediately before trial. Plaintiff argues the recalcitrant defendant could then avoid the imposition of his opponent's attorneys' fees by submitting an offer of judgment in the amount owed on the very eve of trial, which would prevent the trial court from awarding attorneys' fees under N.C. Gen. Stat. § 44A-35. However, as explained, the rationale behind an offer of judgment under N.C.R. Civ. P. 68 "is to encourage compromise and avoid lengthy litigation. [Therefore b]ecause the rationale behind N.C.R. Civ. P. 68 is to encourage a voluntary, mutual settlement, both parties may consider themselves prevailing parties." *Evans*, 114 N.C. App. at 781, 443 S.E.2d at 110. Given the rationale behind an offer of judgment, we conclude the disallowance of attorneys' fees under N.C. Gen. Stat. § 44A-35 when an offer of judgment is made and accepted does not thwart the remedial nature of the statute. Moreover, nothing in this opinion precludes the parties from negotiating the inclusion of attorneys' fees in the offer of judgment.

Finally, plaintiff argues that in *Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40, our appellate courts allowed attorneys' fees to be awarded as a part of costs after an offer of judgment was accepted. However, in *Hicks*, neither the Court of Appeals nor our Supreme Court addressed whether a party could be considered a prevailing party when an offer of judgment was accepted. Indeed, in *Hicks*, our Supreme Court was analyzing N.C. Gen. Stat. § 6-21.1 which does not utilize the term "prevailing party." Moreover, there is no indication in *Hicks* that our Supreme Court or the parties involved considered the propriety of awarding attorneys' fees when the parties have settled the action by an offer of judgment.

In sum, based upon this Court's opinion in *Evans*, 114 N.C. App. 777, 443 S.E.2d 108, and our interpretation of N.C. Gen. Stat. § 44A-35, we conclude that when an offer of judgment is accepted under N.C. Gen. Stat. § 44A-35, neither party is a prevailing party and therefore can not recover attorneys' fees. Thus it is unnecessary to address defendant's remaining issue that the trial court erroneously awarded plaintiff attorneys' fees because the finding that defendants' unreasonably refused to resolve the matter was unsupported by the evidence.

Reversed.

Judges CALABRIA and LEVINSON concur.

STATE OF NORTH CAROLINA v. ERIC SCOTT GLADDEN, DEFENDANT

No. COA03-1581

(Filed 15 February 2005)

1. **Homicide— first-degree murder—short-form indictment—constitutionality**

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

2. **Evidence— autopsy photographs—illustrative purpose**

The trial court did not abuse its discretion in a first-degree murder case by allowing autopsy photographs to be admitted into evidence, because: (1) the photographs were offered to illustrate the testimony of the State's pathologist; (2) the State sought to publish several photographs of the victim's face showing the gunshot wound, but the court ruled one admissible and the other two inadmissible as being cumulative; and (3) the number of photographs was not excessive when ten were admitted including seven of the victim's body wrapped in plastic and three of the victim's head, including one which showed the face.

3. **Confessions and Incriminating Statements— interview statements to officers—voluntariness**

The trial court did not err in a first-degree murder case by admitting defendant's interview statements to law enforcement officers into evidence even though defendant contends he made the various statements without a knowing and intelligent waiver of the right to counsel, because defendant failed to specifically point to any facet of the interviews which would indicate his participation was involuntary.

4. **Evidence— husband-wife privilege—wife's observations of defendant—telephone conversation**

The trial court did not err in a first-degree murder case by admitting the testimony of defendant's wife about her observations of defendant on the morning of 1 September 2000 and a transcript and tape of the 23 September 2000 phone conversation between defendant, his wife, and his stepdaughter, because: (1) although defendant contends the phone conversation he made from jail was protected by marital privilege, defendant's stepdaughter actively participated in the phone conversation with her mother and defendant, and defendant was informed prior to mak-

ing the phone call that all calls made to outside parties were subject to recording and monitoring; and (2) the wife's testimony that defendant retrieved a gun around 7:15 a.m. while she was still in the bedroom and that defendant said he was using the gun to help his grandpa kill some chicken hawks did not give rise to the conclusion that defendant's statement was made out of the confidence of the marital relationship as defendant was simply making a casual remark.

5. Criminal Law— motion for mistrial—juror misconduct—failure to reread entire set of jury instructions

The trial court did not err in a first-degree murder case by denying defendant's motion for a mistrial based upon juror misconduct involving a juror asking an attorney unrelated to the case to provide her with the legal definition of premeditation, and the failure of the trial court to reread the entire set of jury instructions, because: (1) the trial court interviewed both the juror and the attorney involved in the outside communications and concluded that the juror had violated an order of the court but that there was no substantial or irreparable prejudice to defendant; (2) the determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal; and (3) the decision of whether to give additional jury instructions is within the trial court's discretion, the trial court instructed on premeditation only, and here the jury foreperson asked for further instruction specifically on premeditation.

6. Homicide— first-degree murder—motion to dismiss—sufficiency of evidence

The trial court did not err in a first-degree murder case by denying defendant's motions to dismiss and to set aside the verdict, because the evidence viewed in the light most favorable to the State was sufficient to show that: (1) defendant admitted he shot the victim in the head and told the police that the victim had been blackmailing him over a tape of defendant's wife; (2) the victim's body was found buried on defendant's property; and (3) defendant denied any knowledge of what happened to the victim until after the body was discovered on his property and then changed his story to reveal a confrontation with the victim.

Appeal by defendant from judgment entered 12 March 2003 by Judge W. Robert Bell in Burke County Superior Court. Heard in the Court of Appeals 16 September 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Jonathan P. Babb, for the State.

C. Gary Triggs and Law Office of Victor N. Yamouti, by Charles M. Bostian for the defendant-appellant.

ELMORE, Judge.

Eric Scott Gladden (defendant) was convicted of first degree murder and, now appeals the judgment entered against him. Defendant and William Kenneth Smith, Jr. (the victim) worked the same shift at the Great Lakes Carbon Plant in Morganton, North Carolina. The State's evidence tended to show that during his shift on the morning of 1 September 2000, the victim told Derrick Caldwell, a co-worker, that "I'm leaving here with Eric Gladden. If I come up missing, I want you to tell everybody who I left here with."

When the victim did not return home from work, his wife, Kim Smith, went to his place of work and observed his truck parked in an unusual spot. After Ms. Smith reported her husband missing, William Duplain of the Morganton Department of Public Safety began investigating the disappearance. Over the course of his investigation, Detective Duplain interviewed defendant on five separate occasions. During the first four interviews, defendant denied any knowledge of what happened to the victim. Following the fourth interview, the victim's body was discovered wrapped in plastic and buried on defendant's property. During the fifth interview, defendant admitted to shooting the victim. Defendant told Detective Duplain that the victim had been blackmailing him with a video of defendant's wife and that he shot the victim in self-defense after the victim struck him in the head with a stick.

Tammy Gladden, defendant's ex-wife, testified that around 7:15 a.m. on the morning of 1 September 2000, defendant retrieved a gun from underneath her pillow and returned home 30 to 45 minutes later. On 23 September 2000, Ms. Gladden and her thirteen-year-old daughter participated in a three-way telephone call with defendant while defendant was being held at the Burke County Jail. Defendant made the call from a phone within the jail facility's phone system, which advises each inmate via an automated message that the call is subject

to recording and monitoring. Within a few days of this call, defendant's attorney met with Lt. John R. Head, supervisor of the jail, to ask about the jail's call recording system. This inquiry prompted Lt. Head to review the recordings of defendant's recent calls. At trial, the State presented the 23 September phone conversation as an exhibit.

Dr. Robert L. Thompson, a forensic pathologist who performed the autopsy, testified that the cause of the victim's death was a single gunshot wound to the left side of the head. During the examination of Dr. Thompson, the State introduced into evidence several autopsy photographs of the victim.

At the close of the evidence, defendant made a motion to dismiss, which was denied by the trial court. During the deliberation, the jury asked the trial court for further instructions on the definition of premeditation. Defendant requested that the court reread the entire set of instructions on murder, but the court re-instructed the jury on premeditation only. Thereafter, the jury returned a verdict of guilty on the charge of first degree murder.

I.

[1] By his first assignment of error, defendant argues that the trial court erred in failing to dismiss the first degree murder indictment because it did not specifically allege the elements of premeditation and deliberation. We find no merit in defendant's argument. Our Supreme Court has repeatedly stated that the short-form indictment authorized by N.C. Gen. Stat. § 15-144 is sufficient under both state and federal constitutional standards to support a conviction of first degree murder. *State v. Maske*, 358 N.C. 40, 50, 591 S.E.2d 521, 528 (2004); *State v. Hunt*, 357 N.C. 257, 274, 582 S.E.2d 593, 604-05, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003); *State v. Braxton*, 352 N.C. 158, 173-75, 531 S.E.2d 428, 436-38 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). Defendant's assignment of error is overruled.

II.

[2] Next, defendant contends that the court erred in allowing the autopsy photographs into evidence because they were irrelevant and offered solely for the purpose of inflaming the jury. A photograph that depicts the victim's remains in an advanced state of decomposition is not inadmissible simply because it is gory and may tend to arouse prejudice. *State v. Harris*, 323 N.C. 112, 126-27, 371 S.E.2d 689, 698 (1988). "However, the admission of an excessive number of pho-

tographs, depicting substantially the same scene, may be prejudicial error where the additional photographs add nothing of probative value but tend solely to inflame the jury." *Id.* at 127, 371 S.E.2d at 689. The decision to admit photographs pursuant to Rule 403 and what constitutes an excessive number is within the discretion of the trial court. *State v. Bearthes*, 329 N.C. 149, 161, 405 S.E.2d 170, 177 (1991).

Here, the autopsy photographs were offered to illustrate the testimony of the State's pathologist. The State sought to publish to the jury several photographs of the victim's face showing the gunshot wound, but the court ruled one admissible and the other two inadmissible as being cumulative. The trial judge admitted ten photographs in all: seven photographs of the victim's body with plastic wrapped around it, and three photographs of the victim's head, one of which showed the face. We conclude that the trial court did not abuse its discretion in ruling that the photographs were more probative than prejudicial and that the number of photographs was not excessive.

III.

[3] Next, defendant challenges the court's ruling to admit defendant's interview statements to law enforcement officers into evidence. Defendant argues that he made the various statements without a knowing and intelligent waiver of the right to counsel. However, defendant fails to specifically point to any facet of the interviews which would indicate his participation was involuntary. As such, we find this assignment of error without merit.

IV.

[4] By two related assignments of error, defendant argues that the court erred in admitting (1) testimony by Ms. Gladden, his wife, about her observations of defendant on the morning of 1 September, and (2) a transcript and tape of the 23 September 2000 phone conversation between defendant, his wife, and his step-daughter.

Defendant contends that the 23 September 2000 phone conversation concerned confidential communications between him and his wife. We disagree. A communication between husband and wife is privileged if it was induced by the confidence of the marital relationship. *See State v. Holmes*, 330 N.C. 826, 835, 412 S.E.2d 660, 665 (1992) (citing *Hicks v. Hicks*, 271 N.C. 204, 155 S.E.2d 799 (1967)). Here though, defendant's step-daughter *actively participated* in the phone conversation with her mother and defendant. *Cf. Hicks*, 271

N.C. at 207, 155 S.E.2d at 802 (communications were confidential where couple's young daughter was present but only "singing or playing in the area" during conversation). In addition, defendant was informed prior to making the phone call that all calls made to outside parties were subject to recording and monitoring. Under these circumstances, the conversation between defendant and his wife was not confidential. As such, the admission of the three-party phone conversation did not violate the marital privilege.

Defendant also challenges on the basis of marital privilege the admission of Ms. Gladden's testimony that he retrieved a gun from their bedroom the morning of 1 September. "An action may be protected if it is intended to be a communication and is the type of act induced by the marital relationship." *Holmes*, 330 N.C. at 835, 412 S.E.2d at 665. Here, defendant retrieved a gun around 7:15 a.m. when Ms. Gladden was still in the bedroom. Defendant did nothing to indicate that he intended his action to be a confidential communication. *See State v. Hammonds*, 141 N.C. App. 152, 171-72, 541 S.E.2d 166, 179, *aff'd*, 354 N.C. 353, 554 S.E.2d 645 (2001), *cert. denied*, 536 U.S. 907, 153 L. Ed. 2d 184 (2002) (defendant's act of retrieving firearm from underneath bed was not confidential communication where wife's presence in the bedroom was incidental rather than at defendant's request). Ms. Gladden also testified that defendant told her he was using the gun to "help his grandpa kill some chicken hawks." The facts here do not give rise to the conclusion that defendant's statement was made out of the confidence of the marital relationship, as defendant was simply making a casual remark. *See Hammonds*, 141 N.C. App. at 170-71, 541 S.E.2d at 179 (casual observation is not a statement induced by the confidence of the marital relationship). Therefore, the court did not err in allowing the testimony by Ms. Gladden.

V.

[5] Next, defendant contends that the denial of his motion for a mistrial based upon juror misconduct and the failure of the trial court to reread the entire set of jury instructions constituted prejudicial error. The record establishes that on the first day of deliberations, the jury asked the court to reread the instructions on the definition of premeditation. Defendant requested that the court reread the instruction on first degree murder in its entirety, but the court re-instructed on premeditation only. During the overnight recess, one of the jurors asked an attorney unrelated to the case to provide her with the legal definition of premeditation. The attorney declined to answer the

question, and the juror did not communicate her question to any other member of the jury. The Assistant District Attorney informed the court of this development, and the court conducted a full inquiry of the juror's conduct. The court concluded that the juror had violated an order of the court but that there was no substantial or irreparable prejudice to defendant.

The trial court retains sound discretion over the scope of an inquiry into allegations of juror misconduct. *State v. Murillo*, 349 N.C. 573, 599, 509 S.E.2d 752, 767, *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999). " 'The determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal.' " *Id.* (quoting *State v. Bonney*, 329 N.C. 61, 83, 405 S.E.2d 145, 158 (1991)). In the instant case, the trial court interviewed both the juror and the attorney involved in the outside communications. We have reviewed the court's findings and conclusions and find no abuse of discretion.

We also find no error in the court's denial of defendant's request to reread the entire set of jury instructions. Our Supreme Court has noted that "the trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court's instructions." *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986). Thus, the decision of whether or not to give additional jury instructions is within the trial court's discretion. *Id.* Here, the jury foreperson asked for further instruction specifically on premeditation. It was not an abuse of discretion for the trial court to instruct on premeditation only.

VI.

[6] Finally, defendant assigns as error the court's denial of his motions to dismiss and to set aside the verdict. In ruling on a motion for dismissal, the trial court must view the evidence in the light most favorable to the State, drawing all reasonable inferences in favor of the State. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). "[C]ontradictions and discrepancies do not warrant dismissal of the case [but] are for the jury to resolve." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). The question for the court is whether a reasonable inference of the defendant's guilt may be drawn from the evidence. *Id.* at 67, 296 S.E.2d at 652.

The evidence at trial, viewed in the light most favorable to the State, tended to show the following: defendant admitted that he shot the victim in the head and told the police that the victim had been blackmailing him over a tape of defendant's wife; the victim's body was found buried on defendant's property; and defendant denied any knowledge of what happened to the victim until after the body was discovered on his property and then changed his story to reveal the 1 September confrontation. The State's evidence was sufficient to support the jury's verdict, and thus the court properly denied defendant's motions.

No error.

Judges CALABRIA and STEELMAN concur.

JAMES CARNELL WALKER, JR., PLAINTIFF-APPELLEE v. PENN NATIONAL SECURITY INSURANCE COMPANY, DEFENDANT-APPELLANT

No. COA04-119

(Filed 15 February 2005)

1. Insurance— multiple coverage—credits

The trial court erred by failing to credit defendant—UIM carrier with the amount paid by the liability carrier in an automobile accident case involving liability insurance, workers' compensation insurance, and UIM insurance. A UIM carrier is entitled to a credit for payments made by the liability carrier; the failure to give defendant this credit gave plaintiff a recovery in excess of his actual damages.

2. Workers' Compensation— rehabilitation costs—lack of evidence

A lack of evidence regarding the rehabilitation services in question meant that the Court of Appeals was unable to perform a meaningful review of the exclusion of rehabilitation costs from the total amount of workers' compensation benefits.

3. Workers' Compensation— rehabilitation costs—case-by-case determination

The trial court did not err by excluding the cost of rehabilitation services when it computed workers' compensation benefits. Rehabilitation services are not a benefit as a matter of law; they must be subject to a fact-specific determination of whether a benefit was conferred.

4. Insurance— multiple coverages—calculation of amount payable

The Court of Appeals calculated the amount payable to plaintiff by defendant in an automobile accident case involving liability insurance, UIM insurance, and workers' compensation as follows: first, the amount paid to plaintiff by the liability carrier was subtracted from the UIM policy limit to find the UIM coverage limit; second, the amount plaintiff is entitled to recover from the UIM carrier was determined by subtracting the amount of workers' compensation benefits (not including the amount of the workers' compensation lien) and the amount plaintiff received from the liability carrier from plaintiff's total loss. The resulting figure represents the total amount of plaintiff's uncompensated loss and is the amount payable by the UIM carrier, plus interest.

Appeal by defendant from judgment dated 1 December 2003 by Judge William C. Griffin, Jr. in Superior Court, Beaufort County. Heard in the Court of Appeals 13 October 2004.

Gaskins & Gaskins, P.A., by Herman E. Gaskins, Jr., for plaintiff-appellee.

McDaniel & Anderson, L.L.P., by William E. Anderson and John M. Kirby, for defendant-appellant.

McGEE, Judge.

James Carnell Walker, Jr. (plaintiff) was injured in a motor vehicle collision on 1 August 2000. The accident was caused by the negligence of Troy Walker. At the time of the accident, plaintiff was working in the scope and course of his employment and operating a vehicle owned and insured by his employer, SIA Group-Seashore (SIA).

Troy Walker had liability insurance coverage with Shelby National Insurance Company (the liability carrier). The liability

insurance coverage limit was $30,000 per person and $60,000 per accident. The vehicle in which plaintiff was injured was also covered by an underinsured motorist (UIM) policy with Penn National Security Insurance Company (defendant). The UIM policy coverage limit was $1,000,000.

Plaintiff recovered the full $30,000 allowable from the liability carrier. The workers' compensation carrier for plaintiff's employer also paid a total of $81,948.37, as follows: $24,201.54 for plaintiff's medical expenses, $51,547.88 to plaintiff as compensation, and $6,198.95 to Hoover Rehabilitation. Pursuant to a clincher agreement, the workers' compensation carrier asserted a lien in the amount of $35,000 on any recovery plaintiff received from third parties.

Plaintiff and defendant submitted the issue of the value of plaintiff's personal injury claim to arbitration on 2 October 2002. The arbitrator found that the value of plaintiff's personal injury claim was $129,524. The parties thereafter agreed that the award should be modified to $126,874. The arbitrator did not resolve coverage issues or amounts to be credited.

Following the arbitration, plaintiff and defendant were unable to agree on the amount payable by defendant under the UIM policy. Specifically, the parties were unable to resolve how the 1999 amendment to the UIM statute, N.C. Gen. Stat. § 20-279.21(e) (2003), would affect the relationship between the award amount and the workers' compensation lien, thereby determining the amount payable by defendant. Defendant contended that the statute required that the arbitration award be offset by plaintiff's recovery from the workers' compensation carrier.

Plaintiff filed a complaint for a declaratory judgment on 2 April 2003, asking the trial court to declare the rights and liabilities of the parties and to declare that defendant pay plaintiff $96,874: the difference between the arbitration award and the $30,000 recovered from the liability carrier. Defendant's answer asked that the trial court require defendant to pay plaintiff an amount not greater than $50,874. Defendant calculated this amount by subtracting the sum of $30,000 recovered from the liability carrier and $46,000[1] workers' compensation benefits from the $126,874 total value of plaintiff's injury.

1. The figure $46,000 was reached by subtracting $35,000 (the amount of the worker's compensation carrier's lien) from $81,000 (the total paid out by the worker's compensation carrier). Defendant now admits, and the trial court found, that the total paid out by the worker's compensation carrier was $81,948.37: $24,201.54

While the declaratory judgment action was pending in the trial court, this Court, in *Austin v. Midgett* (*Austin I*), 159 N.C. App. 416, 583 S.E.2d 405 (2003), resolved the confusion surrounding the 1999 amendment to the UIM statute. We held that the 1999 amendment "requires UIM carriers to insure the amount of the employer's workers' compensation lien on UIM proceeds received by the employee in addition to the damages uncompensated by workers' compensation benefits." *Id.* at 421, 583 S.E.2d at 409. As a result, a UIM carrier is entitled to a credit for the amount of workers' compensation benefits that are not subject to a workers' compensation lien. *Id.* at 421, 583 S.E.2d at 409. However, our Court did not consider the amount paid by the liability carrier and did not credit the UIM carrier with this amount.

In accordance with our holding in *Austin I*, the trial court credited defendant with the amount paid by the workers' compensation carrier, less the amount of the workers' compensation lien. However, the trial court reduced the amount of workers' compensation benefits by $6,198.95, the amount paid to Hoover Rehabilitation. In addition, under the guidance from *Austin I*, the trial court did not credit defendant with the $30,000 plaintiff received from the liability carrier. The resulting judgment ordered defendant to pay plaintiff $86,124.58, plus interest.

Following the trial court's declaratory judgment, this Court granted a petition for rehearing in *Austin I*. We subsequently clarified the *Austin I* holding in *Austin v. Midgett* (*Austin II*), 166 N.C. App. 740, 603 S.E.2d 855 (2004). In *Austin II*, we held that *Austin I* resulted in an incorrect computation of the amount the UIM carrier owed to the plaintiff. *Austin II*, 166 N.C. App. at 741, 603 S.E.2d at 856. Our Court determined that, in order to avoid a windfall to the plaintiff, the UIM carrier was entitled to a credit for payments made by the liability carrier. *Id.* at 742, 603 S.E.2d at 856-57.

Our Court also outlined a two-step process for determining the amount due to a plaintiff from an UIM carrier. *Id.* at 741-42, 603 S.E.2d at 856. First, the limit of the UIM coverage is determined by subtracting the amount paid by the liability carrier from the UIM policy limit. *Id.* at 741, 603 S.E.2d at 856; *see also* N.C. Gen. Stat. § 20-279.21(b)(4) (2003). Second, the amount a plaintiff is entitled to recover from the UIM carrier must be determined. *Austin II*, 166 N.C. App. at 742, 603 S.E.2d at 856. This figure is calculated by subtracting from the total

in medical expenses; $51,547.88 to plaintiff in compensation; and $6,198.95 to Hoover Rehabilitation.

value of the plaintiff's loss, the amount of workers' compensation benefits (not including the amount of the workers' compensation lien) and the amount received from the liability carrier. *Id.* at 743, 603 S.E.2d at 857.

[1] Defendant first assigns error to the trial court's failure to credit defendant with the amount plaintiff received from the liability carrier. Defendant argues that by failing to credit defendant with this amount, plaintiff has received a windfall and a net recovery in excess of his actual damages. We agree. Under *Austin II*, a UIM carrier is entitled to a credit for payments made by the liability carrier. *Austin II*, 166 N.C. App. at 742, 603 S.E.2d at 856. Therefore, we hold that the trial court erred in failing to credit defendant with the $30,000 paid by the liability carrier.

[2] Defendant next assigns error to the trial court's calculation of the amount of benefits plaintiff received from the workers' compensation carrier. Defendant argues that the trial court erred by excluding the costs for Hoover Rehabilitation's services from the total amount of workers' compensation benefits plaintiff received.

The trial court's order contains the following finding of fact:

> 7. The sum paid to Hoover Rehabilitation was for a nurse to accompany plaintiff to his doctor visits and plaintiff received no benefit from this service. The sum paid to Hoover Rehabilitation was not compensation to plaintiff.

Our standard of review of a declaratory judgment is the same as in other cases. N.C. Gen. Stat. § 1-258 (2003); *Integon Indem. Corp. v. Universal Underwriters Ins. Co.*, 131 N.C. App. 267, 270, 507 S.E.2d 66, 68 (1998). Therefore, in an action for a declaratory judgment where the trial court decides questions of fact, our standard of review is whether the trial court's findings of fact are supported by competent evidence. *Insurance Co. v. Allison*, 51 N.C. App. 654, 657, 277 S.E.2d 473, 475, *disc. review denied*, 303 N.C. 315, 281 S.E.2d 652 (1981). If supported by competent evidence, the trial court's findings of fact are conclusive on appeal. *Finch v. Wachovia Bank & Tr. Co.*, 156 N.C. App. 343, 346-47, 577 S.E.2d 306, 308-09 (2003) (citing *Miesch v. Ocean Dunes Homeowners Assn.*, 120 N.C. App. 559, 562, 464 S.E.2d 64, 67 (1995), *disc. review denied*, 342 N.C. 657, 467 S.E.2d 717 (1996)).

Defendant argues that there was no evidence on which the trial court could base its finding that plaintiff received no benefit from

Hoover Rehabilitation. However, defendant has failed to present any evidence in the record tending to show that plaintiff received *any* benefit from Hoover. " 'The burden is on an appealing party to show, by presenting a full and complete record, that the record is lacking in evidence to support the [trial court's] findings of fact.' " *Davis v. Durham Mental Health/Development*, 165 N.C. App. 100, 112, 598 S.E.2d 237, 245 (2004) (alteration in original) (quoting *Dolbow v. Holland Industrial*, 64 N.C. App. 695, 696, 308 S.E.2d 335, 336 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984)). Our Rules of Appellate Procedure state: "The record on appeal in civil actions . . . shall contain . . . so much of the evidence . . . as is necessary for an understanding of all errors assigned[.]" N.C.R. App. 9(a)(1)(e). Furthermore, "[w]here the evidence is not in the record, it will be assumed that there was sufficient evidence to support the findings. In other words, when the evidence is not in the record the matter is not reviewable." 1 Strong's North Carolina Index 4th *Appeal and Error* § 489 (1990) (footnotes omitted) (citing *Leasing, Inc. v. Dan-Cleve Corp.*, 31 N.C. App. 634, 638, 230 S.E.2d 559, 562 (1976), *disc. review denied*, 292 N.C. 265, 233 S.E.2d 393 (1977) ("The rule is well established that when the evidence is not included in the record, it will be assumed that there was sufficient evidence to support the findings by the trial court.")); *see also Forrest v. Pitt County Bd. of Education*, 100 N.C. App. 119, 123, 394 S.E.2d 659, 662 (1990), *aff'd*, 328 N.C. 327, 401 S.E.2d 366 (1991) (holding that, without transcripts, depositions, or other necessary documents "it is presumed that the findings of fact are supported by competent evidence, and [the findings of fact] are therefore conclusive on appeal"). Since the record on appeal is devoid of evidence regarding the services provided by Hoover Rehabilitation, we are unable to determine what evidence was before the trial court and are unable to perform a meaningful review of this assignment of error.

[3] In the alternative, defendant argues that, as a matter of law, rehabilitation costs are a part of the workers' compensation benefits received by an injured worker. In support of its argument, defendant cites *Roberts v. ABR Associates, Inc.*, 101 N.C. App. 135, 398 S.E.2d 917 (1990), *superseded by statute on other grounds as stated in Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 472 S.E.2d 382, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). We disagree with defendant's interpretation of *Roberts*. In *Roberts*, the workers' compensation carrier claimed that it was entitled to a lien in the amount that it paid for rehabilitation services. *Id.* at 137, 398 S.E.2d at 918. We held that before the Industrial Commission (the

Commission) can determine that a workers' compensation carrier is entitled to a lien, "the Commission must first find as fact . . . that the services were rehabilitative in nature . . . and reasonably 'required to effect a cure or give relief' to the plaintiff." *Id.* at 140-41, 398 S.E.2d at 920 (citing N.C. Gen. Stat. § 97-25 (1985)). Contrary to defendant's contention, *Roberts* states that rehabilitation services are not a benefit to a plaintiff as a matter of law, but rather must be subject to a fact-specific determination as to whether the services conferred a benefit to a plaintiff. We hold that the trial court did not err in excluding the cost of Hoover Rehabilitation's services when it computed the amount of workers' compensation benefits received by plaintiff.

[4] Having determined the foregoing, we proceed to the two-step inquiry outlined in *Austin II* to calculate the amount payable to plaintiff by defendant. *See Austin II*, 166 N.C. App. at 743, 603 S.E.2d at 856. We first subtract the amount paid to plaintiff by the liability carrier ($30,000) from the UIM policy limit ($1,000,000) and find that the UIM coverage limit is $970,000. We next determine the amount plaintiff is entitled to recover from the UIM carrier. Plaintiff's total loss was valued at $126,874. From this amount we subtract the amount of workers' compensation benefits, not including the amount of the workers' compensation lien, ($40,749.42[2]) and the amount plaintiff received from the liability carrier ($30,000). The resulting figure representing the total amount of plaintiff's uncompensated loss is $56,789.68. Thus, we hold that the amount payable by the UIM carrier to plaintiff is $56,789.68, plus interest.

Since we have held that, under *Austin II*, defendant is entitled to a credit for the amount plaintiff received from the liability carrier, we need not consider defendant's remaining assignments of error regarding this issue.

We remand this matter for entry of judgment in the above calculated amount.

Reversed and remanded.

Judges McCULLOUGH and ELMORE concur.

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2. This figure was reached by subtracting the amount paid to Hoover Rehabilitation ($6,198.95) and the amount of the worker's compensation lien ($35,000) from the total amount paid by the worker's compensation carrier ($81,948.37).

PAUL COOPER, PLAINTIFF v. COOPER ENTERPRISES, INC., EMPLOYER, COMPTRUST AGC, CARRIER, DEFENDANTS

No. COA04-147

(Filed 15 February 2005)

Workers' Compensation— prior arm injury—not the direct cause of auto accident

An Industrial Commission opinion denying compensation was affirmed where plaintiff contended that an automobile accident was a direct and natural result of his prior compensable arm injury, but there was competent evidence that the accident was caused by plaintiff jerking his car to the left upon hitting gravel in the road. The employee bears the burden of establishing the compensability of the claim, and the Commission did not err by finding that there was insufficient evidence that the accident was caused by the prior compensable injury.

Appeal by Plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 29 September 2003. Heard in the Court of Appeals 30 November 2004.

Hyler & Lopez, P.A., by George B. Hyler, Jr., for plaintiff-appellant.

Morris York Williams Surles & Barringer, LLP, by John F. Morris, for defendant-appellees.

WYNN, Judge.

Plaintiff Paul Cooper asserts that the full Industrial Commission committed prejudicial error in denying his claim. Cooper contends he submitted sufficient evidence for the Industrial Commission to determine that the lack of mobility in his right arm prevented him from regaining control of his automobile and avoiding his 17 October 1998 automobile accident. Cooper contends that the automobile accident was therefore a direct and natural result of his prior compensable injury. 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: Cooper had worked in the construction field since 1966. From 1986 through 1996, Cooper worked at Cooper Enterprises, Inc., a firm owned in part by Cooper's brother. Cooper had a history of

problems with his right shoulder. These were exacerbated when, on 25 September 1993, Cooper stepped on a piece of rebar while carrying a roll of mesh wiring, lost his balance, and fell into an embankment. He sustained crush injuries to the right side of his upper body and had to undergo, *inter alia*, five surgical procedures on his right shoulder.

Cooper Enterprises admitted the compensability of Cooper's resulting workers' compensation claim and paid Cooper medical compensation and disability benefits. In December 1997, Cooper's physician, Donald D'Alessandro, M.D., found that, despite treatment, Cooper retained a fifty percent partial impairment of his right upper extremity and a one-hundred percent impairment of his right shoulder. However, in March 1998, Dr. D'Alessandro also noted that Cooper "has done quite well[,]" that Cooper's shoulder "has not been bothering him[,]" and that "[n]o further treatment is necessary."

On 17 October 1998, Cooper was involved in a single-car automobile accident. Cooper testified that gravel on the roadway caused his vehicle to slide toward the right shoulder of the road, where there was a steep drop-off. To avoid the embankment on the right, Cooper turned his steering wheel sharply to the left, causing his vehicle to veer toward an embankment on the other side of the road. In Cooper's own words, "when I started sliding, [the car] went off just a little bit. Then when I pulled it back, you know, I guess I jerked it or whatever and [the car], you know, shot across the road." Cooper was unable to regain control, and his vehicle went off the road and flipped over. As a result, Cooper sustained serious injuries, including hip and leg fractures and lacerations. Cooper alleged that his inability to regain control of his vehicle and the subsequent accident and injuries were due to his prior work injury to his right arm.

On 13 October 2000, Cooper filed a notice of accident, alleging that his automobile accident constituted a compensable claim because it was caused by his prior right upper extremity disability. Defendants denied the claim. Deputy Commissioner Bradley W. Houser filed an Opinion and Award on 21 August 2002, amended on 26 August 2002, awarding benefits to Cooper. Defendants appealed to the full Industrial Commission, which, on 29 September 2003, overturned Deputy Commissioner Houser's Opinion and Award and held that Cooper had failed to present sufficient evidence to show that the 17 October 1998 automobile accident was a direct and natural result of Cooper's prior compensable injury. Cooper appealed.

It is well-settled that the employee bears the burden of establishing the compensability of a workers' compensation claim. *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003). Our review of the Commission's opinion and award is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Industrial Commission is the "sole judge of the weight and credibility of the evidence," and this Court " '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) (quoting *Anderson v. Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

Cooper contends that the lack of mobility in his right arm prevented him from regaining control of his automobile and that the accident was therefore a direct and natural result of his prior compensable injury. "A subsequent injury to an employee, whether an aggravation of the original injury or a new and distinct injury, is compensable only if it is the direct and natural result of a prior compensable injury." *Vandiford v. Stewart Equip. Co.*, 98 N.C. App. 458, 461, 391 S.E.2d 193, 195 (1990) (citing *Starr v. Charlotte Paper Co.*, 8 N.C. App. 604, 610, 175 S.E.2d 342, 347 (1970)). An injury is not compensable, however, if "it is the result of an independent intervening cause attributable to claimant's own intentional conduct. Our supreme court defines intervening cause . . . as an occurrence entirely independent of a prior cause." *Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 379-80, 323 S.E.2d 29, 30 (1984) (citations omitted).

To show that the prior compensable injury caused the subsequent injury, the " 'evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation.' " *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (quoting *Gilmore v. Hoke County Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942)). "Although expert testimony as to the possible cause of a medical condition is admissible . . ., it is insufficient to prove causation, particularly when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." *Id.* at 233, 581 S.E.2d at 753 (internal quotation and citations omitted).

Here, the record reflects that, as Cooper approached a curve in the roadway, gravel caused his vehicle to slide to the right. In an

attempt to avoid falling into an embankment on the right, Cooper intentionally steered sharply to the left, in his own words "jerking" his vehicle and thereby causing it to veer toward an embankment on the other side of the road. While Cooper alleged that his prior work injury to his right arm caused the accident, the record reveals little evidence to support this contention. The only relevant medical evidence produced was limited testimony by Dr. D'Alessandro, who characterized his testimony as "just conjecture" by someone who is "no expert in th[e] area" of driving with impaired extremities. Dr. D'Alessandro stated that "it's just conjecture, but I imagine that the right arm could really only be used to steady the wheel to re-grip it with the left[.]" Meanwhile, prior to the accident, Dr. D'Alessandro noted that Cooper "has done quite well[,]" that Cooper's shoulder "has not been bothering him[,]" and that "[n]o further treatment is necessary." Moreover, Dr. D'Alessandro testified that he did not see Cooper for ten months after the automobile accident, that he was not involved in any way with the accident, and that the accident was not relevant at the time that he saw Cooper for treatment.

To support his argument that his accident was a result of his prior compensable injury, Cooper cited several cases where a subsequent accident was found to be a direct and natural result of a prior compensable injury. These cases are, however, easily distinguishable. In *Horne v. Universal Leaf Tobacco Processors*, 119 N.C. App. 682, 459 S.E.2d 797 (1995), the plaintiff sustained a compensable injury to his back. While the plaintiff was still in the process of recovering from that injury, he was involved in an automobile accident. The plaintiff's work injury had not yet stabilized at the time of the accident, and it was undisputed that the accident was not caused by the plaintiff's " 'own intentional conduct.' " *Id.* at 687, 459 S.E.2d at 800-01. The injuries resulting from the automobile accident were therefore not the product of an independent, intervening cause and were thus compensable. Similarly, in *Heatherly*, 71 N.C. App. 377, 323 S.E.2d 29, the plaintiff fractured a bone that was still healing from a prior compensable fracture. The evidence showed that the relevant bone had been weakened by the prior compensable fracture, and the subsequent injury was therefore compensable. In *Starr*, 8 N.C. App. 604, 175 S.E.2d 342, the plaintiff had been paralyzed from the waist down in a work-related accident. Several years later, while in bed, the plaintiff sustained severe burns from a fire started by his cigarette. This Court affirmed the Industrial Commission's finding that the burns were compensable, both because the plaintiff put his cigarette on his wheelchair due to muscle spasms in his legs resulting from his

prior compensable injury, and because the plaintiff was incapable of perceiving that his bed and legs had caught on fire because of the prior compensable injury. *Id.* at 609-11, 175 S.E.2d at 346-47.

Here, in contrast, the Industrial Commission found that the evidence was insufficient from which to find that the 17 October 1998 car accident was the result of Cooper's prior compensable injury. Indeed, there was competent evidence that the accident and injuries were caused by Cooper's jerking his car to the left upon hitting gravel in the road. Though Cooper testified that, had he retained full use of his arm, he would have had more control over his vehicle, the evidence supports the Industrial Commission's finding that the evidence did not suffice to show that he would have avoided the accident. The evidence also showed that Cooper's prior injury had stabilized by the time Cooper had the accident. The Industrial Commission therefore did not err in finding that there was insufficient evidence to find that Cooper's automobile accident was caused by, or a natural and direct result of, his prior compensable injury. These findings in turn support the Industrial Commission's conclusion that Cooper's automobile accident injuries were not compensable.[1]

Accordingly, we affirm the Industrial Commission's Opinion and Award.

Affirmed.

Judges HUDSON and ELMORE concur.

BILLY L. CAMPBELL, PLAINTIFF v. THE CITY OF LAURINBURG, DEFENDANT

No. COA04-789

(Filed 15 February 2005)

1. Police Officers— retirement—special separation allowance—employment by sheriff—not a State agency

A retired city police officer who began working for the county sheriff was working for a local government employer, and not a State agency, for retirement payment purposes.

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1. However, this opinion does not address and does not preclude Cooper's possible ongoing entitlement to disability benefits and medical treatment for his admittedly compensable prior right arm injury.

2. Police Officers— retirement—separation payments—employment by sheriff's office—termination of payments

Plaintiff, a retired police officer, lost the right to receive future separation payments from the city upon his employment with the sheriff's office, an employer stipulated as local government. The City of Laurinburg acted congruent with its designated authority under N.C.G.S. § 143-166.42 and consistent with the General Assembly's intent in determining that it would have grounds to cease payment of a separation allowance for law enforcement officers who become employed by another local government agency, such as the Scotland County Sheriff's Office.

Appeal by defendant from order entered 17 December 2003 by Judge Jack A. Thompson in Scotland County Superior Court. Heard in the Court of Appeals 26 January 2005.

Jack E. Carter for plaintiff-appellee.

Gordon, Horne, Hicks, and Floyd, P.A., by Charles L. Hicks, for defendant-appellant.

North Carolina League of Municipalities by General Counsel, Andrew L. Romanet, Jr. and Senior Assistant General Counsel, John M. Phelps, II, as amicus curiae in favor of defendant-appellant.

ELMORE, Judge.

The City of Laurinburg (the City) appeals an order of partial summary judgment requiring them to continue to pay a portion of separation benefits pursuant to N.C. Gen. Stat. §§ 143.166.41 and 143.166.42 for Billy L. Campbell (plaintiff), a former police officer. Plaintiff retired from the City of Laurinburg Police Department on 30 August 1999, after 30 years of service. He was not yet 62 years old. The City began paying him a retirement allowance and also a special separation allowance pursuant to N.C. Gen. Stat. § 143-166.42. These special separation payments of $928.54 a month continued until 28 September 2001, when the City ceased payment. Plaintiff contends, and the trial court agreed, that this cessation was wrongful. But as of October 2001 plaintiff was employed as a law enforcement officer for the Scotland County Sheriff's Office. The City contends that this employment made plaintiff no longer eligible to receive payments. There is no argument as to these material facts; each party argues though, that the facts entitle them to judgment as a matter of law.

The City makes four arguments as to why plaintiff is no longer eligible for the special separation allowance because of his employment with Scotland County. First, that the Laurinburg City Council, as the local governing body, established in 1991 that any officer who was receiving the special separation allowance would forfeit the allowance upon employment "by another local government or agency thereof." Second, the City argues that the statute itself, when properly interpreted, also provides for termination of the allowance if the officer is hired by another local government employer. Third, the City argues that because plaintiff became "reemployed," under N.C. Gen. Stat. § 128-27(a) he is no longer actually retired and any allowance paid because of retirement should end. Fourth, in the alternative, the City argues that the Scotland County Sheriff's Office can be considered a state agency, which under section 143-166.41(c)(3) would make plaintiff's employment act as a terminating event to his receipt of the allowance.

[1] Prior to analysis of these arguments it is important to note that the parties entered into stipulations of fact, one of which stated that as of "October 2001 the Plaintiff became employed as a law enforcement officer as defined by G.S. 128-21(11b) or G.S. 143-166.50(a)(3) of the Sheriff of Scotland County, which employment has continued at all times through this date." Both of the statutes referenced in the stipulation defining "law enforcement officer" begin by qualifying plaintiff as "a full-time paid employee of an employer . . . ." N.C. Gen. Stat. §§ 143-166.50(a)(3) and 128-21(11b) (2003). Both statutes define "employer" as "a county, city, town or other political subdivision of the State." N.C. Gen. Stat. §§ 143-166.50(a)(2) and 128-21(11) (2003). Accordingly, for this stipulation to be given effect, plaintiff is necessarily employed by a local government employer and not a State agency, leaving the City's fourth argument, that plaintiff now works for the State, without merit.

[2] The remainder of the arguments attempt to address the seeming ambiguity within the language of section 143-166.42, an ambiguity which is further clouded when attempting to construe section 143-166.42 in conjunction with section 143-166.41: the statute which creates the special separation allowance.

N.C. Gen. Stat. § 143-166.42 (2003) states that:

> the provisions of G.S. 143-166.41 shall apply to all eligible law-enforcement officers as defined by G.S. 128-21(11b) or G.S.

> 143-166.50(a)(3) who are employed by local government employers, except as may be provided by this section. As to the applicability of the provisions of G.S. 143-166.41 to locally employed officers, the governing body for each unit of local government shall be responsible for making determinations of eligibility for their local officers retired under the provisions of G.S. 128-27(a) and for making payments to their eligible officers under the same terms and conditions, other than the source of payment, as apply to each State department, agency, or institution in payments to State officers according to the provisions of G.S. 143-166.41.

Id. The first sentence of section 143-166.42 allows local law enforcement officers to receive the same special separation allowance that officers who are employed by the State enjoy, "except as may be provided by this section." The very next sentence authorizes the governing body of the local government in question to determine who, among their officers, is "eligible" for the special separation allowance set forth in section 143-166.41. But further within the same sentence the General Assembly notes that payments should be made "under the same terms and conditions" as apply to the State. Looking at the statute then, the extent to which a local governing body can effectively determine "eligibility" and apply the provisions of section 143-166.41, is ambiguous.

Nonetheless, operating under its authority to determine eligibility, the City's governing body—its City Council—determined on 16 April 1991 that any future officer receiving a special separation allowance who then became employed by "another local government or agency" would no longer be eligible to receive payments. The City argues that its Council's decision is controlling and plaintiff is no longer entitled to receive payments. Plaintiff, however, notes that the plain language of section 143-166.41 only requires termination of the allowance if plaintiff is employed by the State, not another local government entity, and argues that application of N.C. Gen. Stat. § 163-144.41(c)(3) is controlling. N.C. Gen. Stat. § 143-166.41, in pertinent part, states:

> (a) Notwithstanding any other provision of law, every sworn law-enforcement officer as defined by G.S. 135-1(11b) or G.S. 143-166.30(a)(4) employed by a State department, agency, or institution who qualifies under this section shall receive, beginning on the last day of the month in which he retires on a basic service retirement under the provisions of G.S. 135-5(a) or G.S. 143-166(y), an annual separation allowance . . . . The allowance

shall be paid in 12 equal installments on the last day of each month. To qualify for the allowance the officer shall:

(1) Have (i) completed 30 or more years of creditable service or, (ii) have attained 55 years of age and completed five or more years of creditable service; and

(2) Not have attained 62 years of age; and

(3) Have completed at least five years of continuous service as a law enforcement officer as herein defined immediately preceding a service retirement. Any break in the continuous service required by this subsection because of disability retirement or disability salary continuation benefits shall not adversely affect an officer's qualification to receive the allowance, provided the officer returns to service within 45 days after the disability benefits cease and is otherwise qualified to receive the allowance.

(b) . . .

(c) Payment to a retired officer under the provisions of this section shall cease at the first of:

(1) The death of the officer;

(2) The last day of the month in which the officer attains 62 years of age; or

(3) The first day of reemployment by any State department, agency, or institution, except that this subdivision does not apply to an officer returning to State employment in a position exempt from the State Personnel Act in an agency other than the agency from which that officer retired.

(d) . . .

(e) The head of each State department, agency, or institution shall determine the eligibility of employees for the benefits provided herein.

(f) . . .

(g) The head of each State department, agency, or institution shall make the payments set forth in subsection (a) to those persons certified under subsection (e) from funds available under subsection (f).

N.C. Gen. Stat. § 143-166.41 (2003). Section 143-166.41 is clear on its face that employment with the State, under the listed conditions, while drawing a separation allowance from that same agency would be grounds to terminate the allowance.

We hold that, under its authority to determine eligibility according to section 143-166.42, the City Council appropriately changed the applicable provision of section 143-166.41(c)(3) from reemployment with the State to "reemployment with another local government." *See Bowers v. City of High Point*, 339 N.C. 413, 419, 451 S.E.2d 284, 288 (1994) (holding that N.C. Gen. Stat. § 143-166.42 does not permit local governments to determine the amount of payment, *i.e.*, alter the rate found in 143-166.41(a), but does permit them to determine eligibility). Upon plaintiff's employment with the sheriff's office, an employer already stipulated as local government, he lost the right to receive future separation payments from the City.

This interpretation is congruent with the intent of the General Assembly, the primary goal of statutory construction. *See id.*, 339 N.C. at 419-20, 451 S.E.2d at 289 (citing cases). In enacting section 143-166.42, the legislature wanted to encourage early retirement at the local level under similar circumstances as they had done at the State level. *See id.* Instead of setting forth the exact eligibility requirements, the legislature saw fit to give that responsibility to the local governing body. N.C. Gen. Stat. § 143-166.42 (2003) ("As to the applicability of the provisions of G.S. 143-166.41 . . . the governing body for each unit of local government shall be responsible for making determinations of eligibility . . . ."); *Moody v. Transylvania County*, 271 N.C. 384, 386, 156 S.E.2d 716, 717 (1967) (In addition to expressed powers, a municipality can exercise "those necessarily or fairly implied in or incident to the powers expressly granted . . . .") (quoting *Madry v. Scotland Neck*, 214 N.C. 461, 462, 199 S.E. 618, 619 (1938)). To interpret the local governing body's ability to determine eligibility in such a way as to prevent them from setting the eligibility requirements listed in section 143-166.41 makes the General Assembly's exception in section 143-166.42 virtually meaningless. *See* N.C. Gen. Stat. § 160A-4 (2003) ("[G]rants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect . . ."); *Bowers*, 339 N.C. at 417, 451 S.E.2d at 288 (applying 160A-4 to its decision interpreting section 143-166.42); *Duke Power Co. v. City of High Point*, 69 N.C. App. 378, 387, 317 S.E.2d 701, 706 ("no part of a statute is mere surplusage . . . [and] each provision adds something not oth-

erwise included therein"), *disc. review denied*, 312 N.C. 82, 321 S.E.2d 895 (1984).

The City acted congruent with its designated authority under N.C. Gen. Stat. § 143-166.42 and consistent with the General Assembly's intent in determining that for their law enforcement officers, becoming employed by another local government agency, such as the Scotland County Sheriff's Office, would be grounds to cease payment of the separation allowance. As such, we reverse the trial court's order that the City must continue special separation allowance payments to plaintiff.

Reversed.

Judges McCULLOUGH and LEVINSON concur.

STATE OF NORTH CAROLINA v. DAVID JEROD MILLER

No. COA04-429

(Filed 15 February 2005)

1. Sentencing— habitual felon—cocaine possession—felony

Defendant's habitual felon indictment listed three prior felony convictions and the trial court had jurisdiction to sentence defendant as an habitual felon where the indictment listed one conviction for attempted larceny and two for possession of cocaine. The North Carolina Supreme Court recently rejected the argument that possession of cocaine is not a felony because it is classed by statute with misdemeanor controlled substances offenses (but is punishable as a felony).

2. Sentencing— prior record level—convictions used to establish habitual offender status

The State incorrectly sought to prove defendant's prior record level by relying on two convictions that were also used to establish defendant's status as an habitual felon.

3. Sentencing— credits for pre-trial incarceration—remanded

Defendant's sentence was remanded where the State admitted that the trial court erred in determining the credits defendant may have earned for time spent in jail prior to judgment.

Appeal by defendant from amended judgment dated 14 November 2003 by Judge Charles H. Henry in Superior Court, Onslow County. Heard in the Court of Appeals 7 December 2004.

Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for the State.

Everett & Hite, L.L.P., by Stephen D. Kiess, for defendant-appellant.

McGEE, Judge.

David Jerod Miller (defendant) was convicted of possession with the intent to manufacture, sell, and deliver cocaine; manufacturing a controlled substance; maintaining a vehicle for keeping and selling a controlled substance; and driving while his license was revoked. Defendant was also determined to be an habitual felon. The trial court consolidated defendant's convictions and sentenced defendant to 100 to 129 months in prison. Defendant appealed his convictions to this Court. In an unpublished opinion dated 21 October 2003, we reversed defendant's convictions for manufacturing a controlled substance, possession with intent to manufacture a controlled substance, and maintaining a vehicle for keeping and selling a controlled substance. We also remanded for resentencing.

At resentencing, defendant requested that the trial court set aside the habitual felon verdict. The trial court denied defendant's request and found that defendant was an habitual felon with a prior record level II. The trial court entered an amended judgment sentencing defendant to a term of 90 to 117 months in prison. Defendant appeals.

I.

[1] Defendant first assigns error to the trial court's sentencing defendant as an habitual felon. Defendant contends that the habitual felon indictment only alleged one prior felony offense and therefore the trial court lacked jurisdiction to sentence defendant as an habitual felon.

An habitual felon indictment must "set[] forth the three prior felony convictions relied on by the State[.]" *State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 865 (1995); *see also* N.C. Gen. Stat. § 14-7.3 (2003). Defendant's habitual felon indictment listed three previous convictions: one conviction for attempted larceny and two convictions for possession of cocaine. Defendant argues that possession of

cocaine is a misdemeanor, and consequently the habitual felon indictment listed only one previous felony conviction.

N.C. Gen. Stat. § 90-95(d)(2) (2003), states that any person who possesses "[a] controlled substance classified in Schedule II . . . shall be guilty of a Class 1 misdemeanor."[1] However, the statute further states: "If the controlled substance is . . . cocaine . . . , the violation shall be punishable as a Class I felony." N.C. Gen. Stat. § 90-95(d)(2). Defendant contends that his prior convictions for possession of cocaine are misdemeanor convictions, arguing that "[t]he fact that possession of cocaine is *punishable* as a Class I felony does not make it a felony."

Our Supreme Court recently rejected a similar argument in *State v. Jones*, 358 N.C. 473, 598 S.E.2d 125 (2004). In *Jones*, the defendant pled guilty to having attained habitual felon status. *Id.* at 474, 598 S.E.2d at 126. The defendant's habitual felon indictment listed three prior convictions, including one conviction for possession of cocaine. *Id.* at 474, 598 S.E.2d at 126. On appeal, the defendant argued that his habitual felon indictment was insufficient to allege habitual felon status because N.C. Gen. Stat. § 90-95(d)(2) classified possession of cocaine as a misdemeanor. *Id.* at 475, 598 S.E.2d at 126. Our Supreme Court rejected the defendant's argument and held that possession of cocaine is a felony, stating that: "The language of N.C.G.S. § 90-95(d)(2), the statute's legislative history, and the terminology used in other criminal statutes all indicate the General Assembly's intent to classify possession of cocaine as a felony offense." *Id.* at 476, 598 S.E.2d at 127.

Based on our Supreme Court's holding in *Jones*, we find that defendant's habitual felon indictment listed three prior felony convictions and hold that the trial court had jurisdiction to sentence defendant as an habitual felon. We overrule this assignment of error.

II.

[2] Defendant next assigns error to the trial court's determination of defendant's prior record level. In the amended judgment, the trial court found that defendant had four prior record points and a prior record level II.

When establishing a defendant's prior record level, the State bears the burden of proving a prior conviction by a preponderance of

1. Cocaine is a Schedule II controlled substance. N.C. Gen. Stat. § 90-90(1)(d) (2003).

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.

The State did not present any evidence at defendant's resentencing hearing. Defendant argues that this failure to present any evidence precludes the State from meeting its burden of proving defendant's prior convictions. The State contends that defendant stipulated to a prior record level II since defendant admitted in open court at the resentencing hearing that he had two prior convictions for possession of cocaine:

> [ATTORNEY FOR DEFENDANT]: Your Honor, . . . we're asking the [trial court] to modify the sentence in the mitigated range, based on the fact that . . . two of [defendant's] prior convictions, Your Honor, are possession of cocaine, and Court of Appeals law . . . indicates that possession of cocaine is a misdemeanor punishable as a felony, and therefore, should not be considered . . . for the purpose of sentencing for habitual status[.]
>
> . . . .
>
> Basically, we would ask the Court to consider . . . setting aside the habitual status, based on the law we know exists from the Court of Appeals in another case.

The State argues that this is the equivalent of a stipulation to a prior record level II. *See* N.C. Gen. Stat. § 90-95(d)(2) (possession of cocaine is a Class I felony); N.C. Gen. Stat. § 15A-1340.14(b)(4) (2003) (two prior record level points are assigned to each Class I felony conviction); N.C. Gen. Stat. § 15A-1340.14(c)(2) (2003) (a defendant with four prior record level points acquires a prior record level II).

Prior convictions used to establish a defendant's habitual felon status may not also be used to determine a defendant's prior record level. N.C. Gen. Stat. § 14-7.6 (2003); *see also State v. Lee*, 150 N.C.

App. 701, 703-04, 564 S.E.2d 597, 598, *disc. review denied*, 356 N.C. 171, 568 S.E.2d 856 (2002). In *Lee*, the defendant's habitual felon indictment listed five prior felony convictions. *Lee*, 150 N.C. App. at 703, 564 S.E.2d at 598. The trial court determined that the defendant had a prior record level III, relying in part on the same five prior felony convictions. *Id.* at 702-03, 564 S.E.2d at 597-98. Even though the habitual felon statute only required an habitual felon indictment to list three prior felony convictions, we held that none of the felonies listed on the habitual felon indictment could simultaneously be used to prove the defendant's prior record level. *Id.* at 703-04, 564 S.E.2d at 598-99; *see also State v. Bethea*, 122 N.C. App. 623, 626, 471 S.E.2d 430, 432 (1996) ("A defendant's prior convictions will either serve to establish a defendant's status as an habitual felon . . . or to increase a defendant's prior record level . . . . [T]he existence of prior convictions may not be used to increase a defendant's sentence pursuant to both provisions at the same time.").

In the case before us, the State incorrectly sought to prove defendant's prior record level by relying on two convictions that were also used to establish defendant's status as an habitual felon. We therefore hold that defendant's admission that he had two prior convictions for possession of cocaine is not sufficient to prove that he had a prior record level II. Since the State has failed to present any other evidence regarding defendant's prior record, we must remand for resentencing.

III.

[3] Defendant argues in his final assignment of error that the trial court erred in failing to credit defendant with time spent in jail prior to judgment. N.C. Gen. Stat. § 15-196.4 (2003) provides that "[u]pon sentencing or activating a sentence, the judge presiding *shall* determine the credits to which the defendant is entitled [.]" (emphasis added). In this case, the trial court only credited defendant with fifteen days. However, defendant was confined from (1) the date of his arrest on 3 November 2001, until his release on 17 November 2001, and (2) from 15 May 2002, until the date judgment was entered on 14 November 2003. As a result, defendant argues that he is entitled to a total credit of 563 days, or an additional 548 days of credit. The State admits that the trial court erred in failing to make a determination regarding any credits defendant may have earned, and requests that we remand the issue to the trial court. Therefore, we remand this issue to the trial court to make a determination regarding the credits to which defendant is entitled.

Affirmed; remanded for resentencing and a determination of earned credits.

Judges WYNN and TYSON concur.

GASTON COUNTY, BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY, EX-REL. APRIL D. MILLER, PLAINTIFF v. RANDY MILLER, DEFENDANT

No. COA04-157

(Filed 15 February 2005)

1. Child Support, Custody, and Visitation— adoption assistance payments—received by parent rather than child

The trial court acted within its discretion in departing from the guidelines and determining child support in an action involving adopted children and adoption assistance payments. Adoption assistance payments administered pursuant to North Carolina's adoption assistance program are received by the child rather than the adoptive parent.

2. Child Support, Custody, and Visitation— findings—departing from guidelines

The trial court made adequate findings of fact when departing from the child support guidelines in a case involving adopted children and adoption assistance payments.

Appeal by defendant from order entered 2 October 2003 by Judge James A. Jackson in Gaston County District Court. Heard in the Court of Appeals 2 November 2004.

Cerwin Law Firm, by Todd R. Cerwin, for defendant-appellant.

Gaston County Department of Social Services, by Jill Y. Sanchez, for plaintiff-appellee.

ELMORE, Judge.

April Miller (plaintiff) and Randy Miller (defendant) were married on 25 September 1999. The parties adopted two children during the marriage. Plaintiff and defendant entered into an Adoption Assistance Agreement with the Guilford County Department of Social Services

(DSS). Pursuant to this agreement, based upon their status as special needs children, the Miller children received monthly adoption assistance payments in the amount of $830.00 ($415.00 per child). The parties separated on 25 March 2003, and plaintiff filed an action on 23 July 2003 seeking an order for child support. Plaintiff is the custodial parent of the two children and will continue to receive monthly adoption assistance payments on behalf of the children until each child reaches the age of eighteen. Plaintiff is not disabled but is currently unemployed. Defendant is employed by the United States Postal Service and receives Military retirement benefits, for a total gross income of $4,607.41 per month.

On 17 September 2003 the district court held a hearing on plaintiff's claims. The court applied the North Carolina Child Support Guidelines (guidelines), which provided a presumptive amount of $918.00 per month as defendant's support obligation. The court then considered the relative abilities of each party to provide support and the needs of the children. In considering these factors pursuant to N.C. Gen. Stat. § 50-13.4(c), the court deviated from the guidelines. As support for this conclusion, the court entered a specific finding that the presumptive amount under the guidelines "would exceed the needs of the children due to the children's separate income of $830.00 per month and the lack of extraordinary expenses related to the needs of the children." The court found that the children were in the custody of defendant twenty percent of the time. The court then considered the benefit the children receive from the adoption assistance income while in the care of defendant and accordingly reduced defendant's obligation by twenty percent of the children's income, resulting in a support obligation of $752.00 per month. On 2 October 2003 the court entered its child support order, concluding that $752.00 per month is a reasonable amount of support and directing defendant to pay this amount beginning 1 September 2003. From this order, defendant appeals.

[1] Defendant contends that the trial court erred in failing to credit the adoption assistance payments against his child support obligation. At the outset, we note that the trial court's findings in a child support order are reviewed under a abuse of discretion standard. *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). Thus, the trial court's ruling will be reversed on appeal only upon a showing that it could not have been supported by a reasoned decision. *Id.*

Defendant assigns error to the following finding of fact entered by the court in the child support order:

> 12. That the Defendant introduced into evidence that the children receive adoption assistance income in the amount of $415.00 per month per child.

Defendant argues that the evidence in the record does not support the court's finding that the adoption assistance payments are the income of the children. According to defendant, the adoption assistance payments are not income of the children, but rather a subsidy to plaintiff exceeding the needs of the children. Yet, the language of the regulations governing the administration of adoption assistance programs by county departments of social services dictates otherwise. The North Carolina Administrative Code states that "payments may be made *to children* who meet the requirements set out in Rule .0402 of this Section." N.C. Admin. Code tit. 10A, r. 70M.0401 (June 2004) (emphasis added). Thus, the regulations applicable to adoption assistance payments specify that such payments are a resource of the adopted child, not a subsidy to the parent. Furthermore, the Adoption Assistance Agreement between Guilford County DSS and the Millers states, "[f]or the child receiving a monthly cash payment, [the parties] understand and agree that it is based upon the needs of the child and the circumstances of [the adoptive parents] . . . ."

A decision rendered by the Arizona Court of Appeals, *Hamblen v. Hamblen*, 54 P.3d 371 (Ariz. Ct. App. 2002), addressed an issue very similar to the one raised by defendant here. In *Hamblen*, the defendant argued that the trial court erred in ruling that adoption assistance subsidies for special needs children constituted money received by the children. The appellate court disagreed, explaining that the children are the recipients of the funds and that the parents' agreement to receive the payments pursuant to Arizona's adoption assistance program does not cause the funds to become property of the parents. *Hamblen*, 54 P.3d at 374. This analysis provides additional support for our conclusion that the child, rather than the adoptive parent, is the recipient of adoption assistance payments administered pursuant to North Carolina's adoption assistance program.

Defendant argues nonetheless that the court should have applied the entire adoption assistance benefit against his child support obligation in order to achieve equity. He contends that the court's failure to credit the full amount of the payments in reducing his obligation

resulted in plaintiff receiving a windfall. A trial court has the discretion to deviate from the guidelines if it finds, by the greater weight of the evidence, that applying the guidelines would not meet or would exceed the reasonable needs of the child. N.C. Gen. Stat. § 50-13.4(c) (2003); *Guilford County Ex. Rel. Easter v. Easter*, 344 N.C. 166, 473 S.E.2d 6 (1996). Here, defendant presented evidence to the court of the children's monthly adoption assistance payments. The record reveals that the court considered whether the presumptive amount under the guidelines would exceed the needs of the children in light of the adoption assistance payments. The court acted within its discretion in determining that $752.00 is a reasonable amount of support, and defendant has not shown an abuse of that discretion.

[2] By his next assignment of error, defendant argues that the court erred in failing to make the requisite findings of fact when deviating from the guidelines. We disagree. N.C. Gen. Stat. § 50-13.4(c) (2003) provides that when a trial court considers evidence supporting a deviation from the guidelines, the court must "find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support." Here, the court specifically found that the children did not have any extraordinary financial needs:

> 13. That although the children are considered special needs children for the purpose of receiving adoption assistance income, the children do not have any additional or extraordinary expenses relating to any physical or emotional health needs, educational needs, or other special needs that should be considered by the court.

The court also made findings as to the parties' employment circumstances and income sources. *Cf. Gowning v. Gowning*, 111 N.C. App. 613, 619, 432 S.E.2d 911, 914 (1993) (remand for further findings where trial court's findings failed to address needs of child or earning capacity and income of parties). Based upon these findings, the court concluded that $752.00 was a reasonable amount of support to meet the children's needs. As the trial court entered adequate findings in compliance with N.C. Gen. Stat. § 50-13.4(c), defendant's assignment of error is without merit.

Affirmed.

Chief Judge MARTIN and Judge HUDSON concur.

STATE OF NORTH CAROLINA v. HARRY WOOD

No. COA04-526

(Filed 15 February 2005)

1. Appeal and Error— preservation of issues—failure to assert issue at trial

Although defendant contends he was denied his state constitutional right to a verdict by a jury of twelve because fewer than all twelve jurors engaged in deliberations while having lunch, defendant failed to present this argument to the trial court and therefore this argument is not properly before the Court of Appeals. N.C. R. App. P. 10(b)(1).

2. Jury— juror misconduct—motion for mistrial

The trial court did not abuse its discretion in a first-degree murder, robbery with a dangerous weapon, first-degree kidnapping, and second-degree arson case by denying defendant's motion for a mistrial based on juror misconduct, because: (1) the trial court questioned the identified jurors individually regarding their lunch conversation; (2) the trial court individually questioned each juror regarding what he or she had expressed or heard regarding the jurors' opinions on the ultimate issues in the case; and (3) while the jurors' lunch conversation did violate the judge's instructions by discussing the demeanor of the witnesses before the close of all evidence, this misconduct did not substantially and irreparably prejudice defendant's case.

Appeal by Defendant from judgment entered 1 May 2003 by Judge Ronald E. Spivey in Superior Court, Forsyth County. Heard in the Court of Appeals 11 January 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Teresa H. Pell, for the State.

Staples Hughes, Appellate Defender, by Constance E. Widenhouse, Assistant Appellate Defender, for defendant-appellant.

WYNN, Judge.

Where the trial court inquired into juror misconduct and determined that no jurors had expressed their opinion on the ultimate issues in the case, the trial court did not abuse its discretion in deny-

ing Defendant's motion for a mistrial. After careful review of the record, we find no error.

Defendant, Harry Wood, was indicted by the Forsyth County Grand Jury for the first-degree murder of Edward Grant, robbery with a dangerous weapon, first-degree kidnapping of Mr. Grant, first-degree arson, and first-degree kidnapping of Earther Wynn. At the close of all evidence, the trial court dismissed the first-degree kidnapping charge with regard to Ms. Wynn.

At trial, after Defendant presented his evidence and while the State was presenting its rebuttal evidence, a local attorney, J.D. Byers, informed the trial court that while he was having lunch at Bon Appetit in Winston-Salem, North Carolina, he thought he overheard some of the jurors discussing witnesses in the case. The jury was brought into the courtroom, given a brief instruction, and then returned to the jury room. Mr. Byers identified two or three jurors he thought he heard discussing witnesses.

At Defendant's request, the trial court brought the identified jurors into the courtroom individually and questioned them. All jurors stated that they did not express or hear anyone express an opinion as to guilt or innocence of Defendant. One juror stated that during the lunch conversation jurors "joked about facial expressions and stuff like that, but nothing to do with the events of the case or anything like that." Defendant moved for a mistrial.

The trial court proceeded to individually question every juror and alternate juror. The trial court asked each juror the following questions:

> [H]ave you expressed your opinion about the guilt or innocence of the Defendant to other Jurors?
>
> [H]ave you heard any of the other Jurors discuss their opinions about the guilt or innocence of the Defendant?
>
> [H]ave you formed any opinion about this case based on anything you've overheard or talked with other Jurors about?
>
> [C]an you make your decision based solely upon the law and the evidence presented at trial?

All jurors answered the first three questions in the negative, and the last in the affirmative. Upon additional questioning by the defense counsel, one juror stated that more than half of the jurors had dis-

cussed questions they wanted answered, but no one had expressed any opinions about the ultimate issues. After the trial court questioned a juror, he or she was taken to a second jury room. After questioning all the jurors, the trial court denied Defendant's motion for a mistrial.

The jury found Defendant guilty of first-degree murder, second-degree arson, first-degree kidnapping, and robbery with a dangerous weapon. Defendant was sentenced to life imprisonment without parole on the first-degree murder charge; 100 months to 129 months imprisonment on the first-degree kidnapping charge; and a consecutive sentence of fifteen to eighteen months imprisonment on the second-degree arson charge. Defendant appealed.

On appeal, Defendant argues that he was denied his state constitutional right to a verdict by a jury of twelve and that the trial court erred in denying his motion for a mistrial. We disagree.

[1] Defendant first argues that he was denied his state constitutional right to a verdict by a jury of twelve because fewer than all twelve jurors engaged in "deliberations" while having lunch. Defendant did not present this argument to the trial court and therefore this argument is not properly before this Court on appeal. N.C. R. App. P. 10(b)(1).

[2] Defendant contends that the trial court erred in denying his motion for a mistrial without conducting an adequate investigation to determine whether Defendant was prejudiced by the jury misconduct. We disagree.

"A mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Blackstock*, 314 N.C. 232, 243-44, 333 S.E.2d 245, 252 (1985); N.C. Gen. Stat. § 15A-1061 (2004). Whether to grant a motion for mistrial is within the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion. *State v. Ward*, 338 N.C. 64, 92-93, 449 S.E.2d 709, 724 (1994), *cert. denied*, 514 U.S. 1134, 131 L. Ed. 2d 1013 (1995).

> It is well-settled law in this State that the determination of the trial court on the question of juror misconduct will be reversed only where an abuse of discretion occurred. The reason for the rule of discretion is apparent. Misconduct is determined by the

> facts and circumstances in each case. The trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor, and make appropriate findings.

State v. Harris, 145 N.C. App. 570, 576, 551 S.E.2d 499, 503 (2001) (citing *State v. Drake*, 31 N.C. App. 187, 190, 229 S.E.2d 51, 54 (1976)).

"Where juror misconduct *is alleged* . . . the trial court must investigate the matter and make appropriate inquiry." *State v. Najewicz*, 112 N.C. App. 280, 291, 436 S.E.2d 132, 139 (1993) (emphasis omitted). "Not every violation of a trial court's instruction to jurors is such prejudicial misconduct as to require a mistrial." *Harris*, 145 N.C. App. at 578, 551 S.E.2d at 504.

Here, the trial court questioned the identified jurors individually regarding their lunch conversation. Additionally, the trial court individually questioned *each* juror regarding what they had expressed or heard regarding the jurors' opinions on the ultimate issues in the case. The trial court made an appropriate inquiry into the jury misconduct. *Najewicz*, 112 N.C. App. at 291, 436 S.E.2d at 139.

While the jurors' lunch conversation did violate the judge's instructions by discussing the demeanor of witnesses before the close of all evidence, this misconduct did not substantially and irreparably prejudice Defendant's case. *O'Berry v. Perry*, 266 N.C. 77, 81, 145 S.E.2d 321, 324 (1965) (no abuse of discretion where trial court refused to grant a mistrial after a juror, the plaintiff, and the plaintiff's witness walked to lunch together and discussed fishing); *Harris*, 145 N.C. App. at 578, 551 S.E.2d at 504 (no abuse of discretion where the trial court did not inquire into misconduct where a juror had summarized and typed his thoughts on the evidence while on a break in deliberation). Therefore, the trial court did not abuse its discretion in denying a mistrial.

Defendant did not present arguments for his three remaining assignments of error, therefore, they are deemed abandoned. N.C. R. App. P. 28(b)(6).

No prejudicial error.

Judges McGEE and TYSON concur.

NORTH CAROLINA FARM BUREAU INSURANCE COMPANY, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT

No. COA04-348

(Filed 15 February 2005)

Insurance— auto accident—determination of applicable policy—passenger grabbing steering wheel—not in possession of vehicle

Summary judgment for defendant was affirmed in a declaratory judgment action between two insurance companies to determine their obligations in an automobile accident case in which the passenger grabbed the steering wheel and caused the accident. Although plaintiff argued that the passenger was in lawful possession of the car when she grabbed the wheel, so that the driver's policy (issued by defendant) would provide coverage, grabbing the wheel of the car while joking around does not constitute lawful possession of the car.

Appeal by plaintiff from order entered 10 December 2003 by Judge Charles Lamm in the Superior Court in Guilford County. Heard in the Court of Appeals 16 November 2004.

Pinto, Coates, Kyre & Brown, P.L.L.C., by Paul D. Coates and Brady A. Yntema, for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, L.L.P., by Paul A. Daniels, for defendant-appellee.

HUDSON, Judge.

On 12 September 2002, North Carolina Farm Bureau ("Farm Bureau") brought a declaratory judgment complaint against Nationwide Mutual Insurance Company ("Nationwide") to determine the obligations of each company under terms of a settlement in a wrongful death case. Both parties moved for summary judgment, and following a hearing, on 10 December 2003, the court granted Nationwide's motion and denied Farm Bureau's. Farm Bureau appeals. For the reasons discussed below, we affirm.

This case arises from a fatal car crash. On 27 October 1994, Charly Simms ("Charly") was driving a car owned by her mother, Betty Simms ("Betty"), on I-40 near Asheville, with Betty's permission. Charly's friend Reagan Mason ("Reagan") was a passenger in the

car. After Charly shared a story about once having driven through a weigh station, Reagan suddenly grabbed the wheel and attempted to steer the car into a weigh station the car was passing. Charly's hands remained on the wheel and she attempted to regain control of the car by steering back to the left. When Charly swerved the car back to the left, it struck a car driven by Thomas Graves, who died as a result of the collision. Graves' estate brought a wrongful death action against Reagan, Charly and Betty. Farm Bureau insured Reagan, and Nationwide insured Charly and Betty. The insurance companies settled the claims against their insureds for $37,500, then brought this declaratory action to determine their respective obligations. In its complaint, Farm Bureau argued that Nationwide was primarily liable for damages arising from the wreck. At the hearing on their summary judgment motions, the parties stipulated that Reagan was not a permissive user of Betty's car and that the sole issue before the court was whether Reagan was in lawful possession of the car. The court found that Reagan was not in lawful possession of the car and granted Nationwide's cross-motion for summary judgment.

Farm Bureau argues that the court erred in granting summary judgment in favor of Nationwide and in denying summary judgment for Farm Bureau. We disagree.

The standard of review on appeal from a denial of summary judgment

> is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Further, the evidence presented by the parties must be viewed in the light most favorable to the non-movant. 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.'

Bruce-Terminix Co. v. Zurich Ins. Co., 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (internal citations omitted) (citing N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990)).

Under N.C. Gen. Stat. § 20-279.21(b)(2), a vehicle owner's liability policy

> [*s*]*hall insure* the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the

> express or implied permission of such named insured, or *any other persons in lawful possession*, against loss from the liability imposed by law for damages *arising out of* the ownership, maintenance or *use of such motor vehicle*. . .

N.C. Gen. Stat. § 20-279.21(b)(2) (2004) (emphasis supplied). Here, the parties stipulated that Reagan was not a permissive user of Betty's car, limiting the issue before the court to whether Reagan was in lawful possession of the car when she grabbed the steering wheel as the car traveled down Interstate 40. "[A] person is in lawful possession of a vehicle . . . if he is given possession of the automobile by the automobile's owner or owner's permittee under a good faith belief that giving possession of the vehicle to the third party would not be in violation of any law or contractual obligation." *Belasco v. Nationwide Mut. Ins. Co.*, 73 N.C. App. 413, 419, 326 S.E.2d 109, 113, *disc. review denied*, 313 N.C. 596, 332 S.E.2d 177 (1985). "This implies not only that the owner or the owner's permittee must give possession to a third party in good faith, but also that the third party must take in good faith and without any notice of restrictions on his use." *Nationwide Mut. Ins. Co. v. Baer*, 113 N.C. App. 517, 521, 439 S.E.2d 202, 205 (1994).

Farm Bureau argues that Reagan was in lawful possession of Betty's car when she grabbed the steering wheel. At the time she grabbed the wheel, Reagan was sitting in the front passenger seat, as Charly drove the car down Interstate 40. We find no case in this State in which anyone other than the operator, sitting in the driver's seat, has been found to be in possession of a car. Rather, whether a passenger who grabs a steering wheel can be considered in possession of the vehicle appears to be a matter of first impression in North Carolina. However, a number of other states have addressed a related issue, concerning whether a passenger who grabs the steering wheel is *operating* a vehicle as referred to in an insurance policy exclusion. We are persuaded by the reasoning of those states which hold that a passenger who grabs the steering wheel is actually interfering with the vehicle's operation. *See Harrison v. Tomes*, 956 S.W.2d 268 (Mo. 1997); *Farm Bureau Gen. Ins. Co. v. Riddering*, 432 N.W.2d 404 (Mich. Ct. App. 1988); *West Bend Mut. Ins. Co. v. Milwaukee Mut. Ins. Co.*, 384 N.W.2d 877, *affirmed en banc*, 384 N.W.2d 877, (Minn. 1986); *State Farm Mut. Auto. Ins. Co. v. White*, 655 P.2d 599 (Ore. Ct. App. 1982); *but see Gibbs v. Nat'l Gen. Ins. Co.*, 938 S.W.2d 600 (Mo. Ct. App. 1997); *U.S. Fire Ins. Co. v. United Serv. Auto. Ass'n*, 772 S.W.2d 218 (Tex. Ct. App. 1989); *U.S. Fid. & Guar. Co. v. Hokanson*,

584 P.2d 1264, 1267 (Kan. Ct. App. 1978); *State Farm Mut. Auto. Ins. Co. v. Larsen*, 377 N.E.2d 1218, (Ill. Ct. App. 1978). As such, we cannot agree that grabbing the steering wheel of a moving car from the passenger seat in the circumstances presented here constitutes "possession" of the car. Thus, we conclude that Reagan was not in possession of the car when she grabbed the steering wheel.

Further, even if Reagan were in possession of the car, the possession would not have been lawful. This Court has held that N.C. Gen. Stat. § 20-279.21 requires "not only that the owner or the owner's permittee must give possession to a third party in good faith, but also that the third party must take in good faith and without any notice of restrictions on his use." *Baer*, 113 N.C. App. at 521, 439 S.E.2d at 205. If a driver suffered a medical emergency and lost control of a car, perhaps a passenger could have a good faith belief that she could take possession of the car by grabbing the steering wheel; however, that circumstance is not before us. Here, the evidence indicates that Reagan grabbed the wheel while joking around. Common sense dictates that a reasonable passenger cannot in good faith believe that she may lawfully possess a car by suddenly grabbing the steering wheel of a moving car in this manner.

Affirmed.

Judges WYNN and ELMORE concur.

BENNIE VEREEN, JUNIOR, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CORRECTION, DEFENDANT

No. COA03-1720

(Filed 15 February 2005)

Tort Claims Act; Workers' Compensation— prisoner injured while doing work assignment—jurisdiction of Industrial Commission

After dismissing plaintiff prisoner's action under the Tort Claims Act arising out of his injury received in the course of a North Carolina Department of Corrections work assignment, the Industrial Commission did not have jurisdiction to ex mero motu enter an order with respect to any workers' compensation claim

which plaintiff may have, and the portion of the opinion and award ordering defendant to file a Form 19 Employer's Report of Injury to Employee form is vacated, because: (1) while N.C.G.S. § 143-291 confers jurisdiction upon the Commission over plaintiff's action commenced pursuant to the Tort Claims Act, such jurisdiction is independent of the Commission's jurisdiction over claims governed by Chapter 97 of the Workers' Compensation Act; (2) N.C.G.S. § 97-10.1 and § 97-13(c) provide that workers' compensation is the exclusive remedy for prisoners working for the State; and (3) N.C.G.S. § 97-13(c) provides that a prisoner such as plaintiff may not file a workers' compensation claim until after he is released from prison provided he is still suffering disability as a result of the accident, and only upon plaintiff's release can it be determined if plaintiff is entitled to workers' compensation.

Appeal by defendant from opinion and award entered 15 July 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 December 2004.

No brief for pro se plaintiff-appellee.

Attorney General Roy Cooper, by Associate Attorney General, Iain M. Stauffer, for the State.

MARTIN, Chief Judge.

Defendant, the North Carolina Department of Correction, (NCDOC) appeals from an opinion and award of the North Carolina Industrial Commission. Plaintiff appeared *pro se* before the Deputy Commissioner and the Full Commission and did not file a brief in this Court.

The evidence before the Commission tended to show that plaintiff, Bennie Vereen, Jr., was incarcerated on 2 July 1997 at the Mitchell Correctional Institute (MCI). At the time plaintiff was incarcerated, he had no pre-existing back or knee problems. Plaintiff was paid one dollar a day for his work at MCI's clothing warehouse. When he arrived at work on 19 January 2000, he stepped into some cleaning solvent used to clean the floor, slipped and fell. Plaintiff experienced pain in his lower back and knee and was subsequently treated for a herniated disc at L5-S1 as well as a partially torn ACL. Despite six weeks of physical therapy, plaintiff continues to suffer symptoms and may have permanent partial disability.

Plaintiff filed a claim for damages under the Tort Claims Act, N.C. Gen. Stat. § 143-291 *et. seq.* The case was heard before the Deputy Commissioner on 30 October 2002 and a decision and order was issued dismissing plaintiff's action with prejudice. Upon appeal to the Full Commission, the Commission concluded that because plaintiff was injured in the course of a NCDOC work assignment while a prisoner, the exclusive remedy for his injury was the Workers' Compensation Act and that he could file a claim for any continuing disability within one year of his release from prison. The Commission dismissed plaintiff's Tort Claims Act action with prejudice, but ordered NCDOC to file a Form 19, Employer's Report of Injury to Employee, with the Industrial Commission within 30 days from the date of the order. NCDOC appealed.

The sole question raised by NCDOC's appeal is whether the Commission had jurisdiction to order defendant to file a Form 19 Employer's Report of Injury to Employee. We hold that it did not and vacate such portion of the Commission's Opinion and Award.

"[T]he North Carolina Industrial Commission is not a court of general jurisdiction; the Commission is a quasi-judicial administrative board created by the legislature to administer the Workers' Compensation Act and has no authority beyond that provided by statute." *Cornell v. Western & S. Life Ins. Co.*, 162 N.C. App. 106, 108, 590 S.E.2d 294, 296 (2004). The Commission is also vested with statutory jurisdiction to determine claims brought against the State pursuant to the Tort Claims Act. N.C. Gen. Stat. § 143-291(a) (2003); *Guthrie v. State Ports Authority*, 307 N.C. 522, 535, 299 S.E.2d 618, 625 (1983).

Pursuant to N.C. Gen. Stat. § 97-10.1 and § 97-13(c), "workers' compensation is the exclusive remedy for prisoners working for the State." *Richardson v. N. C. Dept. of Correction*, 345 N.C. 128, 131, 478 S.E.2d 501, 503 (1996). N.C. Gen. Stat. § 97-13(c) provides in pertinent part:

> Whenever any prisoner assigned to the State Department of Correction shall suffer accidental injury . . . arising out of and in the course of the employment to which he had been assigned, . . . if the results of such injury continue until after the date of the lawful discharge of such prisoner to such an extent as to amount to a disability as defined in this Article, then such discharged prisoner . . . may have the benefit of this Article by apply-

> ing to the Industrial Commission as any other employee; provided, such application is made within 12 months from the date of the discharge; and provided further that . . . the period of compensation shall relate to the date of his discharge rather than the date of the accident.

N.C. Gen. Stat. § 97-13(c) (2003). The statute provides that a prisoner, such as plaintiff here, may not file a workers' compensation claim until after he is released from prison, provided he is still suffering disability as a result of the accident. Only upon plaintiff's release can it be determined if plaintiff is entitled to workers' compensation under N.C. Gen. Stat. § 97-13(c). *See Horney v. Pool Co.*, 267 N.C. 521, 527, 148 S.E.2d 554, 559 (1966).

With respect to a claim for benefits under the Worker's Compensation Act, "the jurisdiction of the Commission is invoked . . . when a claim for compensation is filed," *Letterlough v. Atkins*, 258 N.C. 166, 168, 128 S.E.2d 215, 217 (1962), and the Commission "may not *ex mero motu* institute a proceeding." *Id.* While N.C. Gen. Stat. § 143-291 confers jurisdiction upon the Commission over plaintiff's action commenced pursuant to the Tort Claims Act, such jurisdiction is independent of the Commission's jurisdiction over claims governed by Chapter 97 of the General Statutes, the Workers' Compensation Act. Having dismissed plaintiff's tort claim, the Commission had no jurisdiction to *ex mero motu* enter an order with respect to any workers' compensation claim which plaintiff may have, because plaintiff cannot file such a claim until his release from custody with continuing disability resulting from his accident. Therefore, the Commission's order must be vacated. We note, however, that N.C. Gen. Stat. § 97-92(e) imposes other sanctions for an employer's failure to file the report required by N.C. Gen. Stat. § 97-92(a).

The portion of the Commission's Opinion and Award requiring defendant to file Form 19 is vacated.

Vacated.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA v. TERESA DARLENE POPE

No. COA04-251

(Filed 15 February 2005)

Sexual Offenses— crimes against nature—prostitution and public conduct

The United States Supreme Court opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), did not render North Carolina's crime against nature statute under N.C.G.S. § 14-177 unconstitutional, and this case is remanded to affirm the superior court's order reversing the district court's dismissal of the four charges of solicitation of a crime against nature based upon defendant's encounter with undercover police officers in which she indicated that she would perform oral sex in exchange for money, because the United States Supreme Court expressly excluded prostitution and public conduct from its holding.

Appeal by defendant from an order entered 16 October 2003 by Judge Robert P. Johnston in Catawba County Superior Court. Heard in the Court of Appeals 3 November 2004.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Amy C. Kunstling, for the State.

Carlton, Rhodes & Carlton, by Gary C. Rhodes, for defendant-appellant.

HUNTER, Judge.

In this appeal, this Court must decide whether the United States Supreme Court opinion in *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508 (2003) renders North Carolina's crime against nature statute, N.C. Gen. Stat. § 14-177, unconstitutional. For the reasons stated herein, it did not.

Teresa Pope ("defendant"), was charged with four counts of solicitation of a crime against nature, based upon her encounter with undercover police officers in which she indicated she would perform oral sex in exchange for money. She was also charged with one count of solicitation of prostitution to which she entered a plea of guilty. However, pursuant to a defense motion, the district court dismissed the four charges of solicitation of a crime against nature on the basis that *Lawrence v. Texas* rendered the charges unconstitutional. The

State appealed the dismissal to the superior court, and the superior court reversed the district court's dismissal. The superior court certified the interlocutory order for immediate appellate review.

Defendant was charged with the misdemeanor offense of solicitation of a crime against nature. *See State v. Tyner*, 50 N.C. App. 206, 272 S.E.2d 626 (1980) (indicating solicitation of a crime against nature is a misdemeanor offense). She contends that the charges should be dismissed because *Lawrence v. Texas* precludes the prosecution of her for solicitation of a crime against nature, to wit: offering to perform oral sex for money.

N.C. Gen. Stat. § 14-177 (2003) states: "Crime against nature. If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon." As explained by our Supreme Court:

> The crime against nature is sexual intercourse contrary to the order of nature. It includes acts with animals and acts between humans *per anum* and *per os*. "[O]ur statute is broad enough to include in the crime against nature other forms of the offense than sodomy and buggery. It includes all kindred acts of a bestial character whereby degraded and perverted sexual desires are sought to be gratified."

State v. Harward, 264 N.C. 746, 746, 142 S.E.2d 691, 692 (1965) (citations omitted); *see also State v. Stiller*, 162 N.C. App. 138, 140, 590 S.E.2d 305, 307 (2004) (stating the offense of crime against nature "is broad enough to include all forms of oral and anal sex, as well as unnatural acts with animals").

In *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508, the United States Supreme Court overturned its decision in *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140 (1986). In *Bowers*, the United States Supreme Court sustained a Georgia law that made it a criminal offense to engage in sodomy, whether the participants were of the same sex or not. In overruling *Bowers*, the United States Supreme Court

> recognized that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" and held that the Texas statute [at issue] furthered "no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence v. Texas*, 539 U.S. at 572, 578. The Court noted that

> as a "general rule," government should not attempt to define the meaning or set the boundaries of a personal relationship "absent injury to a person or abuse of an institution the law protects." 539 U.S. at 567.

State v. Van, 688 N.W.2d 600, 613 (Neb. 2004). Therefore, the *Lawrence* Court held that the Due Process Clause of the Fourteenth Amendment protects the right of two individuals to engage in fully and mutually consensual private sexual conduct.

However, the *Lawrence* Court limited its holding when it stated:

> The 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. It does not involve *public conduct or prostitution.* It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Lawrence, 539 U.S. at 578, 156 L. Ed. 2d at 525 (emphasis added); *see also State v. Clark*, 161 N.C. App. 316, 588 S.E.2d 66 (2003) and *State v. Oakley*, 167 N.C. App. 318, 605 S.E.2d 215 (2004) (indicating this limiting language in *Lawrence* narrows the constitutional effect of the holding in *Lawrence*). As the *Lawrence* Court expressly excluded prostitution and public conduct from its holding, the State of North Carolina may properly criminalize the solicitation of a sexual act it deems a crime against nature.

Accordingly, we affirm the superior court's order reversing the district court's dismissal of the four charges of solicitation of a crime against nature. This case is remanded to the superior court for remand to the district court for trial.

Affirmed and remanded.

Judges CALABRIA and LEVINSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 15 FEBRUARY 2005

APPEL v. FOOD LION, L.L.C. No. 04-423	Durham (00CVS4358)	Reversed
BRYANT v. RICHARDS No. 03-1597	Harnett (02CVS1146)	Affirmed
CAMP v. CAMP No. 04-144	Alexander (00CVD463)	Dismissed
DEBRUHL v. DEBRUHL No. 04-149	Lenoir (99CVD126)	Affirmed
DOVE v. DAVIS No. 04-810	Lenoir (03CVS1157)	Affirmed
DUNGAN & MITCHELL, P.A. v. DILLINGHAM CONSTR. CO. No. 03-1411-2	Buncombe (01CVD1930)	No error
HEAVNER v. CHA No. 03-1548	Catawba (01CVD1265)	Affirmed
HILL v. WEST No. 04-160	Johnston (02CVS3062)	Dismissed
HOLDEN v. HOLDEN No. 04-146	Brunswick (02CVD1845)	Affirmed
HUMBLE v. SARA LEE CORP. No. 04-131	Randolph (03CVS618)	Affirmed
IN RE A.K. No. 04-986	Buncombe (02J33(B))	Dismissed
IN RE C.M.M. & L.R.W. No. 04-350	Guilford (01J595) (01J596)	Affirmed
IN RE D.D. No. 04-568	Harnett (02J184)	Affirmed
IN RE M.I.V., D.C.B., III, J.T.B. No. 04-320	Wake (03J91)	Affirmed
IN RE P.C. No. 04-83	Catawba (02J280)	Affirmed
INLAND FRESH SEAFOOD CORP. v. SOUTHERN PINE RENOVATIONS, INC. No. 04-292	Mecklenburg (01CVS5812)	No error

ROWELL v. G.S. MATERIALS, INC. No. 04-426	Ind. Comm. (I.C. 173439)	Affirmed
STATE v. AUSTIN No. 03-1549	Forsyth (02CRS13905) (02CRS13906) (02CRS52232) (02CRS52305)	No error
STATE v. BRANDENBURG No. 04-275	Durham (01CRS58999) (01CRS59001)	No error
STATE v. BURNS No. 03-1474	Robeson (00CRS9336)	No error
STATE v. BYRD No. 03-1468	Wake (02CRS14382) (02CRS37819)	No error
STATE v. CHAPMAN No. 03-1695	Gaston (03CRS53781) (03CRS53782) (03CRS53783)	No error
STATE v. CRUMP No. 04-656	Haywood (03CRS52108)	New trial
STATE v. FOSTER No. 04-687	Mecklenburg (03CRS52396)	Affirmed
STATE v. HARDY No. 03-1633	Mecklenburg (00CRS31518)	Affirmed
STATE v. HARVIN No. 04-226	New Hanover (02CRS19010)	No error
STATE v. INGRAM No. 03-1668	Moore (02CRS1921) (02CRS8204) (02CRS51362)	No error
STATE v. KIMBRELL No. 03-1692	Rutherford (02CRS2839) (02CRS51726) (02CRS51727)	No error
STATE v. KING No. 03-1629	Wayne (02CRS56930) (02CRS56931) (03CRS191) (03CRS192) (03CRS208)	No error
STATE v. LOWERY No. 04-755	Forsyth (03CRS58850)	No error

STATE v. MACK No. 04-143	Pender (03CRS50336)	No error
STATE v. MATTERN No. 04-138	Cabarrus (02CRS9508) (02CRS9509) (02CRS9600) (02CRS9601) (02CRS9602) (02CRS9603)	No error
STATE v. MICHAELIS No. 04-503	Randolph (02CRS55113)	No error
STATE v. MILLER No. 04-23	Forsyth (02CRS36221) (02CRS36756) (02CRS62124) (03CRS10606)	No trial error, remand for resentencing
STATE v. PETERSON No. 03-1513	Wayne (00CRS2125) (00CRS2126) (00CRS2127) (00CRS2128) (00CRS53920) (00CRS54030)	No error
STATE v. POWELL No. 04-127	Duplin (02CRS51450) (02CRS51451)	No error
STATE v. RAYNOR No. 03-1647	Wake (02CRS16866) (02CRS16867)	No error
STATE v. SMITH No. 03-1700	Wake (02CRS69621)	No error
WHITLEY v. HORTON No. 03-1459	Wake (01CVS7671)	Affirmed in part, reversed in part
ZBYTNIUK v. ABF FREIGHT SYS., INC. No. 04-118	Ind. Comm. (I.C. 844352)	Affirmed

MICHAEL H. VANDERBURG, PETITIONER v. N.C. DEPARTMENT OF REVENUE, RESPONDENT

No. COA04-554

(Filed 1 March 2005)

1. **Public Officers and Employees— probationary non-career employee—jurisdiction of Personnel Commission**

N.C. G.S. § 126-36(a) allows the State Personnel Commission to review the religious discrimination claims of a probationary non-career employee.

2. **Administrative Law— incorrect standard of review by trial court—record sufficient for review**

In cases appealed from an administrative tribunal, a trial court's use of an incorrect standard of review does not automatically require remand. Here, the whole record and the transcripts were sufficient to consider the issue without remanding the case even though the trial court did not specify the standard it applied, detail its findings of fact, or delineate its conclusions of law.

3. **Public Officers and Employees— Personnel Commission final decision—religious discrimination—whole record review—evidence sufficient**

The trial court's order affirming a State Personnel Commission's final decision was affirmed where plaintiff offered and the Commission found substantial evidence to show that N.C. Department of Revenue's proffered reasons for dismissal of plaintiff probationary employee were a pretext for religious discrimination. A whole record review does not permit the appellate court to substitute its judgment for the Commission's findings of fact.

Judge WYNN concurring.

Appeal by respondent from order entered 22 December 2003 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 11 January 2005.

Ferguson, Stein Chambers, Adkins, Gresham & Sumter, P.A., by John W. Gresham, for petitioner-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General George W. Boylan and Assistant Attorney General Michael D. Youth, for respondent-appellant.

TYSON, Judge.

The North Carolina Department of Revenue ("NCDOR") appeals an order affirming the Final Agency Decision of the State Personnel Commission ("the Commission"). The Commission adopted the recommended decision of the Administrative Law Judge ("ALJ") that overturned the dismissal of Michael H. Vanderburg ("Vanderburg") and reinstated him to his former position. We affirm.

I. Background

Vanderburg was employed with the NCDOR in January 1999 as a Revenue Officer Trainee under a two-year probationary period. Vanderburg was initially assigned to the Charlotte Revenue Office under the supervision of Martha Calhoun ("Calhoun"). On 27 May 1999, Calhoun met with Vanderburg and reviewed his performance from January through April 1999. He received "good" and "very good" ratings in all categories. Calhoun noted that Vanderburg was "thorough in his follow-up and investigation of taxpayers and very good in following departmental policies." Calhoun concluded by stating Vanderburg "handles himself in a professional manner and is respectful of his co-workers and the public."

Shortly after this review, Vanderburg accepted a position with a church as an associate pastor. He subsequently completed and submitted a NCDOR form entitled "Request for Secondary Employment." The request was approved by the NCDOR's Assistant Secretary, Dewey Sanders ("Sanders"), on 29 June 1999. Vanderburg continued to maintain his workload after starting his pastorship.

On 1 July 1999, Vanderburg was reassigned to work under the supervision of Dean Barnes ("Barnes"). On 22 July 1999, Vanderburg met with Barnes and Chris Pappas ("Pappas"), Office Manager for the Collections Division in Charlotte. Barnes and Pappas told Vanderburg that they had received two anonymous complaints that religious materials displayed in his work cubicle were offensive. Vanderburg was ordered to remove all religious items from his walls and the screen saver from his computer. Barnes also stated that he was concerned with Vanderburg's associate pastor position. Although Vanderburg was ordered to remove personal religious items from his cubicle, other employees continued to display materials in their cubicles with religious themes.

On 23 July 1999, Pappas approached Vanderburg's father, an auditor with the NCDOR. Pappas confirmed that he directed Vanderburg

to remove all personal materials from his cubicle. Vanderburg's father advised Pappas that Vanderburg had drafted a letter to be forwarded to Sanders. Pappas became agitated. He referred to Vanderburg's cubicle as a "shrine" and indicated that since Vanderburg was still in training, he could "just fire him right now." Pappas conceded that Vanderburg did "real good work" and worked "very hard."

Pappas met with Vanderburg to discuss their earlier meeting. Vanderburg gave Pappas his letter to Sanders, which Pappas set aside. He told Vanderburg that there may have been a misunderstanding about the directive to remove all personal items from his cubicle. Pappas explained he only meant for a newspaper article and lighthouse to be removed. Vanderburg immediately removed the items. Pappas then advised Vanderburg that there was no need to send his letter to Sanders, as there would be no repercussions or retaliation. Vanderburg agreed, but asked Pappas to place the letter to Sanders in his personnel file.

Vanderburg's caseload increased substantially in August 1999 after the meetings with Barnes and Pappas. The NCDOR acknowledged that it would periodically equalize caseloads among its employees. However, no such equalization was made that August. Despite the expanded caseload, Vanderburg was able to significantly reduce pending cases by the end of September 1999.

On 18 November 1999, Barnes performed an interim performance review of Vanderburg. The review asserted that Vanderburg had priority cases in his caseload "which need work or follow-up." The interim review did not reference the unusual increase in Vanderburg's caseload in August 1999, the non-equalization of Vanderburg's cases, or his positive efforts in reducing his caseload that Fall.

On 19 November 1999, Vanderburg met with Pappas and Ralph Foster ("Foster"), Pappas's superior and Director of the Western Collection Division. In the meeting, Foster commented that he had "specific concerns" about Vanderburg's future with the NCDOR. An argument ensued and Foster called Vanderburg a "smart ass" and a "smart butt." Vanderburg requested transfer to the Gastonia branch.

Vanderburg's last day of work in the Charlotte office was 24 November 1999. That day, Pappas informed Vanderburg that he would not receive an annual raise. Vanderburg sent a letter to Sanders in late November 1999 detailing the events that had occurred from July 1999 forward, including Foster's behavior on 19 November 1999.

Foster met with Vanderburg again in December 1999 after he was transferred to Gastonia. Foster stated that Vanderburg could be "fired at anytime." He also showed Vanderburg a copy of his November letter to Sanders and stated, "what do you think you were doing; you really messed up now; do you think Dewey Sanders would listen to you." Foster ended the meeting by telling Vanderburg that he was waiting for the opportunity to dismiss him.

In Gastonia, Vanderburg was initially assigned personal income tax cases. On 1 June 2000, Vanderburg received an annual review. His supervisors, Libby McAteer ("McAteer") and J.B. Williams ("Williams") stated they were pleased and that Vanderburg was doing a great job. The written review ended with the comment, "keep up the good work."

Vanderburg was assigned to the business tax division in June 2000. His immediate supervisors described him as very helpful, frequently checking with his supervisor, and working very hard to reduce the territory's caseload.

In September 2000, the NCDOR reorganized the Collections Division. Robie McLamb ("McLamb") became the Director of Collections for the State. On 23 October 2000, McLamb met with McAteer and Williams to discuss Vanderburg's employment. He explained that Vanderburg was behind on his caseload and appeared to not be performing his duties. McAteer and Williams explained to McLamb that Vanderburg's large caseload was due to him inheriting the largest territory in Gastonia with a four-month backlog. Despite McAteer and Williams speaking favorably of Vanderburg, McLamb told them Vanderburg would be dismissed.

On 24 October 2000, McLamb met with Vanderburg and expressed several concerns. McLamb first pointed to the large number of pending cases in Vanderburg's territory as an issue. McLamb also stated that he had heard that Vanderburg had trouble getting along with people in authority. McLamb further mentioned that Pappas had a problem with Vanderburg.

On 9 November 2000, Vanderburg filed a *pro se* petition with the Office of Administrative Hearings ("OAH") alleging that he was threatened with dismissal for poor performance despite his history of positive performance reviews.

Vanderburg met with McLamb on 9 November 2000. Vanderburg explained that he filed a petition with the OAH. McLamb informed

Vanderburg that he would not be retained beyond the probationary period. Vanderburg was provided two weeks severance.

Vanderburg filed a second petition on 6 December 2000 alleging violations of rights protected by N.C. Gen. Stat. § 126-36. On 18 December 2000, the OAH consolidated the petitions. Vanderburg and the NCDOR filed prehearing statements. The NCDOR's prehearing statement acknowledged that the governing statute in the case was N.C. Gen. Stat. § 126-36 and that the issue to be resolved was whether Vanderburg's termination during his probationary period arose from either discrimination based on his religious practices and/or retaliation for his opposition to alleged discrimination.

On 31 December 2001, the ALJ found that: (1) Vanderburg proffered substantial evidence to show he was dismissed in violation of his protected rights; (2) the NCDOR's proffered reason for dismissing Vanderburg was "not worthy of belief;" and (3) Vanderburg's termination was retaliatory due to his "protest against what he believed to be encroachment by [the NCDOR] on his protected rights of religious expression." The ALJ recommended Vanderburg be reinstated as a permanent employee within the NCDOR with full benefits.

Following a whole record review, the Commission adopted the ALJ's recommendation. Under N.C. Gen. Stat. § 150B-45, the NCDOR appealed to Wake County Superior Court. Both parties submitted proposed recommended decisions to the trial court for review. The trial court's order stated it "reviewed the petition, the record filed by [Vanderburg], and the submissions by counsel for both [parties] . . . heard extensive argument of counsel," and affirmed the Commission's decision. The NCDOR appeals.

II. Issues

The issues are whether: (1) the Commission has jurisdiction over an appeal from a case filed by a probationary employee of the NCDOR; and (2) the trial court properly reviewed and affirmed the Commission's order.

III. Subject Matter Jurisdiction

[1] The NCDOR contends Vanderburg, as a probationary non-career employee, may not avail himself to the protections of the statutes and procedures before the Commission concerning alleged discriminatory practices. We disagree.

A. N.C. Gen. Stat. § 126-1 *et seq.*

N.C. Gen. Stat. § 126-1 *et seq.* govern the State Personnel System. It includes the appeals process for claims involving unlawful employment practices by State agencies. Not all State government employees qualify for the entire appeals process. N.C. Gen. Stat. § 126-5 categorizes certain employees as "exempt" from the protections and procedures in Chapter 26. Specifically to this issue, N.C. Gen. Stat. § 126-5(c)(1) (2003) states, "except as to the provisions of Articles 6 and 7 of this Chapter, the provisions of this Chapter shall not apply to . . . [a] State employee who is not a career State employee as defined by this Chapter." This rule is also reiterated in N.C. Gen. Stat. § 126-34 (2003), which limits the application of Chapter 126 to "career" State employees:

> *Unless otherwise provided in this Chapter*, any career State employee having a grievance arising out of or due to the employee's employment . . . who alleges unlawful harassment because of the employee's age, sex, race, color, national origin, religion, creed, or handicapping condition as defined by G.S. 168A-3 shall submit a written complaint to the employee's department or agency.

(Emphasis supplied).

In conjunction with the above statutes, the NCDOR argues Chapter 126 applies only to "career" State employees and cites exclusively to *Woodburn v. N.C. State Univ.*, 156 N.C. App. 549, 577 S.E.2d 154, *cert. denied*, 357 N.C. 470, 584 S.E.2d 296 (2003), as authority. In *Woodburn*, the petitioner was a member of the Instructional and Research Staff for North Carolina State University, who was dismissed after an extended leave due to a pregnancy. 156 N.C. App. at 550-53, 577 S.E.2d at 155-57. The petitioner filed a contested case with the Commission alleging gender discrimination under N.C. Gen. Stat. § 126-16 (2001) and § 126-34.1 (2001). *Id.* at 550, 577 S.E.2d at 155.

In resolving the issue of whether the Commission had jurisdiction, this Court followed our decision in *Hillis v. Winston-Salem State Univ.*, 144 N.C. App. 441, 549 S.E.2d 556 (2001). *Id.* at 555, 577 S.E.2d at 158. We noted the distinction in the statutes discussed above between certain classes of State employees in determining who was allowed or eligible to seek redress from employment discrimination through the Commission. *Id.* at 554-55, 577 S.E.2d at 158. This Court determined the appeals process of Chapter 126 did not apply to the

petitioner, as N.C. Gen. Stat. § 126-5(c1)(8) specifically exempts "Instructional and research staff, physicians, and dentists of The University of North Carolina" from "the provisions of [Chapter 126]," except "the provisions of Articles 6 and 7." *See id.* at 555, 577 S.E.2d at 158. The *Woodburn* Court further recognized that the university system provided the petitioner with other internal review procedures in lieu of Chapter 126. *Id.*

B. N.C. Gen. Stat. § 126-36(a)

Where discriminatory actions prohibited by the North Carolina and United States Constitutions are alleged, Chapter 126 does not exclude non-career employees. N.C. Gen. Stat. § 126-36(a) (2003) provides:

> *Any State employee or former State employee* who has reason to believe that employment, promotion, training, or transfer was denied the employee or that demotion, layoff, transfer, or termination of employment was forced upon the employee in retaliation for opposition to alleged discrimination or because of the employee's age, sex, race, color, national origin, religion, creed, political affiliation, or handicapping condition as defined by G.S. 168A-3 except where specific age, sex or physical requirements constitute a bona fide occupational qualification necessary to proper and efficient administration, shall have the right to appeal directly to the State Personnel Commission.

(Emphasis supplied).

N.C. Gen. Stat. § 126-39 (2003) supports this premise by stating, "*[e]xcept* for positions subject to competitive service and except for appeals brought under G.S. 126-16, 126-25, and *126-36*, this Article applies to all State employees who are career State employees at the time of the act, grievance, or employment practice complained of." (Emphasis supplied).

Our Supreme Court recognized that N.C. Gen. Stat. § 126-36 permitted "*[a]ny* State employee or former State employee" an appeal alleging discrimination to the Commission in *Dep't of Correction v. Gibson*, 308 N.C. 131, 135-36, 301 S.E.2d 78, 82 (1983). There, the petitioner had been with respondent for less than two years and was not a "career" State employee as defined by N.C. Gen. Stat. § 126-1.1. *Id.* However, the Court did not question the Commission's jurisdiction over the case and set forth the legislative intent behind the statute, stating:

> [N.C. Gen. Stat. § 126-36] relates only to State employees and is consistent with the legislative policy announced in G.S. 143-422.2 as follows:
>
> It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.
>
> It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely affects the interests of employees, employers, and the public in general.

Gibson, 308 N.C. at 136, 301 S.E.2d at 82.

In *Clay v. Employment Security Comm.*, our Supreme Court recognized that an applicant for employment with the State government has a "right to appeal to the Personnel Commission . . . under N.C.G.S. § 126-36.1" on a discrimination claim. 340 N.C. 83, 85, 457 S.E.2d 725, 727 (1995). As in *Gibson*, the *Clay* Court recognized a right to appeal to the Commission despite acknowledging the petitioners were not "career State employees" for purposes of Chapter 126. *Id.* at 86, 457 S.E.2d at 727; *Gibson*, 308 N.C. at 131, 301 S.E.2d at 78 (neither of the two petitioners had worked for the State for two years).

C. Analysis

Here, Vanderburg was a probationary employee with the NCDOR during the time at issue and was serving the last months of his probationary period when he was dismissed. Substantial evidence exists to show his termination from the NCDOR resulted from conflict over his religious practices. Vanderburg's complaint alleged, "harassment, retaliation, and discrimination against me due to my religion." He argues the Commission has jurisdiction over the matter under N.C. Gen. Stat. § 126-36(a). We agree.

While N.C. Gen. Stat. § 126-5(c)(1) provides that Chapter 126 does not apply to non-career State employees, we find the language of N.C. Gen. Stat. § 126-36(a) to be directly on point to Vanderburg's claim. *See Merritt v. Edwards Ridge*, 323 N.C. 330, 337, 372 S.E.2d 559, 563 (1988) (where one statute deals with a particular issue in specific

detail and another speaks to the same issue in broad, general terms, the particular, specific statute will be construed as controlling, absent a clear legislative intent to the contrary); *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985) ("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.").

N.C. Gen. Stat. § 126-36 specifically allows "*[a]ny* State employee or former State employee" to appeal claims alleging discrimination to the Commission. A statute that is clear and unambiguous must be construed using its plain meaning. *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). The pertinent language of N.C. Gen. Stat. §§ 126-36 and 126-39 remained unchanged during repeated legislative amendments to N.C. Gen. Stat. § 126 *et seq.*, which the NCDOR cites. *See* 1998 N.C. Sess. Laws ch. 135, § 4 (N.C. Gen. Stat. § 126-36); *see also* 1991 N.C. Sess. Laws ch. 354, § 7 (N.C. Gen. Stat. § 126-39) (no legislative intent to the contrary shown in the most recent amendments). Further, our Supreme Court in *Gibson* has held that the public policy of our State allows non-career and former State employees the right to a hearing with the Commission concerning allegations of discrimination. 308 N.C. at 136, 301 S.E.2d at 82. Our Supreme Court's decision in *Clay* strengthens this determination. 340 N.C. at 83, 457 S.E.2d at 725.

Woodburn is not controlling to the facts at bar due to N.C. Gen. Stat. §§ 126-36 and 126-39, our Supreme Court's interpretation of N.C. Gen. Stat. § 126-36 in *Gibson* and *Clay*, and the lack of legislative intent indicating a contrary interpretation. In *Woodburn*, this Court did not address N.C. Gen. Stat. §§ 126-36 or 126-39 in its opinion determining the Commission's jurisdiction. 156 N.C. App. at 549, 577 S.E.2d at 154. Any language in *Woodburn* limiting N.C. Gen. Stat. § 126-36 to "career" State employees is *obiter dicta*.

We hold Vanderburg's employment is not exempted by N.C. Gen. Stat. § 126-5 from the appeals process through the Commission in Chapter 126. Although Vanderburg is not a "career" State employee, N.C. Gen. Stat. § 126-36(a) allows the Commission to review his claims derived from alleged discrimination on the basis of religion.

Vanderburg's petition for hearing was properly before the Commission under N.C. Gen. Stat. § 126-36(a). The NCDOR's argument is overruled.

IV. The Trial Court's Review of the Commission's Order

[2] The NCDOR contends the trial court erred by: (1) not articulating a standard of review; (2) applying an incorrect standard of review; and (3) affirming the Commission's order because substantial evidence supported the findings of fact and the conclusions of law were not erroneous. We disagree.

A. Sufficiency of the Trial Court's Order

In cases appealed from an administrative tribunal, a trial court's use of an incorrect standard of review does not automatically require remand. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004). If the record enables the appellate court to decide whether grounds exist to justify reversal or modification of that decision under N.C. Gen. Stat. § 150B-51(b), the reviewing court may make that determination. *Shackleford-Moten v. Lenoir Cty. DSS*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002), *cert. denied*, 357 N.C. 252, 582 S.E.2d 609 (2003).

Here, the trial court's order stated:

> Based upon its review the Court determines that the Findings of Fact by the State Personnel Commission are supported by the evidentiary record, the Conclusions of Law are consistent with the Findings of Fact and the Conclusions of Law are not erroneous as a matter of law.
>
> Therefore, the Commission's Final Agency Decision is affirmed.
>
> Based upon the foregoing determination by the Court, it is hereby ORDERED that the Petition for Judicial Review is denied and the matter is remanded to the State Personnel Commission for such further proceedings as are necessary to carry out the relief set out in Commission's Final Agency Decision.

The order does not specify the standard of review the court applied in making its decision. It refers to the Commission's findings of fact and conclusions of law and adopts them *in toto*, but does not restate them in its order. Reviewing solely the trial court's order, we cannot determine whether it properly reviewed the Commission's final decision.

In accordance with *Carroll*, and after review of the record and transcripts, we find them sufficient to consider the issue without remanding the case to the trial court to further address the standard

of review, findings of fact, and conclusions of law. 358 N.C. at 665, 599 S.E.2d at 898.

B. Review of Administrative Decisions

[3] Our Supreme Court has held that upon "judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review." *Carroll*, 358 N.C. at 658, 599 S.E.2d at 894 (citations omitted). N.C. Gen. Stat. § 150B-51(b) (2003) states:

> [I]n reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

This standard of review applies to judicial review of an agency's decision, whether at the superior or the appellate court level. *See Rector v. N.C. Sheriffs' Educ. and Training Standards Comm.*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616-17 (1991) (superior court review); *see also Crist v. City of Jacksonville*, 131 N.C. App. 404, 405, 507 S.E.2d 899, 900 (1998) (appellate court review) (citing *Shoney's v. Bd. of Adjustment for City of Asheville*, 119 N.C. App. 420, 421, 458 S.E.2d 510, 511 (1995)).

1. Law-Based Inquiries

Subparts (1) through (4) of N.C. Gen. Stat. § 150B-51(b) are characterized as "law-based" inquiries. *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894 (citation omitted). Reviewing courts consider such questions

of law under a *de novo* standard. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000). *De novo* review requires the court to consider " 'the matter anew[] and freely substitute[] its own judgment for the agency's.' " *Mann Media, Inc. v. Randolph Cty Planning Bd.*, 356 N.C. 1, 13-14, 565 S.E.2d 9, 17 (2002) (quoting *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999)).

Here, the only "law-based" inquiry NCDOR assigns error to is whether the Commission had jurisdiction over Vanderburg, a probationary employee, to consider his complaints. Having determined jurisdiction exists in this case, we now consider the NCDOR's argument that the Commission's findings of fact were not supported by substantial evidence.

2. Fact-Based Inquiries

N.C. Gen. Stat. § 150B-51(b)(5) and (b)(6) are "fact-based" inquiries. *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894 (citation omitted). Fact-intensive issues " 'such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test.' " *Id.* (quoting *In re Greens of Pine Glen Ltd. Part.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). This standard of review requires the reviewing court to analyze all the evidence provided in the record "to determine whether there is substantial evidence to justify the agency's decision." *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895. Substantial evidence is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8b) (2003). A reviewing court "may not substitute its judgment for the agency's," even if a different conclusion may result under a whole record review. *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004).

a. Religious Discrimination

In *Gibson*, our Supreme Court adopted the standard used by the United States Supreme Court in proving discrimination. 308 N.C. at 137, 301 S.E.2d at 82 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668 (1973)).

> (1) The claimant carries the initial burden of establishing a *prima facie* case of discrimination; (2) The burden shifts to the employer to articulate some legitimate nondiscriminatory reason for the applicant's rejection; and (3) If a legitimate nondiscriminatory reason for rejection has been articulated, the claimant has

> the opportunity to show that the stated reason for rejection was, in fact, a pretext for discrimination.

Gibson, 308 N.C. at 137, 301 S.E.2d at 82 (emphasis supplied). This rule has been extended to cases in which an employee has been discharged. *Id.* (citing *McDonald v. Santa Fe Trial Transp. Co.*, 427 U.S. 273, 49 L. Ed. 2d 493 (1976)).

i. *Prima Facie* Discrimination

Our Supreme Court noted in *Gibson* that a *prima facie* case of discrimination "may be established in various ways." 308 N.C. at 137, 301 S.E.2d at 82-83 (citing as examples of proving a *prima facie* case: *Coleman v. Braniff Airways, Inc.*, 664 F.2d 1282 (5th Cir. 1982) ((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); *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251 (5th Cir. 1977) (the discharge of a black employee and the retention of a white employee under apparently similar circumstances); *McDonald*, 427 U.S. at 273, 49 L. Ed. 2d at 493 (white employees discharged while black employees retained under similar circumstances)).

This Court addressed this issue in considering age discrimination in *Area Mental Health Authority v. Speed*, 69 N.C. App. 247, 317 S.E.2d 22, *cert. denied*, 312 N.C. 81, 321 S.E.2d 893 (1984). We determined that an individual " 'need only show that his performance was of sufficient quality to merit continued employment, thereby raising an inference that some other factor was involved in the decision to discharge him.' " *Id.* at 253, 317 S.E.2d at 26 (quoting *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1283 (7th Cir. 1977)).

Vanderburg offered substantial evidence showing his dismissal was not based on his alleged unacceptable job performance. He received positive evaluations in May 1999 and June 2000 from all his supervisors in Charlotte and Gastonia. Pappas admitted that Vanderburg did "real good work" and worked "very hard" during a discussion with Vanderburg's father. Vanderburg substantially reduced the unexplained increased caseload he received that was not equalized in Fall 1999. McAteer and Williams, his superiors in Gastonia, were pleased with his "hard work" in both the personal income tax and business tax departments. When informed by McLamb that Vanderburg would be dismissed, both McAteer and Williams defended Vanderburg's performance. McLamb did not reevaluate his

decision despite admitting that he did not consider Vanderburg's reduction of the considerable backlog of business tax cases for that territory. In fact, Williams explained to Vanderburg that after meeting McLamb, it appeared that several people in more senior positions at the NCDOR "did not want him there." McLamb acknowledged that: (1) Foster had input into the termination decision; (2) he knew of the letters to Sanders; (3) Pappas had a problem with Vanderburg; and (4) he was aware of the 6 November 2000 petition.

This evidence was sufficient to show a *prima facie* case of discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 215 (1981) (the burden of establishing a *prima facie* case of discrimination is not onerous); *Area Mental Health*, 69 N.C. App. at 253, 317 S.E.2d at 26 (such evidence supports the idea that the employee was qualified for the job and the dismissal resulted from "discriminatory motives"). We hold Vanderburg established, through substantial evidence, a *prima facie* case of discrimination based on his religious practices.

ii. Shift of Burden to Employer

Vanderburg's showing of a *prima facie* case of discrimination does not equate to an actual finding of discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579-80, 57 L. Ed. 2d 957, 969 (1978). Rather, a court may presume a discriminatory intent existed because in the absence of an explanation, it is more likely than not that the employer's actions were based upon discriminatory considerations. *Id.*; *Burdine*, *supra*. To rebut this presumption, the employer may show legitimate nondiscriminatory reasons for the dismissal. *Area Mental Health*, 69 N.C. App. at 254, 317 S.E.2d at 27 (citing *Gibson*, 308 N.C. at 138, 301 S.E.2d at 83). " 'The employer is not required to prove that its action was actually motivated by the proffered reasons for it is sufficient if the evidence raises a genuine issue of fact as to whether the claimant is a victim of intentional discrimination.' " *Area Mental Health*, 69 N.C. App. at 254, 317 S.E.2d at 27 (citing *Gibson*, 308 N.C. at 138, 301 S.E.2d at 83).

The NCDOR responded to Vanderburg's claim by arguing Vanderburg was dismissed for "unsatisfactory job performance in the form of insufficient productivity." It asserted: (1) Vanderburg created conflict with his supervisors; (2) he did not perform his share of the workload; (3) his caseload was disorganized and many files were missing; and (4) his overall performance was deficient.

The NCDOR's response to Vanderburg's *prima facie* case of discrimination raises a genuine issue of material fact concerning the reasons why Vanderburg was dismissed. *See Area Mental Health*, 69 N.C. App. at 253, 317 S.E.2d at 26 (citing *Gibson*, 308 N.C. at 138, 301 S.E.2d at 83). We hold the NCDOR articulated legitimate, nondiscriminatory reasons for Vanderburg's dismissal, shifting the burden of proof back to Vanderburg. *See Gibson*, 308 N.C. at 137, 301 S.E.2d at 82.

iii. Pretext for Discrimination

Following the employer's rebuttal of the *prima facie* case of discrimination, the employee receives an opportunity to show that the employer's stated reasons are merely a pretext for intentional discrimination. *Id.* at 139, 301 S.E.2d at 84. The plaintiff may rely on evidence presented to show the *prima facie* case to show a pretextual dismissal. *Id.*

The Commission made factual findings that Vanderburg's termination resulted directly from the conflict derived from his religious practices. In addition to the evidence showing Vanderburg was adequately performing his employment duties, Vanderburg offered additional evidence to support his claims: (1) the conflicts arose after Vanderburg requested and received permission to pursue secondary employment as an associate pastor; (2) Barnes and Pappas ordered the removal of religious items from Vanderburg's cubicle, while allowing several co-workers to continue to display similar religious objects; (3) Pappas indicated to Vanderburg's father that a probationary employee could be fired "for any reason;" (4) Vanderburg's caseload increased substantially without explanation and was not equalized after the meetings with Pappas and Barnes; and (5) Vanderburg was told on several occasions from various supervisors that he did not have a future with the NCDOR.

The record on appeal and transcript contain substantial evidence to support the Commission's factual findings that Vanderburg was dismissed under discriminatory motives. Although the NCDOR presented evidence to suggest Vanderburg had a history of unsatisfactory work as the basis of his dismissal, the ALJ found NCDOR's evidence "not worthy of belief." A whole record review does not permit us to substitute our judgment for the Commission's findings of fact. *Savings & Loan Assoc. v. Savings & Loan Comm.*, 43 N.C. App. 493, 259 S.E.2d 373 (1979). Vanderburg offered and the Commission found substantial evidence to show the NCDOR's prof-

fered reasons for his dismissal were a pretext for religious discrimination. *Gibson*, 308 N.C. at 137, 301 S.E.2d at 82. This assignment of error is overruled.

V. Conclusion

N.C. Gen. Stat. §§ 126-36(a) and 126-39 provide the Commission jurisdiction over employment discrimination claims by non-career and former State employees. Vanderburg satisfied the burden of proof required in discrimination actions to show his dismissal was based on illegitimate and discriminatory motives. Although the trial court did not specify the standard of review it applied, detail its findings of fact, or delineate its conclusions of law, our review of the whole record and transcripts show no grounds exist to warrant reversal of the Commission's final decision. The trial court's order affirming the Commission's Final Decision is affirmed.

Affirmed.

Judge McGEE concurs.

Judge WYNN concurs by separate opinion.

WYNN, Judge concurring.

Although I agree with the majority's resolution of this matter, I separately concur in affirming the State Personnel Commission's decision for the reason that N.C. Gen. Stat. § 126-36 affords all state employees an appeals process if the employee suffered discrimination on the basis of race, religion, color, national origin, age, sex, or handicap.

In *Woodburn v. N.C. State Univ.*, 156 N.C. App. 549, 577 S.E.2d 154 (2003), this Court stated that Chapter 126 of the North Carolina General Statutes does not apply to probationary employees. Since that conclusion went beyond the issue in that case, I agree with the majority that this conclusion was dicta. Indeed, in the face of compelling and clear legislative language, and a prior North Carolina Supreme Court case, *N.C. Dep't of Corr. v. Gibson*, 308 N.C. 131, 301 S.E.2d 78 (1983), a prior opinion of this Court may not contravene the precedential value of a constitutionally allowed legislative mandate.

Moreover, I must emphasize that the issue on appeal concerns a matter of discrimination based on religious practices not of constitu-

tionally protected religious freedoms. The petition filed claimed unlawful discrimination pursuant to N.C. Gen. Stat. § 126-36. N.C. Gen. Stat. § 126-36 allows the State Personnel Commission to review state employee claims derived from alleged racial, religious, age, sex, national origin, or handicap discrimination. While constitutional issues may be applicable here, none are before this Court today.

Finally, I note that our Supreme Court has previously set out the standard for establishing discrimination pursuant to N.C. Gen. Stat. § 126-36. *Gibson*, 308 N.C. at 136-37, 301 S.E.2d at 82 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973)); *see Skinner v. N.C. Dep't of Corr.*, 154 N.C. App. 270, 278, 572 S.E.2d 184, 190 (2002). In *Gibson*, our Supreme Court also set out a four-step test to establish a *prima facie* case of discrimination. 308 N.C. at 137, 301 S.E.2d at 82-83. As N.C. Gen. Stat. § 126-36 applies to all forms of discrimination, this standard is applicable here. Upon applying this standard to the issue in this case, I reach the same result as the majority in affirming the State Personnel Commission decision.

STATE OF NORTH CAROLINA v. WILLIE FORREST, III

No. COA03-1438

(Filed 1 March 2005)

1. Appeal and Error— appellate rules violation—raising more than one issue in assignment of error—discretionary review

Although defendant's first assignment of error violates the mandate of Rule 10(c)(1) of the North Carolina Rules of Procedure since it raises two issues of law including whether the trial court erred by requiring defendant to be physically restrained while in court and whether it erred by denying defendant's oral motion to waive his right to be present at the trial, the Court of Appeals exercised its discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to review both issues raised.

2. Criminal Law— physical restraint of defendant—abuse of discretion standard

The trial court did not abuse its discretion in an attempted first-degree murder, habitual misdemeanor assault inflicting serious injury, and habitual misdemeanor assault on a law enforcement officer case by requiring defendant to be physically restrained while in the courtroom including being secured to his chair, being handcuffed, and being masked during his trial, because: (1) the trial court's determination that it was both necessary and appropriate for the security of court personnel to restrain defendant in this manner at trial was supported by ample evidence when defendant was on trial for attempted first-degree murder and two counts of habitual misdemeanor assault arising out of a brutal attack on his former attorney and his subsequent biting of a sheriff's deputy which occurred in the courtroom during a previous trial and after which it took five men to subdue defendant; (2) at the hearing on defendant's objection to being restrained, the State forecast evidence of defendant's guilty plea from a 1996 Nash County jail incident where he attacked another of his former attorneys while incarcerated; (3) defendant spat on a Wake County sheriff's deputy shortly before being brought into court for pretrial proceedings and interrupted the proceedings at various times with profane outbursts; (4) during pretrial proceedings, defendant was eventually removed from the courtroom to a nearby room where he continued to speak very loudly and abusively to the security officers in their presence and in the hearing of the court; (5) defendant relayed to his counsel threats to disrupt the trial if he was required to appear in court while physically restrained; and (6) the trial court complied with the procedural requirements of N.C.G.S. § 15A-1031 by giving defendant an opportunity to object to being restrained, by conducting a hearing following defendant's objection, by making appropriate findings of fact following the hearing, by entering in the record its reasons for ordering defendant restrained in this manner, and by instructing the jury to disregard defendant's restraints.

3. Constitutional Law— right to be present at trial—denial of waiver of right

The trial court did not abuse its discretion in an attempted first-degree murder, habitual misdemeanor assault inflicting serious injury, and habitual misdemeanor assault on a law enforcement officer case arising out of defendant's assault of his attorney

while in court for an unrelated criminal matter by denying defendant's oral motion that he be allowed to waive his right to be present at trial because, although defendant correctly notes that in a noncapital trial defendant's right to be present is personal and may be waived, defendant neither submitted a written waiver of his appearance nor any other writing in support of his oral motion to waive his right to be present at trial as required by N.C.G.S. § 15A-1011(d).

4. Assault— habitual misdemeanor assault—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the two habitual misdemeanor assault charges even though defendant contends that four of the five prior misdemeanor convictions arose from a single incident, because: (1) N.C.G.S. § 14-33.2 contains no language which could be reasonably construed as requiring that any of the prior misdemeanor convictions either occur on separate dates or arise from separate incidents; (2) contrary to defendant's assertion, from the very fact that the legislature chose to specify that the three felony convictions underlying a habitual felon charge must arise from separate occurrences, it can be inferred that the legislature would have included a similar specification in N.C.G.S. § 14-33.2 if it had intended to impose a separate occurrences limitation on the offense of habitual misdemeanor assault; and (3) the Court of Appeals has already concluded that N.C.G.S. § 14-33.2 violates neither the ex post facto nor double jeopardy provisions of our federal and state constitutions.

5. Homicide— attempted first-degree murder—motion to dismiss—sufficiency of evidence—premeditation and deliberation

The trial court did not err by denying defendant's motion to dismiss the charge of attempted first-degree murder based on alleged insufficient evidence of premeditation and deliberation, because: (1) the victim, an attorney who was representing defendant in the sentencing phase of his trial on multiple felony counts when the assault took place, did nothing to provoke defendant prior to the assault; (2) the victim was listening to the district attorney and the trial judge and was neither looking at nor speaking to defendant when defendant struck him; (3) there was evidence that defendant became agitated during his counsel's closing argument earlier in the day, and that defendant again

became agitated as the verdict was being read; (4) during and immediately after the assault, defendant utilized violent and profane language to repeatedly indicate that he intended to kill the victim; and (5) defendant struck the victim with sufficient force to fracture the victim's skull, continued to punch and kick the victim after the initial blow rendered the victim unconscious, bit one of the sheriff's deputies who was attempting to subdue him, and attempted to bite the victim as he lay prone on the courtroom floor.

Appeal by defendant from judgment entered 16 July 2003 by Judge Steve A. Balog in Wake County Superior Court. Heard in the Court of Appeals 16 June 2004.

Attorney General Roy Cooper, by Assistant Attorney General Brent D. Kiziah, for the State.

Terry W. Alford for defendant-appellant.

ELMORE, Judge.

Willie Forrest, III (defendant) appeals from judgment entered upon jury verdicts finding him guilty of attempted first degree murder, habitual misdemeanor assault inflicting serious injury, and habitual misdemeanor assault on a law enforcement officer. For the reasons stated herein, we conclude defendant received a fair trial, free of prejudicial error.

The events giving rise to the charges against defendant occurred in courtroom 3-C of the Wake County Courthouse on 22 January 2003, during the sentencing phase of defendant's trial in a criminal matter unrelated to the convictions which are the subject of the present appeal. The State's evidence tended to show the following: George Hughes, defendant's attorney in the earlier matter, was giving his closing argument when defendant became agitated and attempted to leave the courtroom. Defendant was restrained by sheriff's deputies and Hughes completed his closing argument, during which Hughes twice read to the jury a statement defendant had written and instructed Hughes to read. The jury then deliberated for between one and a half and two and a half hours and returned with a verdict. As the verdict was being read, defendant, seated next to Hughes at the defense table, again became increasingly agitated. Shortly thereafter, as Assistant District Attorney Ned Mangum was addressing the court during the trial's sentencing phase, four witnesses testified that

defendant's expression changed and he rolled or shook his head in disgust; one witness testified that defendant balled his hand into a fist as Mangum spoke. Defendant then abruptly stood and struck the unsuspecting Hughes on the side of the head with his fist, with such force that Hughes was immediately knocked unconscious and fell to the floor. Defendant continued to punch and kick Hughes, landing at least one more forceful blow before being tackled by Mangum and four Wake County Sheriff's deputies, one of whom, Lieutenant David Woodruff, was bitten on the arm by defendant during the scuffle. After he was subdued, defendant also attempted to bite Hughes as the two men lay on the courtroom floor.

The audio recording device used by the court reporter captured several statements defendant made during and immediately after the incident, including the following:

> I would try to kill . . . I hope he's dead! I tried to kill him, he tried . . . he just took my life. . . . I hope you die m------ f------! I told you you was f------ with the wrong one! . . . Oh jack ass leg [sic] lawyer. . . . [T]hey found me guilty . . . I hope you die George! You took my life, I'm gonna to take yours. . . . I hope the bastard die. You done f--- the last n----- you gonna f--- in your lifetime. . . .

Hughes remained unconscious until an ambulance crew arrived and revived him with smelling salts. He was taken to Wake Medical Center, where he was diagnosed with a fractured skull and where he remained in the intensive care unit overnight for observation. At the hospital he was treated by Robert Lee Allen, M.D., a neurosurgeon. At trial, Dr. Allen testified that Hughes' injury was serious and that a blow to the head from a fist such as defendant inflicted upon Hughes could result in death. Hughes was released from the hospital the next day and suffered from headaches for approximately six weeks after the incident. Hughes testified that he is now completely recovered from his injuries.

On 28 January 2003, the Wake County Grand Jury returned four indictments charging defendant with the following offenses arising from his actions on 22 January 2003: (1) attempted first degree murder, (2) habitual misdemeanor assault inflicting serious injury, (3) habitual misdemeanor assault on a law enforcement officer, and (4) being a habitual felon. These offenses were joined and called for trial at the 15 July 2003 criminal session of Wake County Superior Court. During all phases of the trial, defendant was secured to his chair at the defense table by straps across his shoulders, waist, feet,

and legs. Defendant's hands were also cuffed, and he wore a white mask covering his mouth and nose. The trial court noted defendant's pretrial objection to appearing in court restrained in this manner and, after a hearing, ruled that defendant would have to be restrained while in court, specifically concluding that defendant's restraints were "both necessary and appropriate for the security of court personnel[.]" Defendant then made an oral motion to voluntarily waive his right to be present during the trial, which the trial court, again after a hearing, denied.

The trial court, pursuant to N.C. Gen. Stat. § 1A-1, Rule 404(b), admitted testimony from Nash County Jail Administrator Claudis Langston regarding a 1996 incident which occurred while defendant was incarcerated at the Nash County jail. Langston testified that on 13 December 1996, defendant met with his then-attorney, John Fenner, in a conference room at the jail. Upon the meeting's conclusion, defendant was being escorted by an officer back to his cell when defendant "turned around, bolted back towards Mr. Fenner, striking Mr. Fenner in the head and knocking his glasses off and knocking Mr. Fenner to the floor" before being subdued by Langston and another officer. Fenner suffered a wound over his eye and was taken to Nash General Hospital for treatment.

The record indicates that on 30 April 1997, defendant pled no contest to four misdemeanor offenses arising from the 1996 incident at the Nash County Jail: assault inflicting serious injury, assault on a government official, and two counts of injury to personal property. The record further indicates that on 12 March 2001, defendant pled guilty in Wake County to a fifth misdemeanor offense, communicating threats, arising from an incident which occurred on 11 August 2000.

Defendant's motion to dismiss all charges, made at the close of the State's evidence, was denied. Defendant presented no evidence. The jury returned verdicts of guilty on the attempted first degree murder charge, the habitual misdemeanor assault inflicting serious injury charge, and the habitual misdemeanor assault on a law enforcement officer charge. The State then dismissed the habitual felon charge. The trial court sentenced defendant to a minimum of 313 and a maximum of 385 months imprisonment on the attempted first degree murder conviction. The trial court consolidated the two habitual misdemeanor assault convictions and sentenced defendant to a minimum of 20 and a maximum of 24 months imprisonment, to run consecu-

tively with the sentence imposed for defendant's attempted first degree murder conviction.

Defendant appeals, contending that the trial court erred by: (1) requiring him to be physically restrained while in the courtroom and by denying his oral motion that he be allowed to waive his right to be present at trial; (2) denying his motion to dismiss the two habitual misdemeanor assault charges; and (3) denying his motion to dismiss all charges for insufficiency of the evidence.

[1] By his first assignment of error, defendant contends the trial court erred by "requiring defendant to be present in Court in the presence of the jury in the condition he was forced to be in—strapped to a chair, cuffed, and wearing a mask—and not allowing defendant to waive his right to be present in Court." At the outset, we note that this assignment of error actually raises two issues of law, namely whether the trial court erred by (1) requiring defendant to be physically restrained while in court, and (2) denying defendant's oral motion to waive his right to be present at the trial. Defendant's first assignment of error therefore violates the mandate of Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure that "[e]ach assignment of error shall, so far as practicable, be confined to a single issue of law[,]" and as such, this assignment of error is subject to dismissal. *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). Nevertheless, we elect in our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to review both issues raised in defendant's first assignment of error.

[2] Our General Assembly has provided as follows regarding the physical restraint of a criminal defendant in the courtroom:

> A trial judge may order a defendant or witness subjected to physical restraint in the courtroom when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons.

N.C. Gen. Stat. § 15A-1031 (2003). In making this determination, the trial judge may consider, *inter alia*, the following factors:

> [T]he seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of

> mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

State v. Holmes, 355 N.C. 719, 728, 565 S.E.2d 154, 162, (quoting *State v. Tolley*, 290 N.C. 349, 368, 226 S.E.2d 353, 368 (1976)), *cert. denied*, 537 U.S. 1010, 154 L. Ed. 2d 412 (2002). When the trial court orders a criminal defendant restrained at trial, "the test on appeal is whether, under all of the circumstances, the trial court abused its discretion." *Tolley*, 290 N.C. at 369, 226 S.E.2d at 369.

In the present case, we conclude that the trial court's determination that it was "both necessary and appropriate for the security of court personnel" to restrain defendant in this manner at trial was supported by ample evidence. Defendant was on trial for attempted first-degree murder and two counts of habitual misdemeanor assault arising out of a brutal attack on his former attorney and his subsequent biting of a sheriff's deputy, which occurred *in the courtroom* during a previous trial and after which it took five men to subdue defendant. At the hearing on defendant's objection to being restrained, the State forecast evidence of defendant's guilty plea from the 1996 Nash County jail incident where he attacked another of his former attorneys while incarcerated. The transcript reveals that defendant spat on a Wake County sheriff's deputy shortly before being brought into court for pretrial proceedings and interrupted the proceedings at various times with profane outbursts. During the pretrial proceedings, defendant was eventually removed from the courtroom to a nearby room, where he "continue[d] to speak very loudly and abusively to the security officers . . . in their presence and in the hearing of the Court." Defendant relayed to his counsel threats to disrupt the trial if he was required to appear in court while physically restrained. Moreover, our review of the transcript indicates that the trial judge complied with the procedural requirements of N.C. Gen. Stat. § 15A-1031 by giving defendant an opportunity to object to being restrained; conducting a hearing following defendant's objection; making appropriate findings of fact following the hearing; entering in the record his reasons for ordering defendant restrained in this manner; and instructing the jury to disregard defendant's restraints.

We conclude that on these facts and pursuant to the factors enumerated in *Tolley*, the trial court did not abuse its discretion in requir-

ing that defendant be secured to his chair, handcuffed, and masked during his trial.

[3] The trial court also heard argument on defendant's oral motion to waive his right to be present at trial and denied the motion. Defendant contends the trial court abused its discretion by denying his oral motion. Defendant correctly notes that in a non-capital trial, the defendant's right to be present is personal and may be waived. *State v. Richardson*, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991). However, N.C. Gen. Stat. § 15A-1011(d), which governs waiver of appearance by a criminal defendant, provides as follows:

> (d) A defendant may execute a *written waiver of appearance* and plead not guilty and designate legal counsel to appear in his behalf *in the following circumstances*:
>
> (1) The defendant agrees *in writing* to waive the right to testify in person and waives the right to face his accusers in person and agrees to be bound by the decision of the court as in any other case of adjudication of guilty and entry of judgment, subject to the right of appeal as in any other case; and
>
> (2) The defendant submits *in writing* circumstances to justify the request and submits *in writing* a request to proceed under this section; and
>
> (3) The judge allows the absence of the defendant because of distance, infirmity or other good cause.

N.C. Gen. Stat. § 15A-1011(d) (2003) (emphasis added).

In the present case, defendant concedes that he submitted neither a written waiver of appearance nor any other writing in support of his oral motion to waive his right to be present at trial. Defendant has therefore failed to comply with N.C. Gen. Stat. § 15A-1011(d), which by its plain language requires that in order to waive his right to be present at trial, a criminal defendant must submit to the court, *in writing*, the following: (1) a waiver of appearance, (2) an agreement to waive both his right to testify and to confront his accusers, and to be bound by the court's adjudication, (3) an enumeration of the circumstances justifying his request, and (4) a request to proceed under this statute. The language of N.C. Gen. Stat. § 15A-1011(d) is unambiguous and requires no construction by this Court. Accordingly, the trial court did not abuse its discretion by denying defendant's oral

motion to waive his right to appear at trial. Defendant's first assignment of error is overruled.

[4] By his second assignment of error, defendant contends the trial court erred by denying his motion to dismiss the two habitual misdemeanor assault charges. We disagree.

Our General Assembly has defined the offense of habitual misdemeanor assault as follows:

> A person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33(c) or G.S. 14-34 and has been convicted of five or more prior misdemeanor convictions, two of which were assaults. A person convicted of violating this section is guilty of a Class H felony.

N.C. Gen. Stat. § 14-33.2 (2003).

Defendant argues in his brief that because the statute "does not say that misdemeanors that occur at the same time can be counted separately" towards the five prior convictions required for conviction of habitual misdemeanor assault, this Court should construe N.C. Gen. Stat. § 13-33.2 to "require that the five misdemeanors should have to occur on different occasions—which would show a repeated behavior." Defendant argues that under such a construction the evidence would be insufficient to support his habitual misdemeanor assault convictions, because four of defendant's five prior misdemeanor convictions arose from a single incident, defendant's 1996 assault of his attorney at the Nash County jail.

We discern no support for defendant's proposed construction of N.C. Gen. Stat. § 14-33.2 from the plain language of the statute. N.C. Gen. Stat. § 14-33.2 clearly and unambiguously sets forth the elements of the offense of habitual misdemeanor assault: (1) violation of any of the provisions of N.C. Gen. Stat. § 14-33(c) or § 14-34, and (2) five or more prior misdemeanor convictions, (3) two of which were assaults. The statute contains no language which could be reasonably construed as requiring that any of the prior misdemeanor convictions either occur on separate dates or arise from separate incidents. "Where the words of a statute are clear and unambiguous, the words will be given their plain and definite meaning." *State v. Roache*, 358 N.C. 243, 273, 595 S.E.2d 381, 402 (2004). Moreover, we are not persuaded by defendant's argument that because our Legislature has expressly provided that an offender must be convicted of three

felonies committed on separate occasions in order to obtain habitual *felon* status, *see* N.C. Gen. Stat. § 14-7.1 (2003), this same "separate occurrences" requirement should be read into the habitual misdemeanor assault statue. To the contrary, from the very fact that the legislature chose to specify that the three felony convictions underlying a habitual felon charge must arise from separate occurrences, we may infer that the legislature would have included a similar specification in N.C. Gen. Stat. § 14-33.2 if it had intended to impose a "separate occurrences" limitation on the offense of habitual misdemeanor assault. *See N.C. Baptist Hospitals, Inc. v. Mitchell*, 323 N.C. 528, 538, 374 S.E.2d 844, 849 (1988).

In a written pretrial motion and in his argument to the trial court, defendant asserted that N.C. Gen. Stat. § 14-33.2 violates the United States Constitution's prohibition against *ex post facto* laws and double jeopardy, as well as the federal constitution's due process and equal protection provisions. In his brief, defendant "concedes that the issues of *ex post facto*, double jeopardy, due process and equal protection have been ruled upon against his claims" before "ask[ing this Court to] reconsider these issues." However, because defendant has presented to this Court no reason, argument, or authority in support of this request, these issues are deemed abandoned. N.C.R. App. P. 28(b)(6) (2004); *State v. Barnes*, 333 N.C. 666, 677, 430 S.E.2d 223, 229, *cert. denied*, 510 U.S. 946, 126 L. Ed. 2d 336 (1993). Moreover, we note this Court has previously held that N.C. Gen. Stat. § 14-33.2 violates neither the *ex post facto* nor double jeopardy provisions of our federal and state constitutions, *State v. Carpenter*, 155 N.C. App. 35, 47-48, 573 S.E.2d 668, 676 (2002), and we are bound by this holding until it is overturned by a higher court, *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Defendant's second assignment of error is without merit.

[5] By his final assignment of error, defendant contends the trial court erred by denying his motion to dismiss the attempted first degree murder charge for insufficiency of the evidence. Specifically, defendant argues the State failed to prove the premeditation and deliberation elements of the offense. We disagree.

When ruling on a defendant's motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, and the State is entitled to all inferences to be drawn from the evidence presented. *State v. Davis*, 325 N.C. 693, 696-97, 386 S.E.2d 187, 189 (1989). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essen-

tial 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. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). " 'Substantial evidence' simply means 'that the evidence must be existing and real, not just seeming or imaginary.' " *State v. Sexton*, 336 N.C. 321, 361, 444 S.E.2d 879, 902, (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)), *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994).

"The elements of attempted first degree murder are: '(1) a specific intent to kill another person unlawfully; (2) an overt act calculated to carry out that intent, going beyond mere preparation; (3) the existence of malice, premeditation, and deliberation accompanying the act; and (4) a failure to complete the intended killing.' " *State v. Poag*, 159 N.C. App. 312, 318, 583 S.E.2d 661, 666, (quoting *State v. Peoples*, 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000)), *disc. review denied*, 357 N.C. 661, 590 S.E.2d 857 (2003).

Defendant contends the State has presented insufficient evidence of his premeditation and deliberation to kill Hughes, arguing in his brief that the assault "happened too quickly for there to be premeditation and deliberation." Our appellate courts have held that "[p]remeditation is present where the defendant formed a specific intent to kill the victim some period of time, no matter how short, prior to perpetrating the actual act. Deliberation is acting in a cool state of blood and not under the influence of a violent passion." *State v. Andrews*, 154 N.C. App. 553, 561, 572 S.E.2d 798, 804 (2002), *cert. denied*, 358 N.C. 156, 592 S.E.2d 696 (2004) (citations omitted). However, "[o]ne may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time." *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991).

Our Supreme Court has stated that premeditation and deliberation "are usually proven by circumstantial evidence because they are mental processes that are not readily susceptible to proof by direct evidence." *State v. Sierra*, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994). Among the circumstances from which premeditation and deliberation may properly be inferred in a prosecution for first degree murder are:

> (1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing,

(3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulty between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

Vause, 328 N.C. at 238, 400 S.E.2d at 62.

In the present case, the uncontroverted evidence tended to show that Hughes, who was representing defendant in the sentencing phase of his trial on multiple felony counts when the assault took place, did nothing to provoke defendant prior to the assault. Hughes was listening to the district attorney and the trial judge and was neither looking at nor speaking to defendant when defendant struck him. There was evidence that defendant became agitated during Hughes's closing argument earlier in the day, and that defendant again became agitated as the verdict was being read. Defendant then rolled or shook his head in disgust and balled up his fist as the district attorney spoke during sentencing. During and immediately after the assault, defendant utilized violent and profane language to repeatedly indicate that he intended to kill Hughes. Defendant struck Hughes with sufficient force to fracture Hughes's skull; continued to punch and kick Hughes after the initial blow rendered Hughes unconscious; bit one of the sheriff's deputies who was attempting to subdue him; and attempted to bite Hughes as he lay prone on the courtroom floor. We hold that when taken in the light most favorable to the State, there is substantial evidence of defendant's premeditation and deliberation to kill Hughes. Accordingly, the trial court properly denied defendant's motion to dismiss the attempted first degree murder charge, and this assignment of error is without merit.

No error.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. JAMES EMANUEL SILAS

No. COA04-367

(Filed 1 March 2005)

1. Firearms and Other Weapons— discharging firearm into occupied property—evidence sufficient

The trial court correctly denied defendant's motion to dismiss a charge of discharging a firearm into occupied property where the victim testified that defendant continued shooting after he entered his apartment and that bullets fired by defendant entered his apartment and caused damage. Contradictions in the evidence were for the jury to resolve.

2. Indictment and Information— amendment—intent of breaking and entering

Judgment was arrested on defendant's conviction for felonious breaking and entering where the original indictment alleged that defendant entered a residence to commit murder and an amendment at the close of all of the evidence alleged an intent to commit an assault with a deadly weapon inflicting serious injury or assault with a deadly weapon with intent to kill inflicting serious injury. Research does not reveal a case specifically stating that these assaults are lesser included offenses of first-degree murder; in order to convict on a charge of assault and battery or assault with a deadly weapon in a murder case, the murder indictment should include the elements of assault or it should contain a separate count of assault. However, this indictment sufficiently charged defendant with misdemeanor breaking and entering, and the case is remanded for entry of such a judgment.

3. Sentencing— prior record level—worksheet and oral recitation—not sufficient—trial testimony—not sufficient in this case

Defendant was entitled to a new sentencing hearing for discharging a firearm into occupied property and misdemeanor breaking and entering where the State relied upon a sentencing worksheet and an oral recitation by the State of defendant's criminal history instead of utilizing a method authorized by N.C. Gen. Stat. § 15A-1340.14 (2003). Defendant's trial testimony was not sufficient to support the prior record level determination.

Appeal by defendant from judgments entered 7 September 2000 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 December 2004.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Gary A. Scarzafava, for the State.

Thomas K. Maher for defendant-appellant.

HUNTER, Judge.

James Emanuel Silas ("defendant"), presents the following three issues for our consideration: (I) Whether sufficient evidence was presented supporting the charge of discharging a firearm into occupied property; (II) whether the trial court erroneously allowed the State to amend the indictment for felony breaking and entering; and (III) whether the State presented sufficient evidence of defendant's prior record for sentencing purposes. After careful review, we conclude defendant's conviction for discharging a firearm into occupied property was supported by sufficient evidence, however, we conclude the breaking and entering indictment was erroneously amended and that insufficient evidence of defendant's prior record level was presented. Accordingly, we reverse defendant's conviction for breaking and entering and remand for resentencing in accordance with this opinion.

The pertinent facts tend to indicate that on 30 July 1999, defendant became angry after arguing with his estranged wife, Rhonda Moore, on the telephone. The evidence indicated that defendant and his wife had separated a month earlier, that his wife had recently obtained a restraining order, and that defendant was upset about his wife's relationship with Jasper Herriott ("Herriott").

After arguing with his wife on the telephone, defendant went to his wife's apartment, forced open the latched screen door, and entered the kitchen where his wife was combing his daughter's hair. His wife's niece was also in the kitchen. After saying very few words, defendant pulled out a gun and shot his wife in the leg and hip. His wife ran upstairs and locked herself in a bedroom. Instead of chasing his wife, defendant left the apartment, the niece locked the door, and the girls dialed 911. Neither of the girls were injured.

Approximately two hours later, defendant drove to Herriott's apartment and parked. He saw Herriott standing in the breezeway of his apartment talking and Herriott saw defendant sitting in his

car. Defendant exited his car, started walking towards Herriott, and began firing his weapon. Herriott returned to his apartment, locked the door, and called the police. Herriott testified that defendant continued to shoot and bullets continued to enter his apartment after Herriott fled inside. However, an eyewitness, Herriott's next door neighbor, testified that defendant stopped shooting once Herriott entered his apartment. Defendant testified that he was angry and that he wanted to hurt his wife and Herriott, but not kill them. Later that evening, defendant was arrested after returning to his wife's neighborhood.

Defendant was indicted for assault with a deadly weapon with intent to kill Herriott, assault with a deadly weapon with intent to kill inflicting serious injury as to his wife, discharging a firearm into occupied property, possession of a firearm by a felon, and felonious breaking and entering. After the close of all evidence, the State moved to amend the breaking and entering indictment to conform to the evidence presented. In its relevant part, the original indictment stated: "James Emanuel Silas unlawfully and wilfully did feloniously break and enter a building occupied by Rhonda Silas, used as a residence, located at . . . Charlotte, North Carolina, with the intent to commit a felony therein, to wit: murder." The amended indictment alleged defendant entered the apartment to commit an assault with a deadly weapon inflicting serious injury, or the felony of assault with a deadly weapon with intent to kill inflicting serious injury.

After defendant was found guilty, the State submitted a sentencing worksheet listing defendant's prior convictions and argued for a sentence in the aggravated range. Defendant received consecutive sentences of ten to twelve months for felonious breaking and entering, forty to fifty-seven months for assault with a deadly weapon inflicting serious injury, fifteen to eighteen months for possession of a firearm by a felon, forty to fifty-seven months for assault with a deadly weapon with intent to kill, and forty to fifty-seven months for discharging a firearm into occupied property. From his convictions and sentences, defendant appeals.

[1] Defendant first contends the State presented insufficient evidence supporting the charge of discharging a firearm into occupied property. We disagree.

> The standard for ruling on a motion to dismiss "is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the

offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). In determining the sufficiency of the evidence, "[t]he trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994).

State v. Harris, 145 N.C. App. 570, 578, 551 S.E.2d 499, 504 (2001). "If there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court's duty to submit the case to the jury." *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958). " 'Contradictions and discrepancies [in the evidence] are for the jury to resolve and do not warrant [dismissal].' " *State v. Pallas*, 144 N.C. App. 277, 286, 548 S.E.2d 773, 780 (2001) (citation omitted).

Pursuant to N.C. Gen. Stat. § 14-34.1 (2003):

> Any person who willfully or wantonly discharges or attempts to discharge:
>
> (1) Any barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second; or
>
> (2) A firearm into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.

Defendant contends the State did not present sufficient evidence indicating Herriott's apartment was occupied when bullets entered the apartment. In support of his argument, defendant references the testimony of Leverne Phifer ("Phifer"), an eyewitness who testified defendant stopped shooting when Herriott entered his apartment. However, Herriott testified that after he entered his apartment, defendant continued shooting. The bullets broke two of his windows and entered one of his walls.

The contradictions in the testimony of Herriott and Phifer were for the jury to resolve. *See Pallas*, 144 N.C. App. at 286, 548 S.E.2d at 780. As Herriott's testimony presented more than a scintilla of com-

petent evidence tending to indicate defendant shot into an occupied building, the trial court did not erroneously deny the motion to dismiss and submit the issue to the jury. *See Horner*, 248 N.C. at 344-45, 103 S.E.2d at 696.

Nonetheless, defendant argues *State v. Hewitt*, 294 N.C. 316, 239 S.E.2d 833 (1978), and *State v. Heaton*, 39 N.C. App. 233, 249 S.E.2d 856 (1978), indicate the indictment charging defendant with discharging a firearm into occupied property should have been dismissed. In *Heaton*, shortly after a confrontation on a nearby road, a bullet was fired through the victim's kitchen door and struck the chimney in the living room. *Heaton*, 39 N.C. App. at 235, 249 S.E.2d at 857. The police visited the defendant's home and found ammunition of the type fired into the victim's home. *Id.* The defendant's hand was bloody and there was a blood trail in the direction of the defendant's car and the victim's home. *Id.* However, no weapon was recovered and no one saw the defendant shoot into the victim's home. *Id.* This Court determined the State "failed to produce evidence sufficient to indicate [the] defendant fired the shot" into the victim's mobile home. *Id.* at 236, 249 S.E.2d at 858. "The State's evidence [was] entirely circumstantial" and "[o]ne [could] do no more than speculate that [the] defendant fired the gunshot and that he injured himself fleeing the scene of the crime." *Id.* at 235-36, 249 S.E.2d at 858. Unlike *Heaton*, in this case the victim testified that he saw defendant shooting at him and that defendant continued to shoot after the victim entered his apartment.

In *Hewitt*, the victim's mobile home was fired upon and the weapon from which one of the bullets was fired was found in the defendant's possession. *Hewitt*, 249 N.C. at 316-18, 239 S.E.2d at 833-34. However, no one could testify with certainty as to when the bullet holes were created in the side of the victim's mobile home. Specifically, the victim testified " '[t]o my knowledge the holes were not in my trailer before I heard the eight to ten shots.' " *Id.* at 319, 239 S.E.2d at 835. In reversing the defendant's conviction, our Supreme Court held "the [S]tate's evidence creates only a suspicion that defendant committed the crime with which he was charged." *Id.* Unlike *Hewitt*, the victim in this case specifically testified the bullets fired by defendant entered his apartment and caused damage. Herriott testified that the shots fired by defendant broke two windows and entered a wall. Accordingly, we conclude the State presented sufficient evidence that defendant discharged a firearm into occupied property.

[2] Defendant next contends the trial court erroneously allowed the State to amend the indictment for felonious breaking and entering. At the close of all evidence, the State was allowed to amend the breaking and entering indictment to allege defendant entered the residence to commit an assault with a deadly weapon inflicting serious injury or the felony of assault with a deadly weapon with intent to kill inflicting serious injury. As originally stated, the indictment alleged defendant entered the residence to commit the felony of murder.

N.C. Gen. Stat. § 15A-923(e) states a bill of indictment may not be amended. Our Supreme Court has interpreted this provision as prohibiting indictment amendments which substantially alter the charge set forth in the indictment. *See State v. Kamtsiklis*, 94 N.C. App. 250, 255, 380 S.E.2d 400, 402 (1989).

"[A]n indictment charging the offense of felonious breaking or entering is sufficient only if it alleges the particular felony which is intended to be committed." *State v. Vick*, 70 N.C. App. 338, 340, 319 S.E.2d 327, 328 (1984). Felonious intent is an essential element of the felony defined in N.C. Gen. Stat. § 14-54, and it " 'must be alleged and proved, and the felonious intent proven, must be the felonious intent alleged[.]' " *State v. Jones*, 264 N.C. 134, 136, 141 S.E.2d 27, 29 (1965) (citation omitted). Indeed, if the felonious intent alleged is not proven, then the defendant has only committed misdemeanor breaking and entering, if the other elements are established. *See State v. Worthey*, 270 N.C. 444, 446, 154 S.E.2d 515, 516 (1967) (stating "[w]rongful breaking or entering without intent to commit a felony or other infamous crime is a lesser degree of felonious breaking or entering within G.S. 14-54"). Thus, the intent to commit a particular felony is an essential element of the crime. *See State v. Vick*, 70 N.C. App. 338, 319 S.E.2d 327 (reversing a defendant's conviction for felonious breaking and entering because the indictment did not specifically allege the felony the defendant intended to commit). Therefore an indictment amendment changing the alleged intended felony would constitute a substantial alteration of the indictment.

The State contends the indictment amendment was not a substantial alteration of the indictment because the felonies of assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury are lesser-included offenses of murder.

The original indictment in this case alleged defendant intended to commit murder. As a person cannot intend to commit second degree

murder, we must construe the language that defendant intended to commit murder to mean defendant intended to commit first degree murder. In *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000), our Supreme Court had to determine whether the crime of attempted second degree murder existed in North Carolina. Similar to felonious breaking and entering where the actor must break and enter with the intent to commit a particular specified felony, the "crime of attempt requires that the actor specifically intend to commit the underlying offense." *Id.* at 451, 527 S.E.2d at 48. In determining attempted second degree murder was a logical impossibility, our Supreme Court in *Coble* explained that a " 'specific intent to kill' " was not " ' "an element of second degree murder or manslaughter." ' " *Id.* at 450, 527 S.E.2d at 47 (citations omitted). Our Supreme Court stated: "It is logically impossible, therefore, for a person to specifically intend to commit a form of murder which does not have, as an element, specific intent to kill." *Id.* at 451, 527 S.E.2d at 48. Thus, in this case, we construe the original indictment to allege defendant "unlawfully and wilfully did feloniously break and enter a building . . . with the intent to commit a felony therein, to wit:" first degree murder. *See also State v. Jordan*, 140 N.C. App. 594, 537 S.E.2d 843 (2000) (indicating second degree murder could not be the underlying offense in a burglary charge because a person cannot intend to commit second degree murder).

As stated, the State contends the indictment amendment was not a substantial alteration of the indictment because assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon are lesser included offenses of murder.

> It is . . . well recognized in North Carolina that when a defendant is indicted for a criminal offense he may be convicted of the charged offense or of a lesser included offense when the greater offense charged in the bill contains all the essential elements of the lesser offense, all of which could be proved by proof of the allegations of fact contained in the indictment.

State v. Riera, 276 N.C. 361, 368, 172 S.E.2d 535, 540 (1970); *see also* N.C. Gen. Stat. § 15-170 (2003). In this case, the allegations in the original felonious breaking and entering indictment did not encompass the elements of assault with a deadly weapon with the intent to kill or assault with a deadly weapon inflicting serious injury. Therefore, as explained below, the indictment did not provide defendant notice that an assault with a deadly weapon with intent to kill inflicting serious

injury or assault with a deadly weapon inflicting serious injury charge was alleged.[1]

Our Supreme Court has held that in a murder case, in order to convict on a charge of assault and battery or assault with a deadly weapon, the murder indictment should include the elements of assault or it should contain a separate count of assault. *See State v. Whiteside*, 325 N.C. 389, 383 S.E.2d 911. In *Whiteside*, our Supreme Court stated,

> "when it is sought to fall back on the lesser offense of assault and battery or assault with a deadly weapon, in case the greater offense, murder or manslaughter, is not made out, the indictment for murder should be so drawn as necessarily to include an assault and battery or assault with a deadly weapon, or it should contain a separate count to that effect."

Id. at 403, 383 S.E.2d at 919 (citation omitted). According to the Court in *Whiteside*, an analysis of N.C. Gen. Stat. § 15-169[2] and earlier cases indicated that in cases where a defendant, indicted for murder, was convicted of simple assault or assault with a deadly weapon, the crime charged included an assault against the person as an ingredient. *Id.* at 402, 383 S.E.2d at 918. Thus, a short-form murder indictment which charged "defendant 'unlawfully, willfully, and feloniously and of malice aforethought did kill and murder [the victim]' [was] insufficient to support a verdict of guilty of assault, assault inflicting serious injury or assault with intent to kill." *Id.* at 403, 383 S.E.2d at 919. Indeed, the short-form murder indictment "does not specify a murder accomplished by assault." *State v. Gibson*, 333 N.C. 29, 38, 424 S.E.2d 95, 100 (1992).

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1. We note that our research has not revealed a case specifically stating assault with a deadly weapon with intent to kill inflicting serious injury or assault with a deadly weapon inflicting serious injury is a lesser included offense of first degree murder. We also note that the State has not cited any authority stating assault with a deadly weapon is a lesser included offense of first degree murder. Therefore, we are guided by our Supreme Court's discussion in *Whiteside*, 325 N.C. 389, 383 S.E.2d 911 (1989), regarding whether a defendant may be convicted of assault with a deadly weapon under a short-form murder indictment.

2. N.C. Gen. Stat. § 15-169 (2003), entitled "Conviction of assault, when included in charge" states "[o]n the trial of any person for any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character." *Id.*

In this case, the original felonious breaking and entering indictment simply stated the intended felony was murder:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 9th day of July, 1999, in Mecklenburg County, James Emanuel Silas unlawfully and wilfully did feloniously break and enter a building occupied by Rhonda Silas, used as a residence, located at [address], with the intent to commit a felony therein, to wit: murder.

Similar to the short-form murder indictment, this indictment did not specify the defendant committed breaking and entering to commit the felony of murder by means of an assault with a deadly weapon with or without the intent to kill inflicting serious injury. Since the short-form murder indictment does not include the lesser offenses of assault with a deadly weapon with or without the intent to kill inflicting serious injury, simply stating a defendant had the felonious intent to commit murder does not include the felonious intent to commit the lesser included offenses of assault with a deadly weapon with or without the intent to kill inflicting serious injury. Under *Whiteside* and N.C. Gen. Stat. § 15-170, as interpreted by case law, the elements of assault with a deadly weapon with or without the intent to kill inflicting serious injury should have been alleged in the original felonious breaking and entering indictment in order to apprise defendant that he had to defend against those charges. If the original felonious breaking and entering indictment had included "for the purpose of committing a murder by an assault with a deadly weapon with or without the intent to kill inflicting serious injury," then the indictment amendment would not have constituted a substantial alteration of the charge. The defendant would have had notice to defend against the lesser charges.

Accordingly, we conclude the indictment amendment constituted a substantial alteration of the charge set forth in the original indictment. As a result of the trial court's erroneous amendment, we arrest judgment on defendant's conviction of felonious breaking and entering. Because the indictment sufficiently charges him with misdemeanor breaking and entering, and the evidence supports such a charge, we remand for entry of judgment on misdemeanor breaking and entering. *See State v. Moses*, 154 N.C. App. 332, 572 S.E.2d 223 (2002).

[3] Finally, defendant contends the State did not present sufficient evidence of his prior record during sentencing. The transcript indi-

cates the State relied upon a sentencing worksheet and an oral recitation by the State of defendant's criminal history instead of utilizing a method authorized by N.C. Gen. Stat. § 15A-1340.14 (2003). As an initial matter, we note defendant did not object to the prosecutor's use of a sentencing worksheet during the sentencing hearing. However, as explained in *State v. Mack*, 87 N.C. App. 24, 33, 359 S.E.2d 485, 491 (1987), we are not precluded from reviewing this assignment of error. In *Mack*, this Court stated:

> Absent objection at the sentencing hearing or assertion of the "plain error" rule,[3] . . . [the] defendant has waived objection to the competency of the prosecutor's statements as an acceptable method of proof. . . . However, while [a] defendant may have waived challenging the competency of the assistant prosecutor's statements, [the] defendant was not required to object at the sentencing hearing in order to assert the insufficiency of the remarks as a matter of law to prove his prior convictions by a preponderance of the evidence. . . .
>
> It is clear a prosecutor's mere unsupported statement is not sufficient proof of defendant's prior convictions[.]

Mack, 87 N.C. App. at 33-34, 359 S.E.2d at 491-92.

N.C. Gen. Stat. § 15A-1340.14 (2003) states in pertinent part:

> (f) Proof of Prior Convictions.—A prior conviction shall be proved by any 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.

"These methods of proof are permissive rather than mandatory." *Mack*, 87 N.C. App. at 31-32, 359 S.E.2d at 490. However, a prosecutor's unsworn statements as to a defendant's criminal history is insufficient. *See id.* at 34, 359 S.E.2d at 492. Moreover, "the law requires more than the State's unverified assertion that a defendant was con-

3. Defendant has argued plain error in this case.

victed 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 in part on other grounds*, 357 N.C. 43, 577 S.E.2d 619 (2003). Thus, as a matter of law, the State did not present sufficient evidence of defendant's prior crimes.

Nonetheless, the State argues defendant testified about some of his prior convictions during direct and cross-examination. Indeed, the transcript indicates defendant stated he was convicted of assault on a female in 1993 and 1995, possession of a firearm by a felon in 1997, and communicating threats in 1997. Defendant also testified he was on probation when the present offenses occurred. N.C. Gen. Stat. § 15A-1340.14(f) (2003) states "[e]vidence presented by either party at trial may be utilized to prove prior convictions." Using defendant's trial testimony to establish his prior record level would result in a prior record level 3 instead of a prior record level 4 as indicated on the prior record level sentencing worksheet. Thus, even though the State is correct in its assertion that trial testimony may be used to prove a defendant's prior record level, defendant's testimony in this case does not support the prior record level determination in this case. Accordingly, defendant is entitled to a new sentencing hearing.

In sum, we conclude sufficient evidence was presented supporting the charge of discharging a firearm into occupied property. However, the trial court erroneously allowed an amendment to the felonious breaking and entering indictment. Notwithstanding the error, misdemeanor breaking and entering was sufficiently charged, and the evidence supports such a charge. Therefore, although judgment is arrested on the felonious breaking and entering conviction, we remand for entry of judgment on misdemeanor breaking and entering. As the trial court incorrectly determined defendant's prior record level, defendant is entitled to a new sentencing hearing in which his prior record level is properly determined.

No error in part, judgment arrested in part, and remanded for a new sentencing hearing.

Judges CALABRIA and LEVINSON concur.

IN THE MATTER OF: M.J.G., A MINOR CHILD

No. COA04-369

(Filed 1 March 2005)

1. Child Abuse and Neglect— neglect—findings of fact—failure to visit child one week prior to filing of petition

The trial court erred in a child neglect case by its finding of fact 5 that states neither the mother nor the putative father visited the minor child for approximately one week prior to the date of the filing of the petition in this case on June 24, 2003, because: (1) the record does not reveal any testimony indicating the mother failed to visit the minor child in the hospital during the week prior to the petition; (2) the two social workers did not provide any testimony regarding the mother's visitation of the minor in the hospital; (3) the paternal grandfather testified the mother lived with him for two weeks after the child's birth and that he would take the mother to visit the child every night until she moved out of his home; and (4) DSS did not offer any testimony regarding the mother's hospital visitation or lack thereof during the last week the child was in the hospital.

2. Child Abuse and Neglect— neglect—findings of fact—whereabouts of parents unknown

The trial court did not err in a child neglect case by the portion of finding of fact 5 which states the whereabouts of the mother were not known at the time of the release of the minor child from the hospital and the portion of finding of fact 10 which states the mother left the paternal grandfather's residence and at the time of the filing of her petition her whereabouts were unknown and she had no housing or income known to DSS, because: (1) the paternal grandfather testified that the mother had moved from his home, that he did not know her whereabouts, and that he informed DSS that the mother had left his residence; (2) no evidence was offered tending to indicate DSS knew of the mother's whereabouts after she left the grandfather's home; (3) a social worker testified the mother did not have any employment at the time the petition was filed; and (4) no evidence was entered regarding the mother's housing situation, and all of the evidence indicated that DSS did not know where the mother was.

3. Child Abuse and Neglect— neglect—findings of fact—mother admitted smoking marijuana before child birth

The trial court did not err in a child neglect case by the portion of finding of fact 7 which states the mother acknowledged smoking marijuana the day before the birth of the minor child, because even though the mother did not specifically admit to using marijuana the day prior to the child's birth, the testimony that she refused to take a drug test the day before the child's birth and the fact that she tested positive for marijuana the day of the child's birth is sufficient evidence from which the trial court could infer the mother had recently used marijuana.

4. Child Abuse and Neglect— neglect—findings of fact—cease reunification order entered for infant's older sister

The trial court did not err in a child neglect case by finding that a cease reunification order had been entered for the infant's older sister, because a social worker testified the older daughter had been adjudicated abused and neglected and that a cease reunification order had been entered.

5. Child Abuse and Neglect— neglect—findings of fact—mother diagnosed with narcissistic personality disorder

The trial court did not err in a child neglect case by its finding of fact 9 stating that the mother previously had been diagnosed as having narcissistic personality disorder, because: (1) a social worker testified by reading the pertinent report that an 11 February 2003 psychological evaluation indicated the mother has narcissistic personality disorder; and (2) although the mother objected to this testimony, she neither stated a basis for this objection during the hearing nor does she make any arguments on appeal as to why this testimony was inadmissible.

6. Child Abuse and Neglect— neglect—findings of fact—no supervision of minor child

The trial court erred in a child neglect case by its finding of fact 12 stating that the minor child received no supervision from the mother for around one week next preceding the date of the filing of the petition in this case and that the minor child had been abandoned as of the date of the filing of the petition, because the evidence presented indicated the mother visited her daughter regularly in the hospital and DSS did not present any evidence to the contrary.

7. Child Abuse and Neglect— neglect—findings of fact—mother unavailable to receive child—older sibling abused and neglected

The trial court did not err in a child neglect case by its finding of fact stating that the minor child's mother was unavailable to receive her at discharge from the hospital and that the child's older sister had been subjected to abuse and neglect, because: (1) custody had been placed with DSS prior to the child's release from the hospital, meaning the mother would have been unavailable to receive her daughter at discharge; (2) DSS did not know of the mother's whereabouts at the time the petition was filed; and (3) although the older sister's adjudication order had not been offered into evidence, the social worker did testify that the older sister had been adjudged abused and neglected.

8. Child Abuse and Neglect— neglect—findings of fact—clear, cogent, and convincing evidence

Clear, cogent, and convincing evidence supports the conclusion that the minor child was neglected including that: (1) the mother tested positive for marijuana use on the day the child was born; (2) another child had been adjudged abused and neglected; (3) the mother was unemployed; and (4) the mother's whereabouts were unknown at the time the petition was filed.

9. Child Abuse and Neglect— disposition hearing—admission of reports—rules of evidence do not apply

The trial court did not err in a child neglect case by considering the DSS and guardian ad litem reports in making its disposition even though the reports had not been admitted into evidence, because: (1) N.C.G.S. § 7B-901 provides that the disposition hearing is an informal proceeding in which the formal rules of evidence do not apply; (2) the disposition hearing was continued to a later date after the trial court was informed that all parties had not received a copy of the reports; and (3) all parties had an opportunity to review the reports before the trial court considered the reports in making its disposition.

10. Child Abuse and Neglect— neglect—reasonable efforts made by DSS—cessation of reunification efforts

The trial court did not err in a child neglect case by determining that reasonable reunification efforts had been made by DSS and by ordering DSS to cease reunification efforts, because:

(1) although at the time of the disposition hearing the mother was employed, the findings of fact also indicated the mother did not have stable housing, she had tested positive for marijuana and benzodiazopines on one occasion after the adjudication hearing, and she had not attended several of her substance abuse assessments since the adjudication hearing; and (2) the record included findings that the mother was not making progress on her psychological problems and that an order to cease reunification efforts had been entered regarding her other daughter.

11. Child Abuse and Neglect— neglect—failure to use exact statutory language for cessation of reunification efforts

The trial court did not err in a child neglect case by failing to include in the disposition order the exact statutory language under N.C.G.S. § 7B-507(b) necessary to order a cessation of reunification efforts, because: (1) the statutory requirements were satisfied in conclusion of law 5 of the disposition order when the trial court stated that return to the home of either of the parents is contrary to the best interest of the child at this time and is contrary to the health, safety, and welfare of the child; (2) all of the statutory language is included in either the findings of fact or conclusions of law; and (3) the mother failed to cite any case law or other relevant authority indicating it was error not to use the exact statutory language.

12. Child Abuse and Neglect— neglect—custody with mother not in best interest of child

The trial court did not err in a child neglect case by determining that custody of the child with the mother is contrary to the child's best interest and to her safety and health even though the mother contends that custody should have been placed with her based on N.C.G.S. § 7B-900 stating that the initial approach should involve working with the juvenile and the juvenile's family in their own home so that the appropriate community resources may be involved, because: (1) N.C.G.S. § 7B-900 provides that the initial approach should involve working with the juvenile and the juvenile's family in their home if possible; and (2) the disposition order concluded that DSS had exercised reasonable efforts toward reunification, but that reunification was not in the best interest of the minor child at this time.

Appeal by respondent from orders entered 19 September 2003 and 3 December 2003 by Judge C. Thomas Edwards in Catawba County District Court. Heard in the Court of Appeals 3 November 2004.

J. David Abernethy for petitioner-appellee Catawba County Department of Social Services.

Carolyn Crouch for Guardian ad Litem.

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

HUNTER, Judge.

The respondent mother appeals from the adjudication and disposition orders which concluded her infant daughter, MJG, was neglected and ordered the cessation of reunification efforts. The mother contends several findings of fact in both orders were unsupported by clear, cogent, and convincing evidence. The mother also challenges the trial court's determinations that (1) custody of MJG in her home was contrary to the child's best interest and to the safety and health of the child, (2) reasonable efforts were undertaken by the Department of Social Services ("DSS"), and (3) DSS shall cease its reunification efforts. After careful review, we affirm the orders below.

The record tends to show that MJG was born on 4 June 2003 and weighed two pounds and five ounces (2 lbs. 5 ozs.) at birth. Immediately after birth, the infant was admitted to the intensive care unit at Carolinas Medical Center in Charlotte, North Carolina. The mother was living with the infant's paternal grandfather at the time of MJG's birth, and he took the mother to the hospital each night to visit MJG. Prior to MJG's release from the hospital, the mother left the grandfather's residence and the grandfather did not know her whereabouts. Upon release from the hospital, MJG was placed in the custody of DSS. The child was never in the mother's custody.

The mother's other daughter had been adjudicated abused and neglected prior to MJG's birth and was in the custody of DSS. The mother had been ordered to have drug screenings as part of her case plan, and she had several positive drug tests prior to her pregnancy with MJG. During the pregnancy she had several negative drug tests. However, the mother tested positive for marijuana on the day MJG was born and the mother admitted using marijuana on 6 May 2003. She also refused to take a drug test the day before MJG was born.

On 24 June 2003, Catawba County DSS filed a juvenile petition alleging MJG was neglected, in that MJG did not receive proper care, supervision, or discipline from her parent. After a 26 August 2003 hearing, MJG was adjudged neglected. After disposition was deferred, a disposition hearing was conducted on 18 November 2003 and the disposition order was signed on 3 December 2003. In the disposition order, the trial court ordered DSS to cease its efforts to return the minor child to her own home. The mother appeals.

The mother challenges several findings of fact in the adjudication and disposition orders. Allegations of abuse and neglect must be proven by clear and convincing evidence. N.C. Gen. Stat. § 7B-805 (2003). "In a non-jury [abuse and] neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Our review of a trial court's conclusions of law is limited to whether the conclusions are supported by the findings of fact. *See In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984). "If the trial court's conclusions of law are supported by findings of fact based on clear, cogent and convincing evidence, and the conclusions of law support the order or judgment of the trial court, then the decision from which appeal was taken should be affirmed." *In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999).

[1] First, the mother challenges a portion of finding of fact 5 in the adjudication order which states, "[n]either the mother nor the putative father visited the minor child for approximately one week prior to the date of the filing of the petition in this case on June 24, 2003[.]"

Our review of the record does not reveal any testimony indicating the mother failed to visit MJG in the hospital during the week prior to the filing of the petition. The two social workers did not provide any testimony regarding the mother's visitation of MJG in the hospital. The paternal grandfather testified the mother lived with him for two weeks after MJG's birth and that he would take the mother to visit MJG every night until she moved out of his home. DSS did not offer any testimony regarding the mother's hospital visitation or lack thereof during the last week MJG was in the hospital. Accordingly, this finding of fact is not supported by clear, cogent, and convincing evidence.

[2] The mother also challenges the portion of finding of fact 5 in the adjudication order which states, "the whereabouts of the mother and

the whereabouts of the putative father were not known at the time of the release of [MJG] from Carolinas Medical Center." A social worker attempted to provide testimony regarding this finding of fact. However, the trial court sustained an objection to the testimony and ordered the testimony stricken from the record. The grandfather testified that the mother had moved from his home, that he did not know of her whereabouts, and that he informed DSS that the mother had left his residence. No evidence was offered tending to indicate DSS knew of the mother's whereabouts after she left the grandfather's home. Accordingly, clear, cogent, and convincing evidence supports the testimony that her whereabouts were unknown at the time the petition was filed because neither DSS nor the grandfather knew her location.

Similarly, the mother challenges a portion of finding of fact 10 which states, "[s]he left that residence and at the time of the filing of the petition, her whereabouts were unknown and she had no housing or income known to the Department of Social Services." As previously stated, DSS did not know of the mother's whereabouts at the time the petition was filed. A social worker also testified the mother did not have any employment at the time the petition was filed. No evidence was entered regarding her housing situation at the time the petition was filed. Rather, all of the evidence indicates DSS did not know where the mother was. Accordingly, we conclude the findings that her whereabouts were unknown and that she did not have any income at the time the petition was filed is supported by clear, cogent, and convincing evidence. Also, the finding that she did not have any housing known to DSS at the time the petition was filed is supported by clear, cogent, and convincing evidence.

[3] The mother next challenges the portion of finding of fact 7 in the adjudication order which states "[t]he mother acknowledged smoking marijuana the day before the birth of [MJG] . . . ." The social worker testified that the mother admitted smoking marijuana with MJG's father after a May 2003 court hearing. The social worker also testified the mother refused to take a drug test the day before MJG was born. In regards to whether the mother had used drugs the day prior to MJG's birth, the social worker specifically testified "[the mother] did not state whether she had used." However, the social worker also testified that the mother tested positive for marijuana the day MJG was born. Even though the mother did not specifically admit to using marijuana the day prior to MJG's birth, the testimony that she refused to take a drug test the day before the infant's birth and tested positive

for marijuana the day of her birth is sufficient evidence from which the trial court could infer the mother had recently used marijuana. Accordingly, we conclude this finding of fact is supported by clear, cogent, and convincing evidence.

[4] The mother next argues the trial court erroneously found that a cease reunification order had been entered for the infant's older sister as there was no evidence entered supporting this statement. Our review of the transcript indicates a social worker testified the older daughter had been adjudicated abused and neglected and that a cease reunification order had been entered. Accordingly, this finding of fact is supported by competent evidence.

[5] The mother next challenges finding of fact 9 in the adjudication order which states "[t]he mother previously has been diagnosed as having Narcissistic Personality Disorder." A social worker testified, by reading the report, that an 11 February 2003 psychological evaluation indicated the mother has narcissistic personality disorder. Although the mother objected to this testimony, she neither stated a basis for the objection during the hearing nor does she make any arguments on appeal as to why this testimony was inadmissible. *See* N.C.R. App. P. 28(b)(6). Accordingly, this finding of fact is supported by clear, cogent, and convincing evidence.

[6] The mother next challenges finding of fact 12 in the adjudication order which states "[t]hat [MJG] received no supervision from [the mother or the father] for around one week next preceding the date of the filing of the petition in this case, and [MJG] had been abandoned as of the date of filing of the petition."[1]

The evidence indicates MJG was born on 4 June 2003 and was immediately placed in the intensive care unit of the Carolinas Medical Center. While MJG was in the hospital, the paternal grandfather testified the mother lived with him for approximately fourteen days, and that he took her to the hospital each night to visit MJG. A few days before the mother left his home, she attempted to jump out of a moving vehicle three times. Then, on the day she left his home, the grandfather testified the mother said: "Well, dad . . . . The hell with it. They can have [MJG and the older sister] both. I'm leaving."

1. We do not believe the trial court intended to use the term abandoned as it is used in child abuse, neglect, and dependency proceedings. We believe the trial court was indicating the mother had ceased visiting her daughter by using the word abandoned. Moreover, DSS did not allege the mother abandoned MJG in the petition.

This evidence indicates that prior to the filing of the petition, the mother visited her infant daughter several times in the hospital. The juvenile petition was filed on 24 June 2003, and according to the petition, MJG was still in the hospital at the time the petition was filed. No evidence was presented by DSS regarding whether or not the mother visited her daughter in the hospital after she left the grandfather's home. Rather, the evidence only indicates the mother did not live with the grandfather during the last week MJG was in the hospital. The evidence presented indicates the mother visited her daughter regularly in the hospital, and DSS did not present any evidence to the contrary. Accordingly, clear, cogent, and convincing evidence does not support this finding of fact.

[7] Next, the mother challenges finding of fact 13 which states "[t]hat [MJG], had her mother been available to receive her at discharge from Carolinas Medical Center, would have lived in a home where another child, [the older sister], had been subjected to abuse and neglect." The mother contends the statements that she was unavailable to pick up her child and that another child had been subjected to abuse and neglect were unsupported by competent evidence.

In this case, a nonsecure custody order placing MJG in the custody of DSS was entered on 23 June 2003, the day before the petition was filed, and prior to MJG's release from the hospital. As the record indicates custody had been placed with DSS prior to MJG's release from the hospital, the mother would have been unavailable to receive her daughter at discharge. Furthermore, DSS did not know of the mother's whereabouts at the time the petition was filed. Therefore, this finding of fact was supported by clear, cogent, and convincing evidence.

The mother also challenges the portion of finding of fact 13 in the adjudication order which indicates another child had been abused and neglected. Although the older sister's adjudication order had not been offered into evidence, the social worker did testify that the older sister had been adjudged abused and neglected. Accordingly, finding of fact 13 is supported by clear, cogent, and convincing evidence.

[8] Even though we have concluded several findings of fact were unsupported by clear, cogent, and convincing evidence, the remaining findings of fact support the conclusion that MJG was neglected. A neglected juvenile is:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or care-

> taker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (2003).

The findings of fact that the mother tested positive for marijuana use on the day MJG was born, that another child had been adjudged abused and neglected, that the mother was unemployed, and that her whereabouts were unknown at the time the petition was filed support the conclusion that MJG was neglected.

[9] The mother next challenges several findings of fact in the disposition order. In the disposition order, the trial court adopted and incorporated by reference court reports prepared by the social worker and guardian ad litem. Based upon these reports, the trial court rendered findings of fact indicating:

- the parents had a long history of domestic violence and substance abuse,
- the mother had lived in four different homes in the five months since MJG's birth,
- that the mother had to pay a fine for resisting an officer,
- that the mother was employed,
- that the mother had been hospitalized for depression and threatened suicide,
- that describe details about the older daughter's abuse and neglect case,
- that the mother had signed a relinquishment for MJG's adoption but timely revoked it, and
- that the mother had failed to utilize the services offered her by DSS.

The mother argues that DSS failed to move the reports upon which these findings were based into evidence, and therefore, the

trial court erroneously relied upon the reports in making its findings of fact. We disagree.

N.C. Gen. Stat. § 7B-901 (2003) states:

> The dispositional hearing may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile. The juvenile and the juvenile's parent, guardian, or custodian shall have an opportunity to present evidence, and they may advise the court concerning the disposition they believe to be in the best interests of the juvenile. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition. The court may exclude the public from the hearing unless the juvenile moves that the hearing be open, which motion shall be granted.

Id. In *In re Ivey*, 156 N.C. App. 398, 402, 576 S.E.2d 386, 389-90 (2003), this Court considered the argument that the trial court erroneously rendered findings of fact in a permanency planning hearing based upon reports that were not admitted into evidence. In holding that no error was committed by the trial court, this Court stated dispositional hearings are informal and that the trial court may consider all reports submitted. This Court also emphasized the parties had complied with the local rules requiring DSS and the guardian ad litem to submit reports to all parties at least two working days before the disposition or review hearing. Thus, no error was committed in considering the reports that had not been admitted into evidence and these reports provide sufficient evidence supporting the findings of fact in the disposition order.

Similarly, in this case, DSS and the guardian ad litem presented the reports to the trial court for consideration during the disposition hearing, which under the terms of N.C. Gen. Stat. § 7B-901 is an informal proceeding in which the formal rules of evidence do not apply. *See* N.C. Gen. Stat. § 7B-901; *In re Montgomery*, 77 N.C. App. 709, 715, 336 S.E.2d 136, 140 (1985) (indicating the formal rules of evidence do not apply in a dispositional hearing). Furthermore, the dispositional hearing was continued to a later date after the trial court was informed all parties had not received a copy of the reports. Therefore, all parties had an opportunity to review the reports before the trial court considered the reports in making its disposition. Based upon this Court's holding in *In re Ivey* and N.C. Gen. Stat. § 7B-901, we

conclude the trial court did not erroneously consider the DSS and guardian ad litem reports in making its disposition.

[10] Next, the mother contends the trial court erroneously determined that reasonable efforts had been made by DSS and in ordering DSS to cease reunification efforts. Specifically, she argues that in the three months between the adjudication and disposition hearings, the mother had made progress. She also argues the order did not contain the necessary statutory language for cessation of reunification efforts.

Although at the time of the disposition hearing the mother was employed, the findings of fact also indicate the mother did not have stable housing, that she had tested positive for marijuana and benzodiazopines on one occasion after the adjudication hearing, and that she had not attended several of her substance abuse assessments since the adjudication hearing. The record also includes findings that the mother was not making progress on her psychological problems and that an order to cease reunification efforts had been entered regarding her other daughter. The older daughter had been adjudicated abused and neglected on 17 December 2002. Based upon these findings of fact, we conclude the trial court did not erroneously determine DSS had made reasonable efforts towards reunification of the mother and child.

[11] The mother also argues that the disposition order failed to include the exact statutory language necessary to order a cessation of reunification efforts. N.C. Gen. Stat. § 7B-507(b) (2003) states in pertinent part that:

> [T]he court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:
>
> (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]

Id. In finding of fact 10 of the disposition order, the trial court stated:

> Although reunification efforts have been made, those valiant efforts have failed because the mother has failed to utilize the offered services. Reunification efforts with either parent clearly would be futile and inconsistent with the need of the minor child for a safe, permanent home within a reasonable period of time.

In conclusion of law 5 of the disposition order, the trial court stated "[t]hat return to the home of either of the parents is contrary to the best interest of the child at this time, and is contrary to the health, safety and welfare of the child." We conclude that this finding of fact and conclusion of law satisfies the statutory requirements. Indeed, all of the statutory language is included in either the finding of fact or conclusion of law. Although the mother contends it was error for the trial court not to use the exact statutory language, she does not cite any case law or other relevant authority indicating it was error not to use the exact statutory language. Accordingly, we conclude the trial court did not erroneously fail to use the exact statutory language.

[12] Finally, the mother argues the trial court erroneously determined that custody of MJG with the mother is contrary to the child's best interest and to her safety and health. The mother argues that instead of custody being placed with DSS, custody should have been placed with her because N.C. Gen. Stat. § 7B-900 (2003) states "the initial approach should involve working with the juvenile and the juvenile's family in their own home so that the appropriate community resources may be involved[.]" However, N.C. Gen. Stat. § 7B-900 states in its entirety:

> The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction. *If possible*, the initial approach should involve working with the juvenile and the juvenile's family in their own home so that the appropriate community resources may be involved in the care, supervision, and treatment according to the needs of the juvenile. Thus, the court should arrange for appropriate community-level services to be provided to the juvenile and the juvenile's family in order to strengthen the home situation.

Id. (emphasis added). This statutory provision clearly states that the initial approach should involve working with the juvenile and the juvenile's family in their home *if possible*. In the disposition order, the trial court concluded in pertinent part:

2. That the DSS has exercised reasonable efforts toward reunification of the minor child with her parents, but reunification is not in the best interest of the minor child at this time[.]

3. That the DSS has exercised reasonable efforts to serve the needs of the minor child.

4. That the DSS has exercised reasonable efforts to prevent or eliminate the need for continued placement out of the parents' homes.

5. That return to the home of either of the parents is contrary to the best interest of the child at this time, and is contrary to the health, safety and welfare of the child.

6. That the best interest of the minor child will be served by the entry of the following order.

Based upon the trial court's conclusions of law and the findings of fact discussed previously, we conclude the trial court did not err in placing MJG in the custody of DSS.

In sum, even though we have determined several findings of fact were not supported by clear, cogent, and convincing evidence, several findings of fact, which are supported by clear, cogent, and convincing evidence, remain upon which the trial court could base a finding of neglect. We also conclude the trial court properly considered the DSS and guardian ad litem reports in making its disposition. Finally, notwithstanding the mother's limited progress, we affirm the disposition order.

Affirmed.

Judges CALABRIA and LEVINSON concur.

STATE OF NORTH CAROLINA v. MARCIANA ELLIS

No. COA04-436

(Filed 1 March 2005)

1. Arrest— resisting, delaying, or obstructing an officer— indictment—failure to describe duties officer discharging or attempting to discharge

The bill of indictment used to charge defendant with resisting, delaying, or obstructing an officer under N.C.G.S. § 14-223 was insufficient as a matter of law, because: (1) an indictment fails under N.C.G.S. § 14-223 if it does not describe the duty the named officer was discharging or attempting to dis-

charge; and (2) the pertinent indictment failed to describe the duties the alcohol law enforcement agent was discharging or attempting to discharge.

2. Prisons and Prisoners— malicious conduct by prisoner—motion to dismiss—sufficiency of evidence—custody

The trial court did not err by denying defendant's motion to dismiss the charge of malicious conduct by a prisoner based on alleged insufficient evidence of defendant being in custody, because: (1) the Fourth Amendment "free to leave" test is to be applied to determine whether an individual was in custody under N.C.G.S. § 14-258.4; and (2) substantial evidence shows that at the moment defendant smeared fecal matter on an officer, a reasonable person would have believed that he was not free to leave.

3. Prisons and Prisoners— malicious conduct by prisoner—instruction—custody

The trial court did not err by instructing the jury on the custodial element of malicious conduct by a prisoner, because: (1) the test is whether a reasonable person would have felt free to leave under the circumstances; and (2) in light of the "free to leave" test concerning the custody element of N.C.G.S. § 14-258.4, defendant has failed to show, and a review of the record and transcript do not indicate, that the instructions to the jury were misleading.

4. Sentencing— Level IV offender—stipulation to worksheet of prior convictions

The trial court did not err in a malicious conduct by a prisoner, possession of cocaine, resisting and obstructing a law enforcement officer, and assault on a law enforcement officer case by determining that defendant was a Level IV offender for sentencing purposes, because: (1) N.C.G.S. § 15A-1340.14(f) provides that a prior conviction can be proved by stipulation of the parties; (2) the State tendered defendant's prior conviction worksheet to the trial court and defense counsel stipulated to it; and (3) the trial court offered defendant an opportunity to address the court, which defendant did, and defendant did not object or refer to his prior convictions.

Appeal by defendant from judgments entered 31 July 2003 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 7 December 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Pitman, for the State.

Charns & Charns, by D. Tucker Charns, for defendant-appellant.

TYSON, Judge.

Marciana Ellis ("defendant") appeals from judgments entered after a jury returned guilty verdicts of: (1) knowingly and willfully emitting human excrement at a law enforcement officer in the performance of his duties (malicious conduct by prisoner) (02 CRS 013682); (2) possession of cocaine (02 CRS 013683); and (3) resisting and obstructing a law enforcement officer and assault on a law enforcement officer (02 CRS 013684). We find no error on 02 CRS 013682 and 02 CRS 013683, arrest judgment on 02 CRS 013684 and remand for resentencing.

I. Background

The State's evidence tended to show that around 11:00 p.m. on 16 February 2002, Agents Jason Locklear ("Agent Locklear") and Ralph Nolan ("Agent Nolan") (collectively, "the Agents") of the North Carolina Alcohol Law Enforcement Division ("ALE") witnessed defendant leaving a convenience store and walking down the street. Agent Locklear believed he saw defendant carrying a twelve ounce malt beverage bottle, but could not determine whether it was opened.

The Agents stopped defendant on the street and Agent Locklear identified himself as an ALE agent. Agent Locklear was wearing his uniform and badge. The Agents asked defendant if the bottle was open. During the exchange, Agent Locklear saw defendant place ten to twelve small white rocks into his mouth. Agent Locklear grabbed defendant and ordered him to empty his mouth. Defendant swallowed one time, then opened his mouth, which was empty. Defendant was searched and $427.00 in cash was found.

Agent Locklear told defendant a search warrant could be obtained to have his stomach pumped. Defendant responded by lying to the Agents about his name. The Agents explained to defendant that if he did not start telling the truth, he would be arrested. Defendant continued to give the Agents fictitious names. Agent Locklear then told defendant, "I'm going to take you to the Magistrate's Office and see if the magistrate can determine exactly who you are." Defendant turned and ran from the Agents.

Agent Locklear chased defendant for about forty minutes. During the chase, Agent Locklear yelled at defendant that he was under arrest and to stop. Agent Nolan chased defendant for a few minutes before returning to secure their patrol car. During the chase, Agent Locklear caught up with defendant four times. The first time, Agent Locklear hit defendant in the forehead and sprayed him with pepper spray. On the second time, after a homeowner chased defendant off his porch, Agent Locklear tackled defendant and again sprayed him with pepper spray. Defendant punched Agent Locklear in the face and escaped. During the third time, Agent Locklear caught up with defendant and struck him with a metal baton on his leg causing defendant to fall down. Defendant regained his footing and jumped into a roadside canal. The canal water varied from knee deep to chest high.

Finally, Agent Locklear trapped defendant in the canal. He continued to tell defendant that he was under arrest and that he was going to handcuff him. As Agent Locklear approached with the handcuffs, defendant reached into his pants and told Agent Locklear that he had defecated on himself and would smear the excrement on him if he came closer. Agent Locklear continued to approach and defendant smeared feces over Agent Locklear's chest, left arm, and both hands. Agent Locklear struggled with defendant and managed to place the handcuffs on him. Defendant vomited and tried to step on and hide the vomit's contents. Agent Locklear recovered a plastic bag from the pool of vomit with a rock-like substance inside it.

Defendant was taken to the hospital, where a hand wound was treated and his stomach was pumped. Five rock-like substances were recovered from defendant's stomach. All six objects removed from defendant tested positive for crack cocaine.

Defendant was tried by a jury for: (1) knowingly and willfully emitting human excrement at a law enforcement officer in the performance of his duties (malicious conduct by prisoner); (2) possession of cocaine; and (3) resisting and obstructing a law enforcement officer and assault on a law enforcement officer. After the charge conference, defendant left the courtroom and did not return. An order for his arrest was issued. The jury found defendant to be guilty of: (1) knowingly and willfully emitting human excrement at a law enforcement officer in the performance of his duties (malicious conduct by prisoner); (2) possession of cocaine; and (3) resisting and obstructing a law enforcement officer and assault on a law enforcement officer.

Defendant was later arrested and returned to the courtroom. He was found to be a Level IV offender for sentencing purposes and sentenced in the presumptive range of twenty-five months minimum to thirty months maximum. Defendant appeals.

II. Issues

The issues on appeal are whether: (1) the indictment for resist, obstruct, and delay was sufficient; (2) the State offered evidence for each element of malicious conduct by prisoner; (3) the trial court erred in instructing the jury on malicious conduct by prisoner; and (4) defendant is a Level IV Offender.

III. Sufficiency of an Indictment

[1] Defendant contends the bill of indictment charging him with resist, delay, or obstruct an officer under N.C. Gen. Stat. § 14-223 was insufficient as a matter of law. We agree.

The purpose of an indictment is to provide "sufficient detail to put the defendant on notice as to the nature of the crime charged and to bar subsequent prosecution for the same offense in violation of the prohibitions against double jeopardy." *State v. Burroughs*, 147 N.C. App. 693, 695-96, 556 S.E.2d 339, 342 (2001) (citing *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996)). It must include all the facts necessary to meet the elements of the offense. *State v. Alston*, 310 N.C. 399, 407, 312 S.E.2d 470, 475 (1984). If it does not, the trial court lacks jurisdiction over the defendant and subsequent judgments are void and must be vacated. *State v. Wagner*, 356 N.C. 599, 601, 572 S.E.2d 777, 779 (2002).

N.C. Gen. Stat. § 14-223 (2003) provides, "If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." An indictment fails under N.C. Gen. Stat. § 14-223 if it does not describe the duty the named officer was discharging or attempting to discharge. *State v. Dunston*, 256 N.C. 203, 204, 123 S.E.2d 480, 481 (1962) (citing *State v. Stonestreet*, 243 N.C. 28, 89 S.E.2d 734 (1955); *State v. Harvey*, 242 N.C. 111, 86 S.E.2d 793 (1955); *State v. Eason*, 242 N.C. 59, 86 S.E.2d 774 (1955)).

Here, the bill of indictment charging defendant with violating N.C. Gen. Stat. § 14-223 stated, "the defendant named above unlawfully and willfully did resist, obstruct and delay Agent Jason Locklear of North Carolina Alcohol Law Enforcement Division while he was

attempting to discharge his duties of his office to wit: by running from Agent Jason Locklear and fighting Agent Jason Locklear."

The indictment fails to describe the duties Agent Locklear was discharging or attempting to discharge. The trial court never had jurisdiction over defendant on this charge. *Wagner*, 356 N.C. at 601, 572 S.E.2d at 779. The judgment is void and arrested for lack of jurisdiction.

IV. Malicious Conduct by Prisoner

[2] Defendant asserts the trial court erred by denying his motion to dismiss the charge of malicious conduct by prisoner. We disagree.

A. Standard of Review

The standard of review for a motion to dismiss in a criminal trial is:

> 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. Barnes, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)).

Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995) (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). If substantial evidence, whether direct, circumstantial, or both, supports a finding that the offense charged has been committed and that the defendant committed it, the motion to dismiss should be denied and the case goes to the jury. *State v. Williams*, 319 N.C. 73, 79, 352 S.E.2d 428, 432 (1987) (quoting *State v. Young*, 312 N.C. 669, 680, 325 S.E.2d 181, 188 (1985)). But, "[i]f 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." *Powell*, 299 N.C. at 98, 261 S.E.2d at 117 (citations omitted).

In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995). The trial court

must also resolve any contradictions in the evidence in the State's favor. *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness's credibility. *Id.* It is concerned "only with the sufficiency of the evidence to carry the case to the jury." *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983). Ultimately, the court must decide whether a reasonable inference of defendant's guilt may be drawn from the circumstances. *Powell*, 299 N.C. at 99, 261 S.E.2d at 117.

B. Analysis

Malicious conduct by prisoner is defined as:

> (1) the defendant threw, emitted, or caused to be used as a projectile a bodily fluid or excrement at the victim; (2) the victim was a State or local government employee; (3) the victim was in the performance of his or her State or local government duties at the time the fluid or excrement was released; (4) the defendant acted knowingly and willfully; and (5) the defendant was in the custody of the Department of Correction, the Department of Juvenile Justice and Delinquency Prevention, any law enforcement officer, or any local confinement facility (as defined in G.S. 153A-217, or G.S. 153A-230.1), including persons pending trial, appellate review, or presentence diagnostic evaluation, at the time of the incident.

State v. Robertson, 161 N.C. App. 288, 292-93, 587 S.E.2d 902, 905 (2003) (citing N.C. Gen. Stat. § 14-258.4 (2001)). Defendant concedes the State met its burden in all but one of the elements, "the defendant was in the custody . . . . "

1. Custody

Our research indicates there has been little discussion of this statute since its enactment on 1 December 2001. 2001 N.C. Sess. Laws ch. 360, §§ 1-2. This Court has extended its use to both a prisoner within a correctional facility and an individual placed under arrest. *See State v. Smith*, 163 N.C. App. 771, 594 S.E.2d 430 (2004) (defendant spat on a correctional officer while incarcerated); *see also State v. Cogdell*, 165 N.C. App. 368, 371, 599 S.E.2d 570, 572 (2004) (defendant was "unruly and verbally abusive, and . . . spat at the [arresting] officer"). The issue before us is whether evidence shows defendant was "in custody" when he smeared fecal matter on Agent Locklear.

Defendant asserts the "custody" determination here should mirror the analysis involving the Fifth Amendment right against self-incrimination and the protections afforded by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966) (whether *Miranda* warnings are necessary prior to police questioning an individual hinges upon whether the individual is "in custody"). "[I]n determining whether a suspect [is] in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997).

The State contends the "custody" determination should be based upon whether an individual has been "seized" in relation to the Fourth Amendment. The State asserts the appropriate analysis involves the defendant's "free to leave test." *See State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001). The question becomes whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509, *reh'g denied*, 448 U.S. 908, 65 L. Ed. 2d 1138 (1980); *State v. Johnson*, 317 N.C. 343, 360, 346 S.E.2d 596, 606 (1986). Our Supreme Court has acknowledged that the Fourth Amendment analysis is "broader" than that involving the Fifth Amendment. *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828.

We recognize that "custody" determinations involving *Miranda* result from constitutional protections afforded those being interrogated about alleged criminal conduct. The goal is to prevent overreaching by the police in violation of an individual's Fifth Amendment rights. *See Miranda*, 384 U.S. at 444-45, 16 L. Ed. 2d at 706-07. Thus, the *Miranda* "custody" test defendant seeks to apply here is narrowly drawn due to the constitutional implications involved. In contrast, it is clear that the purpose behind N.C. Gen. Stat. § 14-258.4 is to protect an "employee of the State or local government while the employee is in the performance of the employee's duties" from individuals who may "throw[], emit[], or cause[] to be used as a projectile, bodily fluids or excrement." Based on our review of cases involving both analyses, we hold the broader Fourth Amendment "free to leave test" is to be applied to determine whether an individual was "in custody" under N.C. Gen. Stat. § 14-258.4.

a. Analysis

" 'Only when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.' " *Gaines*, 345 N.C. at 663, 483 S.E.2d at 406 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 20 L. Ed. 2d 889, 905 n.16 (1968)). Our Supreme Court accepted several instances that the United States Supreme Court has recognized that would indicate "a reasonable person" would *not* feel free to leave the presence of a police officer. *See State v. Farmer*, 333 N.C. 172, 187-88, 424 S.E.2d 120, 129 (1993) ("threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled") (quoting *Mendenhall*, 446 U.S. at 554, 64 L. Ed. 2d at 509).

Here, substantial evidence shows that at the moment defendant smeared fecal matter on Agent Locklear, "a reasonable person would have believed that he was not free to leave." *See Mendenhall*, 446 U.S. at 554, 64 L. Ed. 2d at 509. Agent Locklear initially told defendant that he was going to take him to the magistrate's office. Agent Locklear chased defendant for forty minutes, hit defendant in the forehead, tackled him, emptied a can of pepper spray in defendant's face, struck defendant's leg with a metal baton, and eventually cornered defendant in a water-filled canal. During the entire chase, Agent Locklear "talked to [defendant] several times, telling him to get down" and that "he was under arrest." In the canal, Agent Locklear approached defendant with his handcuffs in view, explaining that he "was under arrest." At that point, defendant used his right hand to smear fecal matter on Agent Locklear. It is apparent from Agent Locklear's conduct and voice commands that defendant was not "free to leave."

Analyzed in the light most favorable to the State and providing the State the benefit of every reasonable inference, substantial evidence exists to show defendant was "in the custody of . . . [a] law enforcement officer" when he smeared his feces on Agent Locklear. The trial court properly denied defendant's motion to dismiss the charge of malicious conduct by prisoner, N.C. Gen. Stat. § 14-258.4. This assignment of error is overruled.

V. Jury Instructions

[3] Defendant contends the trial court erred in instructing the jury on the custodial element of malicious conduct by prisoner. We disagree.

This Court is required to consider and review jury instructions in their entirety. *Robinson v. Seaboard System Railroad, Inc.*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987), *disc. rev. denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). The trial court's charge to the jury "will not be dissected and examined in fragments." *Id.* (citing *Gregory v. Lynch*, 271 N.C. 198, 155 S.E.2d 488 (1967)). The party assigning error to the instructions must show "that such error was likely, in light of the entire charge, to mislead the jury." *Robinson*, 87 N.C. App. at 524, 361 S.E.2d at 917 (citations omitted).

At the time of defendant's trial, no pattern jury instructions existed for a charge under N.C. Gen. Stat. § 14-258.4. Thus, the trial court provided the following instruction on "in custody" to the jury:

> A person is in custody, within the meaning of this statute, when a law enforcement officer advises him that he is under arrest or when the law enforcement officer, with the intent to make an arrest, makes verbal commands to a suspect, which commands a reasonable and prudent person under the same or similar circumstances to know that he was under arrest. When so advised, a suspect is under arrest and in custody even if the officer has not actually physically obtained complete control of the suspect.

We hold these instructions pertaining to the element of "in custody," taken in their entirety, conform with our previous holding. The test is whether a reasonable person would have felt free to leave under the circumstances.

In light of our application of the "free to leave test" concerning the custody element of N.C. Gen. Stat. § 14-258.4, defendant has failed to show, and our review of the record and transcript does not indicate that the instructions to the jury were misleading. This assignment of error is overruled.

VI. Prior Record Level

[4] Defendant argues the trial court erred in determining defendant was a Level IV offender for sentencing purposes due to his prior record. We disagree.

N.C. Gen. Stat. § 15A-1340.14(f) (2003) provides in part that, "[a] prior conviction shall be proved by any of the following methods: (1) Stipulation of the parties. . . ." In *State v. Lowe*, this Court found no error where "the State submitted to the court a prior criminal record and that the court considered the record to be reliable." 154 N.C. App. 607, 610, 572 S.E.2d 850, 853 (2002). In *State v. Rich*, a "computerized

record contained sufficient identifying information with respect to defendant to give it the indicia of reliability." 130 N.C. App. 113, 116, 502 S.E.2d 49, 51, *cert. denied*, 349 N.C. 237, 516 S.E.2d 605 (1998).

At defendant's sentencing proceeding, the State tendered defendant's prior conviction worksheet to the trial court. The trial court then asked defense counsel, "[h]ave you seen the worksheet?" Defense counsel responded, "I have, your Honor. We stipulate to that." The trial court offered defendant an opportunity to address the court, which defendant did. He did not object or refer to his prior convictions. Under N.C. Gen. Stat. § 15A-1340.14(f)(1), we hold defendant's prior convictions were sufficiently proved to warrant a Level IV sentencing. This assignment of error is overruled.

VII. Conclusion

The judgment pertaining to the charge of resist, delay, or obstruct an officer under N.C. Gen. Stat. § 14-223 is void and is arrested for insufficiency of the bill of indictment. The trial court properly denied defendant's motion to dismiss related to the "custody" element of malicious conduct of prisoner, N.C. Gen. Stat. § 14-258.4. The trial court did not err in instructing the jury on the element of "custody." Defendant was properly sentenced as a Record Level IV offender.

No error in 02 CRS 013682 and 02 CRS 013683.

Judgment in 02 CRS 013684 is arrested and vacated and Remanded for Resentencing.

Judges WYNN and McGEE concur.

STATE OF NORTH CAROLINA v. OTIS TREMAINE HIGHTOWER

No. COA04-324

(Filed 1 March 2005)

1. Evidence— prior crimes or bad acts—involvement in gang—robberies—drug dealing—motive and intent—modus operandi

The trial court did not commit plain error in a first-degree felony murder case by admitting evidence of defendant's prior illegal activity including involvement in the Jericho gang, prior

robberies, and drug dealing, because: (1) the testimony about the gang provided evidence of defendant's motive as well as the reason for a coparticipant's involvement in the crime; (2) the testimony about defendant's pattern of robbing others of illegal drugs and selling them provided evidence of defendant's motive and intent to commit the crimes at bar as well as his modus operandi; (3) considering the other overwhelming evidence of defendant's guilt presented through numerous eyewitnesses, the admission of this evidence was not plain error; and (4) although defendant contends he received ineffective assistance of counsel based on his attorney's failure to object to the evidence of defendant's prior bad acts, the admission of the Rule 404(b) evidence was not error.

2. Jury— selection—stating murder case tried noncapitally

The trial court did not err in a first-degree felony murder case by informing the jury pool that the case would be tried noncapitally because defendant failed to show, and the Court of Appeals did not find, any prejudice to defendant in the trial court's statement.

3. Sentencing— life without parole—*Enmund/Tison* issues

The trial court did not err in a first-degree felony murder case by imposing a sentence of life without parole without a jury finding of the *Enmund/Tison* issues, because: (1) both *Enmund* and *Tison* involved proportionality review of death sentences, and their application is not implied in noncapitally tried cases; and (2) defendant failed to show any basis to extend the application of proportionality to a noncapital verdict and judgment.

Appeal by defendant from judgment entered 31 October 2003 by Judge Orlando Hudson in Caswell County Superior Court. Heard in the Court of Appeals 2 December 2004.

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

Bruce T. Cunningham, Jr., for defendant-appellant.

TYSON, Judge.

Otis Tremaine Hightower ("defendant") appeals from judgment entered after a jury found him to be guilty of first-degree felony murder and first-degree burglary. We hold defendant received a fair trial free from prejudicial error.

I. Background

A. The Brothers

The State's evidence tended to show that on 4 January 2003, nineteen-year-old Brian Bigelow ("Bigelow"), his seventeen-year-old brother T.W., and others were present at Marcus Sellars' ("Sellars") house "playing Playstation 2" and "smoking marijuana." Defendant "came in the house smoking, smoking a blunt[,] holding a beer and with his gun." Defendant told those present, including the brothers, Bigelow and T.W., that he needed "to do a lick" because "he had spent all his money on Christmas presents . . . ." Bigelow testified that a "lick" meant "a robbery."

Defendant asked Bigelow and T.W. to participate. Bigelow at first refused because the intended victim, Edgar Williamson ("Williamson"), also known as "Eck," was his friend. Sellars and others harassed Bigelow and T.W. for not wanting to participate and called them names. Sellars informed Bigelow, "If you pull something like that, y'all be in Jericho. You would be done did [sic] something that showed you got heart."

Bigelow testified that the "Jericho Gang" consisted of his cousins and a few outsiders. To become a member of the gang, one had either to be "beaten in" by the members or rob someone. This gang would "hang out" at Sellars' house where they would drink, smoke marijuana, and sell drugs. According to Bigelow, defendant was one of the older members of the gang.

Later, Sellars asked defendant to take Bigelow and T.W. to the store and purchase "some beer and blunts." Sellars handed Bigelow and T.W. guns. Sellars also gave Bigelow a black toboggan with holes in it, and T.W. was given a "grayish stocking."

Defendant, Bigelow, and T.W. went to the convenience store and purchased "beer and blunts." After leaving the store, defendant drove past Sellars' house, but did not stop. Defendant told Bigelow, "We're going to pull this lick. . . . you want to get out, jump out." Bigelow and T.W. remained in the vehicle while defendant drove to Williamson's house. Williamson was standing outside in his yard. Defendant drove by the house about "five times" before parking the car two houses up the street from Williamson's house. Defendant told Bigelow and T.W. to "get out of the car and don't get in the house acting like no bitch," or he would shoot them. Defendant was wearing a "red stocking cap, [with] a camouflaged hat over top of it with a towel around his neck."

T.W. pulled the stocking cap over his head. Bigelow wore a ski mask over his face.

Defendant kicked in the door of the house, threw a "big woman" onto the floor, and put a gun to her head. Defendant instructed Bigelow and T.W. to "get the weed." T.W. entered one of the bedrooms and informed defendant that he could not locate the marijuana. Defendant walked down the hall, holding his gun to the "big woman's" head. He ordered her to give him "the weed." She retrieved a "big bag of marijuana" from under a mattress and handed it to defendant.

Defendant, Bigelow, and T.W. entered the kitchen area. Upon a knock at the door, Bigelow opened the rear door, and Lenny Benoit ("Benoit") entered the kitchen. Benoit recognized the brothers and stated, "That's Brian and Tom-Tom." Defendant stated, "I don't know no mo---- f------ Brian and Tom-Tom; I should knock your mo---- f------ teeth out right now." In response, according to Bigelow, Benoit just laughed and smiled. Defendant pointed his gun toward Benoit and fired. Bigelow and T.W. immediately left Williamson's house and ran towards the car, leaving defendant inside the house. About "thirty-seconds later," defendant returned to the car and drove away from the house. Bigelow and T.W. told defendant, "you didn't have to kill that boy," to which defendant responded, "Shut the f--- up before I shoot you."

Defendant, Bigelow, and T.W. returned to Sellars' house and divided up the marijuana. Sellars received two ounces, and Bigelow and T.W. each received one ounce. Defendant left Sellers' house.

On 13 January 2003, both Bigelow and T.W. went to the Caswell County Sheriff's Department and gave a statement. Bigelow's statement was admitted into evidence. T.W. also testified and recounted his involvement in the 4 January 2003 shooting, which was consistent with his brother's statement.

B. Rose Webb

Rose Webb ("Webb") testified that she knew Williamson and was visiting at his home on the evening of 4 January 2003 with her nine-year-old son and her fourteen-year-old-cousin, J.C. After Williamson and her son went to the store, someone knocked at the door while Webb was in the kitchen. She looked out and saw a person standing against the house wearing a red mask, like a toboggan. Later, this person kicked in the door. The person pointed a gun to her head, and she went down on her knees onto the kitchen floor. Webb stated that after

someone ran past her, she was told to get up and go into the back room, where her cousin J.C. was also located. Webb heard a gunshot and a girl scream. When she heard the scream, she saw a "teenager" standing near the door.

Webb entered the living room and saw a body lying on the kitchen floor and blood splattered by the stove. She also observed a girl crying and screaming, and asked whether the man on the floor was breathing.

C. Ashley Coble

Ashley Coble ("Coble") testified that she went to high school with Benoit. On 4 January 2003, Benoit and his girlfriend, J.C., picked her up and drove to Williamson's home around 7:30 p.m. Williamson and Benoit were cousins.

They parked outside near the back door. When J.C. turned the radio off, Benoit told her "something wasn't right" because the back door was open, that it was "never opened." As Benoit approached the door, he saw and read a note on the door. Three men came and slammed the door in his face. Benoit told the men to "quit playing" and knocked on the door again.

The men opened the door and all three huddled around Benoit. Coble described each of the three men and stated that two were wearing what appeared to be ski masks. The third had "something" on top of his head. Coble testified all three men had guns. Coble testified Benoit called for J.C., and Coble and J.C. ran into the house. Benoit was lying wounded on the floor.

D. Deputy Brandon

Caswell County Deputy Sheriff Gwynn Brandon ("Deputy Brandon") responded to a call at 881 Boy Scout Camp Road on 4 January 2003 around 8:00 p.m. When he arrived, he found Benoit lying halfway out of the back door of the residence.

Benoit appeared to have been shot in the lower stomach on the left side. Deputy Brandon stated that he could see several spots of blood on the floor inside the kitchen that appeared to be "fairly fresh." In addition, he observed that Benoit's condition was extremely critical. His eyes had rolled back in his head, and he was gasping for breath. Benoit later died from his wounds. Inside the front part of the house, Deputy Brandon found Webb and J.C. The front door had been blocked with a sofa and chairs.

Defendant did not testify or offer any evidence. The jury found defendant to be guilty of first-degree felony murder and first-degree burglary. As the burglary conviction was an element of the crime of felony murder, the trial court sentenced defendant to life imprisonment without parole for the first-degree murder conviction. Defendant appeals.

II. Issues

The issues on appeal are whether the trial court erred by: (1) admitting evidence of defendant's prior illegal activity; (2) informing the jury pool that the case would be tried non-capitally; and (3) imposing a sentence of life without parole without a jury finding of the *Enmund/Tison* issues.

Defendant's remaining assignments of error are explicitly waived in his brief. He concedes pursuant to the North Carolina Rules of Appellate Procedure, these assignments of error "cannot be pursued based upon the record currently before the Court." *See* N.C.R. App. P. 28(b)(6) (2004) ("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."). These remaining assignments of error are deemed abandoned.

III. Prior Bad Acts

[1] Defendant contends the trial court committed plain error by allowing evidence of defendant's involvement in the Jericho gang, prior robberies, and drug dealing. We disagree.

Defendant failed to object to the admission of this evidence and argues plain error.

> Where evidence is admitted without objection, the benefit of a prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of evidence. Having failed to object, defendant is entitled to relief based on this assignment of error only if he can demonstrate plain error. Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result. The appellate court must study the whole record to determine if the error has such an impact on the guilt determination, therefore constituting plain error.

State v. Berry, 143 N.C. App. 187, 193, 546 S.E.2d 145, 151 (internal quotations and citations omitted), *disc. rev. denied*, 353 N.C. 729, 551 S.E.2d 439 (2001).

Rule 404(b) of the North Carolina Rules of Evidence states:

> Evidence of other crimes, wrongs, or acts, is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). 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.

Berry, 143 N.C. App. at 196, 546 S.E.2d at 153.

A. Gang Activity

At trial, the State presented evidence through Bigelow's testimony that defendant was a member of the Jericho Gang. This testimony provides evidence of defendant's motive, as well as the reason for Bigelow's involvement in the crime. Defendant approached Bigelow, stated that he needed to do a "lick," and told Bigelow that in order to become a gang member, you had to "rob someone."

Presuming error, without finding the trial court erred, defendant failed to show that the jury would have reached a different result had the trial court excluded this evidence. Considering the other overwhelming evidence of defendant's guilt, presented through numerous eyewitnesses, we hold the admission of this testimony is not plain error. This assignment of error is overruled.

B. Past Robberies and Drug Dealing

Defendant also argues the trial court committed plain error by allowing into evidence defendant's past robberies and prior drug dealing. Both Bigelow and T.W. testified that defendant had a pattern of robbing others of illegal drugs and selling them. This testimony pro-

vided evidence of defendant's "motive," and "intent" to commit the crimes at bar, as well as his *modus operandi*. N.C. Gen. Stat. § 8C-1, Rule 404(b). Prior to encountering the victim, defendant, Bigelow, and T.W. planned to rob Williamson of his marijuana. Defendant executed this plan, stole marijuana from Williamson's home, and subsequently distributed the stolen drugs. Benoit was murdered during the commission of this crime.

Admission of this evidence was not error under Rule 404(b). Further, defendant has failed to show that under plain error review, the admission of this evidence prejudiced his defense such that the jury would have reached a different result. This assignment of error is overruled.

C. Ineffective Assistance of Counsel

Defendant also argues his attorney's failure to object to the evidence of defendant's prior bad acts constitutes ineffective assistance of counsel. "In reviewing an appeal based on ineffective assistance of counsel, this Court must first determine whether there was a reasonable probability that without counsel's alleged errors, the outcome of the trial would have been different." *State v. Carrillo*, 164 N.C. App. 204, 211, 595 S.E.2d 219, 224 (2004) (citing *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985)), *appeal dismissed and disc. rev. denied*, —— N.C. ——, 610 S.E.2d 710 (2005). We held the admission of this Rule 404(b) evidence was not error. This assignment of error is without merit.

IV. Statements During Jury Selection

[2] Defendant argues the trial court erred by informing the jury, prior to trial, that he was not being charged with capital murder. We disagree.

> At the outset of jury selection, the trial court informed the jury:
>
> The defendant is charged with the offense of first-degree murder. Members of the jury, this is a noncapital murder case. If you find the defendant guilty of the offense [of] first-degree murder, the highest punishment would be life imprisonment in the Department of Correction without the benefit of parole and not the death penalty. The death penalty is not a possible punishment in this case. . . .

Defendant cites only one case, *State v. Hines*, 286 N.C. 377, 211 S.E.2d 201 (1975), to support his argument. In *Hines*, our

Supreme Court granted a new trial because of statements by the prosecutor during jury selection in a rape trial, where the defendant was being tried capitally: "And to ease your feeling, I might say to you that no one has been put to death in North Carolina since 1961." 286 N.C. at 382, 211 S.E.2d at 204. The *Hines* Court reasoned that the defendant was entitled to a new trial because the prosecutor's "statement was intended to, and in all probability did, lighten the solemn burden of the jurors in returning their verdict." 286 N.C. at 386, 211 S.E.2d at 207.

Here, defendant argues the trial court's statement that this case was to be tried non-capitally "was intended to" and did "lighten the solemn burden of the jurors . . . ." *Id.* The State argues the trial court's statement was made for no other purpose other than to inform the jury regarding the status and posture of the case before it.

Our Supreme Court has stated, "the trial judge should not inform the jurors as to punishment in non-capital cases. . . . When, however, such information is inadvertently given, the error will be evaluated like any other." *State v. Rhodes*, 275 N.C. 584, 592, 169 S.E.2d 846, 851 (1969) (citation omitted). In *Rhodes*, the Court held, "it was error for the trial judge to tell the jury the punishment for assault with intent to commit rape, but we can perceive no prejudice to defendant from the disclosure." *Id.* Similarly, defendant has failed to show and we find no prejudice to defendant in the trial court's statement. This assignment of error is overruled.

V. *Enmund/Tison*

[3] Defendant contends the imposition of a sentence of life imprisonment without parole constitutes a cruel and unusual punishment under the United States Supreme Court cases of *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140 (1982), and *Tison v. Arizona*, 481 U.S. 137, 95 L. Ed. 2d 127, *reh'g denied*, 482 U.S. 921, 96 L. Ed. 2d 688 (1987).

> In *Enmund*, "the Court held that the Eighth Amendment forbids the imposition of the death penalty on a defendant who aids and abets in the commission of a felony in the course of which a murder is committed by others, when the defendant does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *State v. McCollum*, 334 N.C. 208, 223, 433 S.E.2d 144, 151 (1993), *cert. denied*, [512] U.S. [1254], 129 L. Ed. 2d 895, 114 S. Ct. 2784 (1994). A

later case, *Tison v. Arizona*, 481 U.S. 137, 95 L. Ed. 2d 127, 107 S. Ct. 1676 (1987), limited the holding in *Enmund* to exclude defendants who were major participants in a felony that results in death when their actions constituted reckless indifference to human life.

State v. Walker, 343 N.C. 216, 224, 469 S.E.2d 919, 923, *cert. denied*, 519 U.S. 901, 136 L. Ed. 2d 180 (1996).

Both *Enmund* and *Tison* involved proportionality review of death sentences. *Walker*, 343 N.C. at 224, 469 S.E.2d at 923. Our review of North Carolina Supreme Court cases discussing *Enmund* and *Tison* fails to disclose any application in non-capitally tried cases. *See, e.g.*, *State v. Watts*, 357 N.C. 366, 584 S.E.2d 740 (2003), *cert. denied*, 541 U.S. 944, 158 L. Ed. 2d 370 (2004); *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001); *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993), *cert. denied and reh'g denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

On the facts at bar, defendant has failed to show any basis to extend the application of proportionality factors to a non-capital verdict and judgment. This assignment of error is overruled.

VI. Conclusion

The trial court did not err by admitting evidence of defendant's gang membership and prior bad acts under Rule 404(b). Both provided evidence of defendant's motive and intent in committing the crime at bar. The trial court's statement to the jury regarding the non-capital nature of the trial was not error. Defendant has failed to show *Enmunds/Tison* review applies to this non-capital verdict judgment. Defendant received a fair trial free from prejudicial error.

No Prejudicial Error.

Judges TIMMONS-GOODSON and GEER concur.

BECKER v. PIERCE

[168 N.C. App. 671 (2005)]

MADELINE BECKER, DAVID D. BECKER, JOHN BECKER, AND JOHN YAHN, PLAINTIFFS v. JAMES H. PIERCE, DEFENDANT

No. COA04-794

(Filed 1 March 2005)

1. Malicious Prosecution— summary judgment—elements—issues of fact

The trial court erred by granting defendant's motion for summary judgment concerning the claim of malicious prosecution. While investigating agents found merit in some of defendant's claims prior to entering plaintiffs' property and arresting two of the plaintiffs, the jury should be allowed to consider the factual issue of whether defendant initiated the criminal proceedings against plaintiffs. Moreover, there were also issues of fact about malice and probable cause.

2. Discovery— sanctions—compliance with order

The trial court did not abuse its discretion by denying plaintiffs' motion for sanctions against defendant for failure to comply with an order compelling discovery where defendant produced the three documents required by the court, although plaintiffs contend that there was also a fourth document.

Appeal by plaintiffs from order entered 23 January 2003 by Judge J. Richard Parker in Gates County Superior Court. Heard in the Court of Appeals 2 February 2005.

The Twiford Law Firm, L.L.P., by Branch W. Vincent, III, for plaintiffs-appellants.

Hornthal, Riley, Ellis & Maland, L.L.P., by L. Phillip Hornthal, III, and Clayton W. Cheek, for defendant-appellee.

TYSON, Judge.

Madeline Becker, David D. Becker, John Becker, and John Yahn (collectively, "plaintiffs") appeal: (1) a grant of summary judgment entered for James H. Pierce ("defendant") concerning a claim of malicious prosecution; and (2) denial of plaintiffs' motion for sanctions against defendant. We affirm in part, reverse in part, and remand.

I. Background

In 1996, plaintiffs purchased a home in Gates County, adjacent to property owned by defendant. Sworn statements and testimony by both parties indicated that over the years their relationship became less than amicable.

Defendant was a confidential informant to the North Carolina Department of Motor Vehicles ("DMV"). On 9 September 1997, defendant mailed a letter to the DMV alerting them to potentially stolen vehicles located on plaintiffs' property. On 1 December 1997, defendant mailed a letter to Sheriff Elmo Benton ("Sheriff Benton") of Gates County describing various events that had transpired since plaintiffs had moved next door. This list included:

1. For Sale sign stolen.

2. John Becker damaged a bridge on [plaintiffs'] property making it impossible to cross with farm equipment.

3. John Becker dug two holes on defendant's property in an attempt to fix the bridge.

4. Defendant has had a trailer stolen.

5. David Becker harassed defendant while he was meeting with a prospective buyer of some of defendant's property. Specifically, David Becker drove a riding lawn mower in the vicinity of where defendant was conducting his business.

6. Lumber has been stolen from defendant's property.

7. Old lawn mowers were dumped onto defendant's property.

8. John Becker tampered with line stobs after defendant's property was surveyed.

9. John Becker spoke (ugly) to a potential buyer of some of defendant's property.

10. An individual who works on defendant's property had timber [stolen].

11. John Becker moved property of the surveyor who was surveying defendant's property without the surveyor's permission.

In October 1998, the DMV received a fax from defendant that claimed plaintiffs were operating an unlicensed junkyard, selling vehicles without a dealer's license, not paying taxes on any income, stealing vehicles from Virginia to resell or "chop," and driving unlicensed or untitled vehicles. The fax also alleged that plaintiffs "would steal anything they can get their hands on" and have "no respect for other people's property." On 17 August 1999, defendant mailed a third letter to DMV accusing plaintiffs of illegal conduct.

Defendant's letters to both the Gates County Sheriff's Department and the DMV initiated an investigation of plaintiffs. On 28 October 1998, employees of the DMV, North Carolina Highway Patrol, and the Gates County Sheriff's Department went to plaintiffs' property, viewed the suspicious vehicles from the public road, and entered plaintiffs' property without a search warrant to investigate the alleged illegal activities. Plaintiffs provided certificates of title for all the vehicles, and the investigators determined that none of the vehicles were stolen. However, DMV inspectors found evidence of forged inspection stickers and altered vehicle identification numbers ("VIN"). John and David Becker were arrested and indicted for forgery of an inspection sticker and possession of a vehicle with an altered VIN.

The charges against David Becker were dismissed. The State dismissed all but one charge, forging an inspection certificate, against John Becker. Following trial, the jury returned a verdict of not guilty.

On 1 October 2001, plaintiffs filed a complaint against defendant for attachment, defamation, abuse of process, and punitive damages. Plaintiffs' allegations also supported a claim for malicious prosecution. Defendant answered and filed motions to dismiss all plaintiffs' claims for abuse of process and punitive damages. Plaintiffs voluntarily dismissed the defamation claim. The trial court denied defendant's remaining motions. Defendant filed a motion for summary judgment on 27 February 2003.

On 7 March 2003, plaintiffs served defendant with an amended notice of deposition and a request to produce documents under N.C. Gen. Stat. § 1A-1, Rule 34. Defendant responded by filing an objection to discovery and a motion for a protective order. The trial court overruled defendant's request and ordered him to produce three letters requested by plaintiffs.

On 29 September 2003, defendant filed a motion to compel discovery, motion for sanctions, motion to sequester plaintiffs, and motion that law enforcement be present during any court proceeding attended by John Becker. Plaintiffs moved for a protective order on 2 October 2003. On 16 October 2003, the trial court entered an order granting defendant's four motions. Plaintiffs' motion for a protective order was denied.

On 6 November 2003, defendant moved for sanctions contending that plaintiffs had not complied with the trial court's 16 October 2003 order. In response, plaintiffs filed their own motion for sanctions on 11 November 2003, asserting that defendant failed to abide by the trial court's 7 April 2003 order. Following a hearing on 5 January 2003, the trial court granted defendant's motion for summary judgment and denied both parties' motions for sanctions. Plaintiffs appeal.

II. Issues

The issues are whether the trial court properly: (1) granted defendant's motion for summary judgment; and (2) denied plaintiff's motion for sanctions.

III. Malicious Prosecution

[1] Plaintiffs argue the trial court erred in granting defendant's motion for summary judgment concerning the claim of malicious prosecution. We agree.

A. Standard of Review

This Court reiterated the standard of review of a trial court's grant of summary judgment in *Hoffman v. Great Am. Alliance Ins. Co.*, 166 N.C. App. 422, 601 S.E.2d 908 (2004).

> Our standard to review the grant of a motion for summary judgment is whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific

facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.

Id. at 425-26, 601 S.E.2d at 911 (internal citations and quotations omitted).

B. Analysis

To succeed in a claim for malicious prosecution, a plaintiff must allege and prove: "(1) defendant initiated the earlier proceeding; (2) malice on the part of defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff." *Best v. Duke University*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (citing *Jones v. Gwynne*, 312 N.C. 393, 397, 323 S.E.2d 9, 11 (1984)), *reh'g denied*, 338 N.C. 525, 452 S.E.2d 807 (1994). Defendant does not dispute the existence of the fourth element, "termination of the earlier proceeding in favor of the plaintiff." Our analysis focuses on the first three elements. We further note that criminal proceedings were only instituted against John and David Becker. Madeline Becker and John Yahn were not arrested or indicted. Accordingly, they do not have standing to assert claims of malicious prosecution and summary judgment against them on this claim was proper.

1. Initiation of Earlier Proceeding

" 'It cannot be said that one who reports suspicious circumstances to the authorities thereby makes himself responsible for their subsequent action, . . . even when . . . the suspected persons are able to establish their innocence.' " *Harris v. Barham*, 35 N.C. App. 13, 16, 239 S.E.2d 717, 719 (1978) (quoting *Charles Stores Co. v. O'Quinn*, 178 F.2d 372, 374 (4th Cir. 1949)). However, where "it is unlikely there would have been a criminal prosecution of [a] plaintiff" except for the efforts of a defendant, this Court has held a genuine issue of fact existed and the jury should consider the facts comprising the first element of malicious prosecution. *Williams v. Kuppenheimer Manufacturing Co.*, 105 N.C. App. 198, 201, 412 S.E.2d 897, 900 (1992).

There is no dispute that defendant provided the initial information that led to the warrantless search of plaintiffs' property and their arrest. DMV Inspector H. Hardy Gillam, Jr. ("Inspector Gillam") provided an affidavit submitted on defendant's behalf that defendant's letters spurred the investigation into plaintiffs' business activities and their property. Inspector Gillam contacted other DMV agents, the

National Insurance Crime Bureau ("NICB"), and the Virginia State Police Auto Theft Unit ("VSPATU") about the possible infractions after receiving defendant's documents.

Inspector Gillam personally conducted a visual inspection of plaintiffs' property and determined, "it was my professional opinion that the information provided to me by [defendant's letters] was correct." Inspector Gillam witnessed numerous vehicles sitting on the property, some without license plates, some with "For Sale" signs. He testified that, "[m]y visual inspection of the suspected location revealed a circumstance consistent with a backyard salvage operation." Following his personal investigation, Inspector Gillam contacted the local DMV office, the NICB, and the VSPATU to confirm his earlier reports. This led to the onsite investigation of plaintiffs' property.

Viewed in the light most favorable to plaintiffs, the evidence tends to show the police investigation into plaintiffs' alleged illegal practices was instigated initially by defendant's letters. While Inspector Gillam and the other investigating agents found merit in some of defendant's claims prior to entering plaintiffs' property and arresting John and David Becker, the jury should be allowed to consider the factual issue of whether defendant "initiated" the criminal proceedings against plaintiffs. *See Williams*, 105 N.C. App. at 201, 412 S.E.2d at 900.

2. Malice

"Malice" in a malicious prosecution claim may be shown by offering evidence that defendant "was motivated by personal spite and a desire for revenge" or that defendant acted with " 'reckless and wanton disregard' " for plaintiffs' rights. *Moore v. City of Creedmoor*, 345 N.C. 356, 371, 481 S.E.2d 14, 24 (1997) (quoting *Jones v. Gwynne*, 312 N.C. 393, 405, 323 S.E.2d 9, 16 (1984)).

Defendant admitted in his deposition that conflict existed between he and plaintiffs since they became neighbors in 1996. He complained to plaintiffs about their trespassing onto his property, leaving scrap metal on his property, and interfering with a potential sale of his real property. Further, inferences in defendant's letter of 1 December 1997 to Sheriff Benton allege illegal activity by plaintiffs.

Viewed in the light most favorable to plaintiffs, this evidence creates a genuine issue of material fact concerning whether defendant

acted maliciously when he initiated the investigation of plaintiffs. *See Von Viczay v. Thomas*, 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).

3. Probable Cause

Our Supreme Court has defined probable cause with respect to malicious prosecution as:

> "the existence of such facts and circumstances, known to [the defendant] at the time, as would induce a reasonable man to commence a prosecution." *Cook v. Lanier*, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966) (quoting *Morgan v. Stewart*, 144 N.C. 424, 430, 57 S.E. 149, 151 (1907). Whether probable cause exists is a mixed question of law and fact, but where the facts are admitted or established, the existence of probable cause is a question of law for the court. *Id.* at 171, 147 S.E.2d at 914.

Best, 337 N.C. at 750, 448 S.E.2d at 510. The test for determining probable cause is " 'whether a man of ordinary prudence and intelligence under the circumstances would have known that the charge had no reasonable foundation.' " *Wilson v. Pearce*, 105 N.C. App. 107, 113-14, 412 S.E.2d 148, 151 (quoting *Hitchcock v. Cullerton*, 82 N.C. App. 296, 298, 346 S.E.2d 215, 217 (1986)), *disc. rev. denied*, 331 N.C. 291, 417 S.E.2d 72 (1992).

Defendant, acting as a confidential informant for the DMV, gathered the evidence he submitted to the DMV and Sheriff's Office by observing his neighbors' activities and property. The issue of fact is whether the preexisting personal conflicts plaintiffs and defendant caused defendant's informant status to become a collateral pretext for him submitting reports to the DMV. This is a factual question the jury should consider. *See Dickerson v. Refining Co.*, 201 N.C. 90, 95, 159 S.E. 446, 449 (1931) ("Evidence that the chief aim of the prosecution was to accomplish some collateral purpose, or to forward some private interest . . . is admissible, both to show the absence of probable cause and to create an inference of malice, and such evidence is sufficient to establish a prima facie want of probable cause.") (citations omitted).

C. Conclusion

Based on our discussion and review of the facts *de novo*, we hold the trial court erred in granting summary judgment in defendant's

favor. Viewed in the light most favorable to plaintiffs, proffered evidence created genuine issues of material fact to support the elements of malicious prosecution.

IV. Sanctions

[2] Plaintiffs assert the trial court erred in denying their motion for sanctions against defendant. We disagree.

Rule 37(b)(2) of the North Carolina Rules of Civil Procedure authorizes a trial court to sanction a party for failure to comply with a court order compelling discovery. N.C. Gen. Stat. § 1A-1, Rule 37(b) (2003). The trial court is given broad discretion to "make such orders in regard to the failure as are just" and authorized to, among other things, prohibit the introduction of certain evidence, strike pleadings, dismiss the action, or render judgment against the disobedient party. *Id.*

This Court reviews a trial court's ruling on sanctions under the abuse of discretion standard. *Roane-Barker v. Southeastern Hospital Supply Corp.*, 99 N.C. App. 30, 36, 392 S.E.2d 663, 667 (1990) (citations omitted), *disc. rev. denied*, 328 N.C. 93, 402 S.E.2d 418 (1991). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

Here, plaintiffs requested defendant, in a notice of deposition, to produce "any letter, document or other written instrument given to any law enforcement official or agency which mentions, identifies or otherwise makes reference to Madeline Becker, David Becker, John Becker, and John Yahn." Defendant responded by filing an objection to discovery and motion for protective order, claiming such documents were confidential and privileged. The trial court reviewed three documents *in camera* and determined they were relevant and discoverable. Defendant subsequently produced the three documents as required by the trial court's order.

Plaintiffs assert, as the basis for sanctions, there was a fourth document, the October 1998 fax to DMV, which defendant failed to produce. However, the trial court's order required defendant to produce three letters, which he did. Plaintiffs have failed to show that the trial court abused its discretion and its order was not the result of a

reasoned decision. There is no evidence in the record to suggest defendant did not comply with the trial court's order compelling production of the three letters. This assignment of error is overruled.

V. Conclusion

The trial court's grant of summary judgment against plaintiffs Madeline Becker and John Yahn was proper. Plaintiffs proffered sufficient evidence to create genuine issues of material fact concerning the disputed elements of malicious prosecution. Plaintiffs failed to show the trial court abused its discretion in denying their motion for sanctions against defendant. The trial court's order is affirmed in part, reversed in part, and remanded.

Affirmed in part, reversed in part, and remanded.

Judges McGEE and GEER concur.

IN THE MATTER OF: V.L.B.

No. COA04-219

(Filed 1 March 2005)

1. Termination of Parental Rights— inability to establish safe home—sufficiency of evidence

There was clear, cogent, and convincing evidence in a termination of parental rights proceeding to support the trial court's finding that respondents lacked the ability to establish a safe home for the child.

2. Termination of Parental Rights— 2002 evaluation—2003 proceeding

The trial court did not err in a 2003 termination of parental rights proceeding by relying on a 2002 psychological evaluation in assessing the severity and chronic nature of respondents' respective mental health conditions. Nor did the trial court err by concluding, based on respondents' history, that they did not have the ability to provide a safe and appropriate home for the minor child.

3. Termination of Parental Rights— mental and physical health problems—impaired ability to care for child

A trial court may terminate a respondent's parental rights upon a finding of one or more of the statutory grounds in N.C. Gen. Stat. § 7B-1111(a); assuming that evidence of a probability of abuse or neglect was necessary in this case, the evidence of respondents' respective mental and physical health problems and the strain these problems placed on their ability to maintain a stable household as a couple constituted clear, cogent, and convincing evidence of their impaired ability to care for a minor child and an accompanying substantial probability of neglect if the minor child was placed in their household.

4. Termination of Parental Rights— progress of parents—considered—insufficient

Although respondents in a termination of parental rights case asserted that the trial court erred by failing to consider their reasonable progress, the trial court's finding, read in its entirety, indicates that the court considered respondents' progress but determined that it was insufficient. Moreover, a clause in the findings indicating that there had been no significant change in respondents' understanding of their problems and their ability to address those problems was supported by the clear, cogent, and convincing evidence.

5. Termination of Parental Rights— child's adjustment to foster care—one factor in termination

The trial court in a termination of parental rights case did not abuse its discretion by considering the child's positive adjustment to foster care as one factor in determining that termination was in the child's best interests.

Appeal by respondents from an order entered 22 September 2003 by Judge L. Suzanne Owsley in Burke County District Court. Heard in the Court of Appeals 16 September 2004.

Stephen M. Schoeberle, for the Burke County Department of Social Services-petitioner-appellee.

Starnes, Teele, Aycock, Haire & Treibert, PA, by Nancy L. Einstein, for Guardian ad Litem-appellee.

Carlton, Rhodes & Carlton, by Gary C. Rhodes, for respondent-mother-appellant.

Charlotte Gail Blake, for respondent-father-appellant.

CALABRIA, Judge.

A.B. ("respondent-mother") and K.B. ("respondent-father") (collectively "respondents") appeal an order of the Burke County District Court terminating their parental rights to the minor child, V.L.B. We affirm.

The evidence indicates the termination of parental rights issues in this case arose after the Burke County Department of Social Services ("DSS") substantiated a report that respondent-mother was living in a house without electricity and that the State of Michigan had terminated respondents' parental rights to their other children, principally due to abuse committed by respondent-father and respondent-mother's unwillingness to remain separated from him. Respondents moved from Michigan to North Carolina in June 2002 on V.L.B's due date. V.L.B. was born approximately one week later on 10 June 2002. She was the seventh child born to respondent-mother and the fifth born to respondents. On 17 June 2002, seven days after birth, V.L.B. was released from the hospital and immediately placed in the custody of DSS. Subsequently, V.L.B. was placed in a foster-to-adopt home under the supervision of DSS. On 15 August 2002, all parties consented to a dependency adjudication based on the State of Michigan's prior terminations of respondents' parental rights to their other children, respondents' psychological diagnoses, and respondents' lack of psychological treatment. The trial court continued disposition until current psychological evaluations could be completed.

The evidence indicates respondents received psychological evaluations on 16 September 2002. Respondent-mother's psychological evaluation revealed she had: (1) "a very high level of anxiety and tension[,] . . . to [a] degree that her ability to concentrate and attend [appeared] significantly compromised"; (2) "difficulty with anger management"; (3) "low frustration tolerance [and] poor impulse control"; (4) "many characteristics consistent with persons who have been found substantiated for child abuse"; and (5) "[a] significant likelihood of high levels of anxiety, depression and loss of emotional and behavioral control." The evaluating psychologist's clinical impression was that she suffered from an adjustment dis-

order with anxiety and a borderline personality disorder. The psychologist concluded:

> A review of DSS records, previous psychological evaluations and current circumstances do not provide a positive prognosis for [respondent-mother's] . . . ability to care for [V.L.B.] Many of the circumstances that led to the termination of parental rights of her children in Michigan continue currently. [She] continues to have chronic mental health problems, as well as more acute anxiety problems. Although she expressed interest in change, her personality problems are not easily amenable to change.

Respondent-mother met with a counselor one time shortly after giving birth to V.L.B. but sought no further help for her mental health problems and testified that she did not need mental health treatment.

Respondent-father's psychological evaluation revealed he had: (1) "chronic mental illness, which [had] not adequately responded to medication"; (2) symptoms of depression; (3) "speech processes [that were] tangential and circumstantial . . . [and] difficulty answering simple questions"; (4) poor concentration and a high level of distractibility; (5) a history of intermittent psychiatric and psychological treatment but had "not been able to follow through with a long course of treatment"; (6) a brain injury from a 1999 car accident that exacerbated his mental illness; and (7) a September 2001 commitment to an inpatient psychological institution for threatening to assault respondent-mother. The evaluating psychologist's clinical impression was that he suffered from psychosis not otherwise specified and personality disorder not otherwise specified with Schizotypal features. Additionally, his record from prior evaluations indicated bipolar disorder, but he showed no significant signs of bipolar disorder in this evaluation. The psychologist concluded:

> Based on the previous evaluations and the current information, it does not appear that [respondent-father] has made any progress [between] the time . . . [his] parental rights [were] terminated [to the other children and this evaluation]. It's unlikely that he would be capable of constructively parenting an infant at this time, and there are no recommendations, given this finding.

Respondent-father's physical condition, as reported by his physician, included a diagnosis of type II diabetes. It appears respondent-father's physician considered his diabetes in conjunction with his

mental illness and memory problems and recommended he receive "round-the-clock care."

After reviewing the psychological evaluations, the trial court entered an order ceasing reunification efforts and ordered adoption as the permanent plan for V.L.B. On 27 March 2003 and again on 17 July 2003, the trial court reviewed the permanent plan and entered orders maintaining adoption as the permanent plan for V.L.B. On 22 September 2003, a termination hearing was held, and all parties were present with representation, including respondent-mother's guardian ad litem and respondent-father's guardian ad litem. At this hearing, the trial court found the parental rights of respondents with respect to their other children had been terminated involuntarily by a court of competent jurisdiction, and although both had the willingness, respondents lacked the ability to establish a safe home for V.L.B. Therefore, the trial court concluded sufficient grounds existed for termination of respondents' parental rights under N.C. Gen. Stat. § 7B-1111(a)(9) (2003). The trial court then determined the best interests of V.L.B. would be served by terminating respondents' parental rights. Respondents appeal.

A proceeding to terminate parental rights consists of two stages: (1) the adjudicatory stage, under N.C. Gen. Stat. § 7B-1109 (2003), and (2) the dispositional stage, under N.C. Gen. Stat. § 7B-1110 (2003). *In re Mills*, 152 N.C. App. 1, 6, 567 S.E.2d 166, 169 (2002). At the adjudicatory stage, "the petitioner must show by 'clear, cogent and convincing evidence' the existence of one or more of the [nine] statutory grounds for termination of parental rights [enumerated in N.C. Gen. Stat. § 7B-1111 (2003)]." *Id.* (quoting N.C. Gen. Stat. § 7B-1109(f)). Accordingly, in reviewing this stage, we must determine " 'whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law.' " *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6 (2004) (quoting *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984)). " 'Clear, cogent and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt.' And it 'has been defined as evidence which should fully convince [the finder of fact].' " *In re Nesbitt*, 147 N.C. App. 349, 355, 555 S.E.2d 659, 664 (2001) (quoting *N.C. State Bar v. Harris*, 137 N.C. App. 207, 218, 527 S.E.2d 728, 735 (2000)). If the trial court finds one or more of the nine statutory grounds for termination, "it proceeds to the dispositional stage, and must consider whether terminating parental rights is in the best inter-

ests of the child." *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002). At the dispositional stage, "the court shall issue an order terminating the parental rights, unless it . . . determines that the best interests of the child require otherwise." *In re Matherly*, 149 N.C. App. 452, 454, 562 S.E.2d 15, 17 (2002). "We review the trial court's decision to terminate parental rights for abuse of discretion." *Anderson*, 151 N.C. App. at 98, 564 S.E.2d at 602.

Respondents assert the trial court erred at the adjudicatory stage by concluding that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(9) to terminate their parental rights. Under N.C. Gen. Stat. § 7B-1111(a)(9), a trial court may terminate parental rights when "[t]he parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home."

[1] Respondents do not dispute that their parental rights to their other children were terminated by a court of competent jurisdiction. Rather, respondents argue the trial court's finding that they lacked the ability to establish a safe home for V.L.B. was not supported by clear, cogent, and convincing evidence. We disagree. According to respondent-mother's psychological evaluation, she suffered from "chronic mental health problems[,]" specifically depression, high levels of anxiety and tension, a low frustration tolerance, poor impulse control, and anger management difficulties, all of which would significantly affect her ability to concentrate and attend to the needs of V.L.B. Moreover, her belief that she did not need mental health treatment and her failure to pursue treatment compounded her problems. Furthermore, at the time of the hearing, respondent-mother had been, and intended to continue, personally caring for respondent-father, who, as detailed above, suffered from "chronic mental illness[,]" memory problems, and type II diabetes, which necessitated that he receive "round-the-clock care" and greatly impaired his ability to care for V.L.B. Accordingly, we hold, the following evidence constituted clear, cogent, and convincing evidence supporting the trial court's finding that respondents lacked the ability to establish a safe home for V.L.B.: (1) the chronic nature of respondents' respective mental health conditions; (2) the severity of respondent-father's mental and physical health problems; (3) his need for a full-time care provider; (4) respondent-mother's intention to continue providing this care for him; and (5) the stress respondent-father's mental and physical health problems caused respondents, as evi-

denced by the daily arguments to which both admitted during their respective psychological evaluations.

[2] Nonetheless, respondents contend the psychological evaluations performed in September 2002 could not have constituted clear, cogent, and convincing evidence of their mental health on 22 September 2003, the date of the termination hearing, especially because respondent-father appeared slightly more stable due to his most recent therapy. However, the severity and chronic nature of respondent-father's mental illness, as described in the psychological evaluation, constituted clear, cogent, and convincing evidence that respondent-father continued to have debilitating mental health issues despite the fact he appeared somewhat more stable on the date of the hearing. Additionally, although the trial court also relied on a September 2002 psychological evaluation for respondent-mother, the persistence of her personality problems characterized in her psychological evaluation as "not easily amenable to change[,]" together with her lack of mental health treatment, constituted clear, cogent, and convincing evidence that her mental health problems had not changed significantly since the evaluation. Accordingly, the trial court did not err by relying on their 2002 psychological evaluations in assessing the severity and chronic nature of respondents' respective mental health conditions. Nor did the trial court err by concluding, based on respondents' history, that they did not have the ability to provide a safe and appropriate home for the minor child.

[3] Respondents next assert that absent clear, cogent, and convincing evidence of a probability that past patterns of abuse or neglect would recur, the trial court had insufficient grounds upon which to terminate their parental rights. In essence, respondents contend a finding of abuse or neglect under N.C. Gen. Stat. § 7B-1111(a)(1) is a prerequisite to terminating parental rights based on N.C. Gen. Stat. § 7B-1111(a)(9). As mentioned above, however, a trial court may terminate a respondent's "parental rights upon a finding of *one* or more of the [nine statutory grounds]." N.C. Gen. Stat. § 7B-1111(a) (emphasis added). *See In re Clark*, 151 N.C. App. 286, 288, 565 S.E.2d 245, 246 (2002) (stating "a finding of any one of [the nine] grounds is sufficient to support the termination of parental rights"). Moreover, assuming *arguendo* evidence of a probability of abuse or neglect was necessary to conclude grounds for termination existed under N.C. Gen. Stat. § 7B-1111(a)(9), the evidence of respondents' respective mental and physical health problems and the strain these problems placed on their ability to maintain a stable

household living as a couple, constituted clear, cogent, and convincing evidence of their impaired ability to care for a minor child and an accompanying substantial probability of neglect if the minor child was placed in their household.

[4] Respondents further assert the trial court erred by failing to consider their reasonable progress, and they assign error to the independent clause in one of the trial court's findings of fact, which states, "there has been no significant change in [respondents'] understanding of the problems that led to the removal of their previous children and their ability to address those problems." Contrary to respondents' assertion, when read in its entirety, the trial court's finding indicates the trial court considered respondents' progress but determined the progress was insufficient. In full, the finding states, "*Although they have established a stable residence and it appears that they are marginally getting by*, there has been no significant change in [respondents'] understanding of the problems that led to the removal of their previous children and their ability to address those problems." Moreover, the finding's independent clause was supported by the following clear, cogent, and convincing evidence: (1) respondents denied respondent-father had abused the previous children; (2) respondent-father believed the previous children were removed simply because respondents were not "able to take care of their immediate needs . . . [a]nd provide everything safe and nurturing for them"; (3) respondent-mother had chosen her marriage over the needs of her previous children as evidenced by her decision to return to respondent-father rather than maintain custody of the previous children; (4) respondent-mother was unable to recognize her need for mental health treatment and failed to pursue such treatment; and (5) the demands on respondents due to respondent-father's chronic mental and physical health problems remained substantial.

[5] Respondents finally assert the trial court abused its discretion by basing the termination of their parental rights in any part on V.L.B.'s positive adjustment to her foster home. This Court has stated "a finding that [a] child[] [is] well settled in [her] new family unit . . . does not *alone* support a finding that it is in the best interest of the child[] to terminate [a] respondent's parental rights." *Bost v. Van Nortwick*, 117 N.C. App. 1, 8, 449 S.E.2d 911, 915 (1994) (emphasis added). However, the trial court here did not base its decision that termination was in the best interests of V.L.B. solely on her positive adjustment to foster care. Rather, the trial court also based its decision on findings that: (1) respondents each had chronic mental health prob-

lems; (2) respondents' daily needs, in particular respondent-father's mental and physical health problems, required all of their "emotional, physical and financial resources"; (3) respondents made "no significant change in their understanding of the problems that led to the removal of their previous children"; and (4) there was no significant change in their capacity to address the problems that led to the removal of their previous children. Accordingly, the trial court did not abuse its discretion by considering V.L.B.'s positive adjustment to foster care as one factor in determining that termination of respondents' parental rights was in V.L.B.'s best interests. Furthermore, the trial court did not abuse its discretion by concluding, based on the evidence and its findings of fact, that terminating respondents' parental rights was in the best interests of V.L.B.

We have carefully considered respondents' remaining arguments and find them to be without merit. For the foregoing reasons, the trial court's termination of respondents' parental rights is affirmed.

Affirmed.

Judges ELMORE and STEELMAN concur.

ANTHONY DOVE, PLAINTIFF v. NICHOLAUS HARVEY, (CORRECT: "NICHOLAS E. HARVEY, SR."), DEFENDANT

No. COA04-477

(Filed 1 March 2005)

1. Attorneys; Conspiracy; Negligence— legal malpractice—civil conspiracy—breach of fiduciary duty—negligence—gross negligence

The trial court did not err by dismissing plaintiff's complaint for civil conspiracy, breach of fiduciary duty, negligence, and gross negligence against his court-appointed criminal attorney pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), because: (1) in regard to the civil conspiracy claim, there is no separate civil action for civil conspiracy in North Carolina, plaintiff failed to allege that there was an agreement between the prosecutor and his defense counsel to have defense counsel present a less than zealous defense to the jury, and plaintiff did not allege defendant's actions

caused plaintiff damages or that a different outcome would have occurred but for the civil conspiracy, breach of fiduciary duty, negligence, and gross negligence; (2) in regard to the breach of fiduciary duty claim, the only possible damage was plaintiff's conviction for first-degree murder but plaintiff has not alleged defendant's actions caused his conviction; (3) in order for plaintiff to recover damages for defendant's alleged negligence or legal malpractice, he must establish defendant's actions proximately caused him damages, and plaintiff neither alleged any damages nor did he plead actual innocence in his complaint; and (4) as plaintiff did not properly plead a claim for negligence, his claim for gross negligence was also properly dismissed.

2. Discovery— failure to allow—dismissal of case for failure to state a claim

The trial court did not violate plaintiff's due process rights by precluding him from obtaining discovery, because: (1) the parties' dispute was resolved by the trial court's dismissal for failure to state a claim upon which relief can be granted; and (2) as a result, the parties did not have to prepare for a trial and the need to clarify or narrow issues was obviated.

Appeal by plaintiff from an order entered 12 January 2004 by Judge Russell J. Lanier, Jr. in Lenoir County Superior Court. Heard in the Court of Appeals 1 December 2004.

Anthony Dove, plaintiff-appellant, pro se.

Wallace, Morris, Barwick, Landis, Braswell & Stroud, P.A., by Thomas H. Morris and Kimberly A. Connor, for defendant-appellee.

HUNTER, Judge.

Anthony Dove ("plaintiff") presents the following issues for our consideration: (I) Did the trial court erroneously dismiss his complaint against his criminal trial attorney pursuant to N.C.R. Civ. P. 12(b)(6), and (II) did the trial court violate plaintiff's due process rights by precluding plaintiff from obtaining discovery. After careful review, we affirm the order below.

In October 1999, Nicholaus Harvey ("defendant") was court appointed to represent plaintiff in a first degree murder case in which the State was seeking the death penalty. Plaintiff was convicted of

first degree murder, sentenced to life imprisonment, and his conviction and sentence was affirmed by this Court in 2002. *See State v. Dove*, 153 N.C. App. 524, 570 S.E.2d 153 (2002) (unpublished).

Plaintiff alleges that prior to trial he informed defendant that he did not want defendant's legal representation if he had been having an affair with a particular married woman. According to plaintiff's complaint, defendant had been assaulted by the married woman's husband. This was of concern to plaintiff because the State contended plaintiff murdered his wife's boyfriend. Defendant denied the rumors and indicated he would zealously represent plaintiff.

Plaintiff contends defendant committed several errors during the trial in order to help secure his conviction. He contends defendant should have sought a special venire due to pretrial publicity, that defendant failed to adequately cross-examine key State witnesses, and that defendant failed to consult with plaintiff and defendant's co-counsel regarding trial strategy.

After the trial, plaintiff alleges he became aware of an affair between defendant and the assistant district attorney prosecuting his case. He alleges defendant's affair with the assistant district attorney caused defendant to intentionally seek plaintiff's conviction by not zealously representing plaintiff. Plaintiff also alleges defendant lied to plaintiff when he stated he was not having an affair with a married woman, who was not the assistant district attorney.

Based upon the alleged misrepresentations and defendant's conduct during trial, plaintiff filed a civil complaint against defendant on 22 September 2003. In his complaint, plaintiff brought a claim for civil conspiracy, breach of fiduciary duty, negligence, and gross negligence. Defendant moved to dismiss plaintiff's complaint, and on 12 January 2004, the trial court dismissed plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Plaintiff appeals.

A motion to dismiss for failure to state a claim upon which relief may be granted challenges the legal sufficiency of a pleading. *Considine v. Compass Grp. USA, Inc.*, 145 N.C. App. 314, 316-17, 551 S.E.2d 179, 181, *per curiam affirmed*, 354 N.C. 568, 557 S.E.2d 528 (2001). In ruling on a motion to dismiss under Rule 12(b)(6), a court must determine whether, taking all allegations in the complaint as true, relief may be granted under any recognized legal theory. *Taylor v. Taylor*, 143 N.C. App. 664, 668, 547 S.E.2d 161, 164 (2001). A complaint may be dismissed for failure to state a claim if no law

supports the claim, if sufficient facts to make out a good claim are absent, or if a fact is asserted that defeats the claim. *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999).

[1] Plaintiff seeks damages from his criminal trial attorney for acts and omissions that allegedly occurred during his capital first degree murder trial. According to plaintiff's allegations, defendant did not zealously represent plaintiff due to his alleged affair with the prosecuting attorney. Specifically, defendant did not adequately cross-examine the State's key witnesses, did not consult with co-counsel and plaintiff regarding key strategical decisions, and did not request a special venire. Thus, plaintiff brought claims of civil conspiracy, breach of fiduciary duty, negligence, and gross negligence against defendant.

We first note, however, that there is not a separate civil action for civil conspiracy in North Carolina. *See Shope v. Boyer*, 268 N.C. 401, 404-05, 150 S.E.2d 771, 773-74 (1966); *Fox v. Wilson*, 85 N.C. App. 292, 300, 354 S.E.2d 737, 742-43 (1987). Rather:

> "In civil conspiracy, recovery must be on the basis of sufficiently alleged wrongful overt acts. The charge of conspiracy itself does nothing more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts and conduct of one might be admissible against all."

Fox, 85 N.C. App. at 301, 354 S.E.2d at 743 (citation omitted); *see also Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 416, 537 S.E.2d 248, 265 (2000) (citation omitted) (stating that "[i]n order to state a claim for civil conspiracy, 'a complaint must allege a conspiracy, wrongful acts done by certain of the alleged conspirators, and injury' "). In this case, plaintiff seeks damages for the alleged wrongful acts and omissions committed by defendant in furtherance of the conspiracy with the prosecutor. Plaintiff's claim for civil conspiracy fails and was properly dismissed for two reasons. First:

> A threshold requirement in any cause of action for damages caused by acts committed pursuant to a conspiracy must be the showing that a conspiracy in fact existed. The existence of a conspiracy requires proof of an agreement between two or more persons. Although civil liability for conspiracy may be established by circumstantial evidence, the evidence of the agreement must be

sufficient to create more than a suspicion or conjecture in order to justify submission to a jury.

Henderson v. LeBauer, 101 N.C. App. 255, 261, 399 S.E.2d 142, 145 (1991) (citations omitted). In this case, plaintiff alleges his defense attorney was having an affair with the assistant district attorney prosecuting his case. As a result, his defense counsel allegedly did not zealously represent plaintiff in order to help the prosecutor secure his conviction and advance her career. Plaintiff failed to allege, however, that there was an agreement between the prosecutor and his defense counsel to have defense counsel present a less than zealous defense to the jury. As such, the trial court properly dismissed plaintiff's claim for civil conspiracy.

Second, the trial court properly dismissed plaintiff's complaint for civil conspiracy because plaintiff did not allege defendant's actions caused plaintiff damages or that a different outcome would have occurred but for the civil conspiracy, breach of fiduciary duty, negligence, and gross negligence. As explained by our Supreme Court, a civil conspiracy is an action " 'for damages caused by acts committed pursuant to a formed conspiracy, rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone.' " *Henderson*, 101 N.C. App. at 260, 399 S.E.2d at 145 (citation omitted).

The underlying acts in this case were defendant's alleged breach of fiduciary duty, negligence, and gross negligence arising out of his acts and omissions occurring during plaintiff's first degree murder trial, for which plaintiff has brought separate claims.

Plaintiff alleged defendant breached a fiduciary duty owed to him by (1) intentionally withholding information regarding his affair with the prosecutor because the affair was a conflict of interest, and (2) willfully lying to plaintiff about an affair with a married woman because defendant was aware plaintiff did not want his representation if he was committing adultery. Even assuming these alleged actions constituted a breach of fiduciary duty by defendant, plaintiff did not allege defendant's actions caused plaintiff damage.

Certain torts require as an essential element that a plaintiff incur actual damage. *Piedmont Inst. of Pain Mgmt. v. Staton Found.*, 157 N.C. App. 577, 589, 581 S.E.2d 68, 76 (2003). These torts include breach of fiduciary duty. *Id.* at 589-90, 581 S.E.2d at 76. On the facts

of this case, the only possible damage to plaintiff was his conviction for first degree murder. However, plaintiff has not alleged defendant's actions caused his conviction. Indeed, plaintiff's conviction was the result of his own criminal conduct. *See State v. Dove*, 153 N.C. App. 524, 570 S.E.2d 153 (unpublished) (describing how plaintiff obtained a gun, disguised himself as a police officer, stopped the victim's car by posing as a police officer, and shot the victim in the head). Accordingly, the trial court properly dismissed plaintiff's claim for breach of fiduciary duty.

Plaintiff also brought a claim for negligence. Specifically, plaintiff alleged "[a]ttorney Harvey's conduct, as listed throughout this complaint, was negligent with respects as an attorney-representing Plaintiff." Thus, plaintiff's negligence allegations were based upon defendant's acts or omissions during plaintiff's first degree murder trial. Essentially this was a claim for legal malpractice. In *Belk v. Cheshire*, 159 N.C. App. 325, 332, 583 S.E.2d 700, 706 (2003), this Court explained that in a criminal legal malpractice action, the plaintiff has a high burden of proof to show proximate causation. In *Belk*, this Court reviewed cases from other jurisdictions and determined several public policy reasons supported a stricter standard for criminal malpractice actions:

> (1) the criminal justice system affords individuals charged with crimes a panoply of protections against abuses of the system and wrongful conviction, including safeguards against incompetent and ineffective counsel; (2) a guilty defendant should not be allowed to profit from criminal behavior; and (3) the pool of legal representation available to criminal defendants, especially indigents, needs to be preserved.

Id. In many of these jurisdictions, a criminal defendant had to allege and prove his actual innocence in order to recover damages for criminal legal malpractice. *Id.* at 331-32, 583 S.E.2d at 705-06. In *Belk*, this Court declined "to adopt a 'bright-line' rule," but indicated that a higher burden of proof was required to prove proximate causation. *Id.* at 332, 583 S.E.2d at 706.

In order for plaintiff to recover damages for defendant's alleged negligence or legal malpractice, he must establish defendant's negligence or legal malpractice proximately caused him damages. Plaintiff neither alleged any damages nor did he plead actual innocence in his complaint. Furthermore, our review of the facts in his first degree murder case indicates the State presented a strong circumstantial

case from which the jury could determine plaintiff was guilty beyond a reasonable doubt. This evidence included (1) a handwritten list of tasks to be completed in order to commit and cover-up the murder, (2) proof that the handgun used had been purchased by plaintiff's girlfriend, (3) testimony that plaintiff had previously assaulted the murder victim and had threatened to kill the victim, (4) testimony that plaintiff had fired a gun at the victim's residence on two occasions, and (5) plaintiff's credit card receipts from a few days prior to the murder indicating plaintiff had purchased ammunition and other items used to facilitate the murder. *See State v. Dove*, 153 N.C. App. 524, 570 S.E.2d 153 (unpublished). Accordingly, the trial court properly dismissed plaintiff's claim for negligence. As plaintiff did not properly plead a claim for negligence, his claim for gross negligence was also properly dismissed. *See Toomer v. Garrett*, 155 N.C. App. 462, 482, 574 S.E.2d 76, 92 (2002) (indicating "a claim for gross negligence requires that plaintiff plead facts on each of the elements of negligence, including duty, causation, proximate cause, and damages").

[2] Finally, plaintiff contends the trial court violated his constitutional right to due process of law because the trial court dismissed his complaint without allowing plaintiff to obtain discovery. As explained in 23 Am. Jur. 2d *Depositions and Discovery* § 1 (2002) (footnotes omitted), "Generally; purpose of discovery":

> The purpose of discovery is to remove surprise from trial preparation and enable the parties to obtain evidence necessary to evaluate and resolve their dispute. . . .
>
> Discovery also is designed to aid a party in preparing and presenting his or her case or defense, and to enable the parties to narrow and clarify the basic issues between them. Discovery should expedite the disposition of the litigation, by educating the parties in advance of trial of the real value of their claims and defenses, which may encourage settlements.

Id. In this case, the parties' dispute was resolved by the trial court's dismissal for failure to state a claim upon which relief can be granted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). As a result, the parties did not have to prepare for a trial and the need to clarify or narrow issues was obviated.

In sum, the trial court properly dismissed plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure

to state a claim upon which relief can be granted. In the claims for breach of fiduciary duty, negligence, and gross negligence, plaintiff failed to allege proximate causation. Indeed, plaintiff's conviction was caused by his own criminal conduct. As such, the trial court properly dismissed plaintiff's claim for civil conspiracy because a plaintiff can only recover damages for the wrongful act resulting from the conspiracy. Moreover, plaintiff did not allege an agreement between defendant and the prosecutor existed. Finally, as the trial court properly dismissed the complaint, plaintiff was not entitled to seek discovery.

Affirmed.

Judges CALABRIA and LEVINSON concur.

SHIMISHA HOWIE, PLAINTIFF v. JOHN T. WALSH, D.D.S., DEFENDANT

No. COA04-155

(Filed 1 March 2005)

1. Dentists— malpractice—res ipsa loquitur—expert testimony required

The trial court erred by entering judgment on a jury verdict finding that plaintiff was injured by the negligence of defendant dentist based on the doctrine of res ipsa loquitur and by awarding $300,000 in damages for personal injuries, because: (1) in order for the doctrine to apply, not only must plaintiff have shown that the injury resulted from defendant's negligent act, but plaintiff must be able to show without the assistance of expert testimony that the injury was of a type not typically occurring in the absence of some negligence by defendant; and (2) in the instant case, without the assistance of expert testimony a layperson would lack a basis upon which he could determine the force the dentist used in removing a wisdom tooth was excessive or improper as such matters are considered outside of common knowledge, experience, and sense.

2. Costs— improperly taxed against defendant—reversal of judgment

The trial court's imposition of costs against defendant in the amount of $2,305 is reversed because the Court of Appeals reversed the trial court's judgment against defendant.

3. Medical Malpractice; Dentists— instruction—circumstantial evidence

The trial court erred in a medical malpractice case by failing to instruct the jury as to circumstantial evidence as provided in N.C.P.I. Civ. 101.45 and plaintiff is entitled to a trial de novo, because: (1) barring the use of the doctrine of res ipsa loquitur does not likewise bar the use of all circumstantial evidence in medical malpractice cases, but merely bars the jury from inferring negligence and causation from the occurrence of and defendant's relation to the event; and (2) the trial court's instructions improperly limited the jury's choices to utilizing direct evidence for purposes of traditional negligence and utilizing circumstantial evidence for purposes of res ipsa loquitur.

Appeal by plaintiff and defendant from judgment entered 17 July 2003 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 September 2004.

Gittleman, Paskel, Tashman & Walker, P.C., by Justin Haas, for plaintiff.

Carruthers & Roth, P.A., by Kenneth L. Jones, and Womble, Carlyle, Sandridge, & Rice, P.L.L.C., by James Cooney, for defendant.

William H. Potter, Jr., on behalf of the North Carolina Dental Society, amicus curiae.

CALABRIA, Judge.

John T. Walsh, D.D.S., ("defendant") appeals a judgment entered on a jury verdict finding Shimisha Howie ("plaintiff") was injured by the negligence of defendant based on the doctrine of *res ipsa loquitur* and awarding $300,000.00 in damages for personal injuries. We reverse and remand for a new trial.

On 12 March 1999, plaintiff's jaw was fractured while defendant, a licensed general dentist, was attempting to extract her lower left

wisdom tooth. Plaintiff's tooth was eighty to ninety percent impacted, meaning only ten to twenty percent of the tooth protruded above the bone of the jaw, and the tooth was tilted mesially, or forward towards the midline of the body. The tooth had two roots, was not diseased and had a normal, healthy periodontal ligament attaching the roots of the tooth to the bone of the jaw. Defendant successfully extracted the first three of plaintiff's wisdom teeth before proceeding to the tooth in question.

Defendant testified that, prior to the procedure, there was no indication that plaintiff's jaw was abnormal in any way. Because defendant did not remember the surgery until the point where plaintiff's jaw fractured, his testimony concerning that portion of the surgery consisted mainly of his normal procedure during an extraction based on plaintiff's dental history and records.

Defendant testified that, when extracting wisdom teeth, he first incises the tissue surrounding the tooth, then uses a flat spoon periostic elevator to reflect the tissue and expose the tooth. The tooth is wider at the middle than at its crown; thus, the surrounding bone holds a tooth in place and must be cut away with a surgical burr. Thereafter, defendant slides a straight elevator, an instrument somewhat resembling a Phillips-head screwdriver, under the exposed tooth and attempts to rotate it to determine if there is sufficient movement. Assuming sufficient movement, defendant applies pressure on the elevator to determine if the tooth can be raised, thereby allowing the attached ligament to be separated from the roots. If the tooth does not elevate, defendant removes more bone surrounding the tooth, sections (cuts) the tooth, or both.

Sectioning is often required when the roots of the tooth are growing in different directions. When sectioning a tooth, defendant cuts the tooth into two parts, each with a root and removes one section at a time. Defendant removes each sectioned portion with a Cryers elevator, a surgical steel pick-like instrument, which uses leverage to "roll" the section, along with the root, out of the socket. Although some force is necessary to remove the sections, a dentist relies primarily on technique to remove the section in a manner minimizing resistance. The ability of the patient to cooperate is also a factor in a successful outcome.

In this particular surgical procedure, defendant testified plaintiff's tooth did not elevate properly, and he opted to section it. Defendant could not recall if he removed any further bone surround-

ing the tooth. Defendant managed to remove the mesial section of plaintiff's tooth without incident; however, when he attempted to remove the second section of the tooth with the Cryers elevator, he heard a snap and knew plaintiff's jaw had fractured. Plaintiff sustained nerve damage and a compound fracture, which required surgical intervention to repair. Plaintiff brought this malpractice action against defendant to recover damages sustained as a result of the injury.

Plaintiff's experts testified that plaintiff's jaw was normal and not particularly susceptible to fracture and that the force required to cause a compound fracture of plaintiff's jaw had to be significant. In the opinion of plaintiff's expert, Roger Druckman, D.D.S., defendant used improper technique in extracting the tooth; specifically, he opined that defendant used excessive force as evidenced by the fact that "the condyle was actually dislocated from its position in the joint during the fracture." He further opined "the surgical technique used by the dentist in placing the Cryer's instrument is the—one of the elevating instruments to get the last root out—was improperly placed and it was placed in as a wedge. And that is the—definitely below the standard of care." Dr. Druckman further testified that, in his opinion, "[i]t's almost impossible for a Cryer's instrument to cause the jaw fracture unless there was excessive force." Defendant, however, testified that he "kn[ew] that [he] was not using excessive force" and that is why it was "such a surprise" that plaintiff's jaw fractured.

The trial court presented three issues to the jury and instructed them on each:

1. Was the plaintiff Shimisha Howie Richards injured by the negligence of the defendant John Walsh based on the doctrine of direct negligence?

2. Was the plaintiff Shimisha Howie Richards injured by the negligence of the defendant John Walsh based on the doctrine of res ipsa loquitur?

3. What amount is the plaintiff Shimisha Howie Richards entitled to recover for personal injuries?

Defendant's objection to allowing the jury to consider the issue under *res ipsa loquitur* was overruled. Plaintiff's request that the jury be instructed with the general instruction on circumstantial evidence was also denied. The jury found plaintiff was not injured by the negligence of defendant based on the doctrine of direct negligence but

was injured by defendant based on the doctrine of *res ipsa loquitur*. The jury found plaintiff entitled to recover $300,000.00 for personal injuries. Defendant appeals.

[1] In defendant's first assignment of error, he argues that the trial court erred by "instructing the jury on the doctrine of *res ipsa loquitur* and submitting an issue to the jury on said doctrine."

> *Res ipsa loquitur* is a doctrine addressed to those situations where the facts or circumstances accompanying an injury by their very nature raise a presumption of negligence on the part of defendant. It is applicable when no proof of the cause of an injury is available, the instrument involved in the injury is in the exclusive control of defendant, and the injury is of a type that would not normally occur in the absence of negligence.

Bowlin v. Duke University, 108 N.C. App. 145, 149, 423 S.E.2d 320, 322 (1992). "Application of *res ipsa* in medical malpractice actions has received special attention, resulting in what our Supreme Court has characterized as a 'somewhat restrictive' application of the doctrine." *Schaffner v. Cumberland County Hosp. System*, 77 N.C. App. 689, 692, 336 S.E.2d 116, 118 (1985) (citation omitted). This circumspect application is founded on two principles that "render[] the average juror unfit to determine whether [a] plaintiff's injury would rarely occur in the absence of negligence[:]" (1) most medical treatment involves inherent risks despite adherence to the appropriate standard of care and (2) "the scientific and technical nature of medical treatment[.]" *Id.* These principles contend with the basic foundation of the doctrine, which "is grounded in the superior logic of ordinary human experience [and] permits a jury, on the basis of experience or common knowledge, to infer negligence from the mere occurrence of the accident itself." *Diehl v. Koffer*, 140 N.C. App. 375, 378, 536 S.E.2d 359, 362 (2000) (citation and emphasis omitted). "Therefore, in order for the doctrine to apply, not only must plaintiff have shown that [the] injury resulted from defendant's [negligent act], but plaintiff must [be] able to show—without the assistance of expert testimony—that the injury was of a type not typically occurring in absence of some negligence by defendant." *Id.*

In the instant case, plaintiff's cause of action for medical malpractice is premised upon the assertion that defendant negligently used the Cryers elevator to remove plaintiff's tooth. A layperson might be able to infer that the fracture to plaintiff's jaw resulted from the application of force by defendant with the Cryers elevator; how-

ever, without the assistance of expert testimony, the layperson would lack a basis upon which he could determine the force was excessive or improper as such matters are outside his common knowledge, experience and sense. *Accord Grigg v. Lester*, 102 N.C. App. 332, 401 S.E.2d 657 (1991). Such information, we are of the opinion, would necessarily have to be provided by an expert. Under the holdings of *Diehl* and *Grigg*, we are constrained to agree with defendant that instruction on the doctrine was improper and reverse the judgment. We encourage trial courts to remain vigilant and cautious about providing *res ipsa loquitur* as an option for liability in medical malpractice cases other than in those cases where it has been expressly approved. *See, e.g., Grigg*, 102 N.C. App. at 335, 401 S.E.2d at 659 (approving the use of the doctrine for "injuries resulting from surgical instruments or other foreign objects left in the body following surgery and injuries to a part of the patient's anatomy outside of the surgical field").[1]

[2] In defendant's second assignment of error, he contends no costs should have been taxed against him in the exercise of the trial court's discretion on the grounds that judgment should not have been entered against him. Plaintiff also appeals, arguing the trial court abused its discretion by denying certain additional costs requested by her. The trial court taxed costs in the amount of $2,305.00 against defendant. Having reversed the judgment, we likewise reverse the trial court's imposition of costs against defendant in this action.

[3] In plaintiff's brief, she assigns error to the trial court's refusal to charge the jury with an instruction on direct and circumstantial evidence on the issue of negligence. However, plaintiff failed to include in the record an assignment of error regarding this issue as required by N.C. R. App. P. 10(a) (2004). Nonetheless, we choose to consider plaintiff's assignment of error pursuant to our discretion under N.C. R. App. P. 2 (2004). Specifically, plaintiff argues the trial court failed in instructing the jury as to circumstantial evidence as provided in N.C.P.I.—Civ. 101.45, which provides, in relevant part, as follows:

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1. We are cognizant of this Court's holding in *Parks v. Perry*, 68 N.C. App. 202, 314 S.E.2d 287 (1984) in which this Court discussed the use of expert testimony in a medical malpractice case in determining the availability of the doctrine of *res ipsa loquitur*. However, we note that *Parks* involved an injured ulnar nerve in the patient's right arm during the time she was anesthetized for a vaginal hysterectomy. Accordingly, the *Parks* case would appropriately fit within that class of cases involving an injury outside the surgical field for which the doctrine of *res ipsa loquitur* has been allowed.

> There are two types of evidence from which you may find the truth as to the facts of a case—direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain or group of facts and circumstances pointing to the existence or non-existence of certain facts.

Defendant contends *res ipsa loquitur* encompasses all forms of circumstantial evidence; hence, if the trial court could not instruct the jury with respect to *res ipsa loquitur*, it could not instruct the jury with respect to circumstantial evidence. We disagree.

As our Supreme Court has noted, " 'A *res ipsa loquitur* case is ordinarily *merely one kind of case of circumstantial evidence*, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it.' " *Kekelis v. Machine Works*, 273 N.C. 439, 443, 160 S.E.2d 320, 323 (1968) (quoting Restatement (Second) of Torts § 328D, at p. 157 (1965) (emphasis added)). Barring the use of the doctrine of *res ipsa loquitur* does not likewise bar the use of all circumstantial evidence in medical malpractice cases. It merely bars the jury from inferring negligence and causation from the occurrence of and defendant's relation to the event. In the instant case, the trial court's instructions improperly limited the jury's choices to utilizing direct evidence for purposes of traditional negligence and utilizing circumstantial evidence for purposes of *res ipsa loquitur*. We hold the trial court's failure to instruct with respect to N.C.P.I.—Civ. 101.45, the circumstantial evidence instruction, constituted prejudicial error, entitling plaintiff to a trial *de novo*.

New trial.

Judges McCULLOUGH and GEER concur.

STATE OF NORTH CAROLINA v. DANNY LYNN SNIDER

No. COA04-248

(Filed 1 March 2005)

1. Homicide— premeditation and deliberation—felled victim theory—absence of multiple lethal wounds

The trial court did not err by denying defendant's request to have the jury consider the lack of lethal blows after the killing as a factor in assessing premeditation and deliberation. Although defendant argues that the absence of multiple lethal wounds negates premeditation and deliberation if the presence of such wounds shows premeditation and deliberation (the felled victim theory), the State established premeditation and deliberation by other evidence.

2. Criminal Law— closing arguments—failure to call witnesses

The trial court did not abuse its discretion by overruling defendant's objection to the State's closing argument where defendant had commented on the State's failure to call two witnesses and the State's argument that defendant could have called the four-year-old witnesses was appropriate to rebut defense counsel's remarks.

3. Evidence— autopsy photographs—projected onto screen

The trial court did not abuse its discretion in a murder prosecution by admitting autopsy photographs projected onto a screen to illustrate the medical examiner's testimony. The photographs were not used in a repetitive manner and it was not excessive to project them onto a screen so that they could be viewed more easily.

4. Homicide— first-degree murder—short-form indictment—constitutional

The short-form first-degree murder indictment is constitutional.

Appeal by defendant from judgment entered 22 April 2003 by Judge Marcus L. Johnson in Lincoln County Superior Court. Heard in the Court of Appeals 4 November 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Ralf F. Haskell, for the State.

Nora Henry Hargrove, attorney for defendant.

TIMMONS-GOODSON, Judge.

Danny Lynn Snider ("defendant") appeals his conviction of first-degree murder. For the reasons stated herein, we find no error in the trial.

The facts of this case are summarized as follows: On 7 July 2001, defendant attended a cook-out with his girlfriend, Lisa Cersosimo ("Cersosimo"), and their son, William. At the cook-out, defendant socialized with his neighbor, Steve Seagle ("Seagle"). As defendant, Cersosimo and William left the event, Seagle requested a ride home. Defendant and Cersosimo agreed to take Seagle home. Seagle rode in the back seat of the car with William and Seagle's twin nephews, Roger and Dale, who were invited to spend the night with William.

During the drive home, Seagle pressed his fingernails into William's knee and called William a "p*ssy." When the group arrived at the house shared by defendant and Cersosimo, Seagle pulled one of the twins from the car by his arm and threw him to the ground. As a result of Seagle's actions, defendant argued with Seagle and a physical fight ensued whereby both men sustained knife wounds. Cersosimo and the children went into the house, and Cersosimo called the police. A short while later, defendant came into the house, retrieved a rifle from the bedroom closet, returned outside and shot Seagle in the chest. Seagle died as a result of a single gunshot wound.

Defendant was arrested and charged with first-degree murder. He was tried before a jury, which convicted him of the charge. The trial court sentenced defendant to life imprisonment without parole. It is from this conviction that defendant appeals.

As an initial matter, we note that defendant's brief contains arguments supporting only four of the original seventeen assignments of error on appeal. The omitted assignments of error are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6) (2004). We therefore limit our review to the assignments of error addressed in defendant's brief.

The issues presented on appeal are whether (I) the trial court erred by denying defendant's requested jury instruction; (II) the trial court erred by overruling defendant's objection to the State's closing argument; (III) the trial court erred by admitting Seagle's autopsy photographs into evidence; and (IV) the short-form first-degree murder indictment was constitutionally defective.

[1] Defendant first argues that the trial court erred by denying defendant's request to instruct the jury on the felled victim theory of premeditation and deliberation. We disagree.

During the charge conference, defendant requested that the trial court include the phrase "infliction of lethal blows after Steve Seagle was felled" in its jury instruction on the circumstances from which premeditation and deliberation could be inferred. The trial court refused to provide the requested instruction and instructed the jury in pertinent part as follows:

> Neither premeditation nor deliberation is usually susceptible to direct proof. They may be proved by circumstances from which they may be inferred, such as the lack of provocation by Steve Seagle, conduct of the defendant before, during, and after the killing, threats and declarations of the defendant, use of grossly excessive force, brutal or vicious nature—brutal or vicious circumstances of the killing, manner in which or means by which the killing was done, and ill will between the parties.

"The trial court is required to instruct the jury on all substantial features of a case." *State v. Elliott*, 344 N.C. 242, 273, 475 S.E.2d 202, 215 (1996) (citing *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988)). The trial court should honor a defendant's request for a jury instruction only if the instruction is supported by the evidence and is a correct statement of the law. *See State v. Sams*, 148 N.C. App. 141, 146, 557 S.E.2d 638, 642 (2001) (citing *State v. Rogers*, 121 N.C. App. 273, 281, 465 S.E.2d 77, 82 (1996)).

To prove first-degree murder, the State must provide evidence of a "willful, deliberate, and premeditated killing." N.C. Gen. Stat. § 14-17 (2003).

> [P]remeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.

State v. Davis, 349 N.C. 1, 33, 506 S.E.2d 455, 472 (1998) (citations omitted).

"[T]he premise of the 'felled victim' theory of premeditation and deliberation is that when numerous wounds are inflicted, the defendant has the opportunity to premeditate and deliberate from one shot to the next." *State v. Austin*, 320 N.C. 276, 295, 357 S.E.2d 641, 653 (1987). The felled victim theory is typically advanced by the State in first-degree murder cases where the defendant is accused of inflicting multiple lethal wounds on the victim. *See State v. Leazer*, 353 N.C. 234, 539 S.E.2d 922 (2000); *State v. Truesdale*, 340 N.C. 229, 456 S.E.2d 299 (1995); *State v. Watson*, 338 N.C. 168, 449 S.E.2d 694 (1994); *State v. Brogden*, 329 N.C. 534, 407 S.E.2d 158 (1991); *State v. Austin*, 320 N.C. 276, 357 S.E.2d 641 (1987); *State v. Sims*, 161 N.C. App. 183, 588 S.E.2d 55 (2003). In such cases, the State argues that premeditation and deliberation may be inferred by " 'the dealing of lethal blows after the deceased has been felled and rendered helpless,' " and " 'the nature and number of the victim's wounds.' " *State v. Keel*, 337 N.C. 469, 489, 447 S.E.2d 748, 759 (1994) (quoting *State v. Gladden*, 315 N.C. 398, 431, 340 S.E.2d 673, 693 (1986)).

In the present case, defendant argues that "if the presence of [multiple lethal wounds] evidences premeditation and deliberation, then the absence of such [wounds] negates premeditation and deliberation." We conclude that the absence of multiple lethal wounds does not negate the elements of premeditation and deliberation in this case because the State established the elements of premeditation and deliberation by evidence other than the number of shots fired. The State presented evidence that defendant walked away from the argument with Seagle, entered the house, retrieved the firearm from a bedroom closet, exited the house, and shot Seagle. This evidence tends to show that defendant formed the intent to shoot Seagle at some point between the time he left the argument and the time of the actual shooting. Because the evidence tends to show that defendant's actions were deliberate and premeditated, we conclude that the trial court did not err by denying defendant's request to have the jury consider the lack of lethal blows after the killing as a factor in assessing premeditation and deliberation.

[2] Defendant also argues that the trial court erred by overruling defendant's objection to the State's closing argument. We disagree.

Where a defendant timely objects to a prosecutor's closing argument, this Court must determine "whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citing *State v. Huffstetler*, 312

N.C. 92, 111, 322 S.E.2d 110, 122 (1984)). A prosecutor's argument is proper where it is consistent with the record and does not espouse conjecture or personal opinion. Counsel may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom. *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995). "When determining whether the prosecutor's remarks are grossly improper, the remarks must be viewed in context and in light of the overall factual circumstances to which they refer." *State v. Womble*, 343 N.C. 667, 692-93, 473 S.E.2d 291, 306 (1996) (citing *Alston*, 341 N.C. at 239, 461 S.E.2d at 709).

In the present case, defense counsel made the following pertinent remarks in his closing argument:

> Sometimes silence speaks volumes. And I would contend to you in this case that's very true. . . . The State never called these twins [Roger and Dale] to the witness stand to say that what these folks claimed didn't happen.
>
> . . . .
>
> I contend to you that the absence of evidence is very important here. And the absence of the twins is important.

The State, in its closing argument, rebutted defense counsel's remarks as follows:

> And then, finally, Mr. Shuford said, Now, silence is important. And the fact that they didn't bring the two twins in here, you should take account of that, and you can if you want to, but don't forget . . . there was nothing to prevent him from subpoenaing the parents to bring those kids in here and have a chance to see a four-year-old kid testify in front of a jury.

It is to the aforementioned statements that defendant objected.

We conclude that the State's closing argument is consistent with the record and does not espouse conjecture or personal opinion. The State's remarks are appropriate to rebut defense counsel's remarks about the fact that the State did not call Roger and Dale as witnesses. Furthermore, the State's argument addresses a reasonable inference from defendant's strategy, i.e., defendant's failure to present additional witnesses to testify about the events leading up to the shooting. Thus, we hold that the trial court did not abuse its discretion in overruling defendant's objection.

[3] Defendant also argues that the trial court erred by admitting autopsy photographs of Seagle into evidence. Defendant asserts that the inflammatory nature of the photographs outweighs their probative value. We disagree.

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2003). The decision to admit photographic evidence "lies within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling [is] manifestly unsupported by reason or [] so arbitrary that it could not have been the result of a reasoned decision." *State v. Goode*, 350 N.C. 247, 258, 512 S.E.2d 414, 421 (1999) (citing *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). Our appellate courts continue to recognize "the long-standing rule that photographs of a murder victim, though gory or gruesome, may be introduced for illustrative purposes so long as they are not used in an excessive or repetitious manner aimed exclusively at arousing the passions of the jury." *State v. Call*, 349 N.C. 382, 414, 508 S.E.2d 496, 516 (1998) (citing *Hennis*, 323 N.C. at 283, 372 S.E.2d at 526).

In the instant case, the trial court admitted three autopsy photographs into evidence to illustrate the testimony of Dr. Patrick Lantz, Forsyth County Medical Examiner. In the first photograph, Seagle's left arm is raised to reveal two lacerations on the left side of Seagle's torso and a laceration on his chest. The second photograph shows a surgical incision on the right side of Seagle's torso. The third photograph shows the same surgical incision on the right side of Seagle's torso and a second surgical incision on Seagle's right shoulder. Dr. Lantz testified that Seagle suffered a knife wound on his right shoulder, a knife wound on the left side of his torso, and a gunshot wound to his chest, the latter of which was the cause of Seagle's death. The trial court allowed the State to publish two autopsy photographs to the jury by projecting them onto a screen in the courtroom, noting "with these small photographs, it certainly would be helpful to enlarge [them]."

We hold that the trial court's ruling admitting the enlarged photographs that were projected onto a screen was proper for the purpose of illustrating the extent of Seagle's wounds. Thus, the probative value of the photographs outweighs any potential unfair prejudice due to the nature of the photographs. The photographs were not used in a repetitive manner and it was not excessive to project them onto a screen for the purpose of making them more easily viewed. We con-

clude that the trial court did not abuse its discretion by admitting the enlarged photographs that were projected onto a screen.

[4] Defendant also argues that the short-form first-degree murder indictment was constitutionally defective. We disagree.

Our Supreme Court has consistently held that short-form murder indictments are constitutionally sound. *State v. Hunt*, 357 N.C. 257, 278, 582 S.E.2d 593, 607, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702, *petition denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003); *see also State v. Wallace*, 351 N.C. 481, 504-05, 528 S.E.2d 326, 341 (2000) (upholding short-form indictment for murder). Accordingly, we overrule this assignment of error as it is without merit.

NO ERROR.

Judges TYSON and GEER concur.

STATE OF NORTH CAROLINA v. ANDREW DEBNAM

No. COA04-502

(Filed 1 March 2005)

Criminal Law— waiver of right to counsel—statutory procedure

A probation revocation was reversed and remanded where defendant waived his right to assigned counsel in writing and informed the court that he wanted to represent himself, but the trial court did not advise defendant of the consequences of his decision or the "nature of the charges and proceedings and the range of permissible punishments." N.C. Gen. Stat. § 15A-1242(3) (2003).

Judge STEELMAN dissenting.

Appeal by defendant from judgments entered 15 December 2003 by Judge Abraham P. Jones in Wake County Superior Court. Heard in the Court of Appeals 3 January 2005.

Attorney General Roy Cooper, by Assistant Attorney General Caroline Farmer, for the State.

Sue Genrich Berry for defendant-appellant.

ELMORE, Judge.

Defendant Andrew Debnam (defendant) pled guilty to eleven counts of obtaining property by false pretenses. The trial court sentenced defendant to four consecutive sentences of eleven to fourteen months imprisonment, each of which were suspended, and placed him on supervised probation for thirty-six months. On 14 November 2003, defendant's probation officer filed probation violation reports. Three days later, defendant executed a written waiver of counsel form, waving his right to assigned counsel, but not his right to assistance of counsel, at a preliminary hearing held in district court. On 15 December 2003, the trial court held a hearing on defendant's probation violation. After hearing testimony from defendant and defendant's probation officer, the trial court concluded that defendant had willfully and unlawfully violated the terms and conditions of his probation and activated defendant's suspended sentences. Defendant appeals.

Defendant first contends the trial court erred by allowing him to proceed *pro* se without conducting an inquiry as required by N.C. Gen. Stat. § 15A-1242, which provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2003).

"The provisions of N.C. Gen. Stat. § 15A-1242 are mandatory where the defendant requests to proceed *pro se*. The execution of a written waiver is no substitute for compliance by the trial court with the statute." *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) (citations omitted). In *Evans*, this Court held that during probation revocation hearings, the trial court must conduct a full

inquiry pursuant to section 15A-1242 to ensure that a defendant's waiver of counsel is knowing, intelligent, and voluntary. *Id.*

The following exchange occurred when defendant's probation revocation hearing was called on 15 December 2003:

[PROSECUTOR]: Mr. Debnam, have you signed a waiver already?

THE DEFENDANT: Yes, ma'am.

[PROSECUTOR]: You're going to represent yourself?

THE DEFENDANT: Yes, ma'am.

[PROSECUTOR]: Judge, he says he's signed a waiver.

THE COURT: All right. I believe him. Let's go forward.

Although the record shows that defendant executed a written waiver of counsel form waving his right to assigned counsel and informed the trial court that he wanted to represent himself, the trial court failed to advise defendant of the consequences of his decision to represent himself or the "nature of the charges and proceedings and the range of permissible punishments." N.C. Gen. Stat. § 15A-1242(3) (2003). Accordingly, the judgment of the trial court is reversed, and this matter is remanded for another probation revocation hearing. As the other assignments of error are not likely to reoccur, we do not deem it necessary to discuss them.

Reversed and remanded.

Judge HUNTER concurs.

Judge STEELMAN dissents by separate opinion.

STEELMAN, Judge dissenting.

I must respectfully dissent from the majority opinion based upon the holdings in *State v. Watson*, 21 N.C. App. 374, 204 S.E.2d 537 (1974) and *State v. Kinlock*, 152 N.C. App. 84, 566 S.E.2d 738 (2002), aff'd, 357 N.C. 48, 577 S.E.2d 620 (2003).

I agree with the majority that the 15 December 2003 inquiry by the trial court was alone insufficient under N.C. Gen. Stat. § 15A-1242. However, following his arrest for violations of his probation, defendant was brought before the District Court of Wake County, where he executed a waiver of counsel. This made it unnecessary for the trial

court to conduct another inquiry. *State v. Watson*, 21 N.C. App. 374, 204 S.E.2d 537 (1974). The majority improperly relies on *State v. Evans*. In *Evans*, there was no previous waiver of counsel, therefore the trial court needed to inform defendant of his rights and explain fully the consequences of waiver as required by N.C. Gen. Stat. § 15A-1242. "A thorough inquiry into the three substantive elements of the statute, conducted at a preliminary stage of a proceeding, meets the requirements of N.C.G.S. § 15A-1242 even if it is conducted by a judge other than the judge who presides at the subsequent trial." *State v. Kinlock*, 152 N.C. App. 84, 89, 566 S.E.2d 738, 741 (2002), *aff'd*, 357 N.C. 48, 577 S.E.2d 620 (2003). Since no assignment of error was made to this earlier hearing in District Court, we must presume the written waiver of counsel form was administered properly by that court.

In order to "satisfy constitutional standards, [the trial court] must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *State v. Thomas*, 331 N.C. 671, 674, 417 S.E.2d 473, 476 (1992). The inquiry detailed in N.C. Gen. Stat. § 15A-1242 has been deemed sufficient to meet these constitutional standards. *See id.* "In our opinion the statute does not require successive waivers in writing at every court level of the proceeding." *State v. Watson*, 21 N.C. App. 374, 379, 204 S.E.2d 537, 540 (1974). "The waiver in writing once given was good and sufficient until the proceeding finally terminated, unless the defendant himself makes known to the court that he desires to withdraw the waiver and have counsel assigned to him. The burden of showing the change in the desire of the defendant for counsel rests upon the defendant." *Id.* at 379, 204 S.E.2d at 540-41. In Superior Court, defendant Debnam made no statement that he wanted counsel assigned and answered in the affirmative when asked if he was going to represent himself. Defendant's rights were properly protected by the earlier written waiver of counsel. For these reasons, I would find no error with the trial court allowing defendant to proceed *pro se*.

Having decided the trial court's action regarding the first assignment of error should be affirmed, I address defendant's other assignments of error.

In defendant's second assignment of error, he asserts that the trial court erred in receiving unsworn testimony from defendant's probation officer. I would disagree.

The probation violation reports alleged that defendant had violated his probation by (1) failing to report for appointments with his probation officer; (2) failing to attain a substance abuse assessment; (3) failing to make monetary payments; and (4) absconding supervision. Defendant admitted the violations. The trial judge then questioned the probation officer briefly concerning the violations. Defendant then offered explanations for his violations. No one was placed under oath at the revocation hearing.

Rule 603 of the North Carolina Rules of Evidence requires that every witness shall be required to declare that they will testify truthfully, by oath or affirmation. However, Rule 1101(b)(3) of the North Carolina Rules of Evidence specifically states that the Rules of Evidence do not apply in proceedings granting or revoking probation. Defendant in his brief acknowledges that: "It is well-settled that the trial court is not bound by strict rules of evidence in a probation hearing. *State v. Pratt*, 21 N.C. App. 538, 204 S.E.2d 906 (1974)." This assignment of error is without merit.

In his third assignment of error, defendant contends that the trial court did not follow the provisions of N.C. Gen. Stat. § 15A-1364 in determining that the defendant had not complied with the monetary terms of his probation. "[U]nless the defendant shows inability to comply and that his nonpayment was not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment, the court may order the suspended sentence, if any, activated . . ." N.C.G.S. § 15A-1364(b) (2004). The defendant admitted to the violations in this case. While the defendant did tell the trial judge that he had been ill, the trial court was not required to accept defendant's explanation. Assuming *arguendo* that the trial court erred as to the monetary violation, there was plenary evidence of the other violations. "Any violation of a valid condition of probation is sufficient to revoke defendant's probation. All that is required to revoke probation is evidence satisfying the trial court in its discretion that the defendant violated a valid condition of probation without lawful excuse." *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987) (internal citations omitted). This assignment of error is without merit.

In his fourth assignment of error, defendant contends that there was insufficient evidence to support the revocation of defendant's probation and the trial court abused its discretion in revoking defendant's probation. I would disagree. Again, defendant admitted the violations of his probation. This admission established the facts

as set forth in the violation reports. This assignment of error is without merit.

In his fifth and final assignment of error, defendant asserts that the trial court failed to make the required findings of fact to support revocation. I disagree.

Each of the revocation judgments in this case incorporated the violation reports by reference. They further found that the defendant had committed four different violations of the terms and conditions of his probation; that the terms and conditions violated were valid, that defendant violated each condition willfully and without valid excuse; and each violation occurred prior to the expiration or termination of defendant's probation. These ultimate findings of fact are quite sufficient to support the trial court's judgments of revocation. The trial court was not required to make evidentiary findings of fact on all of the contentions raised by the defendant in his explanations to the court. *See State v. Williamson*, 61 N.C. App. 531, 301 S.E.2d 423 (1983). I would find this assignment of error to be without merit.

Finally, in assignments of error two, four, and five, defendant makes a blanket assertion that the error complained of was a violation of the constitutions of the United States of America and the State of North Carolina. This assertion is not argued in defendant's brief, and is deemed abandoned. See N.C.R. App. P. 28(b)(6).

I would affirm the trial court's revocation of defendant's probation in all cases.

ANDREW GOETZ AND CATHERINE GOETZ, PERSONAL REPRESENTATIVES AND GUARDIANS AD LITEM FOR THE MINOR CHILD HAYDEN L. GOETZ, CLAIMANTS V. WYETH-LEDERLE VACCINES AND N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENTS

No. COA04-387

(Filed 1 March 2005)

1. Public Health— vaccine injury act—appeal—full commission—panel of three

The language of N.C.G.S. § 130A-428(b) stating that an appeal be heard by the Industrial Commission sitting as a full commission does not require the entire seven-member body of the

Industrial Commission to hear all appeals under the Childhood Vaccine-Related Injury Compensation Program, but instead means a panel of three commissioners.

2. Public Health— vaccine injury act—appeal—consideration by two commissioners—full panel required

The Industrial Commission erred in an action for damages under the North Carolina Childhood Vaccine-Related Injury Compensation Program by allowing the case to be reviewed by only two commissioners and the case is remanded for a new hearing, because: (1) the vaccine injury act requires that each appeal be decided by a panel of three commissioners, N.C.G.S. § 130A-428(b); (2) the instant case not only involves one commissioner's inability to sign the decision at the time of filing but also the commissioner's recusal immediately after oral arguments and absence during review of the appeal; and (3) although a decision may be rendered by a two-commissioner majority when the third commissioner is unavailable to sign at the time of filing, the appeal must be heard by the Commission sitting as a full commission, meaning a panel of three commissioners.

Appeal by claimants from decision and order entered 25 November 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 November 2004.

Wallace, Creech & Sarda, L.L.P., by Peter J. Sarda, John R. Wallace, and Joseph A. Newsome, for claimants-appellants.

Attorney General Roy Cooper, by Assistant Attorney General Stacey A. Phipps, for respondents-appellees.

CALABRIA, Judge.

Andrew Goetz, Catherine Goetz, and Hayden L. Goetz (collectively "claimants") appeal from a decision and order of the North Carolina Industrial Commission (the "Commission") denying their claim for damages under the North Carolina Childhood Vaccine-Related Injury Compensation Program. We vacate and remand.

On 14 May 1993, Hayden L. Goetz ("Hayden") was born to Andrew and Catherine Goetz ("Mr. and Mrs. Goetz"). On 6 July, 31 August, and 19 November 1993, Hayden received doses of diphtheria/pertussis/tetanus vaccine ("DPT shot") manufactured by Wyeth-Lederle Vaccine's predecessor, Lederle Labs. According to Mr. and

Mrs. Goetz, after each DPT shot, Hayden had fevers ranging from 102-106 degrees and was irritable. The evening after the second shot, he awoke screaming and screamed inconsolably for approximately forty-five minutes. After the second and particularly the third DPT shot, Mr. and Mrs. Goetz and Hayden's grandmother noticed that Hayden seemed lethargic, limp, less responsive, and over time appeared to lag in reaching his developmental milestones. In July 1996, when Hayden was age three, a pediatric neurologist determined that Hayden had a non-progressive alteration in brain functioning, termed a "static encephalopathy," due to an unknown cause and that he suffered from some degree of mental retardation.

In March 1999, claimants filed a claim for a vaccine-related injury in the United States Court of Federal Claims pursuant to the National Vaccine Injury Compensation Program. In January 2001, the United States Court of Appeals for the Federal Circuit dismissed their claim for violation of the applicable statute of limitations. Having exhausted their federal claims, claimants filed a claim for vaccine-related injury pursuant to the North Carolina Childhood Vaccine-Related Injury Compensation Program. On 17 March 2003, a deputy commissioner, sitting for the Commission, denied their claim. On 24 March 2003, claimants appealed to the Commission. A panel of three commissioners heard oral arguments in the matter. Immediately following oral arguments, one commissioner recused himself from review of the appeal. The remaining two commissioners reviewed the appeal and entered a "Decision and Order" on 25 November 2003 denying their claim. From this "Decision and Order," claimants appeal.

There are no North Carolina appellate court opinions reviewing the North Carolina Childhood Vaccine-Related Injury Compensation Program (the "vaccine injury act" or the "act"), N.C. Gen. Stat. §§ 130A-422 through 434 (2003). Therefore, a brief overview of the act is provided. The vaccine injury act became effective 1 October 1986 and "applies to all claims for vaccine-related injuries . . . ." N.C. Gen. Stat. § 130A-432 (2003). Similar to the National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-10 through 34 (2003), the vaccine injury act is an attempt to address concerns regarding the inability of the civil tort system to provide sufficient compensation to children injured by childhood immunizations and also concerns about maintaining the viability of a shrinking number of childhood vaccine manufacturers. *See* Daniel A. Cantor, *Striking a Balance Between Product Availability and Product Safety: Lessons from the Vaccine*

Act, 44 Am. U.L. Rev. 1853, 1858-60 (1995) (examining the aims of the National Vaccine Injury Compensation Program). To these ends, the vaccine injury act authorizes the Commission "to hear and pass upon all claims filed pursuant to [the vaccine injury act]." N.C. Gen. Stat. § 130A-424 (2003). The act also provides that a claim may be filed with the Commission only after a claimant has exhausted his remedies under the National Vaccine Injury Compensation Program or other federal law. N.C. Gen. Stat. § 130A-423(b1) (2003). In addition, the rights and remedies provided claimants under the vaccine injury act's provisions are exclusive. N.C. Gen. Stat. § 130A-423(b) (2003). However, nothing in the act prohibits "a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if the action is not barred by federal law . . . ." N.C. Gen. Stat. § 130A-423(c) (2003).

After a claim is filed under the act, the Commission conducts a hearing, and a member of the Commission or a deputy thereof, sitting for the Commission, determines whether a claimant sustained a vaccine-related injury. N.C. Gen. Stat. § 130A-424. If the commissioner or deputy determines "that a claimant has sustained a vaccine-related injury, the Commission [must] make an award providing compensation or services . . . ." N.C. Gen. Stat. § 130A-427(a) (2003). The monetary compensation for an injured individual may not exceed $300,000, and any services provided are not included as a part of the monetary compensation but are in addition to it. N.C. Gen. Stat. § 130A-427(b) (2003). After the commissioner or deputy makes a decision, any party to the proceedings has fifteen days to appeal the decision to the Commission. N.C. Gen. Stat. § 130A-428(b) (2003). The appeal must "be heard by the Commission, sitting as a full commission, on the basis of the record in the matter and upon oral argument of the parties . . . ." *Id.* Any party may appeal the Commission's decision to this Court for errors of law within thirty days. N.C. Gen. Stat. § 130A-428(c) (2003).

[1] Claimants first assert the plain language of N.C. Gen. Stat. § 130A-428(b), that an appeal "be heard by the Commission, sitting as a full commission . . . [,]" requires the entire seven member body of the Commission to hear all appeals under the act. Claimants, however, failed to properly preserve this issue for appellate review. Under N.C. R. App. P. 10(b)(1), "[i]n order to preserve a question for appellate review, a party must have presented . . . a timely request, objection or motion, stating the specific grounds for the ruling the party desired . . . ." The record contains no evidence that claimants

objected to the size or composition of the three commissioner panel at any time prior to the close of the hearing. Moreover, were we to consider this issue, the clear statutory requirement that a panel of three commissioners review awards under the Worker's Compensation Act, N.C. Gen. Stat. § 97-85 (2003), and the Commission's practice of sitting in panels of three to hear appeals under the Tort Claims Act, which requires that appeals "be heard by the Industrial Commission, sitting as a full Commission . . . [,]" N.C. Gen. Stat. § 143-292, make unpersuasive claimants' assertion that the legislature's use of the term "full commission" in N.C. Gen. Stat. § 130A-428(b) was intended to mean something other than a panel of three commissioners.

[2] In the alternative, claimants assert the panel's "Decision and Order" are invalid because only two commissioners reviewed their appeal. As noted above, both the vaccine injury act and the Worker's Compensation Act require that each appeal be decided by a panel of three commissioners. N.C. Gen. Stat. § 130A-428(b); N.C. Gen. Stat. § 97-85. Based on this similarity, we may obtain guidance from worker's compensation precedent in addressing claimants' assertion.

In two worker's compensation cases, *Pearson v. C.P. Buckner Steel Erection*, 139 N.C. App. 394, 533 S.E.2d 532 (2000), and *Tew v. E.B. Davis Elec. Co.*, 142 N.C. App. 120, 541 S.E.2d 764 (2001), this Court was faced with an opinion by the Commission signed by only two of three commissioners. The third commissioner in each case had participated in the review of the appeal but had been unavailable to sign the opinion before filing. *Pearson*, 139 N.C. App. at 400, 533 S.E.2d at 535; *Tew*, 142 N.C. App. at 122, 541 S.E.2d at 766. In both cases, this Court upheld the Commission's opinion because each opinion "had been reviewed by three commissioners and rendered by a majority of the members of that panel . . . ." *Tew*, 142 N.C. App. at 122, 541 S.E.2d at 766.

The instant case not only involves one commissioner's inability to sign the decision at the time of filing but also the commissioner's recusal immediately after oral arguments and absence during review of the appeal. Although a decision may be rendered by a two commissioner majority when the third commissioner is unavailable to sign at the time of filing, the appeal must nonetheless "be heard by the Commission, sitting as a *full commission* . . . [,]" meaning a panel of three commissioners. N.C. Gen. Stat. § 130A-428(b) (emphasis added). The review of an appeal by only two commissioners does not constitute a hearing by "a full commission." *Id.* Therefore, in the

instant case, the review of claimants' appeal by only two commissioners violated N.C. Gen. Stat. § 130A-428(b) and made the "Decision and Order" invalid as a matter of law. Accordingly, the Commission's "Decision and Order" are vacated, and the cause is remanded for a new hearing. Having so held, we need not address claimants' remaining assignments of error.

Vacated and remanded.

Judges HUNTER and LEVINSON concur.

THEAOSEUS T. CLAYTON, JR., PLAINTIFF v. THE NORTH CAROLINA STATE BAR, DEFENDANT

No. COA04-863

(Filed 1 March 2005)

1. Attorneys— disbarment—subsequent collateral attack

Plaintiff's 2003 complaint challenging his 1998 disbarment was a collateral attack upon a final judgment and was properly dismissed.

2. Attorneys— disbarment—State Bar—court of competent jurisdiction—collateral attack

Plaintiff's 2003 challenge to his 1998 disbarment was properly dismissed even though plaintiff argued that the State Bar is not a court of competent jurisdiction and that he should be allowed to seek relief on his constitutional arguments in superior court. The North Carolina State Bar had authority to discipline plaintiff for his violations of the Rules of Professional Conduct and plaintiff had a right of appeal to the Court of Appeals, of which he did not avail himself. His claims are a collateral attack upon a final judgment properly entered.

3. Attorneys— disbarment—subsequent case not retroactive

Even assuming plaintiff's 2003 challenge to his 1998 disbarment is factually similar to *N.C. State Bar v. Talford*, 356 N.C. 626, nothing in that opinion indicates that it is retroactive.

Appeal by plaintiff from an order entered 31 March 2004 by Judge James C. Spencer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 2 February 2005.

Irving Joyner for plaintiff-appellant.

Deputy Counsel A. Root Edmonson for defendant-appellee.

HUNTER, Judge.

Theaoseus T. Clayton, Jr. ("plaintiff") appeals the dismissal of his complaint against the North Carolina State Bar pursuant to N.C.R. Civ. P. 12(b)(1). Plaintiff also contends the trial court erroneously denied his motion for a restraining order. After careful review, we conclude the trial court properly dismissed plaintiff's complaint.

Plaintiff became licensed to practice law in North Carolina in February 1987, however, in February 1998, plaintiff was disbarred. The Disciplinary Hearing Commission of the North Carolina State Bar found and concluded plaintiff had violated several rules of professional conduct regarding the handling of client funds and a trust account, and had failed to adequately supervise an employee that had embezzled client funds. Plaintiff did not appeal his disbarment.

On 5 August 2003, plaintiff filed a complaint against the North Carolina State Bar. In the complaint, plaintiff alleged the disciplinary hearing committee's decision was contrary to the decision by our Supreme Court in *N.C. State Bar v. Talford*, 356 N.C. 626, 576 S.E.2d 305 (2003), which was decided five years after plaintiff was disbarred. In the complaint, plaintiff alleged the decision to disbar plaintiff was illegal, arbitrary, capricious, and deprived him of Due Process Protections guaranteed under the United States and North Carolina Constitutions. Plaintiff also alleged the disciplinary hearing committee failed to find that the sanction of disbarment was the only one available to correct the plaintiff's conduct, to protect his clients, the legal profession, or the public. Plaintiff also filed simultaneously with the complaint a motion for a temporary restraining order and preliminary injunction. The motion was denied on 14 August 2003.

The North Carolina State Bar moved to dismiss pursuant to N.C.R. Civ. P. 12(b)(1) on the grounds that the trial court lacked subject matter jurisdiction. The trial court granted the motion to dismiss on 24 March 2004. Plaintiff appeals.

[1] Plaintiff first contends the trial court had subject matter jurisdiction over this action, and therefore the trial court erroneously dismissed his complaint. Specifically, plaintiff contends the superior court has subject matter jurisdiction to hear declaratory judgment actions that present constitutional issues and seek injunctive relief. Pursuant to N.C. Gen. Stat. § 7A-245, the superior court is the proper division in which civil actions seeking declaratory or injunctive relief or the enforcement of constitutional rights should be filed. However, in this case, the issue is not whether the superior court can hear this type of lawsuit, the issue is whether plaintiff is permitted to bring this claim on the particular facts of this case.

Plaintiff's civil complaint is a collateral attack upon the order of discipline imposed against plaintiff in 1998. " 'A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid.' " *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969) (citation omitted). "A collateral attack on a judicial proceeding is 'an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it.' " *Regional Acceptance Corp. v. Old Republic Surety Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003) (citation omitted). "North Carolina does not allow collateral attacks on judgments." *Id.* As plaintiff did not appeal the February 1998 order of discipline which ordered his disbarment, it became a final order not subject to collateral attack. *See CBP Resources, Inc. v. Mountaire Farms of N.C., Inc.*, 134 N.C. App. 169, 171, 517 S.E.2d 151, 154 (1999) (citation omitted) (stating " '[a] final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court' ").

[2] Plaintiff also argues he should be allowed to seek declaratory and injunctive relief on his constitutional arguments in superior court because the North Carolina State Bar is not a court of competent jurisdiction. Plaintiff's argument obscures the fact that he is not allowed to present his claims in superior court because his claims are a collateral attack upon a final judgment properly entered by the North Carolina State Bar. Under N.C. Gen. Stat. § 84-28(a) (2003), "[a]ny attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the [Council of the North Carolina State Bar] under such rules and procedures as the Council shall adopt . . . ." If an attorney is disciplined, "[t]here shall be an appeal of right from any final order imposing admonition, reprimand, censure,

suspension, stayed suspension, or disbarment upon an attorney . . . to the North Carolina Court of Appeals." N.C. Gen. Stat. § 84-28(h). Thus, the North Carolina State Bar had authority to discipline plaintiff for his violations of the Rules of Professional Conduct, and plaintiff had a right of appeal to this Court, of which he did not avail himself.

[3] Essentially, plaintiff seeks review of his disbarment in light of our Supreme Court's 2003 opinion in *N.C. State Bar v. Talford*, 356 N.C. 626, 576 S.E.2d 305. In *Talford*, the Supreme Court of North Carolina held that "in order to impose a more severe sanction under [N.C. Gen. Stat. § 84-28(c)]—censure, suspension, or disbarment—an attorney's misconduct must include attending circumstances that demonstrate: (1) a risk of *significant* potential harm, and (2) that the chosen sanction is necessary in order to protect the public." *Id.* at 641, 576 S.E.2d at 315. In *Talford*, because the disciplinary hearing committee's order "fail[ed] to provide either pertinent findings of fact or conclusions of law that address[ed] the statutory factors affecting its choice of discipline, its sanction-related findings and conclusions [could not] serve as adequate support for its decision to disbar [the] defendant." *Id.* at 642, 576 S.E.2d at 315. The discipline-related findings of fact and conclusions of law must "address . . . why the sanction of disbarment is required in order to provide protection of the public." *Id.* at 641, 576 S.E.2d at 315.

Plaintiff argues the situation in *Talford* is similar to his case. In *Talford*, our Supreme Court indicated the

> pertinent facts [were] (1) defendant was investigated by the DHC for allegedly mismanaging his client trust accounts; (2) the DHC, after conducting a hearing, found that the evidence presented showed that defendant had indeed mismanaged those accounts by "fail[ing] to maintain proper trust records," "fail[ing] to preserve funds in a fiduciary capacity," failing to make timely deposits and dispersals of client funds, and "commingl[ing] client and personal funds"; and (3) there was no evidence presented that demonstrated or even intimated that any client or creditor of defendant had suffered economic losses as a consequence of defendant's recalcitrant bookkeeping practices.

Id. at 635, 576 S.E.2d at 311. Even assuming plaintiff's case is factually similar to *Talford*, nothing in the *Talford* opinion indicates it is retroactive to cases finalized prior to the decision in *Talford*.

Accordingly, we conclude the trial court properly dismissed plaintiff's complaint against the North Carolina State Bar. As we have concluded plaintiff's lawsuit was properly dismissed, we do not reach his remaining issue.

Affirmed.

Judges CALABRIA and JACKSON concur.

IN RE: J.L.S., A MINOR CHILD

No. COA04-818

(Filed 1 March 2005)

Termination of Parental Rights— guardian ad litem for child— not appointed

A termination of parental rights was remanded where one parent sought to terminate the parental rights of the other natural parent so that her husband could adopt the child, respondent filed a response on the day of the hearing, and the court did not appoint a guardian ad litem for the child. A guardian ad litem is necessary to ensure that the best interests of the child are adequately represented. N.C.G.S. § 7B-1108(b).

Appeal by respondent from judgment entered 18 December 2003 by Judge Susan R. Burch in Guilford County District Court. Heard in the Court of Appeals 3 February 2005.

David A. Perez for petitioner-appellee.

Rebekah W. Davis for respondent-appellant.

TIMMONS-GOODSON, Judge.

Respondent appeals an order of the trial court terminating his parental rights to J.L.S. For the reasons stated herein, we reverse the order of the trial court.

Petitioner and respondent were never married. Petitioner gave birth to J.L.S. on 24 March 1998. On 19 June 1999, petitioner married a man who subsequently decided to adopt J.L.S. In February 2003, petitioner contacted respondent and asked him to allow petitioner's

husband to adopt J.L.S., an action that would require respondent to surrender his parental rights. In March 2003, petitioner's attorney sent respondent an adoption consent form. Respondent did not return the form. On 22 May 2003, petitioner filed the underlying petition to terminate parental rights based on willful abandonment and respondent's failure to establish paternity judicially or legitimate the child. Respondent filed a response on the day of the termination hearing. A guardian ad litem was not appointed to represent the minor child.

At the termination hearing, after hearing testimony from both parties, the trial judge ruled from the bench that grounds for termination existed and that the best interests of J.L.S. would be served by terminating respondent's parental rights. The trial court consequently entered an order of termination on 18 December 2003. It is from this order that respondent appeals.

Respondent argues that the trial court erred by (I) failing to appoint a guardian ad litem for J.L.S.; (II) entering two findings of fact not supported by clear and convincing evidence; (III) finding as fact that respondent willfully abandoned J.L.S.; (IV) finding as fact that respondent failed to establish paternity, failed to legitimate the child and failed to provide substantial financial support; and (V) abusing its discretion in applying the best interest of the child standard.

While respondent asserts five issues on appeal, the dispositive issue in the case is whether the trial court erred by failing to appoint a guardian ad litem for J.L.S. pursuant to N.C. Gen. Stat. § 7B-1108 where respondent filed a response to the petition on the day of the hearing. We hold that the trial court erred.

In termination of parental rights cases, the respondent must file an answer within thirty days after service of the summons and petition. N.C. Gen. Stat. § 1A-1, Rule 12(a)(1) (2003) ("A defendant shall serve his answer within 30 days after service of the summons and complaint upon him.").

> Upon the failure of a respondent parent to file written answer to the petition or written response to the motion within 30 days after service of the summons and petition . . . the court may issue an order terminating all parental and custodial rights of that parent with respect to the juvenile.

N.C. Gen. Stat. § 7B-1107 (2003).

The trial court may, in its discretion, appoint a guardian ad litem in any termination of parental rights case "when the court finds it would be in the best interests of the juvenile." N.C. Gen. Stat. § 7B-600(a) (2003). However, in cases where the respondent files a response denying any material allegation of the petition, the trial court is required to "appoint a guardian ad litem to represent the best interests of the juvenile." N.C. Gen. Stat. § 7B-1108(b) (2003). Where the trial court fails to appoint a guardian ad litem in accordance with § 7B-1108(b), it is an error constituting grounds for reversal of the trial court's order on appeal. *See generally In Re Fuller*, 144 N.C. App. 620, 548 S.E.2d 569 (2001).

In *Fuller*, the respondent argued on appeal that the trial court failed to appoint a guardian ad litem pursuant to § 7B-1108(b). 144 N.C. App. at 621, 548 S.E.2d at 570. However, the respondent failed to object to the issue at trial, and therefore was in violation of Appellate Procedure Rule 10(b)(1) by raising the issue on appeal. In deciding *Fuller*, this Court was guided by *In Re Barnes*, a case decided under a prior similar statute in which "the child aged twenty-two months, a party to the proceeding, was not represented and obviously could not enter the required objections at trial or in the appellate record." 97 N.C. App. 325, 326, 388 S.E.2d 237, 238 (1990). In *Barnes*, we suspended the Appellate Rules and accepted the appeal. 97 N.C. App. at 327, 388 S.E.2d at 238. In *Fuller* this Court held that G.S. § 7B-1108(b) was intended to protect the best interests of the child and the failure by the trial court to appoint a guardian ad litem to represent "the intended beneficiary" of the statute was reversible error. 144 N.C. App. at 623, 548 S.E.2d at 571. We remanded the case to the trial court "for appointment of a guardian ad litem for the juvenile and for the trial court to conduct appropriate *de novo* proceedings not inconsistent with section 7B-1108(b)." 144 N.C. App. at 623, 548 S.E.2d at 571.

In the present case, the record establishes that respondent filed his response on the day of the hearing. While we recognize petitioner's frustration regarding the last minute response, we refuse to penalize the minor child. This is so especially in light of the nature of these proceedings where one natural parent is seeking to terminate the parental rights of the other natural parent. As in *Fuller*, we conclude that a guardian ad litem is necessary to ensure that the best interests of J.L.S. are adequately represented. Pursuant to *Barnes* and *Fuller*, the order of termination is reversed and the case is remanded for appointment of a guardian ad litem and a new termination proceeding.

REVERSED.

Judges BRYANT and LEVINSON concur.

STATE OF NORTH CAROLINA v. LATARA CHARLITA PROBY

No. COA04-942

(Filed 1 March 2005)

Probation and Parole— probation revocation—knowing and voluntary decision to represent oneself

The trial court did not err in a revocation of probation and activation of sentences for food stamp fraud, solicitation to obtain property by false pretenses, uttering a forged instrument, and obtaining property by false pretenses case by allowing defendant to represent herself allegedly without asking her if she understood the nature of the charges and the consequences of her decision to proceed without a lawyer, because: (1) the trial court's inquiry informed defendant that if she was found to have violated probation, then she faced the possible consequence of active service of the sentences; (2) the court informed defendant that she had the right to the assistance of an attorney, and defendant indicated that she understood but chose to proceed without an attorney; and (3) the court's inquiry elicited the information necessary under N.C.G.S. § 15A-1242 for it to make a determination that defendant's decision to represent herself was knowing and voluntary.

Appeal by defendant from judgments entered 6 April 2004 by Judge Benjamin G. Alford in Duplin County Superior Court. Heard in the Court of Appeals 28 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General Thomas M. Woodward, for the State.

Duncan B. McCormick for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from revocation of probation and activation of sentences for food stamp fraud, solicitation to obtain property by

false pretenses, uttering a forged instrument (two counts), and obtaining property by false pretenses (two counts).

Defendant's sole contention is that the court erred by allowing defendant to represent herself without asking her if she understood the nature of the charges and the consequences of her decision to proceed without a lawyer.

At the call of the matter for hearing, the following transpired:

> MS. RHODES [D.A.]: Her attorney situation needs to be addressed as well. May I approach with the file, Your Honor?
>
> THE COURT: You may.
>
> Ms. Proby, you do have the right to remain silent; anything you say can be used against you. Do you understand that?
>
> THE PROBATIONER: Yes, sir.
>
> THE COURT: If you're found to have willfully violated probation, you could be ordered to serve a sentence of not less than six nor more than eight months, followed by a consecutive sentence of not less than eight nor more than ten months, and another sentence of not less than six nor more than eight that would run at the same time as those other two. Do you understand that?
>
> THE PROBATIONER: Yes.
>
> THE COURT: You have a right to have a lawyer help you with your cases. If you can [sic] afford one, we'll appoint one. Do you understand?
>
> THE PROBATIONER: Yes.
>
> THE COURT: Do you wish to proceed with a lawyer or without?
>
> THE PROBATIONER: Without.
>
> THE COURT: Please step over here and sign a waiver of your right to all assistance of counsel and be sworn to it.
>
> THE PROBATIONER SIGNS A WAIVER OF COUNSEL FORM AND IS SWORN TO THE SAME.

Defendant then admitted to the violations of probation.

After defendant was sentenced, she returned to the courtroom later that day and informed the court that she "didn't understand the question about the lawyer situation. The reason why I signed the waiver saying I didn't want an attorney was because my probation officer had told me before we came to Court that you [sic] she wasn't requesting that I go to prison." The court denied her request for relief.

Before a defendant in a probation revocation is allowed to represent himself, the court must comply with the requirements of N.C. Gen. Stat. § 15A-1242 (2003); *State v. Evans*, 153 N.C. App. 313, 314-15, 569 S.E.2d 673, 674 (2002). This statute provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242. When a claim is made relating to the adequacy of the foregoing statutory inquiry, "the critical issue is whether the statutorily required information has been communicated in such a manner that defendant's decision to represent himself is knowing and voluntary." *State v. Carter*, 338 N.C. 569, 583, 451 S.E.2d 157, 164 (1994).

The trial judge's inquiry in the case at bar clearly informed defendant that if she is found to have violated probation, then she faced the possible consequence of active service of the sentences. The court also clearly informed defendant that she had the right to the assistance of an attorney. Defendant's responses clearly indicated that she understood.

Because the court's inquiry elicited the information necessary for it to make a determination that defendant's decision to represent her-

self was knowing and voluntary, we conclude the court complied with the requirements of the statute.

The judgments are

Affirmed.

Chief Judge MARTIN and Judge CALABRIA concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 1 MARCH 2005

BOMBARDIER CAPITAL, INC. v. LAKE HICKORY WATERCRAFT, INC. No. 04-373	Alexander (00CVS150)	Dismissed
BROWN v. N.C. SPECIAL CARE CTR. No. 04-120	Ind. Comm. (I.C. 200450)	Affirmed
CAUDILL v. HOLT No. 03-1589	Guilford (02CVS4637)	Affirmed
DEAN v. CITY OF CHARLOTTE No. 04-931	Mecklenburg (04CVS3235)	Affirmed
DEANS v. TERRY No. 04-495	Mecklenburg (01CVD15895)	Affirmed
FAW v. HOOVER No. 03-1698	Guilford (03CVS1111)	Reversed and remanded
HARPER v. DOLL No. 04-475	Nash (02CVS2017)	Affirmed
HARTWELL v. MAHAN No. 04-751	Davidson (95CVS950)	Reversed and remanded
IN RE J.G.A. & E.M.P. No. 04-291	Granville (02J48) (02J49)	Affirmed
IN RE K.B.B. & K.A.B. No. 04-179	Guilford (99J230) (99J231)	Affirmed
IN RE S.D.G. & T.L.G. No. 04-385	Wayne (03J117)	Affirmed
JOHNSON v. HOME BLDG. CTR. No. 04-596	Harnett (03CVD2360)	Vacated and remanded
JUVUREK v. JUMPER No. 04-466	Mecklenburg (02CVS21892)	Affirmed
LITTLE v. NASEKOS BLDG. CONTRS., INC. No. 03-1371	Mecklenburg (01CVS9577)	Affirmed inpart; vacated and remanded in part
N.C. DEP'T OF TRANSP. v. WILLIAMS No. 03-1446	Lee (01CVS879)	Dismissed

RAMIREZ v. LITTLE No. 04-184	Randolph (01CVS35)	Affirmed
RIVER HILLS APARTMENTS v. HARDY No. 04-1009	Rutherford (03CVD1748)	Reversed and remanded
RSN PROPS., INC. v. JONES No. 04-100	Harnett (01CVS300)	Affirmed in part, reversed in part, and remanded
RYAN v. UNIVERSITY OF N.C. HOSPS. No. 04-16	Orange (02CVS622)	Affirmed
SOUTHERN DIST. CONVOC. OF THE UNITED HOLY CHURCH v. McNEILL No. 04-639	Robeson (01CVD3517)	Affirmed
STATE v. ADAMS No. 04-616	Stanly (03CRS03937) (03CRS50089) (03CRS50090)	No error
STATE v. BRIKSZA No. 04-848	Wake (00CRS18540)	No error
STATE v. BUCK No. 04-915	Beaufort (03CRS2620)	No error
STATE v. BYRD No. 04-850	Mecklenburg (02CRS243117) (02CRS243118)	No prejudicial error in part; reversed and remanded in part for resentencing
STATE v. CARVER No. 04-734	Mecklenburg (02CRS238904)	No error
STATE v. COFIELD No. 04-833	Surry (03CRS52152) (03CRS54430) (03CRS54682) (03CRS54718) (03CRS2116) (03CRS2117) (03CRS2049) (03IFS1752)	No error
STATE v. COPELAND No. 04-534	Craven (02CRS57243) (02CRS57244)	No error
STATE v. DAVIS No. 04-418	Guilford (03CRS73700)	No error

STATE v. EVANS No. 03-1693	Orange (01CRS53818) (02CRS3004) (02CRS3005) (02CRS3006) (02CRS52073) (02CRS52074)	No error
STATE v. GLOVER No. 03-1627	Robeson (02CRS55732)	No error
STATE v. KILGORE No. 04-1038	Wake (02CRS24699) (02CRS83311) (00CRS33483) (00CRS33484) (00CRS33485) (00CRS38408)	Dismissed
STATE v. LEWIS No. 04-252	Avery (02CRS51200) (02CRS51201) (03CRS247)	Affirmed
STATE v. MARCUS No. 04-771	Moore (01CRS50283) (01CRS50284) (01CRS50285)	No error
STATE v. McCADDEN No. 04-873	Alamance (03CRS56113)	Dismissed
STATE v. McNEILL No. 04-539	Guilford (97CRS20759)	Vacated and remanded
STATE v. McNEILL No. 04-1092	Cumberland (01CRS53303)	Affirmed
STATE v. MORRISON No. 04-798	Mecklenburg (03CRS232332) (03CRS232333) (03CRS232334) (03CRS232336) (03CRS232337) (03CRS232338) (03CRS232339) (03CRS232340) (03CRS232342) (03CRS58114)	No error
STATE v. MURCHISON No. 04-701	Mecklenburg (03CRS7053) (03CRS7054)	No error

STATE v. ROSS No. 04-595	Rowan (02CRS55073)	No error
STATE v. SETZER No. 04-323	Gaston (00CRS54515) (00CRS54516)	No error in defendant's trial, remanded for a determination of defendant's motion for appropriate relief
STATE v. WADE No. 04-571	Greene (02CRS50814)	No error in defendant's trial; vacated and remanded for resentencing
STATE v. WATSON No. 04-643	Forsyth (03CRS56055)	Affirmed
STATE v. WHEELER No. 04-65	Wake (02CRS82787) (02CRS82788) (02CRS82789) (02CRS82790) (02CRS82791) (02CRS82792) (02CRS82793)	No error
STATE v. WILLIAMS No. 04-858	Columbus (03CRS53673)	No error
TUTTLE v. GREER, INC. No. 04-90	Ind. Comm. (I.C. 176605)	Affirmed

APPENDIX

ORDER ADOPTING AMENDMENTS
TO THE NORTH CAROLINA
RULES OF APPELLATE PROCEDURE

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

I. Rules 13, 14, 15, 28, and 30 of the North Carolina Rules of Appellate Procedure are amended as described below:

Rule 13(a) is amended to read:

(a) Time for Filing and Service of Briefs.

(1) *Cases Other Than Death Penalty Cases.* Within 30 days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file his brief in the office of the clerk of the appellate court, and serve copies thereof upon all other parties separately represented. The mailing of the printed record is not service for purposes of Rule 27(b); therefore the provision of that rule allowing an additional three days after service by mail does not extend the period for the filing of an appellant's brief. Within 30 days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of his brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief ~~within 14 days after service of the brief of the appellee~~ as provided in that rule.

(2) *Death Penalty Cases.* Within 60 days after the Clerk of the Supreme Court has mailed the printed record to the parties, the defendant-appellant, in a criminal appeal which includes a sentence of death, shall file his brief in the office of the Clerk and serve copies thereof upon all other parties separately represented. The mailing of the printed record is not service for purposes of Rule 27(b); therefore the provision of that rule allowing an additional three days after service by mail does not extend the period for the filing of a defendant-appellant's brief. Within 60 days after appellant's brief has been served, the State-appellee shall similarly file and serve copies of its brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule, except that reply briefs filed pursuant to Rule 28(h)(2) or (3) shall be filed and served within 21 days after service of the brief of the State-appellee.

The first paragraph of Rule 14(d) is amended to read:

(1) *Filing and Service; Copies.* Within 30 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other par-

ties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; provided, however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall file and serve a new brief within 30 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based on a dissent. Within 30 days after service of the appellant's brief on him, the appellee shall similarly file and serve copies of a new brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief ~~within 14 days after service of the brief of the appellee~~ as provided in that rule.

Rule 15(g)(2) is amended to read:

(2) *Cases Certified for Review of Court of Appeals Determinations.* When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within 30 days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within 30 days after a copy of appellant's brief is served upon him. If permitted by Rule 28(h), the appellant may serve and file a reply brief ~~within 14 days after service of the brief of the appellee~~ as provided in that rule.

Rule 28 is amended as follows:

Rule 28(b)(6) is amended to read:

(6) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. 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. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

The argument shall contain a concise statement of the applicable standard(s) of review for each question presented, which shall appear either at the beginning of the discussion of each

question presented or under a separate heading placed before the beginning of the discussion of all the questions presented.

The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.

Rule 28(c) is amended to read:

(c) Content of Appellee's Brief; Presentation of Additional Questions. An appellee's brief in any appeal shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix as may be required by Rule 28(d). It need contain no statement of the questions presented, statement of the procedural history of the case, statement of the grounds for appellate review, ~~or~~ statement of the facts, or statement of the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present questions in addition to those stated by the appellant.

Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant.

If the appellee is entitled to present questions in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new questions supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate, as well as a statement of the applicable standard(s) of review for those additional questions.

Rule 28(h)(4) is amended to read:

(4) If the parties are notified that the case has been scheduled for oral argument, an appellant may ~~file with the Court~~,

within 14 days after ~~the notice~~service of ~~argument is mailed,~~such notification, file and serve a motion for leave to file a reply brief. The motion shall state concisely the reasons why a reply brief is believed to be desirable or necessary and the issues to be addressed in the reply brief. The proposed reply brief may be submitted with the motion for leave and shall be limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief. Unless otherwise ordered by the Court, the motion for leave will be determined solely upon the motion and without response thereto or oral argument. The clerk of the appellate court will notify the parties of the Court's action upon the motion, and if the motion is granted, the appellant shall file and serve the reply brief within ten days of such notice.

The titles of Rule 30 and Rule 30(e) are amended to read:

RULE 30. ORAL ARGUMENT AND UNPUBLISHED OPINIONS.

(e) ~~Decision of Appeal Without Publication of an Opinion~~ Unpublished Opinions.

II. Appendixes A, B, and E of the North Carolina Rules of Appellate Procedure are amended as described below:

Appendix A is amended as follows:

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
* * *			
Serving proposed record on appeal		notice of appeal (no transcript) or reporter's certificate of delivery of transcript	11(b)
(civil, non-capital criminal)	35		
(agency)	35		18(d)
Serving proposed record on appeal (capital)	70	reporter's certificate of delivery	11(b)
Serving objections or proposed alternative record on appeal		service of proposed record	11(c)
(civil, non-capital criminal)	~~21~~ 30		
(capital criminal)	35		
(agency)	30	service of proposed record	18(d)(2)
* * *			

Appendix B is amended by deleting the parenthetical shown with a strikeout and by adding the words shown in brackets:

* * *

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions greater than five pages in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to [the most recent edition of] A Uniform System of Citation ~~(14th ed.)~~. [Citations shall include parallel citations to official state reporters.]

* * *

Appendix E is amended as follows:

* * *

ARGUMENT

Each question will be set forth in upper case type as the party's contention, followed by the assignments of error pertinent to the question, identified by their numbers and by the pages in the printed record on appeal or in the transcript at which they appear, and separate arguments pertaining to and supporting that contention, e.g.,

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.

ASSIGNMENT OF ERROR NO. 2

(T. p. 45, lines 20-23)

The standard of review for each question presented shall be set out in accordance with Appellate Rule 28(b)(6).

Parties should feel free to summarize, quote from, or cite to the record or transcript during the presentation of argument. If the transcript option is selected under Appellate Rule 9(c), the Appendix to the Brief becomes a consideration, as described in Appellate Rule 28 and below.

Where statutory or regulatory materials are cited, the relevant portions should be quoted in the body of the argument or placed in the appendix to the brief. Appellate Rule 28(d)(1)c.

* * *

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 1st day of September, 2005.

Adopted by the Court in Conference this the 18th day of August, 2005. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Edmunds, J.
For the Court

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

CHILD ABUSE AND NEGLECT—Continued

ing with the juvenile and the juvenile's family in their own home so that the appropriate community resources may be involved where the disposition order concluded that DSS had exercised reasonable efforts toward reunification but that reunification was not in the best interest of the child at this time. **In re M.J.G., 638.**

Neglect—failure to use exact statutory language for cessation of reunification efforts—The trial court did not err in a child neglect case by failing to include in the disposition order the exact statutory language under N.C.G.S. § 7B-507(b) necessary to order a cessation of reunification efforts where all of the statutory language is included in either the findings of fact or the conclusions of law. **In re M.J.G., 638.**

Neglect—findings of fact—cease reunification order entered for infant's older sister—The trial court did not err in a child neglect case by finding that a cease reunification order had been entered for the infant's older sister. **In re M.J.G., 638.**

Neglect—findings of fact—clear, cogent, and convincing evidence—Clear, cogent, and convincing evidence supports the conclusion that the minor child was neglected including that: (1) the mother tested positive for marijuana use on the day the child was born; (2) another child had been adjudged abused and neglected; (3) the mother was unemployed; and (4) the mother's whereabouts were unknown at the time the petition was filed. **In re M.J.G., 638.**

Neglect—findings of fact—failure to visit child one week prior to filing of petition—The trial court erred in a child neglect case by its finding of fact that states neither the mother nor the putative father visited the minor child for approximately one week prior to the date of the filing of the petition in this case on June 24, 2003. **In re M.J.G., 638.**

Neglect—findings of fact—mother admitted smoking marijuana before child birth—The trial court did not err in a child neglect case by the portion of a finding of fact which states the mother acknowledged smoking marijuana the day before the birth of the minor child. **In re M.J.G., 638.**

Neglect—findings of fact—mother diagnosed with narcissistic personality disorder—The trial court did not err in a child neglect case by its finding of fact stating that the mother previously had been diagnosed as having narcissistic personality disorder. **In re M.J.G., 638.**

Neglect—findings of fact—mother unavailable to receive child—older sibling abused and neglected—The trial court did not err in a child neglect case by its finding of fact stating that the minor child's mother was unavailable to receive her at discharge from the hospital and that the child's older sister had been subjected to abuse and neglect. **In re M.J.G., 638.**

Neglect—findings of fact—no supervision of minor child—The trial court erred in a child neglect case by its finding of fact stating that the minor child received no supervision from the mother for around one week next preceding the date of the filing of the petition in this case and that the minor child had been abandoned as of the date of the filing of the petition. **In re M.J.G., 638.**

Neglect—findings of fact—whereabouts of parents unknown—The trial court did not err in a child neglect case by the portion of a finding of fact which

DIVORCE

Equitable distribution—corporate profits—owned by corporation—The trial court erred in an equitable distribution action by distributing profits from a Subchapter S corporation as marital property. Profits of a Subchapter S corporation are owned by the corporation, not by the shareholders. **Allen v. Allen, 368.**

Equitable distribution—distributive award—source of assets—The trial court did not err in an equitable distribution action, as defendant contended, by failing to point to a source of liquid assets from which defendant could pay a distributive award. The court entered findings on the income generated by defendant's business and the equity in the marital home, which was awarded to defendant. There was no concern here that defendant might incur adverse tax consequences (which the court must take into account). **Allen v. Allen, 368.**

Equitable distribution—findings—diminution of stock value—An equitable distribution order was remanded for further findings about whether the diminution of stock value during the separation was the result of defendant's actions. If not, the decline in stock value is included in the equitable distribution of marital and divisible property; if so, the diminution may be considered as a distributional factor. **Allen v. Allen, 368.**

Equitable distribution—IRA—The trial court erred in an equitable distribution case by not distributing plaintiff's IRA where the parties included it on their list of marital property and stipulated to its value. **Allen v. Allen, 368.**

Equitable distribution—motion to set aside—motion for new trial—The trial court did not err by denying plaintiff wife's motions to set aside the equitable distribution order under N.C.G.S. § 1A-1, Rule 60(b)(4) and to grant a new trial, because: (1) no jurisdictional challenge has ever been raised; and (2) plaintiff does not assert that the district court was without authority to enter the equitable distribution order. **Britt v. Britt, 198.**

Equitable distribution—presumption for in-kind division—closely held corporation—An equitable distribution order was remanded for further findings about the in-kind distribution presumption where there was evidence that defendant's business was a closely held corporation not susceptible to division. **Allen v. Allen, 368.**

Equitable distribution—sixteen-month delay between hearing and order—The trial court did not err by entering an equitable distribution order sixteen months after the equitable distribution hearing where there was no prejudice to the parties from the delay. **Britt v. Britt, 198.**

Equitable distribution—tax refund—marital property—The trial court did not err in an equitable distribution action by classifying a tax refund as marital property. The refund was not included on the stipulated list of marital property, but plaintiff did not waive the inclusion of unlisted property in the equitable distribution. Furthermore, funds received after the separation may be considered marital property when the right to receive those funds was acquired before the separation. **Allen v. Allen, 368.**

Equitable distribution—unequal division—The trial court did not abuse its discretion in an equitable distribution case by granting an unequal division of the parties' marital property in favor of defendant husband. **Britt v. Britt, 198.**

EVIDENCE—Continued

degree kidnapping, and robbery with a firearm case by allegedly limiting the cross-examination of defendant's coparticipant concerning pending charges against him because the only times the court sustained the State's objections during the cross-examination occurred after defendant had asked the witness about third-party hearsay statements. **State v. Alvarez, 487.**

Officer's testimony—prior consistent statements—corroboration—The trial court did not err in a statutory rape, statutory sexual offense, and taking indecent liberties case by permitting an investigator to testify that the two minor victims' in-court testimony was consistent with their previous statements to the investigator. **State v. Thaggard, 263.**

Opinion testimony—medical expert—sexual abuse—no prejudicial error—Although the trial court erred in a statutory rape, statutory sexual offense, and taking indecent liberties case by admitting opinion testimony from a medical expert, a forensic pediatrician, that the victims were truthful and did not just get together to tell each other what to say, the error was not prejudicial to defendant. **State v. Thaggard, 263.**

Prior crimes or bad acts—indecent liberties—no prejudicial error—Although the trial court erred in a statutory rape, statutory sexual offense, and taking indecent liberties case by allowing the State to ask a defense witness, defendant's former girlfriend, whether she knew that defendant had previously been convicted of taking indecent liberties with a child, this error was not prejudicial to defendant. **State v. Thaggard, 263.**

Prior crimes or bad acts—involvement in gang—robberies—drug dealing—motive and intent—modus operandi—The trial court did not commit plain error in a first-degree felony murder case by admitting evidence of defendant's prior illegal activity including involvement in a gang, prior robberies, and drug dealing because the evidence was admissible to show defendant's motive, intent and modus operandi. **State v. Hightower, 661.**

Prior crimes or bad acts—prior arrest—drug possession—The trial court did not err in a first-degree murder case by admitting evidence of defendant's prior arrest on the evening before the alleged murder where defendant was found with 18 grams of cocaine, approximately $2,600, and a bag of marijuana. **State v. Davis, 321.**

Prior crimes or bad acts—robberies—The trial court did not abuse its discretion in a double first-degree murder, first-degree kidnapping, and robbery with a firearm case by denying defendant's motion to suppress evidence of prior robberies. **State v. Alvarez, 487.**

Prior crimes or bad acts—similar sex offenses—temporal proximity—opportunity—common scheme or modus operandi—identity—The trial court did not abuse its discretion in a statutory rape, statutory sexual offense, and taking indecent liberties case by allowing two witnesses who were not the victims in this case to testify that they had been sexually abused by defendant. **State v. Thaggard, 263.**

Prior performance problems—rebuttal evidence—The trial court did not abuse its discretion in a breach of employment contract case by allowing defendant to cross-examine plaintiff doctor concerning prior performance prob-

TERMINATION OF PARENTAL RIGHTS—Continued

litem under N.C.G.S. § 7B-1101 to represent respondent parents where DSS sought to terminate their parental rights based upon their incapacity to provide proper care and supervision of the children, and the case is remanded for a new trial. **In re B.M., M.M., An.M., & Al.M., 350.**

Failure to file petition within sixty-day time period—directory rather than mandatory time period—The trial court did not lack jurisdiction based on DSS's failure to file a petition seeking termination of respondents' parental rights within the sixty-day time period specified in N.C.G.S. § 7B-907(e). **In re B.M., M.M., An.M., & Al.M., 350.**

Father excluded by paternity test—standing—service—A respondent in a termination of parental rights case who was excluded by a paternity test lacked standing to raise any issue concerning service on a John Doe father, but the court erred by excluding respondent from the proceeding because he was the only potential father served, and the proceeding could only have concerned his parental rights. **In re L.D.B., 206.**

Findings—lack of evidence—court's observations not sufficient—There was insufficient evidence to support the court's findings in a termination of parental rights proceeding where no evidence was presented at the hearing and paternity test results which the court had seen were not entered into evidence. A fact finder's observation does not constitute evidence and cannot provide the basis for a finding. **In re L.D.B., 206.**

Guardian ad litem for child—not appointed—A termination of parental rights case was remanded where one parent sought to terminate the parental rights of the other natural parent so that her husband could adopt the child, respondent filed a response on the day of the hearing, and the court did not appoint a guardian ad litem for the child. A guardian ad litem is necessary to ensure that the best interests of the child are adequately represented. **In re J.L.S., 721.**

Guardian ad litem for parent—appointment by court required—The trial court erred by terminating respondent mother's parental rights to her son before appointing a guardian ad litem (GAL) to represent her interests pursuant to N.C.G.S. § 7B-1101 when the Department of Social Services' (DSS) petition alleged grounds for termination under N.C.G.S. § 7B-1111(a)(6) based on respondent's physical conditions of having lupus and being prone to seizures. **In re D.S.C., 168.**

Inability to establish safe home—sufficiency of evidence—There was clear, cogent, and convincing evidence in a termination of parental rights proceeding to support the trial court's finding that respondents lacked the ability to establish a safe home for the child. **In re V.L.B., 679.**

Mental and physical health problems—impaired ability to care for child—A trial court may terminate a respondent's parental rights upon a finding of one or more of the statutory grounds in N.C.G.S. § 7B-1111(a); assuming that evidence of a probability of abuse or neglect was necessary in this case, the evidence of respondents' respective mental and physical health problems and the strain these problems placed on their ability to maintain a stable household as a couple constituted clear, cogent, and convincing evidence of their impaired abil-

WORKERS' COMPENSATION—Continued

Causation—expert testimony—The Industrial Commission did not err in a workers' compensation case by concluding that there was competent evidence that plaintiff's disc herniation injury was caused by his employment when he fell from a truck ladder even though plaintiff's medical expert did not opine to a reasonable degree of medical certainty. **Adams v. Metals USA, 469.**

Disability—admitted claim—no finding—The Industrial Commission did not err in a workers' compensation case by not finding that plaintiff was disabled before awarding disability. Defendants had admitted plaintiff's claim; the issue was whether plaintiff complied with vocational rehabilitation. **Brooks v. Capstar Corp., 23.**

Disability—medical restrictions—retirement—The Industrial Commission properly concluded that plaintiff suffered a disability which rendered him incapable of any employment, based on competent evidence including personal and medical testimony, where plaintiff injured his knees, attempted to return to work, continued to experience pain, and retired. Plaintiff's condition, as well as his medical restrictions, prevented his performing his job with defendant. **Weatherford v. American Nat'l Can Co., 377.**

Expense of appeal—granted—The Court of Appeals granted plaintiff's request for expenses in the appeal of a workers' compensation case where defendants appealed a deputy commissioner's decision that temporary total disability be paid, the Commission affirmed the award of disability, defendants appealed to the Court of Appeals, and the Court of Appeals also affirmed. The requirements of N.C.G.S. § 97-88 are satisfied. **Brooks v. Capstar Corp., 23.**

Form 26 Agreement—medical documentation—insufficient—The Industrial Commission did not err in a workers' compensation action by invalidating a Form 26 Agreement for lack of medical documentation where the only document submitted that could be classified as a medical report was a one-paragraph note to plaintiff's chart. Whether or not plaintiff had copies of the records which he did not submit, the fact remains that the necessary and relevant medical records were not submitted with the Agreement. **Clawson v. Phil Cline Trucking, Inc., 108.**

Ongoing disability—suitable employment—The Industrial Commission did not err in a workers' compensation case by concluding that there existed sufficient evidence to prove ongoing disability because plaintiff had not yet regained his preinjury wage capacity. **Adams v. Metals USA, 469.**

Prior arm injury—not the direct cause of auto accident—An Industrial Commission opinion denying compensation was affirmed where plaintiff contended that an automobile accident was a direct and natural result of his prior compensable arm injury, but there was competent evidence that the accident was caused by plaintiff jerking his car to the left upon hitting gravel in the road. **Cooper v. Cooper Enters., Inc., 562.**

Prisoner injured while doing work assignment—jurisdiction of Industrial Commission—After dismissing plaintiff prisoner's action under the Tort Claims Act arising out of his injury in the course of a North Carolina Department of Corrections work assignment, the Industrial Commission did not have jurisdiction to ex mero motu enter an order with respect to any workers' compensation claim

WORKERS' COMPENSATION—Continued

which plaintiff may have, and the portion of the opinion and award ordering defendant to file a Form 19 Employer's Report of Injury to Employee form is vacated. **Vereen v. N.C. Dep't of Corr., 588.**

Professional football player—credit for payments—additional findings of fact necessary—The Industrial Commission erred in a workers' compensation case involving plaintiff injured professional football player by concluding that defendant employer was not entitled to a greater credit for payments including the $225,000 injury protection provision payments paid during the 2001 regular season, the $750,000 one year skill and injury guarantee payments paid in 2002, and the injured reserve pay of fourteen $47,059 installments in 2000, and the case is remanded for further findings on these payments. **Smith v. Richardson Sports Ltd. Partners, 410.**

Professional football player—dollar-for-dollar credit—The Industrial Commission did not err in a workers' compensation case involving plaintiff injured professional football player by concluding that defendant employer was not entitled to a dollar-for-dollar credit for the amounts paid to plaintiff after his injury because credit for such amounts is limited to shortening the period in which compensation is paid. **Smith v. Richardson Sports Ltd. Partners, 410.**

Professional football player—no credit for payments due and payable—roster bonus—signing bonus—minicamp—workout—appearance fees—The Industrial Commission did not abuse its discretion in a workers' compensation case involving plaintiff injured professional football player by concluding that defendant employer was not entitled to a greater credit for five of the payments received by plaintiff post-injury including one of the fifteen payments of $47,059 paid during the 2000 season, the $1,000,000 roster bonus of 3 April 2001, the $1,985.72 paid for workouts and mini-camps in 2001, a $2,500 appearance fee for 7 March 2001, and the $4,500,000 signing bonus. **Smith v. Richardson Sports Ltd. Partners, 410.**

Professional football player—post-injury wage earning capacity—The Industrial Commission did not err in a workers' compensation case involving plaintiff injured professional football player by concluding that plaintiff's post-injury wage earning capacity outside the NFL is $40,000 per year during the relevant 300-week period covered by N.C.G.S. § 97-30. **Smith v. Richardson Sports Ltd. Partners, 410.**

Rehabilitation costs—case-by-case determination—The trial court did not err by excluding the cost of rehabilitation services when it computed workers' compensation benefits. Rehabilitation services are not a benefit as a matter of law; they must be subject to a fact-specific determination of whether a benefit was conferred. **Walker v. Penn Nat'l Sec. Ins. Co., 555.**

Rehabilitation costs—lack of evidence—A lack of evidence regarding the rehabilitation services in question meant that the Court of Appeals was unable to perform a meaningful review of the exclusion of rehabilitation costs from the total amount of workers' compensation benefits. **Walker v. Penn Nat'l Sec. Ins. Co., 555.**

Standing—employee's estate—medical expenses owed by employer to third-party medical provider—An employee's estate did not have standing to

WORKERS' COMPENSATION—Continued

WORD AND PHRASE INDEX

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